C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-17-031760-062

S U P E R I O R C O U R T

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

Plaintiffs

v.

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

Defendants

And

ATTORNEY GENERAL OF CANADA,

Mis-en-cause

PLAINTIFFS' ARGUMENT PLAN ON THE DEFENDANTS' MOTION *DE BENE ESSE* TO DISMISS THE RE-AMENDED MOTION TO INSTITUTE PROCEEDINGS

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I. INTRODUCTION

1. These proceedings concern the arrest, detention, torture and death of Zahra Kazemi, a Canadian-Iranian photojournalist. They are brought against the Islamic Republic of Iran and its Supreme Leader as well as the individual Defendants, both in their official and personal capacities, who authorized and ordered Zahra Kazemi's arbitrary arrest and detention, facilitated and committed the acts of brutality, sexual abuse and torture that led to her death, and subsequently actively sought to prevent those facts from becoming known.

2. After failing to appear to defend this case, Iran and its Supreme Leader have now filed a motion *de bene esse* for leave to appear for the sole purpose of raising state immunity and to dismiss the Plaintiffs' Re-Amended Motion to Institute Proceedings on that basis.

3. The Defendants' motion must be dismissed as:

   a) Subsection 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18 (the "***SIA***") **[Book of Authorities, Tab __]** is inapplicable to the present situation and no other immunity exists at common law that could prevent proceedings before this Court against the Defendants;

   b) Alternatively, s. 3(1) *SIA* is inoperative in the circumstances of this case based on s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (the "***Bill of Rights***") **[Book of Authorities, Tab __]**;

   c) Subsidiarily, s. 3(1) *SIA* is of no force and effect based on s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11 (the "***Charter***") **[Book of Authorities, Tab __]**, as it cannot be saved through s. 1 of the *Charter*.

4. As to point (a), Plaintiffs adopt in their entirety the reasons provided by the Intervener Amnistie International Canada (Section francophone) ("**AI**") in its written argument plan, namely that the *SIA* is not an exhaustive statute and its adoption by Parliament in 1982 did not completely supersede or displace the common law of state immunity that pre-dated the statute. Said common law continues to co-exist in parallel to the

extent that a subject-matter is not expressly addressed. The *SIA* is thus generally inapplicable to acts of torture. Furthermore, these acts cannot attract immunity at common law since they do not constitute sovereign acts of states (*acta jure imperii*), being perpetrated in violation of the peremptory norm of international law (or rule of *jus cogens*) that constitutes the prohibition of torture.

5. As to point (b), Plaintiffs submit that the application of s. 3(1) *SIA* in this case would leave them no other option but to seek justice in Iran for the arrest, torture, rape and death of Zahra Kazemi by Iranian officials. No such proceedings may be entertained fairly by Iranian courts. Moreover, for over six years now, and notwithstanding several official requests by the Canadian government, the Iranian government refuses to conduct a thorough and transparent investigation into the events of July 2003, while failing to bring to justice the individual perpetrators of these gross human rights violations, thus granting them impunity.

6. Given the demonstrated impossibility for the Plaintiffs to ever secure a just and fair outcome for this case in Iran, allowing the Defendants' motion would deprive the Plaintiffs of "*the right to a fair hearing in accordance with the principles of fundamental justice for the determination of [their] rights and obligations*", contrary to s. 2(*e*) of the *Bill of Rights*. As a result, s. 3(1) *SIA* must be declared inoperative in this case and Iran's motion dismissed.

7. As to point (c), Plaintiffs adopt in their entirety the submissions of the Intervener Canadian Centre for International Justice (**"CCIJ"**), namely that s. 3(1) *SIA* runs contrary to s. 7 of the *Charter* and it cannot be saved through s. 1. It is therefore of no force or effect.

II. FACTS[1]

A. PARTIES

i. The Late Zahra Kazemi

8. Zahra Kazemi was a Canadian-Iranian photojournalist, filmmaker and artist. She was born in Shiraz, Iran on October 9, 1948.

9. She came to Canada from Paris in 1993 with her only child, Stephan Hashemi, and settled in Montreal. She became a Canadian citizen in 1997.

10. Before coming to Canada, Ms. Kazemi had spent twenty years in France, during which time she completed a Ph.D. in cinema. In the years before her untimely demise, she had concentrated on photography and much of her later work captures the lives of women and children in countries around the world on film.

11. Since coming to Canada, Ms. Kazemi had been domiciled in Montreal, living with her son.

ii. Stephan Hashemi

12. Plaintiff Stephan Hashemi is a Canadian citizen. He lives in Montreal, Quebec. He is the only child of the late Zahra Kazemi.

13. Mr. Hashemi has instituted the present proceedings against Iran and the other Defendants on his own behalf and in his capacity as liquidator of his mother's estate.

14. Mr. Hashemi seeks damages on behalf of his mother's estate for the prejudice she suffered as a result of her wrongful arrest, detention, sexual assault and torture prior to her death in Iranian custody. Mr. Hashemi also seeks damages for the grief and psychological trauma he personally has endured as a result of those events.

15. Finally, Mr. Hashemi seeks the disinterment and repatriation of his mother's remains for independent autopsy and burial in Canada.

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[1] Unless indicated otherwise, the facts, which for the purpose of this motion are taken to be true (*Laliberté v. Sainte-Adèle (Ville)*, [2004] J.Q. No. 10731 (QL) (C.A.) **[Book of Authorities, Tab _____]**), are taken from the Re-Amended Motion to Institute Proceedings **[Book of Proceedings, Tab __]**, Plaintiffs' Exhibits and the Affidavit of Canada's former ambassador to Iran, Philip MacKinnon (signed October 28, 2009) **[Book of Proceedings, Tab __]**.

iii. The Defendants

16. Defendant the Islamic Republic of Iran is a member state of the United Nations.

17. Defendant Ayatollah Sayyid Ali Khamenei is the Supreme Leader of the Islamic Republic of Iran and its head of state.

18. Defendant Saeed Mortazavi was the Chief Public Prosecutor for Tehran at the time of Zahra Kazemi's death.

19. Defendant Mohammad Bakhshi was the Deputy Chief of Intelligence for Evin Prison in Tehran where Zahra Kazemi was detained prior to her death.

B. ZAHRA KAZEMI'S FINAL DAYS

i. Arrest and detention at Evin Prison

20. In the summer of 2003, Zahra Kazemi visits Iran, doing freelance photographic work for a Canadian publication.

21. She obtains a permit from the Foreign Press Service of the Ministry of Culture and Islamic Guidance, which allows her to take pictures of the daily life of Iranians.

22. On June 23, Ms. Kazemi is taking photographs of men and women protesting the arrest and detention of their family members and friends outside Evin Prison in Tehran. For reasons that remain unknown to this day, she is arrested by Iranian authorities at the request of Tehran's Chief Public Prosecutor, Mr. Mortazavi.

23. She is then taken into custody inside Evin Prison, where she is held *incommunicado*.

24. Despite repeated requests, Ms. Kazemi is not permitted to contact a lawyer or her family, nor is she allowed to seek consular assistance from the Canadian Embassy. In fact, during the entire duration of her detention in Evin Prison, neither her family nor Canadian authorities are even aware that she has been arrested or detained.

25. Over the following days or weeks, she is repeatedly interrogated by Iranian authorities, including representatives of the Iranian Ministry of Justice, the

Intelligence Unit of the Iranian Law Enforcement Force and the Iranian Ministry of Intelligence.

26. Over that same period of time, Zahra Kazemi is beaten, sexually assaulted and tortured. Her injuries, which are clearly indicative of severe physical abuse, include:

a) a fractured nose bone;

b) a crushed right upper eardrum with small bones exposed;

c) deep parallel linear abrasions on the back of her neck;

d) a possible fracture of one or more of her ribs;

e) several strip-like wounds on her back;

f) trauma to the genital area and extensive ecchymosis in the pubic area, thighs, groin, back, buttocks and the sacrum, which are indicative of sexual assault;

g) extensive ecchymosis on the backs of both arms, both legs and on the soles of both feet;

h) fractured bones and broken nails on her hands;

i) crushed and fractured toes and nails; and

j) multiple linear wounds along the back of her forelegs.

ii. Transfer from Evin Prison to Baghiatollah Hospital

27. At some time prior to July 6, Ms. Kazemi is taken from Evin Prison to Baghiatollah Hospital in Tehran.

28. By the time she is admitted to hospital, Zahra Kazemi is unconscious.

29. She is initially diagnosed with gastro-intestinal bleeding, but it later becomes apparent that she has suffered a brain injury.

30. Shortly after being admitted to hospital, she goes into a coma. She will never awake from that state.

31. Ms. Kazemi is transferred to intensive care, yet despite the seriousness of her condition, no attempt is made to notify either Canadian consular officials or members of her family, including her mother who still lives in her hometown of Shiraz.

iii. Refusal to allow access to Ms. Kazemi in hospital

32. On July 6, Ms. Kazemi's mother, Ezat Ebrahimi, is informed that her daughter is in trouble and that she is being detained by Iranian authorities.

33. Mrs. Ebrahimi boards the next available flight to Tehran from Shiraz.

34. Once in Tehran, based on the unclear information she has received by telephone, Mrs. Ebrahimi goes to Evin Prison in search of her daughter. She is eventually directed to Baghiatollah Hospital.

35. Once at Baghiatollah Hospital, Mrs. Ebrahimi is not permitted to have any contact with her daughter. In fact, she is prohibited from even entering Ms. Kazemi's room, being at most allowed to look at her inert body through a window.

36. Mrs. Ebrahimi persuades a nurse to allow her to return to the hospital after hours in order to be able to see her daughter up close. Only then is she able to survey Ms. Kazemi's body and get a sense of the extent of the physical trauma she has suffered.

iv. First contacts with Canadian consular officials and Stephan Hashemi

37. On July 7, Canadian consular officials are informed for the first time of Ms. Kazemi's whereabouts and conditions through Mrs. Ebrahimi and her family.

38. As for Mr. Hashemi, he is not made aware of his mother's whereabouts and of the fact that she is in a coma until the evening of July 7.

39. On July 7, 8 and 10, Canadian consular officials visit Baghiatollah Hospital. They are prevented from approaching Ms. Kazemi and are only able to view her covered body from a distance through a glass window.

v. Refusal to allow independent medical assistance or examination

40. On July 8, the Canadian Embassy in Tehran sends a diplomatic note to the Iranian Ministry of Foreign Affairs seeking information concerning the circumstances that have led to Zahra Kazemi's injuries and hospitalization. No information is provided.

41. The following day, Mrs. Ebrahimi goes to the Canadian Embassy and asks for the assistance of Canadian consular officials in arranging independent medical examination and treatment for her daughter.

42. On July 10, in Ottawa, Iran's Ambassador to Canada is summoned to a meeting with Canada's Deputy Minister of Foreign Affairs, during which the Deputy Minister expresses serious concerns over Ms. Kazemi's treatment and requests co-operation in securing independent medical treatment for her. The Deputy Minister also requests an investigation into the circumstances surrounding Ms. Kazemi's injuries.

43. On the same day, when Canadian consular officials arrive at Baghiatollah Hospital for their third visit, doctors indicate to them that Ms. Kazemi has been declared medically brain dead with no expectation of recovery. Representatives of the Consular Affairs Bureau of the Department of Foreign Affairs and International Trade ("**DFAIT**") contact Mr. Hashemi and notify him of his mother's medical condition.

44. DFAIT's Consular Affairs Bureau also contacts the Iranian Ambassador to Canada in order to confirm Ms. Kazemi's medical condition.

vi. Taking Zahra Kazemi off life support

45. Despite the ongoing efforts of Mr. Hashemi and Mrs. Ebrahimi to obtain independent medical care for Ms. Kazemi and to arrange for her transport to Canada for further treatment, on July 10, medical staff at Baghiatollah Hospital take her off life support. She is pronounced dead shortly thereafter.

46. Iranian officials do not contact members of the Kazemi family or Canadian officials to notify them of Ms. Kazemi's death.

vii. Official announcement of Zahra Kazemi's death by Iranian authorities

47. On July 12, two days after the staff at Baghiatollah Hospital has taken Zahra Kazemi off life support, the Iranian government officially announces her death through the Islamic Republic News Agency, the country's official news agency.

48. Later that same day, officials from DFAIT contact Mr. Hashemi and notify him of his mother's death.

C. AUTOPSY AND BURIAL IN IRAN AGAINST THE FAMILY'S WISHES

49. Despite the obvious need for an independent and transparent process and despite the importance of consulting the family with regard to any dealings with the body after death, Iranian officials proceed with an autopsy of Zahra Kazemi's body without her family's consent.

50. To this day, Iranian authorities refuse to release the results of this autopsy to either the family or to Canadian consular officials.

51. In the days after his mother's death, Mr. Hashemi indicates in writing his wish to have his mother's remains returned to Canada for burial in Montreal. This wish is formally conveyed to Iranian authorities in a letter with diplomatic covering note hand delivered by DFAIT officials to the Iranian Embassy in Ottawa.

52. On July 17 and 18, members of the Kazemi family even discuss the logistics of transportation and burial arrangements for Ms. Kazemi's remains in a series of phone calls between Iran and Canada.

53. On July 19, during a teleconference which includes Mr. Hashemi and his attorney, Canada's Ambassador to Iran as well as Mrs. Ebrahimi, Mr. Hashemi reiterates his wish to have his mother's remains returned to Canada for burial.

54. Both Mr. Hashemi and Mrs. Ebrahimi then sign letters indicating their desire to have Ms. Kazemi's remains buried in Canada and have their signatures authenticated by consular officials in Canada and Iran respectively.

55. Despite these multiple requests and precautions, on July 22, the Islamic Republic News Agency publishes a letter allegedly signed by Mrs. Ebrahimi stating that she wishes to have her daughter buried in Shiraz.

56. Mrs. Ebrahimi would later indicate, during a July 30 interview with the Iranian newspaper *Yas e no*, that she had been pressured by Iranian officials, including Mr. Mortazavi, to allow for her daughter's burial in Iran. Under pressure to name an Iranian burial site, she selected her hometown of Shiraz, so that she would at least be able to attend her daughter's gravesite on a regular basis.

57. Despite further objections by Canadian authorities to the burial of Ms. Kazemi's remains in Iran, the Iranian government arranges for the burial of her remains in Shiraz the very next day, July 23.

58. That same day, Canada's Minister of Foreign Affairs, Bill Graham, announces the withdrawal of Canada's Ambassador to Iran and the Prime Minister of Canada, Jean Chrétien, publicly condemns Iranian authorities for going ahead with a burial in Iran against the wishes of Zahra Kazemi's son and mother.

D. Lack of Independent Investigation into Zahra Kazemi's Death

59. Preliminary reports from the Office of the Prosecutor indicate that Ms. Kazemi died from a digestive disorder.

60. Waves of protest greet this announcement since all non-governmental reports indicate that Ms. Kazemi's death was the direct result of wrongful treatment during her detention. NGOs require an independent and transparent investigation to be launched immediately.

61. On July 13, President Khatami announces that an inquiry into Ms. Kazemi's death will be carried out by a Ministerial Inquiry Committee composed of representatives from five ministries (Culture and Islamic Guidance, Justice, Intelligence, Interior and Health).

62. On the same day, the Director General of the Foreign Press Service of the Ministry of Culture and Islamic Guidance announces that Ms. Kazemi has died of a stroke, a

statement he will later recant. As he explained at that point, he was pressured into making that statement by Mr. Mortazavi, who threatened him with responsibility for Ms. Kazemi's death on the basis that it was the Director General's office who had originally issued Mr. Kazemi's permit for the purpose of taking photographs during her stay in Iran.

63. On July 16, Vice-President Abtahi announces that Ms. Kazemi has died, not of a stroke, but of a skull fracture after sustaining a blow to the head while in detention.

64. The Report of the Ministerial Inquiry confirms this cause of death. That report, released on July 20, indicates that Ms. Kazemi has died from a fractured skull and brain hemorrhage after "*either a hard object struck her head, or her head struck a hard object*". The Report also states, rather improbably, that Ms. Kazemi's body showed no signs of any other injury.

65. The Ministerial Inquiry recommends further investigation into the circumstances surrounding Ms. Kazemi's death. The case is to be referred to a judicial official who will lead that subsequent investigation.

66. Despite strong suggestions in the preliminary report that members of the Office of the Prosecutor, and in particular the Chief Public Prosecutor of Tehran, Mr. Mortazavi, were directly involved in the events leading to Ms. Kazemi's death, Ayatollah Mahmud Hashemi-Shahrudi, Head of the Iranian Judiciary, appoints Mr. Mortazavi to lead the inquiry into Ms. Kazemi's death.

67. The protests that follow on the heels of this last decision inside and outside Iran are so immediate and widespread that Mr. Mortazavi's appointment is withdrawn. On July 25, Judge Javad Esmaeili is assigned to the investigation.

68. The next day, the Iranian government announces that five individuals have been arrested in connection with Ms. Kazemi's death. Their names and details of the charges against them are kept secret.

69. Moreover, no charges are laid against any individual within the Office of the Chief Public Prosecutor of Tehran despite strong indications from various sources that this organ was directly involved in Ms. Kazemi's death.

70. At the end of July, the Majlis (Iranian Parliament) creates its own commission pursuant to Article 90 of the Iranian Constitution to carry on a separate inquiry into the circumstances surrounding Ms. Kazemi's death.

71. In early August, two female Iranian prison guards detained in connection with Ms. Kazemi's death are released on bail, leaving three other individuals in detention for questioning.

72. In late August, it is reported that two Iranian interrogators have been detained in connection with Ms. Kazemi's death. By this point, her death is officially being labeled a "*quasi-intentional murder*".

73. On October 28, 2003 the Article 90 Commission of the Majlis releases its report, which indicates that Mr. Mortazavi and other members of the judiciary were directly involved in Ms. Kazemi's torture and death and were part of an ongoing attempt to keep any information related to her death from becoming known.

74. Notwithstanding those findings, only one individual, Mr. Reza Ahmadi, eventually faces trial on charges relating to Ms. Kazemi's death.

75. The hearing on the merits of the charges against Mr. Ahmadi lasts all of two days in mid-July 2004, during which it becomes apparent that the presiding judge has little interest in providing conditions for a fair, transparent and genuine inquiry into the facts. Hence the judge is belligerent with counsel and flippant in his references to events. Counsel are also denied access to key witnesses prior to the start of the trial and important documentary and physical evidence is kept from them both prior to and during the trial.

76. A week after the end of the hearing, Mr. Ahmadi is acquitted.

77. An appeal will eventually be filed, but to this day no one has been convicted or held accountable in Iran for the brutal arrest, detention, torture, rape and murder of Zahra Kazemi.

E. THE CANADIAN GOVERNMENT REACTS TO IRAN'S FAILURE TO PROPERLY INVESTIGATE

78. Since 2003 and to this day, Canada's official position, expressed on numerous occasions by the Prime Minister, the Deputy Prime Minister and at least three successive Ministers of Foreign Affairs, has been that Iran has breached its obligations at international law, that it has failed to independently and satisfactorily investigate the circumstances of Zahra Kazemi's death and that it must hold accountable those responsible for her torture and death.[2]

79. On July 13, 2003, the day after Iranian authorities made Zahra Kazemi's death public, Canada's Ambassador to Iran, Philip MacKinnon, meets with the Director General of Consular Affairs at the Iranian Ministry of Foreign Affairs and requests a transparent investigation into the circumstances of her death.

80. The following day, Ambassador MacKinnon raises the death of Ms. Kazemi with the Speaker of the Iranian Parliament, while Deputy Prime Minister John Manley states that Canadian-Iranian relations will be affected if her death is not satisfactorily explained.

81. On July 15, Canada's request for an independent investigation is conveyed by Ambassador MacKinnon to the Deputy Minister responsible for Europe and America at the Iranian Ministry of Foreign Affairs.

82. On July 16, Canada's Minister of Foreign Affairs, Bill Graham, phones Iranian Foreign Minister, Kamal Kharrazi, to express Canada's deep concern over the death of Ms. Kazemi and the lack of cooperation of Iranian authorities.

83. On the same day, Prime Minister Jean Chrétien calls for a transparent investigation into the circumstances that lead to Zahra Kazemi's death and for those responsible for these acts to be brought to justice.

84. On July 20, Ambassador MacKinnon once again meets with Iran's Director General of Consular Affairs to raise the Zahra Kazemi case.

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[2] The statements of Canadian officials related in this part have been communicated to the Defendants and the Mis-en-cause pursuant to art. 294.1 *C.C.P.* **[Plaintiffs' Exhibits P-18 to P-37]**.

85. On July 21, Minister of Foreign Affairs Bill Graham reacts to the publication of the report of the Presidential Inquiry Committee. In a press release issued that day, Minister Graham states that "*[t]he treatment of Ms. Kazemi […] was a flagrant violation of her rights under international human rights law and a breach of obligations that Iran owes to the international community*." Although he welcomes Iran's initial inquiry into the circumstances of Ms. Kazemi's death, he also requests "*the Iranian government to take the next step and proceed with the full and swift prosecution of those responsible for Ms. Kazemi's death in order to clearly demonstrate to Canada and the rest of the international community that its officials are not allowed to act with impunity, and to deter any future violations.*" **[Plaintiffs' Exhibit P-27]**.

86. On July 23, another meeting is held between Ambassador MacKinnon and the Iranian Director General of Consular Affairs.

87. Later that same day, Ambassador MacKinnon is recalled to Ottawa for consultations.

88. Throughout August and September, Canadian officials will raise the Kazemi affair with several international actors, including UN Secretary-General Kofi Annan, the Iranian Foreign Ministry, Iran's Chief Revolutionary Prosecutor, and the International Relations Branch of the Iranian Judiciary.

89. On September 29, Ambassador MacKinnon is sent back to Tehran carrying a letter from Prime Minister Chrétien to President Khatami.

90. On October 7, Ambassador MacKinnon attends the preliminary hearing in the trial of Mr. Ahmadi, the only individual charged in relation to the arrest, torture, sexual assault and death of Zahra Kazemi.

91. In December, Canada asks for copies of all photographic material and reports associated with the autopsy performed on Zahra Kazemi's body.

92. Throughout 2004, Canada continues to raise the issue of Ms. Kazemi's death with Iranian authorities and different international organizations.

93. A year goes by and as the resumption of Mr. Ahmadi's trial approaches, Iranian authorities announce that "*Canadian observers would be barred from the trial of the*

person accused in the murder of Zahra Kazemi." Canada decides to recall its ambassador and on July 14, 2004, Minister Graham states in a press release that "*Iran's refusal to allow Canadian observers at the trial is unacceptable.*" **[Plaintiffs' Exhibit P-28]**.

94. Ambassador MacKinnon, who remains in Iran for a few days after the announcement of his recall, shows up at the courthouse on July 17 and is actually allowed into the courtroom, where he sits through the first day of the hearing on the merits of the charges. He goes back the following day, only this time to be denied access, along with other foreign diplomats. His recall to Canada is then reiterated by Minister Graham.

95. Mr. Amahdi is quickly acquitted of all charges against him. Reacting to this acquittal on July 25, Canada's new Minister of Foreign Affairs, Pierre Pettigrew, issues the following statement: "*This trial has done nothing to answer the real questions about how Zahra Kazemi died or to bring the perpetrators of her murder to justice*." He further adds: "*The Government of Canada continues to insist that justice be done. The process has to be both transparent and credible. I call on Iran to fulfill its responsibilities to bring out the truth in this case.*" **[Plaintiffs' Exhibit P-29]**.

96. On July 28, DFAIT rejects the explanation provided by Iran's judiciary and dismisses "*as lacking all credibility*" an official statement that says that: "*With the acquittal of the sole defendant, only one option is left: the death of the late Kazemi was an accident due to a fall in blood pressure resulting from a hunger strike and her fall on the ground while standing.*" **[Plaintiffs' Exhibit P-32]**.

97. In November 2004, Minister Pettigrew announces that Canada's Ambassador to Iran will return to that country.

98. In April 2005, Minister Pettigrew suggests the creation of a "*three-member, independent group of forensic experts to conduct an autopsy that would help to determine precisely what happened during her custody.*" **[Plaintiffs' Exhibit P-30]**.

99. Meanwhile, an appeal is filed against Mr. Amahdi's acquittal. On May 17, Minister Pettigrew officially reacts to the previous day's proceedings before the Iranian Court of Appeal, denouncing Iran's failure to take serious actions in this case **[Plaintiffs'**

Exhibit P-31]. The language used is the strongest thus far by a Canadian official. Moreover, from then on, diplomatic contacts between Canada and Iran will be limited to a strict minimum:

> Yesterday's events illustrate once again that **the Iranian justice system has neither the capacity nor the will to confront the perpetrators of the brutal murder of Zahra Kazemi**. Canada will not accept justice being denied.
>
> We continue to insist on a proper investigation and trial of those guilty of Mrs. Kazemi's murder and the return of her remains to Canada in accordance with her family's wishes.
>
> We will continue to pursue our demands for justice bilaterally with Iranian officials, as well as multilaterally with support from international partners. But the bilateral relationship with Iran cannot proceed as normal. We have decided to constrain our bilateral relations with Iran until Iranian authorities are prepared to deal with this affair in a serious and credible manner.
>
> Effective immediately, we are further tightening our policy of controlled engagement. We will limit our encounters with Iranian officials to the Kazemi case, Iran's human rights record and Iran's nuclear non-proliferation performance. No visits or exchanges by Iranian officials to Canada will be permitted, nor will Canadian officials engage with Iran, except relating to these issues. The Iranian Embassy in Ottawa will need to have any meetings with officials of the Government of Canada approved, in advance, by Foreign Affairs Canada.
>
> […]
>
> **This state of relations will persist until Iran has taken steps to launch a credible and independent investigation and judicial process into the Kazemi case. This process must lead to real consequences for those responsible for her death**.
>
> […]
>
> These legitimate concerns must be addressed for us to find a way forward. (Emphasis added)

100. A month later, Minister Pettigrew makes the chronology of events relating to the torture and death of Zahra Kazemi public **[Plaintiffs' Exhibit P-32]**. The Minister has the following comments on the case:

> "Zahra Kazemi's death is far more than a consular case," said Minister Pettigrew. "**It represents a clear violation, by a state, of international human rights norms and laws**. The grave circumstances of her arrest and killing have attracted sustained international attention, as well as expressions of support and solidarity in the search for justice." (Emphasis added)

101. In June 2006, Canada's new Minister of Foreign Affairs, Peter MacKay, publicly condemns in no uncertain terms the presence of Tehran Prosecutor General Saeed Mortazavi, one of the Defendants in this case, at the inaugural meeting of the UN Human Rights Council **[Plaintiffs' Exhibit P-33]**:

> The presence of Mr. Mortazavi in Iran's delegation demonstrates the Government of Iran's complete contempt for internationally recognized principles of human rights. The Government of Canada expresses its disgust at the fact that Iran would choose to include such a person in its delegation to a new UN body intended to promote the highest standards of respect for human rights.
>
> By including Mr. Mortazavi in its delegation, Iran is trying to discredit the Council and deflect attention from the Council's goal of ensuring greater respect for human rights.
>
> Two official Iranian government investigations found that Prosecutor General Mortazavi ordered the illegal arrest and detention of Canadian journalist Zahra Kazemi, which led to her torture and death. He then falsified documents to cover up his involvement in her case. Mr. Mortazavi has also been involved in the harsh clampdown on the Iranian press and the arrests of many Iranian journalists.
>
> Canada is committed to making the UN Human Rights Council a respected and effective body that will encourage improved human rights performance by all UN member states. Iran ran for the Council but failed to secure the support of a majority of UN members.
>
> Canada has shared its assessment of the Government of Iran's involvement in the killing of Zahra Kazemi and the role of Mr. Mortazavi in that case with the President of the Council, representatives of the host government – Switzerland – and the Office of the High Commissioner for Human Rights. We have also called on other delegations to the Human Rights Council meeting to condemn Mr. Mortazavi's presence. (Emphasis added)

102. On July 10, 2006, Minister MacKay marks the anniversary of Zahra Kazemi's death by releasing an official statement **[Plaintiffs' Exhibit P-34]**:

> The Government of Canada offers its sincere condolences to the family of Zahra Kazemi on this sad day, the third anniversary of her death. Canada continues to demand that Iran bring those responsible for this murder to justice.
>
> **The culture of impunity that prevails in Iran runs counter to the Iranian constitution and the international obligations that Iran has voluntarily assumed. Iran has a duty to conduct a transparent process that will punish those responsible for this murder**. From this perspective, and as a reminder of our interest in the Kazemi case, we condemn Mr. Mortazavi's presence at the UN Human Rights Council last month.

> Moreover, we continue to call on Iran to comply with the request by Ms. Kazemi's family to authorize the exhumation and repatriation of her body, so she can be buried here in Canada near her son Stephan. (Emphasis added)

103. Moreover, every year since 2003, Canada has sponsored, with up to 40 other countries, a resolution on the human rights situation in Iran before the UN General Assembly. Every year, the resolution has been adopted by the Assembly, denouncing, among others, "*[t]he continuing violations of human rights in the Islamic Republic of Iran*", "*[t]he use of torture and other forms of cruel, inhuman and degrading punishment*", "*[t]he failure to comply fully with international standards in the administration of justice*", and "*the absence of due process of law*" **[Plaintiffs' Exhibits P-1 to P-17]**.[3]

104. To this day, Canadian-Iranian diplomatic relations remain limited to a strict minimum due to a lack of any progress in the investigation of the circumstances surrounding the arrest and death of Zahra Kazemi and the impunity those responsible for thoee acts have enjoyed in Iran. As of August 2008, DFAIT described Canadian-Iranian relations as follows **[Plaintiffs' Exhibit P-38]**:

> In 1996, bilateral relations between Canada and the Islamic Republic of Iran were such that the two countries agreed to exchange Ambassadors. However, since late 2007 both countries have reduced their representation in each other's capital to the Chargé level. Given ongoing concerns, Canadian political and economic relations with Iran have been governed by the Controlled Engagement Policy. As a result, Canada places limits on its contact with Iran. For example, Canada prevents the establishment of direct air links between the two countries or the opening of Iranian consulates and cultural centres elsewhere in Canada.
>
> For five consecutive years, and with the support of its like-minded partners, Canada has successfully led a resolution on the Situation of Human Rights in Iran at the UN General Assembly. The adoption of this resolution sends a strong signal to the Islamic Republic of Iran that the international community remains deeply concerned by its deteriorating human rights situation, which it has an obligation to seriously and comprehensively address.
>
> On May 17, 2005, Canada tightened its Controlled Engagement Policy. Official contacts between Canada and the Islamic Republic of Iran are now limited to four subjects: 1 - the human rights situation in Iran, 2 - Iran's nuclear program and its lack of respect for its non-proliferation obligations, 3 - the case of Mrs. Zahra Kazemi who was killed in an Iranian prison by regime officials in 2003, and 4 - Iran's role in the region. (Emphasis added)[4]

[3] Also see the statements made by Canadian officials in relation to those UN resolutions from 2005 to 2008 **[Plaintiffs' Exhibits P-18 to P-26 and P-35]**.

[4] Also see the statement published on the website of Canada's Embassy to Iran **[Plaintiffs' Exhibit P-39]**.

III. ARGUMENT

A. SUMMARY OF PLAINTIFFS' POSITION

105. Plaintiffs adopt AI's exposé on the law and history of state immunity in Canada and its partial codification through the adoption of the *SIA* in 1982 **[AI's Plan of Argument, par. 3-30]**.

106. Plaintiffs also adopt the position taken by AI that the *SIA* does not prevent this Court from finding an exception to state immunity where the cause of action is based on acts of torture, given the *jus cogens* nature of the prohibition against such acts in international law **[AI's Plan of Argument, par. 31-66]**.

107. In the event that this Court does not accept AI's position, Plaintiffs submit that Iran's motion to dismiss cannot succeed on the alternative basis that the application of s. 3(1) *SIA* to dismiss the present proceedings would, in this case, infringe s. 2(*e*) of the *Bill of Rights*. As a result, s. 3(1) *SIA* must be declared inoperative and Iran's motion dismissed.

108. While it is the first time that a Canadian court is being asked to declare a provision of the *SIA* inoperative on the basis of the *Bill of Rights*, as will be discussed in greater detail below, such a possibility was raised by the Ontario Superior Court of Justice as an *obiter* in *Aristocrat v. National Bank of the Republic of Kazakhstan*, [2001] O.J. No. 2876 (QL) (S.C.J.) (**"*Aristocrat*"**) (at par. 31-33) **[Book of Authorities, Tab __]**.

109. Indeed, the three precedents where the constitutional applicability of the *SIA* was impugned and its validity upheld by courts in Ontario and Quebec all dealt exclusively with attacks based on s. 7 of the *Charter*. These three cases are:

(a) *Bouzari v. Iran*, [2002] O.J. No. 1624 (QL) (S.C.J.) (**"*Bouzari S.C.J.*"**) (appeal dismissed, [2004] O.J. No. 2800 (QL) (C.A.) (**"*Bouzari C.A.*"**); leave to appeal denied, January 17, 2005 S.C.C. No. 30523) **[Book of Authorities, Tab __]**;

(b) *Arar v. Syrian Arab Republic*, [2005] O.J. No. 752 (QL) (S.C.J.) **[Book of Authorities, Tab __]**; and

(c) *Teitelbaum v. 9093-8119 Québec inc.*, J.E. 2009-61 (S.C.) (appeal discontinued, April 3, 2009, C.A. 500-09-019180-082) ("***Teitelbaum***") **[Book of Authorities, Tab __]**.

110. As s. 2(*e*) of the *Bill of Rights* was neither raised by the parties nor addressed by the courts in either one of those three cases, they are not determinative of the issue at hand.

111. Subsidiarily, were this Court come to the conclusion that no declaration of inoperability may be issued pursuant to s. 2(*e*) of the *Bill of Rights* in this case, Plaintiffs submit that s. 3(1) *SIA* should be declared of no force and effect on the basis of the arguments raised by the Intervener CCIJ with respect to s. 7 of the *Charter*.

B. JURISDICTION OF THE QUEBEC SUPERIOR COURT

i. This Court has jurisdiction *ratione loci*

112. Although this Court's jurisdiction *ratione loci* over the present case is not directly at issue at this stage of the proceedings, considerations of jurisdiction are relevant to the determination of the quasi-constitutional argument raised by Plaintiffs.

113. Moreover, constitutional limits on the jurisdiction of provincial courts provide a complete answer to the proverbial "floodgates" argument that may otherwise be raised against Plaintiffs' position. As the Supreme Court held in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289: "*And courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place*." (p. 328) **[Book of Authorities, Tab __]**.

114. Contrary to *Bouzari*, where the plaintiff's claim was based on acts of torture by Iranian authorities which would have taken place years before he actually moved to Canada, thus raising serious concerns as to the jurisdiction of Ontario courts under the traditional rules of private international law,[5] jurisdiction of this Court in the present case is solidly grounded in the relevant provisions of the *Civil Code of Quebec* (the "***CCQ***"):

[5] See *Bouzari S.C.J.*, par. 15-17, and *Bouzari C.A.*, par. 23-38 **[Book of Authorities, Tab __]**.

(a) "*[D]amage was suffered in Québec*" by Stephan Hashemi, which pursuant to art. 3148(3) *CCQ* is sufficient to confer jurisdiction on Quebec courts with respect to his personal claim;[6] and

(b) As the Estate's claim is directly linked to Mr. Hashemi's personal claim, jurisdiction of Quebec courts may be found at art. 3139 *CCQ*.[7]

115. Alternatively, art. 3136 *CCQ* states that: "*Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.*"

116. This "forum of necessity" approach has been relied upon to confer jurisdiction on Quebec courts where political circumstances or lack of an independent judiciary make it impossible to obtain a fair trial in the foreign state.[8] As will be discussed below, this is clearly a situation where it would impossible for Plaintiffs to pursue this action before an Iranian court and as a result, in the event that art. 3148(3) and 3139 *CCQ* are found to be inapplicable, they could invoke art. 3136 *CCQ*.

ii. The effect of the *SIA*

117. The Superior Court of Quebec having jurisdiction *ratione loci* over the dispute between Plaintiffs and Defendants, the only obstacle that stands in the way of the present action is the *SIA*. Subsection 3(1) *SIA* provides as follows:

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.	**3.** (1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada. (Emphasis added)

118. Unless this Court accepts AI's interpretation of the *SIA* that it does not preclude Canadian courts from entertaining claims against foreign states where the rule at issue

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[6] See *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, par. 29-30 **[Book of Authorities, Tab ___]**.
[7] See *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, par. 29-31 **[Book of Authorities, Tab ___]**.
[8] See *L.F. v. N.T.*, [2001] R.J.Q. 300 (C.A.), par. 38 **[Book of Authorities, Tab ___]**; and *Droit de la famille - 082431*, J.E. 2008-1937 (S.C.), par. 86 **[Book of Authorities, Tab ___]**.

is one of *jus cogens*, the *SIA* itself does not at present provide for an exception for cases of torture and other crimes against humanity.

119. As a result, where a plaintiff is suing a foreign state and the *SIA* finds application, the plaintiff's action "*is barred by s. 3 of the Act, unless s. 3 is unconstitutional*".[9] This is the position that Plaintiffs will now advance, on account of the *SIA*'s incompatibility with s. 2(*e*) of the *Bill of Rights* in cases where no other forum exists that could offer a **fair hearing** for the determination of the parties' rights and obligations.

C. THE *CANADIAN BILL OF RIGHTS*

i. The *Bill of Rights* applies to all federal laws

120. The *Bill of Rights* was adopted by Parliament in 1960. Subsection 5(2) provides that it applies to all federal laws, whether they were adopted prior to or after its coming into force:

5. (2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.	**5.** (2) L'expression « loi du Canada », à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après la mise en vigueur de la présente loi, ou toute ordonnance, règle ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abrogation, d'abolition ou de modification par le Parlement du Canada.

121. As was confirmed by the Supreme Court of Canada in *The Queen v. Drybones*, [1970] S.C.R. 282 (at p. 294) **[Book of Authorities, Tab __]**, the *Bill of Rights* is a quasi-constitutional statute that renders inoperative federal laws that are incompatible with its provisions.

122. The ongoing applicability and relevance of the *Bill of Rights* was preserved by s. 26 of the *Charter* and reaffirmed by the Supreme Court in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 ("***Singh***") (at par. 4 and 85) **[Book of Authorities, Tab __]** and *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40

[9] *Bouzari S.C.J.*, par. 73 **[Book of Authorities, Tab __]**. Also see *Air Canada v. Canada (Attorney General)*, [2003] R.J.Q. 322 (C.A.) (appeal discontinued, June 3, 2004, S.C.C. No. 29660) ("***Air Canada***"), par. 58 **[Book of Authorities, Tab __]**.

("***Authorson***") (at par. 10) **[Book of Authorities, Tab __]**, as well as by the Quebec Court of Appeal in *Air Canada* (at par. 40-43) **[Book of Authorities, Tab __]**.

123. Finally on this point, the proper remedy to be granted in cases of incompatibility between a federal law and the *Bill of Rights* is a declaration of inoperability limited to the case at hand.[10] By way of comparison, a declaration of invalidity pronounced pursuant to the *Constitution Act, 1867* or the *Charter* is of general application.

ii. Paragraph 2(*e*) of the *Bill of Rights* guarantees the right to a fair hearing in civil proceedings

124. Section 2 of the Bill of Rights enumerates certain rights that cannot be derogated from through federal legislation, **including the right to a fair hearing in civil proceedings**:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to […] (*e*) **deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations**; […]	**2.** Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme […] *e*) **privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations**; […] (Emphasis added)

125. As such, and contrary to s. 7 of the *Charter*, s. 2(*e*) of the *Bill of Rights* is triggered whenever a person's rights and obligations stand to be determined, whatever the nature of those rights and obligations. As Beetz J. wrote in *Singh* **[Book of Authorities, Tab __]**:

> 96. Be that as it may, it seems clear to me that the ambit of s. 2(*e*) is broader than the list of rights enumerated in s. 1 which are designated as

[10] See *Northwest Territories v. Public Service Alliance of Canada*, [2001] F.C.J. No. 791 (QL) (C.A.) (appeal discontinued, August 15, 2002, S.C.C. No. 28737) ("***Northwest Territories***"), par. 60 **[Book of Authorities, Tab __]**, which summarizes the relevant jurisprudence.

> "human rights and fundamental freedoms" whereas **in s. 2(*e*), what is protected by the right to a fair hearing is the determination of one's "rights and obligations", whatever they are** and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to "the rights or freedoms herein recognized and declared", but s. 2(*e*) does protect a right which is fundamental, namely "the right to a fair hearing in accordance with the principles of fundamental justice" for the determination of one's rights and obligations, **fundamental or not**. It is my view that, as was submitted by Mr. Coveney, it is possible to apply s. 2(*e*) without making reference to s. 1 and that the right guaranteed by s. 2(*e*) is in no way qualified by the "due process" concept mentioned in s. 1(*a*). (Emphasis added)

126. In other words, as the Quebec Court of Appeal wrote in *Air Canada*: "*Pour avoir droit à la protection de l'article 2(e), une partie n'a pas nécessairement à invoquer un droit fondamental. Dès que ses droits et ses obligations au sens large sont affectés, elle a droit à « une audition impartiale de sa cause »*." (par. 49) **[Book of Authorities, Tab __]**.[11]

127. As a result, the issue that this Court must determine is the following: **Does s. 3(1) *SIA* deprive Plaintiffs of their right "*to a determination of [their] rights and obligations by an independent and impartial tribunal*"?**[12] Plaintiffs submit that the answer to this question in the present case is **yes**.

D. Application of the *SIA* in this Case would Deprive the Plaintiffs of their Right to a Fair Hearing

i. Context determines what type of hearing Plaintiffs are entitled to

128. The application of s. 2(*e*) of the *Bill of Rights* is highly contextual. In *Duke v. The Queen*, [1972] S.C.R. 917 **[Book of Authorities, Tab __]**, the Supreme Court described the minimum content of that provision as follows:

> Under s. 2(*e*) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case. (p. 923) (Emphasis added)

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[11] Also see *Northwest Territories*, par. 50 **[Book of Authorities, Tab __]**; and Peter W. Hogg, *Constitutional Law of Canada*, vol. 2, 5th Ed. Suppl. (loose-leaf) (2007), p. 35.4-35.5 **[Book of Authorities, Tab __]**.

[12] *Northwest Territories*, par. 49 **[Book of Authorities, Tab __]**.

129. Thirty years later, the Supreme Court of Canada reiterated that same rule in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 ("***Suresh***") **[Book of Authorities, Tab __]**, this time with respect to s. 7 of the *Charter*, which similarly entrenches the "*principles of fundamental justice*":

> 45 The principles of fundamental justice are to be found in "the basic tenets of our legal system": *Burns*, *supra*, at para. 70. "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. The relevant principles of fundamental justice are determined by a contextual approach that "takes into account the nature of the decision to be made": *Kindler*, *supra*, at p. 848, *per* McLachlin J. (as she then was). The approach is essentially one of balancing. As we said in *Burns*, "[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance" (para. 65). […] (Emphasis added)

130. As a result, what exactly is required in terms of a hearing may vary from case to case. For example, an assessment process in writing, without a hearing, may be sufficient where the issue is the renewal of a license for commercial purposes. At the other end of the spectrum, in the case of the determination of a refugee claim, "*nothing will pass muster short of at least one full oral hearing before adjudication on the merits.*"[13]

131. One thing is certain: Whatever the process may be, **it must be fair**.

ii. In the present case, principles of fundamental justice as understood in Canada require a full hearing

132. Context in the present case is as follows: In Canada, a civil claim for damages – such as Plaintiffs' – is pursued before a court of law and is subject to the full procedural guarantees of fairness, independence and impartiality. As Pigeon J. wrote in *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639: "*I know of no case where a **judicial decision** was upheld, where there was neither a hearing nor reasons given.*"[14]

133. Where a judicial decision is at issue, the "*principles of fundamental justice*" require that the parties' rights and obligations be determined after a full hearing before an

[13] *Singh*, par. 107, *per* Beetz J. **[Book of Authorities, Tab __]**.
[14] Passage quoted by Beetz J. in *Singh*, at par. 109 **[Book of Authorities, Tab __]**.

independent and impartial tribunal.[15] That is what Plaintiffs are entitled to in this case pursuant to s. 2(*e*) of the *Bill of Rights*.

iii. Iranian courts are incapable of delivering justice in this case

134. The basic theorem that lies at the heart of the Plaintiffs' position on this branch of the argument was articulated by the Ontario Superior Court of Justice in *Aristocrat* **[Book of Authorities, Tab __]**:

> **32** Section 2 [of the *Bill of Rights*] states that every law of Canada shall not "authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ... deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations." The term "authorize" denotes a difference between actual federal legislation that deprives an individual of his rights and deprivation done by another actor under the authority of the federal government. The action by an actor that deprives an individual of his rights or freedoms, or deprives the latter of a fair hearing would be a violation of s. 2 of the Bill.
>
> **33** Section 2 could be relied on by Dr. Aristocrat to argue that in this case the *State Immunity Act* unlawfully deprives him of his property by prohibiting action against a party who allegedly denied the plaintiff a fair hearing. The *State Immunity Act*, in essence, transfers the requirement of a fair hearing to the State of Kazakhstan because it prevents an action in Canada by legislative authority of the Federal government. Therefore, if Dr. Aristocrat could prove that there was a reasonable apprehension of bias: see *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 per Sopinka J. arising from the proceedings in Kazakhstan, he could argue that there was a failure to provide a fair hearing as guaranteed under s. 2 of the *Bill of Rights*. Such a failure even if in Kazakhstan would result in the provisions of the *State Immunity Act* being inoperative and allowing him to pursue his action in Ontario. (Emphasis added)[16]

135. In other words, if Plaintiffs establish that Iranian courts do not afford in this case minimal guarantees of independence, impartiality and fairness, the application of s. 3(1) *SIA* under the present circumstances runs afoul s. 2(*e*) of the *Bill of Rights*, and a declaration of inoperability must be issued by this Court.

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[15] *Authorson* is distinguishable on the basis that in that case, class members were relying on s. 2(*e*) of the *Bill of Rights* in an attempt to "*impose upon Parliament the duty to provide a hearing before the enactment of legislation*" (par. 61) **[Book of Authorities, Tab __]**. Plaintiffs are clearly not seeking such a remedy in the present case.

[16] In that particular case, it was found that: "*On all of the material it appears that Dr. Aristocrat was afforded a fair hearing in Kazakhstan. There is no evidence that he was prevented from calling witnesses or was denied the right to cross examine witnesses.*" (par. 34) **[Book of Authorities, Tab __]**.

136. **The evidence in this file overwhelmingly supports the Plaintiffs' contention that they would not be afforded a fair hearing in Iran**:

(a) Generally speaking, as is detailed in the expert report of Kaveh Moussavi on the Iranian justice system, "*[t]he Iranian justice system is not capable of delivering justice in this kind of case, where political considerations play a significant, if not dominant, role*" **[Kaveh Moussavi's Report, par. 7];**

(b) As appears from the affidavit of Philip MacKinnon, who was Canada's ambassador to Iran in 2003-2004, and as appears from the statements and press releases of official representatives of the Government of Canada issued since 2003 **[Plaintiffs' Exhibits P-27 to P-34]**, "*the Iranian justice system has neither the capacity nor the will to confront the perpetrators of the brutal murder of Zahra Kazemi*";[17] and

(c) Every year since 2003, the General Assembly of the United Nations has adopted a Canadian sponsored resolution denouncing the human rights situation in Iran, notably "*[t]he continuing violations of human rights in the Islamic Republic of Iran*", "*[t]he use of torture and other forms of cruel, inhuman and degrading punishment*", "*[t]he failure to comply fully with international standards in the administration of justice*", and "*the absence of due process of law*" **[Plaintiffs' Exhibits P-1 to P-17].**[18]

137. Indeed, Canada indicated in 2005 that it would maintain its policy of "controlled engagement" in its diplomatic relations with Iran "*until Iran has taken steps to launch a credible and independent investigation and judicial process into the Kazemi case. This process must lead to real consequences for those responsible for her death*."[19] Since Iran has failed to take any such steps, Canada-Iran relations remain frozen at a strict minimum.[20]

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[17] News release of Foreign Affairs Canada entitled "Minister Pettigrew announces new restrictions on Canada's engagement with Iran", May 17, 2005 **[Plaintiffs' Exhibit P-31]**.
[18] Also see the statements made by Canadian officials in relation to those UN resolutions from 2005 to 2008 **[Plaintiffs' Exhibits P-18 to P-26 and P-35]**.
[19] News release of Foreign Affairs Canada entitled "Minister Pettigrew announces new restrictions on Canada's engagement with Iran", May 17, 2005 **[Plaintiffs' Exhibit P-31]**.
[20] Foreign Affairs and International Trade Canada: Status of Canada-Islamic Republic of Iran as of August 2008 **[Plaintiffs' Exhibit P-38]**; and Embassy of Canada to Iran website as of November 11, 2008 **[Plaintiffs' Exhibit P-39]**.

138. As a matter of fact, Iran's inability to deal fairly and impartially with cases like the Kazemi one was taken for granted by the Ontario Court of Appeal in *Bouzari C.A.* **[Book of Authorities, Tab __]**:

> [36] That said, there are several circumstances that make the presumptive conclusion of no jurisdiction troubling. First, the action is based on torture by a foreign state, which is a violation of both international human rights and peremptory norms of public international law. As the perpetrator, Iran has eliminated itself as a possible forum, although it otherwise would be the most logical jurisdiction. This would seem to diminish significantly the importance of any unfairness to the defendant due to its lack of connection to Ontario.
>
> [37] Second, if Ontario does not take jurisdiction, the appellant will be left without a place to sue. Given that the appellant is now connected to Ontario by his citizenship, the requirement of fairness that underpins the real and substantial connection test would seem to be of elevated importance if the alternative is that the appellant cannot bring this action anywhere. (Emphasis added)

139. As a result, **based on the facts alleged and proven in this case**, s. 3(1) *SIA* "*deprives [the Plaintiffs] of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of [their] rights and obligations*", contrary to s. 2(*e*) of the *Bill of Rights*.

140. Furthermore, that a foreign state's judicial system, namely Iran's, is the one that cannot afford the minimal guarantees of procedural fairness entrenched at s. 2(*e*) of the *Bill of Rights* does not detract from this analysis. In *Suresh* **[Book of Authorities, Tab __]**, the Supreme Court held that the procedural guarantees of s. 7 of the *Charter* may be engaged with respect to the acts of a foreign state so long as there is a **causal connection** between Canada's actions or inactions and the risk to the person's "*life, liberty or security of the person*" in the country of deportation:

> 54 While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here. In *Burns*, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than *refoulement*. Rather, the governing principle was a general one — namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. **At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand**. (Emphasis added)

141. In the present case, the application of s. 3(1) *SIA* makes its "*entirely foreseeable*" that the Plaintiffs will be deprived of a "*fair hearing according to the principles of fundamental justice*", since short of abandoning their claims altogether, the only forum left would be Iranian courts. That is sufficient to establish a causal connection between the application of the *SIA* and the alleged violation of s. 2(*e*) of the *Bill of Rights*.

E. THE VIOLATION OF THE PLAINTIFFS' FUNDAMENTAL RIGHT TO A FAIR HEARING IS NOT JUSTIFIED UNDER THE CIRCUMSTANCES

i. Justification analysis under the *Bill of Rights*

142. The *Bill of Rights* contains no provision equivalent to s. 1 of the *Charter*. As such, the protections it affords appear to be limited only by the language used in the opening paragraph of s. 2 as well as in its different subsections.

143. Two approaches may be therefore be taken at this juncture:

(a) Modulate the content of the protection afforded by s. 2(*e*) of the *Bill of Rights* to adapt it to the current circumstances, namely the presence of a foreign state as defendant and the doctrine of state immunity at international law, which is the approached favoured by the House of Lords in *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, [2006] UKHL 26 ("***Jones***") **[Book of Authorities, Tab __]**; or

(b) Conduct a separate justification analysis, as was done by the Quebec Court of Appeal in *Air Canada* **[Book of Authorities, Tab __]**.

144. Whatever the approach ultimately favoured by this Court, Plaintiffs submit that the same result should be achieved, namely that the application of s. 3(1) *SIA* in this case is incompatible with s. 2(*e*) of the *Bill of Rights*. The reasons for this may be summed up as follows:

(a) Plaintiffs are claiming civil redress for gross violations of international human rights law, including norms of *jus cogens* that create obligations *erga omnes*, namely obligations that may be sanctioned by all other members of the international community;

(b) Whether or not there exists a positive norm of international law requiring Canada to take jurisdiction over a civil action for acts of torture, current principles of international law may accommodate this Court assuming jurisdiction over the Zahra Kazemi case, as the Iranian judicial system does not offer the minimal procedural guarantees of fairness recognized under international law, and that the relevant international treaties preserve the right of Canada to afford greater procedural protection to its own citizens in such cases;

(c) Iran's actions in this case have run contrary to established norms of international law and have violated Canada's own rights, thereby undermining the very foundations of state immunity, namely comity and reciprocity. Iran has thus forgone any claim to immunity or is precluded from making such a claim in these proceedings; and

(d) As a result of Iran's violations of Canada's rights at international law, Canada is entitled to take proportional countermeasures, including authorization by this Court of civil proceedings against the Defendants.

ii. International law is not controlling

145. To begin with, although this Court's justification analysis must take into account norms of international law, it must be mindful of the rule whereby except where it has been rendered applicable in Canada through statutes adopted by Parliament or the provincial legislatures, international law is not controlling. **In fact, where there is a conflict, domestic law trumps international law**.

146. In *Suresh* **[Book of Authorities, Tab __]**, the Supreme Court of Canada summed up the proper role to be assigned to international law when dealing with a *Charter* challenge to a federal statute that implements rules of international law in Canada. In that case, the Court was dealing with the *refoulement* provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, but its comments could also apply to the *SIA*, which imports into Canadian law customary rules of international law on state immunity:

> 59 We have examined the argument that from the perspective of Canadian law to deport a Convention refugee to torture violates the principles of

> fundamental justice. However, that does not end the inquiry. The provisions of the *Immigration Act* dealing with deportation must be considered in their international context: *Pushpanathan*, *supra*. Similarly, the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect. A complete understanding of the Act and the *Charter* requires consideration of the international perspective.
>
> 60 International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. **We look to international law as evidence of these principles and not as controlling in itself**. (Emphasis added)[21]

147. As the Supreme Court held in *Daniels v. White*, [1968] S.C.R. 517, and later reiterated in *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 ("***Schreiber***") (at par. 50) **[Book of Authorities, Tab __]**, where an irreducible conflict arises between domestic law and a rule of international law, domestic law must prevail, even if that means putting Canada in breach of its international obligations.[22]

148. As a result, were this Court to find some conflict between:

(a) A declaration of inoperability of s. 3(1) *SIA* issued pursuant to the *Bill of Rights*; and

(b) Customary norms of international law on state immunity;

domestic law must prevail and the declaration of inoperability issued.

149. This last point distinguishes the present case from the judgments of the European Court of Human Rights in *Al-Adsani v. United Kingdom*, [2001] ECHR 761 ("***Al-Adsani***") **[Book of Authorities, Tab __]** and that of the House of Lords in *Jones* **[Book of Authorities, Tab __]**. In both instances, litigants were raising the incompatibility of the UK *State Immunity Act*, which incorporates into British law the doctrine of state immunity, with Article 6 of the *European Convention on Human Rights* (the "***ECHR***"),

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[21] Also see par. 46.
[22] Also see *R. v. Hape*, [2007] 2 S.C.R. 292 ("***Hape***"), par. 39 and 53-54 **[Book of Authorities, Tab __]**; and *Bouzari C.A.*, par. 66 **[Book of Authorities, Tab __]**.

which language is similar to that of s. 2(*e*) of the *Bill of Rights*.[23] In both cases, it was found that although there was a *prima facie* breach of Article 6 of the *ECHR*, it was justified under the circumstances.[24]

150. Both the majority judges of the European Court of Human Rights and the Law Lords assumed that they were dealing with two hierarchally equal norms of international law – one based on custom (state immunity) and the other one on a convention (right to a fair hearing) – and that unless some higher norm could be found that displaced or excluded state immunity where the right to a fair hearing is concerned, the doctrine of state immunity and the *ECHR* should both be allowed to coexist. No higher norm having been found, state immunity was held to be a justifiable limitation to Article 6 *ECHR*.[25]

151. The situation is different here as there indeed exists a higher norm, namely the *Bill of Rights*, a quasi-constitutional Canadian statute which trumps international law in cases of incompatibility.

152. In any event, Plaintiffs submit that there is no incompatibility between international law and the limited exemption that they are seeking to the doctrine of state immunity as codified in the *SIA* on the basis of the *Bill of Rights*.

iii. International law allows for the exception advocated by Plaintiffs

153. Plaintiffs' submissions on this branch of the argument are based on the following theorem:

(a) Where a civil redress is sought by a Canadian citizen before a Canadian court against a foreign state as a result of that state's violation of a norm of *jus cogens*, such as the prohibition of torture; and

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[23] Paragraph 6(1) *ECHR* provides in part: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*" **[Book of Authorities, Tab ___]**.

[24] See the speech of Lord Bingham of Cornhill in *Jones*, par. 14 **[Book of Authorities, Tab ___]**. Whereas the House of Lords reached a unanimous decision, eight out of the seventeen members of the European Court of Human Rights dissented in *Al-Adsani*, demonstrating that the question is far from being settled among international law jurists.

[25] *Id.*, par. 18.

(b) The courts of the foreign state do not offer a forum where such a claim may be fairly entertained;

Canada is not violating customary international law on state immunity by allowing the case to proceed before its own courts.[26]

(a) The prohibition of torture is a norm of *jus cogens* and it creates obligations *erga omnes*

154. Plaintiffs adopt the written representations of AI to the effect that acts of torture do not constitute *acta jure imperii* and as a result cannot attract immunity at international law **[AI's Plan of Argument, par. 31-61]**.

155. Moreover, it is now well established that the prohibition of torture constitutes a peremptory norm of international law, or norm of *jus cogens*. As Lord Hoffmann said in *Jones* **[Book of Authorities, Tab __]**:

> 42. A peremptory norm or jus cogens is defined in article 53 of the Vienna Convention of the Law of Treaties of 23 May 1969 (which provides that a treaty is void if, at the time of its conclusion, it conflicts with such a norm) as:
>
> > "a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted".
>
> 43. As the majority accepted, there is no doubt that the prohibition on torture is such a norm: for its recognition as such in this country, see *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147. Torture cannot be justified by any rule of domestic or international law. […] (Emphasis added)[27]

156. Previously, in *Prosecutor v. Furundžija*, December 10, 1998, Case No.: IT-95-17/1-T (T.C.) (appeal dismissed, July 21, 2000 (A.C.)) ("***Furundžija***") **[Book of Authorities, Tab __]**, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (the "**ICTFY**") had analyzed at length the treatment of the prohibition of torture in international law and had come to the conclusion that it constituted a norm of *jus cogens*:

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[26] Neither one of these two elements were present in *Teitelbaum* **[Book of Authorities, Tab __]**: The plaintiffs were not alleging the violation of a norm of *jus cogens*, nor were they alleging that they would be deprived of the right to a fair hearing were they forced to pursue their proceedings before the courts of the defendant state, namely Israel.

[27] Also see *Suresh*, par. 62-65 and 76 **[Book of Authorities, Tab __]**; and *Bouzari S.C.J.*, par. 61; confirmed by *Bouzari C.A.*, par. 86-87 **[Book of Authorities, Tab __]**.

> 153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.
>
> 154. Clearly, **the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community**. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate. (References omitted) (Emphasis added)

157. Not only is torture such a serious crime at international law that its prohibition supersedes all other norms, including treaties, but as was noted by the ICTFY in *Furundžija* **[Book of Authorities, Tab __]**, enforcement of the rule may be sought by each member of the international community, whether or not they are directly affected by the breach at issue:

> 151. Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, **which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued**. (Emphasis added)[28]

158. As explained by Professor Antonio Cassese in his treatise *International Law*, 2nd ed. (2005) (at p. 273-275) **[Book of Authorities, Tab __]**, this right of other states in cases of breaches of obligations *erga omnes* extends to the right to:

(a) "*[C]laim reparation […] to the benefit of the victim State, or, as in the case of gross violations of human rights, to the benefit of the individuals that have suffered from the wrongful act*"; and

[28] See Craig Forcese, "De-Immunizing Torture: Reconciling Human Rights and State Immunity", (2007) 52 *McGill Law Journal* 127, p. 165-166 **[Book of Authorities, Tab __]**.

(b) Enact "*peaceful countermeasures on an individual basis*".[29]

159. In other words, in the hierarchy of international norms, the prohibition of torture sits at the top of the pyramid. In addition, its *erga omnes* nature confers on the members of the international community certain procedural rights to enforce this prohibition and seek reparation for torture victims.

(b) International law allows states to exercise their jurisdiction over acts of torture committed against their own nationals

160. Given that the prohibition of torture constitutes a superior norm in international law and that the breach of that norm by one state creates for other members of the international community the right to insist that the breach be discontinued and to provide for reparation, then it must follow that international law does not prevent the courts of state A from entertaining a civil claim against state B for acts of torture committed against a national of state A.

161. In *Jones*, although the Law Lords acknowledged the evolutionary nature of international law, and also that an exemption to state immunity in cases of civil claims arising out of torture may be "*desirable*", they expressed the view that as of 2006, no such exemption had emerged.[30]

162. Yet, as the Quebec Court of Appeal recently noted in *Kuwait Airways Corporation v. Iraq*, 2009 QCCA 728 (leave to appeal granted, August 27, 2009, S.C.C. No. 33145) **[Book of Authorities, Tab __]**, even if the doctrine of state immunity as applied by domestic courts around the world is based on the same broad international law principles, local law varies from one state to another, and even between the United Kingdom and Canada. Foreign judgments on that issue should therefore not be followed blindly by Canadian courts, who must undertake their own independent analysis of the law:

> 61. À mon avis, adopter le point de vue de KAC revient à affirmer qu'en l'espèce le droit anglais régit la compétence des tribunaux canadiens à l'égard d'un État étranger. Comme le souligne l'Irak, **le fait que le juge Steel a décidé qu'elle ne bénéficiait pas de l'immunité de juridiction quant aux procédures intentées contre elle en Angleterre n'a aucune pertinence sur la question**

[29] Also see C. Forcese, "De-Immunizing Torture…", *supra*, p. 166 **[Book of Authorities, Tab __]**.
[30] See Lord Hoffman's speech, par. 45 **[Book of Authorities, Tab __]**.

> **de savoir si elle bénéficie, au Canada, de cette immunité de juridiction à l'égard des procédures qui lui ont été ici intentées**. De plus, les articles 3155 et 3158 C.c.Q. n'ont certainement pas pour effet de conférer aux tribunaux québécois une juridiction qu'ils ne possèdent pas à l'égard d'une partie. Enfin, à mon sens, le fait que KAC reconnaisse que la signification doit être conforme à l'article 9 de la L.I.E. tout en soutenant que cette même loi ne s'applique pas à la question de la juridiction des tribunaux canadiens démontre bien l'illogisme de son argument. (Emphasis added)

163. Following the Court of Appeal's teachings, this Court must undertake its own analysis of the international law as reflected by state practices, court cases, international instruments and the writings of reputed publicists in order to determine whether or not Canadian courts may recognize a limited exception to state immunity in cases such as the present one.[31]

164. This Court must also be mindful that rules of customary international law evolve over time, and that it is sometimes difficult to pinpoint at which exact moment a rule crystallizes.[32] As U.S. Supreme Court Justice Benjamin Cardozo noted in the 1934 case of *New Jersey v. Delaware*, international customary law "*has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality*."[33]

- **State practice**

165. In 1991, the United States adopted the *Torture Victim Protection Act*, 28 U.S.C. § 1350 (the "***TVPA***") **[Book of Authorities, Tab __]**. It creates a right of action in favour of both U.S. nationals and foreigners to sue for torture and extrajudicial executions committed "*under actual or apparent authority, or color of law, of any foreign nation.*"

166. Moreover, since 1994, under its *Foreign Sovereign Immunities Act*, 28 U.S.C. § 1605(*a*)(7) **[Book of Authorities, Tab __]**, the United States permits its citizens to seek damages against designated "*state sponsors of terrorism*" for "*personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage,*

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[31] Article 38 of the Statute of the International Court of Justice **[Book of Authorities, Tab __]**. Also see *Jones*, par. 46 **[Book of Authorities, Tab __]**; and Ian Brownlie, *Principles of Public International Law*, 7th ed. (2008), p. 3-7 **[Book of Authorities, Tab __]**.
[32] See A. Cassese, *International Law*, *supra*, p. 156-160 **[Book of Authorities, Tab __]**.
[33] Cited in A. Cassese, *International Law*, *supra*, at p. 160 **[Book of Authorities, Tab __]**.

hostage taking, or the provision of material support or resources for such an act", including Iran. Litigants have found some measure of success under that statute.[34]

167. In addition, the 1789 *Alien Tort Claims Act*, 28 U.S.C. § 1350 (the "***ATCA***") **[Book of Authorities, Tab __]** gives district courts "*original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations.*"[35]

168. The Canadian government is now following in the United States' footsteps, with the introduction before the House of Commons on June 2, 2009 by the Minister of Public Safety of *Bill C-35: An Act to Deter Terrorism and to Amend the State Immunity Act* **[Book of Authorities, Tab __]**. This bill, modeled on the relevant provisions of the U.S. *Foreign Sovereign Immunities Act*, albeit narrower in scope, would allow Canadians to institute civil proceedings before Canadian courts against state sponsors of terrorism. As in the U.S., immunity would be lifted only for states that appear on a list prepared by the government.

169. Although *Bill C-35* would not apply to victims of torture, its introduction before Parliament by the Minister of Public Safety is evidence of the government's official position on the scope of the doctrine of state immunity. As such, it should preclude the Attorney General in this case from arguing that the issuance of an order by this Court lifting Iran's immunity would be anymore of a breach of Canada's obligations at international law then *Bill C-35* would lead to.

➢ **International and Canadian jurisprudence**

170. The possibility of civil claims for victims of torture against foreign states before domestic courts has been acknowledged by international tribunals as well as at the highest level of Italian, American and Canadian courts.

171. In 1998, in *Furundžija* **[Book of Authorities, Tab __]**, when discussing the possibility that acts of torture be authorized by a state through legislative, administrative or judicial acts, the ICTFY wrote the following:

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[34] See Beth Stephens, "Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", (2002) 27 *Yale J. Int'l L.* 1, p. 9-10 **[Book of Authorities, Tab __]**.
[35] For the latest application of the *TVPA* and the *ATCA* against a foreign public official for acts of torture and other gross human rights violations, see *Yousuf v. Samantar*, U.S.C.A. 4th Cir., No. 07-1893 (2009) (petition for a writ of certiorari granted, September 30, 2009, U.S.S.C. No. 08-1555) **[Book of Authorities, Tab __]**.

> 155. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. (Emphasis added)

172. Six years later, in *Ferrini v. Federal Republic of Germany* (2004), Cass sez un 5044/04 ("***Ferrini***"), the Italian Court of Cassation was seized of a civil claim arising out of war crimes committed by Germany during the Second World War. Distinguishing both *Al-Adsani* and *Bouzari*, the Court found that there was "*no doubt that the principle of universal jurisdiction also applies to civil actions which trace their origins to such crimes.*"[36]

173. If in *Jones* neither *Furundžija* nor *Ferrini* were found to be authoritative by the House of Lords, our own Supreme Court appears to be more receptive to the evolutionary nature of the doctrine of state immunity. In *Schreiber* **[Book of Authorities, Tab __]**, the United States, who had intervener status, had asked the Supreme Court to find that **only** *acta jure gestionis* (commercial acts of states) could be the object of an exception to state immunity, and that *acta jure imperii* should therefore be immunized in every case.

174. Foreseeing the argument advanced by Plaintiffs in this case, namely that recent developments in international law may justify the prosecution of civil claims before domestic courts in cases of international crimes, the Supreme Court dismissed the argument advanced by the United States. Delivering the Court's opinion, LeBel J. wrote:

> 37 In addition, the interpretation advanced by the United States would deprive the victims of the worst breaches of basic rights of any possibility of redress in national courts. Given the recent trends in the development of international humanitarian law enlarging this possibility in cases of international crime, as evidenced in the case before the House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827, such a result would jeopardize **at least in Canada** a

[36] Quoted in *Jones*, at par. 22 **[Book of Authorities, Tab __]**. As explained by AI in its written argument, this case has now been followed and applied in Italy in 16 other cases **[AI's Plan of Argument, par. 50-51]**.

> potentially important progress in the protection of the rights of the person. (Emphasis added)[37]

175. LeBel J. was thus aware that by allowing Pinochet to be arrested at the request of Spain for alleged crimes against humanity while he was president of Chile, the House of Lords had cracked opened what had hitherto been a locked and bolted door.[38] In other words, LeBel J. foresaw the day when the doctrine of state immunity would evolve so as to accommodate not only criminal proceedings against a state official, but also civil redress.

176. That the House of Lords itself refused, seven years after the *Pinochet* case, to take that extra step in *Jones* should not deter this Court from doing so, based on a Canadian quasi-constitutional instrument and a Canadian understanding of international law.

177. Indeed, the House of Lords' refusal to extend the exception to state immunity therein recognized in criminal law matters to civil proceedings relies heavily on the traditional common law distinction between criminal and civil proceedings (which was also invoked by the Ontario Court of Appeal in *Bouzari C.A.* (at par. 91) **[Book of Authorities, Tab __]**). This emphasis on such a divide overlooks the fact that in many continental legal systems, the victims of a crime are allowed to join criminal proceedings as *partie civile* and claim damages.

178. That point was well made by U.S. Supreme Court Justice Breyer in his concurring reasons in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) **[Book of Authorities, Tab __]**, when dealing with the U.S. *ATCA*. Breyer J. expressed the opinion that where a rule of *jus cogens* had been breached, universal jurisdiction should be recognized for both criminal and civil proceedings:

> Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that

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[37] Also see *Hape*, par. 43 **[Book of Authorities, Tab __]**.

[38] As a matter of fact, the Nuremberg Tribunal had stated, 50 years before the *Pinochet* case, that "*[t]he principle of international law, which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.*" Cited by John Terry in "Taking *Filártiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in Craig Scott, ed., *Torture as Tort*, (2001), p.110, at p. 128 **[Book of Authorities, Tab __]**.

> behavior. See Restatement §404, and Comment *a;* International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 2 (2000). That subset includes torture, genocide, crimes against humanity, and war crimes. See *id.*, at 5—8; see also, *e.g.*, *Prosecutor* v. *Furundzija*, Case No. IT—95—17/1—T, ¶¶155—156 (International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia since 1991, Dec. 10, 1998); *Attorney Gen. of Israel* v. *Eichmann*, 36 I. L. R. 277 (Sup. Ct. Israel 1962).
>
> The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement §404, Comment *b*. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. Brief for European Commission as *Amicus Curiae* 21, n. 48 (citing 3 Y. Donzallaz, La Convention de Lugano du 16 septembre 1998 concernant la competence judiciaire et l'execution des decisions en matiere civile et commerciale, ¶¶5203—5272 (1998); EC Council Regulation Art. 5, §4, 44/2001, 2001 O. J. (L 12/1) (Jan. 16, 2001)). **Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well**. (p. 3-4 of Breyer J.'s reasons) (Emphasis added)[39]

179. On the contrary, applying the reasoning that prevailed in *Bouzari* and *Jones* to the present case leads to the somewhat absurd result that Canada could validly seek the arrest and extradition of Messrs. Mortazavi and Bakhshi in order to prosecute them criminally before the Superior Court of Quebec for their role in Zahra Kazemi's arrest, detention, torture and murder, but that the same court would nonetheless have no jurisdiction over civil proceedings instituted by Plaintiffs against these two individuals in relation to the same events. And given the traditional reluctance of governments to prosecute international crimes before their domestic courts, the different treatment afforded to criminal and civil proceedings becomes hardly justifiable in practice as well as in theory.[40]

180. From the above it may be taken that although the matter is not without controversy, there appears from the U.S. practice and certain pronouncements of domestic and international courts that a trend is emerging that would allow, in cases of gross

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[39] Also see American Law Institute, *Restatement of the Law Third - Foreign Relations Law of the United States*, vol. 1 (1986), § 404, Comment *b* **[Book of Authorities, Tab __]**.
[40] See J. Terry, "Taking *Filártiga* on the Road…", *supra*, p. 115-118 **[Book of Authorities, Tab __]**.

violations of international law, civil proceedings to be pursued against foreign states and government officials before national courts, despite state immunity.

181. The exception advocated by Plaintiffs in this case based on s. 2(*e*) of the *Bill of Rights* is even narrower since it could only be invoked by Canadian citizens in instances where the foreign state's inability to offer due process is duly established.

➢ **Treaties and other International instruments**

182. What do international instruments say of such a possible exception? The 2004 U.N. Convention on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/59/508 **[Book of Authorities, Tab __]** contains no exception for torture or other gross violations of international law, but it is not in force, having only gathered six ratifications out of the thirty required. Canada has not signed this convention and interestingly enough, Norway made the following declaration when it filed its ratification instruments in 2006: "*Norway understands that the Convention is without prejudice to any future international development in the protection of human rights.*"[41] No country has commented or opposed Norway's declaration.

183. The second treaty of relevance is the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, *U.N.T.S.*, vol. 1465, p. 85 (the "**Torture Convention**") **[Book of Authorities, Tab __]**, which was ratified by Canada in 1987. Iran has yet to adhere to it.[42]

184. Article 14(1) of the Torture Convention creates an obligation for state parties to ensure that civil remedies are available in their justice system to compensate victims of torture:

> 1. **Each State Party shall ensure in its legal system** that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. (Emphasis added)

[41] Status of the U.N. Convention on Jurisdictional Immunities of States and Their Property **[Book of Authorities, Tab __]**. Also see *Jones*, par. 47, *per* Lord Hoffman **[Book of Authorities, Tab __]**.
[42] See the List of countries that have signed and ratified the Torture Convention **[Plaintiffs' Exhibit P-44]**.

185. The wording of Article 14(1) does not specify whether the act of torture in question has to have been committed within the territory of the state party or whether the obligation to afford a civil remedy also applies to acts of torture committed abroad.

186. In *Bouzari S.C.J.*, Swinton J. came to the conclusion that Article 14(1) of the Torture Convention did not create a "*treaty obligation which requires [Canada] to provide a civil remedy for acts of torture committed by foreign states*" (par. 56) **[Book of Authorities, Tab __]**, a conclusion that was upheld by the Court of Appeal.[43] Both Ontario judgments would later be relied upon by the House of Lords in *Jones* to reach the same conclusion.[44]

187. One of the elements invoked by Swinton J. in her 2002 judgment was the silence of the Committee against Torture (created pursuant to Article 17 of the Torture Convention to supervise its implementation by state parties) on the true scope of Article 14(1) when dealing with the reports of signatory states, including Canada:

> **51** Mr. Greenwood also reviewed the state reports on the implementation of the Convention which are filed with the Committee Against Torture in accordance with states' obligations under the Convention. Canada has filed three such reports to date. None of these reports have 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**. Therefore, Mr. Greenwood is of the opinion that Article 14 does not require a state to provide a civil remedy for acts of torture by a foreign state outside the forum, nor is it inconsistent with the Convention if Canada continues to provide immunity for such acts. (Emphasis added)

188. The judgment of the Court of Appeal in *Bouzari* came out in June 2004. A year later, in May 2005, the Committee against Torture considered Canada's fourth and fifth periodic reports. Further to exchanges between Committee members and Canadian representatives at the hearing held to consider the reports, the Committee included the following "*subject of concern*" in the Report of its 33rd and 34th sessions **[Book of Authorities, Tab __]**:

> (g) The absence of effective measures to provide civil compensation to victims of torture in all cases; (p. 27) (Emphasis added)

189. The Committee then added, in the "Recommendations" section of the Report:

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[43] *Bouzari C.A.*, par. 72-81 **[Book of Authorities, Tab __]**.
[44] At par. 46, *per* Lord Hoffman **[Book of Authorities, Tab __]**.

> (f) The State party [Canada] should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture; (p. 27) (Emphasis added)

190. In other words, post-*Bouzari*, the Committee against Torture made it clear that it interpreted Article 14(1) of the Torture Convention as requiring state parties to afford civil remedies to all victims of torture, including for acts committed in foreign states.[45]

191. Although the Committee's pre-2002 silence had appeared authoritative to the Ontario courts in *Bouzari*, on whose judgments the Law Lords relied heavily in support of their conclusions in *Jones*, the same Law Lords simply brushed aside the Committee's post-*Bouzari* interpretation of Article 14(1) of the Torture Convention.[46] Yet it cannot be that the Committee's views only carry weight when they are supportive of the court's opinion, and then ignored when they contradict it.

192. In Canada at least, the Committee's interpretations of the Torture Convention are authoritative. For example, in *Suresh*, the Supreme Court relied in its reasons on the conclusions and recommendations of the Committee made in response to periodic reports submitted by the Canadian government (at par. 73) **[Book of Authorities, Tab __]**.

193. In any event, no matter what interpretation may be given to Article 14(1) of the Torture Convention, Article 14(2) makes it clear that: "*Nothing in this article shall affect any right of the victim or other person to compensation* ***which may exist under national law***." The quasi-constitutional guarantee of s. 2(*e*) of the *Bill of Rights* that a person's rights and obligations will be afforded a fair hearing constitutes such a "*national law.*" As such, the declaration of inoperability sought in this case in no way contradicts Canada's obligations under international law. On the contrary, it is specifically safeguarded by the language of Article 14(2) of the Torture Convention.

194. The third relevant international instrument is the International Covenant on Civil and Political Rights, *U.N.T.S.*, vol. 999, p. 171 (the "**ICCPR**") **[Book of Authorities, Tab**

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[45] For a more complete discussion of the Committee against Torture's position post-*Bouzari*, see C. Forcese, "De-Immunizing Torture…", *supra*, p. 161-162 **[Book of Authorities, Tab __]**.
[46] At par. 23, *per* Lord Bingham of Cornhill, and 56-58, *per* Lord Hoffman **[Book of Authorities, Tab __]**.

__], which has been ratified by both Canada and Iran.[47] It creates obligations that are similar to those found in the Torture Convention. Article 2(3) thus stipulates that:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted. (Emphasis added)

195. Article 7 of the ICCPR prohibits acts of torture while Article 9 protects individuals against arbitrary arrest and detention.

196. Once again, although the language used at Article 2(3) does not specifically refer to ICCPR violations that took place abroad, Article 5 provides that the safeguards found in the treaty may not undermine or diminish the more extensive rights one can enjoy under national law:

> 1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
>
> 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent. (Emphasis added)

197. As a matter of fact, the community of nations agrees on the importance of granting civil remedies to victims of international human rights violations, no matter the identity of the perpetrator. In 2005, the General Assembly of the United Nations adopted, without the necessity of a vote, resolution 60/147 entitled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations

[47] See the List of countries that have signed and ratified the International Covenant on Civil and Political Rights **[Plaintiffs' Exhibit P-43]**.

of International Human Rights Law and Serious Violations of International Humanitarian Law" **[Book of Authorities, Tab __]**:

> *The General Assembly*,
>
> *Guided* by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights, other relevant human rights instruments and the Vienna Declaration and Programme of Action,
>
> *Affirming* the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,
>
> *Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field,
>
> […]
>
> 1. *Adopts* the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law annexed to the present resolution;
>
> 2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;
>
> […] (References omitted) (Emphasis added)[48]

198. The Basic Principles and Guidelines annexed to the General Assembly resolution specify in their Preamble that they "*do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law.*"

199. More importantly for the present purposes, these Basic Principles and Guidelines establish a direct link between a state's **substantive** obligations to comply with international human rights law on the one hand and a state's **procedural** obligations

[48] See I. Brownlie, *Principles of Public International Law*, *supra*: "*In general these resolutions are not binding on member states, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes* evidence *of the opinions of governments in the widest forum for the expression of such opinions.*" (p. 15) **[Book of Authorities, Tab __]**.

to afford victims of international human rights law violations effective remedies to pursue justice and obtain compensation from the perpetrators of such violations on the other hand:

> **II. Scope of the obligation**
>
> 3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
>
> […]
>
> (*c*) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, **irrespective of who may ultimately be the bearer of responsibility for the violation**; and
>
> (*d*) Provide effective remedies to victims, including reparation, as described below. (Emphasis added)[49]

200. This resolution was submitted to the General Assembly by the Commission on Human Rights, where it had been adopted by a vote of 40 to none, with 13 abstentions. While several statements were made by state representatives in the course of the Commission hearing, none of them addressed the issue of the territorial scope of the obligations contained in the resolution, let alone expressed the view that the duty to afford civil redress to victims of gross violations of international human rights was limited to acts committed within the state's borders, or that the obligations at issue did not extend to acts committed by foreign officials.[50]

201. Whatever the true territorial scope of the obligations contained in the Basic Principles and Guidelines, at a minimum, the UN General Assembly recognizes that there now exists as part of international law, in addition to the **substantive obligations** of states not to commit gross human rights violations, **procedural obligations** for states to offer civil remedies to all victims of the worse human rights violations. **Failure to provide such a remedy would in and of itself constitute a breach of international law**.

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[49] Nothing in Section VIII - "Access to justice" of the resolution purports to exclude from the application of the general rule instances where a foreign state is responsible for the alleged violation.

[50] Procès-verbal de la 56e séance de la 61e session de la Commission des droits de l'homme, 10 avril 2005, p. 18-20 **[Book of Authorities, Tab __]**. By way of comparison, such an observation had been made by the United States at the time of ratification of the Torture Convention, with the express recognition of Germany (see *Jones*, par. 20, *per* Lord Lord Bingham of Cornhill, and 56-57, *per* Lord Hoffman **[Book of Authorities, Tab __]**).

202. Incidentally, that dichotomy between substantive and procedural obligations was relied upon by the Ontario courts in *Bouzari* and the House of Lords in *Jones* to arrive at their conclusion that the substantive prohibition of torture did not entail a correlative procedural obligation to afford a civil remedy. This unanimous UN resolution appears to seriously undermine the judges' rational in these two cases.[51]

➢ **Conclusion: international law is in a state of flux**

203. From this brief overview, it appears that international law is in a state of flux.[52] As such, the judgment of the House of Lords in *Jones* is but the expression of one domestic court's opinion on the matter. Other members of the international community do not share those views and the decision itself has been the object of much criticism by commentators.[53]

204. Furthermore, Plaintiffs take issue with the following dictum of Lord Hoffman in *Jones*: "*It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.*" (par. 63) **[Book of Authorities, Tab __]**.

205. On the contrary, domestic courts have a long and well established history of initiating and affecting changes to international law with respect to state immunity. As the Ontario Court of Appeal wrote in *Jaffe v. Miller* (1993), 13 O.R. (3d) 745 (C.A.) (leave to appeal denied, December 14, 1995, S.C.C. No. 24971) **[Book of Authorities, Tab __]**, state immunity is a creature of the domestic courts of the world's nations and it falls within their purview to modify it in keeping with developments in the international sphere:

> **18** Professor Ian Brownlie writes in *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990), at pp. 322-36, that restrictive immunity emerged from doctrinal and judicial responses to the extension of state activity into commercial enterprises and public sector intervention in national economies. He notes at pp. 327-28 that Belgian and Italian courts responded to these developments by crafting a distinction between 'acts of

[51] *Bouzari C.A.* was rendered in 2004, before the resolution was adopted by the UN General Assembly, whereas the House of Lords makes no mention of it in *Jones*.
[52] Professor Brownlie expresses the view, in *Principles of Public International Law*, *supra*, p. 327-332 **[Book of Authorities, Tab __]**, that the current state of customary international law on state immunity is still a matter of debate. Also see A. Cassese, *International Law*, *supra*, p. 307-310 **[Book of Authorities, Tab __]**.
[53] See the authorities cited at par. 54 of AI's Plan of Argument.

> government, jure imperii, and acts of a commercial nature, jure gestionis, denying immunity from jurisdiction in the latter case. This approach, often called the doctrine of restrictive or relative immunity, has been adopted by the courts of at least twenty countries. Another eleven states support the restrictive approach in principle. (Emphasis added)[54]

206. In Canada, Quebec courts were the first ones to adopt the restrictive doctrine of state immunity in the 1960s, 15 years before it was codified in the *SIA*,[55] while it took the United Kingdom's courts until 1977 and the judgments rendered in *The Philippine Admiral*, [1977] A.C. 373 (P.C.) and *Trendtex v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356 (C.A. Engl.) ("***Trendtex***") **[Book of Authorities, Tab __]** to follow suit.

207. Surely if domestic courts around the world could respond to the increase in governments' commercial activities by creating a new exception to state immunity, they are perfectly capable of doing so to ensure that impunity is not afforded to perpetrators of gross human rights violations and to give full force and effect to 60 years of developments in the field of international human rights law. This is certainly what the Supreme Court of Canada had in mind in *Schreiber*.

208. In fact, Lord Hoffman's *dictum* has no support in English law or practice: The doctrine of restrictive immunity was first recognized by British courts before making it into legislation through the *State Immunity Act 1978*.[56] And in *Trendtex* **[Book of Authorities, Tab __]**, Lord Denning M.R. considered as inapplicable the rules of *stare decisis* in matters of customary international law (at p. 365-366), while he insisted on the central role of domestic courts in creating and defining principles of state immunity:

> To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied

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[54] As Richard Falk wrote in a 1971 article: "*It has been generally true that* domestic *courts have been far more important than international courts in developing and upholding international law*." Quoted in J. Terry, "Taking *Filártiga* on the Road…", *supra*, p. 114 **[Book of Authorities, Tab __]**.

[55] See AI's Plan of Argument, par. 3-10.

[56] See *Kuwait Airways Corporation v. Iraqi Airways Co.*, [1995] 1 W.L.R. 1147 (H.L.), p. 1156-1158 **[Book of Authorities, Tab __]**.

> the problem, from treaties and conventions and, **above all, defining the rule in terms which are consonant with justice rather than adverse to it**. That is what the Privy Council did in *The Philippine Admiral* [1976] 2 W.L.R. 214: see especially at pp. 232-233; and we may properly do the same. (p. 364) (Emphasis added)

209. As a result, Plaintiffs submit that this Court is free to choose its own path, having in mind the *jus cogens* nature of the rights that have been breached by Iran in this case and the fact that to grant Defendants immunity from prosecution before a Canadian court would amount to shielding them from the consequences of their actions, fostering impunity as opposed to true accountability. The proposed declaration of inoperability of s. 3(1) *SIA*, limited as it is to the present set of facts, is a proportional response to Iran's actions, while remaining within the types of incremental developments courts have made to the doctrine of state immunity over the years to adapt it to changing circumstances.

210. As Lord Denning M.R. wrote in *Trendtex* **[Book of Authorities, Tab __]**:

> Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, some one some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank. ". . . We must take the current when it serves, or lose our ventures.": *Julius Caesar*, Act IV, sc. III. (p. 367) (Emphasis added)

iv. Iran cannot claim immunity where it has repeatedly breached its obligations at international law

211. If any doubts remain as to the proper balance that should be struck between state immunity on the one hand and the protection and enforcement of the fundamental rights entrenched in the *Bill of Rights* and recognized by the community of nations on the other, Plaintiffs submit that on the particular facts of this case, a *fin de non-recevoir* must be opposed to Iran's claim of immunity since it has repeatedly violated its own obligations at international law toward Canada and shown blatant disregard for principles of comity and reciprocity in international relations.[57]

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[57] Professor Brownlie writes, in *Public International Law*, *supra*, "*that estoppel or* préclusion *is a principle of international law.*" (p. 403) **[Book of Authorities, Tab __]**.

- **Iran's actions violated and continue to violate international law and Canada's rights**

212. Beginning with the arbitrary arrest, detention, torture and death of Zahra Kazemi, moving to its failure to inform Canadian consular officials of her whereabouts and medical condition and refusal to allow her to receive any assistance from Canadian authorities, all the way to its refusal to conduct a proper investigation into the circumstances of her death and the denial of access to Canadian diplomats at the only trial held in relation to the present case, Iran has breached and continues to be in breach of its obligations at international law, both towards the community of nations in general and Canada in particular.

213. As Canada's Foreign Affairs Minister put it in 2005, "*Zahra Kazemi's death is far more than a consular case […] It represents a clear violation, by a state, of international human rights norms and laws*." **[Plaintiff's Exhibit P-32]**.

- **Rules of comity cannot be invoked to shield gross violations of international law**

214. State immunity "*developed from the doctrine of the law of nations, which governs the international community of states based on the notions of sovereignty and equality of states*".[58] Moreover, as La Forest J. wrote for a majority of the Supreme Court in *Re Canada Labour Code*, [1992] 2 S.C.R. 50, the twin pillars on which state immunity rests are "*international comity and reciprocity*" (p. 91) **[Book of Authorities, Tab __]**.[59]

215. La Forest J. had defined comity as follows in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 **[Book of Authorities, Tab __]**, insisting on the idea that protection of a state's own citizens could not be ignored when applying the doctrine:

> "Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws […]. (p. 1096) (Emphasis added)

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[58] *Schreiber*, par. 13 **[Book of Authorities, Tab __]**. Also see *Hape*, par. 41 **[Book of Authorities, Tab __]**.
[59] Also see *Al-Adsani*, par. 54 **[Book of Authorities, Tab __]**.

216. Indeed, as extensive as they may be, both sovereignty and comity have their limits. In *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, Sopinka J. noted how comity is itself based on reciprocity. Speaking of the possibility for a Canadian court to issue an anti-suit injunction where a foreign court had exercised its jurisdiction over a case without being the *forum conveniens*, he wrote: "*The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.*" (p. 934) **[Book of Authorities, Tab __]**.

217. More recently, in *Hape* **[Book of Authorities, Tab __]**, the Supreme Court had to determine whether or not the *Charter* applies to the actions of Canadian officials while pursuing a criminal investigation in a foreign country. The majority found that under normal circumstances, given the respect that must be afforded to a foreign state's sovereignty over its own territory and principles of comity, the *Charter* could not receive extraterritorial application. Yet the majority also recognized that comity had its limits. As LeBel J. wrote:

> 51 The principle of comity does not offer a rationale for condoning another state's breach of international law. Indeed, the need to uphold international law may trump the principle of comity (see for example the English Court of Appeal's decision in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (QL), [2002] EWCA Civ. 1598, in respect of a British national captured by U.S. forces in Afghanistan who was transferred to Guantanamo Bay and detained for several months without access to a lawyer or a court). (Emphasis added)

218. A year later, in *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125 ("***Khadr***") **[Book of Authorities, Tab __]**, the Supreme Court was called upon to apply the exception it had recognized in *Hape*. In that case, Omar Khadr was invoking s. 7 of the *Charter* to seek the disclosure of transcripts of interviews conducted by Canadian officials at the U.S. prison camp of Guantanamo Bay, Cuba. The Canadian government, citing *Hape*, was opposing the request on the basis that when outside the country, its officials were not subject to Canadian constitutional safeguards.

219. The Court dismissed the government's argument, citing the *Hape* exception, namely that where the foreign state's process in which Canada is involved breaches basic rules of international human rights laws, the *Charter* may fill in the gap:

> [18] In *Hape*, however, the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the deference required by the principle of comity **"ends where clear violations of international law and fundamental human rights begin"** (*Hape*, at paras. 51, 52 and 101, *per* LeBel J.). The Court further held that in interpreting the scope and application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law (para. 56, *per* LeBel J.).
>
> [19] If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation. (Emphasis added)

220. Although we are here dealing with the *Bill of Rights*, the same reasoning must apply. The effect of s. 3(1) *SIA* is to shut the doors of Canadian courts and force litigants to seek justice before the courts of the foreign state whose officials are responsible for the prejudice suffered. Based on *Hape*, the principles of sovereignty and comity in international relations should dictate that the *SIA* be applied and the case deferred to the relevant foreign courts, without engaging the protections afforded by the *Bill of Rights*.

221. The situation is different though where it is demonstrated that the justice system of the foreign state at issue is incapable of handling the case in a manner that is fair and that conforms to principles of fundamental justice as recognized in international law. As discussed above, international law now comprises both a normative and a procedural content with respect to violation of basic human rights, that is international law requires states to afford real avenues of redress to victims.

222. In the present case, Plaintiffs have proven that no fair and open process would be available to them in Iran were they to attempt to pursue this case in that country. Putting an end to the present proceedings and sending Plaintiffs to Iran through the application of s. 3(1) *SIA* would therefore cause Canada, through the application of a federal statute, to participate "*in a process that was violative of Canada's binding obligations under international law*".

223. Consequently, as in *Khadr*, the *Bill of Rights* must apply to fill in the void to the extent of Canada's participation. In this case, it means a declaration of inoperability of s. 3(1) *SIA* pursuant to s. 2(*e*) of the *Bill of Rights* and the dismissal of Iran's motion in order to allow this case to proceed to the merits before this Court.

v. The present proceedings are justified countermeasures against Iran's violations of international law

224. Finally on the justification analysis, given Iran's well-documented and serious breaches of norms of *jus cogens* and *erga omnes* obligations, every member of the international community, including Canada, has a right to seek compliance of Iran with said norms. This includes Canada's right to take proportional countermeasures against Iran for as long as it fails to remedy the situation. Plaintiffs submit that the present proceedings constitute such proportional countermeasures and should therefore be authorized to go ahead by this Court.

225. Professor Cassese summarizes as follows the consensus that emerges from international practice on *erga omnes* obligations:

> In sum, international practice shows that various notions have become firmly embedded in the international community: (i) there exists some *universal values* of concern for any member of that community; (ii) a *serious* breach of those values *affects any member of the community*, regardless of whether or not that breach directly damages interests or concerns of a member; (iii) any member of the community is *authorized to take steps* to demand cessation of the serious breach. (Italics in the original)[60]

226. As explained by the ICTFY in *Furundžija* (at par. 151-154) **[Book of Authorities, Tab __]**, the rule prohibiting torture creates obligations that are *erga omnes*. As such, every state, including Canada, has a right to sanction Iran for its conduct in the Zahra Kazemi case.[61]

227. One form of sanctions authorized by international law in such cases are countermeasures, which are described as follows by Professor Forcese:

> Countermeasures are steps taken by one state to induce compliance with international law by another state that **"would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State."**

[60] A. Cassese, *International Law*, *supra*, p. 269 **[Book of Authorities, Tab __]**.
[61] C. Forcese, "De-Immunizing Torture...", *supra*, p. 165-166 **[Book of Authorities, Tab __]**. Also see A. Cassese, *International Law*, *supra*, p. 273-275 **[Book of Authorities, Tab __]**.

> They "are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act."
>
> Countermeasures are not limited to suspending performance of the same or a closely related obligation to that breached. They are, however, subject to certain prerequisites. The ICJ listed these preconditions in *Gabčíkovo-Nagymaros Project*:
>
> > In order to be justifiable, a countermeasure must meet certain conditions ...
> >
> > In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. ...
> >
> > Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. ...
> >
> > In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question. (References omitted) (Emphasis added)[62]

228. Plaintiffs' position is that so long as the three conditions set by the International Court of Justice in *Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*, (1997) ICJ Reports 7, at p. 55-57) **[Book of Authorities, Tab __]** are met, the present proceedings are justifiable as proportional countermeasures taken by Canada against Iran in relation to the Zahra Kazemi case.

229. It appears from the facts of the present case that all three conditions are indeed met:

(a) By arresting, illegally detaining, torturing, sexually assaulting and ultimately killing Zahra Kazemi, Iran and Iranian officials have violated rules of international law of the highest status and utmost importance;

(b) Since 2003, Canada has repeatedly requested from Iran that it fully investigate the circumstances of the Zahra Kazemi case and that it punish those responsible for her demise. Furthermore, in 2005, Canada reduced to a minimum its diplomatic relationship with Iran, as a result of Iran's failure to

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[62] C. Forcese, "De-Immunizing Torture...", *supra*, p. 166 **[Book of Authorities, Tab __]**. Also see International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, (2001), p. 75-76 and 128-131 **[Book of Authorities, Tab __]**.

meet its international obligations in the Zahra Kazemi case, a state of affairs which persists to this day; and

(c) Lifting Iran's immunity at international law in order to allow for civil proceedings against Iran and the Iranian officials responsible for Zahra Kazemi's torture and death to obtain compensation for their acts is commensurate with the injury suffered by Canada and the international community as a result of Iran's violation of its own obligations.

230. That this Court, as opposed to the executive branch of the Canadian government, could authorize countermeasures in such an exceptional case based on an application of s. 2(*e*) of the *Bill of Rights*, is no more extraordinary than the Federal Court ordering the federal government to repatriate a Canadian citizen from Sudan or to seek from U.S. authorities the release of Omar Khadr.[63] As the Supreme Court of Canada underscored in *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3 **[Book of Authorities, Tab __]**, courts in this country are as much part of the government as the legislative and executive branches:

> […] However, political institutions are only one part of the basic structure of the Canadian Constitution. As this Court has said before, there are three branches of government — the legislature, the executive, and the judiciary: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at p. 469; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 620. Courts, in other words, are equally "definitional to the Canadian understanding of constitutionalism" (*Cooper*, *supra*, at para. 11) as are political institutions. […] (p. ___) (Emphasis added)

231. Furthermore, given that Iran does not recognize the compulsory jurisdiction of the International Court of Justice,[64] Canada cannot institute proceedings against Iran before that international forum without Iran first consenting to it. Countermeasures may well be the only effective way of forcing Iran to comply with its international law obligations in this case.

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[63] See *Abdelrazik v. Canada (Foreign Affairs)*, 2009 FC 580 (CanLII) **[Book of Authorities, Tab __]**; and *Khadr v. Canada (Prime Minister)*, 2009 FC 405 (CanLII) (appeal dismissed, 2009 FCA 246 (CanLII); leave to appeal granted, September 4, 2009, S.C.C. No. 33289 (hearing scheduled for November 13, 2009)) **[Book of Authorities, Tab __]**.

[64] See the List of countries that have filed Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court **[Plaintiffs' Exhibit P-45]**. Moreover, Iran has not signed the Optional Protocol to the International Covenant on Civil and Political Rights, which sets up a complaint mechanism for victims of ICCPR violations. See the List of countries that have signed and ratified the Optional Protocol to the International Covenant on Civil and Political Rights **[Book of Authorities, Tab __]**.

IV. CONCLUSION

232. The story of Zahra Kazemi, as tragic as it is, offers an opportunity for the Canadian justice system to recognize victims of torture and their families and to afford them a real measure of redress, albeit incomplete and limited to monetary compensation, where no other venue exists. That such a step should be taken by this Court in this case is mandated by the principles of fundamental justice entrenched 50 years ago in our *Bill of Rights*. As Deschamps J. wrote in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 **[Book of Authorities, Tab__]**:

> 87 […] if a court is satisfied that all the evidence has been presented, there is nothing that would justify it in refusing to perform its role on the ground that it should merely defer to the government's position. When the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities. **Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch**. (Emphasis added)

233. The whole respectfully submitted.

MONTREAL, November 12, 2009

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