

## PERSECUTION BY PROXY

In 2002 the government of Canada enacted a new immigration statute, the Immigration and Refugee Protection Act. This law extended the ability to rely on secret evidence in immigration hearings, but did not first introduce the practice. It was possible to rely on secret evidence before this act came into effect (MEI v. Chiarelli 1992 1 SCR 711; Suresh v. MCI 2002 1 SCR 3), however the new law has extended the use of secret evidence and made it easier for officials to commence hearings that will rely on secret evidence. In addition to “security certificate” hearings, where a Cabinet Minister must approve a security certificate leading to preventative detention of the suspect, and a hearing before a Federal Court judge in which secret evidence may be relied on, any immigration (or Canadian Border Security Agency) officer may commence a hearing in which secret evidence will be relied on. The officer simply has to prepare a brief report stating that he alleges the person is inadmissible for security grounds, and the hearing takes place before one member of the Immigration and Refugee Board of Canada’s Immigration Division (who need not be a lawyer).

The framework for the International Commission of Jurists panel is stated in the context of post September 11, 2001 state measures to prevent acts of terrorism. People often characterize the increased use of repressive state measures, whether it be in detention practices, methods of interrogation, the acceptance of evidence obtained through torture, or inherently unfair trial procedures, as a reaction to the September 11, 2001 attack in New York City. In the Canadian context, this ignores that secret evidence was relied on in Immigration proceedings before 2001, and that elements of the Canadian security, intelligence and immigration services have long sympathized with repressive governments. It is submitted that the post 2001 context encouraged the government to increase its legislative tools, resources allocated, and willingness to engage in immigration prosecutions in which secret evidence would be relied on. However the use of secret evidence did not begin in 2002.

The use of secret evidence in Canadian immigration proceedings can be used, in practice, as a means to assist repressive governments in repressing dissidents here.

Under the apartheid government, Canadian security agencies completely sympathized with the repression of anti-apartheid activists. They monitored anti-apartheid protestors, because they viewed the anti-apartheid movement as latently terrorist. Although the apartheid government was replaced years ago, an ANC activist recently cancelled plans to travel to Canada when he learned that our security services still classify him as a security concern.

Under the Pinochet dictatorship, our security agencies spied on Chileans who opposed the dictatorship, and Canada Immigration deported some who the Chilean security agency characterized as terrorist. Canada's security agencies have long included agents who feel a strong sense of identification with right wing governments, and great willingness to work in cooperation with their security services.<sup>1</sup> This becomes increasingly problematic in the post 2001 context, where intelligence and immigration services are more aggressive and techniques formerly relied on only in espionage are readily converted into evidence and argument in immigration hearings.

While Canadian politicians were denouncing apartheid at the United Nations, I had to defend an ANC activist Immigration accused of being a terrorist, because he had belonged to the ANC's armed wing. Immigration's prosecutor argued, in all seriousness, that it was the blacks oppressing the whites in South Africa, with their terrorist violence. An advantage we had, as this case was prosecuted in the 1990s, was that the government did not seek to rely on secret evidence. Although in theory they might have, it was not a prevalent part of the litigation culture. As a result, it was easy and relatively inexpensive to defend. We were able to answer all evidence against the refugee, in a hearing which concluded within a day. Today the same case would provoke reliance on secret evidence

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<sup>1</sup> Cleroux, Richard, *Official Secrets* (McGraw-Hill Ryerson, Toronto, 1990)

and secret submissions, which makes it impossible to gauge the scope of evidence and argument required to mount a defence.

By way of comparison, if the ANC case I acted on created litigation costs of several thousand dollars, and was completed in a day, a case involving a refugee prosecuted using secret evidence may require well over \$100,000 to defend to completion, and take many years to litigate. This is because the refugee's lawyer is arguing against unknown evidence and unknown factual allegations.

Today Canada's Immigration and Refugee Protection Act maintains a definition of exclusion so broad in scope that any person who advocates armed opposition to any form of government in the world can be excluded. The Supreme Court's definition of terrorism is broad enough to include any guerrilla movement, and any government that has used violence against civilians. The definition of a prohibited link to a movement classified as terrorist includes potential past, present or future membership<sup>2</sup>. Membership has been defined as not requiring actual membership, since a person may share the intent and purpose of a terrorist group without officially joining it.

The highest profile cases in Canada, to date, have been cases framed in the post 9/11 context, and the claim that Canada is only breaching rights to fair hearings out of fear of violent attack. However other cases express the Canadian theme of officials having uncritical sympathy for their counterparts in repressive regimes abroad.

Amparo Torres' case illustrates how our officials are enabled by their freedom to use secret evidence to target refugees in Canada in a manner that promotes the repressive interests of their home state.

The government of Colombia is locked in a prolonged civil war between its right-wing state and a leftist guerrilla movement. Colombia has been in the

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<sup>2</sup> Immigration and Refugee Protection Act, s. 34

forefront of experimentation with secret evidence, which it justified as necessary to combat guerrilla movements and organized crime.

In 1997 Colombia's Constitutional Court determined that although reliance on secret evidence breached the right of the accused to make full answer and defence, it was necessary in order to balance the security needs of witnesses against the rights of the accused. The underlying concern was that violence was so prevalent in Colombia that witnesses would be killed.<sup>3</sup>

This was a reasonable concern. Witnesses were killed, along with prosecutors and sometimes even judges. Measures taken to guard against this included having witnesses testify from behind a screen, with a ban on questions relating to their identity; as well as hiding the identities of prosecutors and judges. However the substantive evidence against an accused, and the statements sworn by witnesses (excluding their identity) were given to the accused. The CCC considered this a fair balance of competing rights.

Three years later, the same court reversed its ruling. In a judgment which clearly stated the Court's legal principles, but gave no sense of what had led to this reversal, the CCC determined that the right to full answer and defence is fundamental in all systems of justice, and that a trial simply cannot rely on secret evidence.<sup>4</sup>

This is because enabling the use of secret evidence replaces one evil with another. In Colombia prosecutors had taken to relying on secrecy to use paid army informants, housed in army barracks, who would claim to have witnessed union activists taking part in guerrilla activity across the country. After years of false evidence, and unjust convictions, a brave and tenacious defence lawyer named Eduardo Umana Menoza, proved this by showing that the words used by

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<sup>3</sup> Corte Constitucional de Colombia, **Sentencia C-475/97, Expediente D-1630, Re:** Roberto Lobelo Villamizar y Manuel Fernando Moya Vargas; [http://www.secretariassenado.gov.co/leyes/SC475\\_97.HTM](http://www.secretariassenado.gov.co/leyes/SC475_97.HTM)

<sup>4</sup> Corte Constitucional de Colombia, **Sentencia C-392/00**, expediente D-2472, Re: Pedro Pablo Camargo, Carlos Alberto Maya Restrepo, Augusto Francisco Bernal González y Carlos Mario Salazar Pineda, [http://www.secretariassenado.gov.co/leyes/SC392\\_00.HTM](http://www.secretariassenado.gov.co/leyes/SC392_00.HTM)

witnesses who were purportedly in various parts of the country at the same time, were so identical that they must have been uttered by one person. The lawyer was murdered in 1998, and in 2000 the CCC released its abstract expression of a principle lawyers had always considered self-evident.<sup>5</sup>

Canada's Supreme Court lags behind the CCC, perhaps because we have not yet been shamed enough by our state's abuse of secret evidence to accept that the right to full answer and defence must be an indivisible value in any trial.

In its recent decision in *Charkaoui*, the Supreme Court has accepted that reliance on secret evidence in immigration hearings did not minimally impair the rights of the accused. Its basis for this finding is that the government had not attempted mediating measures which exist in other contexts to protect secret evidence. In hearings before the SIRC, which hears complaints against the CSIS intelligence agency, the tribunal has a special counsel who questions secret evidence on behalf of the accused, without revealing it to the accused. In the *Air India* trial, criminal defence counsel agreed to view secret evidence without revealing it to their clients. Without endorsing either method, the Court noted that the government has demonstrated that it can adopt methods that are less absolute.

However the Court would not declare that the use of secret evidence is simply wrong, and that a person cannot be excluded from Canada, detained, or deported, based on secret evidence. The Court remains engaged in the sort of balancing the Colombian Constitutional Court accepted for years. The Court accepts restraints on the right to full answer and defence which even exceed the old Colombian trial system, where all substantive evidence had to be disclosed.

Ms. Torres' case actualizes the risks of this acceptance.

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<sup>5</sup> FIDH, (*Fédération Internationale des ligues des droits de l'Homme*), OMCT (*Organisation Mondiale Contre la Torture*), *l'Observatoire pour la protection des Défenseurs des Droits de l'Homme*, "Rapport d'une mission d'enquête internationale, Colombie, administration de justice ou de l'impunité", March 2003, at p. 24 (<http://www.fidh.org/IMG/pdf/co357f.pdf>)

Amparo Torres was a trade union activist in Colombia, who became a lawyer, a human rights activist and a founding member of the Union Patriótica. The UP was a coalition of leftist political parties, put together as a result of a peace initiative between the president of Colombia and the leftist guerrilla forces. The purpose of this initiative was to invite the left –including the guerrilla forces and civil society groups- to unite in a political party which would be tolerated in mainstream elections. If the experiment succeeded, the guerrillas would be shown that dialogue and peaceful resolution of Colombia’s political problems could be possible.

Amparo Torres, and many other civilian activists who believed that Colombia must break its cycle of violence, put their lives at risk by volunteering for this party. The Colombian security forces were not amused by the civilian president’s experiment. They murdered over 3,000 members of the UP. The UP has asked the Inter American Commission for Human Rights to declare this genocide. The IACHR has declared it to be a state-tolerated campaign of massacres, rather than genocide, on the legal distinction that the systemic extermination of a political party cannot legally be termed genocide.<sup>6</sup>

Ms. Torres suffered severe persecution, and was brought to Canada at the invitation of our government as a state-selected refugee. She was granted permanent residence on arrival. In order to be granted permanent residence, an immigrant must clear security checks, however any evidence of this is now withheld from her as secret.

The current president of Colombia is more closely identified with Colombia’s extreme right wing, and its paramilitary movement in particular, than any president in Colombian history. While the Colombian Constitutional Court has theoretically barred reliance on secret evidence, his government has subverted this by promoting a national campaign to have a million informants; by continuing to rely on secret evidence before lower courts; and by simply

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<sup>6</sup> Inter-American Commission on Human Rights, Organization of American States, Report No. 5/97 On Admissibility, Case 11.227, Colombia

murdering people who win at trial. In his second mandate, he has promised to expand his secret informant program worldwide, to ensure that people who sympathize with terrorists are repressed everywhere.<sup>7</sup>

He has denounced human rights groups such as Amnesty International, Human Rights Watch and Peace Brigades International, as advocates of terrorism, lumping them together with the Colombian guerrilla, who are classed terrorist.<sup>8</sup>

His ambassadors to Canada have attacked church-based Canadian human rights groups as advocates of terrorism for criticizing state-sponsored murders of civilians.<sup>9</sup>

The Colombian government is highly concerned with monitoring and reacting to criticism of it in Canada.

Amparo Torres became a target of CSIS in Canada, after engaging in public speeches critical of the Colombian state. She was monitored, her friends were approached and questioned about her, Canadian union activists who collaborated in her work criticizing abuses in Colombia were questioned about her, and her employer was warned that if she was not fired the employer would be targeted for facilitating terrorism. While some people have remained brave enough to stand by her, others –especially immigrants fearful of being targeted in turn- have as a result shunned her.

Ms. Torres is now the subject of an Immigration admissibility hearing, to determine if she should have her residence stripped and be ordered deported from Canada, for being an alleged member of the Colombian guerrilla movement

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<sup>7</sup> *Human Rights Watch, August 2005 "Smoke and mirrors, Colombia's demobilization of paramilitary groups"*

<sup>8</sup> Amnesty International, June 17, 2004;

<sup>9</sup> Canadian Parliament, Standing Committee on Foreign Affairs and international Trade, September 26, 2001 testimony of Colombian ambassador Fanny Kertzman; Canada Colombia Solidarity Campaign, statement by Murray Lumley in response to Fanny Kertzman, March 22, 2002; Embassy magazine, June 15, 2005 letter to the editor by Jorge Visbal Martelo, Colombian Ambassador to Canada

FARC. While there are various steps which must be followed before effecting a deportation, which are unlikely to be met, the result of a finding against her will be that the government of Canada will have classified a pacifist leftist activist as a terrorist –legitimizing the Colombian government’s war on dissent.

In theory, an open trial could be a good thing for the cause of democracy. Ms. Torres has often stated that she would agree to a trial before a judge where the evidence against her is disclosed and witnesses can be compelled to attend and be cross-examined. An open trial, where state agents are required to disclose their sources, could demonstrate the extent to which the Colombian state falsely accuses dissidents, and to which Canadian security agencies collaborate with repressive governments.

However, when secret evidence is permitted, all manner of anti-democratic abuse is enabled.

The state has disclosed a book of public materials –news articles and published reports- which it claims show Ms. Torres could have links to the FARC, but none of these materials state that she actually does.

The state has relied on articles from right-wing sources, such as Jane’s Intelligence Review, claiming that the UP and the Colombian Communist party, which she belonged to, are just a political front for the FARC. Both are lawful and peaceful civilian political movements in Colombia.

They have also relied on a statement the Colombian police attribute to a captured FARC leader, which appears to be the result of torture, where he states that the FARC is very proud of intellectuals abroad who criticize the Colombian state and advocate for peace in Colombia, because this serves the FARC’s interests.

The state has disclosed an article from a leftist magazine in the United States, which says that Ms. Torres went on a speaking tour in the United States where

she promoted peace in Colombia, criticized the Colombian state's human rights abuses, and the support of the US government for Colombia's war effort.

The state has also disclosed articles confirming that Ms. Torres's elder brother is a leading member of the FARC, and that her former common law spouse joined the FARC.

We are not aware of any other evidence against her. As the case has been prosecuted in an immigration admissibility hearing, rather than a security certificate hearing, it is held before an immigration Board Member, a non-lawyer who has refused all motions for further disclosure or production of even representative witnesses.

The state refuses to confirm or deny whether information from the Colombian security forces is part of the case against her. The state refuses to confirm or deny what secret sources tell it about her speeches in the United States. The state refuses to confirm or deny what it claims to have learned in secret questioning of refugees, immigrants and Canadians approached by CSIS officers.

The only information disclosed to Ms. Torres is banal, and irrelevant to the question of whether she is actually a member of the FARC. Yet we have been required to mount a massive defence against all potential sources of evidence, whether known or unknown, in a hearing that has gone on for over a year.

The prosecution of Ms. Torres, relying on secret evidence, raises concern about Canada's complicity in state repression of dissent by Colombia. The Canadian government's intelligence service is targeting Colombian refugees in Canada, and warning Canadians who employ or collaborate with them that they could be accused of supporting terrorism. The Canadian government is relying on evidence obtained through torture in Colombia. It is probably relying on evidence from dubious sources in the Colombian security services or embassies, or recycled evidence from them repeated by US or Canadian intelligence services. The Canadian government is probably relying on statements by people

who are part of the Colombian president's worldwide million informants campaign.

The Canadian government has cast a chill on the Colombian exile community, and extended the long arm of state repression from Colombia to Canada. It has subjected a victim of state-sponsored torture and interrogation to cross-examination based on undisclosed evidence from unknown sources.

Because our Supreme Court lags behind Colombia's Constitutional Court, the Canadian government is doing for the Colombian government what it could not, in theory, do in a Colombian court of law.

This is persecution by proxy.

It is impossible for a political exile to properly defend against accusations where secret evidence is relied on. She, who knows the political and personal context of her accusers, cannot question them or call them into doubt. She cannot properly instruct her lawyer. She cannot help but feel revictimized by the state that persecuted her, in her supposed country of asylum. This is a form of psychological torture.

It is impossible for an exile community to take part in a democratic nation's discourse, or to call for peace and human rights in its home, when the long arm of their nation's repression extends under cover of secrecy, to Canadian prosecutions.

Canada also legitimates ongoing campaigns of violence in repressive states, where it legitimates their methods by relying on secret evidence to accuse dissidents of terrorism. While an open trial would allow informed debate of the issue, a secret trial validates the methods and values of the repressive state.

It may be inherently difficult for judges, who believe in the good intentions of the state, to accept that enabling state abuse of rights in the name of protecting

democracy and human rights ensures that abuses imperilling both will take place. While intelligence work must often function at a level of secrecy, a trial cannot. The principle problem with the state of the law in Canada is that it is not consistent with legal values which have been expressed as universal because they are necessary.

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