Court File No. 04-CV-278915CM2

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KUNLUN ZHANG, SHENLI LIN, LIZHI HE,
TIANQI LI, CHANGZHEN SUN and NA GAN

Plaintiffs

and

JIANG ZEMIN, LI LANQING, LUO GAN, LIU JING and WANG MAOLIN

Defendants

and

ALL-CHINA LAWYERS ASSOCIATION

Intervener

and

CANADIAN CENTRE FOR INTERNATIONAL JUSTICE
and AMNESTY INTERNATIONAL CANADA

Interveners

FACTUM OF THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE and AMNESTY INTERNATIONAL CANADA

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I. Overview

1. At the present time, Article 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("*Convention against Torture*")[1] recognizes the universal right of torture survivors to obtain civil redress and the commensurate obligation of state parties to provide all survivors of torture with an enforceable right to fair and adequate compensation.

2. In 2004, the Court of Appeal for Ontario noted in *Bouzari v. Iran* "that Article 14 … has not been interpreted to date to require a state to provide access to its courts" with respect to acts of torture committed outside its jurisdiction (emphasis added).[2] The Court of Appeal therefore upheld the dismissal of the case under the *State Immunity Act*[3].

3. International law regarding the scope of Article 14 has evolved significantly since the Court of Appeal's decision in *Bouzari*. Notably, the United Nations body tasked with interpreting the *Convention against Torture* has concluded, in response to *Bouzari*, that state parties – and specifically Canada – are required to provide civil remedies to all torture survivors within their jurisdiction. In addition, state practice now increasingly provides civil remedies to torture survivors and in some cases has overridden assertions of state immunity.

4. Since the *State Immunity Act* cannot be applied in a manner that is inconsistent with Canada's evolving international obligations with respect to torture, the Court can properly turn to the common law of state immunity. Canadian common law incorporates international law, and international law – in its emerging form – does not grant immunity for severe violations like torture. As a result, the common law removes immunity from government officials and agents that engage in torture.

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[1] *Convention Against Torture*, UN Doc. A/39/51 (1984); 1465 UNTS 85; R.T. Can. 1987 nº 36; Art. 14 [Joint Book of Authorities, Tab 81]
[2] *Bouzari v. Iran* (2004), 71 O.R. (3d) 675 at para. 83 (C.A.) [Joint Book of Authorities, Tab 7].
[3] *State Immunity Act*, R.S.C. 1985 c. S-18 [Joint Book of Authorities, Tab 1].

5. The *Convention against Torture* and recent international law developments mandate both the exercise of universal civil jurisdiction with respect to torture and the removal of state immunity for torture.

II. Facts

6. The Canadian Centre for International Justice ("CCIJ") and Amnesty International Canada ("AI") adopt the facts as alleged by the Plaintiffs in the Statement of Claim.

III. Issues

7. The CCIJ & AI will present submissions on the following two issues:

(i) Whether Canada is mandated under Article 14 of *Convention against Torture* and customary international law to exercise universal civil jurisdiction with respect to torture; and

(ii) Whether the exercise of universal civil jurisdiction renders state immunity inapplicable in such proceedings.

IV. Law and Argument

Issue 1: *The* Convention against Torture *mandates the exercise of universal civil jurisdiction with respect to torture.*

1. The Convention against Torture*: general principles*

8. The prohibition of torture is a peremptory norm of international law: it is absolute and allows no derogation in any circumstance. The torture prohibition forms part of customary

international law[4] and has been codified in several international treaties.[5] As stated by Lord Bingham: "there can be few issues on which international legal opinion is more clear than on the condemnation of torture."[6]

9. The United Nations *Convention against Torture* is the world's most important legal instrument on the subject of torture. It has been ratified by 146 of 192 countries (including Canada and China) making it one of the most well-adhered-to international treaties.[7]

10. The object and purpose of the *Convention against Torture*, as stated in its Preamble, is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world". To this end, the state parties agreed to define torture at international law (Article 1); to prohibit torture everywhere and in every circumstance, including during times of war or national emergencies (Article 2); to prohibit the expulsion or return of persons towards states where they are likely to be tortured (Article 3); and to codify the customary international obligation of state parties to exercise universal criminal jurisdiction with respect to torture (Articles 4-9).

11. Article 14 of the *Convention against Torture* is particularly relevant to the case at bar because it recognizes the universal right of torture survivors to obtain civil redress and the commensurate obligation of state parties to provide it. Article 14 reads in part as follows:

> **Article 14**
>
> 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

[4] *Bouzari v. Iran* (2004), at para. 86-87 (C.A.) [Joint Book of Authorities, Tab 7].
[5] *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 17 [Joint Book of Authorities, Tab 38]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Apr. 11, 1950, 213 U.N.T.S. 222, Art. 3 [Joint Book of Authorities, Tab 39]; *International Covenant on Civil and Political Rights*, Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Art. 7 [Joint Book of Authorities, Tab 40]; *American Convention on Human Rights*, Nov. 22, 1969, 1144 U.N.T.S. 123, Art. 5(2) [Joint Book of Authorities, Tab 41]; *African Charter on Human and Peoples' Rights*, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, Art. 5 [Joint Book of Authorities, Tab 42].
[6] *A(FC) and Others v. Secretary of State for the Home Department,* 2005 UKHL 71 at para. 33 [Joint Book of Authorities, Tab 43]
[7] Convention against Torture, Status of ratification report. [Joint Book of Authorities, Tab 81].

possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. The scope of article 14 of the Convention against Torture

12. Article 14 mandates the exercise of universal civil jurisdiction with respect to torture, wherever committed. In other words, it requires states to provide civil remedies to all victims of torture over which their courts have jurisdiction. As international law stands today, Article 14 does not, as the courts in *Bouzari* concluded based on the law at the time, limit its reach only to torture committed within a state's territory.

13. This view is consistent with and supported by the general canon of treaty interpretation at international law that 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 light of its object and purpose." [8] The "ordinary meaning" of the terms of Article 14 is that it requires state parties to provide all survivors of torture with an enforceable right to fair and adequate compensation. Article 14 contains no territorial limitations; it applies to torture committed everywhere.

14. The "context" of Article 14 includes its surrounding provisions, its drafting history and subsequent related state practice. This state practice includes, as outlined below, the enactment of a universal cause of action by the United States as an implement of Article 14, decisions by the courts of other countries to provide civil remedies for torture outside their borders, and the comments and recommendations of the Committee against Torture regarding its universal scope.

15. The "object and purpose" of the *Convention against Torture*, namely, "to make more effective the struggle against torture … throughout the world"[9] (Emphasis added), are also consistent with the recognition and exercise of universal civil jurisdiction under Article 14.

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[8] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, [1980] Can. T.S. No. 37, Art. 31(1) [Joint Book of Authorities, Tab 44].
[9] *Convention against Torture*, Preamble [Joint Book of Authorities, Tab 81].

16. In *Bouzari v. Iran*, after considering conflicting expert evidence on the issue, the Superior Court took the view that Article 14 "creates no obligation on Canada to provide access to the courts so that a litigant can pursue an action for damages against a foreign state for torture committed outside Canada."[10] The Court of Appeal deferred to the Superior Court's conclusion, holding "that Article 14 … has not been interpreted to date to require a state to provide access to its courts" with respect to acts for torture committed outside its jurisdiction.[11] (Emphasis added). Indeed, the expert witness relied on by the Court of Appeal and the Superior Court in *Bouzari* reviewed the submissions to and reports by the Committee against Torture up to that time and found "there had been no negative comment from the Committee" about the failure of states to grant civil remedies for extraterritorial torture.[12]

17. The situation is now different. International law regarding the scope of Article 14 has evolved significantly since the decisions of the Ontario courts in *Bouzari*. Notably, the United Nations body tasked with interpreting the *Convention against Torture* has concluded, in response to *Bouzari*, that state parties – and specifically Canada – are required to provide civil remedies to all torture survivors within their jurisdiction. In addition, state practice now increasingly provides civil remedies to torture survivors and in some cases has overridden assertions of state immunity.

(i) International law evolves

18. The Supreme Court of Canada recently adopted the oft quoted words of Lord Denning: "It is certain that international law does change. I would use of international law the words which Galileo used of the earth: 'But it does move.' International law does change and the courts have applied the changes without the aid of any Act of Parliament".[13]

19. The same principle applies to the interpretation of treaties. With specific reference to the *Convention against Torture*, the Supreme Court of Canada directed that "international

[10] *Bouzari v. Iran*, [2002] O.J. No. 1624 at para. 54 (S.C.J.) [Joint Book of Authorities, Tab 20].
[11] *Bouzari v. Iran* (2004), at para. 83 (C.A.) [Joint Book of Authorities, Tab 7].
[12] *Bouzari v. Iran*, [2002] O.J. No. 1624 at para. 51 (S.C.J.) [Joint Book of Authorities, Tab 20].
[13] *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 36 [Joint Book of Authorities, Tab 2]

conventions must be interpreted in the light of current conditions"[14] (Emphasis added). Human rights treaties, much like constitutions, are properly regarded as living instruments and should be interpreted progressively, with a view of progressively fulfilling their primary object and purpose. This principle was affirmed by the House of Lords with respect to the Geneva Conventions:

> It is clear that the signatory states intended that *the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded*.[15] (Emphasis added.)

(ii) After Bouzari, Article 14 was authoritatively interpreted by the Committee against Torture to require civil remedies for extraterritorial torture

20. The United Nations Committee against Torture ("the Committee") is the world's authoritative body for the interpretation of the *Convention against Torture*. Established under Part II (Articles 17-24) of the *Convention against Torture*, the Committee is a body composed of "ten experts of high moral standing and recognized competence in the field of human rights",[16] to whom state parties mandatorily submit periodic reports on "the measures they have taken to give effect to their undertakings" under the Convention.[17] State parties may also recognize the competence of the Committee to receive complaints from individuals "who claim to be victims of a violation by a State Party of the provisions of the Convention".[18] Canada has acceded to the Committee's complaint-receiving authority.[19] Moreover, the 146 state parties to the *Convention against Torture* empower the Committee to monitor their compliance with their treaty obligations and to make "such general comments on the report as it may consider appropriate".[20]

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[14] *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3 at para. 87 [Joint Book of Authorities, Tab 5]

[15] *R. v. Secretary of State For The Home Department, Ex Parte Adan,* [2000] UKHL 67 at p. 18, citing with approval Laws LJ's decision at the Court of Appeal: [1999] 3 W.L.R. 1274 at 1296 (C.A.) [Joint Book of Authorities, Tab 79]. See also, Shaheed Fatima, *Using International Law in Domestic Courts,* Oxford, Hart Publishing, 2005 at p. 100 [Joint Book of Authorities, Tab 80].

[16] *Convention against Torture*, Article 17(1), [Joint Book of Authorities, Tab 81].

[17] *Convention against Torture*, Article 19(1), [Joint Book of Authorities, Tab 81].

[18] *Convention against Torture*, Article 22(1), [Joint Book of Authorities, Tab 81].

[19] Convention against Torture, Status of ratification report at p. 12.

[20] *Convention against Torture*, Article 19(3), [Joint Book of Authorities, Tab 81].

21. In 2005, after considering Canada's periodic reports and individual submissions on, *inter alia*, the dismissal of the *Bouzari* litigation in Ontario's courts, the Committee sent a clear message to Canada regarding the scope of its obligations under Article 14 of the *Convention against Torture*. In its report, the Committee noted as a subject of concern "the absence of effective measures [in Canada] to provide civil compensation to victims of torture in all cases" and recommended that Canada should "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture."[21] (Emphasis added)

22. Since 2005, the Committee has made similar comments and recommendations to other state parties to the *Convention against Torture.*[22] In 2006, the Committee recommended that the Republic of Korea "ensure in its legal system… that all victims obtain redress and have an enforceable right to fair and adequate compensation".[23] Similarly, in 2007, the Committee recommended that Japan "should take all necessary measure[s] to ensure that all victims of acts of torture or ill-treatment can exercise fully their right to redress, including compensation and rehabilitation."[24] Most recently, in 2009, the Committee urged New Zealand to "consider withdrawing its reservation to article 14 of the Convention and ensure the provision of fair and adequate compensation through its civil jurisdiction to all victims of torture."[25]

23. Thus, the situation has changed considerably since the Superior Court and the Court of Appeal considered the meaning of Article 14 in *Bouzari*. It is now clearly established, according to the expert view of the Committee against Torture, that Article 14 mandates the establishment

[21] Conclusions and recommendations of the Committee against Torture: Canada, UN CAT, 34th Sess., UN Doc. CAT/C/CR/34/CAN (7 July 2005) at para. 4(g) and 5(f) [Joint Book of Authorities, Tab 47].
[22] See List of issues (Benin), UN Doc. CAT/C/BEN/Q/2 (9 July 2007), at para. 20 [Joint Book of Authorities, Tab 48] and List of issues (Ukraine), UN Doc. CAT/C/UKR/Q/5/Rev.1 (26 Feb. 2007), at para. 30 [Joint Book of Authorities, Tab 49], where the Committee asked Benin and Ukraine to clarify whether existing compensation mechanisms were available to non-nationals as required by Article 14.
[23] Conclusions and recommendations of the Committee against Torture: Republic of Korea, UN CAT, 36th Sess., UN Doc. CAT/C/KOR/CO/2 (25 July 2006) at para. 8(a) [Joint Book of Authorities, Tab 50].
[24] Conclusions and recommendations of the Committee against Torture: Japan, UN CAT, 38th Sess., UN Doc. CAT/C/JPN/CO/1 (3 August 2007) at para. 23 [Joint Book of Authorities, Tab 51].
[25] Conclusions and recommendations of the Committee against Torture: New Zealand, UN CAT, 42nd Sess., UN Doc CAT/C/NZL/CO/5 (14 May 2009) at para. 14 [Joint Book of Authorities, Tab 52].

and exercise of universal civil jurisdiction in *all cases* for the benefit of *all victims* of torture over whom the courts of states parties have jurisdiction.

24. Though not strictly binding in law, the comments and recommendations of the Committee constitute highly authoritative, indeed definitive, interpretations of the *Convention against Torture*. Canadian courts consistently and quite properly refer to the authoritative comments and recommendations of such treaty monitoring bodies. For instance, in ***Suresh v. Canada (MCI),*** the Supreme Court of Canada relied on a 2000 report from the Committee against Torture to support its reading of the *Convention against Torture* in that case.[26] Also, in 2007, the Supreme Court of Canada followed the International Human Rights Committee's interpretation of Article 22 of the *International Convention on Civil and Political Rights*.[27]

25. Other such examples abound in our law[28], illustrating that Canadian courts are respectful of the international institutions and structures to which Canada assented. Justice La Forest described the Canadian judicial approach to treaty monitoring bodies in these terms: "[W]e do not confine ourselves to polite references to the international agreements themselves, but examine with care the interpretations given to them by international institutions".[29]

26. The Committee may lack coercive powers but it enjoys great legitimacy by virtue of the fact that 146 of the world's countries have signed on to the *Convention against Torture*, thereby agreeing to submit to the Committee's processes and expertise. This monitoring system, that Canada negotiated and assented to, would be rendered meaningless if courts simply ignored their essential function in the international legal order. Indeed, international obligations apply to all organs of the state, including courts, which must strive to give full effect to Canada's undertakings.

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[26] ***Suresh v. Canada (MCI),*** [2002] 1 S.C.R. 3 at para. 73 [Joint Book of Authorities, Tab 5].
[27] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 at para. 74 [Joint Book of Authorities, Tab 53].
[28] ***Li v. Canada (MCI),*** [2005] F.C.J. No. 1 at para. 20-24 (F.C.A.) [Joint Book of Authorities, Tab 54]; ***Li v. Canada (MCI)***, [2003] F.C.J. No. 1934 at para. 34-35 (F.C.C.) [Joint Book of Authorities, Tab 4]; ***Bouaouni v. Canada (MCI)***, [2003] F.C.J. No. 1540 at para. 34-40 (F.C.C.) [Joint Book of Authorities, Tab 55] ; ***Thamotharampillai v. Canada (MCI),*** [2001] F.C.J. No. 599 at para. 24-30 (F.C.C.) [Joint Book of Authorities, Tab 56] ; ***Gosselin v. Quebec (A.G.),*** [1999] J.Q. No. 1365 at para 342-347 (C.A.) [Joint Book of Authorities, Tab 57].
[29] G. V. La Forest, "Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 *C.Y.I.L.* 89 at 98 [Joint Book of Authorities, Tab 58].

27. It is Canada's stated policy to submit to and respect the findings and recommendations of treaty monitoring bodies:

> Canada takes its international human rights obligations seriously. Canada regularly submits its human rights record for review by UN monitoring bodies and accepts the authority of the UN human rights treaty-monitoring committees to hear complaints from Canadian citizens under the *Optional Protocol* to the *International Covenant on Civil and Political Rights* and the *Convention Against Torture*. These international mechanisms provide an independent perspective on the state of human rights in Canada, and allow the Canadian government to review laws or policies which may be in conflict with international obligations. This willingness to accept independent, constructive criticism is critical to Canada's credibility, both domestically and internationally.[30]

28. It is noted that the House of Lords gave short shrift to the Committee's 2005 report on Canada. With no basis in law (for there could have been none), Lord Bingham inexplicably concluded the legal authority of the Committee's conclusions was "slight", while Lord Hoffman considered it as having "no value".[31] The House of Lords was improperly dismissive of the Committee's paramount role in interpreting the *Convention against Torture* and accordingly undermined the international legal framework of the convention with which the United Kingdom agreed to comply. As demonstrated above, the House of Lords' dismissal of the Committee's value is not in line with Canadian practice.

29. Finally, through their reports and recommendations, treaty-monitoring bodies have a measurable impact on the development of international law as a whole. As noted by van Ert:

> [T]he reports, statements and recommendations of treaty-monitoring bodies serve principally to ensure compliance with their respective instruments. They also serve, however, to elucidate and develop the content of the international obligations they enforce. In this sense, the treaty-monitoring bodies may not only apply international law but also develop it.[32]

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[30] Foreign Affairs and International Trade Canada, Policy Statement: "Canada's Commitment to Human Rights" [Joint Book of Authorities, Tab 59]

[31] *Jones v. Saudi Arabia*, [2006] UKHL 26 at para. 23 (Lord Bingham) and para. 57 (Lord Hoffman) [Joint Book of Authorities, Tab 23]

[32] Gib van Ert, *Using International Law in Canadian Courts,* 2nd ed., Toronto, Irwin Law, 2008 at 38 [Joint Book of Authorities, Tab 60].

30. In keeping with the Canadian approach to the work of treaty monitoring bodies, the Court can and should adopt the Committee against Torture's authoritative interpretation of Article 14 and recognize Canada's obligation to ensure that all torture survivors have access to fair and adequate compensation. Such a ruling would not be contrary to *Bouzari* but would rather reflect the significant developments that have occurred since *Bouzari* was decided.

(iii) State practice supports the extraterritorial scope of Article 14

31. It can no longer accurately be maintained that state practice does not support the extraterritorial scope of Article 14. Indeed, the judicial and legislative practice of the United States, of several civil law countries (most notably France) and of Canada support a broader interpretation of Article 14.

United States of America

32. The Court of Appeal, in summarizing the opinion of an expert witness in *Bouzari*, took notice of the fact that, when it ratified the *Convention against Torture*, "the United States issued an interpretive declaration indicating that it understood Article 14 to require a state to provide a private right of action for damages only for acts of torture committed within the jurisdiction of that state."[33] The expert used this fact, among others, to conclude that Canada was not required to provide civil remedies in torture cases against foreign governments.

33. Whatever weight this executive "understanding" of Article 14 might have had upon ratification in 1990, it was superseded by the statements of both houses of Congress when they enacted the *Torture Victim Protection Act* ("TVPA"), a statute that implements the *Convention against Torture* into domestic law by creating a civil cause of action for torture wherever committed.[34] The TVPA specifically authorizes civil lawsuits, just like this one, against individuals who have acted "under actual or apparent authority, or color of law, of any foreign nation."

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[33] *Bouzari v. Iran* (2004), at para. 83 (C.A.) [Joint Book of Authorities, Tab 7].
[34] *Torture Victim Protection Act*, Pub. L. 102–256, Mar. 12, 1992, 106 Stat. 73, 28 U.S.C. §1350 note. [Joint Book of Authorities, Tab 61].

34. In their 1991 reports accompanying the TVPA bill, both the House of Representatives and the Senate explicitly noted that the TVPA was primarily intended to implement the Article 14 obligation to provide civil jurisdiction over torture. The congressional reports explicitly refer to *Filártiga v. Peña-Irala,*[35] a landmark case on civil redress for extraterritorial torture, and to the general "no safe haven" policy the TVPA implements with respect to foreign officials who commit torture. For example, in its report, the Senate Committee on the Judiciary stated that "this legislation will carry out the intent of the CAT…This legislation will do precisely that – by making sure that torturers and death squads will no longer have a safe haven in the United States."[36]

35. In cases involving human rights abuses outside the United States, U.S. federal district courts consistently characterize the TVPA as an implementation of the *Convention against Torture's* obligation under Article 14 to provide a private remedy for torture.[37] As a result, U.S. courts routinely assert civil jurisdiction over acts of torture committed outside the United States by foreign officials.[38]

36. The universal civil jurisdiction established under the TVPA faithfully implements Article 14 of the *Convention against Torture*. As a result, and in stark contrast to its later admonition against Canada, the Committee against Torture's 2000 report on U.S. compliance with its treaty

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[35] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir 1980) [Joint Book of Authorities, Tab 22].

[36] Senate Committee on the Judiciary, Report on the Torture Victim Protection Act of 1991 to accompany S. 313, as amended, S. Rep. No. 249, 102d Cong., 1st Sess. (1991). See also Committee on Foreign Affairs and on the Judiciary, House of Representatives, Report to accompany HR 2092, HR Rep. No. 367, 102d Cong., 1st Sess., pt. 1 (1991). Both congressional reports are reprinted in Beth Stephens *et al.*, *International Human Rights Litigation in U.S. Courts,* 2nd ed., The Hague, Brill, 2008, App. E, at pp. 561 and 568. [Joint Book of Authorities, Tab 62].

[37] *Flores v. Southern Peru Copper Corp.,* 414 F.3d 233 at 247 n.20 (2nd Cir. 2002) [Joint Book of Authorities, Tab 63]; *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 at 92 (D.C. Cir. 2002) [Joint Book of Authorities, Tab 64]. See also Beth Stephens *et al.*, *International Human Rights Litigation in U.S. Courts,* 2nd ed., The Hague, Brill, 2008 at 77-79 [Joint Book of Authorities, Tab 65]

[38] "Until the mid-1990s, international human rights litigation in U.S. courts focused primarily on lawsuits against foreign government officials sued for violations committed outside the United States." Beth Stephens *et al.*, *International Human Rights Litigation in U.S. Courts,* 2nd ed., The Hague, Brill, 2008, at 281. [Joint Book of Authorities, Tab 66]

obligations praised the United States for its "broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the United States of America." [39]

Civil Law Countries

37. The extraterritorial scope of Article 14 is also supported by and consistent with the universal criminal jurisdiction established under Articles 4-9 of the *Convention against Torture*. The Court of Appeal in *Bouzari* acknowledged that states have followed Article 4's requirements by "allowing prosecution of individuals for acts of torture."[40] The creation of universal criminal jurisdiction under the *Convention against Torture* necessarily entails the recognition of a corresponding jurisdiction over civil claims because many civil law countries permit survivors and survivors' rights organisations to join criminal proceedings as civil parties (often called "*partie civile*") and obtain damages as part of the court's sentence. Justice Breyer of the United States Supreme Court explained the significance of these civil actions:

> The fact this procedural consensus exists [viz. a consensus that 'universal jurisdiction exists to prosecute a subset' of certain universally condemned behaviour which includes torture] suggests that recognition of universal jurisdiction in respect of a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement para. 404, Comment b. That is because 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 proceedings itself.[41] (Emphasis added.)

38. Torture survivors may become civil parties in criminal proceedings based on universal jurisdiction in many countries, including Argentina, Austria, Belgium, Denmark, Finland, France,

[39] Conclusions and Recommendations of the Committee against Torture : United States of America, UN Doc. A/55/44 (15 May 2000) at para. 178(b) [Joint Book of Authorities, Tab 67].
[40] *Bouzari v. Iran* (2004), at para. 71 (C.A.) [Joint Book of Authorities, Tab 7].
[41] *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 762 (2004) [Joint Book of Authorities, Tab 30].

Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Senegal, Spain and Sweden.[42]

39. Thus, in 2009, France's highest court upheld the jurisdiction of French national courts under the *Convention against Torture* to prosecute foreign nationals accused of committing torture in Cambodia during the Khmer Rouge regime.[43] Significantly, the Cour de Cassation explicitly recognized the rights of survivors, as civil parties, to obtain compensation for acts of extraterritorial torture under Article 14 of the *Convention against Torture*.[44]

40. Likewise, in 2008, the Cour d'assises du Bas-Rhin in Strasbourg found Khaled Ben Saïd, a former Tunisian Vice-Consul to France, guilty of torturing a woman in Tunisia in 1996. The proceedings were an exercise of universal criminal jurisdiction under the *Convention against Torture*. Moreover, in a manner consistent with Article 14, the survivor and two human rights organisations were permitted to join the proceedings as civil parties.[45]

41. In 2007, the Cour d'Assise of Brussels permitted 164 civil parties to join the criminal proceedings against Bernard Ntuyahaga on accusations of genocide, among other international crimes.[46] Numerous other examples exist of cases where civil parties joined proceedings for crimes of universal jurisdiction.[47]

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[42] REDRESS, *Universal Jurisdiction in the European Union: Country Studies,* London, REDRESS Trust, 2004 [Joint Book of Authorities, Tab 70].
[43] *Affaire Billon*, France, Cour de Cassation, No. 07-88330, 21 January 2009 [Joint Book of Authorities, Tab 71]
[44] *Affaire Billon*, France, Cour de Cassation, No. 07-88330, 21 January 2009, at pp. 4-8 [Joint Book of Authorities, Tab 71]
[45] FIDH Press Release, "Khaled Ben Saïd, former Tunisian Vice-consul in France, condemned for torture by the Criminal court of Strasbourg" December 16, 2008 [Joint Book of Authorities, Tab 72].
[46] *Procureur fédéral v. Ntuyahaga*, Belgium, Cour d'assise de l'arrondissement administratif de Bruxelles-Capitale, No. 005417, July 2007 at pp. 4-13 [Joint Book of Authorities, Tab 73].
[47] *E.g.*: **France**: The Collectif des parties civiles pour le Rwanda (CPCR), the Fédération internationale des droits de l'homme (FIDH) and Ligue des droits de l'homme (LDH) were granted civil party status courts in fifteen (15) other cases involving alleged Rwandan génocidaires. See CPCR list of cases [Joint Book of Authorities, Tab 74]; See also *Re Javor*, France, Cour de Cassation, No. 95-81527, 26 March 1996 where French Cour de Cassation recognized the criminal jurisdiction of French courts under the Convention against Torture and the standing of civil parties in such proceedings, but ultimately dismissed claim for lack of personal jurisdiction over the defendants. [Joint Book of Authorities, Tab 75]; **Spain**: *Guatemala Genocide Case*, Constitutional Court Judgement No. 237/2005, 26 September 2005 at pp. 7-8 [Joint Book of Authorities, Tab 76]; **Senegal**: *Guengueng c. Habré*, Cour du Cassation du Sénégal, arrêt No. 14/2001, 21 March 2001 [Joint Book of Authorities, Tab 77]

42. That many countries permit civil claims to be raised in criminal proceedings based on universal jurisdiction constitutes further state practice in support of the extraterritorial scope of Article 14. As the above cases show, this practice has become particularly widespread since the *Bouzari* case was decided.

Canada

43. Further state practice in support of the extraterritorial scope of Article 14 can be found in Canadian law. The Yukon *Torture Prohibition Act* creates a civil cause of action against "[e]very public official, and every person acting at the instigation of or with the consent or acquiescence of a public official, who inflicts torture".[48] While "public official" is defined as "any person in the public service of the Yukon", the act does not restrict the cause of action to torture committed within the territory.[49] At the second reading of Bill No. 31, the Yukon's Minister of Justice stated: "this Act will be evidence of Canada's obligation under the Convention [against Torture]."[50]

Issue 2: *Canada's obligations under the* Convention against Torture *and recent international developments render state immunity inapplicable to civil proceedings for torture*

1. Canadian Courts must interpret legislation in light of Canada's international obligations

44. It is a well-established principle of international and Canadian law that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[51] Therefore, Canada's statutory and common law of state immunity cannot be invoked as justifying its failure to meet the Article 14 obligation to provide survivors of torture with a civil remedy.

45. While it is open to Parliament to legislate in a manner contrary to Canada's international obligations under the *Convention against Torture*,[52] it is not presumed to do so and has certainly not done so with respect to Article 14. The Supreme Court of Canada recognized that "a

[48] *Torture Prohibition Act*, R.S.Y 2002 c. 220, s. 1 [Joint Book of Authorities, Tab 68]
[49] *Torture Prohibition Act*, R.S.Y 2002 c. 220, s. 5 [Joint Book of Authorities, Tab. 68]
[50] Hansard, Debates of the Yukon legislative assembly, November 10, 1987 (Hon. R. Kimmerly) [Joint Book of Authorities, Tab 69].
[51] *Vienna Convention on the Law of Treaties*, art. 31(1) Joint Book of Authorities, Tab 44].; *Zingre v. The Queen*, [1981] 2 S.C.R. 392 at 407 [Joint Book of Authorities, Tab 82].
[52] *Bouzari v. Iran* (2004), at para. 66 (C.A.) [Joint Book of Authorities, Tab 7].

legislature may violate international law, but … it must do so expressly."[53] Parliament has not "expressly" barred civil proceedings in relation to extraterritorial acts of torture. The *State Immunity Act*'s silence with respect to torture cannot be taken to signify that Canada intends to violate its treaty obligations under Article 14 of the *Convention against Torture*.

46. Indeed, the *State Immunity Act* was enacted in 1982, that is, two years before the coming into force of *the Convention against Torture* in 1984. There is no evidence that Parliament was thinking about torture when it passed the *State Immunity Act*.

47. This issue must be examined anew in light of the numerous developments, outlined above, since the *Bouzari* decision.

48. The rule, as the Supreme Court of Canada stated, is that "[s]tatutes should be construed to comply with Canada's international obligations"[54]. Canada's obligation under Article 14, now clear due to the developments since *Bouzari*, is to ensure through its civil jurisdiction that all survivors of torture have access to redress and compensation. This obligation compels the inapplicability of Canada's *State Immunity Act* in civil proceedings for extraterritorial torture.

49. Because the *State Immunity Act* is silent with respect to torture, this Court can and should reconcile that statute with Canada's obligations under Article 14 by correctly applying the interpretative principle of conformity between domestic and international law. The Supreme Court of Canada recently explained the scope of that guiding principle.

> The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that

[53] *R. v. Hape,* [2007] 2 S.C.R. 292 at para. 39 [Joint Book of Authorities, Tab 2].
[54] *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.),* [2004] 1 S.C.R. 76 at para. 31 [Joint Book of Authorities, Tab 83]; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 137 [Joint Book of Authorities, Tab 84];

> would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. [55]

50. In addition to its abolition through the *Convention against Torture*, the torture prohibition is also a norm of customary international law, and is therefore automatically adopted into Canadian law without additional legislative action, and courts may administer the prohibition of torture as part of the common law.[56] This means that courts may not only refer to customary norms in determining the rights of private parties, they may also "look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law."[57]

51. Following the principle of conformity with international law, the Court should strive to avoid a construction of the *State Immunity Act* that would place Canada in violation of its obligations under Article 14 of the *Convention against Torture* and of the values and principles the peremptory prohibition of torture embodies.

2. The Court should apply Canada's common law on immunity rather than the State Immunity Act

52. Since the *State Immunity Act* cannot be interpreted to ensure the impunity of government officials or agents who torture, the Courts must turn to the common law to resolve the issue of immunity. The common law incorporates customary international law and thus excludes the wrongful act of torture from the ambit of sovereign acts (*acta jure imperii*) to which immunity applies. Such an interpretation of Canadian state immunity law is consistent with Canada's obligations under Article 14 and with the mandated exercise of universal civil jurisdiction over torture.

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[55] *R. v. Hape,* [2007] 2 S.C.R. 292 at para. 53-54 [Joint Book of Authorities, Tab 2].
[56] *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 36 [Joint Book of Authorities, Tab 2]; *Bouzari v. Iran* (2004), at para. 65 (C.A.) [Joint Book of Authorities, Tab 7].
[57] *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 39 [Joint Book of Authorities, Tab 2];

(i) Canada's common law of immunity

53. International law increasingly recognizes that the perpetration of "torture as defined in the *Torture Convention* cannot be a state function" for immunity purposes.[58] International law, as incorporated into Canadian common law, therefore gives effect to the peremptory (*jus cogens)* character of the torture prohibition. As legal expressions of international public policy, peremptory norms must inform, and ultimately direct the judicial prioritisation of competing rules and principles. As stated by Judge Dugard (*ad hoc*) of the International Court of Justice:

> Norms of *jus cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of the international order – such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community – the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination. This explains why they enjoy a hierarchical superiority to other norms in the international legal order. The fact that norms of *jus cogens* advance both principle and policy means that they must inevitably play a dominant role in the process of judicial choice.[59]

54. International law, through Canadian common law, thereby gives effect to the normative primacy of the torture prohibition.

55. This is best explained by the Italian Supreme Court (Corte di Cazzione) in its 2004 decision in *Ferrini v. Germany*,[60] a civil claim for crimes against humanity, and in thirteen (13) other cases since.[61]

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[58] *R. v. Bow Street Magistrate, Ex. parte Pinochet (No. 3),* [2000] 1 A.C. 147 at p. 26 of printout [Joint Book of Authorities, Tab 8]; *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium),* [2002] ICJ Report 1 (14 February 2002), Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans, at para. 85 [Joint Book of Authorities, Tab 19]; *Trajano v. Marcos*, 978 F.2d 493, 498 n.10 (9th Cir. 1992) [Joint Book of Authorities, Tab 18].

[59] *Armed Activities on the territory of the Congo (Congo c. Rwanda),* International Court of Justice (3 December 2006), individual opinion of Judge Dugard (*ad hoc*) at para. 10 [Joint Book of Authorities, Tab 85]; A. Orakhelashvili, "State Immunity and International Public Order Revisited" (2006) 49 German Y.I.L. 327 [Joint Book of Authorities, Tab 86].

[60] *Ferrini v. Germany*, No 5044/4, 11 March 2004; ILDC 19 (IT 2004) [Joint Book of Authorities, Tab 87];

[61] *Germany v. Mantelli and others*, No 14201/2008, 29 May 2008; ILDC 1037 (IT 2008) [Joint Book of Authorities, Tab 88]. The ruling in *Mantelli*, which followed *Ferrini*, was applied in twelve (12) other decisions issued on May

56. In holding that the right to civil redress for violations of peremptory norms trumps the hierarchically lower rule of state immunity,[62] the Italian Supreme Court stated that peremptory norms "stand at the apex of the international legal system, taking precedence over all other norms, whether of conventional or customary nature"[63] and that their violation "threaten[s] humanity as a whole and undermine[s] the very foundations of international coexistence."[64] The Court further noted the corresponding obligation of every state to abstain from recognizing as lawful the violation of peremptory norms.[65]

57. The Court went on to state that the

> recognition of immunity from jurisdiction for States that are responsible for such offences is in blatant contrast with the normative framework outlined above, since this recognition obstructs rather than protects such values, the protection of which is rather to be considered … essential for the entire international community, so that in the most serious cases it should justify mandatory forms of response. Moreover, there can be no doubt that this antinomy must be resolved by giving precedence to the higher-ranking norms.[66]

58. When it upheld the *Ferrini* ruling in 13 other cases in 2008, the Italian Supreme Court registered its awareness that it was part of the emergence of a new customary exception to state immunity, an exception the Court considered already inherent to ("già *insita*") the international legal system.[67]

29, 2008 : No14201/2008, No 14202/2008, No 14203/2008, No 14204/2008, No 14205/2008, No 14206/2008, No 14207/2008, No 14208/2008, No 14209/2008, No 14210/2008, No 14211/2008, and No 14212/2008.

[62] There is also *obiter dicta* supporting the *Ferrini* principle in *Borri v. Argentina*, No 11225, 27 May 2005; ILDC 296 (IT 2005) [Joint Book of Authorities, Tab 89] and *Lozano v. Italy*, No 31171/2008, 24 July 2008; ILDC 1085 (IT 2008) [Joint Book of Authorities, Tab 90].

[63] *Ferrini v. Germany*, at para. 9 (IT 2004) [Joint Book of Authorities, Tab 87].

[64] *Ferrini v. Germany*, at para. 9 (IT 2004) [Joint Book of Authorities, Tab 87].

[65] *Ferrini v. Germany*, at para. 9 (IT 2004) [Joint Book of Authorities, Tab 87] ; J. Crawford, *The International Law Commission's Articles on State Responsability : Introduction, Text and Commentaries*, Cambridge, CUP, 2002 at pp. 249-51. [Joint Book of Authorities, Tab 91]

[66] *Ferrini v. Germany*, at para. 9.1 (IT 2004) [Joint Book of Authorities, Tab 87].

[67] *Germany v. Mantelli and others*, No 14201/2008, 29 May 2008; ILDC 1037 at para. 11 (IT 2008) where the Court stated: « *Che*, nel ribadire ora le conclusioni cui sono già pervenute con il ricordato proprio precedente, queste Sezioni unite sono *consapevoli* di contribuire così alla *emersione* di una regola conformativa della immunità dello Stato estero, che si ritiene comunque già *insita* nel sistema dell'ordinamento internazionale ». [Joint Book of Authorities, Tab 88].

59. The Italian jurisprudence shows the evolution of international law since the European Court of Human Rights' decision in *Al-Adsani v United Kingdom*. In a 9-8 split, the *Al-Adsani* court granted immunity to the government of Kuwait despite allegations of torture. The eight dissenting judges correctly indicated the direction international law would later go: "The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity."[68]

60. The rulings of the Italian Supreme Court and the reasoning of the significant minority of in *Al-Adsani* reflect the current state of international law and therefore form Canada's common law on immunity.

(ii) The State Immunity Act *did not displace common law regarding immunity*

61. Despite apparently exclusive language, the *State Immunity Act* is not a complete code and there exists in Canada a parallel regime of state immunity at common law. The common law, therefore, continues to apply to those matters, such as torture, not covered by the statute.[69] Indeed, several considerations support this conclusion.

a) Stability in the law principle

62. First, to promote stability in the law, it is well established in Canada that where statutes and common law intersect, "a Legislature is not presumed to depart from the general system of the law without expressing its intention to do so with irresistible clearness, failing which the law remains undisturbed."[70]

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[68] *Al-Adsani v. United Kingdom* (2002), 34 E.H.R.R. 273, Dissenting opinion of judges Rozakis and Calflisch at para. 4, to which judges Wildhaber, Costa, Cabral Barreto and Vajić subscribed. Judges Ferrari Bravo and Loucaides issued separate dissenting reasons along the same lines. [Joint Book of Authorities, Tab 31].
[69] *Jaffe v. Miller* (1993), 13 O.R. (3d) 745 at para. 13 (C.A.), enumerating pre-SIA common law exceptions to the rule of state immunity, some of which were not codified in the SIA. [Joint Book of Authorities, Tab 6].
[70] *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co*., [1956] S.C.R. 610 at 614 [Joint Book of Authorities, Tab 95].

63. The *State Immunity Act* does not evince an intention on the part of Parliament to displace the common law. When Parliament wishes to exclude the common law, it must do so unequivocally (with "irresistible clearness"). For example, in s. 2 of *Occupier's Liability Act*, the Ontario legislature specifically indicated that the "Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show".[71] Parliament was equally clear when it enacted s. 6.1 of the *Extradition Act*: "Despite any other Act of law, no person who is the subject of a request for surrender … may claim immunity under common law or by statute from arrest or extradition under this Act."[72] In addition to showing Parliament's practice and ability of clearly defining a statute's relationship to the common law, s. 6.1 of the *Extradition Act* clearly illustrate that jurisdictional immunities continue to be governed in part by the common law.

b) Absence of conflict

64. Second, in the absence of conflict between the statute and the common law, both are said to apply and coexist. The common law may even continue to evolve in parallel to the statute. The Supreme Court of Canada stated:

> The conventional view has been that the common law is always speaking. Some theories hold that it is a process of discovery, others of evolution. Whatever it might be properly classified to be in jurisprudence it would take the clearest and most precise language in a statute which purports to incorporate the principles of common law to so construe it as to crystallize the common law at the date of enactment of the statute. If so, the importation of common law principles would be limited to those which had crystallized and developed prior to the effective date of the statute. … Where a statute might be read as displacing the common law the appropriate canon of interpretation is a preference for that construction which preserves the rule of common law where it can be done consistently with the statute. By analogy the common law would be allowed to develop defences not inconsistent with the provisions of the Code if the construction adopted was prospective.[73]

65. The common law development (*i.e*. the removal of immunity for torture) best described in *Ferrini* does not conflict with the *State Immunity Act* since it is premised on the very same

[71] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, s. 2. [Joint Book of Authorities, Tab 96].
[72] *Extradition Act*, S.C. 1999 c. 18, s. 6.1, as amended by S.C. 2000 c. 42, s. 48 [Joint Book of Authorities, Tab 97].
[73] *R. v. Amato*, [1982] 2 S.C.R. 418 at p. 15 of printout (per Laskin C.J., Estey, McIntyre and Lamer JJ., dissenting. The majority did not dispute this statement of principle.) [Joint Book of Authorities, Tab 98].

principle of restricted immunity that underlies the *State Immunity Act*, namely, that only official acts of state attract immunity. As set out above (see *supra* at para. 53), torture is prohibited by a peremptory norm of international law and therefore cannot be considered an official or legitimate function of state.

c) Judicial interpretations of the *State Immunity Act*

66. Third, many Canadian court decisions establish that the *State Immunity Act* was a partial codification of existing common law principles, thereby confirming that the common law of state immunity still operates in the interstices of the statute. For instance, in its first decision dealing with the *State Immunity Act*, the Supreme Court of Canada noted that the enactment was "intended to clarify and continue the theory of restrictive immunity, *rather than to alter its substance*."[74] To displace the common law would have altered the principle of restrictive immunity by freezing it in time. More recently, the Supreme Court of Canada stated that the "general principle of sovereign immunity", with its "*increasing number of emerging exceptions*", has been "incorporated into the Canadian domestic legal order through the enactment" of the *State Immunity Act*.[75]

67. Lower courts have also characterized the *State Immunity Act* as a partial codification of the common law. For instance, the Quebec Court of Appeal noted that, in enacting the *State Immunity Act*, "[TRANSLATION] Canada, like many countries, codified *in part* the principle of restrictive immunity at common law."[76] Similarly, the Superior Court once noted that "while the Act is, *in part*, a codification of historic principles, it is also a clear statement by Parliament that sovereign immunity now has important limitations"[77].

[74] *Re Canada Labour Code*, [1992] 2 S.C.R. 50 at para. 30 (Emphasis added) [Joint Book of Authorities, Tab 99].
[75] *Schreiber v. Canada (A.G.),* [2002] 3 S.C.R. 269 at para. 17 (Emphasis added) [Joint Book of Authorities, Tab 29].
[76] *Republic of Irak c. Export Development Corporation*, [2003] R.J.Q. 2416 au para. 9 (C.A.) (Q.L.) (Emphasis added.) [Joint Book of Authorities, Tab 100].
[77] *United States of America v. Friedland* (1998), 40 O.R. (3d) 747 at para. 47 (Gen. Div.) [Joint Book of Authorities, Tab 101].

d) Legislative history

68. Fourth, it is now well established that the intention of Parliament can quite properly be "ascertained by reference to extrinsic material such as *Hansard* and government publications… as long as it is relevant and reliable and not assigned undue weight".[78] With respect to the *State Immunity Act*, the *Hansard* debates support the view that Parliament intended the statute to operate in parallel to the common law. For instance, in support of the legislative decision not to provide a detailed definition of the term "commercial activity", the Hon. R. Hnatyshyn (as he then was) said :

> Again, I understand the rationale; it is the traditional common law approach to the courts. Probably the most appropriate way to deal with this question is to allow the courts to look at it on a case by case basis to establish the principle if there is a right to bring an action… [79]

The Minister of Justice's parliamentary secretary also emphasised that the *State Immunity Act* left certain key terms to be defined by the courts on case-by-case basis.[80] This legislative history is further evidence of Parliament's intention to preserve the common law of state immunity and permit courts to develop it in a manner consistent with the *State Immunity Act*.

e) An area of law historically developed by courts

69. Fifth, the Supreme Court of Canada has consistently held "that courts can continue to modify and expand common law rules introduced by statute."[81] As a statute dealing with an area of the law historically developed by courts, *i.e.* state immunity, the *State Immunity Act* is presumed to allow judges as "custodians of the common law" to continue to shape the law of state immunity to reflect "the emerging needs and values of our society".[82]

70. The law of state immunity, in this respect, is analogous to maritime law: both areas of common law were historically derived from English law and customary international law prior to

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[78] *Reference re Firearms Act*, [2000] 1 S.C.R. 783 at para. 17 [Joint Book of Authorities, Tab 102].
[79] Debates of the House of Commons of Canada, 32nd Parliament, Vol. X, 23 June 1981 at p. 10905 (Hnatyshyn) [Joint Book of Authorities, Tab 103].
[80] Debates of the House of Commons of Canada, 32nd session32nd Parliament, Vol. X, 23 June 1981 at p. 10902 (Irwin) [Joint Book of Authorities, Tab 103].
[81] *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*, [1997] 3 S.C.R. 1278 at para. 24 [Joint Book of Authorities, Tab 105].
[82] *R. v. Salituro*, [1991] 3. S.C.R. 654 at p. 678 [Joint Book of Authorities, Tab 104].

being introduced in Canadian law by statute. The Supreme Court of Canada summarized the principles governing the continuing development of Canadian maritime law as follows:

> - The substantive content of Canadian maritime law is to be determined by reference to its heritage.[83]
> - Canadian maritime law has sources which are both statutory and non-statutory, national and international, common law and civilian.[84]
> - In those instances where Parliament has not passed legislation dealing with a maritime matter, the inherited non-statutory principles embodied in Canadian maritime law as developed by Canadian courts remain applicable.[85]
> - Canadian maritime law is not static or frozen. The general principles established by this Court with respect to judicial reform of the law apply to the reform of Canadian maritime law, allowing development in the law where the appropriate criteria are met.[86] (Emphasis added.)

The same is true of state immunity law. Parliament did not intend to prevent courts from continuing to fashion the Canadian common law of state immunity in a manner consistent with the *State Immunity Act* and with Canadian values, such as our commitment to human rights.

f) Incorporated customary law

71. Finally, as incorporated international law, the Canadian common law of state immunity is a special branch of the common law subject to particular considerations. If the *State Immunity Act* were deemed to have displaced the common law of state immunity, then the application of current developments in the international customary law of state immunity would be statute-barred in Canada. Such an interpretation of the *State Immunity Act* would not only prevent the incorporation of newly-emerging customary international norms, but also potentially cause Canada to stand in breach of its international obligations. Such an interpretation would require the clearest of legislative language, which is simply not present in the *State Immunity Act*.

[83] *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 71(3) [Joint Book of Authorities, Tab 84].
[84] *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 75 [Joint Book of Authorities, Tab 84].
[85] *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 71(6) [Joint Book of Authorities, Tab 84].
[86] *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 71(7) [Joint Book of Authorities, Tab 84].

72. When Parliament legislates in areas of international law, it is a well-established principle that such legislation does not alter or limit the international rule, but merely regulates its domestic application. As Blackstone wrote:

> The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.[87] (Emphasis added.)

73. For the reasons outlined above (para. 62-72), the *State Immunity Act* is not a complete code. There subsists in Canada a common law regime of state immunity that applies to all cases that fall outside the scope of the *State Immunity Act*. In other words, the *State Immunity Act* governs with regards to the exceptions it codifies, but does not preclude the reception in Canada of further emerging exceptions. In addition, it is open to Canadian courts, pursuant to their inherent jurisdiction over the common law to develop new exceptions to state immunity that reflect Canadian and international law.

V. Conclusion

74. International law regarding the scope of Article 14 has evolved significantly since the Court of Appeal's decision in *Bouzari*. Notably, the United Nations body tasked with interpreting the *Convention against Torture* has concluded, in response to *Bouzari*, that states – and specifically Canada – are required to provide civil remedies to all torture survivors within their jurisdiction. In addition, state practice now increasingly provides civil remedies to torture survivors and in some cases has overridden assertions of state immunity.

75. The universal civil jurisdiction mandated by the *Convention against Torture* and the peremptory status of the torture prohibition at international law support the removal of state immunity in proceedings for extraterritorial torture by excluding torture from the list of official acts that attract immunity at common law. The *State Immunity Act* has not displaced the common

[87] W. Blackstone, *Commentaries on the Laws of England*, Book 4, Ch. 5 at p. 67 [Joint Book of Authorities, Tab 106].

law of state immunity and the Court should exercise its inherent jurisdiction to establish that torture is not an immune act of state under Canadian common law.

76. In the same year that the Superior Court decided *Bouzari*, the Supreme Court of Canada was already anticipating the coming developments outlined above. In *Schreiber*, after rejecting the submissions of the intervenor, the United States of America, that section 6 of the *State Immunity Act* [the local tort exception] applied strictly to non-official acts, Justice LeBel, stated :

> the interpretation advanced by the United States would deprive the victims of the worst breaches of basic rights of any possibility of redress in national courts. Given the recent trends in the development of international humanitarian law enlarging this possibility in cases of international crime, as evidenced in the case before the House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827, such a result would jeopardize at least in Canada a potentially important progress in the protection of the rights of the person.[88]

77. Therefore, that the developments since the *Bouzari* decision render the conclusions reached about immunity in that case inapplicable to any current lawsuit alleging torture. The law, as it now stands, requires that any court examining allegations of torture should withhold from granting immunity to defendants.

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All of which is respectfully submitted,

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[88] *Schreiber v. Canada (A.G.),* [2002] 3 S.C.R. 269 at para. 37, [Joint Book of Authorities, Tab 29].

SCHEDULE "A"
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3. *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 17.

4. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Apr. 11, 1950, 213 U.N.T.S. 222, Art. 3.

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

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21. *Li v. Canada (MCI),* [2005] F.C.J. No. 1 (F.C.A.)

22. *Li v. Canada (MCI),* [2003] F.C.J. No. 1934 (F.C.C.)

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and

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ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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