InCAT Submissions to the Arar Commission

(By David Matas with the assistance of Sukanya Pillay)

In addition to supporting the joint recommendations of the interveners, the International Coalition against Torture or InCAT asks the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar to make three recommendations. One is that Parliament amends the State Immunity Act to allow civil law suits against foreign states for torture. The second is that Attorney General consent, in appropriate cases, to private prosecution for torture abroad. The third is that Government of Canada petition the United Nations Committee against Torture that the United States has violated the Convention against Torture.

The focus of the International Coalition against Torture focus of the organization is advocating an exception to state immunity laws to allow for compensation for torture. Its president is Houshang Bouzari. Its co-chairs are Mark Arnold and David Matas. Its website can be found at <http://www.incat.org>.

A. The State Immunity Act

Houshang Bouzari sued Iran for the torture the Iranian government inflicted upon him. Bouzari was tortured in Iran in 1993. He became a Canadian permanent resident in July, 1998 and a citizen in 2001. He sued Iran in Canadian courts in 2000 for compensation for his torture, but without success. He lost in the Ontario Superior Court in May, 2002[1], the Ontario Court of Appeal[2] in June, 2004 and the Supreme Court of Canada in 2005 which denied his request to appeal the Ontario decision. David Matas,

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[1] *Bouzari v. Iran* [2002] O.J. No. 1624 Court File No. 00-CV-201372 Ontario Superior Court of Justice Swinton J., May 1, 2002.

[2] *Bouzari v. Iran*, 2004-06-30, C38295

the co-author of this submission, was one of his counsels in these court proceedings.

The Canadian courts held that the State Immunity Act was a bar to Bouzari's lawsuit. After he lost at the Ontario Superior Court he formed the International Coalition against Torture or InCAT.

Maher Arar sued Jordan and Syria for the torture inflicted on him. Syria did not defend and was noted in default. Jordan moved to dismiss the action on the basis of the State Immunity Act. Counsel for Maher Arar attempted to distinguish the decision of the Ontario Court of Appeal in the *Bouzari* case on the basis that at the time of the torture, Arar was a Canadian citizen and Bouzari was not. Echlin J. of the Ontario Superior Court of Justice in February 2005 rejected this distinction and accepted the Jordanian motion[3].

Canada is a signatory to the United Nations Convention against Torture and has a duty to report periodically on its compliance with the Convention. The reports go to the UN Committee against Torture. The Committee considered Canada's most recent compliance report in May this year in Geneva and commented on Canadian compliance. The comments and conclusions were released May 20th.

The Convention against Torture obligates states parties to provide victims of torture with a right to compensation. Bouzari in his lawsuit against Iran argued that this duty applied to him. Canadian courts had, so he argued, a duty to give him a right to compensation against Iran.

The Canadian courts disagreed, holding that the duty to compensate for torture set out in the Convention against Torture applied only to torture inflicted in Canada, but not to

[3] *Arar v. Syrian Arab Republic*, (ON S.C.) 2005-02-28 Docket: 03-CV-259270CM2.

torture inflicted abroad. The Ontario Superior Court heard the testimony of an expert, Christopher Greenwood, who told the Court about the reports of states to the UN Committee against Torture on their compliance with the Convention and the Committee's responding comments. Justice Katherine Swinton of the Ontario Court observed:

> "None of these reports have indicated that a state has granted a civil remedy for torture committed outside its territory, and there has been no negative comment from the Committee."

Now all that is changed. The Committee was well aware of what had happened to Bouzari because he and David Matas went over to Geneva and told them about Bouzari's case during a meeting about Canada the Committee held with non-governmental organizations the day before they met with the Canadian government delegation.

When setting out their conclusions on Canada, the Committee stated their concern at ***"the absence of effective measures to provide civil compensation to victims of torture in all cases"***. They recommended that "the state party (i.e. Canada) should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture"[4]. Article 14 is the provision in the Convention that sets out the right to compensation for torture.

Note the reference to "all cases" and "all victims of torture". It is plain that what the Committee had in mind, especially in light of Bouzari case about which they had just been told, was victim of torture inflicted abroad.

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[4] CAT/C/CO/34/CAN Committee against Torture 34th session Consideration of Reports Submitted by States Partiesunder Article 19 of the Convention. Conclusions and recommendations of the Committee against Torture Canada, paragraphs 4(g) and 5(f).

As can be seen from the Bouzari litigation, this is the first time in the history of the United Nations Committee that this point of view has been expressed, not just about Canada, but about any country. It is not just a statement about what Canada should do. It is a statement about what all countries should do, about what the Convention against Torture means.

What the UN Committee is now telling us is that the Convention means that the obligation to provide a right to compensation for torture does not just to refer to torture inflicted at home. The obligation applies to torture anywhere.

By its conclusions about Canada, the Committee has made clear that state immunity is no answer. The duty to provide a right to compensation trumps state immunity. Canada can not allow any state to get away from a lawsuit for torture by claiming sovereign immunity.

Sovereign immunity has become a Trojan horse, allowing foreign states to enter Canada and be immune from remedies for the victimization they inflicted abroad. Canada and other states need to whittle sovereign immunity down to size, so that it does not continue to be a license for the world wide violation of human rights.

Bouzari and Arar's failure in court means that Canadian law is deficient. There needs to be an amendment to the State Immunity Act to allow for compensation for foreign torture and crimes against humanity. The United States has such an exception to state immunity in its legislation. The US exception allows victims of torture and other international crimes to sue foreign states provided the states are designated by the US government as sponsors of terrorism.

Conservative Party Senator David Tkachuk in May of this year introduced into the

Senate a private member's bill allowing for an exception to the State Immunity Act for lawsuits against foreign states which sponsor any of the terrorist groups listed by the Government of Canada under the Criminal Code anti-terrorism provisions. The bill would give a cause of action to anyone who has suffered damage as a result of a terrorist act.

There is an overlap between torture and terrorism, since both may target innocents for the purpose of intimidation. But they are not identical. Torture is prohibited against anyone. Terrorism is prohibited only against civilians or those not taking part in armed conflict. Torture can have other purposes besides intimidation - for example to elicit a confession. Terrorism too can have other purposes besides intimidation - for example to compel a government to do something.

The private member's bill proposed by Senator Tkachuk is a good start. But it is not enough. The State Immunity Act needs a specific exemption for torture and crime against humanity.

Francine Lalonde, Foreign Affairs critic for the Bloc Quebecois committed the Bloc in June of this year to introducing an amendment to the State Immunity Act into Parliament for torture and crimes against humanity. The initiatives of the Bloc and the Conservative Party need to be melded. We urge the Arar Commission to propose to Parliament an amendment which would cover torture and other international crimes.

B. Consent to private prosecution

The law allows for private prosecution by a Canadian citizen for torture inflicted abroad[5]. Kunlun Zhang is a Canadian citizen, a Falun Gong practitioner and a Chinese torture victim. He was a Canadian citizen at the time that he was a Chinese torture

[5] Criminal Code section 269.1 and 504.

victim, in the year 2000. Although it is not clear in law whether or not it is necessary[6], David Matas, as counsel for Kunlun Zhang, out of an abundance of caution, asked the consent of the Attorney General of Canada for the private prosecution in Canada of these Chinese torturers.

The Honourable Anne McLellan in her role as acting Attorney General refused the request of Kunlun Zhang for consent to private prosecution for torture in March 2005 on the basis there was not a reasonable prospect of being able to bring the case to trial in Canada. Kunlun Zhang has since challenged that refusal in Federal Court[7]. The Federal Court challenge is still pending.

The fact that a suspect is a fugitive from justice is not normally considered a good reason for refusing to commence a prosecution. China may well not cooperate with Canadian attempts to prosecute the torturers of Kunlun Zhang. But once the arrest warrants are issued and sent abroad, all states which cooperate with Interpol, all states which have an extradition treaty with Canada would send the accused to Canada to trial. The accused would be bottled up in China to avoid arrest.

Despite the nature of the request, the acting Attorney General dismissed the request based on the decision to prosecute policy applied by attorneys generals. That policy is, on its face, inapplicable, since the decision requested was not a decision to prosecute by the Attorney General.

The decision to prosecute by attorneys general sets a high threshold for a number of different reasons listed in the policy. One is that a wrong decision to prosecute would undermine the confidence of the community in the criminal justice system. Another is that the public interest is at stake.

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6 See section 7(3.7) and 7(7) of the Criminal Code

7 *Zhang v. A.G. Canada* T-769-05

For a private prosecution, the stakes are different. A private prosecution does not have to be in the public interest. The only standard which has to be met for a private prosecution is, according to the Criminal Code, that there are reasonable grounds to believe that a person has committed an indictable offence. As long as that standard has been met, the consent should be forthcoming. By taking into account other considerations relating to public prosecutions, the acting Attorney General erred in law.

Even for a private prosecution where no advance consent by the Attorney General is contemplated, the Attorney General can direct a stay[8]. The effect of section the Criminal Code which arguably requires the consent of the Attorney General for a private prosecution for torture inflicted abroad is to allow the Attorney General to give a green light to a private prosecution before the commencement of proceedings rather than just give a red light to a private prosecution after the commencement of proceedings. In all other respects, the relevant considerations would remain the same. The acting Attorney General by bringing to bear the considerations relevant to public prosecutions rather than private prosecutions has applied the wrong policy and the wrong law to the decision that had to be made.

In refusing consent to prosecution, the acting Attorney-General reasoned in such a way as to make the law on extraterritorial prosecution of torture unworkable. The reasoning in support of the refusal in this case amounts to an effective repeal of the law.

Despite the proliferation of torture around the world and the wealth of torture victims in Canada, there has never been even one extraterritorial prosecution for torture since the inception of the Canadian extraterritorial torture jurisdiction. The current

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[8] Criminal Code section 579(1).

extraterritorial torture offence has been on the statute books since 1987[9]. It defies belief that there has not been even one prosecutable case of torture in eighteen years given the multiplicity of torture incidents around the world and torture victims in Canada. The only plausible explanation for this absence of prosecutions is a decision by the respondent not to use the law despite the express wishes of Parliament.

The letter of refusal to consent to the private prosecution Kunlun Zhang wanted to launch stated that much of the evidence is not available to Canadian authorities for investigation, assessment and or trial. Yet, the evidence of the victim is more than enough to establish a *prima facie* case against the named accused and what is more, likely to be the only evidence available. It is hard to know what other evidence the Attorney General would want, other than confessions of the accused which are unlikely to be forthcoming.

By its very nature, when the victim is in Canada and the perpetrator is abroad, there will be difficulties in prosecution based on this fact. The acting Attorney General raised concerns about the prosecution that were generic in nature. They did not relate to the prosecution of the named accused, but rather related to the prosecution of any accused where the perpetrators are abroad. By its reasoning the acting Attorney General was saying that she would not consent to the prosecution of any torturer abroad with a Canadian citizen victim.

Canada is implicated in torture when it provides immunity from torture. A person can commit a crime by being an accessory after the fact. The implication of a person in a crime is not limited to aiding, abetting or being an accessory before the fact[10].

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[9] 1987 Statutes of Canada chapter 13 section 2.

[10] *Suresh v. M.C.I.*, 2002 SCC 1, paragraphs 52 to 54; Criminal Code sections 463 and 23(1).

There is an obvious nexus between torture and immunity. Torturers inflict torture because they think they can get away with it. One reason torture occurs in spite of its universal rejection in principle is the existence of immunity. Torturers inflict torture because they think they can get away with it. Torture in Syria is chronic. The existence and prevalence of torture in Syria is explicable only because of the immunity torturers receive in practice. When Canada provides immunity from torture, Canada becomes an accessory after the fact to torture.

The refusal of consent in one case creates an expectation of immunity in other cases. Indeed, the failure to prosecute anyone for torture inflicted abroad since the inception of Criminal Code prohibition against torture created in Syrian an expectation of immunity in the case of Maher Arar. It is reasonable to conclude that the torturers thought, at the time that the torture was inflicted on Maher Arar, that Canada would allow the torturers to get away with that torture once the applicant returned to Canada. This expectation of immunity has to be considered a contributing cause to the torture inflicted on Mr. Arar. While torture is irrevocable once inflicted, the Government of Canada owes it to him to say that they were not in part responsible, that the expectation of immunity that contributed to his torture was false.

It is untenable to make a distinction between torture that has been inflicted and torture that is to be inflicted. Compensation, deportation, revocation of citizenship, extradition, and prosecution for torture abroad are all ways of preventing torture.

Maher Arar as a dual national was disadvantaged. The Minister of Foreign Affairs on November 4, 2003 said this to the House of Commons Standing Committee on Foreign Affairs and International Trade:

> "Colleagues, we have to recognize that our consular officials work within some basic constraints. One of these is that dual nationality is a seriously complicating factor. In many countries there is no way of renouncing a former citizenship

when you become a Canadian. When a Canadian is arrested or detained in his or her country of origin or other citizenship and that country does not recognize dual nationality, it poses very serious problems. The Vienna convention itself does not legally oblige that country to grant us consular access. In other words, the person has no international legal right to be treated as a Canadian citizen."

The document to which that statement refers entitled *Dual Citizenship: What Travellers Should Know*,states:

"There are also risks and problems associated with having more than one citizenship.

Recognition of Canadian citizenship: The most important of these is that your Canadian citizenship may not be recognized in the country of your second citizenship. The authorities of that country may not recognize Canada's right to provide you with consular assistance.

There could also be problems in other countries, especially if you used the travel document of the country of your second citizenship to gain entry. In such circumstances, the local authorities could decide that Canada does not have the right to provide consular assistance."

The Vienna Convention on Consular Relations provides[11]:

"Communication and Contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall,

[11] Article 36.

without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The problem appears to be subsection (2) which refers to the laws of the receiving state. If the receiving state does not recognize dual nationality, then, at least the way the Convention has been applied by those states which refuse to recognize dual nationality, article subsection(1) is considered not to apply.

This problem is a general one many Canadians face. Maher Arar is a dual national of Syria and Syria does not recognize dual nationality. For Syria, the Foreign Affairs travel report states: "Holding dual nationality may limit the ability of Canadian consular officials to provide consular services".

As is apparent both from practical experience and the many government statements, dual nationals are disadvantaged when travelling abroad. The disadvantage is partly the fact that they are susceptible to worse treatment abroad in their country of other nationality than the single national Canadians. It is also partly the fact that Canada is unable to help Canadian nationals who are dual nationals under the Vienna Convention on Consular Relations.

While the problems of denial of consent to private prosecution are formally the same for all Canadians, there is an adverse impact of denial of consent on dual citizen Canadians. Dual national Canadians are more likely to be tortured abroad than single national Canadians because many foreign torturing states do not accept these dual nationals as Canadians and do not offer them the protection under the Vienna Convention on Consular Relations due to Canadians. It becomes correspondingly important for Canada to offer these victims other countervailing protections such as the consent to private prosecution requested here. When that consent is denied, the disadvantage dual nationals face is aggravated, accumulated. In light of the vulnerability of dual nationals when abroad to torture in the state of their other nationality without Canadian consular assistance, it becomes incumbent on the Attorney General to remedy that disadvantage by consenting to the private prosecution of torturers abroad.

C. Interstate complaint

The Convention against Torture provides[12]:

> "A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be

[12] Article 21

> received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration."

Both Canada and the United States have declared that they recognize the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention against Torture. Accordingly, the Committee has the competence, on a petition by Canada, to determine whether the United States did or did not fulfil its obligations under the Convention against Torture that the United States owed to Maher Arar.

There is substantial evidence before this Commission that the United States did not fulfil its obligations under the Convention against Torture that the United States owed to Maher Arar. On September 26, 2002, Maher Arar landed at John F. Kennedy airport in New York. He had been in Tunisia visiting his wife's parents, and was returning to his home in Montreal. He landed at JFK airport in New York, and intended to fly on from there to Canada.

Upon his landing at JFK on September 26th, 2002, US Immigration and Naturalization Services ("INS") took Mr. Arar into custody. With no lawyer present to represent Mr. Arar, the INS questioned Mr. Arar for nine hours about his alleged links to Al Qaeda.

Mr. Arar was removed to the Metropolitan Detention Centre in New York, where he spent 13 days. From the Metropolitan Detention Centre, Mr. Arar was deported by the US, via Jordan, to Syria. This deportation occurred without a hearing, without any knowledge apparently of the Canadian consulate, Mr. Arar's lawyer or Mr. Arar's family.

Maureen Girvan, Canadian consul in New York at the time the Americans detained Maher Arar in New York and shipped him off to Jordan and Syria, told the Commission on May 11, 2005 that American officials stonewalled her and other Canadian officials when they tried to find out why Mr. Arar was detained. Mr. Arar was removed from the US to Jordan, Syria and torture without any advance notice from American officials to Ms. Girvan that he would be removed.

Significantly, the deportation occurred despite Mr. Arar's repeated and continuous protests and statements to US officials in the US and in Jordan that if returned to Syria, he would be tortured. Following a short detention in Jordan, Mr. Arar was handed over to Syrian authorities on October 21, 2002. Apparently the US did not insist upon or implement any monitoring system to report on Mr. Arar's treatment while in Syrian custody, despite a 2001 US Department of State report condemning torture practices in Syria#.

In Syria, Mr. Arar reports that he was taken immediately into the custody of the Syrian military intelligence branch "Far Falestin" allegedly known for torturing political prisoners. Mr. Arar reports that he was immediately and for the next 6 days of interrogation, subjected to torture using an electric cable and beatings. During this interrogation, Mr. Arar claims that because of the torture, he signed a false confession that he had visited Afghanistan

Mr. Arar reports that for the next 10 months he was kept in cruel and inhumane conditions in Syria, in a basement cell, deprived of natural light for at least the first 6 months. He was released to the Canadian Consulate in Damascus on October 5th, 2003.

The Convention against Torture prohibits States Parties from expelling, or returning

("refouler") a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture[13]. There is substantial credible evidence that the United States violated this prohibition by removing Maher Arar to Syria through Jordan.

Indeed, there is substantial credible evidence of a pattern of the behaviour of American officials using "extra-ordinary renditions" to send suspected terrorists to countries where torture is practised as a means of extracting information. It appears that Maher Arar fell victim to this pattern of behaviour.

The evidence currently available indicates that the United States neither sought nor received written diplomatic assurances from Syria that Maher Arar would not be torture. The Americans had no system in place to monitor Maher Arar once returned to Syria to assure themselves that he would not be tortured.

We do not expect this Commission to come to any conclusion on the evidence of US complicity in the torture of Maher Arar. The United States is not a party or intervener at this Commission; it would be unfair to the United States to come to any conclusion on their responsibility without hearing from them.

Nonetheless, the issue of American responsibility should not just sit there unresolved once there is a serious ground to believe that there was direct American complicity in the torture of Maher Arar. The Committee against Torture and its inter-state complaint mechanism in our view provides a credible mechanism for coming to a conclusion on that evidence.

Determining American responsibility is an essential component of determining Canadian responsibility. Simply in order to make a complete determination of the responsibility of

[13] Article 3(1).

Canadian officials, it would be necessary to make a determination of American responsibility. The Convention against Torture provides a mechanism ready at hand to make this determination. It is a mechanism this Commission should recommend to the Government of Canada to invoke.

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