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
(Moving Parties)

- and -

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

Defendants
(Responding Parties)

- and -

THE ALL CHINA LAWYERS ASSOCIATION

Intervener

- and -

THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE and AMNESTY INTERNATIONAL

Interveners

FACTUM OF THE PLAINTIFFS ON RULE 21 MOTION

February 3, 2010

OLTHUIS, KLEER, TOWNSHEND
Barristers & Solicitors
229 College St., Suite 312
Toronto, Ontario
M5T 1R4
Kate Kempton (LSUC #44588L)
Matt McPherson (LSUC #55905D)

& David Matas of the Manitoba Bar
(Man. Law Society #564)

Counsel for the Plaintiffs

TABLE OF CONTENTS

I. OVERVIEW

1. This is a motion for a determination of a question of law brought pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure*.[1]

2. Prior to bringing a motion for default judgment, the Plaintiffs seek a determination that the *State Immunity Act* [2] ("*SIA*") or immunity at common law does not apply to individuals who have committed crimes against humanity, such as torture.

3. The action is for damages stemming from the brutal torture of the Plaintiffs at the instance and direction of Jiang Zemin, Li Lanqing, Luo Gan, Liu Jing and Wang Maolin (the "Defendants"). The Plaintiffs were the subject of systemic torture by the Defendants on the basis of the Plaintiffs' religious beliefs.

4. The Defendants, who were officials of the Chinese Communist Party ("CCP") and/or the People's Republic of China ("China") when they ordered the torture, acted contrary to international law, Chinese law, and China's international legal obligations. The torture continues to affect the Plaintiffs since moving to Canada, and the torture is contrary to Canadian law and Canada's international legal obligations.

5. The Defendants have not defended the action and were noted in default, and are thus deemed to admit all the allegations of fact in the Statement of Claim.[3]

6. The scope of the immunity available to individuals (as opposed to a foreign state) under the *SIA* and common law is limited to individuals acting in a public capacity. In view of international legal prohibitions of the highest order and the Supreme Court of Canada's

---

[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 21.01(1)(a) ["*Rules of Civil Procedure*"].
[2] *State Immunity Act*, R.S.C. 1985, c. S-18, s. 3 ["*SIA*"], Joint Book of Authorities ["BOA"], **Tab 1**.
[3] *Rules of Civil Procedure*, Rule 19.02(1)(a).

statements on the informative role of international law in interpreting domestic law, public actions cannot be interpreted to include crimes against humanity such as torture for the purposes of individual immunity. There can be no valid legal authority for individuals to commit torture. Therefore, neither the *SIA* nor the common law of immunity applies to provide immunity for the Defendants.

II. FACTS

7. The Plaintiffs are Falun Gong (a.k.a. Falun Dafa) practitioners. Falun Gong is a peaceful spiritual discipline devoted to the self-improvement of the body, mind and spirit through adherence to principles of "Truthfulness – Compassion – Forbearance".[4]

8. The Plaintiffs, who all live in Ontario, moved to Canada in order to escape further persecution in China. Except for Kunlun Zhang who was at the time of his torture and still is a Canadian citizen, all of the Plaintiffs moved to Canada after being tortured in China and are in the process of acquiring or have attained either refugee or landed immigrant status in Canada.[5]

9. The Defendant Jiang Zemin was the head of state of China at the time the Plaintiffs were tortured. Jiang is no longer the head of state of China. The Defendants were all senior members of the CCP at the relevant times. Four of the Defendants also held positions in the government of China. The Defendant Luo Gan was not an official of the government of China at the relevant times.[6]

10. The Defendants, acting in their private capacity and outside of the scope of their authority and contrary to international law, Chinese law, and China's international obligations,

[4] Statement of Claim, paras. 5 - 6, Plaintiffs' Motion Record, Tab 2.
[5] Statement of Claim, paras. 13 - 15, Plaintiffs' Motion Record, Tab 2.
[6] Statement of Claim, para. 24, Plaintiffs' Motion Record, Tab 2.

ordered and were responsible for a systemic and widespread campaign of terror and persecution of Falun Dafa practitioners including the Plaintiffs. The Defendants used threats, intimidation, and rewards directed at others to compel the torture and imprisonment of the Plaintiffs.[7] The Plaintiffs and other Falun Dafa practitioners were singled out for torture and abuse solely as a result of their religious beliefs.[8] The campaign against the Plaintiffs was initiated by Jiang at a CCP meeting, and the Defendants carried out this campaign in their roles as party officials.[9]

11. Individual Plaintiffs were subjected to: being beaten severely and repeatedly (sometimes to the point of unconsciousness), being shocked with electric batons causing severe pain and burns, being forced to sit immovable on special stools or squat unnaturally for many hours at a time causing extreme pain and bleeding, being doused in freezing water and exposed to cold temperatures, being deprived of sleep for several days at a time, and being forced to watch the physical abuse and torture of others.[10]

12. The Plaintiffs have suffered and continue to suffer significant after effects from their torture and imprisonment including: extreme mental and emotional distress, severe anxiety, depression, as well as various physical ailments and physical pain and weakness.[11]

---

[7] Statement of Claim, paras. 2, 3, 28, 31, 40, Plaintiffs' Motion Record, Tab 2.
[8] Statement of Claim, para. 5, Plaintiffs' Motion Record, Tab 2.
[9] Statement of Claim, para. 42, Plaintiffs' Motion Record, Tab 2.
[10] Statement of Claim, paras. 11, 101, 103, 122, 131-136, 152-154, 162-163, 172, 174, 187, 191, 204, 211, Plaintiffs' Motion Record, Tab 2.
[11] Statement of Claim, paras. 120, 122, 144, 161, 168, 177-178, 195, 215, Plaintiffs' Motion Record, Tab 2.

III. ISSUES

13. The only issue is whether Canadian law provides immunity to the individual Defendants who, acting in their personal capacity and not in a public capacity, were responsible for the commission of torture.

IV. LAW AND ARGUMENT

A. Rule 21 and a determination of a question of law

14. A party may move before a judge for determination of a question of law before trial where the determination of the question may dispose of all or part of the action or result in a substantial savings in cost or time, and the judge may make an order or grant judgment accordingly.[12]

15. As the Defendants have been noted in default, the Defendants are deemed to admit the truth of all allegations of fact made in the statement of claim according to Rule 19.02 of the *Rules of Civil Procedure*. Therefore no facts are in dispute.[13]

16. The determination of whether the *State Immunity Act* and the common law apply to provide immunity to individuals who are responsible for crimes against humanity, including torture, could dispose of this action. If the court concludes the *SIA* or the common law does provide immunity to individuals who have committed torture, then the action of the Plaintiffs cannot succeed. Therefore, the determination of this question on the Rule 21 motion could save substantial time and cost to the Plaintiffs and to the court.

---

[12] *Rules of Civil Procedure*, Rule 21.01(1)(a).
[13] *Rules of Civil Procedure*, Rule 19.02 (1)(a); Requisition to Note in Default, Motion Record of the Plaintiffs, Tab 5.

B. Canadian immunity law and international law

17. The *SIA* provides a framework outlining when a foreign state will be able to avail itself of immunity from the jurisdiction of Canadian courts:[14]

> 2. In this Act,
>
> …
>
> "foreign state" includes
>
> (a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
>
> (b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
>
> (c) any political subdivision of the foreign state;
>
> …
>
> 3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
>
> (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

18. As a statute dealing with international law principles it is necessary to interpret the *SIA,* and the common law, in view of Canada's international law obligations.[15] The Supreme Court of Canada held in *R. v. Hape* that international laws will be directly adopted into Canadian law in the absence of conflicting legislation.[16] "Parliament may violate international law, but it must do so expressly."[17] In this case, interpreting the law of immunity in such a way that the *SIA* and the common law of immunity would violate international prohibitions on torture law must be avoided.

19. In cases involving the interplay between domestic and international law, Canadian courts have consistently shown respect for and often directly adopted the analyses of

---

[14] *SIA*, ss. 2-3, BOA, **Tab 1.**
[15] *R.v. Hape,* [2007] 2 S.C.R. 292, 220 C.C.C. (3d) 161 ["*Hape*"] at paras. 53-54, BOA, **Tab 2.**
[16] *Hape, supra* at paras. 36-39, BOA, **Tab 2**.
[17] *Hape, supra* at paras 39, 53-54, BOA, **Tab 2.**

international tribunals and other bodies, such as the Committee against Torture, on the content of international law and Canada's international law obligations.[18]

C. Immunity for individuals

The Defendants were all acting in their capacity as Party officials not government officials

20. None of the Defendants can be considered state officials acting in a public capacity because all of the Defendants were acting as members of the CCP, not the state. While the CCP is the political party in power in China, it is distinct from the Chinese state.[19] The campaign of torture and intimidation against the Plaintiffs was instigated and conducted by the Defendants in their roles as officials of a political party. Officials of political parties are private actors; they are not officials of the state. This was not a case where the state directed the CCP, rather the Defendants as members of the dominant political party used the elements of the government as tools to carry out their private ends. Therefore, neither the *SIA* nor the common law provides immunity to any of the Defendants.

21. However, and more importantly, even if the Defendants are found to be state officials, this does not result in any immunity for the Defendants. None of the actions at issue can be considered public acts. Immunity only applies if the Defendants were acting in a public capacity, regardless of the cloak under which they performed their actions – party or state.

---

[18] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40 (CanLII) ["*Mugesera*"] at para. 126, BOA, **Tab 3**; *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.R. 239, [2005] F.C.J. No. 1 (QL) at paras. 17-26, BOA, **Tab 4**; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3 at para. 73, BOA, **Tab 5**.

[19] Statement of Claim, para. 23, Plaintiffs's Motion Record, Tab 2.

Immunity for individuals acting in a public capacity

22. In *Jaffe v. Miller*, in dealing with the application of immunity to individuals, the Court of Appeal held the *SIA* is silent on the application of immunity to employees or public officials of foreign states, and therefore Parliament intended for individual immunity to be defined at common law. [20]

23. The Defendant Jiang was head of state at the relevant times, and therefore s. 2 of the *SIA* requires him to have been acting in a public capacity for immunity to apply. All the rest of the Defendants are required to have been acting in a public capacity by the common law of immunity. In the alternative, if s. 2 of the *SIA* is found to apply to the other Defendants, they would still be required to have been acting in a public capacity for immunity to apply. Thus all of the Defendants are immune only with respect to their public acts.

24. In *Bouzari v. Iran* ("*Bouzari*"), the Court of Appeal held that the *SIA* applied to claims against the Islamic Republic of Iran for the abduction and torture of the plaintiff.[21] The court held the *SIA* provided complete immunity to foreign states and that torture did not fall into the exceptions in the *Act*. However, the court in *Bouzari* noted the distinction in the law between immunity for individuals and for states proper.[22]

25. Courts in Canada have addressed the application of the *SIA* and the common law of immunity to individuals for acts other than torture, and a state's immunity for acts of torture. However, no case before Canadian courts has dealt with the application of immunity to individuals who commit torture and other crimes against humanity.

---

[20] *Jaffe v. Miller*, [1993] O.J. No. 1377 (QL), (1993) at para. 33, 13 O.R. (3d) 745 (C.A.)["*Jaffe*"], BOA, **Tab 6**.
[21] *Bouzari v. Iran* (2004), 71 O.R. (3d) 675, 2004 CanLII 871 (C.A.) at paras. 65-95 ["*Bouzari*, CA"], BOA, **Tab 7**.
[22] *Bouzari*, CA, *supra*, at para. 91, BOA**, Tab 7**.

26. All of the Defendants had to be acting in a public capacity in order for immunity to apply to them. Their immunity is not absolute or personal immunity. Only Defendant Jiang could possibly argue he had absolute or personal immunity in this case as an acting head of state. However, absolute immunity for heads of state ceases once they leave office. Former heads of state are liable for any actions done outside their public duties, even if those acts occurred while they were head of state. [23] The Defendant Jiang was the head of state at the relevant times, but no longer holds that office, and the rest of the Defendants either do not hold state office or are lower public officials.[24]

27. Article 2(1)(b)(iv) of the draft 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* indicates that individual "representatives" of the state will be immune only where they are "acting in that capacity." [25]

28. The Intervener ACLA has previously suggested the draft articles on *Responsibility of States for Internationally Wrongful Acts* stand for the proposition that immunity for individuals is the same as for states. However, the draft articles on *Responsibility of States for Internationally Wrongful Acts* expressly state that the articles have no bearing on the issue of individual liability for wrongful acts.[26]

---

[23] *Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 (H.L.) at 202-203 ["*Pinochet III*"], BOA, **Tab 8**; *Jones v. Saudi Arabia* (2004), [2005] 2 WLR 808 (EWCA) at para. 91 ["*Jones*, CA"], BOA, **Tab 9**; *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium),* [2002] ICJ Report 1 (14 February 2002) at para. 61 ["*Arrest Warrant*"], BOA, **Tab 10.**

[24] Statement of Claim, paras. 36, 44, 52, 65, 72, Plaintiffs' Motion Record, Tab 2

[25] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res. 59/38, UN GAOR, 59th Sess., Supp. No. 49, Annex, UN Doc. A/59/49 (2004) [not yet in force], Art. 2(1)(b)(iv), BOA, **Tab 11**.

[26] *Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, UN GAOR, 56th Sess. Supp. No. 49, Annex, UN Doc. A/59/49 (2004) [not in force] at Art. 58, BOA, **Tab 12**; *Yearbook of the International Law Commission, 2001*, Volume II, Part II, Report of ILC to GA, 53rd session, A/CN.4/SER.A/2001/Add.1 (Part 2) at 142-143, BOA, **Tab 13**.

29. International law and Canadian law make a distinction between immunity for foreign states and immunity for individuals. At issue is the extent of immunity available to individuals. The *SIA* and the case law indicate individuals will be provided with immunity only where carrying out official duties and acting in a public capacity.

Immunity for individual officials is limited to acts of a public nature

30. The Canadian common law of immunity provides a limited immunity to public officials or employees acting within the scope of their official duties.[27]

31. In *Jaffe v. Miller*, the Court of Appeal held individuals may be immune from illegal or tortious activities if those activities are carried out within the scope of their official duties and in furtherance of a public act.[28] The defendant individual officials caused Jaffe to be apprehended in Canada and illegally transported to the U.S. to face trial.

32. In *Tritt v. United States of America*, *Gascon Estate v. Paradis,* and *Friedland v. United States of America* the respective courts found the individual defendants were immune because they were acting within the scope of their authority.[29] *Tritt* involved the seizure of documents for a criminal investigation, *Gascon Estate* involved the operation of a state vehicle as part of road construction, and *Friedland* involved a government lawyer swearing an affidavit in support of a Mareva injunction sought by the U.S. government.

33. In *Ritter v. Donell*, the Alberta Court of Queen's Bench found immunity extended to employees of the United States who carried out certain aspects of a U.S. criminal

---

[27] *Jaffe, supra* at paras. 30-33, BOA, **Tab 6**; *Tritt v. United States of America* (1989), 68 O.R. (2d) 284, [1989] O.J. No. 446 (QL) (H.C.J.) at para. 7 ["*Tritt*"], BOA, **Tab 14**; *Gascon Estate v. Paradis*, [1991] O.J. No. 504 (QL) at 3 ["*Gascon Estate*"], BOA, **Tab 15**; *United States of America v. Friedland* (1999), 182 D.L.R. (4th) 614 (Ont. C.A.) ["*Friedland*"], BOA, **Tab 16**.

[28] *Jaffe, supra* at para. 30-34, BOA, **Tab 6.**

[29] *Tritt*, *supra* at paras. 7-8, BOA, **Tab 7**; *Gascon, supra* at 3, BOA, **Tab 15**.

investigation and related civil proceeding. In *Ritter*, while there were allegations the individuals were acting in a private capacity, there was little or no evidence from the plaintiffs on this point, and the defendants presented affidavit evidence that the activities of the individual defendants were the type of activities that would be routinely carried out by the defendants as part of their official duties.[30]

34. The cases above deal with the manner in which actions were performed, not the nature of such actions. If the type of duty is within the scope of official authority, even if the manner is which it was exercised was "illegal", immunity still applies. These cases did not address the type of action that would fall outside the scope of official authority.

35. While Canadian courts have found individuals immune, the courts have not squarely addressed the types of activities that will fall outside the definition of what is a public activity. The decision in *Jaffe* suggests that whether a type of action is sufficiently public to provide immunity to an individual will be decided on a case by case basis.[31]

36. In this case, torture must be interpreted as a type of action, which because of its very nature, cannot be considered a public action or activity. Therefore, immunity for an individual responsible for torture does not apply.

Parliament could not have intended for individuals to have greater immunity than heads of state

37. The common law provides a limitation on immunity for individuals, and s. 2 of the *SIA* supports that position. Section 2 of the *SIA* expressly provides that heads of state and heads of political subdivisions are part of the state, and therefore protected by immunity, but only where they are "acting as such in a public capacity". The *SIA* and international

[30] *Ritter v. Donnell*, 2005 ABQB 197 (CanLII) at paras. 32-34 ["*Ritter*"], BOA, **Tab 17**.
[31] *Jaffe, supra* at paras. 33, 34, 37, BOA, **Tab 6.**

law limit immunity for such high officials to when those officials are acting in a public capacity. Parliament's intent cannot have been to extend a higher level of immunity to a lower official or individual. Given the position at international law, per *Hape*, if Parliament desired to increase protection for individuals to an absolute protection, it was required to do so explicitly.

D. Individuals cannot be acting in a public capacity when committing crimes against humanity

38. The Plaintiffs submit the weight of international authorities indicates crimes against humanity, including torture, cannot be considered to be the public actions of individuals because of the very nature of those acts.[32]

Torture is jus cogens *under international law*

39. The prohibition on torture and other crimes against humanity has been widely accepted in international law and by Canadian courts as *jus cogens* or a peremptory norm.[33] The *United Nations Convention against Torture* (the "CAT") is one of the most widely adhered to treaties in international law. It has been ratified by 146 of the 192 countries in the world, including China and Canada. [34]

---

[32] *Jones*, CA, *supra*, at paras. 48-49, 55, 64, 92, BOA, **Tab 9**; *Trajano v. Marcos*, 978 F.2d 493 (9th Cir 1992) at 498 ["*Trajano*"], BOA, **Tab 18**; *Pinochet III, supra* at 203, BOA, Tab 8; *Arrest Warrant, supra*, Joint Separate Opinion of Judges Higgins et al, at para. 85 ["*Arrest Warrant*, Higgins J. et al."], BOA, **Tab 19.**

[33] *Bouzari v. Iran,* [2002] O.J. No. 1624 at para. 61, [2002] O.T.C. 297 (2002), aff'd 71 O.R. (3d) 675, 2004 CanLII 871 (C.A.) ["*Bouzari*, SCJ"], BOA**, Tab 20**; *Pinochet III*, *supra* at 198, BOA, Tab 8; *Jones v. Saudi Arabia*, *supra* at para. 108, BOA, **Tab 8**.

[34] *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), Can. T.S. 1987 No. 36, (entered into force June 26, 1987) ["CAT"], BOA, **Tab 21**.

40. *Jus cogens* is a principle of international law so fundamental, no derogation is permitted from it. Rules having obtained the status of *jus cogens* are superior to and will override conventional and customary international law, and domestic law, if there is a conflict.[35]

41. The obligations of states under *jus cogens* rules relating to torture are owed to the international community as a whole:[36]

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture….the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.[37]

42. *Jus cogens* prohibitions bind the entire community of nations not only out of a sense of moral obligation about the evils they can represent, but for the very practical reason that violation of *jus cogens* rules threatens international order by damaging relations between states.

43. Torture and other crimes against humanity are so reviled and universally condemned that special considerations apply. These crimes are not merely illegal – they are antithetical to human existence and world order. Almost all other crimes and illegal acts, even the most serious, such as homicide, can be justified on certain grounds. Torture, however, is recognized as being unjustifiable regardless of the circumstances.[38]

44. Interpreting public actions performed by individuals as excluding torture is consistent with international law, and with the decisions in *Jaffe*, *Tritt*, *Gascon Estate*, *Ritter,* and *Friedland*. These cases found that when the type of activity is within official authority (*e.g.* seizing documents in *Tritt*), immunity may apply even if such authority is performed

---

[35] *Bouzari,*CA, *supra* at para. 86, BOA, **Tab 7**.
[36] *Suresh, supra* at para. 61-62, BOA, **Tab 5**.
[37] *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir 1980) at 890 ["*Filartiga*"], BOA, **Tab 22**.
[38] CAT, *supra*, Art. 2, BOA, **Tab 21**.

in an illegal manner. As long as the type of activity is within the scope of the official authority, they will be immune from the Canadian court's jurisdiction. This is, however, fundamentally different than rules that prohibit immunity for a type of action, which by its very nature cannot be considered a public action, such as torture.

The definition of torture at international law does not require a public act

45. In the decision of the House of Lords in *Jones v. Saudi Arabia* ("*Jones*, HL"), the Lords rejected the conclusion of the English Court of Appeal that acts of torture could not be "official acts".[39] The Lords held torture was by definition something done in a public capacity. However, the Lords' decision was based on a faulty premise – that the definition of torture at international law requires a public act.[40]

46. In fact, the definition of torture at international law does not require torture to be carried out by someone acting in an official capacity.

47. The CAT is a convention drafted with states in mind, *i.e.* states are the primary actors on the international stage and the entities with the most power to stamp out torture. However, simply because states have a broad obligation to prevent torture, does not mean that when torture occurs it is an act of the state:

> The central role of the State in article 1 of the Convention, which restricts the definition of torture to acts "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" has frequently been used to exclude [acts of torture] outside direct State control from the scope of protection of CAT.
>
> However, the Special Rapporteur wishes to recall that the language used in article 1…. clearly extends State obligations into the

[39] *Jones v. Saudi Arabia* (2006), [2007] 1 AC 270 at paras. 19, 83 ["*Jones*, HL"], BOA, **Tab 23**.
[40] *Ibid.*

> private sphere and should be interpreted to include state failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals. [emphasis added].[41]

48. Further, as the statement by the Special Rapporteur suggests, to attempt to use article 1 to essentially provide a liability escape hatch for individuals responsible for torture would be a perversion of the Convention.

49. Thus the Convention itself does not require that torture be a "public act". Nor does customary international law have a requirement that torture be a public act.

50. The European Court of Human Rights has articulated on several occasions that neither the *European Convention on Human Rights* nor the *International Covenant on Civil and Political Rights* require acts of torture be carried out by public officials or in an official capacity for those conventions to apply.[42]

51. The Canadian statute dealing with crimes against humanity, the *Crimes Against Humanity and War Crimes Act,*[43] (the "CAHWCA") incorporates the definition of torture in Art. 7(2)(e) of the Rome Statute of the International Criminal Court, which does not include a public action or capacity requirement for torture.[44]

52. Finally, the lack of a requirement for crimes against humanity to be public actions has been supported by the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*. Mugesera was a private citizen who incited genocide and was sought by the Rwandan authorities. In reviewing his deportation order from Canada,

---

[41] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly, Human Rights Council (15 January 2008), A/HRC/7/3 at para. 31, BOA, **Tab 24**.

[42] *Costello-Roberts v. UK*, [1993] ECHR 13134/87 (Lexis) at paras. 27-28, BOA, **Tab 25**; *HLR v. France*, [1997] ECHR 24573/94 (Lexis) at para. 40, BOA, **Tab 26**; *A. v. United Kingdom*, [1998] ECHR 25599/94 (Lexis) at paras. 22-24, BOA, **Tab 27**.

[43] *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 ["*CAHWCA*"], BOA, **Tab 28**.

[44] *CAHWCA*, supra at ss. 4(3)-(4), Schedule, Art. 7(2)(e), BOA, **Tab 28**.

the court analysed the definition of crimes against humanity under the CAHWCA. The court held crimes against humanity under the *Act* must be widespread or systematic, but there was no requirement at international law that a public policy underlie the crime.[45]

53. In view of the Canadian and international authorities that at customary international law torture is not by definition a public act, to conclude, as the House of Lords does in *Jones*, that individuals committing acts of torture are acting in a public capacity by virtue of their status as public officials alone would be nonsensical. International law and the decisions of Canadian court, including *Jaffe*, indicate that immunity only applies to individuals "acting in pursuit of their duties."[46] If individuals were immune simply by virtue of their status, why would it be necessary to include that qualifier? Torture and crimes against humanity are *jus cogens* acts of such enormity they cannot be considered public acts, and must fall outside the scope of immunity for individuals.

E. Indemnifying individual torturers would be a breach of international law

54. The court in *Jaffe* raised the concern that allowing suits against individuals would permit a back-door attack on the immunity of the state itself by forcing the foreign state to pay a claim because the state would have to indemnify its officials. The court in *Jaffe* concluded the individual officials in that case were immune on the grounds it would make no sense to allow plaintiffs to sue public officials acting in the course of their duties when the foreign state would have to indemnify them.[47] *Jaffe* proceeded on the assumption that individual officials will always be indemnified by their own states if the individuals are sued. That assumption does not apply in this case.

---

[45] *Mugesera, supra* at para. 158, BOA, **Tab 3**.
[46] *Jaffe, supra* at para. 33, BOA, **Tab 6**.
[47] *Jaffe, supra* at para. 31, BOA, **Tab 6**.

55. It cannot be assumed China would be required to indemnify an individual for crimes which China itself has agreed to stamp out in a binding international treaty. Beyond not being required to indemnify individuals, China is not permitted to indemnify individuals for torture. Indemnifying an individual for torture would be a direct breach of Art. 14 of the CAT,[48] which requires states to ensure effective redress and compensation for victims. In the words of the English Court of Appeal in *Jones*:

> …It would be absurd to suggest that a state is bound to indemnify its officials for conduct which states have outlawed, and in respect of which the signatories to the Torture Convention have agreed to prosecute offenders and to compensate victims.[49]

56. The court in *Jaffe* noted the rationale behind immunity is to allow state officials to go about their duties without interference. [50] It is not reasonable, nor is it consistent with *Hape* or international order to conclude immunity is intended to extend to individuals so that they may be left undisturbed to go about committing crimes against humanity. Interpretation of the *SIA* and the common law of immunity cannot be guided by a presumption a foreign state will engage in a breach of the most serious international law obligations.

F. The *SIA* and the law on immunity must be interpreted to be consistent with international obligations regarding torture

57. The Supreme Court of Canada has set out clear guidelines for how to interpret domestic law where international law comes into play. The Supreme Court has held state immunity is based on considerations of public policy and the comity of nations.[51] Comity, according to the Supreme Court, is based on a "desire for states to act courteously

---

[48] CAT, *supra*, art 14, BOA, **Tab 21**.
[49] *Jones*, CA, *supra* at para. 126, per Lord Phillips, MR, paras. 35, 76 per Mance LJ, BOA, **Tab 9.**
[50] *Jaffe, supra* at para. 30, BOA, **Tab 6.**
[51] *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 (CanLII) at paras. 13-15, BOA, **Tab 29**.

towards one another". Comity exists to facilitate global relations and international public order. [52] However, for that reason, "comity does not offer a rationale for condoning another state's breach of international law" because this would undermine the international legal order and be damaging to the community of nations.[53]

58. The Supreme Court's decision in *R. v. Hape* states international law must be followed unless Parliament explicitly rejects it, and that comity is not an excuse to break international law. In view of these directions, it would be inappropriate to interpret the scope of public action so as to grant individual torturers protection for actions which international law declares are unjustifiable in any circumstance. Comity of nations cannot be advanced by encouraging an activity which is both prohibited at international law and harmful to the entire world.

59. The prohibition on torture at international law trumps all other rules - international or domestic. All states are prohibited from engaging in torture and are required to prevent it and punish individuals when it occurs. Parliament has not expressly granted immunity to individuals responsible for torture. Therefore, interpreting the phrase "acting in a public capacity" to provide immunity for individuals responsible for torture would be contrary to international law and Canadian law.

G. Torture attracts neither criminal nor civil immunity

60. As torture is not a public act under the *SIA* or at common law, Canadian law provides no immunity to individuals committing acts of torture, whether from civil or criminal proceedings. It would be illogical to conclude torture was a governmental act for the purposes of civil suits (granting immunity from suit), but was not a governmental act for

[52] *Hape*, *supra* at para. 50, BOA, **Tab 2**.
[53] *Hape, supra* at para. 51, BOA, **Tab 2**.

a criminal purpose (allowing criminal prosecution).[54] The nature of the proceeding does not have any bearing on whether an action committed by an individual is public or not.

61. In the alternative, as noted by both Justice Breyer in *Sosa v. Alvarez-Machain* and Lord Mance in *Jones*, CA, it is difficult to see how allowing a civil action against an individual is any more interference with state sovereignty than allowing a criminal action.[55] Breyer J.'s decision was based in part on the fact that many civil law countries combine civil and criminal proceedings to allow recovery of damages by persons harmed by the criminal conduct.[56] *Jus cogens* rules are supreme, therefore the prohibition on torture applies in any type of proceeding – civil or criminal.[57]

H. International law has advanced since *Bouzari*

62. Further, in *Hape*, the Supreme Court also indicated that international law changes over time and Canadian courts should adopt those changes absent explicit direction from Parliament.[58] The Plaintiffs agree with the submissions of the Joint Interveners CCIJ and Amnesty International that international law has advanced since *Bouzari*, and that Art. 14 of the CAT (which creates the obligation of states to ensure compensation for victims) applies to require both extraterritorial civil and criminal proceedings be made available by signatory states.

63. The Court of Appeal in *Bouzari* held the duty of Canada to compensate victims of torture under the CAT was limited to torture inflicted in Canada, not to torture inflicted abroad. The trial judge in *Bouzari* concluded that none of the reports from the Committee against

---

[54] *Jones*, CA, *supra* at para. 127, BOA, **Tab 9**.
[55] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) at 762, BOA, **Tab 30**; *Jones*, CA, *supra* at para. 75, BOA, **Tab 9**.
[56] *Sosa*, *ibid*.
[57] *Al-Adsani v. United Kingdom* (2002) 34 ECHR 11, per Joint Dissenting Opinion of Rozakis, Calflisch JJ. joined by Wildhaber, Costa, Cabral Barreto, and Vajić JJ., BOA, **Tab 31**.
[58] *Hape, supra* at paras. 36-37.

Torture "indicated that a state has granted a civil remedy for torture committed outside its territory, and there has been no negative comment from the Committee."[59]

64. In the wake of the *Bouzari* decision, the Committee against Torture stated its concern that "the absence of effective measures to provide civil compensation to victims of torture in all cases" [emphasis added]. They recommended Canada "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture" [emphasis added].[60] This is not just a statement about what Canada should do; it is a statement about what all countries must do to fulfill their obligations under the CAT.

65. International law has moved forward since *Bouzari*. States, including Canada, now have an obligation to provide a right to compensation for torture abroad. Therefore the claim of immunity at domestic common law or statute can be no answer, unless the SIA expressly disallows the right for compensation under Article 14. To date, Canada has not so legislated, so immunity cannot apply to the Defendants so as to remove the right of the Plaintiffs to compensation under Article 14.

I. The Defendants in this case are not immune under the *SIA*

66. The Defendant, Jiang Zemin, is no longer the head of state of China (and therefore no longer protected by procedural immunity) and thus is only able to claim immunity under s. 2 of the *SIA* for his public actions while he was head of state.[61] The rest of the Defendants are all officials of the Chinese government and/or the CCP, and not heads of state, and therefore can only claim immunity if acting in a public capacity. In the

[59] *Bouzari,* SCJ, *supra* at para. 51, aff'd on this point by *Bouzari,* CA, *supra* at para. 68
[60] Conclusions and recommendations of the Committee against Torture: Canada, UN CAT, 34th Sess., UN Doc. CAT/C/CR/34/CAN (7 July 2005), BOA, **Tab 47**
[61] *Pinochet III, supra* at 202, 210, 277, 280, BOA, **Tab 8**.

alternative, if the other Defendants were heads of state for the purposes of s. 2, then they still can only claim immunity for public acts.

67. None of the Defendants can claim immunity because none were acting in a public capacity at the relevant times. As specified in the Statement of Claim, all the Defendants were acting outside of their public capacity in organizing and implementing their campaign of terror against practitioners of Falun Gong, including the torture of the Plaintiffs.

68. While the Defendants may have used elements of the state apparatus to carry out the torture of the Plaintiffs, this does not make their activities "public". The elements of the state apparatus were merely tools to effect the action. The use of those tools does not change the nature of the action.

69. The commissioning of torture by the Defendants is not "acting as such in a public capacity", and therefore the Defendants do not fall within the scope of immunity provided under Canadian law.

V. ORDER REQUESTED

70. The Plaintiffs seek a finding that the *State Immunity Act* and the common law of immunity do not provide immunity to individuals responsible for acts of torture, and therefore the Defendants are not immune from suit.

February 3, 2010

All of which is respectfully submitted

_____

Kate Kempton per
Kate Kempton (LSUC# 44588L)
Matt McPherson (LSUC #55905D)
& David Matas (Man. Law Soc # 564)

VI. LIST OF AUTHORITIES

TAB **AUTHORITY**

1. *State Immunity Act*, R.S.C. 1985, c. S-18.
2. *R.v. Hape,* [2007] 2 S.C.R. 292
3. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100
4. *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.R. 239, [2005] F.C.J. No. 1 (QL)
5. *Suresh v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3
6. *Jaffe v. Miller* (1993), 13 O.R. (3d) 745, [1993] O.J. No. 1377 (QL) (C.A.) ["*Jaffe*"]
7. *Bouzari v. Iran* (2004), 71 O.R. (3d) 675, 2004 CanLII 871 (C.A.)
8. *Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 (UK H.L.)
9. *Jones v. Saudi Arabia* (2004), [2005] 2 WLR 808 (EWCA)
10. *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium),* [2002] ICJ Report 1 (14 February 2002)
11. *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res. 59/38, UN GAOR, 59th Sess., Supp. No. 49, Annex, UN Doc. A/59/49 (2004) [not yet in force]
12. *Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, UN GAOR, 56th Sess. Supp. No. 49, Annex, UN Doc. A/59/49 (2004) [not in force]
13. *Yearbook of the International Law Commission, 2001*, Volume II, Part II, Report of ILC to GA, 53rd session, A/CN.4/SER.A/2001/Add.1 (Part 2) at 142-143.
14. *Tritt v. United States of America* (1989), 68 O.R. (2d) 284, [1989] O.J. No. 446 (QL) (H.C.J.)
15. *Gascon Estate v. Paradis*, [1991] O.J. No. 504 (QL)
16. *United States of America v. Friedland* (1999), 182 D.L.R. (4th) 614 (Ont. C.A.)
17. *Ritter v. Donnell*, 2005 ABQB 197 (CanLII) at paras. 32-34.
18. *Trajano v. Marcos*, 978 F.2d 493 (9th Cir 1992)
19. *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium),* [2002] ICJ Report 1, Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans
20. *Bouzari v. Iran,* [2002] O.J. No. 1624 at para. 61, [2002] O.T.C. 297 (2002), aff'd 71 O.R. (3d) 675, 2004 CanLII 871 (C.A.)
21. *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), Can. T.S. 1987 No. 36, (entered into force June 26, 1987)
22. *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir 1980) at 890 ["*Filartiga*"].

23. *Jones v. Saudi Arabia*, [2006] UKHL 26, [2007] 1 AC 270, [2006] 2 WLR 1424

24. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly, Human Rights Council (15 January 2008), A/HRC/7/3 at para. 31.

25. *Costello-Roberts v. UK*, [1993] ECHR 13134/87 (Lexis)

26. *HLR v. France*, [1997] ECHR 24573/94 (Lexis)

27. *A. v. United Kingdom*, [1998] ECHR 25599/94 (Lexis)

28. *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 ["CAHWCA"].

29. *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62 (CanLII)

30. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)

31. *Al-Adsani v. United Kingdom* (2002) 34 ECHR 11, per Joint Dissenting Opinion of Rozakis, Calflisch JJ. joined by Wildhaber, Costa, Cabral Barreto, and Vajić JJ.

32. Conclusions and recommendations of the Committee against Torture: Canada, UN CAT, 34th Sess., UN Doc. CAT/C/CR/34/CAN (7 July 2005).

KUNLUN ZHANG ET AL. Moving Parties (Plaintiffs)	-and-	**JIANG ZEMIN ET AL.** Responding Parties (Defendants)	Court File No: 04-CV-278915CM2

Ontario
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE PLAINTIFFS

OLTHUIS, KLEER, TOWNSHEND
Barristers & Solicitors
Suite 312, 229 College St.
Toronto, ON M5T 1R4

Kate Kempton
LSUC#: 44588L

Tel: (416) 981-9330
Fax: (416) 981-9350

Lawyers for the Moving Parties (Plaintiffs)