

Barring George W. Bush from Canada: Time for the Law to Step in:

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Why Bother?

Why bother doing this, is a question often asked of efforts to have George W. Bush barred from Canada or prosecuted for torture once he arrives. Being questioned, is not the quality of the overwhelming evidence of Bush' involvement in torture (and other war crimes and crimes against humanity), but rather the power of Canadian law to either prevent or punish torture and other crimes committed by the Bush administration. All these crimes were committed outside Canada and, for the most part, against non- Canadians; so what can Canadian law do? It is a question that stumps even people responsible for law enforcement. Even judges, police officers and political leaders get it wrong, thinking that either: only the International Criminal Court has jurisdiction over such crimes, or, Canadian law has no jurisdiction over even the most heinous crimes if they were committed outside Canada, or, Canadian criminal law doesn't apply to short term or special visitors to Canada, and even that the universal ban on torture is just a political platform and not the law.

In December 2004, a member of the Canada-based group, Lawyers against the War (LAW) filed a 7-count information alleging that Bush, as President of the U.S. and Commander in Chief of the U.S. Armed Forces, had aided, abetted and counseled torture at Abu Ghraib, Guantánamo Bay and other offshore U.S. prisons. A judge of the Provincial Court of BC, when the information came before him for a fix date, sealed the courtroom, made a gag order banning publication and summarily dismissed the information on the basis that, as a sitting head of state, Bush had, "immunity from prosecution under the criminal laws of Canada." The judge then went on, apparently accepting the need to prosecute, to suggest that, "...perhaps an information could be laid in [the International Criminal Court], and perhaps if it were laid, then Canada may be involved in various proceedings to assist..." Although the judge was wrong to think that the International Criminal Court has jurisdiction over Mr. Bush, he was right to suggest that Canada would be duty bound to assist in a prosecution of him for torture.

At the B.C. Supreme Court level, the judge hearing LAW's appeal from the order by the Provincial Court didn't express doubt about the quality or quantity of torture evidence against Bush but instead questioned the intentions of the informant who had laid the torture information. The judge dismissed the appeal, again summarily, because she suspected the informant intended, "to use the criminal procedure [against Bush] under the Criminal Code as a forum to express her political views." Apparently the judge mistakenly took the informant's submissions that freedom from torture is universal right that cannot be displaced by anyone, anywhere, under any circumstances, to be a political platform rather than an accurate statement of Canadian and international law.

When Bush (the same George W.) was scheduled to visit Calgary in March 2009, the head of the RCMP War Crimes Investigation Section explained that his department would not take any action because of an internal policy to focus, "...investigative efforts on persons who are suspected of having committed criminal offences under the Crimes against Humanity and War Crimes Act, and who are present (living) in Canada on an ongoing basis."

This, in apparent ignorance of Canadian law and his own department's written policy, both of which prohibit people suspected of any involvement in torture or other war crimes and crimes against humanity from entering Canada for any period and for any purpose. The most recent report of the War Crimes Program affirms the necessity of barring war crimes suspects from Canada, "The most effective way to deny safe haven to people involved or complicit in war crimes or crimes against humanity is to prevent them

from coming to Canada." The Immigration and Refugee Protection Act (IRPA) requires every person seeking entry to Canada to be assessed for admissibility: there are no exceptions for people coming for short stays, special purposes or for people in high places. Section 35 of that act bars entry to any person suspected on reasonable grounds, of involvement in any violation of Canada's Crimes against Humanity and War Crimes Act (CAHWC). According to the Supreme Court of Canada, reasonable grounds are more than a suspicion and less than proof to the balance of probabilities: simply put, an honest belief in a serious possibility based on credible evidence. In fact, the involvement of the Bush administration in general and Bush in particular, in the widespread use of torture in U.S. offshore prisons such as Guantánamo, Abu Ghraib and Bagram has been so extensively investigated and reported—the International Committee of the Red Cross, United Nations experts, the U.S. Senate Committee, American Civil Liberties Association—that many commentators have concluded the Bush' culpability and that of other key members of his administration, is beyond questioning.

The RCMP Deputy Criminal Operations Officer for Alberta explained RCMP inaction somewhat differently, writing, "I believe the matters concerning Mr. Bushe (sic) and allegations of his involvement in war crimes have been examined by the International Criminal Court, Hague. You should also be aware, in Canada, the Dept. of Justice determines if conduct constitutes criminal activity as defined within the Crimes Against Humanity and War Crimes Act."

In July 2009 Canada's Minister of Public Safety—responding to LAW's letters of February 2009—apparently misunderstanding both the inadmissibility provisions of the IRPA, and his own duty to ensure that suspected war criminals are barred entry, by saying, "Foreign nationals who are found inadmissible (on the grounds inter alia, of...human or international rights violations...) may be denied entry into Canada unless special permission is granted." While there is discretion under the IRPA to admit to Canada people suspected of being a security risk, there is no discretion to admit people suspected of involvement in CAHWC offences.

In September 2009, the Saskatoon Police Chief had this to say when responding to a complaint about Bush's scheduled October 21 visit to Saskatoon, "Although the pending visit may not be popular with some people/organizations, there is no legal ramification to bar the event. In reply to your request for the Saskatoon Police Service to begin an investigation into past actions by the former President; as a municipal police agency in Canada, we have no jurisdiction in this matter of international law."

So what do the protesters want?

They want the evidence and criminal charges (accusations) against G.W. Bush to be tested in a fair trial and his guilt or innocence determined by an independent and impartial court—a right Bush has illegally denied to thousands of non-Americans prisoners, many of whom are now dead. The protesters think that Bush should be tried, first for torture as his involvement in torture has been extensively investigated and reported on. Other charges—a recent book by U.S. professor Michael Haas, cites 269 categories of war crimes and crimes against humanity committed by the Bush administration during the invasions and occupations of Iraq and Afghanistan—would then also be put to the test of fair trials. Many protesters realize that perhaps such prosecutions should ideally be conducted in the U.S., but understand that, as this is not happening, once Bush enters Canada, the duty to prosecute him or extradite to another jurisdiction to be prosecuted for torture is triggered. Unlike the politicians and police officers in charge of law enforcement, the protesters know that the law allows for no special treatment either on the basis of Bush's former status or on the basis that he plans a short visit. They know that once Bush enters Canada, the torture and the other crimes committed by the Bush administration are deemed to have been committed in Canada and have to be treated as such. That's why they want him barred from Canada. They understand that once he enters, those in charge of law enforcement—police, judges and politicians have to act to enforce Canada's laws.

Protesters agree with UN Special Rapporteur Martin Scheinin who reported, "...States must not aid or assist in the commission of acts of torture, or recognize such practices as lawful, ...Under international human rights law, States are under a positive obligation to conduct independent investigations into alleged violations of the right to life, freedom from torture or other inhuman treatment, enforced disappearances or arbitrary detention, to bring to justice those responsible for such acts, and to provide reparations where they have participated in such violations."1 (emphasis added)

Protestors agree with then President of the UN General Assembly Miguel D'Escoto Brockmann, when he said in March 2004, "The illegality of the use of force against Iraq cannot be doubted..." and "...the aggressions against Iraq and Afghanistan and their occupations, constitute atrocities that must be condemned and repudiated by all who believe in the rule of law in international relations." 2

Protestors agree with Navi Pillay, UN High Commissioner of Human Rights when she said in August, "There should not be impunity for torture or any other unlawful treatment of detainees, whether it is in the United States or anywhere else in the world."

The protestors agree with Martin Sheinin when he said, "We have had a witch hunt for alleged terrorists for the past 7 1/2 years....Now I think the witch hunt is over and it is time for the law to step in."

That is what protesters want from Canada's politicians, police and judges: for the law to step in.

So why isn't this happening? Police and Politicians vs Protestors

Other than the few responses set out above, protestors haven't received any explanations from those in control of law enforcement in Canada for their refusals to act. Protestors are therefore left to wonder what possible reasons the politicians in control—the Prime Minister,

Attorney General and the ministers of Immigration and Public Safety—could have for not enforcing the law: for violating not only Canadian law but Canada’s international law responsibilities. Perhaps, like former U.S. Attorney General Alberto Gonzalez, Canada’s Attorney General finds the Geneva Conventions ‘quaint’ and ‘obsolete’ along with the Criminal Code, the Convention against Torture and the CAHWC, and can therefore be ignored. Maybe Canadian government legal advisors, like those advising the Bush administration, are advising the executive how to get away with violating or ignoring our laws instead of how to enforce them. Or maybe the Prime Minister, the Attorney General and others ministers responsible just don’t like the law. Perhaps they are aping the likes of former Governor or Alabama George Wallace, who just didn’t like anti-segregation laws and so defied them and used his power as Governor to compel and persuade others to follow suit?

So is it against the law to refuse to enforce the law?

The protestors think it is necessary to enforce the law against Bush, to hold him and others accountable. Both common sense and history tell them that enforcement is necessary in order prevent further crimes. The Canadian government, backed up by the RCMP and municipal police, plan instead to welcome Mr. Bush to Canada. The RCMP, alone, plan to spend upwards of \$500,000 to protect Bush during his October visit from the protests of those calling for the proper enforcement of the law.

Protestors are beginning to ask—are they, politicians and police—breaking the law by refusing to enforce it? Can we charge them? Certainly both the government and police are giving the message that, at least in Canada, George W. Bush will be immune, not accountable: that he will be welcomed, not barred.

Protestors fear that by providing even temporary immunity to Bush, Canada offers licence to other leaders to commit torture and other war crimes and to do so with immunity. Protestors fear that by so doing, Canadian officials tacitly encourage other states to commit the very crimes that Canada has agreed to vigorously and effectively prevent and punish wherever they occur. These crimes include torture, murder, unlawful confinement, denial of a fair trial, enforced disappearances, wilfully causing great suffering or serious injury, extensive destruction and appropriation of property, unlawful deportation or transfer. In order to combat impunity for these crimes and to ensure justice for victims, Canada has agreed that these crimes, “...must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level...” and also that, “...it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.”

The protestors want that commitment honoured and the laws passed in furtherance of the commitment to be enforced: our government and law enforcement officials apparently refuse to do so. Instead they appear poised to bypass the law and use law enforcement resources to shield Bush and other suspects from accountability while they are in Canada.

We hope the law wins. We think that our collective survival depends on it.

Gail Davidson is a spokesperson for *Lawyers against the War (LAW)* a Canada-based organization of lawyers and others who oppose war, advocate adherence to international humanitarian and oppose impunity for violators.

Notes

1. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/3,4 February 2009.

2 Rome Statute of the International Criminal Court, A/CONF.183/9, Adopted 17.07.98, entry into force 01.07.02, Preamble

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