

Analysis of the State Immunity Act

by

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Executive Summary

Introduction

The Primary purpose of this paper is to Study how State Immunity is being applied as a principle in Canada and around the world, as well as to see what the plausibility is of amending the State Immunity Act in Canada. State Immunity is a principle in international law that prevents foreign officials and states from being sued successfully outside of their own state jurisdiction, The State Immunity of Canada as it stands now includes no exception for act of torture and other similar serious human rights violations. In Canada and other commonwealth countries the Principle is codified as law in act such as the State Immunity Act. As a result of this victims of these abuses are unable to sue for civil damages and the perpetrators of these crime allowed impunity for these abuses. Collecting information and providing an analysis of the current state will be useful to the Canadian Centre of International Justice which has been advocating an amendment to the act.

Methodology and Methods

The data is gathered through two method. The first method is reading academic articles, case studies, and grey literature. The second method is by interviewing experts on the State Immunity Act, previous attempts to amend the act, and the possibility of amending the act in the future.

Key Findings

The main findings of the project are as follows: *The State Immunity Act* of Canada will disallow civil suits from succeeding in suing states and public officials known to have used torture and other serious human rights abuses. The international scan has shown that most countries with State Immunity legislation have a similar model to Canada's *State Immunity Act*. However, there are many countries which lack State Immunity legislation. There is trend of limiting State Immunity worldwide as seen in exceptions related to terrorism and legislation like the *Magnitsky act* which targets human rights offenders. The Present moment is not the ideal time to amend the act given that there is a lack of public awareness, the issue not being on the radar for both the public and lawmakers, as well as no lawmakers currently supporting an amendment. By focusing on solutions to the previous listed issues an amendment to the act is a possibility.

Options to Consider and Recommendations

Option #1 is to pursue a more rigorous policy of criminally trying serious human rights abuse internationally based on the model of Spain and Belgium.

Option #2 Is to expand the *Magnitsky Act* to include more perpetrators of the crimes potentially freezing their assets and barring entry to Canada.

Option #3 is to amend the *State Immunity Act* to include an exception to the rule of State Immunity for acts of Torture and other serious human rights abuses.

The recommendation is option #3 on the grounds that it accomplishes both objectives of compensating the victims of these crimes and not allowing for impunity for the perpetrators.

1. Introduction

This paper examines the history of the *State Immunity Act* in Canada and its equivalents in other countries' laws. State Immunity is a principle of law that protects a state and its public officials from lawsuit and criminal prosecution outside its own jurisdiction and by another state. The paper posits that state immunity has been used as a defense for serious human rights abuses abroad in Canadian courts and the Canadian Legislation should be amended in order to allow for accountability and compensation for those violations. State immunity is a widely accepted principle in international law (Yang, 2012 1). Its core purpose is to prevent a foreign state's government being sued outside of its own territory by courts and legal standards that are not its own (Ibid). Most countries accept state immunity as a principle, and it is a customary norm in international law (Larocque 85). A recent trend in the approach to state immunity is for states to pass legislation on the principle of state immunity. This is advantageous because it changes state immunity from a legal concept into a law. By writing state immunity into law, states can also create exceptions to the rule of state immunity. Many countries including the USA, UK, and Canada have created comprehensive legislation on state immunity that includes exceptions to the rule of state immunity. There are commercial exceptions to state immunity in order to improve co-operation between states and to allow states to better conduct business with other states.

The principal issue with recent state immunity legislation is that the text of the law does not include an exception for serious human rights violations such as torture. As a result of this, victims of serious human rights abuses are unable to sue the foreign state that authorized the

abuse outside of that state. In most cases the victim is unable to apply for reparation from within the state where the abuse occurred due to the danger involved with returning to the state (Larocque 85). Due to these factors the victims of serious human rights violations have little recourse and virtually no access to justice.

There have been several cases in which the principle of state immunity has been challenged in court such as *Al Adsani v. Kuwait* (UK), *Bouzari v. Iran*, and *Kazemi v. Iran* (Canada). In these cases, it has been found that State immunity legislation includes no exception to serious human rights abuses committed outside of the forum state's territory and so the state being sued is protected from civil suit. These cases then set a precedent in international law. This precedent influences states which do not have comprehensive foreign state immunity legislation to make similar judgements when faced with cases related to state immunity and serious human right violations. The issue of state immunity for acts of torture has been tested in court many times with the same result as demonstrated below. The courts are unable to give decisions that go against the state immunity legislation. The core argument developed in this paper is that Canada's *State Immunity Act* must be expanded to include an exception to State Immunity for extreme human rights violations such as torture so that the victim's may sue the state responsible for their abuse. There have been previous bills that attempted to amend the act to include an exception to State Immunity in the case of torture and other serious human rights violations.

Amending the *State Immunity Act* as well as protecting human rights for Canadian citizens abroad could lead to a number of advantages for Canada. The amendment could improve Canada's international standing as a lead promoter of human rights. The amendment

would allow for some accountability on states with low human rights records and for which there is currently little level of accountability for acts such as torture. The amendment may also lead to an amelioration of Canada's international standing.

This report is a review that examines Canada's *State Immunity Act* and the possibility of amending the act. The report is comprised of four parts: (1) an analysis of Canada's *State Immunity Act* and its history. (2) An international scan of State Immunity legislation to ascertain best practices. (3) A current state analysis to examine the applicability of amending the act. (4) Finally, a set of three policy options and a recommendation. The report aims to determine if the *State Immunity Act* can be amended and what would be the optimum strategy to undertake such an amendment. The overall purpose of the project is to analyze the *State Immunity Act* in relation to serious human rights violation and outline the advantages to amending the act.

2. Methodology

The project will be based primarily on qualitative data. The data is gathered through two key activities. The first activity will be reading and researching using academic sources, grey literature, law journals and case studies. The online databases of Hein Online, West Law and Academic Search premier have been scanned in order to uncover information concerning State Immunity. This activity creates a basis of knowledge in order to understand the *State Immunity Act* and its history and application in Canadian law. The second activity will be a series of expert interviews. These interviews will provide a more nuanced understanding of the subject matter and gather information from real world sources in order to better understand the challenges the experts, and lawmakers have had with amending the act.

2.1 Design

The design of the project will be a combined historical and case studies design. There are multiple strands to the project. The first two parts of the project are an analysis of the act and an international scan. For these parts of the project a historical design focus is the optimum approach to research. Historical design approach involves collecting material from the past and synthesizing it into an argument. This is appropriate given that all the material for this part of the project is in from the recent past and a matter of public knowledge. The third part of the project is a current state analysis which will focus on the question whether the present time is an opportune moment to re-open the debate on the *State Immunity Act* and attempt to amend it. This is a more rarefied subject of which there is less material, so the case studies design approach is a stronger methodology for that aspect of the project as a case studies design approach is an in depth look at a more nuanced and rarefied aspect of a research question.

A historical design is useful because much of the project is related to the timeline of the *State Immunity Act* its history and application in Canada. The Case design approach is important to understand the narrower experience of how to amend the act including what had gone wrong in previous attempts to amend the act and what is the applicability of amending the act in the future. The cases studies will be primarily court cases involving the State Immunity. In total 11 cases have been reviewed based on their prominence in the literature, whether the eventual decision was against the rule of state immunity, or if the case set a precedent. The first two parts of the project will be mainly research based and follow a historical design plan. The third part of the project will follow the case studies design when conduct interviews with experts who have a more specialized understanding of the subject and offer more nuanced information than the information provided by the texts.

Interviews:

Interviews will be a key source of information for this project with the intention of addressing the gap in the literature concerning the work done by non-profits and advocates to amend the act in the past. The lessons learned of previous attempts can be discovered by speaking with the people who have worked on amending the act and recording their findings based on their experience. The type of approach used for interviewing will be the elite and specialized interview approach. The interviewees will be interviewed individually using a standard set of questions (Included as an appendix), although unique questions will be asked depending on the interview. The interview will be with experts since the project focuses on legislative nuances when amending the act. Three interviews have been conducted in total for

the project with experts who previously worked on attempts to amend the Canadian State Immunity Act.

The Interview is semi structured. A series of open questions have been produced to be used in each interview but given the expertise of the interviewee they will be given free rein to explore the topic and introduce elements relevant to the interview.

3. Literature review

The first key objective of this paper is to uncover the history of the *State Immunity Act* in Canada and to also study different approaches to State Immunity Internationally. This research will uncover first how State Immunity as it is understood currently can be an impediment to human rights internationally as well as to justice and accountability. Secondly, the research will examine how different states approach State Immunity differently whether this leads to more accountability and justice abroad or not.

There are three main themes that will be studied in this paper: the Canadian *State Immunity Act*, its international equivalents and differing approaches to State Immunity, and the current state. The first two themes can be understood through reading of academic texts and grey literature. the final theme will be studied through interviewing.

3.1 State Immunity Act of Canada

Grey literature is a critical source for understanding the *State Immunity Act*. This includes of course the text of the act itself which details how state immunity should be applied in Canada and what are the exceptions to the rule. The text of previous attempted amendments such as bills C-632 and C-483. These bills to amend the *State Immunity Act* had never made it past first reading in the House of Commons, but the text of the bills give a good example of what an amended *State Immunity Act* would look like.

Although there has not been significant amount of debate in parliament over Bill C-632 and Bill C-483 there has been discussion through parliamentary committees such as the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs which includes testimonials from key members

of the Canadian Centre for International Justice. Jane Stoyles spoke before the committee and argued in favor of bill C-483. Stoyles noted that the bill was supported by a member of all major parties showing its bi-partisan nature. Stoyles was followed by Matthew Eisenbrandt who also worked for the Canadian Centre for International Justice. He argued that the global trend has been one of moving away from allowing immunity in civil based lawsuits. He had cited the United States' hearing of many cases involving torture outside of the United States. He also noted that most countries especially those who follow civil law do not have foreign state immunity legislation. Eisenbrandt also described the potential arguments against amending the act. These hearings showed the type of parliamentary deliberation that has occurred concerning amending the *State Immunity Act*.

There are a number of articles that argue for amending the state Immunity in Canada and discuss the potential ramifications of doing so. "State Immunity and Jus Cogens" by Lorna McGregor, "Tort au Canada: A Proposal for Canadian Tort legislation on gross violations of International Human rights and Humanitarian Law" and "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing exceptions for Terrorism and Torture" by Prasanna Rangnathan are all articles that explore that subject. These articles all argue for an amendment to the *State Immunity Act* and emphasize the importance the amendment has on Canada's role as a human rights champion.

There are also articles that take a more international approach to the question of amending foreign state immunity legislation. Craig Forcese's "De-Immunizing Torture: Reconciling Human Rights and State Immunity", Mirgen Prence's "Torture as Jus Cogens Norm", and François Larocque's "Recent developments in transnational human rights litigation: A

postscript to 'torture as tort'". Larocque is an especially a critical source given that he was involved with several of the high-profile cases within Canada and has a good knowledge of developments concerning State Immunity legislation abroad. Noah Benjamin Novogrodsky wrote a detailed account of the Canadian legal case *Bouzari v. Iran*. The article is an important narrative of the trial, and a good introductory source to the material.

3.2 International Approaches

The Law of State Immunity by Hazel Fox and Philippa Webb is a detailed textbook on state immunity. The work is written from the perspective of the United Kingdom and the United States and includes detailed chapters on both the *State Immunity Act* of the UK and the *Foreign Sovereign Immunity Act* of the USA. There is also a section that includes an international scan, but this scan does not focus on human rights abuses such as torture. The work is purely educational and does not pose any arguments for or against amendments as discussed in this report.

Another textbook consulted was Xiaodong Yang's *State Immunity in International Law*. That textbook includes a vital section on state immunity and human rights. As was the case with *The Law of State Immunity*, the textbook is intended as a teaching tool.

Torture as Tort: Comparative perspectives on the development of Transnational Human rights Litigation is another important textbook for understanding the conflict between state immunity and human rights. The textbook is composed of a series of essays that reflect on how transnational human rights torts are blocked by domestic legislation. The work is Canadian primarily, but its focus is international.

Case studies are another critical source of information in understanding state immunity internationally. The cases are often similar since most state immunity legislation follows similar parameters, but they show the reality of how the law affects an individual's access to justice after enduring extreme human rights abuses. Academic case studies also include pertinent commentary on the law of state immunity and develops the narrative of how immunity legislation is applied.

Ed Bates writes about the prominent case of *Al Adsani v. Kuwait* and the following European Court of Justice case *Al Adsani v. UK*. This is one of the earlier cases relating to State Immunity and torture. The case set a precedent both in the UK and internationally. Bates describes the case as a missed opportunity for a human rights understanding of State Immunity (Bates 2003 p.193). He also stresses the importance for states to update their laws to include exceptions for torture (ibid 224).

The case decisions are also important sources. They include the reasoning behind the decision and often references to precedent set in earlier cases. In the case of decisions on state immunity the judges' decision often cite decisions made internationally that provide leads on different approaches and decisions on state immunity. The cases also often include dissenting opinions on State Immunity that could contribute to the overall argument to amend the act.

3.3 Project Limitations

The key gaps in the literature concerns the work of non-profits and advocates who have challenged the status quo of state immunity in Canada. The literature shows the history, reasoning and some argumentation on why state immunity should be changed, but there is little about the challenges of amending state immunity and why previous attempts have largely

been unsuccessful. The texts do not speak to the likelihood of the act being amended in the current state of world politics.

3.4 UN Committee Against Torture 2005 Report

The Bouzari decision would draw criticism from the UN Committee against torture. Mirgen Prenc notes in her article: "In May 2005, [...] The UN Committee against torture (CAT), the international body tasked with monitoring implementation of the treaty [convention against torture] expressed concern at Canada's failure to provide a civil remedy through the domestic judiciary for all victims of torture." (Prenc. 2011, p.90). Although, Canada is following the international norm by placing state immunity above accountability for abuses like torture, the report shows that the act results in international criticism and tarnishes Canada's role as a defender of human rights.

3.5 Attempts to Amend the Act

State Immunity for torture has been tested at the court's multiple times and the court's decision is always the same that there is no exception in the *State Immunity Act* for torture. Therefore, if State Immunity for acts of torture is to be changed it must be by legislation and not by the courts. Novogrodsky writes "The findings and subsequent application of Bouzari v. Iran suggest that civil redress in Canada for grave human rights abuses committed by foreign states will be driven by legislative change, not an expansive interpretation of the existing Act." (Novogrodsky 2007 948). Both the Liberal and the Conservative parties have proposed bills to amend the act to enable civil remedies. A Conservative proposed amendment would eventually

succeed with the *Justice for Victims of Terrorism Act* enacted under the omnibus bill C-10. an Amendment for victims of torture and significant human rights abuses is yet to be enacted.

The only proposed amendments to the *State Immunity Act* that sought an exception for serious human rights abuses committed abroad have come from Private member's bills which are unlikely to pass into law. Novogrodsky writes that one of the first attempts at amending the act would be proposed by Francine Lalonde of the Bloc Québécois in 2005. Novogrodsky writes "If Lalonde's Bill were enacted, Canadian victims abused abroad, but without legal recourse there, would be permitted to sue foreign states in Canadian courts for acts of torture or other jus cogens violations" (ibid 949). The former Justice Minister and Liberal MP Irwin Cotler was the most active MP in attempting to bring an amendment to *State Immunity Act*. Cotler had introduced Bills C-483 and C-632 both of which proposed removing state immunity for offences such as war crimes, and torture. Both bills did not pass first reading in the House of Commons. Both bills were private member bills which rarely become law. Cotler had said in the House of Commons "When I last introduced this legislation [Bill C-483] in the 40th Parliament with the support of members of all parties, it never came to a vote. Given my place in the order of precedence, that risks being the case once again. When I last introduced this legislation in the 40th Parliament with the support of members of all parties, it never came to a vote. Given my place in the order of precedence, that risks being the case once again" (Cotler. October 20th <https://openparliament.ca/bills/41-2/C-632/?tab=major-speeches>). As Cotler had predicted the bill never made it past first reading. These proposals were unlikely to become law given that they are private members bills and as such were not from the governing majority and never came to a vote.

3.6 Justice for Victims of Terrorism Act

In many ways the *Victim of Terrorism Protection Act* outlines many of the objectives sought after in amending the *State Immunity Act* in that it allows for an individual to sue a foreign state for civil redress for damages caused abroad. It allows the court to make its decision across jurisdictional boundaries. It also allows for plaintiffs to sue the foreign state itself instead of natural persons. The amendment also allows for the plaintiff to receive civil remedies likely taken from frozen assets from the country that financed the terrorist organization responsible for the attack. This allows the court to take on cases of *jus cogens* importance and to act as a deterrent to international violence. There are many limitations as well such as the plaintiff are only able to sue the countries listed in subsection 2 of the *State Immunity Act*. The countries on the list are reviewed every two years by Public Safety Canada. At the present moment the list includes Islamic Republic of Iran and the Syrian Arab Republic. The act also only covers damages and acts committed by terrorist organizations financed by the foreign state, but not the state itself or state actors.

It should be noted that Conservative MPs pushed for the changes outlined in the *Victims of Terrorism Protection Act* for more than a decade before it became law. The first attempt was a private member's bill proposed by Stockwell Day in 2005 which was inspired by the American *Anti-Terrorism and Effective Death Penalty Act* of 1996 (Novogrodsky 948). The amendment was proposed in five other bills none of which became law. It finally gained royal assent after being proposed in 2012 under omnibus bill C-10. The lesson is that an amendment to the state immunity act must come from the governing majority it cannot be proposed through a private members bill.

3.7 Magnitsky Act

In response to the unlawful detention and death of Sergei Magnitsky by Russian officials and the US passing of the Sergei Magnitsky (detailed in next chapter), Canada had passed *the Justice for Victims of Corrupt Foreign Officials Act* sometimes called the *Magnitsky Act*. This act, passed into law in 2017, effectively may sanction a foreign official who “is responsible for, or complicit in, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state” (*Justice for Victims of Corrupt Foreign Officials act* Section 4.2.a). This act states its express purpose is to promote human rights internationally (Ibid Preamble). The act identifies human rights offenders and assigns guilt and applies some retaliatory measures for their actions. However, the act has two major shortcomings. the first shortcoming is the act is used very cautiously and as such very few human rights offenders are included (Knight para 12). the second major shortcoming is that it does not include any option for the victim to seek justice against the perpetrator of the human rights offence. Although the *Magnitsky act* is a strong measure against human rights offenders it leaves out concern for the victims of the offence.

4. Analysis of Canada's State Immunity Act

Canada had adopted the *State Immunity Act* in 1985 based on earlier legislation adopted by the UK and the USA respectively. The act has blocked all civil suits from being successful in suing states and public officials who have committed torture and other serious human rights offences. The act has been amended over the years to include some exceptions to human rights infringements, and other laws in Canada target human rights offender internationally. These amendment and laws are limited and as such few victims of these abuses have access to justice in Canada.

4.1 Canada's role as human rights champion

Before describing the adoption of the *State Immunity Act* in 1985 it is important to note Canada's reputation as a supporter for human rights internationally. For instance, Caroline Davidson writes: "Canadians Pride themselves on their commitment to internationalism and human rights. Canada is a member of almost every international agency and organization. [...] In addition, Canada views itself as a champion of human rights" (Davidson 2005 1405). This reputation is an important factor in the decision making of legislators in Canada. Even to the point of allowing Canadian Courts to prosecute cases that occurred outside of Canadian territory if they involve serious human rights violations. Davidson describes the *Crimes Against Humanity and War Crimes Act* (CAHWCA) which theoretically gives Canadian courts universal jurisdiction for cases involving crimes against humanity and war crimes "CAHWCA "asserts universal jurisdiction, allowing Canada to prosecute anyone (regardless of nationality) present in Canada for the crimes listed in the CAHWCA" (Davidson 1407). It should be noted that these measures can only be brought against people present in Canada and cannot be brought against a foreign state itself. Davidson also describes the act as inadequate despite its reach as few

cases have ever been brought to trial under the act (Ibid). None the less this history shows that Canadian Legislation often takes an approach to supporting human rights cases abroad that is an approach where a *jus cogens* or universally accepted principle trumps international jurisdiction.

Canada is also a signatory of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Article 14 of the convention 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. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation." This article is vaguer than the other articles of the convention in that it does not state if the victim has to be connected to the signee state or whether the act of torture has to have taken place within the territory of the signee state.

4.2 The adoption of State Immunity in Canada

State Immunity is a basic piece of international law which strives to have states respect the sovereignty of another state (Fox 25). It bars a foreign sovereign state from being sued outside of its own legal system and by legal standards which are not its own. There are two doctrines of state immunity that the legislation would fall under. The first is Absolute State Immunity under which another state was given full state immunity barring any suit outside the state's jurisdiction. Hazel Fox and Phillippa Webb describe the ideology behind the absolute doctrine in *The Law of State Immunity* "Inherent in the recognition of the foreign State's independence is an acknowledgement that it alone is responsible for the determination of its policy and conduct of its public administration and that courts should refrain from hampering

the foreign state in the achievement of these purposes.” (Hazel Fox et. Webb, Phillippa *The Law of State Immunity* 3rd ed. 2013 p.28) The second is the restrictive doctrine which is the doctrine that most states have adopted in the 20th century. The restrictive doctrine sets out certain exceptions to state immunity although the exceptions must be clearly stated in the legislation. The exceptions usually fall under commercial law in order to protect private business assets between the two states. However, these acts have been amended to include exceptions beyond commercial law for international human rights abuses such as funding terrorist organizations. These exceptions need to be clear and stated in the legislation. The global trend in state immunity is the adoption of the restrictive doctrine. This requires states to write and enact legislation recognizing state immunity as a legal rule and to set out the exceptions to state immunity in their legislation. United States (1976), the United Kingdom (1978), and Canada (1981) are part of this trend of adopting the restrictive doctrine.

4.3 Characteristics of the Canadian State Immunity Act

In 1985 Canada adopted the *State Immunity Act* based on the restrictive doctrine of setting certain restrictions in law to the rule of state immunity. Brian Douglas Coad divides the Canadian *State Immunity Act* into three parts. “The first part contains those sections creating exceptions to foreign state’s immunity from the jurisdiction of Canadian courts” Most of the exceptions included in the act fall under commercial law. Section 6 makes exceptions to state immunity in cases “relating to death, personal injury, or damage to or loss of property occurring in Canada.” (Brian Douglas Coad 1983. p.1206). State Immunity defines a foreign state as: “**(a)** any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity, **(b)** any government of the foreign state

or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and (c) any political subdivision of the foreign state.” (*State Immunity Act* S.2). This legislation gives immunity to the state, the head of the state when acting as an official and not as a private person, and also gives immunity to state actors acting under the direction of the state. Benjamin Novogrodsky describes the case of *Jaffe v. Miller* in his article “There, the court refused to recognize an exception to state immunity where the United States claimed immunity on behalf of agents responsible for kidnapping a Canadian citizen. The court founded its position on the evolution of common law related to state immunity and concluded that so long as the officials were acting as functionaries of the state even the demonstrated illegality of those duties would not remove the protection of state immunity.” (Novogrodsky 2005 p.951). Novogrodsky also writes that it is problematic to focus on state actors as opposed to the state given that acts of torture are often committed anonymously making it difficult for the victims to identify the specific individual who committed the act of torture. There is also an exception by which a civil remedy may be sought for personal injury, damages, and loss of property due to terrorist actions. Through this exception the Plaintiff may sue a foreign state for a civil remedy. However, this option is extremely limited given the states must be listed by Public Safety Canada as financiers of international terrorism.

Given these characteristics The State Immunity of Canada bars Canadian Courts from challenging extremes human rights abuses and torture committed abroad whether to Canadian Citizens or non-Canadian citizens. The current legislation of Canada represents the status quo in the interpretation of State Immunity around the world. Despite the clarity of the act, the principle of state immunity for atrocity has been challenged multiple times in Canadian Courts.

5. Jurisprudence: Review of Major Court case Decisions in Canada

5. 1 Bouzari V. Iran

Houshang Bouzari v. Iran is one of the most critical case in which State Immunity had blocked civil redress measures in Canada. The case set a precedent in later cases blocking victims of torture and human rights abuses from suing the states that subjected them to the treatment.

Bouzari was working in Iran, negotiating for an agreement with the National Iranian Oil Company (NIOC) on behalf of a consortium of Oil companies for “oil and gas drilling and exploration technology and pipeline and refinery construction” called the South Pars project (Novogrodsky p.940). In 1992 while negotiating this deal he was approached by the then president of Iran’s son, Mehdi Hashemi Bahramani. Bahramani offered to facilitate the negotiations after a payment of fifty million US dollars in what was effectively a bribe. Bouzari refused to pay the bribe and was later arrested. He spent eight months in prison where he was brutally tortured. A ransom was set to release Bouzari of five million US Dollars. His family had paid three of the five million in 1993. Only after paying another 250,000 US Dollars was he finally released. In 1998, Bouzari and his Family emigrated to Canada.

There were no long-term consequences for any involved until many years later. The deal Bouzari was negotiating would be scrapped and then remade excluding him. Novogrodsky writes: “NIOC cancelled its contract with his consortium for the South Pars project. Mehdi Hashemi Bahramani later established a new company, the Iran Offshore Engineering and Construction Company, which entered ‘into a contract with the consortium for the South Pars project that was identical to the one that Mr. Bouzari had obtained. Not surprisingly [Bouzari]

was entirely excluded from the new arrangement.” (Novogrodsky 2007 940). This suggests that despite the episode of torture business went on as usual for many of the perpetrators.

Bouzari and his family brought the case to the Ontario Superior Court of Justice while they were in the process of obtaining Canadian citizenship. He was unable to return to Iran and lodge a complaint in that country for fear of his life. He had even received death threats by phone after his release. The court dismissed his case given that the *State Immunity Act* does not include an exception for torture and that the act of torture did not occur within Canada. The superior court Decision also cited some international cases such as *Al Adsani v. United Kingdom* which occurred in the UK court system, *Siderman de Blake v. Republic of Argentina* which occurred in the US court system. both of these cases involve a civil remedy for torture being blocked by state immunity. Another case brought forward was the Belgian case: *Democratic Republic of Congo v. Belgium* which was a Belgian Court’s decision to issue a warrant against a foreign public official for crimes against humanity which was overruled by the international court of Justice. The decision was not held up by the International Court of Justice given that *jus cogens* Exceptions for torture is not a customary law that is that it is not a common practice among many different states (Bouzari v. Iran. p.13-14 2002).

Bouzari attempted to Appeal the decision to a higher court but his appeal was dismissed as there is no exception to state immunity for torture committed outside of Canada. Bouzari V. Iran set a precedent that cases involving torture outside of Canada do not constitute a *jus cogens* violation.

Mehdi Rafsanjani Hashemi, son of the ex-Iranian president, who approached Bouzari, would later be put on trial in absentia in the UK. Bouzari re-filed his case against Hashemi but

“the Ontario Court of Appeal ruled that Bouzari’s case should be dismissed under the doctrine of *forum non conveniens* because the UK was a more appropriate venue for the case.”

(Canadian Centre for International Justice website <https://www.ccij.ca/cases/bouzari/>). In the trial in the UK Hashemi was “ordered to pay total damages of £3.7m to Houshang Bouzari and his family.” (para 2 Guardian <https://www.theguardian.com/world/2011/nov/23/iranian-oxford-student-torture-damages>). Ironically Hashemi was later imprisoned at Evin Prison, the exact same facility where Bouzari was held, on an unrelated charge. Hashemi himself would be kept in solitary confinement there for seven months.

The Bouzari case is one of the earliest and most prominent cases related to state immunity in Canada. The case would lead to a precedent that would be followed in other cases related to State Immunity. The decision of the court noted that the act was clear and there was no room for interpretation which could lead to a reward for damages (Bouzari v. Iran. p.7-8 2002). The case shows that the courts were unable to interpret the law differently in order to allow access to justice for victims abroad. In order to allow for access to justice lawmakers would have to change the law itself.

5.2 Arar v. Republic of Syria, Hashemite Kingdom of Jordan

Maher Arar was a Canadian Citizen of Syrian origin who was extradited from the US and was held in a Syrian prison where he was subjected to acts of torture. he tried to have case heard in both the Us and Canada and was denied in both country which denied him any access to justice. Novogrodsky details “Arar’s ordeal was the subject of a Commission of Inquiry in Canada which exonerated Arar from any wrongdoing and recommended that Canadian

authorities ‘ assess Mr. Arar’s claim for compensation in light of the finding of this report ’ which detail the ways in which Canadian authorities failed to respond to the torture of a Canadian citizen of Syrian origin who was removed from the United States to Syria. Citing Bouzari , the Superior Court dismissed Arar’s action against Syria.” (Novogrodsky 945). Arar was eventually offered financial recompense but the episode shows how the *State Immunity Act* can allow for serious human rights violations to occur.

5.3 Kazemi v. Iran

Zahra Kazemi was a Canadian-Iranian photo-journalist who travelled to Iran to document protests against the Iranian Government. She was arrested while taking photos outside of Evin Prison. She was taken inside the prison and was subjected to interrogation, beatings and sexual assault. Nineteen days after her initial arrest she had died due to her injuries.

Her son sued the Iranian Government in Canadian Courts. The trial reached the Supreme court level. The case was lost for similar reasoning as the Bouzari and Arar cases: that there is no exception to state immunity for acts of torture outside of Canadian territory. The decision of Bouzari v. Iran was used as a precedent in making the decision. In the Supreme Court decision “state immunity is not solely a rule of customary international law. It also reflects domestic choices made for policy reasons, particularly in matters of international relations. As Fox and Webb note, although immunity as a general rule is recognized by international law, the “precise extent and manner of [the] application” of state immunity is determined by forum states. In Canada, therefore, it is first towards Parliament that one must turn when ascertaining the contours of state immunity.” (Kazemi estate v. Iran. 45. 2014). This

decision makes it clear that it is up to the legislators and not the courts to decide what is and isn't covered by State Immunity.

The Kazemi case followed the exact same pattern as Bouzari. The court are obligated by the law to reject claims of victims of torture. This shows that the courts in Canada are not the right forum to challenge serious humans' rights abuses committed abroad and no new interpretation of the law is possible that could result in access to justice for victims. Therefore, the act must be amended by parliament in order to allow for victims to seek access to justice.

5.4 Conclusion: Lessons from the Jurisprudence – State of Immunity in Canada

For policymakers and the people of Canada their country's support for human rights is central to their identity. For this reason, to support human rights abroad is an important pillar in policy making when it comes to international law. However, this identity as defenders of human rights comes into question when Canadian courts are unable to ensure access to justice for the victims of the most egregious acts of torture. In the prominent cases of *Bouzari v. Iran*, *Kazemi estate v. Iran* and *Arar v. Syria and Jordan* Canada's *State Immunity act* disallowed the proper application of justice. As such an amendment along the lines of bills C-483 and C-632 should be processed in order to allow for proper application of justice and to better ensure Canada's role as a key proponent of human rights at home and abroad is continued. Internationally similar cases have occurred with varying results depending on the legislation.

6. State of Immunity Outside Canada: International Scan and Analysis

The countries discussed in this analysis are chosen for having prominent, influential, or distinct state immunity legislation or for having developed other legislation that challenges immunity for serious human rights abuses. The states are also chosen if there is a significant court decision that has occurred in that state which has been influential. State Immunity legislation is a recent trend in international policy. It was in the 1980's that the United States, the United Kingdom, and Canada adopted State Immunity legislation moving from a doctrine of absolute immunity to restrictive immunity as a part of wider trend as there were more exceptions to the rule of state immunity in terms of commerce law mainly. Many countries such as Germany do not have state immunity but follow the norms of international law (Nacimiento and Sharaw para 2 <https://gettingthedealthrough.com/area/113/jurisdiction/11/sovereign-immunity-germany/>). When states do adopt legislation, they tend to follow international norms. There are very few outliers to consider in the legislation of State Immunity. Occasionally there are cases internationally that challenge the norms of State Immunity and may effect a greater change or counter argument to the rule. There also many cases internationally that strengthens the rule of state immunity even for Jus Cogens violations.

In terms of case law most international cases concerning state immunity and serious human rights violations follow the same pattern. As was the result in the Canadian trials *Kazemi v. Iran* and *Bouzari v. Iran* State Immunity legislation blocks civil suits against a foreign state for serious human rights abuses such as torture. The cases of foreign states often set a precedent internationally. The exceptions to state Immunity often are when the violation occurred outside the state accused of the violation and when the individual accused of the violation is present

and can be charged. In both cases it is not the state itself that is being sued but the public official or the individual responsible for the abuse. There has been no successful civil suit of a foreign state for serious human rights abuses and torture despite dissenting opinions in many high-profile cases.

State immunity legislation and cases are not strictly uniform. There are often small deviations in policy that result in different approaches to State Immunity.

6.1 The United States of America's Foreign Sovereign Immunity Act

The United States' approach to State Immunity has had a strong influence on Canada. The *Magnitsky Act* and *Justice for Victims of Terrorism Act* of Canada were very clearly based on American Legislation. The USA's legislation has had a strong global influence especially on Canada. There is an argument that could be made that US legislation is also the most advanced include exceptions for terrorism and allowing non-citizens to bring their claims to US courts often successfully. The US Legislation merits discussion based on its influence and uniqueness among interpretations of state immunity.

The US equivalent to Canada's *State Immunity act* is the *Foreign Sovereign Immunity Act* of 1976. Since its inception there have been many changes to the act. Most notable of these changes is the *Torture Protection Act* of 1991 which allows both U.S. Citizens and aliens to bring claims forward for extrajudicial killing and torture against a natural person. It is important to note that the claim must be brought against a natural person so that the foreign state itself which authorized the act itself cannot be sued under this act. The *Torture Victim Protection Act* requires that "the claimant exhaust 'adequate and available remedies in the place in which the conduct giving rise to the claim occurred'. It also includes a ten-year statute of limitations"

(Hazel Fox p.280). Although this legislation is much further reaching when compared to other states, the main shortcoming is that the claim can only be brought against natural persons and not the state itself. As Novogrodsky has noted Serious human rights violations are often committed anonymously and it is unlikely that the victim would be able to identify the specific abuser or person responsible (Novogrodsky 951). Nonetheless this act has allowed civil actions against foreign officials including former heads of state for serious human rights abuses committed abroad. Mayo Moran writes: “federal courts in the United States have been adjudicating responsibility for torture and other fundamental human rights abuses committed abroad. Thus, for example, the courts have considered the tort liability of Ferdinand Marcos [former president of the Phillipines], The former President of Haiti, Radovan Karadzic, as well as officials in various regimes” (Moran 2001 661). The United States is unique in that it allows tort claims against human rights abusers. However, it requires the abusers to be present in the states and to be no longer holding their official post.

The *Foreign Sovereign Immunity Act* was also amended by the *Anti-Terrorism and Effective Death Penalty Act* (1996). This act is very similar to Canada’s *Justice for Victims of Terrorism Act* for which the American act served as a framework. The act allows plaintiffs to sue states for “personal injury or death caused by an act of torture, extra judicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources to terrorists” (Fox 281). This does not apply to every foreign state only the States identified by the secretary of state to be sponsors of terrorism. In this way it is similar to Canada’s *Justice for Victims of Terrorism* in that it allows for civil remedies against states, but only for states identified by a government body as a sponsor of terrorism and only for terrorism related offences. Canada and

the United States are the only two countries to have an exception for terrorism in their state immunity legislation.

The *Foreign Sovereign Immunity Act* goes beyond Canada's *State Immunity Act* in that it provides provisions for torture victims for both American citizens and non-citizens and even allows tort claims against foreign former public officials. However in many ways both pieces of legislation have the same drawbacks. Courts in the United States can be used to file tort claims for serious human rights violations committed abroad, but it is rare that such a claim can be filed, given the requirements that the official be present in the states.

Magnitsky Act

One of the most prominent pieces of US legislation is the *Magnitsky Act* also called the *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act* of 2012. This is a bi-partisan bill that passed with overwhelming success that allows the US Government to sanction, deny US Visas and freeze assets of identified human rights violators.

The act was created in response to the wrongful imprisonment, torture, and death of the Russian accountant Sergei Magnitsky. Magnitsky worked for Hermitage Capital Management a Hedge fund based in Moscow. Magnitsky had uncovered a tax fraud scheme perpetrated by Russian businesses with Kremlin connections. Magnitsky was arrested for the same tax evasion scheme that he himself had uncovered and reported to the Russian Prosecutor's office. Amy Knight reports on the treatment Magnitsky received while in prison: "Russian human rights groups established that Magnitsky was subjected to treatment by prison officials "comparable to torture," apparently to get him to retract his statements. He developed acute pancreatitis that went untreated and died an anguished death in November 2009.

Andreas Gross, a Swiss member of the Parliamentary Assembly of the Council of Europe (an international organization dedicated to upholding human rights), observed in his exhaustive, meticulously documented report on the case: Instead of receiving the urgently needed treatment, Sergei Magnitsky was “tranquillised” by a beating with rubber batons, handcuffed and thrown into a holding cell, alone and without any medical attention” (Knight 2018 para 6). After his death no one was prosecuted for Magnitsky’s inhumane treatment. Knight explains: “Russian prosecutor-general Yuri Chaika was responsible for handling the Magnitsky case and received numerous complaints from Hermitage lawyers and human rights activists both before and after Magnitsky’s death. His office conducted several perfunctory investigations, but only filed charges against two prison doctors. The charges against one were later dropped, and the other doctor was acquitted. In March 2013, the case was officially closed.” (ibid para 7). The Magnitsky case was a clear example of an extreme human rights violation being willfully ignored by the regime that perpetrated it.

The American response to the Magnitsky case was to pass the Sergei Magnitsky *Rule of Law Accountability Act*, often shortened to *Magnitsky Act*. Ariel Cohen and Bryan Ryley describe the bill’s sponsorship and original purpose: “*The Sergei Magnitsky Rule of Law Accountability Act*, introduced by Senators Ben Cardin (D–MD) and John McCain (R–AZ) in the Senate and Representatives Ed Royce (R– CA), Chris Smith (R–NJ), and Jim McGovern (D–MA) in the House of Representatives, would “impose sanctions on persons responsible for the detention, abuse, or death of Sergei Magnitsky, for the conspiracy to defraud the Russian Federation of taxes on corporate profits through fraudulent transactions and lawsuits against Hermitage, and for other gross violations of human rights in the Russian Federation.” (Cohen

2012 p. 4). Although the original targets were corrupt officials in the Russian federation, the *Magnitsky Act* allows for the President of the United States to impose sanctions on human rights violators universally. Cohen and Riley write: “While named after Magnitsky, the bill would target human rights abusers around the globe by denying U.S. visas to individuals guilty of massive human rights violations and freezing all of their assets within the purview of the U.S. government.” (ibid). The *Magnitsky act* allows the US government to target human rights violators internationally regardless of where the human rights violation occurred and whether the individual was protected by the doctrine of state immunity.

The *Magnitsky act* has been hailed as a triumph in international human rights legislation. Cohen and Riley quote one of the supporters of the bill “The Magnitsky bill has prominent supporters, including David J. Kramer, president of Freedom House and former Assistant Secretary of State for Human Rights in the George W. Bush Administration. He testified that the Magnitsky bill, even before passage, has already “done more for the cause of human rights [in Russia] than anything done by the Obama Administration or by the Bush Administration.” (ibid p.4) They also note that the bill has been seen as successful by pro-democracy groups within Russia (Ibid p.5). What must also be stressed is the bipartisan nature of the bill and its overwhelming success in the senate passing in a vote of 92-4. The *Magnitsky act* has also caused many countries to pass similar legislation. Knight notes that “Britain, Canada, Estonia and Lithuania have passed similar legislation (Knight Para 12). This suggests that the legislation has caused a chain reaction internationally showing that a piece of legislation challenging serious human rights abusers protected by immunity can be successful.

The main shortcomings of the bill are that it used on identifiable state officials not on the State itself, and there is no compensation or access to justice for the victims of the human rights abuses. Despite the enormous scope of the *Magnitsky act* it has been utilized on 49 individuals and often missing serious human rights offenders. Knight notes: Notably absent [from the list of those affected by sanctions] is Yuri Chaika. the éminence grise of the entire Magnitsky affair” (Knight para 12). The legislation has been historically unpopular with those holding the post of president of the United States the very same office which decides on whom to impose sanctions. Cohen and Riley write: “the Obama Administration views the Magnitsky bill and other human rights legislation as threats to the Administration’s “reset” policy toward Russia.” (Cohen and Riley p. 8). The current president of the United States has also viewed the law negatively: “Trump has said that the law is seriously flawed because it restricts his ability to negotiate with Russia and to ease or lift sanctions without congressional approval.” (Knight para 25). Its unpopularity with these two presidents may explains its limited use. However, under future presidents the acts may be utilized more widely.

Despite the *Magnitsky act’s* shortcomings it has international significance and its influence has spread widely.

Notable cases involving State Immunity in the United States of America

The *Foreign Sovereign Immunity act* goes beyond Canada’s *State Immunity Act* but some of the court cases in the United States have set a precedent that influenced Canadian judges to uphold state immunity for torture and other serious Human rights Violations. However, there has been some success in prosecuting extraterritorial crimes such as torture and extreme

human rights violations in the United States. The United States has been a more successful venue for trying international human rights abuses than Canada.

Filártiga v. Peña-Irala

Jennifer A. Orange summarizes the landmark case of *Filártiga v. Peña-Irala* in her essay: “A family in New York discovered that the man who tortured their 17-year-old son to death in Paraguay was living in New York. They told the local police and the man was arrested. Although the activities occurred in Paraguay and both the parties were Paraguayans resident in Paraguay at the time of the torture, an American court took jurisdiction and applied its interpretation of the law of nations, to find the man liable for the tort of torture” (Orange 291). This case took place in 1980 and it is notable for being a successful case brought against an extraterritorial act of torture. Orange also notes that the *Alien Tort Claims Act* enacted first in 1789 formed the basis of the case. She also notes the importance of the *Torture Victim Protection Act* in the success of cases involving extraterritorial acts of torture. Orange notes the absence of similar statutes in Canadian Law: “In Canada, no statute exists upon which to found such international tort claims. Instead a victim in Filártiga’s shoes, or his family, could argue that Canadian tort law should be applied as the outcome of Private international law (conflict of laws) analysis.” (ibid).

Filártiga v. Peña-Irala is not a completely atypical case in International court cases related to torture. The Filártiga family brought their case under the individual who tortured their son not against the state who sanctioned the act of torture. In these cases, it is rare that the victim is able to recognize their torturer or that the torturer happens to reside in the same country where the victims live. As noted in the Chapter on Canada’s *State Immunity Act*, cases

can be brought forth against the alleged human rights abuser if they reside in Canada and are recognized by the victim. Mayo Moran also writes how for a case involving an international crime there is very little focus on international law but a strong focus on domestic law in Paraguay. Moran writes “[The Court] makes virtually no mention of international law- not even the UN Declaration against Torture. [...] The whole focus is on the domestic law of Paraguay not on international norms” (Moran 672). This is somewhat promising given that laws prohibiting torture are widespread almost to the point of universality. Even countries well known to have authorized acts of torture such as Iran have domestic laws prohibiting torture (although Iran has not signed onto the UN declaration against torture). However, the Case does not break enough ground in that it does not hold the state responsible for the crimes committed.

The USA has been a testing ground for human rights-based legislation. All of the legislation that have amended the *State Immunity Act* in Canada have first had counterparts in the *Foreign Sovereign Immunity Act*. The *Magnitsky Act* and *Anti-Terrorism and Effective Death Penalty Act* would shape Canadian legislation like Canada’s own *Magnitsky Act* and *Justice for Victims of Terrorism Act*. Furthermore, the American legislation would have farther influence than just the US and Canada with the *Magnitsky Act* being widely copied (Knight Para 12). The American example shows the possibility of a state taking leadership in amending its state immunity legislation to allow for human rights based exceptions and influencing other states to do likewise.

6.2 United Kingdom’s State Immunity Act

Like the *Foreign Sovereignty and Immunity Act* of The United States, the *State Immunity Act* of the UK served as a model for the identically titled *State Immunity Act* of Canada. The

State Immunity Act of the United Kingdom's influence goes much further than Canada. It is the principal model used by Commonwealth countries when developing state immunity legislation. In *The Law of State Immunity*: "The SIA [UK] has served as a model, subject to some modification, for much subsequent legislation in commonwealth countries (Singapore *State Immunity Act* 1979, Pakistan *State Immunity Ordinance* 1981, South African *Foreign State Immunities Act* 1981, Canadian *State Immunity Act* 1982, Malawi *Immunities and Privileges Act* 1984, Australian *Foreign State Immunities Act* 1985) and the ILA Montreal convention 1982 as revised at Buenos Aires in 1994." (p.170). The *State Immunity Act* of the UK has been a key model for the many commonwealth countries including Canada in developing State Immunity legislation.

The *State Immunity Act* of the UK passed in 1978 two years after the American *Foreign Sovereignty Act*. The legislation in the UK does not include any civil remedy by which a state can be sued for serious human rights abuses and torture that occur outside of the UK. The act includes a number of exceptions to the rule of State Immunity most of which are related to commercial law. Section 5 of the act includes an exception for death, personal injury and loss of property "caused by an act or omission in the United Kingdom." (*State Immunity Act* s.5). Unlike the US and Canada, it does not include an exception to state immunity for states that support terrorism.

Notable Cases involving State Immunity In the United Kingdom

The two most notable cases in the UK are *Al Adsani v. Government of Kuwait* and *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet*. Both of these cases have an influence that extend far beyond the United Kingdom. The decision of *Al Adsani v. Government*

of Kuwait was a prominent ruling that was cited in the decision of *Bouzari v. Iran* and thus helped set a precedent in Canada.

Al Adsani v. Government of Kuwait

Al Adsani was a businessman of dual Kuwaiti and British Citizenship. Ed Bates in his article summarizes the torture and abuse Al Adsani had undergone in Kuwait: "According to Al-Adsani, he became the subject of a vendetta involving a relation ("the Sheikh") of the Emir of Kuwait such that in May 1991 he was taken at gunpoint in a government jeep to a Kuwaiti State Security Prison. There, false imprisonment and beatings ensued for three days until a false confession was signed. Two days later, further unpleasant events ensued at the palace of the Emir of Kuwait's brother as a result of which Al-Adsani was seriously burnt. He was treated in a Kuwaiti hospital, and very soon returned to England where he spent six weeks in hospital being treated for burns covering 25 percent of his total body surface area. He also suffered psychological damage and was diagnosed as suffering from a severe form of post-traumatic stress disorder." (Bates 194) After this traumatic experience he received phone calls in England threatening him if he did anything to bring publicity to his case or to sue for damages.

Despite the threats he received Al Adsani would sue the Kuwaiti government in England. In 1992 he sued the Sheikh with whom he was involved in a vendetta civilly for personal injury and damages he later expanded the case to a lawsuit against the government of Kuwait (ibid). Incredibly Al-Adsani was granted leave to sue the Kuwaiti government abroad by the UK Court of Appeal. Bates writes "The Court of Appeal broke new ground in the field of human rights jurisdiction and immunity by overturning a High Court ruling so as to grant Al-Adsani leave to pursue proceedings abroad against the Kuwaiti government. [...] [The Court of Appeal] refused

to accept that the doctrine of State Immunity should be applied in favor of the Kuwaiti government, despite the clear terms of the *State Immunity Act* 1978, because allegations of torture underlay the claim and such acts contravened international law. The ruling provoked comment at the time and was criticized by an expert on the law of State Immunity.” (Bates 195) This was a dramatic decision given that the court of appeals decision contravenes the clearly stated rules of the *State Immunity Act* (UK).

The Court of Appeal decision would later be overturned by a higher court. Bates writes: “However, before the case could be properly considered, the traditional line on State immunity was re-asserted by the High Court and then the Court of Appeal in 1996. The High Court granted a request from the Government of Kuwait to strike out the claim on the ground of State immunity.” (ibid). Despite the earlier successes of Al-Adsani’s case the rule of state immunity was reasserted. Al-Adsani took the case to the European Court which again dismissed his claim. Bates wrote on the decision of the European Court stating that in future judges when deciding on whether serious human rights violations such as torture, they could be justified in stating that the legislation does not allow an exception. Bates: “This does not mean, of course, that these Judges would not have great sympathy with the applicant. But they may rest assured that the fault lies with the legislative bodies of the member States for failing to adopt legislation that makes a plea of State immunity unavailable in cases such as Al-Adsani’s” (Bates 222). Bates’ speculation has proven to be correct. Courts when deciding on whether or not State Immunity is overruled by serious human rights violations have often stated that the legislation is comprehensive, and the decision must be in favor of the state being sued. The decision of Al-

Adsani had a great effect on other tort claims on states for serious human rights violations including Canada.

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet

The Pinochet case has often been seen as a victory for a human rights first approach to State Immunity when prosecuting crimes such as torture. Pinochet the former dictator of Chile was in the United Kingdom seeking medical treatment when he was arrested and placed under house arrest. The court case that followed was not to decide whether or not Pinochet was accountable for the torture of Spanish Nationals committed during his time in office as Chile's President. The case was concerned with whether the UK could legally extradite Pinochet to Spain to face trial. Yang writes: "However the denial of Immunity turned out to be a partial or even symbolic victory for those endeavouring to bring Pinochet to justice. for the Pinochet case to be more accurate was only about the *extraditability*" (Yang 436). The eventual decision was that Pinochet was not immune from extradition, but the Home Secretary chose not to extradite Pinochet and decided to release him on account of his poor health.

Though Pinochet had not been brought to justice for his crimes the ruling represents a positive step against State Immunity for serious human violations. Yang writes of the eventual ruling: "For the first time in history a rule has been established that a former head of state shall not enjoy immunity from criminal proceedings in a foreign court for acts of torture committed during his term of office and in his own country, whether or not such acts were committed as or pursuant to state policy. In this sense the *Pinochet* case is without a doubt a monumental landmark celebrating the triumphant march of international human rights law over the past half century" (ibid 436-437). The Pinochet case is one of the rare case where state immunity did

not grant impunity for serious human rights violations. There is a substantial asterisk attached given that Pinochet never stood trial in Spain and there was no access to justice for his victims. However, the Pinochet case decision can be celebrated as a positive ruling despite not bringing Pinochet to justice.

6.3 State Immunity in Italy

Unlike Canada, the UK or the United States, Italy does not have a specific piece of legislation that sets out State Immunity when it would apply and where are its exceptions. Petronio and Saura write “Italy does not have a specific law on sovereign immunity. The topic is instead governed by article 10 of the Italian Constitution, according to which the Italian legal system must conform to international principles, including customary international principles.” (para 3 <https://gettingthedealthrough.com/area/113/jurisdiction/15/sovereign-immunity-2018-italy/>) Italy does not have specific State Immunity legislation and due to this it is difficult to determine what are the parameters of State Immunity In Italy. The best way to understand State Immunity in Italy is through the decisions made in Italian courts specifically *Ferrini v. Germany*.

Notable Cases in Italy

Ferrini v. Germany

One of the most prominent cases in challenging State Immunity is the *Ferrini vs. Federal Republic of Germany* decision. This case is notable in that it is one of the few cases where human rights consideration had trumped the rule of State Immunity. De Sena and De Vittor write “The [...] most interesting aspect of the *Ferrini* decision relates to its implications in the broader picture of case law concerning the conflict between the law on State Immunity and the

norms on the protection of human rights. In excluding the applicability of the traditional regime of foreign state immunity in regard to 'international crime', This decision would clearly seem to represent a real reversal in of the established trend in previous case law." (De Sena, De Vittor 2005 91-92). Ferrini is a unique case in that it is one of the few cases where State Immunity was not a defence for atrocity.

Ferrini was an Italian citizen who was seized by German troops during the German occupation of Italy in 1944. In Germany he was sent into forced labour for the German war industry until the end of the war. In 1998 he brought a case against Germany for reparation to the court of Arezzo for physical and psychological harm during his imprisonment. The court of Arezzo upheld the rule of State Immunity even for 'international crimes' as did the court of appeal. It was only when the Ferrini case reached the Supreme Court of Italy that a positive decision was made. Part of the Supreme Court's decision was based on the changing concept of State Immunity. De Vittor and De Sena write: "the court [...] asserted that there could be no doubt concerning the 'existence of a *customary* norm of international law obliging States to abstain from exercising jurisdiction against foreign states. Nonetheless, the court went on to affirm that this norm, which initially was 'absolute in nature in that it granted foreign State full immunity... has become, and continues to become, gradually limited.'" (ibid 94). The Ferrini case is one of the sole cases that suggest the rule of State Immunity is changing.

Although Ferrini represents a landmark ruling it has had little impact internationally. De Vittor and De Sena write that there have been few parallel decisions in other country's courts. "Despite the recent decision by the Greek Supreme Court in the prefecture of Voiotia v. Federal Republic of Germany. the 'progressive' conclusion reached by the Italian Supreme Court has

found a parallel in only a few judgements by US courts, which furthermore, have been regularly overturned by the Supreme Court.” (ibid 92). The case although remarkable has not resulted in many courts deciding against the State Immunity defence. Significantly, many of the facts of the case took place on Italian soil and not in the territory of the foreign country being sued. This differentiates from the Canadian Cases: Bouzari, Arar, and Kazemi where the applicant was seized, detained and subjected to torture in the foreign state. De Vittor and De Sena: “The reference made by the court to the fact that Ferrini was captured on and deported from Italian territory (territorial nexus) can be explained by the need to distinguish the case under examination from the Al-Adsani case, in which the English court of appeal had upheld Kuwait’s immunity in relation to acts of torture on a British citizen committed by agents of the Kuwaiti government in Kuwait itself.” (ibid 95). This means the Ferrini Decision is not as applicable to most cases related to State Immunity and atrocity where the atrocity usually takes place in the state being sued.

The Ferrini decision was later overturned by the International court of Justice. Germany brought Italy to the International Court of Justice which found that “the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under International Law by allowing Civil Claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945.” (ICJ 2012 p.11). This decision is part of a trend of decisions made by the ICJ disallowing civil lawsuits for international atrocities.

The case of Italy shows that the understanding of State Immunity is not a homogenous as it would have previous seemed and that many states see State Immunity as being limited by

Jus Cogens violations. Although, the Ferrini case was unsuccessful in the International Court of Justice, the interpretation of Italian Courts shows is one of the few rulings where State Immunity was not a successful defense for serious human rights violations. This demonstrates that state immunity is still a contentious issue and not all rulings are identical

6.4 State Immunity in Belgium

Belgium provides an interesting case study of a state that tried to expand its criminal jurisdiction for crimes that constituted *Jus Cogens* violations, but which also would be protected by State Immunity normally. This ultimately would become unsuccessful due to international pressures and the rulings of the International Court of Justice.

In 1993 Belgium implemented the *Universal Jurisdictions Laws or Anti-Atrocity Laws* which would be modified in 1999 under the *Punishment of Grave Breaches of International Humanitarian Law* (Yang 431). These laws gave Belgian courts extraterritorial jurisdiction with which they could prosecute heads of state and other senior public official usually protected by immunity. These laws were tested in the case *Re, Sharon*. Yang writes: "In the *Sharon* case, criminal prosecution was instituted in Belgium against Ariel Sharon, then Israeli Prime Minister, and other Israeli high officials, for war crimes, crimes against humanity, and genocide in connection with the 1982 massacre of Palestinian and Lebanese civilians in the Sabra and Shatila Palestinian refugee camps in Beirut, Lebanon." (ibid). This case is notable because there is no territorial connection whatsoever to Belgium. This shows Belgium taking a *Jus Cogens* approach to the case and prosecuting despite the extraterritoriality of the event.

The Sharon case would lead to a significant reversal of the laws mentioned above. The charges against Sharon were also not upheld in court. Yang writes: "The Court of Appeal of

Brussels held the proceedings inadmissible on the ground, inter alia, that the defendants were not present on Belgian territory. The Court of Cassation, in partly reversing the decision, drew a distinction between Sharon, who enjoyed immunity under customary international law, and other defendants, who enjoyed no such immunity.” (ibid). These decisions changed the far-reaching laws that the Belgian government implemented into something more in line with rest of the world state immunity legislation. Where the original laws allowed the criminal prosecution of heads of state and other officials for serious human rights committed extraterritorially the decisions set a precedent where the heads of state remained immune and only other individuals could be charged criminally for the crimes. Yang writes: “It should be noted that the Belgian laws only concerned Criminal Prosecution, not civil remedies such as compensation, the latter being the core of the issue of universal civil jurisdiction which is currently under intense academic debate.” (ibid 432). This is important to note that the question of civil redress for extraterritorial human rights violation has untested.

The Belgian laws provoked the Chagrin of both Israel and the USA. The latter responded by enacting a “Universal Jurisdiction Rejection Bill” Yang writes: “Section 2(1) to (12) make it abundantly clear that the bill was designed as a response to the Belgian case against [Sharon] under the ‘Anti-Atrocity laws’ of 1993/1999 and section 2(4) sees in the ‘very concept of universal jurisdiction’ ‘a threat to the sovereignty of the United States” Yang continues by stating “It was Belgium that chose to back down [...] [amended the Laws and] inserted a new article into the Belgian Code of Criminal Procedure, to the effect that: In accordance with international law, there shall be no prosecution with regards to Heads of State, heads of government, and foreign ministers of foreign affairs during their terms of office.” (ibid) In effect

Belgium reversed far reaching laws to ones that reflected international norms due to international pressure.

This case shows the dangers of changing State Immunity legislation which is out of step with the international norms. However, the stance of the United States has changed in the years since with the *Magnitsky Act*. Also, the Belgian laws focused on Criminal prosecution which internationally may be less effective and amenable than civil proceedings. Since criminal proceedings implies that the culprit can simply avoid setting foot on the soil of the country, he was prosecuted in whereas civil proceedings can target frozen assets that are held between the two states. The geopolitical context is highly important as well given that the US was acting to protect an ally whereas habitually countries that are charged with serious human rights offences are often diplomatically isolated and unlikely to produce a reaction internationally such as the one described above.

Notable cases in Belgium

Another notable case that deserves mentioning is the International Court of Justice Case *Democratic Republic of the Congo v. Kingdom of Belgium*. This case involves the same Laws mention above. Belgium issued an arrest warrant for Mr. Abdulaye Yerodia Ndombasi the former minister of International affairs of the Democratic Republic of the Congo. Ndombasi used his position to encourage the massacre of the Ethnic Tutsi minority. In response to the arrest warrant, the Democratic Republic of the Congo sued Belgium arguing that the warrant violated the immunity of the position of Minister of Foreign Affairs of the Democratic Republic of the Congo.

The Case was argued not in terms of Jus Cogens violations but more so related to the position of Mr. Yerodia Ndobasi himself. Though the arrest warrant was issued when he was minister of Foreign Affairs, he no longer held that position at the time of trial and therefore it was argued could not enjoy the immunity of the position. Judge Al-Khasawneh argued in a dissenting opinion that “Incumbent Ministers for Foreign Affairs enjoy only limited immunity i.e. Immunity from enforcement when on an official mission. He arrived at this conclusion on the basis that: immunity is an exception to the rule that man is legally and morally responsible for his actions. As an exception, it has to be narrowly defined” (Al Khasawneh 2002 p.97 3.) This Case is a substantial step back especially given that most states allow for Human rights perpetrators to be tried criminally for their actions as officials. For example, Pinochet is a case where a human rights violator who had previously held public office was held accountable for those same violations. The case represented a significant setback to the cause of universal jurisdiction for International human rights abuses.

The Belgian laws

The Belgian laws represent an important experiment in universal jurisdiction for significant human rights abuses. In retrospect the laws granting Belgian courts universal jurisdiction to criminally prosecute human rights violator may have been too threatening to the international community. However, it has not yet been tested whether a civil law solution aimed at securing reparation for victims of international human rights abuses instead of international criminal prosecution would succeed. Therefore, it should be noted that amending Canada’s State Immunity Act is entirely different from the Belgian laws. This also shows that

another international jurisdiction has attempted more radical changes than the amendments proposed for the Canadian State Immunity Act.

6.5 State Immunity in Spain

Spain is similar to Belgium in that it is a country which has a robust programme of bringing criminal law trials against public officials and states accused of Extreme human rights violations. However, unlike Belgium, Spain continues to prosecute cases outside of its jurisdiction and against public officials and states protected by State Immunity.

Spain is an exceptional case when speaking about universal jurisdictional for grievous human rights violations. Jouet writes in his article on Spain's universal jurisdiction: "Article 23.4 of Spain's law on Judicial Power posits that "Spanish Jurisdiction is competent to try acts committed by Spaniards or foreigners outside the national territory" for crimes recognized under Spanish law as *inter alia*, "genocide," "terrorism," and crimes that, "under international treaties and agreement, must be prosecuted in Spain." (Jouet 2007 p.504-505). Jouet also notes that Spain is party to the torture convention so that they may also try crimes of torture committed outside of Spanish territory (ibid 504). This gives Spain universal jurisdiction with which to charge human rights violators. Spain will not try the human rights violators *in absentia* as that is prohibited by Spanish Law, but Spain has made numerous requests to extradite an offender to be brought to Spain to stand trial most notably General Augusto Pinochet (see section on UK). Spanish law gives it courts universal jurisdiction to criminally prosecute serious human rights offenders including former public office holders.

This practice is similar to the Belgian laws but unlike the Belgian laws Spanish law did not change due to international pressure. Jouet writes that after the Belgian arrest warrant

case when Belgium curbed its power to try public official criminally for serious human rights offences, Spain's Supreme Court "also decided to narrow Spain's universal jurisdiction to reign in prosecution that it felt had gone too far" (Jouet 503). This decision by the Supreme Court was overruled by the Spanish Constitutional Tribunal, the highest court in Spain which only deals with matters of constitutional importance (ibid). Spain had undergone a similar challenge to that of Belgium during the arrest warrant case but had not in the end altered its law.

Spanish courts are much more active than Canadian courts when dealing with atrocity. The CHRWCA gives Canadian courts universal jurisdiction to criminally prosecute atrocities such as war crimes as well, but as discussed in the earlier chapter Canada has only used this act twice to prosecute war criminals residing in Canada and it was unsuccessful. In contrast, Spanish courts have frequently criminally prosecuted serious human rights violations outside of Spain's borders. Jouet also notes that "Spain, [...] does not recognize the immunity of former heads of state and senior officials, as evidenced by its attempt to prosecute Pinochet" (511). It should be noted however that Spain only does not recognize a foreign official's immunity when a serious human rights violation has taken place and it only applies to former public officials. Acting public officials still enjoy immunity in Spain.

There are several shortcomings to note with the Spanish policy of universal jurisdiction. It is important to distinguish that Spain prosecutes international human rights offenders criminally and there is no tort case that may give the victims of these abuses civil redress. The Spanish court cases are often brought forth by the victims of these abuses and they give the victim the chance to speak about the abuses they have endured and to seek justice but there is no possibility of civil compensation.

6.6 State Immunity in Argentina

Attention was drawn to Argentina during the 2018 G20 conference held in Buenos Aires when Human Rights Watch submitted a writ against Crown Prince Salman of Saudi Arabia for war crimes in Yemen and the murder of journalist Jamal Kashoggi. Argentina has State immunity laws called *the Statute on the Immunity of Foreign States before Argentine Tribunals*. It was not the state immunity law of Argentina that were being relied on in making this complaint against a head of state, it is the Argentine constitution itself that allows for universal jurisdiction. Dominic Dudley writes in Forbes “Argentina’s constitution recognizes the principal of universal jurisdiction for war crimes and torture. As a result, its judicial authorities are able to investigate and prosecute such crimes regardless of where they were committed, who carried them out or who the victims were.” (Dudley 2018 para 10). Argentina has accepted the request to prosecute Crown Prince Salman and has contacted the government of Saudi Arabia and Yemen to see if charges are being brought against the crown prince in their courts. Since November of 2018 when Argentina accepted the case there has been no significant news on the case. However, it is significant to note another country which takes a more rigorous approach to pursuing international crimes. Although it should be noted that the case is criminal and is not a tort case.

6.7 State Immunity in Japan, Singapore, Israel, and Australia.

It should be noted how uniform State Immunity legislation is worldwide. This is likely due to most state immunity legislation being based heavily on the US Foreign Sovereignty Immunities Act and the UK’s State Immunity Act (Fox 170). To illustrate this example Japan’s *Act on the Civil Jurisdiction of Japan with respect to a Foreign State*, Singapore’s *State Immunity*

Act, Israel's *Foreign States Immunity Law*, and Australia's *Foreign State Immunities Act* all include an exception for death, personal injury, and loss of property provided that the act occurred within their state and not abroad. For each of these countries the legislation is almost identical to Canada's when it comes to acts of violence and injury occurring internationally and therefore it is likely that a case occurring in any one of these states would follow similarly to cases in Canada.

6.8 Conclusion

There are currently no civil redress options for victims of torture and other serious human rights violations abroad as well as in Canada. However, it should be noted that there are various pieces of legislation that do deny immunity for serious human rights violations as well as court decisions abroad that denied immunity to high ranking officials and even to former heads of state. The *Magnitsky Act* targets human rights violators abroad and freezes their assets. A court in the UK had denied immunity to Pinochet for acts of torture that occurred during his presidency. Spain and Belgium's have criminally prosecuted human rights violators who would usually have been protected by state immunity. Canada and the USA also allow for victims of terrorism to sue designated state sponsors of terrorism for civil compensation. All these examples show that states often do not recognize immunity when it is used as a defence for torture and state terrorism. The logical next step should be to allow the victims of serious human rights abuses to sue for civil compensation as well.

Passing a law allowing civil suits for human rights violation may have international implications given that many countries do not have state immunity legislation and follow the precedent of other countries. Therefore, passing legislation allowing civil suits for serious

human rights violations may influence other countries is to allow civil claims against human rights offenders. Passing such a law may also lead to other countries adopting similar legislation as many countries are just adopting State Immunity legislation now. Legislation like the *Magnitsky Act* have proved to have strong influence and are often adopted in quick succession by other countries.

To conclude this review of the literature and major court cases in Canada, USA, UK, Italy, Belgium, and Spain. there are many countries that have denied immunity for serious human rights violations, but still there is no civil redress options for the victims of these violations. It should logically follow from that a civil redress option be created through legislation to ensure victims of serious human rights violation such as torture receive proper compensation. A country like Canada could adopt legislation that allows for this and ensure that victims of human rights abuses have access to justice. The current trends in Canada may not allow for such a change to occur.

Table:

State	State Immunity Legislation	Other legislation that allows for universal jurisdiction for human rights offences	Notable Cases that accepted State immunity Norms (Negative Decision)	Notable Cases that Challenged State Immunity Norms (Positive decision)	Summary
Canada	<i>State Immunity Act</i>	<i>Magnitsky act</i> <i>Justice for Victims of Terrorism Act</i> [civil remedies]	Bouzari v. Iran Kazemi estate v. Iran Arar v. Syria	n/a	Based on the State immunity legislation of the USA and the UK. Includes no exception for torture or other serious humans' rights violations outside of Canada.

<p>United States of America</p>	<p><i>Foreign Sovereign Immunity Act</i></p>	<p><i>Magnitsky act</i> [sanctions on public officials]</p> <p><i>Alien Tort and Victim Protection Act</i> [criminal and civil remedies]</p>	<p>Siederman et. Blake v. republic of Argentina</p>	<p><i>Filártiga v. Peña-Irala</i></p>	<p>The United State has led on changing its State Immunity to include exceptions to the rule of sovereign immunity. Canada has adopted similar changes based on the US model. However, no exceptions exist for torture and serious human rights abuses committed outside of US Territory.</p>
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<p>United Kingdom</p>	<p><i>State Immunity Act</i></p>		<p>Jones v. Saudi Arabia Al-Adsani v. Kuwait</p>	<p>R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet</p>	<p>The UK's State Immunity Act is the model of many countries own state immunity legislation. Court cases in the UK on whether State Immunity apply often set a precedent internationally. The UK legislation includes no exception for torture and other serious human rights offences committed outside of the UK.</p>
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<p>Belgium</p>		<p>the Universal Juridictions Laws or Anti-Atrocity Laws</p>	<p>Democratic Republic of the Congo v. Kingdom of Belgium (ICJ) <i>Re, Sharon</i></p>		<p>Belgium has attempted to enact laws allowing Belgian courts universal jurisdiction to prosecute serious human rights offences. However, these laws were not recognized internationally and have been walked back.</p>
<p>Italy</p>	<p>Italy does not have a specific piece of legislation related to State Immunity but follows article 10 of the Italian constitution which requires Italian law to conform to the general recognized principles of International Law.</p>	<p>n/a</p>	<p>n/a</p>	<p>Ferrini v. Federal Republic of Germany</p>	<p>Italy has no legislation for State Immunity. But critical decisions have been made related to state immunity.</p>

Japan	<i>Act on the Civil Jurisdiction of Japan with respect to a Foreign State</i>	n/a	n/a	n/a	Similarly structured to UK's <i>State Immunity Act</i>
Israel	<i>Foreign States Immunity Law</i>	n/a	n/a	n/a	Similarly structured to UK's <i>State Immunity Act</i>
Singapore	<i>State Immunity Act</i>	n/a	n/a	n/a	Similarly structured to UK's <i>State Immunity Act</i>
Australia	<i>Foreign State Immunities Act</i>	n/a	n/a	n/a	Similarly structured to UK's <i>State Immunity Act</i>

7. Political and Policy Context in Canada: A Review and Discussion

There are various challenges to amending the Canadian *State Immunity Act* in the current day. In many ways amending the *State Immunity Act* is a harder challenge in the present day than it was when the previous attempts were proposed by Irwin Cotler since the issue had a larger following in the media and there were prominent MPs such as Irwin Cotler who were supportive of amending the *State Immunity Act*. There are three main challenges to amending the act. The first challenge is related to awareness, much of the Canadian public and lawmakers are unfamiliar with the *State Immunity Act* and do not know it can be used to block the claims of victims of torture and other serious human rights abuses overseas. Any attempt to amend the *State Immunity Act* in future will have to promote awareness among the public and policymakers. The second challenge is finding a member of parliament to promote amending the *State Immunity Act*. Previous attempts were bolstered by the work of Irwin Cotler, the former Justice Minister who wrote private member's bill dedicated to amending the act. Although, Irwin Cotler has still been active and working towards amending the *State Immunity Act*, he is retired from parliamentary service and can no longer propose bills to amend the act. As a result, any organization working to amend the act must find MPs who are supportive of amending the act. The third challenge is related to resources. There are few non-profit organizations which are able to dedicate the time and resources to this issue. These are the main challenges that face those working towards amending the act.

7.1 Public Awareness

The first concern for those wanting to amend the act is to try to spread awareness with the public and lawmakers. It is likely that the Canadian public and most lawmakers are unaware

of the issue of State Immunity and this lack of awareness leads to the issue not being a pressing concern for parliament. When asked whether the public was aware of the State Immunity and torture issue Alex Neve, Secretary General of Amnesty International said: "I've never done any opinion polling on this subject, but I would be surprised if even 5% of Canadians are aware that if you as a Canadian citizen were imprisoned in another country, were subjected to horrific torture, and then did eventually return to Canada. I think the news that the Canadian courts are more concerned about the rights and interests of the foreign government than they are of a Canadian Citizen who has experienced torture would come as a shock to most Canadians and they would be astounded that their courts paid for by their tax dollars are not open to them to pursue redress for damages that have resulted from one of the most horrific kinds of international crimes: torture, crimes against humanity etc., That said it doesn't come up very often. I mean it's not part of the reality of most Canadians themselves or even of their families or their community members." (Neve 2019 Question 2) Neve notes that is a rare issue for a member of the Canadian public, but if they were of the issue or if it was closer to their own experience it would likely cause concern.

Spreading awareness among policy makers is another area of concern. When asked about whether Policy makers were aware of the issue Matt Eisenbrandt who had previously presented on the issue of state immunity to the Parliamentary subcommittee on human rights stated that: the understanding of the issue was "quite limited" and "We worked most specifically with Irwin Cotler, who was a MP at the time and a former justice minister, he understood those issues well; but, I don't have the sense that most policy makers know much on that and I don't know if anybody is doing much of anything in the last 5 or 7 years on it. Such

that this issue isn't even on the radar for policy makers." (Matt Eisenbrandt 2019, Question 2)

Alex Neve also agreed that the majority of policy makers were unfamiliar with the issue: "I would say that the awareness of the *State Immunity Act* within policy making circles is very limited and I find that every time it does come up if there is an opportunity during a parliamentary committee hearing for instance to refer to it I often find a lot of surprise from MPs or senators who aren't aware of this restriction and who intuitively agree that it is unjust." (Alex Neve Question 2). Eisenbrandt and Neve note that the issue is not a subject that is well known, but when it is brought to the attention of the public and lawmakers has great resonance.

Promoting public awareness is an important first step in Amending the *State Immunity Act*. There is little awareness of the issue so even at flash points, such as when Canadians are subjected to torture and serious human rights violations or are in court attempting to seek justice, the majority of Canadians are unaware of the issue. However, when Canadians are made aware of the issue they often are shocked and agree that the act should be amended (Neve Question 2). Organizations seeking to amend the *State Immunity Act* should seek to spread awareness to the Canadian and lawmakers in the hopes that this creates the impetus for government to amend the act.

7.2 Champions

A significant challenge in amending the *State Immunity Act* lies in finding policy makers willing to champion the amendments. Bills C-351 and C-344 were championed by MP Irwin Cotler, the former justice minister, who had a background in human rights law. Since Irwin Cotler has left office there have been no major attempts to amend the *State Immunity Act* to

include an exception to the rule in cases of extreme human rights violations and torture. Irwin Cotler has continued to work on promoting human rights-based law through his organization the Raoul Wallenberg Centre for Justice.

Alex Neve noted that there have been few MPs and Ministers who like Irwin Cotler were attempting to amend the act: "Irwin was obviously kind of an exceptional figure in terms of the lawmaking world because he entirely came from a background of international human rights law, and continued as a parliamentarian and even as a minister to make that one of his primary concerns so it's not surprising that he is been on board and has been a bit of a champion I think he is a bit exceptional unfortunately and while there has been many other parliamentarians that have been sympathetic we haven't come across I do not think I should say any but many who have been willing to make this a lead issue for them to really devote considerable time and energy to championing law reform in this area and part of that is probably even though they are attracted and compelled when they hear about the issue they probably quite quickly get information from government officials saying "ahh but you don't want to go down that road for the following reason" and that kind of dissuades things." (ibid) As Neve has noted there hasn't been many lawmakers like Cotler who are working towards amending the act and the few that do wish to become involved are dissuaded from making further attempts. Neve gives the example of the former minister of Global Affairs, Stephane Dion, who showed some interest in amending the act. "In summer of 2016 there was some interest in minister Dion's office in looking at that more seriously, but unfortunately the minister's office faced opposition from the department and minister Dion was shuffled out of cabinet and there has not been a serious return to the issue since."(Neve question 1) Irwin Cotler's work was vital to amending the *State*

Immunity Act, however It has been challenging to find lawmakers who are willing to take up the task of amending the *State Immunity Act*.

Crucial work for an organization trying to amend the act is to find an MP or minister willing to champion the amendments. Neve had said that the feasibility of whether an attempt to amend the act will succeed depends on the next election (which is to occur in a few months at time of writing). Neve: "given the political context in Canada right now we are about to go into an election we don't know I think the first question would be who is the next government so I don't think we can even do a realistic analysis of that until early next year when we know who is the government and who are the key ministers. Who is the minister of foreign affairs and who is the minister of justice in particular. If we were lucky enough to have someone like Irwin Cotler in a key ministerial role someone with a strong international human rights law background someone who understands the issues and is sympathetic. That obviously shifts the equation a lot and if we have key ministers who primarily come from an international trade and investment perspective and see the world of a lens of not wanting to offend other governments and not wanting to disrupt relationships then we obviously have a bigger challenge." (Neve question 7) If members of parliament who are sympathetic and willing to champion the amendments then the organization should seek out those MPs and Minister and work as a partnership in trying to amend the act. However, if there are no members elected who are willing to take up the work then no such partnership can be formed.

Another critical concern related to amending the act is the argumentation used against amending the act. As noted above policymakers are often dissuaded from amending the act by other public officials (Neve Question 7). There are two main arguments that lead to previous

governments not amending the act. The first is the concern that the amendments would make Canada an international forum for serious human rights violation and would result in an over-log of cases in Canadian courts. The second concern is that the civil lawsuit of another sovereign state on Canadian soil may result in an antagonistic relationship between the two states and pose a challenge to diplomacy.

For the first argument on whether permitting civil lawsuits against a foreign state or foreign public official would result in many international cases being brought to Canada and backlogging Canadian courts. It is impossible to know what effect the changes of the act would have on the Canadian legal system. It should be noted that these cases tend to be rare. Alex Neve noted that cases of extraterritorial torture do not occur frequently (Neve Question 2). Other countries have more far reaching legislation when it comes to prosecuting international criminal cases and do so more frequently. In the previous chapter Spain, Belgium and the United States were noted as countries that are farther reaching than Canada when prosecuting international crimes and this has not caused a considerable backlog in any of those countries.

The second concern is that this policy would lead to an antagonistic relationship between Canada and the state being sued. Eisenbrandt notes that this is the main argument against amending the *State Immunity Act*: "The argument goes if you suddenly remove immunity for foreign governments and you allowed them to be sued in a for torture in a Canadian court that's going to ruffle feathers with certain countries, and that will make the conduct of foreign policy much more difficult. That generally is the argument that is made and that would be top concern that kept anything from moving forward and probably why it was hard to get any traction on this issue." (Eisenbrandt Question 7) Neve noted that it is also

theorized the country being sued would counter sue Canadian officials. "I think it has largely been the two I referred to earlier that the government is concerned that if Canada would make these changes that exposes Canadian Diplomats to a risk of retaliation. Not that anyone is suggesting that there is Canadian diplomats who have been responsible for torture and would thus be sued by their victim's in other courts. I think the suggestion here is that as a form of retaliation other governments would encourage bringing forward groundless unsubstantiated cases against Canadian officials just to punish them. That seems a bit extreme to imagine and there is no statistical basis for drawing that conclusion, but that certainly is it" (Neve question 3) That is likely to be the exception as most countries are trying to improve their international standing and using retaliatory measures are unlikely.

The final issue is that the amount of work required towards amending the act would take up a large amount of a non-profit organization's resources. The project requires hours of work, and resources spent advocating for the amendment, networking with lawmakers, and spreading awareness. Eisenbrandt writes about the challenges this poses to a non-profit organization based on his previous work on amending the act. Eisenbrandt: "You need to raise awareness with the public, but you certainly need awareness among policy makers and the only way to do that is a really concerted effort of meeting with numerous people, public events and op-eds and other publications and it needs to be a pretty big campaign. That is a challenge for a small NGO with limited resources. I think that is difficult to do. We put a lot of time into it, but we had a small staff and only a few of us were able to work on it. After we were unsuccessful in the first wave on the issue when Irwin Cotler's bill didn't advance it was something on our radar for a number of years, but there were never the amount of resources and staff availability to

really launch the kind of campaign you need to do.” (Eisenbrandt question 5) This is a sticking problem with the issue of amending the *State Immunity Act* for the organizations that work on amending the act there likely will be constraints so that the organization may not ever have the proper time and resources to work on amending the act.

There are ways to lessen the impact of time constraints such as working through partnerships with other NGOs to help shoulder the burden. The Canadian Centre for International Justice, the Raoul Wallenberg centre for human rights, and Amnesty International are all Canadian organizations that have dedicated themselves to amending the *State Immunity Act*. Developing the partnership between those organizations may lead to greater work being done. Devoting time and resources strategically at such times as there is a flashpoint on state immunity and public awareness is increased is another viable to make sure the time and resources are being utilized effectively.

Conclusion:

In the current state amending the *State Immunity Act* represents a considerable challenge to any non-profit organization. The lack of public awareness, prominent champions of amending the act in parliament, and lack of resources to promote amending the act are formidable obstacles for any NGO.

8. Policy Options

Option #1: Canada can follow a similar approach to Belgium and Spain and prosecute international human rights abuses criminally.

As a signatory of the UN convention against Torture gives encourages Canada to prosecute cases of torture outside of Canada’s normal jurisdiction and the *Crimes Against*

Humanity and War Crimes Act also gives Canada universal jurisdiction to criminally try war crimes and Crimes against Humanity. Therefore, it would require no legislative changes to begin to Prosecute crimes against humanity from around the world. Canada could take an approach like Belgium or Spain and bring cases against states and officials accused of serious human rights violations.

The serious flaw with this plan is that it would require extradition of offenders to Canada to stand trial. As was the case in Spain it has been hard to bring the offenders to trial. Also acting unilaterally in this way may disrupt relations with allies like in the Belgian case. Belgium's Universal jurisdictions law drew ire internationally and was vigorously opposed by the United States. Although this plan may lead to Access to Justice for the Victims it does not leave open the possibility of compensation for the victim which a civil trial may provide.

Option #2: Expand the use of the Magnitsky act

The *Magnitsky act* already exists in Canadian law and targets human rights offenders by freezing their assets and imposing a travel ban on them. At present it affects very few individuals and as Knight notes it often does not affect key offenders (Knight para 12). This option would expand the *Magnitsky act* to affect more human rights offenders around the world with an emphasis on those who have caused harm to Canadian citizens abroad. This may introduce a stronger level of accountability internationally for serious human rights violations.

The serious drawback of this option is it leaves out the victim almost entirely. The victim is not given any compensation and no judgement is made that brings to light the victim's plight. As Alex Neve recognition of the abuse is of critical importance for the victim "I don't

think anyone is naive enough to imagine that just because you get a court order for five million dollars against an Iranian official who was responsible for horrific torture that two weeks later you will have five million dollars in your bank account and most people kind of recognize that you never get a penny in your bank account. but it still feels like an important victory it still feels like a very crucial step forward in justice and for many people is an essential part in the healing process.” (Neve question 10). Also, this strategy works best when it is done bilaterally with other states who have similar legislation to the *Magnitsky act*. Canada alone freezing assets and imposing a travel ban might have little effect on the perpetrator.

Option #3: Amend the State Immunity Act to include an exception for Serious Human rights violations.

This option would involve creating an exception along the same line as *The Justice for Victims of Terrorism Act* which allows for Civil suits against countries who grant fiscal and material support for terrorists. By this exception victims of terrorism may sue foreign states who have caused harm to them or their family members throughs acts of terrorism. By including another exception for serious humans rights abuses victim may also sue the state in a civil trial in order to obtain compensation. This resolve some issues as when the victim cannot note the exact identity of the torturer by suing the state that enabled the torture instead. This option would create a route through which victims can seek access to justice and compensation for their abuse as well as opposing serious human rights violations such as torture worldwide.

The main drawbacks with this option are passing the amendment into law. As noted in the previous chapter immunity for acts such as torture is an issue that has not been holding the

public attention recently. Matt Eisenbrandt has noted that organizations who have sought to amend the State Immunity Act have lacked the proper resources to carry out a successful campaign “there were never the amount of resources and staff availability to really launch the kind of campaign you need to do.” (Eisenbrandt question 4) It is also challenging to pass such novel legislation into law and similar legislation has failed to pass into law multiple times before. Francois Larocque has summarized the arguments that have been used against amending the act in the past: “In the literature when you read objections to any legal objections it would be that Canada would be an outlier in the world other than the United State limited exception under its state immunity act no other country has done this before. and there is a fear of reprisals and counter measures and basically reciprocity being implied. and I think also there is a sense of just opening the floodgates and that there would be too much litigation. complex transnational litigation involving parties from all over the world evidence from all over the world and that would be a tremendous burden on our court system if this were permitted to go forward.” (Larocque interview 2019, question 3). It is also costly to promote legislation like this to the public and policy makers. however, there would be a significant boon if a policymaker was willing to act as a champion for the legislation.

Recommendation:

Option #3 is the best possible solution. to the issue. Amending the legislation would support victims seeking compensation for acts of torture and other serious human rights abuses. This option also acts as a deterrent to further serious human abuses by potentially seizing assets of states and state official responsible for the act of torture and also condemns the crimes as unlawful. This option could also promote similar changes to occur internationally.

Harold Koh has written on similar American legislation that allows for civil trials to find state officials and states responsible for supporting terrorism and to reward the victims of the terrorist act. "A judgement awarding compensatory and punitive damages to a victim of terrorism serves the objectives of public international law by furthering the development of international rule of law condemning terrorism. by issuing an opinion and judgement finding liability, The United State federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends." (Koh, 1985. p.675) Legislation creating civil liability for acts of terrorism exist in Canada and the United States similar goals could be accomplished by creating an amendment which allows for civil liability to acts of torture in the *State Immunity Act*.

An incremental approach to amending the State Immunity act could prove more plausible. In the short term, amendments that are more limited and perhaps easier to pass into law can be chosen: Such as focusing on former official instead of acting public officials or designating a list of known offender states that are not immune in case of serious human rights violations such as was done in the Justice for Victims of Terrorism act. In the medium term seeking to expand on Canadian human rights laws that are already passed such as the Magnitsky act could prove to be a good objective. The final and long-term objective is to amend the State Immunity act in such a way that immunity does not interfere with accountability for serious human rights violation and compensation for victims of the violation.

9. Final Conclusion and Findings:

Amending the *State Immunity act* of Canada, in order to include a civil action exception for victims of serious human rights violations, represents a serious challenge. The international

scan conducted showed that progress has been made in terms of countries disallowing the state immunity defence for serious human rights violation, but there are no countries that allow for civil lawsuits to succeed for those violations when they have occurred overseas and those responsible are public officials. In Canada there is a lack of awareness of the fact that the *State Immunity Act* leads to impunity for serious human rights violations. Although, the bills proposed by Irwin Cotler to amend the act have had bi-partisan support, no acting government has let the bills come to a vote in the House of Commons. All of this shows the formidable challenge associated with amending the act.

Despite these challenges a number of factors could lead to amending the *State Immunity Act*. Awareness could increase due to some unforeseen factor, another country could amend their equivalent to the state immunity act causing other countries to follow suit, and an MP or Minister could decide to champion the cause of amending the *State Immunity Act* much like Irwin Cotler. Any combination of these factors could lead to a situation where it is much more tenable to amend the *State Immunity Act*. In conclusion, amending the *State Immunity Act* is a daunting task, but can be accomplished.

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Interviews:

Neve, Alex (April 3rd 2019) Personal interview

Eisenbrandt, Matt (April 5th 2019) Phone Interview.

Larocque, François (October 17th 2019) Personal Interview

Appendices

Appendix A: Interview Script

Thank you taking the time to meet with me.

First, I would like to ask your permission to record this interview on this recorder. The recording will never be published or presented it will be just used for my personal note-taking uses. I will also type your responses using my laptop. Following this interview, I will write a transcript and send it to you for your approval. The transcripts will be included as part of my project as appendices. The document will be shared with University of Victoria and my client, the Canadian Centre for International Justice.

If you wish to cancel and leave the interview you may do so at any time. If you decide that you do not want me to use the interview, please phone me or email me and I will not use any of the information. You may refrain from answering questions or providing information you prefer not to divulge.

I'm also required to obtain your signature on this consent form before conducting the interview.

1. Can you think of any critical examples where the state Immunity defence has been challenged for serious human rights abuses or torture? Either in court or through legislative changes? Nationally or internationally?
2. Is there enough awareness, for both the public and policy makers, that the State Immunity Act can be used to block redress for victims of torture and other Serious human rights abuses? what strategies have worked in this past or can be used in the future to draw attention to the State Immunity Act?
3. In previous attempts to amend the Act what concerns may have caused the acting government to prevent the Bill from moving forward?
4. What are the most important lessons learned from previous attempts to amend the act?
5. Are you aware of any initiative either working towards amending the State immunity legislation in another state?
6. What are the specific parameters that should be applied to amending the State Immunity Act? Should it apply just to citizens or to non-citizens? Should there only be exceptions for offences within the country's borders or extraterritorially as well?
7. Is it realistic to expect an amendment to pass to the State Immunity Act within the next few years?
8. What effect has the State Immunity Act as it stands now on Canada's Human Rights Record?
9. If Canada amends its State Immunity Act would it be an international outlier? Or is there a chance of similar changes occurring internationally?

10. Would the exceptions to state immunity have to be a customary norm in order to be enforceable internationally?

Appendix B: Interview Alex Neve

Thank you taking the time to meet with me.

First, I would like to ask your permission to record this interview on this recorder. The recording will never be published or presented it will be just used for my personal note-taking uses. I will also type your responses using my laptop. Following this interview, I will write a transcript and send it to you for your approval. The transcripts will be included as part of my project as appendices. The document will be shared with University of Victoria and my client, the Canadian Centre for International Justice.

If you wish to cancel and leave the interview you may do so at any time. If you decide that you do not want me to use the interview, please phone me or email me and I will not use any of the information.

You may refrain from answering questions or providing information you prefer not to divulge.

I'm also required to obtain your signature on this consent form before conducting the interview.

1. Can you think of any critical examples where the state Immunity defence has been challenged for serious human rights abuses or torture? Either in court or through legislative changes? Nationally or internationally?

Successfully challenged or just challenged in any way?

interviewer: It doesn't have to be successful.

Unfortunately, I guess our examples to date... there have been ongoing efforts to challenge it, but to date they have largely been unsuccessful. So in Canada the two most well known instances, and Amnesty was very actively involved with both, was the Houshang Bouzari case. Houshang Bouzari in the Ontario Courts, which went as far as the Ontario Court of Appeal. Then there is in Quebec, the Zahra Kazemi case which made its way up to the Supreme Court of Canada. Both were very serious efforts, ironically both involving human rights violations in Iran, with impressive legal teams and various organizations that intervened, Notably Amnesty International intervened in both, but ultimately both were unsuccessful. Notably, the Supreme Court decision, which is the most authoritative of all the rulings from those two cases, when you read it expressed a sense of regret that this was the decision they had to make, but they felt the law gave them no other choice and they felt the law was very clear in establishing this protection for foreign governments and really put it therefore back in the hands of government to be the ones that will be the ones to make the necessary changes through the legislative process.

So I guess that brings us to the second part of our question: challenges through lawmaking and legislative means. Well actually it's probably worth saying one other thing on the courts first: I'm certainly aware that there are numerous cases of other individuals who would have wanted to pursue legal action against a foreign government in Canada for the Human rights Violations they endured. Whether that be Canadian citizens or other individuals who simply refrained because of the Bouzari and Kazemi rulings. I think it is important to take note of the fact that there would be many other cases coming forward including cases that would try to challenge the ban, but they largely been dissuaded from doing so because of those two rulings.

The legislative process it has not been possible yet to convince a government and course over this past twenty years or so, when this issue has been live we have had both liberal and conservative governments and in both instance they were not receptive. Certainly Amnesty International many times met with minister, other members of government, and other officials, and they have never been open to making this change to the state immunity act to allow for essentially what we are looking for which is of course lawsuits with respect to damages for acts that constitute crimes under international law: crimes against humanity, war crimes, torture.

There was one initiative that did come forward with conservative support which made a limited amendment with respect to some cases involving acts of terrorism, but it is limited. It's not terrorism writ large it has to be with respect to designated countries which are designated as supporters of terrorism. Of course it is only limited to terrorism it does not extend to any of those other crimes under international law. That's where we stand. We had urged because there are times when there's been law reform that's a bit similar. So recently in Canada, a piece of legislation known as the Magnitsky Act which created a regime for Canada to impose sanctions on named individuals in other countries who are amongst other things considered to be responsible for serious human rights violations.

Well that was passed and that is part of Canadian law and there are a number of individuals who have been sanctioned under that act. Amnesty urged the government to think about it in the way that I described it, when I met with officials in the minister's office and even with former foreign affairs minister Stephan Dion, was to say the logical next step was to remove the State Immunity Act restriction. In Canadian law to say you are prepared to impose sanctions on a foreign public official who is responsible for human rights violations so why is not possible to pursue justice against that same

individual. Here we have that same individual responsible for serious human rights violations and under Canadian Law we are prepared to impose sanctions on him, but if there is an individual in Canada who suffered directly because of that individual's acts they are not allowed to pursue justice. It is incoherent.

In summer of 2016 there was some interest in minister Dion's office in looking at that more seriously, but unfortunately the minister's office faced opposition from the department. and minister Dion was shuffled out of cabinet and there has not been a serious return to the issue since.

2. Is there awareness, on both the public and policy maker's part, that the State Immunity Act can be used to block redress for victims of torture and other Serious human rights abuses? what strategies have worked in this past or can be used in the future to draw attention to the State Immunity Act?

No, there is not sufficient awareness and one of the main issues we struggle against is its a very technical legal issue. I'll come to the public second, I'll deal with policy makers first. Now certainly policy makers, a small group of policy makers who are very informed about the state immunity act: government lawyers within the department of foreign affairs for instance. There certainly would be many there who are very aware of it, and their awareness of course is not supportive of the kind of change we want to see they largely see two main reasons why the government shouldn't lift the restrictions in the State Immunity Act. [1.] They feel that Canada's law is largely consistent with the rest of the world and that is where it should remain. [2.] They also believe that if we open our courts to the possibility to the lawsuit of foreign officials then Canadian officials may be at risk of spurious lawsuits being brought against them in other countries, they feel that notion that one of the key hallmarks of international law is this notion of reciprocity. One government will do x because that's how they want another government to act. There is this sense that when one government promise that don't worry

your officials won't be sued in our courts then that provides a sense of protection that our officials won't be sued in their courts. Well that may be fine, but who is the one left out of that equation of course is people who have very legitimate claims for redress for very serious human rights violations. Beyond that broad circle I would say that the awareness of the state immunity act within policy making circles is very limited and I find that every time it does come up if there is an opportunity during a parliamentary committee hearing for instance to refer to it I often find a lot of surprise from MPs or senators who aren't aware of this restriction and who intuitively agree that it is unjust. So yes I think there is more work to be done there.

When it comes to the Canadian Public, I've never done any opinion polling on this subject, but I would be surprised if even 5% of Canadians are aware that if you as a Canadian citizen were imprisoned in another country, were subjected to horrific torture, and then did eventually return to Canada. I think the news that the Canadian courts are more concerned about the rights and interests of the foreign government than they are of a Canadian Citizen who has experienced torture would come as a shock to most Canadians and they would be astounded that their courts paid for by their tax dollars are not open to them to pursue redress for damages that have resulted from one of the most horrific kinds of international crimes: torture, crimes against humanity etc., That said it doesn't come up very often. I mean it's not part of the reality of most Canadians themselves or even of their families or their community members. I think there probably is larger awareness within some of the sectors of Canadian society that have been more directly impacted by these kinds of cases we certainly know that over the last 15 plus years that quite a few of the cases of individuals who have experience torture and other similar international crimes abroad have been Muslim Canadians for instance, and a number of those cases have arisen in so called national security cases. So there is probably a slightly broader awareness of the difficulties that those individuals have faced in trying to fully pursue justice.

So the last part of your question is how do we change that. Clearly, especially with the public but I think even with broader policy making circles it has to be about making this something that is real and human and personal and not just a theoretical complicated international legal question with words that people do not fully understand like immunity and reciprocity. There have been times to do that. For example certainly with the campaigning involved in Zahra Kazemi's case for instance, but we often find and this isn't specific to Canada this is reflective of the general public around the world. We can often generate quite a response from the public when someone is in the midst of human rights violations, they are imprisoned, they are subject to torture and we circulate petitions circulate letters and those kind of actions generally receive considerable support. People react, they are generally concerned about someone's safety, but when you come back to those same people afterwards you know the persons' out they are back in Canada and they say you know its not quite over there is still this struggle for justice and redress. you don't get such a response people don't necessarily see that as compelling or as compelling or as urgent as the initial work and maybe we just have not found the right way to make it clear to people that this is all part of the same story. In fact, if we don't pay careful attention to the redress and justice part at the end of the story then all we are doing is ensuring that more cases like this are going to happen again in the future because the perpetrators have not faced any consequences for what they have done. So I think we need to focus on ways to make it very real and human for people but also to bring in that sense of urgency that this isn't just now they are free and wouldn't it be nice if they also received justice we need to shift that to you know what they are not free yet, because they haven't received justice and they truly will not be free or even be able to begin the journey down the road to freedom until justice has been served as well.

It also could be a deterrent for a foreign government as well for the next time someone is being held and tortured it would make them think twice.

Oh absolutely. Obviously justice and accountability is about two things it's about the person themselves deserves justice for what they have been through, Deserves to be compensated for the harm they experienced but clearly the broader need to tackle the impunity that continues to fuel impunity. I'm always struck by anyone I have worked with in their campaign for justice for what they experienced in another country. Always talks about both no one ever says I'm in this for me and stops there. Usually they don't even begin with I'm in this for me they usually begin with I'm in this because I want to make sure what I've been through doesn't happen to anyone else.

You were saying that oftentimes when lawmakers do find out they agree that there should be a change. and I think that is reflected in Irwin Cotler's private member's bills C-483 and C-632 those were sort of bi-partisan. would you agree?

Yeah, Irwin was obviously kind of an exceptional figure in terms of the lawmaking world because he entirely came from a background of international human rights law. and continued as a parliamentarian and even as a minister to make that one of his primary concerns so its not surprising that he is been on board and has been a bit of a champion I think he is a bit exceptional unfortunately and while there has been many other parliamentarians that have been sympathetic we haven't come across I do not think I should say any but many who have been willing to make this a lead issue for them to really devote considerable time and energy to championing law reform in this area. and part of that is probably even though they are attracted and compelled when they hear about the issue they probably quite quickly

get information from government officials saying “ahh but you don’t want to go down that road for the following reason” and that kind of dissuades things.

3. In previous attempts to amend the Act what concerns may have caused the acting government to prevent the Bill from moving forward?

I think it has largely been the two I referred to earlier that the government is concerned that if Canada would make these changes that exposes Canadian Diplomats to a risk of retaliation. Not that anyone is suggesting that there is Canadian diplomats who have been responsible for torture and would thus be sued by their victim’s in other courts. I think the suggestion here is that as a form of retaliation other governments would encourage bringing forward groundless unsubstantiated cases against Canadian officials just to punish them. That seems a bit extreme to imagine and there is no statistical basis for drawing that conclusion, but that certainly is it. The other that the government often refers to is the fact that Canadian law is largely in step with international law and other governments around the world in this area. Whether or not there are some exceptions, but largely Canada is with the status quo and that’s where Canada should be.

We argued back that just because something is the status quo doesn’t mean that it is right. If everyone was to say that the status quo was an excuse for not changing anything than the status quo would never change, and that obviously you need a government or an individual or a government official of some kind to show a bit of moral leadership and take that first step. Perhaps do so in a concerted way and to encourage maybe initially a handful of other governments to join us and hope that leads us to more government’s following suit. Those are largely the grounds that we have heard and to this point in time they have prevailed.

4. What are the most important lessons learned from previous attempts to amend the act?

Well I think it is maybe going back a little bit to our earlier discussion on where the public is on this I think that given that within government itself there is no interest in doing this, given that the political champions like Irwin Cotler have been very few and far between. I think it is clear that we are not going to make headway unless there starts to be more public concern about this. That's not easy and obvious about how we can make that happen it does necessitate a very compelling human face to it. It needs time, probably needs considerable resources etc. I think there is a lot there around if we are really going to mount an effort that would be successful. I may be wrong. Maybe after the next election whoever is in power we will find that there is actually someone in a key minister's position who gets it and is prepared to push this forward as an initiative but, I think it is more likely that we are not really going to generate that kind of pressure unless there is more public expression of concern.

6. What are the specific parameters that should be applied to amending the State Immunity Act? Should it apply just to citizens or non-citizens? Should there only be exceptions for offences within the country's borders or extraterritorially as well?

Well maybe it would be easier to sell if it was limited to Canadian citizens. I'm not comfortable with that. I am comfortable that there be some sort of requirement that there be a Canadian Connection of some kind. That could include that the person is a permanent resident or has some other kind of status, resides in Canada, or that maybe there is some kind of Canadian connection to the facts and circumstances for the case. Fair enough there is some kind of Canadian connection test. I think it is also

fair to be as there would be in any case include what in the legal world is called a conflict of laws analysis which is if you do have a case which theoretically could be the subject of a lawsuit in many different countries is it appropriate to consider is there a more appropriate venue. If a case was being brought forward in Canada against a foreign official, but the courts in that country are reliable are effective are perfectly capable of delivering justice and that for a whole host of reasons it actually is more convenient and effective for the case to be heard there then so be it then maybe that is the right way. So there could be some sort of test to ensure that there is not a more appropriate forum in which the case could and would be heard. I don't think the case should be dismissed in Canadian courts unless there is a confidence that justice is possible somewhere else. In terms of what should be covered Amnesty has taken the approach that civil law should follow criminal law. So international criminal law does recognize that foreign officials can and should be held accountable individually for criminal cases with respect to what are now commonly known as crimes under international law that is crimes that are subject to universal jurisdiction. so thats genocide, war crimes, crimes against humanity, torture, disappearances, slavery and a few others and we think that civil law should mirror criminal law so this is an act that would be open to universal jurisdiction under criminal law the same should apply with respect to civil law. That would be the test as to which kinds of cases should forward.

7. Is it realistic to expect an amendment to pass to the State Immunity Act within the next few years?

I mean it certainly is not realistic to think of it in the next one to two years. Especially given the political context in Canada right now we are about to go into an election we don't know I think the first question would be who is the next government so I don't think we can even do a realistic analysis of that until early next year when we know who is the government and who are the key ministers. Who is the minister of foreign affairs and who is the minister of justice in particular. if we were lucky enough to

have someone like Irwin Cotler in a key ministerial role someone with a strong international human rights law background someone who understands the issues and is sympathetic. That obviously shifts the equation a lot and if we have key ministers who primarily come from an international trade and investment perspective and see the world of a lens of not wanting to offend other governments and not wanting to disrupt relationships then we obviously have a bigger challenge. I think what is obvious is that this issue is not going to go away. because there has been a fairly definitive court ruling. A court ruling that has said maybe there is a need for law reform here. doesn't mean its the end of the story and most particularly we live in a world where sadly there is going to continue to be cases that arise and that may be what eventually tips the balance sadly I don't know in 2020 will there be a particularly compelling case of someone who comes forward a Canadian citizen who has experienced horrific human rights violations in another country and knows that they can't go to court because of the Kazemi ruling and really feels strongly about this and is prepared to be at the centre of a determined campaign to change the law. I think that is what it will take we'll need something to rally around not just cause we wanted to launch another campaign next year and did so largely based on the number of cases that have been in the public record in the past. I doubt we could get much traction. I know that seems a sad thing to say and almost an opportunistic thing to say that future success is going to depend on future injustice but I think that probably is the case.

Not everyone who goes through this not everyone who experiences that kind of abuse and violence abroad is going to want to be a public figure and wants to be involved in an advocacy campaign obviously not and thats entirely their right. many will but not all will.

8. What effect has the State Immunity Act as it stands now on Canada's Human Rights Record?

Sadly, Canada is largely in step with the rest of the world, so really all we can say is Canada's refusal to amend the state immunity act means that Canada is not demonstrating in leadership. It doesn't mean that somehow, we have a worse record than most other governments we are in fact largely in step with those same governments. Clearly it doesn't give us something to be proud of and part of our profile as a global human rights champion is being able to demonstrate there are way in which we are leading there are ways that we are pushing for change, and there are ways in which we are refusing to accept the status well continuing stand by the State Immunity act is obviously not part of that image. To that extent it is certainly I guess it I don't think we can necessarily hurts our global image, but it doesn't boost our global image and quite the contrary if we were to take some innovative steps forward it would kind of burnish this idea of us being leaders in the human rights field.

9. If Canada amends its State Immunity Act would it be an international outlier? Or is there a chance of similar changes occurring internationally?

I guess we would be an international outlier, but that would be a good thing. Outlier is often seen as a bit of a negative like you are over here doing something bad and imperfect while others are having a better record in whatever field we are talking about. Whereas here we are talking about a kind of outlier trying to push for the kind of change that is so important when it comes to rights and justice.

Do you think that there is a chance of similar changes occurring international?

I'm not in the loop around that. I'm certainly not aware of major campaigns obviously it comes up frequently. The first steps forward, the notable steps forward will come from somewhere else. Canada has shown to date that we don't want to be a leader here maybe once some other governments will

step forward whether they are forced to do so because of court rulings or do so on their own volition through law reform maybe that will give the kind of space for Canada to follow suit.

10. Would the exceptions to state immunity have to be a customary norm in order to be enforceable internationally?

Well who knows. Yes it may face all sorts of international legal challenges so if Canada did amend the act and then a lawsuit was brought by let say Iran because previous cases have involved Iran if a lawsuit was successfully brought against Iranian officials and there was a court order, a Canadian court order in favor of the individual. Yes, it is possible that the government of Iran may challenge Canada at the International Court of Justice, and that's a long and slow and complicated process and I think that just because you might be challenged doesn't mean you shouldn't do it. You should be ready for it and you should enact the law in a way that minimizes the chance of a successful challenge. I think it's also worth noting and I'm always struck that when I do talk with individuals who would like to pursue lawsuits of this sort. I don't want to suggest they are uninterested in the money but more often than not it really isn't about the money it's about what it signifies it's about actually getting a court order that says what happened to you was wrong it constitutes a human rights violation of the highest order and you deserve to be compensated for what you went through. whether they ever see a penny of the judgement 1. they are smart enough to recognize that a lot of these official that they would be bringing the lawsuit against probably don't have any assets in Canada may never have assets in Canada may themselves never visit Canada. and the options for how you enforce the judgement outside of Canada are very complicated and limited. I don't think anyone is naive enough to imagine that just because you get a court order for five million dollars against an Iranian official who was responsible for horrific torture that two weeks later you will have five million dollars in your bank account and most people kind of recognize that you

never get a penny in your bank account. but it still feels like an important victory it still feels like a very crucial step forward in justice and for many people is an essential part in the healing process.

And often times like I know in the Marcos case that he did have a ton of secret bank accounts all across the united states with assets that were later frozen

Yeah, you can never discount the possibility that number one there are assets in Canada, but also and one of the things that I'm always interested in here is if we do start to open up the possibility of these kinds of lawsuits and subsequently efforts to actually enforce the judgement it gives a wonderful opportunity for commercial lawyers to become human rights champions, because commercial lawyers are the ones who have developed strategies and all sorts of sophisticated approaches to how you enforce court orders within Canada across border and what are the approaches that can be used because that comes up all the time in the world of international business obviously so there may be and I won't pretend remotely at all that's an area of expertise for me as a lawyer. It absolutely isn't but I know that exists. Houshang Bouzari's lawyer way back in the earlier appeal he came up from the world of commercial law and litigation and I think just cause you are commercial lawyer that doesn't mean you are uninterested in human rights and I think there is many commercial lawyers who would welcome the opportunity to turn that knowledge and skills towards helping people realize justice for the horrific violations they have endured.

Appendix C Ethics Approval

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