INTERNATIONAL LAW - STATE IMMUNITY: CANADA AMENDS ITS STATE IMMUNITY ACT TO ALLOW VICTIMS OF TERRORISM TO SUE IN CANADIAN COURTS

Most of the world's major legal systems have on their books laws barring lawsuits against foreign countries in their own courts. They are usually called State Immunity Acts.

Essentially, the acts state that the courts of those countries have no jurisdiction to handle lawsuits directed against foreign states. The acts usually provide limited exceptions to the immunity rule such as when a foreign state causes bodily injury or material damage in the other country. Then, there is no immunity and the victim can sue the foreign country in the courts of the country where the injury or damage occurred. It is easy to understand why in some situations this would be the best option, as the alternative could sometimes be to go before the subservient courts, if they even exist, of a foreign dictatorship, for example.

Ten years after the United States of America did it, last spring, Canada decided to follow and added a new exception to its State Immunity Act, removing jurisdictional immunity for states that support terrorism. The government sets out a list of foreign states that have supported or support terrorism. The list can be revised to add or remove states from the list.

In Canada, Iran and Syria were recently included in the list. This explains why many U.S. victims of Iran-sponsored terrorist attacks have flocked to Canada with U.S. court judgments in hand to have them recognized by Canadian courts in order to enforce them on assets of Iran in Canada.

Unfortunately, adding this exception to the Canadian State Immunity Act was of no help to the son of a photo-journalist who was suing Iran in a Canadian court for the death of his mother in Iran, allegedly resulting from a severe beating and torture by prison guards in Teheran in 2003. The Canadian courts threw out his lawsuit, on the basis of immunity.

Indeed the new provision of the State Immunity Act - section 6.1 - which came into force on March 13, 2012, does not include beatings or torture by state agents.

The Court decision

In a decision recently handed down by the Quebec Court of Appeal, in the case of Stephan Hashemi et al. vs. The Islamic Republic of Iran et al. [2012] QCCA 1694, concluding that the state of Iran had immunity under the Canadian State Immunity Act, it threw out a lawsuit brought in Canada against Iran.

The facts

In the summer of 2003, a Canadian photo journalist of Iranian descent, while in Iran to put together a report, was observed filming outside a prison in Teheran. The chief prosecutor of Teheran ordered her arrest. While detained in the prison, she was allegedly beaten, sexually assaulted and tortured. She was moved to a hospital unconscious and died after a brief coma when the hospital authorities took her off life support. The cause of death was head injuries.

The woman's son, a Canadian citizen and resident who was not with her at the time, filed a lawsuit before the Quebec Superior Court against the State of Iran, its leader, Ayatollah Ali Khamenei, the chief prosecutor of Teheran and the official in charge of the prison. One plaintiff was the Estate of Mrs. Kazemi, the victim and the other plaintiff was the son. The Estate was claiming damages essentially for the pain and suffering of Mrs. Kazemi resulting from the bodily injuries allegedly inflicted upon her in prison. The son was claiming damages for what is referred to as "*solatium doloris*"

or psychological and emotional prejudice. This distinction between bodily injury and psychological and emotional prejudice was a key issue in the decision.

It is interesting particularly for its extensive review of case law on the subject of exceptions under state immunity acts.

The trial division allowed the lawsuit of the son but dismissed the lawsuit of the Estate of Mrs. Kazemi. Both the plaintiffs and the defendants appealed. The Court of Appeal let stand the dismissal of the Estate's lawsuit but reversed the decision to allow the son's lawsuit.

I will present the grounds of appeal in the order in which they are discussed in the Court of Appeal decision, which was written by Mr. Justice Yves-Marie Morissette, sitting in the panel of three judges.

But prior to presenting those grounds and the analysis conducted by the Court, it is important to note that the facts alleged in the lawsuit were never proven in court. There was no trial. The lawsuit was dismissed, in part, by Justice Robert Mongeon, at the preliminary stage, on a motion to dismiss presented by the state of Iran, for lack of jurisdiction, based upon the State Immunity Act of Canada. Under the applicable rules of procedure, the facts alleged in the lawsuit at that stage must be taken as true. Therefore, no proof of the facts was presented.

1. Whether the exceptions mentioned in the Act are exhaustive

The first ground was two pronged. In the first portion, it was argued that the State Immunity Act should be interpreted in harmony with international law and more specifically a rule of international law prohibiting torture. Said differentely, that torture should be read as an exception to immunity. The Court rejected that argument on the basis that the exceptions to immunity under the Canadian State Immunity Act are exhaustive and they do not include torture.

In support of its reasoning on this ground, the Court relied upon the principle that the rule of construction to the effect that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law, can only come into play in the presence of an ambiguous statutory provision, and that, if a provision is unambiguous, it must be followed even if contrary to international law.

The Court found that the Act was clear, that the exceptions therein were exhaustive and did not contain torture.

In other words, state immunity under the Act applies even if acts of torture are alleged in the lawsuit.

The second arm of the argument, similar to the first, was to the effect that because of recent developments in the customary international law of state immunity, the State Immunity Act cannot apply to acts of torture.

The Court also dismissed this argument.

In doing so, it adopted largely the reasoning of the judgment rendered on February 3rd, 2012 by the International Court of Justice in the case called "Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)" [online: www: icj-cij.org/docket/files/143/16883.pdf]. Greek nationals were

trying to enforce in Italy judgments they had obtained in Greece against Germany. Also, Italy nationals had instituted claims in Italy against Germany having to do with violations in Italy by the German military between 1943 and 1945. Italy's highest court had denied Germany's claims of immunity in those proceedings. Germany decided to bring the matter before the ICJ.

Italy in essence argued that customary international law had developed in such a way that a state is not entitled any more to immunity for acts causing death, personal injury or property damage on the territory of the forum state. The ICG disagreed and concluded that "customary international law continues to require that a state be accorded immunity in proceedings for torts allegedly committed on the territory of another state by its armed forces and other organs of the state in the course of conducting an armed conflict." But the ICJ went further and did not limit its reasoning only to military personnel in time of war.

Indeed, it went on to reject more generally the notion that a state is not entitled to immunity in the case of serious state violations of human rights law, stating that aside from the Italian courts, it had found almost no State practice in support of such a proposition. Further that it had found a substantial body of state practice from other countries which demonstrates "that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated."

And finally, the ICJ states: "The rules of State Immunity are procedural in character and are confined to determine whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."

The Court of Appeal agreed with the reasoning of the ICJ and rejected as well this line of argument of the plaintiffs, concluding that "the State Immunity Act is a complete codification of the law of state immunity in Canada, that no exceptions to immunity other than those contained therein may be invoked by a party suing a foreign state in a Canadian court and that state immunity may apply to acts of torture."

2. The application of the exception relating to bodily injury contained in section 6 of the State Immunity Act

Section 6 in the English version reads as follows:

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

(a) any death or personal or bodily injury;

(b) any damage to or loss of property

that occurs in Canada."

The French version reads as follows:

"6. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant :

(a) des décès ou dommages corporels survenus au Canada;

(b) des dommages aux biens ou perte de ceux-ci survenus au Canada."

This is where the respective claims of the Estate and that of the son in his personal capacity are distinguished.

From the wording of Section 6, it is quite clear that the Estate is not covered by the exception in Section 6(a) because the allegations concerning Mrs. Kazemi refer to events which occurred in Iran. The Court of Appeal thus found it so and concluded that the Canadian courts had no jurisdiction to entertain its lawsuit, as the motion judge had done, in throwing out the Estates' lawsuit.

There therefore remained the lawsuit of the son based on psychological or mental prejudice suffered by him in Canada, which the motion judge had allowed to proceed.

Iran argued that the exception in Section 6(a) did not apply because the alleged fault or series of faults from which the damage flowed did not take place in Canada, but in Iran.

The Court disagreed and proceeded to analyze the meaning of the words "occurs in Canada – survenus au Canada".

More particularly the Court disagreed with the position of Iran that the wording of Section 6(a) meant that regardless of whether the prejudice claimed by the son occurs in Canada, Iran is entitled to immunity if the tort giving rise to such prejudice occurred on its own territory.

The Court of Appeal did not go too much at length on this argument as it occurred to the court that the language of Section 6(a) was quite clear, that it requires only that the injury or damage and not the tortious act or omission, occur in Canada, for Canadian courts to have jurisdiction.

Another argument called into question the meaning of "personal or bodily injury" – actions découlant de … dommages corporels".

The whole debate on this point revolved around what type of injury is contemplated by Section 6(a). Bodily injury or psychological or mental prejudice or both ?

After engaging in a lengthy analysis and comparison of the English and French versions of Section 6(a), it concluded that Section 6(a) should be interpreted as covering only bodily injury and not psychological or mental prejudice. The French version only uses the words "dommages corporels" which is narrower that the English "personal or bodily injury".

In the end it sided with the reasoning of the Canadian Supreme Court in the Schreiber case [2002 3 S.C.R. 269] which ruled that the French version was clearer and that a "breach of physical integrity" is necessary to bring into play the exception in Section 6(a).

As a result, the decision of the motion judge to let the lawsuit of the son continue was reversed.

3. Are the chief prosecutor of Teheran and the prison official covered by State immunity ?

The third ground of appeal was whether or not the head prosecutor of Teheran and the official in charge of the prison where the mother was jailed, were covered by the State Immunity Act.

The lawsuit named as defendants not only the state of Iran but also its head of state, the head prosecutor of Teheran and the official in charge of the prison in question. There was no dispute that the state of Iran itself and its head of state Ayatollah Ali Khomenei were covered by the Act. The issue was whether its agents were.

The Court of Appeal concluded they were covered as well.

The plaintiffs were arguing that these agents of the state did not qualify for immunity.

These two points were raised: can the agents qualify for immunity and if so, were their alleged actions so egregious as to deprive them of the claim to immunity ?

Basing itself principally on authorities from other jurisdictions, the Court held that the Act applies to individual agents of a foreign state.

In addition, basing itself upon the reasoning of Lord Hoffmann in the case of Jones vs. Ministry of Interior [2007] 1 A.C. 270, the Court concluded that the alleged actions of these agents of Iran do not prevent them from benefiting from immunity. Essentially, that torture connotes an idea of official action, especially when taking place in a state prison.

4. The impact of the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms

Finally, the fourth ground of appeal, a two pronged affair, was that the Act violated provisions of two Canadian laws dealing with fundamental rights.

First, the Canadian Bill of Rights, and more particularly, Section 2(e) which guarantees the right to a fair hearing. It reads, in part, as follows:

> "Every law of Canada shall, unless it expressly declared by an act of the Parliament that it shall operate notwithstanding the Canadian Bill of Rights be so construed and applied as not to …
>
> (e) deprive a person of the right to a fair hearing in accordance with the principle of fundamental justice…"

The argument, put forward by the Estate, was that the State Immunity Act unlawfully deprives the Estate from seeking redress in the Canadian courts. The Court dismissed this argument.

The Court ruled that in order for this principle to apply (i.e. to be entitled to a fair hearing) there must first be a court available to hear a case. But under the State Immunity Act there was simply no court available since Iran was immune from the jurisdiction of the Canadian courts with respect to the claim of the Estate.

The second prong of this argument was that the Act violated Section 7 of the Charter of Rights which reads as follows:

> "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The point was argued by the son.

The Court of Appeal dismissed this argument as well.

In essence, the son says that the State Immunity Act by preventing him from suing Iran and its agents before the Canadian courts violates his "Charter" right to liberty. The Court said that the word "liberty" as used in the Charter only means the liberty to exercise fundamental freedoms and not the freedom to do whatever one wishes. That is what is protected under the Charter.

The Court concluded that such "liberty" does not extend to the liberty to choose a forum where to file a lawsuit, putting it in contrast with "the freedom of choice of a pregnant woman wanting or not to abort, the freedom of choice of parents wanting or not their child to undergo certain medical treatments, or the freedom of choice of an individual in deciding where to establish his or her home".

COMMENTARY

The purpose of state jurisdictional immunity is to prevent a state from being judged by a foreign court. An important exception exists where the actions of a state cause injury or damage to someone in another state. Such an exception is in line with the generally accepted rule of private international law that the courts of the state where the prejudice occurs or arises have jurisdiction to hear the claim resulting therefrom. As mentioned above, the immunity acts of the major legal systems in the world are more of less worded along those lines. There is a certain uniformity. For one of those states on its own to substantially modify its immunity act, for instance by adding more exceptions, such as torture, would undermine this uniformity and that state could then be singled out by the courts of other states. I don't believe Canada should go that route. Anyway from reading the review done by the Quebec Court of Appeal of relevant case law on the subject, there appears to be a consensus among world courts that human rights violations should not be considered as an exception to jurisdictional immunity.

There is however a minor change that could be brought legislatively to the wording of Section 6(a) in order to make it clear whether or not psychological or mental prejudice is an exception. Indeed, this was the major point of disagreement between the motion judge and the Court of Appeal, the former concluding that psychological or mental prejudice was an exception and the latter ruling that only physical injury – "blessures corporelles" was made an exception by the legislature under Section 6(a) of the State Immunity Act. It is difficult to predict whether or not the Supreme Court of Canada would grant leave to appeal, if asked, since the Court of Appeal largely based its ruling on this point on the reasoning of one of the judges of the Supreme Court sitting in the Schreiber case, previously referred to.

In the writer's view, laws should be changed by lawmakers not judges.

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