Seeking Global Justice

by David Matas

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Victims come to Canada from around the world seeking protection and justice. Part of protection is justice. If Canada is to integrate and resettle its refugees, it must provide them a remedy for the wrongs inflicted against them. Otherwise the victimization continues. The wounds do not heal.

Yet, justice is hard to find. Canadians have been insular, worrying about crimes committed at home, but relegating to oblivion violations of human rights committed abroad.

The distinction between politics and law, clear at home, becomes blurred abroad. Canadian governments have seen international justice as political rather than legal, a settling of accounts between battling foreign groups rather than the pursuit of principle.

Canadian principles often disintegrate in the face of international politics. Canadian governments end up worrying more about the reaction of foreign governments than the welfare of their own victim citizens.

The search for justice, in theory, should be easy. Who after all speaks for injustice? But in practice it is difficult. Insularity, indifference and ignorance are formidable opponents.

The Canadian legal system has been designed for local justice only, not international justice. For the Canadian legal system to act globally requires a massive change both in its structure and in the thinking of its participants.

Canadians act globally once they leave Canadian borders. But within Canada, Canadians think locally. When it comes to justice, for Canada we still do not live in a global village.

The arrival of victim populations in Canada is not new. The history of Canadian immigration has been a history of populations in flight from persecution. But today expectations are rising. Suppressing memory, pretending the past no longer exists are no longer acceptable.

The sad truth is that forgetting about the past has not worked. The past remains present. Impunity to perpetrators has meant crimes against humanity have continued. Deterrence can occur only through justice. We need justice to stop the endless repetition of the most horrible crimes.

The ease of travel and communication means that Canada can not insulate itself from the world. The Canadian justice system can not insulate itself from injustice elsewhere. Canada becomes an accessory after the fact to grave violations of human rights committed elsewhere if Canada provides immunity to the perpetrators.

Canada has been a magnet both to victims and perpetrators. Victims seek protection. Perpetrators seek a safe haven. Canada, thankfully, has offered protection to refugees. Canada, regrettably, has offered a safe haven to all to many perpetrators.

The presence of perpetrators in Canada makes the integration of victims into Canadian society that much more difficult. How real and sincere is the welcome to Canadian victims if Canada allows the perpetrators to flaunt themselves in Canada in front of the victims? Immunity to perpetrators is an insult to the victims, making the welcome to victims an exercise in hypocrisy.

The federal government and the federal Parliament need to do everything in their power to bring global fugitives in Canada to justice if they are to be sincere in the welcome they offer to refugees. So far, the record has been far from glorious.

We have seven suggestions to make to the federal government and Parliament to promote international justice: requesting prosecution by the International Criminal Court, extradition of foreign perpetrators for trial in Canada or extradition of perpetrators in Canada for trial abroad, revocation of citizenship, deportation, allowing civil lawsuits against foreign states for international crimes, public prosecutions in Canada, and consenting to private prosecutions in Canada.

First, we suggest requesting prosecution by the International Criminal Court. The Court has a jurisdiction which is limited in a number of ways. It can punish only those acts committed since its inception in July 1, 2002. As well, either the accused has to be a national of a state party to the Court treaty. Or the acts have to have been committed on the territory of a state party.

The major human rights violators have not accepted the authority of the Court; they are not states parties. Neither China nor Iran nor Uzbekistan nor Zimbabwe nor Cuba nor Burma nor Syria is a state party.

However, there is an important exception to the jurisdictional limitations of the Court for situations referred to Court by the Security Council as a threat to the peace. That exception was invoked for Darfur. The Security Council, on March 31, 2005, referred the situation in Darfur to the Court, even though Sudan is not a party to the statute of the Court.

That exception could be used, for instance, for Zahra Kazemi the Canadian photojournalist tortured and killed in Iran on July 10, 2003. The situation in Evian prison where Zahra Kazemi was tortured and killed is a threat to the peace both within

Iran and between Iran and those states whose nationals it tortures and kills at this prison. That situation could be referred by the Security Council to the International Criminal Court. Canada can and should be asking the Security Council to do just that.

A second criminal remedy we suggest in the pursuit of international justice is extradition to Canada for prosecution here or extradition from Canada for prosecution abroad. Even though Canada can prosecute an international criminal against humanity fugitive once in Canada solely on the basis that the criminal is found here, Canada can not rely on that power to request extradition. It would be bootstrapping to request extradition on the basis that Canada, once the person is here, would have jurisdiction. The jurisdiction would have to exist at the time the request is made.

But Canada would have that pre-existing jurisdiction in the case of a Canadian citizen victim like Kunlun Zhang, a victim of torture in China in the year 2000. The trouble with the Kunlun Zhang case is that Canada has no extradition treaty with China. Yet that difficulty is surmountable. Canada can extradite persons from Canada only to states which are extradition partners. Extradition partners are states with which Canada has either a general or specific extradition agreement or whose name appears on the schedule to the Extradition Act. However, Canada may request extradition from any state, whether or not the state is party to an agreement with Canada or listed in the schedule to the Extradition Act.

So extradition to Canada of a foreign torturer or criminal against humanity remains possible even in the absence of an extradition treaty. Whether or not the foreign government would ever accede to such an extradition request, the attempt should nonetheless be made. Those who seek global justice should ask for those attempts to be made.

Extradition of an international criminal to a foreign state is more straightforward than extradition to Canada but far from problem free. Take for instance the case of Michael

Seifert.

Italy requested the extradition of Michael Seifert from Canada for participation in Nazi war crimes. Proceedings in Canada began in April 2002. Seifert lost in the Supreme Court of British Columbia in August 2003. He appealed to the British Columbia Court of Appeal. That appeal has yet to be decided.

We can get a flavour of what is going on in this case from a statement in the reasons of Mr. Justice Romilly in the BC Supreme Court. Mr. Justice Romilly wrote:

> "This extradition hearing has been anything but an expedited process in which the expenses have been kept to a minimum. In my view, the notion of ensuring prompt compliance with Canada's international obligations became nothing more than a pipe dream. The various applications made by the Respondent [Michael Seifert] during this hearing, and the manner in which they were conducted, make it clear that he was in no hurry to have these proceedings concluded in a timely fashion."

Justice delayed is justice denied. One problem victims of global crimes face is simply getting the legal system engaged. A second problem, once it is engaged, is getting it to work. What is happening in the Seifert case is typical of international criminal fugitive cases.

The victims have not won simply because the justice machinery switches on. Those against whom there is compelling evidence of complicity in torture and crimes against humanity can enjoy Canada as a safe haven by not being prosecuted. They can also enjoy Canada as a safe haven by dragging out a prosecution forever once it has begun.

What that means is that the prosecution and the courts must be vigilant, not allowing stalling tactics to prevail. Parliament must ensure that this procedure and other justice procedures are streamlined, not fragmented to the point where they become

unworkable.

The delays in justice have been most extravagant with the third remedy we advocate, revocation of citizenship. Here, the delays have been egregious, outrageous.

Revocation of citizenship and its ensuing deportation is a massively fragmented process. There needs to be whole scale reform of both the citizenship and immigration statutes to make the process functional in revoking citizenship and removing from our midst those against whom there is compelling evidence of complicity in war crimes or crimes against humanity. I will not go through here the many suggestions we have to make about consolidation of this process, but we have made them elsewhere, when Citizenship Act reform was previously before Parliament.

Nonetheless, the present system can and should be made to work. Revocation of citizenship is a two step process. First the Federal Court determines whether the person entered by false representation or fraud or by knowingly concealing material circumstances. Second, if the Federal Court finds against the person, the cabinet revokes citizenship.

Seven people died after revocation of citizenship or deportation proceedings were launched against them by the Department of Justice war crimes unit and before they were completed. The dead are Wasily Bogutin, Serge Kisluk, Ludwig Nebel, Erichs Tobiass, Antanas Kenstavicius, Josef Nemsila, and Walter Obodzinsky.

There have been inordinate, inexplicable delays in the pending cases. The government began proceedings against Jacob Fast on September 30, 1999. The Federal Court decided against Fast on October 3, 2003, four years later. Almost two years later, there is still no cabinet action.

The case of Vladimir Katriuk began August 15, 1996. The Federal Court found against

him on January 29, 1999. Over six years later, the cabinet has yet to make a decision on the revocation of his citizenship. Katriuk has now been in Canada almost nine years since the commencement of proceedings, and has gone through only the first step.

The Minister began revocation of citizenship proceedings against Wasyl Odynsky on September 24, 1997. The Federal Court found against him on March 2, 2001. There is still no cabinet decision on his case either. Almost eight years after commencement, the case of Odynsky too has gone through only the first step.

The Minister began proceedings against Michael Baumgartner on September 24, 1997. The Federal Court found against him on August 31, 2001, almost four years later. He too is benefitting from inordinate cabinet delays. Almost four years later and almost eight years after commencement, the cabinet has yet to decide on revocation.

The case of Helmut Oberlander is the poster child for delays. His case began January 27, 1995. The Federal Court found against him on February 28, 2000, an amazing five years later. In his case, the Supreme Court of Canada had occasion to remark that the delays were "inordinate and arguably inexcusable"; that the dilatoriness of the case "defies explanation". The Governor in Council revoked the citizenship of Oberlander August 21, 2001, a year and a half later. The Federal Court of Appeal in this case and the case of the Rwandan Leon Mugesera, which I will mention in minute, has been shockingly insensitive to the need to bring to justice persons in Canada against whom there is compelling evidence of complicity in crimes against humanity. The Court in May 2004 overturned the Oberlander revocation and sent it back to cabinet for reconsideration. Cabinet, over a year later, has yet to engage in this reconsideration.

The War Crimes Unit in the Department of Justice does not launch World War II a revocation case unless it has compelling evidence that the individual is complicit in war crimes or crimes against humanity. Though, in form every revocation case determines only that the person entered by false representation or fraud or by knowingly

concealing material circumstances, one can see in every one of these cases the Government has won that the evidence of complicity in war crimes and crimes against humanity is overwhelming.

Helmut Oberlander was an interpreter for the Einsatzgruppen, the German Nazi roving units in Eastern Europe tasked with killing Jews. The Germans did not know who the Jews where or were they lived. To get that information, they depended on the local authorities. The Germans would meet with the local authorities to identify the Jews so that they could be rounded up and executed. Oberlander was the interpreter for these meetings. That is enough for there to be serious grounds for considering that he was complicit in crimes against humanity, even though the Federal Court observed that there was no evidence he was present at any execution. Oberlander admitted he interpreted for the Germans with local authorities without admitting the subject matter of these meetings.

Wasyl Odynsky, according to Justice MacKay, was a guard at the Poniatowa forced labour camp in Poland. Michael Baumgartner was, according to Justice McKeown, a guard at both the Stutthof and Sachenhausen concentration camps in 1942 and 1943. The inmates of these camps were victims of crimes against humanity. 15,000 mostly Jewish forced labourers were killed in November 1943 at the camp Odynsky guarded. Odynsky was not working the day of the slaughter but his guard duties prevented inmates from avoiding their then pending doom. By being guards, by preventing possible escape and rescue, Odynsky and Baumgartner were complicit in the crimes committed in the camps they guarded.

Jacob Fast was part of the political section of the Nazi auxiliary police in Zaporozhye, Ukraine. According to Justice Pelletier, all of the auxiliary police participated in the rounding up and killing of the Jews of Zaporozhye. The political section was responsible for the arrest, imprisonment, torture and deportation of prisoners to concentration camps in Poland and Germany.

Vladimir Katriuk was a member of a Germany army battalion which committed atrocities against civilians in what is now Belarus. Katriuk was in charge of a platoon unit. Justice Nadon found that Katriuk was lying when he testified that he did not participate in military operations with his battalion and when he testified he was forced to join the battalion. The judge did not make a finding that Katriuk was complicit in war crimes, writing "Not enough is known to reach any conclusion." But, in law he did not have to reach any such conclusion, because Katriuk lied his way into Canada and, by so doing, cut off inquiries that might have been made at the time about his war time activities.

Ultimately, this cutting off of inquiries is and should be all that is necessary. A person should not be able to insist that the Government of Canada, many years after a fraud which allowed the trail of evidence against him to grow cold, to prove in citizenship revocation proceedings, a case of criminality against him beyond a reasonable doubt, as if the fraud never happened. A person whose lies raise serious questions about cover up of criminal activity should not be able to benefit from his lies.

So now we wait for cabinet to act. The victims have waited over sixty years for justice. They should not have to wait a day longer.

The first order of business bar none for the Government of Canada, if it is serious about global justice, has to be the revocation of citizenship of those five people who have already lost, years ago, in Federal Court - Fast, Odynsky, Baumgartner, Katriuk and Oberlander. Unless and until the citizenship of these five individuals is revoked and they are removed from Canada, Canada makes a mockery of its commitment to justice.

The fourth remedy we advocate is deportation. This remedy has recently been the terrain of a high stakes legal debate. The Federal Court of Appeal in the deportation case of Leon Mugesera virtually shut down the law of crimes against humanity and incitement to hatred in Canada.

Mugesera gave a speech in November 1992 referring to Tutsis as cockroaches and calling for their extermination. There were mass killings immediately after the speech. Its words and themes became central to the propaganda inciting the genocide of April 1994. Mugesera fled Rwanda immediately after his speech and surfaced in Canada in August 1993 as a permanent resident. The Government of Canada began removal proceedings against him, claiming misrepresentation, participation in crimes against humanity and incitement to genocide. The Government succeeded at the first three levels but lost at the Federal Court of Appeal in spectacular fashion. The Court set such onerous requirements for proving incitement to hatred, genocide and crimes against humanity, no case would ever likely be able to meet those requirements.

The Rwandan community in Canada, needless to say, has followed this case with great interest. I applied unsuccessfully on behalf of PAGE Rwanda, a Rwandan community group, B'nai Brith Canada and the Canadian Centre for International Justice to intervene in the Federal Court of Appeal. The trio asked the Government of Canada to seek leave to appeal to the Supreme Court of Canada, which the Government did. The trio applied, this time successfully, to intervene in the Supreme Court appeal. More heartening than that, the Supreme Court of Canada accepted the positions of the intervenors and the Government of Canada almost in their entirety.

The fifth initiative we advocate is allowing civil law suits against foreign states for international crimes. That was what Houshang Bouzari did, suing 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, the Ontario Court of Appeal in June, 2004 and the Supreme Court of Canada in 2005 which denied his request to appeal the Ontario decision. I was one of

his counsel 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 organization called the International Coalition against Torture or InCAT, one of the sponsors of this Conference. The focus of the organization is advocating an exception to state immunity laws to allow for compensation for torture.

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 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 I 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". 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 victims of torture inflicted abroad.

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'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 Liberal caucus to work with the other parties to agree on an amendment which would cover all international crimes.

The sixth remedy we urge is public prosecution for war crimes and crimes against humanity. Canada slowly is turning its face towards global justice. The Supreme Court of Canada took a crucial step in the case of Leon Mugesera, not only overturning the backward decision of the Federal Court of Appeal, but as well overruling its own previous problematic ruling in the case of Imre Finta.

Imre Finta was head of unit in Szeged Hungary during World War II which detained almost 9,000 Jews and shipped them off in cattle cars to Auschwitz and other concentration camps. He was acquitted by a jury after a highly contentious charge to the jury about the legal definition of the crimes for which he was charged. The Supreme Court of Canada in 1994 upheld the charge.

The Mugesera case in the Supreme Court of Canada finally puts to rest the ghost of the *Finta* case. It puts the crimes of incitement to hatred and genocide and the crime against humanity of persecution back on their feet. It sends a signal that Canada will join the global community in fighting the worst crimes known to humanity.

Victims can call on the government to launch a prosecution. That is what Joe Arvay and I did as counsel for Kunlun Zhang in March 2004. 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 victim, in the year 2000.

Torture and crimes against humanity are exceptions to the general rule that Canadian

courts can prosecute crimes committed only in Canada. Torture and crimes against humanity can be prosecuted in Canada, even if the crime was not committed here, even if the perpetrator is not found here, provided only the victim was a Canadian national at the time the crime was committed.

"Crimes against humanity" as the plural "crimes" suggests is an umbrella term, encompassing a whole list of specific crimes. One of those specific crimes is torture. For torture or any of the other crimes on the list to be a crime against humanity, the crime must be part of a pattern that is either systematic or widespread. Even a single act of the listed crimes can be a crime against humanity if it forms part of a widespread or systematic attack directed against a civilian population. The torture of Kunlun Zhang was a crime against humanity because it was part of a widespread and systematic attack directed against the Falun Gong in China. So far there has been no answer to this request.

The last remedy I will mention is government consent to private prosecution. Again this is something Kunlun Zhang has sought. Although it is not clear in law whether or not it is necessary, I, 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 this Chinese torturers.

Of the two remedies, private prosecution for torture and state prosecution for crimes against humanity, I wrote for Kunlun Zhang that he would prefer Government prosecution of his torturers for crimes against humanity. There is the advantage, in prosecuting only for torture, that the burden of proof is less. For prosecution of torture, there is no need to prove the torture was part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

The reason why Kunlun Zhang nonetheless preferred prosecution for crimes against humanity is that this sort of prosecution indicates the true gravity and dimension of the

crime. It is a more accurate factual description of what has been and is being inflicted in China on the Falun Gong.

A prosecution for crimes against humanity would allow for other elements of the wrong done against Kunlun Zhang, besides torture, to be brought to court. Kunlun Zhang suffered severe deprivation of physical liberty in violation of the fundamental rules of international law. He was persecuted as a member of an identifiable group, the Falun Gong, on grounds that are impermissible under international law. These forms of persecution and deprivation of liberty can also constitute crimes against humanity

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. 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.

For the fight against global injustice to be real we need both legal effectiveness and political will. Until the decision of the Supreme Court of Canada in the case of Leon Mugesera in June of this year, the effectiveness of the Canadian legal system was in doubt. Now the issue is: does the Government have the political will?

As we can see with the foot dragging over revocation of citizenship of those against whom there is compelling evidence of complicity in Nazi war crimes, the political will in

Canada is still not evident. This caucus should make its contribution to the generation of the necessary political will. We call on this caucus to raise its voice in favour of global justice.

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