File No. 35034

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL FOR QUEBEC)

BETWEEN:

ESTATE OF THE LATE ZAHRA (ZIBA) KAZEMI

APPELLANT
(Appellant (500-09-021457-114))

- and -

STEPHAN (SALMAN) HASHEMI

APPELLANT
(Respondent (500-09-021440-110))

- and -

THE ISLAMIC REPUBLIC OF IRAN
AYATOLLAH SAYYID ALI KHAMENEI
SAEED MORTAZAVI
MOHAMMAD BAKHSHI

RESPONDENTS
(Respondents (500-09-021457-114))
(Appellants (500-09-021440-110))

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Mis-en-cause)

APPELLANTS' FACTUM

Henri A. Lafortune Inc.
Tel.: 450 442-4080
Fax: 450 442-2040
lafortune@factum.ca

2005 Limoges Street
Longueuil, Québec J4G 1C4
www.halafortune.ca

Mr. Kurt A. Johnson
Mr. Mathieu Bouchard
Ms. Audrey Boctor
Mr. David Grossman
Irving Mitchell Kalichman LLP
Suite 1400
3500 De Maisonneuve Blvd. W.
Montreal, Quebec
H3Z 3C1

Tel.: 514 935-4460
Fax: 514 935-2999
kjohnson@imk.ca
mbouchard@imk.ca
aboctor@imk.ca
dgrossman@imk.ca

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

Mr. Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
PO Box 466, Station D
Ottawa, Ontario
K1P 1C3

Tel.: 613 233-1781
Fax: 613 563-9869
brian.crane@gowlings.com

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

Mr. James A. Woods
Woods LLP
Suite 1700
2000 McGill College Avenue
Montreal, Quebec
H3A 3H3

Tel.: 514 982-4503
Fax: 514 284-2046
jwoods@woods.qc.ca

Counsel for The Islamic Republic of Iran, Ayatollah Sayyid Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi

Mr. Bernard Letarte
Mr. René LeBlanc
Department of Justice
Suite SAT-6060
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Tel.: 613 946-2776 (Mr. Letarte)
Tel.: 613 957-4657 (Mr. LeBlanc)
Fax: 613 952-6006
bletarte@justice.gc.ca
rene.leblanc@justice.gc.ca

Counsel for Attorney General of Canada

Mr. Christopher Rupar
Department of Justice
Suite 1212
234 Wellington Street
Ottawa, Ontario
K1A 0H8

Tel.: 613 941-2351
Fax: 613 954-1920
christopher.rupar@justice.gc.ca

Agent for Attorney General of Canada

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APPELLANTS' FACTUM

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. This is the case of Zahra Kazemi, a Canadian citizen who was arrested, detained, tortured and murdered by Iranian authorities in the summer of 2003, and the civil proceedings brought before the Superior Court of Quebec by her son, Stephan Hashemi, to hold those responsible for his mother's mistreatment and brutal murder accountable.

2. There is no doubt today that the prohibition against torture is a norm of *jus cogens* that imposes upon states obligations that are owed towards all other members of the international community (obligations *erga omnes*). States are obliged not only to refrain from engaging in torture, but to suppress torture in all of its forms. No legal loopholes are meant to remain.[1]

3. Pursuant to Article 14(1) of the UN *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the "**CAT**"),[2] which Canada ratified in 1987, closing the legal loopholes means that states parties are required to provide a forum of redress to *all* victims of torture, regardless of where or by whom the acts were committed. As recently as December 2012, the Committee against Torture, mandated by states parties to oversee the implementation of the CAT, affirmed that granting state immunity for torture is in direct conflict with this obligation. This is particularly so when, as in this case, the victim is unable to obtain redress in the country where the violation took place.[3]

4. Against this backdrop, granting immunity to Iran and the individual Respondents in the circumstances of this case is incompatible with Canada's international obligations as well as its domestic rejection of torture.

5. To the extent that s. 3(1) of the *State Immunity Act* (the "***SIA***")[4] grants such immunity to the Respondents, this Court must decide whether that grant is in conformity with Canada's constitutional

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1 *Prosecutor v. Furundžija*, December 10, 1998, Case No. IT-95-17/1-T (I.C.T.F.Y., T.C.), aff'd, July 21, 2000 (I.C.T.F.Y., A.C.) ("***Furundžija***"), at paras. 143-146, Appellants' Book of Authorities ("**B.O.A.**"), **Vol. IV, Tab 54**.

2 U.N.T.S., vol. 1465, p. 85, B.O.A., **Vol. I, Tab 4**.

3 *General comment No. 3 (2012) – Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3 (13 December 2012) ("***General comment No. 3***"), at paras. 22, 38 and 42, B.O.A., **Vol. VII, Tab 85**.

4 R.S.C., 1985, c. S-18.

and quasi-constitutional instruments, namely the *Canadian Bill of Rights* (the "***Bill of Rights***")[5] and the *Canadian Charter of Rights and Freedoms* (the "***Charter***"), instruments which serve not only to safeguard the rights and freedoms of Canadians but also to implement Canada's obligations under the CAT and other international human rights conventions that Canada has ratified.

6. The Appellants' position is as follows:

(a) In the circumstances of this case, s. 3(1) *SIA* deprives the Appellants of their right to a fair hearing as protected by s. 2(*e*) of the *Bill of Rights* because it diverts their claim to the courts of Iran, where it is taken as averred that fair and impartial proceedings are impossible, and while Iran does not adhere to any of the international instruments which would allow its actions to be judged by an international body;

(b) In the circumstances of this case, s. 3(1) *SIA* infringes Mr. Hashemi's right to security of the person as protected by s. 7 of the *Charter* because of the adverse psychological impact caused by being prevented from seeking accountability and redress for the acts of torture committed by the Respondents; and

(c) In light of Canada's obligations under the CAT and the other human rights instruments it has ratified, it shocks the Canadian conscience and is therefore not in accordance with the principles of fundamental justice to grant immunity to Iran in this case, particularly where for the past 10 years, Iran's judicial system has failed to hold those responsible to account, and its government has refused to accept responsibility for their actions.

7. Finally, the Appellants submit that the *SIA* in any event does not apply to lower-level officials such as the Respondents Mortazavi and Bakhshi and that, at common law, foreign public officials are not immune from the jurisdiction of Canadian courts for acts of torture.

B. FACTS

8. The facts, which were taken as averred in first instance,[6] are as follows.

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5 S.C., 1960, c. 44.

6 Judgment of the Superior Court, at para. 8, Appellants' Record ("**A.R.**"), **p. 5**.

9. Zahra Kazemi was a Canadian-Iranian photojournalist, filmmaker and artist. She was born in Shiraz, Iran on October 9, 1948. She moved to Paris in the 1970s, and then to Canada in 1993, where she settled in Montreal with her only child, Stephan Hashemi. She became a Canadian citizen in 1997.

10. In the summer of 2003, Ms. Kazemi visited Iran to do freelance photography work for a Canadian publication. She obtained a permit from the Foreign Press Service of the Ministry of Culture and Islamic Guidance allowing her to take pictures of the daily life of Iranians.

11. On June 23, Ms. Kazemi was taking pictures of men and women who were protesting outside Evin Prison in Tehran. For reasons that remain unexplained to this day, she was arrested by Iranian authorities at the request of Tehran's Chief Public Prosecutor, Respondent Saeed Mortazavi, and taken into custody at Evin Prison.

12. Ms. Kazemi was not permitted to contact a lawyer or her family, nor was she allowed to seek consular assistance from the Canadian Embassy. In fact, during the entire duration of her detention in Evin Prison, neither her family nor Canadian authorities were informed that she had been arrested or detained.

13. Over the following days, she was repeatedly interrogated by Iranian authorities. She was beaten, sexually assaulted and tortured.

14. She sustained multiple injuries, including: a fractured nose bone, a crushed right upper eardrum with small bones exposed, deep parallel linear abrasions on the back of her neck, a possible fracture of one or more of her ribs, several strip-like wounds on her back, trauma to the genital area and extensive ecchymosis in the pubic area, thighs, groin, back, buttocks and the sacrum, extensive ecchymosis on the backs of both arms, both legs and on the soles of both feet, fractured bones and broken nails on her hands, crushed and fractured toes and nails, and multiple linear wounds along the back of her forelegs.

15. At some time prior to July 6, Ms. Kazemi was taken from Evin Prison to Baghiatollah Hospital in Tehran. By the time she was admitted to hospital, she was unconscious.

16. Ms. Kazemi was initially diagnosed with gastro-intestinal bleeding, but it later became apparent that she had suffered a brain injury. Shortly after being admitted to hospital, she went into a coma and was transferred to intensive care. No attempt was made to notify Canadian consular officials, her son, or even her mother who still lived in Ms. Kazemi's hometown of Shiraz.

17. Ms. Kazemi's mother, Ezat Ebrahimi, eventually learned through unofficial channels that her daughter was in trouble. On July 6, Ms. Ebrahimi made her way to Tehran and eventually Baghiatollah Hospital and it was she who notified the Canadian Embassy of Ms. Kazemi's arrest and detention. Mr. Hashemi, who was then in Canada, was finally reached on the evening of July 7.

18. Despite the intervention of the Canadian Embassy, all requests for her independent medical examination and treatment were denied. She was eventually declared brain-dead with no possibility of recovery.

19. On or about July 10, a request for Ms. Kazemi's transfer to Canada was denied. On July 12, the Iranian government announced that she was dead.

20. On July 23, the Iranian government arranged for Ms. Kazemi's burial in Shiraz despite numerous requests by her family to have her body repatriated and buried in Canada, and despite formal objection by Canadian authorities to her burial in Iran.

21. In the following weeks and months, numerous explanations were provided for her death, including digestive disorder, stroke and eventually, murder.

22. Yet only one individual, Reza Ahmadi, ever faced a "trial" on charges related to Ms. Kazemi's death. Counsel were denied access to key witnesses prior to the start of the trial, important documentary and physical evidence was kept from them both prior to and during the trial, and one week after a two-day hearing, Mr. Ahmadi was acquitted.

23. To this day, no one has been convicted or held accountable in Iran for the arrest, detention, torture, sexual assault and murder of Ms. Kazemi.

PART II – QUESTIONS IN ISSUE

24. The questions raised by this appeal are as follows:

a) Does the application of s. 3(1) *SIA* in the circumstances of this case deprive the Appellants of their right to a fair hearing, as protected by s. 2(*e*) of the *Bill of Rights*?

b) Does the application of s. 3(1) *SIA* in the circumstances of this case violate Mr. Hashemi's right to security of the person, as protected by s. 7 of the *Charter*?

c) In light notably of Canada's obligation under Article 14(1) of the CAT, does the jurisdictional bar created by s. 3(1) *SIA* conform to the principles of fundamental justice enshrined in s. 2(*e*) of the *Bill of Rights* and s. 7 of the *Charter*?

d) If s. 3(1) SIA breaches s. 2(*e*) of the *Bill of Rights* or s. 7 of the *Charter*, can it be justified in a free and democratic society?

e) Are foreign public officials, sued in their individual capacity, immune from the jurisdiction of Canadian courts in civil proceedings for acts of torture?

PART III – ARGUMENT

A. DOES THE APPLICATION OF S. 3(1) *SIA* IN THE CIRCUMSTANCES OF THIS CASE DEPRIVE THE APPELLANTS OF THEIR RIGHT TO A FAIR HEARING, AS PROTECTED BY S. 2(*E*) OF THE *BILL OF RIGHTS*?

i) The *Bill of Rights* should be subject to the same interpretive principles that apply to all quasi-constitutional instruments in Canada

25. The *Bill of Rights* is Canada's first quasi-constitutional instrument. Adopted in 1960, s. 5(2) provides that it applies to all federal laws, whether adopted prior to or after its coming into force.[7]

26. This Court has repeatedly affirmed that human rights legislation prevails over all other types of legislation and that it should be given a liberal and purposive interpretation so as to advance its broad purposes.[8] This includes all federal, provincial and territorial human rights statutes and codes that came into force in the 22 years between the enactment of the *Bill of Rights* and that of the *Charter*, including the Quebec *Charter of Human Rights and Freedoms*,[9] s. 23 of which is similar in scope and purpose to s. 2(*e*) of the *Bill of Rights*.

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7 *The Queen v. Drybones*, [1970] S.C.R. 282, at pp. 293-294 and 296-298, B.O.A., **Vol. III, Tab 39**.

8 See, for example: *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145 ("***Heerspink***"), at pp. 157-158, B.O.A., **Vol. II, Tab 27**; *Québec (Commission des droits de la personne et des droits de la jeunesse)* v. *Montréal (City),* 2000 SCC 27 ("***Commission des droits de la personne***"), at paras. 27-29, B.O.A., **Vol. II, Tab 31**.

9 R.S.R.Q., c. C-26.

27. A liberal and purposive interpretation means that "[p]rotected rights receive a broad interpretation" and that "key provisions of the legislation are adapted not only to changing social conditions but also to evolving conceptions of human rights" [Emphasis added].[10]

28. In this light, there is no longer any justification for maintaining the traditional approach to the interpretation of the *Bill of Rights* that saddles its jurisprudence,[11] given the liberal, flexible and purposive approach that infuses the interpretation of every other piece of quasi-constitutional human rights legislation in Canada.

29. The continued relevance and importance of the *Bill of Rights* is evident in a case like the present where the key provision relied upon, s. 2(*e*), finds no direct equivalent in the *Charter*,[12] but figures prominently in important international law instruments that Canada has either ratified or which play a significant role in interpreting Canadian human rights instruments, including Article 10 of the *Universal Declaration of Human Rights*,[13] Article 14 of the *International Covenant on Civil and Political Rights* (the "**ICCPR**")[14] and Article 6§1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the "**European Convention**").[15]

30. Viewed in this context, s. 2(*e*) rights are no less worthy of protection than the rights embodied in the *Charter.* Indeed, Canada has affirmed that the *Bill of Rights*, alongside the *Charter*, is one of the means by which it implements its obligations under international human rights instruments that it has ratified, such as the CAT.[16]

ii) Subsection 2(*e*) of the *Bill of Rights* applies to the Appellants' claim

31. Subsection 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."

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10 *Commission des droits de la* personne, at para. 29, citing with approval the rules summarized by Professor Ruth Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (1994), at pp. 383-384.

11 *Authorson v. Canada (Attorney General)*, 2003 SCC 39 ("***Authorson***"), at para. 33, B.O.A., **Vol. I, Tab 16**; Judgment of the Superior Court, at para. 175, A.R., **pp. 48-49**.

12 *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 ("***Singh***"), at p. 224, per Beetz J., B.O.A., **Vol. III, Tab 37**.

13 GA Res. 217 A (III), UN Doc. A/810, at 71 (1948), B.O.A., **Vol. I, Tab 10**.

14 U.N.T.S., vol. 999, p. 171, B.O.A., **Vol. I, Tab 7**.

15 U.N.T.S., vol. 213, p. 222, B.O.A., **Vol. I, Tab 6**.

16 *Presentation of Canada's Sixth Report to the Committee against Torture: Opening Statement*, May 21, 2012, at p. 2, B.O.A., **Vol. VIII, Tab 94**.

32. Subsection 2(*e*) is broader than s. 1(*a*) of the *Bill of Rights*, which is limited to procedural due process, and s. 7 of the *Charter*, which only applies where one's life, liberty or security of the person are at stake. Subsection 2(*e*) thus protects the right to a *fair hearing* for the determination of one's rights and obligations "whatever they are" [Emphasis added].[17]

33. The Court of Appeal below held that s. 2(*e*) was not engaged in this case because "no determination of the Estate's rights is […] contemplated by the relevant law."[18] Like the Motion Judge before it, the Court of Appeal assumed that, in virtue of s. 3(1) *SIA*, "no right exists" requiring a fair process.[19]

34. With respect, the courts below erred in their appreciation both of the nature of state immunity and of the nature of the Appellants' claim.

35. State immunity is a "procedural bar to the exercise of jurisdiction that otherwise, substantively, exists" [Emphasis added].[20] It does not extinguish the Appellants' substantive claim – a claim for damages for personal injury – over which the Superior Court of Quebec plainly has jurisdiction.[21] This much is clear from the fact that pursuant to s. 4 *SIA*, Iran can either tacitly or expressly waive its immunity, thereby submitting to the otherwise intact jurisdiction of Canadian courts.

36. In essence, the effect of the *SIA* is simply to erect a procedural bar which diverts the adjudication of one's claim to another forum.[22] The question then becomes whether that diversion prevents the claim from being determined in a manner that is fair, in conformity with the principles of fundamental justice.

37. For this reason, in *Al-Adsani v. United Kingdom*,[23] all 17 judges of the European Court of Human Rights (the "**ECHR**") rejected the approach that was adopted by the courts below in the present case,

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17 *Singh*, at p. 228, *per* Beetz J., B.O.A., **Vol. III, Tab 37**. See also: *Air Canada v. Canada (Attorney General)*, [2003] R.J.Q. 322 (C.A.) ("***Air Canada***"), at paras. 47-50, appeal discontinued, June 3, 2004, S.C.C. No. 29660, B.O.A., **Vol. III, Tab 41**.

18 Judgment of the Court of Appeal, at para. 109, A.R.**, pp. 108-109**.

19 Judgment of the Superior Court, at para. 161, A.R., **pp. 45-46**.

20 John H. Currie, *Public International Law*, 2nd ed. (2008), at p. 365, B.O.A., **Vol. VI, Tab 70**. See also: *Case concerning the arrest warrant of April 11, 2000 (Democratic Republic of Congo v. Belgium)*, I.C.J. Report 2002, p. 1 ("***Arrest Warrant***"), at para. 60, B.O.A., **Vol. IV, Tab 51**; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, February 3, 2012 (I.C.J.) ("***Jurisdictional Immunities***"), at para. 58, B.O.A., **Vol. IV, Tab 52**.

21 *Civil Code of Quebec,* arts. 3148(3) and 3136, B.O.A., **Vol. I, Tab 2**. On the contrary, the jurisdiction of the Ontario courts was far from certain in *Bouzari v. Iran*, [2002] O.J. No. 1624 (QL) (S.C.J.), B.O.A., **Vol. III, Tab 47** ("***Bouzari SCJ***"), at paras. 15-17, aff'd, [2004] O.J. No. 2800 (QL) (C.A.), B.O.A., **Vol. III, Tab 42** ("***Bouzari CA***"), at paras. 23-38, leave to appeal denied, January 17, 2005, S.C.C. No. 30523.

22 *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, [2006] UKHL 26 ("**Jones**"), at para. 24, per Lord Bingham of Cornhill, and at para. 44, per Lord Hoffman, citing Hazel Fox Q.C., *The Law of State Immunity* (2004), at p. 525, B.O.A., **Vol. V, Tab 60**.

23 [2001] ECHR 761 ("***Al-Adsani***") B.O.A., **Vol. III, Tab 50**.

holding that Article 6§1 of the European Convention, which is similar to s. 2(*e*) of the *Bill of Rights*, was engaged in factual circumstances that are practically indistinguishable from the case at bar:

> 48. The proceedings which the applicant intended to pursue were for damages for personal injury, a cause of action well known to English law. The Court does not accept the Government's submission that the applicant's claim had no legal basis in domestic law since any substantive right which might have existed was extinguished by operation of the doctrine of State immunity. It notes that an action against a State is not barred *in limine*: if the defendant State waives immunity, the action will proceed to a hearing and judgment. **The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right**. [Emphasis and bold characters added]

38. In other words, what s. 2(*e*), like Article 6§1, protects is not a freestanding "right to sue", but rather a quasi-constitutional right to a fair process when the law otherwise recognizes an actionable right.

39. The reliance of the courts below on *Authorson* was therefore misplaced. In that case, legislation had actually extinguished the substantive right at issue. Accordingly, it was found that s. 2(*e*) of the *Bill of Rights* could not be relied upon to create a hearing process where no claim remained to be determined. Here, and to the contrary, because immunity is procedural in nature, it is caught by the procedural fairness guarantees conferred by s. 2(*e*) of the *Bill of Rights*.

40. Indeed, the notion that there can be no right without a court to enforce it is a long-established feature of Canadian law.[24] Even if this Court affirms the traditional approach to the interpretation of the *Bill of Rights*, the right the Appellants seek to enforce in the present case is without a doubt part of the "rights that existed when the *Bill of Rights* was enacted, in 1960."[25]

iii) In the circumstances of this case, the application of s. 3(1) *SIA* deprives the Appellants of the only possibility they have for a fair hearing of their claim

41. Since a successful plea of state immunity diverts a litigant's claim to another forum, an investigation of where that diversion leads becomes necessary if we are to give any effect to the protection afforded by s. 2(*e*) of the *Bill of Rights*. Where the alternate forum offers a meaningful

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24 *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 ("***Canadian Liberty Net***"), at paras. 30-32, referring to *Board* v. *Board*, [1919] A.C. 956 (P.C.) B.O.A., **Vol. I, Tab 18**.

25 *Authorson*, at para. 10, B.O.A., **Vol. I, Tab 16**.

avenue for redress, the *SIA* does not interfere with a claimant's rights. However, s. 2(*e*) is engaged where the plea of immunity leads to a process that is unfair or effectively non-existent.[26]

42. In this case, in the words of the Motion Judge, "it is impossible for [the Appellants] to enjoy procedural fairness and obtain a fair hearing" before Iranian courts.[27] Moreover, Iran:

(a) is not a party to the CAT, Article 14 of which requires that states parties ensure that means of redress are available to victims of torture within their legal system. The Convention also includes an optional complaint mechanism before the Committee against Torture in cases of CAT violations, which either states parties (Article 21) or individuals (Article 22) can initiate;

(b) does not recognize the compulsory jurisdiction of the International Court of Justice (the "**ICJ**"),[28] meaning that Canada could not bring a case against Iran before the ICJ to seek reparation for the torture and death of Zahra Kazemi; and

(c) has not ratified the Optional Protocol to the ICCPR, which sets up a complaint mechanism for victims of ICCPR violations, including torture, arbitrary imprisonment and arbitrary killing (Articles 6, 7 and 9), before the Human Rights Committee, nor has it recognized the competence of the Committee to receive and consider communications with respect to Covenant violations from other states parties having recognized its competence, such as Canada (Article 41).

43. In other words, Canadian courts constitute not merely a forum of necessity in this case, but indeed a forum of last resort for the Appellants. The application of s. 3(1) *SIA* thus effectively deprives the Appellants of the *only* opportunity they have for a fair and impartial determination of their substantive rights.

44. That a foreign state's judicial system, namely Iran's, is the one that cannot afford the minimal guarantees of procedural fairness entrenched at s. 2(*e*) of the *Bill of Rights* does not detract from this analysis. In *Suresh v. Canada (Minister of Citizenship and Immigration*),[29] when concerned with the

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26 *Aristocrat v. National Bank of the Republic of Kazakhstan*, [2001] O.J. No. 2876 (QL) (S.C.J.), at paras. 31-33, B.O.A., **Vol. III, Tab 46**, where in *obiter*, Granger J. noted that s. 2(*e*) of the *Bill of Rights* could be triggered by the *SIA* where the judicial system of the foreign State at issue did not offer minimal guarantees of procedural fairness.

27 Judgment of the Superior Court, at paras. 8 and 161, A.R., **pp. 5 and 26-27**. The Motion Judge refused to hear the Appellants' expert on Iran's judicial system (Notice of filing of an expert report, November 1, 2007, A.R., **pp. 158-159**) and to take into consideration any facts that were not alleged in the Appellants' proceedings (Transcript of the hearing of December 2, 2009, A.R., **pp. 211 and ff.**).

28 *Statute of the International Court of Justice*, U.N.T.S., vol. 33, p. 993, Article 36(2), B.O.A., **Vol. I, Tab 9**.

29 [2002] 1 S.C.R. 3 ("***Suresh***") B.O.A., **Vol. III, Tab 38**.

refoulement provisions of the *Immigration Act*,[30] this Court held that the procedural guarantees of s. 7 of the *Charter* may be engaged with respect to the acts of a foreign state so long as there is "a sufficient causal connection between our government's participation and the deprivation ultimately effected":

> 54. […] At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand. [Emphasis added]

45. In the present case, "Canada's participation" – namely the application of s. 3(1) *SIA* – makes it "entirely foreseeable" that the Appellants will be deprived of their right to a fair hearing, since short of abandoning their claim altogether, the only forum left would be Iranian courts. That is sufficient to establish a causal connection between the application of the *SIA* and the violation of s. 2(*e*) of the *Bill of Rights*, a connection the courts below failed to recognize.

46. In sum, if the jurisdictional immunity granted by the *SIA* has the effect, in the specific circumstances of a given case, of denying a Canadian citizen access to the *only* forum where his or her claim may be heard fairly and without bias, then it effectively authorizes the deprivation of that person's right to a fair hearing. The analysis must then proceed to a determination of whether that deprivation is consonant with Canadian principles of fundamental justice, as discussed below.

B. DOES THE APPLICATION OF S. 3(1) *SIA* IN THE CIRCUMSTANCES OF THIS CASE VIOLATE MR. HASHEMI'S RIGHT TO SECURITY OF THE PERSON, AS PROTECTED BY S. 7 OF THE *CHARTER*?

47. It is well settled that an enactment of Parliament that causes a serious and profound interference with a person's psychological condition engages s. 7 of the *Charter*.[31]

48. The Appellants submit that in circumstances such as those in this case, where s. 3(1) *SIA* operates to deny any chance at accountability (including accountability in another forum) and the wrongdoing in question is so heinous that the lack of accountability causes an "adverse psychological impact" on the individual seeking justice, the s. 7 protection of security of the person is engaged.[32]

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30 R.S.C., 1985, c. I-2.

31 *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 ("***Chaoulli***"), at paras. 103-104 and 117, *per* McLachlin C.J. and Major J, B.O.A., **Vol. I, Tab 20**.

32 There is no question that Mr. Hashemi is a both a direct and indirect victim of the Respondents' acts. See: *Augustus v. Gosset*, [1996] 3 S.C.R. 268, at pp. 285-286 and 294, B.O.A., **Vol. I, Tab 15**. Specifically in the context of torture, international authorities have stated that direct family members of torture victims suffer a prejudice and are themselves to be considered as victims. See: Committee against Torture, *General Comment No. 3*, at para. 3, B.O.A., **Vol. VII, Tab 85**; Human Rights Committee, *Sarma v. Sri Lanka*, *Communication No. 950/2000*, UN Doc. CCPR/C/78/D/950/2000 (31 July 2003), at para. 9.5,

i) Adverse psychological impact triggers the protection of s. 7 of the *Charter*

49. Section 7 of the *Charter* exists to restrain the government from depriving individuals of their life, liberty and security of person. The phrase "security of person" includes both the physical and the psychological security of individuals.[33]

50. Not all government action that affects one's psychological state will trigger the application of s. 7 of the *Charter*. Most government actions will cause some "ordinary" emotional reaction in individuals; these actions will not automatically engage s. 7.[34]

51. That being said, this Court has refused to set the bar for psychological impact very high. The psychological injury that gives rise to the protection of s. 7 "need not rise to the level of nervous shock or psychiatric illness."[35] Section 7 is thus triggered by psychological impact that is "greater than ordinary stress or anxiety",[36] or that is above the level of "trivial" such that it is "above the ordinary anxiety caused by the vicissitudes of life."[37]

52. To the extent there is a strong gatekeeper in s. 7 protecting against unfounded attempts to overturn government action, that gatekeeper is the requirement that deprivations of security of the person be shown to violate the principles of fundamental justice.[38]

53. In assessing the psychological impact in a given case, a court should put itself in the position of a "person of reasonable sensibility."[39] Where the person of reasonable sensibility would experience an adverse psychological impact greater than ordinary stress or anxiety based on the circumstances of that case, s. 7 of the *Charter* will be triggered.

B.O.A., **Vol. IV, Tab 55**; *Tibi v. Ecuador*, September 7, 2004, Inter-American Court of Human Rights ("***Tibi***"), at paras. 160, 162 and 230, B.O.A., **Vol. V, Tab 56**; *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. A/Res/60/147 (16 December 2005) (the "***Basic Principles and Guidelines***"), at s. 8 of the Annex, B.O.A., **Vol. VII, Tab 83**; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/Res/40/34 (29 November 1985), at s. 2 of the Annex, B.O.A., **Vol. VII, Tab 84**.

33 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 ("***Morgentaler***"), at p. 56, *per* Dickson C.J., and at p. 173, *per* Wilson J, B.O.A., **Vol. II, Tab 33**.

34 *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46 ("**G. (J.)**"), at para. 59, B.O.A., **Vol. II, Tab 30**.

35 *G.(J.)*, at para. 60, B.O.A., **Vol. II, Tab 30**.

36 *Chaoulli*, at para. 116, *per* McLachlin C.J. and Major J, B.O.A., **Vol. I, Tab 20**.

37 *Chaoulli*, at para. 204, *per* Binnie and LeBel JJ., dissenting on the result but in agreement with McLachlin C.J. and Major J. on the issue of infringement of security of person, B.O.A., **Vol. I, Tab 20**.

38 *Chaoulli*, at para. 199, *per* Binnie and LeBel JJ. The issue of fundamental justice is considered below, B.O.A., **Vol. I, Tab 20**.

39 *G.(J.)*, at para. 60, B.O.A., **Vol. II, Tab 30**.

ii) Section 3(1) *SIA* causes an adverse psychological impact where the result of its application is a complete denial of redress

54. In cases such as the present, s. 3(1) *SIA* operates as an insidious form of secondary victimization in which victims of serious wrongdoing are made to suffer again with the realization that their aggressors will escape justice entirely. As a result, it triggers the application of s. 7 of the *Charter*.[40]

55. Legal proceedings such as those brought by Mr. Hashemi are a reminder that accountability is not just a lofty legal concept. For victims, a sense of justice is a basic human need, necessary to process their trauma and make sense of their experience. Without accountability, the effect of the harm that they suffered endures, and may even be exacerbated.

56. Civil proceedings brought by victims thus "contribute towards [their] rehabilitation"; they "can restore a sense of justice within victims."[41] Participation in the legal process is precisely the kind of activity that is found to be "integral to [their] recovery from trauma and to the prevention of psychological decomposition" [Emphasis added].[42] It has been singled out by the Committee against Torture as a means to restore a victim's dignity.[43]

57. Justice therefore has an essential role to play in the recovery from the extreme trauma that torture causes.[44]As Professor Linda Mills puts it, "victims *need* a voice at the table as a matter of survival. Victims' substantive inclusion enhances the possibility of their recovery" [Italics in the original].[45]

58. On the other hand, when victims are denied access to justice – *i.e.*, where there exists a situation of impunity – their ability to recover is severely compromised. Impunity becomes a new traumatic factor that renders closure impossible.[46]

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40 The fact that *all* individuals affected by the *SIA* do not experience adverse psychological impact does not take away from the violation of security of person suffered by those who do. See: *Chaoulli*, at para. 191, *per* Binnie and LeBel JJ, B.O.A., **Vol. I, Tab 20**.

41 Beth Van Schaack, "In Defence of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention" (2001), 42 *Harv. Int'l L.J.* 141, at p. 155-156, B.O.A., **Vol. VII, Tab 82**.

42 Linda G. Mills, "The Justice of Recovery: How the State Can Heal the Violence of Crime" (2005-2006), 57 *Hastings L.J.* 457, at p. 492, B.O.A., **Vol. VII, Tab 76**.

43 *General Comment No. 3*, at para. 4, B.O.A., **Vol. VII, Tab 85**. See also B.V. Schaack, *supra*, at p. 158, B.O.A., **Vol. VII, Tab 82**.

44 Knut Rauchfuss and Bianca Schmolze, "Justice heals: The impact of impunity and the fight against it on the recovery of severe human rights violations' survivors" (2008), 18 *Journal on Rehabilitation of Torture Victims and Prevention of Torture* 38, at p. 49, B.O.A., **Vol. VII, Tab 79**. The extreme trauma that torture causes and its long term psychological impact on the victim were reviewed at length by this Court in *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3 ("***Gauthier***") B.O.A., **Vol. II, Tab 25**.

45 L.G. Mills, *supra*, at p. 483, B.O.A., **Vol. VII, Tab 76**, referring to her position on the role that victims should play in the criminal justice system.

59. In his separate reasons in *Tibi*, at para. 33, Judge Antônio Augusto Cançado Trindade (as he then was) elaborated on this issue as follows:

> 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. [Emphasis added]

60. As one author has written, so long as "impunity exists, the trauma remains untouched. […] [W]ith time it may produce mechanisms of perturbation capable of inducing equal or worse mental disorders than torture" [Emphasis added].[47]

61. In this respect, the *SIA* is not a benign legal instrument. Where it leads to *de facto* impunity, it contributes to the victims' suffering, thereby preventing their dignity from being restored.

62. Based on the foregoing, the circumstances in the case at bar are far beyond those of "ordinary stress or anxiety." With due respect to the Ontario Court of Appeal, its decision to the contrary in *Bouzari CA*, which presented similar circumstances but was decided before *Chaoulli*, should not be followed.

63. In that case, the Ontario Court of Appeal determined, at para. 101, that an individual who was tortured by Iranian officials did not have his security of the person violated by the operation of the *SIA*. In the Court's view, there was insufficient connection between the torture itself and the actions of the Canadian government.

64. This primary argument can be dispensed with briefly. Mr. Hashemi does not reproach Canada for any involvement in the torture, sexual assault and murder of his mother. His situation is analogous to that of the women described in *Morgentaler* – whom the government of Canada did not impregnate – and of Sue Rodriguez – to whom the government of Canada did not give Lou Gehrig's disease.[48] Mr. Hashemi's complaint is simply that, *given his specific circumstances*, the *SIA* has the effect of

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46 Yael Danieli, "Massive Trauma and the Healing Role of Reparative Justice" (2009), 22 *Journal of Traumatic Stress* 351, at p. 352, B.O.A., **Vol. VI, Tab 71**.

47 Paz Rojas B., "Impunity and the Inner History of Life" (1999), 26 *Social Justice* 13, at pp. 25-26, B.O.A., **Vol. VII, Tab 80**. See also: Paz Rojas Baeza, "Impunity: An Impossible Reparation" (2000), 69 *Nordic Journal of International Law* 27, B.O.A., **Vol. VII, Tab 81**.

48 *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 584, B.O.A., **Vol. III, Tab 35**.

infringing his security of person. Formulated in this way, Mr. Hashemi's argument gives rise to a valid *Charter* claim.[49]

65. The case at bar is thus distinguishable from *Whitbread v. Walley*,[50] where McLachlin J.A. (as she then was) held that a limit on the amount of compensation that a victim of a shipping accident could claim did not engage s. 7 of the *Charter* because the claim was purely economic and the *Charter* does not protect property interests. Unlike Mr. Whitbread, Mr. Hashemi is not claiming a s. 7 entitlement to an amount of money as a proxy to make him whole. Rather, his claim is that, in the circumstances of this case, where s. 3(1) *SIA* directly interferes with his ability to pursue his recovery and therefore itself contributes to his psychological suffering – as was the case with the legislation at issue in *Chaoulli* – it triggers the application of s. 7 of the *Charter*.

66. In *Bouzari CA*, the Ontario Court of Appeal held, at para. 102, that "it cannot be said that the precluding of the appellant's civil claim for torture has itself caused [Mr. Bouzari] the kind of harm necessary to trigger s. 7. […] While the appellant has suffered horribly as a consequence of being tortured, he gave very limited evidence of the impact on him of being unable to claim a civil remedy against Iran."

67. As a practical matter, it must be noted that an individual who suffers adverse psychological impact from the application of s. 3(1) *SIA* will not feel the full effects of that impact until his or her claim has actually been denied on that basis. As such, where the adverse psychological impact arises from the final decision of the court itself, following *Bouzari CA* would put a litigant in an impossible position of having to prove a prejudice that he or she has yet to experience.

68. Hence this Court has ruled that s. 7 of the *Charter* is not only concerned with *actual* infringements to an individual's security, but also with *potential* infringements.[51] As such, the risk that one's health may be impaired by the impugned government action can be sufficient to trigger the application of s. 7.[52]

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49 Compare also *Chaoulli*, B.O.A., **Vol. I, Tab 20**, in which the government had not made patients ill; rather, the relevant government action was the enactment of a law that placed patients' health and security at risk once an illness was already contracted.

50 (1988), 26 B.C.L.R. (2d) 203 (C.A.), aff'd, [1990] 3 S.C.R. 1273, B.O.A., **Vol. III, Tab 45**.

51 *Suresh*, at para. 53, citing *Burns*, at para. 60, B.O.A., **Vol. III, Tab 38**.

52 *Singh*, at pp. 207-208, *per* Wilson J., B.O.A., **Vol. III, Tab 37.**

69. In any event, in the present case, the Motion Judge took the Appellants' factual allegations as averred, including the fact that Mr. Hashemi has suffered adverse psychological impact as a result of the prevailing situation of impunity, as any "person of reasonable sensibility" in his circumstances would.[53]

70. The secondary victimization suffered by victims like Mr. Hashemi when s. 3(1) *SIA* operates to deny them any chance at accountability therefore rises above the level of psychological impact recognized by this Court to trigger s. 7 of the *Charter*. Wherever that line may specifically be drawn, the circumstances in the case at bar fall clearly on the offending side of it.

C. IN LIGHT NOTABLY OF CANADA'S OBLIGATION UNDER ARTICLE 14(1) OF THE CAT, DOES THE JURISDICTIONAL BAR CREATED BY S. 3(1) *SIA* CONFORM TO THE PRINCIPLES OF FUNDAMENTAL JUSTICE ENSHRINED IN S. 2(*E*) OF THE *BILL OF RIGHTS* AND S. 7 OF THE *CHARTER*?

i) The principles of fundamental justice are to be found in the basic tenets of our legal system

71. The principles of fundamental justice are relevant to the analysis pursuant to both s. 2(*e*) of the *Bill of Rights* and s. 7 of the *Charter*. Under either provision, this Court must determine whether, in the circumstances of this case, the procedural bar created by the *SIA*, which deprives the Appellants of the possibility they otherwise would have to seek accountability for Zahra Kazemi's torture and murder before a Canadian court, is acceptable to our notions of fair practice and justice.[54]

72. As this Court has noted on several occasions, the contours and contents of the principles of fundamental justice are variable and turn on context. The inquiry is one of justice, not policy. As stated in *Suresh*:

> 45. The principles of fundamental justice are to be found in "the basic tenets of our legal system": *Burns*, *supra*, at para. 70. "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. The relevant principles of fundamental justice are determined by a contextual approach that "takes into account the nature of the decision to be made": *Kindler*, *supra*, at p. 848, *per* McLachlin J. (as she then was). […][55]

73. The approach is "one of balancing." As such, "it [is] impossible to say in advance […] that the balance will necessarily be struck in the same way in every case."[56]

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53 Re-Amended Motion to Institute Proceedings, at paras. 88 and 90, A.R.**, p. 153**.
54 *Suresh*, at para. 49, citing *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 852, and *United States v. Burns*, 2001 SCC 7 ("***Burns***"), at para. 60, B.O.A., **Vol. III, Tab 38**.
55 See also: *Singh*, at pp. 229-230, *per* Beetz J., B.O.A., **Vol. III, Tab 37**.
56 *Suresh*, at para. 45, B.O.A., **Vol. III, Tab 38**.

74. In addition to the Canadian context, the principles of fundamental justice are defined by having recourse to rules of international law, including *jus cogens*, taking into account "Canada's international obligations and values as expressed in '[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms.'"[57]

ii) In Canada, a civil claim for damages is determined further to a fair process before a court that is both independent and impartial

75. It is beyond dispute that under Canadian law, torture is prohibited, that it constitutes both a criminal act and a civil fault, and that public officials who commit acts of torture enjoy neither immunity nor impunity.[58] Victims of torture in Canada are therefore able to seek redress and obtain justice in a manner that contributes to the restoration of their human dignity, one of the core values that underlie the *Charter*.[59]

76. Furthermore, "the right to a *hearing*" [Italics in the original] has been recognized by this Court as forming part of the principles of fundamental justice entrenched in s. 7 of the *Charter*,[60] whereas a "tribunal which adjudicates upon [a litigant's] rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case" [Emphasis added].[61]

77. Indeed, the maxims *audi alteram partem* and *nemo judex in sua causa* have long been a feature of Canadian law and are now guaranteed by s. 7 of the *Charter*.[62] They find application in the administrative, civil and criminal law contexts and there is no doubt that in this country, a claim such as the Appellants' must be determined further to a fair process, based on the evidence adduced by the parties, before an independent and impartial decision-maker.

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57 *Suresh*, at para. 46, citing *Burns*, at paras. 79-81, B.O.A., **Vol. III, Tab 38**.

58 *Charter*, ss. 7, 9 and 12; *Criminal Code*, R.S.C., 1985, c. C-46 (the "***Cr.C.***"), s. 269.1, B.O.A., **Vol. I, Tab 3**; *Suresh*, at paras. 50-52, B.O.A., **Vol. III, Tab 38**; *Gauthier*, B.O.A., **Vol. II, Tab 25**.

59 *Health Services and Support – Facilities Subsector Bargaining Assn*. v. *British Columbia,* 2007 SCC 27, ("***Health Services***"), at para. 81, B.O.A., **Vol. II, Tab 26**.

60 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 ("***Charkaoui***"), at para. 29, B.O.A., **Vol. I, Tab 21**. See also: *Singh*, at pp. 213-216, *per* Wilson J. and at pp. 229-231, *per* Beetz J., B.O.A., **Vol. III, Tab 37**.

61 *Duke v. The Queen*, [1972] S.C.R. 917, at p. 923, B.O.A., **Vol. II, Tab 24**. See also: *Singh*, at pp. 212-215, *per* Wilson J, B.O.A., **Vol. III, Tab 37**.

62 *Charkaoui*, at paras. 32, 48 and 53, B.O.A., **Vol. I, Tab 21**; *Singh*, at p. 233, *per* Beetz J., B.O.A., **Vol. III, Tab 37**.

iii) Iranian courts are incapable of delivering justice in this case

78. As previously stated, the Motion Judge accepted as averred that Iranian courts cannot offer a fair hearing of the Appellants' claims, while Iran has failed to ratify any of the international instruments that would compel an independent assessment of its actions. As a result, in the present case, Canadian courts are the only forum before which the Respondents may be brought to face justice.

79. It has long been held in Canada that there can be no right without a court to enforce it.[63] Consequently, Iran's failure or refusal to offer some means of redress to the Appellants forms part of the "circumstances or conditions" that impact how the balance of fundamental justice should be struck in this case.[64]

80. It is not unusual for Canadian courts to look into the conduct of foreign states when required to do so by law or circumstances. Examples of such situations include examining whether a foreign judgment to be recognized here was rendered pursuant to a process that conforms to basic rules of procedure and fairness, even where the foreign court had jurisdiction over the subject-matter of the dispute,[65] the assessment of a claim for refugee status, a decision with regards to *refoulement* when there is a risk of torture,[66] or a determination as to whether a foreign government has complied with basic human rights norms recognized under international law.[67] All those instances raise delicate issues of comity between states, yet this court has repeatedly maintained that "the principle of comity 'ends where clear violations of international law and fundamental human rights begin'" [Emphasis added].[68]

81. This is not to say that the principles of fundamental justice require Canadian courts to assume jurisdiction whenever a victim of torture has nowhere else to go. Other constitutional and jurisdictional

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63 *Canadian Liberty Net*, at paras. 30-32, B.O.A., **Vol. I, Tab 18**; *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 971-972, *per* La Forest J. concurring: "it is a vain thing to imagine a right without a remedy." B.O.A., **Vol. II, Tab 29**.

64 *Suresh*, at para. 45, B.O.A., **Vol. III, Tab 38**. See also: *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, [2004] EWCA Civ 1394 ("***Jones CA***"), at paras. 85-86, per Mance L.J., B.O.A., **Vol. V, Tab 61**, varied by *Jones*, B.O.A., **Vol. V, Tab 60**. In *Jurisdictional Immunities*, at paras. 98-104, B.O.A., **Vol. IV, Tab 52**, the ICJ found that at international law, in cases where the rules at issue do not impose on a state the obligation to provide a remedy to an injured party, a plea of immunity should not be denied on that basis. Notwithstanding this, the ICJ opinion still refers to the steps taken by Germany to offer some form of compensation to the victims of its acts in that case, while in his separate opinion, Judge Bennouna, and in their dissenting opinions, Judge Cançado Trindade and Judge Yusuf, take the view that the availability of means of redress is a relevant factor in determining a claim of state immunity.

65 *Beals v. Saldanha*, 2003 SCC 72, at paras 59-64, B.O.A., **Vol. I, Tab 17**.

66 *Suresh*, B.O.A., **Vol. III, Tab 38**.

67 *Canada (Justice) v. Khadr*, 2008 SCC 28 ("***Khadr***") B.O.A., **Vol. I, Tab 19**.

68 *Khadr*, at para. 18, citing *R. v. Hape*, 2007 SCC 26 ("***Hape***"), at para. 52, B.O.A., **Vol. II, Tab 32**.

considerations, such as the fact that Canadian courts can generally only exercise their jurisdiction where there exists a "real and substantial connection" with the subject-matter of the dispute, as well as the doctrines of *forum non conveniens* and forum of necessity, may tilt the balance in cases which have no connection whatsoever to Canada.[69] Allowing the Appellants' claim to proceed in this case, where jurisdiction otherwise exists, would therefore not open the proverbial "floodgates".[70]

iv) International law, in particular the CAT, requires that Canada provide a means of redress to *all* victims of torture

82. This Court has consistently held that Canada's obligations under international law, including those provided for in the international conventions it has ratified, must inform our interpretation of Canada's own human rights instruments, such as the *Bill of Rights* and the *Charter*.[71] Indeed, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[72]

83. The key international instrument in this case is the CAT. The Appellants contend that Article 14(1) of the CAT requires that Canada make available to *all* victims of torture a process whereby they may seek redress for violations of their Convention rights, irrespective of who the torturers are or where the torture was committed.

a. <u>The CAT proscribes torture generally</u>

84. The CAT was adopted by the UN General Assembly on December 10, 1984. It was signed by Canada on August 23, 1985 and ratified on June 24, 1987, two days before it entered into force. The CAT proscribes all forms of torture as well as cruel and unjust punishment, without a doubt including the Respondents' actions in the present case.[73] It has been broadly ratified by the community of states, currently numbering 153 parties.[74]

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69 *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, B.O.A., **Vol. II, Tab 22**. The civil law concept of forum of necessity, codified at art. 3136 CCQ, requires that the dispute have a "sufficient connection with Quebec."

70 Alexander Orakhelashvili, "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong" (2007), 18 *E.J.I.L.* 955, at pp. 956-957, B.O.A., **Vol. VII, Tab 77**; *Jones CA*, at paras. 81 and 97, *per* Mance L.J. , B.O.A., **Vol. V, Tab 61**.

71 See, for example: *Suresh*, at paras. 46 and 59, B.O.A., **Vol. III, Tab 38**; *Hape,* at paras. 55-56, B.O.A., **Vol. II, Tab 32**; *Health Services*, at para. 69, B.O.A., **Vol. II, Tab 26**.

72 *Health Services*, at para. 70, B.O.A., **Vol. II, Tab 26**.

73 See: the definition of torture at Article 1(1) of the CAT, B.O.A., **Vol. I, Tab 4**.

74 *Status of Signature, Accession, Succession and Ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, online:

85. The prohibition of torture has reached the status of norm of *jus cogens* under international law, *i.e.* a norm "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[75] As such, the prohibition binds all members of the international community, even those, like Iran, that have not ratified the CAT.[76]

b. The CAT guarantees a means of redress for victims of torture and their relatives

86. Article 14 of the CAT reads as follows:

> 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. [Emphasis added]

87. In the present case, the Quebec Court of Appeal, as the Ontario Superior Court of Justice, the Ontario Court of Appeal and the House of Lords before it, opted for a restrictive interpretation of Article 14(1) which purports to limit its application to acts of torture that occur within a state party's territory.[77]

88. Such a restrictive interpretation of Article 14(1) is not borne out by the text of the CAT or its history. Moreover, legal developments since *Bouzari SCJ* was heard and decided in 2002, in particular different country reports issued by the Committee against Torture between 2005 and 2013 as well as *General comment No. 3* on Article 14 released on December 12, 2012, have rendered obsolete key portions of Professor Greenwood's expert report on state immunity and torture, which was the

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http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en ("***Status of Signature, Accession, Succession and Ratification of the CAT***") B.O.A., **Vol. VIII, Tab 95**.

75 *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (the "**VCLT**"), Article 53, B.O.A., **Vol. I, Tab 11**. See: *Bouzari SCJ*, at para. 61, B.O.A., **Vol. III, Tab 47**; *Bouzari CA*, at para. 87, B.O.A., **Vol. III, Tab 42**; *Jones*, at paras. 42-43, *per* Lord Hoffman, citing *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97 (H.L.) ("***Pinochet***") B.O.A., **Vol. VI, Tab 62**; *Al-Adsani*, at paras. 60-61, B.O.A., **Vol. III, Tab 50**; *Furundžija*, at paras. 144-147 and 153-154, B.O.A., **Vol. IV, Tab 54**. See also: *Suresh*, at paras. 62-65, where this Court noted that "there are […] compelling indicia that that the prohibition of torture is a peremptory norm.", B.O.A., **Vol. III, Tab 38**.

76 Antonio Cassese, *International Law*, 2nd ed. (2005), at p. 394, B.O.A., **Vol. VI, Tab 69**.

77 Judgment of the Court of Appeal, at paras. 56-59, A.R., **pp. 85-86**; *Bouzari SCJ*, at paras. 43-54, B.O.A., **Vol. III, Tab 47**; *Bouzari CA*, at paras. 69-81, B.O.A., **Vol. III, Tab 42**; *Jones*, at para. 25, *per* Lord Bingham of Cornhill, and at para. 46, *per* Lord Hoffman, B.O.A., **Vol. V, Tab 60**.

foundation for the Superior Court of Justice's reasons, which in turn was the main authority cited by other courts here and abroad in support of the restrictive interpretation.

c. Treaties must be interpreted in a purposive fashion

89. "By and large, international treaties are interpreted in a manner similar to statutes."[78] Article 31(1) of the VCLT, which codifies the general rule of treaty interpretation, reads as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

90. Giving words used at Article 14(1) of the CAT their ordinary meaning, there is no territorial limit on a state party's obligation to "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", *as none is stated*.

91. The absence of any geographical limitation on the obligation created by Article 14(1) may be contrasted to other provisions of the CAT – *i.e.* Articles 2(1), 5(1), 5(2), 6(1), 7(1), 11 and 16(1) – which are all *expressly* circumscribed to the "territory under [the state party's] jurisdiction" [Emphasis added].

92. In addition, where acts of torture are committed within a state party's own territory, the CAT imposes obligations that go beyond simply ensuring that means of redress are available to the victim:

> 12. Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.
>
> 13. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given. [Emphasis added]

93. As such, if one were to follow the reasoning adopted in *Bouzari SCJ*, *Bouzari CA* and *Jones*, the drafters of the CAT would have chosen to specifically limit the territorial reach of Articles 12 and 13, yet omitted to do so at Article 14 while still expecting the same outcome. In other words, according to those decisions, a territorial limitation should be "read-in" to Article 14.

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78 *Thomson v. Thomson*, [1994] 3 S.C.R. 551 ("***Thomson***"), at p. 577, B.O.A., **Vol. III, Tab 40**.

94. This is contrary to the general rule of treaty interpretation: "To impose an additional condition […], a condition not provided for in the Treaty […], would be equivalent; not to interpreting the Treaty, but to reconstructing it."[79]

95. Other provisions of the CAT that contain no express geographical limit have been interpreted accordingly:

(a) At Articles 4 to 8, a state's duty to prosecute or extradite perpetrators of acts of torture manifestly applies to perpetrators of acts of torture committed outside the state's territory, where the other geographical or citizenship conditions are met. This is the interpretation that Canada adopted when it enacted s. 269.1 *Cr.C.*, which covers foreign officials, as well as that favoured by the Law Lords in *Pinochet*;

(b) The Article 10 duty to educate and inform certain specified personnel necessarily includes a state's officials deployed abroad, whether in diplomatic postings, peacekeeping missions or military operations;[80] and

(c) The Article 15 prohibition against using statements obtained under torture in any proceedings applies equally to statements obtained by a state's own officials and to statements obtained abroad by foreign officials.[81]

96. As noted by one author, a survey of the CAT "demonstrates that the Convention is not primarily territorial, but rather that when the drafters wished to limit obligations to territory under a state party's jurisdiction they did so expressly" [Emphasis added].[82]

97. Of all the judges who have found Article 14(1) of the CAT to be geographically limited to acts of torture committed within a state's borders, only Swinton J., in *Bouzari SCJ*, at para. 49, and Lord Bingham of Cornhill, in *Jones*, at para. 25, turned their attention to the actual words of the CAT, both

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79 *Acquisition of Polish Nationality*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7 (Sept. 15), at para. 41, B.O.A., **Vol. III, Tab 48**.

80 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" (2007), 18 *E.J.I.L.* 921, at p. 926, B.O.A., **Vol. VI, Tab 72**. *Contra*: *Bouzari SCJ*, at para. 49, B.O.A., **Vol. III, Tab 47**, although Swinton J. cited no authority in support of her bald assertion, while failing to explain why a state's training obligations would not be applicable to personnel deployed abroad.

81 *A (FC) and others (FC)* v. *Secretary of State for the Home Department*, [2005] UKHL 71 ("***A and Ors.***") B.O.A., **Vol. V, Tab 59**.

82 C.K. Hall, *supra*, at pp. 923-926.

in a cursory fashion. As for the Quebec Court of Appeal's textual analysis in this case, it was limited to the following statement: "The provision itself remains, at best, ambiguous."[83]

98. The Appellants instead submit that, based on the ordinary meaning of the CAT's terms as read "in their context and in the light of its object and purpose"[84] – *i.e.* "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world"[85] – Article 14(1) applies to *all* acts of torture, wherever they may have been committed.[86]

d. *Subsequent practice establishing the understanding of the CAT*

99. Pursuant to Article 31(3) of the VCLT, "[t]here shall be taken into account, together with the context: […] (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

100. From the reasons issued in *Bouzari SCJ* and *Jones*, we can gather that four states, namely the United States, Germany, New Zealand and Canada, have formally expressed the view that Article 14 of the CAT only applies to acts of torture committed within their territory.[87] This is hardly sufficient to demonstrate a widespread agreement as to its interpretation among the 153 states parties to the Convention.[88]

101. In the case of the United States, that view was expressed in a reservation made at the time it ratified the CAT.[89] It appears to have been based on a statement made by President Reagan to the Senate to the effect that a territorial limit had been included in Article 14(1) at some point in the drafting process, but had erroneously been deleted. Yet a review of the preparatory work of the CAT as well as the first-hand account of key diplomats involved in its drafting reveals no such mistake,[90] while

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83 Judgment of the Court of Appeal, at para. 57, A.R., **p. 85**.

84 VCLT, Article 31(1), B.O.A., **Vol. I, Tab 11**.

85 CAT, Preamble, B.O.A., **Vol. I, Tab 4**.

86 C.K. Hall, *supra*, at pp. 926-927; A. Orakhelashvili, *supra*, at p. 961, B.O.A., **Vol. VII, Tab 77**. The same purposive approach has guided the ICJ when determining that the ICCPR applies not only to a state's actions taken within its borders, but also to "the exercise of its jurisdiction outside its own territory", even where the text of the Covenant makes no mention of its territorial reach. See: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at paras. 108-111, B.O.A., **Vol. IV, Tab 53**; A. Cassese, *supra*, at pp. 384-386, B.O.A., **Vol. VI, Tab 69**.

87 *Bouzari SCJ*, at para. 50, B.O.A., **Vol. III, Tab 47**; *Jones*, at paras. 20 and 25, *per* Lord Bingham of Cornhill, and at paras. 56-57, *per* Lord Hoffman.

88 C.K. Hall, *supra*, at p. 927, B.O.A., **Vol. VII, Tab 72**; A. Orakhelashvili, *supra*, at p. 962, B.O.A., **Vol. VII, Tab 77**.

89 *Status of Signature, Accession, Succession and Ratification of the CAT*, B.O.A., **Vol. VIII, Tab 95**. That understanding was recognized by one country only, namely Germany. See: *Bouzari SCJ*, at para. 50, B.O.A., **Vol. III, Tab 47**; *Jones*, at para. 20, *per* Lord Bingham of Cornhill, and at para. 56, *per* Lord Hoffman, B.O.A., **Vol. V, Tab 60**.

90 C.K. Hall, *supra*, at pp. 932-935, B.O.A., **Vol. VII, Tab 72**.

no country has since availed itself of the process provided for at Article 79 of the VCLT to have this alleged error corrected. Even the U.S. Congress subsequently disavowed President Reagan's statement, expressing its view that Article 14(1) of the CAT has universal reach and adopting legislation reflecting that interpretation.[91]

102. This limited and inconclusive evidence of state practice must be contrasted to the work carried out by the Committee against Torture since the CAT came into force in 1987. The Committee was established to monitor and report on states parties' compliance with the CAT. It is composed of "10 experts of high moral standing and recognized competence in the field of human rights."[92]

103. The interpretations given by institutions like the Committee are accorded great weight. Indeed, states have lost their monopoly over the interpretation and application of international human rights law, themselves creating expert bodies to oversee the implementation of their obligations in a more neutral fashion.[93] As stated by the ICJ, referring to the interpretation given to a provision of the ICCPR by the Human Rights Committee:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. **The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled**. [Emphasis and bold characters added][94]

104. The Committee against Torture has plainly expressed the view that states parties are required to provide a means of redress to *all* victims of torture, whether the acts were committed inside or outside the state party's territory, and state immunity notwithstanding.

105. This much is clear from its *General comment No. 3*, released in December 2012 after over a year of public consultation and several months after the ICJ decision in *Jurisdictional Immunities*. Noting, at para. 5, that Article 14 creates both procedural and substantive obligations, the Committee then specifically stated:

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91 C.K. Hall, *supra*, at pp. 935-937, B.O.A., **Vol. VII, Tab 72**, discussing the *Torture Victims Protection Act,* 28 U.S.C. §1350, B.O.A., **Vol. I, Tab 13**.

92 CAT, Article 17, B.O.A., **Vol. I, Tab 4**.

93 A. Cassese, *supra*, at pp. 291-295, B.O.A., **Vol. VI, Tab 69**. See also: *Furundžija,* at para. 152, B.O.A., **Vol. IV Tab 54**.

94 *Case concerning Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, I.C.J. Reports 2010, p. 639, at para. 66, B.O.A., **Vol. III, Tab 49**.

> 22. […] 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. [Emphasis added]

106. The Committee then went on to identify, at para. 38, "[s]pecific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14", including "inadequate national legislation" and "immunities." It concluded its observations on this topic with the following admonition:

> 42. 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. [Emphasis added]

107. In fact, the Committee has been making similar statements in periodic country reports ever since the Ontario Court of Appeal came to the opposite conclusion in *Bouzari CA*.[95] After specifically questioning Canada on the subject in 2005, the Committee noted, as a subject of concern, "[t]he absence of effective measures to provide civil compensation to victims of torture in all cases", and recommended that Canada "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture" [Emphasis added].[96]

108. Similar or analogous concerns were raised and comments made by the Committee in the ensuing years with respect to other countries.[97] Moreover, in 2012 and 2013, the Committee specifically

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95 *Jones*, at para. 23, *per* Lord Bingham of Cornhill, and at paras. 56-57, *per* Lord Hoffman; Prasanna 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 pp. 376-377, B.O.A., **Vol. VII, Tab 78**; 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 pp. 160-161, B.O.A., **Vol. VI, Tab 68**; C.K. Hall, *supra*, at pp. 927-928, B.O.A., **Vol. VI, Tab 72**.

96 *Conclusions and recommendations of the Committee against Torture: Canada*, UN Doc. CAT/C/CR/34/CAN (7 July 2005), at paras. 4(g) and 5(f), B.O.A., **Vol. VII, Tab 87**.

97 See, for example: *List of issues to be considered during the examination of the second periodic report of Benin,* UN Doc. CAT/C/BEN/Q/2 (9 July 2007), at para. 20, B.O.A., **Vol. VIII, Tab 93**; *Conclusions and recommendations of the Committee against Torture: Japan*, UN Doc. CAT/C/JPN/CO/1 (3 August 2007), at para. 23, B.O.A., **Vol. VII, Tab 88**; *Concluding observations on the second periodic report of Japan*,

recommended that Canada and the United Kingdom amend their state immunity legislation in order to provide for an exception in cases of civil claims for acts of torture.[98]

109. The Court of Appeal in the present case and the House of Lords in *Jones* gave short shrift to the Committee's interpretation of Article 14(1) of the CAT.[99] In their view, the Committee's observations pointed to a hope for the future rather than a statement of present obligation.

110. Nothing in the mandate of the Committee against Torture or the way its reports are drafted suggests that it is merely engaging in wishful thinking. To the contrary, as noted by Canada and other states parties to the CAT, "[t]hrough its functions and its activities, the Committee against Torture plays an essential role in the execution of the obligations of States parties to the Convention against Torture" [Emphasis added].[100]

111. This Court should therefore afford a high level of deference to the Committee's interpretation when determining Canada's obligations pursuant to Article 14(1) of the CAT, just as it has done in previous cases.[101]

e. Article 14(1) of the CAT trumps state immunity

112. Article 31(3)(*c*) of the VCLT requires that "any relevant rules of international law applicable in the relations between the parties" be taken into account when interpreting a treaty. The doctrine of state immunity is one such relevant rule in the present context.

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98 UN Doc. CAT/C/JPN/CO/2 (28 June 2013), at para. 18, B.O.A., **Vol. VII, Tab 90**. See also: C.K. Hall, supra, at pp. 928-929, B.O.A., **Vol. VII, Tab 72**.
Concluding Observations of the Committee against Torture: Canada, UN Doc. CAT/C/CAN/CO/6 (25 June 2012), at para. 15, B.O.A., **Vol. VII, Tab 86**; *Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (Advanced unedited version)*, UN Doc. CAT/C/GBR/CO/5 (6-31 May 2013), at para. 22, B.O.A., **Vol. VII, Tab 89**, recommending the adoption of the *Torture (Damages) (No. 2) Bill, 2009*, B.O.A., **Vol. VIII, Tab 101**. See also: *Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims*, 24th Report of the Joint Committee of the House of Lords and House of Commons on Human Rights (2008-2009), at pp. 24-30, B.O.A., **Vol. VIII, Tab 98**.

99 Judgment of the Court of Appeal, at para. 58, A.R., **p. 86**; *Jones*, at para. 23, *per* Lord Bingham of Cornhill, and at paras. 56-57, *per* Lord Hoffman, B.O.A., **Vol. V, Tab 60**.

100 Objection of Canada to the declaration made by the German Democratic Republic when ratifying the CAT, 5 October 1988, Annex to the *Status of Signature, Accession, Succession and Ratification of the CAT*, B.O.A., **Vol. VIII, Tab 95**. Also see the analogous objections made to that declaration by other states parties.

101 *Suresh*, at paras. 66-67, referring to the Human Rights Committee's *General Comment 20 – Article 7*, UN Doc. HRI/GEN/1/Rev. 1, at p. 30 (1994) to determine the intent of Article 7 of the ICCPR, and at para. 73, citing the *Conclusions and Recommendations of the Committee against Torture: Canada*, UN Doc. CAT/C/XXV/Concl.4 (2000) with respect to the scope of Article 3(1) of the CAT B.O.A., **Vol. III, Tab 38**.

113. The Appellants submit that where the doctrine of state immunity would prevent a state party from providing a victim of torture with an "enforceable right to fair and adequate compensation" [Emphasis added], Article 14(1) trumps state immunity by necessary implication. The contrary interpretation would render Article 14(1) ineffective, given that Article 1 only considers as torture 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" [Emphasis added], in other words where a state or one of its agents is involved.

114. State immunity, though an ancient doctrine which was "established as a fundamental principle of public international law in recognition of the autonomy and the equality of states"[102] has never achieved the status of norm of *jus cogens*.[103] Its precise contours are in constant evolution, having gone from an absolute doctrine to a restrictive one allowing for several exceptions.[104]

115. Indeed, contrary to what was said in *Jones* and in the reasons of the courts below in this case,[105] defining the doctrine of state immunity, including recognizing new exceptions to it, has traditionally been the province of the judiciary.[106] Domestic courts in this country and abroad have played an important role in fashioning our current understanding of state immunity and they should not shy away from developing the law further, including where their own constitutional or quasi-constitutional documents mandate it.

116. That state immunity is still mostly a matter of customary international law is reinforced by the fact that the UN *Convention on Jurisdictional Immunities of States and Their Property*,[107] which was adopted by the General Assembly in December 2004, has yet to garner the 30 ratifications necessary for it to enter into force. Canada in particular has neither signed nor ratified its text.

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102 *Kuwait Airways Corp.* v. *Iraq*, 2010 SCC 40 ("***Kuwait Airways***"), at para. 13, B.O.A., **Vol. II, Tab 28**.

103 *Al-Adsani*, joint dissenting opinion of Rozakis and Caflisch JJ., joined by Wildhaber, Costa, Cabral Barreto and Vajié JJ., at para. 2, B.O.A., **Vol. III, Tab 50**. The majority in that case does not dispute that statement and the ICJ in *Jurisdictional Immunities* does not hold that state immunity enjoys such a higher status as a norm in international law.

104 *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 ("***Schreiber***"), at paras. 13-17, B.O.A., **Vol. III, Tab 36**; *Kuwait Airways*, at paras. 13-14 and 24, B.O.A., **Vol. II, Tab 28**.

105 *Jones*, at para. 63, *per* Lord Hoffman, B.O.A., **Vol. V, Tab 60**; Judgment of the Superior Court, at para. 153, A.R., **p. 44**; Judgment of the Court of Appeal, at para. 59, A.R., **p. 86**.

106 *Jaffe*, at para. 18, B.O.A., **Vol. III, Tab 44**; *Trendtex v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356 (C.A. Engl.), at pp. 364-366, B.O.A., **Vol. VI, Tab 64**; François Larocque, "La *Loi sur l'immunité des États canadienne* et la torture" (2010), 55 *McGill L.J.* 81, at p. 99, B.O.A., **Vol. VI, Tab 73**. This is also obvious from the numerous national courts decisions referred to by the ICJ in *Jurisdictional Immunities*, B.O.A., **Vol. IV, Tab 52**.

107 UN Doc. A/59/508, B.O.A., **Vol. I, Tab 5**.

117. Moreover, of the 14 states that have ratified it to date, four – Norway, Sweden, Switzerland and Italy – have indicated that their adhesion is without prejudice to emerging norms in the field of human rights law.[108] No state party has objected to these declarations.

118. State immunity and its interaction with rules of *jus cogens* was at the heart of the recent ICJ decision in *Jurisdictional Immunities*. As the ICJ noted, the issue in that case was narrow, being "confined to acts committed on the territory of the forum state by the armed forces of a foreign state, and other organs of state working in co-operation with those armed forces, in the course of conducting an armed conflict."[109]

119. Although the ICJ dismissed the arguments advanced by Italy in support of a general proposition that the right of redress of victims of gross violations of international human rights law should trump state immunity,[110] the Court noted that the specific provisions of the CAT had no bearing on its reasoning as they were not at issue.[111]

120. Moreover, the Court put great emphasis on the fact that the law of armed conflicts does *not* impose on states an obligation to offer full reparation to victims of violations of humanitarian law,[112] which in turn is grounded in the traditional conception of international law whereby only states were subjects of international law.[113] It is in this context that it considered that a state's failure to directly indemnify the victim does not impact the state's immunity.[114]

121. In contrast, international human rights law, which has developed since 1945 under the auspices of the United Nations, is predicated on the notion that both states and individuals have rights and obligations at international law. Post WWII human rights instruments have thus departed from previous multilateral treaties and imposed on states parties an obligation to provide individuals with avenues of

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108 *Status of Ratification, Acceptance, Approval and Accession of the United Nations Convention on Jurisdictional Immunities of States and Their Property*, online: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en, B.O.A., **Vol. VIII, Tab 96**.

109 *Jurisdictional Immunities*, at para. 65 of the opinion of the Court, and at paras. 15-19 of the separate opinion of Judge Keith, B.O.A., **Vol. IV, Tab 52**.

110 *Jurisdictional Immunities*, at paras. 85 and 96, referring to *Bouzari CA* and *Jones*, B.O.A., **Vol. IV, Tab 52**.

111 *Jurisdictional Immunities*, at para. 87, B.O.A., **Vol. IV, Tab 52**.

112 *Jurisdictional Immunities*, at para. 94 of the opinion of the Court, and at para. 9 of the separate opinion of Judge Koroma, B.O.A., **Vol. IV, Tab 52**.

113 On the history and traditional focus of international law on states and the emergence of individual complaint mechanisms and avenues of redress, see: A. Cassese, *supra*, at pp. 142-150, 241-242, 376-377 and 435-441, B.O.A., **Vol. VI, Tab 69**; J.H. Currie, *supra*, at pp. 73-75, B.O.A., **Vol. VI, Tab 70**.

114 *Jurisdictional Immunities*, at paras. 98-104, B.O.A., **Vol. IV, Tab 52**.

redress.[115] An individual's right to a remedy in case of a violation of international human rights law is now regarded by the community of states as inextricably linked to the substantive rights themselves, so that the denial of a remedy amounts to a breach of the underlying right at issue.[116]

122. The *ratio* of the ICJ's opinion in *Jurisdictional Immunities* is therefore not controlling with respect to state conduct covered by the CAT. Contrary to humanitarian law and the law of armed conflicts, which are silent in that regard, Article 14(1) of the CAT imposes a clear obligation on states parties to provide redress to *all* victims of torture through their legal system.

123. Indeed, the Committee against Torture's most authoritative pronouncements on the interpretation and scope of Article 14 of the CAT – *i.e.* the latest periodic reports on Canada and the U.K. and *General Comment No. 3* – were all issued *after* the ICJ decision in *Jurisdictional Immunities*. The experts appointed to oversee the Convention's implementation therefore appear to view that decision as inapplicable to the specific context of the CAT.

124. Besides *Bouzari SCJ*, *Bouzari CA* and *Jones*, which was followed by the High Court of New Zealand in *Fang v. Jiang*,[117] three other judgments of note have dealt with the relationship between the prohibition of torture and state immunity:

(a) *Pinochet*, where the House of Lords held that affording state immunity to a former head of state for acts of torture committed while he was in office was incompatible with the obligations of states under the CAT, and that by necessary implication, the provisions of the Convention should take precedence over the doctrine of sovereign immunity. Although in *Jones* the Law Lords appeared to retreat from this position with respect to civil remedies for torture, [118] their attempt to distinguish civil from criminal proceedings to justify their conclusions is far from satisfying;[119]

(b) *Furundžija*, at para. 155, where the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, although not referring specifically to the CAT, opined that because of

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115 See, for example: European Convention, Article 6§1; ICCPR, Article 2(3), B.O.A., **Vol. I, Tab 6**.

116 *Basic Principles and Guidelines*, at paras. 3(c) and (d), B.O.A., **Vol. VII, Tab 83**; *Human Rights Committee, General Comment No. 31 – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), at paras. 9, 15 and 16, B.O.A., **Vol. VII, Tab 91**. As noted by C.K. Hall, supra, at pp. 929-931, these principles were nowhere considered or addressed in *Bouzari* SJC, *Bouzari* CA or *Jones*, B.O.A., **Vol. VI, Tab 72**.

117 21 December 2006, BC200663098, B.O.A., **Vol. V, Tab 56**.

118 *Jones*, at para. 19, *per* Lord Bingham of Cornhill, and at paras. 46, 68 and 71, *per* Lord Hoffman, B.O.A., **Vol. V, Tab 60**.

119 See: paras. 154 *ff infra*.

the *jus cogens* nature of the prohibition against torture, victims should be authorized to bring civil claims against the perpetrators before foreign courts, who would be asked to "disregard the legal value of the national authorising act"; and

(c) *Al-Adsani*, where, as discussed above, the ECHR unanimously held that the right to a fair hearing entrenched at Article 6§1 of the European Convention was engaged, but by a split vote of 9-8 held that the doctrine of state immunity constituted sufficient justification to limit it. Rather inexplicably in light of Article 14(1) of the CAT, which it failed to even mention, the Court's decision was primarily grounded on its determination that "none of the primary international instruments referred to […] relates to civil proceedings or to State immunity."[120] The majority judges, like the Law Lords in *Jones* after them, also assumed for the purpose of their justification analysis that they were then dealing with two norms of equal standing at international law: one based on custom, *i.e.* state immunity, and the other on a multilateral treaty, *i.e.* the right to a fair hearing, which therefore had to be allowed to coexist.[121] This issue does not arise once due consideration is given to the CAT, which this Court has held was not intended to be derogable. The CAT should therefore take precedence over other rules of international law.[122]

f. The preparatory work of the CAT and the circumstances of its conclusion confirm the extraterritorial application of Article 14

125. Pursuant to Article 32 of the VCLT, recourse to the preparatory work and the circumstances surrounding the conclusion of a treaty to determine its meaning is only allowed where application of the general rule provided for at Article 31 of the VCLT "(*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable."[123]

126. As application of the general rule in the present case leads to neither scenario, the only use that can be made of these supplementary interpretative tools is to "confirm the meaning resulting from the application of article 31" [Emphasis added].[124]

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120 *Al-Adsani*, at para. 61, B.O.A., **Vol. III, Tab 50**.

121 *Al-Adsani*, at paras. 55-56, B.O.A., **Vol. III, Tab 50**; *Jones*, at para. 18, *per* Lord Bingham of Cornhill, and at paras. 40-41, *per* Lord Hoffman, B.O.A., **Vol. V, Tab 60**.

122 *Suresh*, at para. 71, B.O.A., **Vol. III, Tab 38**.

123 See: *Thomson*, at pp. 577-578, B.O.A., **Vol. III, Tab 40**. One author notes that recourse to such extrinsic sources in treaty interpretation is generally resisted given that the material is too often inconclusive. See: J.H. Currie, *supra*, at p. 164, B.O.A., **Vol. VI, Tab 70**.

124 VCLT, Article 32, B.O.A., **Vol. I, Tab 11**.

127. In any event, in the present case, the preparatory work does confirm the interpretation of Article 14 of the CAT arrived at through the application of the general rule, namely that its reach is extraterritorial.

128. As previously mentioned, an analysis of the preparatory work of the CAT, including its 6-year drafting process (from 1978 to 1984), reveals that the words "committed in any territory under its jurisdiction" were briefly added to the text of Article 14 during the deliberations and then dropped, without the issue being contentious:

> […] Numerous and detailed changes in the wording of this draft article were made over the next three years, and twice there were changes made with regard to geographic scope, but the *travaux préparatoires* shed no light whatsoever on the reasons for the changes in geographic scope. However, they make it clear that the Working Group carefully scrutinized every word of the text of this article throughout the course of drafting and that the contentious issues regarding this provision were the scope of the remedy and whether it would cover ill-treatment other than torture. […] [Emphasis added][125]

129. As for Professor Greenwood's opinion that those words "were dropped because they were superfluous since this limitation was already implicit in the Article",[126] it finds no support in the drafting history of the CAT, in addition to being hard to reconcile with the actual text of the Convention.

v) The *SIA* is incompatible with the principles of fundamental justice applicable to this case

130. The Appellants are very much mindful of La Forest J.'s concluding words in *Re Canada Labour Code*,[127] at p. 91: "Any time sovereign immunity is asserted, the inevitable result is that certain domestic parties will be left without legal recourse. This is a policy choice implicit in the [*SIA*] itself."[128]

131. However, the principles of fundamental justice are not about policy; they are about justice. Here, having regards to: (i) Canada's internal laws on torture, its prohibition and prosecution, (ii) Iran's failure or incapacity to deliver justice to the Appellants, and (iii) the international law obligations of Canada by virtue of Article 14(1) of the CAT; the principles of fundamental justice *in the particular circumstances of this case* are incompatible with the blanket immunity provided by the *SIA*.

132. Indeed, barring the Appellants' claims in Canada would lead to impunity for Zahra Kazemi's torturers.[129] That result would "shock the Canadian conscience."[130]

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125 C.K. Hall, *supra*, at pp. 931-934, B.O.A., **Vol. VI, Tab 72**.
126 *Bouzari CA*, at para. 80, B.O.A., **Vol. III, Tab 42**.
127 [1992] 2 S.C.R. 50 ("***Re Labour Code***"), B.O.A., **Vol. III, Tab 34**.
128 Interestingly, in that case, the U.S. government had indicated its willingness to allow the Canadian employees of its military base to form a union, subject to U.S. labour laws and procedures. As such, and contrary to the Appellants in this case, they were not left without a remedy. See: at p. 109, *per* Cory J. dissenting.

D. IF S. 3(1) *SIA* BREACHES S. 2(*E*) OF THE *BILL OF RIGHTS* OR S. 7 OF THE *CHARTER*, CAN IT BE JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY?

133. The *Bill of Rights* contains no saving provision analogous to s. 1 of the *Charter*. Drawing on the jurisprudence of this Court in interpreting s. 35 of the *Constitution Act, 1982*, the Quebec Court of Appeal has held that an analysis analogous to that required under s. 1 should also be conducted under the *Bill of Rights*.[131] The Appellants take no position in that regard, leaving it to this Court to clarify the law on this matter should it deem fit to do so.

134. With respect to s. 7 of the *Charter*, this Court has held that, given the nature of the rights protected, a derogation will usually only be justified "in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[132]

135. The test to be applied is that formulated in *R. v. Oakes*,[133] which imposes on the government the burden of demonstrating that the restriction is justified by a pressing and substantial goal and that the means chosen are proportional to that objective. As noted in *Charkaoui*, at para. 67, "[a] finding of proportionality requires: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective."

136. On the first branch of the test, there is no doubt that the *SIA* stems from a pressing and substantive objective: it incorporates into Canadian law the principles of international law on state immunity, which doctrine is itself based on notions of comity and reciprocity between states in international relations, as well as sovereignty and equality of states.[134]

137. As important as these principles are, in Canadian law at least, they are not absolute. They will be overridden when other, more pressing considerations come into play, such as where a foreign state fails to demonstrate comity to Canada's judicial process,[135] where strict adherence to those notions may cause Canada to breach its own international law obligations, especially in the human rights field,[136] or

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129 Lorna McGregor, "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty" (2007), 18 *E.J.I.L.* 903, at pp. 911-912, B.O.A., **Vol. VI, Tab 74**.
130 *Suresh*, at para. 49, B.O.A., **Vol. III, Tab 38**.
131 *Air Canada*, at paras. 95-98, B.O.A., **Vol. III, Tab 41**.
132 *Charkaoui*, at para. 66, B.O.A., **Vol. I, Tab 21**, citing *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 518.
133 [1986] 1 S.C.R. 103.
134 *Kuwait Airways*, at para. 13, B.O.A., **Vol. III, Tab 28**; *Schreiber*, at paras. 1, 13 and 17, B.O.A., **Vol. III, Tab 36**; *Re Labour Code*, at p. 91, B.O.A., **Vol. III, Tab 34**.
135 *Amchem Products Incorporated* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at p.934, B.O.A., **Vol. I, Tab 14**.
136 *Khadr*, at para. 18, B.O.A., **Vol. I, Tab 19**; *Hape*, at paras. 51-52, B.O.A., **Vol. II, Tab 32**.

where a foreign state fails to extend to Canada the same immunity that it would be entitled to under our laws.[137] As this Court noted in *Schreiber*, at para. 23, an absolutist approach to state immunity should be avoided where it would have the effect of depriving "the victims of the worst breaches of basic rights of any possibility of redress in national courts."

138. Even at international law there is not, and never was, any real consensus as to the precise scope of the doctrine. As Professor Jean-Gabriel Castel testified before the Senate Committee on Legal and Constitutional Affairs when it was examining the draft *SIA*:

> Whatever the decision is, you have a general principle of international law which is immunity of state, but the rest is left to the individual states, so one cannot really say that there is a general rule with respect to the extent of the immunity. Is it up to each state to accommodate the general principle, which leaves us a lot of freedom to legislate as we wish, within certain boundaries. [Emphasis added][138]

139. One should also be mindful that state immunity is rooted in the outmoded concept that the "King can do no wrong."[139] As Lord Denning noted over half a century ago, "[i]t is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality, than by arbitrarily rejecting their jurisdiction" [Emphasis added].[140]

140. With respect to the proportionality analysis, maintaining a plea of state immunity appears as a rational means of ensuring Canada's good relations with other states under normal circumstances. In a case such as this, however, where Iran (i) has failed to independently investigate the brutal acts committed by its officials, let alone take responsibility for them, (ii) does not offer any measure of compensation to a Canadian citizen for acts that are prohibited by a norm of *jus cogens* while its justice system is incapable of fairly entertaining a claim for recovery, (iii) has shown little regard to Canada's official envoys, including its ambassador, who tried to investigate the case,[141] and (iv) where diplomatic protection is an inadequate method of settling a claim such as the Appellants' (in 10 years

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137 *SIA*, s. 15.

138 *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 26, 1981, Second Proceedings on Bill S-19, "An Act to provide for State Immunity in Canadian Courts", at p. 11-7, B.O.A., **Vol. VIII, Tab 100**. See also: *Schreiber*, at para. 17, citing Ian Brownlie, *Principles of Public International Law*, 5th ed. (1998), at pp. 332-333, B.O.A., **Vol. III, Tab 36**; *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 (H.L.) ("***Rahimtoola***"), at p. 417, B.O.A., **Vol. VI, Tab 63**.

139 L. McGregor, *supra*, at pp. 913-915, B.O.A., **Vol. VI, Tab 74**.

140 *Rahimtoola*, at p. 418, B.O.A., **Vol. VI, Tab 63**. See also: L. McGregor, *supra*, at p. 917, citing Rosalyn Higgins, "Certain Unresolved Aspects of the Law of State Immunity" (1982), 29 *Neth Int'l L Rev* 265, at p. 271, B.O.A., **Vol. VI, Tab 74**.

141 Affidavit of Philip MacKinnon, Canada's ambassador to Iran in 2003, signed on October 28, 2009, A.R., **pp. 204 and ff.**

now since the murder of Zahra Kazemi, it has not produced any concrete results);[142] any rational connection between the *SIA* and its goals becomes tenuous at best.

141. In such a context, this Court should "not [be] impressed by the argument based on the practical undesirability of upsetting foreign regimes which may resort to torture."[143] To the contrary, refusing to extend immunity in the present case may act "as a pressure point on states to ensure the availability and adequacy of remedies in the state allegedly responsible."[144] This is in keeping with Canada's commitment to the community of nations as a whole to make human rights enforceable.

142. As for the impairment to the Appellants' rights in this case, far from being minimal and reasonably tailored, it is absolute, whereas the *SIA* could provide for an exception to immunity in the limited circumstances advocated by the Appellants.[145]

143. A proper application of the proportionality test thus leads to the conclusion that applying the *SIA* to the Appellants' claim is not justified in a free and democratic society.

E. ARE FOREIGN PUBLIC OFFICIALS, SUED IN THEIR INDIVIDUAL CAPACITY, IMMUNE FROM THE JURISDICTION OF CANADIAN COURTS IN CIVIL PROCEEDINGS FOR ACTS OF TORTURE?

i) The *SIA* does not apply to lower-level officials

144. The courts below, relying on the Ontario Court of Appeal decision in *Jaffe v. Miller*[146] and the House of Lords' decision in *Jones*, erred in holding that the *SIA* extends to all state officials acting within the scope of their duties, including the individual Respondents in this case.[147]

145. To begin, the Court of Appeal in *Jaffe* actually held that the *SIA* does *not* extend to individuals, noting, at para. 33, that the fact that the *SIA* was silent as to which public officials were covered "can only mean that Parliament is content to have the question of which employees are entitled to immunity determined at common law."

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142 L. McGregor, *supra*, at pp. 908-911, B.O.A., **Vol. VI, Tab 74**.

143 *A and Ors.*, at para. 50, *per* Lord Bingham of Cornhill, B.O.A., **Vol. V, Tab 59**.

144 Lorna McGregor, "Is there a Future after *Germany v. Italy*?" (2013), 11 *Journal of International Criminal Justice* 125, at pp. 131-132, B.O.A., **Vol. VI, Tab 75**.

145 See, for example: the *Torture (Damages) (No. 2) Bill*, introduced before the U.K. House of Commons in 2009, B.O.A., **Vol. VIII, Tab 101**, and *Bill C-483 – An Act to amend the State Immunity Act (genocide, crimes against humanity, war crimes or torture)*, introduced before Canada's House of Commons in 2009, neither of which was adopted, B.O.A., **Vol. VIII, Tab 97**.

146 (1993), 13 O.R. (3d) 745 (C.A.), leave to appeal dismissed, January 20, 1994, S.C.C. No. 23755 ("***Jaffe***") B.O.A., **Vol. III, Tab 44**.

147 Judgment of the Superior Court, at paras. 96-153, A.R., **pp. 35-44**; Judgment of the Court of Appeal, at paras. 87-97, A.R., **pp. 101-104**.

146. Indeed, the *SIA*'s definition of "foreign state" at s. 2 is deliberately crafted so as to limit the extension of the state's immunity to specific categories of state entities and individuals. As far as individuals are concerned, immunity extends only to the sovereign or other head of state:

"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;	« État étranger » Sont assimilés à un État étranger : a) le chef ou souverain de cet État ou d'une subdivision politique de celui-ci, dans l'exercice de ses fonctions officielles; b) le gouvernement et les ministères de cet État ou de ses subdivisions politiques, ainsi que les organismes de cet État; c) les subdivisions politiques de cet État. [Emphasis added]

147. The definition of "agency of the foreign state" likewise confirms that only the legal entity benefits from the foreign state's immunity:

"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;	« organisme d'un État étranger » Toute entité juridique distincte qui constitue un organe de l'État étranger. [Emphasis added]

148. Moreover, the foreign state's immunity extends to the "sovereign or other head of the foreign state" only when acting "as such in a public capacity." If Parliament had intended to extend the foreign state's statutory immunity to all public officials, it would surely have done so expressly and subject to at least the same caveat.

149. That the *SIA* was not meant to apply to individual public officials in general was confirmed by Mr. Jewitt, General Counsel, Constitutional and International Law Section, Department of Justice, before the Standing Committee on Justice and Legal Affairs studying the adoption of the *SIA*. Responding to a question from a Member of Parliament as to what might be included in the scope of "quasi-criminal proceedings" under s. 18 *SIA*, he cautioned: "One should also remember that this proposed act deals with states, not with individuals, and generally you are not talking about criminal acts of states" [Emphasis added].[148]

150. This does not mean that foreign public officials will never be immune from civil proceedings in Canada. It simply means that, unless they can claim diplomatic or consular immunity, they are subject

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148 *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, February 4, 1982, at p. 60:32, B.O.A., **Vol. VIII, Tab 99**.

to the common law relating to public international law immunities and each province's rules of private international law on jurisdiction.

151. The U.S. *Foreign Sovereign Immunities Act of 1976*[149] (the "***FSIA***") takes the same approach. As such, the U.S. Supreme Court recently confirmed in *Samantar v. Yousuf*[150] that while individual officials may benefit from state immunity in some circumstances, such immunity is governed by the common law and not by the *FSIA*.[151]

152. In the present case, the courts below reasoned that state immunity and individual immunity must necessarily be co-extensive, or else state immunity would be meaningless. This approach reflects neither the state of customary international law nor Canada's own experience. Indeed, prior to the abolition of Crown immunity in Canada, it was widely accepted that although the Crown was immune from suit, individual officials were liable in tort as any private person would be.[152] The same position still prevails in Canada with respect to injunctive relief: although the Crown may be immune from such relief, an injunction can still issue against its officials in order to restrain their illegal acts.[153]

153. The U.S. Supreme Court thus wisely rejected in *Samantar* the arguments that prevailed below in this case, noting, at p. 15 of the Court's opinion, that "the relationship between a state's immunity and an official's immunity is more complicated than petitioner suggests."

ii) At common law, immunity does not extend to Respondents Mortazavi and Bakhshi in the circumstances of this case

154. Because the courts below considered that all four Respondents fit within the definition of "foreign state" under the *SIA*, they did not go on to consider the scope of state immunity as it applies to individuals at common law.

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149 28 U.S.C. §1330, B.O.A., **Vol. I, Tab 12**.

150 560 U.S. 210 (2010) ("***Samantar***") B.O.A., **Vol. VI, Tab 65**.

151 The case was remanded to the District Court for a determination as to whether Samantar, a former high-ranking official under the Barre regime in Somalia, benefitted from immunity at common law from the jurisdiction of U.S. courts in the context of a civil suit for torture, arbitrary detention and extra-judicial killing committed in Somalia. See: *Yousuf v. Samantar*, November 2, 2012, U.S.C.A. (4th Circ.) No. 11-1479 ("***Samantar II***"), where the Court of Appeals affirmed the District Court's judgment on remand, denying immunity in that case for acts of torture. Samantar has now filed a petition for a writ of certiorari before the U.S. Supreme Court, which is still pending. See: the U.S. Supreme Court Docket in file No. 12-1078, B.O.A., **Vol. VI, Tab 67**.

152 *Conseil des Ports Nationaux* v. *Langelier*, [1969] S.C.R. 60, at pp. 65-72, B.O.A., **Vol. II, Tab 23**.

153 *Carrier* v. *Québec (Procureur général)*, 2011 QCCA 123, at para. 63, B.O.A., **Vol. III, Tab 43**.

155. The common law recognizes two branches of state immunity: immunity *rationae personae* and immunity *rationae materiae*. Each is broader and narrower than the other in its own way, and both belong to the state and exist for the state's benefit.[154]

156. Immunity *rationae personae* extends to an elite circle of the state's actors on the basis of the office they hold, *i.e.* the head of state and other very high ranking officers such as the minister of foreign affairs. It applies in respect of any act the office holder commits, but only for as long as the individual holds that office.

157. In contrast, immunity *rationae materiae*, or "functional immunity", extends to a specific category of the state's acts, *i.e.* "official state functions." It can extend to any state actor acting in his or her official capacity, whether or not he or she still holds office, "if the effect of exercising jurisdiction would be to enforce a rule of law against the state."[155]

158. Neither branch extends to Respondents Mortazavi and Bakhshi in this case. First, they fall outside the circle of immunity *rationae personae*. Second, Iran cannot claim functional immunity for Mortazavi and Bakhshi in this case because: (i) their acts, while legally imputable to Iran, do not constitute official state functions; and (ii) a civil suit against Mortazavi and Bakhshi in their personal capacity does not enforce any rule of law against Iran nor involve any claim to Iran's assets.

a. *Public international law does not recognize torture as an official state function*

159. In *Pinochet*, the House of Lords determined that state immunity did not protect Senator Pinochet from *criminal* proceedings for torture in large part because torture, for international law purposes, was not an act that could be recognized as an official state function.[156]

160. This conclusion flows from the status of the prohibition against torture as a peremptory norm of *jus cogens* as well as from the terms of the CAT itself. Indeed, the very tenor of the CAT is to expose the illegitimacy of torture, an act which, by definition, occupies its status as a *jus cogens* violation precisely because it is committed under the colour of authority.[157]

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154 On the scope of each type of immunity, see: *Pinochet*, at pp. 171-172 and 178-179, *per* Lord Millett , B.O.A., **Vol. VI, Tab 62** and Currie, pp. 366-367, B.O.A., **Vol. VI, Tab 70**.

155 *Restatement (Second) of Foreign Relations Law of the United States*, at §66(f), cited in *Samantar*, at p. 15, B.O.A., **Vol. VI, Tab 65** of the Court's opinion, and in *Samantar II*, at p. 8, B.O.A., **Vol. VI, Tab 67**.

156 See, for example: at pp. 113-114, *per* Lord Browne-Wilkinson, at pp. 164-166, *per* Lord Hutton; and at pp. 178-179, *per* Lord Millett ("The definition of torture is […] entirely inconsistent with the existence of a plea of immunity *rationae materiae*.") B.O.A., **Vol. VI, Tab 62**.

157 See: the definition of torture at Article 1(1) of the CAT; *Pinochet* at p. 179, B.O.A., **Vol. VI, Tab 62**, *per* Lord Millet ("The official or government nature of the act, which forms the basis of the immunity, is an

161. In the words of Lord Browne-Wilkinson in *Pinochet*, at p. 114 (B.O.A., **Vol. VI, Tab 62**): "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalizes?"

162. In *Samantar II*, at p. 19, the U.S. Court of Appeals for the Fourth Circuit adopted the same position with respect to civil proceedings:

> […] *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official's employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.

163. After reviewing the relevant U.S. and foreign case law and acknowledging that the law is "less settled in the civil context", the Court of Appeals came to the conclusion, at pp. 21-22, that unless public officials could bring themselves within the confines of some form of *in personam* immunity, such as that enjoyed by heads of state and foreign affairs ministers while in function,[158] they did not enjoy immunity for breaches of norms of *jus cogens* in either the criminal or civil context.

164. Indeed, since functional immunity is concerned with the type of *act* at issue, and not the identity or functions of the person being sued, on a principled analysis, the nature of the proceedings – civil or criminal – should be irrelevant. In this respect, the qualifications made in *Jones* on the reasons the Law Lords had issued in *Pinochet* are based on a misapprehension of the principles at stake and the House of Lords erred in reversing the Court of Appeal on this point.

165. It also ignores the fact, noted by Breyer J., at pp. 3-4 of his concurring reasons in *Sosa v. Alvarez-Machain*,[159] that "the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. […] Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well" [Emphasis added].[160]

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essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence") [Emphasis added].)

158 In *Arrest Warrant*, the ICJ held that such *in personam* immunity extends to violations of norms of *jus cogens*, B.O.A., **Vol. IV, Tab 51**.

159 542 U.S. 692 (2004), B.O.A., **Vol. VI, Tab 66**.

160 See: C.K. Hall, *supra*, at p. 934, fn. 53, which provides a non-exhaustive list of 24 countries where civil claims are allowed in criminal proceedings based on universal jurisdiction: Argentina, Austria, Belgium, Bolivia, China, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Myanmar, the Netherlands, Panama, Poland, Portugal, Romania, Senegal, Spain, Sweden and Venezuela,

166. This Court must avoid the path taken by the Court of Appeal below in accepting Iran's argument that since torture, as defined in the CAT, can only be committed by a public official or in an official capacity, it must necessarily attract immunity.[161] This cannot be so, or else the very character which makes acts of torture universally abhorrent is the same character that would cloak them with immunity.

b. A civil suit against Respondents Mortazavi and Bakhshi would not have the effect of enforcing a rule of law against Iran

167. State immunity is not circumvented where proceedings are taken against an individual official, in his or her personal capacity, seeking an award of damages that is enforceable solely against the individual's patrimony. This is particularly so with respect to an act such as torture, where the individual clearly bears a responsibility that is separate and distinct from the responsibility of the state.[162]

168. The fact that the acts are also legally attributable to Iran is of no consequence. As Article 58 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* and the commentary thereto make clear, state responsibility is "without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." As such, "[t]he question of individual responsibility is in principle distinct from the question of State responsibility."[163]

169. A discussed above, there exist a variety of circumstances in which Canadian courts sit in judgment of acts that are attributable to a foreign state, none of which are seen as an end-run around the state's immunity.

170. In *Habib v. Commonwealth of Australia*, the Federal Court of Australia held that the common law "act of state" doctrine did not preclude Australian courts from sitting in judgment of allegations of torture committed by foreign officials at Guantanamo Bay, where Australian officials were being sued civilly in Australia for complicity in those acts. In Black C.J.'s view, where the common law comes to a fork in the road, it should follow the path of human rights law:

B.O.A., **Vol. IV, Tab 72**. Likewise, pursuant to Article 75 of the *Rome Statute of the International Criminal Court* U.N.T.S., vol. 2187, B.O.A., **Vol. I, Tab 8**, p. 90 the Court may order a convicted person to pay compensation to victims.

161 Judgment of the Court of Appeal, at para. 96, A.R., **p. 104**.

162 The CAT clearly envisages individual responsibility. For example, Article 2(3) stipulates that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture", while Articles 5 to 7 establish the conditions of criminal jurisdiction over individuals who are suspected of having committed acts of torture, B.O.A., **Vol. I, Tab 4**.

163 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001), at p. 142, B.O.A., **Vol. VII, Tab 92**.

> It is not to the point that Mr. Habib's proceeding is a civil claim for damages and not a criminal proceeding under the *Crimes (Torture) Act*, the *Geneva Conventions Act* or the *Criminal Code*. The point is that, if a choice were indeed open, in determining whether or not the act of state doctrine operates to deny a civil remedy contingent upon breach of those Acts, the common law should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms. (para. 13) [Emphasis added][164]

171. The Appellants submit that the same approach to the development of the common law should prevail in determining whether Respondents Mortazavi and Bakhshi are entitled to immunity in the circumstances of this case.

F. CONCLUSION

172. There is no hiding the fact that the decision the Appellants are asking this Court to make in the present case would place it at the forefront of international human rights law. But that is a place that this Court, equipped with Canada's constitutional and quasi-constitutional instruments, and robust human rights jurisprudence, is well-equipped to occupy. As Deschamps J. wrote in *Chaoulli*:

> 87 […] When the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch.

173. The Appellants are asking this Court to apply Canadian law in a manner that reflects Canadian values, values that are regularly informed by international human rights law and in particular, the CAT. Equipped with these tools, this Court can craft a uniquely Canadian response to this manifestly wrong and unjust situation of impunity, thereby restoring a measure of dignity to the tragic story of Zahra Kazemi.

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[164] [2010] FCAFC 12, at para. 13, B.O.A., **Vol. V, Tab 58**.

PART IV – SUBMISSIONS CONCERNING COSTS

174. Costs should be awarded to the Appellants in this Court and in the courts below.

PART V – ORDER SOUGHT

175. **FOR THESE REASONS,** the Appellants request an order:

(a) Granting their appeal;

(b) Declaring that s. 3(1) of the *State Immunity Act*, in so far as it bars the proceedings in the present case, is inconsistent with s. 2(*e*) of the *Canadian Bill of Rights* and is therefore inoperative in the circumstances of this case;

(c) Declaring that s. 3(1) of the *State Immunity Act*, in so far as it bars Mr. Hashemi's claim, infringes s. 7 of the *Canadian Charter of Rights and Freedoms*, cannot be saved under s. 1 and is of no force or effect;

(d) Setting aside the judgment of the Quebec Court of Appeal dated August 15, 2012, quashing the judgment of the Superior Court of Quebec dated January 25, 2011 and dismissing the Respondents' *de benne esse* Motion for Declinatory Exception.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2013.

M^e Kurt Johnson
Mathieu Bouchard
Audrey Boctor
David Grossman
IRVING MITCHELL KALICHMAN LLP
Counsel for Appellants
The Estate of the Late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi

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UNITED NATIONS DOCUMENTS AND OTHER INTERNATIONAL MATERIALS *(cont'd)* **Paragraph(s)**

OTHER *(cont'd)* **Paragraph(s)**

PART VII

STATUTES, REGULATIONS, RULES

CANADA

CONSOLIDATION

CODIFICATION

Canadian Bill of Rights

Déclaration canadienne des droits

S.C. 1960, c. 44

S.C. 1960, ch. 44

Current to June 25, 2013

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to June 25, 2013. Any amendments that were not in force as of June 25, 2013 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 25 juin 2013. Toutes modifications qui n'étaient pas en vigueur au 25 juin 2013 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

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S.C. 1960, c. 44

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

[*Assented to 10th August 1960*]

Preamble

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

BILL OF RIGHTS

Recognition and declaration of rights and freedoms

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of

S.C. 1960, ch. 44

Loi ayant pour objets la reconnaissance et la protection des droits de l'homme et des libertés fondamentales

[*Sanctionnée le 10 août 1960*]

Préambule

Le Parlement du Canada proclame que la nation canadienne repose sur des principes qui reconnaissent la suprématie de Dieu, la dignité et la valeur de la personne humaine ainsi que le rôle de la famille dans une société d'hommes libres et d'institutions libres;

Il proclame en outre que les hommes et les institutions ne demeurent libres que dans la mesure où la liberté s'inspire du respect des valeurs morales et spirituelles et du règne du droit;

Et afin d'expliciter ces principes ainsi que les droits de l'homme et les libertés fondamentales qui en découlent, dans une Déclaration de droits qui respecte la compétence législative du Parlement du Canada et qui assure à sa population la protection de ces droits et de ces libertés,

En conséquence, Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète :

PARTIE I

DÉCLARATION DES DROITS

Reconnaissance et déclaration des droits et libertés

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe :

a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la

property, and the right not to be deprived thereof except by due process of law;

(*b*) the right of the individual to equality before the law and the protection of the law;

(*c*) freedom of religion;

(*d*) freedom of speech;

(*e*) freedom of assembly and association; and

(*f*) freedom of the press.

Construction of law

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(*e*) 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;

(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and

jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi;

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

c) la liberté de religion;

d) la liberté de parole;

e) la liberté de réunion et d'association;

f) la liberté de la presse.

Interprétation de la législation

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

a) autorisant ou prononçant la détention, l'emprisonnement ou l'exil arbitraires de qui que ce soit;

b) infligeant des peines ou traitements cruels et inusités, ou comme en autorisant l'imposition;

c) privant une personne arrêtée ou détenue

(i) du droit d'être promptement informée des motifs de son arrestation ou de sa détention,

(ii) du droit de retenir et constituer un avocat sans délai, ou

(iii) du recours par voie d'*habeas corpus* pour qu'il soit jugé de la validité de sa détention et que sa libération soit ordonnée si la détention n'est pas légale;

d) autorisant une cour, un tribunal, une commission, un office, un conseil ou une autre autorité à contraindre une personne à témoigner si on lui refuse le secours d'un avocat, la protection contre son propre témoignage ou l'exercice de toute garantie d'ordre constitutionnel;

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

impartial tribunal, or of the right to reasonable bail without just cause; or

(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

f) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable; ou

g) privant une personne du droit à l'assistance d'un interprète dans des procédures où elle est mise en cause ou est partie ou témoin, devant une cour, une commission, un office, un conseil ou autre tribunal, si elle ne comprend ou ne parle pas la langue dans laquelle se déroulent ces procédures.

Duties of Minister of Justice

3. (1) Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Devoirs du ministre de la Justice

3. (1) Sous réserve du paragraphe (2), le ministre de la Justice doit, en conformité de règlements prescrits par le gouverneur en conseil, examiner tout règlement transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires*, ainsi que tout projet ou proposition de loi soumis ou présentés à la Chambre des communes par un ministre fédéral en vue de rechercher si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.

Exception

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of this Part.

Exception

(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et destiné à vérifier sa compatibilité avec les fins et les dispositions de la présente partie.

1960, c. 44, s. 3; 1970-71-72, c. 38, s. 29; 1985, c. 26, s. 105; 1992, c. 1, s. 144(F).

1960, ch. 44, art. 3; 1970-71-72, ch. 38, art. 29; 1985, ch. 26, art. 105; 1992, ch. 1, art. 144(F).

Short title

4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.

Titre abrégé

4. Les dispositions de la présente Partie doivent être connues sous la désignation : *Déclaration canadienne des droits*.

PART II

PARTIE II

Savings

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

Clause de sauvegarde

5. (1) Aucune disposition de la Partie I ne doit s'interpréter de manière à supprimer ou restreindre l'exercice d'un droit de l'homme ou d'une liberté fondamentale non énumérés dans ladite Partie et qui peuvent avoir existé au Canada lors de la mise en vigueur de la présente loi.

"Law of Canada" defined

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

Définition : « loi du Canada »

(2) L'expression « loi du Canada », à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après la mise en vigueur de la présente loi, ou toute ordonnance, règle ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abrogation, d'abolition ou de modification par le Parlement du Canada.

Jurisdiction of Parliament

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

Juridiction du Parlement

(3) Les dispositions de la Partie I doivent s'interpréter comme ne visant que les matières qui sont de la compétence législative du Parlement du Canada.

Canadian Charter of Rights and Freedoms, s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

CONSTITUTION ACT, 1982 (80) 1982, c. 11 (U.K.), Schedule B PART I **CANADIAN CHARTER OF RIGHTS AND FREEDOMS**	LOI CONSTITUTIONNELLE DE 1982 (80) 1982, ch. 11 (R.U.), Annexe B PARTIE I **CHARTE CANADIENNE DES DROITS ET LIBERTÉS**
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

CANADA

CONSOLIDATION

CODIFICATION

State Immunity Act

Loi sur l'immunité des États

R.S.C., 1985, c. S-18

L.R.C. (1985), ch. S-18

Current to June 25, 2013

À jour au 25 juin 2013

Last amended on March 13, 2012

Dernière modification le 13 mars 2012

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to June 25, 2013. The last amendments came into force on March 13, 2012. Any amendments that were not in force as of June 25, 2013 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 25 juin 2013. Les dernières modifications sont entrées en vigueur le 13 mars 2012. Toutes modifications qui n'étaient pas en vigueur au 25 juin 2013 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

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R.S.C., 1985, c. S-18

L.R.C., 1985, ch. S-18

An Act to provide for state immunity in Canadian courts

Loi portant sur l'immunité des États étrangers devant les tribunaux

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *State Immunity Act*.

1980-81-82-83, c. 95, s. 1.

Titre abrégé

1. *Loi sur l'immunité des États*.

1980-81-82-83, ch. 95, art. 1.

INTERPRETATION

DÉFINITIONS ET INTERPRÉTATION

Definitions

2. In this Act,

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

"agency of a foreign state" « *organisme d'un État étranger* »

"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;

« organisme d'un État étranger » "*agency of a foreign state*"

« organisme d'un État étranger » Toute entité juridique distincte qui constitue un organe de l'État étranger.

"commercial activity" « *activité commerciale* »

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;

« activité commerciale » "*commercial activity*"

« activité commerciale » Toute poursuite normale d'une activité ainsi que tout acte isolé qui revêtent un caractère commercial de par leur nature.

"foreign state" « *État étranger* »

"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;

« État étranger » "*foreign state*"

« État étranger » Sont assimilés à un État étranger :

a) le chef ou souverain de cet État ou d'une subdivision politique de celui-ci, dans l'exercice de ses fonctions officielles;

b) le gouvernement et les ministères de cet État ou de ses subdivisions politiques, ainsi que les organismes de cet État;

c) les subdivisions politiques de cet État.

"political subdivision" « *subdivision politique* »

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

« subdivision politique » "*political subdivision*"

« subdivision politique » Toute province, tout état ou toute autre subdivision politique similaire d'un État étranger à régime fédéral.

"terrorist activity" « *activité terroriste* »

"terrorist activity" in respect of a foreign state has the same meaning as in subsection 83.01(1) of the *Criminal Code*, provided that a foreign state set out on the list referred to in subsection 6.1(2) does the act or omission on or after January 1, 1985.

« activité terroriste » "*terrorist activity*"

« activité terroriste » S'entend au sens du paragraphe 83.01(1) du *Code criminel* dans les cas où l'acte ou l'omission en cause est commis, le 1er janvier 1985 ou après cette date, par un État étranger inscrit sur la liste visée au paragraphe 6.1(2).

R.S., 1985, c. S-18, s. 2; 2012, c. 1, s. 3.1.

L.R. (1985), ch. S-18, art. 2; 2012, ch. 1, art. 3.1.

Meaning of supports terrorism

2.1 For the purposes of this Act, a foreign state supports terrorism if it commits, for the benefit of or otherwise in relation to a listed entity as defined in subsection 83.01(1) of the *Criminal Code*, an act or omission that is, or had it been committed in Canada would be, punishable under any of sections 83.02 to 83.04 and 83.18 to 83.23 of the *Criminal Code*.

2012, c. 1, s. 4.

Soutien du terrorisme — sens

2.1 Pour l'application de la présente loi, un État étranger soutient le terrorisme s'il commet, au profit ou au regard de toute entité inscrite au sens du paragraphe 83.01(1) du *Code criminel*, tout acte ou omission qui est sanctionné par l'un des articles 83.02 à 83.04 et 83.18 à 83.23 de cette loi ou le serait s'il avait été commis au Canada.

2012, ch. 1, art. 4.

STATE IMMUNITY

IMMUNITÉ DE JURIDICTION

State immunity

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

Immunité de juridiction

3. (1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.

Court to give effect to immunity

(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.

1980-81-82-83, c. 95, s. 3.

Immunité reconnue d'office

(2) Le tribunal reconnaît d'office l'immunité visée au paragraphe (1) même si l'État étranger s'est abstenu d'agir dans l'instance.

1980-81-82-83, ch. 95, art. 3.

Immunity waived

4. (1) A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3(1) by submitting to the jurisdiction of the court in accordance with subsection (2) or (4).

Renonciation à l'immunité

4. (1) L'État étranger qui se soumet à la juridiction du tribunal selon les modalités prévues aux paragraphes (2) ou (4), renonce à l'immunité de juridiction visée au paragraphe 3(1).

State submits to jurisdiction

(2) In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it

(*a*) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;

(*b*) initiates the proceedings in the court; or

(*c*) intervenes or takes any step in the proceedings before the court.

Soumission à la juridiction du tribunal

(2) Se soumet à la juridiction du tribunal l'État étranger qui :

a) le fait de manière expresse par écrit ou autrement, avant l'introduction de l'instance ou en cours d'instance;

b) introduit une instance devant le tribunal;

c) intervient ou fait un acte de procédure dans l'instance.

Exception

(3) Paragraph (2)(*c*) does not apply to

(*a*) any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court; or

(*b*) any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.

Exception

(3) L'alinéa (2)*c*) ne s'applique pas dans les cas où :

a) l'intervention ou l'acte de procédure a pour objet d'invoquer l'immunité de juridiction;

b) l'État étranger a agi dans l'instance sans connaître les faits qui lui donnaient droit à l'immunité de juridiction, ces faits n'ayant pu être suffisamment établis auparavant, et il a invoqué l'immunité aussitôt que possible après l'établissement des faits.

Third party proceedings and counter-claims

(4) A foreign state that initiates proceedings in a court or that intervenes or takes any step in

Demandes incidentes

(4) La soumission à la juridiction d'un tribunal qui s'opère soit par l'introduction d'une ins-

proceedings before a court, other than an intervention or step to which paragraph (2)(*c*) does not apply, submits to the jurisdiction of the court in respect of any third party proceedings that arise, or counter-claim that arises, out of the subject-matter of the proceedings initiated by the state or in which the state has so intervened or taken a step.

tance soit par l'intervention ou l'acte de procédure qui ne sont pas soustraits à l'application de l'alinéa (2)*c*), vaut pour les interventions de tiers et les demandes reconventionnelles découlant de l'objet de cette instance.

Appeal and review

(5) Where, in any proceedings before a court, a foreign state submits to the jurisdiction of the court in accordance with subsection (2) or (4), that submission is deemed to be a submission by the state to the jurisdiction of such one or more courts by which those proceedings may, in whole or in part, subsequently be considered on appeal or in the exercise of supervisory jurisdiction.

1980-81-82-83, c. 95, s. 4.

Appels

(5) La soumission à la juridiction d'un tribunal intervenue selon les modalités prévues aux paragraphes (2) ou (4) vaut également pour les tribunaux supérieurs devant lesquels l'instance pourra être portée en totalité ou en partie par voie d'appel ou d'exercice du pouvoir de contrôle.

1980-81-82-83, ch. 95, art. 4.

Commercial activity

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.

1980-81-82-83, c. 95, s. 5.

Activité commerciale

5. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions qui portent sur ses activités commerciales.

1980-81-82-83, ch. 95, art. 5.

Death and property damage

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.

R.S., 1985, c. S-18, s. 6; 2001, c. 4, s. 121.

Dommages

6. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant :

a) des décès ou dommages corporels survenus au Canada;

b) des dommages aux biens ou perte de ceux-ci survenus au Canada.

L.R. (1985), ch. S-18, art. 6; 2001, ch. 4, art. 121.

Support of terrorism

6.1 (1) A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985.

Soutien du terrorisme

6.1 (1) L'État étranger inscrit sur la liste visée au paragraphe (2) ne bénéficie pas de l'immunité de juridiction dans les actions intentées contre lui pour avoir soutenu le terrorisme le 1er janvier 1985 ou après cette date.

List of foreign states

(2) The Governor in Council may, by order, establish a list on which the Governor in Council may, at any time, set out the name of a foreign state if, on the recommendation of the Minister of Foreign Affairs made after consulting with the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism.

Liste d'États étrangers

(2) Le gouverneur en conseil peut, par décret, établir une liste sur laquelle il peut, dès lors et par la suite, inscrire tout État étranger s'il est convaincu, sur la recommandation du ministre des Affaires étrangères faite après consultation du ministre de la Sécurité publique et de la Protection civile, qu'il existe des motifs raisonnables de croire que cet État soutient ou a soutenu le terrorisme.

Establishment of list

(3) The list must be established no later than six months after the day on which this section comes into force.

Établissement de la liste

(3) La liste doit être établie dans les six mois suivant la date d'entrée en vigueur du présent article.

Application to be removed from list

(4) On application in writing by a foreign state, the Minister of Foreign Affairs must, after consulting with the Minister of Public Safety and Emergency Preparedness, decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be set out on the list.

Demande de radiation

(4) Le ministre des Affaires étrangères, saisi d'une demande écrite présentée par un État étranger, décide, après consultation du ministre de la Sécurité publique et de la Protection civile, s'il existe des motifs raisonnables de recommander ou non au gouverneur en conseil de radier cet État de la liste.

Notice of decision to applicant

(5) The Minister of Foreign Affairs must without delay give notice to the applicant of that Minister's decision respecting the application.

Avis de la décision au demandeur

(5) Il donne sans délai au demandeur un avis de la décision qu'il a rendue relativement à la demande.

New application

(6) A foreign state set out on the list may not make another application under subsection (4), unless there has been a material change in its circumstances since the foreign state made its last application or the Minister of Foreign Affairs has completed the review under subsection (7).

Nouvelle demande de radiation

(6) L'État étranger ne peut présenter une nouvelle demande de radiation en vertu du paragraphe (4) que si sa situation a évolué d'une manière importante depuis la présentation de sa dernière demande ou que si le ministre a terminé l'examen mentionné au paragraphe (7).

Review of list

(7) Two years after the establishment of the list, and every two years after that, the Minister of Foreign Affairs must

(*a*) review the list in consultation with the Minister of Public Safety and Emergency Preparedness to determine whether there are still reasonable grounds, as set out in subsection (2), for a foreign state to be set out on the list and make a recommendation to the Governor in Council as to whether the foreign state should remain set out on the list; and

(*b*) review the list in consultation with the Minister of Public Safety and Emergency Preparedness to determine whether there are reasonable grounds, as set out in subsection (2), for a foreign state that is not set out on the list to be set out on the list and make a recommendation to the Governor in Council as to whether the foreign state should be set out on the list.

Examen périodique de la liste

(7) Deux ans après l'établissement de la liste et tous les deux ans par la suite, le ministre des Affaires étrangères :

a) examine celle-ci, après consultation du ministre de la Sécurité publique et de la Protection civile, pour savoir si les motifs visés au paragraphe (2) justifiant l'inscription d'un État étranger sur la liste existent toujours et recommande au gouverneur en conseil de radier ou non cet État de la liste;

b) examine la liste, après consultation de ce ministre, pour savoir s'il existe des motifs, visés au paragraphe (2), justifiant l'inscription sur cette liste d'un État étranger non encore inscrit sur celle-ci et recommande au gouverneur en conseil d'inscrire ou non cet État sur la liste.

Effect of review

(8) The review does not affect the validity of the list.

Effet de l'examen

(8) L'examen est sans effet sur la validité de la liste.

Completion of review

(9) The Minister of Foreign Affairs must complete the review as soon as feasible, but in any case within 120 days, after its commencement. After completing the review, that Minister must without delay cause a notice to be published in the *Canada Gazette* that it has been completed.

Fin de l'examen

(9) Le ministre termine son examen dans les meilleurs délais mais au plus tard cent vingt jours après l'avoir commencé. Une fois l'examen terminé, il fait publier sans délai un avis à cet effet dans la *Gazette du Canada*.

Effect of removal from list on proceedings

(10) If proceedings for support of terrorism are commenced against a foreign state that is set out on the list, the subsequent removal of the foreign state from the list does not have the effect of restoring the state's immunity from the jurisdiction of a court in respect of those proceedings or any related appeal or enforcement proceedings.

(10) La radiation de l'État étranger de la liste après que des actions ont été intentées contre lui pour avoir soutenu le terrorisme n'a pas pour effet de restaurer l'immunité de juridiction de celui-ci dans ces actions ou dans tout appel ou procédure d'exécution connexe.

Effet de la radiation sur les actions en justice

Terrorist activity

(11) Where a court of competent jurisdiction has determined that a foreign state, set out on the list in subsection (2), has supported terrorism, that foreign state is also not immune from the jurisdiction of a court in proceedings against it that relate to terrorist activity by the state.

(11) L'État étranger inscrit sur la liste visée au paragraphe (2) à l'égard duquel un tribunal compétent a conclu qu'il avait soutenu le terrorisme ne bénéficie pas de l'immunité de juridiction dans les actions intentées contre lui relativement à une activité terroriste à laquelle il s'est livré.

Activité terroriste

2012, c. 1, s. 5.

2012, ch. 1, art. 5.

Maritime law

7. (1) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

(*a*) an action *in rem* against a ship owned or operated by the state, or

(*b*) an action *in personam* for enforcing a claim in connection with a ship owned or operated by the state,

if, at the time the claim arose or the proceedings were commenced, the ship was being used or was intended for use in a commercial activity.

7. (1) L'État étranger ne bénéficie pas, pour tout navire dont il est le propriétaire ou l'exploitant et qui était utilisé ou destiné à être utilisé dans le cadre d'une activité commerciale au moment de la naissance du droit d'action ou de l'introduction de l'instance, de l'immunité de juridiction dans les actions suivantes :

a) actions réelles contre le navire;

b) actions personnelles visant à faire valoir un droit se rattachant au navire.

Droit maritime

Cargo

(2) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

(*a*) an action *in rem* against any cargo owned by the state if, at the time the claim arose or the proceedings were commenced, the cargo and the ship carrying the cargo were being used or were intended for use in a commercial activity; or

(*b*) an action *in personam* for enforcing a claim in connection with any cargo owned by the state if, at the time the claim arose or the proceedings were commenced, the ship carrying the cargo was being used or was intended for use in a commercial activity.

(2) L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions suivantes :

a) actions réelles contre une cargaison dont il est propriétaire et qui, au moment de la naissance du droit d'action ou de l'introduction de l'instance, était, ainsi que le navire qui la transportait, utilisée ou destinée à être utilisée dans le cadre d'une activité commerciale;

b) actions personnelles visant à faire valoir un droit se rattachant à cette cargaison, le navire qui la transportait étant, au moment de la naissance du droit d'action ou de l'introduction de l'instance, utilisé ou destiné à être utilisé dans le cadre d'une activité commerciale.

Cargaisons

Idem

(3) For the purposes of subsections (1) and (2), a ship or cargo owned by a foreign state includes any ship or cargo in the possession or

(3) Pour l'application des paragraphes (1) et (2), sont réputés appartenir à l'État étranger le navire ou la cargaison qui sont en sa posses-

Idem

control of the state and any ship or cargo in which the state claims an interest.

1980-81-82-83, c. 95, s. 7.

Property in Canada

8. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to an interest or, in the Province of Quebec, a right of the state in property that arises by way of succession, gift or *bona vacantia*.

R.S., 1985, c. S-18, s. 8; 2004, c. 25, s. 172.

PROCEDURE AND RELIEF

Service on a foreign state

9. (1) Service of an originating document on a foreign state, other than on an agency of the foreign state, may be made

(*a*) in any manner agreed on by the state;

(*b*) in accordance with any international Convention to which the state is a party; or

(*c*) in the manner provided in subsection (2).

Idem

(2) For the purposes of paragraph (1)(*c*), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Deputy Minister of Foreign Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.

Service on an agency of a foreign state

(3) Service of an originating document on an agency of a foreign state may be made

(*a*) in any manner agreed on by the agency;

(*b*) in accordance with any international Convention applicable to the agency; or

(*c*) in accordance with any applicable rules of court.

Idem

(4) Where service on an agency of a foreign state cannot be made under subsection (3), a court may, by order, direct how service is to be made.

Date of service

(5) Where service of an originating document is made in the manner provided in subsection (2), service of the document shall be deemed to have been made on the day that the Deputy Minister of Foreign Affairs or a person designated by him pursuant to subsection (2) certifies to the relevant court that the copy of

sion, dont il est responsable ou sur lesquels il revendique un droit.

1980-81-82-83, ch. 95, art. 7.

Biens situés au Canada

8. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions portant sur la reconnaissance de ses intérêts ou, dans la province de Québec, de ses droits sur des biens dépendant d'une succession ou d'une donation, ou vacants.

L.R. (1985), ch. S-18, art. 8; 2004, ch. 25, art. 172.

PROCÉDURE ET RÉPARATION

Signification à l'État étranger

9. (1) La signification d'un acte de procédure introductif d'instance à l'État étranger, à l'exclusion de ses organismes, se fait :

a) selon le mode agréé par l'État;

b) selon le mode prévu à une convention internationale à laquelle l'État est partie;

c) selon le mode prévu au paragraphe (2).

Idem

(2) La signification mentionnée à l'alinéa (1)*c*) peut se faire par remise personnelle ou par envoi recommandé d'une copie de l'acte introductif d'instance au sous-ministre des Affaires étrangères ou à la personne qu'il désigne; le sous-ministre ou cette personne transmet à son tour cette copie à l'État étranger.

Signification à l'organisme d'un État étranger

(3) La signification d'un acte introductif d'instance à un organisme d'un État étranger se fait :

a) selon le mode agréé par l'organisme;

b) selon le mode prévu à une convention internationale applicable à l'organisme;

c) selon les règles de procédure ou de pratique applicables.

Idem

(4) Dans les cas où la signification à un organisme d'un État étranger ne peut se faire conformément au paragraphe (3), le tribunal peut, par ordonnance, prescrire le mode de signification.

Date de signification

(5) La date de signification de l'acte introductif d'instance est, dans le cas prévu au paragraphe (2), celle de l'attestation au tribunal concerné, par le sous-ministre des Affaires étrangères ou la personne qu'il désigne en vertu du paragraphe (2), que l'acte a été transmis à l'État étranger.

L.R. (1985), ch. S-18, art. 9; 1995, ch. 5, art. 27.

the document has been transmitted to the foreign state.

R.S., 1985, c. S-18, s. 9; 1995, c. 5, s. 27.

Default judgment

10. (1) Where, in any proceedings in a court, service of an originating document has been made on a foreign state in accordance with subsection 9(1), (3) or (4) and the state has failed to take, within the time limited therefor by the rules of the court or otherwise by law, the initial step required of a defendant or respondent in those proceedings in that court, no further step toward judgment may be taken in the proceedings except after the expiration of at least sixty days following the date of service of the originating document.

Jugement par défaut

10. (1) Dans les cas où l'État étranger, après que signification de l'acte introductif d'instance lui a été faite conformément aux paragraphes 9(1), (3) ou (4), ne fait pas, dans les délais fixés par les règles de procédure ou de pratique du tribunal ou par une autre règle de droit, le premier acte de procédure que doit faire un défendeur ou un intimé dans une action similaire, les actes de procédure menant au jugement ne peuvent être faits qu'à l'expiration d'au moins soixante jours suivant la date de signification.

Idem

(2) Where judgment is signed against a foreign state in any proceedings in which the state has failed to take the initial step referred to in subsection (1), a certified copy of the judgment shall be served on the foreign state

(*a*) where service of the document that originated the proceedings was made on an agency of the foreign state, in such manner as is ordered by the court; or

(*b*) in any other case, in the manner specified in paragraph 9(1)(*c*) as though the judgment were an originating document.

Idem

(2) Une expédition du jugement rendu à la suite du défaut prévu au paragraphe (1) est signifiée :

a) selon le mode prescrit par le tribunal, si l'acte introductif d'instance a été signifié à l'organisme d'un État étranger;

b) sinon, selon le mode prévu à l'alinéa 9(1) *c*), comme si le jugement était un acte introductif d'instance.

Idem

(3) Where, by reason of subsection (2), a certified copy of a judgment is required to be served in the manner specified in paragraph 9(1)(*c*), subsections 9(2) and (5) apply with such modifications as the circumstances require.

Idem

(3) Dans les cas où il est nécessaire en raison du paragraphe (2) de signifier l'expédition d'un jugement selon le mode de signification prévu à l'alinéa 9(1) *c*), les paragraphes 9(2) et (5) s'appliquent, compte tenu des adaptations de circonstance.

Application to set aside or revoke default judgment

(4) A foreign state may, within sixty days after service on it of a certified copy of a judgment under subsection (2), apply to have the judgment set aside or revoked.

R.S., 1985, c. S-18, s. 10; 2004, c. 25, s. 173.

Demande en rétractation ou annulation

(4) L'État étranger dispose de soixante jours suivant la date de signification de l'expédition du jugement prévue au paragraphe (2) pour produire une demande en rétractation ou annulation de jugement.

L.R. (1985), ch. S-18, art. 10; 2004, ch. 25, art. 173.

No injunction, specific performance, etc., without consent

11. (1) Subject to subsection (3), no relief by way of an injunction, specific performance or the recovery of land or other property may be granted against a foreign state unless the state consents in writing to that relief and, where the state so consents, the relief granted shall not be greater than that consented to by the state.

Réparation sous réserve de consentement

11. (1) Sous réserve du paragraphe (3), il ne peut être accordé de réparation par voie d'injonction, d'exécution en nature ou de récupération de biens fonciers ou autres contre un État étranger, sauf dans les cas et dans la mesure où celui-ci y a consenti par écrit.

Submission not consent

(2) Submission by a foreign state to the jurisdiction of a court is not consent for the purposes of subsection (1).

Exception

(3) This section does not apply either to an agency of a foreign state or to a foreign state that is set out on the list referred to in subsection 6.1(2) in respect of an action brought against that foreign state for its support of terrorism or its terrorist activity.

R.S., 1985, c. S-18, s. 11; 2012, c. 1, s. 6.

Execution

12. (1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture except where

(*a*) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;

(*b*) the property is used or is intended to be used for a commercial activity or, if the foreign state is set out on the list referred to in subsection 6.1(2), is used or is intended to be used by it to support terrorism or engage in terrorist activity;

(*c*) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada, or

(*d*) the foreign state is set out on the list referred to in subsection 6.1(2) and the attachment or execution relates to a judgment rendered in an action brought against it for its support of terrorism or its terrorist activity and to property other than property that has cultural or historical value.

Property of an agency of a foreign state is not immune

(2) Subject to subsection (3), property of an agency of a foreign state is not immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture, for the purpose of satisfying a judgment of a court in any proceedings in respect of which the agency is not immune from the jurisdiction of the court by reason of any provision of this Act.

Consentement exprès

(2) La soumission de l'État étranger à la juridiction du tribunal ne constitue pas le consentement prévu au paragraphe (1).

Exception

(3) Le présent article ne s'applique pas aux organismes d'un État étranger ni à un État étranger inscrit sur la liste visée au paragraphe 6.1(2) dans le cadre de toute action intentée contre lui pour avoir soutenu le terrorisme ou pour s'être livré à une activité terroriste.

L.R. (1985), ch. S-18, art. 11; 2012, ch. 1, art. 6.

Exécution des jugements

12. (1) Sous réserve des paragraphes (2) et (3), les biens de l'État étranger situés au Canada sont insaisissables et ne peuvent, dans le cadre d'une action réelle, faire l'objet de saisie, rétention, mise sous séquestre ou confiscation, sauf dans les cas suivants :

a) l'État a renoncé, de façon expresse ou tacite, à son immunité relative à l'insaisissabilité et aux autres mesures mentionnées ci-dessus, toute révocation ultérieure de la renonciation ne pouvant être faite que suivant les termes de la renonciation qui l'autorisent;

b) les biens sont utilisés ou destinés à être utilisés soit dans le cadre d'une activité commerciale, soit par l'État pour soutenir le terrorisme ou pour se livrer à une activité terroriste si celui-ci est inscrit sur la liste visée au paragraphe 6.1(2);

c) l'exécution a trait à un jugement qui établit des droits sur des biens acquis par voie de succession ou de donation ou sur des immeubles situés au Canada;

d) la saisie ou l'exécution a trait à un bien autre qu'un bien ayant une valeur culturelle ou historique et à un jugement rendu dans le cadre d'une action intentée contre l'État pour avoir soutenu le terrorisme ou pour s'être livré à une activité terroriste, si celui-ci est inscrit sur la liste visée au paragraphe 6.1(2).

Biens des organismes des États étrangers

(2) Sous réserve du paragraphe (3), les biens des organismes des États étrangers sont saisissables et peuvent, dans le cadre d'une action réelle, faire l'objet de saisie, rétention, mise sous séquestre et confiscation en exécution du jugement d'un tribunal dans toute instance où les dispositions de la présente loi ne reconnaissent pas l'immunité de juridiction à ces organismes.

Military property

(3) Property of a foreign state

(*a*) that is used or is intended to be used in connection with a military activity, and

(*b*) that is military in nature or is under the control of a military authority or defence agency

is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture.

Biens militaires

(3) Sont insaisissables et ne peuvent, dans le cadre d'une action réelle, faire l'objet de saisie, rétention, mise sous séquestre et confiscation, les biens suivants de l'État étranger :

a) ceux qui sont utilisés ou destinés à être utilisés dans le cadre d'une activité militaire;

b) ceux qui sont de nature militaire ou placés sous la responsabilité d'une autorité militaire ou d'un organisme de défense.

Property of a foreign central bank immune

(4) Subject to subsection (5), property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial activity is immune from attachment and execution.

Biens d'une banque centrale étrangère

(4) Sous réserve du paragraphe (5), sont insaisissables les biens qu'une banque centrale ou une autorité monétaire étrangères détiennent pour leur propre compte et qui ne sont pas utilisés ou destinés à être utilisés dans le cadre d'une activité commerciale.

Waiver of immunity

(5) The immunity conferred on property of a foreign central bank or monetary authority by subsection (4) does not apply where the bank, authority or its parent foreign government has explicitly waived the immunity, unless the bank, authority or government has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal.

Renonciation à l'insaisissabilité

(5) Les biens mentionnés au paragraphe (4) sont saisissables si la banque ou l'autorité, ou le gouvernement dont elles relèvent, ont expressément renoncé à l'insaisissabilité, toute révocation ultérieure de la renonciation ne pouvant être faite que suivant les termes de la renonciation qui l'autorisent.

R.S., 1985, c. S-18, s. 12; 2012, c. 1, s. 7.

L.R. (1985), ch. S-18, art. 12; 2012, ch. 1, art. 7.

Assistance for judgment creditors

12.1 (1) At the request of any party in whose favour a judgment is rendered against a foreign state in proceedings referred to in section 6.1, the Minister of Finance or the Minister of Foreign Affairs may, within the confines of his or her mandate, assist, to the extent that is reasonably practical, any judgment creditor in identifying and locating the following property, unless the Minister of Foreign Affairs believes that to do so would be injurious to Canada's international relations or either Minister believes that to do so would be injurious to Canada's other interests:

(*a*) in the case of the Minister of Finance, the financial assets of the foreign state that are held within Canadian jurisdiction; and

(*b*) in the case of the Minister of Foreign Affairs, the property of the foreign state that is situated in Canada.

Aide aux créanciers bénéficiaires du jugement

12.1 (1) À la demande d'une partie ayant obtenu gain de cause à l'encontre d'un État étranger dans le cadre d'une action visée à l'article 6.1, le ministre des Finances ou le ministre des Affaires étrangères peut, dans le cadre de son mandat et dans la mesure du possible, aider le créancier bénéficiaire du jugement à identifier et localiser les biens ci-après, sauf si, de l'avis du ministre des Affaires étrangères, cela est préjudiciable aux intérêts du Canada sur le plan des relations internationales ou, de l'avis de l'un ou l'autre des ministres, cela est préjudiciable aux autres intérêts du Canada :

a) s'agissant du ministre des Finances, les actifs financiers de l'État étranger ressortissant à la compétence du Canada;

b) s'agissant du ministre des Affaires étrangères, les biens de l'État étranger situés au Canada.

Disclosure of information

(2) In exercising the power referred to in subsection (1), the Minister of Finance or the Minister of Foreign Affairs, as the case may be, may not disclose

Communication des renseignements

(2) Dans le cadre de l'exercice de ce pouvoir, le ministre ne peut communiquer aucun renseignement produit par ou pour une institution fédérale sans l'autorisation de celle-ci, ni aucun renseignement qui n'a pas été ainsi pro-

(*a*) information that was produced in or for a government institution, without the authorization of the government institution; and

(*b*) information produced in circumstances other than those referred to in paragraph (*a*), without the authorization of the government institution that first received the information.

duit sans l'autorisation de la première institution fédérale à l'avoir reçu.

Definition of "government institution"

(3) In subsection (2), "government institution" means any department, branch, office, board, agency, commission, corporation or other body for the administration or affairs of which a minister is accountable to Parliament.

2012, c. 1, s. 8.

(3) Au paragraphe (2), « institution fédérale » s'entend des ministères, directions, bureaux, conseils, commissions, offices, services, personnes morales ou autres organismes dont un ministre est responsable devant le Parlement.

2012, ch. 1, art. 8.

Définition de « institution fédérale »

No fine for failure to produce

13. (1) No penalty or fine may be imposed by a court against a foreign state for any failure or refusal by the state to produce any document or other information in the course of proceedings before the court.

13. (1) Le tribunal ne peut imposer aucune pénalité ni amende à un État étranger en raison de son abstention ou de son refus de produire des documents ou de fournir des renseignements au cours de l'instance.

Défaut de produire

Exception

(2) Subsection (1) does not apply either to an agency of a foreign state or to a foreign state that is set out on the list referred to in subsection 6.1(2) in respect of an action brought against that foreign state for its support of terrorism or its terrorist activity.

R.S., 1985, c. S-18, s. 13; 2012, c. 1, s. 9.

(2) Le paragraphe (1) ne s'applique pas aux organismes d'un État étranger ni à un État étranger inscrit sur la liste visée au paragraphe 6.1(2) dans le cadre de toute action intentée contre lui pour avoir soutenu le terrorisme ou pour s'être livré à une activité terroriste.

L.R. (1985), ch. S-18, art. 13; 2012, ch. 1, art. 9.

Exception

GENERAL

DISPOSITIONS GÉNÉRALES

Certificate is conclusive evidence

14. (1) A certificate issued by the Minister of Foreign Affairs, or on his behalf by a person authorized by him, with respect to any of the following questions, namely,

(*a*) whether a country is a foreign state for the purposes of this Act,

(*b*) whether a particular area or territory of a foreign state is a political subdivision of that state, or

(*c*) whether a person or persons are to be regarded as the head or government of a foreign state or of a political subdivision of the foreign state,

is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question, without proof of the signature of the Minister of Foreign Affairs or other person or of that other person's authorization by the Minister of Foreign Affairs.

14. (1) Le certificat délivré par le ministre des Affaires étrangères ou en son nom par la personne qu'il autorise est admissible en preuve et fait foi pour toute question touchant :

a) la qualité d'État étranger, au sens de la présente loi, d'un pays donné;

b) la qualité de subdivision politique d'une région ou d'un territoire donnés d'un État étranger;

c) la ou les personnes à considérer comme chefs d'un État étranger ou d'une de ses subdivisions politiques, ou comme formant leur gouvernement.

Il n'est pas nécessaire de prouver l'authenticité de la signature apposée sur ce certificat ni l'autorisation accordée au signataire.

Certificat du ministre des Affaires étrangères

Idem

(2) A certificate issued by the Deputy Minister of Foreign Affairs, or on his behalf by a person designated by him pursuant to subsection 9(2), with respect to service of an originating or other document on a foreign state in accordance with that subsection is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that service, without proof of the signature of the Deputy Minister of Foreign Affairs or other person or of that other person's authorization by the Deputy Minister of Foreign Affairs.

R.S., 1985, c. S-18, s. 14; 1995, c. 5, ss. 25, 27.

Idem

(2) L'attestation délivrée par le sous-ministre des Affaires étrangères ou en son nom par la personne qu'il désigne en vertu du paragraphe 9(2) est admissible en preuve et fait foi de son contenu en ce qui a trait à la signification d'un acte introductif d'instance ou d'un autre acte à un État étranger, sans qu'il soit nécessaire de prouver la signature qui y est apposée ni l'autorisation accordée au signataire.

L.R. (1985), ch. S-18, art. 14; 1995, ch. 5, art. 25 et 27.

Governor in Council may restrict immunity by order

15. The Governor in Council may, on the recommendation of the Minister of Foreign Affairs, by order restrict any immunity or privileges under this Act in relation to a foreign state where, in the opinion of the Governor in Council, the immunity or privileges exceed those accorded by the law of that state.

R.S., 1985, c. S-18, s. 15; 1995, c. 5, s. 25.

Restriction de l'immunité par décret

15. Le gouverneur en conseil, sur recommandation du ministre des Affaires étrangères, peut, par décret, limiter l'immunité ou les privilèges prévus par la présente loi, s'il estime, pour un État donné, qu'ils dépassent ceux qui sont accordés par le droit de cet État.

L.R. (1985), ch. S-18, art. 15; 1995, ch. 5, art. 25.

Inconsistency

16. If, in any proceeding or other matter to which a provision of this Act and a provision of the *Extradition Act*, the *Visiting Forces Act* or the *Foreign Missions and International Organizations Act* apply, there is a conflict between those provisions, the provision of this Act does not apply in the proceeding or other matter to the extent of the conflict.

R.S., 1985, c. S-18, s. 16; 1991, c. 41, s. 13; 2000, c. 24, s. 70.

Incompatibilité

16. Les dispositions de la *Loi sur l'extradition*, de la *Loi sur les forces étrangères présentes au Canada* et de la *Loi sur les missions étrangères et les organisations internationales* l'emportent sur les dispositions incompatibles de la présente loi.

L.R. (1985), ch. S-18, art. 16; 1991, ch. 41, art. 13; 2000, ch. 24, art. 70.

Rules of court not affected

17. Except to the extent required to give effect to this Act, nothing in this Act shall be construed or applied so as to negate or affect any rules of a court, including rules of a court relating to service of a document out of the jurisdiction of the court.

1980-81-82-83, c. 95, s. 16.

Application des règles de procédure ou de pratique des tribunaux

17. La présente loi ne porte atteinte à l'application des règles de procédure ou de pratique des tribunaux, notamment celles qui sont relatives à la signification d'un acte hors de leur ressort, que dans la mesure exigée par la nécessité de lui donner effet.

1980-81-82-83, ch. 95, art. 16.

Application

18. This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.

1980-81-82-83, c. 95, s. 17.

Champ d'application

18. La présente loi ne s'applique pas aux poursuites pénales ni à celles qui y sont assimilées.

1980-81-82-83, ch. 95, art. 17.