



רשת הסטודנטים היהודים בצפון אמריקה

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WAR CRIMES AND THE CONSTITUTION

A Submission to the  
Special Joint Committee  
on the Constitution of Canada

by

The North American Jewish Students' Network-Canada

on

the wording of sections 11.(e) and (f) of  
the Canadian Charter of Rights and Freedoms

November 25, 1980

SUMMARY AND RECOMMENDATIONS

1. We recommend, in order to preserve the possibility of the prosecution and/or extradition of alleged Nazi war criminals who may be found in Canada, and in accordance with article 15 of the International Covenant on Civil and Political Rights, that section 11.(e) of the Canadian Charter of Rights and Freedoms be amended to read as follows:

"11. Anyone charged with an offence has the right

...

(e) not to be found guilty on account of any act or omission unless, when it was committed, it constituted an offence under provincial, national or international law or was criminal according to the general principles of law recognized by the community of nations."

"11. Tout inculpé a le droit

...

(e) de n'être déclaré coupable en raison d'une action ou d'une omission que si, au moment où elle est survenue, elle constituait une infraction d'après le droit provincial, fédéral ou international ou était tenue pour criminelle d'après les principes généraux de droit reconnus par l'ensemble des nations."

2. We recommend, in order to prevent prior convictions in absentia e.g. in Eastern Europe being considered to be a bar to subsequent trials not in absentia in Canada or West Germany, and more generally to leave open the question of the recognition in Canada of the finality of foreign judgements, and in accordance with article 14.(7) of the International Covenant, that section 11.(f) of the Charter be amended by the addition of the words "in Canada", to read as follows:

"11. Anyone charged with an offence has the right

...

(f) not to be tried or punished more than once for an offence of which he or she has, in Canada, been finally convicted or acquitted."

"11. Tout inculpé a le droit

...

(f) de n'être poursuivi ou puni qu'une fois pour une infraction dont il a déjà, au Canada, été définitivement acquitté ou déclaré coupable."

3. We believe that the above two changes correspond well with the concept of minimum constitutional guarantees, and that not making them would risk extending to alleged Nazi war criminals in Canada a constitutional protection against being brought to justice which they do not now have and which it would be against public policy to extend to them.



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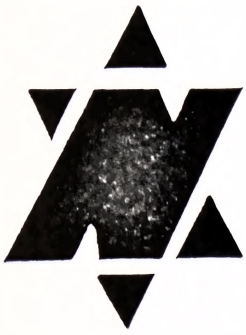
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November 25, 1980

The Co-Chairmen and Members  
Special Joint Committee  
on the Constitution of Canada  
Parliament Buildings  
Ottawa, Ontario

Ladies and Gentlemen:

As previously promised to you through your Joint Clerks, this is our written submission setting forth the necessity, as we see it, of rewording sections 11.(e) and (f) of the Canadian Charter of Rights and Freedoms (la Charte canadienne des droits et libertés) if Canada is not to run the risk of inadvertently becoming a safe haven for Nazi war criminals, together with precedents for such rewording, specific draft language for such rewording, and associated materials.

We are in full accord with the presentation already made to you on the same points by the Canadian Jewish Congress, and offer the present submission by way of further and we hope useful detail.

1. Section 11.(e)

Section 11.(e) of the proposed Charter now reads:

"11. Anyone charged with an offence has the right

...

(e) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence"

"11. Tout inculpé a le droit

...

(e) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction."

The danger is that if that section is passed in its present form, the word "offence" may be narrowly interpreted to exclude Nazi war crimes and crimes against humanity for not having been inscribed in Canadian statute law during the Second World War.

Such an interpretation could not only prevent the trial in Canada, under existing, amended or new legislation, of Nazi war criminals who might be found here, but might also prevent their extradition to West Germany, since our extradition treaty with that country provides that each of us will extradite to the other for offences in third countries (e.g. Poland) only "where in a similar case it [the requested state] would have jurisdiction"

("s'il [l'État requis] revendique une compétence semblable à l'égard d'infractions commises hors de son propre territoire").<sup>1</sup>

Such a result would make a mockery of Canada's having urged West Germany in 1979 to repeal its Statute of Limitations for war crimes, and of the pledges by all political parties in the last two federal elections to move against Nazi war criminals resident in Canada.

Fortunately there is ample and perhaps even binding precedent for a better wording for section 11.(e).

The Universal Declaration of Human Rights (la Déclaration universelle des droits de l'homme) of 1948, to which both Canada and Britain are parties, provides in article 11 that:

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1. Extradition Treaty between Canada and the Federal Republic of Germany, signed July 11, 1977 and in force September 30, 1979 (copy provided by the Department of External Affairs), article I.(2). The full text is:

"I.(2) Where the requesting state asserts jurisdiction in respect of an offence committed outside its territory the requested state shall grant extradition where in a similar case it would have jurisdiction."

"I.(2) L'État requis est tenu d'accorder l'extradition à raison d'infractions commises hors du territoire de l'État requérant s'il revendique une compétence semblable à l'égard d'infractions commises hors de son propre territoire."



"(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."

(emphasis added)

And the European Convention on Human Rights (la Convention européenne des droits de l'homme) of 1950, by which Britain is bound<sup>2</sup>, provides in article 7 that:

"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

"(2) Nul ne sera condamné pour des actions ou omissions qui, au moment où elles ont été commises, ne constituaient pas une acte délictueux d'après le droit national ou international."

"(1) Nul ne peut être condamné pour un action ou une omission qui, au moment où elle a été commise, ne constituait pas une infraction d'après le droit national ou international."

and that

"(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."<sup>3</sup>

"(2) Le présent article ne portera pas atteinte au jugement et à la punition d'une personne coupable d'une action ou d'une omission qui, au moment où elle a été commise, était criminelle d'après les principes généraux de droit reconnus par les nations civilisées."<sup>3</sup>

And finally the International Covenant on Civil and Political Rights (le Pacte international relatif aux droits civils et politiques) of 1966, by which both Canada and Britain are now bound, similarly provides in article 15 that:

"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

"(1) Nul ne sera condamné pour des actions ou omissions qui ne constitueraient pas un acte délictueux d'après le droit national ou international au moment où elles ont été commises."

and that

"(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

"(2) Rien dans le présent article ne s'oppose au jugement ou à la condamnation de tout individu en raison d'actes ou omissions qui, au moment où ils ont été commis, étaient tenus pour criminels, d'après les principes généraux de droit reconnus par l'ensemble des nations."

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Footnotes to page 4 supra:

2. As in the Sunday Times (Thalidomide) case on freedom of expression, decided by the European Court of Human Rights, Strasbourg in April 1979.

3. Texts from J.E.S. Fawcett - The Application of the European Convention on Human Rights (London, 1969), page 177.

Thus, by the above international instruments, Canada and Britain have accepted limits on their traditional rule that Parliament has full authority to enact retroactive legislation, previously limited only by the requirement that it do so in clear language or be presumed not to have done so.

But Canada and Britain specifically retain the right to enact retrospective legislation setting out procedures for the trial and punishment of acts which when they were committed were "criminal under international law" ("délictueux d'après le droit international") or "criminal according to the general principles of law recognized by the community of nations" ("criminels d'après les principes généraux de droit reconnus par l'ensemble des nations") such as the war crimes and crimes against humanity of the Second World War.

To enact section 11.(e) in its present form, leaving out key words which occur in the existing international instruments, would risk constituting not a minimum guarantee of rights which could later be increased by legislation, but the extension of a right not to be tried to a class of persons who now very properly lack such a right, of which right it would then be unconstitutional to attempt to deprive them by legislation.

We are confident that the omission of the said key words in section 11.(e) was an oversight.

A possible rewording of section 11.(e) of the Charter along the lines of article 15 of the International Covenant might read:

"11. Anyone charged with an offence has the right

...

(e) not to be found guilty on account of any act or omission unless, when it was committed it constituted an offence under provincial, national or international law or was criminal according to the general principles of law recognized by the community of nations."

2. Section 11.(f)

Section 11.(f) of the proposed Charter now reads:

"11. Anyone charged with an offence has the right

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(f) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted."

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"11. Tout inculpé a le droit

...

(f) de n'être poursuivi ou puni qu'une fois pour une infraction dont il a déjà été définitivement acquitté ou déclaré coupable."

There is no corresponding provision in the Universal Declaration of 1948 or in the European Convention of 1950, but section 11.(f) is clearly closely modelled on article 14.(7) of the International Covenant of 1966, which reads:

"(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

"(7) Nul ne peut être poursuivi ou puni en raison d'une infraction pour laquelle il a déjà été acquitté ou condamné par un jugement définitif conformément à la loi et à la procédure pénale de chaque pays."

For instance in both the Covenant and the Charter the English has "convicted or acquitted" while the French is in the reverse order ("acquitté ou condamné" and "acquitté ou déclaré coupable").

The major difference here between the Covenant and the Charter is the omission in the latter of any equivalent of the phrase "in accordance with the law and penal procedure of each country" ("conformément à la loi et à la procédure pénale de chaque pays"), which seems to modify the word "finally" ("définitivement"), i.e. to say that it is up to the law of each country to say which judgements it will consider final.

The danger here from our point of view is that an alleged war criminal resident in Canada who has been convicted in absentia e.g. in Eastern Europe but never punished will be able to claim a constitutional right not to be tried again not in absentia in Canada or West Germany.

That such a scenario is not completely far-fetched may be seen from the experience of West Germany, which until very recently was willing to try war criminals, but not those who had already been tried in absentia in France. This policy was recently reversed, and in early 1980 Kurt Lishka, who had been tried in absentia in France in the 1950's, was given ten years by a West German court, at the age of 80, for his crimes as chief of the Gestapo in Paris.

After considering several possible ways of rewording section 11.(f), we have come to prefer one suggested to us and others by the vice-chairman of the Civil Liberties Section of the Canadian Bar Association, Mr. Sheldon Chumir of Calgary, namely the addition of the words "in Canada".

This solution recommends itself to us because:

1. It solves the problem we have posed;
2. It fits well within the norm set out in the Covenant;
3. It corresponds well with the concept of minimum constitutional guarantee -- as a constitutional minimum, one would be guaranteed against retrial after a final Canadian judgement, with the finality or not in Canada of foreign judgements being left to other instruments;<sup>4</sup> and

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4. For instance, by article VI of the extradition treaty between them, Canada and West Germany in effect agree to consider each other's final judgements as final, but reserve the right to consider the final judgements of third states as final or not. This option might be blocked by article 11.(f) of the Charter in its present form but would be preserved by article 11.(f) of the Charter plus the words "in Canada".

4. It makes sense in itself, allowing Canada to consider as non-final if it feels it should foreign judgements of acquittal or foreign convictions with small penalties if the case should arise (e.g. the acquittal of a terrorist, by the state that sent him, for an attack on Canada).

We hope the above will assist you in your deliberations.

Respectfully submitted,

Yours very truly,

The North American Jewish  
Students' Network - Canada

per: Robert Gasner  
Chairperson

Kenneth M. Narvey  
Consultant