STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

COMITÉ PERMANENT DE LA JUSTICE ET DES DROITS DE LA PERSONNE

EVIDENCE

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• 0910

[*English*]

The Chair (Ms. Shaughnessy Cohen (Windsor—St. Clair, Lib.)): I'll call the meeting to order. We are dealing with Bill C-40, an act respecting extradition, to amend the Canada Evidence Act, the Criminal Code, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other acts in consequence.

Today we have, from Amnesty International, Roger Clark, secretary general, and David Matas, legal network coordinator; from the Canadian Council for Refugees, Janet Dench, executive director, and Jetty Chakkalakal, who is a lawyer. Are you with the council?

Ms. Jetty Chakkalakal (Lawyer, Canadian Council for Refugees): I do refugee law for the council.

The Chair: Welcome to both groups. We grouped you together because we thought you might have a similar perspective. I'm suggesting that each group make a separate presentation, and then we'll direct our questions accordingly. So if Amnesty International would like to begin, we'd appreciate it. Thanks.

Mr. Roger Clark (Secretary General, Amnesty International (Canada)): Thank you, Madam Chair, and thank you for the opportunity to make this presentation to you.

Our presentation will fall into two parts. I'll make some introductory comments and then David Matas will make some additional comments on one of the cases that illustrates the points we are raising.

Amnesty International welcomes Bill C-40 and in particular welcomes the fact that at last transfer of suspects to the international criminal tribunals for Rwanda and the former Yugoslavia will become possible. It is now over four years since the Security Council created the international tribunal for Rwanda on November 8, 1994. It's now over five years since the Security Council created the international tribunal for the former Yugoslavia on May 25, 1993.

In the intervening period, fugitives who committed crimes within the jurisdiction of these tribunals could come to Canada and Canada did not have the power to hand these fugitives over to these tribunals. For over four years in the case of Rwanda, five years for the former Yugoslavia, Canada has been available as a haven for international fugitives from these tribunals. Amnesty International has been calling for some time for legislation such as Bill C-40, which allows the surrender of fugitives to international tribunals.

Nonetheless, despite the fact that we welcome the tabling of the legislation, we are concerned that the bill makes no distinction between surrender to an international tribunal and extradition to a state. The international tribunal for the former Yugoslavia rules of procedure and evidence provide that the obligations regarding state cooperation laid down in the statute of the tribunal shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the tribunal that may exist under the national law or extradition treaties of the state concerned.

The registrar of the Yugoslavia tribunal drafted tentative guidelines for national implementing legislation. One guideline provides that the relevant state court shall approve the transfer of an arrested accused to the custody of the international tribunal without resort to extradition proceedings.

The Rome statute for the International Criminal Court defines extradition and surrender differently. Surrender is defined to mean the delivering up of a person by a state to the court, pursuant to the statute. Extradition, on the other hand, is defined to mean the delivering up of a person by one state to another as provided by treaty convention or national legislation. The Rome statute states that the requirements for the surrender process in the requested state:

> should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

Bill C-40 fails to comply with these provisions. According to Bill C-40, the transfer of an arrested accused to the custody of an international tribunal is done through extradition proceedings. Bill C-40 needs to be amended so that there is a regime of surrender to international tribunals separate from the extradition regime.

The assimilation of extradition to states with surrender to tribunals in Bill C-40 leads to a number of problems: the application of the rule of speciality, the use of the political exception rule, giving primacy to the minister instead of to the tribunals, and the rigours of the rule of double criminality.

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Bill C-40 proposes adoption of the rule of specialty. The rule of specialty is designed to protect the state interest in assuring that the accused is tried only for offences that are analogous to those in its own criminal justice system. This concern does not apply to an international tribunal. According to Bill C-40, the minister may seek any assurances the minister considers appropriate from the extradition partner or may subject the surrender to any conditions the minister considers appropriate, including a condition that the person not be prosecuted nor that a sentence be imposed on or enforced against the person in respect of any offence or conduct other than that referred to in the order of surrender.

Bill C-40 proposes adoption of the political offence exception. This exception is also not appropriate for surrender to international tribunals. According to Bill C-40, the minister shall refuse to make a surrender order if the minister is satisfied that the conduct in respect of which extradition is sought is a political offence or an offence of a political character. Yet the political offence exception has no bearing on genocide, other crimes against humanity, or serious violations of humanitarian law.

Bill C-40 makes the minister final judge of issues, which, according to treaty, are in the purview of international tribunals. The proposed Extradition Act is inconsistent with the intent to make international tribunals the final judge of admissibility in all cases before them.

Bill C-40 provides that the minister may refuse to make a surrender order if the minister is satisfied that the person would be entitled, if that person were tried in Canada, to be discharged under the laws of Canada because of previous acquittal or conviction; or if the minister is satisfied that the conduct in respect of which the request for extradition is made is the subject of criminal proceedings in Canada against the person; or if none of the conduct on which the extradition partner bases its request occurred in the territory over which the extradition partner has jurisdiction. While all of these grounds may be legitimate reasons for refusing surrender, according to the treaties it should be the tribunals deciding these issues and not the minister.

Bill C-40 proposes adoption of the rule of double criminality. Such a rule should not be imposed on surrender to international tribunals. According to Bill C-40, an accused is not extraditable unless the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada, in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more or by a more severe punishment, and in any other case by imprisonment for a maximum term of two years or more or by a more severe punishment, subject to a relevant extradition agreement.

The problem is not just that surrender requests may run afoul of the double criminality rule, the specialty rule, or the political offence exception. Even if at the end of the day surrender is the likely result, the mere fact that these issues can legitimately be raised under Bill C-40 extradition proceedings means that the proceedings can be unnecessarily protracted. Extradition proceedings could lead to lengthy delays in the transfer of an accused to the tribunals.

None of these issues legitimately arise with regard to the transfer of an accused to an international tribunal. The crucial question, if a tribunal asks Canada to surrender an accused, will not be whether the crimes are defined in the same way in the two jurisdictions, but whether Canadian courts are able or willing to bring the suspect or accused to justice in a fair trial that is not a sham.

The requirement that the double criminality rule must be satisfied before a person can be surrendered to an international tribunal can cause far more than delay. It can lead to the refusal to surrender war criminals and criminals against humanity requested by an international tribunal. The problem is the case of Imre Finta. What that case decided and the differences from what is in the statute of the International Criminal Court are set out in an appendix to this submission. The Criminal Code needs to be amended to overcome the decision in the Finta case. However, unless and until the Criminal Code is amended, the double criminality rule in Bill C-40 may prevent surrender of war criminals and criminals against humanity to international tribunals.

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If an international fugitive who the international tribunal for Rwanda or the international tribunal for the former Yugoslavia or the International Criminal Court had the power to prosecute were to seek refuge in Canada, and if Bill C-40 were to pass in its current form, Canada might be unable, because of the decision in Finta, to surrender the fugitive to the tribunal. Relying on the Finta decision and the double criminality rule in Bill C-40, the fugitive could contend that he or she would never be convicted here for the offence.

The Criminal Code offences of war crimes and crimes against humanity as interpreted by the Supreme Court of Canada illustrate graphically the inappropriateness of the double criminality rule for surrender proceedings to international tribunals. Whatever state interest there may be in refusing to extradite one of its nationals to another state for prosecution, that interest does not apply to a request by an international tribunal or the International Criminal Court.

Amnesty International recommends Bill C-40 be amended to distinguish surrender to a tribunal from extradition to a state. The proceedings for surrender and extradition should differ. For surrender, the proceedings should provide safeguards for the rights of detainees as set out in the statutes and rules of the tribunals: that the warrant for the provisional arrest of a suspect or arrest of an accused has been issued by the tribunal, and that the person detained is the person sought in the warrant.

The other aspects of extradition proceedings such as double criminality, the rule of specialty, the political offence exception, and the power in the minister to refuse surrender on grounds on which the tribunals are supposed to have final say should not apply.

I wish to table, Madam Chair, a number of documents that Amnesty International prepared in late 1996 and 1997 regarding the establishment of the International Criminal Court and the means for ensuring there is effective state cooperation, and that applies both to the tribunals and to the ICC.

If I may, I will pass to my colleague, David Matas, at this point.

Mr. David Matas (Legal Network Coordinator, Amnesty International (Canada): I'll be quite brief.

I appreciate being on the same platform as the Canadian Council for Refugees, for more reasons than one. But I want to point out to you our submissions are quite different in content. We are addressing surrender to international tribunals and the need to have a separate regime. The Canadian Council for Refugees, as I understand it, will be addressing the issue of extradition to states and the absence of a true refugee determination process in that context. I just want to point out that both I, individually, and Amnesty International as an organization are familiar with what the Canadian Council for Refugees is going to say and are in agreement with it. But we are addressing a different issue.

My colleague Roger Clark has pointed out in a general way why it's important to have a separate regime. What I want to say very briefly is why the case of Imre Finta makes that mandatory. There's a relatively long analysis of this case as an appendix to our submission, and I don't intend to go through that analysis. What I want to do is just point out three differences between what the Supreme Court of Canada says is Canadian law and what the International Criminal Court statute provides in terms of prosecution of international criminal offences.

One has to do with the defence of superior orders. The Supreme Court of Canada in the case of Finta acknowledged or accepted or held that there was a defence of superior orders for crimes against humanity as well as for war crimes. The statute of the International Criminal Court rejects the notion of a defence of superior orders for crimes against humanity. It does allow it for war crimes, but not for crimes against humanity or for genocide. There wasn't actually a prosecution of genocide in the Finta case, but one can assume from the Finta case that the defence of superior orders would be available for genocide. But it's certainly not available according to the statute of the International Criminal Court.

Secondly, there's the issue of the mental element necessary to cause a crime, to be convicted of a crime. For any crime, in order to be convicted you not only have to perform the act, you have to have a certain mental element. You have to have intent.

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Now the intent that the Supreme Court of Canada said was necessary was a very high level of intent. According to the court, the accused must be aware of or not willfully blind to the fact that he's inflicting untold misery on his victim.

The court said that the requisite mental element should be based on a subjective test. The court said the issue is not what a reasonable person would believe, but rather what the accused himself believed. The court said that the war crimes provision in the Criminal Code cannot be aimed at those who killed in the heat of battle or in the defence of their country. The court said that the Criminal Code provision about war crimes or crimes against humanity is aimed at those who inflicted immense suffering with foresight and calculated malevolence.

The statute of the International Criminal Court says something quite different. If the person has intent wherein the person means to engage in the conduct in relation to consequence, the person means to cause that consequence, or is aware that it will occur in the ordinary course of events.

So it's much closer to an objective test than the highly subjective test the Supreme Court of Canada uses.

Third, the Supreme Court of Canada had an independent defensive mistake of fact, which was also based on this subjective mental element. The statute of the International Criminal Court doesn't have an independent defensive mistake of fact. It refers to a mistake of fact but assimilates it to the mental elements, saying it arises only if the mistake negates the mental element required by the crime.

So what we have, at least in three very important respects, is a difference between what the Supreme Court of Canada said is the law in Canada about war crimes and crimes against humanity and what the International Criminal Court in its statute said is the difference between war crimes and crimes against humanity.

Of course, Bill C-40 imposes a double criminality rule. You have to be guilty of the offence here before you can be extradited, or there must be at least prima facie evidence. You would be guilty of the offence here before you could be extradited or surrendered to an international tribunal.

The result is that right now, at least the way the Finta case reads, many war criminals, criminals against humanity, and genocidal killers, if not all of them, could plead the Finta case to prevent surrender to international tribunals.

To a certain extent, Bill C-40 has been superseded by subsequent events. Bill C-40 was drafted some years ago, and in the interim, we have the statute of the International Criminal Court. One can hardly fault the drafters of Bill C-40 for not conforming to the statute of the International Criminal Court when the statute of the International Criminal Court was not even in existence when they drafted it.

But it's in existence now, and Canada has been a leader in developing that statute. Canada, we would submit, should be a leader in implementing legislation that would conform to the rigours of that statute.

So even if one cannot say the drafters are to blame for Bill C-40 because of the sequence of events, we would suggest that it falls upon this committee to correct the deficiencies in Bill C-40 as they become apparent from what one can see of the statute of the International Criminal Court and create these separate regimes for extradition and surrender.

Thank you very much.

The Chair: Ms. Dench.

Ms. Janet Dench (Executive Director, Canadian Council for Refugees): Thank you. I'd just like to point out that we are now joined by Nicholas Summers as a third witness for the Canadian Council for Refugees.

The Chair: Welcome.

Ms. Janet Dench: The Canadian Council for Refugees is a coalition of non-governmental organizations concerned for refugee rights. We have about 140 member organizations from across Canada. We have a written version of comments on Bill C-40, which we have submitted to the Department of Citizenship and Immigration. I've tabled a copy of that letter with the clerk of this committee. What we're saying this morning is essentially the points we raised in that letter.

First is the importance of amending Canadian legislation on extradition. For the Canadian Council for Refugees, a major concern is seeing that abusers of human rights are brought to justice. Refugees, as victims of human rights abuses, have a particular interest in seeing justice done. They don't want to see their torturers walking free, nor do they want to meet their torturers in Canada where they have taken refuge.

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We see Canada as part of a world in which human rights abuses are happening and in which human rights abuses have been allowed to occur for too long with impunity. We want to see Canada taking its role in bringing an end to this impunity.

Therefore, we warmly welcome the provisions of the current bill, which will make it possible for Canada to extradite to international criminal tribunals and to the International Criminal Court.

However, the concerns we want to talk about in the bill stem from our same commitment to human rights but refer to problems that we have with the bill as it currently stands. We recognize that the extradition bill is designed to deal with people who have committed crimes. We share the concern that criminals should not seek haven from justice in Canada. But those who are accused of committing crimes have not necessarily committed them, and even those who have committed crimes have human rights that must be respected.

Ms. Jetty Chakkalakal: The Canadian Council for Refugees opposes the provisions of Bill C-40 relating to refugee determination, particularly clause 96, which deems a negative decision in refugee cases, which is in effect a presumption of exclusion from due process.

We certainly do not wish for persons who face extradition to abuse the refugee determination system in order to delay their extradition. Most people affected will not be refugees. But our greater concern is that those who are refugees not be returned to countries where they face persecution. This is even more important, not less important, where they are accused of serious crimes. Fair refugee determination is essential to meet our international obligation, but it requires access to the determination procedure. Presumptive exclusion is inherently incompatible with this right.

The United Nations High Commissioner for Refugees, the key authority on international refugee determination, pointed out in its comments on the legislative review of the

Immigration Act earlier this year that exclusion is the most extreme sanction in international refugee law. It also said that there needs to be a balancing of the nature of the offence presumed to have been committed against the degree of persecution feared. It considered that exclusion should be examined as part of refugee determination so that a decision-maker could consider all relevant factors, including mitigating circumstances.

The Supreme Court of Canada recently found in Pushpanathan that exclusion to refugee determination is an exception in human rights law and therefore it needed to be interpreted and applied restrictively. This exclusion is not a simple administrative decision. The proposed amendment that would have a decision to extradite result in a deemed negative decision of the refugee board would not even allow a proper determination to take place so that this life-and-death decision can be made with regard to all the relevant circumstances. It leaves this very important decision to the whim of political discretion, and there is no recourse at all to due process or appeal. There is no opportunity for a judicial body to weigh evidence to see if a seemingly innocuous prosecution by another country is really persecution in disguise.

A hypothetical example could involve a member of a foreign government with which Canada has close trade relations. He decides to speak out or disagree with his government. The government brings about serious criminal charges against him in order to punish him. He flees to Canada and asks for protection. He knows he will not get a fair trial because he fears persecution, which is disguised as prosecution.

Under this bill, the decision to send him back would be a matter of simple discretion in the hands of a member of the Canadian government, which would also have to take into account political considerations, such as trade. There's no appeal. There's no sober second thought. Such an outcome is unacceptable in light of our international obligation not to send back refugees to persecution. By taking away access to a fair refugee determination, Canada would actually be playing into the hands of repressive regimes and would undermine any role it has in the realm of human rights.

Mr. Nicholas Summers (Member, Canadian Council for Refugees): Apart from the concerns raised with regard to the Immigration Act, there's also the concern that this act does not take into consideration the fact that Canada has obligations under other international covenants. In particular, we're concerned about the covenant against torture, which clearly states in article 3 that there is an absolute prohibition against sending a person back to a country where there is a risk that they would be tortured. Canada is a signatory to that convention.

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I appreciate that in clause 44 of C-40, there's a section that says the minister shall not make an order to surrender where it would be unjust or oppressive with regard to all the relevant circumstances. It's our submission that there can be no circumstances that would be relevant to make it just or proper to send somebody back to a country where they would be tortured.

All of this relates to the fact that the decision that has to be made with regard to whether somebody goes back is a discretionary one in the hands of the minister. In this case, it's the Minister of Justice under this act. There's no independent body, which has been pointed out. There's no body with expertise to deal with issues such as torture, refugee claims, or human rights conditions in the country in question.

It's our submission that there should be a process put into the act whereby the decision, which is often very complex and politically charged, can be made by an independent body that has the expertise to make that decision and whose decision can be clear and transparent.

Such bodies exist. We have, of course, the Immigration and Refugee Board, which deals with refugee claims. We would submit that such a board should also be set up in a case like this to deal with the problems that relate to extradition.

The discretion of the minister alone is not enough. I think part of the problem is the wording. It says simply that the minister must be “satisfied”. There is no definition of what that satisfaction must be or what sort of considerations he must take into account. The problem with that wording is that the only appeal available is a judicial review. And where there is discretion, of course, judicial review is a very difficult road to go.

Are there any questions?

The Chair: Just for the purpose of clarification, do you appreciate that all of those steps are subject to judicial review?

Mr. Nicholas Summers: They are subject to judicial review, but as I say, the act is written in such a way that all the decisions are discretionary ones. It speaks of the minister being satisfied. Look, for instance, at subclause 44(2):

> (2) The Minister may refuse to make a surrender order

Judicial review is not the avenue to go to challenge discretion, unfortunately, because most courts will defer to a minister's discretion.

Ms. Janet Dench: I'd like to just add to that. Clause 96 of the bill takes away judicial review in cases where they've deemed a negative refugee decision. So there's no appeal and no judicial review of that decision of not allowing someone access to the refugee determination system at all.

The Chair: Do you want to start, Mr. Reynolds?

Mr. John Reynolds (West Vancouver—Sunshine Coast, Ref.): Sure, I'll actually do this last one first and then I'll go back.

The Chair: I'm going to hold you to about seven minutes.

Mr. John Reynolds: That's fine.

Would you agree then that the minister shouldn't have a say in any of these cases? You're asking for a sort of refugee appeal board. But would you not be satisfied with a judge looking at this issue without interference from the minister?

Mr. Nicholas Summers: Not necessarily. A judge does not necessarily have the expertise to deal with this issue either. What you really need is a panel of experts, just as we have with the refugee board in refugee cases.

The fact is that you're dealing with very complex issues. You need to have somebody who's able to look at all of the data with regard to a country in terms of their human rights record. You're assessing the risk of torture and persecution. A judge of a court of appeal in any one of our provinces just doesn't have the expertise to deal with that.

Mr. John Reynolds: Should the minister not have any say at all?

Mr. Nicholas Summers: No, I'm not saying that. You could go through the minister, but I think the minister has to.... Obviously, the ultimate responsibility is the minister's. It has to be. But he can defer the decision to a panel of experts who will make the determination. Then the minister can confirm it or take his own steps.

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Just as with the refugee board, there is a quasi-independence there. The minister therefore has the ability to say the decision is made by somebody who is not politicized and it is a fair decision.

Mr. John Reynolds: That's if you assume the Immigration Appeal Board isn't politicized.

The Chair: You'd probably have a fundamental disagreement with them on that.

Mr. Nicholas Summers: Maybe not.

Mr. John Reynolds: I agree with that, if you can find something that's non-political—maybe a tribunal—but I'm trying to get at whether the minister has the final say. If you select somebody to make decisions, should they not be able to make those decisions without having to go back and be overruled? If they are the experts, why would we allow them to be overruled?

Mr. Nicholas Summers: If the process is clear and transparent and the minister uses his residual powers to overrule a board that exists under him, he would be publicly accountable for that, of course. The problems now are that these decisions are often made out of sight, no reasons need to be given, and an order is simply issued.

Ms. Janet Dench: If I can comment just to clarify what we are asking for, we're not proposing the specific mechanisms but the principles we want to see respected. We want to see decisions made by an impartial and qualified body.

Mr. John Reynolds: Well, the minister would be impartial.

Let me go back to the first group's statement, in which it says:

> Bill C-40 makes the Minister final judge of issues which, according to treaty, is in the purview of international tribunals. ...the intent [is] to make [them] the final judge...in all cases before them.

I'd like to understand what you're talking about. Should the minister not be making any decisions at all in these areas? Should just a judge make the decision?

Mr. David Matas: According to the treaties, these treaties have tribunals that make these decisions, so it is they who should be making the decisions.

Mr. John Reynolds: So if the tribunal makes a decision that Mr. X is wanted before that tribunal, what should Canada's position be? What are you saying? That we should just pack him up and send him off to that tribunal without any due process in Canada?

Mr. David Matas: I think it's incumbent upon us to make sure the person we have is Mr. X.

Mr. John Reynolds: And that's all?

Mr. David Matas: These tribunals themselves have rules about due process, about procedure, and we have to make sure they're respected. We can't use the fact that the tribunal has requested someone to violate rights that are in the treaty of the tribunal. There's a whole package of them, and we were very active in negotiating them. We should therefore make sure those rights are respected, and we should make sure that what supposedly comes through the tribunal really does come through the tribunal.

So there are those three things: make sure the rights that the tribunal treaty sets up are respected; make sure the request comes through to the tribunal; and make sure the person requested is the person we have. And yes, that's all.

Mr. John Reynolds: And then send them over.

Mr. David Matas: That's right.

Mr. John Reynolds: What if the tribunal has the right to issue the death penalty?

Mr. David Matas: Well, the fact of the matter is that the former Rwanda, the former Yugoslavia, and the International Criminal Court—in which we're very active—do not.

There is a provision in Bill C-40 about the death penalty. We were happy to see it, and we would like it maintained. Your hypothetical example of an international tribunal being set up that, in the future, would allow for the death penalty—

Mr. John Reynolds: It's been done in the past.

Mr. David Matas: It doesn't exist with any of the tribunals now; it was done in the far distant past. I would call that as most unlikely to happen now, given the state of current international play. There are so many states right now that will refuse to extradite or surrender for the death penalty that in my view no international tribunal that would allow for the death penalty could possibly be set up because it would not be functional. There would be too many states refusing to cooperate with it.

Mr. Roger Clark: I might just add that I think the body of international law now, along with decisions made by the UN Commission on Human Rights regarding the death penalty, moves entirely in the opposite direction. It certainly does argue against any sort of form of reintroduction of the death penalty at a national level, so I think it is not only hypothetical but very improbable under any circumstance at an international level.

Mr. John Reynolds: What concerns me is that if you don't have some sort of a system here, you could end up with someone like the fellow in the United States, Demjanjuk—I'm not sure that's what his name was—

Mr. David Matas: Demjanjuk, yes.

Mr. John Reynolds: —who was found innocent at that end after going through a whole process.

The Chair: He was found not guilty of that particular charge, not necessarily found innocent.

Mr. John Reynolds: Yes, well, I would want to make sure. If we didn't have due process, you could have a whole bunch of people being charged with things and having to go over and defend themselves in a foreign country.

Mr. David Matas: No, what we're dealing with are the international tribunals only. We're not talking about extradition to foreign states. With extradition to foreign states there's no problem whatsoever, except for this refugee provision, which we're concerned about as well. We're not suggesting that the protections disappear for extradition to foreign states. With

the international tribunals there are lots of protections; all you have to do is read those treaties. As I say, Canada has been heavily involved in negotiating those protections. We're saying we should respect the treaties; that's all.

• 0945

The treaties say it's these tribunals that are to decide these issues. We were at the forefront of taking that decision, and we shouldn't say one thing over there and another thing here.

The Chair: Thank you.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga—Maisonneuve, BQ): I just want to make sure I clearly understand the position of Amnesty International and your colleague, Mr. Matas. On the whole, you're satisfied with Bill C-40. However, you feel that there should be a different procedure for extradition to a partner state or a requesting state, and extradition to a human rights tribunal. There should be a special procedure for extradition to an international tribunal.

I would like you to go back to this and tell us your position again, in order to make it very clear to us. What amendments would you like to see made to the bill?

Mr. Roger Clark: Basically, you are right. The distinction in our presentation between a State handing over a person to an international tribunal and to an international criminal court must be drawn very clearly in both the bill and the Act. As we said in reply to the previous question, we are talking about an international institution formed with the joint participation of the world's nations with Canada having played a key role. Canada made more of a contribution to the creation of the international criminal court than any other State.

Thus we must have a very clear, very visible distinction between what is called aid, from State to State, and international legal aid between a State and a tribunal. The current bill does not show this distinction, and one could even draw the conclusion that it is looking only at extradition to these tribunals. This does not coincide with the Rome statute or what is already contained in the laws governing the international tribunals.

Mr. Réal Ménard: But Bill C-40 contains references and draws distinctions between a tribunal and a State. The Schedule even contains a list of states with which we have treaties, and those with which we do not. More specifically, in legal terms, in order to help us understand clearly, what kind of distinctions would you like to see in the bill?

[*English*]

Mr. David Matas: You say there's a distinction in the bill between tribunals and states, but in fact if you look at the bill, there is no distinction. There's one regime for all, a sort of one size fits all. There's reference in an annex to both states and tribunals, but they're all subsumed under the same umbrella and they all go through the same process.

What we envisage is a different procedure for surrender to tribunals from the procedure for extradition to states, so that the bill itself would say for extradition to states you go through these steps and you have to pass these tests, and for surrender to tribunals there are different procedures; you go through those steps and you pass those tests, which are different procedures, different tests.

Indeed, we at one time actually toyed with the possibility of suggesting two separate bills. But you prefaced your remarks by saying we were happy with the bill as a whole, and that is certainly so. In fact, we are more than happy. We had been calling for a bill like this for some years, because the obligation to have something like this arose five years ago when the former Yugoslavia tribunal was created. So this bill is five years late, and in the interim there have been fugitives from the former Yugoslavia.

[*Translation*]

Mr. Réal Ménard: Mr. Matas, I understand the distinction that you would like to see the members adopt, a distinction between the procedure as it applies to a State and the procedure as it applies to a tribunal. What I would like to know is why you also say that the rule of specificity should not apply in the same terms in the case of the international tribunals.

• 0950

What you're basically concerned about is the fact that some circumstances set out in an extradition request made by a specific State should not apply to an international tribunal. You say that the rule of specificity should not apply. The provision giving the Minister the authority to proceed or not to proceed should not apply in the same terms. You say that when it is a question of international law, when it is the community that is forming a tribunal, it is not the same thing as a State requesting extradition.

Please talk to us about the rule of specificity now. What could be the consequences if it were fully applied? Please try to convince us that in our legal system there is something amiss. The Justice Minister has specific responsibilities. What you are asking us to let go of somewhat is national sovereignty. I am sure that on this point, my Liberal friends will agree with me. When people are elected to speak on behalf of the community, and in matters of justice, to make decisions, it is certainly not unreasonable for it to lie in the hands of the minister.

Please talk about the rule of specificity. What is it that bothers you about the fact that the minister has the final word, according to section 44, which gives him or her the power in some cases to refrain from having a person extradited?

[*English*]

Mr. David Matas: Let me deal with this notion first of sovereignty, that we're asking for the limitation of sovereignty.

[*Translation*]

Mr. Réal Ménard: Say it with enthusiasm.

[*English*]

Mr. David Matas: I think I'll decline that.

Mr. Réal Ménard: It was just a joke.

Mr. David Matas: Sovereignty exists in the context of international law and it has meaning only as an international law notion. International law is a body of law. States have sovereignty because international law gives it to them, but international law is not just the sovereignty of states, it's a whole body of law. International human rights law is part of that body of law. The treaties establishing the international criminal courts are part of that body of law. If states expect their sovereignty to be recognized at international law, states in turn have to respect international law that recognizes this sovereignty, which means the whole body of international law.

What we have with these treaties is another aspect of international law that states have willingly signed on to. And in the case of Rwanda and the former Yugoslavia it was ratified. In the case of the International Criminal Court, Canada has signed but not yet ratified. One of the things it has to do is get its legislation in shape in order to get it ratified. It is in the process, we would hope, of doing so. Canada has also been a leader in the establishment of the court.

So one has to juggle the notion of sovereign states with all these other aspects of international law, including these international tribunals. Canada—one could say for better or for worse, but I would say for better—has chosen to ascribe to these tribunals and take some leadership on them, and it would, as I said before, be inconsistent in its own legislation to contradict that.

I've talked about double criminality, specialty political exception. There are two particular problems with them. One is that even if at the end of the day a tribunal asks for a fugitive and the person is surrendered in spite of all these exceptions, the very fact that they can be raised is going to unnecessarily protract proceedings. We don't want people who are international fugitives tied up in the Canadian courts for years dealing with issues that ultimately have no bearing on our obligations under the treaty, because that just frustrates the realization of international justice. You can say that's a theoretical problem, but obviously one of the reasons Bill C-40 is here is that extradition proceedings right now are taking far too long, and they could potentially still take far too long if Bill C-40 is passed.

The other very real problem is the rule of double criminality. With the rule of double criminality, the problem we face is not just that somebody can raise the issue and drag out the proceedings, but somebody could actually escape justice because of that rule. We have in our Criminal Code the crimes, crimes against humanity and war crimes, that are in the international statutes, but the Supreme Court of Canada has interpreted those crimes so restrictively in the case of Finta—which I've analysed in this index—that virtually every war criminal and criminal against humanity can plead the Supreme Court of Canada decision on Imre Finta, say he could not be convicted here for these offences, invoke the rule of double criminality, and successfully argue that he should not be surrendered to an international tribunal for an offence that would fit within the provisions of the crimes of those tribunals. So the result would be that because of the double criminality rule and because of the way the Supreme Court of Canada has interpreted the parallel provisions in our Criminal Code, we would end up being in violation of these tribunal provisions.

• 0955

Obviously one solution to that is to amend the Criminal Code, and as I understand it, it is the government's position that they will do so to overcome the case of Finta. But that's not here before you now, and unless and until that happens, an accused can plead the Finta case and the double criminality rule to avoid surrender to international tribunals.

I don't know if that was passionate enough for you.

The Chair: Mr. Ménard, I'm going to pass to another—

[*Translation*]

Mr. Réal Ménard: I will have the floor again, I hope.

[*English*]

The Chair: I'll try to come back.

[*Translation*]

Mr. Réal Ménard: Thank you.

[*English*]

The Chair: Mr. MacKay, did you have some questions?

Mr. Peter MacKay (Pictou—Antigonish—Guysborough, P.C.): Yes, thank you, Madam Chair, and thank you all for being here. We really appreciate your input into this.

I have a question about your difficulty with the transparency in the process, and I'm trying to follow your line of argument in suggesting that a board would necessarily be preferential to the minister having the discretion over these types of cases. My own feeling, and I find myself in an odd position as an opposition member defending the minister—

The Chair: I'm sure she'll appreciate it.

Mr. Peter MacKay: —but obviously the minister herself, the individual minister, is not making these decisions in isolation. The minister would not be making the decisions on any limited basis. They have a huge department in this country under them, which would take into consideration the political dynamics that exist and the international treaties that would apply as well—all of the criteria you talk about—in making these decisions on extradition. I'm not suggesting that you're telling us it's one person here, but the Minister of Justice obviously represents a huge resource in terms of coming to their decision.

So is it the discretion that you're concerned about being too centralized? Is it the transparency issue, that the decision is going to be made perhaps without public or international scrutiny?

Ms. Janet Dench: We have a lot of experience with discretionary decision-making in the immigration system, and our experience from our members is that it is very unsatisfactory, because you never get to know on what basis decisions are really made. You never know exactly what is taken into consideration. This discretionary decision-making issue is a contentious point for those in the refugee and immigrant advocacy community, because of this experience.

What we would like to see is, as you say, a transparent process whereby there is an independent decision-maker who is taking into consideration the arguments of the applicant and also the other arguments that may be put forward by other interested parties.

In the cases we're dealing with here that are in Bill C-40, you are faced with a situation where the decision-maker is also in a sense a party to the decision. Because the justice department has decided to proceed with this request for extradition, they have an interest in it. So what we're looking for is an independent decision-maker in a transparent decision-making process where it is clear to all parties what is going into the decision, what the evidence is that is heard, and what the decision finally is and how it is motivated.

The second point has to do with the political pressures. You said the justice department is large and the minister, obviously, is not making the decisions on her own. That is of course true, but as long as the decision is finally the minister's, she has to take into consideration political considerations, which in many cases will not be consistent with seeing that justice is done to the individual.

We gave you the example earlier of a situation where someone is being sought by the government of a country with which Canada has close trade relations. Obviously, the minister is in an uncomfortable position if she realizes that justice is not being done, but at the same time realizes the consequences for the Canadian government if she personally is seen to be

making a decision on behalf of the Canadian government on a discretionary matter that will not sit well with the government of a country with whom Canada has close trade relations. So in her own interest she has an advantage in having that decision made by an independent body to whom she can refer when that country is displeased with a decision that has been made.

• 1000

Mr. Peter MacKay: I'm trying to get at the ideal method of decision-making. The words I recall you using were an impartial and qualified body. In an ideal scenario, would you have it that the minister would have checks and balances between herself and this hypothetical board, if one were to exist? Ultimately, who would have the say? I think it's a given that the minister has to have some discretion. Whether it should be the final say is the issue you're questioning.

Are you suggesting that there be a dual system where they might first appear before a board? As Mr. Reynolds mentioned, you're presuming that the board itself is going to meet this criteria, particularly that of impartiality. How many would be on the board? I'm looking for some input into what this board would be made up of. How would you comprise the board?

Ms. Janet Dench: Within the Canadian Council for Refugees we have not undertaken the work to develop exactly what kind of process we would like to see, but only to identify the principles we would like to see respected.

We have particularly focused, of course, on the refugee determination issues. From our point of view, the Immigration and Refugee Board is a positive element in the system insofar as it is an independent body. It is our position that the independence of the Immigration and Refugee Board is less than absolute, and we are constantly encouraging the government to protect and enhance the independence of the Immigration and Refugee Board.

However, as part of encouraging the independence, we want to make sure that decisions are made by the IRB, which is an independent body, rather than being taken away for the discretion of the department, the department in many cases being the immigration department but in this case to the justice department. So some independence is better than no independence.

Mr. Peter MacKay: Thank you.

The Chair: Thank you, Mr. MacKay.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you.

I just wanted to touch again on the Finta problem. Is it your view, Mr. Matas, that if the Criminal Code were remediated in some way to patch up the problem that has been described, we wouldn't have a problem with this bill? I'm just dealing with the double criminality issue.

Mr. David Matas: We wouldn't have the particular problem that the double criminality provision could be invoked to deny surrender. We would still have the problem that it could be invoked and arguments could be made. If the Finta problem were patched up, it would be my estimation that at the end of the day those arguments about double criminality would not succeed and the person would be surrendered. But we would still end up having extradition taking a lot longer than it should by dealing with issues that according to the treaty we shouldn't even be considering. The mere delay in surrender to tribunal should be a matter of concern to this committee.

Mr. Derek Lee: We have a bill that attempts to assist Canada to fulfil its international obligations as a state among many states. But at the same time we have an obligation to protect Canadians. That's why we're here; we're governing for Canadians. Don't you think this bill strikes a reasonable balance? Given that intent, if you don't think the balance is correct, if you think the process that may flow from this is too long or whatever, how would you fix it and still maintain a balance in a statute that's enacted for Canadians?

Mr. David Matas: I think in maintaining a balance what we have to do is look at what's happening elsewhere. These are tribunals that we have invested some confidence in.

• 1005

Canadians are part of a global community, and we cannot be protected in isolation. We're talking about international fugitives, international crimes, and the only effective form of protection is an international form of protection, which we have helped to construct. This is not just about Canada.

Obviously, with extradition legislation, this is part of what's happening globally. What we want to do is insert this in such a way that it makes sense in a global context. We've gone to these tribunals, we've exercised leadership, and we've gotten a lot of what we wanted. These are things we have asked for in terms of the protections there. It's not necessarily that we're contradictory, because this bill was drafted earlier. But we've gotten what we wanted, and we should be consequent with our own international position and also set an example for other countries. Supposedly because we've advocated this internationally, what these international treaties say is what we're asking other states to do. So we should be doing—

Mr. Derek Lee: Yes, we know we have this potential problem. How would one fix it?

Mr. David Matas: The way I suggest we fix it, and we have a very good guideline in the treaties themselves, is that we set up two separate regimes. We define surrender to international tribunals differently from extradition to states, as the International Criminal Court statute does. We say that for surrender to international tribunals there has to be the protection of basic rights as they are set out in the statutes of the tribunals in terms of access to counsel, detention, and so on. There's a sort of whole bill of rights there. We have to make sure the request really came from the tribunal. We have to really make sure the person brought to court is the person who is wanted in the warrant. But the other requirements of double criminality, specialty, political exception, and so on simply do not apply to this surrender proceeding.

Then we have a separate extradition regime, which applies only to requests from states, and the extradition regime for requests from states would be as it is in Bill C-40, hopefully with the refugee provision changed. But everything else is the same.

Mr. Derek Lee: Thank you.

I'd like to direct a question in relation to the refugee issues. I personally don't have any problem with having someone who was elected to govern and made a minister making decisions. That's what these people get paid to do. That's what the Minister of Justice gets paid for, that's what the Minister of Foreign Affairs gets paid for, and I think that's what is going to happen in this bill. I understand your suggestion that somehow ministers may not be well equipped. I don't agree with you, and I think I'll just leave it at that.

But what I wanted to ask was—and I don't know which one of you would like to answer this—in the event one felt the need to question a ministerial decision, an exercise of discretion, believing it was not founded properly in law, that there was a real problem with it, what documentation do you think would be there if you wanted to challenge the discretion?

I'll just note that in making decisions under this statute, the Minister of Justice would usually receive information from the Department of Foreign Affairs with or without the signature of the Minister of Foreign Affairs. I don't think this bill includes any reference to a particular document. Maybe it would be a phone call. Maybe it would be some words over coffee. Maybe there would be a memo that would never be made public. Do you think the process, albeit somewhat deficient from your perspective, would be improved if there were some recognition of formal documentation moving from Foreign Affairs to Justice that related to the exercise of ministerial discretion in relation to refugee claims?

Ms. Jetty Chakkalakal: Maybe I can start, and then Nick can take over.

As Janet was saying, we've had a lot of experience with discretion at the ministerial level. As it is now, not only do they not have to give us what they base their decision on, but also a minister doesn't even have to give reasons for the exercise of discretion. In this bill it is so vague, and it is not just if the minister is satisfied. There are no criteria given. There's no way we could challenge a judicial review, and the deeming provision has no judicial review whatsoever.

Nick.

• 1010

Mr. Nicholas Summers: The problem of course is it's not necessarily the minister who's making the decision. Of course, he or she delegates that authority to one of the officials of the department and the process becomes.... The minister is ultimately responsible.

Mr. Derek Lee: Thank you. The minister will take advice from officials, but it will be a ministerial decision.

Mr. Nicholas Summers: Yes, but the reality is that somebody will do the legwork, and the minister may or may not have delegated the final decision to someone else.

Mr. Derek Lee: That's the case in most law firms.

Mr. Nicholas Summers: Yes. I'm simply saying that's the way things work.

Mr. Derek Lee: Someone does the legwork.

I'm sorry, I interrupted you.

Mr. Nicholas Summers: The only provision in this act I've found that relates to documentation is there is a time limit for the person who does not want to be extradited to file submissions with regard to why they think the minister should not give the surrender order. There is no provision in there for what steps the minister has to take besides that to make his or her decision with regard to all of the issues that are set out here with regard to whether it's a political crime, whether there's torture, whether there's any of the other criteria that are set out when the minister should not issue an order.

So there is no paper process identified here. There is no time when the parties get together and sit down and discuss it. There are 30 days to file papers and then at some point later a decision is made. There is no obligation for a decision to be in writing to be given to the claimant or appellant, whatever you want to call it.

Mr. Derek Lee: That was my suggestion, but do you think a formal document of this nature, a brief, a memorandum, a document—I don't know what we'll call it, but it's the brief or memorandum used by the minister in whole or in part in making the decision, in exercising the discretion—should be identifiable and available to the party? Would that help?

Mr. Nicholas Summers: Of course it would help. If one has access to all of the documentation and the reasoning that went into a decision, that would be good.

What would be much better is if it was combined with a real appeal on the merits of that decision, because what we have now.... The language in the act even is a bit ambiguous about exactly what sort of appeal can be brought at this decision, but I think a court would interpret the language to say that the ministerial decision can be reviewed judicially by a court of appeal of one of the supreme courts of the provinces.

But judicial review is not an appeal on the merits. Judicial review is, did the minister use good faith or one of the other very limited criteria for that decision?

So it's all very well to have the documentation, but unless you can then say the minister erred because he or she did not understand this issue or did not get the proper information in front of her, what's the point?

The Vice-Chairman (Mr. John Maloney (Erie—Lincoln, Lib.)): Thank you.

Mr. Ménard, three minutes.

[*Translation*]

Mr. Réal Ménard: I would like to know what you think of section 44. I do not know whether you have a copy of the bill with you. As someone who is concerned about human rights, I find section 44 to be the most important one in the bill.

Mr. Matas, Mr. Clark and Janet, you have all expressed concern about the possibility that this process will lead to people being sent back to countries that practise torture. From a strictly legal viewpoint, do you not feel that under section 44, we have legislative provisions to protect against this?

Ms. Janet Dench: I feel that section 44 is very interesting, because it indicates that requests for extradition will be rejected when they pertain to people who are persecuted for reasons based on race, nationality, ethnic origin, etc. We greatly appreciate the wording of this section, because these concerns are central to our discussions. The question is so important that we cannot afford to make a wrong decision.

• 1015

According to the present wording, only the minister has the tremendously important responsibility of making what he or she feels is the right decision. We have some reservations about that.

Mr. Réal Ménard: Yes, but you are missing one aspect. Later on, before the bill goes to third reading in the House of Commons, we can bring this question to the officials, which have far less power than you say they have, I feel, even if, as we know, there is still a balance of powers.

How do you feel about the matter of judicial review? The decisions are not always discretionary in the bill. If you do not read the legislative summary, perhaps our clerk can give you a copy. It describes at least two or three stages where a judicial review can be conducted. Would you agree that it is not all left up to the discretion of the minister?

In the final analysis, the system definitely does say that the decision will be up to the minister. But does section 44 give these guarantees by citing as grounds for refusal the suggestion that "surrender would be unjust or oppressive"? What do you feel about the balance between the minister's power and the judicial review set out in the bill in two stages?

Ms. Janet Dench: I will give the floor to Mr. Matas.

[*English*]

Mr. David Matas: You did invite me to also answer this question, so I'm taking advantage of this invitation.

The bill does not say a person shall not be returned if surrender would be unjust or oppressive or the request is for the purpose of prosecuting, etc. It says the minister shall refuse to make a surrender if the minister is satisfied. So the test is whether or not the minister is satisfied. That's not what our international treaties say. The international treaties say the minister must be satisfied that the international treaties say there are reasonable grounds to believe that. When we get to judicial review in Canada, the judicial review is not about whether the surrender would be unjust; the judicial review is of whether or not the minister was satisfied.

If the minister is satisfied, then the test has been met, whether the minister was right or wrong. But according to international law, the standard is whether it is going to be unjust or oppressive, whether it's going to be for the purpose of prosecuting, and so on. So we have the wrong test here. It's not an objective, real test but a subjective test of whether or not the minister is satisfied.

[*Translation*]

Mr. Réal Ménard: You would like it to be automatic. I understand your viewpoint. When talking about international law and about surrender to an international tribunal, you say that essentially the minister's assessment should not be a factor. You maintain that it should be automatic whenever an international tribunal requests that a person be extradited or something similar to that. You would not like the minister's assessment to be a part of it.

[*English*]

Mr. David Matas: Exactly. Our obligation internationally is that we don't return them to torture. Our obligation internationally is not making sure the minister is satisfied that we don't return them to torture. If we are in fact returning them to torture, the fact the minister was satisfied in the opposite direction does not keep us in compliance.

[*Translation*]

Mr. Réal Ménard: I understand your point of view. I find it somewhat unsettling.

[*English*]

The Vice-Chairman (Mr. John Maloney): You're over your time.

[*Translation*]

Mr. Réal Ménard: Have I run out of time already? The time goes by so quickly on this committee.

[*English*]

The Vice-Chairman (Mr. John Maloney): Mr. Reynolds, please.

Mr. John Reynolds: Does everything in this comply with the Canadian Charter of Rights and Freedoms? Is there anything in it that does not comply?

Mr. David Matas: I take the point of view that the Canadian Charter of Rights and Freedoms is an internal Canadian expression of international human rights. In fact, if you look at the evolution of the charter, many of its provisions came from international human rights instruments.

International human rights law is constantly evolving, as we have seen with the articulation of these tribunals. These tribunals are new, and they are further expressions and developments of international human rights law. I would say that a sensitive and consistent appreciation of the charter would require conformity of this bill with these international tribunals, which are designed to promote international human rights.

Mr. John Reynolds: Is that a yes or a no?

Mr. David Matas: My position is what it was before in this context: it doesn't conform with the charter insofar as it doesn't conform with the international tribunal jurisdictions.

Ms. Jetty Chakkalakal: I just have a short comment.

When we're dealing with returning someone to death or torture, we're dealing with interfering with life, liberty, and security of the person. Those things, according to our charter, aren't supposed to be deprived of without due process.

• 1020 

I think all of my colleagues agree with me that there is no due process here. Discretion is not equal to due process. There's no hearing. There's no reasoning behind a minister's discretion. We would expect more due process when we get a parking ticket—more appeal rights, or a fair hearing to look into that item. We should expect more due process in a situation where life, liberty, and security of the person are involved.

Mr. Nicholas Summers: If I might just say something very briefly, you might note that the Immigration and Refugee Board was set up after a decision of the Supreme Court of Canada in the Singh case. The Supreme Court found that there was a right to due process and to a hearing before an independent tribunal. I would think you may be well looking at the same sort of thing here.

Mr. Roger Clark: I have another comment in response to that.

I think we keep coming back to the question of national sovereignty versus the authority of international courts. At least, this is the issue we're raising here.

First of all, as my colleague has pointed out, the authority of international courts really is part of a creation to which Canada has been a major contributor. We have brought this about, so it is now our duty internationally to make sure that national legislations—not just our own, but other nations' legislations—allow the international court process to function, and I'll give two examples of why the problem is there.

One is the case of Pinochet currently. It's clear that his case is calling into question some of the authority of international procedure. In this case, it has to do with extradition to Spain, but it's nevertheless an illustration of how national law and procedure can impede a process that may in fact be heading towards justice.

The other example is the position in Rwanda. Rwanda has the death penalty. Rwanda is carrying out a sham of due process, and justice is being denied. Yet when the international tribunal for Rwanda was established, it was very clear that the international tribunal had authority or supremacy over the process inside Rwanda. In other words, the international process was an internationally recognized guarantee that those standards would be met. If the international standards were not being met, then clearly we'd have a different set of problems.

What is at issue here is whether or not the international tribunals, and ultimately the international criminal court, are going to be able to function in a way that does not depend on the whims of national standards and process even if national standards are good. The point is that the international tribunal has to have the authority and the ability to work in a way that is not dependent upon other things that may in fact impede or delay justice internationally.

Mr. John Reynolds: So we have to give up our sovereignty.

The Vice-Chairman (Mr. John Maloney): Last question, Mr. Reynolds.

Mr. John Reynolds: Pinochet is a different case because it's not an international tribunal; it's a state versus a state. You have the diplomatic community involved, and everything else.

Mr. Roger Clark: That's correct, but it's not giving up sovereignty. The point is that our legislation must in fact allow for international law to take its proper course. If national law impedes that, slows it down, puts barriers in the way, then we're not satisfying our international obligations. That is really what is at issue here.

It costs us nothing to introduce a separate regime into Bill C-40 that allows for other issues that have been raised with regard to refugee determination and so on. Nevertheless, a distinction can be made very easily on extradition between states, where a lot of the protections and so on need to be in place, as opposed to a separate, distinct regime that acknowledges a different process in the case of international tribunals and, ultimately, the international criminal court.

The Vice-Chairman (Mr. John Maloney): Thank you, Mr. Reynolds.

Mr. Peter MacKay, and then Mr. John McKay.

Mr. Peter MacKay: Thank you, Mr. Chair.

As a backdrop to my question, it's recognized that you don't take your Canadian charter rights with you when you leave our country. Much of this bill, and much of what we'd like to see accomplished here, is premised on the fact that Canada obviously has a different relationship with a lot of the countries we would be involved in. There are some that are signatories to the international agreements to which Canada is also a signatory, and there's a lot of commonality. In what we're talking about here, though, maybe we're wrestling with what's almost an impossible task, and that is to have cookie-cutter legislation that is going to apply to every single country.

• 1025

Criminally, the countries we're going to be dealing with most often are probably going to be Great Britain and the United States, where there's the greatest amount of travel. I therefore have a question with respect to the death penalty, without getting into the merits of all of that. In the United States, you obviously have some states that do have the death penalty invoked, particularly in the southern U.S. There have been numerous examples in the last number of years in which American citizens have been sent back to states where the death penalty was or could be invoked.

Again, this goes back to the definition that Mr. Matas gave us, which I think is a very good one, and that's this internal expression of human rights that we have in Canada, that being our charter. But the charter isn't something that even Canadians can take with them when they leave the country, so how far can we go in trying to impose this? The definition you're using is the specialty rule. You're saying Canada is going to try to set a standard that may not exist in another country.

Mr. David Matas: I think it's wrong to talk about no death penalty as if it's a Canadian standard and not another country's standard and relativize it that way. At least from the point of view of Amnesty International, we view the death penalty as an international standard that some countries don't comply with—most notably many of the states, although not all of the states of the United States. Within Canada, of course, you'd comply with it.

I assume you know there is a provision in Bill C-40 about the death penalty. It's in subclause 44(2), and it says:

> The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct in respect of which the request for extradition is made is punishable by death under the laws that apply to the extradition part.

That's also in the standard-form extradition treaty right now, and it's in many of our extradition treaties, including our extradition treaty with the United States.

It's our position that this should happen in every case; that the minister should do it in every case; that he or she should be obliged to do it; and that, indeed, the Charter of Rights and Freedoms requires it. But that's a separate issue, and it may have to be litigated. In fact, it has been litigated in Ng and Kindler, and it's being litigated again in Burns and Rafay. We know it's the government's position that they should have the discretion but should not be obliged, and that's the way it stands now.

I wanted to actually take advantage of the fact that I have the floor now just to refer to something in the agreement between the United States and the international tribunal for Yugoslavia. It says:

> The requirements for a finding that a person is subject to surrender to the Tribunal are solely those specifically articulated in this Agreement. No additional conditions regarding or defenses to surrender may be asserted by the person sought as barring such person's surrender to the Tribunal under this Agreement.

The United States historically has been even more jealously guarding its sovereignty than Canada has. At least for the tribunal for the former Yugoslavia, though, it has accepted the principle of a separate surrender regime for the tribunals. None of the defences it would normally raise to extradition can be raised. I just wanted to point that out.

The Chair: Thank you, Mr. MacKay.

John MacKay, a quick question and a quick response, please. We're out of time.

Mr. John McKay (Scarborough East, Lib.): I just wanted to pursue this distinction between “surrender to international tribunal” and “surrender to state”. You're disappointed in the bill in that you say the bill should be “amended so that there is a regime of surrender to international tribunals separate from the extradition regime”. It should be, if anything, less burdensome.

When the minister came here the week before last, I understood him to be saying that the extradition to a state requires a higher standard, and the extradition to tribunals requires a

lower standard of evidence. That leaves me confused. Are those contradictory concepts, or is the bill flawed here? This is not clear at all in my mind.

• 1030

Mr. David Matas: If you look at the bill itself, there is no distinction between states and tribunals. If you look at the definition section, it refers to “extradition partner” as:

> a State or entity with which Canada is party to an extradition agreement, with which Canada has entered into a specific agreement or whose name appears in the schedule.

That's the only place in the bill where you find a distinction between states and entities. You can find the tribunals in the schedule, so everything is assimilated into one. Under this umbrella category, both the states and the entities are defined as extradition partners, and the whole bill applies to both without any differentiation between them.

Mr. John McKay: So if the minister said it was a lower standard of evidence to extradite to a tribunal, he would be wrong about that.

Mr. Roger Clark: Certainly, based on what is before us now, I would say he is not correct. Unless he can show from the document that there is a different standard being applied.... We don't see that. In fact, if anything, I would suggest the minister is probably agreeing with us. What he is in fact suggesting is that there should be a different process and that the standard should be one facilitating the operation of the international tribunals.

Mr. John McKay: What you're saying is that it should be less burdensome.

Mr. Roger Clark: Exactly.

Mr. John McKay: Therefore, it is a lower standard of evidence.

Mr. David Matas: It should be, but unless we've missed something, there's nothing here to indicate that.

The Chair: Thank you very much for two interesting and thought-provoking presentations.

We're going to rise for a minute while our next witnesses join us. We'll recess for five minutes.

• 1032

• 1040

The Chair: We're back, and we have with us the Criminal Lawyers' Association of Ontario. Michael Lomer is the secretary and Paul Slansky is a member.

Welcome, gentlemen. Michael, after spending two days with us last spring, you're back.

Mr. Michael Lomer (Secretary, Criminal Lawyers' Association of Ontario): I couldn't get enough of it.

The Chair: Welcome.

Mr. Michael Lomer: Thank you. I'd like to thank the members of the committee for inviting us up here. We have material we'd like to pass out. It's our submission.

[*Translation*]

First of all, I am sorry that I have been unable to give you a copy of the French version of our brief. I represent a volunteer organization, and until yesterday afternoon, we did not have anything prepared, either in English or French.

[*English*]

So we're lucky to have it in any language at all.

The Chair: By the rules of this committee we need unanimous consent in order to receive a brief in only one language. Do we have unanimous consent?

Some hon. members: Yes.

The Chair: Thank you.

[*Translation*]

Mr. Réal Ménard: Our clerk will take the measures to have it translated and then distribute it to us.

Mr. Michael Lomer: Thank you very much.

[*English*]

The Chair: Thank you.

Mr. Michael Lomer: I'd like to make a brief opening statement and give an overview of the Extradition Act as it presently stands. It has been around for a significant period of time, but it has nonetheless undergone some recent fundamental changes. When the charter came in in 1992, it had certain rights attached to it, as you're all aware, that had an impact on the Extradition Act. Primarily these were with respect to mobility rights, due process, liberty interests, and cruel and unusual punishment.

In 1992 there was a significant and effective streamlining of that act. No longer were there two separate procedures with respect to both judicial review and the minister, and the court process. The appellate process was combined and it significantly shortened the time periods. I think you even had one of your officials here to tell you the time periods were significantly shortened as a result of those changes in 1992.

I should also point out that the act as it presently stands has passed constitutional muster. In other words, it has been attacked constitutionally and has withstood that attack with respect to a number of charter applications. However, that's all gone now with this new act because you have changed the field, taken away the lines, and torn down the posts. I'll explain to you exactly why, in my view, you're going to be in for another period of significant charter challenges based on what you now have before you.

In this act—and I'm primarily addressing clause 32—you have taken away the evidentiary requirements that it be under oath, so that has a reliability factor, a responsibility factor, and an accountability factor to it. The constitutionality of virtually all of the provisions of the new act will be challenged, in my view, in large part because you have done away with the underpinning of the constitutionality of the old act. In other words, the courts could always turn to the old act and say it's a requirement that you do affidavits; they're under oath, there is accountability, there is reliability and responsibility. That no longer exists, so the whole constitutional framework that was premised on a prima facie case is done away with. The new legislation becomes an open question without a clear answer as to its constitutionality.

This brief we've provided to you is merely a road map of where you'll find these challenges. It's by no means exhaustive. There are certainly many others that may come.

In light of the submission I heard earlier from Amnesty International, there should be two separate systems with respect to international tribunals versus state requests for extradition.

• 1045 

The charter challenges we foresee within this global Extradition Act—because it makes no real distinction between an international request and a request by a state—will apply equally to those under the international system and those under a state request. So, in our view, as Bette Davis said, fasten your seatbelts; you're in for a rocky ride. This legislation will be in for a tough few years to determine its constitutionality ultimately in the Supreme Court.

I suppose in an ironic sense, and in our unenlightened lawyers' sense, we should thank you for a period of litigation because we always need the work. But maybe from a more significant sense I will ask you to look at the bill a second time to determine whether it's really necessary, first of all, to have international people and state people in the same system, and secondly, whether it's really necessary to do away with the evidentiary provisions that are the underpinnings for the present constitutionality.

Those are my opening comments, and I guess we're here for questions.

The Chair: We sort of think of all this as economic development for the Canadian Bar Association.

Mr. Michael Lomer: For that we appreciate your thoughts.

The Chair: Mr. Reynolds.

Mr. John Reynolds: It sort of shocks me to sit here and listen to what you have to say. It doesn't surprise me, but after listening to the last witnesses, it's sort of a turnaround in the other direction. You're the lawyers. How can we draft a bill like this that's so bad?

Mr. Michael Lomer: I suppose in one sense the facetious response is you've only had one side draft the bill, and that's the lawyers who do the extraditions for the government. It could be described as a wish list for them in part.

I suppose a more reasoned response is that courts have in the past given due deference to the state interest over the individual interest in the charter aspect in extradition. It has always been that way, and I suppose the thought is that it will always continue to be that way.

I quite frankly would ask that everybody raise a flag of caution. Imagine just for a second if the first case that comes up is one where you have this prosecutorial summary with a little certification at the end that says yes, this was the evidence that was given to me and I hope it's okay, and it's on a death penalty case of a Canadian citizen in Texas. I suspect our courts will have a lot to say with respect to that person's charter rights, going to that state at this time. That's how I think it can happen.

I guess, Mr. Reynolds, I don't really know the answer to how you can draft a bill that has that problem in it.

Mr. John Reynolds: Let me ask you this question. I didn't have a chance to read your brief totally, but have you made recommendations on amendments that could be made to the different sections in here that would help to solve that problem?

Mr. Michael Lomer: Yes, but we have not made any recommendations with respect to international tribunals. Don't get us wrong, we certainly recognize the value of those organizations. They represent the future and we are part of that. I think there's a significant difference when we're talking about sending an individual to a state where we have no control and sending an individual to an international tribunal we helped set up. I understand the sovereignty issues, but there is a significant difference.

There are recommendations we made, but some of it has to do with abolition of certain things, and the evidentiary one is probably front and centre. It's certainly the one that will carry the day because it will premise most charter challenges, I suspect, in the future.

Mr. John Reynolds: Thank you.

The Chair: Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: Thank you, Madam.

You are attorneys and proud of it. I understood that you had some concerns about section 32.

Mr. Michael Lomer: Yes.

Mr. Réal Ménard: We have the changes suggested by the department here. Please tell me exactly what your reservations are in terms of the evidence. Talk to me as if I were a student taking his first law course in university and did not know anything. That isn't the case, but talk as if it were.

• 1050 

[*English*]

Mr. Michael Lomer: I realize it's in English, and perhaps it really needs to be translated, but if you look at our submissions with respect to subclause 32(1), particularly the two paragraphs that follow the introduction, it renders hearsay and unqualified opinion evidence mandatorily admissible. The documents to be contained in the record of the case must

include, under paragraph 33(1)(a), a summary of the evidence available to the prosecutor. This summary must be certified, although it need not be sworn, and the evidence must not be summarized in any way by affidavits from the first person.

Once admitted, the content of that document itself, pursuant to clause 29, given the proposed low evidentiary threshold, is capable of grounding a committal. The net effect of that is you could have an allegation from an unnamed person. There was a question with respect to the minister on whether it is possible to hide or keep back the names of witnesses, and the answer is yes. So you have an unnamed individual and a second-hand or hearsay allegation that is not merely presumptively admissible, but mandatorily admissible.

In those circumstances, what if the defendant in an extradition were to call evidence under oath to rebut it? The judge would be faced with the problem of unsworn hearsay with no proven reliability attached to it on the one hand, and under oath, sworn, attached to it on the other. You're creating a very difficult situation, and a judge is likely to give, in my submission, charter remedies to stop that sort of thing.

[*Translation*]

Mr. Réal Ménard: I want to make sure that I clearly understood you. You seemed to say that in principle, in these areas, when it is a matter of criminal law, hearsay evidence should never be admitted. I do not know whether you were here when the Minister appeared. We were told that one of the particularities of this bill was that it should be compatible with legal regimes that vary greatly from one another.

The extradition process has long been an obstacle for various countries because their systems for handling evidence differed. How could this have been different for the legislator? If you were in the place of Mr. Lemire or someone else, what would you have suggested as wording, in view of what I am saying to you about the international community?

[*English*]

Mr. Michael Lomer: I am not an expert in civil law, but I know they take evidence under oath. They have a solemnity of the oath. There is a difference between a casual conversation and something that is presented to be believed. They have formalistic ways of ensuring that happens.

It doesn't necessarily have to be an affidavit. Do they not have interrogatories? Can they not transcribe those if they are taken under oath? Would they not also apply? It seems to our association that every country that purports to have a legal system where you decide issues of guilt and innocence has a way of making the solemnity of the occasion an important aspect. If that is the case, it should be able to be translated.

[*Translation*]

Mr. Réal Ménard: The committee should perhaps lean in the direction of your suggestions. You say that there is a problem because in cases such as these, hearsay evidence, which must be authenticated by virtue of subsection 33(1), would constitute a breach of the law. You even say that this could make us liable. As a possible solution, you suggest taking an oath and transcribing the hearing. Do I understand you correctly?

• 1055

[*English*]

Mr. Michael Lomer: I wouldn't get too wrapped up in the issue of hearsay as a problem. Our Supreme Court has fashioned a common-law series of cases where hearsay is admissible on principled exceptions to the old common-law rule. There's no reason to think that wouldn't again translate into the extradition process.

Our concern is that none of the provisions that are presently in the act allow for accountability—and this is accountability of foreign states, foreign police, and foreign prosecutors—responsibility, or reliability of the evidence, and that has to do with the oath. So hearsay or not, that's an issue that could be taken up by a judge sorting it out at a tribunal. But with respect to those three important factors, there really isn't anything in the act that we see as making it accountable, reliable or responsible, and I've read the arguments that have been put forward by the officials.

[*Translation*]

Mr. Réal Ménard: But I am having a little difficulty seeing just where you are headed. I felt that the hearsay evidence aspect was central, although I feel it poses a problem, but you say it is rather the accounts given that are central. Just what do you mean by these accounts?

Mr. Michael Lomer: Excuse me, but accounts...

[*English*]

Accountability. Thank you.

[*Translation*]

Mr. Réal Ménard: I think that the term we're looking for is "accountability." You mean that those who are making decisions—and this is always what the Official Opposition wants—must give explanations concerning their decisions.

[*English*]

Mr. Michael Lomer: Perhaps I could do it by way of an example. In a case called Leonard Peltier, which some people may be familiar with, the U.S. government put forward to Canada false affidavits in order to extradite him.

The Chair: There was one false allegation.

Mr. Michael Lomer: There was one. It was Myrtle Pooh Bear's false affidavit. For years it was used, unsuccessfully ultimately, but at least it was there to hold them accountable for having done so.

If you do away with the requirements of affidavits and putting it under oath, or interrogatories where you have transcripts where it's a solemn occasion, you run the risk that the prosecutor says “I certified it; it's what I thought was available,” and there is no accountability. It is possible to avoid accountability when it's under oath; it's very easy to avoid accountability when it's not.

[*Translation*]

Mr. Réal Ménard: Okay. I know that I will have an opportunity to speak again in the second round, but I wish to say that it is very important for you under all circumstances, whenever a judge—in this case an extradition judge—looks at an item of evidence, that there be a statement under oath. That is what you are calling for, and what you would like to see us include in the bill.

[*English*]

Mr. Michael Lomer: Yes, and that is contrary to what's in this section.

The Chair: Just so we're clear, there's a section now that will require a counter-signature, a certification by the senior prosecutor, so if it were the federal government of the United States requesting extradition, Janet Reno or her designate would have to countersign. The reason for that is to at least put some international political responsibility on the person responsible within the requesting state.

Mr. Michael Lomer: That's in clause 33, where the record of the case must include a document summarizing the evidence available. You can hide a myriad of ills in that expression. That includes the synopsis for a guilty plea. If any of you have criminal law experience, that's the thing the police type up for the guilty plea of the individual.

Separating fact from fiction in those documents is always an interesting term, and it's not necessarily even one that causes problems in the courts. They're capable of doing it, but they do it by the solemnity of the oath, the actual exactitude of the words that are used. If you have a document summarizing the evidence available, you have no accountability in that document.

• 1100

[*Translation*]

Mr. Réal Ménard: In order to clearly understand your view, you who are attorneys and who understand legal language, would you be able to suggest a concrete amendment to suggestions 32 or 33?

[*English*]

Mr. Michael Lomer: I would suggest going back to what sections 16 and 17 of the Extradition Act require, which is that there be affidavits under oath or interrogatories, which is questions and answers, as long as there's some proof that it's done under oath or with solemn affirmation. It doesn't necessarily have to be by affidavit. Quite frankly, as a practical matter, the extradition officials, the people who do the work for the U.S.A. or whichever state, commonly assist in the drafting of affidavits and commonly assist other civil law countries. It's not a question of inability in any regard.

But you need to have some amendment. Really, the way it stands now, you should abolish clause 32 and put in there that you do still have it under oath either by affidavit or interrogatory. You meed to have evidence as opposed to rumour.

[*Translation*]

Mr. Réal Ménard: I wish to make sure that I clearly understand. I have taken about 20 law courses, and I have about 10 to go to get a Bachelor's degree in it; I will do it one day, but you can't do everything at once. Are you suggesting that we delete section 16 or section 33? It would be useful for you to submit a very specific recommendation in order that we might know exactly what amendment you would like to see. Would you like to see an amendment to section 16 or to section 33?

[*English*]

Mr. Michael Lomer: Actually, it's a system. It starts with clause 29, in which “A judge shall order the committal” where there is “evidence admissible under this Act”. Now the phrase “evidence admissible under this Act” brings in clauses 32 through to clause 38. To the extent that the evidence in clauses 32 through 38 does not comply with what we understand the evidence to be—under oath, affidavit, interrogatories, transcripts, or something of that nature—this is where we think this law will be subject to serious charter challenges.

The Chair: Let's just hear from Mr. Slansky. He had something to add.

Mr. Paul Slansky (Member, Criminal Lawyers' Association of Ontario): With respect to that latter point first, in the present act the system is in section 13. The extradition hearing is to be conducted like a preliminary hearing, which has been interpreted to incorporate the usual Canadian laws of evidence.

Our concrete proposal is essentially that it revert to that. Basically, it's my understanding and experience that the problems asserted by Justice officials in presenting this legislation—we can't deal with the civil law jurisdictions because of the differences of their systems—are not borne out by the facts or by experience. There haven't been problems. They haven't pointed to cases where they have been unable to obtain extradition in those circumstances. For decades, if not longer, the system has been in place, and it has been perfectly satisfactory to deal with that.

As Mr. Lomer indicated, Justice officials are there to assist the requesting state in preparing the materials. When I was counsel at the Department of Justice, before I became a defence counsel, I was involved in that process and did provide assistance to foreign states in preparing extradition materials. I think Justice officials, in proposing this legislation, have effectively set up a straw man or a complaint that this is not working when in fact it is.

[*Translation*]

Mr. Réal Ménard: Is that why you left the department?

Some Hon. Members: Ha, ha!

[*English*]

Mr. Michael Lomer: He asked if that was the reason you left.

Mr. Paul Slansky: No. It had nothing to do with it.

The Chair: The next one is Peter MacKay.

Mr. Peter MacKay: Thank you, Madam Chair.

• 1105

I'm going to preface my remarks by saying that I have a prosecutorial bent, so I do take some issue with—

The Chair: We hadn't noticed that at all, Peter.

Mr. Peter MacKay: Your brief says that hearsay is not admissible, but there are dozens of exceptions to the hearsay rule.

Mr. Michael Lomer: There are dozens of exceptions, yes, and judges are in the best position to sort out a good exception from a bad one. Just as a general rule, a prosecutor giving a summary can say that a witness, whose name he's not going to tell you, is going to say that you shot A.

Mr. Peter MacKay: I have a problem with that too.

Mr. Michael Lomer: That's serious hearsay that will not fly in this country. And so it shouldn't.

Mr. Peter MacKay: As you know, particularly with the admissibility of videotape evidence now as well—you mentioned KGB in your brief—are you saying this should be mandatorily inserted into this legislation? Should we be requiring that type of reliability or that type of evidence?

That seems to undermine the existing Canadian approach to hearsay evidence, which is that it goes to weight. There are all kinds of exceptions that say we're going to admit this evidence, not for the truth of it but on the basis that it was said. Then it will go to weight.

Mr. Michael Lomer: But that's not a hearsay exception.

Mr. Peter MacKay: It will go to weight. You've already acknowledged that ultimately the tryer of fact is going to be the one that makes this decision. There will be an opportunity for the defence to make that argument.

Granted, it's becoming increasingly clear that yes, this is going to be a heyday. There's going to be all kinds of litigation that comes out of this. I don't know how we do away with that, because any time you talk about the application of the Constitution in the law, it's automatically going to be challenged. You can almost presume that with any piece of legislation that comes out of this committee or any committee on Parliament Hill, it's going to be challenged. That's what you do.

Mr. Michael Lomer: Why don't you look to the experience of the old Extradition Act? They managed to nail down every constitutional challenge, and the act has survived. Ask yourself, why has it survived? Given that extradition can impinge significantly on charter rights of an individual Canadian, how does it survive? One of the ways it clearly has survived—this is from the Smith case—is because it's under oath, so you have some sense of reliability. And now you're going to take that away. Well, okay.

Mr. Paul Slansky: In addition, this is happening at a time when the continued validity of Smith is in question. By the very bill itself, there's provision for video links. Technology has advanced to such a state that the conclusions in Smith may no longer be valid. The use of affidavits is what was being discussed in Smith, which was without cross-examination. The Ontario Court of Appeal said—this was agreed to by the Supreme Court of Canada—that to allow affidavits was necessary; otherwise the extradition process would be frustrated. But now, with the availability of video-link technology, it wouldn't be frustrated.

So when the trend of technology is such as to perhaps require more protections of liberty in the judicial phase of extradition, this legislation is taking a step in the other direction. So that's also a concern our association has.

Mr. Peter MacKay: I haven't had an opportunity to digest your brief either, but you do take issue with quite a bit of the language used in terms of definitions.

Mr. Michael Lomer: A lot of what we've done is technical. We may be wrong, but we want to at least raise the flag so that you have, at some point when you do go clause by clause, responsible responses from the bureaucrats who drafted the legislation in terms of why they did it one way and whether this is a legitimate concern. Some of the stuff—this is the broad-brush stuff I've touched on—is more appropriate here, while some of it is clause by clause. As I said, some of it may be wrong, but—

Mr. Peter MacKay: I appreciate what you're doing, Mr. Lomer. In many ways, you're taking away arguments that you personally could conceivably make at some point down the road if this act goes through in this current form.

I'll just go back to the major issue you've highlighted in your brief, which is the admissibility of unsworn testimony. Is it your suggestion, then, that we should be relying more on the old provisions, where it is nailed down that anything that falls outside of the exceptions and is not sworn testimony, that doesn't have that innate reliability...?

• 1110

As you pointed out, in other cases we've seen that false affidavits have been sworn to, even though they were done under oath. So although it's nice to have that red seal, that judicial stamp of approval from a foreign state, I guess that's not necessarily approval or a guarantee of reliability.

Mr. Michel Lomer: No, it's no guarantee of reliability, but what you have presently is a virtual guarantee of non-reliability.

Mr. Peter MacKay: So it's a lower threshold.

Mr. Michael Lomer: You've taken the bar and dropped it on the ground. You have to question whether that's appropriate for the citizens of this country.

Mr. Peter MacKay: Thank you.

The Chair: Mr. Lee.

Mr. Derek Lee: Thank you.

In your brief, you refer to clause 17, dealing with persons who are in custody, and you suggest that the time within which they must be brought before a judge should be no less than what is provided for in the Criminal Code. But here in clauses 13 and 16, as I read them, we're not dealing with persons who have been arrested by a police officer; we're dealing with a person for whom a warrant for arrest has already been issued by a judge. I may be wrong and I may not understand all of the background, but clause 17 says the person must be brought as soon as possible. I think you're being a little unfair by saying it's the same as the person who's in a police cell waiting to be brought before a court.

Mr. Michael Lomer: Mr. Lee, it's something of a technical amendment. There's no real rational reason you'd want to separate out people under arrest, and there's a lot of people under arrest for bench warrants, which are judicial warrants in the first instance, or whatever, that are brought before the courts. If you're going to arrest somebody and bring them before the court to commit some judicial process, there's no reason why you should have two separate systems, one for those who are arrested under the extradition and one for those arrested

under the Criminal Code.

It's simply a way of simplifying it. Why not be consistent all the way through in our legislation in dealing with arrest of persons?

Mr. Derek Lee: Well, other than the fact that in many cases under extradition you'd have perhaps a greater practical likelihood or potential for flight. That's one element.

Mr. Michael Lomer: Once arrested, that gets addressed in issues with respect to bail, which is another part we've addressed.

Mr. Derek Lee: I thought your reference to the police cell was a little off centre, keeping in mind that the person has already been taken into custody under a warrant issued by a judge, and the judge has obviously not chosen the summons procedure for reasons that would be particular to the case at hand.

Mr. Paul Slansky: That's part of the problem. For provisional arrest, there is only the arrest power. For ordinary arrests under the Extradition Act or the proposed bill, there will be the option of arrest or summons, and where arrest is the only option in the provisional circumstances, that's why it's important that you have the 24-hour rule, which is, as I understand it, there essentially to prevent long periods of time in police custody before you're brought to a judicial officer, to prevent being held effectively incognito, and the potential for pressure and eliciting statements, and so on, that exists in Canadian law and also in the extradition context.

Mr. Derek Lee: Okay, I hear you on the provisional warrant, but those provisional warrants include cases where a warrant has already been issued or the person has been convicted. The provisional warrant covers very specific circumstances, including a reference to public interest and things like that.

In any event, you've made your point. It's something we may be cautioned on.

The second issue I'd like to address relates to process, since we're changing horses from the old Extradition Act and fugitive offenders into this new one-track system.

Under the statute, as you would act for someone who would be the object of an extradition procedure, how would you go about addressing information that the justice minister takes into consideration that would have come from the Minister of Citizenship and Immigration or the Minister of Foreign Affairs? How would you go about gaining access to those if the statute doesn't provide for disclosure? How would you find out what were those elements that the Minister of Justice took into consideration?

• 1115

Mr. Paul Slansky: There is no mechanism in place now to obtain disclosure and there is no mechanism in the proposed bill to obtain disclosure. That will have to be dealt with on a request-by-request basis. As is clear from the recent decision of the Ontario Court of Appeal in Kwok, and also the Supreme Court of Canada decision in Dynar, there are charter implications to the disclosure issue. But there's also a division between disclosure for purposes of the judicial phase, which will be restricted effectively to evidentiary matters, and disclosure for the ministerial phase.

Presumably if the counsel for the person needs disclosure to make effective submissions for the ministerial phase, a request to the minister will have to be made for that disclosure. The minister will comply or not comply as he or she sees fit, and if that becomes a serious issue regarding the inability to make effective submissions because of lack of disclosure, that would be ultimately an issue for judicial review of the minister's decision. You would argue that you haven't been able to make a full answer in defence or you've been denied natural justice in the opportunity to make submissions to the minister.

Mr. Derek Lee: Are you satisfied then that the absence of any disclosure provisions in this statute is not a problem?

Mr. Paul Slansky: It's no more of a problem than it is at present. It would be helpful if there were guidelines. But that we have guidelines in the criminal context in the Stinchcombe case in the Supreme Court of Canada, and Dynar and Kwok, indicate there has to be some adjustment in the extradition context.

It's not yet clear, but it presumably will be made clear through the evolution of the common law on a case-by-case basis. It's not something that necessarily has to be in the legislation. We may criticize a particular case and not be happy, for instance, with Kwok or Dynar, but I think it can be dealt with in the long term without legislation.

Mr. Michael Lomer: Mr. Lee, unfortunately, we're a reactive organization. We spend all our time reacting to the legislation as opposed to putting forward what would be very helpful and useful. To make the procedure before the minister transparent, it would be helpful to have legislative requirements for disclosure. They do not presently exist, and oftentimes the request is refused. We have some material in here with respect to the informal...one part of it dealing with the death penalty. There is provision within the treaties for the minister to demand a formal assurance that the person will not be executed before we'll surrender.

But there are all sorts of informal procedures that go on in an attempt to persuade without requiring formal assurance. That's never been made available, to my knowledge, despite requests, particularly when formal assurances are turned down in death penalty cases. The transparency of that would be of some assistance, yes.

Mr. Derek Lee: So, as a legislator, you're saying from your perspective, and the perspectives of all those clients out there, that I shouldn't spend too much time worrying about what I think of as an absence of disclosure provisions, an absence of transparency relative to data that come from Immigration and data that come from Foreign Affairs.

Mr. Michael Lomer: I'm saying the opposite.

Mr. Derek Lee: Okay.

Mr. Paul Slansky: What I was saying—and I agree with Mr. Lomer—is it would be helpful if there were provision for it. But the absence of a provision doesn't mean there is not a mechanism to get it. It's just that it's not as transparent; it's not as clear. If it was subject to after-the-fact review of the minister's decision and the minister's refusal to provide it, which is always going to be less effective than if we had clear guidelines at the outset....

But I understood you were essentially getting at whether there is in fact a lack of any mechanism there, and I'm saying there is a potential mechanism there.

Mr. Derek Lee: I know there's one in place. It's there because the department has created it and because the courts have asked for it. But it's not in the statute.

• 1120

Mr. Paul Slansky: That's true.

Mr. Derek Lee: Thank you.

The Chair: Thank you, Mr. Lee.

John McKay.

Mr. John McKay: I wanted to go to your major point, which is the decision by the department to link the extradition process under tribunals and states and treat them essentially as one. I take it that your concerns about the absence of evidentiary protection are primarily related to the extradition process with respect to states, and you feel that bill, in effect, drops the evidentiary bar on the ground, to use your phrase, because it's driven by the growing sense that tribunals and crimes against humanity, etc.... Is that a fair statement? Am I summarizing your evidence correctly?

Mr. Michael Lomer: I think it is. You have to understand that our background is in criminal law and defending, usually, state extradition. I have no experience with international tribunal extradition. It really wasn't until I was listening to the Amnesty International presentation, recognizing that there are significant differences between international fugitives from crimes against humanity, who are going to be tried in international tribunals, and our giving over individuals in our country to another country to be tried for another crime, that I realized there is a significant difference. And it does, perhaps belatedly—belatedly in the sense that we're looking at this from a criminal law perspective—seem to us that the bar, as I said, was dropped on the ground and it was done so in order to comply with international obligations.

Mr. John McKay: Yes.

Mr. Michael Lomer: Maybe the answer is to separate the two.

Mr. John McKay: Whether the bill could be amended is something else again, but if we went back to the initial concept of state extradition to state, is there a way in which the crimes themselves could be identified so as to be clearly individual crimes, as opposed to crimes against humanity? And what would happen if in fact we moved the evidentiary bar up to where you want it to be, which is essentially a preliminary hearing? I think that's the kind of—

Mr. Michael Lomer: It's a modified version.

Mr. John McKay: Within limits.

Mr. Michael Lomer: It's a paper version of it, if I could put it that way.

Mr. John McKay: Because you're worried about sworn hearsay, is what it boils down to.

Is there an effective way whereby you can see how that could be separated out, those kinds of crimes, from the larger issue of crimes against humanity?

Mr. Paul Slansky: It's not a simple amendment to the legislation, as I see it. You would have to provide an alternate framework for international tribunals. As Mr. Matas said earlier, the way the definition section is drafted, the extradition partner, which incorporates “state” or “entity”, is just defined as including international criminal court or tribunal. They would have to redefine it to have a separate category for international criminal court and tribunal and provide a different evidentiary and procedural structure for that kind of proceeding.

You could, potentially, adopt some of the provisions we take issue with, the lower evidentiary provisions, the summary by the prosecution, etc., as being the provisions that would be appropriate for the international tribunal and basically re-enact section 13 of the present act that the hearing is to be, as nearly as possible, a preliminary hearing. With this re-enactment of that section and preserving the present evidentiary section for international tribunals, it could at least address the evidentiary aspect of the question, although I gather there are other concerns of Amnesty International in relation to issues of specialty and double criminality and such. Again, you may have to, on an issue-by-issue basis, differentiate the different standards for the two different kinds of extradition.

Mr. John McKay: But double criminality is nothing more than if it's a crime here, it's a crime there. It's a fancy way of saying that.

• 1125

Mr. Paul Slansky: That's right. Although it's a little more complicated in this application, that's the concept.

I gather there is some concern being expressed in relation to the Finta case about that. I'm not sure I necessarily share that concern, but in any case, they are concerned about that, and to the extent that this committee and Parliament shares such a concern, there may have to be some adjustment for the international tribunal context to perhaps water down the double criminality definition so that it doesn't create an undue obstacle for the international tribunal.

Mr. John McKay: But in some respects we've taken on almost the impossible task of trying to treat a Finta in the same manner as we treat an Ng.

Mr. Paul Slansky: That's right. That's why it's important to have this differentiated and why we effectively agree with Amnesty International that by having the same process for the two different procedures, you're blending apples and oranges, and it's inappropriate for both. It's far too low for the criminal context and too high for the international tribunal context. That's why, if you separate it out, you can achieve justice in both contexts while complying with both international law and Canada's international obligations, as well as the Canadian Charter of Rights and Freedoms. That's why it's an appropriate suggestion to have these two avenues separated.

Mr. John McKay: One final question is with respect to the refugee stream, because the refugee stream crosses both. We may have some folks here from Bosnia and Rwanda who did some really nasty things back home, and yet we also have some refugees here who have committed the crimes within...the kinds of folks you would defend.

This bill presumes that basically it hijacks the refugee process. That's the way I read it. Have you any thoughts in terms of a finding whereby the decision is not to extradite, but the evidence that has been generated has a significant impact upon that person's eligibility as a refugee claimant? Have you given any thought to whether the extradition process should in effect overwhelm the refugee process?

Mr. Paul Slansky: Yes, we have given some thought to that issue, and we have concerns about this hijacking of the process—which I think is a fair way to put it. There is no impediment, however, at present to incorporate the evidence from the extradition hearing, by way of transcript or otherwise, and make that available to the refugee process, and so you don't necessarily have a duplication.

Part of the problem with the refugee provisions in this act is that when you are convicted of a serious crime, being defined as one for which you can get 10 years, you are deemed to be ineligible as a refugee when in fact there is more to the refugee exclusionary provision than merely being convicted of an offence for which you can get 10 years, especially as is clear from the recent Supreme Court of Canada decisions.

Beyond that, there is also a concern that it takes away the judicial review. Even if you are ineligible as a refugee, there are cases such as Nguyen in the Federal Court of Appeal that say even if you're ineligible, if you have a well-founded fear of persecution from a particular country, removal to that country will be contrary to the charter. If you can in fact demonstrate not only well-founded fear of persecution but that bad things will happen to you, such as torture or something, that also will be a violation of the charter.

The provision in this act that precludes any such review is very troubling, because it's effectively removing any remedy for this kind of charter violation. It's not necessary. You can

still have these provisions and have the refugee process going on. To the extent that you want to prevent duplication, allow for the use of the evidence from the extradition process in the refugee process. It's as efficient as it needs to be without sacrificing any rights under international law or the charter.

• 1130

Mr. John McKay: Let me understand this. If we have the extradition process and a person is extradited, that's the end of the story from our refugee—well, no it's not.

Mr. Paul Slansky: No, not necessarily.

Mr. John McKay: That's the point. It's not the end of the story as far as the refugee claimant process is concerned. And if the person is not extradited, it's obviously not the end of the refugee process. But all of that evidence is quite relevant to the determination of one's status as a refugee.

Mr. Paul Slansky: Especially potentially exclusion as a refugee. And yes, it's relevant, but there's no requirement to make it deeming the exclusion. You can still use it. It's relevant. You can use it without deeming them to be ineligible as a refugee claimant.

Mr. John McKay: Thank you.

The Chair: Thanks, Mr. McKay.

I have one question. In subclause 44(2) you recommend changing:

> (2) The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct...is punishable by death

You recommend making that mandatory.

I live on the border with Windsor. Across the river is Detroit, where there are 400 or 500 murders a year. Wouldn't it be interesting if you could commit a murder in Detroit and escape to Windsor knowing that you could never be extradited because...well, there isn't capital punishment in Michigan, but if there were capital punishment....

Mr. Michael Lomer: You are presuming a great deal of intelligence on the part of the person who's charged with the murder. In any event, as Justice Cory said in Kindler, there is absolutely no evidence that this is in fact a case...despite, I might add, that since the charter has come down, virtually every case where it's a death penalty extradition has been fought, up to and including leave applications or hearings in the Supreme Court of Canada—virtually every case. If you want to speed up the process, get rid of the death penalty, because then there won't be the fights there are now because of that.

I'd recognize the argument, if there was any evidence to support that validity other than our gut feeling that maybe that is the case.

The Chair: It's a question worth asking.

Mr. Michael Lomer: Yes.

The Chair: All right. We are going to have to break now because we have other witnesses waiting.

I want to thank you. It's nice to see new faces from the Criminal Lawyers Association, but you can tell Irwin that we miss him.

Mr. Michael Lomer: I'll come back.

The Chair: All right. I'll see you a week from Saturday.

Take five minutes, please.

• 1133

• 1145

The Chair: Our seventh inning stretches are getting longer and longer. The chair has a short attention span.

From Citizenship and Immigration Canada we have Gerry Van Kessel, director general, refugees; Yaron Butovsky, legal counsel, legal services; and William Lundy, director of port of entry management, enforcement. Welcome, gentlemen. Do you have a brief?

Mr. Gerry Van Kessel (Director General, Refugees, Department of Citizenship and Immigration): Yes, a very brief one.

The Chair: Thank you. A brief brief. That's what we like.

Mr. Gerry Van Kessel: Thank you to the committee for inviting us. As you have already introduced my colleagues, I will dispense with that, but Yaron is from our legal services with the Department of Justice and Bill Lundy is with the enforcement branch.

I would like to open by saying that the basic question we believe we face is how to deal with persons who are facing extradition and make refugee claims. At the present time they are separate processes. The role of the Immigration and Refugee Board now is to hear the refugee claim and at the same time make the decision on whether or not this person should be excluded from the refugee process and from receiving refugee status.

Bill C-40 changes will legislate the rules for the interaction between the extradition process and the refugee determination process for the first time. Under Bill C-40, a refugee hearing before the IRB will not commence or will be adjourned automatically if extradition is requested for reasons of a serious crime, which is defined as one for which there is a penalty in Canada of ten or more years. If extradition is granted, the refugee hearing recommences. If extradition proceeds, it is deemed that the refugee board has excluded the individual from refugee protection.

While under Bill C-40 the person seeking refugee protection is excluded from the refugee process, the bill does require the Minister of Justice to consult with the Minister of Citizenship and Immigration in order to make a determination on whether extradition should proceed. This determination is based on several factors, including whether the person meets criteria that basically parallel the convention refugee definition.

The extradition process provides that issues related to criminality and risk will be taken into account. If he or she feels the case merits it, the Minister of Justice shall refuse the extradition requests for reasons similar to the refugee definition. In other words, while the decision-maker will change, the matters to be considered—criminality and risk—will remain the same, and the intent to ensure that protection is provided where it is warranted remains.

I want to point out that the refugee convention itself has a specific exclusion clause for serious crimes. This provision was added explicitly so that refugee law would be in line with extradition law. It is therefore consistent with our international obligations, as well as our legislation, to ensure that genuine refugees receive the protection they are entitled to, while fugitives and other persons wanted for trial or incarcerated elsewhere do not use the system to create delays or circumvent justice and escape legitimate criminal liability.

Rationalizing the refugee determination process with the extradition system will allow us to focus our energies where they belong, on those individuals who claim refugee status, who are genuinely deserving of international and Canadian protection.

That is the end of my statement. I'll be pleased to take any of your questions.

The Chair: Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: You had been following our work since this morning, and you know that four witnesses have been here and said that we should establish two regimes depending on where the extradition request comes from. Basically, we are being asked to draw a distinction depending on the type of request, whether from an international tribunal, or from a partner State.

• 1150

I am speaking more specifically to your legal advisor, who I feel can hardly wait to answer. Have your department's officials considered these distinctions? If so, can you point out to the committee members who, although not beginners, are not experts either, the pros and cons and the merits of a single formula or a single regime for everyone, or the merits of drawing a distinction?

[*English*]

Mr. Yaron Butovsky (Legal Counsel, Legal Services, Department of Citizenship and Immigration): Mr. Ménard, the advice I've given to my colleagues in the immigration department doesn't bear on any of the issues respecting extraditions to international tribunals.

The distinctions you've raised today, and those the witnesses before you this morning have spoken to, don't bear on any of the amendments to the Immigration Act or any of the jurisdictions of the immigration department. As far as I'm concerned, in my role as adviser to the immigration department, I haven't taken any position on those issues.

On the justice department's concerns, I would suggest they're best answered by witnesses from the Department of Justice directly responsible for the extradition bill, as opposed to the amendments to the Immigration Act portions that are the direct concern of the client department as well as myself.

[*Translation*]

Mr. Réal Ménard: I am sorry for asking you the first question. People always feel that attorneys are knowledgeable in many fields. But I realize that each has his own area of specialization. Excuse me for asking the question. I should have kept it for Mr. Jacques Lemire and his colleagues, who will be appearing tomorrow.

The Justice and Immigration departments recently took measures that will help to more effectively find and uproot war criminals. There was quite a stir in these departments in the wake of a report in the *Toronto Star* claiming that Canada was increasingly becoming a haven for war criminals.

Can you discuss the present measures and instruments available to you to deal with the question of potential war criminals coming into Canada?

[*English*]

Mr. Gerry Van Kessel: In our department, the issue of war crimes is dealt with by a totally separate branch from the ones I represent or that are represented here. So the answer I'm going to give you will be somewhat limited in terms of what I think you'd like to hear.

Let me just say we are taking fairly strong measures and doing what we can to deal with both World War II and what we call modern-day war criminals. From a bureaucratic perspective, we're setting up a division within the case management branch to deal with that at the present time. In fact, my director of asylum has just left to take on that position. So that is what is happening right now.

In terms of further details, I apologize, but I'm just not in a position to give you that kind of information. It's not a file I'm familiar with, other than at a very general level.

Mr. William Lundy (Director, Port of Entry Management, Enforcement, Department of Citizenship and Immigration): Mr. Ménard, I can add somewhat to what Mr. Van Kessel has provided you. In this file there are two processes that are under way. One addresses those persons who are suspected war criminals who have become Canadian citizens already, and the first step in that process is the denaturalization process, which has to go before the courts. Thereafter, the person, no longer being a Canadian citizen, would come under the jurisdiction of the Immigration Act with respect to removal.

The second process involves those persons who are not yet Canadian citizens. They may have permanent resident status, refugee claimant status, or be here without any particular status. Depending on where they are in the process, different procedures would have to be taken to take action against them.

[*Translation*]

Mr. Réal Ménard: Okay. One last question, if I may.

• 1155

So to summarize the impact of Bill C-40 on the Immigration Department, under this bill, if the extradition request is granted, the process before the Immigration and Refugee Board must be interrupted. If extradition is authorized, the refugee status application is rejected. If the extradition request is turned down, the process starts again and the refugee status

claimant may file another request. Is this an accurate summary?

The Finta decision has been referred to a number of times this morning. I don't imagine you would be able to talk about how this decision might affect our assessment of the bill. This morning, Mr. Matas said that according to the Supreme Court's Finta decision, a person could not be punished for having carried out orders given by a superior. There is a good deal of activism, not at the judicial level, but on the part of the Jewish community, among others, who claim that under the Supreme Court's authority, Canada has not gone as far as it could and should have done, since there are war criminals within its boundaries. But I do not imagine that you would be prepared to give your assessment of what the Finta decision might signify in terms of this bill.

[*English*]

Mr. Yaron Butovsky: With that question, I'm afraid you won't get that much satisfaction from us. Again, that's an issue with which we're not directly involved. We really have no information to bring you, I'm afraid, on Finta or the consequences of that case for legislative change.

[*Translation*]

Mr. Réal Ménard: Thank you. You are always welcome before this committee.

[*English*]

Mr. Yaron Butovsky: Thank you.

The Chair: Thank you, Mr. Ménard.

Mr. MacKay.

Mr. Peter MacKay: Thank you, Madam Chair.

I just have a couple of quick questions for clarification. What essentially happens when an extradition has been refused and it returns then to the board? What is the process then in place or invoked?

Mr. Yaron Butovsky: I can answer, if I can just clarify it. Do you mean under the proposed regime?

Mr. Peter MacKay: Yes.

Mr. Yaron Butovsky: Under the proposed regime, if extradition is finally not carried through, the complainant can proceed as usual after the Immigration and Refugee Board.

Mr. Peter MacKay: Okay, so it just simply starts again after the decision has been made.

Mr. Yaron Butovsky: That's right. It's on hold or doesn't commence at all unless a final decision on surrender is made under the extradition process.

Mr. Peter MacKay: Just so we're clear, how does that differ from the current system?

Mr. Yaron Butovsky: The current system is very confusing. That's really the origin of this legislative change. It was to bring some legislative clarity to the process. At the moment, the two systems are separate and distinct. The legislation does not interact at all. We have had individual cases where an actual problem has arisen in which it's extremely unclear as to which system takes precedence and which decision-maker has precedence. Again, the origins of this legislative change are to bring some clarity to that process.

So there's is no real answer as to what happens today. Each system goes along its own track on its own timeframe. Individual applicants have brought court applications challenging various things, but there has been no legislative procedure or rules governing the existing regime.

Mr. Peter MacKay: So with those dual processes that operated in the past that are coming forward now into this new act, do you foresee any conflicts arising, particularly in light of the fact that this new bill seems to—I think it has been backed up further by the witnesses here today—give a fair bit of discretion and power to the justice minister? Do you foresee any circumstances where ministers may find themselves on opposite sides of an issue? It wouldn't necessarily be a conflict, but an external affairs minister could basically be disagreeing with the discretion of the minister.

Mr. Gerry Van Kessel: I would think that possibility always exists in any matter of public policy where perspectives and views are different and where impacts of decisions are different.

What I would see under the proposed process in Bill C-40 is that the justice minister will have to take into account information received from different sources, including from the Minister of Citizenship and Immigration, and will have to make a judgment there combining all information received from all sources as to how to proceed. Our minister's input would be only one of the sources of information that would be put forward. Whether that would lead in some cases to a disagreement with the ultimate decision that is made is speculative, theoretical, or hypothetical. I suppose it could, but this is the kind of balancing that I think the Minister of Justice, probably even at the present time, is quite used to and has to do very frequently when there are different interests at play.

• 1200

Mr. Peter MacKay: I have a final question. You refer to an exclusion clause for certain crimes. What are those crimes? You'll have to excuse my ignorance.

Mr. Yaron Butovsky: The refugee convention, which is the document that contains these exclusion clauses, lists crimes against humanity and war crimes. It lists serious non-political crimes. That's the only trigger we're speaking of here today. That's the legislative change we're talking about for the interaction of the refugee and immigration process. That's the relevant exclusion clause we're discussing.

The third listed offence that excludes people from the refugee determination system is something called an act against the principles or purposes of the United Nations. That was recently a subject of a Supreme Court of Canada decision, the meaning of that term. But it's only that second category, serious, non-political crimes, which is relevant for the proposed legislative changes here.

Mr. Peter MacKay: Thank you. Thank you, Madam Chair.

The Chair: I'm trying to clarify something. I think we're right about this, but the only way the refugee process is eliminated, basically, is if the minister makes an order surrendering the person. If the accused person waives extradition, the refugee process still goes on—right?—because there's no order—

Mr. Yaron Butovsky: That's right. An order is the only trigger for this exclusion from the refugee process.

The Chair: Are we forcing the accused person to choose process? Under that scenario we're saying if you want to have a refugee hearing, you can waive extradition and we'll give you the benefit of the Immigration Act.

Mr. Yaron Butovsky: I believe under the existing process, it is if the person waives surrender or the judge makes an order of surrender, in lieu of the Minister of Justice.

The Chair: It says in proposed subsection 69.1(14):

> (14) If the person is ordered surrendered by the Minister of Justice under the *Extradition Act*...the order of surrender is deemed to be a decision by the Refugee Division

It doesn't say anything about a judge. It's quite specific.

Mr. Yaron Butovsky: That's right. Frankly, in the drafting of the bill, I don't think the waiver of extradition by an individual was taken into account. So that certainly is one circumstance in which there should probably be a change made to the proposed wording here.

The Chair: You would want to fix that, would you?

Mr. Yaron Butovsky: I'd like to contemplate that more carefully, but it's certainly a possibility.

The Chair: You don't think that was an intended consequence of the drafting?

Mr. Yaron Butovsky: I believe it wasn't.

The Chair: From Immigration's point of view?

Mr. Yaron Butovsky: From Immigration's point of view, exactly, which are again the only concerns we looked at.

The trigger, again, under the proposed legislation is the surrender order by the Minister of Justice.

The Chair: Subsection 69.1(14) clearly says:

> (14) If the person is ordered surrendered by the Minister of Justice under the *Extradition Act*

It is not if they waive, it is not if they are ordered by a judge, it is not if they're committed by a judge—it is not anything. It's just if the minister signs a surrender order.

Mr. Yaron Butovsky: That's right.

The Chair: So I'll just put a big question mark by that and check with Justice.

Mr. McKay.

Mr. John McKay: I want to go back to the philosophical premise of clause 96. The philosophical premise of clause 96 is that once a surrender or extradition comes into play, the refugee determination process comes to a full stop. I guess the fundamental question is why? The refugee process, by definition, is a broader inquiry. It includes, and would necessarily include, this kind of evidence. In addition, the bill proposes having a minister stop a quasi-judicial process, yank it right out of the whole system. In a way, that offends some people's notions of what is procedurally fair, and it possibly leaves some charter challenge laying out there.

• 1205 

Take me back to step one here. Why wouldn't the refugee board be notified that a request for extradition has been made? The evidence is there, so have the determination done simultaneously on both extradition and refugee status.

Mr. Gerry Van Kessel: To some extent, that's what happens now. The conclusion about the present system is that it is not in the interests of the extradition process or of the refugee process to allow the refugee process to be used by people who fundamentally, in almost all cases—and I acknowledge immediately that it's not in all cases—are using the refugee process not for the purpose for which it was designed, but for the purposes of delaying, prolonging, and frustrating the extradition process. Accessing the refugee determination system is not done because there's a serious issue of protection at stake, but simply as an attempt to use instruments available to the individual to frustrate the intent of the extradition process. That's one factor.

I would think you can appreciate that, in certain instances, individuals are facing extradition when there is clearly—in the public mind at least, and I would think we would very often agree—absolutely no refugee issue at stake other than access to the process. The question then becomes whether or not you continue with that. That's the choice you make. Bill C-40 makes the choice that it should not continue.

Bill C-40 also says protection remains an issue and a concern that the Minister of Justice needs to deal with, and that is also dealt with in Bill C-40. The choice made there is that the Minister of Justice, before making a final decision on extradition or surrender order, shall refuse to make a surrender if the refugee definition applies—and I don't need to repeat the refugee definition. In a sense, what has really changed here is who the decision-maker is. To some extent, it is a matter of choice as to whether that decision-maker should be as proposed in Bill C-40, or as the status quo currently has it.

I should also like to point out that, at the present time, as I understand it—and these fine points of process are not always the easiest to follow, I would submit—when the Immigration and Refugee Board has a case in which there is an issue of exclusion, as soon as that decision can be made, the process stops as well. For example, that would happen if the evidence is incontrovertible, if there is just simply no doubt about it. We don't get to the balancing of the risk and so on simply because what applies then are the exclusion provisions. The exclusion provisions of the refugee convention simply state that there are circumstances in which the crime that has been committed shall not bind a receiving state to the protection that is at the bottom of the non-refoulement, which is at the bottom of the refugee convention.

To sum up, I think the choice that is before us, and the choice that has been made in Bill C-40, is that the decision-maker here will be the Minister of Justice, based on advice received from the Minister of Citizenship and Immigration, as opposed to the refugee board. As I've indicated, the IRB won't even get to that decision in some cases simply because of the way the process works, as I understand it.

Mr. John McKay: Then it will bounce from the minister and back to a judicial determination process in terms of whether or not the evidence is sufficient and warrants that whole exercise. You've gone through this very bizarre loop, if you will. The individual comes in and starts a refugee claimant process. The refugee claimant process stops and the matter goes up to the minister. The minister says he has something of a case to present to the court. The court makes a determination one way or another, and then it bounces back. If a positive

decision is bounced back, the minister then goes through some sort of quasi-refugee-determination process to decide whether or not the person should be extradited. It's a little convoluted. In some respects, it's also something of an admission on the part of the department that it really doesn't want the refugee board making this kind of determination.

• 1210 

Mr. Gerry Van Kessel: Sorry, what kind of determination?

Mr. John McKay: It's a bit of an admission on the part of the immigration department that they don't want the refugee board making determinations of extradition or surrender.

Mr. Gerry Van Kessel: I don't know if I would go quite that far, but I think it is an admission of our understanding that refugee determination is used too frequently in these kinds of circumstances for purposes that have nothing to do with refugee determination.

Mr. John McKay: You and I wouldn't disagree on that point.

Mr. Gerry Van Kessel: In the bulk of the cases in which this comes forward, I would suggest it would support the position I've taken. But Yaron might be able to help us more on this—and you can contradict me if you wish, Yaron, I don't mind.

Mr. Yaron Butovsky: I don't think so, no. I'll support you on that. As a matter of fact, there was a court challenge a couple of years ago by a fellow who was being extradited. He claimed he had a right to have his refugee hearing heard as a prelude to that. On the facts of the case—I think it was a stay application, one only for the court not to remove—the court found that because he brought his refugee claim so late in the day, years after he was in Canada and was already in the middle of an extradition process, it was clear there was no serious issue of refugee risk at stake. I think this case is a perfect illustration of the normal kinds of cases that do or would fall under these proposed provisions. We're talking about a maximum of maybe three or four individuals per year. That has been the historical number, so we're not talking about a large group of people.

The Chair: Derek Lee.

Mr. Derek Lee: Thank you.

I'm of the view that these changes are pretty necessary because we have this problem with a multiplicity of proceedings. Frankly, from my point of view as an MP, Canadians are fed up with two hands of government operating two separate procedures. So these amendments are certainly going in the right direction.

I'm going to make reference to the Immigration Act for the purposes of these amendments to the Extradition Act. Does the department similarly make moves to deport people for serious criminality while the refugee process is ongoing? If the department's view is that we should avoid the refugee process if there is serious criminality, that we should pre-empt the refugee process with the extradition process, why wouldn't the department take the same view in relation to deportation proceedings for serious criminality?

Mr. Gerry Van Kessel: We do. Again, my colleagues can amplify this, but what exclusion is about—

Mr. Derek Lee: We know what it's about. I just want to know if the department does move to pre-empt the refugee process when there is serious criminality, in the same manner as is described here.

Mr. Gerry Van Kessel: We do.

Disregard extradition for the moment. Just look at exclusion. Again, the refugee convention provides for exclusion. That means there is no access to protection in issues of serious criminality. What will then happen in the future is that nothing will change with respect to that aspect. At the present time, if we have someone who has committed a crime under a certain provision of the act—say one of ten years or more, which would be considered a serious crime—that person would be excluded from the protection provisions of our Immigration Act, of the refugee provisions within the Immigration Act. Removal proceedings with that person would proceed.

Mr. Derek Lee: Who does the removal? Does the refugee process make that decision?

Mr. Gerry Van Kessel: No.

Mr. Derek Lee: The department does.

Mr. Gerry Van Kessel: Yes.

Mr. Derek Lee: Does the department wait for the end of the refugee process before it moves?

Mr. Gerry Van Kessel: Yes.

• 1215 

Mr. Derek Lee: All right, well, in this case, with extradition, the department does not. In this case the government is saying, when you have an extradition, we're not going to wait for refugee determination.

Mr. Gerry Van Kessel: There are two things. First of all, when we get the decision on exclusion from the refugee board, the case then proceeds and then stops.

Mr. Derek Lee: You're saying the refugee board makes the exclusion decision based on serious criminality?

Mr. Gerry Van Kessel: Yes.

Mr. Derek Lee: That answers my question.

Mr. Gerry Van Kessel: Then the removal goes ahead.

Mr. Derek Lee: Thank you.

In pre-empting the refugee process, we allow...and this is subject to the wrinkle of the chairman. I don't know whether there's a wrinkle there or not, but subject to the waiver issue that has been raised by the chairman, the person in Canada who was a refugee claimant is extradited and the refugee hearing is put on hold. But there's also a section that says where the surrender is ordered, there's no more refugee hearing, no more refugee process at all in Canada. That person being extradited has not been convicted yet; that's an allegation. So how

does that person get back to Canada, if he or she wished to, as a refugee claimant?

Mr. William Lundy: Mr. Lee, under the present act, most persons who are in a refugee determination process probably have a removal order against them. Under the act, when a person is removed for extradition, the removal order is waived and therefore is voided and cancelled. So if the person was found to be not guilty of what they were charged with, as a result of the court proceedings in the country to which they had been extradited, they would seek to come back to Canada as any person who would normally seek admission to the country. They would have no explicit bar in front of them related to their previous immigration dealings in Canada, because the removal order would have been voided because of the extradition.

Mr. Derek Lee: I'm getting concerned here. Let's say you have a legitimately frightened person, but a person who also has been implicated in some serious criminality. That person is in Canada and that person has never been convicted at all, here or there or anywhere. This statute would allow that person to be extradited without completion of their refugee hearing, subject to the views of the minister—always subject to that. But ministers and governments can be cold and hard-hearted sometimes. This is a process. The person is not dealing with his grandmother here, and there may be other international political considerations at play here. So the person is sent back. You've essentially said that these provisions would sever the ability of that person to legally come back to Canada, even though that person was removed only for an allegation of serious criminality.

Mr. William Lundy: No, Mr. Lee.

Mr. Derek Lee: How does the person come back? You've told me the person can come back as an ordinary immigrant.

Mr. William Lundy: No, a person can come back into the country as an immigrant or a visitor. It depends on what they apply to be. What I'm saying is the extradition—

Mr. Derek Lee: No, please, you're not suggesting to me that the person is going to get a visa to come back here.

Mr. William Lundy: Mr. Lee, what I'm saying is that the act of extradition voids the removal order. So the removal order has not been carried out, so the person does not require a special approval of the minister to come back into the country. Therefore, in applying to come into the country, whether they were to apply for a visa abroad or whether they were to simply be a person not requiring a visa who shows up at a port of entry, they would be examined as to whether or not they are admissible under the act. If the officer found that they were admissible, they would be entered.

Mr. Derek Lee: No, we know those rules, but now I'm concerned because the person may have had, in the absence of the serious criminality, a perfectly valid, legitimate, understandable refugee claim. The alleged criminality is not proved. The person is back into the same boiling pot they were in when they started out, based on an allegation. We've just sent them off to the boiling pot, and there's something wrong with that.

The Chair: Derek, go back to subclause 44(1) before you get too worried.

Mr. Derek Lee: Sure. This is what, the minister's...?

The Chair: “The Minister shall”—it's a mandatory section.

• 1220

Mr. Derek Lee: Yes, the minister looks at this, and although the minister would apply the refugee criteria, we've simply removed the refugee criteria by pre-empting the refugee process. It would be deemed after the minister has completed his or her decision-making.

Mr. Gerry Van Kessel: The question is, does the system ever fail, whether it is the refugee board system, considering the number of cases in which we get complaints that the negative decision was incorrect, or will the minister fail? We try to create the best system we can to make the best possible decisions we can. In terms of the advice I would send from my branch to the minister to move forward over to the Minister of Justice, it would be the most honest assessment we could make about the information we have and the applicability of the refugee definition to that individual, as well as other information, for example, on the convention against torture. We provide that information.

Can I give you an iron-clad assurance that the system will never be wrong? No. But can I provide you with an assurance that it will be as honest as we can possibly make it? The answer to that is yes. It seems to me that in one way the Minister of Justice is in fact taking on a fairly onerous responsibility by “shall refuse”—not “may refuse” but “shall refuse”. There has to be a decision made there around the refugee.

Mr. Derek Lee: So you are essentially saying that the minister, under this statute, will have to give that person a “one off” refugee hearing, and the person will have a one-off disposition of his or her refugee claim before the minister gives the surrender order.

Mr. Gerry Van Kessel: It's not a hearing in the broad sense. As I understand the act, it also provides for the person making submissions to either minister that are about any aspect the individual wishes to present to the minister, as both our minister and the Minister of Justice will do this balancing act, the sifting of all the information, and make a decision based on that information.

Mr. Derek Lee: I think I understand better now. Thank you.

The Chair: But the Minister of Foreign Affairs may also be involved as well.

John Reynolds.

Mr. John Reynolds: I had a constituent at one time for whom the U.S. had an extradition order on a charge. Because he was also having some disagreements with the U.S. government on income tax matters, which are non-extraditable, part of the agreement in extraditing him for the charge against him was that once the case was over he would be given free access back to Canada with no other charges laid against him. Is that still in this act? Going back to what he is talking about there, if somebody is in Canada seeking refugee status or landed status, or for whatever reason, and there's a criminal charge where you've sought extradition, we could still have in the order sending him or her back that if the charge was not a legitimate one, they would be brought back to Canada to go through the process.

Mr. Yaron Butovsky: I believe in the Extradition Act today, as there always has been, there's a provision that allows for the minister to set conditions to surrender—a general provision like that. It's as broad as possible, and under that, many kinds of schemes could be agreed to.

Mr. John Reynolds: So that could be done if you wanted to speed a case up and send somebody back for a criminal charge, but they're brought right back to Canada after that is over. I know it was done in this case. That person is now a Canadian citizen, because he was not convicted of the criminal charge they extradited him for. He came back to Canada a couple of years later and got citizenship.

Thank you.

The Chair: Thank you very much. We're going to speak to the department about that brilliant discovery we made. Thank you.

The meeting is adjourned.