



Canadian Centre for International Justice
Centre canadien pour la justice internationale



**SUBMISSION OF THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE
TO THE COMMITTEE AGAINST TORTURE ON THE
EXAMINATION OF THE SIXTH PERIODIC REPORT OF CANADA**

**THE *STATE IMMUNITY ACT* AND CANADA'S FAILURE TO FULFILL ITS
OBLIGATIONS UNDER THE *CONVENTION AGAINST TORTURE***

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This report focuses on Canada's non-compliance with Article 14 of the *Convention against Torture* ("the Convention") and specifically the application of immunity in legal cases brought by torture survivors.¹ During the last decade, the Government of Canada has called for the application of immunity in civil lawsuits seeking redress and compensation for survivors, and Canadian courts have repeatedly terminated those cases. The government has also failed to amend the statute that provides immunity to foreign states, even those accused of torture. As a result, Canada is in violation of its obligations under Article 14 of the Convention.

The most significant barrier preventing torture survivors from obtaining redress and compensation in Canada is the federal *State Immunity Act* ("SIA"),² which generally grants immunity to foreign governments in Canadian courts. The statute contains certain exceptions to immunity, notably for proceedings relating to commercial dealings or injuries that occurred in Canada, but the SIA contains no exception for torture. The SIA therefore continues to prevent individuals subjected to torture outside Canada from seeking and obtaining civil redress in Canadian courts.³

This report first summarizes Canadian court cases in which torture survivors have been denied their right to compensation, then provides an overview of the Committee's previous comments regarding Canadian compliance with Article 14. Finally, the report illustrates the failure of the Canadian government to make crucial legislative changes, in conformity with the recommendations of the Committee, that are necessary to bring Canada in line with its obligations under Article 14.

APPLICATION OF IMMUNITY IN CANADIAN CASES

Bouzari v. Iran

Houshang Bouzari was detained arbitrarily and tortured over a number of months by the Government of Iran, including beatings, electrical shock, mock executions and solitary confinement in a tiny cell. After paying bribes to get out of prison and escape Iran, he eventually moved to Canada and became a Canadian citizen. In 2000, he filed a civil lawsuit against the Government of Iran in a Canadian court. Even though Iran did not present a defence in the case, the Attorney General of Canada intervened to argue that Iran enjoyed immunity for torture. The Superior Court of

¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). Article 14 states, "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."

² R.S.C. 1985, c. S-18.

³ As discussed below, the Committee against Torture ("the Committee") has previously commented on the problematic nature of the SIA in relation to Canada's obligations under Article 14 of the Convention.

Ontario dismissed the lawsuit, finding that the action was barred by the SIA.⁴ Although the court noted that the doctrine of absolute immunity had been replaced by a doctrine of “restrictive immunity” that was codified in the SIA, including the exceptions for commercial activity and injuries that occurred in Canada, the court found that the SIA contained no exception for torture.⁵

Mr. Bouzari argued that an exception should be read into the SIA because the Convention obliges Canada to provide survivors of torture with civil remedies.⁶ The court decided that the Convention’s text provides no clear guidance as to whether Article 14 imposes an obligation on states to provide a civil remedy for torture that occurred outside their territory.⁷ The expert witness presented by the Attorney General of Canada asserted that the Article 14 obligation only applies to torture committed within a state’s territory. The court accepted this argument and found that Canada did not have a responsibility to provide a remedy for torture that occurred in Iran.⁸ In so doing, the court specifically mentioned that Canada had previously filed three reports with the Committee and “there [had] been no negative comment from the Committee” with regard to the immunity issue.⁹

The Ontario Court of Appeal affirmed the judgment.¹⁰ Mr. Bouzari sought leave to appeal to the Supreme Court of Canada but his petition was denied.¹¹

The *Bouzari* decision set an unfortunate precedent that has since been cited to deny torture survivors a remedy in Canada. Even the Committee’s rebuke of the *Bouzari* reasoning, discussed below, has neither deterred the Government of Canada from asserting immunity in another lawsuit nor stopped Canadian courts from rejecting cases by other survivors.

Arar v. Syria

Maher Arar was a Canadian citizen in 2002 when he was subjected to the United States’ program of extraordinary rendition. Mr. Arar was detained while in transit through New York, then flown to Jordan and transferred to Syria. While in Syria, Mr. Arar was tortured repeatedly, with Syrian officials hitting him, beating him with shredded electrical cable and forcing him to hear the torture of other inmates. Following his release and return to Canada, Mr. Arar brought a civil lawsuit in a Canadian court against the governments of Jordan and Syria. Relying on the *Bouzari*

⁴ *Bouzari v. Islamic Republic of Iran*, [2002] O.J. No. 1624, at para. 90 (Sup. Ct.).

⁵ *Ibid.*, at para. 18.

⁶ *Ibid.*, at para. 35.

⁷ *Ibid.*, at para. 49.

⁸ *Ibid.*, at para. 50.

⁹ *Ibid.*, at para. 51.

¹⁰ *Bouzari v. Islamic Republic of Iran*, [2004] O.J. No. 2800, 243 D.L.R. (4th) 406, 71 O.R. (3d) 675 (C.A.).

¹¹ *Bouzari v. Islamic Republic of Iran*, [2005] 1 S.C.R. vi, 122 C.R.R. (2d) 376 (note).

precedent, the court applied immunity and dismissed the case. The court indicated that amending the SIA to remove immunity for torture “remains the sole responsibility of Parliament.”¹²

Kazemi v. Iran

Zahra Kazemi was a Canadian citizen in 2003 when she was arrested in Iran. Government agents tortured and sexually abused her, resulting in broken bones, internal bleeding and a brain injury. Iranian officials then prevented her family from seeing her at the hospital where she eventually died. Her son, Stephan, filed a civil lawsuit in Québec against the Government of Iran and three individual Iranian officials. Even though Iran chose to defend the case, the Attorney General of Canada once again intervened to support Iran’s call for immunity. In a positive but narrow step, the Superior Court of Québec relied on the SIA exception concerning injuries suffered inside Canada to permit Stephan Kazemi’s claim for mental suffering to proceed.¹³ However, the court granted Iran immunity on the claims of Zahra Kazemi’s estate because the abuse she suffered took place in Iran. As in *Bouzari*, the Court dismissed arguments that the application of immunity violates Article 14 of the Convention.¹⁴ The outcome may mean that the families of torture survivors can obtain civil redress in Canada but the survivors themselves cannot. Both aspects of the ruling are now on appeal.

THE COMMITTEE’S CONDEMNATION OF THE *BOUZARI* REASONING

In 2005, the Committee considered Canada’s fourth and fifth periodic reports and specifically addressed the lack of recourse to civil remedies in Canadian courts. During its deliberations, the Committee was fully aware of the *Bouzari* case.¹⁵ Representatives of Canada argued, as the Attorney General had done in *Bouzari*, that Article 14 is implicitly limited to torture committed within a state’s territory.¹⁶ Moreover, Canada asserted that state immunity is a “fundamental principle” that is not overridden by Article 14 of the Convention.¹⁷ These arguments faced skepticism

¹² *Arar v. Syrian Arab Republic*, (2005), 28 C.R. (6th) 187, 127 C.R.R. (2d) 252, at para. 28 (Sup. Ct.).

¹³ *Kazemi (Estate) v. Islamic Republic of Iran* (2011), 330 D.L.R. (4th) 1, 227 C.R.R. (2d) 233 (Sup. Ct.), at para. 92.

¹⁴ *Ibid.* at paras. 147-48.

¹⁵ Jennifer Besner and Amir Attaran, “Civil liability in Canada’s courts for torture committed abroad: The unsatisfactory interpretation of the State Immunity Act 1985 (Can)” (2008) 16 Tort L. Rev. 150 at 160.

¹⁶ Summary Record of the Second Part (Public) of the 646th Meeting, UN CAT, 34th Sess., 646th Mtg., CAT/C/SR.646/Add.1 (6 May 2005), at para. 42. In making this argument, however, Canada did not address the fact that a proposal to include a territorial limitation was at one point added to the draft of the Convention but omitted from its final text. Besner and Attaran, *supra* note 15, at 162.

¹⁷ Summary Record, *supra* note 16 at para. 43.

from the Committee. Member Felice Gaer noted that Canada's presentation contained some inaccuracies and she invited Canada to reconsider its response on the immunity issue.¹⁸ The Committee's Chairperson commented that a state could permissibly remove a foreign government's immunity as a countermeasure to respond to torture committed by that state. He went further by saying there is "no peremptory norm of general international law" preventing states from withdrawing immunity in torture cases.¹⁹

These doubts were reflected in the Committee's official comments. In its concluding observations, the Committee identified as an area of concern Canada's "absence of effective measures to provide civil compensation to victims of torture in *all* cases."²⁰ The Committee also recommended that Canada ensure civil compensation to all victims of torture by reviewing its position under article 14.²¹

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

The Committee has also published a working copy of a forthcoming General Comment on Article 14. The Comment contains several clear statements about the duties of states to provide civil redress to survivors. The Committee's draft language directly refutes the position taken by Canada regarding territorial limitations:

The Committee considers that obligations of States parties under article 14 are not limited to victims who were harmed in the territory of the State party

¹⁸ *Ibid.* at para. 64.

¹⁹ *Ibid.* at para. 67.

²⁰ Conclusions and Recommendations of the Committee against Torture: Canada, UN CAT, 34th Sess., CAT/C/CR/34/CAN (7 July 2005), at para. 4.(g) (emphasis added).

²¹ *Ibid.* at para. 5(f).

²² See List of issues (Benin), UN Doc. CAT/C/BEN/Q/2 (9 July 2007), at para. 20, and List of issues (Ukraine), UN Doc. CAT/C/UKR/Q/R/Rev.1 (26 Feb. 2007), at para. 30. The Committee asked Benin and Ukraine to clarify whether existing compensation mechanisms were available to non-nationals as required by Article 14.

²³ Conclusions and recommendations of the Committee against Torture: Republic of Korea, UN CAT, 36th Sess., UN Doc. CAT/C/KOR/CO/2 (25 July 2006) at para. 8(a).

²⁴ Conclusions and Recommendations of the Committee against Torture: Japan, UN CAT, 38th Sess., UN Doc. CAT/C/JPN/CO/1 (3 August 2007) at para. 23.

²⁵ Conclusions and recommendations of the Committee against Torture: New Zealand, UN CAT, 42nd Sess., UN Doc CAT/C/NZL/CO/5 (14 May 2009) at para. 14.

or by or against nationals of the State party. The Committee has praised the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise his or her rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States to ensure that all victims of torture are able to access remedy and obtain redress.²⁶

The draft also includes the Committee's conclusion that the application of immunity is contrary to states' obligations under the Convention:

Similarly, providing immunity to the State party and its agents for acts of torture or ill-treatment is in direct conflict with the obligation of providing redress, compensation, and as full rehabilitation as possible. When impunity is sanctioned by law or exists de facto, it bars victims from seeking redress as it allows the violators to go unpunished and denies victims their rights under article 14.²⁷

FAILURE TO REFORM THE SIA

Despite the Committee's recommendations, there has been little progress in Canada to ensure that torture survivors have access to civil redress particularly with regard to adding an explicit exception for torture in the SIA.

Bill C-483 (Redress for Victims of International Crimes Act)

In 2009, with the support of members of all political parties represented in Parliament, Member of Parliament Irwin Cotler introduced Bill C-483 which would have amended the SIA to eliminate immunity in civil lawsuits involving claims of genocide, crimes against humanity, war crimes or torture.²⁸ A letter supporting C-483 was signed by eight prominent organizations and 45 lawyers, law professors and survivors of torture. As a Private Member's Bill, however, C-483 faced greater obstacles than a government bill would have.

The Canadian Centre for International Justice ("CCIJ"), along with a law professor and a civil litigation lawyer, both with expertise on the issue of state immunity,

²⁶ Committee against Torture, Working Document on Article 14, at para. 20, available at http://www2.ohchr.org/english/bodies/cat/comments_article14.htm.

²⁷ *Ibid.* at para. 37.

²⁸ Bill C-483, *An Act to Amend the State Immunity Act (Genocide, Crimes Against Humanity, War Crimes, or Torture)*, 3rd Sess., 40th Parl., 2010. This was not the first time a Member of Parliament had taken up the immunity problem. In 2005, MP Francine Lalonde pledged to introduce a similar bill to remove immunity in cases of torture, war crimes, crimes against humanity and genocide. See Noah Novogrodsky, "Immunity for Torture: Lessons from *Bouzari v. Iran*," (2008) 18(5) Eur. J. Int'l Law 939 at 948-49.

appeared before the House of Commons Subcommittee on International Human Rights as part of the Subcommittee's hearings on human rights in Iran. In their testimony, CCIJ and the legal experts called for amendment of the SIA. In December 2010, the Standing Committee on Foreign Affairs and International Development, with representatives from all political parties, released its report on Iran and recommended that Parliament remove immunity in cases of gross violations of human rights. CCIJ again testified before the Subcommittee in March 2011 to advocate passage of C-483. Despite these efforts, the bill failed to advance through Parliament and died when elections were called in 2011. The Government of Canada has never introduced its own legislation to eliminate immunity for torture. Such a step would greatly improve the chances of passage.

Bill C-10 (Justice for Victims of Terrorism Act)

In contrast to the issue of torture, Parliament recently passed Bill C-10, a government bill, that added a new exception under the SIA for cases involving terrorism.²⁹ Indeed, the legislation established a civil cause of action.³⁰ Under the Act, the Governor in Council may establish a list of states for which there are reasonable grounds to believe they have supported terrorism. Any foreign state on the list will not enjoy immunity in any proceeding in Canada related to terrorism.³¹

CCIJ testified before both the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs concerning the need to remove immunity for torture in addition to terrorism. However, the government did not amend Bill C-10 to include torture. The passage of the bill demonstrates a willingness by Parliament to amend the SIA but to date the government has not embraced an exception to immunity for torture.

CONCLUSION

At present, survivors of torture have virtually no possibility of seeking redress in Canada. Based on a strict interpretation of the SIA, as advocated by the Government of Canada in support of notorious regimes like Iran, Canadian courts have repeatedly applied immunity in lawsuits involving torture. Unable to take legal measures abroad for reasons of security, survivors in Canada are effectively denied justice. Although courts have counseled claimants to look to Parliament for redress, the legislative route has proven equally unsuccessful. By amending the SIA for cases

²⁹ Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1st Sess., 41st Parl., 2011. The bill received Royal Assent and became law on March 13, 2012.

³⁰ *Ibid.* at Chap. 1, s. 3, *Justice for Victims of Terrorism Act*.

³¹ *Ibid.* at Chap. 1, s. 6.1(1) - (2).

involving terrorism, the Government of Canada has demonstrated that it is not opposed to creating new exceptions to immunity. In this context, the government's failure to carve out a similar exception for torture is particularly glaring.

These circumstances have resulted in Canada's violation of its obligations under Article 14 of the Convention. Seven years after the Committee criticized Canada for its failure to provide remedies to all torture survivors, the Canadian government continues to ignore the Committee's recommendations. Rather than side with nations that practice systematic torture, Canada should open its judicial system to survivors. The government should make a strong statement for accountability by amending the SIA and revoking immunity in cases of torture.