Canada[1]

IHF FOCUS: hate speech; asylum seekers and immigrants; international humanitarian law (accountability for war crimes); rights of the child.

The Canadian Helsinki Watch Group focused its activities in 2003 on child pornography legislation, refugee protection, prosecutions against war criminals in Canada and hate speech. It opposed proposed amendments to the child pornography legislation on the grounds that they would make it more difficult for courts to convict perpetrators.

The group also expressed concerns about the US Canada Safe Third Country Agreement, officially aimed at stopping economic migrants from abusing the refugee determination systems but which, in effect, could lead to a decrease in the protection of refugees.

In addition, inexcusable delays by the Canadian government in deporting war criminals found guilty by Canadian courts, resulted in effective impunity of both Nazi and more recent war criminals. The failure to act promptly suggested that Canada was not genuinely interested in making war criminals accountable.

On the other hand, the government brought charges against Leon Mugesera who had incited hatred against the Tutsi in Rwanda and whose speech had immediately been followed by widespread massacres. However, the government lost the case in the Federal Court of Appeal, which decided to drop the charges. Charges were also brought against David Ahenakew, a prominent native leader, for anti-Semitic statements.

The Canadian Helsinki Watch Group urged the government to make Canadian legislation on the financing of terrorist organization more consistent: in 2003, three different laws dealt with that issue.

Hate Speech

The Canadian Helsinki Watch Group supported the prosecution of David Ahenakew in 2003 for incitement to hatred. In December 2002, Ahenakew applauded Hitler for the six million Jews, who he had "fried" in the Holocaust. Ahenakew is a prominent native leader, a former head of the Assembly of First Nations and the Federation of Saskatchewan Indian Nations, and a member of the Order of Canada.[2]

According to the Canadian Helsinki Watch Group, there were four other factors besides what David Ahenakew had said justifying his prosecution. One was that Ahenakew was a leader in the native community and an example for others. Therefore the community has to react when such personalities set atrocious examples. Second, as Saskatchewan is rife with hate speech against aboriginals, the prosecution of David Ahenakew was not just a warning to anti-Semitics, but also a warning to those who would incite hatred against aboriginals. Third, the aboriginal justice system was available to Ahenakew to deal with his remarks, but he declined to invoke it. Fourth, his prosecution was justified because of the failure of the governor in general to revoke Ahenakew's membership in the Order of Canada.

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[1] Based on a report of the Canadian Helsinki Watch Group by David Matas, co-chair.

[2] The Order of Canada is the country's highest honor for lifetime achievement for Canada. The appointment and revocation of the membership in the Order in Canada is done on the advice of an advisory council chaired by the Chief Justice of Canada. The Chief Justice of Canada in 2003 was Beverley McLachlin, an opponent of Canadian hate speech laws with a history of dissent in several hate speech cases.

Asylum Seekers

The Canadian Helsinki Watch Group expressed concerns about the US Canada Safe Third Country Agreement, adopted on 30 August 2002. The agreement will come into force as soon as the parties can show that they have put in place the necessary domestic legal procedures to enforce the agreement.[3] While Canada had already completed all necessary domestic legal procedures by the end of 2003, the US had yet to publish its draft regulations for comment.

The agreement is based on the premise that there are a substantial number of irregular migrants within the refugee claimant population. Its basic principle is that a claim must be made in the country of first presence. As a result, a refugee claimant who passes through Canada to the US can be returned to Canada for the determination of the claim. In a similar vein, cases of refugee claimants who pass through the US to Canada will be determined by US authorities.

The "safe third country" concept is an attempt to deal with the problems stemming from the controversial concept of irregular migrants. A statement made in the government's Refugee Impact Analysis in the *Canada Gazette*, accompanying the pre-publication of the regulations, began with the words: "The global growth of irregular migration..." However, it appears that the very notion of "irregular migration" is antithetical to the principle of refugee protection. According to immigration officials, migration is regular when migrants come to Canada on immigrant visas, i.e., when Canadian immigration officials choose them. In practice, however, refugees arrive as a result of human rights violations abroad—not because of a choice made by immigration officials.

The Refugee Impact Analysis also referred to "the contemporary phenomenon of mixed flows of migrants, refugees and asylum seekers who move together through the same irregular channels." However, both the government and official statistics have failed to provide evidence to substantiate the claim of mixed flows, including economic migration within the refugee claimant population. In 2003, Canada had an acceptance rate of about 50%, however, it would not be right to assume that all those rejected were therefore economic migrants as all determination procedures involve some errors. In Canada, the legislation provided for an appeal to correct errors, but that part of the legislation was not implemented. Moreover, some claimants were rejected even though they were victims of human rights violations but Canadian officials determined that the abuses were not grave enough to amount to persecution as defined by the Geneva Convention. Further, some claims were refused because country conditions had improved since they had left. And finally, some claimants were fleeing a "generalized risk," i.e., they did not fall under the protection definition, which insists that the danger be "individualized." All these rejected people were nonetheless motivated to move for non-economic reasons.

In addition, some forms of economic deprivation fall within the refugee definition. For example, a person fleeing a country where he is denied all forms of employment due to his political opinion is fleeing persecution, albeit economic persecution. Yet, the person cannot be considered a mere economic migrant.

The Refugee Impact Analysis also claimed that "[irregular migration] has resulted in significant pressures on asylum systems in developed countries, including Canada and the United States." This concern over "significant pressures" rings hollow, however, because shifting claims from one country in North America to another would not change the overall number of claims in North America. It would only prevent some, but not all double claims. The general effect of the agreement will be to shift a significant numbers of claims from Canada to the US. In fact, the Immigration and Refugee Board statistics showed that 24,912 refugee claims were referred to the board from January to September 2003 while 30,605 were finalized during the same period, showing that the board was finalizing cases at a substantially greater rate than cases

[3] Article 10(1).

were being referred.

The Refugee Impact Analysis also pointed out that "migrants attempt to make use of asylum systems to secure entry to a developed country and the attendant economic opportunities." It should, however, be borne in mind that, according to laws in force in 2003 in the US, claimants were not able to get work permits for the first six months, and in Canada they were unable to get work permits until found eligible and referred to the Immigration and Refugee Board. Further, in Canada they were not able to get work permits if they decided to challenge a negative decision in Federal Court. Notwithstanding, even for economic migrants it would presumably not make a difference if they stayed in Canada or the US. Moving this population from one country will do nothing to discourage economic migration.

The US Canada Safe Third Country Agreement aims at forcing refugees to remain in or return to the first country they enter where there is an opportunity for protection. Such a principle violates the duty to share responsibility for refugee protection and prompts those countries to reject refugee obligations altogether and deny protection to those who flee.

In addition, while the Impact Analysis Statement required a refugee claimant to seek protection in the first possible country, the UNHCR has stated that a claimant should seek protection in the first country where he/she "found or could have found" protection—not “could have sought.” [4] In practice, there are some people who can find protection in Canada, but not in the US. This is the case, for example, regarding protection from spousal abuse. Sending a person back to the US where she is denied protection would mean that Canada is committing a violation of the Geneva Convention as it is interpreted in Canadian law.

The Immigration and Refugee Protection Act provides that a person is ineligible to make a refugee claim if the claimant has been recognized as a convention refugee by a country other than Canada and can be sent or returned to that country.[5] These people are the true irregular movers, and are already encompassed by the present legislation, even without the Safe Third Country Agreement. The Safe Third Country Agreement embraces a whole group of other people falsely described as irregular movers.

The Canadian Helsinki Watch Group stated that if a government truly wants to stop economic migrants from abusing refugee determination systems in developed countries, the only way to do so is to make these systems as simple as possible. Any refugee determination system in a developed country, which is substantially backlogged and which allows claimants to stay for years pending determination, attracts at least some people to make a claim just for the time it buys in the country of claim. Viewed from this perspective, the Safe Third Country Agreement goes in exactly the wrong direction.

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[4] UNHCR Executive Committee 1989 Conclusion 58 (XL)

[5] Section 101(1).

International Humanitarian Law

Accountability for War Crimes[6]

Canada failed to take effective measures to punish international fugitives accused of war crimes, crimes against humanity and genocide. There was particular concern both about Nazi war criminals and more recent war criminals. The problems included inordinate, inexcusable delays by the Canadian government in deporting war criminals who had been found by Canadian courts to have lied their way into Canada, suggesting that Canada was not genuinely interested in making war criminals accountable.

Delays in bringing to justice Nazi war criminals remained unconscionable. By the end of 2003, six Nazi war criminals, who had been naturalized in Canada, had died after revocation of citizenship or after deportation proceedings had been launched against them by the war crimes unit of the Department of Justice, but before they had been completed. The dead were Wasily Bogutin, Serge Kisluk, Ludwig Nebel, Erichs Tobiass, Antanas Kenstavicius, and Josef Nemsila. For example, the minister of citizenship and immigration commenced proceedings against Serge Kisluk in early 1997 and the Federal Court ruled against him in June 1999; the cabinet revoked his citizenship in March 2000 and he died awaiting deportation proceedings in May 2001— more than four years after the commencement of proceedings.

Two criminal proceedings were stopped due to deaths. The Crown began a prosecution against Radislav Grujicic in the fall of 1992. The case was dropped two years later in September 1994, before completion because Grujicic became too ill for the case to proceed. He died shortly after. Stephen Reistetter was charged in February 1990, but the Crown dropped charges against him in March 1991, again before the case had been heard, because of the death of two witnesses.

The Fifth Annual Report of Canada's Crimes against Humanity and War Crimes Program noted that the program had commenced only three new cases, rather than the target of fourteen set for the fiscal year 2001-2002. One was commenced subsequently. The report stated: “It is becoming increasingly more difficult to investigate and litigate World War II cases due to the passage of time and its effects on both suspects and witnesses."

Moreover, there have been inordinate inexplicable delays in the cases pending as of the end of 2003.

- The case of Vladimir Katriuk began in August 1996, and the Federal Court found him guilty in January 1999. As of the end of 2003 — almost five years later — the cabinet had yet to make a decision on the revocation of his citizenship. Katriuk had been in Canada for over seven years since the commencement of proceedings, but had only gone through the first stage.

- The minister began revocation of citizenship proceedings against Wasyl Odynsky in September 1997 and the Federal Court found him guilty in March 2001. By the end of 2003, there was still no cabinet decision on his case either. More than six years after commencement, the case of Odynsky had also only completed the first stage of proceedings.

- The minister began proceedings against Michael Baumgartner in September 1997. The Federal Court found him guilty in August 2001, almost four years later. Over two years later and more than six years after commencement, the cabinet had not decided on revocation.

However, following revocation cases did not necessarily progress at a fast pace either.

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[6] *See also IHF, Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2003 (Events of 2002)*, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1322.

- A case against Helmut Oberlander began in January 1995 and the Federal Court found him guilty in February 2000. In his case, the Supreme Court of Canada remarked that the delays were "inordinate and arguably inexcusable" and that the dilatoriness of the case "defies explanation." The governor in council revoked Oberlander's citizenship in August 2001, a year and a half later. As of the end of 2003, Oberlander was still in Canada fighting deportation proceedings, almost nine years since proceedings against him began.

Two World War II war criminals, Konrads Kalejs and Arthur Rudolph, neither of whom had permanent status in Canada, were removed. However, because they did not have status in Canada, their cases were not fair indicators of the time involved. Two others, Ladislaus Csizsik-Csatary and Mamertas Roland Maciukas, left Canada voluntarily after revocation of citizenship. These cases also did not give an indication of the time normally taken in contested cases.

Only one war criminal whose citizenship had been revoked had been removed from Canada as of the end of 2003: Jacob Luitjens. Proceedings against him had been initiated in January 1988. Luitjens was removed to the Netherlands in November 1992, almost five years later.

As of the end of 2003, two cases which were only at the preliminary stage already displayed alarming foot dragging: the case of Jacob Fast (initiated in September 1999 and found guilty by the Federal Court in October 2003) and Walter Obodzinsky (initiated in February 2000 and found guilty by the Federal Court in September 2003). The revocation case of Michael Seifert was also pending, which had begun over two years earlier in November 2001. There were also extradition proceedings against Seifert, which were taking place simultaneously.

The Mugesera Case

The failure of attempts to bring Nazi war criminals in Canada to justice was also evident in the case of Leon Mugesera, once a high-ranking political figure in Rwanda. The case was decided by the Federal Court of Appeal on 8 September 2003 and created yet another set of obstacles to the prosecution of international fugitives in Canada.

- In November 1992, Leon Mugesera gave a speech in which he referred to people as cockroaches and called for their extermination. It was apparent from the context that he was referring to the Tutsi population in Rwanda. Immediately following Mugesera's speech there was widespread killing of Tutsis in Rwanda. An order was issued to deport him for misrepresentation, complicity in war crimes and incitement to genocide in Rwanda. However, the Federal Court of Appeal overturned the deportation order asserting several legal principles which gave rise to concern. The judgment was 257 paragraphs long and full of exceptions. The court acknowledged that when Mugesera used the word "cockroaches" he was referring to Tutsis "for the most part,"[7] but it decided that this was no crime because the word "cockroaches" rather than the word "Tutsi" was used. The government of Canada appealed this decision to the Supreme Court of Canada and the case was pending as of the end of 2003.

While Canada has been a haven for Nazi mass murderers for decades, this judgment also made Canada a haven for genocidal propagandists, stated the Canadian Helsinki Watch Group.

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[7] Paragraph 63.

Rights of the Child

In 2003, the government proposed changes to the child pornography legislation Bill C-20. The Canadian Helsinki Watch Group expressed concerns about this proposed legislation: in its opinion, the defense of artistic merit of the present law needs narrowing, while the bill, if adopted, would in effect broaden that defense.

As of the end of 2003, the law stated that where an accused is charged with a child pornography offense, the accused has the defense either that the representation or written material has "artistic merit" or an educational, scientific or medical purpose or that the representation serves the "public good." The bill proposes that the first part of this defense be repealed and the law be left only with the defense that the material alleged to constitute child pornography serves the "public good."

A change of law was felt to be necessary as the law still in force in 2003 had led to several questionable court rulings.

- In February 2002, Mr. Justice Shaw of the Supreme Court of British Columbia[8] found that the written works of Robin Sharpe had "artistic merit" and acquitted him of the charges of possession and distribution of child pornography in relation to those written works. The court observed that the defense of public good had received little interpretation and its precise definition was beyond the scope of the appeal.[9]

However, it is unlikely that this verdict would be any different under the proposed law as the defense of "public good" provides no clear guidance to the courts and no obvious deterrent to potential violators. The Canadian Helsinki Watch Group argued that courts are likely to be clogged with not guilty pleas invoking that defense until the courts clarify its meaning. Since the courts in different provinces are likely to approach the defense of serving the "public good" differently, it is obvious that it will take years until the Supreme Court of Canada will be able to give defense a uniform interpretation.

Comments of the Supreme Court of Canada in the Sharpe case led the Canadian Helsinki Watch Group to believe that it was possible to legislate at least three limitations to the defense of "artistic merit" and still maintain the constitutionality of the law. According to these limitations, "artistic merit" cannot be invoked in cases in which the subjective intention of the creator is sexual portrayal, enticement or seduction (rather than an artistic purpose); in which works are unconnected or have little connection with artistic conventions, traditions or styles; and in which the production, display or distribution of material to young children serves the purpose of sexual gratification enticement, seduction and abuse. Bill C-20 fails to provide all these limitations.

The Canadian Helsinki Watch Group believed that Bill C-20 makes convictions harder to obtain. The fact that Sharpe was acquitted of some charges against him can be attributed to a broad interpretation of the defense of "artistic merit," showing that this kind of legal problem has to be properly addressed. However, Bill C-20 fails do so.

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[8] *R. v. Sharpe* (2002) B.C.S.C. 423, decided on 26 January 2001.
[9] Paragraph 70.