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COURT OF APPEAL FOR ONTARIO

GOUDGE, MACPHERSON AND CRONK JJ.A.

BETWEEN:

HOUSHANG BOUZARI, FERESHTEH YOUSEFI, SHERVIN BOUZARI and NARVAN BOUZARI	***Plaintiffs (Appellants)***
- and -	
ISLAMIC REPUBLIC OF IRAN	***Defendant (Respondent)***
- and -	
ATTORNEY GENERAL OF CANADA	***Intervener (Respondent)***
- and -	
AMNESTY INTERNATIONAL (CANADIAN SECTION), CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND MAHER ARAR	***Interveners***

Mark H. Arnold and David Matas for the appellants
Peter Southey and Christine Mohr for the Attorney General of Canada
Michael Battista for Amnesty International (Canadian Section)
Patricia D.S. Jackson and François Larocque for Canadian Lawyers for International Human Rights
Lorne Waldman for Maher Arar

HEARD: December 3 and 4, 2003

On appeal from the judgment of Justice Katherine E. Swinton of the Superior Court of Justice dated May 1, 2002.

GOUDGE J.A.:

[1] From June 1993 to January 1994 Houshang Bouzari was abducted, imprisoned and brutally tortured by agents of the Islamic Republic of Iran. Shortly after his release, he escaped from Iran and eventually came to Canada as a landed immigrant in 1998. He now seeks to sue Iran for the damages he suffered.

[2] Swinton J. found that his action is barred by the State Immunity Act, R.S.C. 1985, c. S-18 (the "SIA") and that neither the limited exceptions in the SIA, nor public international law nor the Canadian Charter of Rights and Freedoms could relieve against this conclusion. She therefore dismissed the action. For the reasons that follow, I agree and would therefore dismiss the appeal.

[3] This appeal engages two important principles: the prohibition of torture, which is widely acknowledged as vital to international human rights, and the requirement that sovereign states not be subjected to each other's jurisdiction, which is widely acknowledged as vital to the relations between nations. The balance struck today between these two principles by both Canada's domestic legislation and public international law prohibits a civil claim (though not a criminal prosecution) from being brought in Canada for the torture suffered in Iran by Mr. Bouzari. Hence, Mr. Bouzari's civil action was properly dismissed.

BACKGROUND

[4] Mr. Bouzari commenced this action in the Ontario Superior Court of Justice on November 24, 2000. In addition to his own claim against Iran, his wife and two children also claim damages pursuant to the Family Law Act, R.S.O. 1990, c. F.3.

[5] Iran did not defend and was noted in default. As a result, it is deemed by rule 19.02(1)(a) of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to admit the truth of all allegations of fact made in the statement of claim.

[6] When the matter came before her on a motion to determine whether the court had jurisdiction and could proceed to an assessment of damages, Swinton J. also heard evidence. The appellant gave evidence on his own behalf and called Professor Ed Morgan of the University of Toronto, Faculty of Law as an expert in international law. The Attorney General of Canada, who had been granted leave to intervene with respect to international law and Charter issues, also called expert evidence on international law through Professor Christopher Greenwood of the London School of Economics.

[7] The motion judge also heard submissions from Amnesty International (Canadian Section) which had been given leave to intervene. In this court it continued in that role and was joined by Canadian Lawyers for International Human Rights ("CLAIHR") and Mr. Maher Arar, both of whom were also granted intervener status.

[8] The factual record in this matter begins with Mr. Bouzari's birth in Tehran, Iran on June 10, 1952. After obtaining his first university degree in Tehran, he went on to complete his Ph.D. in physics at the University of Turin in Italy. He returned to Iran shortly after the revolution in 1979 and soon obtained employment with the government of Iran. Within a few years, he became an advisor to the Minister of Petroleum and the state owned National Iranian Oil Company, where he remained until late 1987. At that point, he left the Iranian government, moved his family to Italy and formed his own consulting company to advise foreign enterprises seeking to do oil and gas business in Iran.

[9] In the early 1990s, he was retained by a consortium of companies seeking to participate in the development of the very rich South Pars oil and gas field in southern Iran. In April 1992, as a result of his efforts, the consortium signed a contract with the National Iranian Oil Company to provide it with oil and gas exploration, offshore drilling and platform and pipeline construction in connection with the South Pars project. The consortium was to receive $1.8 billion U.S. for its work. Mr. Bouzari's commission was to be two per cent of this, to be paid over time.

[10] In November 1992, on one of his trips to Tehran to work on this project, Mr. Bouzari was approached by Mehdi Hashemi Bahramani, the second son of the president of Iran. He offered to give his father's help in guaranteeing the implementation of the contract, but in return he demanded some $50 million. Mr. Bouzari refused, but over the next few months the president's son repeated this demand on a number of occasions until May 21, 1993, when Mr. Bouzari delivered his final negative response.

[11] On June 1, 1993, plain clothes agents of the Iran government broke into the apartment which Mr. Bouzari kept in Tehran. They held him at gunpoint, robbed him of his money, jewellery, documents and electronic equipment and forcibly abducted him.

[12] From then until January 22, 1994, he was imprisoned in Tehran with no due process and repeatedly tortured in a variety of brutal ways. He was blindfolded, beaten with fists, whipped with steel cables and subjected to electric shocks to his genitals. He was deprived of food, sleep and sanitation. His head was forced into a bowl of excrement and held there. He was subjected to several fake executions by hanging. He was suspended by the shoulders for lengthy periods. His ears were beaten until his hearing was damaged.

[13] In the summer of 1993, agents of Iran demanded a ransom of $5 million from Mr. Bouzari's family, who had remained in Italy. They were able to pay only $3 million of this until January 1994, when they were able to pay a further $250,000. After they promised to provide the balance of the $5 million, Mr. Bouzari was finally released from detention on January 22, 1994, and dumped in downtown Tehran.

[14] Mr. Bouzari finally managed to flee Iran on July 27, 1994, after repeatedly promising to pay the remainder of the ransom demand and saying that he could not get the funds to do so unless he could get out of the country. From that point until they came to Canada, Mr. Bouzari and his family lived in various countries in Europe. On a number of occasions, Iranian agents contacted him to demand further payments of money. These contacts were accompanied by numerous threats against both Mr. Bouzari and his family. They promised to put a bullet in his head in Rome and Mr. Bourzari testified that, given this threat: "you can image what they could do if I go to Tehran."

[15] Mr. Bouzari says that he was kidnapped, imprisoned and tortured in order to remove him from the South Pars project and to extract an advance payment of the commission that he had refused to pay to the son of the president of Iran. In the summer of 1993, the National Iranian Oil Company cancelled the contract it had with the consortium. Iran then incorporated the Iran Offshore Engineering Construction Company, appointed the president's son as its managing director and caused the new company to enter into a contract with the consortium for the South Pars project that was identical to the one that Mr. Bouzari had obtained. Not surprisingly, he was entirely excluded from the new arrangement.

[16] Mr. Bouzari and his family emigrated to Canada in July 1998. They were granted landed immigrant status, but remained citizens of Iran. When this action was commenced they had applied for Canadian citizenship and as of the hearing of this appeal, we were advised that this has now been granted.

[17] Mr. Bouzari continues to suffer from his experiences in Iran in a number of ways including post-traumatic stress disorder, ongoing pain in his shoulders and back and damaged hearing. There is no evidence of what medical care if any he requires in Ontario as a result. Mr. Bouzari also testified about the effect on him of being able to access the Ontario court to assert his claim, saying that this would accord him a sense of relief in being able to tell his story. Indeed, he said that even the opportunity to tell his story to the court in the course of this jurisdictional dispute was helpful to him.

[18] Mr. Bouzari commenced this action on November 24, 2000, seeking damages from Iran for kidnapping, false imprisonment, assault, torture and death threats. He also seeks the return of the ransom monies paid to Iran and punitive damages. His wife and children seek damages pursuant to the Family Law Act.

[19] The motion judge dismissed the action in reasons for judgment that are both thorough and erudite. She first addressed the question of the court's jurisdiction over a claim that is brought against a foreign defendant for a tort committed abroad. While she found no real and substantial connection with Ontario, as would normally be required to establish jurisdiction, she declined to decide the case on that basis because of the possibility that these rules might be modified where the claim is for torture by a foreign state inflicted in that state.

[20] She then turned to the issue of the state immunity of Iran. She found that none of the three exceptions provided in the SIA applies to displace the immunity accorded by s. 3 of that legislation. She also concluded that there is no public international law, sourced either in treaties or in customary international law, that alters that conclusion. Finally, she found that s. 3 of the SIA does not violate s. 7 of the Charter.

[21] As a result, she concluded that the court has no jurisdiction over Iran in the circumstances of this case because of state immunity. She therefore dismissed the action. Mr. Bouzari now appeals.

ANALYSIS

[22] While I am in substantial agreement with the reasons of Swinton J., the arguments made on appeal require that I deal with each of the four issues that she addressed. They are:

> (a) The court's jurisdiction over this action pursuant to common law rules of conflict of laws;
>
> (b) The interpretation of the SIA;
>
> (c) The impact of public international law whether found in Canada's treaty obligations or in norms of customary international law; and
>
> (d) The Charter issue.

THE CONFLICT OF LAWS ISSUE

[23] The appellant's claim is against Iran, a foreign defendant, for acts of torture it committed against him in Iran, which he says continue to cause him damage here. The test for determining whether the Ontario court should take jurisdiction over an action like this has two parts. The plaintiff must first meet the legal requirement that has come to be known as the real and substantial connection test. If he does so, the court retains the discretion to decline jurisdiction if there is another forum more appropriate to entertain the action. This is the forum conveniens test. The factors to be considered in each of these are admirably elucidated by Sharpe J.A. in Muscutt v. Courcelles (2002), 213 D.L.R. (4th) 577 (Ont. C.A.).

[24] It is the first of these two that is in issue here. The choice of the more convenient forum does not arise, since it would appear that there is no forum other than Ontario capable of assuming jurisdiction. As the motion judge found, the appellant cannot sue in Iran, particularly in light of the evidence that he might well be killed by agents of the state if he were to return there. Nor is there any suggestion of any other forum

except Ontario in which the appellant could bring this action. The question is simply whether Ontario has jurisdiction simpliciter.

[25] In response to our request, the parties filed written submissions following the hearing of the appeal to address the applicability of the real and substantial connection test to this case. Both the appellant and Amnesty International submit that this test should not be applied to determine whether Ontario has jurisdiction over a civil action for torture abroad. The appellant says that because prohibition of torture is so important as a peremptory norm of customary international law, there must be universal civil jurisdiction to sue, limited only by the required presence of the plaintiff in the jurisdiction at the time of the proceeding and his continuing to suffer harm there due to the torture. Amnesty International would not require even these two conditions, appearing to argue for a full universal jurisdiction, namely, the right to sue in Ontario for torture regardless of any connection to the jurisdiction.

[26] CLAIHR, although adopting both these submissions, also argues that the real and substantial connection test is sufficient to allow Ontario to take jurisdiction over the appellant's claim, particularly given the absence of another forum.

[27] The Attorney General also urges the application of the real and substantial connection test, but argues that an even greater connection with Ontario should be required because the assumption of jurisdiction in a civil action against a foreign state could affect foreign relations, comity and international order.

[28] In my view, there is no basis for departing from the real and substantial connection test in this kind of case. There is nothing in the SIA nor in any treaty by which Canada is bound that would require Ontario to apply a rule of universal jurisdiction, even modified as the appellant suggests, to a civil action for torture abroad by a foreign state. Nor does there appear to be any norm of customary international law to that effect. There is no general practice nor wide-spread legal acknowledgement by states that civil jurisdiction is to be accorded on this basis for an action based on foreign torture. There is thus no reason to displace the usual common law test.

[29] While it is true, as the Attorney General argues, that the taking of jurisdiction in a civil action against a foreign state raises questions of international order, this is not a reason to tighten the real and substantial connection test in such a circumstance. Rather, it is a consideration about whether state immunity ought to be accorded to the defendant foreign state. In other words, the question of whether such a consideration precludes a foreign state from being sued in Ontario is one of state immunity rather than jurisdiction simiplicter.

[30] Moreover, as Sharpe J.A. emphasized in Muscutt, supra, the hallmark of the real and substantial connection test is flexibility. As a result, it can meet the special challenges of this kind of case. It is not meant to be rigid, but rather is meant to be guided ultimately by the requirements of order and fairness, not a mechanical counting of connections with the proposed forum. As Sharpe J.A. said at para. 43, the question is whether Ontario can assume jurisdiction over the defendant given the sort of relationship that exists among the case, the parties and the forum.

[31] Sharpe J.A. went on to elucidate a number of factors that are relevant in assessing whether a real and substantial connection exists with the Ontario forum. They are as follows:

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;

- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature (although the subsequent case of Beals v. Saldanha, [2003] 3 S.C.R. 416 suggests that there is little difference between these two); and
- comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[32] As the motion judge said, if this were the usual case of a foreign defendant sued here for a foreign tort, the application of these factors would probably yield the conclusion that there is no real and substantial connection to Ontario.

[33] Of particular importance is that at the time of the torture the appellant had absolutely no connection with Ontario. In this, his situation is very different from that of Mr. Arar. While it is not suggested that the appellant came here merely to engage the jurisdiction of the Ontario court, he did not arrive until 1998, more than four years after the torture finally ended. In all, the appellant's connection to Ontario for the purposes of this test is very tenuous.

[34] Moreover, the defendant Iran has no connection with Ontario beyond, presumably, the diplomatic. There is no suggestion that it is set up to easily defend a civil action in another state.

[35] As well, there appears to be no broadly shared international practice among states to assume jurisdiction over civil actions in similar circumstances.

[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.

[38] Thus, I think that the application of the real and substantial connection test to the circumstances of this case is not easy. However, given the conclusion I have reached on the issue of state immunity, it is unnecessary to finally determine how the real and substantial connection test would apply here. That is best left for a case in which the issue must be resolved.

THE STATE IMMUNITY ACT ISSUE

[39] The appellant brings this action against a foreign state. The action therefore necessarily engages the principle of sovereign immunity or state immunity.

[40] Founded on the concepts of the sovereign equality of states and the non-interference of states in the internal affairs of each other, the principle is rooted in customary international law.

[41] Historically, it provided foreign states with absolute immunity from proceedings in the courts of other states. However, over the years, the dictates of justice have led to some attenuation in the absolute immunity of states, through the evolution of certain specified exceptions to the general rule. Nevertheless, the doctrine of restrictive immunity which has emerged continues to have the general principle of state immunity as its foundation. In Schreiber v. Canada (Attorney General) (2002), 216 D.L.R. (4th) 513 (S.C.C.) LeBel J. put it this way at para. 17:

> Despite the increasing number of emerging exceptions, the general principle of sovereign immunity remains an important part of the international legal order, except when expressly stated otherwise, and there is no evidence that an international peremptory norm has been established to suggest otherwise. Indeed, Brownlie [Principles of Public International Law, 5th ed. (Oxford: Clarendon Press, 1998)], supra, notes at pp. 332-33 that:
>
> It is far from easy to state the current legal position in terms of customary or general international law. Recent writers emphasize that there is a trend in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law. [Emphasis in original.]
>
> As observed at the outset of these reasons, this principle of international law has been incorporated into the Canadian domestic legal order through the enactment of the federal State Immunity Act.

[42] The SIA reflects this approach. It was passed by Parliament in 1982 and makes foreign states immune from civil suits in Canadian courts unless one of the exceptions in the Act applies. Section 3 is its cornerstone:

> 3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
>
> (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

[43] The appellant relies on three exceptions. The first is found in s. 18 of the Act:

> 18. This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.

[44] The appellant argues that this proceeding is in the nature of a criminal proceeding because he is seeking punitive damages which are in the nature of a fine. The motion judge rejected this argument, concluding that this relief is available only in a civil proceeding after a finding of civil liability and an award of compensatory damages. She found that while the purpose of punitive damages is to deter, they remain a remedy in a civil proceeding. I agree.

[45] Second, the appellant relies on the tort exception found in s. 6 of the Act:

> 6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

> (a) any death or personal or bodily injury, or
>
> (b) any damage to or loss of property
>
> that occurs in Canada.

[46] The appellant argues that his suffering continues in Canada and that this constitutes injury occurring in Canada. The motion judge rejected this argument as well, finding that the appellant continues to suffer from physical and psychological injuries inflicted on him not in Canada, but in Iran, because of the acts of torture committed there.

[47] Again I agree. This reasoning conforms with LeBel J.'s discussion of this exception in Schreiber, supra. At para. 80 he describes it as reflecting "a legislative intent to create an exception to state immunity which would be restricted to a class of claims arising out of a physical breach of personal integrity". Viewing the exception in this light, the SIA requires that the physical breach of personal integrity giving rise to the claim take place in Canada. The appellant cannot meet that condition. He was tortured in Iran.

[48] The third exception cited by the appellant, and the one he relies on most heavily, is that relating to commercial activity. It is found in s. 5 of the Act:

> 5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

[49] The Act also contains the following definition of "commercial activity":

> "commercial activity" means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character[.]

[50] The appellant argues that this exception applies because the acts of torture on which his claim is based are related to the appellant's commercial activity in connection with the South Pars oil and gas field. The motion judge disagreed, finding that regardless of their purpose, these acts were exercises of the state policing, security and imprisonment powers and therefore were inherently sovereign and not commercial in nature.

[51] I agree with her conclusion that the commercial activity exception does not apply here. Section 5 of the Act requires that the acts to which the proceedings relate (namely the acts of torture) be commercial in nature. It is not enough that the proceedings relate to acts which, in turn, relate to commercial activity of the foreign state. To interpret the exception in this way, as the appellant contends, would broaden the exception beyond the clear language of the SIA.

[52] The issue, then, is whether the acts of torture for the which the appellant sues can be said to be commercial in nature. Re Canada Labour Code, [1992] 2 S.C.R. 50 is the leading authority on this question. Writing for the majority at 69, La Forest J. set out the two basic questions raised by s. 5: first, whether the acts in question constitute commercial activity and second, whether the proceedings are related to that activity.

[53] La Forest J. found that a consideration of the purpose of the acts is of some, although limited, use in determining both their nature and which facets of the acts in question are truly "related" to the proceedings in

issue. Here, apart from their purpose, the acts of torture underpinning the appellant's action cannot be said to have anything to do with commerce. They are nothing more than unilaterally imposed acts of brutality. The appellant believes that they were committed with a purpose of affecting his involvement in the commercial activity of the South Pars project. Even if this is taken to include an intention to affect the commercial activity of Iran, that is not enough to turn the acts of torture themselves into the commercial activity of Iran. The acts of torture are related only by intention to the commercial activity of the South Pars project.

[54] Moreover, the proceedings here are not truly "related" to this aspect of the acts of torture. If the appellant's claim proceeds, the purpose of these acts is of little if any relevance to the appellant's ability to recover damages for them. Damages would flow regardless of the purpose of the acts. In other words, the only aspect of the acts of torture that can be linked in any way to the commercial activity of Iran is their alleged purpose. Since this proceeding is not "related" to this aspect of the acts in question, it cannot be said that these acts relate to any commercial activity of Iran for the purposes of s. 5 of the SIA.

[55] Hence, I conclude that the commercial activity exception in s. 5 of the Act has no application to this case.

[56] The final argument related to the SIA issue is raised by the intervener CLAIHR. It argues that the enactment of the SIA has not displaced the common law of state immunity and that, under that common law, torture cannot be legitimized as a government act and cannot therefore attract immunity.

[57] In my view, the wording of the SIA must be taken as a complete answer to this argument. Section 3(1) could not be clearer. To reiterate, it says:

> 3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada [Emphasis added].

[58] The plain and ordinary meaning of these words is that they codify the law of sovereign immunity. Indeed in Re Canada Labour Code, supra, La Forest J. says exactly that at 69:

> This appeal raises the issue of sovereign immunity, as codified in the State Immunity Act [Emphasis added].

[59] Thus the appellant is left with the exceptions in the Act, and, as I have indicated, none of the three he advances applies to this case.

THE PUBLIC INTERNATIONAL LAW ISSUE

a) Introduction

[60] This issue takes the appellant beyond the exceptions to state immunity which are expressly enacted in the SIA. He argues that the SIA must be read in conformity with Canada's public international law obligations and that both by treaty and by peremptory norms of customary international law, Canada is bound to permit a civil remedy against a foreign state for torture committed abroad. He says that Canada's obligations under international law require that the SIA be interpreted to provide an exception to state immunity for such a claim.

[61] The motion judge dismissed this argument. She carefully analyzed both Canada's treaty obligations and

its obligations under customary public international law and found that neither extends to the obligation contended for by the appellant.

[62] I agree with her analysis and will return to it in more detail. First, however, it is useful to turn to a preliminary point about the interplay between Canada's obligations at public international law and its domestic legislation.

[63] Canada's international law obligations can arise as a matter of conventional international law or customary international law.

[64] Where Canada has undertaken treaty obligations, it is bound by them as a matter of conventional international law. Parliament is then presumed to legislate consistently with those obligations. See Schreiber, supra, at para. 50. Thus, so far as possible, courts should interpret domestic legislation consistently with these treaty obligations.

[65] The same is true where Canada's obligations arise as a matter of customary international law. As acknowledged by the Attorney General in this case, customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with those obligations. This is even more so where the obligation is a peremptory norm of customary international law, or jus cogens. For a helpful discussion of these and related issues see Jutta Brunnée and Stephen J. Toope: A Hesitant Embrace: The Application of International Law by Canadian Courts (2002) 40 Canadian Journal of International Law 3.

[66] However, as Professors Brunnée and Toope have written, whether Canada's obligations arise pursuant to treaty or to customary international law, it is open to Canada to legislate contrary to them. Such legislation would determine Canada's domestic law although it would put Canada in breach of its international obligations.

[67] This discussion is important in this case because the SIA so clearly provides the code for according state immunity as a matter of Canadian domestic law. Even if Canada's international law obligations required that Canada permit a civil remedy for torture abroad by a foreign state, Canada has legislated in a way that does not do so. Section 3 of the SIA accords complete state immunity except as provided by the SIA. And, as we have seen, none of the relevant exceptions in the SIA permits a civil claim against a foreign state for torture committed abroad. Canada has clearly legislated so as not to create this exception to state immunity whether it has an international law obligation to do so or not.

[68] However, the more fundamental question is whether Canada has the international law obligation contended for by the appellant. After careful examination, the motion judge concluded that it does not. She analysed this first as a matter of treaty law and then of customary international law. In both contexts she relied on the expert evidence of Professor Greenwood concerning the scope of Canada's international law obligations. She preferred this evidence to that of Professor Morgan because she found Professor Greenwood to be more helpful on the issue she had to decide, namely, the current state of international law. Professor Morgan, on the other hand, focused rather more on where, in his view, international law is headed. While the motion judge's acceptance of Professor Greenwood's opinion over that of Professor Morgan is not a finding of fact by a trial judge, it is a finding based on the evidence she heard and is therefore owed a certain deference in this court. I would depart from it only if there were good reason to do so and, having examined the transcript, I can find none. Indeed, for the reason she gave, I agree with her reliance on Professor Greenwood's evidence.

b) Canada's treaty obligations

[69] The appellant's argument that Canada has a treaty obligation to provide an exception to state immunity for civil actions for torture committed abroad by a foreign state is based primarily on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 which came into force on June 26, 1987. Canada has ratified this Convention although Iran has not.

[70] The definition of torture in Article 1 of the Convention requires that the acts of torture be perpetrated by or with the consent or acquiescence of public officials or persons acting in a public capacity.

[71] Article 4 affects Canada's criminal law jurisdiction. It imposes on each ratifying state the obligation to ensure that all acts of torture are offences under its criminal law. States have implemented this obligation by allowing prosecution of individuals for acts of torture, whether committed in Canada or abroad. Canada has done so through An Act to Amend the Criminal Code (torture) R.S.C. 1985, c.10 (3rd Supp.) s. 2.

[72] However, it is Article 14 which is the focus of the appellant's argument. It reads as follows:

> 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 dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

[73] The question is whether this Article creates an obligation on a ratifying state to provide a civil right of redress for torture whether committed at home or abroad or only for torture committed within its own jurisdiction.

[74] The motion judge concluded that the Convention creates no obligation on Canada to provide access to the courts so that a litigant can pursue an action for damages against a foreign state for torture committed outside Canada. Rather, it simply requires Canada to provide a civil remedy for torture committed within its jurisdiction. The motion judge rested this conclusion on several foundations, each of which the appellant challenges.

[75] First, she accepted Professor Greenwood's opinion to this effect. The appellant says that she should have preferred the opinion of Professor Morgan. I disagree. As I have said, she properly accepted expert evidence that focused on the present state of international law, rather than its possible or even hoped for future.

[76] The motion judge went on to analyze the text of the Convention and found it to provide no clear guidance on the issue. While some of its articles contain a specific territorial limitation, other articles (such as Articles 10 and 15) contain no explicit language to that effect, exactly like Article 14, even though they clearly only apply within the territorial jurisdiction of the signator state. The appellant says that this conclusion represents error and that the ordinary meaning of Article 14 is that it applies no matter where the torture takes place. I disagree. A full textual analysis of the provisions of the Convention shows that the absence of explicit territorial language does not necessarily mean the absence of territorial limitation. The text of the Convention itself simply provides no answer to the question.

[77] Finally, the motion judge looked to state practice concerning Article 14. Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 provides that where subsequent practice in the application of a treaty establishes agreement regarding its interpretation, this should be taken into account in giving the treaty meaning.

[78] Both experts agreed that state practice is important in the interpretation of Article 14. The motion judge found that no state interprets Article 14 to require it to take civil jurisdiction over a foreign state for acts committed outside the forum state. Indeed, on ratifying the Convention, the United States issued an interpretive declaration indicating that it understood Article 14 to require a state to provide a private right of action for damages only for acts of torture committed within the jurisdiction of that state. Ultimately, the motion judge based her conclusion on Professor Greenwood's evidence of a broad state practice reflecting a shared understanding that Article 14 limits the obligation of a ratifying state to providing the right to a civil remedy only for acts of torture committed within its territory.

[79] While the appellant contests this finding of state practice, particularly that it reaches the level of agreement on the meaning of Article 14, there was ample evidence to sustain this conclusion. Indeed, I agree with it.

[80] The appellant also argues that the motion judge should have expressly considered the fact that an early draft of Article 14 contained the phrase "committed in any territory under its jurisdiction" and should have drawn the inference that by omitting this phrase from the final draft, the intention was to exclude this concept from the Article. However, Professor Greenwood, whose opinion the motion judge accepted, was of the view that the words were dropped because they were superfluous since this limitation was already implicit in the Article. The motion judge did not err in accepting this opinion and disregarding the drafting history of Article 14.

[81] In my view, the motion judge correctly concluded on the basis of these various considerations that Canada's treaty obligation pursuant to Article 14 does not extend to providing the right to a civil remedy against a foreign state for torture committed abroad. The appellant's various attacks on her careful analysis all must be dismissed. Canada's treaty obligation under Article 14 simply does not extend to the appellant's case.

[82] In saying that Canada is obliged by treaty to extend a civil remedy for torture to him, the appellant also placed some reliance on Article 14(1) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 by which both Canada and Iran have agreed to be bound. It reads in part:

> Article 14
>
> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. …

[83] The simple answer to the appellant's position is that the motion judge accepted Professor Greenwood's evidence that Article 14 of this Covenant has not been interpreted to date to require a state to provide access to its courts for sovereign acts committed outside its jurisdiction and his opinion that this provision carries no such obligation. This finding of the motion judge is due deference in this court. Indeed, in my view, it is the right conclusion.

c) Canada's obligations under customary international law

[84] The appellant also argues that Canada is bound by peremptory norms of customary international law to permit a civil claim against a foreign state for torture committed abroad.

[85] As Professor Greenwood put it, customary international law is generally defined as widespread and consistent state practice accepted as law. The immunity of states from civil proceedings in the courts of foreign jurisdictions is an example of a principle of customary international law. The enactment of the SIA confirms that state immunity is a part of Canada's domestic law.

[86] A peremptory norm of customary international law or rule of jus cogens is a higher form of customary law. It is one accepted and recognized by the international community of states as a norm from which no derogation is permitted. Not only does the rule of jus cogens override other rules of customary international law in conflict with it, but, by the Vienna Convention on the Law of Treaties, a treaty obligation which conflicts with a rule of jus cogens is of no force or effect in international law.

[87] The motion judge found that prohibition of torture is a rule of jus cogens. For the purpose of this appeal, no one, including the Attorney General of Canada, questions this conclusion. Rather the question is the scope of that norm. In particular, does it extend to a requirement to provide the right to a civil remedy for torture committed abroad by a foreign state?

[88] The motion judge conducted a careful review of the decisions of domestic and international tribunals and state immunity legislation and concluded that the peremptory norm prohibiting torture does not carry with it such an obligation. She put her conclusion succinctly at para. 63 of her reasons:

> An examination of the decisions of national courts and international tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to jus cogens. Indeed, the evidence of state practice, as reflected in these and other sources, leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state.

[89] The appellant attacks this conclusion primarily on two bases. First, he says that if the prohibition against torture is to be respected, torture cannot be considered a state function and therefore cannot be accorded state immunity. In this he relies on R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3), [2000] 1 A.C. 147.

[90] I do not agree. As I have discussed, the SIA simply does not include a civil action for damages for torture in any of the specifically drawn exceptions to the encompassing state immunity provided in s. 3(1). Moreover, the extent of the prohibition against torture as a rule of jus cogens is determined not by any particular view of what is required if it is to be meaningful, but rather by the widespread and consistent practice of states. As the motion judge found, that practice reflects the customary international law principle that state immunity is provided for acts of torture committed outside the forum state, not the obligation contended for by the appellant.

[91] Finally, nothing in Pinochet is inconsistent with this. As the motion judge points out, Pinochet concerned criminal proceedings against an individual, not civil proceedings against the state of Chile. It is in that

context that one of the law lords, Lord Browne-Wilkinson (at 203) offered the view that the commission by an individual of the international crime of torture cannot be considered to be an act done in an official capacity on behalf of the state and therefore is not a state function. However, three of the law lords: Lord Hutton (at 254 and 264), Lord Millett (at 278) and Lord Phillips of Worth Matravers (at 280) expressly discussed the immunity of the state from civil proceedings for torture committed in that state and all accepted that it would apply. Thus, the opinions in Pinochet clearly reflect the distinction for state immunity purposes between proceedings seeking a criminal sanction against an individual for acts of torture committed abroad and proceedings seeking a civil remedy against a foreign state for the same acts. In the former case, the sanction can be imposed on the individual without subjecting one state to the jurisdiction of another. That is not so in the latter case.

[92] This distinction is relevant for the appellant's second point. The appellant argues that the prohibition against torture constitutes a right to be free from torture and where there is a right there must be a remedy.

[93] There are two answers to this. The first reflects the distinction drawn in Pinochet. As a matter of principle, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition. The criminal prosecution of individual torturers who commit their acts abroad (which is expressly sanctioned by the Convention Against Torture) gives some effect to the prohibition without damaging the principle of state sovereignty on which relations between nations are based.

[94] The second answer is that as a matter of practice, states do not accord a civil remedy for torture committed abroad by foreign states. The peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant.

[95] Thus, I see no basis to depart from the conclusion of the motion judge. Just as Canada's treaty obligations do not do so, the rules of customary international law binding Canada do not accord to the appellant the civil remedy he seeks. Both under customary international law and international treaty there is today a balance struck between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction. It would be inconsistent with this balance to provide a civil remedy against a foreign state for torture committed abroad. In the future, perhaps as the international human rights movement gathers greater force, this balance may change, either through the domestic legislation of states or by international treaty. However, this is not a change to be effected by a domestic court adding an exception to the SIA that is not there, or seeing a widespread state practice that does not exist today.

THE CHARTER ISSUE

[96] The appellant's last argument is that, in any event, s. 3 of the SIA is contrary to s. 7 of the Charter, insofar as it grants a state immunity from liability for torture committed abroad. Section 7 reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[97] The motion judge found that s. 3 of the SIA causes no denial of the appellant's right to security of the person and in any event, does not contravene the principles of fundamental justice, because state immunity legislation is not contrary to the fundamental tenents of our legal system.

[98] The appellant contests both conclusions. He says that the torture inflicted upon him in Iran was a

deprivation of his security of the person and that the only issue is whether granting immunity to Iran from a civil claim for compensation for that torture accords with fundamental justice. He relies particularly on Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 in advancing this argument.

[99] In my view, this misreads the Supreme Court jurisprudence on this issue and Suresh in particular. In the United States of America v. Burns, [2001] 1 S.C.R. 283, the Supreme Court made clear that while s. 7 of the Charter extends to circumstances where the deprivation of life, liberty or security of the person is ultimately effected by actors other than a Canadian state actor, that is so only where there is a sufficient causal connection between the participation of the Canadian state actor and the deprivation ultimately carried out. Where there is that sufficient causal connection, the Canadian state actor is bound to observe the principles of fundamental justice in participating in that deprivation.

[100] In Suresh, it was conceded that the Canadian government's action in deporting an individual to torture was sufficiently causally connected to the deprivation of security of the person that would result that the only question was whether the deportation was in accordance with the principles of fundamental justice. However, the Supreme Court reiterated the principle it had stated in Burns, that a sufficient causal connection between the role of the Canadian state actor and the deprivation is required for s. 7 to be engaged. Only once that is established is there an examination of whether the deprivation is in accordance with the principles of fundamental justice. The Supreme Court put the point this way at para. 54 of Suresh:

> 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.

[101] In the appellant's case the Canadian government had no participation whatsoever in his abduction, confinement and torture in Iran. That all took place years before the appellant had any connection to Canada. Nor is there any basis to say that the fact that Canada enacted the SIA granting state immunity from a civil claim for torture is causally connected in any way to the torture inflicted on the appellant by Iran.

[102] Moreover, on this record it cannot be said that the precluding of the appellant's civil claim for torture has itself caused him the kind of harm necessary to trigger s. 7. There is no doubt that the denial of a civil remedy may cause varying degrees of psychological harm to victims of torture, depending on the individual. While the appellant has suffered horribly as a consequence of being tortured, he gave very limited evidence of the impact on him of being unable to claim a civil remedy against Iran. He simply said that he would feel a sense of relief if the court heard his story. As discussed in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, this does not reach the level of serious psychological distress necessary to constitute deprivation of security of the person.

[103] Thus, I agree with the motions judge that the appellant has not established that s. 3 of the SIA gives rise to the necessary deprivation of security of the person to engage s. 7 of the Charter. This is sufficient to dismiss the appellant's claim for relief based on the Charter. Were it necessary to go beyond this to determine whether s. 3 of the SIA accords with the principles of fundamental justice, my conclusion would be the same as that reached by the motion judge, for the reasons she gave. I do not think that s. 3 violates those principles

in granting state immunity to Iran from a civil claim for the torture committed there.

[104] In summary therefore, I have found it unnecessary to decide whether under conflict of laws principles this court can take jurisdiction over the appellant's action. I have concluded that his action is barred by the SIA and that there is no principle of public international law that says otherwise. Finally, I have found that s. 3 of the SIA does not violate s. 7 of the Charter of Rights and Freedoms. I would therefore dismiss the appeal.

[105] No party is seeking costs in this court. Given the nature of the issues, and their importance, it is appropriate that there be no order of costs and I would make none.

Released: June 30, 2004 "STG"

"S.T. Goudge J.A."
"I agree J.C. MacPherson J.A."
"I agree E.A. Cronk J.A."