File No. : 35034

SUPREME COURT OF CANADA

THE ESTATE OF THE LATE ZAHRA ZIBA KAZEMI, and **STEPHEN (SALMAN HASHEMI)**

APPELLANTS

-and-

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

RESPONDENTS

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT

-and-

CHRISTOPHER D. BREDT

AMICUS CURIAE

-and-

CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNISTIE INTERNATIONALE, SECTION CANADA FRANCOPHONE, REDRESS TRUST LTD., CANADIAN ASSOCIATION OF REFUGEE LAWYERS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN BAR ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN CENTRE FOR RIGHTS, INTERNATIONAL JUSTICE, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW and IRAN HUMAN RIGHTS DOCUMENTATION CENTRE

INTERVENERS

ATTORNEY GENERAL OF CANADA'S FACTUM
(in reply to the interveners)

William F. Pentney
Deputy Attorney General of Canada
Per : Bernard Letarte
René LeBlanc
Department of Justice
284 Wellington, SAT-6060
Ottawa (Ontario) K1A 0H8
Tel: (613) 946-2776
Fax: (613) 952-6006
Email: bernard.letarte@justice.gc.ca
Counsel for the Attorney General of Canada

Christopher M. Rupar
Department of Justice
50, O'Connor
Ottawa (Ontario) K1A 0H8
Tel: (613) 941-2351
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Correspondent for Attorney General of Canada

TO:

Mr. Kurt Johnson
Mr. Mathieu Bouchard
Ms. Audrey Boctor
Mr. David Grossman
IRVING MITCHELL KALICHMAN LLP
Alexis Nihon Place, Tower 2
3500 Maisonneuve Blvd. West, Suite 1400
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 Stephen (Salman) Hashemi

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

Tel.: (613) 786-0107
Fax: (613) 563-9869
brian.crane@gowlings.com

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

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

Tel.: (514) 982-4545
Fax: (514) 284-2046
jwoods@woods.qc.ca
swoods@woods.qc.ca

Counsel for Islamic Republic of Iran, Ayatolah Sayyid Ali Khamenei, Saeed Mortazavi, Mohammad Bakhshi

Mr. Christopher D. Bredt
Borden Ladner Gervais LLP
Scotia Plaza, 44th Floor
40 King Street West
Toronto, Ontario M5H 3Y4

Tel.: (416) 367-6165
Fax: (416) 361-7063
cbredt@blg.com

Amicus Curiae

Ms. Nadia Effendi
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, Ontario K1P 1J9

Tel.: (613) 787-3562
Fax: (613) 230-8842
neffendi@blg.com

Agent for Christopher D. Bredt

Mr. John A. Terry
Ms. Sarah R. Shody
Torys LLP
Maritime Life Tower, 30th Floor
79 Wellington Street West
Toronto, Ontario MSK 1N2

Tel.: (416) 865-8245 (Mr. Terry)
Fax: (416) 865-7380 (Ms. Shody)
jterry@torys.com
sshody@torys.com

Counsel for Canadian Centre for International Justice

Mr. Jeffrey W. Beedell
McMillan LLP
Barristers and Solicitors
50 O'Connor Street, Suite 300
Ottawa, Ontario KIP 6L2

Tel. (613) 232-7171
Fax: (613) 231-3191
jeff.beedell@mcmillan.ca

Agent for Canadian Centre for International Justice

Mr. Azim Hussain
Mr. Rahool P. Agarwal
Ms. Maureen Edwards
Northern Rose Fulbright Canada LLP
Royal Bank Plaza
South Tower, Suite 3800
P.O. Box 84
Toronto, Ontario M5J 2Z4

Tel.: (514) 847-4827 (Mr. Hussain)
Tel.: (416) 216-3943 (Mr. Agarwal)
Tel.: (416) 216-4834 (ms. Edwards)
Fax: (416) 216-3930
azim.hussain@nortonrosefulbright.com
rahool.agarwal@nortonrosefulbright.com
maureen.edwards@nortonrosefulbright.com

Counsel for Redress Trust Ltd.

Ms. Sally Gomery
Northern Rose Fulbright Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, Ontario KlP 1A4

Tel.: 613-780-8604
Fax: 613-230-5459
sally.gomery@nortonrose.com

Agent for Redress Trust Ltd.

Mr. Christopher A. Wayland
Mr. Simon Chamberland
McCarthy Tétreault LLP
TD Bank Tower, Suite 5300
66 Wellington Street West
Toronto, Ontario M5K 1E6

Tel.: (416) 601-8109 (Mr. Wayland)
Tel.: (514) 397-4430 (Mr. Chamberland)
Fax: (416) 868-0673
cwayland@mccarthy.ca
schamberland@mccarthy.ca

Counsel for Canadian Civil Liberties Association

Mr. Colin S. Baxter
Cavanagh Williams Conway Baxter LLP
1111 Prince of Wales Drive, Suite 401
Ottawa, Ontario K2C 3T2

Tel.: (613) 569-8558
Fax: (613) 569-8668
cbaxter@cavanagh.ca

Agent for Canadian Civil Liberties Association

Mr. François Larocque
CazaSaikaley LLP
220 Laurier Avenue West, Suite 350
Ottawa (Ontario) K1P 5Z9

Tel.: (613) 894-4783
Fax: (613) 565-2087
francoislarocque@uottawa.ca

Counsel for Aministie International, Section Canada francophone

Ms. Alyssa Tomkins
CazaSaikaley LLP
220 Laurier Avenue West, Suite 350
Ottawa, Ontario K1P 5Z9

Tel.: (613) 564-8269
Fax: (613) 565-2087
atomkins@plaideurs.ca

Agent for Aministie International, Section Canada francophone

Ms. Jill Copeland
Sack Goldblatt Mitchell LLP
20 Dundas Street West, Suite 1100
Toronto, Ontario M5G 2G8

Tel: (416) 979-6970
Fax: (416) 591-7333
jcopeland@sgmlaw.com

Counsel for Canadian Lawyers for International Human Rights

Ms. Colleen Bauman
Sack Goldblatt Mitchell LLP
30 Metcalfe Street, Suite 500
Ottawa, Ontario K1P 5L4

Tel.: (613) 482 2463
Fax: (613) 235-3041
cbauman@sgmlaw.com

Agent for Canadian Lawyers for International Human Rights

Mr. Daniel Sheppard
Sack Goldblatt Mitchell LLP
20 Dundas Street West, Suite 1100
Toronto, Ontario M5G 2G8

Tel.: (416) 979-6442
Fax: (416) 979-4430
dsheppard@sgmlaw.com

Counsel for Canadian Association of Refugee Lawyers

Ms. Colleen Bauman
Sack Goldblatt Mitchell LLP
30 Metcalfe Street, Suite 500
Ottawa, Ontario K1P 5L4

Tel.: (613) 482 2463
Fax: (613) 235-3041
cbauman@sgmlaw.com

Agent for Canadian Association of Refugee Lawyers

Mr. Ward K. Branch
Ms. Susan M. Precious
Branch, MacMaster LLP
777 Horny Street, Suite 1410
Vancouver, British Columbia V6Z 1S4

Tel.: (604) 654-2966 (Mr. Branch)
Tel.: (604) 654-2959 (Ms. Precious)
Fax: (604) 684-3429
wbranch@branmac.com
sprecious@branmac.com

Counsel for British Columbia Civil Liberties Association

Mr. Michael J. Sobkin
18 Yorkville Street
Ottawa, Ontario K2C 4B6

Tel.: (613) 282-1712
Fax: (613) 235-3041
msobkin@sympatico.ca

Agent for British Columbia Civil Liberties Association

Mr. David Matas
225 Vaughan Street, Suite 602
Winnipeg, Manitoba R3C 1T7

Tel. : (204) 944-1831
Fax: (204) 942-1494
dmatas@mts.net

Counsel for Canadian Bar Association

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

Tel.: (613) 786-0139
Fax : (613) 563-9869
henry.brown@gowlings.com

Agent for Canadian Bar Association

Mr. John Norris
Ms. Carmen Cheung
Simcoe Chambers
116 Simcoe Street, Suite 100
Toronto, Ontario M5H 4E2

Tel. : (416) 596-2960
Fax : (416) 596-2598
john.norris@simcoechambers.com

Counsel for David Asper Centre for Constitutional Rights, International Human Rights Program, University of Toronto Faculty of Law

Ms. Martha A. Healy
Norton Rose Fulbright Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, Ontario K1P 1A4

Tel. : (613) 780-8638
Fax : (613) 230-5459
martha.healey@nortonrosefulbright.com

Agent for David Asper Centre for Constitutional Rights, International Human Rights Program, University of Toronto Faculty of Law

Mr. James Yap
130 Adelaide Street West, Suite 2600
Toronto, Ontario M5H 3P5

Tel. : (416) 992-5266
Fax : (416) 865-9010
james.yap@gmail.com

Counsel for Iran Human Rights Documentation Center

Ms. Mylène Beaulieu
Beaudry, Bertrand SSP
160 de Hôpital Blvd., Suite 107
Gatineau, Quebec J8T 8J1

Tel. : (819) 770-4480 ext. 310
Fax : (819) 595-4979
mbeaulieu@beaudry-bertrand.com

Agent for Iran Human Rights Documentation Center

TABLE OF CONTENTS

ATTORNEY GENERAL OF CANADA'S FACTUM
(in reply to the interveners)

OVERVIEW

1. The Attorney General of Canada (AGC) will address the following propositions in reply to the interveners:

   a. Section 3(1) of the *State immunity Act* (SIA) contains no ambiguity;
   b. The AGC's position with respect to section 2(e) of the *Canadian Bill of Rights* was recently confirmed by this Court;
   c. Section 7 of the *Charter* is not engaged and, in any event, the maxim "where there is a right, there is remedy" does not constitute a principle of fundamental justice under 7 of the *Charter*; and
   d. Recent jurisprudential developments confirm that there is no obligation in international law to provide victims of torture with a civil remedy for acts of torture committed outside the forum state.

A. STATUTORY INTERPRETATION OF SECTION 3(1) OF THE *STATE IMMUNITY ACT*

- Section 3(1) is not ambiguous

2. Section 3(1) of the SIA establishes a general principle of state immunity that applies in all circumstances where a foreign state is named in a lawsuit in Canada, unless the SIA provides otherwise. There is no ambiguity in this provision. Section 3(1) provides for an unqualified immunity that applies unless an exception set out in the SIA trumps it. As pointed by the Québec Court of Appeal, the meaning of the words "*except as provided by this Act – sauf exceptions prévues dans la présente loi* " are "*perfectly plain*".[1] They mean that the only exceptions to the principle of state immunity are to be found in the SIA itself.

---

[1] Judgment of the Court of Appeal, par. 39, Appellant's Record (AR), p. 77.

3. This interpretation of the SIA, which is also shared by the Ontario Court of Appeal[2], is correct. As this Court indicated in *Canada Trustco Mortgage Co. v. Canada*, "[w]hen the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process".[3] Here, the words of section 3(1) of SIA are precise and unequivocal. They enunciate the general principle of state immunity and expressly state that the exceptions to this principle are to be found in the SIA.

4. Contrary to what the Canadian Civil Liberties Association (CCLA) submits, the fact that the SIA does not explicitly mention that the immunity is conferred even in case of violation of *jus cogens* does not mean that the statute is ambiguous.

5. According to section 3(1) of the SIA, state immunity applies regardless of the basis of the claim (violation of *jus cogens* or other), unless there is a specific exception in the SIA allowing for a lawsuit to proceed against a foreign state for a particular type of claim, as is the case for section 6a) which allow claims against a foreign state for any death or personal or bodily injury that occurs in Canada.

6. Since there is only one possible interpretation of section 3(1) on the basis of its plain meaning, it is unnecessary to consider *Charter* values[4] or international law[5] to interpret this provision. As Morissette J.A. pointed out in the present case, relying on this Court ruling in *Bell ExpressVu Ltd Partnership v. R.*[6], *"the existence of a "genuine ambiguity" is a precondition for interpreting a statute in a manner consistent with values or legal principles (including, where appropriate, principles of international law) extrinsic to the text itself*".[7]

---

2 *Bouzari v. Iran*, (2004) 71 OR (3d) 675; 2004 CanLII 871 (ON CA), par. 57-58, R.B.A., Vol. I, Tab 18; *Steen v. Islamic Republic of Iran*, 2013 ONCA 30 (CanLII), par. 24, R.B.A., Vol. III, Tab 60.

3 *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, par. 10.

4 *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, par. 48; *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, 2006 SCC 48, par 29; *Bell ExpressVu Ltd Partnership v. R.*, [2002] 2 S.C.R. 559, par. 62. R.B.A., Vol. III, Tab 60. *Application under s. 83.28 of the Criminal Code (Re)*, [2002] 2 S.C.R. 248, par. 35.

5 *R. v. Hape*, [2007] 2 SCR 292, par. 53-56, R.B.A., Vol. II, Tab 48; *Schreiber v Canada*, [2002] 3 R.C.S. 269, par. 50, R.B.A., Vol. III, Tab 57; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, par. 137; *Daniels v. White*, [1968] S.C.R. 517, p. 541, R.B.A., Vol. 1, Tab 25;

6 *Bell ExpressVu Ltd Partnership v. R.*, [2002] 2 S.C.R. 559, par. 62. R.B.A., Vol. III, Tab 60.

7 Judgment of the Court of Appeal, par. 40, AR, p. 77.

7. In fact, the CCLA invites this Court to read a new exception to state immunity into the SIA. This Court should not accept this invitation as the creation by courts of additional exceptions to state immunity runs contrary to the plain and ordinary meaning of section 3. It would usurp Parliament's role in that regard[8] and require the court to modify the very wording of section 3(1), something that would not be an appropriate judicial exercise, as confirmed in *Lavigne v. Canada (Official Languages Commissioner).*[9]

8. In any event, as further discussed below, the absence of an exception to state immunity for claims based on breach of *jus cogens* is consistent with international law. There is no obligation in international law to provide victims of torture with a civil remedy for acts of torture committed abroad.

- **Section 3(1) contains no implicit limit**

9. According to section 3(1) of the SIA, state immunity also applies regardless of the nature of act of the foreign state, unless the SIA provides otherwise. For instance, section 5 of the SIA provides that 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.

10. Thus, Amnesty international's proposition to the effect that state immunity only applies to sovereign acts of foreign states is incorrect.

11. There is nothing in the scheme of the SIA or in the wording of section 3(1) itself that suggests that this provision contains an implicit limit to the effect that only certain types of acts – sovereign acts- are covered by the immunity. To reach such conclusion, the Court would have to read in words limiting the scope of this very encompassing provision. This method of statutory interpretation has been rejected by this Court.[10]

---

[8] *Arar v. Syrian Arab Republic*, [2005] O.J. No 752, par. 25, R.B.A., Vol. I, Tab 11.
[9] *Lavigne c. Canada (Commissariat aux langues officielles)*, [2002] 2 R.C.S. 773, par. 55.
[10] *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, par. 90; *R. v. Hinchey*, [1996] 3 S.C.R. 1128, par. 36.

12. Furthermore, the proposition is incompatible with the context that led to the enactment of the SIA, which shows that the concept of "sovereign act" (*acta jure imperii*), to the extent it remains relevant today, should only be used when interpreting sections of the SIA pertaining to the commercial activity exception (*acta jure gestionis*).

13. When Parliament codified state immunity law in 1982, it abandoned the Latin concepts of *acta jure imperii* and *acte jure gestionis* that were used at common law. Rather, it decided to enact the general principle of state immunity and a few exceptions, including the commercial activity exception. As appears from the Standing Senate Committee on Legal and Constitutional Affairs, Parliament chose to use the expression "commercial activity" rather than to continue to employ a somewhat outdated Latin terminology, which could lead to some difficulties when applied.[11] If those concepts remain of some relevance today, it is solely when one has to determine whether a specific act is covered by the "commercial activity" exception found in the SIA.

14. Indeed, in *Schreiber v. Canada*, this Court rejected the United States of America's argument to the effect that the concept of *sovereign act* has bearing on the interpretation of the SIA as a whole. In that case, the US Government contended that the exception set out in s. 6 of the SIA did not apply if the bodily injury flowed from a sovereign act. However, this Court dismissed this argument essentially on the ground that this concept was related to the commercial activity exception set out in section 5 and because the section 6 exception was not limited in scope by this concept, but applied to all torts committed by a foreign state which cause death and injury in Canada.[12]

15. The same reasoning should apply here as there is nothing in section 3 that limits the immunity conferred to foreign states other than the terms, "except as provided by this Act".

16. For these reasons, the Quebec Court of Appeal was correct when deciding that "the SIA is a complete codification of the law of state immunity in Canada, that no exceptions to

---

[11] *Schreiber v. Canada*, [2002] 3 R.C.S. 269, par. 30-34, R.B.A., Vol. III, Tab 57.

immunity other than those contained therein may be invoked by a party suing a foreign state in a Canadian court and that state immunity may apply to acts of torture."[13]

B. SECTION 2e) OF THE *CANADIAN BILL OF RIGHTS*

17. The recent decision of this Court in *Amaratunga v. Northwest Atlantic Fisheries Organization* confirms that section 2e) of the *Canadian Bills of Rights* does not provide for a right of access to courts of law or a "right to sue" where the courts are statutorily barred from exercising adjudicative jurisdiction.[14]

18. In *Amaratunga*, the Court held that section 2e) of the *Bill of Rights* was not infringed by the granting of jurisdictional immunity to an international organization, even if it meant that the claimant would be left without a forum to air his grievance and without a remedy. In doing so, this Court relied on *Authorson v. Canada* and on the Québec Court of Appeal decision under appeal in the present case:

> [61] As for the *Canadian Bill of Rights*, the "right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" recognized in s. 2(*e*) does not create a substantive right to make a claim. Rather, it provides for a fair hearing if and when a hearing is held. (See also *Islamic Republic of Iran v. Hashemi*, 2012 QCCA 1449 (CanLII), 2012 QCCA 1449, [2012] R.J.Q. 1567, at para. 109; *Authorson v. Canada (Attorney General)*, 2003 SCC 39 (CanLII), 2003 SCC 39, [2003] 2 S.C.R. 40, at paras. 59-61). Section 2(*e*) is the source of a procedural right, not of a substantive right.[15]

19. Therefore, the challenge based on section 2e) of the *Bill of Rights* should be dismissed.

C. SECTION 7 OF THE *CHARTER*

20. The David Asper Center for Constitutional Rights, International Human Rights Program, University of Toronto Faculty of Law (DAC) argues that the maxim "where there is a

---

[12] Idem.
[13] Judgment of the Court of Appeal, par. 60, A.R., p. 86-87.
[14] *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66 (CanLII).

right there must be a remedy for its violation" should be recognized as a principle of fundamental justice. DAC submits that section 3(1) of the SIA is unconstitutional under section 7 of the *Charter* to the extent that it prevents access to an effective remedy for gross human rights violations.

21. This argument should be rejected for the following reasons.

22. First, section 7 of the *Charter* is not engaged in the present case. As explained at paragraphs 95-106 of the AGC's main factum, the Appellants' statement of claim does not contain any allegation supporting the contention that Mr. Hashemi's right to security of the person is engaged by the application of s. 3(1) of the SIA. Also, the Appellants do not contend before this Court that Mr. Hashemi's right to liberty is infringed by the SIA.

23. Second, the DAC proposes the recognition of a principle of fundamental justice that is not invoked by the Appellants themselves. As per Abella J.'s order dated September 23, 2013, interveners are not entitled to raise new issues.

24. In any event, despite the fact that the maxim "where there is a right, there is a remedy" is commonly invoked as a matter of legal theory, it does not meet the established requirements for a rule or principle to be elevated to a principle of fundamental justice for the purposes of section 7 of the *Charter*. Specifically, it cannot be considered "a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate".[16] The long-accepted nature of state immunity and limitation periods, to give two examples, suggests that the maxim in question is not actually a principle of fundamental justice. Each of these procedural mechanisms is a fundamental feature of the Canadian legal system, although they can have the procedural effect of denying a remedy for an alleged violation of a right.[17]

---

[15] *Ibid*. par. 61.

[16] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, par. 113, R.B.A.,Vol. II, Tab 50; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, par. 8, R.B.A., Vol. I, Tab 23; *R. v. D.B.*, [2008] 2 S.C.R. 3, 2008 SCC 25, par. 46, R.B.A., Vol. II, Tab 45.

[17] *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66 (CanLII), par. 63.

D. INTERNATIONAL LAW

- The appropriate role of international law in Canadian law

25. Like the Appellants, the interveners place a great deal of weight on international law. They allege that international law has evolved and now obliges states to provide victims of torture with a civil remedy for acts of torture committed abroad. Therefore, Canadian law should recognize such an obligation and state immunity should be set aside accordingly.

26. While international law can assist in the interpretation of domestic statutory provisions or the provisions of the *Charter* in certain situations, it is not determinative in either context.

27. With respect to the interpretation of section 7 of the *Charter*, international law is one of the contextual factors that can be used to determine whether infringement on a particular section 7 right accords with the principles of fundamental justice. However, in and of itself, international law does not control domestic law.[18]

28. With respect to statutory interpretation, a provision is presumed to be compatible with international law. Therefore, when confronted with two plausible interpretations, courts will favour the one that is compatible with Canada's obligations in international law. However, if a statute is unambiguous, Parliamentary sovereignty requires courts to give effect to a statute even if it derogates from international law, as this Court indicated in *R. v. Hape*[19]. In any event, granting state immunity in the present case is compatible with international law, as discussed below.

---

[18] *Suresh v.Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R.. 3, par. 46, 60, R.B.A., Vol. III, Tab 61; *R. v. Hape*, [2007] 2 S.C.R. 917 at paras. 55-56, R.B.A., Vol. II, Tab 48; *Health Services and Support – Facilities Subsector Bargaining Assn. v. B.C.*, 2007 SCC 27, [2002] 2 S.C.R. 391 at paras. 69-70, R.B.A., Vol. I, Tab 31.

- **International law does not support the interveners' position**

29. There is currently no obligation in international law to provide victims of torture with a civil remedy for acts of torture committed abroad. Therefore, the absence of an exception to state immunity for claims based on breach of *jus cogens* is consistent with international law.

30. This was recently reiterated by the European Court of Human Rights (the European Court) in *Jones and others v. The United Kingdom* rendered on January 14, 2014.[20]

31. In this ruling, which confirmed the House of Lords decision under appeal, the European Court recognized the importance of State immunity and confirmed that section 6 of the *European Convention on Human Rights* was not violated by the application of state immunity in cases where torture was alleged as the basis of the claim, thereby reaffirming its ruling in *Al-Adsani v. United Kingdom.*[21]

32. The European Court indicated that it considers the 2012 International Court of Justice (ICJ) judgment in *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening*) as authoritative regarding the content of customary international law with respect to state immunity and held that this judgment clearly established that no *jus cogens* exception to state immunity had yet crystallised.[22]

33. In *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening*), the ICJ found that Italy had violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it for breach of *jus cogens*[23].

---

19 *R. v. Hape*, [2007] 2 SCR 292, par. 53-56, R.B.A., Vol. II, Tab 48; *Schreiber v. Canada*, [2002] 3 R.C.S. 269, par. 50, R.B.A., Vol. III, Tab 57; *Daniels v. White*, [1968] S.C.R. 517, p. 541, R.B.A., Vol. 1, Tab 25.

20 *Jones and others v. The United Kingdom* (European Court of Human Rights, Fourth Section Judgment of 14 January 2014), Applications Nos. 34356/06 and 40528/06.

21 *Al-Adsani v. United Kingdom*, [2001] ECHR 751, par. 56, R.B.A., Vol. I, Tab 9.

22 *Jones and others v. The United Kingdom*, supra note 19, par. 198.

23 *Jurisdictional Immunities of State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, online: international Court of Justice, http:www.icj-cij.org/docket/files/143/16883.pdf, R.B.A., Vol. II, Tab 33.

34. At par. 93 and 95 of its judgement, the ICJ makes it clear that there is no conflict between rules of *jus cogens* and the rules on State immunity:

> 93] The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. […]recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a jus cogens rule […].
> …
>
> [95] To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A jus cogens rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor is there anything inherent in the concept of jus cogens which would require their modification or would displace their application.[24]

35. On this issue, the ICJ was relying on *Jones v. United Kingdom* decided by the House of Lords and on *Bouzari v. Iran* by the Ontario Court of Appeal, where similar conclusions were reached.

36. In the *Jones* ruling dated January 14, 2014, the European Court also considered the argument to the effect that Article 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[25] obligates State parties to provide civil remedies in cases of torture no matter where that torture was inflicted. The European Court noted that this argument found support in the Committee Against Torture's comments, but dismissed it on the ground that no decision of the ICJ or international arbitral tribunals has given to Article 14 the interpretation proposed by the Committee. The Court also relied on the fact this interpretation of Article 14 had been rejected by

---

[24] *Ibid*., par. 93, 95, R.B.A., Vol. II, Tab 33.
[25] [1984] 1485 U.N.T.S. 85 (entry into force for Canada on 24 July 1987).

Courts in both Canada and the United Kingdom and that the United States has lodged a reservation to the Convention to express its understanding that the provision was only intended to require redress for acts of torture committed within the forum State[26]. This ruling by the European Court confirms the AGC proposition that more weight should be given to the extant judicial rulings interpreting Article 14 of the *Convention* than to the non-binding and often hortatory statements that have been made on this matter by the UN Committee against Torture.

37. Ultimately, this recent ruling of the European Court confirms that international law does not currently recognize an exception to State immunity in cases of torture committed abroad. It also confirms the related point that international human rights law – including the *Convention against Torture* – does not currently impose an obligation on Canada to provide civil remedies in cases of torture committed abroad. According to this ruling, state immunity still applies in circumstances such as those at issue in the present case.

Ottawa, this day of January 2014.

_____

Bernard Letarte
René LeBlanc
Department of Justice Canada
284 Wellington, SAT-6060
Ottawa (Ontario) K1A 0H8
Tel.: (613) 946-2776
Fax: (613) 952-6006
E-mail: bernard.letarte@justice.gc.ca
Counsel for the Attorney General of Canada

[26] *Jones and others v. The United Kingdom*, supra note 19, par. 208.

LIST OF AUTHORITIES