The torturer has become like the pirate and the slave trader before him hostis humani generis, an enemy of all mankind.¹

Acts of torture elicit some of the strongest repugnance and denunciation the international community can muster. The instruments condemning it and calling for its eradication are many. And yet, when it comes to compensating the victims, there is a gap, particularly when a foreign state is impugned before a domestic court.

An examination of the potential for victims of human rights violations such as torture to claim damages in Canadian courts leads quickly to the realization that state immunity is a central barrier. The normative force of this principle was demonstrated in the case of Bouzari v. Iran (Islamic Republic)² in 2004 in which the Ontario Court of Appeal dismissed an action against the government of Iran for torture as a result of the absolute immunity held to be provided by the State Immunity Act³. At the heart of this case and similar cases that have come before common law courts such as Al-Adsani v. Government of Kuwait⁴ is the tension between the traditional interstate legal paradigm centred on the principles of state sovereignty and equality, and the rise of human rights discourse and the primacy it puts on the protection of the individual. In the case of a rights violation such as torture, universally condemned yet consistently practiced in many states, the tension is highly visible. State immunity sits at the border between these paradigms, a tenacious principle in international law which purports to maintain the

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1. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir.(N.Y.) Jun 30, 1980). Filartiga was the first in a line of Alien Tort Claims Act [ATCA] cases in the United States which allowed aliens to claim damages in American courts for foreign torture.
4. Al-Adsani v. Government of Kuwait (1996) 107 ILR 536. [Al-Adsani] Al-Adsani was a dual Kuwaiti and British national who was tortured in Kuwait.
international order, but one which upon examination threatens the progress of human rights by allowing impunity for serious rights violations to persist.

Although the decision in Bouzari appears to have shut down the legal possibility for civil actions against foreign governments in Canada, the reaction to this decision at the United Nations lends support to the argument that, contrary to the interpretation of the courts and certain Canadian officials, Canada’s international legal obligations require the availability of domestic civil remedies for victims of foreign torture. The comments of the UN Committee Against Torture regarding Canada’s implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, along with evidence of growing support for universal jurisdiction in civil as well as criminal matters in a number of states, and international jurisprudence which denies the immunity of governments for violations of jus cogens norms indicate that moral and intellectual support for the concept of state immunity as a bar to jurisdiction in cases of torture is eroding. Despite the academic and political trends which emphasize human rights and reaffirm the condemnation of torture, however, domestic common law courts have been loath to interpret international law so as to supercede statutory immunity regimes. The result is a gap between rights and remedies into which victims of indefensible violations such as Houshang Bouzari fall. As party to the many instruments condemning torture and as a country which purports to be committed to the values and aspirations of the human rights project, this situation must be rectified. To correct the problem, comply with Canada’s international obligations and reestablish Canada’s commitment to human rights, the SIA must be amended to contain an exception to immunity in the case of serious human rights violations.

State Immunity and the Foundations of the Interstate System

The concept of state immunity flows from the joint concepts of the sovereignty and the equality of states, which are fundamental tenets of the interstate system. *Par in parem non habet imperium* is the maxim which expresses the horizontal nature of the pure interstate structure; all states are equally sovereign and it follows from this that none may presume to judge the exercise of another’s sovereignty within its own territory. The principle was long held to be desirable for the smooth functioning of international relations, since it ensures that the proper discharge of diplomatic duties is not impeded by legal actions and that the sovereign is not subjected to the indignity of such actions. As one author aptly puts it, “state immunity is the oil that lubricates international relations.”

The principle of state immunity and the related doctrines of head of state and diplomatic immunity have thus long been a feature of the international system, and prior to the beginning of the twentieth century, the presumption that sovereign immunity was as an absolute bar to the jurisdiction of a foreign state was strong. Profound changes to international legal thought and political culture however have caused inroads into the concept and have called into question the legitimacy with which the privilege of immunity is accorded to states. The development of the exceptions to the doctrine of state immunity demonstrates the doctrine’s mutability. The example of the ‘commercial activities’ exception to state immunity is an example of the limitation that has been placed on the privilege of immunity for behaviour deemed to fall outside the category of *jure imperii* (acts of the sovereign which by definition were understood to be immune from judgment). As states entered more frequently into business activities and behaved

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more like private actors in the marketplace, the commercial activities exception
developed in response to the perceived unfairness of allowing a government to behave
like a private actor without being liable for breaches of contract and other wrongs as a
result of the immunity doctrine.  

The development of this and other exceptions which curtail the privileges and
immunities of the state led to what is known as the restrictive theory of immunity, which
is now the generalized theory of immunity accepted by most states, although there are
those that continue to cling to an absolute theory of immunity.  

Although a restrictive
approach is broadly accepted, however, there is considerable variability in the application
of the doctrine among states and it is contentious among scholars whether it is possible to
speak of a customary law of state immunity.

Internationally, there have been efforts to codify the law of state immunity spanning
several decades, culminating in the United Nations Convention on Jurisdictional
Immunities of States and Their Property, which the General Assembly adopted in 2004
and which opened for signature in 2005. The Immunities Convention provides for a
general rule of immunity subject to exceptions in the traditional restrictive vein, including
in context of commercial transactions (article 10), contracts of employment (article 11),
and personal injuries and damage to property (article 12), though this is limited to acts
which “occurred in whole or in part in the territory of that other [forum] State and if the
author of the act or omission was present in that territory at the time of the act or

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9Supra note 7 at 287, Notably Russia and some Latin American countries. 
10Redress, “Immunity v. Accountability: Considering the Relaioonsship between State Immunity and
Some states use a ‘nature’ test to determine if the acts attract immunity, while others use a ‘purpose’ test. 
12General Assembly Resolution 53/98 United Nations Convention on Jurisdictional Immunities of States
omission.” Worryingly, the convention contains no provision for a human rights exception to state immunity, and some authors are calling for a human rights protocol to be adopted prior to ratification. The failure to address the relationship of international human rights law to the terms of state immunity is common to the Immunities Convention and the other related instruments, such as the CAT. The result is uncertainty in the law and unpredictable, if not indeed unjust results for human rights claimants, whose outcomes are pinned on the interpretation of these provisions by domestic judges.

In the cases of Bouzari and Al-Adsani, the courts have resolved the tension in favour of the domestic state immunity statutes, which in both cases were found to be a complete bar to the actions, even in the case of acts of torture.

**State immunity and Torture**

In the case of a human rights violation such as torture, there is a particularly cruel irony inherent in the acceptance of state immunity as a bar to jurisdiction and to possible compensation for the victim. The CAT defines torture as “severe pain or suffering… 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.” The participation of the state is therefore an intrinsic part of the offence of torture itself. While individual officials may carry out the specific acts of violence, the convention’s definition indicates that torture is a phenomenon which involves the complicity of the state. While measures adopted by some states have allowed victims of torture to sue individual officials, this is not necessarily satisfactory either from the point of view of enforceability, since many of the damages awarded go uncollected, or from the wider perspective of ending impunity. As

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14 *Supra* note 10 at 2.
15 *Supra* note 5 art 1.
the UK organization Redress has commented, “In the enforcement of the prohibition of torture, the focus on the individual without acknowledgment of the overall state involvement only serves to sustain impunity through the exceptionalisation of the actions of an individual perpetrator as distinct from the state itself.”

Indeed, the individual responsibility of particular torturers cannot suffice for the underlying responsibility of the state for patterns of crimes which depend upon abuse of state power for their commission, their concealment and for the protection of the perpetrators. Indeed, because of the implicit role of the state in the commission of torture and the corruption that is often present in states where torture occurs, it is often impossible for victims to obtain redress in the courts of that state. The domestic courts of another state may therefore represent the only option for victims looking for a forum in which to have their rights enforced. However, for a domestic court to legitimately exercise its jurisdiction over a foreign state in a torture case, there is a need for an international rule that justifies extraterritorial jurisdiction while at the same time removes the availability of the state immunity defence. The silence of the international instruments on the interaction of torture and state immunity is therefore a very regrettable omission.

However, given that this omission has been overcome with regard to extraterritorial criminal jurisdiction for torture, it ought to be possible to do the same for civil cases. Indeed, the artificiality of the distinction between civil and criminal proceedings in the context of torture has been noted by various authors and judges.

Indeed, given that in many countries a *partie civile* can be raised during a criminal proceeding, there is a de facto form of universal civil jurisdiction for torture available in

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16 *Supra* note 10 at 5.
17 *Al-Adsani v UK* (2002) 34 EHRR 11, dissenting judgment of judges Rozakis and Caflisch, see text infra at? Donovan (supra?) at ?
those countries that recognize the universal criminal jurisdiction for the crime of torture.\textsuperscript{19} This has created a situation of inequality among victims, since bringing such an action in most of the common law systems is made difficult by the “recalcitrant statutory regimes”\textsuperscript{20} Given the strength of the prohibition, the state immunity doctrine ought to yield to actions for torture whether criminal or civil. After all, as one author writes, “the modern rationale for universal jurisdiction as easily encompasses civil remedies as criminal ones. In the face of horrific conduct, the international community should have as its objective the care of the victims as much as the punishment of the offenders.”\textsuperscript{21} If there is a tension between the prohibition on torture and the law of state immunity, there are good reasons to resolve the dispute in favour of the victims whose rights Canada has bound itself to protect and uphold. The strength and importance of this commitment, as illustrated by the international agreements which prohibit torture, has outstripped the once-great rhetorical force of the language of sovereignty. As one author writes, “to insist that the courts of one sovereign state may not sit in judgment of another sovereign state’s acts is to restate a traditional rule in formal terms, but not to provide a functional analysis of the values and interests promoted by the rule.”\textsuperscript{22} As those values and interests lose ground to those of human rights, states must act to implement the required remedies.

\textbf{The International Prohibition on Torture and the Right to a Remedy}

The international community has reiterated the prohibition on torture many times over. The prohibition appears under article 5 of the 1948 Universal Declaration of Human Rights.


\textsuperscript{21}\textit{Supra} note 18 at 162.

\textsuperscript{22}\textit{Supra} note 20 at 271.
Rights\textsuperscript{23} and under article 7 of the 1966 International Covenant on Civil and Political Rights.\textsuperscript{24} In 1975, the General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,\textsuperscript{25} upon which the most recent instrument regarding torture, the CAT, which came into force in 1987 is based. The 1998 statute of the International Criminal Court also includes reference to torture as a crime against humanity,\textsuperscript{26} which is subject to universal jurisdiction.

The prohibition is therefore longstanding and well established in international law in instruments some of which are by now understood to be part of customary international law such as the UDHR, as well as in agreements to which Canada has consensually bound itself by becoming a state party, such as the CAT. In addition, and as is established in the CAT, the character of the prohibition is one which is non-derogable. As is provided there,

Article 2
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.\textsuperscript{27}

The right to be free from torture is thus part of the special category of norms to which no exception or limitation is permitted. Although there is some debate as to which norms have attained this status, it is broadly accepted among scholars and jurists that the prohibition on torture is in this category. The consequences of the \textit{jus cogens} designation

\textsuperscript{23} Universal Declaration on Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No.13, UN Doc. A/810 (1948), art 5. [UDHR]
\textsuperscript{24} International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, art 7. [ICCPR]
\textsuperscript{25} Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. [Declaration on Torture]
\textsuperscript{27} \textit{Supra} note 5 art 2.
are a matter of controversy, as will be discussed below.

The recognition of the right to a remedy for victims of human rights violations is perhaps even more longstanding in international law than the prohibition against torture. As early as 1907, article 3 of the Hague Convention IV Respecting the Laws of War on Land provided for the payment of compensation to victims of violations. This right has been elaborated more recently by article 2(3) of the ICCPR which provides that state parties must ensure an effective remedy for victims of human rights violations, that that individual’s right be determined by competent legal or administrative authorities and that these authorities enforce the remedies granted. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that the state should provide restitution and compensation to victims and the 2005 UN 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 provide that states must provide “equal and effective access to justice…irrespective of who may ultimately be the bearer of responsibility for the violation.” The 2005 UN Updates set of principles for the protection and promotion of human rights through action to combat impunity perhaps goes the farthest: Principle 21 requires that states “undertake effective measures, including the adoption or amendment of internal

28 Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. Hague Convention IV, 1907.
29 Supra note 24 art. 2(3).
31 Supra note 30 arts. 11 and 12.
32 UN 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, UN Doc E/CN.4/RES/2005/35 [Van Boven-Bassaouini principles]
33 Ibid. art 3
34 UN Updates set of principles for the protection and promotion of human rights through action to combat impunity E/CN.4/2005/102/Add 1 (2005) [Joinet-Orentlicher principles]
legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law” and states in Principle 27 that “the official status of the perpetrator of a crime under international law—does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence.”

Despite this broad-based condemnation of torture in the strongest terms and the elevation of the right to be free from it to the most elite and theoretically unassailable category of freedoms, as well as the recognition of a right to a remedy for such violations, the ramifications remain unclear and the situation of victims on the ground embattled. The interaction between this staunchly declared freedom and the tenacious state immunity statutes remains uncertain. For victims of torture such as Bouzari, this has resulted in the quandary of rights without remedies.

The silence of the instruments in relation to how state immunity interacts with these rights is part of the problem. This ambiguity is a source of disagreement as to the relative primacy of the rules involved. There are good reasons however to resolve the dispute in favour of the human rights imperatives which characterize the development of international law over the last sixty years. To do otherwise is to acquiesce to the impunity fostered by a principle of questionable value to the contemporary international system.

Canada’s State Immunity Act

Canada’s SIA fits in with the general picture of restricted immunity as accepted by the majority of states and is similar in its provisions to the immunity statutes of other common law jurisdictions such as the United Kingdom’s Sovereign Immunities Act 1978 and the United States Foreign Sovereign Immunities Act. In its current form, the

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35 Ibid. art 27, emphasis added.
36 UK State Immunity Act 1978
37 Foreign Sovereign Immunities Act 1976 [FSIA]
Canadian SIA gives all foreign governments blanket immunity from the jurisdiction of Canadian courts, with several exceptions, examined below. Its cornerstone is s. 3, which reads in part:

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

(2) In any proceeding 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.\(^{38}\)

The Act provides for several exceptions to this immunity, as per the restrictive approach. These include ss. 5, 6 and 18, all of which were invoked unsuccessfully in Bouzari. These sections preclude the granting of immunity to states in proceedings relating to commercial activity (s.5), death or personal or bodily injury, damage to or loss of property in Canada (s.6), or criminal acts (s.18). These exceptions have not been interpreted so as to capture a foreign tort.

Prior to Bouzari, some scholars suggested that Canadian courts might be willing and able to use international law to justify taking the necessary jurisdiction in such a case. Following the decision in Baker v. Canada (Minister of Citizenship and Immigration),\(^{39}\) in which the Supreme Court suggested a flexible approach to domestic legal interpretation which takes into the values expressed by international agreements, one author postulated that “it may be possible for a Canadian court adjudicating allegations of torture in a civil claim to refer to Canada’s obligations pursuant to the CAT, notwithstanding the lack of an enabling statute in which the legislature has defined the nature and extent of these obligations,”\(^{40}\) However, she writes,

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\(^{38}\) Supra note 3 s.3  
\(^{39}\) Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817  
\(^{40}\) Supra note 20 at 257.
no express term of the CAT authorizes an extraterritorial assertion of civil jurisdiction with a corresponding exclusion of state immunity. By engaging in an interpretive process whereby the necessary terms would first be implied into the CAT and then drawn from ‘interpretively’ to create an implied exception to immunity in the SIA, a Canadian court would be moving even farther from the strict transformations approach of the Supreme Court in *Baker.*”

The *Bouzari* court agreed. Although there is reason to demand that the SIA be amended, as will be discussed below, the judgment in this case indicates both the narrow, and, it is contended, incorrect reading of the provisions of the CAT, as well as the formalist, conservative approach to the issue of state immunity.

**Bouzari v. Iran**

In 2004, the Ontario Court of Appeal rejected Houshang Bouzari’s claim for compensation for the torture he suffered at the hands of the Iranian government in 1993-1994 for his refusal to cooperate with officials on a multi-billion dollar oil project for which he was a consultant. During his seven month ordeal he was held chained and blindfolded. The abuse he endured took various forms: he was punched, hung by his wrists and beaten with steel cables, his head was forced into a toilet and he was subjected to simulated hangings. His captors accused him of being a spy and he was forced to sign a false confession. Following his eventual release, Bouzari and his family relocated several times in Europe, and finally came to Canada in 1998.\(^{41}\) The suit against Iran was launched in 2000; Bouzari became a Canadian citizen in 2001.

Although the case presented jurisdictional difficulties with regard to the lack of demonstrable link with Ontario which is necessary in order for the province’s courts to hear a case under the real and substantial connection test, Bouzari’s case was ultimately dismissed on the basis of state immunity, the judge finding that the SIA had been

correctly interpreted by the motion judge to provide absolute immunity to foreign governments, even in the case of torture. Torture by a foreign government in a foreign jurisdiction was deemed not to fall within the enumerated exceptions. Section 18, which provides an exception for criminal proceedings or “proceedings in the nature of criminal proceedings”\textsuperscript{42} was held not applicable to an action seeking punitive damages, as these damages are a remedy in a civil proceeding. Section 6, which provides an exception for proceedings that relate to death or personal or bodily injury, damage or loss of property that occurs in Canada was also held not to apply. Bouzari argued that he continued to suffer in Canada as a result of the torture he endured, but this was held to be insufficient. The court found that it was necessary for the “physical breach of integrity”\textsuperscript{43} to take place in Canada in order for this exception to apply.\textsuperscript{44}

Thus, according to the Court’s decision in Bouzari, the SIA appears to be more or less watertight with regard to a civil action seeking damages from a foreign government for a human rights violation, even one which could be interpreted as a violation of a \textit{jus cogens} norm. As Goudge J.A. writes,

\begin{quote}
...customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with those obligations. This is even more so where the obligation is a peremptory norm of customary international law, or \textit{jus cogens}.\textsuperscript{45}
\end{quote}

However, as he goes on to say,

\begin{quote}
...whether Canada’s obligations arise pursuant to treaty or to customary international law, it is open to Canada to legislate contrary to them. Such legislation would determine Canada’s domestic law although it would put
\end{quote}

\textsuperscript{42} Supra note 2 at s.18.
\textsuperscript{43} Supra note 1 at 4.
\textsuperscript{44} A further exception, s. 5 of the Act, says immunity does not apply in any proceeding related to the commercial activity of a state. This was also held to be inapplicable, the court stating that the fact that the torture was itself connected to the state’s commercial activities and its dealings with Bouzari was not sufficient to make the exception applicable, supra note 1 at 54.
\textsuperscript{45} Supra note 2 at 66.
Canada in breach of its international obligations….Even if Canada’s international law obligations required that Canada permit a civil remedy for torture abroad by a foreign state, Canada has legislated in a way that does not do so.46

The trump card power of the State Immunity Act as interpreted by the Ontario Court of Appeal in 2004 is thus evident, and despite the strength of the evidence that at the international level this interpretation needs to be reconsidered, at the moment this formalistic determination represents the last word in Canadian law on the matter. As the decision of the Ontario Superior Court of Justice dismissing Maher Arar’s suit against Syria stated, relying on this precedent, “Should parliament determine that current public policy requires that state sponsored torture should no longer be accorded immunity in Canadian courts, undoubtedly the SIA will be amended accordingly. To “read into” the SIA a previously unstated exclusion, would be an unmerited and inappropriate expression of judicial activism.”47

The Bouzari court had not, in any event, found an existing obligation in international law for Canada to provide Bouzari with the civil remedy he sought. Subsequent to the decision’s publication, however, commentary from the United Nations Committee Against Torture suggests that this finding was erroneous and that the CAT does indeed carry with it the obligation which Bouzari had tried to invoke.

**Bouzari and the Convention against Torture**

During the court cases, Bouzari had argued that article 14 of the CAT, obligates Canada to provide a civil remedy for torture committed abroad. The article reads in part as follows:

**Article 14**

46 *Supra* note 2 at 67
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.  

The court rejected Bouzari’s argument, holding that the obligation indicated by article 14 of the CAT attached only to torture committed within Canada’s jurisdiction. Goudge J.A. notes that the text of the convention itself is unclear as to territorial issues, but that “the absence of explicit territorial language does not necessarily mean the absence of territorial limitation.” Looking then to state practice, the court incorrectly held that “no state interprets Article 14 to require it to take civil jurisdiction over a foreign state for acts committed outside the forum state.” The court further found that there was nothing in customary law or treaty obligations to support the notion of the obligation to offer compensation to victims of torture committed abroad by foreign governments.

Following the Bouzari decision, the United Nations Committee Against Torture, which oversees the implementation of the CAT, held its 34th session in May of 2005. The account which emerged from this session, and the Committee’s conclusions and recommendations for Canada, indicate the Committee’s view that Canada is in contravention of its legal obligations under the convention with regard to the meaning of article 14.

During its examination of Canada’s 4th and 5th periodic reports, the account reports,

Several Committee members asked the delegation about state immunity

48 Supra note 5 art. 14.
49 Supra note 2 at 74.
50 Supra note 2 at 76.
51 Supra note 2 at 78. The United States Torture Victims Protection Act allows suits for extraterritorial torture and implements the United States obligations under this article.
52 Supra note 2 at 88.
and the extent to which victims of torture could obtain compensation in line with article 14 of the Convention. Article 14, as the Canadian government understood it, places an obligation upon a State to ensure redress where an act of torture took place within the jurisdiction of that State. Canada’s policy with respect to compensation was in line with this interpretation.\(^{53}\)

In its conclusions and recommendations for Canada which emerged from that session, the Committee notes, under “Subjects of Concern,” “The absence of effective measures to provide civil compensation to victims of torture in all cases”\(^ {54}\) and recommends that “The State party should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture.”\(^ {55}\)

The Committee’s comments thus indicate that Canada’s interpretation of article 14 as applicable only to torture which takes place within the Canadian jurisdiction is incorrect. The significance of these comments is all the more clear given that the Committee members were well aware of the decision in Bouzari’s case, having met with Bouzari and his lawyer David Matas during a session with non-governmental organisations the day before the meeting with the Canadian delegation.\(^ {56}\) The Committee had thus indicated by its comments that a victim of foreign torture such as Bouzari has the right to compensation under the CAT, and that the principle of state immunity is not an answer for the failure by a state party to provide a remedy.

**The Drafting and Interpretation of CAT Article 14**

A look at the context of article 14, the object and purpose of the treaty and the negotiations which led up to the ultimate formulation of its provisions suggests that an

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\(^{53}\) Committee Against Torture, 34\(^{th}\) Session (Geneva, 2-21 May 2005) at page 7, paragraph 1.

\(^{54}\) Conclusions and recommendations of the Committee against Torture : Canada. 07/07/2005. CAT/C/CR/34/CAN. (Concluding Observations/Comments) at 4g.

\(^{55}\) Supra note 51 at 5f.

\(^{56}\) Matas, David “InCat submissions to the Arar commission” available at: [http://www.incat.org/ararsub06.pdf](http://www.incat.org/ararsub06.pdf) at 3.
expansive interpretation which includes an obligation to provide civil remedies for
foreign torture is correct. First, the provisions of the convention must be read in light of
the preamble, which states, among other things, that the convention’s provisions are
adopted in order to “make more effective the struggle against torture and other cruel,
inhuman or degrading treatment of punishment throughout the world.” Article 14 then,
like all the other provisions of the convention, must be interpreted so as to make the
efforts to eradicate torture more effective. Bringing foreign torturers to justice, through
civil as well as criminal proceedings, would be in line with this objective.

While it is true that article 14 contains no geographical language, creating some
ambiguity as to its scope, the history of the drafting shows that language limiting the
obligation to torture committed “in territory under the jurisdiction of the state party” was
proposed, added and then subsequently deleted from the provision ultimate formulation. The travaux préparatoires themselves do not explicitly explain the reasons for the
removal of the limiting language. However, it is clear that the wording of the article was
carefully examined by the working group during the drafting negotiations and that the
ultimate formulation is the result of a deliberate process. Christopher Keith Hall, who has
undertaken a detailed study of the provision and its drafting history, notes that the
decision to leave out the proposed restrictive territorial language makes sense, as it
brought the article closer to previous drafts and to the 1975 Declaration on Torture that
inspired the CAT, where it is provided without geographical limitation in article 11 that
victims of torture “shall be afforded redress and compensation.” He also notes that the
43 member states of the Commission on Human Rights reviewed the draft text of the

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57 Supra note 5 art. 1.
58 Christopher Keith Hall “The duty of states parties to the Convention against Torture to provide
procedures permitting victims to recover reparations for torture committed abroad” forthcoming EJIL 2008
at 8.
59 Ibid. at 9.
convention in 1982, 1983 and 1984 and that there is no record during these revisions of any state’s objection to the lack of geographic scope to article 14.\textsuperscript{60}

Despite the evidence of this deliberate and careful process, however, it has been contended, most notably by the Reagan administration, that territorial limitation to the scope of article 14 was omitted ‘by mistake’.\textsuperscript{61} The United States attached an ‘understanding’ to their ratification of the CAT in 1988, six years after the working group’s decision to omit the geographic restriction, indicating the U.S. position 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”\textsuperscript{62} However, three years later in 1991, the U.S. changed its position and enacted the Torture Victims Protection Act,\textsuperscript{63} which implements the convention and creates a civil cause of action for torture which is not limited by geographical nexus. While the TVPA allows for suits against individuals and not against foreign states, its enactment nevertheless indicates that the United States takes the CAT to permit the exercise of universal civil jurisdiction over torture.

The notion that the obligations expressed in article 14 lack geographical limitation because of an error has regrettably been taken up by Canadian officials as a justification for a narrow interpretation of the provision and the resulting enforcement gap illustrated by the judgment in \textit{Bouzari}. Hall notes that at the meeting of the Committee Against Torture in May of 2005 following which the Committee made the recommendation that Canada review its interpretation of article 14, an exchange among Committee members and the Canadian delegation indicated Canada’s regressive and untenable stance:

\textsuperscript{60} Supra note 58 at 9.
\textsuperscript{61} Supra note 58 10.
\textsuperscript{62} Supra note 18 at 149.
\textsuperscript{63} Torture Victims Protection Act, 1991 [TVPA]
One delegate, Ms. Fitzgerald, conceded that the article ‘included no express limitations’ but asserted, without citing any authority, that it was limited to torture committed in the forum state; claimed, erroneously, that no state had interpreted art 14 as requiring universal civil jurisdiction and stated that there was no discussion of such jurisdiction during the drafting, which she asserted would have occurred if there had been any intention to override state immunity. [Committee member] Felice Gaer noted in response that ‘the preparatory work had not been as straightforward as had been described’ and that the U.S.A. had such legislation. The chair disagreed with the analysis of immunity and noted that a state could deny immunity as a countermeasure under international law. Ms. Levasseur of Canada asserted that there was no exception to state immunity for torture committed abroad and cited the U.S. understanding filed on ratification that art 14 did not require a procedure for making such claims. Ms. Fitzgerald advanced two mutually exclusive and entirely speculative explanations: that the deletion of the geographic restriction on the scope of this article during drafting must have been either an error or, citing the implausible view of unnamed experts, a decision to remove the restriction because there already was an implicit limitation.

To reiterate the Committee’s subsequent expression of concern regarding Canada’s position, the remarks stated that Canada must “ensure the provision of compensation through its civil jurisdiction to all victims of torture” As Hall notes, the expressions of a treaty body like the committee are crucial to the legal interpretation of the treaty whose implementation they oversee. These comments carry legal weight as “subsequent practice” which reflects the manner in which the convention ought to be interpreted, according to article 31 of the Vienna Convention on the Law of Treaties. Despite the importance of the Committee’s comments however, they have been disregarded by the courts, Lord Hoffman going so far as to say, in *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Others*, that he regarded the statements “as having no value” as regards the state of international law.

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64 Hall notes that this assertion was based on the judgment in *Bouzari*.
65 *Supra* note 52 at 4g.
66 *Supra* note 58 at 5.
67 *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Ors* [2006] UKHL 26. [Ron Jones]
68 *Supra* note 58 at 6.
Although the silence of the CAT as to the interaction between extraterritorial civil jurisdiction and state immunity has created ambiguity, this ambiguity ought arguably to be resolved in favour of the victims of torture and their right to a remedy. After all, the same difficulty theoretically exists with regard to how extraterritorial criminal jurisdiction for torture is to be reconciled with state immunity; the CAT is equally silent on this point, although the express grant of extraterritorial jurisdiction in article 5(2) is clear. The lack of provisions for resolving the dispute has not been understood by the Committee to allow deference to state immunity to supercede the obligation to establish criminal jurisdiction over torturers, which is unsurprising since this would contradict the object and purpose of the treaty. As the Committee said with regard to the case of Pinochet, the extension of immunity to protect heads of state who perpetrate atrocities would lead to absurd results; “The absolutist notion of sovereign immunity had been seriously undermined by State and international practice over the past 25 years. If domestic legislation in the United Kingdom made it impossible to prosecute or consider prosecuting former heads of State, it should be brought into conformity with the requirements of the Convention.”

This same attitude should apply to civil suits with crimes of torture underlying them. The Committee has made it clear that this is the correct interpretation. The political will is the key element lacking. Canada must amend its domestic legislation to correct the situation. If the legislature fails to make this amendment, Canada will continue to be in abrogation of its international obligations and will likely to continue to be criticized before the Committee during performance reviews.

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69 Supra note 5 at 5(2) : 5(2): Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.

State Immunity and the Violation of Jus Cogens

Though the court in Bouzari denied the existence of an obligation to provide a civil remedy for foreign torture and although Goudge J. asserted the primacy of the SIA and the balance struck by it between human rights and international relations, he left the door open, in obiter, for change: “In the future,” he wrote, “perhaps as the international human rights movement gathers greater force, this balance may change, either through the domestic legislation of states or by international treaty.”

The decisions in a number of international cases indicate that just such a different balance has been struck by some courts. In the case of Ferrini v. Federal Republic of Germany, an Italian man sued for damages for the physical and psychological suffering resulting from his arrest, deportation and forced labour during WWII. In this decision, the Italian court rejected Germany’s claim of immunity, reasoning that this defence was not available in cases of the violation of a *jus cogens* norm. This appears to be the reverse of the reasoning in Bouzari, i.e. the court in this case held that human rights and the violation of a *jus cogens* norm trumped state immunity and not the other way around. In the case of Prefecture of Voiotia v. Federal Republic of Germany, in which Greek citizens sued for damages for the actions of German forces in the village of Distomo during WWII, it was argued successfully that the violation itself of *jus cogens* norms by Germany implied a waiver of state immunity, making this defence unavailable.

Both the ‘trumping’ and the ‘implied waiver’ arguments regarding state immunity have provoked controversy, and other courts facing similar cases have rejected these

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71 Supra note 2 at 95.
arguments. However, these decisions present a contrast to the decisions in Bouzari and Al-Adsani and suggest a recognition by some courts that some human rights violations constitute actions grave enough to displace such previously sacrosanct notions as the sovereign equality of states. The weight accorded to the category of *jus cogens* norms is central to the reasoning in these cases, though there appears to be considerable disagreement regarding the ramifications of this designation, which is reflected in the contrasting decisions.

Though Goudge J.A. does not dispute the status of the prohibition against torture as a *jus cogens* norm, he finds that the scope of this norm does not extend to the requirement to provide the right to a civil remedy for foreign torture because the SIA does not contain an exception into which such a right could fall. He further justifies this conclusion by saying that “the extent of the prohibition against torture as a rule of *jus cogens* is determined not by any particular view of what is required for it to be meaningful, but rather by the widespread and consistent practice of states.” This practice, he asserts, is to provide immunity for acts of torture committed outside the forum state.

The impact of the *jus cogens* status of the prohibition against torture was hotly contested in the similar cases of Al-Adsani v. Kuwait and Al-Adsani v. UK, though the Ontario Court of Appeal judgment makes no reference to the decisions. The English Court of Appeal in this case found similarly to the Ontario Court of Appeal in Bouzari

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74 Notably Ron Jones, *supra* note 63 and Princz v. Federal Republic of Germany 26 F.3rd 1166 (DC Cir. 1994) [*Princz*].

75 It must be pointed out that Italy and Greece are monist countries with regard to the incorporation of international law within their domestic systems. The cases of Ferrini and Prefecture of Voiota accordingly dealt with the issues as matters of international law. The common law courts in Bouzari and Al-Adsani, in contrast, had to address the matter from the perspective of a dualist nation with a state immunity statute in its domestic legislation. While this difference may have made it easier for the Greek and Italian courts to arrive at their decisions, their decisions are nevertheless instructive for the reasoning they provide about the nature of *jus cogens* and the ramifications of this designation.

76 *Supra* note 2 at 90.

77 *Supra* note 2 at 90.
that the *UK Sovereign Immunities Act 1978* was a “comprehensive code” which precluded any suit against a state for foreign torture. Al-Adsani was refused the right to appeal to the House of Lords; he took the case to the European Court of Human Rights in 2000 alleging a breach of his European Convention rights under articles 3 (prohibition of torture) and 6 (right to a fair hearing). Though the court upheld the grant of immunity to Kuwait and did not find a violation of article 6, it was by a slim majority of nine votes to eight. While the majority adopted the formalist position that there was no “firm basis” for revoking state immunity in the case of torture, the dissent strongly supported the notion that the *jus cogens* character of the prohibition trumped the lower-ranking law of immunities and therefore required changes in state practice with regard to domestic legislation. The dissent of Judges Rozakis and Caflisch emphasized the disabling effect of the *jus cogens* prohibition against torture on the law of state immunity:

…the prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity raised by the defendant state as an element preventing him from entering into the merits of the case and from dealing with the claim of the applicant for the alleged damages inflicted upon him.  

The court was thus divided over the consequences to be drawn from the *jus cogens* status of the prohibition on torture; the split reflects the state of flux in the law with regard to the interaction between state immunity and *jus cogens* norms and the position of the state immunity doctrine on the border between the traditional interstate legal paradigm and rights-centred approach which has come to characterize international law in the last sixty

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79 *Supra* note 6 at 155 and note 78 at 204.
years. Although the formalist line taken in the *Al-Adsani* and *Bouzari* decisions may reflect an unwillingness to depart from a well-entrenched principle of the international legal order, mechanical adherence to this principle is of questionable value to the international community of today. The values espoused in the many international instruments prohibiting torture and the commitment to combating the impunity with which torture continues to be carried out point towards a less central position for state immunity among the organizing principles of the legal order.

The rhetorical power of the notions of sovereignty and state immunity may be losing ground to that of human rights. But what is also made clear by the decisions in the cases of *Al-Adsani* and *Bouzari* is that common law courts continue to feel bound by statutory or customary-law state immunity. Accordingly, the necessary progress must come from the legislature; an amendment to Canada’s SIA which can counteract the regressive attitude of the courts is required for the proper attention to remedies for victims and to reaffirm Canada’s commitment to combating impunity for grave human rights violations.

**An Amendment to Canada’s State Immunity Act**

Given the international obligations to which Canada is bound and the moral imperatives of the prohibition against torture, as well as the unfortunate precedent set by *Bouzari*, a human rights exception to the SIA for violations of *jus cogens* norms such as torture is crucial. Such an exception might look something like Jurgen Brohmer’s proposal for such a provision in the context of the draft articles which led to the Immunities Convention, which reads in part:

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80 This is evidenced by the cases of *Siderman de Blake v. Republic of Argentina* (1992) 965 F 2d 699 (9th Cir), *Princz, Al-adsani v. Kuwait*, and *Al-adsani v. UK*. It should be noted that even in the U.S. where the ATCA provides an avenue for recovery for foreign torts, courts have held that the ATCA does not provide an exception to the Foreign State Immunity Act.
A Foreign State shall not be immune from the jurisdiction of the forum State to adjudicate
A. If the cause of action relates to death or personal injury and the act or omission, whether governmental in nature or not, which caused the death or injury also constitutes a violation of such fundamental international human rights, which are part of the *jus cogens* body of international law, e.g. the prohibition of torture and extrajudicial killing and if
1. the act or omission of the Foreign State which caused the death or personal injury was aimed at the injured or killed individual and if
2. the act or omission of the Foreign State which caused the death or personal injury is not in violation of other norms of international law designed to protect large groups of individuals, e.g. the prohibition of genocide and if
3. the act or omission of the Foreign State which caused the death or personal injury did not occur in the context of an armed conflict between states.

No such provision was included in the Immunities Convention, its drafters being of the opinion that, since the state of the law is in flux, the Convention was not an appropriate place to make a determination on it. Such a provision could usefully be employed domestically in Canada, however, to clarify the relationship of state immunity to remedies for human rights violations.

Interestingly, the United States has created a form of human rights exception to the FSIA, in the form of the Anti-Terrorism and Effective Death Penalty Act of 1996. This amendment provides that immunity will not be granted in a case “In which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extra political killing, aircraft sabotage, hostage-taking” when the state in question has been designated as a state sponsor of terrorism by the U.S. Department of State. Although the reasons for enacting this exception stem from the objective of creating an additional sanction against those states which support terrorist groups, it

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83 *Anti-Terrorism and Effective Death Penalty Act*, 1996.
84 *Supra* note 293.
nevertheless represents, as the first instance court in Bouzari heard, “the closest thing to a statutory human rights exception to state immunity in existence.” A number of cases have been brought against Cuba, Iran, Lebanon, Libya and Iraq in which the claimants have been awarded large sums in compensatory and punitive damages.

There have been several proposals in Canada for a similar amendment to the SIA, the most recent being Bill C-346, introduced in June of 2006. The proposed amendment would add an exception to the SIA as follows: “A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any terrorist activity that the foreign state conducted on or after January 1, 1985.”

The accompanying text of the proposed amendment include two statements of note: “Whereas state immunity is generally accepted as being restrictive or relative, applying only to sovereign acts of state” and ‘Whereas the prohibition against terrorism is a peremptory norm of international law (jus cogens) accepted and recognized by the international community of States as a whole as a norm from which no derogation is possible.’ It appears then that the Government’s amendment, should it pass, would justify itself through resort to the language of jus cogens, and use the logic that the prohibition on terrorism implies both a right of civil action and a waiver of state immunity. These text mentions also that this amendment is a response to obligations undertaken by Canada pursuant to the International Convention for the Suppression of the Financing of Terrorism and to reports made to the Security Council’s Counter-Terrorism

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85 Supra note 6 at 164.
86 Enforcing these judgments against the assets of the states in question, however, is another matter, and was the subject of a proposed legislation in 1999 which would have made these judgments executable against diplomatic and consular properties. This proposal was opposed by the executive; the law which was ultimately adopted provides certain claimants with the right to claim the some of the damages awarded from the Treasury Department if they relinquish other rights.
87 Bill C-346, June 22 2006.
88 Ibid.
89 Ibid.
90 International Convention for the Suppression of the Financing of Terrorism
Committee in which it was noted that Canada has “no civil liability in tort for criminal
offences relating specifically to terrorism.”\textsuperscript{91} The Government is thus ready, it would
seem, to respond to the pressures of United Nations bodies and to carve out exceptions to
the doctrine of state immunity while relying on the justification of the principles of \textit{jus
cogens} in the case of terrorism.

While this amendment would be a step in the right direction in that it would create
the possibility for recovery against foreign states for some victims of serious human
rights violations, it is narrow in scope and limited by its political motivation. The
willingness to use this logic to vindicate the rights of victims is the proper approach, but
there is an air of political expediency with which the right to remedy is here invoked.
Equality for the victims of rights violations as enshrined in international instruments
ddictates that this exception must be extended to all victims, not only those who happen to
have been tortured by the officials of one of the ‘right’ countries.

Another proposal, which was mentioned in the proceedings before the Committee
Against Torture referred to above and recently reiterated by Craig Forcese\textsuperscript{92} is that
Canada could use countermeasures to withdraw immunity from the foreign state in the
case a civil action for grave rights violations. He proposes an amendment to the SIA like
the American approach which would revoke immunity in cases of state sponsors of
terrorism designated by the executive as a countermeasure justified by violation of \textit{erga
omnes} obligations by the state in question.\textsuperscript{93} This approach would respond to the
objection that further exceptions to the doctrine of state immunity might create friction in
international relations. Such a proposal would represent a middle ground, he argues,
between what he calls “an aggressive interpretation of article 14” and “an unflagging

\textsuperscript{91} supra note 87.
\textsuperscript{92} supra note 6. At 167.
\textsuperscript{93} Supra note 6. at 167.
commitment to state immunity”\(^{94}\)

As indicated by the language of Bill C-346 however, the commitment to this doctrine appears less than unflagging under the right political circumstances; rather than allowing the impulse to defer to state immunity for the purposes of smooth international relations, Canada ought to lead the charge for greater human rights protection and enact an amendment which would cover violations of \textit{jus cogens} norms regardless of the perpetrators. To do less than this is to abdicate the responsibilities Canada has undertaken to victims and the international community.

\textbf{Conclusions}

Criticisms of the proposal for a human rights exception to state immunity legislation which would allow for these civil suits include the arguments that it will cause a flood of claims and that these claims could be vexatious, that domestic enforcement of international human rights norms as concern another state’s actions is inappropriate, that it would create havoc in international relations and that the existing treaty regime for torture could be harmed, and even that states that torture might be encouraged to adopt a ‘disappearance’ policy instead to avoid suits.

With regard to the fear of floodgates, restrictions already exist which would filter the claims, notably the \textit{forum non conveniens} doctrine, which might require courts to decline jurisdiction because another court is better placed to hear the case. This would not be applicable in cases such as Bouzari where the claimant has little chance of a fair hearing in the state where the torture occurred and an injustice would result from declining jurisdiction; the doctrine may nevertheless be justly applicable in some instances. Additionally, the difficulty of meeting the burden of proof in such a case would

\(^{94}\) Supra note 6 at 168.
present a considerable challenge for many such cases.

The fear that stronger enforcement of human rights will lead to friction among players on the international stage is not be unfounded. The United States enactment of the Terrorist Activity exception to the FSIA prompted Iran to adopt corresponding measures allowing suits against the U.S. and there is no doubt that states are not likely to be enthusiastic about relinquishing the privilege of immunity. This, however, is part of the bargain of international diplomacy, and just as the commercial activities exception was controversial when it emerged to limit the immunity previously held to be absolute, evolving human rights norms and enforcement mechanisms must work their way towards acceptance.

As to the suggestion that stronger enforcement will harm the torture treaty regime, there are two responses. First, this might well have been argued as a reason to refrain from extending criminal jurisdiction for torture extraterritorially. The fear of prosecution of its officials might have worried states, but the CAT which expressly grants this universal criminal jurisdiction for torture has been widely signed and the state parties are subject to greater supervision of state practices than under any of the previous torture instruments. Second, there is the serious question of whether the existing regime is in fact gaining any ground with regard to its objective of eradicating torture. Torture continues to be widely practiced, despite the current regime.

As such the arguments against the creation of a human rights exception to the law of state immunity do not appear very strong, while the moral imperatives which demand this exception are much stronger. Though there may be negative reaction in some quarters to such a move taken by Canada, this may be the price of defending human rights. As Adams writes, “states…that are willing to work to secure true universality of human rights guarantees should not be deterred by the fact that their efforts are not universally
recognized, at the outset of an initiative, as legitimate at the international level.” 95 What matters, she argues, is that

within states the political authorities responsible should openly acknowledge that their unilateral efforts are justified by reference to natural law imperatives rather than by existing positive international law, and that auto-interpretation, including that performed by domestic judges operating pursuant to express statutory authorisation, is a necessary evil given the lack of political will in terms of establishing international enforcement mechanisms. 96

It thus appears that the concept of state immunity remains a significant barrier to the recovery of damages for victims of human rights violations in Canada as well as in other jurisdictions. The need to amend Canada’s State Immunity Act seems clear; unless changes are made to this law, foreign governments will remain immune from prosecution in civil courts no matter how gravely their actions offend international human rights norms. This state of affairs puts Canada in contravention of its international obligations under the CAT as well as other agreements. But no matter what obligations Canada may incurs by treaty or custom, domestic courts will continue to be bound (or at least to believe themselves to be bound) by domestic legislation (and by precedents like that of Bouzari). As long as the SIA lacks a human rights exception, we cannot reasonably hope for just outcomes for victims of human rights violations who seek damages in our courts.

95 Supra note 20 at 273
96 Supra note 20 at 274.