
Immunity for Torture: Lessons from Bouzari v. Iran

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Abstract

This article assesses the implications of the Canadian case of Bouzari v. Islamic Republic of Iran in which sovereign immunity barred recovery against a foreign state for acts of torture. Part 2 describes the case and the courts' rejection of arguments centred on the hierarchy of jus cogens norms, implied waiver and common law principles. Part 3 evaluates parallel developments in the United States and demonstrates the commonalities and differences associated with efforts to overcome immunity in the two countries. Part 4 examines potential amendments to Canada's State Immunity Act with a view to balancing considerations of comity with a just and workable means of holding states accountable for grave human rights abuses.

1 Introduction

Too often immunity from suit equals impunity. In the wake of *Bouzari v. Iran*, Canadian victims of torture at the hands of foreign sovereigns find themselves without redress. The unanimous decision of Ontario's Court of Appeal has meant that human rights defenders are now proposing legislative reform, rather than waiting for a court to deliver an expansive interpretation of Canada's State Immunity Act (SIA). This article offers (1) a critical examination of the first Canadian effort to hold a foreign sovereign responsible for *jus cogens* violations, (2) a summary of parallel developments in the United States, and (3) an analysis of amendments to the SIA that would balance concerns of comity with a method of holding states accountable for grave violations of human rights.

2 A Challenge to Canada's State Immunity Act

In 1991, Houshang Bouzari was a successful Iranian businessman who owned a consulting firm that advised foreign investors seeking to develop oil and gas projects in

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the Persian Gulf. Bouzari was retained by a consortium of companies to negotiate a US\$1.8 billion deal with the National Iranian Oil Company (NIOC) for the purpose of conducting ‘oil and gas drilling and exploration technology and pipeline and refinery construction’¹ in the South Pars offshore fields. ‘For his services [Bouzari] and his company were set to receive a commission of 2 percent (\$35 million).’² In November 1992, Mehdi Hashemi Bahramani, the son of the President of Iran, approached Bouzari on the first of several occasions and offered his father’s help in facilitating the project, in exchange for \$50 million. Bouzari refused to pay the bribe. On 1 June 1993, three plain clothes police officers arrested Bouzari in Tehran and took him to Section 209 of Even Prison. For the next eight months, Bouzari was brutally tortured: ‘[h]e was deprived of food, sleep and sanitation. His head was forced into a bowl of excrement and held there. He was subjected to several fake executions by hanging. He was suspended by the shoulders for lengthy periods. His ears were beaten until his hearing was damaged.’³

In January 1994, Bouzari’s family paid \$3 million of a demanded \$5 million ransom to secure his release. Bouzari escaped to Vienna in July of that year. Despite telephoned death threats from Iranian agents, Bouzari and his family safely emigrated to Canada in July 1998.

While Bouzari was being tortured in detention, NIOC cancelled its contract with his consortium for the South Pars project. Mehdi Hashemi Bahramani later established a new company, the Iran Offshore Engineering and Construction Company, which entered ‘into a contract with the consortium for the South Pars project that was identical to the one that Mr. Bouzari had obtained. Not surprisingly [Bouzari] was entirely excluded from the new arrangement.’⁴

Bouzari sued the Islamic Republic of Iran in the Ontario Superior Court under Canada’s State Immunity Act 1985 (SIA), claiming damages for torture. Bouzari, of course, had nowhere else to bring a civil action.⁵ As with most victims of torture, it was impossible for Bouzari to return to the scene of the crime in order to lodge a claim against the state.⁶

Sovereign states are presumptively immune from suit in Canada unless the case meets one or more exceptions contained in the SIA.⁷ Bouzari argued for the application of three exceptions to immunity; the section 18 exception for criminal proceedings; the

¹ *Bouzari v. Islamic Republic of Iran* [2002] OJ No. 1624, at para. 6.

² Krotz, ‘Houshang’s Promise’, *The Walrus*, June 2004, at 58.

³ *Bouzari v. Islamic Republic of Iran* [2004] OJ No. 2800 Docket No. C38295, at para. 12.

⁴ *Ibid.*, at para. 15.

⁵ Both the Superior Court and the Court of Appeal skirted the conflict of laws question, refusing to decide whether Bouzari’s continuing injuries in Canada constituted a real and substantial connection to the forum.

⁶ Like many opponents of powerful interests or victims of torture, Houshang Bouzari would risk re-arrest or worse if he were to return to Iran in order to pursue his legal claims. His lawyer, Mark Arnold, applied for a visa to visit Iran and listed ‘service of legal process’ as the purpose of his visit. His request for a visa was denied. In the trial of the individual accused of killing Zahra Kazemi, no Canadian consular official, much less a family member of the deceased, was permitted to attend.

⁷ *State Immunity Act*, RSC 1985, c. S-18 (the ‘SIA’)

tort exception found in section 6 which provides that ‘a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property’; and the section 5 ‘commercial activity’ exception. Bouzari also claimed that the SIA must be read in conformity with Canada’s international legal obligations and that, both by treaty and peremptory norms of customary international law, Canada is bound to permit a civil remedy against a foreign state for torture abroad. Specifically, Bouzari contended that Article 14 of the Convention Against Torture⁸ required Canada to provide him with the opportunity to seek redress from his torturers.⁹ Article 14 provides:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

Nothing in this article shall affect any right of the victim or other person to compensation which many exist under national law.

In the Ontario Superior Court, Swinton J expressed sympathy for Bouzari’s plight but found that his case did not fall within one of the enumerated exceptions of Canada’s State Immunity Act.¹⁰ The Court found that despite the plea for punitive damages, the statute is civil, not criminal, in nature; that the commercial activity exception was inapplicable because the activity giving rise to the case ‘was imprisonment by agents of the foreign state and acts of torture performed by them in a state prison’; and that the tort exception does not apply to injuries which occur outside Canada.¹¹ The Superior Court also refused to import a new exception for torture committed outside Canada into the Act and found that the SIA is consistent with Canada’s international obligations, including the Convention Against Torture.

The Ontario Court of Appeal affirmed the lower court’s dismissal, holding that Canadian law precludes claims against foreign sovereigns for acts not enumerated in the statute, including torture. Goudge JA declared that ‘the wording of the SIA must be taken as a complete answer to this argument. Section 3(1) could not be clearer. To reiterate, it says: “(1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.” The plain and ordinary meaning of these words is that they codify the law of sovereign immunity.’¹² In sum, the Court of Appeal concluded that the SIA occupies the field in this area and that it provides no exception for torture. Like the Superior Court, the Court of Appeal agreed that the prohibition

⁸ Canada has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 UNTS 85, [1987] Can. TS No. 36, entry into force on 26 June 1987; Iran has not.

⁹ For discussion of the reach of Art. 14 see Hall, ‘The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad’, in this Symposium.

¹⁰ *Bouzari v. Iran*, *supra* note 1.

¹¹ *Ibid.*, at paras 18–34.

¹² *Bouzari v. Iran*, *supra* note 3, at para. 42.

against torture constitutes a rule of *jus cogens*, but held that the norm does not encompass the civil remedy sought by Bouzari.¹³ The Superior Court evaluated expert testimony on the subject and concluded that while the law may be moving in this direction, neither emerging state practice nor Article 14 of the Convention Against Torture ‘require[s] it to take civil jurisdiction over a foreign state for acts committed outside the forum state’.¹⁴

When the Supreme Court of Canada refused Bouzari’s request for leave to appeal, his domestic remedies were effectively exhausted.¹⁵ In May 2005, however, the UN Committee Against Torture (CAT), the international body tasked with monitoring implementation of the treaty, expressed concern at Canada’s failure to provide a civil remedy through the domestic judiciary for all victims of torture. In its concluding observations, the CAT noted ‘[t]he absence of effective measures to provide civil compensation to victims of torture in all cases’, and recommended that Canada ‘review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture’.¹⁶

3 Lessons from *Bouzari*

The case of *Bouzari v. Iran* was exceptional for two distinct reasons. First, on the facts of the case, Houshang Bouzari was neither a Canadian citizen nor a Canadian resident. As a victim of torture who emigrated to Canada four years after suffering abuse, Bouzari was left to argue that he satisfied the jurisdictional nexus to Canada necessary for the court to assume jurisdiction based on continuing effects related to the torture he originally endured in Iran, that is, that Iran’s actions harmed Bouzari while he was in Canada.¹⁷ While neither Court resolved the question whether the case satisfied a ‘real and substantial connection’ to Ontario,¹⁸ in *dicta* the Court of Appeal observed that Bouzari’s nexus to the forum was ‘very tenuous’.¹⁹ And while the Court explained that ‘it is not suggested that the appellant came here merely to engage the jurisdiction of the Ontario court’, the policy implications for Canada were obvious. If the *Bouzari* court had found that this case satisfied the real and substantial connection test, future refugees and immigrants to Canada – many of whom have fled grave human rights abuses abroad – would be eligible to bring cases in Canadian courts, assuming they satisfied other limitations.²⁰

¹³ *Ibid.*, at paras 87 and 94.

¹⁴ *Ibid.*, at para 78.

¹⁵ *Bouzari v. Iran* [2005] SCCA No. 410 Docket No. 30523.

¹⁶ CAT, ‘Conclusions and Recommendations of the Committee against Torture: Canada’, 7 July 2005, CAT/C/CR34/CAN.

¹⁷ *Bouzari v. Iran*, *supra* note 3.

¹⁸ *Ibid.*, at para. 23 (citing *Muscutt v. Courcelles* (2002), 60 OR (3d) 20, 213 DLR (4th) 577 (CA)).

¹⁹ *Ibid.*, at para. 33.

²⁰ The notion that limiting sovereign immunity will open the floodgates to an unwieldy number of claims against foreign sovereigns has never been seriously tested. If an exception to immunity were found or developed in a future amendment, potential plaintiffs would still face substantial hurdles related to concerns over retroactive application, statutes of limitation, the scope of the exception, the threat of costs, *forum non conveniens*, exhaustion of remedies, effective service of process, and potential deference to the political branches.

Second, Bouzari's attempt to fit his ordeal within the 'commercial activity' exception was wholly atypical. Most instances of torture are not accompanied by extortion, and even fewer cases are prompted by state officials seeking to appropriate business opportunities. The ordinary commercial activity case involves an agency or instrumentality of a foreign state engaged in contractual or business dealings within the forum state.²¹ The Canadian Supreme Court in *Re Canada Labour Code* established two basic questions raised by the 'commercial activity' exception: first, whether the acts in question constitute commercial activity and, secondly, whether the proceedings relate to that activity.²² In *Bouzari*, the Court of Appeal found emphatically that 'the acts of torture underpinning the appellant's action cannot be said to have anything to do with commerce. They were nothing more than unilaterally imposed acts of brutality.'²³

Notwithstanding the extraordinary facts of Bouzari's ordeal, the fundamental question posed by the case is whether states may continue to claim immunity in foreign courts for *jus cogens* violations. Bouzari's counsel argued that the prohibition against torture constitutes a peremptory norm that overrides the civil immunity accorded to foreign sovereigns.²⁴ In so doing, Bouzari and supporting interveners made three interrelated arguments: (i) that the normative hierarchy of the prohibition against torture trumps the immunity, (ii) that the act of torture represents a form of implied waiver, and (iii) that common law rules outside the SIA provide an alternative basis for abrogating immunity.

The first claim is rooted in the structure of international law as a body of rules found in conventions, treaties, and customary law based on the existence of widespread state practice and *opinio juris*. In terms of normative hierarchy, state immunity is abrogated when the state is responsible for crimes that have the status of peremptory norms of international law. Acts prohibited under *jus cogens* occupy a higher status than state immunity which, while part of customary international law, does not occupy the status of *jus cogens*. As a result, where a state has violated a norm of *jus cogens*, state immunity cannot attach to that act because the norm that has been violated is of greater importance. While controversy exists as to the exact content of *jus cogens*, it is well accepted that the prohibition against torture is a peremptory norm.²⁵ Under principles of normative hierarchy, Bouzari contended, Iran's immunity was nullified where the *jus cogens* prohibition of torture had been violated. This view was adopted

²¹ In the US, the primary exceptions to immunity contained in the Foreign Sovereign Immunities Act (FSIA) are for cases in which 'the foreign state has waived its immunity either expressly or by implication', where 'the action is based upon a commercial activity carried on in the United States by the foreign state', and cases against a foreign state for personal injury or death or damage to property occurring in the US as a result of the tortious act of an official or agent of state acting within the scope of his or her office or employment: 28 USCA §§ 1602 ff.

²² *Re Canada Labour Code* [1992] 2 SC 50, para. 69.

²³ *Bouzari v. Iran*, *supra* note 3, at para. 53.

²⁴ See Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' in this Symposium (for further discussion on the hierarchy of norms debate in immunity cases).

²⁵ See *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3) [1999] 2 All ER 97 (HL). The *Pinochet* case arose in the context of a request for extradition to a third country (Spain) to face criminal charges, not as a private individual seeking civil redress.

by the dissent in the European Court of Human Rights case of *Al-Adsani* authored by Judges Rozakis and Caflisch.²⁶ Their dissent articulates the view that because the prohibition on torture operates as a *jus cogens* norm ‘in the international sphere’, the doctrine acts to deprive the sovereign of immunity and the ‘criminal or civil nature of the [subsequent] domestic proceeding is immaterial’.²⁷

The second theory, usually referred to as the implied waiver approach, first gained prominence in the United States and is related to the normative hierarchy theory.²⁸ State immunity is a privilege granted to states as members of the international community of nations and intended to encourage comity and mutual respect among states. As a form of customary international law, this privilege is of significant importance and historical stature. However, when a state violates prohibitions of international *jus cogens*, the implied waiver theory holds that the state in question cannot then claim the privilege of immunity for those acts: ‘[i]nternational law cannot bestow immunity from prosecution for acts that the same international law has universally criminalized’.²⁹ Under this notion, by disregarding peremptory norms the offending state has waived its rights under international law to the extent that those rights conflict with the illegal behaviour. Citing US Supreme Court Chief Justice Marshall’s 1812 decision in *The Schooner Exchange*, Caplan argues that there is no inherent right of state immunity and there is no international norm that shields foreign states from human rights litigation.³⁰

The third claim, contained in the Canadian Lawyers for Human Rights’ (CLAIHR) intervener submission before the Court of Appeal, argued that common law principles of adjudication continued to operate outside Canada’s SIA that would permit the court to take jurisdiction of the case. CLAIHR argued that the remedies available in Canadian law for other forms of tortuous conduct could be read into the interstices of the SIA.³¹

In rejecting each of these contentions, the Ontario Court of Appeal situated sovereign immunity within customary law – although it acknowledged the countervailing customary law considerations related to the prohibition against torture – and Canada’s statutory codification of comity principles.³² Relying on the reasoning in *Schreiber v. Canada (Attorney General)*, the court endorsed the view that it is not in Canada’s interest to attempt to adjudicate every – or any but the most egregious – act of a foreign nation. This oft-repeated perspective maintains that for the court to find otherwise would ignore the international system of dispute resolution, and fundamental principles of sovereign equality.³³

²⁶ Springham, ‘State Immunity – “What a Pity!”’, 3(3) *Human Rights & UK Practice* (2002) 3.

²⁷ *Al-Adsani v. UK*, 21 Nov. 2001 (2002) 34 EHRR 11, at para. 4.

²⁸ See generally Caplan, ‘State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory’, 97 *AJIL* (2003) 41 and Belsky *et al.*, ‘Implied Waiver Under the FSIA’, 77 *Cal L Rev* (1989) 365.

²⁹ Day, ‘Crimes Against Humanity as a Nexus of Individual and State Responsibility’, 22 *Berkeley J Int’l L* (2004) 489.

³⁰ Caplan, *supra* note 28, at 781.

³¹ See www.claihr.org/claihr_new/SupplementaryFactum.doc.

³² *Schreiber v. Canada (Attorney General)* (2002), 216 DLR (4th) 513 (SCC), at para. 27.

³³ Throughout the *Bouzari* case, the Attorney General of Canada maintained that if Canadian courts were to view jurisdiction expansively, other countries would be less inclined to respect the Canadian legal system and its authority and could lead to retaliatory actions in foreign courts against Canada and/or Canadian interests. For an opposing view see McGregor, ‘Torture and State Immunity: Deflecting Impunity; Distorting Sovereignty’, in this Symposium.

Bouzari thus serves to align Canada with those states and juridical bodies that have refused to regard torture as an exception to the rule of immunity.³⁴ Like applicants in the United Kingdom,³⁵ the United States,³⁶ and those who appear before the European Court of Human Rights,³⁷ future Canadian plaintiffs face the spectre of enduring immunity despite claims alleging grave human rights abuses committed by foreign states.³⁸ For at least three real or potential Canadian plaintiffs who have recently been tortured and/or killed abroad by agents of foreign states – William Sampson, Maher Arar, and the family of Ziba Zahra Kazemi – the *Bouzari* precedent now poses a formidable obstacle. Maher Arar, for one, was subject to extraordinary rendition and removed from the United States to Syria where he was tortured for nine months; Arar's ordeal was the subject of a Commission of Inquiry in Canada which exonerated Arar from any wrongdoing and recommended that Canadian authorities 'assess Mr. Arar's claim for compensation in light of the finding of this report' which detail the ways in which Canadian authorities failed to respond to the torture of a Canadian citizen of Syrian origin who was removed from the United States to Syria.³⁹ Citing *Bouzari*, the Superior Court dismissed Arar's action against Syria.⁴⁰

4 Developments in the United States

In contrast to Canada, the United States offers a peculiar patchwork of civil redress for torture and other serious human rights abuses. The scope of sovereign immunity for pure *jus cogens* violations was most recently decided by the United States Court of Appeals for the District of Columbia Circuit through its grant of immunity to the Federal Republic of Germany with regard to acts committed by the Nazi regime.⁴¹ Hugo Princz, a US citizen at the outbreak of World War II, sought damages from Germany for his internment at Auschwitz and the slave labour that he provided to the Third Reich.⁴² At the District Court, Judge Sporkin denied Germany's motion to dismiss and claimed jurisdiction over the case.⁴³ The DC Circuit ultimately reversed Judge

³⁴ See generally Currie, 'Perspectives on State and Diplomatic Immunity', *County of Carlton Law Association Update on Civil Litigation 2001* (2001); and H. Fox, *The Law of State Immunity*, (2002).

³⁵ *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya and others* [2006] UKHL 26 and *Al-Adsani v. Government of Kuwait and Others*, CA, 12 Mar. 1996; 107 ILR 536.

³⁶ *Princz v. Federal Republic of Germany*, 26 F 3d 1166 (DC Cir 1994).

³⁷ But see the dissenting judgments rendered in the 9-8 decision of the European Court of Human Rights in *Al-Adsani v. the United Kingdom* [2001] ECHR 752.

³⁸ See McGregor, 'State Immunity and Jus Cogens', 55 ICLQ (2006) 437 (citing *Ferrini v. Federal Republic of Germany* (Cass Sez Un 5044/04 Italy)) and *Prefecture of Voiotia v. Federal Republic of Germany*, Case No 11/2000, Areios Pagos (Greece).

³⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events in Relation to Mahar Arar, Analysis and Recommendations* (2006), available at: www.ararcommission.ca.

⁴⁰ *Arar v. Syrian Arab Republic* [2005] OJ No. 752, at para. 28.

⁴¹ See also *Siderman de Blake v. the Republic of Argentina*, 965 F 2d 688 (9th Cir. 1992).

⁴² Princz had failed to qualify for post-Holocaust compensation because of his status as a US citizen.

⁴³ *Princz*, *supra* note 36.

Sporkin's decision but recognized (as the lower court had) the difficulties of claiming immunity for violations of *jus cogens* norms.⁴⁴

Like Bouzari, Prinz sought to expand the exceptions to statutory immunity afforded by the Foreign Sovereign Immunities Act (FSIA),⁴⁵ the US equivalent to the Canadian SIA. In 1996, however, the FSIA was amended to include an anti-terrorism exception for 'personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act'.⁴⁶ The added exception under the FSIA applies only to claims brought by US citizens, who were citizens at the time of the alleged events, and permits as defendants only those states listed by the State Department as sponsors of terrorism at the time the act occurred or later so designated as a consequence of the act in question.⁴⁷ That list now includes Cuba, Iran, North Korea, Sudan, and Syria.⁴⁸ Finally, a claim may only be brought where the claimant 'afford[s] the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration'.⁴⁹

The US Congress subsequently passed the Civil Liability for Acts of State Sponsored Terrorism Act (known as the 'Flatow Amendment') to give parties injured or killed by a terrorist act covered by the FSIA exception, or their legal representatives, a cause of action against 'an official, employee, or agent of a foreign state designated as a state sponsor of terrorism' who commits the terrorist act 'while acting within the scope of his or her office, employment, or agency', if a US government official would also be liable for such actions.⁵⁰ The Flatow amendment arose because of a case filed by Stephen Flatow after his daughter Alisa was killed in a 1995 car bombing in the Gaza Strip by Islamic Jihad, an organization which a federal district court later found to be funded by Iran.⁵¹

Emboldened by the amendment, several US plaintiffs filed actions against Iran, Iraq, and Cuba between 1996 and 2000. In *Alejandre v. Republic of Cuba*, the court awarded \$50 million in compensatory damages and \$137.7 million in punitive damages to families of three of the four persons who were killed when the Cuban air force shot down two Brothers to the Rescue planes in 1996.⁵² In both the *Flatow* and *Alejandre* cases, the plaintiffs sought to attach assets of Iran and Cuba in the United States that had been

⁴⁴ *Prinz v. Federal Republic of Germany*, 26 F 3d 1166 (DC Cir 1994). Professor Mathias Reimann later reflected on *Prinz* and identified three primary concerns with the Court's grant of immunity: '[t]hey pertain to the relationship between the branches of government, to considerations of efficiency in human rights enforcement, and to the risk of suffering retaliation by foreign states. In all these respects, the arguments point both ways': Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Prinz v. Federal Republic of Germany*', 16 *Mich J Int'l L* (1995) 403.

⁴⁵ Foreign Sovereign Immunities Act (FSIA), 28 USC §§1602–11 (1976).

⁴⁶ *Ibid.*, §1605(a)(7)(B) (i).

⁴⁷ The State Department identifies state sponsors of terrorism under s. 6(j) of the Export Administration Act of 1979 (50 All. USCA §2405(j)0), §620A of the Foreign Assistance Act (22 USCA §2371), and §40(d) of the Arms Export Control Act (22 USCA §2780(d)).

⁴⁸ See 22 CFR 126.1(a) (2002).

⁴⁹ FSIA, *supra* note 44, at §1605(a)(7)(B) (i).

⁵⁰ *Ibid.*, at §1605 notes (a) and (b).

⁵¹ *Flatow v. Islamic Republic of Iran*, 999 F Supp 1 (DCC 1998).

⁵² *Alejandre v. Republic of Cuba*, 996 F Supp 1239 (SD Fla. 1997).

blocked by the US government in previous decades. Over the objections of President Clinton, the US Congress further amended the FSIA to provide that any property of a state designated as a sponsor of terrorism and frozen pursuant to lawful means could be subject to execution or attachment in aid of a judgment against that state under the terrorism exception to the FSIA.⁵³ Three years of additional negotiations followed between the Executive Branch and Congress before the US federal government ultimately liquidated \$96.7 million of the \$193.5 million of Cuban assets that had been blocked and paid that amount to the plaintiffs in the *Alejandre* action and their lawyers. The claimants in the cases against Iran generally received compensatory but not punitive damages, and eventually settled for more than \$380 million in compensation out of US funds.⁵⁴ Congress effectively forestalled additional FSIA cases by approving settlement appropriations only for cases filed as of July 2000.⁵⁵

Under the international takings exception of the FSIA, plaintiffs in the US may also invoke 28 USC §1605(a)(3) to reclaim property or assets seized in violation of international law. The little-used international takings exception embodies the spirit of the Second Hickenlooper Amendment, 22 USC §2370, and reflects legislative concern that the Act of State doctrine found in *Banco Nacional de Cuba v. Sabbatino*⁵⁶ not serve to foreclose claims for wrongful expropriation. Recently, the taking in violation of international law exception has been used by plaintiffs in *Nemariam v. Federal Republic of Ethiopia*, a case involving Ethiopia's seizure of assets owned by Ethiopians of Eritrean origin in the course of their mass expulsion from Ethiopia during the 1998–2000 Eritrea–Ethiopia war.⁵⁷

Significantly, the FSIA applies to states and their agencies and instrumentalities, but not to individuals.⁵⁸ Cases against individual human rights abusers may be brought by aliens in the United States under the Alien Tort Claims Act (ATCA),⁵⁹ as well as the Torture Victim Protection Act of 1991 (TVPA) which provides a civil cause of action to US citizens and foreigners alike for torture or extrajudicial killing.⁶⁰ (Service of process rules requiring the presence of the defendant in the US and a 10-year statute of limitations mean that relatively few TVPA cases are ever filed.) The ATCA, which provides a remedy for 'violations of the law of nations', was recently narrowed in *Sosa v. Alvarez-Machain*,⁶¹ but almost certainly applies to cases of torture, genocide, and

⁵³ Victims of Trafficking and Violence Protection Act of 2000, 22 USC §7100.

⁵⁴ See J.K. Elsea, Congressional Research Serv, *Suits Against Terrorist States by Victims of Terrorism* (2006), App. I (presenting a full list of the remedies provided in 10 cases against Iran), available at: www.fas.org.

⁵⁵ S. 2002 of the Victims of Trafficking and Violence Protection Act of 2000, Pub L No. 106-386, 114 stat. 1464 limits funded compensation to a limited class of suits filed before July 2000.

⁵⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (1964).

⁵⁷ *Nemariam v. Federal Republic of Ethiopia*, 315 F 3d 390, 391–392 (DC Cir 2003).

⁵⁸ FSIA, *supra* note 44, at §1603(a–b).

⁵⁹ 28 USC §1350, 1602–1611 (1976).

⁶⁰ Torture Victim Protection Act of 1991, 28 USC §1350.

⁶¹ *Jose Francisco Sosa v. Humberto Alvarez-Machain*, 124 S Ct 2739 (2004).

crimes against humanity. Indeed, Justice Breyer's concurrence in *Alvarez-Machain* explains that universal criminal jurisdiction necessarily contemplates civil recovery:

[C]onsensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. 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 proceeding itself.⁶²

Where the FSIA and the ATCA conflict, *Trajano v. Marcos*⁶³ holds that the FSIA trumps and that the ATCA may not be used to sue an individual in his or her capacity as a state official.

The result in US courts has been a steady stream of cases aimed at obtaining civil redress for a limited universe of claims. In recent years, a host of hybrid actions against individual Saudi Arabian nationals and state actors alleging support for terrorist acts and mass crimes against US citizens have complicated the picture.⁶⁴ At a minimum, the proliferation of ATCA cases and law suits against state sponsors of terrorism in the US has cemented the United States' reputation as the most amenable jurisdiction for certain human rights cases. But the paradigmatic case of torture committed by state officials in a foreign country remains beyond the reach of plaintiffs hoping to use the FSIA.

5 Next Steps on Immunity in Canada

The findings and subsequent application of *Bouzari v. Iran* suggest that civil redress in Canada for grave human rights abuses committed by foreign states will be driven by legislative change, not an expansive interpretation of the existing Act. Advocates for reform are now pushing two distinct efforts to amend the SIA. Each amendment would be concerned with Canadian, not international, law, although any such amendments would introduce the effect of the international prohibition against at least certain *jus cogens* offences into domestic law.

The first was inspired by the 1996 amendments to the FSIA in the United States and would bar immunity in Canada 'in any proceedings that relate to terrorist activity that the foreign state conducted on or after January 1, 1985'.⁶⁵ The proposed legislation was introduced in the 38th Parliament, 2005, by then-opposition Conservative Member of Parliament Stockwell Day. However, as noted by Forcese, '[t]his law project died on the order paper in 2005. It remains to be seen whether it will be resuscitated by the new Conservative government with Day as the new Minister of Public Safety and Emergency Preparedness.'⁶⁶

A second proposed amendment was briefly floated by Francine Lalonde, a Bloc Québécois Member of Parliament. Lalonde's Bill would deny immunity for acts of torture, genocide, crimes against humanity, or war crimes that occurred outside

⁶² *Ibid.*, at 762–763.

⁶³ *Trajano v. Marcos (In re Estate of Marcos Litigation)*, 978 F 2d 493, 497 (9th Cir 1992), cert denied sub nom. *Marcos-Manotoc v. Trajano*, 113 S Ct 2960 (1993).

⁶⁴ See, e.g., *Burnett v. Al Baraka Inv & Dev Corp.*, 274 F 2d 86 (DC Cir 2003).

⁶⁵ Bill C-394, 1st Sess., 38th Parl., 53–54 Eliz. II, 2004–2005, cl. 1. A parallel Private Member's Bill was introduced in the Senate. Bill S-35, 1st Sess., 38th Parl., 53–54 Eliz. II, 2004–2005.

⁶⁶ Forcese, 'De-Immunizing Torture: Reconciling Human Rights and State Immunity', *McGill LJ* (2007).

Canada. The Bloc Québécois' legislation is informed by the work of several human rights organizations and the University of Toronto Faculty of Law International Human Rights Clinic.⁶⁷ This effort seeks to deny civil immunity to states and state officials responsible for a class of egregious human rights abuses, subject to several limitations. It applies only to a category of international crimes for which universal criminal jurisdiction already exists, in cases filed by Canadian citizens and residents who can meet the 'real and substantial connection' test, and would maintain *forum non conveniens* restrictions.⁶⁸ If Lalonde's Bill were enacted, Canadian victims abused abroad, but without legal recourse there, would be permitted to sue foreign states in Canadian courts for acts of torture or other *jus cogens* violations.⁶⁹

The case for amending Canada's SIA in this way rests on several propositions. First, Canada is a party to virtually every international human rights convention⁷⁰ and has set the standard for criminal accountability of serious human rights abuses. Under the *Crimes Against Humanity and War Crimes Act* (CAHWCA) Canada permits extraterritorial criminal prosecution of foreign nationals for acts, including torture, occurring outside Canada. (The Act requires that the accused be present in Canada or that the alleged victims be Canadian citizens.⁷¹) Paired with the existing SIA, the CAHWCA creates an anomalous legal regime in which Canada has the ability to deprive an individual of his or her liberty for the same acts for which a victim is unable to seek civil redress.

In this light, the Committee Against Torture's implied acknowledgement of Canada's failure to provide a remedy is further evidence that the *Bouzari* judgment is inconsistent with Canada's commitments as a global protector of human rights.⁷² Fully two years before *Bouzari* was decided, Adams observed that '[t]he CAT is the most promising source of international law in which to locate a transfer of enforcement authority from international to national jurisdiction, expressing as it does the most recent and wide-ranging consensus concerning the rights of all persons to be free from torture.'⁷³

⁶⁷ A conference at the University of Toronto Faculty of Law on 1 Oct. 2004, included representatives of the Government of Canada, the province of Ontario, Human Rights Watch, Amnesty International, REDRESS, the International Coalition Against Torture, Le Centre International des Ressources Juridiques, and counsel for existing and potential plaintiffs.

⁶⁸ Civil cases are not limited by prosecutorial discretion and involve a less onerous standard of proof. Accordingly, most civil actions are subject to stricter jurisdictional tests and, ordinarily, must be filed within a prescribed time.

⁶⁹ Unless the law is made retroactive, Arar, Sampson, and the Estate of Zahra Kazemi will face the same difficulties *Bouzari* encountered.

⁷⁰ As Andrew Cohen has noted, 'no country belongs to more clubs': A. Cohen, *While Canada Slept: How We Lost Out Place in the World* (2003), at 15.

⁷¹ *Crimes Against Humanity and War Crimes Act* 2000, c. 24, at s. 8. The first case to be prosecuted under the statute began in Mar. 2007. The defendant, Désiré Munyaneza, is accused of committing crimes against humanity in the Butare region of Rwanda during the 1994 genocide.

⁷² Forcese, *supra* note 66, observes that some Committee Against Torture members went further in their examination of Canada and outlined a rationale for international countermeasures that would countenance civil suits in Canada against sovereigns responsible for torture.

⁷³ Adams, 'In Search of a Defence of the Transnational Human Rights Paradigm: May *Jus Cogens* Norms be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?', in C. Scott (ed.), *Torture as Tort* (2001), at 250.

Amending the SIA to craft an exception to immunity for torture would reaffirm Canada's respect for the spirit of international human rights and align Canadian law with the Canadian Supreme Court's frequent embrace of customary international law.⁷⁴

Second, permitting Canadian victims of grave human rights abuses to sue the responsible state empowers the appropriate parties to appear in such cases. There is a significant literature describing the value of civil actions to plaintiffs as a tool for addressing international human rights abuses.⁷⁵ The Court of Appeal's decision in *Jones v. Saudi Arabia* accepts a position long held by psychologists and lawyers working with survivors of torture that 'there are cases and torture is among them, where the value of civil redress may be suggested to lie as much in terms of the ability to establish the truth and so to assist rehabilitation or closure as in terms of the prospect of financial recovery'.⁷⁶

As for the proper defendants, torture and other grave abuses are – by definition – committed by state actors in their official capacity.⁷⁷ In *Jones v. Saudi Arabia*, Lord Justice Mance addressed the supposed incongruity between the definition of torture, which requires that the act stem from official state authority, and the protection of state actions under state immunity provisions:

I do not accept that the claimants face any such unanswerable dilemma. ... the requirement that the pain or suffering be inflicted by a public official does no more in my view than identify the author and the public context in which the author must be acting. It does not ... suggest that the official inflicting such pain or suffering can be afforded the cloak of state immunity.⁷⁸

In this regard, the Court of Appeal decision in *Jones v. Saudi Arabia* (since reversed by the House of Lords)⁷⁹ created a distortion. In ruling that Jones, Mitchell, Sampson, and Walker may pursue claims against their alleged torturers but not the State of Saudi Arabia, the Court of Appeal removed immunity from individuals while upholding Saudi Arabia's untouchable status.⁸⁰ Like the TVPA in the US, the Court of Appeal's

⁷⁴ See *Mugesera v. Canada* [2005] 2 SCR 100; *Baker v. Canada* [1999] 2 SCR 817. See also *Bouzari v. Iran*, *supra* note 1, at para. 65; On the importance of customary international law for Canadian legislation generally see *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (ville)* 2001 SCC 40, 200 DLR (4th), paras 28–32. For a discussion of the application and incorporation of international law generally in Canada see Brunnée and Toope, 'A Hesitant Embrace: The Application of International Law by Canadian Courts', 40 *Canadian J Int'l L* (2002) 3.

⁷⁵ E.g., see B. Stephens and S. Ratner, *International Human Rights Litigation in U.S. Courts* (1996), at 233–238.

⁷⁶ *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya (The Kingdom of Saudi) and another Mitchell and others v. Al-Dali and others* [2004] All ER (D) 418, para. 80.

⁷⁷ Art. 1 of the Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force on 26 June 1987, defines torture as any 'act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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'.

⁷⁸ *Ibid.*, at para. 71.

⁷⁹ *Jones*, *supra* note 34.

⁸⁰ *Jones*, *supra* note 76.

ruling in *Jones* assigned blame to individuals precluded from claiming *ratione materiae* immunity.⁸¹ Predictably, Houshang Bouzari refiled his action against the individuals he believes to be responsible for his torture.⁸²

The illogic inherent in this trend shields the most responsible party from blame. A state's responsibility for the actions of government authorities derives from both public international law and the private law tort doctrine of *respondet superior*; in each case, the principal, not the agent, is liable. In reality, the experience of Houshang Bouzari and other survivors demonstrates that victims of torture are routinely blindfolded during their ordeal and unable to identify the individual identity of their torturers.⁸³ Only by naming the state as a defendant is the ultimate authority called to account and, in most cases, is the possibility of pecuniary recovery engaged. Finally, holding a state liable for systematic abuses precludes the possibility that the sovereign will later disclaim responsibility for the action of government agents.

In the Canadian context, removing sovereign immunity for grave human rights abuses committed by state agents would also have the benefit of limiting the conceptual danger posed by the Ontario Court of Appeal's decision in *Jaffe v. Miller*.⁸⁴ There, the court refused to recognize an exception to state immunity where the United States claimed immunity on behalf of agents responsible for kidnapping a Canadian citizen. The court founded its position on the evolution of common law related to state immunity and concluded that so long as the officials were acting as functionaries of the state even the demonstrated illegality of those duties would not remove the protection of state immunity. That position was rejected in Mance LJ's recent decision in the Court of Appeal in *Jones v. Saudi Arabia*. Mance LJ identified the 'incongruity' of suggesting a rationale for extending immunity through which state agents continue to be indemnified by the state for 'illegal or malicious' conduct.⁸⁵ The Court of Appeal also distinguished *Jaffe* as a case that did not address illegal conduct on the scale of systemic torture seen in *Jones*, and which presented a scenario in which there was no international law rationale for the indemnification of state officials.⁸⁶ By amending a federal statute, reform of the SIA would limit *Jaffe* to its facts while maintaining the consistency of federal law and ensuring that civil remedies are equal across Canada's provinces.⁸⁷

Third, a *jus cogens* focused exception to immunity targets the harm and serves to buttress the international architecture of human rights protection. Perhaps surprisingly, Canadian law does not provide for individual civil redress following the

⁸¹ For a summary of arguments for and against holding individuals, even state actors, potentially liable while upholding immunity for the sovereign see Forcese, *supra* note 66, at 22–25.

⁸² Bouzari's lawyer, Mark Arnold, refiled his client's action against individuals associated with the Rafsanjani family and received a default judgment.

⁸³ Krotz, *supra* note 2, at 59.

⁸⁴ *Jaffe v. Miller*, 13 OR (3d) 745, [1993] OJ No. 1377.

⁸⁵ *Jones*, *supra* note 76, at para. 35.

⁸⁶ Equally, however, once the decision reached the House of Lords, the Law Lords placed great emphasis on the risk that the State would be implicated by a case against individual officials.

⁸⁷ Tort remedies are generally governed by each province in Canada. See A. Linden, *Canadian Tort Law* (6th edn., 1997).

commission of international human rights abuses: ‘Canada has no equivalent to the US Alien Tort Claims Act (ATCA) or Torture Victim Protection Act (TVPA), which provide jurisdiction for violations of the “law of nations” and a cause of action for torture, respectively’.⁸⁸ Amending the SIA would help Canada find a balance between the country’s international orientation – its commitment to multilateralism and the international rule of law – and its desire to promote the realization of human rights, as evidenced by its sponsorship of the Ottawa Convention, its support for the International Criminal Court, and its stance at the United Nations. A human rights exception to sovereign immunity would permit Canada to express its revulsion at the commission of such acts, promote access to justice, and communicate the sense in which Canada *itself* is damaged by acts of torture committed abroad. Domestic law can give substance to *erga omnes* obligations in international law, responsibilities that states owe to the international community. Accordingly, a violation of such an obligation deriving from *jus cogens* violations constitutes an offence against other states, in this case, Canada.⁸⁹

By contrast, an exception aimed solely at sponsors of terrorism runs the risk of being under-inclusive. Acts of terror may constitute a crime against humanity and, like torture, produce victims deserving of compensation. The problem of removing immunity for states designated as supporters is a political one. In the US, “[t]errorist state” suits ... pose [a] serious danger to U.S. courts: namely, that they will become politicized as they are drawn into foreign policy debates’.⁹⁰

6 Conclusion

As Forcese argues, ‘[s]ometime before Canada submits its sixth periodic report to the UN Committee Against Torture in 2008 it will have to consider how best to respond to that Committee’s position on civil remedies for torture victims’.⁹¹ Parliament would honour the legacy of Houshang Bouzari’s effort by amending the SIA to remove immunity for acts of torture and other *jus cogens* offences.

To address the concern that such a statute would be over-used or applied as a political weapon against selected states, the law should operate within existing ‘real and substantial’ connection requirements for standing. Any amendment allowing Canadians to sue foreign states in Canadian courts should in turn permit foreign countries acting in good faith to adjudicate these claims themselves. Judges, of course, would possess the discretion to invoke *forum non conveniens* or apply a conflict-of-law analysis. As a result, states that are willing and able to prosecute such crimes should not find themselves as defendants in Canadian courts.

⁸⁸ Davidson, ‘Tort Au Canadien’, 38 *Vanderbilt J Transnat’l L* (2005) 1403, at 1406.

⁸⁹ *Barcelona Traction, Light and Power Co*, Second Phase [1970] ICJ Rep 5, at 64; and for commentary see Bartsch and Elberling, ‘Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision’, 4(5) *German LJ* (2003), at para. 20.

⁹⁰ Slaughter and Bosco, ‘Plaintiff’s Diplomacy’, *Foreign Affairs*, Sept./Oct. 2000.

⁹¹ Forcese, *supra* note 66, at 57.

A specific and workable amendment will help victims abused in other states to obtain legal redress while still respecting broader considerations of international comity and state sovereignty: '[i]n an era marked by almost universal agreement about core human rights, it is no longer appropriate to allow a State to violate them with impunity'.⁹²

In the end, *Bouzari* is about the power of law to respond to universal human rights abuses. By amending the SIA, Canada has an opportunity to align its civil and criminal opprobrium of human rights violations, give hope to victims of torture, and rebalance immunity and accountability.

⁹² Reimann, *supra* note 44, at 432.