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CANADA[1]

*Government Action — Removal of Génocidaire from Canada to Rwanda*

☛ Decision of the Minister of Citizenship and Immigration to remove Léon Mugesera

On 22 November 1992, Mr Léon Mugesera, a prominent Hutu politician, gave a violent speech in Rwanda calling for the extermination of members of the Tutsi ethnic group. On 12 August 1993, he arrived in Canada as a refugee and immediately obtained permanent residence. On 28 June 2005, the Supreme Court of Canada unanimously concluded that Mugesera was inadmissible to Canada as a result of having incited genocide and having committed a crime against humanity during his speech in 1992.[2]

On 24 November 2011, Canada's Minister of Citizenship and Immigration decided that Mugesera should not be allowed to remain in Canada and ordered his removal to Rwanda. This decision was taken in light of humanitarian and compassionate considerations, the potential risks that Mugesera could face in Rwanda, and the nature and severity of his acts. The decision was also based on diplomatic assurances from the Rwandan government regarding the protection of Mugesera's rights, including fair trial guarantees.

Shortly thereafter, Mugesera's removal to Rwanda was scheduled for 12 January 2012. He then requested Canada's Federal Court to stay the removal order pending his application for leave for judicial review of the Minister's decision. On 11 January 2012, the Federal Court dismissed Mugesera's motion for a stay as a result of his failure to demonstrate the three required criteria: the existence of a serious issue; the existence of irreparable harm; and sufficient inconvenience to outweigh the public interest in his timely removal.[3]

Mugesera subsequently convinced the United Nations Committee Against Torture to formally request the Canadian authorities to suspend the removal order's execution while the Committee evaluated the risk of torture to Mugesera if he was removed to Rwanda. He then obtained, *ex parte,* a brief suspension of the removal order from Québec's Superior Court. On 23 January 2012, the Court rejected Mugesera's application for injunction on the basis that

[1] The author of this Correspondent's Report is counsel with the Public Prosecution Service of Canada and a contract instructor at the University of Ottawa teaching "International Criminal Law." The information and summaries presented below do not necessarily reflect the position(s) of either the Public Prosecution Service of Canada or the Government of Canada.

[2] *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] SCC 40 at [98] and [179].

[3] *Mugesera v Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)* [2012] FC 32 at [81].

the Court lacked jurisdiction over the removal order and that the Committee's request to suspend the removal order did not bind Canadian authorities.[4]

A few hours after this decision, Mugesera was onboard a Canadian jet bound for Rwanda. On 24 January 2012, Mugesera was handed-over to Rwandan authorities at the Kigali airport. On 25 January 2012, the Federal Court dismissed another motion by Mugesera for a stay of the removal order on the same grounds that he failed to demonstrate the three required criteria.[5] Mugesera is currently on trial in Rwanda.

*Government Action — International Transfer of Offender from Guantánamo Bay*

☛ Decision of the Minister of Public Safety to accept Omar Khadr

As highlighted in the 2011 report from Canada's Correspondent, the detention of Mr Omar Khadr in Guantánamo Bay has been the subject of significant litigation in Canada. On 28 September 2012, Canada's Minister of Public Safety accepted Khadr's application to serve the remainder of his sentence in Canada.[6] On 29 September 2012, Khadr was delivered by US authorities to their Canadian counterparts at Canadian Forces Base Trenton, Ontario. The Minister's written decision to accept Khadr's application highlighted the following five noteworthy facts.

First, Khadr was sentenced on 31 October 2010 to eight years' incarceration at Joint Task Force Guantánamo pursuant to a plea agreement and a lengthy agreed statement of facts. In summary:

- He was captured on 27 July 2002 while participating in a four-hour firefight with US military forces in the village of Ayub Kheyl, Afghanistan.
- During the course of that firefight, he threw a grenade which killed Sergeant First Class Christopher Speer.
- He provided material support to Al Qaeda by receiving one month of one-on-one training in the use of rocket-propelled grenades, rifles, pistols, hand grenades and explosives.
- He received training in the conversion of land mines into improvised explosive devices (IEDs).
- Between 1 June 2002 and 27 July 2002 he attempted to commit murder by converting land mines into IEDs.
- Between 1 June 2002 and 27 July 2002 he attempted to commit murder by placing IEDs on the ground in areas in which he knew that US troops would be travelling.
- He engaged US Military and Coalition personnel with small arms fire, killing two members of the Afghan Militia force.
- He threw and/or fired grenades at nearby Coalition Forces, resulting in numerous injuries to them.

[4] *Mugesera c l'Honorable Jason Kenney, et l'Agence des services frontaliers du Canada, et le Procureur général du Canada* [2012] QCCS 116 at [33] and [37].
[5] *Mugesera v Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)* [2012] FC 100 at [12].
[6] Decision of the Minister of Public Safety (28 September 2012) 'In the matter of Omar Ahmed Khadr and the *International Transfer of Offenders Act'*, see online: http://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/_fl/lttr-20120929-eng.pdf (last accessed 13 August 2014).

- He conducted surveillance of US Forces by clandestine means or while acting under false pretences with the intention of conveying the information collected to Al Qaeda or its associated forces.
- He was known to associate during these activities with Usama bin Laden, Ayman al Zawahiri, Muhammad Atef, Saif al Adel, and Ahmed Sa'id Khadr.

Second, the US Government approved Khadr's request for transfer prior to submitting it to Canada. Third, upon receipt of Khadr's application on 13 April 2012, the Canadian officials were advised that a copy of Khadr's interview with forensic psychiatrist Dr Michael Welner would be provided. Notwithstanding requests by Canadian officials for this item, it was not forthcoming. On 19 July 2012, the Minister of Public Safety formally requested this item (and other related documents). They were received by Canadian officials on 6 September 2012. Fourth, Khadr was born in Scarborough, Ontario, and as a Canadian citizen, he has the right to enter Canada after the completion of his sentence. Fifth, the Minister was satisfied that the Correctional Service of Canada and the Parole Board of Canada can effectively administer the remainder of Khadr's sentence in a manner which recognizes the serious nature of the crimes, addresses various concerns involving radicalization and reintegration, and ensures the safety of Canadians.

*Government Action — Extradition of Alleged International Criminal*

☛ *United States of America v. Sosa,* [2012] ABCA 242 and [2012] SCCA No. 433

According to the Record of the Case (certified by US officials and provided to Canada's Attorney General), Mr Jorge Sosa was a member of the Guatemalan Army and served as a sub-lieutenant of an elite unit. On or around 7 December 1982, Sosa's elite unit massacred unarmed civilians in the Guatemalan village of Dos Erres. During his subsequent request for US citizenship, Sosa allegedly misrepresented several facts about his past. The USA decided to prosecute Sosa for knowingly making false statements under oath to US immigration officials. US officials eventually learned that Sosa was residing in Canada, and they therefore sought his extradition.

On 2 September 2011, Alberta's Court of Queen's Bench ordered Sosa into custody to await surrender to the USA to stand trial.[7] The Court found that Sosa had prima facie made a false statement, knew it was false, and made it with the intent to mislead.[8] Furthermore, the Court concluded that:

> The evidence of the massacre at Dos Erres clearly establishes that Sosa was present and involved; that he actively participated in the killings with a sledgehammer, with a firearm and a grenade. The evidence also clearly establishes that he was one of the commanding officers that took the decision to slaughter 171 men, women and children.[9]

On 8 August 2012, Alberta's Court of Appeal dismissed Sosa's application for leave to appeal the committal order.[10] The Court of Appeal concluded that the uncontradicted evidence before the lower court was 'clearly sufficient to support the committal order.'[11]

[7] *United States of America v Sosa* [2011] ABQB 534 at [34].
[8] Ibid [27].
[9] Ibid [32].
[10] *United States of America v Sosa* [2012] ABCA 242 at [22].
[11] Ibid [13].

Additionally, the Court of Appeal weighed Sosa's new evidence produced in support of his application for leave to appeal and concluded that his appeal was 'hopeless.'[12] Following the dismissal of his application for leave to the Supreme Court of Canada on 24 January 2013,[13] Sosa was extradited to the USA and convicted by a US jury on 1 October 2013.[14]

*Cases — Lawsuit against Corporation — Aiding and Abetting in Alleged War Crimes*

☛ *Canadian Association Against Impunity v Anvil Mining Ltd.,* [2012] QCCA 117 and [2012] SCCA No. 128

As highlighted in the 2011 report from Canada's Correspondent, the Canadian Association Against Impunity ('CAAI') filed a motion in Québec's Superior Court for authorization to bring a class action against Anvil Mining Limited ('Anvil') on behalf of all persons who suffered damage in October 2004 in the town of Kilwa in the Democratic Republic of Congo ('DRC'). All alleged faults, whether war crimes or crimes against humanity, were committed in the DRC. All alleged damages caused by these atrocities were sustained in the DRC. And all members of the group contemplated by the class action reside in the DRC. Anvil's head office is in Australia, but it has maintained an office in Montréal, Québec since June 2005.

In response to CAAI's motion to authorize a class action, Anvil presented a motion for declinatory exception on the grounds that: (i) Québec has no jurisdiction because the dispute is not related to Anvil's activities in Québec; or alternatively (ii) the Superior Court should decline to exercise its jurisdiction pursuant to the doctrine of *forum non-conveniens*. On 27 April 2011, the trial judge did not accept Anvil's arguments and dismissed its motion for declinatory exception.[15] On 3 June 2011, Anvil received leave to appeal the judgment to Québec's Court of Appeal.[16]

On 24 January 2012, Québec's Court of Appeal quashed the judgment under appeal and allowed Anvil's motion for declinatory exception.[17] Furthermore, it dismissed CAAI's motion for authorization to bring a class action. In summary, the Court of Appeal concluded that Québec courts do not have jurisdiction over the dispute because there was an insufficient connection between Anvil's alleged faults in the DRC in October 2004 and any activities undertaken in Québec since June 2005.[18] Additionally, the Court of Appeal concluded that CAAI had not established any exceptional circumstances (such as the impossibility of access to courts in the DRC or Australia) to warrant Québec's jurisdiction as a forum of necessity.[19]

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[12] Ibid [21].
[13] *Sosa v Attorney General of Canada (On behalf of the United States of America)* [2012] SCCA No. 433 (SCC).
[14] See CCIJ online: http://www.ccij.ca/programs/index.php?DOC_INST=3 (last accessed 13 August 2014).
[15] *Anvil Mining Ltd c Association canadienne contre l'impunité*, Cour supérieure du Québec, 27 avril 2011, no. 500-06-000530-101 at [41] (see CCIJ online: http://www.ccij.ca/webyepsystem/program/download.php?FILENAME=74-6-at-File_Upload_5.pdf&ORG_FILENAME=Ruling_on_jurisd_FNC.pdf, last accessed 13 August 2014).
[16] *Anvil Mining Ltd c Association canadienne contre l'impunité* [2011] QCCA 1035 at [13].
[17] *Anvil Mining Ltd c Association canadienne contre l'impunité* [2012] QCCA 117 at [4 ]-[6] [CanLII – unofficial English translation]. (For French original, see CCIJ online: http://www.ccij.ca/webyep-system/program/download.php?FILENAME=74-6-atFile_Upload_15.pdf&ORG_FILENAME=Jugement_QCA.pdf, last accessed 13 August 2014).
[18] Ibid [93].
[19] Ibid [103].

The CAAI subsequently applied for leave to appeal the judgment of the Court of Appeal. On 1 November 2012, the Supreme Court of Canada dismissed this application.[20] The CAAI continues to evaluate its options to seek redress.[21]

*Cases — State Immunity and Torture*

☛ *Bouzari v Bahremani,* [2011] OJ No. 5009

As highlighted in the 2003 and 2004 reports from Canada's Correspondent, Mr Houshang Bouzari was tortured by agents of the Islamic Republic of Iran from June 1993 to January 1994. Following his arrival to Canada in 1998, he sued Iran in Ontario for the damages he suffered. Ontario's Superior Court of Justice dismissed the suit in 2002.[22] This judgment was affirmed by the Ontario's Court of Appeal in 2004.[23] The Court of Appeal concluded that the plaintiff's action was barred by the *State Immunity Act* ('*SIA*') and that no principle of public international law says otherwise. Moreover, the *SIA* does not violate Canada's constitutionally-entrenched *Charter of Rights and Freedoms*.[24] The Supreme Court of Canada denied leave to appeal in 2004.[25]

Bouzari subsequently re-filed his case in Ontario against the specific individuals whom he considered responsible for his torture. On 26 August 2011, Ontario's Superior Court of Justice issued a default judgment against the primary defendant, Mr Mehdi Hashemi Bahremani.[26] The Court's endorsement noted that the plaintiff endured 'unspeakably outrageous torture' and that the defendant's heinous conduct warranted 'punitive damages in very significant magnitude.'[27] The Court was satisfied that it ought to assume jurisdiction on the basis of necessity.[28]

The 2013 report from Canada's Correspondent will highlight the results of the defendant's motion to set aside this 2011 default judgment. Additionally, the 2013 report will note the defendant's application for leave to intervene before the Supreme Court of Canada in the related *Kazemi* case.

☛ *Kazemi v Iran,* [2012] QCCA 1449

As highlighted in the 2011 report from Canada's Correspondent, Ms Zahra (Ziba) Kazemi was arrested, detained, severely beaten, sexually assaulted, and tortured by Iranian authorities in 2003. She died in Iran shortly thereafter as a result of this extreme psychological and physical harm. She was a photojournalist and a citizen of both Canada and Iran. Her estate and her son subsequently brought an action in Québec against those allegedly responsible for various damages: the Islamic Republic of Iran and three specific Iranian officials. On 25 January 2011, Québec's Superior Court dismissed the estate's claim against the defendants on the basis of Canada's *State Immunity Act* ('*SIA*') but allowed the son's personal claim

[20] *Association canadienne contre l'impunité v Anvil Mining Ltd* [2012] SCCA No. 128 (SCC).
[21] See CCIJ online: http://www.ccij.ca/programs/cases/index.php?WEBYEP_DI=14 (last accessed 13 August 2014).
[22] *Bouzari v Iran* [2002] OJ No. 1624 (ONSC).
[23] *Bouzari v Iran* [2004] OJ No. 2800 (ONCA).
[24] Ibid [104].
[25] *Bouzari v Iran* [2004] SCCA No. 410 (SCC).
[26] *Houshang Bouzari et al v Mehdi Hashemi Bahremani et al* [2011] OJ No. 5009 (ONSC).
[27] Ibid [3] and [4].
[28] Ibid [5].

against them on the basis of an exception in the *SIA*.[29] The estate appealed against the dismissal, and the defendants appealed the application of the exception.

On 15 August 2012, Québec's Court of Appeal dismissed the estate's appeal and allowed the defendants' appeal.[30] Four issues were addressed. First, the Court of Appeal concluded that the *SIA* is a complete codification of the law of state immunity in Canada and that 'no exceptions to immunity other than those contained therein may be invoked by a party suing a foreign state in a Canadian court and that state immunity may apply to acts of torture.'[31] Second, the Court of Appeal concluded that the son failed to discharge his burden to establish the application of any exceptions under the *SIA*.[32] Third, the Court of Appeal affirmed that the *SIA* applies to individual agents of foreign states.[33] Finally, the Court of Appeal confirmed that the *SIA* is operative and constitutionally valid. On 18 March 2014, the Supreme Court of Canada heard the appeal and reserved judgment.[34]

*Cases — Criminal Prosecution of Genocide and Crimes Against Humanity*

☛ Various Pre-Trial Decisions in *R v Mungwarere*[35]

In November 2009, the Royal Canadian Mounted Police ('RCMP') arrested Mr Jacques Mungwarere, a Rwandan refugee living in Canada. He was subsequently accused of committing genocide and crimes against humanity in western Rwanda in 1994. His trial in Ottawa before Ontario's Superior Court of Justice began in May 2012, and he was acquitted of all counts in July 2013. The 2013 report from Canada's Correspondent will survey the trial itself, but some of the 26 pre-trial applications filed between 2009 and 2012 warrant discussion in this report.

Beginning in November 2009, the Court issued 7 pre-trial orders that imposed certain conditions on the use of disclosure by Mungwarere's defence lawyers and his investigators.[36] These orders did not deny any information to the defence team nor did they address any non-publication during the trial itself. Instead, the orders sought to ensure confidentiality of the witnesses' identities in light of the heightened risk of reprisals in Rwanda.

On 9 May 2011, the Court rejected Mungwarere's application for disclosure from the prosecution of un-redacted documents identifying the family members of prosecution witnesses and also of documents in the possession of third-parties in the USA, the International Criminal Tribunal for Rwanda, and the Netherlands.[37] Also on 9 May 2011, the Court dismissed Mungwarere's challenge to the sufficiency of the indictment.[38] Specifically, the Court clarified that 'intentional killing' is one of the elements of the offence of genocide. As such, and in light of the prosecution's disclosure obligations pursuant to domestic

[29] *Kazemi (Estate of) v Islamic Republic of Iran* [2011] QCCS 196 at [218].
[30] *Kazemi (Estate of) v Islamic Republic of Iran* [2012] QCCA 1449 at [122].
[31] Ibid [60].
[32] Ibid [84].
[33] Ibid [97].
[34] See SCC online: http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35034 (last accessed 13 August 2014).
[35] The author of this Correspondent's Report was a member of the 3-person prosecution team.
[36] The 7 orders were dated as follows: 23 November 2009, 25 June 2010, 29 September 2010, 9 November 2010, 12 May 2011, 22 December 2011 (see *R c Mungwarere* [2011] ONCS 7593), and 15 March 2012.
[37] *R c Mungwarere* [2011] CSON 1247 at [27].
[38] *R c Mungwarere* [2011] CSON 1254 at [22].

criminal law, the indictment need not mirror the practice of the international tribunals by identifying each alleged victim or specifying exact dates and locations of alleged crimes.

On 24 August 2011, the Court ruled that Mungwarere's numerous letters and documents submitted to Canadian immigration authorities and his two interviews with RCMP investigators were free and voluntary in character.[39] As a result, they were available for use by the prosecution at trial. On 22 December 2011, the Court rejected the prosecution's application that the entirety of Mungwarere's evidence, if any, be subject to the domestic rules governing alibi evidence and therefore disclosed to the prosecution within a reasonable time to permit investigation in Africa.[40] In effect, the Court prioritized Mungwarere's right to silence over the inherent logistical complexities burdening the prosecution's response to any defence evidence. Also on 22 December 2011, the Court clarified the disclosure regimes applicable to numerous documents sought by Mungwarere that were either in the prosecution's possession or in that of third-parties abroad.[41]

On 27 February 2012, the Court rejected Mungwarere's application for an exception to the requirement that his alibi evidence, if any, must be disclosed to the prosecution within a reasonable time (as is required by domestic criminal law).[42] Also on 27 February 2012, the Court rejected Mungwarere's application for disclosure of a 'trial book' from the prosecution finalizing all material facts and the witnesses whose testimony will support these facts.[43] Given the complexities of cross-examining witnesses via videoconference between Africa and Ottawa, however, deadlines were imposed for the exchange of various witness lists.[44]

*Cases — Exclusion from Refugee Protection for Complicity in International Crimes*

☛ Various 2012 Cases Prior to *Ezokola v Canada (Citizenship and Immigration),* [2013] SCC 40

Canada's administrative law regime is often called upon to determine whether individuals seeking refugee protection were complicit in international crimes committed by groups of individuals, organizations, or states. Canada's commitment to refugee protection does not, however, include the protection of international criminals. As a result, individuals are excluded from the protection afforded to refugees if there are 'serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity.'[45]

Throughout 2012 and until 19 July 2013, the definition of 'committed' was defined broadly in Canadian law and encompassed a variety of actors – principals, aiders, abettors, and other forms of complicity by association. The 2013 report from Canada's Correspondent will highlight the Supreme Court of Canada's clarification of the test for complicity,[46] but throughout 2012, the applicable test for complicity required only 'personal and knowing'

[39] *R c Mungwarere* [2011] CSON 5032 at [43].
[40] *R c Mungwarere* [2011] CSON 7594 at [6].
[41] *R c Mungwarere* [2012] ONCS 7658 at [34].
[42] *R c Mungwarere* [2012] ONCS 1237 at [10].
[43] *R c Mungwarere* [2012] ONCS 1369 at [8].
[44] Ibid at [7].
[45] *Convention relating to the Status of Refugees* Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1F(a) as incorporated by Canada's *Immigration and Refugee Protection Act,* SC 2001, c 27 at article 98.
[46] The pivotal decision of *Ezokola v Canada (Citizenship and Immigration)* [2013] SCC 40 that recalibrated the test for complicity will be addressed in the 2013 report from Canada's Correspondent.

participation in international crimes.[47] To determine this, the following non-exhaustive six factors were typically examined: the nature of the organization; the method of recruitment; position/rank in the organization; knowledge of the organization's atrocities; the length of time in the organization; and the opportunity to leave the organization.[48] The applicable test for complicity did not require an examination of the voluntariness or degree of contribution to the international crime or of the sharing in the criminal purpose of the group alleged to have committed the crime.

The following individuals were excluded in 2012 on the basis of their association with others who perpetrated international crimes: a member of the Center Reserve Police Force in India who performed regular tasks as a constable driver;[49] a Congolese computer technician who maintained local government computer tools;[50] a high-ranking Tamil officer in the Sri Lankan Navy who was involved with bases, ships, and communications requirements;[51] an officer in the Intelligence Service of the Armed Forces of the Philippines who tracked and arrested members of opposition groups;[52] a Congolese soldier who guarded funds and protected a government television station;[53] a member of the Armed Forces of Haiti who participated in this organization's limited and brutal purpose;[54] an artillery officer in the Rwandan Armed Forces who identified targets for rocket attacks during the 1994 genocide and supervised soldiers who carried out the attacks;[55] a journalist who worked for Radio Rwanda broadcasting hate messages during the 1994 genocide;[56] a Sinhalese soldier in the Sri Lankan armed forces who assisted anti-LTTE operations and was asked to place a bomb at the home of a Tamil Member of Parliament.[57]

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[47] *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 at [15] and [23].
[48] *Ryivuze v Canada (Minister of Citizenship and Immigration)* [2007] FC 134 at [38].
[49] *Multani v Canada (Citizenship and Immigration)* [2012] FC 15.
[50] *Mata Mazima v Canada (Citizenship and Immigration)* [2012] FC 698.
[51] *Kuruparan v Canada (Citizenship and Immigration)* [2012] FC 745.
[52] *Villegas Lumocso v Canada (Citizenship and Immigration)* [2012] FC 905.
[53] *Nsika v Canada (Citizenship and Immigration)* [2012] FC 1026.
[54] *Saintilus v Canada (Citizenship and Immigration)* [2012] FC 1105.
[55] *Seyoboka v Canada (Citizenship and Immigration)* [2012] FC 1143.
[56] *Mupenzi v Canada (Citizenship and Immigration)* [2012] FC 1304.
[57] *Priyashantha v Canada (Citizenship and Immigration)* [2012] FC 1340.