Court File No. 35034

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Quebec)

BETWEEN:

ESTATE OF ZAHRA (ZIBA) KAZEMI and STEPHAN (SALMAN) HASHEMI

Appellants
(Appellant/Respondent)

- and -

ISLAMIC REPUBLIC OF IRAN, AYATOLLAH ALI KHAMENEI, SAEED MORTAZAVI, and MOHAMMAD BAKHSHI

Respondents
(Respondents/Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Mis-en-cause)

- and -

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PART I – OVERVIEW

1. Customary international law requires that victims of gross human rights violations have an enforceable right to seek and obtain effective remedies for the wrongs committed against them. This right includes the right of "access to justice" – that is the right to be able to submit a complaint to a judicial body for consideration on the merits.

2. At least where the wrongful act is a gross human rights violation, the right to an effective remedy is a peremptory norm of international law, and imposes a duty on all states to ensure that effective remedies are available to victims of human rights abuses, regardless of whether the state is implicated in the wrongful act.

3. The right of victims to an effective remedy is in tension with state immunity. Although this right is not incompatible with state immunity in all cases, when the only way to pursue an effective remedy is before the courts of a foreign state, international law requires that state immunity be set aside so that victims' claims may be adjudicated on their merits. Otherwise, upholding immunity would render human rights protections illusory and perpetuate impunity.

PART II – POSITION ON APPELLANTS' QUESTIONS

4. The interpretation of s. 3(1) of the *SIA* and its constitutionality should be informed by Canada's obligations under international law, particularly the right to an effective remedy. CARL's submissions are intended to assist the Court in understanding these principles.

PART III – STATEMENT OF ARGUMENT

A. CUSTOMARY INTERNATIONAL LAW GUARANTEES THE RIGHT TO AN EFFECTIVE REMEDY FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS

5. It is a cornerstone of international law that any violation of an obligation gives rise to a duty to make reparations.[1] The corollary of the duty to make reparations is the right of victims to have an effective remedy. The 'right to an effective remedy', contained in numerous human rights treaties,[2] has become well-established as a norm of customary international law.[3] The

[1] *Factory at Chorzów (Germany v. Poland)*, Judgment of 13 September 1928, Ser. A, No. 17 (P.C.I.J.), at 29, **BoA, Tab 16**; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, [2004] I.C.J. Rep. 12, at para. 119, **BoA, Tab 4**;

[2] *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), 213 U.N.T.S. 222 ["*ECHR*"], Art. 13, **BoA, Tab 40**; *International Covenant on Civil and Political Rights* (1966), 999 U.N.T.S. 171 ["*ICCPR*"], Art. 2(3), **BoA, Tab 41**; *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), 660 U.N.T.S. 195, Art. 6, **BoA, Tab 42**; *American Convention on Human Rights* (1969),

right, which applies even when wrongful acts are committed by public officials acting in their official capacity,[4] requires that victims receive reparations for harms suffered, and that ongoing violations cease.[5] States have a duty to ensure the realization and protection of this right to all persons within their jurisdiction, regardless of the identity of the perpetrator of the violation.[6]

6. The right to an effective remedy encompasses a range of procedural and substantive norms. One is "access to justice", the right to submit a claim of a rights violation to a competent authority which is empowered to deal with the substance of the complaint.[7] The Grand Chamber of the European Court of Human Rights held that, where public officials violated a norm as central as the prohibition against torture, "access to a court whereby the individual could hold the responsible officials to account in adversarial proceedings and obtain an enforceable order for compensation if the claim was substantiated" unquestionably realizes this right.[8]

7. The right of access to justice, an integral aspect of the right to an effective remedy, was identified as a *jus cogens* norm by the Inter-American Court of Human Rights in *Goiburú*.[9] As a *jus cogens* norm, this right cannot be derogated from by states under any circumstances.[10]

1144 U.N.T.S. 143 ["*ACHR*"], arts. 25, 63(1), **BoA, Tab 37**; *African Charter on Human and Peoples' Rights* (1981), 1520 U.N.T.S. 217, Art. 7(1)(a), **BoA, Tab 34**; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), 1465 U.N.T.S. 85 ["*CAT*"], Art. 14(1), **BoA, Tab 39**; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990), 2220 U.N.T.S. 3, Art. 83, **BoA, Tab 43**. On the use of treaties to identify principals of customary international law, see International Law Commission, "Report of the International Law Commission covering its second session, 5 June – 29 July 1950" in *Yearbook of the International Law Commission, 1950, Vol. II*, UN Doc. A/CN.4/Ser.A/1950/Add.1 (1957) 364, at paras. 24-30, **BoA, Tab 50**.

[3] *Universal Declaration of Human Rights*, GA Res. 217 A (III) (1948), Art. 8, **BoA, Tab 44**; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principals and procedures to be applied to reparations, ICC-01/04-01/06-2904 (7 August 2012)(ICC, T.Ch.I), at paras. 185-186, **BoA, Tab 28**; *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* (2005), GA Res. 60/147, UN Doc. A/RES/60/147 ["*Basic Principles*"], Arts. 11-13, **BoA, Tab 38**; *Case of Castillo-Páez v. Peru*, Judgment of November 3, 1997 (Merits), Ser. C, No. 34 (Int.-Am. Ct. H.R.), at para. 82, **BoA, Tab 8**.

[4] *ICCPR, supra*, Art. 2(1), **BoA, Tab 41**; *ECHR, supra*, Art. 13, **BoA, Tab 40**; UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) ["*Comment 31*"], at para. 18, **BoA, Tab 54**.

[5] *Comment 31, supra*, at paras. 15-16, **BoA, Tab 54**; *Basic Principles, supra*, Arts. 18-23, **BoA, Tab 38**.

[6] *ICCPR, supra*, Art. 2(3)(a), **BoA, Tab 41**; *ECHR, supra*, Art. 1, **BoA, Tab 40**; *ACHR, supra*, Art. 1(1), **BoA, Tab 37**, *Comment 31, supra*, at para. 8, **BoA, Tab 54**.

[7] *Soering v. United Kingdom* [Plen.], App. No. 14038/88, Judgment of 7 July 1989 (Eur. Ct. H.R.), at para. 120, **BoA, Tab 29**; *Chahal v. United Kingdom* [GC], App. No. 22414/93, Judgment of 15 November 1996 (Eur. Ct. H.R.), at para. 145, **BoA, Tab 11**; *Basic Principles, supra*, Arts. 3(c), 12-14, **BoA, Tab 38**.

[8] *Z and Others v. United Kingdom* [GC], App. No. 29392/95, Judgment of 10 May 2001 (Eur. Ct. H.R.) ["*Z and Others*"], at paras. 106-110, **BoA, Tab 33**.

[9] *Case of Goiburú et al. v. Paraguay*, Judgment of September 22, 2006 (Merits, Reparations and Costs), Ser. C, No. 153 (Int.-Am. Ct. H.R.) ["*Goiburú*"], at para. 131, **BoA, Tab 10**; see also *Cabrera v. Commision Tecnica Mixta de*

8. Access to justice for gross human rights abuses is also an *erga omnes* norm:[11] a legal rule of an interest to every state. All states have an interest as well as a duty[12] to ensure that *erga omnes* norms are complied with. From its inception in the *Barcelona Traction* decision, the concept of *erga omnes* rules have been intimately tied into human rights.[13] The generalized nature of these rules means that even where a state is not implicated in a human rights violation, it maintains both an interest in, and an obligation to ensure that the wrongful acts cease, and that victim has access to effective remedies.

9. The duty of all states to ensure the realization of this right has been recognized in international jurisprudence. In *Goiburú*, a case against Paraguay before the Inter-American Court of Human Rights, the Court found that the non-party Honduras, the country where one of the alleged perpetrators had been granted asylum, had a duty of cooperation to ensure that effective judicial proceedings in Paraguay could take place.[14]

10. Similarly in *Nada* the European Court of Human Rights held that the right to an effective remedy required Switzerland to allow the claimant to challenge, in Swiss courts, a travel ban imposed on him by the UN Security Council's "1267 Committee". This was notwithstanding the fact that, as a member of the UN, Switzerland was legally required to give domestic effect to the committee's sanctions. The absence of any domestic means to judicially challenge the UN travel ban constituted a violation of the right to an effective remedy by Switzerland.[15]

11. Although the obligation to ensure access to an effective remedy is broad, it is not limitless. The *erga omnes* nature of the right to an effective remedy prohibits any state from frustrating access to justice for a victim; it does not go so far as to require every state in the

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Salto Grande, 305 Fallos de la Corte Suprema 2150 (1983)(Sup. Ct. Argentina) ["*Cabrera*"], at 2167-2168, **BoA, Tab 6**.

[10] See, eg., *Vienna Convention on the Law of Treaties* (1969), 1155 U.N.T.S. 331, Art. 53, **BoA, Tab 45**.

[11] Michael Byers, "Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules" (1997) 66 Nordic J. Int'l L. 211 ["*Byers*"], at 236, **BoA, Tab 47** ("Moreover, *jus cogens* rules necessarily apply *erga omnes*."); see also *Jurisdictional Immunities of the State (Italy v. Germany; Greece Intervening)*, Dissenting Opinion of Judge Cançado Trindade (I.C.J.), at para. 212, **BoA, Tab 23**.

[12] *Byers, supra*, at 232-233, **BoA, Tab 47**; See also Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc. A/HRC/10/3 (2009), at paras. 53, 55, **BoA, Tab 52** (*jus cogens* nature of torture prohibition giving rise to *erga omnes* duty on all states to cooperate in eradication of torture).

[13] *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, [1970] I.C.J. Rep. 3 ["*Barcelona Traction*"], at paras. 33-34, **BoA, Tab 9**.

[14] *Goiburú, supra*, at paras. 123-133, 164-166, **BoA, Tab 10**. Indeed, the court found all states had such a duty.

[15] *Nada v. Switzerland* [GC], App. No. 10593/08, Judgment of 12 September 2012 (Eur. Ct. H.R.), at paras. 41-50, 207-214, **BoA, Tab 26**.

world to invite litigation in its own courts. The positive obligation to actually provide access to a court is limited to those victims within the state's jurisdiction – in effect, within its territory.[16]

B. When Immunities Conflict with Access to an Effective Remedy, International Law Requires that Immunities be Set Aside

12. While a state that has jurisdiction over a victim of a foreign human rights abuse may not be liable directly for the human rights violation at issue, it may still violate international law by interfering with the individual's ability to obtain an effective remedy. Domestic laws that bar judicial consideration of the substance of claims of human rights abuses through immunities *prima face* conflict with the right to an effective remedy.[17]

13. The international jurisprudence relied upon by the Attorney General of Canada, notably the *Al-Adsani* decision, recognizes the inherent tension between state immunity and the right to access a court to obtain an effective remedy.[18] The Attorney General is wrong to suggest that the European Court of Human Rights ("ECtHR") has held that the provision of state immunity against suits in foreign courts is *per se* an acceptable limit on the ability to access a court.[19] Rather, the Grand Chamber has held that "in cases where the application of the principal of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court must ascertain whether the circumstances of the case justify such restriction."[20]

14. *Al-Adsani* itself states that the provision of immunity may not operate in such a way as to impair the very essence of the right to access a court to seek an effective remedy. To be lawful, the provision of state immunity must both be directed towards a legitimate aim and not have a

[16] The concept of "jurisdiction" in international law is largely based upon the territorial sovereignty of states. While principals of "effective control" may broaden or narrow this concept, absent unusual circumstances, a state's jurisdiction for human rights purposes is co-extensive with its territory: See *Ilaşcu and Others v. Moldova and Russia* [GC], App. No. 48787/99, Judgment of 8 July 2004 (Eur. Ct. H.R.), at paras. 310-319, **BoA, Tab 20**; *Coard et al. v. United States of America*, Case 10.951, Report No. 109/99 of 29 September 1999 (Int.-Am. Com. H.R.), at para. 37, **BoA, Tab 12.**

[17] UN Human Rights Committee, *General Comment 20: Prohibition of Torture or Cruel, Inhumane or Degrading Treatment or Punishment*, U.N. Doc. HRI/GEN/1/Rev.6 (1994) 151, at para. 15, **BoA, Tab 53**; *Comment 31, supra*, at para. 18, **BoA, Tab 54**; *Case of Barrios Altos v. Peru*, Judgment of 14 March, 2001 (Merits), Ser. C., No. 75 (Int.-Am. Ct. H.R.), at para. 43, **BoA, Tab 7.**

[18] *Al-Adsani v. The United Kingdom* [GC], App. No. 35763/97, Judgment of 21 November 2001 (Eur. Ct. H.R.) ["*Al-Adsani*"], at paras. 52-53, **BoA, Tab 3.**

[19] Factum of the Attorney General of Canada, para. 63-65.

[20] *Cudak v. Lithuania* [GC], App. No. 15869/02, Judgment of 23 March 2010 (Eur. Ct. H.R.) ["*Cudak*"], at para. 59, **BoA, Tab 14.** Notably, in *Cudak*, the court concluded that Lithuania's provision of immunity to Poland in the Lithuanian courts violated the *European Convention on Human Rights* on the facts of the case. See *Cudak, supra*, at paras. 60-75, **BoA, Tab 14.**

disproportionate impact on the victim.[21] When either of these requirements is not met, the provision of state immunity crystalizes into a violation of the right to an effective remedy.

15. Immunity will only be proportionate in its impact of victims of wrongful acts where victims are nevertheless provided with some "reasonable alternative means to protect effectively their rights".[22] Where no reasonable and effective alternative exists, immunity is incompatible with the right to an effective remedy,[23] and the immunity must be set aside.

16. This approach to state immunity was accepted by the Constitutional Court of Slovenia in *A.A.*, in a case against Germany arising out of the Second World War. Using the 'legitimate aim/proportionality' test, the Court found that the provision of immunity to Germany did not violate the principal of "judicial protection". In concluding that the effect of upholding Germany's immunity was proportionate the Court recognized that the claimants could effectively bring a claim before the German courts.[24] Had the German courts not represented a realistic and effective alternative means of seeking redress, the provision of immunity for Germany would have been disproportionate, and constituted a violation of the right to an effective remedy.[25]

17. The requirement to set aside immunity when it is incompatible with the right to an effective remedy is also demonstrated in the jurisprudence on the immunity of international organizations ("IOs"). Like states, IOs enjoy immunity from the jurisdiction of national courts on the basis of sovereign equality. As the International Law Commission's Special Rapporteur on the Relations Between States and International Organizations explained, when sovereign equals create an IO, the organization enjoys immunity to ensure that no state can improperly influence it. Since all states share an equal interest in the functioning of the institutions they create, IO immunity, like state immunity, ensures that states respect the sovereign equality of their peers by guaranteeing that no individual state may assert authority over an IO.[26]

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[21] *Al-Adsani, supra* at paras. 53, **BoA, Tab 3**; *Cudak, supra*, at para. 55, **BoA, Tab 14.**

[22] *Beer and Regan v. Germany* [GC], App. No. 28934/95, Judgment of 18 February 1999 (Eur. Ct. H.R.), at para. 58, **BoA, Tab 5**; *Waite and Kennedy v. Germany* [GC], App. No. 29083/94, Judgment of 18 February 1999 (Eur. Ct. H.R.), at para. 68, **BoA, Tab 31.**

[23] *Cordova v. Italy (No. 1)*, App. No. 40877/98, Judgment of 30 January 2003 (Eur. Ct. H.R.) ["*Cordova*"], at paras. 49-71, **BoA, Tab 13.**

[24] *A.A. v. Republic of Germany*, Up-13/99-24 (8 March 2001)(Const. Ct. Slovenia), at para. 21, **BoA, Tab 1.**

[25] Ricardo Pavoni, "Human Rights and the Immunities of Foreign States and International Organizations" in Erika De Wet & Jure Vidmar, eds., *Hierarchy in International Law: The Place of Human Rights* (Oxford: OUP, 2012) 71 ["*Pavoni*"], at 95-96, **BoA, Tab 51.**

[26] Leonardo Diaz Gonzales, International Law Commission Special Rapporteur, "Fourth Report on Relations Between States and International Organizations (Second Part of the Topic)" in *Yearbook of the International Law*

18. In fact, IOs enjoy a form of immunity that is stronger than that possessed by states: whereas states enjoy immunity only for their sovereign acts under modern custom, IOs enjoy absolute immunity against all claims, even in relation to commercial acts.[27]

19. Yet even with this enhanced form of immunity, national courts have been setting aside IO immunities for over 30 years where the absence of adequate alternatives mean that national court litigation is the sole mechanism to obtain an effective remedy. The doctrinal unity between both state and IO immunity makes this jurisprudence equally persuasive in resolving the interaction between state immunity and the right to an effective remedy.

20. Perhaps the earliest court decision recognizing this principal was the 1983 decision of the Supreme Court of Argentina in *Cabrera*, in which the immunity of the Mixed Technical Commission of Salto Grande was set aside. The Court found that the right to an effective remedy was *jus cogens* and because there were no avenues other than national court litigation to challenge the acts of the Mixed Commission, the court found that the right to an effective remedy required that the IO's immunity be set aside.[28]

21. Since *Cabrera*, several national supreme courts have followed this same reasoning:

- In 2005 the French Court of Cassation set aside the immunity of the African Development Bank because of the absence of any international court or tribunal to hear claims against the bank;[29]
- In 2007 the Italian Court of Cassation set aside the immunity of the International Plant Genetic Resources Institute because the IO had failed to submit to the jurisdiction of any international tribunal to hear claims against it by its employees;[30]
- In 2009 the Belgian Court of Cassation set aside the immunity of the Western European Union.[31] Notably, while the WEU had established an internal dispute

Commission, 1989, Vol. II, Part One, U.N. Doc. A/CN.4/SER.A/1989/Add.1(Part 1) 153 ["*Fourth Report*"], at para. 28, **BoA, Tab 48**; See also *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir., 1983), at 615-616, **BoA, Tab 25.**

[27] *Fourth Report, supra*, at para. 33, **BoA, Tab 48.**

[28] *Cabrera, supra*, at 2167-2168, **BoA, Tab 6**; *Pavoni, supra*, at p. 99, **BoA, Tab 51.**

[29] *Haas v. Banque Africaine de developpment*, Chambre Sociale, pourvoi no. 04-41012 (24 January 2005)(Ct. Cass. France), **BoA, Tab 19**; see also *Agreement Establishing the African Development Bank (Khartoum Agreement)* (1964), 510 U.N.T.S. 46, Art. 52, s. 1, **BoA, Tab 35.**

[30] *Drago v. International Plant Generic Resources Institute*, All Civil Section, Case No. 3718, ILDC 827 (19 February 2007)(Sup. Ct. Cass. Italy), **BoA, Tab 15.**

resolution mechanism, the Belgian Court found as a fact that it lacked sufficient judicial independence from the WEU itself and so inadequate as an alternative to judicial proceedings before a national court;[32]

- The same day it released its decision with respect to the WEU, the Belgian Court of Cassation issued two decisions setting aside the immunity from execution of the General Secretariat of the African, Carribean and Pacific Group of States due to the absence of an alternative means for the victim to obtain compensation.[33]

22. These cases demonstrate that, notwithstanding that IO immunity is both derivative of, and stronger than state immunity, IO immunity gives way to the right to an effective remedy when adequate alternative means to seek redress are unavailable. Under international law, no immunity may operate as an absolute bar to obtaining a remedy.

23. The Attorney General notes that the ICJ in *Jurisdictional Immunities of the State* rejected an exception to state immunity in cases where there was no "effective alternative means of securing redress".[34] The ICJ did so because the majority was not aware of national court decisions applying such a principle.[35] This conclusion was criticized in the separate opinion of Judge Bennouna[36] and the dissenting opinion of Judge Yusuf[37] for not meaningfully considering the issue. Both judges recognized that responsibility for ensuring access to effective remedies requires immunities to be lifted where there is no adequate alternatives way to secure redress.

24. The finding of the majority must be viewed in its context. It was a cursory statement made with little analysis, and no consideration of principles of state responsibility, the right to an

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[31] See *Agreement on the Status of Western European Union, National Representatives and International Staff* (1956), 1258 UNTS 313, Art. 4, **BoA, Tab 36.**

[32] *Western European Union v. Seidler*, No. S.04.0129.F (21 December 2009)(Ct. Cass. Belgium), **BoA, Tab 32.**

[33] *General Secretariat of African, Caribbean and Pacific Group of States v. L. M.-A.*, No. C.03.0328.F (21 December 2009)(Ct. Cass. Belgium), **BoA, Tab 17**; *General Secretariat of African, Caribbean and Pacific Group of States v. B.D.*, No. C.07.0407.F (21 December 2009)(Ct. Cass. Belgium), **BoA, Tab 18.** Immunity from execution is a closely related concept to immunity from jurisdiction: see *SIA*, s. 12(1)-(3).

[34] Factum of the Attorney General of Canada, at para. 91.

[35] *Jurisdictional Immunities of the State (Italy v. Germany; Greece Intervening)*, Judgment of 3 February 2012 (I.C.J.) ["*Jurisdictional Immunities*"], at para. 101, **BoA, Tab 21.**

[36] *Jurisdictional Immunities of the State (Italy v. Germany; Greece Intervening),* Separate Opinion of Judge Bennouna (I.C.J.), at paras. 13-15, 25-31, **BoA, Tab 22.**

[37] *Jurisdictional Immunities of the State (Italy v. Germany; Greece Intervening)*, Dissenting Opinion of Judge Yusuf (I.C.J.), at paras. 28-31, 44, 51-58, **BoA, Tab 24.**

effective remedy, or the principle of adequate alternative means.[38] In asserting the non-existence of relevant state practice, the majority appeared to be unaware of the above-noted jurisprudence.

25. While the ECtHR chamber decision in *Mothers of Srebrenica* also did not accept this principal of international law,[39] it is notable that it merely followed the majority decision in *Jurisdictional Immunities of the State*, providing no greater analysis than the ICJ did. Moreover, the decision was largely concerned with problems of imputing responsibility to a state for the acts of a UN Peacekeeping force, a unique issue of jurisdiction that is not raised by the instant appeal. Indeed, the chamber left open the possibility that the UN had the legal obligation to provide access to an adequate alternative remedy, notwithstanding its own immunity.[40]

C. ADEQUATE AND EFFECTIVE ALTERNATIVE REMEDIES FOR VICTIMS OF GROSS HUMAN RIGHTS VIOLATIONS, PARTICULARLY REFUGEES, ARE ELUSIVE

26. The immunities of foreign states are usually upheld because in most situations effective alternatives are available. However, in cases of gross human rights violations, such alternatives are elusive. This is particularly true in the case of refugees and protected persons who have fled their home states as a result of human rights abuses committed against them.

27. The most common alternative remedy to litigation before a foreign national court is to bring a claim before the defendant state's own courts. Where the state conduct is a gross human rights violation, this is not a realistic option. Inherent in the very status of 'refugee' or 'protected person' is that the individual faces a risk of persecution, torture, or cruel, inhuman or degrading treatment or punishment if they were to return to their home state.[41]

28. Expecting those who have fled from gross human rights violations, and who are at risk of continued abuse if they return, to expose themselves to such a risk is inconsistent both with their right to refugee protection under international law, and the right to a remedy that is effective.

29. Customary international law also recognizes the possibility of "diplomatic protection", a process in which one state espouses the claim of an injured national against a foreign state in order to obtain compensation. This is the procedure that the majority in *Jurisdictional Immunities*

[38] The same is of the *Al-Adsani* judgment, the House of Lords' decision in *Jones v. Kingdom of Saudi Arabia*, [2006] UKHL 26, and the New South Wales Court of Appeal's decision in *Zhang v. Zemin*, [2010] NSWCA 255.
[39] *Stichting Mothers of Srebrenica and Others v. The Netherlands* (dec.), App. No. 65542/12, undated decision (Eur. Ct. H.R.) ["*Mothers of Srebrenica*"], at paras. 161-165, **BoA, Tab 30.**
[40] *Mothers of Srebrenica, supra*, at para. 165, **BoA, Tab 30.**
[41] *Immigration and Refugee Protection Act,* S.C. 2001, c. 27, ss. 96-97; *Németh v. Canada (Justice),* [2010] 3 S.C.R. 281, at para. 98, **BoA, Tab 27.**

of the State alluded to as still available to vindicate the rights of the Italian war internees whose suits against Germany formed the basis of the dispute before the Court.[42]

30. In most cases, diplomatic protection does not represent a reasonable alternative to national court litigation. First, engaging in diplomatic protection is a discretionary decision of the state.[43] There exists no "right" to such a remedy. Moreover, customary international law does not permit a state to exercise diplomatic protection on behalf of refugees under their protection. Diplomatic protection may only be exercised by a state on behalf of their own nationals.[44]

31. The third and final common alternative to national court litigation is resort to an international court or tribunal. A regional human rights court may represent an adequate alternative to domestic litigation, but accessing such a body is contingent on the defendant state falling within the court's jurisdiction.

32. Access to more universal bodies, such as the UN treaty monitoring committees, is still contingent on the defendant state accepting the jurisdiction of the body to hear individual complaints.[45] Moreover, bodies such as the Human Rights Committee have been found by at least one Canadian appellate court to lack the power to grant binding judgments either as a matter of domestic or international law,[46] a position maintained by the Attorney General of

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[42] *Jurisdictional Immunities, supra*, at para. 104, **BoA, Tab 21.**

[43] *Barcelona Traction, supra*, at paras. 35-36, **BoA, Tab 9**; International Law Commission, "Draft Articles on Diplomatic Protection with Commentary" in *Report of the International Law Commission – Fifty-Eighth Session*, UN GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (2006) 22 ["*ILC Draft Articles*"], at 29, **BoA, Tab 49.**

[44] *ILC Draft Articles, supra*, Art. 3(1), **BoA, Tab 49.** Attempts to expand diplomatic protection to cover refugees in the 1930s were defeated, and more recent attempts by the International Law Commission to progressively expand the scope of diplomatic protection do not go so far as to embrace refugees: see Chittharanjan J. Amerasinghe, *Diplomatic Protection* (Oxford, OUP, 2008) ["*Amerasinghe*"], at 117, 119, **BoA, Tab 46**; *ILC Draft Articles, supra*, Art. 8(3), **BoA, Tab 49.**

The situation for individuals such as the Appellant – who has both Canadian and Iranian nationality – is more complex. While there is some support for the view that in cases of dual nationality, a claim may be espoused against a state of nationality so long as the victim's nationality with the espousing state is "effective", "dominant" or "predominant" (depending on the particular authority), there is equal support for the position that no claim may be made against a state of nationality. The question is unresolved as a matter of customary international law: *Amerasinghe, supra*, at 106-110, **BoA, Tab 46.**

[45] For example, for an individual complaint to be made to the Committee Against Torture, the defendant state must be a party to the Convention Against Torture, and also have made a special declaration recognizing the competence of the Committee to hear individual complaints against it: *CAT, supra*, Art. 22, **BoA, Tab 39.**

[46] *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107 (C.A.), at para. 32, **BoA, Tab 2.**

Canada in this appeal.[47] If this view is correct – a matter of some dispute – then such bodies cannot constitute an adequate means by which to secure a remedy that is effective.

33. Refugees and other similarly situated persons are generally unable to seek an effective remedy for gross human rights violations other than by resorting to foreign national courts. Domestic courts represent an indispensable mechanism by which human rights are given substantive protection through the provision of effective remedies.[48] International law recognizes this important role by resolving conflicts between state immunity and the right to an effective remedy in favour of effective remedies. When adequate and effective alternatives to domestic litigation are absent, international law requires national courts to set aside immunity and consider complaints on their merits. Anything less would render the right to an effective remedy – the cornerstone of international human rights enforcement – theoretical and illusory.[49]

PART IV – SUBMISSIONS RESPECTING COSTS

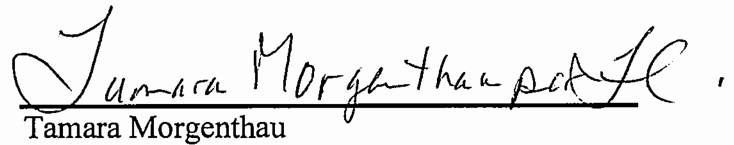
34. CARL does not seek its costs of this appeal, and asks that no costs be awarded against it.

PART V – ORDER REQUESTED

35. CARL seeks an order permitting it to make oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DONE at the City of Ottawa, this 14 day of November, 2013



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[47] Factum of the Attorney General of Canada, at paras. 77-79 (albeit in the context of general comments and not communications of decisions on individual petitions. However, the AG's argument is based on the character of the Committee, and not on any distinction between their comments, observations and decisions).
[48] *Pavoni, supra*, at 76, **BoA, Tab 51**.
[49] Cf. *Cordova, supra*, at para. 58, **BoA, Tab 13**.

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PART VII – STATUTORY PROVISIONS

State Immunity Act, R.S.C. 1985, c. S-18	**Loi sur l'immunité des États, L.R.C. 1985, ch. S-18**
3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.	**3.** (1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.
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	**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) 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;	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) 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;	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) 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	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) 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.	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).

(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. (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.	(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. (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.
Immigration and Refugee Protection Act, S.C. 2001, c. 27 **96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country. **97.** (1) A person in need of protection is a person in Canada whose removal to their	**Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27** **96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner. **97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.