

CANADA

END IMPUNITY THROUGH
UNIVERSAL JURISDICTION

AMNESTY
INTERNATIONAL



Amnesty International Publications

First published in June 2020 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

© Copyright Amnesty International Publications 2020

Index: AMR 20/2287/2020
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publishers.

Amnesty International is a global movement of 8 million people in more than 150 countries and territories, who campaign on human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. Our work is largely financed by contributions from our membership and donations

**AMNESTY
INTERNATIONAL**



CONTENTS

| | |
|---|----|
| 1. INTRODUCTION | 1 |
| 2. The Legal Framework | 4 |
| 2.1 Type of legal system | 4 |
| 2.2 Status of international law..... | 4 |
| 2.3 Court system | 6 |
| 2.3.1. Structure of the civilian court system | 6 |
| 2.3.2. Structure of the military court system..... | 7 |
| 2.4 Other components of the judicial system..... | 8 |
| 2.5 Role of victims and organizations acting in the public interest in criminal proceedings | 9 |
| 2.5.1 civil claims in criminal proceedings..... | 9 |
| 2.5.2 Criminal proceedings initiated by victims or On their behalf..... | 9 |
| 2.5.2.1. Criminal proceedings initiated by victims | 10 |
| 2.5.2.2. Criminal proceedings initiated on behalf of the victims or the public interest | 10 |
| 2.5.3 Rights of victims in criminal proceedings..... | 10 |
| 2.5.3.1. Notice of the rights of victims | 11 |
| 2.5.3.2. Protection | 11 |
| 2.5.3.3. Support..... | 11 |
| 2.5.3.4. Notice..... | 12 |
| 2.5.3.5. Participation..... | 12 |
| 2.5.3.6. Representation | 13 |

| | |
|---|----|
| 3. GEOGRAPHIC JURISDICTION OTHER THAN UNIVERSAL JURISDICTION | 13 |
| 4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION..... | 16 |
| 4.1. Ordinary crimes | 16 |
| 4.2. Crimes under national law of international concern..... | 17 |
| 4.3. Crimes under international law | 21 |
| 4.3.1. War crimes..... | 21 |
| 4.3.1.1. War crimes in international armed conflict: Grave breaches of the 1949 Geneva Conventions..... | 23 |
| 4.3.1.3. War crimes in international armed conflict: Rome Statute, other treaties, and customary international law | 24 |
| 4.3.1.4. War crimes in non-international armed conflict: Common Article 3 of the Geneva Conventions, Additional Protocol II, Rome Statute, other conventional international law and customary international law | 35 |
| 4.3.2. Crimes against humanity | 43 |
| 4.3.3. Genocide | 47 |
| 4.3.4. Torture | 49 |
| 4.3.5. Extrajudicial executions..... | 51 |
| 4.3.6. Enforced disappearance | 51 |
| 4.3.7. Aggression | 52 |
| 5. JURISDICTION OVER CIVIL CLAIMS FOR REPARATIONS..... | 54 |
| 5.1. Universal jurisdiction over civil claims in civil cases | 54 |
| 5.2. Civil claims in criminal proceedings..... | 55 |
| 5.3. The right to reparation of victims in civil proceedings | 55 |
| 6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION | 58 |
| 6.1. Flawed or missing definitions of crimes under international law, principles of criminal responsibility or defences | 58 |
| 6.1.1 Definitions of crimes..... | 58 |

| | |
|---|----|
| 6.1.2. Principles of criminal responsibility..... | 59 |
| 6.1.3. Defences | 60 |
| 6.2. Presence requirements in order to open an investigation or request extradition | 71 |
| 6.3. Statutes of limitations applicable to crimes under international law | 71 |
| 6.4. Double criminality | 73 |
| 6.5. Immunities | 74 |
| 6.6. Bars on retroactive application of international criminal law in national law or other temporal restrictions | 76 |
| 6.7. <i>Ne bis in idem</i> | 78 |
| 6.8. Political control over decisions to investigate and prosecute..... | 80 |
| 6.9. Discrimination in law and practice | 82 |
| 6.10. Restrictions on the rights of victims and their families | 83 |
| 6.11. Amnesties..... | 83 |
| 7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE | 85 |
| 7.1. Extradition | 85 |
| 7.1.1. Obstacles to extradition to and from canada..... | 90 |
| 7.1.1.1. Political control over the making or granting of extradition requests | 90 |
| 7.1.1.2. Nationality | 91 |
| 7.1.1.3. Double criminality and territorial jurisdiction | 93 |
| 7.1.1.4. Political offence..... | 94 |
| 7.1.1.5. Military offence..... | 94 |
| 7.1.1.6. <i>Ne bis in idem</i> | 95 |
| 7.1.1.7. Non-retroactivity | 95 |
| 7.1.1.8. Statutes of limitation..... | 95 |
| 7.1.1.9. Amnesties, pardons and similar measures of impunity | 95 |

| | |
|--|-----|
| 7.1.1.10. Other obstacles | 96 |
| 7.1.2. Safeguards..... | 96 |
| 7.1.2.1. Fair trial | 96 |
| 7.1.2.2. Torture and other cruel, inhuman or degrading treatment or punishment.... | 98 |
| 7.1.2.3. Death penalty | 99 |
| 7.1.2.4. Other human rights safeguards | 100 |
| 7.1.2.5. Humanitarian concerns | 100 |
| 7.1.2.6. Specialty | 100 |
| 7.2. Mutual legal assistance | 101 |
| 7.2.1 Unavailable or inadequate procedures..... | 101 |
| 7.2.1.1. Conducting investigations..... | 101 |
| 7.2.1.2. Tracing, freezing, seizing and forfeiting assets..... | 101 |
| 7.2.1.3. Video-conferencing and other special measures to present evidence | 102 |
| 7.2.1.4. Acceptance of foreign official documents..... | 102 |
| 7.2.2 Inappropriate bars to mutual legal assistance | 109 |
| 7.2.2.1.Nationality..... | 109 |
| 7.2.2.2. Political offence | 109 |
| 7.2.2.3. <i>Ne bis in idem</i> | 109 |
| 7.2.2.4.Double criminality | 110 |
| 7.2.2.5. Jurisdiction..... | 110 |
| 7.2.2.6. Amnesty or similar measure of impunity | 110 |
| 7.2.2.7. Other inappropriate bars to mutual legal assistance | 110 |
| 7.2.3. Safeguards..... | 111 |
| 7.2.3.1. Fair trial | 111 |

| | |
|--|-----|
| 7.2.3.2. Torture and other cruel, inhuman or degrading treatment or punishment . | 111 |
| 7.2.3.3. Death penalty | 112 |
| 7.2.3.4. Other human rights safeguards | 112 |
| 8. SPECIAL IMMIGRATION, POLICE AND PROSECUTOR UNITS | 113 |
| 8.1. Crimes Against Humanity and War Crimes Program | 113 |
| 8.2. Special immigration units..... | 115 |
| 8.2.1. immigration, refugees and citizenship canada | 115 |
| 8.2.2. Canadia Border Services Agency | 116 |
| 8.3. Special police units | 117 |
| 8.4. Special prosecution units | 117 |
| 8.5. Results..... | 118 |
| 9. JURISPRUDENCE | 121 |
| 9.1 OVERVIEW..... | 121 |
| 9.2 CASES PROSECUTED BEFORE THE ADOPTION OF THE WAR CRIMES AND CRIMES AGAINST HUMANITY ACT..... | 121 |
| 9.2.1. R v. Finta | 121 |
| 9.3 CASES PROSECUTED AFTER THE ADOPTION OF THE WAR CRIMES AND CRIMES AGAINST HUMANITY ACT..... | 123 |
| 9.3.1 R v. Munyaneza | 123 |
| 9.3.2 R v. Mungwarere | 124 |
| 9.4 OTHER IMPORTANT CASES..... | 124 |
| 9.4.1 R. v. Mugesera..... | 124 |
| 9.4.2 Ezokola v Canada (Citizenship and immigraiton), 2013 SCC 40..... | 126 |
| RECOMMENDATIONS..... | 128 |
| BIBLIOGRAPHY..... | 132 |

| | |
|---|-----|
| Appendix I – List of papers in the <i>No safe haven</i> series published so far | 153 |
| Appendix II – List of abbreviations of IHL treaties listed on charts III and V..... | 154 |

1. INTRODUCTION¹

Jurisdiction over particular crimes.

Universal jurisdiction means that Canadian courts can try persons for crimes committed outside its territory which are not linked to Canada by nationality of the suspect or the victims, or by harm to Canada's own national interests. At domestic law, Canadian courts can exercise universal jurisdiction over several crimes of international concern, including offences committed on aircraft, attacks on ships and navigation at sea, offences against internationally protected persons or UN personnel, hijacking, hostage taking, nuclear terrorism and theft of nuclear material, terrorist bombing, and financing terrorism (see Section 4.2. below). In addition, Canadian courts can exercise universal jurisdiction over crimes under international law including grave breaches of the four 1949 Geneva Conventions, grave breaches of Additional Protocol I, other war crimes, crimes against humanity, genocide, and torture (see Section 4.3. below).

Canadian courts cannot exercise universal criminal jurisdiction over ordinary crimes and certain crimes of international concern, including counterfeiting, narcotics trafficking, psychotropic substances trafficking, transnational organized crime, and firearms trafficking.

As explained in Section 4.3.2., although Canada has defined crimes against humanity as a crime under national law, it has not included the crimes of enforced disappearance (see Section 4.3.6.), apartheid, extrajudicial executions, or forcible transfer of populations under domestic law. Moreover, as explained in Section 4.3.3., the modes of criminal liability for genocide in Canadian law have distinct differences from those in the Rome Statute. Furthermore, Canada has not recognized the crime of planning, preparing, initiating or waging aggressive war as a crime under domestic law, and Canadian courts cannot exercise universal jurisdiction over the crime of aggression under international law (see Section 4.3.7.).

¹ The drafting of this report was coordinated by Prof. Sébastien Jodoin (McGill University, Faculty of Law), under the supervision of the International Justice Team in the Secretariat of Amnesty International. The report was researched and drafted by Rebecca Aleem (Canadian Centre for International Justice Toronto Working Group), Minoo Alipoor (Canadian Centre for International Justice Toronto Working Group), Raha Bahreini (Amnesty International Canada), Katrina Gower (Amnesty International Canada), Karen Heath (Canadian Centre for International Justice Toronto Working Group), Caylee Hong (McGill University, Faculty of Law), Morgan McGill (McGill University, Faculty of Law), Justin Mohammed (Canadian Centre for International Justice), Audrey Mocle (McGill University, Faculty of Law), Rachel Rhéaume (Université Laval, Clinique de droit international pénal et humanitaire), Cimon Sénécal (Université Laval, Clinique de droit international pénal et humanitaire), William Shipley (McGill University, Faculty of Law), Valérie Simard-Croteau (Université Laval, Clinique de droit international pénal et humanitaire), and Émilie Tremblay (Université Laval, Clinique de droit international pénal et humanitaire). Thanks are due to Christiane Bossé (University of Ottawa, Faculty of Law), Carrie Levitt (Osgoode Hall Law School), and Verity Thomson (McGill Faculty of Law) for editing and proofreading assistance. Amnesty International wishes to thank Prof. Robert Currie (Dalhousie University, School of Law), Matt Eisenbrandt (Canadian Centre for International Justice), Prof. Fannie Lafontaine (Université Laval, Faculty of Law), and Dr. Joseph Rikhof for their thoughtful and helpful comments and suggestions on the report during the drafting stage. In addition, Amnesty International is grateful for the very helpful cooperation and assistance provided by members of the Crimes against Humanity and War Crimes Section in Canada's Department of Justice. Every effort was made to ensure that all the information in this paper was accurate as of January 2020. However, for an authoritative interpretation of Canadian law, counsel authorized to practice in Canada should be consulted. Amnesty International welcomes any comments or corrections, which should be sent to iiteam@amnesty.org.

Safe haven consequences regarding prosecution

In addition to the failure to define satisfactorily certain crimes under international law as crimes under national law and the failure to provide for universal jurisdiction over ordinary crimes, there are numerous other obstacles to prosecution in universal jurisdiction cases. For example, differing principles of criminal responsibility than those found in international law, improper defences, double criminality, immunities, bars to the retrospective application of international criminal law for offences committed in Canada, political control over decisions to investigate or prosecute, and restrictions on the rights of victims.²

Therefore, Canada can be a safe haven from prosecution in its courts for foreigners who are responsible for the crimes of aggression, enforced disappearance, apartheid, extrajudicial execution, or forcible transfer of populations, committed abroad, and where the obstacles to prosecution noted are present.

Safe haven consequences regarding extradition.

In addition, as explained in Section 7, Canada is also a safe haven from extradition for political or military offences because persons cannot be extradited for such crimes.

Universal civil jurisdiction.

As explained below in Section 5.1, no statute authorizes Canadian courts to exercise universal civil jurisdiction or to permit victims to obtain reparation against individuals in civil proceedings based on universal jurisdiction. With the exception of the Yukon Territory, there is no Canadian legislation recognizing the right of victims of crimes under international law to reparation in civil proceedings.

As explained in Section 6.5, Canadian courts do not have universal civil jurisdiction to hear claims by individuals against foreign states for the crimes under international law committed by their representatives, officials or organs.

Special immigration, police and prosecution units.

As explained below in Section 8, Canada has several government agencies that work together as part of the Crimes Against Humanity and War Crimes Program. Government agencies including the War Crimes Section of the Department of Justice, the Canada Border Services Agency, Citizenship and Immigration Canada, and the Royal Canadian Mounted Police work together to screen persons suspected of crimes under international law and are meant to refer them to police or prosecuting authorities for investigation and possible prosecution. While the Program's purpose is "to deny safe haven to persons believed to have committed or been complicit in crimes against humanity, war crimes or genocide, and to contribute to the domestic or international fight against impunity,"³ the

² Other obstacles to prosecution, not specifically related to prosecutions based on universal jurisdiction, such as general economic, social and cultural barriers to access to justice in the state exercising universal jurisdiction, are not addressed in this paper.

³ Department of Justice Evaluation Division Corporate Services Branch, *Crimes Against Humanity and War Crimes*

last twenty years of the Program indicate that it is primarily aimed at screening individuals seeking entry into Canada and denying them entry into the country, rather than seeking their prosecution in Canada or elsewhere. As the Program's Eleventh Annual Report (2007-2008) noted, "[r]emedies are restricted by available funding. Criminal investigations and prosecution, widely seen as essential to international justice, are the most expensive options. Therefore, partners diligently seek the more cost-effective remedies such as early detection and denial of entry into Canada."⁴ A mere two prosecutions in nearly 20 years does not go far enough to fulfil Canada's international legal obligations regarding criminal prosecution of crimes against humanity, war crimes, and genocide. As such, the Program's most recent evaluation report (2016) notes that concern remains that the Program is failing to reach its stated goals and potential "to contribute to the domestic or international fight against impunity."⁵

Jurisprudence. There are a handful of cases in Canadian jurisprudence involving universal jurisdiction (see Section 9).

Recommendations. This paper makes extensive recommendations for reform of law and practice so that Canada can fulfil its obligations under international law to investigate and prosecute crimes under international law, to extradite persons suspected of such crimes to another state able and willing to do so in a fair trial before an ordinary civilian court without the death penalty or a risk of torture or other cruel, inhuman or degrading treatment or punishment or to surrender them to any international criminal court⁶ It should be read together with the Amnesty International paper, *Universal jurisdiction: The Duty of States to Enact and Enforce Legislation*, AI Index IOR 53/017/2001 [August 2001].

Program Evaluation: Final Report, August 2016.

⁴ Canada Border Services Agency et al., *Eleventh Annual Report: Canada's Program on Crimes Against Humanity and War Crimes, 2007-2008* (Ottawa: Canada Border Services Agency et al., 2008) at 2.

⁵ *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, 2016, *supra* note 3, i.

⁶ Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, AI Index: 53/014/2001 (Amnesty International, 2001). Seven of the papers in the series have been published so far (Bulgaria, Burkina Faso, Germany, Solomon Islands, Spain, Sweden and Venezuela) (see Appendix I for list and links).

2. THE LEGAL FRAMEWORK

Canada was founded through the union of former colonies of the British Empire in North America. It became a dominion of the United Kingdom in 1867 and acquired full independence as a sovereign state through the *Statute of Westminster* in 1936. Canada is a federal state and its constitution provides for two levels of government: a federal government and ten provincial governments. Canada also has three territories that exercise powers delegated to them by the federal government.

2.1 Type of legal system

Canada's federal government and nine of its provinces have a common law legal system that is modelled on the legal system of the United Kingdom. The province of Québec possesses a mixed legal system. Québec public law, including criminal law, is a common law system; while Québec private law is a civil law system. While this description characterises the formal legal systems of the settler state in Canada, there is a growing acknowledgement that the recognition, revitalization and implementation of Indigenous law and legal traditions is a vital element of the process of reconciliation with Indigenous peoples.⁷ While this report does not address the intersections of Indigenous legal traditions and Canada's obligations to investigate and prosecute individuals for the commission of international crimes, these traditions, as long as in accordance with international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples, have an important role to play in on-going processes of justice, truth, and reparation, most notably in relation to serious crimes that have been committed against Indigenous peoples.⁸

Canada has a separate military justice system (see Section 2.3.2 below).

2.2 Status of international law

In Canada, different rules apply to the reception of international law depending on the source of the legal rule being received. Canada's reception system is a combination of monist and dualist approaches.⁹

For customary international law, Canadian courts follow the monist approach. This means

⁷ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) online: http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf.

⁸ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) online: <<https://www.mmiwg-ffada.ca/final-report/>>.

⁹ According to the dualist approach, international and national law are two separate legal systems. International law would apply within a state only to the extent that it has been adopted by that state's own national law, not as international law. According to the monist approach, international and national law are part of a single legal system and international law can be directly applied by national courts. See generally, Robert Jennings & Arthur Watts, *Oppenheim's International Law*, (London and New York: Longman, 1992) [Jennings & Watts] at 53-54. See also *R v Hape*, [2007] SCJ No 26, [2007] 2 SCR 292 [*Hape*].

that customary rules are treated as part of Canadian law and may be directly and immediately applied by domestic courts through the common law without legislative or executive action. This approach results from Canada's constitutional structure and its deep roots in the English legal system. There is one exception to this approach: customary international criminal law is applied following the dualist approach. Canada's *Criminal Code* stipulates there are no common law crimes, so even if a customary criminal prohibition exists in international law, it must be implemented by domestic statute.¹⁰ Also, the *Canadian Charter of Rights and Freedoms* provides that an individual charged with an offence has the right "not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations."¹¹ Therefore, judges cannot base their verdict upon a crime in customary international criminal law if that crime is not found in Canadian law, or Canadian law explicitly references customary international criminal law as being supplementary. For example, the *Crimes Against Humanity and War Crimes Act* (CAHWCA)¹² refers to customary international law in its definitions of genocide, crimes against humanity and war crimes, thereby reflecting these non-written concepts into Canadian law.

The reception of conventional international law in Canada follows the dualist approach. This requires that a treaty to which Canada is a party be implemented by a legislative or executive act in order to become part of the domestic law of Canada and enforceable in court. While the power to negotiate, conclude, and ratify treaties is exercised by the executive branch of the federal government, the implementation of treaties is carried out by the legislative branch. In matters of federal jurisdiction, this is the responsibility of the federal Parliament. In matters of provincial jurisdiction, it falls to the provincial legislatures to implement treaties signed by the federal executive.

As a party to the *Vienna Convention on the Law of Treaties*, Canada is obliged to recognize the supremacy of conventional international law and customary international law with regard to its national law.¹³ This obligation applies to all national law, including the Constitution of Canada, federal legislation, provincial constitutions and local legislation.¹⁴ As per the 1969 *Vienna Convention*, a treaty means every international agreement concluded between states in written form and governed by international law.¹⁵ It is binding upon the parties to it and must be performed by them in good faith.¹⁶ As such, Canada is expressly prohibited from invoking the provisions of its internal law as justification for its

¹⁰ *Criminal Code*, RCS 1985, c C-46, s 6 and 9 [*Criminal Code*].

¹¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter of Rights and Freedoms*] s 11(g).

¹² *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [*Crimes Against Humanity and War Crimes Act*].

¹³ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 27 [*Vienna Convention on the Law of Treaties*].

¹⁴ Annemie Schaus, "Article 27" in Olivier Corten & Pierre Klein, eds, *Les Conventions de Vienne sur le droit des traités. Commentaire article par article* (Bruxelles : Bruylant-Centre de droit international-Université Libre de Bruxelles, 2006) at 1136: "L'article 27 de la Convention de Vienne, quant à lui, prescrit certainement, dans l'ordre juridique international, la primauté du droit international sur le droit interne." Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Martinus Nijhoff, 2009), at 375: "Article 27 expressed the principle that on international level international law is supreme".

¹⁵ *Vienna Convention on the Law of Treaties*, supra note 13, art 2(1)(a).

¹⁶ *Ibid*, art 26.

failure to perform a treaty.¹⁷ The same obligation to comply exists under customary international law with respect to both conventional and customary international law.¹⁸ Therefore, in keeping with the *Vienna Convention* and as a matter of customary international law, Canada is obliged to undertake any legislative changes necessary to comply with its obligations under treaties and customary international law.

2.3 Court system

There are civilian and military court systems in Canada.

2.3.1. STRUCTURE OF THE CIVILIAN COURT SYSTEM

The civilian court system includes both provincial and federal courts. The *Constitution Act, 1867* provides the provinces with jurisdiction over “the administration of justice,” including the “constitution, organization and maintenance” of the courts, both civil and criminal.¹⁹ Under its authority to establish a “general court of appeal for Canada and any additional courts for the better administration of the laws of Canada,”²⁰ the federal government has created the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court.

The Federal Court is a statutory court created by the *Federal Courts Act*.²¹ The Federal Court has jurisdiction over legal disputes in the federal domain, including claims against the Government of Canada, civil suits in federally-regulated areas and challenges to the decisions of federal tribunals. For example, the Federal Court has jurisdiction over offences relating to national security and terrorism.²² The Federal Court of Appeal hears appeals from decisions of the Federal Court and Tax Court of Canada, as well as performing judicial review and hearing appeals from several federal tribunals and federal decision makers, including those dealing with immigration, refugee and citizenship matters.²³ Appeals from the Federal Court of Appeal are heard by the Supreme Court of

¹⁷ *Ibid*, art 27.

¹⁸ For more than a century, international court decisions, arbitral awards and public international law experts have not limited the obligation under international law to ensure that national legislation and jurisprudence not be inconsistent with international law to conventional international law. See, for example: *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion [1988] ICJ at para 57 noting: “the fundamental principle of international law that international law prevails over domestic law” citing *Alabama Claims Arbitration Award* [1872], reprinted in JB Moore, “International Arbitrations” (1898) New Cork, vol. I 495 at 653; Jennings & Watts, *supra* note 9 at 82–86; Malcolm N Shaw, *International Law*, 4th ed (Cambridge: Cambridge University Press, 1997) at 102-103; Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice 1954-9 General Principles and Sources of International Law” (1959) 35 Brit YB Int’l L at 183; Edwin Borchard, “The relation between international law and municipal law” (1940) 27 Va L Rev 137.

¹⁹ *Constitution Act 1982* (UK), 1982, c11, s 92(14) [*Constitution Act 1982*].

²⁰ *Ibid*, s 101.

²¹ *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*].

²² *Criminal Code*, *supra* note 10, ss 83.13(1)(1.1)(5)(7)(10), 83.14(1)(2)(4)(10).

²³ The Federal Court of Appeal performs judicial review and hears appeals from the following federal tribunals and federal decision makers: Board of Arbitration or Review Tribunal established under the *Canada Agricultural Products Act*; Conflict of Interest and Ethics Commissioner, Canadian Radio-Television and Telecommunications Commission, Pension Appeals Board, Canadian International Trade Tribunal, National Energy Board, Governor in Council acting under subsection 54(1) of the *National Energy Board Act*, Social Security Tribunal (Appeal Division), Canada Industrial Relations Board, Public Service Labour Relations Board, Copyright Board, Canadian Transportation Agency, Umpire acting under the *Employment Insurance Act*, Competition Tribunal, Assessor appointed under the *Canada Deposit Insurance Corporation Act*, Public Servants Disclosure Protection Tribunal,

Canada.

In each province and territory, superior courts have inherent jurisdiction pursuant to s. 96 of the *Constitution Act, 1867*, meaning they have jurisdiction to hear any cases unless a statute specifically assigns it to a different court. Superior courts act as courts of first instance for criminal offences of a certain gravity.²⁴ Appeals from superior courts are heard by provincial appellate courts, for example an appeal from the Ontario Superior Court would be heard by the Ontario Court of Appeal. Appeals from these appellate courts are heard by the Supreme Court of Canada.

There are also provincial courts in each province which are established by statute. Criminal offences below a certain gravity are heard by these courts.

2.3.2. STRUCTURE OF THE MILITARY COURT SYSTEM

Martial courts are military courts that were established under the *National Defence Act* ("NDA") to address breaches of the *Code of Service Discipline* ("CSD").²⁵ The CSD, which provides for specific extraterritorial jurisdiction to some extent,²⁶ applies to members of the Canadian Forces at all times and to members of the reserve force in specified circumstances, such as: when on duty, in uniform, in any Canadian Forces vehicle, etc.²⁷ In addition, the CSD can also apply to civilians in limited circumstances, such as a person who accompanies any unit or other element of the Canadian Forces that is on service or active service and participates with that unit in carrying out its operations.²⁸

The NDA gives the military justice system the jurisdiction to deal with a matter where a person who is subject to the CSD commits an offence punishable under the *Criminal Code*, or any other Act of Parliament (other than those noted above that have been excluded). Similarly, jurisdiction under the NDA may also be extended to offences committed outside Canada by persons subject to the CSD that are punishable under the *Criminal Code* or any other Act of Parliament.²⁹ Although several UN treaty bodies and experts share the view that military justice systems should be prevented from exercising jurisdiction over crimes against humanity and, more in general, human rights violations, martial courts in Canada have jurisdiction over crimes under international law, as well as those listed in the *Crimes Against Humanity and War Crimes Act*. In some cases, martial courts may be the only Canadian court with jurisdiction to adjudicate offences involving human rights violations or crimes under international law committed by military members or by civilians who have direct connections

Specific Claims Tribunal, Minister of Revenue refusing to register or revoking certain registrations under the *Income Tax Act*, Attorney General of Canada issuing a certificate under section 38.13 of the *Canada Evidence Act*, and Order to a Crown official requiring disclosure of confidential taxpayer information.

²⁴ For example, in Ontario, the Superior Court of Justice will hear cases with the most serious offences, while the Ontario Court of Justice will hear all other criminal matters, including cases with young offenders.

²⁵ *National Defence Act*, RS 1985 c N-5 [*National Defence Act*]. Jurisdiction, organization and procedures of the Canadian military justice system are covered under Volume II of the Queen's Regulation and Orders.

²⁶ See International Law Commission, the obligation to extradite or prosecute (*aut dedere aut judicare*), Comments and information received from Governments, A/CN.4/612, para.52 ("Canada also asserts specific extraterritorial jurisdiction in other limited circumstances, including offences committed by Canadian military personnel and other persons subject to the Code of Service Discipline (sections 67, 130 and 132 of the National Defence Act).

²⁷ *Ibid*, s 60(a)-(d).

²⁸ *Ibid*, ss 60(f), 61.

²⁹ *Ibid*, s 130(1)(b).

with Canadian Armed Forces that are not otherwise subject to universal jurisdiction.

The Court Martial Appeal Court (“CMAC”) hears appeals from martial courts’ decisions.³⁰ There is a right of appeal to the Supreme Court of Canada from the CMAC where one of the CMAC judges dissents on a question of law, and an appeal with leave if the CMAC judges were unanimous.³¹

While trials by courts martial within this system are heard before military judges with the same degree of constitutional independence as their civilian counterparts and are subject to Charter protections and international law that is binding on Canada, It is increasingly recognized that military courts should not have jurisdiction over members of the armed forces or civilians in cases involving human rights violations or crimes under international law (See below Section 4.3.1.).

Precedent. As in most common law countries, all courts, including the Supreme Court of Canada, are bound by the rule of *stare decisis* (binding precedent). A court may disregard one of its previous rulings or a ruling of a higher court if there are compelling reasons to do so.³² These reasons include: the prior decision departed from the purpose of a *Charter* provision as articulated in an earlier precedent; experience shows that the prior decision is unworkable as its application is unnecessarily complex and technical; the prior decision is contrary to sound principle; or, the prior decision results in unfairness.³³ A court may also overrule itself where precedent was wrongly decided.³⁴ A decision to depart from precedent requires a balancing between correctness and certainty.³⁵

2.4 Other components of the judicial system

In addition to the courts, other actors in the judicial system include police and prosecutors as well as a number of other institutions, such as immigration screening units. These latter actors are not formally part of the judicial system, but can play an important role in law reform (see Section 2.6 below).

Immigration screening unit. Citizenship and Immigration Canada (“CIC”) and Canada Border Services Agency (“CBSA”) screen persons and seek to bar entry into Canada of those who are suspected of having committed crimes under international law. Although the immigration unit is not formally part of the judicial system, it plays a crucial role in identifying possible suspects and informing police or prosecuting authorities.

Police. The Royal Canadian Mounted Police (“RCMP”) is Canada’s national police force and enforces Canadian federal laws. In addition to its federal policing responsibilities, the RCMP provides support to all police forces in Canada through its National Police Services branch, except those in Ontario and Quebec.³⁶ In these two provinces, the RCMP focuses exclusively on investigations relating to a defined set of federal offences. Most provinces also have their own provincial police forces. Their

³⁰ *Code of Service Discipline*, RS, 1985, c N-5, s 230.

³¹ *Appeals From Courts Martial*, online: Court Martial Appeal Court of Canada <http://www.cmac-cacm.ca/business/military_law4_e.shtml>.

³² *R v Henry*, [2005] 3 SCR 609 at para 44.

³³ *Ibid* at paras 45-46.

³⁴ (*Ontario*) *Attorney General v Fraser*, [2011] 2 SCR 3 at para 130.

³⁵ *Ibid* at para 133.

³⁶ *Beyond the Red Serge* (Fact Sheet), online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/about-ausujet/mod-eng.htm>>.

mandates are varied and extensive: traffic safety, crime prevention, criminal and organized crime investigation, child sexual exploitation investigation, etc. Joint investigations between the RCMP and provincial police forces are common. However, the RCMP has exclusive jurisdiction over cases involving crimes against humanity, genocide and war crimes. The RCMP National Division Services includes the Sensitive and International Investigations Unit, which conducts investigations related to war crimes in partnership with CBSA, CIC and the Department of Justice in the context of Canada's Crimes Against Humanity and War Crimes Program.

Prosecuting authorities. In Canada, police conduct investigations and decide whether to lay a charge. Once a charge has been laid, one of the provincial Attorneys General (or, in the case of offences subject exclusively to federal jurisdiction, the Attorney General of Canada) decides whether to proceed with a prosecution. Attorneys General serve dual roles as both cabinet ministers and the persons responsible for criminal prosecutions. Federal and provincial Crown attorneys are agents of their respective Attorneys General, and carry out the day-to-day decision making of the Attorneys General. They are lawyers who prosecute criminal matters on behalf of the Crown. The "Crown" refers to the English Monarch who is the head of state of Canada. For offences under the *Crimes Against Humanity and War Crimes Act*, the Department of Justice and the Public Prosecution Service of Canada decide whether to recommend criminal prosecution to the Attorney General or Deputy Attorney General of Canada, who must provide his or her personal consent in writing before charges can be laid (see Section 8 below).³⁷ To guide the Attorney General of Canada and other agents in matters of prosecution policy, the Public Prosecution Service of Canada has developed the Federal Prosecution Service Deskbook,³⁸ which elaborates the criteria that may guide prosecutors in the exercise of their discretion. The possibility to review prosecutorial discretion of the Attorney General of Canada, even regarding crimes under international law, is limited.³⁹

2.5 Role of victims and organizations acting in the public interest in criminal proceedings

In addition to government prosecutors, victims, individuals or legal persons acting on their behalf, individuals or legal persons acting on behalf of the public interest can initiate criminal prosecutions. Police and prosecutors have experts on crimes of sexual violence and crimes against members of marginalized groups, such as minorities and children as victims, witnesses or suspects.

2.5.1 CIVIL CLAIMS IN CRIMINAL PROCEEDINGS

The right to reparation and to civil claims in criminal, as well as in civil proceedings is discussed in Section 5 below.

2.5.2 CRIMINAL PROCEEDINGS INITIATED BY VICTIMS OR ON THEIR BEHALF

As discussed below, victims, individuals or legal persons acting on their behalf can initiate criminal

³⁷ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 9(3).

³⁸ *The Federal Prosecution Service Deskbook*, online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/index.html>> [*Federal Prosecution Service Deskbook*].

³⁹ See: *Krieger v Law Society of Alberta*, [2002] 3 SCR 372 [*Krieger*]; *Campbell v Attorney-General of Ontario* (1987), 60 OR (2d) 617; 42 DLR (4th) 383 (ONCA); *R v Power*, [1994] 1 SCR 601 [*Power*].

prosecutions.

2.5.2.1. Criminal proceedings initiated by victims

A citizen's right to initiate a private prosecution exists in common law. While there is no *Criminal Code* provision that expressly authorizes private prosecution, several provisions impliedly recognize its possibility.⁴⁰ However, the decision to continue a private prosecution, once it has been initiated, remains the prerogative of the Attorneys General. The Attorneys General reserve the right to intervene in private prosecutions and can either take control of proceedings or stop them entirely.⁴¹

In *Davidson v. British Columbia (Attorney General)*, an individual and a public interest group sought to bring a private prosecution against George W. Bush under section 269.1 of the *Criminal Code* for counselling, aiding and abetting torture in Abu Ghraib prison in Iraq and at Guantanamo. They were unsuccessful at the trial level, where a Provincial Court judge and trial judge dismissed their proceedings. On appeal to the British Columbia Court of Appeal, they were also unsuccessful, with the court adopting the Crown's argument that it lacked jurisdiction to hear such a matter because the Attorney General of Canada had not consented to the prosecution as required by section 7(7) of the *Criminal Code*.⁴²

In *Zhang v. Canada (Attorney General)*, an individual sought consent from the Attorney General of Canada to allow a private prosecution of 22 individuals in China responsible for his alleged torture. The acting Attorney General of Canada denied the request and did not consent to the prosecution. The applicant sought judicial review of the acting Attorney General's decision. The Federal Court found that the acting Attorney General's decision was properly within her discretion and that the decision not to grant consent did not violate the applicant's section 7 or section 15 *Charter* rights.⁴³ Thus, the action failed to materialize. This was confirmed by the Court of Appeal.⁴⁴

2.5.2.2. Criminal proceedings initiated on behalf of the victims or the public interest

Individuals or legal persons can also initiate criminal proceedings on behalf of victims or the general public interest pursuant to section 504 of the *Criminal Code* and its requirements.⁴⁵

2.5.3 RIGHTS OF VICTIMS IN CRIMINAL PROCEEDINGS

The rights of victims in criminal proceedings are protected through federal, provincial and territorial laws and vary from jurisdiction to jurisdiction. The following sections refer to the rights of victims in criminal proceedings as set out in the federal *Criminal Code*, *the Canadian Victims Bill of Rights*

⁴⁰ *Federal Prosecution Service Deskbook*, *supra* note 38 at c 26. (Several *Criminal Code* provisions impliedly recognize private prosecution. For example, section 504 permits anyone to lay an information, except where the Attorney-General's consent is required. Also, the definitions of "prosecutor" in sections 2 and 785 suggest that someone other than the Attorney-General may institute proceedings.)

⁴¹ *Ibid.*

⁴² *Davidson v British Columbia (Attorney General)*, 2006 BCCA 447 (available on CanLII), [2006] 12 WWR 591.

⁴³ *Zhang v Canada (Attorney General)*, 2006 FC 276 (available on CanLII), 139 CRR (2d) 137.

⁴⁴ *Zhang v Canada (Attorney General)*, 2007 FCA 201 (available on CanLII), 365 NR 277.

⁴⁵ *Criminal Code*, *supra* note 10, s 504.

(CVBR),⁴⁶ and legislation from Canada's two largest provinces: *Victims' Bill of Rights*⁴⁷ in Ontario and the *Act Respecting Assistance for Victims of Crime*⁴⁸ in Québec.

In addition to these rights, all federal, provincial and territorial Ministers responsible for criminal justice have endorsed the *Canadian Statement of Basic Principles of Justice for Victims of Crime*.⁴⁹ This Statement provides a comprehensive overview of how victims should be treated during the Canadian criminal justice process. However, because it is not law, it does not provide victims with additional rights beyond those provided by statute.

2.5.3.1. Notice of the rights of victims

The rights of victims regarding notice of the investigation, prosecution and appeal stages are not explicitly guaranteed in law. However, principle 5 of the *Canadian Statement of Basic Principles of Justice for Victims* stipulates that information should be provided to victims about the criminal justice system and the victim's role and opportunities to participate in criminal justice processes.⁵⁰

2.5.3.2. Protection

Victims are extended certain protections at various stages of the investigation, prosecution and appeal of a case and, if necessary, afterwards, which is guaranteed in law and practice. The preamble of the *Canadian Victims Bill of Rights* maintains that victims of crime and their families should be treated with courtesy, compassion and respect, including respect for their dignity.⁵¹ In Ontario, section 2(1)1 of the *Victims' Bill of Rights* stipulates that victims should be treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials.⁵² Similarly, in Québec, article 2 of the *Act Respecting Assistance for Victims of Crime* guarantees that victims of crime have the right to be treated with courtesy, fairness and understanding and with respect for their dignity and privacy.⁵³

2.5.3.3. Support

The right to psychological and other support for victims, particularly people who are often marginalized, such as women, members of minority groups and children, is guaranteed in law and practice in Québec. Article 6 of the *Act Respecting Assistance for Victims of Crime* stipulates that victims have the right, in so far as resources are available, to medical, psychological and social care or help as they may require, and to such other assistance services capable of meeting their needs for shelter and support, or for referral to other services better suited to provide them with assistance.⁵⁴

⁴⁶ *Canadian Victims Bill of Rights* SC 2015, c 13, s 2.

⁴⁷ *Victims' Bill of Rights*, SO 1996, c 6 [*Victims' Bill of Rights*].

⁴⁸ *An Act respecting assistance for victims of crime*, RSQ 1988, c A-13.2 [*An Act respecting assistance for victims of crime*].

⁴⁹ *Victims' rights in Canada*, online: Federal Ombudsman for Victims of Crime <<http://www.victimfirst.gc.ca/serv/wvr-qdv.html>> [*Victims' rights in Canada*].

⁵⁰ Department of Justice Canada, *Canadian Statement of Basic Principles of Justice for Victims of Crime* (2003), online: Department of Justice Canada <<http://www.justice.gc.ca/eng/pi/pcvi-cpcv/pub/03/princ.html>>.

⁵¹ *Canadian Victims Bill of Rights*, *supra* note 44 at para 2.

⁵² *Victims' Bill of Rights*, *supra* note 45 at s 2(1)1.

⁵³ *An Act respecting assistance for victims of crime*, *supra* note 48 at art 2.

⁵⁴ *Ibid*, art 6.

Additionally, there are programs administered by provinces that provide support to victims. Section 5 of the Ontario *Victims' Bill of Rights* provides for a "victim assistance justice fund account" which is to be used to assist victims, whether by supporting programs providing assistance directly to victims or by making grants to community agencies that assist victims.⁵⁵ Similarly, article 11 of the Québec *Act Respecting Assistance for Victims of Crime* also provides for an assistance fund, the assets from which may be granted as financial assistance to further the development of victims' assistance services and to establish and maintain victims of crime assistance centres.⁵⁶

The *Canadian Victims Bill of Rights* does not provide for specific support of victims in a similar way as the provincial legislation in Ontario and Quebec.

2.5.3.4. Notice

The right of victims to notice about all developments in the investigation, prosecution and appeal stages of a case is guaranteed in law and practice. Paragraphs 26(1)(a) and 142(1)(a) of the federal *Corrections and Conditional Release Act*⁵⁷ require the Correctional Service of Canada and the Parole Board of Canada to disclose the following information to a victim: the offender's name, the offence for which the offender was convicted and the court that convicted the offender, the date of commencement and length of the sentence that the offender is serving, and the eligibility dates and review dates applicable to the offender in respect of escorted and unescorted temporary absences or parole.⁵⁸

In Ontario, sections 2(1)2 and 2(1)3 the *Victims' Bill of Rights* articulate those aspects of the criminal justice process which victims have the right to information, including court procedures that relate to the prosecution, the dates, places and outcomes of all significant proceedings, the interim release and sentencing of the accused.⁵⁹ Article 4 of Québec's *Act Respecting Assistance for Victims of Crime* guarantees that victims have the right to be informed of the progress and final disposition of the case on request, and article 5 guarantees that victims have the right to be informed, on request, of the progress and outcome of police investigations to the extent possible, if it is not inconsistent with the public interest.⁶⁰ Article 6 of the *Canadian Victims Bill of Rights* protects victims' rights to request general information,⁶¹ article 7 protects the right to request case-specific information on the status of the investigation and proceedings,⁶² and article 8 protects the right to request information about the offender or accused.⁶³

2.5.3.5. Participation

The right of victims to participate in some pre-trial, trial and appellate proceedings are guaranteed in

⁵⁵ *Victims' Bill of Rights*, *supra* note 45, s 5.

⁵⁶ *An Act respecting assistance for victims of crime*, *supra* note 46, art 11.

⁵⁷ *Corrections and Conditional Release Act*, SC 1992, c 20, ss 26(1)(a), 142(1)(a).

⁵⁸ Additionally, paragraphs 26(1)(b) and 142(1)(b) list information that the Correctional Service and Parole Board are permitted to release to victims on a case-by-case basis, if it is determined that the release of said information is justified on the grounds that the interest of the victim in disclosure outweighs any invasion of the offender's privacy that may result from disclosure.

⁵⁹ *Victims' Bill of Rights*, *supra* note 45, ss 2(1)2, 2(1)3.

⁶⁰ *An Act respecting assistance for victims of crime*, *supra* note 46, art 5.

⁶¹ *Canadian Victims Bill of Rights*, *supra* note 44, art. 6.

⁶² *Ibid*, art 7.

⁶³ *Ibid*, art 8.

law and practice. Victims have the right to participate in sentencing proceedings by filing a Victim Impact Statement, as per section 722 of the *Criminal Code*.⁶⁴ This consists of a written statement made by the victim that describes the harm done to the victim and the effect the crime has had on his or her life. The Victim Impact Statement will be taken into account by judges when considering sentencing.⁶⁵

In Québec, article 3(4) of the *Act Respecting Assistance for Victims of Crime* stipulates that victims have a right to due consideration of their views and concerns at the appropriate stages of the proceedings, where their personal interests are affected.⁶⁶

The *Canadian Victims Bill of Rights* asserts, in article 14, that every victim has the right to convey their view on decisions made by the authorities and to have those views considered as well as,⁶⁷ in article 15, to present and have considered a victim impact statement.⁶⁸

2.5.3.6. Representation

The right of victims to legal representation is not guaranteed in Canada.

2.5.3.7 Restitution

Victims have the right to seek restitution, including requiring courts to consider a restitution order for all offences under the CVBR as per article 16.⁶⁹ Furthermore, article 17 gives victims awarded a restitution order the right to have it enforced through a civil court.⁷⁰

3. GEOGRAPHIC JURISDICTION OTHER THAN UNIVERSAL JURISDICTION

Geographic jurisdiction consists of territorial and extraterritorial jurisdiction. Extraterritorial jurisdiction includes: active and passive personality jurisdiction, protective jurisdiction and universal jurisdiction (discussed below in Section 4). Canadian courts can exercise territorial jurisdiction over all crimes committed in any territory under Canada's jurisdiction and extraterritorial jurisdiction over certain crimes only.

Territorial jurisdiction. There are several ways Canadian courts can exercise territorial jurisdiction. Canadian courts can exercise territorial jurisdiction over crimes and torts that occurred in Canadian territory if the crimes were committed entirely in the territory or on board one of its ships or aircraft. Territorial jurisdiction can also be exercised where the offence has a “real and substantial

⁶⁴ *Criminal Code*, supra note 10, s 722.

⁶⁵ *Victims' rights in Canada*, supra note 47.

⁶⁶ *An Act respecting assistance for victims of crime*, supra note 46, art 3(4).

⁶⁷ *Canadian Victims Bill of Rights*, supra note 44, art. 14.

⁶⁸ *Ibid*, art 15.

⁶⁹ *Ibid*, art 16.

⁷⁰ *Ibid*, art 17.

connection” based on evidence that “a significant portion of the activities constituting the offence” took place in Canada.⁷¹ To be captured by territorial jurisdiction, an offence cannot be wholly committed in another territory; there must be a connection between some aspects of the crime and the territory of Canada.⁷²

Exceptions to the territorial reach of criminal jurisdiction are rare, although Canada's international obligations under customary international law, or treaties to which Canada has acceded or has ratified, may require Canada to extend adjudicative jurisdiction in certain cases, for example to prosecute alleged offenders for certain serious crimes under international law, like piracy, war crimes, crimes against humanity, and genocide.

Active personality jurisdiction. Active personality jurisdiction allows Canadian courts to exercise jurisdiction over crimes committed by persons who were nationals of Canada at the time of the crime. This type of jurisdiction is provided for in section 8(a)(i) of the *Crimes Against Humanity and War Crimes Act*: “[a] person who is alleged to have committed an offence [of genocide, crimes against humanity, war crimes or every person who conspires or attempts to commit those crimes] may be prosecuted for that offence if, at the time the offence is alleged to have been committed, the person was a Canadian citizen or was employed by Canada in a civilian or military capacity [...]”. Canada claims jurisdiction on this ground for crimes such as treason,⁷³ international terrorism,⁷⁴ torture,⁷⁵ offences against United Nations or associated personnel⁷⁶ or offences in relation to sexual crimes against children⁷⁷.

Passive personality jurisdiction. Passive personality jurisdiction allows Canadian courts to exercise jurisdiction over crimes committed abroad against Canadian nationals. There are also several examples of passive personality jurisdiction in the *Criminal Code*.⁷⁸ This jurisdiction is also provided

⁷¹ *Libman v The Queen*, [1985] 2 SCR 178.

⁷² Robert J Currie, *International and Transnational Criminal Law*, 2nd ed. (Toronto: Essentials of Canadian law, 2013) [Currie] at 62-63.

⁷³ *Criminal Code*, *supra* note 10, s 46(3): “Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada, (a) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or (b) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).”

⁷⁴ *Ibid*, s 7(3.75): “Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada that, if committed in Canada, would be an indictable offence and would also constitute a terrorist activity referred to in paragraph (b) of the definition “terrorist activity” in subsection 83.01(1) is deemed to commit that act or omission in Canada [...]”.

⁷⁵ *Ibid*, s 7(3.7): “Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence [of torture] shall be deemed to commit that act or omission in Canada [...]”.

⁷⁶ *Ibid*, s 7(3.71): “Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against a member of United Nations personnel or associated personnel or against property referred to in section 431.1 that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 235, 236, 266, 267, 268, 269, 269.1, 271, 272, 273, 279, 279.1, 424.1 or 431.1 is deemed to commit that act or omission in Canada [...]”.

⁷⁷ *Ibid*, s (4.1): “Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident [...]”.

⁷⁸ *Ibid*, ss 7(2.1)(f), 7(2.31)(a), 7(3)(d)(i), 7(3)(d)(ii), 7(3.1)(e), 7(3.7)(d), 7(3.71)(e), 7(3.72)(e), 7(3.73)(g),

for in section 8(a)(iii) of the *Crimes Against Humanity and War Crimes Act* and concerns victims of genocide, crimes against humanity and war crimes: “[a] person who is alleged to have committed an offence [of genocide, crimes against humanity, war crimes or every person who conspires or attempts to commit those crimes] may be prosecuted for that offence if, at the time the offence is alleged to have been committed, the victim of the alleged offence was a Canadian citizen.” Canadian courts will also have jurisdiction over aliens who commit offences against Canadian internationally protected persons or their families even when abroad⁷⁹ or who take a Canadian citizen hostage.⁸⁰ There is also passive personality jurisdiction to seek civil remedies for terrorism-related crimes committed against Canadian nationals abroad through the *Justice for Victims of Terrorism Act*.⁸¹

Protective jurisdiction. Protective jurisdiction allows Canadian courts to exercise jurisdiction over crimes against specific national interests of Canada. The *Security Offences Act* employs protective jurisdiction over any “offence under any law of Canada where the alleged offence arises out of conduct constituting a threat to the security of Canada [...]”.⁸² “Threats to the security of Canada” are defined in the *Canadian Security Intelligence Service Act*.⁸³ Examples of offences over which protective jurisdiction is exercised include: the forging of passports, fraudulent use of a certificate of citizenship, treason and high treason, as well as certain offences in the *Citizenship Act*.⁸⁴ It is also provided for in section 26 of the *Security of Information Act*.⁸⁵

7(3.75)(a)

⁷⁹ *Ibid*, ss 7(3)(d)(i) and (ii): “Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against the person of an internationally protected person or against any property referred to in section 431 used by that person that, if committed in Canada, would be an offence against any of sections 235, 236, 266, 267, 268, 269, 269.1, 271, 272, 273, 279, 279.1, 280 to 283, 424 and 431 is deemed to commit that act or omission in Canada if [...]the act or omission is against [...]a person who enjoys the status of an internationally protected person by virtue of the functions that person performs on behalf of Canada, or [...] a member of the family of a person [...]”.

⁸⁰ *Ibid*, s 7(3.1)(e): “Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 279.1 shall be deemed to commit that act or omission in Canada [...] a person taken hostage by the act or omission is a Canadian citizen; [...]”.

⁸¹ *Justice for Victims of Terrorism Act*, SC 2012, c 1, ss 2, 4(1).

⁸² *Security Offences Act*, RSC 1985, c S-7, s 2(a).

⁸³ *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 2: Threats to the security of Canada include: (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage; (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person; (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state; and (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.

⁸⁴ Currie, *supra* note 72 at 464. See also *Criminal Code*, *supra* note 10 at ss 46, 57(1), 57(2), 58; and *Citizenship Act*, RSC 1985, c C-29, s 30.

⁸⁵ *Security of Information Act*, RSC 1985, c O-5.

4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION

As discussed below, Canadian courts cannot exercise universal jurisdiction over ordinary crimes, such as murder, assault, rape or kidnapping. Canadian courts may exercise universal jurisdiction over several crimes under national law of international concern identified in treaties providing for, or requiring, universal jurisdiction. These include offences committed on aircraft, attacks on ships and navigation at sea, offences against internationally protected persons or UN personnel, hijacking, hostage taking, nuclear terrorism and theft of nuclear material, terrorist bombing, and financing terrorism. Canadian courts may also exercise universal jurisdiction over certain crimes under international law, including war crimes, crimes against humanity, genocide, and torture. However, Canadian courts cannot exercise universal jurisdiction over some crimes under international law, like enforced disappearance and extrajudicial executions. Likewise, the following ordinary crimes of international concern are not subject to universal jurisdiction under Canadian law: counterfeiting, narcotics trafficking, psychotropic substances trafficking, transnational organized crime and firearms trafficking. Obstacles to the exercise of universal jurisdiction over crimes under international law are discussed below in Section 6.

Definitions. Universal jurisdiction is the *ability* of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests. Sometimes this rule is called permissive universal jurisdiction. This rule, which applies only to the notion of relative universal jurisdiction, is now part of customary international law (although it is also reflected in treaties), national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. When a national court is exercising jurisdiction over conduct amounting to crimes under international law or ordinary crimes of international concern committed abroad, as opposed to conduct simply amounting to ordinary crimes, the court is really acting as an agent of the international community enforcing international law.

Under the related *aut dedere aut judicare* (extradite or prosecute) rule, a state may not shield a person suspected of certain categories of crimes. Instead, the state is *required* either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to prosecute, or to surrender the person to an international criminal court. As a practical matter, when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of prescriptive jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court.

4.1. Ordinary crimes

Canadian courts cannot exercise universal jurisdiction over ordinary crimes, such as murder, assault, rape or kidnapping.

4.2. Crimes under national law of international concern

As indicated in the chart below, Canada has signed, but not yet ratified, two international treaties providing for universal jurisdiction over crimes under national law of international concern. It has ratified 15 of such treaties. As noted below, it has defined the crimes listed in 20 of those treaties in whole or in part, as crimes under national law, and it has provided its courts with universal jurisdiction over 15 of such crimes.

| CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN | | | | |
|--|-------------------------------|---|---|--|
| CRIME AND TREATY⁸⁶ | SIGNED RELEVANT TREATY | RATIFIED/ ACCEDED TO RELEVANT TREATY | DEFINED IN NATIONAL LAW | UNIVERSAL JURISDICTION |
| Piracy - 1889 Montevideo Treaty [OAS only] | NO | NO | Criminal Code, R.S.C. 1985, c. C-46, s. 74 (1) | Criminal Code, R.S.C. 1985, C. C-46, s. 74 (2) |
| Piracy - 1928 Bustamante Code | NO | NO | Criminal Code, R.S.C. 1985, c. C-46, s. 74 (1) | Criminal Code, R.S.C. 1985, c. c-46, s. 74 (2) |
| Piracy -1940 Montevideo Treaty | NO | NO | Criminal Code, R.S.C. 1985, c. C-46, s. 74 (1) | Criminal Code, R.S.C. 1985, c. c-46, s. 74 (2) |
| Piracy - 1958 High Seas Convention | NO | NO | Criminal Code, R.S.C. 1985, c. C-46, s. 74 (1) | Criminal Code, R.S.C. 1985, c. c-46, s. 74 (2) |
| Piracy - 1982 UN Convention on the Law of the Sea | 10 December 1982 | 7 November 2003 | Criminal Code, R.S.C. 1985, c. C-46, s. 74 (1) | Criminal Code, R.S.C. 1985, c. c-46, s. 74 (2) |
| Counterfeiting - 1929 Convention | NO | NO | Criminal Code, R.S.C. 1985, c. C-46, s. 448 - 449 ⁸⁷ | NO |
| Narcotics Trafficking: 1961 Single Convention, | 30 March 1961 ⁸⁸ | 11 October 1961 | Controlled Drugs and | NO |

⁸⁶ The citations to these treaties, with links, where they exist are found in Appendix II. For a summary of the relevant provisions of each treaty, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, AI Index: IOR 53/003/2001, 2001.

⁸⁷ Canada has not specifically defined counterfeiting of a foreign currency as a crime under national law but Section 449 of the Criminal Code (*supra* note 10) establishes the offence of making counterfeit money generally. However, in defining “counterfeiting money”, Section 448 uses the term “current” coin or paper money which includes “lawfully current in Canada or elsewhere by virtue of a law, proclamation or regulation in force in Canada or elsewhere as the case may be.

⁸⁸ Canada signed and ratified the *Single Convention on Narcotic Drugs*, 30 March 1961, 520 UNTS 204 (entered into force 13 December 1964), but not the version amended by the *Protocol amending the Single Convention on*

| CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN | | | | |
|--|-------------------------------|---|--|--|
| CRIME AND TREATY⁸⁶ | SIGNED RELEVANT TREATY | RATIFIED/ ACCEDED TO RELEVANT TREATY | DEFINED IN NATIONAL LAW | UNIVERSAL JURISDICTION |
| as amended by 1972 Protocol | | | Substances Act, S.C. 1996, c. 19, ss. 4-7 | |
| Violence on Aircraft – 1963 Tokyo Convention | 4 November 1964 | 7 November 1969 | Criminal Code, R.S.C., c. C-46, ss. 76 – 77 ⁸⁹ | Criminal Code, R.S.C. 1985, c. C-46, s. 74 (2) |
| Hijacking Aircraft- 1970 Hague Convention | 16 December 1970 | 20 June 1972 | Criminal Code, R.S.C., 1985, c. C-46, s. 76 | Criminal Code, R.S.C., c. C-46, s. 7 (2) |
| Psychotropic Substances: 1971 Convention | 20 December 1988 | 5 July 1990 | Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4-7; Criminal Code, R.S.C. 1985, c.C-46, s. 462.2 | NO |
| Attacks on Aviation – 1971 Montreal Convention | 19 September 1971 | 19 June 1972 | Criminal Code, R.S.C., 1985, c. C-46, ss.76-77 | Criminal Code, R.S.C., 1985, c. C-46, s. 7 (2) |
| Internationally Significant Persons - 1971 OAS Convention | NO | NO | NO | NO |
| Internationally Protected Persons - 1973 Convention | 26 June 1974 | 4 August 1976 | Criminal Code, R.S.C. 1985, c. C-46, ss. 279.01 – 279.03 | Criminal Code, R.S.C. 1985, c. C-46, s. 7 (3) |
| | 18 February 1980 | 4 December 1985 | Criminal Code, R.S.C. 1985, c. C-46, s. 279.1 | Criminal Code, R.S.C., 1985, c. C-46, s. 7 (3.1) ⁹⁰ |
| Nuclear Materials - 1979 | 22 | 21 March | Criminal Code, | Criminal Code, |

Narcotic Drugs, 1961, 25 March 1972, 976 UNTS 3 (entered into force 8 August 1975).

⁸⁹ Some of the conduct covered by the Tokyo Convention is defined as a crime by these provisions.

⁹⁰ In *R v Ribic*, 2008 ONCA 790.

| CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN | | | | |
|--|-------------------------------|---|--|---|
| CRIME AND TREATY⁸⁶ | SIGNED RELEVANT TREATY | RATIFIED/ ACCEDED TO RELEVANT TREATY | DEFINED IN NATIONAL LAW | UNIVERSAL JURISDICTION |
| Convention | September 1980 | 1986 | R.S.C., c. C-46, ss. 7 (3.2), 7 (3.6) | R.S.C. 1985, c. C-46, s. 7 (3.5) (c) |
| Attacks on Navigation - 1988 Convention | 10 March 1998 | 18 June 1993 | Criminal Code, R.S.C., c. C-46, s. 78.1 | Criminal Code, R.S.C., 1985, c. C-46, ss. 7 (2.1); 7 (2.2) (b) (i) – (ii) |
| Mercenaries – 1989 Convention | NO | NO | NO | NO |
| Trafficking In Minors: 1994 Convention | NO | NO | Criminal Code, R.S.C. 1985, c. C-46, s. 279.01 – 279.04 (trafficking in persons); Immigration and Refugee Protection Act (ditto) | Immigration and Refugee Protection Act, ds. 135 (only over trafficking covered by this act) |
| UN Personnel - 1994 Convention | 15 December 1994 | 3 April 2002 | Criminal Code, R.S.C. 1985, c. C-46, ss. 2, 431.1 | Criminal Code, R.S.C. 1985, c. C-46, s. 7 (3.71) |
| UN Personnel - 2005 Protocol | NO | NO | NO | NO |
| Terrorist Bombing - 1997 Convention | 12 January 1998 | 3 April 2002 | Criminal Code, R.S.C. 1985, c. C-46, ss. 431.2, 431.2 (2) and 431.2 (3) | Criminal Code, R.S.C. 1985, c. C-46, s. 7 (3.72) |
| Financing of Terrorism - 1999 Convention | 10 February 2000 | 19 February 2002 | Criminal Code, R.S.C. 1985, c. C-46, ss. 83.02 – 83.04 | Criminal Code, R.S.C. 1985, c. C-46, s. 7 (3.73) |
| Transnational Organized Crime - 2000 UN Convention | 14 December 2000 | 13 May 2002 | Criminal Code, R.S.C. 1985, c. C-46, ss. 119-120 and 139, | NO |

| CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN | | | | | |
|---|------------------------|--------------------------------------|--|----|---|
| CRIME AND TREATY ⁸⁶ | SIGNED RELEVANT TREATY | RATIFIED/ ACCEDED TO RELEVANT TREATY | DEFINED IN NATIONAL LAW | IN | UNIVERSAL JURISDICTION |
| | | | 467.11 - 467.13 and 462.31 | | |
| Trafficking of Human Beings - 2000 Protocol | 14 December 2000 | 13 May 2002 | Criminal Code, R.S.C. 1985, c. C-46, ss. 279.01, 279.02, 279.03 and 279.04; Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 118 | | Immigration and Refugee Protection Act, S.C., c. 27, s. 135 (only trafficking under this act) |
| Firearms – 2001 Protocol | 20 March 2002 | NO | Firearms Act, S.C. 1995, c. 39, ss. 91, 92, 93, 99 – 101, 103 – 104, 117.02 – 117.06; Export and Import Permits Act, R.S.C. 1985, c. E-19, ss. 13 – 21; Defence Production Act, R.S.C. 1985, c. D-1, ss. 37, 44, 45; United Nations Act, R.S.C. 1985, c. U-2 (Sudan Regs. S.O.R./2004-197) | | NO |
| Nuclear Terrorism - | 14 | NO ⁹¹ | Criminal Code, | | Criminal Code, |

⁹¹ Though Canada has not yet ratified the *Nuclear Terrorism Convention (International Convention for the Suppression of Acts of Nuclear Terrorism*, 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007), the *Nuclear Terrorism Act*, SC 2013, c 13 was passed on 21 May 2013, creating 4 new *Criminal Code*

| CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN | | | | |
|---|------------------------|--------------------------------------|---|------------------------------------|
| CRIME AND TREATY ⁸⁶ | SIGNED RELEVANT TREATY | RATIFIED/ ACCEDED TO RELEVANT TREATY | DEFINED IN NATIONAL LAW | UNIVERSAL JURISDICTION |
| 2005 Convention | September 2005 | | R.S.C. 1985, c. C-46, ss. 83.01, 82.3, 82.4, 82.5, 82.6 | R.S.C. 1985, c. C-46, s. 7 (2.21). |

4.3. Crimes under international law

Canada's courts may exercise universal jurisdiction over grave breaches of the four 1949 Geneva Conventions, grave breaches of Additional Protocol I, other war crimes in international armed conflict, violations of common Article 3 to the Geneva Conventions, violations of Additional Protocol II, other war crimes in non-international armed conflict, crimes against humanity, genocide, and torture. However, they cannot exercise universal jurisdiction over other crimes under international law, including extrajudicial execution, and enforced disappearance.

4.3.1. WAR CRIMES

Canada is a party to the four Geneva Conventions of 1949.⁹² It has ratified Additional Protocols I⁹³, II⁹⁴, and III⁹⁵ to these conventions.⁹⁶

In addition, Canada has been a party to the Rome Statute of the International Criminal Court ("Rome Statute") since July 7, 2000.⁹⁷ On June 29, 2000, Canada enacted the *Crimes Against*

offences related to nuclear terrorism. See *Criminal Code*, *supra* note 10, ss 82.3, 82.4, 82.5, and 82.6.

⁹² The Geneva Conventions are:

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1951) [*First Geneva Convention*];

Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1951) [*Second Geneva Convention*];

Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1951) [*Third Geneva Convention*]; and

Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) [*Fourth Geneva Convention*].

⁹³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) [*Protocol I*].

⁹⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) [*Protocol II*].

⁹⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem*, 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007) [*Protocol III*].

⁹⁶ *Geneva Conventions Act*, RSC 1985, c G-3, s 2(2).

⁹⁷ *Rome Statute of the International Criminal Court*, 17 July 1999, 2187 UNTS 90 (entered into force 1 July 2002) [*Rome Statute*].

Humanity and War Crimes Act (CAHWCA), which implemented the Rome Statute. A Canadian legal scholar has argued that the definition of war crimes contained in the *CAHWCA* may be “broader or narrower than the Rome Statute”⁹⁸, because it relies on customary and conventional international law. As a dualist state, treaty obligations do not become enforceable in Canadian courts until they are transformed into domestic law by statute or other legislative act.⁹⁹ For the obligations under the Rome Statute to become enforceable in Canadian law, Canada needed to enact the *CAHWCA*. Enacting the *CAHWCA* allows Canada to comply with the obligation to investigate or prosecute a crime under the International Criminal Court’s jurisdiction pursuant to the principle of complementarity in addition to its duty to investigate or prosecute for non-treaty based crimes of universal jurisdiction.¹⁰⁰

War crimes are defined as follows in section 4(3) and 6(3) of the *CAHWCA*:

An act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts.

Further, section 6(1.1) and section 4(1.1) provide that “[e]very person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to [...] [war crimes] is guilty of an indictable offence”.¹⁰¹

As indicated in the charts below, Canada has also signed and, for the most part, ratified a number of other international humanitarian law treaties with provisions that may give rise to individual criminal responsibility. However, such treaties will not always provide individual liability; most often, the crimes will have to qualify as crimes under customary international law, as war crimes in the Rome Statute or as grave breaches of the Geneva Conventions.¹⁰²

As the charts also indicate, Canada has defined war crimes in domestic law based on the definitions under conventional international law and customary international law.

Canadian courts were able to exercise universal jurisdiction over certain war crimes committed abroad under the former 1987 *Criminal Code*,¹⁰³ which only criminalised war crimes committed in the context of international armed conflicts.¹⁰⁴ Only *R v. Finta* was prosecuted under these former provisions.¹⁰⁵ The *Crimes Against Humanity and War Crimes Act* does not include this limitation and

⁹⁸ Fannie Lafontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012) at 107.

⁹⁹ John H Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice and Theory* (Toronto: Irwin Law, 2007) at 104.

¹⁰⁰ Robert Hage, “Implementing the Rome Statute: Canada’s Experience” in Roy S Lee, ed, *States’ Responses to Issues Arising from the ICC Statute: Constitutional Sovereignty, Judicial Cooperation, and Criminal Law*, (Ardstley NY: Transnational Publishers, 2005) at 50; UNGAOR, 61th Sess, UN DOC A/CN.4/612 (2009).

¹⁰¹ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s. 6(1.1) and s. 4(1.1).

¹⁰² Lafontaine, *supra* note 98 at 116-117.

¹⁰³ *Ibid* at 49.

¹⁰⁴ Repealed section 7(3.76) of the Canadian Criminal Code, in Lafontaine, *supra* note 98 at 360.

¹⁰⁵ *R v Finta* [1994] 1 SCR 701 [*Finta*]. Three other cases were tried under these former *Criminal Code* provisions but abandoned; see e.g.: *R v Pawlowski*, (1993) 12 OR (3d) 709; 101 DLR (4th) 267 (ONCA); *R v Grujicic*, (1994) OJ 2280; and *R v Reistetter*, (1990) OJ 2100.

has since repealed the provisions of the former statute.

4.3.1.1. War crimes in international armed conflict: Grave breaches of the 1949 Geneva Conventions

The four Geneva Conventions of 1949 each contain a list of prohibited acts which constitute “grave breaches” when committed against “protected persons” or “protected objects”, including wounded and sick members of the armed forces in the field, wounded and sick and shipwrecked members of armed forces at sea, prisoners of war and civilians.¹⁰⁶ Those breaches have been consolidated without change in substance in Article 8.2(a) of the Rome Statute.¹⁰⁷

Each of the Conventions contains a common article which requires each state party to fulfil a two-part obligation. First, states undertake to define grave breaches as crimes under national law. Second, states parties must either exercise universal jurisdiction over persons suspected of committing grave breaches; or extradite them to another state party able and willing to do so; or surrender them to an international criminal court with jurisdiction over them.¹⁰⁸ That common article states in relevant part:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.¹⁰⁹

Canada has defined grave breaches of the Geneva Conventions as crimes under national law through the *Geneva Conventions Act*.¹¹⁰ Grave breaches can also be prosecuted under the *Crimes Against Humanity and War Crimes Act*, which establishes universal jurisdiction over genocide, war crimes and crimes against humanity under “conventional international law”¹¹¹ and includes those breaches or crimes defined in the Geneva Conventions and their Additional Protocols as well as the Rome Statute. Canada can therefore exercise universal jurisdiction over grave breaches of the Geneva Conventions.

¹⁰⁶ *First Geneva Convention*, supra note 92 at art 50; *Second Geneva Convention*, supra note 92 at art 51; *Third Geneva Convention*, supra note 92, art 130; and *Fourth Geneva Convention*, supra note 92, art 147.

¹⁰⁷ *Rome Statute*, supra note 97, art 8(2)(a).

¹⁰⁸ See: ICRC, *The Geneva Conventions of 12 August 1949, Commentary, I Geneva Convention* (ICRC, Geneva 1952), 366 (“[t]here is nothing in the paragraph [Art.49, para.2] to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties”).

¹⁰⁹ *First Geneva Convention*, supra note 92 at art 49; *Second Geneva Convention*, supra note 92 at art 50; *Third Geneva Convention*, supra note 92 at art 129; *Fourth Geneva Convention*, supra note 92, art 146.

¹¹⁰ *Geneva Conventions Act*, supra note 96.

¹¹¹ *Crimes Against Humanity and War Crimes Act*, supra note 12.

4.3.1.2. War crimes in international armed conflict: Grave breaches of Additional Protocol I

Canada signed Additional Protocol I in 1977 and ratified it on November 20, 1990. Additional Protocol I applies to international armed conflicts. It enlarges the traditional concept of international armed conflict to include peoples exercising their right of self-determination in fighting against colonial domination, alien occupation, and against racist regimes.¹¹² It expands the range of grave breaches and basic humanitarian protections required of states during international armed conflicts.¹¹³ Article 85(2) of Additional Protocol I expands the scope of persons protected by the Geneva Conventions.¹¹⁴ Additional Protocol I also enumerates grave breaches supplementary to those of the Geneva Conventions in articles 11, 85(3), 85(4) and 85(5).¹¹⁵ Finally, Additional Protocol I imposes the same two-part obligation on states parties to 1) define grave breaches as crimes under national law, and 2) to try or extradite persons suspected of such grave breaches.¹¹⁶

Canada has fulfilled its obligations under Additional Protocol I in defining grave breaches as crimes under its national law and providing courts with universal jurisdiction over such grave breaches through the *Geneva Conventions Act* and the *Crimes Against Humanity and War Crimes Act*.

4.3.1.3. War crimes in international armed conflict: Rome Statute, other treaties, and customary international law

In addition to grave breaches of the Geneva Conventions and Additional Protocol I, there are other war crimes in international armed conflict that are defined in the Rome Statute, a number of international humanitarian law treaties, and customary international law.

Rome Statute. Article 8(2)(b) of the Rome Statute defines a broad range of war crimes in international armed conflict. Canada has defined these war crimes as crimes under national law in sections 4(4) and 6(4) of the *Crimes Against Humanity and War Crimes Act*. However, the provisions of the Rome Statute have not been implemented in their entirety in Canadian domestic law.¹¹⁷ Instead, “the *Act* relies expressly on the Rome Statute only as an interpretative guide of customary international law and only with respect to the definitions of the crimes”.¹¹⁸ Therefore, the explicit reference to Article 8(2)(b) of the Rome Statute in section 4(4) of the *CAHWCA* “does not limit or prejudice in any way the application of existing or developing rules of international law.”¹¹⁹

¹¹² *Protocol I*, *supra* note 93, art 1(4). For the text of this provision, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, *supra* note 6, s 4.3.1.

¹¹³ Edward M. Morgan, *International Law and the Canadian Courts: sovereign immunity, criminal jurisdiction, aliens' rights and taxation powers*, (Toronto: Carswell, 1990) at 139.

¹¹⁴ *Protocol I*, *supra* note 93, art 85(2) protects “persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.”

¹¹⁵ For the text of Articles 11 and 85(3) of Protocol I, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, *supra* note 6, s 4.3.1.

¹¹⁶ For the text of Article 85 (1) of Protocol I, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, *supra* note 6, s 4.3.1.

¹¹⁷ Currie, *supra* note 72 at 264; and Lafontaine, *supra* note 98 at 83.

¹¹⁸ Lafontaine, *supra* note 98 at 85.

¹¹⁹ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 4(4).

Canada has authorized its courts to exercise universal jurisdiction over war crimes in the Rome Statute.¹²⁰ This is despite the fact that, strictly speaking, the Rome Statute does not contain an explicit obligation for states parties to establish jurisdiction over war crimes and prosecute them. However, some argue that there is a duty to prosecute implied in the preamble to the Rome Statute and the complementarity principle.¹²¹ Despite a lack of an explicit obligation on states parties to prosecute, “many states have taken the opportunity presented by the need to modify their domestic law to implement their obligations under the *Rome Statute*, to give their domestic courts jurisdiction to try these crimes on the basis of universality”.¹²²

Treaties addressing war crimes. The Rome Statute leaves out a number of war crimes in international armed conflict that are listed in other treaties. As Chart II indicates, Canada has defined these other crimes as war crimes under national law. Canada has also authorized its courts to exercise universal jurisdiction over these additional war crimes.

CHART II. WAR CRIMES IN INTERNATIONAL ARMED CONFLICT IN THE THIRD GENEVA CONVENTION AND PROTOCOL I THAT HAVE BEEN OMITTED FROM THE ROME STATUTE

| Crime | Treaty | Signed | Ratified/ Acceded | Defined in national law (citing any relevant provision) | Universal jurisdiction (citing any relevant provision) |
|---|---|------------------|-------------------------------------|--|---|
| Unjustifiable delay in the repatriation of prisoners of war | Geneva Conv. III ¹²³ and Prot. I, art. 85 (4) (b) ¹²⁴ | November 2, 1950 | June 14, 1965/ November 14, 1965 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.4 and 6. <i>Geneva Conventions Act</i> , R.S.C. 1985, c. G-3, s.3(1). | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). <i>Geneva Conventions Act</i> , R.S.C. 1985, c. G-3, s.3(2). |

¹²⁰ Currie, *supra* note 72 at 264.

¹²¹ Lafontaine, *supra* note 98 at 43.

¹²² *Ibid* at 44.

¹²³ *Third Geneva Convention*, *supra* note 92 at art 118, as well as customary international humanitarian law; Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Geneva: International Committee of the Red Cross & Cambridge University Press, 2005) Rule 156: serious violations of international humanitarian constitute war crimes.

¹²⁴ *Protocol I*, *supra* note 93, art 85(4)(b); as well as customary international humanitarian law: Henckaerts & Doswald-Beck, *supra* note 123, Rule 156: serious violations of international humanitarian constitute war crimes.

CHART II. WAR CRIMES IN INTERNATIONAL ARMED CONFLICT IN THE THIRD GENEVA CONVENTION AND PROTOCOL I THAT HAVE BEEN OMITTED FROM THE ROME STATUTE

| Crime | Treaty | Signed | Ratified/ Acceded | Defined in national law (citing any relevant provision) | Universal jurisdiction (citing any relevant provision) |
|--|---|------------------|-----------------------------------|--|---|
| Unjustifiable delay in the repatriation of civilians | Prot. I, art. 85 (4) (b) ¹²⁵ | January 23, 1979 | January 24, 1991/ May 20, 1991 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.4 and 6. <i>Geneva Conventions Act</i> , R.S.C. 1985, c. G-3, s.3(1). | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). <i>Geneva Conventions Act</i> , R.S.C. 1985, c. G-3, s.3(2). |
| Launching of an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects | Prot. I, art. 85 (3) (c) ¹²⁶ | January 23, 1979 | January 24, 1991/ May 20, 1991 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.4 and 6. <i>Geneva Conventions Act</i> , R.S.C. 1985, c. G-3, s.3(1). | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). <i>Geneva Conventions Act</i> , R.S.C. 1985, c. G-3, s.3(2). |

¹²⁵ *Protocol I*, supra note 93, art 85(4)(b): as well as customary international humanitarian law: Henckaerts & Doswald-Beck, supra note 123, Rule 156: serious violations of international humanitarian constitute war crimes.

¹²⁶ *Protocol I*, supra note 93, art 85(3)(c): as well as customary international humanitarian law: Henckaerts & Doswald-Beck, supra note 123, Rule 156: serious violations of international humanitarian constitute war crimes.

Other treaties imposing criminal responsibility. In addition to the Geneva Conventions and Additional Protocol I, there are a number of international humanitarian law treaties applicable during international armed conflict which impose obligations which, if violated, can result in individual criminal responsibility, either under the treaties or because the prohibitions are recognized as part of customary international law. As Chart III indicates, Canada has defined some of the violations of these treaties as war crimes under national law. The chart also indicates that Canada has authorized its courts to exercise universal jurisdiction over all incorporated crimes.

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| Crime | Treaty | Signed | Ratified/ Acceded | Defined in national law (citing any relevant provision) | Universal jurisdiction (citing any relevant provision) |
|---|--|----------------------------------|--|---|---|
| Use of poisonous gases or bacteriological weapons | <i>Geneva Protocol</i> 1925 ¹²⁷ <i>Rome Statute</i> , article 8(2)(b)(xviii) ¹²⁸ | June 17, 1925 1 July 1998 | September 7, 1929 (ratified) 17 July 1998 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. (defined as a war crime ¹²⁹) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Harm to protected cultural property | <i>Convention for the Protection of Cultural Property in the Event of Armed Conflict</i> ¹³⁰ , 1954 | | March 11, 1999 (acceded) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. (defined as a war crime) ¹³¹ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

¹²⁷ *Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare*, 17 June 1925, 94 LNTS 65 (entered into force 8 February 1928) [*Geneva Protocol*].

¹²⁸ *Rome Statute*, *supra* note 96, article 8(2)(b)(xviii); Resolution ICC-ASP/16/res.4 (14 December, 2017) [*Resolution, 2017*].

¹²⁹ Henckaerts & Doswald-Beck, *supra* note 123, Rule 73: "Canada's LOAC Manual (2001) provides in its chapter entitled "Restrictions on the use of weapons": Bacteriological/biological methods of warfare are prohibited. Nations are prohibited from manufacturing, storing and using biological weapons. Both bacteriological and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion. In its chapter on "War crimes, individual criminal liability and command responsibility", the manual states that "using bacteriological methods of warfare" constitutes a war crime". Also see *Rome Statute*, *supra* note 97, s 8(2)b), for the prohibition of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.

¹³⁰ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956).

¹³¹ To some extent, harm to protected cultural property may also be defined as a grave breach of *Protocol I*, *supra* note 93. See Henckaerts & Doswald-Beck, *supra* note 123, Rule 38 (attacks against cultural property), at 733: "Canada's LOAC manual defines as a grave breach of AP I: attacks against clearly-recognized historic monuments,

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| | | | | | |
|---|--|----------------|---------------------------|--|---|
| Illegal export of cultural property | <i>Convention for the Protection of Cultural Property in the Event of Armed Conflict</i> ¹³² , 1954 | | March 11, 1999 (accessed) | <i>Cultural property export and import Act</i> , R.S.C., 1985, c. C-51, s. 36.1 (2) <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Developing, producing and stockpiling bacteriological weapons | 1972 BWC ¹³³ | April 10, 1972 | March 26, 1975 (ratified) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. (defined as a war crime) ¹³⁴ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of prohibited environmental modification techniques | ENMOD Conv. 1976 ¹³⁵ | May 18, 1977 | June 11, 1981 (ratified) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. (war crime under customary | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

works of art or places of worship which constitute the cultural or spiritual heritage of peoples, where there is no evidence of prior use of such objects in support of the adverse party's military effort and where such places are not located in the immediate proximity of legitimate targets". Therefore, absolute universal jurisdiction is provided under the *Geneva Conventions Act*, *supra* note 96, s 3(2).

¹³² *Ibid.*

¹³³ *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975) [*Biological Weapons Convention*].

¹³⁴ "Using bacteriological methods of warfare constitute a war crime" according to the Canada's LOAC manual, see Henckaerts & Doswald-Beck, *supra* note 123, Rule 73 at 1610. Also see internal legislation relating to the *Biological Weapons Convention*, online: http://www.international.gc.ca/arms-armes/non_nuclear-non_nucleaire/bio_legislation-bio_lois.aspx?view=d. However, none of this legislation provides Canadian courts with universal jurisdiction over the crime of developing, producing and stockpiling bacteriological weapons, which, as explained above, can be prosecuted as a war crime under the *Crimes Against Humanity and War Crimes Act*, *supra* note 12.

¹³⁵ *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 10 December 1976, 1108 UNTS 151 (5 October 1978) [*Environmental Modification Convention*].

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| | | | | international law ¹³⁶⁾ | |
|---|---|-----------------------------------|--|---|---|
| Use of prohibited conventional weapons | CCW 1980 ¹³⁷ | April 10, 1981 | June 24, 1994 (ratified) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6 ¹³⁸ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of weapons that injure by non-detectable fragments | CCW Prot. I 1980 ¹³⁹ <i>Rome Protocol</i> , article 8(2)(b)(xviii) ¹⁴⁰ | April 10, 1981 1 July 1998 | June 24, 1994 (ratified) 17 July 1998 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of prohibited land mines, booby traps and other devices | CCW Prot. II 1980 ¹⁴¹ | April 10, 1981 | June 24, 1994 (ratified) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of prohibited incendiary weapons | CCW Prot. III 1980 ¹⁴² | April 10, 1981 | June 24, 1994 (ratified) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. ¹⁴³ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

¹³⁶ Henckaerts & Doswald-Beck, *supra* note 123, Rule 45 (Causing serious damage to the environment).

¹³⁷ *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III)*, 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983) [*Convention on Certain Conventional Weapons*].

¹³⁸ *Crimes Against Humanity and War Crimes Act*, *supra* note 12.

¹³⁹ *Convention on Certain Conventional Weapons*, *supra* note 137.

¹⁴⁰ *Rome Statue*, *supra* note 96, article 8(2)(b)(xviii); *Resolution, 2017*, *supra* note 127.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Also see *Criminal Code*, *supra* note 10, s 431.2(1) for internal legislation on incendiary weapons (explosive or other lethal device). SS 431.2 (2) and (3) states that "(2) Every one who delivers, places, discharges or detonates an explosive or other lethal device to, into, in or against a place of public use, a government or public facility, a public transportation system or an infrastructure facility, either with intent to cause death or serious bodily injury

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| | | | | | |
|---|--|-----------------------------------|---|--|---|
| Developing, producing, stockpiling or using prohibited chemical weapons | CWC 1992 ¹⁴⁴ | January 13, 1993 | September 26, 1995 (ratified) | <i>Chemical weapons implementation Act</i> , S.C. 1995, c. 25, s.20. <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of blinding laser weapons | CCW Prot. IV 1995 ¹⁴⁵ <i>Rome Protocol</i> , article 8(2)(b)(xviii) ¹⁴⁶ | April 10, 1981 1 July 1998 | July 30, 1998 (consent to be bound) 17 July 1998 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of prohibited mines, booby-traps and other devices | CCW Prot. II a 1996 ¹⁴⁷ | April 10, 1981 | December 3, 1998 (consent to be bound) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

or with intent to cause extensive destruction of such a place, system or facility that results in or is likely to result in major economic loss, is guilty of an indictable offence and liable to imprisonment for life. (3) For greater certainty, subsection (2) does not apply to an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or to activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.” Thus, the Code excludes its application to this crime when conventional or customary international law apply in the context of an armed conflict.

¹⁴⁴ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, 13 January 1993, 1974 UNTS 317 (entered into force 24 April 1997) [*Chemical Weapons Convention*].

¹⁴⁵ *Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, 13 October 1995, 1380 UNTS 370 (entered into force 30 July 1998) [*Protocol IV, entitled Protocol on Blinding Laser Weapons*].

¹⁴⁶ *Rome Statute*, *supra* note 96, article 8(2)(b)(xviii); *Resolution, 2017*, *supra* note 127.

¹⁴⁷ *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices* as amended on 3 May 1996, 3 May 1996, 2048 UNTS 93 (entered into force 3 December 1998) [*Protocol II to the CCW Convention as amended on 3 May 1996*] annexed to the *Convention on Certain Conventional Weapons*, *supra* note 137.

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| | | | | | |
|--|---|---------------------------------|---|--|---|
| Use, stockpiling, production and transfer of prohibited anti-personnel mines | AP Mine Ban Conv. 1997 ¹⁴⁸ | December 3, 1997 | March 1, 1999 (ratified) | <i>Anti-Personnel Mines Convention Implementation Act</i> , S.C. 1997, c. 33, s. 21. <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Harm to cultural property | Hague Prot. 1999 ¹⁴⁹ Arts. 15 – 20 | December 27, 2005 (reception) | February 28, 2006 (acceded) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Recruitment or use of child soldiers | Optional Protocol CRC 2000 ¹⁵⁰ <i>Rome Statute</i> , article 8(2)(b)(xxvi) ¹⁵¹ | June 5, 2000 1 July 1998 | July 7, 2000 (ratified) 17 July 1998 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of prohibited | CCW Amdt | July 22, | May 18, 2004 | <i>Crimes Against</i> | <i>Crimes Against</i> |

¹⁴⁸ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 18 September 1997, 2056 UNTS 241 (entered into force 1 March 1999) [*Anti-Personnel Mine Ban Convention*].

¹⁴⁹ *Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, 26 March 1999, 2253 UNTS 172 (entered into force 9 March 2004).

¹⁵⁰ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict*, 25 May 2000, A/RES/54/263 (entered into force 12 February 2002).

¹⁵¹ *Rome Statute*, *supra* note 96, article 8(2)(b)(xxvi).

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| | | | | | |
|---|---------------------------------------|------------------------------------|-------------------------|--|---|
| conventional weapons | 2001 ¹⁵² | 2002 (acceptance) | (effect) ¹⁵³ | <i>Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Failure to clear, remove or destroy explosive remnants of war | CCW Prot. V 2003 ¹⁵⁴ | May 19, 2009 (consent to be bound) | November 19, 2009 | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of prohibited cluster munitions | Cluster Munitions 2008 ¹⁵⁵ | December 3, 2008 | March 17, 2015 | <i>An Act to implement the Convention on Cluster Munitions</i> , S.C. 2014, c. 27 ¹⁵⁶ | NO |

The definitions of the war crimes in the above treaties that have been incorporated into Canadian law appear to be consistent with international humanitarian law. As stated above, the *Crimes Against Humanity and War Crimes Act* relies on conventional international law and customary international law in interpreting and defining what constitutes war crimes. This legislative choice ensures that war crimes can be prosecuted in Canada as long as they are war crimes with respect to conventional international law or customary international law at the time of their commission. However, it must be kept in mind that “the way in which the crimes are structured means that, in each case, the trial judge must determine as a matter of law what the state of the applicable customary and/or conventional international law was at the time (and in the case of treaties, at the place) the offence was committed.”¹⁵⁷

¹⁵² *Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, 21 December 2001, 2260 UNTS 89 (entered into force 18 May 2004) [*Amendment to the Convention on Certain Conventional Weapons*].

¹⁵³ The Amendment to Article 1 of the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons*, *supra* note 153 expands the application of the prohibition to non-international armed conflicts.

¹⁵⁴ *Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, 28 November 2003, 2399 UNTS 100 (entered into force 12 November 2006) [*Protocol V*].

¹⁵⁵ *Convention on Cluster Munitions*, 30 May 2008, UNTS No 47713 (entered into force 1 August 2010).

¹⁵⁶ *An Act to implement the Convention on Cluster Munitions*, SC 2014, c27.

¹⁵⁷ Currie, Robert J. *International and Transnational Criminal Law* (Toronto: Essentials of Canadian law, 2010) at 240.

Rules of customary international law. There are numerous rules of customary international humanitarian law applicable to international armed conflict not expressly listed in the Rome Statute nor Additional Protocol I which, if violated, could lead to individual criminal responsibility. Some of these rules are listed in the following chart, indicating whether Canada has defined violations of these rules as war crimes in international armed conflict. As Chart IV indicates, Canada has defined violations of these rules of customary international law as war crimes under national law. The chart also indicates that Canada has authorized its courts to exercise universal jurisdiction over these crimes.

| CHART IV. RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW IN INTERNATIONAL ARMED CONFLICT | | |
|--|--|---|
| Rule of customary international humanitarian law | Defined in national law (citing any relevant provision) | Courts provided with universal jurisdiction (citing any relevant provision) |
| Prohibition of slavery ¹⁵⁸ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Deportation to slave labour ¹⁵⁹ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). <i>Geneva Conventions Act</i> , R.S.C. 1985, c. G-3, s.3(2). |
| Collective punishments; ¹⁶⁰ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Despoliation of the wounded, sick, shipwrecked or dead ¹⁶¹ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Attacking or ill-treating a <i>parlementaire</i> or bearer of the flag of | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.- | <i>Crimes Against Humanity and War</i> |

¹⁵⁸ Henckaerts & Doswald-Beck, *supra* note 123, Rule 94 (Slavery and the slave trade in all their forms are prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁵⁹ *Ibid*, Rule 95 (Uncompensated or abusive forced labour is prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁶⁰ *Ibid*, Rule 103 (Collective punishments are prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁶¹ *Ibid*, Rule 156 (Serious violations of international humanitarian law constitute war crimes).

| CHART IV. RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW IN INTERNATIONAL ARMED CONFLICT | | |
|--|---|--|
| Rule of customary international humanitarian law | Defined in national law (citing any relevant provision) | Courts provided with universal jurisdiction (citing any relevant provision) |
| truce ¹⁶² | 2000, c. 24, s.6. <i>Rome Statute</i> , article 8(2)(b)(vii) ¹⁶³ | <i>Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Launching an indiscriminate attack resulting in loss of life or injury to civilians or damage to civilian objects ¹⁶⁴ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. <i>Rome Statute</i> , articles 8(2)(b)(i) and (ii) ¹⁶⁵ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of biological weapons ¹⁶⁶ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. <i>Rome Statute</i> , article 8(2)(b)(xvii) ¹⁶⁷ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of chemical weapons ¹⁶⁸ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. <i>Rome Statute</i> , article 8(2)(b)(xvii) ¹⁶⁹ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| The use of non-detectable fragments ¹⁷⁰ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. <i>Rome Statute</i> , article | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

¹⁶² *Ibid*, Rule 67 (*Parlementaires* are inviolable), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁶³ *Rome Statute*, *supra* note 96, article 8(2)(b)(vii).

¹⁶⁴ *Ibid*, Rule 11 (Indiscriminate attacks are prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁶⁵ *Rome Statute*, *supra* note 96, article 8(2)(b)(i) and (ii).

¹⁶⁶ *Ibid*, Rule 73 (The use of biological weapons is prohibited).

¹⁶⁷ *Rome Statute*, *supra* note 96, article 8(2)(b)(xvii).

¹⁶⁸ *Ibid*, Rule 74 (The use of chemical weapons is prohibited).

¹⁶⁹ *Ibid*, article 8(2)(b)(xvii).

¹⁷⁰ *Ibid*, Rule 79 (The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited).

| CHART IV. RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW IN INTERNATIONAL ARMED CONFLICT | | |
|---|---|---|
| Rule of customary international humanitarian law | Defined in national law (citing any relevant provision) | Courts provided with universal jurisdiction (citing any relevant provision) |
| | 8(2)(b)(xviii) ¹⁷¹ | |
| The use of binding laser weapons ¹⁷² | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. <i>Rome Statute</i> , article 8(2)(b)(xviii) ¹⁷³ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

The definitions of the war crimes under customary international humanitarian law that have been incorporated into Canada's domestic laws appear to be consistent with international humanitarian law.

4.3.1.4. War crimes in non-international armed conflict: Common Article 3 of the Geneva Conventions, Additional Protocol II, Rome Statute, other conventional international law and customary international law

Certain violations of international humanitarian law prohibitions in non-international armed conflict are now recognized as being war crimes attracting individual criminal responsibility. These prohibitions are found, in particular, in Articles 8(2)(c) and (e) of the Rome Statute, other conventional international law, and customary international humanitarian law.

Common Article 3. Common Article 3 of the Geneva Conventions provides protections for those persons in non-international armed conflicts not taking part in hostilities.¹⁷⁴

Additional Protocol II. Additional Protocol II enhances the protections envisioned in Common Article 3 with respect to non-international armed conflicts. Additional Protocol II applies to conflicts which take place in the territory of a state party to the Protocol "between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."¹⁷⁵ Additional Protocol II provides a broad range of

¹⁷¹ *Rome Statute*, supra note 96, article 8(2)(b)(xviii); *Resolution, 2017*, supra note 127.

¹⁷² *Ibid*, Rule 86 (The use of laser weapons that are specifically designed, as their combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited).

¹⁷³ *Rome Statute*, supra note 96, article 8(2)(b)(xviii); *Resolution, 2017*, supra note 127.

¹⁷⁴ For the text of common Article 3, see First, Second, Third or Fourth *Geneva Conventions*, supra note 92.

¹⁷⁵ *Protocol II*, supra note 94, art 1.

protections to persons impacted and involved in non-international armed conflict.¹⁷⁶ The Rome Statute has codified the war crimes that occur in the context of a non-international armed conflict. Article 8(2)(c) of the Rome Statute includes most of the war crimes in Common Article 3, and Article 8(2)(e) contains an extensive, though not complete, list of war crimes in non-international armed conflicts.¹⁷⁷

Rome Statute. Canada has defined and implemented all of the war crimes listed in Article 8(2)(b) as crimes under national law, in sections 4(4) and 6(4) of the *Crimes Against Humanity and War Crimes Act*. Canada has expressly authorized its courts to exercise universal jurisdiction over these crimes.¹⁷⁸

Although serious violations of Additional Protocol II are listed as war crimes in the Statute of the International Criminal Tribunal for Rwanda, many of them are not expressly included in Article 8(2)(e) of the Rome Statute. For example, intentionally starving the civilian population (Article 14 of Additional Protocol II) is omitted.¹⁷⁹

Other international humanitarian law treaties. In addition, there are a number of international humanitarian law treaties applicable during non-national armed conflict imposing obligations that, if violated, possibly may result in individual criminal responsibility, either under the treaties or because the prohibitions are recognized as part of customary international law. There are also numerous rules of customary international humanitarian law applicable in non-international armed conflict that, if violated, would result in individual criminal responsibility. These rules are not without limits, however. The notion of war crimes in non-international armed conflicts was only first recognized by the International Criminal Tribunal for the former Yugoslavia Appeals Chamber in the *Tadic* case in 1995, and applied only to situations occurring after 1990.¹⁸⁰

As Chart V indicates, Canada has defined violations of these treaties as war crimes under national law, given that the *Crimes Against Humanity and War Crimes Act* “avoids any distinction as to the type of armed conflict and refers to acts or omissions committed during “an armed conflict” that constitutes war crimes according to international law applicable to “armed conflicts”.”¹⁸¹ Therefore, if it can be established that a certain violation of international humanitarian law attracted criminal liability under either conventional or customary law at the time (and, in cases of treaties, place) of the commission of the crime, it can be prosecuted in Canada. The chart also indicates that Canada has authorized its courts, through the same *Act*, to exercise universal jurisdiction over these crimes.

¹⁷⁶ *Protocol II*, *supra* note 94.

¹⁷⁷ For the text of *Rome Statute*, *supra* note 97, art 8(2)(d).

¹⁷⁸ See *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 8.

¹⁷⁹ See *Protocol II*, *supra* note 147. See also Henckaerts & Doswald-Beck, *supra* note 123, Rule 53 (The use of starvation of the civilian population as a method of warfare is prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes). On starvation of civilian population in non-international armed conflicts, see recent proposal by Switzerland to amend the Rome Statute at <https://treaties.un.org/doc/Publication/CN/2019/CN.399.2019-Eng.pdf>

¹⁸⁰ *Prosecutor v. Dusko Tadic aka “Dule”*, Case No IT-94-1, ICTY Appeals Chamber (2 October 1995) [*Tadic*].

¹⁸¹ Lafontaine, *supra* note 98 at 203.

CHART V. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, POSSIBLY MAY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| Crime | Treaty | Signed | Ratified or acceded | Definition in national law (citation to any relevant provision) | Universal jurisdiction (citation to any relevant provision) |
|--|--|---|--------------------------|---|---|
| Harm to protected cultural property | 1954 CCP and Hague Prot. 1954 ¹⁸² | December 11, 1998 (consent to be bound) | March 11, 1999 (acceded) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of certain prohibited conventional weapons | CCW 1980 ¹⁸³ | April 10, 1981 | June 24, 1994 (ratified) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6 (war crime) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of weapons that injure by non-detectable fragments | CCW Prot. I 1980 ¹⁸⁴ | April 10, 1981 | June 24, 1994 (ratified) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of prohibited mines, booby-traps and other devices | CCW Prot. II 1980 ¹⁸⁵ | April 10, 1981 | June 24, 1994 (ratified) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of prohibited incendiary | CCW Prot. III | April 10, 1981 | June 24, 1994 | <i>Crimes Against Humanity and War Crimes Act</i> | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

¹⁸² *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, supra note 130.

¹⁸³ *Convention on Certain Conventional Weapons*, supra note 137.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

CHART V. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, POSSIBLY MAY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| Crime | Treaty | Signed | Ratified or acceded | Definition in national law (citation to any relevant provision) | Universal jurisdiction (citation to any relevant provision) |
|--|------------------------------------|------------------|---|--|---|
| weapons | 1980 ¹⁸⁶ | | (ratified) | <i>Act</i> , S.C.-2000, c. 24, s.6. | 2000, c. 24, s.8 b). |
| Use of prohibited mines, booby-traps and other devices | CCW Prot. II a 1996 ¹⁸⁷ | April 10, 1981 | December 3, 1998 (consent to be bound) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Developing, producing, stockpiling and using prohibited chemical weapons | CWC 1993 ¹⁸⁸ | January 13, 1993 | September 26, 1995(ratified) | <i>Chemical weapons implementation Act</i> , S.C. 1995, c. 25, s.20. <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of blinding laser weapons | CCW Prot. IV 1995 ¹⁸⁹ | April 10, 1981 | July 30, 1998 (consent to be bound) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

¹⁸⁶ *Ibid.*

¹⁸⁷ *Protocol II to the CCW Convention as amended on 3 May 1996, supra note 147.*

¹⁸⁸ *Chemical Weapons Convention, supra note 144.*

¹⁸⁹ *Protocol IV, entitled Blinding Laser Weapons, supra note 145.*

CHART V. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, POSSIBLY MAY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| Crime | Treaty | Signed | Ratified or acceded | Definition in national law (citation to any relevant provision) | Universal jurisdiction (citation to any relevant provision) |
|--|---------------------------------------|---|-----------------------------|--|---|
| | | | | s.6. | |
| Using, stockpiling, producing and transferring prohibited anti-personnel mines | AP Mine Ban Conv. 1997 ¹⁹⁰ | December 3, 1997 | March 1, 1999 (ratified) | <i>Anti-Personnel Mines Convention Implementation Act</i> , S.C. 1997, c. 33, s. 21. <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Harm to protected cultural property | Hague Prot. 1999 ¹⁹¹ | November 29, 2005 (consent to be bound) | February 28, 2006 (acceded) | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Recruiting and using | Opt Prot. CRC | June 5, | July 7, 2000 | <i>Crimes Against Humanity and</i> | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.- |

¹⁹⁰ *Anti-Personnel Mine Ban Convention*, supra note 148.

¹⁹¹ *Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, supra note 149.

CHART V. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, POSSIBLY MAY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

| Crime | Treaty | Signed | Ratified or acceded | Definition in national law (citation to any relevant provision) | Universal jurisdiction (citation to any relevant provision) |
|--|---------------------------------------|------------------------------------|--------------------------------------|---|--|
| child soldiers | 2000 ¹⁹² | 2000 | (ratified) | <i>War Crimes Act, S.C.-2000, c. 24, s.6.</i> | 2000, c. 24, s.8 b). |
| Using certain prohibited conventional weapons | CCW Amdt 2001 ¹⁹³ | July 22, 2002 (acceptance) | May 18, 2004 (effect) ¹⁹⁴ | <i>Crimes Against Humanity and War Crimes Act, S.C.-2000, c. 24, s.6.</i> | <i>Crimes Against Humanity and War Crimes Act, S.C.-2000, c. 24, s.8 b).</i> |
| Failing to clear and destroy explosive remnants of war | CCW Prot. V ¹⁹⁵ | May 19, 2009 (consent to be bound) | November 19, 2009 (effect) | <i>Crimes Against Humanity and War Crimes Act, S.C.-2000, c. 24, s.6.</i> | <i>Crimes Against Humanity and War Crimes Act, S.C.-2000, c. 24, s.8 b).</i> |
| Use of prohibited cluster munitions | Cluster Munitions 2008 ¹⁹⁶ | December 3, 2008 | NO | NO | NO (Unless the trial judge concludes that the use of prohibited cluster munitions is a crime under customary international law.) |

Rules of customary international humanitarian law. Finally, there are a number of rules of customary

¹⁹² *Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, supra note 150.*

¹⁹³ *Amendment to the Convention on Certain Conventional Weapons, supra note 152.*

¹⁹⁴ The Amendment to Article 1 of the *Convention on Certain Conventional Weapons*, the application of the prohibition to non-international armed conflicts (see *Amendment to the Convention on Certain Conventional Weapons, supra note 152*).

¹⁹⁵ *Protocol V, supra note 154.*

¹⁹⁶ *Convention on Cluster Munitions, supra note 155.*

international law applicable in non-international armed conflict which, if violated, could lead to individual criminal responsibility for war crimes. Some of these rules are listed in Chart VI. The chart indicates that Canada has defined violations of these treaties as war crimes under national law. It also indicates that Canada has authorized its courts to exercise universal jurisdiction over these crimes.

CHART VI. RULES OF CUSTOMARY INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT WHICH, IF VIOLATED, COULD LEAD TO INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES

| Rule of customary international humanitarian law | Defined in national law (citation to any relevant provision) | Universal jurisdiction (citation to any relevant provision) |
|---|---|---|
| Use of biological weapons ¹⁹⁷ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of chemical weapons ¹⁹⁸ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. <i>Rome Statute</i> , articles 8(2)(e)(xiii) ¹⁹⁹ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of non-detectable fragments ²⁰⁰ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of blinding laser weapons ²⁰¹ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.- | <i>Crimes Against Humanity and War Crimes Act</i> , |

¹⁹⁷ Henckaerts & Doswald-Beck, *supra* note 123, Rule 73 (The use of biological weapons is prohibited).

¹⁹⁸ *Ibid*, Rule 74 (The use of chemical weapons is prohibited).

¹⁹⁹ *Rome Statute*, *supra* note 96, article 8(2)(e) (xiii).

²⁰⁰ *Ibid*, Rule 79 (The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited).

²⁰¹ *Ibid*, Rule 86 (The use of laser weapons that are specifically designed, as their combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited).

| CHART VI. RULES OF CUSTOMARY INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT WHICH, IF VIOLATED, COULD LEAD TO INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES | | |
|--|--|---|
| Rule of customary international humanitarian law | Defined in national law (citation to any relevant provision) | Universal jurisdiction (citation to any relevant provision) |
| will cause excessive Incidental civilian loss, injury or damage ²⁰² | 2000, c. 24, s.6. | S.C.-2000, c. 24, s.8 b). |
| Making non-defended localities and demilitarized zones the object of attack ²⁰³ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Using human shields ²⁰⁴ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Slavery ²⁰⁵ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Collective punishments ²⁰⁶ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of poison ²⁰⁷ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.- | <i>Crimes Against Humanity and War Crimes Act</i> , |

²⁰² *Ibid*, Rule 11 (Indiscriminate attacks are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

²⁰³ *Ibid*, Rule 36 (Directing an attack against a demilitarized zone agreed upon between the parties to the conflict is prohibited), Rule 37 (Directing an attack against a non-defended locality is prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

²⁰⁴ *Ibid*, Rule 97 (The use of human shields is prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

²⁰⁵ *Ibid*, Rule 94 (Slavery and the slave trade in all their forms are prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

²⁰⁶ *Ibid*, Rule 103 (Collective punishments are prohibited), and Rule 156 (Serious violations of international humanitarian law constitute war crimes).

²⁰⁷ The Review Conference of the Rome Statute adopted an amendment to Article 8(2)(e) to make the use of this weapon in non-international armed conflict a war crime. *Amendments to article 8 of the Rome Statute*, 10 June 2010 RC/ Res5 (entered into force 26 September 2012).

CHART VI. RULES OF CUSTOMARY INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT WHICH, IF VIOLATED, COULD LEAD TO INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES

| Rule of customary international humanitarian law | Defined in national law (citation to any relevant provision) | Universal jurisdiction (citation to any relevant provision) |
|--|--|---|
| | 2000, c. 24, s.6. <i>Rome Statute</i> , articles 8(2)(e)(xiii)- (xiv) ²⁰⁸ | S.C.-2000, c. 24, s.8 b). |
| Use of toxic gases ²⁰⁹ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. <i>Rome Statute</i> , articles 8(2)(e)(xiii)- (xiv) ²¹⁰ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |
| Use of dum-dum bullets ²¹¹ | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.6. <i>Rome Statute</i> , article 8(2)(e)(xv) ²¹² | <i>Crimes Against Humanity and War Crimes Act</i> , S.C.-2000, c. 24, s.8 b). |

The definitions of the war crimes under customary international humanitarian law listed above that have been incorporated into Canada’s law appear to be consistent with international humanitarian law.

4.3.2. CRIMES AGAINST HUMANITY

Canada signed the Rome Statute on December 18, 1998 and ratified it on July 7, 2000. The most widely accepted definition of the acts constituting crimes against humanity is found in Article 7 of

²⁰⁸ *Rome Statute*, supra note 96, article 8(2)(e) (xiii)-(xiv).

²⁰⁹ *Amendments to article 8 of the Rome Statute*, supra note 203.

²¹⁰ *Rome Statute*, supra note 96, article 8(2)(e)(xiii)-(xiv).

²¹¹ *Amendments to article 8 of the Rome Statute*, supra note 203.

²¹² *Rome Statute*, supra note 96, article 8(2)(e)(xv).

the Rome Statute.²¹³

Canada has prohibited some conduct that could amount to crimes against humanity in its ordinary criminal law. For example, section 235 of the *Criminal Code* criminalizes murder, section 271 criminalizes sexual assault, and torture is criminalized in section 269.1. Universal jurisdiction cannot be exercised over most domestic criminal offences, however the offence of torture is subject to universal jurisdiction by virtue of section 7(3.7) of the *Criminal Code*.

Universal jurisdiction can be exercised over crimes against humanity pursuant to the *Crimes Against Humanity and War Crimes Act*. According to section 8 of the *CAHWCA*, a Canadian court may exercise jurisdiction over crimes against humanity as follows:

“A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if

(a) at the time the offence is alleged to have been committed,

(i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,

(ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,

(iii) the victim of the alleged offence was a Canadian citizen, or

(iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or

(b) after the time the offence is alleged to have been committed, the person is present in Canada.²¹⁴

Section 6(3) of the *Crimes Against Humanity and War Crimes Act* lists the crimes that qualify as “crimes against humanity”:

[...] murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.²¹⁵

Section 6(1.1) provides that “[e]very person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to [...] [crimes against humanity] is guilty of an indictable offence”.

The Quebec Court of Appeal, in *Munyaneza*, specified that the list defining crimes against humanity in subsection 6(3) of the *CAHWA Act* is not exhaustive, “since any other act or omission that

²¹³ For the scope of crimes against humanity, see Machteld Boot, Rodney Dixon & Christopher K. Hall, “Article 7 (Crimes Against Humanity)” in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, (Munich: C. H. Beck; Oxford: Hart & Baden-Baden: Nomos, 2008) at 183.

²¹⁴ *Crimes Against Humanity and War Crimes Act*, supra note 12, s 8.

²¹⁵ *Ibid*, s 6(3).

contravenes customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations may constitute a proscribed underlying act”.²¹⁶

In the *Mugesera* case, the Supreme Court of Canada endeavoured to develop a definition of crimes against humanity.²¹⁷ According to the judgment, the *actus reus* of a crime against humanity contains three elements: “(a) one of the underlying offences or “proscribed acts” had been committed; (b) that it was committed as part of a widespread or systematic attack; and (c) that the attack was directed against any civilian population or any identifiable group of persons”.²¹⁸ The Court defined “attack” as the commission of an act of violence²¹⁹ while “widespread attack” includes “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.²²⁰ For the third element of the *actus reus*, the population against which an attack is directed has to be the primary and not the collateral target of the attack.²²¹

As for the *mens rea*, the person committing the proscribed act has to have knowledge of the attack. This means he or she must be cognizant of the link between his or her act and the attack, knowing either that his or her acts are part of the attack directly or at least take the risk that they are part of the attack.²²² Both the *actus reus* and the *mens rea* of the underlying offences have to be proved by the prosecution.

It must be kept in mind that this decision was based on the former *Criminal Code* provisions, but after the *Crimes Against Humanity and War Crimes Act* had been adopted. The Court “in fact specifically mentioned that the differences in the manner that crimes against humanity are defined in the *Act* were ‘not material’ to its discussion on this issue”.²²³ It seems that “there are indications that the court would look to domestic law to define the constitutive elements of the underlying offence”.²²⁴ The elements of the underlying offence should be established with respect to international law; the default of doing so might “create a disparity in the way the international offences are defined and applied in Canada”.²²⁵

This definition from the Supreme Court of Canada of the elements of a crime against humanity is susceptible to evolution given to the provisions of the *Crimes Against Humanity and War Crimes Act* because it relies on customary international law.

Section 6 of the *Crimes Against Humanity and War Crimes Act*, as compared to Article 7 of the Rome Statute, omits the crimes of enforced disappearance and apartheid.²²⁶ Canada has ratified

²¹⁶ *R c. Munyaneza* (2014), QCCA 904 [*Munyaneza*].

²¹⁷ *Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100 [*Mugesera*].

²¹⁸ *Ibid* at para 128.

²¹⁹ *Ibid* at para 153.

²²⁰ *Ibid* at para 154.

²²¹ *Ibid* at para 161.

²²² *Ibid* at paras 174 and 176.

²²³ Fannie Lafontaine, “Canada’s Crimes against Humanity and War Crimes Act on Trial: An Analysis of the *Munyaneza* case” (2010) 8 *Journal of International Criminal Justice* 269 at 180, citing *Mugesera*, *supra* note 217 at para 118.

²²⁴ Lafontaine, *supra* note 98 at 138.

²²⁵ *Ibid*.

²²⁶ Given the fact that enforced disappearance in article 7(2)(i) of the Rome Statute includes within its definition arrest and detention (followed by other elements for this crime) one could also argue that it partially subsumed

neither of the international treaties providing for such crimes.²²⁷ However, some argue that it would be possible to prosecute enforced disappearances and apartheid in Canada by including it under the umbrella of “any other inhumane act” from the definition of crimes against humanity in the *Crimes Against Humanity and War Crimes Act*.²²⁸

The *Crimes Against Humanity and War Crimes Act* does not expressly include the crime of forcible transfer of populations, although it prohibits the crime of deportation. Notwithstanding this lack of further specification in the *Crimes Against Humanity and War Crimes Act*, some interpretations may favour a prosecution in Canada of the crime of forcible transfer. Besides the fact that the crime of forcible transfer is undoubtedly part of customary international law, “Canadian judges and prosecutors may either adopt the view that since ss. 4(4) and 6(4) of the *Act* essentially mandate an interpretation of customary international law that corresponds to the Rome Statute -which makes a single category with the two terms and defines them in the same manner- ‘deportation’ under the *Act* should include ‘forcible transfer of population’.”²²⁹ Also, prosecutors and judges could “include the crime within the concept of “persecution” if discriminatory intent is present, or as “other inhumane acts” as some judgements of the international tribunals have done“.²³⁰ However, “it would seem that the most coherent interpretation is to read “forcible displacement” within the meaning of “deportation” in prosecutions under the *Act*.²³¹

The *Crimes Against Humanity and War Crimes Act* refers to sexual violence in a generic manner, as opposed to the list of sexual-related crimes enumerated in the *Rome Statute* (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity). The Quebec Superior Court case of *Munyaneza*, addressed sexual violence as a crime under international law for the first time.²³² In *Munyaneza*, Justice Denis considered that international jurisprudence did not differ from Canadian jurisprudence on enumerated sexual acts that amount to sexual violence. Justice Denis decided that acts of sexual violence include: “(a) forcing a person to undress in public; (b) sexual penetration; (c) rape; (d) sexual molestation”.²³³ On appeal, the Court specified that the *mens rea* of rape as an underlying offence to crimes against humanity “is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim” and that this knowledge of non-consent “may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine

within article 7(1)(e), which refers to imprisonment; similarly, with apartheid, which definition in article 7(2)(h) starts with inhumane acts. These two crimes have not been subject to any interpretation at the international criminal jurisprudence although enforced disappearance has been interpreted by international human rights courts.

²²⁷ *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006 UNTS 2715 (entered into force 23 December 2010) [*Disappearance Convention*]; and *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976).

²²⁸ Lafontaine, *supra* note 98 at 189. See also *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 6(3).

²²⁹ *Ibid* at 190.

²³⁰ *Ibid*.

²³¹ *Ibid*.

²³² *R c Munyaneza* (2006), QCCS 8007 . For commentary see Lafontaine, *supra* note 98 at 147.

²³³ Lafontaine, *supra* note 98 at 147.

consent”.²³⁴

Canadian legal scholar Fannie LaFontaine argues that in analyzing jurisprudence, one needs to consider the particular nuances of crimes of sexual violence and the particular issues that arise in that context. Indeed, “the crimes’ definitions in the *Act* refer to customary international law which, in the case of rape and sexual violence, is likely different [...] than the standards as it was elaborated in *Akayesu*”²³⁵, a reference in *Munyaneza* in the judge’s analysis. Moreover, “the *actus reus* of sexual violence on consent rather than on force or coercion” is different from “the standard expressed in *Akayesu* referred to by [the judge]”.²³⁶ Finally, the author mentions that in this case, the judge has considered “the *Rome Statute* as constitutive of customary law”; however, “the ICC *Elements of Crimes* likely differ from customary international law by not including lack of consent as a material element of the crime of rape (and other acts of sexual violence.)”²³⁷

At times, the *Crimes Against Humanity and War Crimes Act* (CAHWCA) goes beyond the Rome Statute to extend liability more broadly. For example, the CAHWCA expands the circle of victims of genocide to include “an identifiable group of persons” and circle of victims of a crime against humanity to include “any identifiable group”. The CAHWCA goes further beyond the Rome Statute to extend the definition of war crimes to include those defined in customary international law or conventional international law. The CAHWCA also narrows the scope of some international defences and criminalized forms of extended liability relating to the offences of war crimes, crimes against humanity, and genocide not found in the Rome Statute, such as conspiracy, while making command and superior responsibility a criminal offence instead of a mode of liability.

4.3.3. GENOCIDE

Canada has been a party to the 1948 *Convention for the Prevention and Punishment of the Crime of Genocide* (“Genocide Convention”) since September 3, 1952.²³⁸ The formulation of the crime of genocide in the Genocide Convention has passed into customary international law.²³⁹ Article 2 of the Genocide Convention defines genocide as:

[...] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its

²³⁴ *Munyaneza*, *supra* note 212.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid* at 148.

²³⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) [*Genocide Convention*].

²³⁹ Payam Akhavan, “Enforcement of the Genocide Convention: A Challenge to Civilization” (1995) 8 *Harv Hum Rts J* 229 at 229-230.

physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.²⁴⁰

Article 6 of the Rome Statute contains a virtually identical definition of the crime of genocide. In addition, Article 3 of the Genocide Convention requires that states make genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide, crimes under national law.²⁴¹

Direct and public incitement to genocide is also incorporated in Article 25 (individual responsibility) of the Rome Statute.

Canada has defined the inchoate offence of advocating or promoting genocide as a crime in section 318 of the *Criminal Code*.²⁴² Genocide is broadly defined in section 318(2) as “[...] acts committed with intent to destroy in whole or in part any identifiable group, namely, (a) killing members of the group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.”²⁴³ However, committing genocide in itself is not a criminal offence punishable under the *Criminal Code*. Rather, genocide is a criminal offence punishable through the *Crimes Against Humanity and War Crimes Act*.-

The modes of criminal liability for genocide in international law overlap with some of the modes of criminal liability in Canadian law, though there are distinct differences.²⁴⁴ LaFontaine argues that the “differences between [modes of liability] could potentially lead to admissibility issues before the ICC, or at least create inconsistency in the scope of responsibility for the same crimes, depending on whether they are prosecuted in Canadian courts, or before the ICC or other international jurisdictions”.²⁴⁵ For example, in Canada, the crime of genocide can be committed by omission under the *Crimes Against Humanity and War Crimes Act* and can attract principal liability.²⁴⁶

In *Mugesera*,²⁴⁷ the Supreme Court of Canada has defined the elements of the crime of incitement to genocide under section 318 of the *Criminal Code*. The proof that genocide occurred is not required. The prosecution does not have to prove a direct causal link between the incitement and actual acts of violence because the offence of direct and public incitement to genocide is of an inchoate nature. The *actus reus* of the crime is therefore defined by incitement to genocide which is direct and public. “Innuendo and obscure language” are not sufficient to establish a incitement to genocide. According to the Court, “the words used must be clear enough to be immediately understood by the intended audience”.²⁴⁸ The *mens rea* required is an “intent to direct, prompt or

²⁴⁰ *Genocide Convention*, *supra* note 238.

²⁴¹ *Ibid.*

²⁴² *Criminal Code*, *supra* note 10, s. 318.

²⁴³ *Ibid.*

²⁴⁴ LaFontaine, *supra* note 98 at 217.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid* at 227-228.

²⁴⁷ *Mugesera*, *supra* note 217.

²⁴⁸ *Ibid* at para 87.

commit genocide”²⁴⁹; the accused also needs to have had the specific intention of committing genocide, namely the intent to “destroy in whole or in part any identifiable group, namely, any section of the public distinguished by colour, race, religion, or ethnic origin”.²⁵⁰

The *Crimes Against Humanity and War Crimes Act* defines conspiracy, attempt or complicity of genocide as crimes under national law. Section 6(1.1) provides that “[e]very person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to [...] [genocide] is guilty of an indictable offence”.

Finally, Canada defines genocide in section 8(b) of the *Crimes Against Humanity and War Crimes Act* as: an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.²⁵¹ In this way, Canadian legislation had gone beyond international criminal law when defining genocide by expanding the number of victim groups, referring to identifiable groups instead of the four traditional groups for genocide.

Justice Denis, in *Munyaneza*²⁵², specified the intent required in a case where an accused was charged with committing genocide by both killing and causing serious bodily or mental harm.²⁵³ The intent must have been to physically destroy the targeted group, not only its national, linguistic, religious or cultural identity. More specifically, the intent must have been to destroy the group in substantial part, meaning a high proportion of the group or the most prominent members of the community, the effect of which on the whole group is significant.

4.3.4. TORTURE

Canada has been a party to the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“Convention against Torture”) since June 26, 1987.²⁵⁴ This treaty requires states parties to define acts of torture as a crime under national law (Article 4); to establish jurisdiction over persons suspected of committing acts of torture (which may include rape and other crimes of sexual violence) who are present in any territory subject to Canadian jurisdiction if they are not extradited (Article 5(2)); to take measures to ensure presence for prosecution or extradition (Articles 6(1) and 6(2)); and to submit the cases to the competent authorities, unless the person concerned is extradited (Article 7(1)).²⁵⁵

²⁴⁹ *Ibid* at para 88, referring to *Prosecutor v Akayesu*, [1998] 9 IHRR 608 at para 560.

²⁵⁰ *Mugesera*, *supra* note 217 at para 89; and *Criminal Code*, *supra* note 10, ss 318(2) and (4).

²⁵¹ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, art 4(3).

²⁵² *R v Munyaneza*, (2009) QCCS 2201.

²⁵³ *Ibid*; the genocide definition of the court relies on the *Genocide Convention*, the *ad hoc* tribunal jurisprudence, the *Mugesera* case and the decision of the International Court of Justice in the *Serbian Genocide Case*.

²⁵⁴ *Convention on the Elimination of All Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [*Convention Against Torture*].

²⁵⁵ See, International Court of Justice, *Obligation to prosecute or extradite (Belgium v Senegal)*, Judgment, 20 July 2012, para.95, (“Extradition is an option offered to the State by the Convention, whereas prosecution is an

Canada has not signed the *Inter-American Convention to Prevent and Punish Torture*.²⁵⁶ This treaty requires states parties to prevent and punish torture (Article 1); to ensure that all acts of torture and attempts to commit torture are crimes under domestic criminal law which are punishable by severe penalties that take into account the serious nature of the offence (Article 6); to take the necessary measures to establish jurisdiction over torture when the suspect is within a state's jurisdiction and it is not appropriate to extradite the suspect (Article 12); and, when the state does not grant extradition, to submit the case to the competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law (Article 14).

However, Canada has criminalized torture in section 269.1(1) of the *Criminal Code*: "every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."²⁵⁷

Torture is defined in the *Criminal Code* as:

any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (a) for a purpose including:

- (i) obtaining from the person or from a third person information or a statement,
- (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and

(iii) intimidating or coercing the person or a third person, or

(b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.²⁵⁸

According to Section 7(3.7) of the *Criminal Code*, Canada may exercise universal jurisdiction over the crime of torture.

Canada can also exercise universal jurisdiction over torture as both a crime against humanity and a war crime under the *Crimes Against Humanity and War Crimes Act*.²⁵⁹ Since the *Crimes Against Humanity and War Crimes Act* refers to these crimes as they are defined under customary international law and cites the Rome Statute as constitutive of custom, its definition differs from the one adopted in the *Criminal Code*.²⁶⁰

international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State').

²⁵⁶ *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OAS TS 67 (entered into force 28 February 1987).

²⁵⁷ *Criminal Code*, *supra* note 10, s 269.1(1).

²⁵⁸ *Ibid*, s 269.1(2).

²⁵⁹ See *Crimes Against Humanity and War Crimes Act*, *supra* note 12, ss 6(3) and 4(3).

²⁶⁰ Lafontaine, *supra* note 98 at 176.

The disadvantage of using crimes against humanity or war crimes compared to the specific crime of torture is that for the former have chapeau elements (systematic or widespread for crimes against humanity and the occurrence of an armed conflict for a war crime). On the other hand, the crimes under international law are easier to prove as the purpose elements necessary for the crime of torture have been removed in the international jurisprudence as well as the *Rome Statute*.²⁶¹

4.3.5. EXTRAJUDICIAL EXECUTIONS

Extrajudicial executions, which are “unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence”, constitute “fundamental violations of human rights and an affront to the conscience of humanity”.²⁶² The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions make clear that all states must ensure that all persons found in their territory or subject to their jurisdiction who are suspected of such crimes are either prosecuted in domestic courts or extradited to face trial elsewhere.²⁶³

Extrajudicial executions are not expressly defined as crimes under Canadian law. They could be prosecuted under the ordinary crime of murder according to section 235 of the *Criminal Code* (though Canadian courts cannot exercise universal jurisdiction over the ordinary crime of murder). Extrajudicial executions can also be prosecuted, if committed during an international armed conflict, as a grave breach of the Geneva Conventions, either under the *Crimes Against Humanity and War Crimes Act* or under the *Geneva Conventions Act*. Extrajudicial executions could also be prosecuted as crimes against humanity (with the underlying act being murder), or as genocide according to the *Crimes Against Humanity and War Crimes Act*.²⁶⁴ As in the case of torture, the disadvantage of using crimes against humanity or war crimes framework in the case of extrajudicial executions is requirement of the chapeau elements, whereas for crimes under international law the purpose elements necessary for the crime have been removed.²⁶⁵

4.3.6. ENFORCED DISAPPEARANCE

Canada has neither signed nor ratified the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance* (“Disappearance Convention”).²⁶⁶ This treaty requires states

²⁶¹ *Rome Statute*, *supra* note 96, art 7(2)(e); it can also be prosecuted as genocide under the rubric of 6(b) of the Rome Statute, causing serious bodily harm, etc.

²⁶² Amnesty International, *14-Point Program for the Prevention of Extrajudicial Executions*, AI Index: POL 35/002/1993 (Amnesty International, 1993); Amnesty International, “*Disappearances and Political Killings – Human Rights Crisis of the 1990s: A Manual for Action*”, AI Index: ACT 33/01/94 (Amnesty International: 1994) at 86. For a discussion of universal jurisdiction over extrajudicial executions, see Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, *supra* note 6, c 11.

²⁶³ *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, recommended by Economic and Social Council Resolution 1989/65, 24 May 1989. Principle 18 declares: Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

²⁶⁴ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, ss 6 and 8.

²⁶⁵ *Rome Statute*, *supra* note 96, art.7 (2)(e); it can also be prosecuted as genocide under the rubric of 6(b) of the Rome Statute, causing serious bodily harm, etc.

²⁶⁶ *Disappearance Convention*, *supra* note 227.

parties to define enforced disappearance as a crime under national law (Articles 2 and 3);²⁶⁷ to establish jurisdiction over persons suspected of enforced disappearance present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized. (Article 9(2)); to take measures to ensure presence for prosecution or extradition (Articles 10(1) and 10(2)); and to submit the case to the competent authorities if the person is not extradited (Article 11(1)).

In addition, Article 7(1)(i) of the Rome Statute lists enforced disappearance of persons as a crime against humanity, while Article 7(2)(i) defines enforced disappearances as:

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.²⁶⁸

Canada has not explicitly defined enforced disappearances as a crime under national law. However, some acts and conduct amounting to this crime can be prosecuted under the Canadian *Criminal Code* as an ordinary crime of kidnapping. That said, the offence of kidnapping under the *Criminal Code* does not capture the distinct nature of enforced disappearances as a crime under international law, most notably because it does not require state involvement.²⁶⁹ Canada has not moreover expressly provided its courts with universal jurisdiction over enforced disappearances. However, the crime of enforced disappearances could arguably be prosecuted under the *Crimes Against Humanity and War Crimes Act* as an “other inhumane act” given the non-exhaustive nature of the list of crimes against humanity in section 8(3).²⁷⁰ As with torture and extrajudicial executions, the trade-off of being required to prove the chapeau elements in a crime against humanity or war crime, versus the utility of not needing to prove the purpose elements applies.²⁷¹

4.3.7. AGGRESSION

The crime of planning, preparing, initiating or waging aggressive war has been recognized as a crime under international law since it was incorporated in the Nuremberg Charter in 1945.²⁷² It is

²⁶⁷ The Convention has defined enforced disappearance in Article 2 as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. The Convention also imposes to states parties the obligation to ‘take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice’.

²⁶⁸ *Rome Statute*, *supra* note 97, art 7(2)(i).

²⁶⁹ *Criminal Code*, *supra* note 10, s 279(1).

²⁷⁰ Lafontaine, *supra* note 98 at 188; Currie, *supra* note 72 at 158. See also *Crimes Against Humanity and War Crimes Act*, *supra* note 12 at s 8(3).

²⁷¹ *Rome Statute*, *supra* note 127, art 7(2)(e); is can also be prosecuted as genocide under the rubric of 6(b) of the Rome Statute, causing serious bodily harm etc.

²⁷² *Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, London, 8 August 1945 [*Nuremberg Charter*], art 6(a): “CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation

expressly listed as a crime in Article 5 of the Rome Statute over which the ICC will exercise jurisdiction once a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.²⁷³ The Review Conference on the Rome Statute in 2010 adopted an amendment to the Statute defining the crime and setting out the conditions under which the Court will exercise its jurisdiction over the crime.²⁷⁴

Canada has not yet defined the planning, preparation, initiation or waging of an aggressive war as a crime under national law and it has not provided its courts with universal jurisdiction over this crime.

of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]”

²⁷³ *Rome Statute*, *supra* note 97, art 5 (2).

²⁷⁴ *Amendments on the crime of aggression to the Rome Statute of the International Criminal Court*, 11 June 2010, RC/ Res 6.

5. JURISDICTION OVER CIVIL CLAIMS FOR REPARATIONS

Under international law and standards, victims of crimes under international law and other human rights violations and abuses are entitled to full reparation, including restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.²⁷⁵

5.1. Universal jurisdiction over civil claims in civil cases

In contrast to a number of civil law countries and the United States,²⁷⁶ there is no specific legislation in Canada permitting victims to obtain reparation in civil proceedings based on universal jurisdiction. However, there are private international law rules, such as *Mareva* injunctions, which allow Canadian courts to exercise universal jurisdiction over civil claims.²⁷⁷ Scholars Amir Attaran and Jennifer Besner argue “extraterritorial assertions of civil jurisdiction already exist in the common law without any treaty to authorize the practice”.²⁷⁸

There has been at least one attempt to try this claim. In the recent *Araya v. Nevsun Resources Ltd.*, the plaintiffs argued that Nevsun is liable for actions contrary to customary international law occurring at a mining project in Eritrea.²⁷⁹ The argument was founded on the common law doctrine of adoption, which was accepted in Canada in *R v Hape* as “the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule”.²⁸⁰

²⁷⁵ With regard to war crimes, see, for example, *1907 Hague Convention IV Respecting the Laws and Customs of War on Land*, reprinted in Adam Roberts & Richard Guelff, *Documents on the Laws of War* 67, 3rd ed (Oxford: Oxford University Press, 2000). See also Hisakazu Fujita, Isomi Suzuki & Kantato Nagano, *War and the Rights of Individuals, Renaissance of Individual Compensation*, (Tokyo: Nippon Hyoron-sha Co Ltd. Publishers, 1999), expert opinions by Frits Kalshoven at 31; Eric David at 49; Christopher Greenwood at 59; *Protocol I*, *supra* note 93 at art 91 (Responsibility). With regard to crimes under international law and other human rights violations and abuses, see, for example, Human Rights Committee, *General Comment 31, Nature of the Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev1/Add13 (2004) (scope of Article 2 of the ICCPR); *Convention Against Torture*, *supra* note 222, at art 14; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34 (1985); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res A/RES/60/147, UN Doc E/CN4/2005/35 (2005) [*Van Boven-Bassiouni Principles*]; *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN4/2005/102/Add1 (2005) [*Joinet-Orentlicher Principles*].

For a more complete discussion of the right to reparation, see Amnesty International paper XXX.

²⁷⁶ See, for example, Amnesty International, *Universal jurisdiction: The scope of universal civil jurisdiction*, IOR 53/008/2007 (Amnesty International, 2007) noting legislative provisions in 25 countries with universal civil jurisdiction, including: Argentina, Austria, Belgium, Bolivia, China, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Myanmar, the Netherlands, Panama, Poland, Portugal, Romania, Senegal, Spain, Sweden, United States and Venezuela).

²⁷⁷ See V Black & E Babin, “Mareva Injunctions in Canada: Territorial Aspects” (1997) 28 Can Bus LJ 431.

²⁷⁸ Jennifer Besner & Amir Attaran, “Civil liability in Canada’s courts for torture committed abroad: The unsatisfactory interpretation of the State Immunity Act 1985” (2008) 16 Tort L Rev 150.

²⁷⁹ *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 [Nevsun].

²⁸⁰ *Hape*, *supra* note 7.

The British Columbia Supreme Court permitted this novel claim, which implies that violations of customary international law should be civilly actionable as standalone torts under domestic common law. Nevsun argued that they cannot be held liable, and that domestic law should be limited to domestic common law torts. The Court denied Nevsun's application to strike those claims.²⁸¹

The appeal was dismissed at British Columbia Court of Appeal. On appeal, Nevsun contended that the Court had erred in not striking out the actions that were based on customary international law, as no such cause of action had ever been recognized by a Canadian court. The judge notes that recent developments in "transnational law" opened the possibility that a step "an incremental step towards reflecting CIL norms in private law remedies might be appropriate in this instance". Thus Court of Appeal found that the chambers judge had not erred in accepting the claims based in customary international law.²⁸²

The case was granted leave to appeal to the Supreme Court of Canada, and was heard in January 2019. As of October 2019, the Court has yet to render its decision.

5.2. Civil claims in criminal proceedings

Victims and their families or heirs of the victims cannot bring civil claims in criminal proceedings (for a description of how the rights of victims in such criminal proceedings generally are implemented, see Section 2.5 above).

However, judges may provide compensation or restitution for victims, on their own initiative or at the request of the Attorney General of the province in which those proceedings are taken.²⁸³ For example, section 738(1)(a) of the *Criminal Code* permits judges to order the payment of "an amount not exceeding the replacement value of the property as of the date the order is imposed"²⁸⁴ if the damage, loss or destruction of this property is "the result of the commission of the offence or the arrest or attempted arrest of the offender".²⁸⁵ The imposition of an amount is also provided "in the case of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender".²⁸⁶

5.3. The right to reparation of victims in civil proceedings

With the exception of Yukon Territory, there is no Canadian legislation that recognizes the right of victims of crimes under international law to reparation in civil proceedings. The *Yukon Torture Prohibition Act* provides an explicit cause of action:

Every public official, and every person acting at the instigation or of with the consent or acquiescence of a public official, who inflicts torture on any other person commits a tort and is liable and renders the employer of the public official or person liable to pay damages to the

²⁸¹ *Nevsun*, supra note 275.

²⁸² *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 40.

²⁸³ *Criminal Code*, supra note 10, s 2.

²⁸⁴ *Ibid*, s 738(1)(a).

²⁸⁵ *Ibid*.

²⁸⁶ *Ibid*, s 738(1)(b).

victim of the torture.²⁸⁷

However, some provincial laws allow victims of crimes to initiate civil proceedings to recover damages against offenders.²⁸⁸ In addition, provinces have established compensation programs for the victims of crimes.²⁸⁹ These provincial programs provide assistance and compensation to victims, persons who are responsible for the support of the victim, or, if the victim is dead, the victim's dependants. Compensation is generally awarded for pecuniary losses incurred by victims as a result of disability affecting the victim's capacity for work, pecuniary losses incurred by dependants as a result of the victim's death, pain and suffering, support of a child born as a result of rape, and expenses incurred or to be incurred as a result of the victim's injury or death.²⁹⁰ Their jurisdiction is limited to victims that are injured or killed in their province.

In 1985, the federal government created the Victims Assistance Fund. This Fund "supports a wide range of projects and activities designed to improve the experience of victims in the criminal justice system".²⁹¹ It does not provide compensation to victims of crime, because this type of compensation is managed by provincial and territorial compensation programs. The Fund has three components: one provides the financing of provinces and territories to encourage the implementation of their legislations for victims of crime; another provides the financing of governmental and non-governmental organizations that promote access to justice for victims of crime; and the last one provides financial assistance to victims of crime in specific circumstances.²⁹² Since 2007, through the Victims Assistance Fund, the Canadian government has an emergency financial assistance for Canadians victimized abroad. This assistance is limited in many ways. First, the assistance is limited to a Canadian who has been a victim of a violent crime abroad, a family member of a victim who is dead, ill or incapacitated due to their victimization in a foreign jurisdiction or, in the case of a child, the parent or the person responsible for the care and support of the child may be eligible for emergency financial assistance.²⁹³ Secondly, this financial assistance is limited to victim specific crimes like homicide, sexual assault, aggravated assault and assault with serious personal violence, including against a child. Thirdly, it is also limited in substance because the financial assistance will only be offered where no other source of financial assistance is available.

The *Crimes Against Humanity and War Crimes Act* also creates a victims support fund called the Crimes Against Humanity Fund.²⁹⁴ Payments are made out of the fund to

the International Criminal Court, the Trust Fund established under article 79 of the Rome Statute, victims of offences under this Act or of offences within the jurisdiction of the International Criminal

²⁸⁷ *Torture Prohibition Act*, RSY 2002, c 220, art 1.

²⁸⁸ For example, *Crime Victim Assistance Act*, SBC 2001, c 38 of the province of British Columbia provides at section 15 that a victim, an immediate family member, a witness or a legal representative can commence "an action against any person arising out of the prescribed offence or the event that resulted in the death or injury of the victim".

²⁸⁹ *Victims of Crime Act*, RSA 2000, c V3 for Alberta; *Victims of Crime Act*, RSBC 1996, c 478 for British Columbia; *Compensation for Victims of Crime Act*, RSO 1990, c C24 for Ontario; *Compensation for Victims of Crime Act*, LRQ, c I-6 for Quebec; *Victims of Crime Act*, c V-3.1 for Prince Edward Island.

²⁹⁰ See Ontario's *Compensation for of Crime Act*, *supra* note 289, s 7 for legal grounds for compensation.

²⁹¹ *Victims Fund*, online: Government of Canada, Department of Justice <<http://www.justice.gc.ca/eng/pi/pb-dgp/prog/vf-fv.html>>.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 30(1).

Court, and to the families of those victims, or otherwise as the Attorney General of Canada sees fit.²⁹⁵

More generally, since 1988, Canada has also had a “victim fine surcharge.” Two amendments were made in 2000 which made the surcharge a fixed amount and making it mandatory unless it would cause undue hardship to the offender. In 2013, the *Increasing Offenders' Accountability for Victims Act* came into force.²⁹⁶ It amends the victim surcharge provisions in the *Criminal Code* to double the amount that an offender must pay when sentenced, and to ensure that the surcharge is applied in all cases. The surcharge is now 30 percent of any fine imposed on the offender. Where no fine is imposed, the surcharge will be \$100 for offences punishable by summary conviction and \$200 for offences punishable by indictment. The judge will retain the discretion to impose an increased surcharge where the circumstances warrant and the offender has the ability to pay. The recent legislation has been controversial. For example, as a recent Court of Quebec judge noted, it is “a mandatory order that must be imposed in every case with the sentence, without consideration of the circumstances of the offence or the offender, and without regard for the offender’s ability to discharge this debt.”²⁹⁷

²⁹⁵ *Ibid*, s 30(2).

²⁹⁶ *Criminal Code*, *supra* note 10, s 737, as amended by *Increasing Offenders' Accountability to Victims Act*, SC 2013, c11.

²⁹⁷ *R v Cloud* (2014), QCCQ 464 at para 22, 8 CR (7th) 364.

6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION

As discussed below, there are several obstacles in Canada to exercising criminal and civil jurisdiction based on universal jurisdiction in criminal and civil cases. These obstacles include flawed or missing definitions of crimes under international law, principles of criminal responsibility and defences (6.1.), presence requirements in order to open an investigation or request extradition (6.2.), statutes of limitations applicable to crimes under international law (6.3.), double criminality (6.4.), immunities (6.5.), bars on retroactive application of international criminal law or other temporal restrictions (6.6.), *ne bis in idem* (6.7.), political control over decisions to investigate and prosecute (6.8.), and restrictions on the rights of victims and their families (6.9).²⁹⁸

In the Canadian context universal jurisdiction is always limited by the fact that the person has to be present in Canada, see examples in section 7 of the Criminal Code as well as section 8(b) of the CAHWCA. This approach is the most common internationally as well where the notion of absolute universal jurisdiction (in the sense that no presence is required) was tried in for instance Germany, Belgium and Spain but then restricted by their respective legislatures.

6.1. Flawed or missing definitions of crimes under international law, principles of criminal responsibility or defences

6.1.1 DEFINITIONS OF CRIMES

As indicated above in Section 4, the definitions of war crimes, crimes against humanity, genocide, and torture used in national law are basically consistent with international law.

However, Canada has not defined extrajudicial executions or enforced disappearances as crimes under national law. Instead, persons in Canada suspected of such crimes can only be prosecuted if the conduct amounts to an ordinary crime. Although some of the conduct amounting to crimes under international law can be prosecuted as ordinary crimes under the *Criminal Code*, this alternative is not satisfactory as it leaves gaps where conduct amounting to crimes under international law is not subject to criminal responsibility under national law. Moreover, prosecution based on universal jurisdiction for ordinary crimes is not possible in Canada. In addition, conviction for an ordinary crime, even when it has common elements, does not convey the same moral condemnation as if the person had been convicted of the crime under international law and does not necessarily involve as severe a punishment.²⁹⁹

²⁹⁸ As noted above in footnote 2, this report does not address a whole range of other types of obstacles to justice, including poverty and discrimination, that are not specific to universal jurisdiction.

²⁹⁹ *Prosecutor v Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11 *bis* of the Rules of Procedure and Evidence, ICTR-2005-86-11 *bis*, Trial Chamber (19 May 2006) at para. 16, *aff'd*, *Prosecutor v Bagaragaza*, Decision on Rule 11 *bis* Appeal, ICTR-05-86- AR11 *bis*, Appeals Chamber (30 August 2006) at para. 16.

6.1.2. PRINCIPLES OF CRIMINAL RESPONSIBILITY

Principles of criminal responsibility are found both in statutes, such as the general part of a criminal code, as in many civil law countries, and in jurisprudence, as traditionally has been the case in common law countries although there has been a shift in common law countries to the codification of some principles of responsibility. As explained below, some of the principles of criminal responsibility under domestic law, such as the principle of superior responsibility, fall short of the principles of responsibility required under international law with respect to crimes under international law. Other principles of criminal responsibility, as found in domestic law, are largely consistent with principles of international law.

There are a number of differences between the principles of criminal responsibility in Canadian law and those found in the Rome Statute and other international instruments. The principle of superior responsibility in international law is found in Articles 86 (2) and 87 of Additional Protocol I,³⁰⁰ Article 6 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind³⁰¹ and Article 28 of the Rome Statute.³⁰² In addition, the Committee against Torture has concluded that superiors cannot escape criminal responsibility for torture committed by their subordinates.³⁰³

The principle of command responsibility in Canadian law departs from the approach of the Rome Statute in the area of superior responsibility.³⁰⁴ Whereas Article 28 of the Rome Statute makes a military commander or civilian superior subject to prosecution for negligent supervision of subordinates who commit one of the crimes within the jurisdiction of the Court, Canadian legislation treats command responsibility as a distinct offence.³⁰⁵ This could widen the responsibility of persons involved in crimes under international law, as persons who have indirectly liability to this offences

³⁰⁰ *Protocol I*, *supra* note 93, art 86 (Failure to act) reads:

"1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

See also art 87 (Duty of commanders).

³⁰¹ *Draft Code of Crimes against the Peace and Security of Mankind*, 51 UN GAOR Supp (No 10) at 14, UN Doc A/CN.4/L.532, corr1, corr3 (1996) [*1996 Draft Code of Crimes*], which was intended to apply both to international and national courts, art 6 (Responsibility of superiors) states:

"The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime."

³⁰² *Rome Statute*, *supra* note 97 at art 28 (Responsibility of commanders and other superiors).

Although Article 6 (1) (b) of the International Convention for the Protection of All Persons from Enforced Disappearance is modelled on the two-tiered Article 28 of the Rome Statute, Article 6 (1) (c) makes clear that this provision "is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander."

³⁰³ Committee against Torture, *General Comment 2 (Implementation of article 2 by States parties)*, 2008, UN Doc CAT/C/GC/2 [*CAT General Comment 2*] at para. 26.

³⁰⁴ William A. Schabas, "Canadian Implementing Legislation for the Rome Statute" (2000) 3 YB Int'l Human L 337 at 342 [*Schabas*].

³⁰⁵ *Ibid.*

can also be held responsible, which is not possible under international law, at least not under this provision. The *CAHWCA* defines command responsibility in section 5(1), where a military commander commits an indictable offence if:

- (a) the military commander
 - i. fails to exercise control over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4; or
 - ii. fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;
- (b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
- (c) the military commander subsequently
 - i. fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
 - ii. fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.³⁰⁶

Canadian courts could be expected to resist an attempt to convict a commander who was merely negligent for a crime or its cognates, although such a commander would be subject to prosecution for lesser crimes.³⁰⁷ Pursuant to sections 5 and 7 of the *CAHWCA*, a superior or commander may be liable for an act or omission of subordinates provided that the *mens rea* standard is met.³⁰⁸ Furthermore, sections 21 and 22 of the *Criminal Code* provide liability for aiding, abetting or counselling others to commit a crime. The *CAHWCA*, too, provides for inchoate offences both in Canada³⁰⁹ and outside the country including conspiracy, attempt, acting as an accessory, or counselling.³¹⁰

It is important to note that the distinction between the treatment of command responsibility under the *CAHWCA* and the Rome Statute could give rise to the argument that transfer to ICC jurisdiction from Canada might not be possible due to the requirement of double criminality.³¹¹

6.1.3. DEFENCES

As discussed below, there are a number of defences in Canadian law that are broader than defences

³⁰⁶ See also *Crimes Against Humanity and War Crimes Act*, supra note 12 at s 7(1) for offences committed outside Canada.

³⁰⁷ Schabas, supra note 304 at 342.

³⁰⁸ Lafontaine, supra note 98 at 194.

³⁰⁹ *Crimes Against Humanity and War Crimes Act*, supra note 12, s 4(1.1).

³¹⁰ *Ibid*, s 6(1.1).

³¹¹ Schabas, supra note 304 at 342.

permitted under international law, such as the defence of mistake of fact, which could lead to impunity for the worst imaginable crimes.³¹²

Section 11 of the *Crimes Against Humanity and War Crimes Act* provides that “[i]n proceedings for an offence under any of sections 4 to 7, the accused may [...] rely on any justification, excuse or defence available under the laws of Canada or under international law”.³¹³ Thus, this defence is also available to the crimes of the Rome Statute. Furthermore the defence available under section 33.1(3) of the *Criminal Code* applies not only to offences under the *Criminal Code*, but also to offences under any Act of Parliament, which would thus include offences under the *CAHWCA*.

Pursuant to section 11 of the *Crimes against Humanity and War Crimes Act*, an accused can rely on “any justification, excuse or defence available under the laws of Canada or under international law.” Since duress is encompassed in section of the *Criminal Code*, it can be invoked in limited circumstances. The defence of duress appears to be narrower in Canadian law than in the Rome Statute. Article 31(1)(d) of the Rome Statute provides:

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: [...] The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) made by other persons; or (ii) constituted by other circumstances beyond that person's control.³¹⁴

Defences – superior orders

Canadian law provides that superior orders amount to a limited defence in specific circumstances that mirror those included in article 33 of the Rome Statute. Section 14 of the *CAHWCA* provides that genocide, a war crime or a crime against humanity committed by the accused pursuant to a government or superior order shall not relieve the accused of criminal responsibility unless the following three conditions are met:

- (a) the accused was under a legal obligation to obey orders of the government or superior;
- (b) the accused did not know that the order was unlawful; and
- (c) the order was not manifestly unlawful.³¹⁵

The *CAHWCA* defines a “manifestly unlawful” order as an order to commit genocide or a crime against humanity.³¹⁶ Further, the *CAHWCA* stipulates that an accused cannot base their defence under section 14 on a belief that an order was lawful if the belief was based on information about a

³¹² This section is not intended to cover the full range of defences to criminal charges under Canadian law, but simply to discuss some of the most significant features regarding defences that have implications for prosecutions for crimes under international law based on universal jurisdiction.

³¹³ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 11.

³¹⁴ *Rome Statute*, *supra* note 97, art 31(1)(d).

³¹⁵ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 14.

³¹⁶ *Ibid*, s 14(2).

civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group.³¹⁷

This defence has been contrary to international law since Nuremberg, although it may properly be taken into account in mitigation of punishment.³¹⁸ This defence has been excluded in numerous international instruments for more than half a century, including the Nuremberg Charter, Allied Control Council Law No. 10, the ICTY Statute, the ICTR Statute, the Regulation establishing the Special Panels for East Timor, the Statute of the Special Court for Sierra Leone, the Cambodian Law establishing the Extraordinary Chambers and the International Convention for the Protection of All Persons from Enforced Disappearance.³¹⁹ The Committee against Torture has concluded that superior orders can never be a defence to torture.^{320,321}

Defences – mistake of fact

A defence based on a mistake of fact is a common law principle³²² and is restricted to specific circumstances elaborated in the *Criminal Code*.³²³ In *R v. Pappajohn*³²⁴, the Supreme Court of Canada decided that a mistake of fact defence constitutes a denial that the fault element has been proven beyond a reasonable doubt. Writing for the majority, Justice Dickson wrote “a mistake that negates intention or recklessness entitles the accused to an acquittal.”³²⁵ Therefore, depending on

³¹⁷ *Ibid*, s 14(3).

³¹⁸ Amnesty International, *The International Criminal Court: Making the Right Choices – Part I: Defining the Crimes and Permissible Defences*, AI Index: IOR 40/01/1997, (Amnesty International, 1997), s VI E 6.

³¹⁹ Nuremberg Charter, *supra* note 272, art 8; Allied Control Council Law No10, *Punishment of persons guilty of war crimes, crimes against peace and against humanity*, 20 December 1945, published in the Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946 [*Allied Control Council Law No. 10*], art II(4)(b); International Military Tribunal for the Far East Charter, 19 January 1946 [Tokyo Charter], art 6; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by S/RES/827 (1993) [*ICTY Statute*], art 7(4); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, adopted by S/RES/955 (1994) amended by S/RES/1165 (1998), S/RES/1329 (2000), 1411 (2002) and 1431 (2002) [*ICTR Statute*], art 6(4); 1996 Draft Code of Crimes against the Peace and Security of Mankind, *supra* note 301, art 5; UNTAET, ‘On the Establishment of Panels with Executive Jurisdiction Over Serious Criminal Offences’, UN Doc UNTAET/Reg/2000/15 (6 June 2000), s 21; Statute of the Special Court for Sierra Leone adopted by A/RES/1315 (14 August 2000) [*Sierra Leone Statute*], art 6(4); Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [*Cambodian Extraordinary Chambers Law*], art 29; Disappearance Convention, *supra* note 227, art 6(2).

Rome Statute, *supra* note 97, art 33 permits the defence of superior orders to war crimes, but it is narrowly circumscribed, applicable only to trials in the International Criminal Court and contrary to every other international instrument adopted concerning crimes under international law, including instruments subsequently adopted, such as the Statute of the Special Court for Sierra Leone and the Cambodian Extraordinary Chambers Law.

³²⁰ CAT General Comment 2, *supra* note 303 at para 26.

³²¹ The Rome Statute allows this defence (if all the criteria are met) only for war crimes and continues the tradition of excluding it for crimes against humanity and genocide, which was followed by Canada.

³²² *R v Bulmer*, [1987] 1 SCR 782.

³²³ See *Criminal Code*, *supra* note 10, ss 150.1(4),(5), 163.1(5), 273.2b) and 290(2).

³²⁴ *R v Pappajohn*, [1980] 2 SCR 120.

³²⁵ *Ibid* at para 148.

the fault element of a particular offence, such as subjective *mens rea*, objective negligence, or diligence defence, the mistake may be honest, reasonable or both.

The defence of mistake of fact as laid out in Canadian law seems to be broader than the defence of mistake of fact in Article 32(1) of the Rome Statute, which could lead to impunity. Article 32(1) of the Rome Statute provides: “a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.”³²⁶

Defences – ignorance of the law

Section 19 of the *Criminal Code* provides that “ignorance of the law is not an excuse for committing that offence.” In *R v Forster*, Chief Justice Lamer of the Supreme Court of Canada (as he was then) explained that:

It is a principle of our criminal law that an honest but mistaken belief in respect of the legal consequences of one's deliberate actions does not furnish a defence to a criminal charge, even when the mistake cannot be attributed to the negligence of the accused: *Molis v. The Queen*, [1980] 2 S.C.R. 356. This Court recently reaffirmed in *R. v. Docherty*, [1989] 2 S.C.R. 941, at p. 960, the principle that knowledge that one's actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence.³²⁷

The Supreme Court recently reaffirmed this principle in addressing possession of firearms.³²⁸

While the Supreme Court of Canada has clearly confirmed that ignorance of the law is never an excuse to a criminal offense, the law or regulation must have been officially promulgated or published.³²⁹ Moreover, using *R v Pontes* as an example, Roach points out that the Supreme Court “mitigates [the harshness of Section 19] by, in this one limited context, taking imprisonment away as a sentencing option”.³³⁰

In international legislation, the Rome Statute article 32 (2) affirms the same principle that “A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility”.³³¹

Defences – officially induced error

In *Lévis (City) v Tétreault*,³³² the Supreme Court of Canada recognized the defence of officially induced error for all criminal and regulatory offences.³³³ This defence requires a consideration of several factors, including: “efforts made by the accused to obtain information, the clarity or

³²⁶ For Amnesty International's view on the scope of this defence, see 'Making the Right Choices', *supra* note 318, s VI E 6.

³²⁷ *R v Forster*, [1992] 1 SCR 339 at 346.

³²⁸ In *R v MacDonald*, 2014 SCC 3.

³²⁹ Kent Roach, *Criminal Law*, 4th ed (Toronto: Irwin Law, 2009) at 91.

³³⁰ *Ibid* referring to *R v Pontes*, [1995] 3 SCR 44.

³³¹ *Rome Statute*, *supra* note 127, art 32(2).

³³² *Lévis (City) v 2629-4470 Québec inc.*, 2006 SCC 12, [2006] 1 SCR 420 [*Lévis (City) v Tétreault*].

³³³ *Ibid* at paras 20-27; Roach, *supra* note 329 at 93.

obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion.”³³⁴ The Court held that “it is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused.”³³⁵ The Court further noted that “the inflexibility of this rule is cause for concern where the error in law of the accused arises out of an error of an authorized representative of the state and the state then demands, through other officials, that the criminal law be applied strictly to punish the conduct of the accused”.³³⁶

This defence seems to be narrower than the defence of mistake of law in Article 32(2) of the Rome Statute. In Canada, the defence is only available in limited circumstances, whereas it can be used at the International Criminal Court for excluding criminal responsibility if the mistake of law negates the *mens rea* element of the crime or as provided for in article 33.³³⁷

Defences – insanity and mental disease or defect

The defence of mental disorder in section 16 of the *Criminal Code* is very similar to the defence available in article 31(1)(a) of the Rome Statute. Section 16 of the *Criminal Code* states:

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.³³⁸

Mental disorders are a cause of non-penal liability in some cases and, as was noted in *R v Swain*, “[t]he insanity defence is an exemption to criminal liability which is based on an incapacity for criminal intent”.³³⁹

Article 31 (1)(a) of the Rome Statute states:

[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law[.]³⁴⁰

³³⁴ *Ibid* at para 27.

³³⁵ *Ibid* at para 27.

³³⁶ *Ibid* at para 22.

³³⁷ *Rome Statute*, *supra* note 97, art 32(2). For the scope of Article 33 (Superior orders and prescription of law) of the Rome Statute, see the discussion of superior orders above in this subsection.

³³⁸ *Criminal Code*, *supra* note 10, s 16.

³³⁹ *R v Swain*, [1991] 1 SCR 933 [*Swain*] at para 972. See also *R v Chaulk*, [1990] 3 RCS 1303.

³⁴⁰ *Rome Statute*, *supra* note 97, art 31(1)(a) provides that:

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the

The difference between the defence in Canadian law and the defence under the Rome Statute would be the presumption in section 16(2) of the *Criminal Code*, whereby every person is presumed not to have a mental disorder until proved on a balance of probabilities. The Rome Statute does not specify if the person invoking the defence is presumed not to suffer from a mental disorder. Also, in the Canadian context, the accused has the choice whether or not to invoke the defence.³⁴¹

Defences – intoxication

Both section 33.1 of the *Criminal Code* and article 31(1)(b) of the Rome Statute preclude the defence of self-induced intoxication. Under the Rome Statute, a person shall not be criminally responsible if, at the time of that person's conduct,

The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

Similarly, Parliament amended the *Criminal Code* following the controversial decision of the Supreme Court of Canada in *R v Daviault* where the Supreme Court found that a self-induced state of intoxication akin to automatism or insanity can be considered in determining whether the accused possesses the minimal mental element required for crimes of general intent. Justice Cory, writing for the majority of the Supreme Court, stated that:

[i]t is obvious that it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful. Nonetheless, the adoption of this alternative would avoid infringement of the Charter. [I]n those rare situations where the degree of intoxication is so severe it is akin to automatism, drunkenness will not be a defence to crimes of general intent.³⁴²

The new provision, section 33.1, of the *Criminal Code* limits the ability to claim a defence of self-induced intoxication. It provides that the defense is not available for offences that have assault or interference or threat of interference with the bodily integrity of another person where the person “departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person”.³⁴³

unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law[.]”

³⁴¹ *Swain*, *supra* note 339 at para 972.

³⁴² *R v Daviault*, [1994] 3 SCR 63 at 43-44. See also Roach, *supra* note 329 at 238: this decision “dealt with the crime of sexual assault, which, at the time, required subjective *mens rea*”.

³⁴³ The provision provides:

33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour,

This provision is relatively new in the *Criminal Code* and as Roach notes, some trial courts have concluded that it is an “unjustified violation of sections 7 and 11(d) of the Canadian Charter.”³⁴⁴ The Supreme Court of Canada has yet to pronounce on the matter.

Article 31(1)(b) of the Rome Statute is broader than the defence in Canadian law since it provides an exclusion of criminal responsibility for crimes perpetrated by a “person in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct”.³⁴⁵

Defences – compulsion, duress and necessity

As Amnesty International has argued, compulsion, duress and necessity should not be *defences* to crimes under international law, but should simply be grounds for *mitigation* of punishment.³⁴⁶ However, in a regrettable political compromise, article 31(1)(d) of the Rome Statute permits, in strictly limited circumstances, defences of duress in response to threats from another person and of necessity in response to threats from circumstances beyond a person’s control.³⁴⁷

Compulsion or duress.

Duress³⁴⁸ is a defence to crimes under international law in Canada and is recognized as an excuse. Section 17 of the *Criminal Code* provides:

A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault,

voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

³⁴⁴ Roach, *supra* note 329 at 247.

³⁴⁵ *Rome Statute*, *supra* note 97, art 31(1)(b).

³⁴⁶ Amnesty International ‘*Making the Right Choices*’, *supra* note 318, s VI E 3 and 4. The Committee against Torture has recommended that states parties “*completely remove necessity as a possible justification for the crime of torture.*” Concluding observations – Israel, UN Doc CAT/C/ISR/CO/4 (23 June 2009) at para 14.

³⁴⁷ Article 31(1)(d) of the *Rome Statute*, *supra* note 97, provides that:

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

... (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person’s control.”

³⁴⁸ Eric Colwin & Sanjeev Anand, *Principles of Criminal Law*, 3rd ed (Toronto: Thomson & Carswell, 2007) at 355: “The Code uses the title “compulsion by threats”. Nevertheless, it is still standard usage in Canada to call this defence “duress”.

forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).³⁴⁹

The expression “person who commits an offence” has been interpreted as meaning the principal author of the crime.³⁵⁰ Consequently, duress can be invoked by someone who is accused of complicity in a crime.³⁵¹ The defence of duress cannot be invoked when threats come from a criminal organization that the accused consciously joined, and where the accused has knowledge that the criminal organization could force him or her to commit criminal acts.³⁵² The defence “may include threats against third parties”.³⁵³

Duress was evoked as a defence for the first time at the International Criminal Court in the case of *Ongwen*,³⁵⁴ where the Court delineated the scope of article 31(1)(d) of the Rome Statute.³⁵⁵ Under article 31(1)(d) of the Rome Statute, duress is a ground for excluding criminal responsibility. Here, the International Criminal Court interpreted the article to specify:

For duress to exclude criminal responsibility it is required that:

- (i) the conduct of the person has been caused by duress resulting from a threat (whether made by other persons or constituted by circumstances beyond the person’s control) of imminent death or of continuing or imminent serious bodily harm against that person or another person; and
- (ii) the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.³⁵⁶

In *Ongwen*, the Pre-Trial Chamber determined there was no threat of death or imminent seriously bodily harm to the defendant at the time of his crimes.³⁵⁷ Moreover, the Court determined, the circumstances of Ongwen’s participation in the criminal organization (the Lord’s Resistance Army, or LRA), which was supposedly the cause of the threat, were not beyond his control. He could have made an escape, he could have chosen not to rise in prominence within the organization, and evidence showed that he shared the organization’s “brutal and perverted” ideology.³⁵⁸ Thus the Court thus denied Dominic Ongwen’s defence of duress as exclusion from criminal responsibility and in doing so, articulated the scope of article 31(1)(d).

³⁴⁹ *Criminal Code*, *supra* note 10, s 17 (emphasis added).

³⁵⁰ *R v Curran* (1977), 38 CCC (2d) 151 (Alta CA).

³⁵¹ *Ibid*; *R v Hartford and Frigon* (1979) 51 CCC (2d) 462 (B-C CA).

³⁵² *R v Li* (2002), 162 CCC (3d) 360 (Ont CA).

³⁵³ *R v Ruzic* (2001), 153 CCC (3d) 1 (SCC) at para 54.

³⁵⁴ *Prosecutor v. Dominic Ongwen*, Case No ICC-02/04-01/15-422-Red, Pre Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, 26 March 2016, [*Ongwen*] at paras 150-154.

³⁵⁵ For a good overview, however, see Beatrice Krebs, “Justification and Excuse in Article 31(1) of the Rome Statute” (2013) 2:3 Cambridge Journal of International and Comparative Law 382.

³⁵⁶ *Ibid*, at para 152.

³⁵⁷ *Ibid*, at para 153.

³⁵⁸ *Ibid*, at para 154.

Necessity.

There is no defence of necessity in the *Criminal Code*. It has, however, “been recognized in Canada as a common law defence which is available by virtue of the general proviso in section 8(3) of the *Criminal Code*.”³⁵⁹ In *Perka v R*,³⁶⁰ the defence was defined in the following terms:

It is now possible to summarize a number of conclusions as to the defence of necessity in terms of its nature, basis and limitations: (1) the defence of necessity could be conceptualized as either a justification or an excuse; (2) it should be recognized in Canada as an excuse, operating by virtue of s. 7(3) of the *Criminal Code*; (3) necessity as an excuse implies no vindication of the deeds of the actor; (4) the criterion is the moral involuntariness of the wrongful action; (5) this involuntariness is measured on the basis of society’s expectation of appropriate and normal resistance to pressure; (6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity; (7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle; (8) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law; (9) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril; (10) where the accused places before the Court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.³⁶¹

In *Perka*,³⁶² the Supreme Court recognized “that it is inappropriate to punish actions which are normatively ‘involuntary’ and stressed the need to ensure that “the acts for which the benefit of the excuse of necessity is sought are truly ‘involuntary’ in the requisite sense.”³⁶³ The Court went on to highlight that “the harm inflicted must be less than the harm sought to be avoided.”³⁶⁴ Therefore, there is no restriction on the availability of the defence of necessity under the *Crimes Against Humanity and War Crimes Act*, so long as the harm inflicted is less than the harm to be avoided.

Defences – defence of person or property

The defences in Canadian law of self-defence, defence of others and defence of property are narrower than the strictest requirements of international law or what is appropriate for crimes under international law. In Canada, the defence of self-defence is absorbed within the defence of the person or others from the use or threat of force, and the defence of property. Sections 34 and 35 of the *Criminal Code* deal with self-defence in two different ways:

Self-defence against use or threat of force in section 34(1): A person is not guilty of an

³⁵⁹ Colwin & Anand, *supra* note 348 at 352: 8(3) provides that (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

³⁶⁰ *Perka v R*, [1984] 2 SCR 232, 42 CR (3d) 113 (SCC) [*Perka*] at para 138-39.

³⁶¹ Colwin & Anand, *supra* note 348 at 352.

³⁶² *Perka*, *supra* note 360.

³⁶³ *Ibid* at 250-251; Colwin & Anand, *supra* note 348 at 355.

³⁶⁴ *Perka*, *supra* note 360 at 253.

offence if:

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.³⁶⁵

Defense of property in section 35(1): A person is not guilty of an offence if:

- (a) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;
- (b) they believe on reasonable grounds that another person
 - (i) is about to enter, is entering or has entered the property without being entitled by law to do so,
 - (ii) is about to take the property, is doing so or has just done so, or
 - (iii) is about to damage or destroy the property, or make it inoperative, or is doing so;
- (c) the act that constitutes the offence is committed for the purpose of
 - (i) preventing the other person from entering the property, or removing that person from the property, or
 - (ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and
- (d) the act committed is reasonable in the circumstances.³⁶⁶

These sections of the *Criminal Code* were amended in 2013, and have not yet been interpreted by the Supreme Court of Canada. The defences of self-defence against use or threat of force and defence of property in the *Criminal Code* are narrower than article 31(1)(c) of the Rome Statute, where self-defence is articulated quite broadly:

The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for

³⁶⁵ *Criminal Code*, *supra* note 10, s 34(1).

³⁶⁶ *Ibid*, s 35(1).

excluding criminal responsibility under this subparagraph.³⁶⁷

Defence of others is expressed in section 27 of the *Criminal Code* which states:

Every one is justified in using as much force as is reasonably necessary

(a) to prevent the commission of an offence

(i) for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).³⁶⁸

Section 27 of the *Criminal Code* justifies the use of force for the prevention of serious offences against either person or property.³⁶⁹ This defence is different from article 31(1)(c) of the *Rome Statute* since the defence in the *Rome Statute* is limited to war crimes when it comes to defence of property.³⁷⁰ The Supreme Court of Canada has ruled in *R v Hebert* that: "section 27 is designed to permit an innocent bystander, who witnesses an offence being or about to be committed, to use force to prevent the offence from occurring."³⁷¹

Pursuant to section 11 of the *Crimes Against Humanity and War Crimes Act*, the defences available in sections 34, 35, and 27 of the *Criminal Code* are available for crimes prosecuted under the *Crimes Against Humanity and War Crimes Act*.

As Amnesty International has argued in the past, self-defence and defence of others can be defences to crimes under international law in certain limited circumstances, but only when the response is reasonable and proportionate and, if deadly force is used, only when retreat is not possible.³⁷² Unfortunately, in another political compromise in drafting the Rome Statute, article 31(1)(c) of the Rome Statute provides very broad defences of self-defence, defence of others and defence of property. In addition, the Rome Statute makes provisions to allow defences not specifically mentioned in 31(1) by virtue of article 31(3). These defences apply only in trials before the International Criminal Court.³⁷³

³⁶⁷ *Rome Statute*, *supra* note 97, art 31(1)(c).

³⁶⁸ *Criminal Code*, *supra* note 10, s 27(1).

³⁶⁹ *Ibid*, s 27.

³⁷⁰ *Rome Statute*, *supra* note 97, art 31(1)(c).

³⁷¹ *R v Hebert* (1996), 107 CCC (3d), 42 SCC, para 10.

³⁷² Amnesty International 'Making the Right Choices', *supra* note 318, s VI E 5.

³⁷³ *Rome Statute*, *supra* note 97, art 31(1)(c) provides that:

"[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

...

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger

6.2. Presence requirements in order to open an investigation or request extradition

There is no need to wait until the person sought has entered the country on a visit that would be too short to permit an investigation to be completed and an arrest warrant issued and implemented. If Canada is able to request extradition of a person suspected of a crime committed abroad (see Section 7), the lack of a presence requirement means that Canada could also help shoulder the burden when other states fail to fulfil their obligations to investigate and prosecute crimes under international law.³⁷⁴ Indeed, this possibility was envisaged as an essential component of the enforcement provisions of the four 1949 Geneva Conventions (and subsequently incorporated in Protocol I to the Conventions), each of which provide that any state party, regardless whether a suspect had ever been in its territory, as long as it “has made out a *prima facie* case”, may request extradition of someone suspected of grave breaches of those Conventions.³⁷⁵ If the presence of the suspected perpetrator were to be necessary for an effective investigation in a particular case and the person could not be extradited to Canada, it is very unlikely that the police would decide to open an investigation.

Pursuant to the *Extradition Act*, upon receiving a request for extradition from an extradition partner for the provisional arrest of a person, a Canadian judge may issue a warrant for the provisional arrest of a person who is ordinarily resident in Canada, is in Canada or is on the way to Canada.³⁷⁶ This section of the *Extradition Act* contemplates that a person need not be present in Canada in order for an extradition request to be made and the extradition process to be triggered.

The person sought is required to attend the committal hearing. As will be explained below in Section 7.1, at the extradition hearing stage, the judge is tasked with determining, amongst other things, whether the person sought is in fact the person before the court in the hearing.³⁷⁷ Therefore, the presence of the person is necessary at the committal hearing of the extradition process.

6.3. Statutes of limitations applicable to crimes under international law

Statutes of limitations in Canadian law do not apply to crimes under international law, but do apply to civil claims in civil proceedings.

Statutes of limitations applicable to crimes

to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.]”

³⁷⁴ For further information about the shared responsibility model, see Amnesty International, *Improving the effectiveness of state cooperation*, AI Index: 53/004/2009, (Amnesty International, 2009). The absence of a presence requirement also means that states can accept cases transferred by an international court, such as the ICTY or ICTR, for crimes under international law more easily by completing an investigation before the transfer and issuing an arrest warrant before the transfer.

³⁷⁵ *First Geneva Convention*, *supra* note 92 at art 49; *Second Geneva Convention*, *supra* note 92 at art 50; *Third Geneva Convention*, *supra* note 92 at art 129; *Fourth Geneva Convention*, *supra* note 92 at art 146.

³⁷⁶ *Extradition Act*, SC 1999, c18 [*Extradition Act*], s 13(1)(b).

³⁷⁷ *Ibid*, s 37. See also Pierre Béliveau & Martin Vaclair, *Traité général de preuve et de procédure pénales*, 17th ed (Cowansville: Yvon Blais, 2010) [Béliveau & Vaclair] at paras 400-401 citing *Extradition Act*, *supra* note 376; *United States of America v Kwok*, [2001] 1 RCS 532 [*Kwok*] at para 28; *Lake v Canada (Ministry of Justice)*, [2008] 1 RCS 761, 2008 CSC 23 [*Lake*] at para 21.

Canada has neither signed nor ratified the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity.³⁷⁸ However, article 29 of the Rome Statute stipulates that crimes within the jurisdiction of the Court shall not be subject to a statute of limitations.³⁷⁹ Independent of conventional international law, states must not apply statutes of limitation to crimes under international law.³⁸⁰ In general, there are no limitation periods in Canadian criminal law. In *R v L. (W.K.)*, the Supreme Court of Canada stated that “staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence.”³⁸¹ One exception, however, can be found at section 48(1) of the *Criminal Code*, which provides that “no proceedings for an offence of treason as defined by paragraph 46(2)(a) shall be commenced more than three years after the time when the offence is alleged to have been committed.”³⁸²

Statutes of limitation applicable to torts

Under Canada’s federalist distribution of power, civil liability falls within provincial jurisdiction. Accordingly, each province sets varying statutory limitations for personal civil liability.

In Ontario, the *Limitations Act* provides that a proceeding shall commence within two years of the claim having been discovered (see section 4). However, section 10 of the Act exempts instances of assault or sexual assault from this two-year limitation period in cases where the individual is incapable of commencing the proceedings due to physical, mental, or psychological condition. In addition, section 15 provides for an ultimate limitation period of 15 years from the date on which the act or omission giving rise to the claim occurred. Section 16 further provides a list of instances to which no limitation period applies.

In principle, the limitation period cannot be suspended or varied pursuant to any agreement (see section 22(1)). However, it may be suspended or extended by an agreement made on or after October 19, 2006 (see section 22(3)) provided that it was not established under section 15.

In Quebec, section 2922 of the *Civil Code of Quebec* states that “[t]he period for extinctive prescription is 10 years, except as otherwise fixed by law.” This period may be suspended pursuant to section 2904 “against persons if it is impossible in fact for them to act by themselves or to be represented by others.” Sections 2905 to 2909 further set out the relevant circumstances to which the limitation period does not apply.

³⁷⁸ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970).

³⁷⁹ *Rome Statute*, *supra* note 97 at art 29 (Non-applicability of statute of limitations) (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

³⁸⁰ See, for example, Committee against Torture, *Concluding observations – Spain*, UN Doc CAT/C/ESP/CO/5, 6-7. While it takes note of the State party’s comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act [dating to 1936], the Committee wishes to reiterate that, bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by [...] the statute of limitation.”); *Prosecutor v Furundzija*, ICTY Judgment, IT-95-17/1-T, 10 December 1998, paras 155-15; *Barrios Altos v. Peru*, IACHR Judgment, 14 March 2001 [*Barrios Altos*], para 41 (provisions on prescription with respect to serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance are prohibited). See also Ruth Kok, *Statutory Limitations in International Criminal Law*, (London: Blackwell, 2008).

³⁸¹ *R v L (WK)*, [1991] 1 SCR 1091 at 12.

³⁸² *Criminal Code*, *supra* note 10.

Alberta's limitation period is very strict. Pursuant to section 3(1) of the *Limitations Act*,³⁸³ a defendant is entitled to immunity from liability if a claimant does not seek a remedial order within:

- (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
 - (i) that the injury for which the claimant seeks a remedial order had occurred,
 - (ii) that the injury was attributable to conduct of the defendant, and
 - (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding; or

(b) 10 years after the claim arose.³⁸⁴

In British Columbia, the *Limitation Act* only allows a claimant to bring an action within 2 years of discovering the claim.³⁸⁵

The Supreme Court of Canada in *Tolofson v Jensen* discussed the principle of *lex loci delicti* and the determination of which provincial statute of limitations would apply when more than one province is engaged.³⁸⁶ The Court decided that limitations periods were substantive law and thereby the limitation period which applied was that which was in place where the wrong occurred, e.g. *lex loci delicti*.³⁸⁷ A trial court in Ontario reiterated this principle and extended it to extraterritorial limitation periods, stating, "a statute of limitation, whether domestic or foreign, is substantive in nature".³⁸⁸ More recently, in *Castillo v Castillo*, the Supreme Court of Canada applied concluded that the statute of limitations applicable in an extraterritorial case is the limitation period of the place where the tort occurred and not the law of the forum in which the tort is being adjudicated.³⁸⁹

6.4. Double criminality

Canada requires that the offence which underpins the request to extradite be criminalized in both Canada and the requesting state. This rule is known as double criminality; it is referred to in all of Canada's extradition treaties and codified in section 3(1) of the *Extradition Act*.³⁹⁰ Double criminality has two components: one foreign and one domestic. Section 3(1)(a) of the *Extradition Act* codifies the foreign aspect of the rule, requiring that the offence which provides the basis for the extradition request be criminal in the requesting state. Section 3(1)(b) codifies the domestic aspect of the rule, requiring that the conduct in question amount to an offence under Canadian law. The double criminality rule requires that both the domestic and foreign elements be satisfied.

The Supreme Court of Canada in *Canada (Justice) v. Fischbacher*³⁹¹ noted that, in theory, double criminality may be satisfied either by way of a conduct-based or offence-based test.³⁹² However, the Court stressed that pursuant to section 3(2) of the *Extradition Act*, Canada has adopted a conduct-

³⁸³ *Limitations Act*, RSA 2000, c L-12.

³⁸⁴ *Ibid*.

³⁸⁵ *Ibid* at s 6(1).

³⁸⁶ *Tolofson v Jensen*, [1994] 3 SCR 1022.

³⁸⁷ *Ibid* at para 42.

³⁸⁸ *Girshberger v Kresz* (2000), 47 OR (3d) 145.

³⁸⁹ *Castillo v Castillo*, [2005] 3 SCR 870, para 11.

³⁹⁰ *Extradition Act*, *supra* note 376.

³⁹¹ *Canada (Justice) v. Fischbacher*, [2009] 3 SCR 170.

³⁹² *Ibid* at para 28.

based approach to double criminality. Therefore, it is not necessary that the offence in question “match” an offence in the requesting state, so long as the “essence of the offence” provides the elements of, and constitutes an offence in that state.³⁹³ Ultimately, the procedure in the *Extradition Act* gives the Minister of Justice discretion in considering whether the alleged conduct is criminal in the requesting state and whether the penalty meets the legislative or treaty requirements. Domestic aspects of double criminality are determined by an extradition judge tasked with determining whether the alleged conduct amounts to a criminal offence under Canadian law.³⁹⁴

Whatever the merits may be for requiring double criminality with respect to conduct that only amounts to an ordinary crime, it has no merit when the conduct amounts to a crime under international law, even if the requesting state is seeking extradition to prosecute the person for an ordinary crime when its legislation does not characterize the conduct as a crime under international law. All states have a shared obligation to investigate and prosecute conduct that amounts to crimes under international law, either by doing so in their own courts or by extraditing the suspect to another state or surrendering that person to an international criminal court, and they cannot escape this obligation by refusing to extradite on the basis of double criminality.

6.5. Immunities

The *State Immunity Act* provides that a foreign state is immune from the jurisdiction of any Canadian court,³⁹⁵ and has been applied by the Ontario Court of Appeal and the Quebec Court of Appeal in cases of torture. The *State Immunity Act* does not apply to criminal cases or proceedings.³⁹⁶ The *State Immunity Act* covers sovereign immunity and does not discuss diplomatic immunity.

In *Bouzari v. Islamic Republic of Iran*,³⁹⁷ the Ontario Court of Appeal held that Canadian law precludes claims against foreign sovereigns for acts not enumerated in the statute, including torture.³⁹⁸ The Court noted that, while the prohibition against torture constitutes a rule of *jus cogens*, Canada has legislated in a way that does not require courts to grant a civil remedy for torture committed abroad by a foreign state.³⁹⁹ Bouzari’s request for leave to appeal to the Supreme Court of Canada was refused.

In *Kazemi (Estate of) v. Islamic Republic of Iran*,⁴⁰⁰ the Quebec Court of Appeal agreed with the analysis in *Bouzari* in determining that the only exceptions to state immunity are those set out in the *State Immunity Act* itself, and that torture is not one of those exceptions.⁴⁰¹ *Kazemi* was appealed to the Supreme Court of Canada, where the Court addressed the tension between state immunity and the efforts of victims to seek remedies in Canadian courts for torture abroad, concluding that

³⁹³ *Ibid* at para 29.

³⁹⁴ See section 29(1) of the *Extradition Act*, *supra* note 376.

³⁹⁵ *State Immunity Act*, RSC 1985, c S-18, s 3(1).

³⁹⁶ *State Immunity Act*, s 18.

³⁹⁷ *Bouzari et al v Islamic Republic of Iran* (2004), 71 OR (3d) 675 (ONCA), leave to appeal refused [*Bouzari*].

³⁹⁸ *Ibid* at paras 87 and 94.

³⁹⁹ *Ibid* at para 66.

⁴⁰⁰ *Kazemi (Estate of) v Islamic Republic of Iran* 2012 QCCA 1449 [*Kazemi v Iran*]. Often also cited as *Islamic Republic of Iran v. Hashemi*.

⁴⁰¹ *Ibid* at para 42.

Canada's State Immunity Act is consistent with international law.⁴⁰²

The current decisions in *Bouzari* and *Kazemi* render Canadian law inconsistent with the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on civil redress.⁴⁰³ In view of this, the last concluding observations issued by the United Nations Committee Against Torture directed at Canada called for amendment to the *State Immunity Act* to bring it into line with Article 14 of the Convention.⁴⁰⁴

Article 14 of the Convention against Torture states:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation;
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.⁴⁰⁵

Amnesty International has argued that the judgment of the International Court of Justice in the *Arrest Warrant* case, which concluded that serving heads of state, heads of government and foreign ministers were immune from prosecution in foreign courts, is based on an incorrect analysis of international law.⁴⁰⁶ Amnesty International has urged that this ruling, which is binding only upon the states in that case, should be reversed and hopes that this will be done in the future, as no serving or former official should be able to successfully assert a claim of immunity with respect to the worst possible crimes ever committed. As explained elsewhere,⁴⁰⁷ there is no convincing basis in customary international law to grant immunity to state officials in or out of office when committing genocide, crimes against humanity and war crimes. Indeed, the International Court of Justice in the *Arrest Warrant* case failed to cite any state practice or *opinio juris* in this respect.

Instruments adopted by the international community show a consistent rejection of state immunity from prosecution for crimes under international law for any government official since the Second World War.⁴⁰⁸ Those instruments articulate a customary international law rule and general principle of law. Indeed, several of the international instruments adopted over the past half century were

⁴⁰² *Kazemi (Estate of) v Islamic Republic of Iran* (2014), 3 SCR 176, 2014 SCC 62 [*Kazemi*].

⁴⁰³ See Committee against Torture, *General Comment 3 (Implementation of article 14 by States parties)*, 2012, CAT/C/GC/3.

⁴⁰⁴ UNCAT, 48th Sess, 1076th & 1079th Mtgs, UN Doc CAT/C/CAN/CO/6 (2012) at para 15ff.

⁴⁰⁵ *Convention Against Torture*, *supra* note 25, art 14.

⁴⁰⁶ *Democratic Republic of the Congo v Belgium*, [2002] ICJ Rep 3 [*Arrest Warrant Case*].

⁴⁰⁷ Amnesty International, *Universal Jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad*, AI Index: IOR 53/001/2003 (Amnesty International, 2003), at 10.

⁴⁰⁸ These instruments include: *Allied Control Council Law No 10*, *supra* note 319, art II (4) (a); *Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal*, UNGA Res 95 (I) (11 December 1946); *Genocide Convention*, *supra* note 238, art IV; *Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, Yearbook of the International Law Commission, 1950, vol II, para 97, principle III; *Draft Code of Offences against the Peace and Security of mankind*, Yearbook of the International Law Commission, 1954, vol II, art. 3; *Apartheid Convention*, *supra* note 227, art III; *Draft Code of Crimes against the Peace and Security of Mankind*, UN Doc A/CN.4/L.459 [and corr1] and Add1 (1991), art 13 (Official position and responsibility); *1996 Draft Code of Crimes*, *supra* note 301, art 6 (Official position and responsibility).

expressly intended to apply both to international and national courts. Moreover, even those international instruments establishing international criminal tribunals envisaged that the same rules of international law reiterated in the instruments would apply with equal force to prosecutions by national courts.⁴⁰⁹

6.6. Bars on retroactive application of international criminal law in national law or other temporal restrictions

States have recognized for more than six decades since the adoption of the Universal Declaration of Human Rights that the prohibition of retroactive criminal laws does not apply to retrospective national criminal legislation enacted after the relevant conduct became recognized as criminal under international law.⁴¹⁰ Article 15 of the International Covenant on Civil and Political Rights, which Canada ratified on May 19th 1976, contains a similar prohibition.⁴¹¹ The Committee against Torture has made clear that national legislation defining torture as a crime under international law can apply to conduct which was considered as torture under international law prior to the enactment of that legislation.⁴¹² The Special Tribunal for Lebanon has also concluded that: "According to the principle of legality, everybody must know in advance whether specific conduct is consonant with, or a violation of, penal law (...). This provision does not necessarily entail, however, that the authorities of a State party to the ICCPR may try and convict a person for a crime that is provided for in international law but not yet codified in the domestic legal order: in criminal matters, international law cannot substitute itself for national legislation; in other words, international criminalisation alone is not sufficient for domestic legal orders to punish that conduct. Nevertheless, Article 15 of the ICCPR allows at the very least that fresh national legislation (or, where admissible, a binding case) defining a crime that was already contemplated in international law may be applied to offences committed before its enactment without breaching the *nullum crimen* principle. This implies that individuals are expected and required to know that a certain conduct is criminalised in international law: at least from the time that the same conduct is criminalised also in a national legal order, a person may thus be punished by domestic courts even for conduct predating the adoption of national

⁴⁰⁹ *Sierra Leone Statute*, *supra* note 319, art 6 (Individual criminal responsibility) (2); *Cambodian Extraordinary Chambers Law*, *supra* note 319, art. 29. For further analysis on this point, see Amnesty International, *Universal Jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings*, AI Index: EUR 53/001/2002 (Amnesty International, 2002).

⁴¹⁰ *Universal Declaration of Human Rights*, GA Res 217 (111), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71, art 11(2) declares:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

⁴¹¹ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR], art 15 reads:

"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

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

⁴¹² See, for example, Committee against Torture, *Concluding observations – Spain*, *supra* note 380.

legislation".⁴¹³

In the *Munyaneza* appeal decision, the Quebec Court of Appeal addressed the retrospective quality of the Crimes Against Humanity and War Crimes Act:

...the Act criminalizes in Canadian law all acts constituting crimes within the meaning of international law at the time they were committed. The Act does not attempt to create an offence *ex post facto*. Rather, it seeks merely to allow the prosecution in Canada of persons who, before the Act entered into force, committed acts that, at the time of their commission, constituted genocide, crimes against humanity, or war crimes, according to the definitions of those crimes under international law...The Act is thus consistent with paragraph 11(g) of the Charter, which recognizes that the criminal nature of an act at the moment it is committed may be assessed under either domestic or international law". In summary, through the Act and the repeal of the 1987 amendments to the Criminal Code, Parliament did not create new legal consequences for the past but only for the future. At most, the Act is retrospective in effect but not retroactive... Consequently, the Act validly permits the prosecution of an individual in Canada for a war crime committed before 2000.⁴¹⁴

Thus, nothing in either the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights nor the Crimes Against Humanity and War Crimes Act prevents Canada from enacting domestic legislation incorporating crimes under international law and permitting prosecutions for those crimes committed prior to the legislation having entered into force. In *R v Finta*,⁴¹⁵ the Supreme Court of Canada held that:

[t]he war crime provisions do not violate ss. 7 and 11(g) of the Charter because they are retroactive. The accused is not being charged or punished for an international offence, but a Canadian criminal offence that was in the [former Criminal] Code when it occurred. [...] Section 11(g) of the Charter specifically refers to the permissibility of conviction on the basis of international law or the general principles of law recognized by the community of nations. One of the factors motivating the terms of the provision was to remove concerns about otherwise preventing prosecution of war criminals or those charged with crimes against humanity.⁴¹⁶

In *British Columbia v. Imperial Tobacco Canada Ltd.*, the Supreme Court of Canada held, "[e]xcept for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution."⁴¹⁷ Citing constitutional law scholar Peter Hogg, the Court stated that the legislature must expressly indicate any desired retroactive or retrospective effect of the law and "there is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and

⁴¹³ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-II-0111, Appeals Chamber (16 February 2011) at paras 132-133 (Special Tribunal for Lebanon).

⁴¹⁴ *Munyaneza c. R.*, 2014 QCCA 906 at paras 50-55.

⁴¹⁵ *Finta*, *supra* note 104.

⁴¹⁶ *Ibid* citing *Rapport de la Commissions Deschênes*, at 147 to 158; *Procès-verbaux et témoignages du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada*, fascicule no 47 (28 janvier 1981) at 57-59 and fascicule no 41 (20 janvier 1981) at 99.

⁴¹⁷ *British Columbia v. Imperial Tobacco Canada Ltd.* [2005] 2 SCR 473 at para 69.

the statute is effective according to its terms.”⁴¹⁸

The *Crimes against Humanity and War Crimes Act* makes a distinction between an offence committed in Canada and outside of Canada. The provisions referring to offences committed outside of Canada allows for retrospective jurisdiction where a person can be indicted either before or after the coming into force of section 6 (genocide, crimes against humanity and war crimes).⁴¹⁹ For offences committed in Canada, there is no retrospective application of the law.⁴²⁰

6.7. *Ne bis in idem*

The principle of *ne bis in idem* (that one cannot be tried twice for the same conduct) is a fundamental principle of law recognized in international human rights treaties and other instruments, including the International Convention on Civil and Political Rights, the American Convention on Human Rights, Additional Protocol I and the constitutive instruments establishing the ICTY, ICTR and the Special Court for Sierra Leone.⁴²¹ However, apart from the vertical exception between international courts and national courts, the principle only prohibits retrials after an acquittal by the same jurisdiction.⁴²² This limitation on the scope of the principle of *ne bis in idem* can serve international justice by permitting other states to step in when the territorial state or the suspect’s state conducts a sham or unfair trial.

Canadian law does not explicitly recognize the *ne bis in idem* rule. However, there are three defence mechanisms that offer more or less a similar scope of protection. They are: *autrefois acquit* or *autrefois convict*, issue estoppel and *res judicata*. *Autrefois acquit* and *autrefois convict* are special pleas set out in the *Criminal Code*.⁴²³ The *autrefois convict* principle prevents multiple convictions for the same offence and *autrefois acquit* secures the finding of an acquittal.⁴²⁴ Issue estoppel prevents re-adjudication of a particular issue which has already been determined in other proceedings.⁴²⁵ *Res judicata* prevents multiple convictions of separate offences for the same

⁴¹⁸ *Ibid* at paras 69 and 71. See also Peter W Hogg, *Constitutional Law of Canada*, vol 2 (loose-leaf ed) (Carswell) at 48-49.

⁴¹⁹ *Crimes Against Humanity and War Crimes Act*, *supra* note 9, s 6(1); Also see *Order Fixing October 23, 2000 as the Date of the Coming into Force of the Act*, SI/2000-95.

⁴²⁰ *Crimes Against Humanity and War Crimes Act*, *supra* note 12 at s 4(1).

⁴²¹ ICCPR, *supra* note 411, art 14 (7); American Convention on Human Rights, art. 8 (4); *Protocol I*, *supra* note 93, art 75 (4) (h); *ICTY Statute*, *supra* note 319, art 10 (1); *ICTR Statute*, *supra* note 319, art 9 (1); *Sierra Leone Statute*, *supra* note 319, art 9.

⁴²² The Human Rights Committee has concluded that Article 14(7) of the ICCPR “does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.” *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This limitation was also recognized during the drafting of Article 14(7) of the ICCPR. See Marc J Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) at 316-318; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: NP Engel, 1993) at 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991). The ICTY Trial Chamber in the *Tadić* case reached the same conclusion. *Prosecutor v Dusko Tadic*, Case No IT-94-1-A, 15 July 1999.

⁴²³ *Criminal Code*, *supra* note 10, s 607.

⁴²⁴ *R v Riddle* [1980] 1 SCR 380.

⁴²⁵ *R v Mahalingan*, [2008] 3 SCR 316 [*Mahalingan*] at para 16. See also *Gushue v R*, [1980] 1 SCR 798; *Grdic v The Queen*, [1985] 1 SCR 810.

conduct.⁴²⁶

The *Crimes Against Humanity and War Crimes Act* recognizes the *autrefois acquit* and *autrefois convict* principles in section 12. Commentaries on Bill C-19 (the precursor to the *War Crimes and Crimes Against Humanity Act*) specify that “[c]lause 12(2) is based on Article 20(3) of the Rome Statute, which provides for a similar exception to the principle of *ne bis in idem* in proceedings before the ICC.”⁴²⁷ Section 12(1) of the *Crimes Against Humanity and War Crimes Act* repeats section 7(6) of the *Criminal Code*. However, unlike section 7(6), section 12(2) includes an exception where a person cannot plead *autrefois acquit*. Section 12(2) states:

(2) Despite subsection (1), a person may not plead *autrefois acquit*, *autrefois convict* or pardon in respect of an offence under any of sections 4 to 7 if the person was tried in a court of a foreign state or territory and the proceedings in that court

- (a) were for the purpose of shielding the person from criminal responsibility; or
- (b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice.⁴²⁸

Section 607(6) of the *Criminal Code* provide an exception for the special plea of *autrefois convict* relating to the crimes in the *CAHWCA*; where a person is alleged to have committed an offence outside Canada for which he or she was convicted by a foreign court *in absentia*, the plea of *autrefois convict* is not available if the accused was not punished in accordance with the sentence imposed by the foreign court.⁴²⁹

Section 11(h) of the *Canadian Charter of Rights and Freedoms* prohibits double jeopardy. Section 11(h) establishes that any person charged with an offence "if finally acquitted of the offence, not to be tried for it again, and if finally found guilty and punished for the offence, not to be tried or punished for it again".⁴³⁰ *Charter* jurisprudence has outlined criteria that the accused must establish to argue double jeopardy, on a balance of probabilities, namely: identification that the charges relating to the facts and the reproached offences and demonstration that the former adjudication was pronounced on merits. In *R v. Pan; R v. Sawyer*,⁴³¹ the Supreme Court of Canada agreed that section 11(h) of the *Charter*:

enshrines the principles underlying the pleas of *autrefois acquit* and *autrefois convict* which are applicable, as previously indicated, only where the first trial has proceeded to verdict and do not apply where the first trial has proved abortive. In my view, however, s. 7 of the *Charter* constitutionalizing the requirement of “fundamental justice” might, in some circumstances, bar a second trial where the first trial has been improperly

⁴²⁶ *Mahalingan*, *supra* note 425 at paras 14-20.

⁴²⁷ David Goetz, Parliamentary Research Branch, Law and Government Division, *Bill C-19: Crimes Against Humanity Act*, LS-230E, 5 April 2000, online: Government of Canada Publications <<http://publications.gc.ca/Collection-R/LoPBdP/LS/362/c19-e.htm>>.

⁴²⁸ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 12(2).

⁴²⁹ *Criminal Code*, *supra* note 10, s 607(6).

⁴³⁰ *Canadian Charter of Rights and Freedoms*, *supra* note 11, s 11(h).

⁴³¹ *R v Pan; R v Sawyer*, [2001] 2 SCR 344.

terminated. [...] The principle of double jeopardy might also preclude a further trial if the Crown were to proceed unfairly in depriving the accused of a verdict.⁴³²

However, as the Saskatchewan Court of Appeal has noted, a “single act may have more than one aspect, and it may give rise to more than one legal consequence.”⁴³³ Therefore, the *autrefois acquit* and *autrefois convict* principles may not be applicable. It is also important to note that *res judicata* has a wider scope than the *autrefois acquit*, *autrefois convict* rule as it forbids multiple convictions.⁴³⁴

6.8. Political control over decisions to investigate and prosecute

In principle, the Minister of Justice, in his or her capacity as the Attorney General of Canada or one of the provinces, determines whether to institute a criminal prosecution. Criminal proceedings are either conducted by one of the Attorneys General⁴³⁵ or, at the federal level, by the Deputy Attorney General, who is the Director of Public Prosecutions.⁴³⁶ The decision whether to prosecute is discretionary and courts do not intervene in its exercise unless a lack of objectivity, impartiality or flagrant reprehensible conduct can be established.⁴³⁷

The Supreme Court summarized the discretionary power of the Attorneys General in *Krieger v Law of Society Alberta*, stating that it includes:

- (a) the discretion whether to bring the prosecution of a charge laid by police;
- (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, R.S.C. 1985, c. C-46, ss. 579 and 579.1;
- (c) the discretion to accept a guilty plea to a lesser charge;
- (d) the discretion to withdraw from criminal proceedings altogether: *R v Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and
- (e) the discretion to take control of a private prosecution: *R v Osioy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.).⁴³⁸

While there are other discretionary decisions, these are the core prosecutorial discretionary powers of the delegated sovereign authority to the office of the Attorneys General. The office of the Attorney General is, according to Pierre Béliveau and Martin Vauclair, “protected from the influence of improper political and other vitiating factors by the principle of independence.”⁴³⁹ Courts will intervene in the Attorney General’s work in case of abuse of process, he or she otherwise enjoys relatively broad prosecutorial powers. In *Nelles v Ontario*⁴⁴⁰ and *Proulx v Québec*,⁴⁴¹ the Supreme Court of Canada concluded that the Attorney General possesses relative and not absolute civil

⁴³² *Ibid* at paras 113-114.

⁴³³ *R v Wigglesworth* (1984), SJ no 204 SKCA at para 11.

⁴³⁴ *R v Kienapple* (1974), SCJ no 76.

⁴³⁵ Béliveau & Vauclair, *supra* note 377 at para 75; *Department of Justice Act*, RSC 1985, c J-2, s 2(2).

⁴³⁶ *An Act respecting the office of the Director of Public Prosecutions*, SC 2006, c 9, s 121, s 3(4).

⁴³⁷ Béliveau & Vauclair, *supra* note 377 at para 75.

⁴³⁸ *Krieger*, *supra* note 39 at para 46.

⁴³⁹ Béliveau & Vauclair, *supra* note 377 at para 78.

⁴⁴⁰ *Nelles v Ontario*, [1989] 2 SCR 170.

⁴⁴¹ *Proulx v Québec (PG)*, [2001] 3 SCR 9, 2001 SCC 66.

immunity, in the case of abuse of process.⁴⁴²

In *R v Power*, the Supreme Court of Canada recognized that courts should be reluctant to “second-guess” the prosecutor’s motive when he or she makes a decision in the context of their prosecutorial function.⁴⁴³ Courts should intervene in decisions of prosecutorial discretion only “where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed.”⁴⁴⁴

The Attorneys General play a central role in the Canadian justice system, and their independence from political pressure is paramount to the functioning of an adversarial criminal justice system. As the Supreme Court of Canada recognized in *Boucher v. The Queen*, “the role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty.”⁴⁴⁵ Hence, a prosecutor is not to make decisions based on political interference, but instead makes a decision to prosecute based on available information and evidence sufficient to secure a conviction. In *Bain*, the Court nevertheless recognized that prosecutors “are subject to all the emotional and psychological pressures that are exerted by individuals and the community [...] for example they may be moved by sympathy for a helpless victim, or by contempt for the cruel and perverted acts of an accused [...]”⁴⁴⁶

The existence of the Public Prosecution Service of Canada (PPSC) and the Director of Public Prosecutions (DPP) helps to maintain independence between prosecutorial discretion and politics. The DPP acts under and on behalf of the Attorney General of Canada, “but he or she is independent of the latter since the creation of this function was specifically designed to create a prosecution service independent from the Ministry of Justice.”⁴⁴⁷

Political interference in the process of justice is contrary to international standards.⁴⁴⁸ There exists at least one example of political influence overriding justice in Canada. The Canadian Centre for International Justice (CCIJ) and the US-based Center for Constitutional Rights sent a letter and draft

⁴⁴² *Kamloops v Nielson*, [1984] 2 RCS at 24.

⁴⁴³ *Power*, *supra* note 39 at para 12.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Boucher v The Queen*, [1955] SCR 16 at paras 23-24. Those paragraphs were also cited in *R v Stinchcombe*, [1991] 3 SCR 326; *R v Taillefer*; *R v Duguay*, [2003] 3 RCS 307 at para 68. It was reiterated in *Application under s 83.28 of the Criminal Code (Re)*, [2004] 2 SCR 248, 2004 SCC 42 at para 95.

⁴⁴⁶ *R v Bain*, [1992] 1 SCR 91 at para 16.

⁴⁴⁷ Lafontaine, *supra* note 98 at 83 citing *An Act respecting the office of the Director of Public Prosecutions*, *supra* note 436, s 3(3) and “Unlike the Federal Prosecution Service, which was part of the Department of Justice, the Public Prosecution Service of Canada is an independent organization, reporting to Parliament through the Attorney General of Canada. [...] The creation of the PPSC reflects the decision to make transparent the principle of prosecutorial independence, free from any improper influence” (information available on the site of the Public Prosecution Service of Canada, online: <<http://www.ppsc-sppc.gc.ca/eng/bas/abt-suj.html>>).

⁴⁴⁸ Political decisions to prosecute could, in some instances, be inconsistent with the *Guidelines on the Role of Prosecutors*, adopted by the 8th UN Congress on the Prevention of the Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. For example, Guideline 12 (a) requires prosecutors to “perform their duties fairly”; Guideline 13 requires prosecutors to “[c]arry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination”; Guideline 13 (b) requires prosecutors to “[p]rotect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect” and Guideline 14 states that “[p]rosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.”

indictment to the Attorney General of Canada calling for the investigation and prosecution of former U.S. President George W. Bush. The alleged offence was the torture of detainees at the U.S. prison in Guantanamo Bay, an act that Mr. Bush admitted to having authorized in his memoirs. Despite the fact that the CCIJ was able to initiate a private prosecution, the Attorney General of British Columbia intervened and stayed the proceedings. In response to a complaint before the UN Committee against Torture, Canada admitted to never having investigated the claims against Mr. Bush.⁴⁴⁹

6.9. Discrimination in law and practice

Laws and practices that discriminate on the grounds of gender, race, religion national, ethnic or social origin, or other status, can be an obstacle to prosecutions and to access to justice in general.⁴⁵⁰

Discrimination on the grounds of race, national or ethnic origin, colour, religion, sex, age, sexual orientation, marital status, Aboriginal residence, citizenship, or mental or physical disability is prohibited by federal and provincial laws, and equal treatment before and under the law without discrimination is protected under the *Canadian Charter of Rights and Freedoms*. The prohibition applies as a matter of law, to access to the judicial system. In practice, discrimination, for example on the grounds of gender, may limit access to justice, and particularly vulnerable groups like Aboriginal Canadians or economically disadvantaged Canadians may have difficulty accessing the justice system.⁴⁵¹

The *Canadian Charter of Rights and Freedoms* guarantees fundamental human rights and freedoms under the *Constitution*.⁴⁵² Section 2 guarantees basic freedoms such as freedom of religion, thought, belief, opinion, expression, peaceful assembly and association. Sections 3 to 5 outline democratic freedoms such as the right to vote. Section 6 guarantees mobility rights such as freedom to enter, remain or leave Canada. Sections 7 to 14 guarantee legal rights including the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Most importantly, section 15 guarantees equality rights before and under the law and equal protection and benefit of the law. Subsection 15(1) notes that “every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁴⁵³ The Supreme Court of Canada has since created a host of analogous grounds for non-discrimination it deems applicable to

⁴⁴⁹ *George W Bush and the “War on Terror”*, online: Canadian Centre for International Justice <<http://www.cciij.ca/programs/cases/guantanamo/index.php>>. Amnesty International also called on Canada to arrest and charge Mr. Bush (“Canada urged to arrest and prosecute George W. Bush” (12 October 2011), online: Amnesty International <<http://www.amnesty.org>>).

⁴⁵⁰ See prohibition on discrimination before the law in *ICCPR*, *supra* note 411, art 26. Other characteristics besides gender for which a person might suffer discrimination include age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. See, for example, *Rome Statute supra* note 97, art 21(3).

⁴⁵¹ See e.g. Jane Bailey, “Reopening Law’s Gate: Public Interest Standing and Access to Justice” (2011) 44 *UBCL Rev* 255.

⁴⁵² *Constitution Act*, *supra* note 19.

⁴⁵³ *Canadian Charter of Rights and Freedoms*, *supra* note 11 s 15.

equality provisions of the *Charter* including sexual orientation,⁴⁵⁴ marital status,⁴⁵⁵ Aboriginal residence,⁴⁵⁶ and citizenship.⁴⁵⁷

In addition to the *Charter*, the *Canadian Human Rights Act*⁴⁵⁸ as well as provincial human rights legislation guarantee equality protection and non-discrimination of Canadians.⁴⁵⁹

6.10. Restrictions on the rights of victims and their families

As noted above in Section 5.3, victims are not able to obtain the full range of reparations against convicted persons to which they are entitled under international law. Depending on provincial or territorial jurisdiction, the rights of victims and their families can differ because some provincial programs are restricted to victims that are injured or killed in their province, while the federal program does not cover compensation for victims of crime. In addition, there are a number of significant restrictions on the ability of victims to participate meaningfully in criminal and civil proceedings. As was noted above in Section 5.2, victims and their families or heirs of the victims cannot bring civil claims in criminal proceedings but it is possible for victims to obtain reparation in civil jurisdiction for damages deriving from criminal acts. Finally, the provincial laws can provide civil proceedings against the accused to recover damages.

6.11. Amnesties

Amnesties and similar measures of impunity for crimes under international law, that prevent the emergence of truth, a final judicial determination of guilt or innocence and full reparation to victims and their families, are prohibited under international law.⁴⁶⁰

Canadian courts have recognized foreign pardons in rare situations, but they did not relate to war crimes, crimes against humanity, or genocide. To recognize foreign pardons, courts must examine three criteria which were established by the Federal Court of Appeal in 1991 in *Burgon*:⁴⁶¹

- (a) the foreign legal system as a whole must be substantially similar to Canada's;
- (b) the aim, content and effect of the specific legal system as a whole must be similar to and consistent with Canadian law, and
- (c) there must be no valid reason not to recognize the effect of the foreign law.⁴⁶²

The Federal Court of Appeal affirmed in *Saini* that “these three criteria must all be met before our

⁴⁵⁴ *Vriend v Alberta*, [1998] 1 SCR 493.

⁴⁵⁵ *Miron v Trudel*, [1995] 2 SCR 415.

⁴⁵⁶ *Corbiere v Canada*, [1999] 2 SCR 203.

⁴⁵⁷ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

⁴⁵⁸ *Canadian Human Rights Act*, RSC 1985, c H-6.

⁴⁵⁹ For an example of provincial legislation, see e.g. Ontario *Human Rights Code*, RSO 1990, c H-19.

⁴⁶⁰ See, for example, Amnesty International, *Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law*, AI Index: AI: AFR 51/012/2003, (Amnesty International, 2003). The Committee against Torture has concluded that amnesties for torture and enforced disappearances are prohibited under international law. *CAT General Comment 2*, *supra* note 303 at para 5. See also Committee against Torture, *Concluding observations – Spain*, *supra* note 380 at para 21.

⁴⁶¹ *Canada (Ministre de l'Emploi et de l'Immigration) v Burgon*, [1991] 3 CF 44 (CAF).

⁴⁶² *Ibid* at 62.

Courts will recognize a foreign pardon or discharge".⁴⁶³

The Immigration and Refugee Board (Appeal Division) in *Choujounian-Abulu* stated:

In Canada, pardons are available only to individuals, not groups of people. Also, the vast majority of pardons follow a legislative scheme that provides for the granting of a pardon to an individual only after undergoing a formal, extensive and detailed process of assessment.⁴⁶⁴

Section 748 of the *Criminal Code* provides for pardons and remissions. Section 748 was interpreted by the Federal Court of Appeal in *Saini*: "a convicted person cannot deny having been convicted and [...] such a pardon does not wipe out the conviction itself; it only limits its negative effects."⁴⁶⁵ At paragraph 40 of the *Saini*⁴⁶⁶ decision, the Federal Court of Appeal refers to *Smith*⁴⁶⁷ and *Therrien (Re)*⁴⁶⁸ and notes that "a Canadian pardon only removes the disqualifications resulting from a conviction, and does not erase the conviction itself"⁴⁶⁹. According to the Supreme Court in *Therrien (Re)*,⁴⁷⁰ there are three categories of pardons: (1) ordinary and partial pardon for which the conviction of the person still exists (*Criminal Code* sections 748(1) and 748.1); (2) conditional pardon (*Criminal Code* section 748(2)); and (3) free pardon (*Criminal Code* sections 748(2) and 748(3)). The Court in *Saini* notes that "a free pardon can only be granted by the Governor in Council where a person has been wrongly convicted, and even then, there are established procedures that must be followed."⁴⁷¹

The Federal Court applied these findings in *Magtibay* to hold that an acquittal based on a pardon from the victim of a crime, is not equivalent to Canadian law and should not be treated as such.⁴⁷² Again in other cases, the Court applied these principles to evaluate the legal recognition of foreign pardons. For example, Justice Mosely in *Sicuro* specified the standard of proof required to establish "reasonable grounds" that the applicant had been "convicted" outside Canada, citing *Chiau*, is "more than a flimsy suspicion, but less than the civil test of balance of probabilities;" it is a "a bona fide belief in a serious possibility based on credible evidence".⁴⁷³ In *S.A. v. Canada (Minister of Immigration)*⁴⁷⁴, the Court found error in the decision maker's failure to consider all the evidence before her and provide adequate reasons for refusing to accept a foreign pardon, and so referred the case back for reconsideration with a different officer.

There have been recent changes to the *Criminal Records Act*.⁴⁷⁵ The amendments change the term

⁴⁶³ *Canada (Minister of Citizenship and Immigration) v Saini* (CA), 2001 FCA 311, [2002] 1 FC 200 [*Saini*] at para 48.

⁴⁶⁴ *Choujounian-Abulu v Canada (Citizenship and Immigration)*, 2004 CanLII 56712 (IRB) at para 16.

⁴⁶⁵ *Saini*, *supra* note 463 at para 35.

⁴⁶⁶ *Ibid* at para 40.

⁴⁶⁷ *Smith v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 144 (TD).

⁴⁶⁸ *Therrien (Re)*, [2001] 2 SCR 3, 2001 SCC 35 [*Therrien (Re)*].

⁴⁶⁹ *Saini*, *supra* note 463 at para 40.

⁴⁷⁰ *Therrien (Re)*, *supra* note 468.

⁴⁷¹ *Saini*, *supra* note 411 at para 40.

⁴⁷² *Magtibay v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 397, at para 18.

⁴⁷³ *Sicuro v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 461, at para 27.

⁴⁷⁴ *S.A. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 515, at para 18.

⁴⁷⁵ *Criminal Records Act*, RSC 1985, c C-47.

“pardon” to “record suspension”. They also extend the ineligibility periods for applications for a record suspension to 5 years for all summary conviction offences and 10 years for all indictable offences. Additionally, the legislative changes make those individuals convicted of sexual offences against minors and those who have been convicted of more than three indictable offences punished by imprisonment for 2 years or more ineligible for a record suspension.

In Canada, the *Criminal Code* refers to amnesties under the section 117.14(1). There are two orders which have been enacted called *Order Declaring an Amnesty Period*.⁴⁷⁶ Both orders relate to handgun possession and do not relate to crimes under international law. There is no amnesty for crimes under international law in Canadian domestic law.

7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

As discussed below, there are a number of obstacles to extradition (Section 7.1) and mutual legal assistance (Section 7.2) that may limit the ability of Canada to obtain and to provide effective cooperation with other states in the investigation and prosecution of crimes under international law. In addition, there are a number of inadequate human rights safeguards governing extradition and mutual legal assistance.

7.1. Extradition

Canada faces various obstacles, both as the state requesting extradition of persons suspected of committing crimes under international law, and as the requested state to extradite suspects from Canada. Extradition requests are generally regulated by Canada’s *Extradition Act*.⁴⁷⁷ They are also subject to any applicable bilateral extradition treaties,⁴⁷⁸ or multilateral treaties targeted to specific categories of criminal behaviour, such as the multilateral treaties dedicated to prosecuting acts of international terrorism, human trafficking and trafficking in narcotics.⁴⁷⁹ These treaties prevail over the *Extradition Act* to the extent that there are any inconsistencies between the two.⁴⁸⁰ Extradition

⁴⁷⁶ *Order Declaring an Amnesty Period*, SOR/98-467; *Order Declaring an Amnesty Period*, SOR/2006-95.

⁴⁷⁷ *Extradition Act*, *supra* note 376.

⁴⁷⁸ Canada has bilateral extradition treaties (whether under its own auspices or those of Great Britain for treaties which predate the Statute of Westminster) with fifty nation-states including: Albania (1928), Argentina (1894), Austria (2000), Belgium (1902), Bolivia (1898), Brazil (signed in 1995 but not yet in force), Chile (1898), Colombia (1899), Cuba (1905), Czech Republic (1926), Denmark (1979), Ecuador (1886), El Salvador (1883), Estonia (1928), Finland (1985), France (1989), Germany (1979), Greece (1912), Guatemala (1886), Haiti (1876), Hong Kong (1997), Hungary (1874), Iceland (1873), India (1987), Israel (1969), Italy (2010), Korea (1995), Latvia (1928), Liberia (1894), Lithuania (1928), Luxembourg (1881), Mexico (1990), Monaco (1892), Netherlands (1991), Nicaragua (1906), Norway (1873), Panama (1907), Paraguay (1911), Peru (1907), Philippines (1990), Portugal (1894), Romania (1894), San Marino (1900), South Africa (2001), Spain (1990), Sweden (2001), Switzerland (1996), Thailand (1911), the United States (1976), and Uruguay (1885).

⁴⁷⁹ Canada has signed 27 multilateral international conventions or protocols with provisions relating to extradition. For a complete list, see Gary Botting, *Canadian Extradition Law Practice*, 2012 ed, (Markham, ON: LexisNexis Canada, 2012) at p. 393. See also online: Canada Treaty Information < www.treaty-accord.gc.ca >.

⁴⁸⁰ *Vienna Convention on the Law of Treaties*, *supra* note 13, art 27.

requests can also be made in the absence of a treaty by special agreement.⁴⁸¹

The Minister of Justice decides whether to grant requests to extradite from Canada, as well as the decision to request extradition to Canada. The *Extradition Act* distinguishes between the Attorney General of Canada and the Minister of Justice at certain stages of the process. Because the Minister of Justice is also the Attorney General of Canada, the same person acts in two different capacities, and responsibility for the various capacities are delegated to subordinate offices.

Requesting extradition to Canada. Under the *Extradition Act*, the Minister of Justice, at the request of a “competent authority”, makes an extradition request of a foreign state to send a person to Canada for the purpose of prosecution, enforcement of a sentence, or enforcement of a disposition under the *Young Offenders Act*.⁴⁸² Those considered to be a “competent authority” for the purpose of requesting extradition to Canada include: the Attorney General of Canada (often the case for crimes of international concern); a provincial Attorney General; the provincial minister responsible for corrections (in the case of enforcement of a prison sentence); or the federal Minister of Public Safety and Emergency Preparedness (in the case of young persons).⁴⁸³

To support a request for extradition with evidence, a competent authority may seek an *ex parte* order, from the Superior Court in the province in which the request is originating, to secure the attendance of witnesses; secure the production of data in any form; receive and record the evidence; and certify or authenticate the evidence.⁴⁸⁴ Part XXII of the *Criminal Code* regarding the procedures applicable to procuring the attendance of persons required to give evidence, applies to these orders.⁴⁸⁵ The Minister of Justice retains the sole discretion to make the request of the appropriate state or entity,⁴⁸⁶ whether it is an extradition partner or not.⁴⁸⁷

In making an extradition request, Canada is bound by the definition of extraditable conduct established by any applicable extradition agreement, whether that conduct is defined in terms of punishment or by inclusion as an offence on a list or schedule (see discussion below in Section 7.1.1.3). For example, in the Treaty on Extradition between the Government of Canada and the Government of the United States of America, any offences that carry a sentence of one-year imprisonment in both Canada and the United States is considered extraditable conduct.⁴⁸⁸

State requesting extradition from Canada. The process of extradition from Canada has several stages. There is both a judicial phase and a ministerial phase.

⁴⁸¹ *Extradition Act*, *supra* note 376, s 10.

⁴⁸² *Ibid*, s 78(1).

⁴⁸³ *Ibid*, s 77.

⁴⁸⁴ *Ibid*, s 79(1).

⁴⁸⁵ *Ibid*, s 79(2).

⁴⁸⁶ *Ibid*, s 78.

⁴⁸⁷ *Ibid*, s 10.

⁴⁸⁸ Treaty on Extradition between the Government of Canada and the Government of the United States of America, 3 December 1971, E101323-Can TS 1976 No 3 (entered into force 22 March 1976), art 2(1). See also *Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America*, 3 December 1971; and *Second Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America*, 12 January 2001 (entry into force 30 April 2003).

Canada can receive a request to extradite from any state or entity, which is defined as:

- (a) a State other than Canada;
- (b) a province, state or other political subdivision of a State other than Canada;
- (c) a colony, dependency, possession, protectorate, condominium, trust territory or any territory falling under the jurisdiction of a State other than Canada;
- (d) an international criminal court or tribunal; or
- (e) a territory.⁴⁸⁹

An extradition partner may request an extradition for the purpose of prosecuting the person, imposing a sentence on the person, or enforcing a sentence.⁴⁹⁰ Section 3 of the *Extradition Act* identifies the scenarios under which a person may be extradited from Canada:

(1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on — or enforcing a sentence imposed on — the person if

- (a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and
- (b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,
 - (i) 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
 - (ii) 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.

(2) For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.⁴⁹¹

Any requirements of extraditable conduct laid out in the *Extradition Act* are subject to modification by a bilateral extradition treaty. In the event there is no extradition treaty with the requested state, the statute provides for extradition on an *ad hoc* basis by “specific agreement”, which is not limited to a formal treaty and applies only to the particular extradition request.⁴⁹²

After receiving a request for extradition, the Minister of Justice can seek an authority to proceed (ATP) which triggers the judicial phase in the form of an extradition hearing. The ATP authorizes the Attorney General to seek, on behalf of the extradition partner, an order of a court for the committal of the person sought.⁴⁹³ The ATP sets out who the requesting partner is and provides the Canadian

⁴⁸⁹ *Extradition Act*, *supra* note 376, s 2.

⁴⁹⁰ *Ibid*, s 3(1).

⁴⁹¹ *Ibid*, s 3.

⁴⁹² *Ibid*, s 10.

⁴⁹³ *Ibid*, s 15.

offence underlying the conduct of the alleged foreign offence.⁴⁹⁴ The Minister of Justice has discretion to determine which charges will form the basis of the ATP on the basis of the application of the double criminality rule (see further discussion in Section 7.1.1.3 below). The extradition hearing is an evidentiary hearing before a trial judge.⁴⁹⁵ At the extradition hearing, the judge must determine that there is sufficient evidence to justify committal in Canada.⁴⁹⁶ This evidentiary determination involves an assessment of the admissibility of the evidence under the *Extradition Act*, and whether there is sufficient evidence to justify committal.⁴⁹⁷ Whether there is sufficient evidence depends on whether there is sufficient evidence to permit a properly instructed jury to commit.⁴⁹⁸ The committal judge can also grant a remedy for any infringement of the suspect's *Charter* rights that occurred throughout the extradition process.⁴⁹⁹

The 'record of the case' is a document containing the list of the evidence available and intended for use in the prosecution⁵⁰⁰ and was created in response to the actual or perceived difficulties of extradition partners in meeting Canada's evidentiary requirements, specifically civil law countries and non-state entities such as the UN International Tribunals for Rwanda and the former Yugoslavia, largely because they do not have general prohibitions against hearsay evidence.⁵⁰¹ Under the new procedure, only evidence gathered in Canada must conform to the Canadian rules of evidence in order to be admitted,⁵⁰² Evidence in the record of the case must be available for trial and must be sufficient to justify prosecution or gathered according to the law of the extradition partner.⁵⁰³ More recently, the Supreme Court of Canada in *United States of America v Anekwu* held that evidence in an extradition hearing need not take a particular form so long as the person sought may still challenge its admissibility or content and the evidence conforms to Canadian evidentiary rules.⁵⁰⁴

After the judicial phase, the Minister of Justice considers any submissions by the person sought for extradition, as well as any assurances from the extradition partner, that may be appropriate before issuing the final order of surrender. The decision of whether the person should be surrendered is at the discretion of the Minister. The International Assistance Group of the Department of Justice evaluates requests for extradition, and makes recommendations to the Minister both with respect to the final surrender order and whether any assurances should be sought in conjunction with the surrender order.

There are both mandatory and discretionary grounds upon which the Minister may refuse surrender. Sections 44(1) and 46(1) of the *Extradition Act* set out the mandatory grounds of refusal. Section

⁴⁹⁴ *Ibid*, s 15.

⁴⁹⁵ *Ibid*, s 24.

⁴⁹⁶ *Ferras; United States of America v Latty*, 2006 SCC 33, [2006] 2 SCR 77 [*Ferras & Latty*], para 36.

⁴⁹⁷ *Ibid* at para 36.

⁴⁹⁸ *Ibid* at para 26.

⁴⁹⁹ *Extradition Act*, *supra* note 376, s 25. In *Lake*, *supra* note 329: "for the purposes of the *Constitution Act, 1982*, a judge has, with respect to the functions that the judge is required to perform in applying this Act, the same competence that that judge possesses by virtue of being a superior court judge." See also *Ferras & Latty*, *supra* note 496 at para 42..Note at the committal stage only Charter issues relevant to the committal proceeding itself are considered; see *Kwok*, *supra* note 377.

⁵⁰⁰ *Extradition Act*, *supra* note 376 at s 33(1)(a).

⁵⁰¹ See *House of Commons Debates*, 8 October 1998, 1st Sess., 36th Parliament, *Hansard*, v 135 at 9003-9004, cited in Elaine F Krivel, Thomas Beveridge and John W Hayward, *A Practical Guide to Canadian Extradition* (Toronto: Carswell, 2002) at 264-265.

⁵⁰² *Extradition Act*, *supra* note 376, s 32(2).

⁵⁰³ *Ibid*, s 33(3).

⁵⁰⁴ *United States of America v Anekwu* [2009] 3 SCR 3 at para 30.

44(1) includes instances where the surrender would be unjust or oppressive⁵⁰⁵ or where the request is made for the purpose of prosecuting or punishing a person for discriminatory purposes (including race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability, or status).⁵⁰⁶ Section 46(1) states that the Minister must refuse to surrender a person sought in three situations:

- (a) the prosecution of a person is barred by prescription or limitation under the law that applies to the extradition partner;
- (b) the conduct in respect of which extradition is sought is a military offence that is not also an offence under criminal law; or
- (c) the conduct in respect of which extradition is sought is a political offence or an offence of a political character.⁵⁰⁷

Sections 44(2) and 47 of the *Extradition Act* sets out the discretionary ground of refusal. According to section 44(2), the Minister may refuse to make a surrender order if he or she is satisfied that the offence for which the person is sought for extradition is punishable by death under the domestic laws of the extradition partner.⁵⁰⁸ In section 47, the Minister may refuse to make the surrender order if he or she is satisfied that:

- (a) the person would be entitled, if that person were tried in Canada, to be discharged under the laws of Canada because of a previous acquittal or conviction;
- (b) the person was convicted in their absence and could not, on surrender, have the case reviewed; (c) the person was less than eighteen years old at the time of the offence and the law that applies to them in the territory over which the extradition partner has jurisdiction is not consistent with the fundamental principles governing the *Youth Criminal Justice Act*;
- (d) the conduct in respect of which the request for extradition is made is the subject of criminal proceedings in Canada against the person; or
- (e) none of the conduct on which the extradition partner bases its request occurred in the territory over which the extradition partner has jurisdiction.⁵⁰⁹

Section 6.1 of the *Extradition Act* limits claims of immunity from arrest or surrender by the person sought by the ICC.⁵¹⁰ After the individual has been committed for extradition, but prior to being surrendered to the requesting state, the accused has 90 days to make submissions to the Minister on “any ground that would be relevant to the Minister in making a decision” regarding surrender.⁵¹¹ The Minister again reviews the case before issuing or denying a surrender order to the requesting state,⁵¹² accompanied by “any assurances that the Minister considers appropriate” (sought from the extradition partner) or “subject [to] any conditions that the Minister considers appropriate” (unilaterally imposed by Canada).⁵¹³ After the surrender order is issued, the individual has 30 days

⁵⁰⁵ *Extradition Act*, *supra* note 376, s 44(1)(a).

⁵⁰⁶ *Ibid*, s 44(1)(b).

⁵⁰⁷ *Ibid*, s 46(1).

⁵⁰⁸ *Ibid*, s 44(2).

⁵⁰⁹ *Ibid*, s 47.

⁵¹⁰ *Extradition Act*, *supra* note 377, s 6.1.

⁵¹¹ *Ibid*, s 43(1).

⁵¹² *Ibid*, s 40(1).

⁵¹³ *Ibid*, s 40(3) “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 offences or conduct other than that referred to in the order of

to apply for judicial review to the court of appeal of the province in which committal was ordered.⁵¹⁴ The Minister also has discretion to delay a surrender order until the conclusion of a trial or serving of a sentence by the same individual within Canada, provided it is not in relation to the same conduct for which the surrender order is being issued.⁵¹⁵

7.1.1. OBSTACLES TO EXTRADITION TO AND FROM CANADA

There are a number of obstacles to requesting extradition to and from Canada, including: Ministerial discretion at all stages of the extradition process, prohibitions against extradition for military crimes or offences not considered criminal at the time they were committed, and constitutional safeguards arising from the application of the Canadian *Charter*, including the mobility rights of Canadian citizens which require consideration of domestic prosecution, and the potential for torture or application of the death penalty.

7.1.1.1. Political control over the making or granting of extradition requests

While the discretionary power of the Minister at the ministerial phase is not absolute, the Supreme Court of Canada in *Lake* held that the discretionary power of the Minister to grant extradition requests is situated at “the extreme legislative end of the continuum of administrative decision-making and has essentially a political nature,”⁵¹⁶ and as such, the judicial system is unlikely to intervene to deny the broad scope of discretion accorded to the Minister under the terms of the act.

The Minister of Justice retains full discretion as to whether to attach any preconditions or assurances to the act of surrender, but has an obligation to refuse surrender under certain conditions. There is no obligation for the Minister to attach preconditions or assurances with respect to crimes of concern to the international community. While normally this serves the purpose of more flexible arrangements that facilitate the extradition process, the discretion exercised by the Minister in characterizing the offence in the ATP and the surrender order creates some ambiguity for crimes of international concern, as these may be characterized in such a way by the country seeking extradition as to lessen their normative importance or minimize state responsibility for the crime being prosecuted. One can imagine, for instance, a state complicit in crimes against humanity for a mass-killing seeking extradition from Canada of a subordinate military officer for the multiple offences of murder, without acknowledging the collective character as a crime against humanity (and thus a crime of international concern). Reducing crimes of international concern to their constituent acts reinforces impunity for all complicit actors by ignoring the obligation that states exercising custodial jurisdiction of those suspected of such crimes have to the international community as a whole to ensure effective investigation and prosecution for such crimes. Obviously this is not an issue with respect to extradition to entities such as the International Criminal Court, whose jurisdiction is limited to crimes under international law.

Assurances are anticipated in extradition treaties, most commonly for the purpose of assuring that the death penalty will not be sought, as in Article 6 of the *Canada-U.S. Extradition Treaty*.

surrender.”

⁵¹⁴ *Ibid*, s 57(1).

⁵¹⁵ *Ibid*, s 64.

⁵¹⁶ *Lake*, *supra* note 377 at para 22 citing *Idziak v Canada (Minister of Justice)* [1989] OJ No 1809, 48 CRR 179 (Ont HC), *aff'd* [1990] OJ No 717, 48 CRR 187 (Ont CA), *aff'd* [1992] SCJ no 97, [1992] 3 SCR 631.

Decisions of the Minister with respect to assurances for this purpose are open to scrutiny by the United Nations Human Rights Committee under the *International Covenant on Civil and Political Rights* (see Section 7.1.2.3 on the death penalty below).

Circumstances may arise where there are competing requests for extradition, where one jurisdiction is seeking extradition for lesser crimes under their domestic criminal law.⁵¹⁷ Under the *Extradition Act*, the Minister retains discretion to determine which request will be pursued first in such circumstances,⁵¹⁸ as well as which charge under Canadian law most appropriately characterizes the nature of the criminal conduct in question, before issuing the ATP.⁵¹⁹ With respect to crimes of concern to the international community, there is a risk that Canada's choice of extraditing to one jurisdiction over another could lead to impunity. It is important for Canada to pursue reasonable assurances to ensure that its advancement of one extradition request does not frustrate the timely and efficacious administration of justice with respect to such crimes. If, in the event of multiple extradition requests for different classes of crimes, the requesting country refuses an assurance to undertake a prosecution for genocide, war crimes or crimes against humanity, Canada's failure to obtain such an assurance for those reasonably suspected of such crimes greatly increases the risk of impunity. In such circumstances, it may be better for Canada to pursue domestic prosecution for these crimes under international law, though this option is not available without devoting substantial resources required to conduct an effective investigation and prosecution of these crimes. Such a capacity may also be required in the circumstances where the Minister is compelled to refuse surrender under section 44(1) and 46(1) of the *Extradition Act* or the suspect faces a reasonable likelihood of torture by the requesting state (see discussion below).

7.1.1.2. Nationality

There is no general prohibition in Canadian law on the extradition of nationals, but Canadian citizens are subject to some protections against extradition under the *Charter*.⁵²⁰ For any Canadian citizen against whom extradition is sought, extradition constitutes a *prima facie* violation of the *Charter* right to remain in Canada pursuant to section 6(1).⁵²¹ This *Charter* right does not apply to non-citizens, however,⁵²² and is only engaged by the Minister of Justice's executive decision at the final stage of the process to surrender the person sought, and not at the earlier judicial stage of committal.⁵²³ Nonetheless the Minister is obliged to consider whether prosecution in Canada with respect to the

⁵¹⁷ For example, there were competing extradition requests for Jorge Vinicio Orantes Sosa, who is a former 2nd lieutenant of the Guatemalan military's *kaibiles* unit responsible for the murder of at least 251 men, women, and children at Dos Erres, Guatemala in 1982; see *Case of the "Las Dos Erres" Massacre v Guatemala* (2009), Preliminary Objection, Merits, Reparations and Costs (24 November 2009), IACHR (Ser C) No. 211 at 62-65 [*Dos Erres*]. The United States sought Sosa's extradition for immigration fraud (for failing to disclose his military service while applying for residency and citizenship) while Guatemala sought his extradition for his complicity in the crimes committed at Dos Erres. Sosa was extradited from Canada to the United States in September 2012 and found guilty of immigration fraud. On 10 February 2014, he was sentenced to the maximum term of imprisonment of 10 years.

⁵¹⁸ *Extradition Act*, supra note 376, s 15(2).

⁵¹⁹ *Ibid*, s 15(1). In the case of Mr. Sosa, the United States' request was given priority and the committal order granted on the count of perjury; see *United States v Sosa*, 2011 ABQB 534, [2011] 521 AR 356.

⁵²⁰ *United States v Burns*, [2001] 1 SCR 283, [2001] SCJ No 8, 2001 SCC 7 [*Burns*].

⁵²¹ See *Canadian Charter of Rights and Freedoms*, supra note 11, s 6(1): "Every citizen of Canada has the right to enter, remain in and leave Canada."

⁵²² See e.g. *United States v Dhillon [No 2]*, [2009] OJ No 1129, 2009 ONCE 247 (Ont CA) (appeal from committal and judicial review).

⁵²³ *Ferras & Latty*, supra note 496.

crimes of which he or she is accused is possible or desirable.⁵²⁴ In other words, the Minister has an obligation flowing from section 6(1) to assure him or herself that prosecution in Canada is not a realistic alternative.⁵²⁵ In *United States v. Cotroni* the Supreme Court of Canada established the factors to consider in weighing whether domestic prosecution is preferable to extradition, and thus whether surrender of the Canadian citizen in question is justifiable in accordance with section 1 of the *Charter*.⁵²⁶ The factors include:

- (a) where was the impact of the offence felt or likely to have been felt;
- (b) which jurisdiction has the greater interest in prosecuting the offence;
- (c) which police force played the major role in the development of the case;
- (d) which jurisdiction has laid charges;
- (e) which jurisdiction has the most comprehensive case;
- (f) which jurisdiction is ready to proceed to trial;
- (g) where the evidence is located;
- (h) whether the evidence is mobile;
- (i) the number of accused involved and whether they can be gathered in one place for trial;
- (j) in what jurisdiction were most of the acts in furtherance of the crime committed;
- (k) the nationality and residence of the accused; and
- (l) the severity of the sentence the accused is likely to receive in each jurisdiction.⁵²⁷

Recently, the Ontario Court of Appeal in *United States v. Leonard* determined the appropriate analysis for whether the infringement of the offender's section 6 *Charter* right is justified under section 1 of the *Charter*.⁵²⁸ The Court held that the *Cotroni* analysis occurs separately and in spite of a prosecutor's decision not to lay charges, stating "the minister cannot treat the prosecutor's decision not to proceed with charges in Canada as conclusive of the separate and distinct *Cotroni* analysis that the minister is required to conduct".⁵²⁹

The Court in *United States v. Leonard* also interpreted some of the individual *Cotroni* factors as they apply to an Aboriginal person sought for extradition, namely the nationality and residence of the accused, and the severity of the sentence the accused is likely to receive in each jurisdiction. For Aboriginal offenders, the Minister, in exercising ministerial discretion to extradite, must consider the Aboriginal status of the offender and must consider:

the distinct situation of Aboriginal peoples in Canada including [...] the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts [...].⁵³⁰

The Supreme Court of Canada in *Sriskandarajah v. United States of America* held that the *Cotroni* assessment in deciding whether the violation of an accused's section 6 *Charter* rights

⁵²⁴ See *Lake*, *supra* note 377 at 42.

⁵²⁵ See *Ferras & Latty*, *supra* note 496.

⁵²⁶ *United States v Cotroni*, [1989] 1 SCR 1469, [1989] SCJ No 56 (La Forest, J for the majority) [*Cotroni*] at para 56. See also *McVey v United States*, [1992] 3 SCR 475, [1992] SCJ No 95 at para 8.

⁵²⁷ *Cotroni*, *supra* note 526 at 1498.

⁵²⁸ *USA v Leonard* 2012 ONCA 622.

⁵²⁹ *Ibid* at para 70.

⁵³⁰ *Ibid* at para 50.

is justified under section 1 is “mostly a political decision”.⁵³¹ The Court also held that no single *Cotroni* factor is dispositive and the assessment need not give each factor the equal weight.⁵³²

Consideration of these factors would assume a greater normative character in the case of those suspected of criminal responsibility for crimes under international law, and that the Minister’s discretion may be constrained in such cases. Canada would potentially be in violation of its obligations to assist in the apprehension and prosecution of those suspected of such crimes if it orders surrender without a determination that extradition will not hinder the investigation or prosecution of other perpetrators, or without issuing an assurance with the requesting state to that effect.⁵³³ Such a scenario has not been considered by the Supreme Court of Canada. We suggest that Canada has an obligation to ensure effective prosecution of crimes of concern to the international community, whether through domestic prosecution or through extradition with the assurances that the process will not undermine active investigations or contribute to impunity for those suspected of criminal responsibility for crimes under international law.

Canada’s domestic prosecution for such crimes must remain a feasible option in the absence of a *bona fide* extradition request that will ensure accountability for crimes under international law. If an analysis of these factors demonstrates that domestic prosecution will better ensure the proper administration of justice for such crimes, domestic prosecution may be necessary to avoid impunity.

7.1.1.3. Double criminality and territorial jurisdiction

Canada’s *Extradition Act* takes a relaxed approach to this requirement. It does not require that offences for which an individual is sought are parallel to specific offences in Canadian law. Rather, it requires only that the conduct alleged by the requesting state amounts to an offence in Canada, notwithstanding the fact that the conduct may be “named, defined or characterized” in a different way by the extradition partner.⁵³⁴ Under Canadian law, Canada may only extradite a person sought for trial or to serve a sentence in the circumstances described in section 3(1) of the *Extradition Act*.⁵³⁵

The Minister of Justice has broad discretion at all stages of the extradition process, particularly in the way the foreign offence is approximated in scope and character to a similar Canadian criminal offence. The Minister determines which Canadian offence(s) most closely approximate the conduct alleged in the Record of the Case when issuing the ATP. Where several offences punishable by Canadian law are alleged in the ATP, only one of the offences needs to comply with the double criminality requirements in section 3 of the *Extradition Act* in order for the extradition hearing to proceed on all of them.⁵³⁶ Additionally, the Minister can order surrender even for charges not listed in the ATP or the judicial order for committal, provided that at least one of the offences in the committal order meets the requirements of section 3 of the *Extradition Act*,⁵³⁷ and all the offences

⁵³¹ *Sriskandarajah v. United States of America* [2012] 3 SCR 609 at para 11.

⁵³² *Ibid* at para 13.

⁵³³ See Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool*, AI Index: IOR 53/015/2010 (Amnesty International, 2010).

⁵³⁴ *Extradition Act*, *supra* note 376, s 3(1).

⁵³⁵ *Ibid*.

⁵³⁶ *Ibid*, s 59.

⁵³⁷ *Ibid*, s 59(a).

for which the individual is surrendered relate to conduct punishable if committed in Canada.⁵³⁸

Canadian law also provides that the Minister of Justice may refuse to grant a request for extradition if he or she is satisfied that “none of the conduct on which the extradition partner bases its request occurred in the territory over which the extradition partner has jurisdiction.”⁵³⁹

This double criminality requirement in the *Extradition Act* does not indicate whether the conduct would have to be criminal at the time of the crime, at the time of the extradition request, or at the time extradition is to take place. However, the protections afforded to all persons under section 7 of the *Charter* suggest that the conduct would have to have been criminal at the time it was committed for such a charge to be valid under Canadian law, and by extension, for the purpose of the double criminality requirement (see discussion below in Section 7.1.1.7 Non-retroactivity).

7.1.1.4. Political offence

Canadian law provides that no one will be extradited for a political offence.⁵⁴⁰ This does not however extend to obligations to extradite for offences under multilateral extradition agreements or other acts such as murder, inflicting serious bodily harm or sexual assault.⁵⁴¹

Including a political offence exception to extradition is not in and of itself a problem. The problem arises when states fail to define the term in a manner which expressly excludes crimes under international law since there is no internationally agreed definition of “political offences.”⁵⁴² Some guidance is provided by treaties such as the Genocide Convention, which expressly states that genocide is not a political crime for the purposes of extradition. Other treaties implicitly exclude this possibility by imposing an ‘extradite or prosecute’ obligation with respect to the crime of genocide.⁵⁴³ The 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism both exclude the crimes listed in those treaties from the definition of political offence.

7.1.1.5. Military offence

Canadian law has a provision expressly barring extradition for purely military offences, such as

⁵³⁸ *Ibid*, s 59(b).

⁵³⁹ *Ibid*, s 47(e).

⁵⁴⁰ *Ibid*, s 46(1)(c).

⁵⁴¹ *Ibid*, s 46(2).

⁵⁴² There is no internationally accepted definition of the term “political offence”. A leading authority on extradition has stated: “Even though widely recognized, the very term “political offence” is seldom defined in treaties or national legislation, and judicial interpretations have been the principle source for its meaning and its application. This may be due to the fact that whether or not a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus, by its very nature it eludes a precise definition, which could constrict the flexibility needed to assess the facts and circumstances of each case”, Cherif Bassiouni, *International Extradition: United States Law and Practice*, 5th ed (Oceana: Oxford University Press, 2007) at 653 (footnotes omitted).

⁵⁴³ *Genocide Convention*, *supra* note 238, art 7 (“Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition”). Other treaties implicitly do so by imposing an extradite or try obligation (see treaties discussed in Section 4.2 above).

conduct unbecoming an officer or mutiny.⁵⁴⁴ However, this provision does not encompass conduct that constitutes an “offence under criminal law” and therefore does not extend to crimes under international law incorporated in a military criminal code.

7.1.1.6. *Ne bis in idem*

Canadian law provides that Canada may not extradite a suspect for trial if the person has been previously acquitted or convicted of the conduct for which extradition is sought.⁵⁴⁵ The principle of *ne bis in idem* in the extradition context engages a person's right to life, liberty, and security of the person guaranteed in section 7 of the *Canadian Charter of Rights and Freedoms*.

Recently, the Quebec Court of Appeal in *Bouarfa v Canada (Minister of Justice)*, considered the principle of *ne bis in idem* in the context of extradition. France sought extradition of a person in Canada who had already faced criminal prosecution in France, albeit *in absentia*, as well as having been acquitted in Algeria for the same offences.⁵⁴⁶ The person was arrested upon arriving in Canada, and the Minister of Justice sought an order for his committal. The Quebec Court of Appeal determined that the Minister should have considered the plea of *autrefois acquit* and the fact that the person sought could face another prosecution for the same offences, and concluded that without “additional assurances from the French authorities [...] the applicant's extradition to France could constitute unlawful interference with his right to liberty and security guaranteed under section 7 of the *Charter*.”⁵⁴⁷

7.1.1.7. Non-retroactivity

There is no provision in Canadian law expressly prohibiting extradition on the basis that the conduct was not a crime under the law of the requesting state or Canada at the time it occurred. Thus, whether certain criminal conduct would be recognized as a crime under international law or the general principles of law “recognized by the community of nations” at the time it was committed could be an issue for determination when extradition is sought for crimes that do not fall within the jurisdiction of an already-existing international criminal tribunal such as the ICC, the ICTR or the ICTY (see also the above discussion in Section 7.1.1.3. Double criminality and territorial jurisdiction).

7.1.1.8. Statutes of limitation

There is a provision in *Extradition Act* expressly prohibiting extradition on the basis that the prosecution would be barred in the requesting state on the basis of a statute of limitation.⁵⁴⁸ See discussion above in Section 6.3 regarding the prohibition of statutes of limitations for crimes under international law.

7.1.1.9. Amnesties, pardons and similar measures of impunity

⁵⁴⁴ *Extradition Act*, *supra* note 376 s 46(1)(b).

⁵⁴⁵ *Ibid* at s 47(a); *Canadian Charter of Rights and Freedoms*, *supra* note 11, s 11(g).

⁵⁴⁶ *Bouarfa v Canada (Minister of Justice)* 2012 QCCA 1378.

⁵⁴⁷ *Ibid* at para 51.

⁵⁴⁸ *Extradition Act*, *supra* note 376, s 46(1)(a).

There are no explicit provisions in Canadian law prohibiting extradition on the basis that the prosecution would be barred in either the requesting state or in Canada on the basis of an amnesty, pardon or other measure of impunity (see discussion above in Section 6.10 regarding the prohibition of amnesties and similar measures of impunity).

7.1.1.10. Other obstacles

The *Extradition Act* provides that the Minister of Justice has both mandatory and discretionary grounds of refuse surrender. Discretionary grounds of refusal are factual determinations by the Minister, as the discretionary provisions apply only “if the Minister is satisfied” that certain circumstances exist. This reinforces the idea that the administration of the *Extradition Act* and extradition decision-making are *de facto* sovereign choice.⁵⁴⁹

7.1.2. SAFEGUARDS

Sections 6 and 7 of the *Canadian Charter of Rights and Freedoms* provide protections to persons in the extradition process. Section 7 provides guarantees applicable to all persons present in Canada, and includes protection against torture, cruel and unusual treatment or punishment (including the death penalty). Additionally, pursuant to section 6(1) of the *Charter*, before ordering the surrender of a Canadian citizen to face charges abroad, Canadian authorities have an obligation to consider whether domestic prosecution is preferable.⁵⁵⁰ However, successfully challenging an extradition decision on a section 6 argument is unlikely in light of the recent Supreme Court of Canada jurisprudence (see above discussion in section 7.1.1.2. Nationality).

7.1.2.1. Fair trial

There is no express prohibition in Canadian law on extradition of a person on the ground that he or she might face an unfair trial.

In *Canada v. Schmidt*, the Supreme Court of Canada cited extensive American jurisprudence on the question of consideration for the due process protections of foreign legal systems, specifically focusing on the question of *autrefois acquit* or double jeopardy.⁵⁵¹ Citing failure of the 19th century extradition process in England due to overly scrupulous application of English legal standards to extradition requests, the Court emphasized the practical nature of Canada’s current extradition regime which was meant to avoid “finicky evaluations against the rules governing the legal process in this country.”⁵⁵² The Court held that “a foreign judicial system will not necessarily be considered fundamentally unjust because it functions on the basis of an investigatory system without the presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system.”⁵⁵³

The right to due process under section 11 of the *Charter* includes the right not to be subject to a

⁵⁴⁹ *Ibid*, s 44(1)(a).

⁵⁵⁰ *Cotroni*, *supra* note 526 at paras 55 and 56.

⁵⁵¹ *Canada v Schmidt*, [1987] 1 SCR 500, [1987] SCJ No 24.

⁵⁵² *Ibid* at para 48.

⁵⁵³ *Ibid* at para 48.

multiplicity of proceedings of citizenship and extradition proceedings.⁵⁵⁴ If the decision is made to prosecute on the basis of charges in Canada, the Crown counsel prosecuting Canadian charges parallel to those that are the subject of extradition cannot be faulted for delaying the expenditure of time and resources on the Canadian prosecution while the Minister of Justice decides whether to authorize extradition proceedings. However, if the Canadian charges ultimately do proceed and delay becomes an issue, the prosecution may be held accountable under the analysis required by section 11(b) of the *Charter*.⁵⁵⁵ The Minister's own decision is subject to the timelines laid out in the *Extradition Act* – surrender must occur not less than 30 days⁵⁵⁶ but not more than 90 days⁵⁵⁷ of the committal order being issued by the extradition judge. There is one exception: where the person sought makes submissions pursuant to section 43, the Minister can impose an additional one-time extension of 60 days.⁵⁵⁸

It is only the potential likelihood of treatment that would “shock the conscience” of Canadian society that trigger the protections of section 7 of the *Charter*. However, this has been interpreted narrowly – the words ‘shock the conscience’ “were intended to underline the very exceptional nature of circumstances that would constitutionally limit the Minister's decision in extradition cases”⁵⁵⁹ In *Ferras*, the Supreme Court of Canada upheld a decision by the Minister of Justice that surrender to an extradition partner whose criminal justice system does not have all the procedural safeguards of the Canadian criminal system.⁵⁶⁰ This act would not, in itself, violate the principles of fundamental justice.⁵⁶¹ In subsequent jurisprudence, Canadian courts have refused to deny extradition for cases of conviction *in absentia* even where statutory limits on appeal or review in that state were exhausted,⁵⁶² where the Minister's failure to consider the admissibility of the charges under the standards of the applicable foreign law,⁵⁶³ or where there are concerns about corruption or mistreatment of prisoners.⁵⁶⁴

On the other hand, cases such as torture, mandatory life in prison for a crime committed by a juvenile⁵⁶⁵, or the death penalty would “shock the conscience” of Canadian society, thus triggering the protections of section 7 of the *Charter*. The Ontario Court of Appeal in *Philippines (Republic) v. Pacificador*, ruled that subjecting the person sought to the potential extensive delay experienced by

⁵⁵⁴ *United States v Prudenza*, [2006] OJ No 4321 (Ont CA), leave to appeal to SCC ref'd [2007] SCCA No 418 (SCC).

⁵⁵⁵ *Ibid* at para 39.

⁵⁵⁶ *Extradition Act*, *supra* note 376, s 38(2).

⁵⁵⁷ *Ibid*, s 40(1).

⁵⁵⁸ *Ibid*, s 40(5)(b).

⁵⁵⁹ *Ferras & Latty*, *supra* note 496 at para 85, citing *Burns*, *supra* note 520 at para 67.

⁵⁶⁰ *Ibid*.

⁵⁶¹ See *Ferras & Latty*, *supra* note 496.

⁵⁶² See *Italy v Caruana [No 2]*, [2004] OJ No 5851 (Ont SCJ), aff'd [2007] OJ No 2550, 2007 ONCA 488 (Ont CA), leave to appeal ref'd [2007] SCCA No 474 (SCC) at para 111.

⁵⁶³ See e.g. *United States v Shull [No 3]*, [2007] BCJ No 2506, 2007 BCSC 1681, 76 WCB (2d) 255 (BCSC) (reconsideration in accordance with *Ferras* finding unnecessary to consider whether charges were statute-barred in the U.S.); *United States v Gorcyca*, [2007] OJ No 395, 216 CCC (3d) 403, 73 Wcb (2d) 120 (Ont CA) (extradition judge not required to consider the foreign charging document or foreign law); and *United States v Weber*, [2004] OJ No 1971 (Ont SCJ) (finding that there are compelling practical reasons for the court not to concern itself with foreign law, especially in complex cases concerning the parameters of fraudulent conduct).

⁵⁶⁴ *Romania v Alexa*, [2009] OJ No 2568.

⁵⁶⁵ *Doyle Fowler c Canada (Ministre de la Justice)*, 2011 QCCA 1076.

other co-accused would make his surrender “simply unacceptable” as the manner in which this prosecution has been conducted in the courts of the Philippines “shocks the conscience” and would violate his *Charter* section 7 rights.⁵⁶⁶

7.1.2.2. Torture and other cruel, inhuman or degrading treatment or punishment

Despite what article 3 of the Torture Convention provides, there is no express prohibition against extraditing a person sought from Canada on the grounds that he or she might face the risk of torture or other ill-treatment. However, the *Canadian Charter of Rights and Freedoms* applies to the decision to extradite at all stages of the process.⁵⁶⁷ These *Charter* guarantees include the right of all persons not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice (section 7) and the right of all persons not to be subject to any cruel and unusual treatment or punishment (section 12), both of which are implicated where an individual faces a serious risk of torture as a result of extradition. As noted above, the Supreme Court of Canada has ruled that section 7 will be violated when a person is extradited or deported to torture, unduly harsh sentences, or other treatment that “shock the conscience” of Canadian society. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada reviewed a decision to deport to Sri Lanka an individual suspected of membership and involvement in fundraising for the Liberation Tigers of Tamil Eelam (“LTTE”), despite the fact that members of the group had previously been subjected to torture by the Sri Lankan government.⁵⁶⁸ Looking to its jurisprudence on extradition in the context of the principle of *non-refoulement*, the Court ruled that the appropriate standard in determining whether any such deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice pursuant to the *Charter* is whether such treatment or punishment “shocks the conscience” of Canadian society.⁵⁶⁹ The Court ruled that it would generally violate the *Charter* and shock the conscience to deport a refugee to a nation where grounds exist to believe that such deportation would subject the refugee to a substantial risk of torture, absent procedural safeguards required to protect his right to life, liberty and security of the person. The Court ruled explicitly that “this showing [of the risk of torture] need not be proof of the risk of torture to that person, but the individual must make out a *prima facie* case that there may be a risk of torture upon deportation.”⁵⁷⁰ While this was a deportation case, a parallel analysis is applicable in the context of extradition.

The Supreme Court of Canada in *Németh v. Canada (Justice)* noted that “it is critical to understand that s. 44(1)(b) [of the *Extradition Act*] is Canada’s primary legislative vehicle to give effect to Canada’s *non-refoulement* obligations when a refugee is sought for extradition.”⁵⁷¹ The Court held that the grounds of discrimination listed at the beginning of section 44(1)(b) are not limited to the position of the person with respect to the prosecution or punishment in the requesting state.⁵⁷²

The ruling in *Suresh* has been interpreted narrowly by lower courts in subsequent extradition jurisprudence, requiring individuals to adduce specific evidence that they personally face a substantial risk of torture. For example, reports of inadequate conditions of detention in the United

⁵⁶⁶ *Philippines (Republic) v Pacificador*, [2002] OB No. 3024 ONCA at para 47.

⁵⁶⁷ *Extradition Act*, *supra* note 376, s 25.

⁵⁶⁸ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

⁵⁶⁹ *Ibid* at para 26.

⁵⁷⁰ *Ibid*.

⁵⁷¹ *Németh v Canada (Justice)* [2010] 3 SCR 281 at para 77.

⁵⁷² *Ibid* at para 88.

States⁵⁷³ and reports from credible international organizations describing cases of torture in Spain⁵⁷⁴ were not sufficient to challenge extradition.

The factors for determining whether general concerns of a risk of torture can operate to deny extradition in a specific case are, whether potential persecution is such that it “sufficiently shocks the conscience” and would be “fundamentally unacceptable to our society,” and whether the applicant has demonstrated that he or she will in fact face persecution if extradited.⁵⁷⁵ The recent ruling by the Ontario Court of Appeal in *France (Republic) v. Diab*⁵⁷⁶ sets out a two-step test to be applied in cases involving a decision by the Justice Minister regarding the surrender of a person who alleges that he or she may face prosecution on the basis of intelligence-sourced evidence tainted by torture. The test requires a “plausible connection” to be shown between the evidence being challenged and the use of torture and that the Minister take steps to make further inquiries to satisfy himself or herself that there is no “real risk” that evidence obtained through torture will be used in the foreign proceeding.

7.1.2.3. Death penalty

There are no mandatory grounds for refusing to surrender a person sought to face the death penalty in the *Extradition Act*. However, section 44(2) stipulates that “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 partner.”⁵⁷⁷ While the terms of the act indicate that this is a discretionary decision, decisions of the Minister are open to scrutiny by the Human Rights Committee, a UN treaty body established by the *International Covenant on Civil and Political Rights* and its Second Optional Protocol,⁵⁷⁸ which has in the past found that Canada failed in its international obligation under these conventions in deporting an individual to face the death penalty.⁵⁷⁹ In *United States v. Burns*, the Supreme Court of Canada held that the failure to seek assurance that the death penalty would not be applied as a precondition to extradition was an unjustifiable infringement of the section 7 *Charter* rights of the person sought in all but exceptional cases.⁵⁸⁰ The Court ruled that any violation of a principle of fundamental justice will always shock the conscience, thereby triggering the protections of section 7 of the *Charter*.⁵⁸¹ The Court further noted that in assessing these principles in particular cases, the Minister must take note of factual developments in Canada and in relevant foreign jurisdictions, including the international commitments that Canada has undertaken.⁵⁸²

⁵⁷³ See *Manolopoulos c. Canada (Ministre de la Justice)*, [2006] JQ no 10858 (QcCA).

⁵⁷⁴ See *Plagaro-Perez De Arrilucea c. Royaume d’Espagne*, [2004] JQ no 13397 (QcCA).

⁵⁷⁵ *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779.

⁵⁷⁶ 2014 ONCA 374 at 86-104, 120 OR (3d) 174.

⁵⁷⁷ *Extradition Act*, *supra* note 376, s 44(2).

⁵⁷⁸ *ICCPR*, *supra* note 411; *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, December 15, 1989, UN Doc A/44/128 (entered into force 11 July 1991).

⁵⁷⁹ *Judge v Canada*, Communication No 829/1998, UN Doc CCPR/C/78/D.829/1998 (view adopted 5 August 2003) in *Report of the Human Rights Committee*, UN GAOR, 58th Sess, Supp No 40, UN Doc A/58/40, vol 2 (2003) annex VI.G reprinted in (2003) 42 ILM 1214 and (2004) 11 IHRR 125.

⁵⁸⁰ *Burns*, *supra* note 520.

⁵⁸¹ *Ibid*.

⁵⁸² *Ibid* at para 144.

7.1.2.4. Other human rights safeguards

There are no other human rights safeguards in Canadian law, apart from any other applicable human rights standards based on the *Charter*.

7.1.2.5. Humanitarian concerns

There is no express provision in Canadian law barring extradition because of humanitarian concerns, whether that decision is made by a court or a political official. However, the Minister may refuse a request for extradition if he or she deems that “the surrender would be unjust or oppressive having regard to all the relevant circumstances.”⁵⁸³ Such a safeguard, particularly if the decision is made by a political official instead of an independent and impartial court, could be abused, as it was in the *Pinochet* case.

7.1.2.6. Specialty

“Specialty” is a principle of extradition law where a person can only be tried on the offences for which he or she was extradited. In extradition from Canada, Canadian law does not limit the scope of the crimes for which the requested state may exercise jurisdiction. Because of the conduct-based approach of the double criminality principle in Canada’s *Extradition Act*, the offences specified before the extradition judge by the Minister of Justice in the ATP do not need to match the offences listed in the extradition request at the judicial phase. Similarly, committal orders from the judicial phase of the extradition process do not prevent the Minister of Justice from issuing surrender orders that allow prosecution of offences that were not included in the order of committal by the extradition judge. This broad discretion creates the need for the Minister of Justice to be cautious to avoid the mischaracterization of crimes under international law when defining the terms of the surrender order to which other nations may be bound by operation of the specialty principle.

The specialty principle is incorporated in Canadian law by the *Extradition Act* for extraditing to Canada. Section 80 of the *Extradition Act* stipulates that persons extradited to Canada cannot be detained, prosecuted, or sentenced with respect to any offences other than those enumerated in the surrender order from the requested state,⁵⁸⁴ unless consent to do so is obtained from the requested state,⁵⁸⁵ or from the individual being surrendered to Canada.⁵⁸⁶ Canada cannot surrender an individual it has sought for the purposes of prosecution to a third state or entity for prosecution or the execution of a sentence, unless the original requested state or entity consents.⁵⁸⁷ However, if the individual has left Canada (or was given reasonable opportunity to leave) voluntarily after trial or completion of the sentence on the initial charges for which surrender was issued, then any other outstanding charges may be brought upon that individual’s return to Canada.⁵⁸⁸

⁵⁸³ *Extradition Act*, *supra* note 376, s 44(1)(a).

⁵⁸⁴ *Extradition Act*, *supra* note 376, s 80; see also *R v Parisien*, [1988] SCJ No 49, [1988] 1 SCR 950 [*Parisien*]; *Froom v Canada (Minister of Justice) [No 2]*, [2003] FCJ No 1655, [2004] 2 FCR 154, 2003 FC 1299 (FC).

⁵⁸⁵ *Extradition Act*, *supra* note 376, s 80(a)(ii).

⁵⁸⁶ *Ibid*, s 80(a)(iii).

⁵⁸⁷ *Extradition Act*, s 80(b). See also *Parisien*, *supra* note 584.

⁵⁸⁸ *Extradition Act*, s 80.

7.2. Mutual legal assistance

As discussed below, there are a number of bilateral and multilateral extradition treaties with mutual legal assistance provisions, including Additional Protocol I⁵⁸⁹ and the Convention against Torture.⁵⁹⁰ As of May 2011, Canada had entered into 36 bilateral Mutual Legal Assistance Treaties (MLATs) in addition to the multilateral conventions through which Canada can receive and provide assistance in gathering evidence in criminal cases.⁵⁹¹ Mutual legal assistance treaties usually require such assistance to be provided if the law of the requested state allows it, but the treaties do not expressly require the requested state to enact such legislation if it does not exist. The statute governing the implementation of mutual legal assistance in Canada is the *Mutual Legal Assistance in Criminal Matters Act*.⁵⁹²

7.2.1 UNAVAILABLE OR INADEQUATE PROCEDURES

The mutual legal assistance procedures in Canada are fairly robust and would not be considered unavailable or inadequate, either with regard to requests by Canada for assistance or with regard to requests by foreign states to Canada for assistance.

7.2.1.1. Conducting investigations

Pursuant to the *Mutual Legal Assistance in Criminal Matters Act*, Canadian police and investigative authorities assist in conducting investigations for foreign states.⁵⁹³

7.2.1.2. Tracing, freezing, seizing and forfeiting assets

Canadian law permits foreign authorities to trace, freeze, seize or forfeit assets of a suspect or convicted person under certain conditions provided by the *Mutual Legal Assistance in Criminal Matters Act*.⁵⁹⁴ Additionally, seizure of the proceeds of crimes falling within the jurisdiction of the ICC and is provided for in the *Crimes Against Humanity and War Crimes Act* (see discussion above in

⁵⁸⁹ Protocol I, *supra* note 93, art 88.

⁵⁹⁰ *Convention Against Torture*, *supra* note 254, art 9.

⁵⁹¹ See *Canada's list of bilateral and multilateral conventions*, online: Canada Treaty Information <<http://www.treaty-accord.gc.ca>>. Updated lists of the bilateral and the multilateral conventions, and the parties to the multilateral conventions are available from International Assistance Group within the Department of Justice or the Mutual Legal Assistance contact person in the Regional Offices.

⁵⁹² *Mutual Legal Assistance in Criminal Matters Act*, SC 1985, c 30 (4th Supp) [*Mutual Legal Assistance in Criminal Matters Act*].

⁵⁹³ *Ibid*, ss 11 and 12.

⁵⁹⁴ The conditions are the following according to section 9 (3) of the *Mutual Legal Assistance in Criminal Matters Act*, *supra* note 594: (a) the person has been charged with an offence within the jurisdiction of the state or entity; and (b) the offence would be an indictable offence if it were committed in Canada; and section 9 (4): On being filed, (a) an order for the seizure of proceeds of crime may be enforced as if it were a warrant issued under subsection 462.32(1) of the *Criminal Code*; (b) an order for the restraint of proceeds of crime may be enforced as if it were an order made under subsection 462.33(3) of the *Criminal Code*; (c) an order for the seizure of offence-related property may be enforced as if it were a warrant issued under subsection 487(1) of the *Criminal Code* or subsection 11(1) of the *Controlled Drugs and Substances Act*, as the case may be; and (d) an order for the restraint of offence-related property may be enforced as if it were an order made under subsection 490.8(3) of the *Criminal Code* or subsection 14(3) of the *Controlled Drugs and Substances Act*, as the case may be.

Section 7.1.1.5 Recognition and enforcement of awards of reparations).

7.2.1.3. Video-conferencing and other special measures to present evidence

Canada permits foreign authorities to use video-conferencing and other special measures to present evidence.⁵⁹⁵

7.2.1.4. Acceptance of foreign official documents

Canada does not have any special procedure for providing and requesting official copies of official documents. The exchange of official documents is therefore governed by any applicable treaty or the general terms of the *Mutual Legal Assistance in Criminal Matters Act*.⁵⁹⁶ As discussed above, the *Extradition Act* allows for documents to be considered in the 'record of the case' upon attestation by the foreign judicial or prosecuting authority submitting the request, including what may be required in an extradition agreement.⁵⁹⁷ A document need not be sworn under oath or affirmation,⁵⁹⁸ nor have proof of signature to be admissible.⁵⁹⁹

7.2.1.5 Recognition and enforcement of civil judgments and awards of reparations

The *Crimes Against Humanity and War Crimes Act* establishes a fund for the award of reparations to victims of those prosecuted under its jurisdiction, or pursuant to a reparation order from the International Criminal Court.⁶⁰⁰ Recognition and enforcement of a foreign civil judgment or a judgment for reparations not emanating from the ICC are complicated by Canada's federal system, in which public law (and particularly criminal law) falls within the competence of the federal government, whereas property and civil rights (including rights of enforcement on a judgment) remain within the competence of the provinces. In common law provinces and territories, recognition and enforcement of foreign civil judgments are governed by provincial common law and applicable provincial legislation for the registration of foreign judgments. In Quebec's civil law system, foreign judgments are recognized and enforced pursuant to the relevant sections of the *Civil Code of Quebec*,⁶⁰¹ namely Title IV of Book Ten, which is based on the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters⁶⁰² (the procedures for recognition and enforcement of a foreign judgment in Quebec also apply).⁶⁰³ Because reparation orders are public or quasi-public, reparation orders from other foreign jurisdictions would normally not be enforced in Canadian courts, however it is suggested that these

⁵⁹⁵ *Mutual Legal Assistance in Criminal Matters Act*, supra note 594 at s 2.1.

⁵⁹⁶ *Ibid*, s 17 et sub.

⁵⁹⁷ *Extradition Act*, supra note 376, ss 33(3) and 33(4).

⁵⁹⁸ *Ibid*, s 34.

⁵⁹⁹ *Ibid*, s 35. See Ferras & Latty, supra note 441 at paras 39, 40, 46, 47, 53, 57, 58.

⁶⁰⁰ *Crimes Against Humanity and War Crimes Act*, supra note 13, s 30(2).

⁶⁰¹ *Civil Code of Quebec*, LRQ, c C-1991, [CCQ] [*Civil Code of Quebec*], arts 3155 – 3168.

⁶⁰² Note that Canada is not a signatory to the Hague Convention. See *Hague Conference on Private International Law: Collection of Conventions (1951-1980)*, (The Hague: Permanent Bureau of the Hague Conference on Private International Law) 106; see generally Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed (Toronto: Butterworths, 2005) at para 14.2; Gérald Goldstein & Jeffrey Alan Talpis, *L'effet au Québec des jugements étrangers en matière de droits patrimoniaux* (Montréal: Themis, 1991).

⁶⁰³ *Code of Civil Procedure*, RSQ, c C-25, arts 785-785, stipulating recognition by way of a motion to institute proceedings, requiring service and allowing a minimum of 20 days for the defendant to respond and of 40 days before the motion is heard.

restrictions do not apply to remedial orders for criminal acts of concern to the international community as a whole. These are discussed in turn below.

7.2.1.5.1 Recognition of Reparation Awards from the International Criminal Court

In Canada, the *Crimes Against Humanity and War Crimes Act* establishes a Crimes Against Humanity Fund for offenses covered by the Act.⁶⁰⁴ The fund is designated to receive any and all monies resulting from enforcement of orders from the International Criminal Court for reparation, forfeiture, or a fine;⁶⁰⁵ funds recovered from the seizure of assets by the Minister of Public Works and Government Services for proceeds of crime; and any donations made to the fund.⁶⁰⁶ “Proceeds of crime” is defined with reference to section 462.3(1) of the *Criminal Code* as “any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (a) the commission in Canada of a designated offence, or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.”⁶⁰⁷ The fund is paid out by the Attorney General of Canada to victims of offences under the *CAHWCA* or within the jurisdiction of the ICC and their families, or “otherwise as the Attorney General of Canada sees fit.”⁶⁰⁸ Awards can also be ordered with or without deduction for costs to the International Criminal Court or the trust fund established by Article 79 of the Rome Statute.⁶⁰⁹ This latter provision suggests that funds could be made available for reparations other than those mandated by a judgment of the ICC if the Attorney General of Canada finds it proper to do so.

7.2.1.5.2 Recognition and Enforcement of Foreign Reparation Awards

Canada’s bilateral treaties for mutual legal assistance do not mention reparation awards,⁶¹⁰ despite the fact that the *Criminal Code of Canada* recognizes that “reparations for harm done to victims or to the community” are a legitimate sanction that advances the purpose of prevention, respect for the law and “the maintenance of a just, peaceful and safe society.”⁶¹¹ Some treaties provide for enforcement of restitution orders for victims of crime and the collection of fines.⁶¹² Other treaties only reference extending assistance to “proceedings related to restitution to the victims of crime,”⁶¹³ which has been found to be broad enough to enforce cost orders as awards for partial reparation of

⁶⁰⁴ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 30(1).

⁶⁰⁵ *Ibid*, s 30.

⁶⁰⁶ *Extradition Act*, *supra* note 376, s 30(1).

⁶⁰⁷ *Criminal Code*, *supra* note 10.

⁶⁰⁸ *Crimes Against Humanity and War Crimes Act*, *supra* note 12, s 30(2).

⁶⁰⁹ *Ibid*.

⁶¹⁰ Canada has 30 bilateral treaties in force with respect to mutual legal assistance: Argentina, Australia, Austria, Belgium, Brazil, China (Hong Kong Special Administrative Region), Czech Republic, Germany, Greece, Hungary, India, Israel, Norway, Peru, Poland, Portugal, Romania, Russia, Spain, South Africa, Sweden, Switzerland, Romania, Thailand, Trinidad & Tobago, Ukraine, Uruguay, the United Kingdom, and the United States (and treaties with Kazakhstan and Jamaica which are not yet in force); Foreign Affairs and International Trade Canada, Canada Treaty Information, online: < <http://www.treaty-accord.gc.ca> >.

⁶¹¹ *Criminal Code*, *supra* note 10, s 718(e).

⁶¹² Language regarding “assistance concerning restitution to the victims of crime and the collection of fines imposed as a sentence in a criminal prosecution” appears in Canada’s bilateral treaties with Greece, Norway, Peru, South Africa, Trinidad & Tobago, and the United States, while the agreement with Romania provides for assistance “compensating the victims of crime and in collecting fines imposed in criminal prosecutions.”

⁶¹³ The agreements with the Bahamas, Belgium, China (Hong Kong), and Italy do not reference collection of fines but do reference assistance “in proceedings related to restitution to the victims of crime.”

environmental damage pursuant to the mutual legal assistance treaty with the United States.⁶¹⁴ However it remains unclear whether language under the treaties or under the *CAHWCA* referencing restitution and collection of fines provides for reparation awards to victims that are not restitutionary in nature.⁶¹⁵

The *Mutual Legal Assistance in Criminal Matters Act* does not reference reparation awards, but does provide for the enforcement of “a payment of a fine imposed in respect of an offence by a court of criminal jurisdiction of the state or entity.”⁶¹⁶ The definition of “fine” in the *Mutual Legal Assistance in Criminal Matters Act* includes “the value of any property, benefit or advantage, irrespective of its location, obtained or derived directly or indirectly as a result of the commission of an offence,” however enforcement of fines is at the discretion of the Minister of Justice.⁶¹⁷

Under the public law exception to enforcement of foreign judgments, the Supreme Court of Canada has held that Canadian courts will not enforce foreign public law, including quasi-criminal awards such as contempt orders, because this would constitute an extraterritorial application of state sovereignty.⁶¹⁸ Jurisprudence in lower courts has suggested that the principles of comity that inform the Supreme Court of Canada’s private international law decisions should also inform the recognition of foreign judgments, even those of a quasi-public nature.⁶¹⁹ In the event that a penal judgment is not enforceable, a judgment based both on civil and criminal liability is severable, and that part of the judgment which awards damages is enforceable in Canada.⁶²⁰ Because Canadian judgments in this area are sparse, the doctrine arises by way of reference to jurisprudence of England, Australia and New Zealand, but in Canada it has been said to rest on a “shaky foundation.”⁶²¹

7.2.1.5.3 Recognition of civil judgments in the common law jurisdictions of Canada

Recognition and enforcement of a foreign judgment falls within the competence of the provinces for civil and property rights⁶²² because a judgment award is regarded as a debt between the parties to it and may only be executed against local assets.⁶²³ A “foreign” judgment includes not only judgments from other states, but also those judgments from other provinces or territories within Canada. As such, recognition and enforcement of foreign judgments in common law Canada (i.e. outside Quebec) are determined principally by common law principles established by jurisprudence from provincial courts and the Supreme Court of Canada. A judgment must be recognized before it can be enforced, which can be accomplished via the common law, or via a legislative system of registration based on the Uniform Law Conference of Canada’s Model Act on the enforcement of foreign

⁶¹⁴ *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, Can TS 1990 No 19, art XVII (2).

⁶¹⁵ *Zschiegner v USA*, [2001] NSCA 74.

⁶¹⁶ *Mutual Legal Assistance in Criminal Matter Act*, *supra* note 594, s 9(1).

⁶¹⁷ *Ibid*, s 9(3).

⁶¹⁸ *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, [2006] 2 SCR 612.

⁶¹⁹ *Ibid*. See also *Beals v Saldanha*, 2003 SCC 72, [2003] SCR 416 [*Beals*], expanding the application of Canada’s conflict of law rules to foreign judgments generally.

⁶²⁰ *Raulin v Fischer*, [1911] 2 KB 93 (French order of compensation to “partie civile”); *Canadian Imperial Bank of Commerce v Coupal*, [1995] OJ No 1643, 38 CPC (3d) 98 (Gen Div). See generally Castel & Walker, *supra* note 604 at para 14.

⁶²¹ See *United States v Ivey*, 26 OR (3d) 533, [1995] OJ No 3579 (Sharpe, J. (as he then was)) at para 38 (decision upheld, [1996] OJ No 3360, 30 OR (3d) 370 (ONCA), leave to appeal to SCC dismissed, [1996] SCCA No 582).

⁶²² *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 92(14).

⁶²³ See generally Castel & Walker, *supra* note 604 at para 14.

judgments.⁶²⁴ A treaty-based system of registration also exists for the recognition of judgments from the United Kingdom.⁶²⁵

The two methods of recognition of foreign judgments, registration under statute and recognition at common law, are not mutually exclusive. The system of registration of a foreign judgment generally preserves the right of individuals at common law to bring an action on the original cause of action or an action for enforcement of the foreign judgment without altering the substantive legal standards of enforcement, even if proceedings have been initiated under the legislation (provided it is a final judgment and not in violation of the principles of natural justice).⁶²⁶ The statutory system of recognition is often more efficient than the common law method of enforcement, which can be cumbersome and expensive. However the limitation periods for each method are different (with registration usually having a longer limitation period) and the provincial system of registration (with the exception of New Brunswick and Saskatchewan) only applies to jurisdictions with reciprocal recognition of provincial judgments, so their recognition of foreign civil judgments is limited.

7.2.1.5.3.1 Recognition of foreign civil judgments via registration in common law jurisdictions of Canada

The provincial statutes providing for the registration and enforcement of a foreign judgment generally have three requirements: proper exercise of jurisdiction, *res judicata*, and reciprocity, and will prohibit registration on the basis of one of the available defences.⁶²⁷ The limitation period for registration is generally six years from the date of the original judgment,⁶²⁸ and the judgment must be final (i.e. enforceable in the same manner as in the jurisdictions where they originated), for which it is usually sufficient that the individual seeking collection on the judgment provide an affidavit stipulating that this is the case.⁶²⁹ Because of the reciprocity requirement, registration is generally only provided for judgements from other provinces. Only New Brunswick and Saskatchewan have legislation that explicitly allows registration of foreign judgments as well as judgments from other

⁶²⁴ (AB) *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6, (BC) *Court Order Enforcement Act*, RSBC 1996, c 78, ss 28-39, ss 61-69 as am SBC 2007, c 10, ss 111, 112; (BC) *Supreme Court Civil Rules*, BC Reg 168/2009, R 19-3; (MB) *Reciprocal Enforcement of Judgments Act*, CCSM, c J20, (NB) *Reciprocal Enforcement of Judgments Act*, RSNB 1973, c R-3, (NL) *Reciprocal Enforcement of Judgments Act*, RSNL 1990, c R-4; (NS) *Reciprocal Enforcement of Judgments Act*, RSNS 1989, c 388; (ON) *Reciprocal Enforcement of Judgments Act*, RSO 1990, c R.5, (PE) *Reciprocal Enforcement of Judgments Act*, RSPEI 1988, c R-6; (SK) *Reciprocal Enforcement of Judgments Act*, 1996, SS 1996, c R-3.1; and (SK) *Judgments Extension Act*, RSS 1978, c J-3; *Eldemire v Eldemire*, [1992] SJ No 137, 101 Sask R 189 (Sask QB); (NT) *Reciprocal Enforcement of Judgments Act*, RSNWT 1988, c R-1; (NU) *Reciprocal Enforcement of Judgments Act*, RSNWT (Nu) 1988, c R-1; (YT) *Reciprocal Enforcement of Judgments Act*, RSY 2002, c 189; Uniform Law Conference of Canada, *Uniform Enforcement of Foreign Judgments Act*, online: <www.ulcc.ca>.

⁶²⁵ See *Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing For The Reciprocal Recognition and Enforcement of Judgments In Civil and Commercial Matters*, Schedule to *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, RSC 1985, c C-30; *Proclamation Giving Notice of the Coming into Force of Canada-United Kingdom Convention Respecting Judgments in Civil and Commercial Matters*, SI/87-26.

⁶²⁶ See e.g. Ontario's *Reciprocal Enforcement of Judgments Act*, *supra* note 626, s 8.

⁶²⁷ *Ibid*, s 3 (lack of jurisdiction, non-service in the original jurisdiction, fraud, non-finality of the judgment, or public policy).

⁶²⁸ The exceptions are British Columbia, whose limitation period is 10 years, and Prince Edward Island, whose limitation period is 10 years or the enforcement period of the original judgment, whichever is shorter; (BC) *Court Order Enforcement Act*, *supra* note 626, s 29(1)(b); (PE) *Reciprocal Enforcement of Judgments Act*, *supra* note 626, s 2(1).

⁶²⁹ See Walker & Castel, *supra* note 604 at para 14.23.

jurisdictions in Canada.⁶³⁰ The legislative regimes in Alberta,⁶³¹ Manitoba,⁶³² and Newfoundland and Labrador⁶³³ also apply to judgments from specified states of the United States and territories of the Commonwealth of Australia, on the basis of reciprocal recognition of provincial judgments in these respective states and territories.

Enforcement in Canada of civil judgments from the United Kingdom is provided for by the *Convention between Canada and the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*.⁶³⁴ Federal and provincial legislation have implemented this convention in the nine common law provinces (i.e. excluding Quebec).⁶³⁵ The legislation is similar to those described above, and generally provides for recognition via application to the local court, through streamlined procedures, for an order for registration of a civil judgment obtained in Great Britain or Northern Ireland. Such an application must be brought within six years after the date of the original judgment or that of its final appeal.⁶³⁶ The Convention applies only to a judgment for the payment of money⁶³⁷ and is expressly without prejudice to any other remedy available to a judgment creditor for recognition and enforcement of a judgment of another contracting state.⁶³⁸

Universal jurisdiction is not provided for as a valid basis for the exercise of jurisdiction of a foreign court with respect to a civil judgment, and it is not clear whether a court exercising jurisdiction on that basis would be seen to have done so properly for the purpose of registering the judgment in Canada. The New Brunswick statute will only recognize the jurisdiction of the court of a foreign country if the defendant was ordinarily resident in that country at the time of commencement of the action or otherwise submitted to the jurisdiction of that court.⁶³⁹ Under the Saskatchewan statute, a court in the state of origin has jurisdiction in a civil proceeding brought against a person if, among other things, there was a real and substantial connection between the state of origin and the facts on which the proceeding was based.⁶⁴⁰ This is a codification of the “real and substantial” test established by the Supreme Court to determine whether jurisdiction by a foreign court was properly exercised over the individual defending the action (see discussion in Section 7.2.1.5.3.2 Recognition of civil judgments via the common law in common law jurisdictions of Canada below).

7.2.1.5.3.2 Recognition and enforcement of civil judgments via the common law in Canada

At common law, a foreign court must have properly exercised its jurisdiction in order for a Canadian court to recognize and enforce the foreign judgment. Jurisdiction may be based on traditional grounds, such as the defendant's presence in the jurisdiction or consent to submit to the court's

⁶³⁰ (NB) *Foreign Judgments Act*, *supra* note 626; (SK) *Enforcement of Foreign Judgments Act*, *supra* note 626.

⁶³¹ *Reciprocating Jurisdictions Regulation*, Alta Reg 344/1985.

⁶³² *Reciprocal Enforcement of Judgments Regulation*, Man Reg 319/87 R.

⁶³³ *Reciprocating States Order*, CNLR 790/96.

⁶³⁴ *Proclamation Giving Notice of the Coming into Force of Canada-United Kingdom Convention Respecting Judgments in Civil and Commercial Matters*, *supra* note 627.

⁶³⁵ See e.g. *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, *supra* note 627; *Reciprocal Enforcement of Judgments (UK) Act*, RSO 1990, c R6.

⁶³⁶ *Ibid*, schedule art III.

⁶³⁷ *Ibid*, art II, 3.

⁶³⁸ *Ibid*, art II, 4.

⁶³⁹ (NB) *Foreign Judgments Act*, *supra* note 626, s 2.

⁶⁴⁰ (SK) *Enforcement of Foreign Judgments Act*, *supra* note 626.

jurisdiction, if established.⁶⁴¹ Otherwise, the “real and substantial connection” test is a constitutional requirement with respect to judgments of jurisdictions within Canada. For parties who neither reside in Canada nor submitted to the jurisdiction in the foreign court, it remains the basic governing principle for establishing whether jurisdiction was properly assumed by a foreign court for the purposes of recognition. While this is a constitutional requirement with respect to judgments from other provinces, in the case of *Beals v. Saldanha* the Supreme Court of Canada specified that Canadian conflict of laws rules apply for the purpose of recognition and enforcement of a foreign civil judgment as well.⁶⁴² Fraud, denial of due process or natural justice, or public policy (if the law upon which the judgment is based offends basic concepts of Canadian morality) are the bases for defendants to oppose recognition of a foreign civil judgment.⁶⁴³

Any Canadian forum that assumes jurisdiction must have a “real and substantial connection” to the parties or the subject matter of the action. The Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda* elaborated on the real and substantial connection test, and held that the test is used both for a constitutional division of powers analysis and a separate and distinct conflict of laws analysis.⁶⁴⁴ The Court enumerated a non-exhaustive list of presumptive connecting factors between the legal situation or subject matter of the litigation, and the forum in which civil action is sought.⁶⁴⁵ These presumptive connecting factors *prima facie*, entitle a court to assume jurisdiction over a dispute:

- (a) the defendant is domiciled or resident in the province;
- (b) the defendant carries on business in the province;
- (c) the tort was committed in the province; and
- (d) a contract connected with the dispute was made in the province.⁶⁴⁶

This nexus between the cause of action, the interest of the parties and the forum is a finding of fact that is nonetheless guided by the principles of order, fairness, and comity. The Court has stated that with respect to torts, certain “presumptive connecting factors” are sufficient to meet the common law “real and substantial connection” test, but that the Court may refer to the principles of order, fairness and comity in recognizing other factors as presumptively establishing a “real and substantial” connection.⁶⁴⁷

Neither the Supreme Court of Canada nor any Canadian appellate courts have decided the issue of whether universal jurisdiction conforms to the requirement of a “real and substantial” connection for the recognition or enforcement of a foreign judgment civil judgment for wrongs committed during genocide, war crimes or crimes against humanity. The “forum of necessity” doctrine, however, recognizes that access to justice justifies the assumption of jurisdiction even absent a “real and substantial” connection.⁶⁴⁸ Under this doctrine (recognized at the appellate level, most notably by the Ontario Court of Appeal) a residual discretion to assume jurisdiction operates as an exception to the real and substantial connection test in cases where there is no other forum in which the plaintiff

⁶⁴¹ *Van Breda v Village Resorts Limited*, 2012 SCC 17, [2012] 1 SCR 572, SCJ No 17 [*Van Breda*] at para 79.

⁶⁴² *Beals*, *supra* note 621.

⁶⁴³ *Ibid.*

⁶⁴⁴ *Van Breda*, *supra* note 641 at para 34.

⁶⁴⁵ *Ibid* at para 82.

⁶⁴⁶ *Ibid* at para 90.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ See *Bouzari*, *supra* note 397 at paras 36-38; *Van Breda*, *supra* note 641 (Sharpe, JA).

can reasonably seek relief or where plaintiffs cannot reasonably be expected to pursue relief elsewhere.⁶⁴⁹ This doctrine parallels the justification for the exercise of universal jurisdiction in criminal matters and should be a sufficient basis to justify the recognition and enforcement of a foreign civil judgment connected to such crimes. It is also suggested that this doctrine should be given effect in the registration of foreign judgments whose statutes codify the “real and substantial” test for proper establishment of the jurisdiction of a foreign civil judgment for the purposes of recognition and enforcement.

7.2.1.5.4 Recognition and enforcement of foreign civil judgments in Quebec

In Quebec, foreign judgments are presumed valid and a judicial authority will recognize and declare enforceable any decision made outside Quebec upon application,⁶⁵⁰ without examining the merits.⁶⁵¹ There are numerous exceptions, including the following: a default judgment initiated without proper service or notice according to the laws of the jurisdiction where the judgment was rendered;⁶⁵² a decision rendered despite a parallel dispute with respect to the same parties and/or facts whether in Quebec or elsewhere (and irrespective of whether final or not);⁶⁵³ a decision that is not final or enforceable where it was rendered,⁶⁵⁴ or one that contravenes “fundamental principles of procedure,”⁶⁵⁵ or a decision that is “manifestly inconsistent with public order as understood in international relations.”⁶⁵⁶

The *Civil Code of Quebec* provides for enforcement of civil claims for damages that are properly established in the law of a foreign jurisdiction or cannot reasonably be pursued in the jurisdiction where the crimes were committed, as is often the case with damages resulting from genocide, crimes against humanity or war crimes.⁶⁵⁷ Quebec applies the rules of jurisdiction that apply to Quebec’s courts,⁶⁵⁸ “to the extent that the dispute is substantially connected with the country whose authority is seized of the case.”⁶⁵⁹ Examples include: when the defendant is domiciled in the country in question;⁶⁶⁰ or “[w]here legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another country with which the situation is closely connected.”⁶⁶¹ Where proceedings “cannot possibly be instituted outside [of the country in question] or where the institution of such proceedings...cannot reasonably be required,”⁶⁶² a foreign court’s exercise of jurisdiction can be properly established and recognized. This provision is a codification of the same “forum of necessity” doctrine provided for in common law jurisdictions, and is consistent with the law adopted by both in the EU and the UK.⁶⁶³ As in common law Canada,

⁶⁴⁹ *Ibid* at para 100; see also *Fewer v Sayisi Dene Education Authority*, [2011] NJ No 60, 2011 NLCA 17 (CW White, JA) at para 46-47.

⁶⁵⁰ *Civil Code of Quebec*, supra note 603, art 3155.

⁶⁵¹ *Ibid*, art 3158.

⁶⁵² *Ibid*, art 3156.

⁶⁵³ *Ibid*, art 3155(4).

⁶⁵⁴ *Ibid*, art 3155(2).

⁶⁵⁵ *Ibid*, art 3155(3).

⁶⁵⁶ *Ibid*, art 3155(5).

⁶⁵⁷ *Ibid*, art 3136.

⁶⁵⁸ *Ibid*, specifically, Book Ten, Title Three: International Jurisdiction of Quebec Authorities (arts 3134-3154).

⁶⁵⁹ *Ibid*, art 3164.

⁶⁶⁰ *Ibid*, art 3134.

⁶⁶¹ *Ibid*, art 3079.

⁶⁶² *Ibid*, art 3136.

⁶⁶³ *Van Breda*, supra note 643 at para 54; see also Janet Walker, “Muscutt Misplaced: The Future of Forum of

while it is not clear whether a civil claim resulting from a judicial process initiated on the basis universal jurisdiction is enforceable absent a “substantial connection” to the original jurisdiction, the “forum of necessity” doctrine provides an adequate basis to do so.

The *Entente between France and Québec Regarding Judicial Mutual Aid in Civil, Commercial and Administrative Matters* allows for cooperation between these jurisdictions for the service of proceedings, the identification of parties in each jurisdiction, and the formation of judicial assistance (“rogatory”) commissions. Unlike the UK-Canada Convention, however, it does not apply with respect to the recognition and enforcement of monetary judgments.⁶⁶⁴

7.2.2 INAPPROPRIATE BARS TO MUTUAL LEGAL ASSISTANCE

There are no inappropriate bars in Canada to mutual legal assistance with regard to crimes under international law. Under the terms of the *Mutual Legal Assistance in Criminal Matters Act*, Canadian courts are empowered to make mandatory orders for the gathering of evidence on behalf of any state or entity for use in a criminal investigation and prosecution being conducted by that state or entity, and pursuant to any agreement in force, including any treaty, convention or other international agreement, to which Canada is a party and that contains a provision respecting mutual legal assistance in criminal matters. Canada has entered into 38 such agreements.⁶⁶⁵

7.2.2.1. Nationality

Canada permits the making/granting of requests for mutual legal assistance when the person concerned is a Canadian national.

7.2.2.2. Political offence

Canada does not permit making/granting requests for mutual legal assistance with respect to political offences or associated offences. However, the *Mutual Legal Assistance in Criminal Matters Act* provides that the following conduct does not constitute a political offence or an offence of a political character: “conduct that constitutes an offence mentioned in a multilateral extradition agreement for which Canada, as a party, is obliged to extradite the person or submit the matter to its appropriate authority for prosecution” as well as “murder or manslaughter; inflicting serious bodily harm; sexual assault; kidnapping, abduction, hostage-taking or extortion; using explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused; and an attempt or conspiracy to engage in, counselling, aiding or abetting another person to engage in, or being an accessory after the fact in relation to the foregoing conduct.”⁶⁶⁶

7.2.2.3. *Ne bis in idem*

Canada does not permit making/granting requests for mutual legal assistance on the ground that the

Necessity Jurisdiction in Canada” (2009) 48 CBLJ 135.

⁶⁶⁴ See *An Act to secure the carrying out of the Entente between France and Québec respecting mutual aid in judicial matters*, RSQ, c A-20.1.

⁶⁶⁵ Online: Canada Treaty Information <<http://www.treaty-accord.gc.ca>>.

⁶⁶⁶ *Mutual Legal Assistance in Criminal Matters Act*, *supra* note 594, s 46(1) and (2).

person concerned has been tried and convicted in a court.⁶⁶⁷

7.2.2.4. Double criminality

Canada permits making/granting requests for mutual legal assistance in limited circumstances for conduct that does not meet the requirement of double criminality.⁶⁶⁸ Section 6(2) of the *Mutual Legal Assistance in Criminal Matters Act* contemplates situations in which mutual legal assistance agreements between Canada and another state allow for legal assistance to be provided “with respect to acts that do not constitute an offence within the meaning of the agreement”.⁶⁶⁹ In this exceptional circumstance, the Minister of Foreign Affairs may enter into an administrative arrangement for mutual legal assistance.⁶⁷⁰

7.2.2.5. Jurisdiction

The *Crimes Against Humanity and War Crimes Act* allows Canada to help the ICC investigate offences of genocide, crimes against humanity and war crimes in much the same way that it currently assists foreign states with normal criminal investigations. The *Mutual Legal Assistance in Criminal Matters Act* was amended to permit Canada to assist the ICC with many aspects of its investigations, from the identification of persons to the gathering evidence in Canada for the purposes of prosecution.⁶⁷¹

7.2.2.6. Amnesty or similar measure of impunity

Canada's *Mutual Legal Assistance in Criminal Matters Act* does not specify whether it permits making/granting requests for mutual legal assistance when a prosecution is barred in either state based on an amnesty, pardon or similar measure of impunity.⁶⁷²

7.2.2.7. Other inappropriate bars to mutual legal assistance

⁶⁶⁷ *Ibid*, s 47(a).

⁶⁶⁸ *Ibid*, s 6.

⁶⁶⁹ *Ibid*, s 6(2).

⁶⁷⁰ *Ibid*, s 6(2).

⁶⁷¹ *Ibid*. See also: *Canada's Crimes Against Humanity and War Crimes Act*, online: Foreign Affairs, Trade and Development Canada <www.international.gc.ca/court-cour/war-crimes-guerres.aspx?view=d>.

⁶⁷² Crimes under international law are not subject to amnesties or similar measures of impunity has emerged in international jurisprudence; see *Barrios Altos*, *supra* note 380; *Rodriguez v Uruguay*, UNHRC Communication No 322/1988, 19 July 1994; UNHRC General Comment 20 on Art 7: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7), 44th Sess, 10 March 1992 at para 15. ICTY, *Prosecutor v. Anto Furundzija*, IT-95-17/1, Trial Chamber, Judgment, 10 Dec. 1998, para.155 (“The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law”); Statute of the Special Court of Sierra Leone, art.10 Amnesty (“An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute [Crimes against humanity, Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and Other serious violations of international humanitarian law] shall not be a bar to prosecution”).

There appear to be no inappropriate bars to making/granting requests for mutual legal assistance.

7.2.3. SAFEGUARDS

The decision to make or grant requests for mutual legal assistance is at the discretion of the Minister of Justice, and limited safeguards exist in relation to such requests. The *Canadian Charter of Rights and Freedoms* nonetheless applies to the conduct of the Minister of Justice or other Canadian officials engaged in activities involving mutual legal assistance.⁶⁷³ In addition, the *Charter* will also apply to the use in Canadian courts of evidence obtained through torture and other cruel, inhuman or degrading treatment or punishment.⁶⁷⁴ The judge at the sending hearing for either a warrant or an evidence-gathering order is empowered to send or not send as he or she sees fit. They may take into account the conduct of Canadian authorities and the foreign authorities, as well as impose conditions on how the evidence can be used.⁶⁷⁵

7.2.3.1. Fair trial

There is no express prohibition in Canadian law on making/granting requests for mutual legal assistance on the ground that the person concerned might face the risk of an unfair trial.

7.2.3.2. Torture and other cruel, inhuman or degrading treatment or punishment

There is no express prohibition in Canadian law on making/granting requests for mutual legal assistance on the ground that he or she might face the risk of torture or other ill-treatment. There have been recent revelations that Canadian authorities may use information derived from torture. There is express authorization from the Canadian government to the Canadian Security Intelligence Service (CSIS) instructing:

in exceptional circumstances where there exists a threat to human life or public safety ... to share the most complete information available at the time with relevant authorities, including information based on intelligence provided by foreign agencies that may have been derived from the use of torture or mistreatment.⁶⁷⁶

Amnesty International has been very critical of the use of information derived from torture and has recommended that Canada make a clear policy barring CSIS and other Canadian law enforcement agencies from using information derived from torture. In a recent briefing to the UN Committee Against Torture, Amnesty International Canada argued that

Canada cannot credibly claim to be vigorously promoting respect for the absolute prohibition on torture or other ill-treatment while at the same time allowing and even requiring security and intelligence services in exceptional circumstances to make use of

⁶⁷³ *Hape*, *supra* note 9 at para 103.

⁶⁷⁴ *Canada (Justice) v Khadr*, [2008] 2 SCR 125, [2008] SCJ No. 28.

⁶⁷⁵ *Mutual Legal Assistance in Criminal Matters Act*, *supra* note 594, ss 11, 12, 15, 17.

⁶⁷⁶ Amnesty International Canada, Human rights abuses prevalent among vulnerable groups: Amnesty International Submission to the UN Universal Periodic Review, AI Index: AMR 20/008/2012 (Amnesty International Canada, 2012).

information that may have been obtained through such prohibited treatment [...].⁶⁷⁷

7.2.3.3. Death penalty

There is no express prohibition in Canadian law on making/granting requests for mutual legal assistance on the ground that the legal assistance might lead to a person facing the death penalty.

7.2.3.4. Other human rights safeguards

There are no other human rights safeguards in Canadian law with regard to making/granting requests for mutual legal assistance.

⁶⁷⁷ Amnesty International Canada, *Briefing to the UN Committee against Torture 48th Session*, AI Index: AMR 20/004/2012 at 21.

8. SPECIAL IMMIGRATION, POLICE AND PROSECUTOR UNITS

8.1. Crimes Against Humanity and War Crimes Program

The Crimes Against Humanity and War Crimes Program was created in 1998 by the Government of Canada. The Program is chiefly tasked with denying safe haven to suspects of crimes against humanity, war crimes or genocide.⁶⁷⁸ For that purpose, an interdepartmental but centrally coordinated structure was established between the governmental entities that are partners in this Program, including:⁶⁷⁹

- The **Canada Border Services Agency** (CBSA) and **Immigration, Refugees and Citizenship Canada** (IRCC) work closely in screening persons seeking entry to Canada with a view to targeting, identifying and ultimately preventing persons suspected of crimes against humanity, war crimes or genocide from entering Canada. IRCC also has mandate to refer cases to the Department of Justice for the revocation of citizenship under the *Citizenship Act* when the alleged criminal is a Canadian citizen;
- The **Department of Justice** (DOJ) created the War Crimes Section (WCS), a multi-disciplinary team composed namely of lawyers, paralegal staff, historians, researchers, and analysts which assists the other departments (CBSA, IRCC and RCMP) in providing advice relating to crimes against humanity, war crimes or genocide. The War Crimes Section supports the Public Prosecution Service of Canada (PPSC), which is an independent federal organization⁶⁸⁰ that has the responsibility to initiate prosecutions of alleged offenders under the Crimes Against Humanity and War Crimes Act. The PPSC reports to Parliament through the Attorney General of Canada (AGC);
- The **Royal Canadian Mounted Police** (RCMP) provides units for the investigation of individuals allegedly involved in crimes against humanity, war crimes or genocide.

The four departments work together under the auspices of the Program Coordination and Operations Committee (PCOC)⁶⁸¹ and meet once a month to discuss all the general issues relating to the management and operation of the Program. One or two senior directors from each partner organization are present in these meetings. Officials from all four partner organizations share responsibility for overseeing and coordinating the Program, and they closely collaborate with each other.⁶⁸² Information is shared four ways and the Program partners have concluded that this

⁶⁷⁸ Department of Justice Canada, *Canada's program on crimes against humanity and war crimes program – Summative evaluation, 13th Report* (2016) online: <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/wc-cdg/wc20112015-cdg20112015/wc20112015-cdg20112015-cdg20112015.pdf>> at 4.

⁶⁷⁹ *Ibid* at 4.

⁶⁸⁰ Online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/bas/abt-suj.html>>.

⁶⁸¹ *Crimes Against Humanity and War Crimes Program – Summative evaluation, supra* note 680 at iii.

⁶⁸² Canada Border Services Agency et al, *12th Report: Canada's Program on Crimes Against Humanity and War Crimes 2008-2011*, online: Canada Border Services Agency <<http://cbsa.gc.ca/security-securite/wc-cg/bsf5039->

arrangement does not give rise to any privacy concerns.

The primary goal of the program is to deny individuals suspected of involvement in crimes against humanity, war crimes, and genocide safe haven in Canada, and to “contribute to the domestic or international fight against impunity.”⁶⁸³ If a suspect enters Canada, Program partners can apply a number of responses among a range of options, including:

- (a) Exclusion;
- (b) Admissibility hearings;
- (c) Removal;
- (d) Warrants;
- (e) Citizenship revocation;
- (f) Criminal investigations and prosecution in Canada;
- (g) Extradition; and
- (h) Surrender to an international criminal court or tribunal.

Program partners select a response among these options to apply to a particular case through deliberations within the File Review Committee, which is a PCOC subcommittee comprised of a senior official from each partner organization. This Committee meets on a semi-annual basis to review the allegations brought to its attention, and allocates them to one of the four Program partners for further processing and action. The File Review Committee decides upon a response based on the nature of the allegations involved and Canada’s international obligations as interpreted by the Program. In principle, the cases that raise allegations of direct involvement in crimes against humanity or allegations of direct or indirect involvement in war crimes in the context of an international armed conflict are transferred to the RCMP for criminal investigation. In addition, cases that raise allegations of complicity in crimes against humanity or allegations of involvement in war crimes in the context of a civil war are transferred to the CIC or CBSA for administrative inquiries.⁶⁸⁴ However, since the Program’s inception in 1998 only two prosecutions have taken place, which—combined with the minimal RCMP budget for investigations⁶⁸⁵—places doubt on the political will of Canadian authorities to fight impunity.

Amnesty International Canada has been openly critical of Canada’s resort to immigration measures for dealing with persons alleged to have committed war crimes or crimes against humanity suspects. In a 2011 open letter to the Minister of Citizenship and Immigration and the Minister of Public Safety, Amnesty International Canada stated that it has

over the past decade [...] frequently raised concern about the fact that Canada overwhelmingly resorts to immigration enforcement measures rather than the criminal law, when faced with the attempted entry into or presence in Canada of

eng.pdf>.

⁶⁸³ *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, *supra* note 3 at i.

⁶⁸⁴ Joseph Rikhof, “Canada and War Criminals: The Policy, the Program and the Results” presented at the 18th International Conference of the International Society for the Reform of Criminal Law held at Montreal Canada from 8-12 August 2004, online: <<http://www.isrcl.org/Papers/2004/Rikhof.pdf>>.

⁶⁸⁵ The RCMP has an annual budget of \$682,000, whereas a criminal investigation and prosecution is estimated to cost over \$6 million per case. *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, *supra* note 3 at 11 and 73.

individuals who are alleged to have committed war crimes, crimes against humanity, or torture. We have highlighted that an immigration response is problematic for two key reasons: It fails to ensure that such individuals will in fact face justice [and] [...] It also fails to adequately safeguard against the possibility that in some cases, the individual concerned might be at risk of serious human rights violations.⁶⁸⁶

It is important to note that a file should be in the hands of two Program partners simultaneously. For example, the RCMP may be conducting its criminal investigations while the CBSA is carrying on its deportation process. When a file is ready to move to the removal stage, the CBSA must seek the approval of the File Review Committee before initiating proceedings. In situations where a parallel criminal investigation regarding the same individual is almost finished or well advanced, the Committee asks the CBSA to put the removal on hold.⁶⁸⁷

Initially, over 95% of the allegations were forwarded to the Committee by the Refugee Protection Division (RPD). However, with the increase in the public's knowledge of the Program, more allegations are being brought forward by ordinary members of the public. Public allegations are often less substantiated than those which are received from the RPD. As a result, the Department of Justice War Crimes Section often has to conduct further research in relation to these allegations and then submit the results to the Committee.

8.2. Special immigration units

While no single unit is solely devoted to screening persons seeking to enter Canada who are suspected of crimes under international law, the CBSA and IRCC each play key roles in this process, with the support of the War Crimes Section of the DOJ and the RCMP.

8.2.1. IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Persons abroad seeking to enter Canada are screened by Immigration, Refugees and Citizenship Canada (IRCC), which has offices in various Canadian consulates, embassies and high commissions around the world. IRCC's mandate with respect to individuals suspected of war crimes, crimes against humanity or genocide is specifically defined in the *Immigration and Refugee Protection Act* (IRPA).⁶⁸⁸ Under the IRPA, IRCC visa officers are required to deny entry to applicants who are in violation of human or international rights by declaring them inadmissible under Section 35.

When screening applicants, IRCC visa officers identify persons with a certain profile for further investigation.⁶⁸⁹ If an application raises concern on that basis, the case is referred to the Canadian Border Services Agency (CBSA), which provides IRCC with analysis, recommendations and

⁶⁸⁶ *Amnesty International Canada Open Letter to Ministers Toews and Kenney about "Wanted by the CBSA"* (2 August 2011), online: Amnesty International Canada <<http://www.amnesty.ca/news/news-item/amnesty-international-canada-open-letter-to-ministers-toews-and-kenney>>. See also "Canada: Briefing to the UN Committee Against Torture 48th Session, May 2012" at 13, online: Amnesty International <<http://www.amnesty.org>>.

⁶⁸⁷ *War Crimes and Crimes Against Humanity*, online: Canadian Department of Justice <<http://canada.justice.gc.ca/eng/cj-jp/wc-cdg/index.html>>.

⁶⁸⁸ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 35(1)(a).

⁶⁸⁹ Citizenship and Immigration Canada, *ENF-18 War crimes and crimes against humanity*, online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/manuals/enf/enf18-eng.pdf>>.

intelligence support for inadmissibility (see Section 8.3.2 below). For these purposes, CBSA has two sections: one for visitor visa applications and one for permanent resident applications; the officers in these sections do detailed contextual background research and provide IRCC visa officers with recommendations.

CBSA's Program on Crimes Against Humanity and War Crimes 12th Report describes the process of screening as follows:

CIC⁶⁹⁰ immigration officers are the first line of defence in preventing such persons from reaching Canada, by ensuring that permanent and temporary residence applicants are admissible under the IRPA as part of the visa assessment process. At ports of entry, CBSA officers also ensure that all persons seeking to enter Canada are admissible under the IRPA and in compliance with Canadian laws and regulations.

Training, screening aids, intelligence, research, and analytical support are provided to CIC and CBSA officials to help identify persons who are believed to have committed or been complicit in war crimes, crimes against humanity, or genocide. When requested, the CBSA provides immigration officers with an assessment of an applicant's involvement or complicity in war crimes, crimes against humanity, or genocide. It is important to note that the assessment is not the same as the final decision to issue or deny a visa - that decision is always made by a CIC official.⁶⁹¹

IRCC also receives files that relate to the revocation of citizenship. Revocation of citizenship is a complex process and legal advice and investigation or litigation assistance can be requested in particular cases from the War Crimes Section of the DOJ and the RCMP.

If a Canadian citizen is suspected of involvement in war crimes, crimes against humanity or genocide, the War Crimes Section of the DOJ and the RCMP select the response to apply to the particular case. If the partners decide that the most appropriate response is to carry proceedings under the *Citizenship Act*, IRCC determines whether to pursue the revocation of citizenship, then the DOJ investigates and litigates the revocation.⁶⁹²

8.2.2. CANADIA BORDER SERVICES AGENCY

As already stated, the Canadian Border Services Agency plays a vital role in denying entry to applicants suspected of crimes under international law. As of 2003, the CBSA became the Program lead for immigration cases involving crimes against humanity, war crimes, or genocide.⁶⁹³

The CBSA fulfils its role in the Program through three divisions—the National Screening Division, the Inland Enforcement Operations and Case Management Division, and the Intelligence, Operations and Analysis Division. These divisions are responsible for a broad range of tasks including, but not

⁶⁹⁰ Now IRCC.

⁶⁹¹ *12th Report: Canada's Program on Crimes Against Humanity and War Crimes 2008-2011*, *supra* note 684 at 5.

⁶⁹² See for example *Canada (Minister of Citizenship and Immigration) v Rogan* [2011] FCJ No 1221.

⁶⁹³ *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, *supra* note 3 at 8.

limited to, denying inadmissible persons entrance to Canada at ports of entry, excluding refugee claimants from protection, and deporting persons deemed inadmissible or excluded from Canada.⁶⁹⁴ The CBSA also manages intelligence support such as libraries and electronic databases. CBSA creates screening tools, policies and guidelines on war crimes, crimes against humanity and genocide concerns, and develops specific training. It provides IRCC and the Minister of Public Safety with advice on cases involving such crimes and regimes abusing international human rights.

CBSA also receives files that relate to deportation and exclusion processes. If an individual suspected of war crimes, crimes against humanity or genocide is found on Canadian territory, enforcement measures are to be taken under the IRPA.

8.3. Special police units

The RCMP is mandated to enforce the *Crimes Against Humanity and War Crimes Act* through the RCMP National Division Services which includes the Sensitive and International Investigations Unit. This unit conducts investigations related to war crimes in partnership with Canada Border Services Agency, Citizenship and Immigration Canada and the Department of Justice in the context of Canada's Crimes Against Humanity and War Crimes Program.⁶⁹⁵

When conducting an investigation, RCMP investigators work abroad and within Canada to collect information and gather evidence. The DOJ works closely with the RCMP throughout this process. A DOJ lawyer and a DOJ historian are assigned to each case investigated by the RCMP.

The RCMP and the War Crimes Section of the Department of Justice consider the results of the investigations in order to decide whether or not to recommend criminal prosecution to the Public Prosecution Service of Canada (PPSC) (see section 8.5) which is responsible for initiating and conducting prosecutions. The DOJ prepares recommendations for consideration by the Attorney General of Canada or Deputy Attorney General of Canada whose consent has to be obtained before laying charges.⁶⁹⁶

8.4. Special prosecution units

There are no special prosecution units with the exclusive responsibility for prosecuting persons suspected of crimes under international law. The Public Prosecution Service of Canada (PPSC) is responsible for prosecuting offences under the *Crimes Against Humanity and War Crimes Act* as well as drug offences, terrorism, crimes in the Northern territories and economic crimes and offences under federal legislation.⁶⁹⁷

However, as part of the Crimes Against Humanity and War Crimes Program, the Department of Justice has established a special multi-disciplinary War Crimes Section consisting of lawyers,

⁶⁹⁴ *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, supra note 3 at 8-9.

⁶⁹⁵ Canada Border Services Agency et al, *10th Report: Canada's Program on Crimes Against Humanity and War Crimes 2006-2007*, online: Canadian Border Services Agency <<http://www.cbsa-asfc.gc.ca/security-secure/wc-cg/wc-cg2007-eng.html#c5>>. See "Enforcement in Canada – Criminal investigations and prosecution" subsection.

⁶⁹⁶ *Crimes Against Humanity and War Crimes Act*, supra note 12, s 9(3).

⁶⁹⁷ Online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/>>.

historians, analysts, researchers, paralegals and specialized support staff.⁶⁹⁸ The War Crimes Section of the DOJ works in a reciprocal manner with international institutions (international tribunals, special courts, independent organizations as well as international law experts).

The War Crimes Section maintains specialized legal counsel, who provide advice to the Program partners “on international criminal law, international humanitarian law, customary international law and immigration and refugee law.”⁶⁹⁹ Legal counsel provides recommendations about the appropriate response in each individual case and assist other Program partners by providing legal opinions and support at the various stages of the Crimes Against Humanity and War Crimes program. Counsel furthermore represents IRCC in citizenship revocation litigation cases and offers assistance to the CBSA in litigation cases under the *IRPA*. In criminal cases, the DOJ lawyer applies Canada’s *CAHWCA* and provides legal opinions to the RCMP on the *CAHWCA*’s extraterritorial jurisdiction, the various modes of criminal liability, and the general and specific elements of crimes under international law.

Although the PPSC is independent from the Department of Justice, the DOJ’s War Crimes Section works very closely with the PPSC throughout the conduct of criminal proceedings. The War Crimes Section provides the PPSC with factual information and legal analysis in support of a criminal prosecution. In fact, the DOJ lawyer and historian who were assigned to the case at its investigation stage are generally part of the PPSC prosecution team. The War Crimes Section also supports the PPSC in travel arrangements, facilitating interviews with victims and witnesses on the ground, and managing issues relating to disclosure, translation and any other support functions. It also pays for all the expenses of the prosecution.

8.5. Results

While the Program’s purpose is “to deny safe haven to persons believed to have committed or been complicit in crimes against humanity, war crimes or genocide, and to contribute to the domestic or international fight against impunity,”⁷⁰⁰ the last twenty years of the Program indicate that it is primarily aimed at screening individuals seeking entry into Canada and denying them entry into the country, rather than seeking their prosecution in Canada or elsewhere. From 1997 to 2007, over 17,000 cases of suspects were reviewed in the offices of the CBSA and CIC, and over 3,700 persons were barred entry to Canada as a result.⁷⁰¹ Between 2009-2015, 138 individuals were removed from Canada as there were reasonable grounds to believe they were involved in crimes against humanity, war crimes, or genocide, 285 people were denied refugee protection, 47 claimants were found inadmissible, and one citizenship was revoked.⁷⁰²

By contrast, only two prosecutions have been completed since 1998. The first resulted in the successful conviction of Désiré Munyaneza for war crimes, crimes against humanity, and genocide

⁶⁹⁸ Despite its misleading name, the War Crimes Section is also responsible for dealing with crimes against humanity and genocide within the Program. However, it has no express mandate to address other crimes under international law.

⁶⁹⁹ *War Crimes and Crimes Against Humanity*, online: Canadian Department of Justice <<http://canada.justice.gc.ca/eng/cj-jp/wc-cdg/index.html>>.

⁷⁰⁰ *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, *supra* note 3 at i.

⁷⁰² *Ibid.* at i.

committed throughout 1994 in Rwanda.⁷⁰³ A second prosecution was initiated in 2009 against Jacques Mungwarere for genocide and crimes against humanity in Rwanda in the same period. In July 2013, Mungwarere was acquitted, and the government is not appealing the decision.⁷⁰⁴ As of April 2012, there were a total of 58 files in the RCMP/DOJ inventory and this was out of close to 2000 notification of allegations that had been received by the Program over the past 15 years.⁷⁰⁵

When a suspect has entered Canada, the program is designed to transfer only a very small number of cases for criminal investigation and prosecution. The reason for this design is because of increased costs associated with these proceedings, as opposed to immigration responses such as denial of visa, deportation and revocation of citizenship, which are less costly.⁷⁰⁶

It must be noted that the War Crimes Section does not have a completely separate budget for prosecutions involving CAHWCA and it plans its budget before each fiscal year based on a list of anticipated expenses. The budget for the War Crimes Program, in its entirety, is \$15.6 million per year.⁷⁰⁷ This budget has remained static since the Program's inception in 1998, but the costs of conducting investigations have risen significantly.⁷⁰⁸ Currently the Program budget is disbursed relatively unevenly among the partners, but in a manner that corresponds to government priorities of preventing safe haven in Canada for those suspected of involvement with crimes against humanity, war crimes, or genocide. The CBSA's annual Program budget is the highest, at \$7.2 million followed by Justice at \$5.74 million, IRCC at \$1.96 million, and the RCMP at \$682,000.⁷⁰⁹

The Program's 2008 *Summative Evaluation: Final Report* highlights that "it remains important that the remedy of investigation and criminal prosecution is visibly present in the Canadian Program if Canada is to make an effective contribution to a global effort to combat impunity."⁷¹⁰ This sentiment was emphatically echoed in the 2016 evaluation report, which argued that "while immigration remedies are Canada's most cost-effective means of achieving the Program's no safe haven outcome, this approach does not contribute to fulfilling the Rome Statute's principle of complementarity and helps to create the impression of Canada's leadership role waning."⁷¹¹ A mere two prosecutions in nearly 20 years does not go far enough to showcase Canada's commitment to its international legal obligations regarding criminal prosecution of crimes against humanity, war crimes, and genocide. As highlighted throughout this report, Canada has the legal framework, expertise, and resources to undertake much more significant efforts to prosecute and cooperate in the prosecution of individuals suspected of crimes under international law. Considering that Belgium has had 10 prosecutions for crimes against humanity, war crimes and genocide since 2002, with another 103 cases under

⁷⁰³ *Munyaneza*, supra note 252.

⁷⁰⁴ *R c Mungwarere*, 2013 ONCS 4594.

⁷⁰⁵ A case may stay in the DOJ/RCMP inventory if "the allegation pertains to a Canadian citizen living in Canada or to a person present in Canada who cannot be removed for practical or legal reasons; or policy reasons such as the national or public interest, or over-arching reasons related to the interests of the War Crimes Program, international impunity or the search for justice exist." See *Crimes Against Humanity And War Crimes Program - Summative Evaluation*, supra note 680 at 17-18.

⁷⁰⁶ For cost estimates of remedies available to the program, see *Crimes Against Humanity And War Crimes Program - Summative Evaluation*, supra note 680 at 47-49.

⁷⁰⁷ *12th Report: Canada's Program on Crimes Against Humanity and War Crimes 2008-2011*, supra note 684 at 3.

⁷⁰⁸ *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, supra note 3 at 59.

⁷⁰⁹ *Ibid.* at 11.

⁷¹⁰ *Ibid.* at 18.

⁷¹¹ *Ibid.* at 72.

investigation or on trial, and Sweden has completed five prosecutions with another 26 cases under investigation or on trial since 2014, Canada's track record of a mere two prosecutions since 1998 seems disappointing, at best.

A further area of concern remains the CBSA's "Most Wanted" List, of which Amnesty International Canada has long been a critic. The Most Wanted list is an approach by the Canadian government to deal with cases of individuals who have been accused of having committed war crimes or crimes against humanity and who are believed to be residing in Canada. Their cases, including their names and photos are listed on the CBSA website. Amnesty International Canada is "concerned that the initiative does not conform to Canada's obligations with respect to human rights and international justice."⁷¹² AI Canada also argues that:

Given that no information is publicly available about the specifics of the allegations in these cases, including the source of the allegations or the seriousness of the charges, the fact that these individuals' faces and names have been so widely publicized is of particular concern. In addition to reputational harm, it may increase the risk they face upon deportation or put their relatives at risk.⁷¹³

In general, the Crimes Against Humanity and War Crimes Program is relatively well-conceived, and its actionable objectives are properly allocated among the four partner organizations. However, concern remains that the Program is failing to reach its stated goals and potential "to contribute to the domestic or international fight against impunity."⁷¹⁴ Key to fulfilling the Program's goals, and Canada's commitment to the Rome Statute's principle of complementarity, are sufficient budgetary provisions in excess of the current \$15.6 million, and reallocation of these funds to enable more investigations and prosecutions. This would ensure that Canada becomes a state that not only refuses safe haven to individuals involved with crimes against humanity, war crimes, or genocide, but also a state that will hold those individuals responsible for their actions and contribute to the process of international justice.

⁷¹² *Amnesty International Canada Open Letter to Ministers Toews and Kenney about "Wanted by the CBSA"*, *supra* note 684.

⁷¹³ *Ibid.*

⁷¹⁴ *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, *supra* note 3 at i.

9. JURISPRUDENCE

9.1 OVERVIEW

After a long period of inaction following the Second World War, Canada's efforts to prosecute persons suspected of criminal responsibility for crimes under international law took an important step in 1987 when amendments were made to the *Criminal Code* to allow Canada to exercise jurisdiction over crimes against humanity and war crimes committed outside Canada. Four prosecutions were launched between 1987 and 1994 but none resulted in a conviction.⁷¹⁵ The most important case from this period with respect to crimes under international law in Canada was the *Finta* decision, which resulted not only in an acquittal but also in an end to prosecutions and a preference for immigration measures in dealing with those suspected of criminal responsibility for crimes under international law in Canada.

The most problematic effects of the *Finta* decision have been subsequently addressed by the adoption of the *Crimes Against Humanity and War Crimes Act* in 2000 and through the subsequent jurisprudence on crimes under international law which began with the indictment of Desiré Munyaneza in 2005 and Jacques Mungwarere in 2012.

While Canada has revived criminal enforcement mechanisms since *Finta* through the adoption of the *CAHWCA* and subsequent jurisprudence, criminal prosecutions still represent a small proportion of the mechanisms used to deal with persons suspected of having committed war crimes or crimes against humanity. Canada continues to rely overwhelmingly on administrative remedies such as deportation and removal. While this may be effective in limiting the entry of or continued residence of persons suspected of criminal responsibility in Canada, more work can be done in creating accountability for these crimes in Canada and in contributing to a broader regime of global justice. Building on the jurisprudence of the cases discussed below, Canada should continue to strengthen its commitment to prosecuting suspected by committing greater resources and efforts to the use of enforcement mechanisms.

9.2 CASES PROSECUTED BEFORE THE ADOPTION OF THE WAR CRIMES AND CRIMES AGAINST HUMANITY ACT

9.2.1. R V. FINTA⁷¹⁶

In 1987, Canada's *Criminal Code* was amended to authorize the prosecution of war criminals, including in particular, alleged Nazi criminals. Section 7(3.71) of the *Criminal Code* conferred jurisdiction on Canadian courts to prosecute foreign acts amounting to war crimes or crimes against humanity according to Canadian criminal law in force at the time of their commission.

Imre Finta was the first person prosecuted under this war crimes legislation. Finta was a Hungarian-Canadian who was alleged to have been part of a Hungarian paramilitary force that was involved in

⁷¹⁵ Lafontaine, *supra* note 223 at 271.

⁷¹⁶ *Finta*, *supra* note 104.

committing war crimes and crimes against humanity during World War II. He had immigrated to Canada in 1948 and became a Canadian citizen in 1956. In 1988, Finta was charged with unlawful confinement, robbery, kidnapping and manslaughter contrary to the *Criminal Code* in relation to his alleged activities as a police officer assisting the Nazis in the forced deportation of Jews during the Holocaust. The charges alleged that each of these offenses constituted a war crime and/or a crime against humanity according to sections 7(3.71) - 7(3.76) of the amended *Criminal Code*.

Finta's acquittal by the lower courts was upheld by the majority of a divided Supreme Court of Canada. The significance of this decision was that the Supreme Court recognized the constitutionality of the impugned war crimes provisions of the *Criminal Code*, but also established a highly subjective standard of proof for the prosecution of war crimes and crimes against humanity that would make it more or less impossible for prosecutions of this nature to occur in Canada over the subsequent years.

The Court found that the prosecution had to prove subjective intent on the part of the accused to commit war crimes and crimes against humanity. Subjective intent meant that the perpetrator was aware of facts or circumstances, which would bring the acts with the definition of a crime against humanity or a war crime. For war crimes, the accused would have to have known that their actions, even in a state of war, would "shock the conscience of all right thinking people." Since this decision, the international criminal law jurisprudence has of course confirmed that there is no general requirement to show this subjective *mens rea* as the Court found in *Finta*, for a person accused of crimes under international law (with the exception of the crime of persecution).⁷¹⁷

Also of significance was the Court's finding that the defence of superior orders was available in prosecutions for war crimes and crimes against humanity. The Court found that since Finta was merely following orders he should not be entirely responsible for his actions. The Court held that this defence would be available where the accused had no "moral choice" as to whether to follow the orders and that there can be no moral choice where there was "such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders".⁷¹⁸ Since this decision, international humanitarian law has evolved substantially such that this defence can no longer shield an individual from accountability. The international *ad hoc* tribunals and the International Criminal Court have clearly set out individual criminal responsibility for one's actions during armed conflict.

The decision by the Supreme Court of Canada in *Finta* essentially ended prosecutions under Canada's war crimes legislation. The failure to convict Finta likely led to the government's subsequent reliance on immigration law and deportation proceedings to remove alleged war criminals from Canada rather than resort to prosecuting them for their crimes in Canada. In the years following *Finta* and until the adoption of the *War Crimes and Crimes Against Humanity Act* in 2000, alleged war criminals were dealt with administratively, either by stripping them of their Canadian citizenship or deporting them to the country in which the alleged crime occurred or the country of nationality.

⁷¹⁷ *Prosecutor v Akayesu*, (Judgment) 1 June 2001 (ICTR Appeals Chamber), paras 447 to 469.

⁷¹⁸ *Finta*, *supra* note 104 at 846.

9.3 CASES PROSECUTED AFTER THE ADOPTION OF THE WAR CRIMES AND CRIMES AGAINST HUMANITY ACT

9.3.1 R V. MUNYANEZA⁷¹⁹

Desiré Munyaneza, a Rwandan national resident in Canada, helped organize and perpetrate the mass-murder of Tutsis in the Butare area during the Rwandan genocide of 1994. Munyaneza was the first person to be arrested in Canada on charges of war crimes and crimes against humanity for his alleged role in the Rwandan genocide. The *Munyaneza* case was the first prosecution under CAHWCA and the first attempt in Canada (after *Finta*) to prosecute someone for crimes against humanity committed abroad during armed conflict.

Munyaneza moved to Canada in 1997 and sought refugee status but his request was denied because of his suspected involvement in the genocide. In October 2005, he was indicted on seven counts related to genocide (murder, causing physical and mental harm), crimes against humanity (murder, sexual violence) and war crimes (murder, sexual violence, pillage). Among other atrocities, Munyaneza was alleged to have participated in a mass slaughter of as many as 500 Tutsis seeking shelter in a church and having played a significant role in committing rape and sexual violence, having personally raped many women and girls and encouraged militia under his command to do the same.

Justice Denis of the Quebec Superior Court found Munyaneza guilty of seven counts of genocide, crimes against humanity and war crimes. He was sentenced to the maximum penalty available under Canadian law: life imprisonment with no chance of parole for 25 years. The lengthy judgement focuses primarily on the evidence substantiating the indictment with the judge carefully summarizing and weighing the credibility of the 66 testimonies heard over the course of the trial. In terms of legal analysis, Justice Denis relied on customary international law, international treaties, including the *Rome Statute*, and the jurisprudence of the ad hoc tribunals to reach his findings on the status of international criminal law at the time of Munyaneza's crimes. The legal analysis with regard to the substantive crimes under international law defines the offences and does so in conformity with international law.⁷²⁰

For example, in considering crimes against humanity, Justice Denis observed that article 6(3) of the CAHWCA defines a crime against humanity in accordance with customary international law or conventional international law. He found that established international criminal law criminalizes a number of acts when committed as part of a widespread or systematic attack against any civilian population or identifiable group. Crimes against humanity were prohibited by customary international law before 1945 and, therefore, were illegal in Rwanda in 1994 when Munyaneza was committing his crimes.⁷²¹

Munyaneza's conviction and sentence have been upheld by the Quebec Court of Appeal⁷²². The Court rejected all of the grounds of appeal, including allegedly poorly defined charges, irregularities

⁷¹⁹ *Munyaneza*, *supra* note 252.

⁷²⁰ Lafontaine, *supra* note 223 at 272. See also Robert J Currie & Ion Stancu, "R. v. *Munyaneza*: Pondering Canada's First Core Crimes Conviction" (2010) 10 International Criminal Law Review 829-853.

⁷²¹ *Munyaneza*, *supra* note 252 at paras 110-117.

⁷²² *Munyaneza v R*, 2014 QCCA 906, [2014] QJ No 3059 (Quicklaw).

and misrepresentations by the trial judge and a lack of credibility in Crown witnesses. The Court affirmed that “the evidence establishes that the appellant had the intent to attack Tutsis specifically and that he was at the forefront of the armed conflict in the Butare prefecture.”⁷²³

The *Munyaneza* trial was a critical case for Canada in demonstrating the strength of the *CAHWCA* framework and Canada’s willingness to hold war criminals accountable for their actions despite the difficulties resulting from the *Finta* decision. The legal reasoning of the decision also demonstrates compliance with obligations under the *Rome Statute* and customary international law and raises the prospect of Canada’s continued efficacy in prosecuting international criminals in line with its international obligations.

9.3.2 R V. MUNGWARERE

Jacques Mungwarere, a former teacher from Rwanda, claimed asylum in Canada in 2001 and was granted refugee status in 2002. Members of the Rwandan community in Canada had gone to police with reports that Mungwarere had participated in the 1994 Rwandan genocide and an investigation leading to his arrest began in 2003. On November 6th, 2009, he was arrested on suspicion of involvement in the Rwandan genocide and was officially indicted on May 26, 2010.⁷²⁴ The indictment was amended on April 16, 2012 and reduced to one count of genocide and one count of crimes against humanity (murder and sexual violence). He is the second person charged under the *Crimes Against Humanity and War Crimes Act*.

Mungwarere is accused of having committed the murder of persons of the Tutsi ethnicity in the Kibuye Prefecture of Rwanda. In particular, he is alleged to have participated in the attack on the Mugonero church and hospital complex on April 16, 1994 where Tutsis that had taken refuge there were massacred. He is also alleged to have participated in subsequent persecution of surviving Tutsis in the hills of Bisesero.

The indictment was filed under section 577 of the *Criminal Code*, which permits a case to be sent straight to trial without a preliminary inquiry in cases where the public interest would be served. Mungwarere’s trial began in Ottawa in April 2012. In July 2013, Mungwarere was acquitted and the government did not pursue an appeal.

As with the *Munyaneza* case, the *CAHWCA* has provided a solid framework from which Canada can exercise custodial universal jurisdiction.

9.4 OTHER IMPORTANT CASES

9.4.1 R. V. MUGESERA⁷²⁵

On 22 November 1992, Léon Mugesera, a politician from Rwanda, delivered a speech to a gathering

⁷²³ *Ibid*, at para 372.

⁷²⁴ *CCIJ’s Public Cases and Interventions*, online : Canadian Centre for International Justice <http://www.ccij.ca/programs/cases/index.php?DOC_INST=19>.

⁷²⁵ *Mugesera*, *supra* note 217.

of approximately one thousand people at a political party meeting in Rwanda. The speech was believed to have included language inciting racial hatred and led Rwandan authorities to issue an arrest warrant against him. Mugesera fled the country shortly thereafter and applied for permanent residence in Canada. The proceedings against Mugesera invoked the inadmissibility and removal process as opposed to criminal prosecution.

A permanent resident in Canada may be deported if it is established, among other things, that they committed criminal acts or offences before or after obtaining permanent residence. In 1995, Canadian authorities commenced proceedings to deport Mugesera on the basis that he had committed incitement to murder, genocide and hatred, and had committed a crime against humanity and was therefore inadmissible pursuant to Canadian immigration law.

Mugesera remained in Canada for many years despite the deportation order and requests from the Rwandan government that he be returned to stand trial, as he filed petitions challenging the order. The Minister of Citizenship and Immigration, Immigration and Refugee Board, and the Federal Court approved Mugesera's deportation order on the basis that his alleged crimes in Rwanda made him inadmissible in Canada before he was admitted in 1993. In a unanimous judgment of an appeal to the Supreme Court of Canada, the Court upheld the deportation order and found that there were reasonable grounds to believe that Mugesera had committed a crime against humanity.⁷²⁶

Although this case was primarily an administrative law case, it is notable for having given the Supreme Court of Canada the opportunity to consider the manner in which Canadian courts should view the jurisprudence of international criminal courts, treaty obligations and customary international law when deciding questions of international criminal law. In determining the elements of a crime against humanity, the Court decided to defer to the expertise of the international criminal tribunals, recognizing the developments in jurisprudence since its decision in *Finta* in 1994. Specifically, the Court reversed the point made in *Finta* that a discriminatory *mens rea* was required for conviction for all crimes against humanity:

It is important to stress that the person committing the act need only be cognizant of the link between his or her act and the attack. The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard: Kunarac, Appeals Chamber, at para. 103. Even if the person's motive is purely personal, the act may be a crime against humanity if the relevant knowledge is made out.⁷²⁷

The Court in *Mugesera* established four elements to conclude that a crime against humanity has occurred, inspired by the *Criminal Code* and international law:

- (a) An enumerated proscribed act was committed (inclusive is the applicant committed the criminal act and had the requisite guilty state of mind for the underlying act);
- (b) The act was committed as part of a widespread or systematic attack;
- (c) The attack was directed against any civilian population or any identifiable group of

⁷²⁶ *CCIJ's Public Cases and Interventions*, online : Canadian Centre for International Justice <http://www.ccij.ca/programs/cases/index.php?DOC_INST=19>.

⁷²⁷ *Mugesera*, *supra* note 217 at para 174.

persons; and
(d) The applicant committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.⁷²⁸

The Court concluded that there were reasonable grounds to believe that Mugesera committed a crime against humanity and was therefore inadmissible to Canada. On January 24th 2012, after a 16-year legal battle, including final appeals to avoid deportation on the principle of non-refoulement,⁷²⁹ Mugesera was finally deported from Canada and is now in custody in Kigali. He is charged with, among other things, incitement to commit genocide.⁷³⁰

9.4.2 EZOKOLA V CANADA (CITIZENSHIP AND IMMIGRATION), 2013 SCC 40⁷³¹

Rachidi Ekanza Ezokola worked as an attaché for the Ministry of Finance of the Democratic Republic of Congo (DRC), and eventually lead the Permanent Mission of the DRC at the United Nations in New York City. In 2008, he resigned from his position, fled to Canada with his family to see refugee protection. Mr. Ezokola claimed that he could no longer work for a government he considered corrupt, violent, and antidemocratic.

The Immigration and Refugee Board of Canada (IRB) barred Mr. Ezokola from making a claim for refugee status, finding him complicit in the crimes against humanity committed by the DRC government because of his work. The Federal Court of Appeal held that someone working in the government could demonstrate complicity by remaining in their position despite knowing of the crimes of the government yet without protest or defence.⁷³²

The Supreme Court of Canada undertook the challenge of determining the proper meaning of Article 1(F)(a) of the *Convention Relating to the Status of Refugees (Refugee Convention)*, which provides that “when there are serious reasons for considering that a person has committed a serious international crime, that person will be excluded from being able to receive refugee protection”.⁷³³ Article 1(F)(a) is incorporated into Canadian law through section 98 of the *Immigration and Refugee Protection Act (IRPA)*.⁷³⁴ In this case, the Court considered whether Mr. Ezokola’s work for the DRC made him complicit so as to be excluded from refugee protection in Canada.

The SCC determined that that the Immigration and Refugee Board had “overextended the concept of complicity to capture individuals based on mere association or passive acquiescence.” The Court

⁷²⁸ *Ibid* at para 119.

⁷²⁹ In December 2011, the Canadian government determined that Mugesera would not be subject to persecution upon return to Rwanda and confirmed his deportation for early 2012. In January 2012, Mugesera lost his appeal before the Federal Court in an effort to prevent his removal to Rwanda but succeeded in obtaining a request by the United Nations Committee against Torture to delay his deportation so the Committee could assess whether he would be at risk of torture in Rwanda. The Quebec Superior Court granted Mugesera a temporary stay of his deportation, pending a hearing on the Committee’s request. On January 23 2012, the Superior Court refused to block the deportation, a final appeal to the Federal Court was rejected and Mugesera was deported the same day.

⁷³⁰ *Trial of ex-Quebec resident on Rwanda genocide charges stirs tensions*, 17 November 2013, online: CTV News <<http://www.ctvnews.ca/canada/trial-of-ex-quebec-resident-on-rwanda-genocide-charges-stirs-tensions-1.1547147>>.

⁷³¹ *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678.

⁷³² *Ibid*, at para 19.

⁷³³ Amnesty International Canada, “Ezokola v. Canada”, (November 20, 2016), online: <www.amnesty.ca/legal-brief/ezokola-v-canada>.

⁷³⁴ *Ibid*.

asserted that individuals can only be excluded for complicity in international crimes if there are “serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crimes” alleged to have been committed by the group or organization, in effect, raising the threshold for exclusion.⁷³⁵

The decision aligned Canada’s interpretation of the *Refugee Convention in the IRPA* with international law. Both now maintain that “it is not enough to simply belong to a group that commits criminal offences; it is necessary to voluntarily and knowingly make significant contributions to those crimes”.⁷³⁶

Specifically, the Supreme Court found the following:

- guilt by association or mere membership in brutal, limited purpose organization is no longer an independent head of liability;
- the overarching test for establishing complicity is no longer “personal and knowing participation” but, instead, whether a person made a “voluntary, knowing and significant contribution” to the crime or criminal purpose of a group carrying out international crimes;
- guidance for determining this test can be found in assessing several factors, six of which are specifically set out by the Supreme Court:
 - (i) the size and nature of the organization;
 - (ii) the part of the organization with which the refugee claimant was most directly concerned;
 - (iii) the refugee claimant’s duties and activities within the organization;
 - (iv) the refugee claimant’s position or rank in the organization;
 - (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group’s crime or criminal purpose; and
 - (vi) the method by which the refugee claimant was recruited and the refugee claimant’s opportunity to leave the organization;
- others forms of liability, such as aiding and abetting and command responsibility fall within the overarching test.⁷³⁷

Considering the effects of the case since, it becomes clear that, in *Ezokola*, the Supreme Court only incrementally adjusted the test from what it had been. Most notably, “membership as a form of liability is no longer applicable (although the notion of this type of organization can still play a role in factor in above) and a renewed emphasis on the nexus between a person and the organization involved in international crimes”.⁷³⁸

⁷³⁵ *Ibid.*

⁷³⁶ *Ibid.*

⁷³⁷ Joseph Rikhof, “Update on Exclusion and Inadmissibility Jurisprudence: New developments since the decisions of the Supreme Court of Canada in the *Ezokola* and *Febles*” *Canadian Association for Refugee and Forced Migration Studies*, Working Paper 2017/2 (2017) at 6-9, online (pdf): <<http://carfms.org/wp-content/uploads/2017/04/CARFMS-WPS-No10-Joseph-Rikhof.pdf>>.

⁷³⁸ *Ibid.*, at 6-9.

RECOMMENDATIONS

Canada should take the following steps to ensure that it is not a safe haven for persons responsible for the worst possible crimes in the world.

1. Substantive law reform:

- Ratify or accede, without any limiting reservations or declaration amounting to reservation, all treaties requiring states to extradite or prosecute crimes under international law, including the International Convention for the Protection of All Persons from Enforced Disappearance.
- Define crimes under international law as crimes under national law in accordance with international law and, where relevant, more broadly than in the *Rome Statute* or other instruments, including:
 - apartheid;
 - aggression;
 - forcible transfer of populations; and
 - enforced disappearance.
- Define the use of cluster munitions and extrajudicial executions as crimes under national law;
- Define principles of criminal responsibility in accordance with international law and, in certain cases, more broadly than in the Rome Statute. In particular, national legislation should ensure that the same strict standards of criminal responsibility apply both to commanders and to other superiors, like in Protocol I.
- Define defences more narrowly than in Rome Statute and, in particular, exclude as permissible defences superior orders, duress and necessity, but permit them to be taken into account in mitigation of punishment.

2. Strengthening jurisdiction:

- Provide that courts have universal criminal jurisdiction over conduct amounting to crimes under international law.
- Provide that Canada has an *aut dedere aut judicare* obligation to investigate all those suspected of criminal responsibility for crimes under international law found in any territory subject to its jurisdiction, unless it decides to extradite the person concerned to a third state or surrender him or her to an international criminal court.
- Ensure that Canada can open an investigation, issue an arrest warrant and seek extradition of anyone suspected of a crime under international law even if that suspect has never entered territory subject to that state's jurisdiction.
- Ensure that legislation provides that the first state to exercise jurisdiction in good faith, whether universal or territorial, to investigate or prosecute a person has priority over other states with regard to the crimes.

3. Reform of procedure related to suspects and accused:

- Establish rapid, effective and fair arrest procedures to ensure that anyone arrested on suspicion of committing crimes under international law will appear for extradition, surrender or criminal proceedings in the state.
- Ensure that national law provides for the exclusive jurisdiction of ordinary civilian courts over all crimes under international law, including crimes committed by members of the armed forces - even in wartime.

4. Reform of procedure related to victims:

- Ensure that victims and their families are able to institute and carry forward criminal proceedings based on universal jurisdiction over crimes under international law through private prosecutions, *actions civiles*, *actio popularis* or similar procedures.
- Ensure that victims and their families are able to file civil claims for all five forms of reparations (restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition) in civil and in criminal proceedings based on universal jurisdiction over crimes under international law.
- Ensure that victims and their families are fully informed of their rights and of developments in all judicial proceedings based on universal jurisdiction concerning crimes under international law.

5. Removal of legal, practical and political obstacles:

A. Elimination of legal obstacles

- Provide that any claimed state or official immunities will not be recognized with regard to crimes under international law or to torts amounting to such crimes or to other human rights violations. Amend the *State Immunity Act* accordingly.
- Promptly adhere to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity without making any reservation and implement it fully into national law. Abolish any statutes of limitations that may apply to such crimes or torts no matter when they were committed.
- Provide that the principle of *ne bis in idem* prohibits retrials after an acquittal by the same jurisdiction, but does not apply to proceedings in a foreign state concerning crimes under international law.
- Ensure that courts can exercise jurisdiction over all conduct that was recognized under international law as a crime at the time that it occurred, even if it occurred before it was defined in a conventional instrument or by national law as crime under national law.
- Provide that amnesties and similar measures of impunity granted by a foreign state with regard to crimes under international law or human rights violations have no legal effect with respect to criminal or civil proceedings.

B. Elimination of practical obstacles

1. Improving the qualifications of members of the judicial system

- Ensure that all judges, prosecutors, defence lawyers and others in the criminal and civil justice systems are effectively trained in relevant subjects, including such matters as issues

related to sexual and gender-based violence and issues related to crimes involving children, whether as victims, witnesses or perpetrators.

2. Improving the protection of and support for victims and witnesses

- Establish an effective victim and witness protection and support unit, based on the experience of such units in international criminal courts and national legal systems able to protect and support victims and witnesses involved in proceedings in the state, in foreign states and in international criminal courts, including through relocation.

3. Increasing resources for the prosecution of crimes under international law

- Ensure that the Crimes Against Humanity and War Crimes Program has sufficient resources to investigate individuals suspected of having committed a crime under international law and to prosecute them in a Canadian court.
- Devote resources to the adoption of a policy ensuring that extradition or criminal investigations will be pursued over deportation when there are reasonable grounds to believe an act of torture has been committed outside Canada by an individual subject to the jurisdiction of Canada.

C. Ending political obstacles

- Ensure that the criteria for deciding whether to investigate or prosecute crimes under international law are developed in a transparent manner in close consultation with civil society, made public, are impartial and non-discriminatory and exclude all political considerations.

6. Improving cooperation with investigations and prosecutions in other states

- Ensure that foreign requests from foreign states for mutual legal assistance, including *commissions rogatoires* (commissions rogatory), in investigating and prosecuting crimes under international law do not face unnecessary obstacles or delays, provided that the procedures are fully consistent with international law and standards concerning the right to a fair trial and that cooperation is not provided when there is a risk that it could lead to the imposition of the death penalty, enforced disappearance, torture or other cruel, inhuman or degrading treatment or punishment or an unfair trial.
- Ensure that all foreign judgments awarding civil reparations, whether in civil or criminal proceedings, regardless of the basis of geographic jurisdiction, can be recognized and enforced in a simple, speedy and fair procedure, unless the defendant in the foreign proceeding can demonstrate that the proceeding violated international law and standards for a fair trial.
- Ensure that other requests for mutual legal assistance by foreign states can be transmitted directly to the police, prosecutor or investigating judge directly, without going through cumbersome diplomatic channels, but ensure that such requests are not complied with

when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or unfair trial.

- Improve procedures in the forum state for conducting investigations abroad, including through the use of joint international investigation teams, with all the necessary areas of expertise, and seek to enter into effective extradition and mutual legal assistance agreements with all other states, subject to appropriate safeguards.
- Eliminate in law and practice any unnecessary procedural obstacles for foreign states seeking to gather information in territory subject to the forum state's jurisdiction concerning crimes under international law.
- Eliminate in law and practice any unnecessary procedural obstacles that would delay or prevent the introduction of admissible evidence from abroad. Exclude any evidence that cannot be demonstrated as having been obtained without the use of torture or other cruel, inhuman or degrading treatment.
- Appoint a contact point responsible for crimes under international law, who will be responsible for participating in the meetings of the Interpol Expert Meetings on Genocide, War Crimes and Crimes against Humanity and other international and bilateral meetings.
- Cooperate with Interpol in the maintenance of the database on crimes under international law.
- Take steps, in cooperation with other states, to draft, adopt and ratify promptly a new multilateral treaty providing for extradition of persons suspected of crimes under international law and mutual legal assistance with regard to such crimes, excluding inappropriate grounds for refusal and including bars on extradition and mutual legal assistance where there is a risk of the death penalty, torture or other ill-treatment, unfair trial or other human rights violations.

BIBLIOGRAPHY

NATIONAL LAW

CONSTITUTION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Constitution Act 1982 (UK), 1982, c11.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

LEGISLATION

An Act respecting assistance for victims of crime, RSQ 1988, c A-13.2.

An Act respecting the office of the Director of Public Prosecutions, SC 2006, c 9, s 121.

An Act to implement the Convention on Cluster Munitions, SC 2014, c 27.

An Act to secure the carrying out of the Entente between France and Québec respecting mutual aid in judicial matters, RSQ, c A-20.1.

Canadian Victims Bill of Rights SC 2015, c 13, s 2.

Canada-United Kingdom Civil and Commercial Judgments Convention Act, RSC 1985, c C-30.

Canadian Security Intelligence Service Act, RSC 1985, c C-23.

Citizenship Act, RSC 1985, c C-29.

Civil Code of Quebec, LRQ, c C-1991.

Code of Civil Procedure, RSQ, c C-25.

Code of Service Discipline, RS, 1985, c N-5.

Compensation for Victims of Crime Act, LRQ, c I-6.

Compensation for Victims of Crime Act, RSO 1990, c C24.

Corrections and Conditional Release Act, SC 1992, c 20.

Court Order Enforcement Act, RSBC 1996, c 78 as am SBC 2007, c 10.

Crime Victim Assistance Act, SBC 2001, c 38.

Crimes Against Humanity and War Crimes Act, SC 2000, c 24.

Criminal Code, RCS 1985, c C-46, s 6.

Criminal Records Act, RSC 1985, c C-47.

Department of Justice Act, RSC 1985, c J-2.

Eldemire v Eldemire, [1992] SJ No 137, 101 Sask R 189 (Sask QB).

Extradition Act, SC 1999, c18.

Federal Courts Act, RSC 1985, c F-7.

Geneva Conventions Act, RSC 1985, c G-3.

Human Rights Code, RSO 1990, c H-19.

Immigration and Refugee Protection Act, SC 2001, c 27.

Judgments Extension Act, RSS 1978, c J-3.

Justice for Victims of Terrorism Act, SC 2012, c 1.

Limitations Act, RSA 2000, c L-12.

Mutual Legal Assistance in Criminal Matters Act, SC 1985, c 30 (4th Supp).

National Defence Act, RS 1985 c N-5.

Nuclear Terrorism Act, SC 2013, c 13.

Order Declaring an Amnesty Period, SOR/98-467; *Order Declaring an Amnesty Period*, SOR/2006-95.

Order Fixing October 23, 2000 as the Date of the Coming into Force of the Act, SI/2000-95.

Proclamation Giving Notice of the Coming into Force of Canada-United Kingdom Convention Respecting Judgments in Civil and Commercial Matters, SI/87-26.

Reciprocal Enforcement of Judgments (UK) Act, RSO 1990, c R6.

Reciprocal Enforcement of Judgments Act, 1996, SS 1996, c R-3.1.

Reciprocal Enforcement of Judgments Act, CCSM, c J20.

Reciprocal Enforcement of Judgments Act, RSA 2000, c R-6.

Reciprocal Enforcement of Judgments Act, RSNB 1973, c R-3.

Reciprocal Enforcement of Judgments Act, RSNL 1990, c R-4.

Reciprocal Enforcement of Judgments Act, RSNS 1989, c 388.

Reciprocal Enforcement of Judgments Act, RSNWT (Nu) 1988, c R-1.

Reciprocal Enforcement of Judgments Act, RSNWT 1988, c R-1.

Reciprocal Enforcement of Judgments Act, RSO 1990, c R.5.

Reciprocal Enforcement of Judgments Act, RSPEI 1988, c R-6.

Reciprocal Enforcement of Judgments Act, RSY 2002, c 189.

Reciprocal Enforcement of Judgments Regulation, Man Reg 319/87 R.

Reciprocating Jurisdictions Regulation, Alta Reg 344/1985.

Reciprocating States Order, CNLR 790/96.

Security of Information Act, RSC 1985, c O-5.

Security Offences Act, RSC 1985, c S-7.

State Immunity Act, RSC 1985, c S-18.

Supreme Court Civil Rules, BC Reg 168/2009, R 19-3.

Torture Prohibition Act, RSY 2002, c 220.

Victims of Crime Act, c V-3.1.

Victims of Crime Act, RSA 2000, c V3.

Victims of Crime Act, RSBC 1996, c 478.

Victims' Bill of Rights, SO 1996, c 6.

JURISPRUDENCE

Araya v Nevsun Resources Ltd., 2016 BCSC 1856.

Araya v Nevsun Resources Ltd., 2017 BCCA 40.

(Ontario) Attorney General v Fraser, [2011] 2 SCR 3.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143.

Application under s 83.28 of the Criminal Code (Re), [2004] 2 SCR 248, 2004 SCC 42.

Beals v Saldanha, 2003 SCC 72, [2003] SCR 416.

Bouarfa v Canada (Minister of Justice) 2012 QCCA 1378.

Boucher v The Queen, [1955] SCR 16.

Bouzari et al v Islamic Republic of Iran (2004), 71 OR (3d) 675 (ONCA).

British Columbia v. Imperial Tobacco Canada Ltd, [2005] 2 SCR 473.

Campbell v Attorney-General of Ontario (1987), 60 OR (2d) 617; 42 DLR (4th) 383 (ONCA).

Canada (Justice) v Khadr, [2008] 2 SCR 125, [2008] SCJ No. 28.

Canada (Justice) v. Fischbacher, [2009] 3 SCR 170.

Canada (Minister of Citizenship and Immigration) v Rogan [2011] FCJ No 1221.

Canada (Minister of Citizenship and Immigration) v Saini (CA), 2001 FCA 311, [2002] 1 FC 200.

Canada (Ministre de l'Emploi et de l'Immigration) v Burgon, [1991] 3 CF 44 (CAF).

Canada v Schmidt, [1987] 1 SCR 500, [1987] SCJ No 24.

Canadian Imperial Bank of Commerce v Coupal, [1995] OJ No 1643, 38 CPC (3d) 98 (Gen Div).

Castillo v Castillo, [2005] 3 SCR 870.

Choujounian-Abulu v Canada (Citizenship and Immigration), 2004 CanLII 56712 (IRB).

Corbiere v Canada, [1999] 2 SCR 203.

Davidson v British Columbia (Attorney General), 2006 BCCA 447 (available on CanLII), [2006] 12 WWR 591.

Doyle Fowler c Canada (Ministre de la Justice), 2011 QCCA 1076.

Fewer v Sayisi Dene Education Authority, [2011] NJ No 60, 2011 NLCA 17.

Ezokla v Canada (Citizenship and Immigration), [2013] 2 SCR 678.

Froom v Canada (Minister of Justice) [No 2], [2003] FCJ No 1655, [2004] 2 FCR 154, 2003 FC 1299 (FC).

Girshberger v Kresz (2000), 47 OR (3d) 145.

Grdic v The Queen, [1985] 1 SCR 810.

Gushue v R, [1980] 1 SCR 798.

Italy v Caruana [No 2], [2004] OJ No 5851 (Ont SCJ), aff'd [2007] OJ No 2550, 2007 ONCA 488 (Ont CA), leave to appeal ref'd [2007] SCCA No 474 (SCC).

Kamloops v Nielson, [1984] 2 RCS.

Kazemi (Estate of) v Islamic Republic of Iran 2012 QCCA 1449.

Kindler v Canada (Minister of Justice), [1991] 2 SCR 779.

Krieger v Law Society of Alberta, [2002] 3 SCR 372.

Lake v Canada (Ministry of Justice), [2008] 1 RCS 761, 2008 CSC 23.

Lévis (City) v 2629-4470 Québec inc., 2006 SCC 12, [2006] 1 SCR 420.

Libman v The Queen, [1985] 2 SCR 178.

Manolopoulos c. Canada (Ministre de la Justice), [2006] JQ no 10858 (QcCA).

Magtibay v Canada (Minister of Citizenship and Immigration) (2005), FC 397.

Miron v Trudel, [1995] 2 SCR 415.

Munyaneza v R, 2014 QCCA 906, [2014] QJ No 3059 (Quicklaw).

Nelles v Ontario, [1989] 2 SCR 170.

Németh v Canada (Justice) [2010] 3 SCR 281.

Perka v R, [1984] 2 SCR 232, 42 CR (3d) 113 (SCC).

Philippines (Republic) v Pacificador, [2002] OB No. 3024 ONCA.

Plagaro-Perez De Arrilucea c. Royaume d'Espagne, [2004] JQ no 13397 (QcCA).

Pro Swing Inc v Elta Golf Inc, 2006 SCC 52, [2006] 2 SCR 612.

Proulx v Québec (PG), [2001] 3 SCR 9, 2001 SCC 66.

R c Mungwarere, 2013 ONCS 4594.

R c Munyaneza (2006) QCCS 8007.

R v Bain, [1992] 1 SCR 91.

R v Bulmer, [1987] 1 SCR 782.

R v Chaulk, [1990] 3 RCS 1303.

R v Cloud (2014), QCCQ 464 at para 22, 8 CR (7th) 364.

R v Curran (1977), 38 CCC (2d) 151 (Alta CA).

R v Daviault, [1994] 3 SCR 63.

R v Finta [1994] 1 SCR 701.

R v Forster, [1992] 1 SCR 339.

R v Grujicic, (1994) OJ 2280.

R v Hape, [2007] SCJ No 26, [2007] 2 SCR 292.

R v Hartford and Frigon (1979) 51 CCC (2d) 462 (B-C CA).

R v Henry, [2005] 3 SCR 609.

R v Kienapple (1974), SCJ no 76.

R v L (WK), [1991] 1 SCR 1091.

R v Li (2002), 162 CCC (3d) 360 (Ont CA).

R v MacDonald, 2014 SCC 3.

R v Mahalingan, [2008] 3 SCR 316.

R v Munyaneza (2014), QCCA 904.

R v Pan; R v Sawyer, [2001] 2 SCR 344.

R v Pappajohn, [1980] 2 SCR 120.

R v Parisien, [1988] SCJ No 49, [1988] 1 SCR 950.

- R v Pawlowski*, (1993) 12 OR (3d) 709; 101 DLR (4th) 267 (ONCA).
- R v Power*, [1994] 1 SCR 601.
- R v Reistetter*, (1990) OJ 2100.
- R v Ribic*, 2008 ONCA 790.
- R v Riddle* [1980] 1 SCR 380.
- R v Ruzic* (2001), 153 CCC (3d) 1 (SCC).
- R v Swain*, [1991] 1 SCR 933.
- R v Wigglesworth* (1984), SJ no 204 SKCA.
- Raulin v Fischer*, [1911] 2 KB 93.
- Romania v Alexa*, [2009] OJ No 2568.
- S.A. v Canada (Minister of Citizenship and Immigration)*, (2006) FC 515.
- Sicuro v Canada (Minister of Citizenship and Immigration)*, (2004) FC 461.
- Smith v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 144 (TD).
- Sriskandarajah v. United States of America* [2012] 3 SCR 609.
- Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.
- Therrien (Re)*, [2001] 2 SCR 3, 2001 SCC 35.
- Tolofson v Jensen*, [1994] 3 SCR 1022.
- United States of America v Anekwu* [2009] 3 SCR 3.
- United States of America v Ferras; United States of America v Latty*, 2006 SCC 33, [2006] 2 SCR 77.
- United States of America v Kwok*, [2001] 1 RCS 532.
- United States v Burns*, [2001] 1 SCR 283, [2001] SCJ No 8, 2001 SCC 7.
- United States v Cotroni*, [1989] 1 SCR 1469, [1989] SCJ No 56.
- United States v Dhillon [No 2]*, [2009] OJ No 1129, 2009 ONCE 247 (Ont CA).
- United States v Gorcyca*, [2007] OJ No 395, 216 CCC (3d) 403, 73 Wcb (2d) 120 (Ont CA).
- United States v Ivey*, 26 OR (3d) 533, [1995] OJ No 3579.
- United States v Prudenza*, [2006] OJ No 4321 (Ont CA), leave to appeal to SCC ref'd [2007] SCCA No

418 (SCC).

United States v Shull [No 3], [2007] BCJ No 2506, 2007 BCSC 1681, 76 WCB (2d) 255 (BCSC).

United States v Sosa, 2011 ABQB 534, [2011] 521 AR 356.

United States v Weber, [2004] OJ No 1971 (Ont SCJ).

USA v Leonard 2012 ONCA 622.

Van Breda v Village Resorts Limited, 2012 SCC 17, [2012] 1 SCR 572, SCJ No 17.

Vriend v Alberta, [1998] 1 SCR 493.

Zhang v Canada (Attorney General), 2006 FC 276 (available on CanLII), 139 CRR (2d) 137.

Zhang v Canada (Attorney General), 2007 FCA 201 (available on CanLII), 365 NR 277.

Zschiegner v USA, [2001] NSCA 74.

GOVERNMENT DOCUMENTS

- Canada Border Services Agency et al, *12th Report: Canada's Program on Crimes Against Humanity and War Crimes 2008-2011*, online: Canada Border Services Agency <<http://cbsa.gc.ca/security-securite/wc-cg/bsf5039-eng.pdf>>.
- Canada Border Services Agency et al., *Eleventh Annual Report: Canada's Program on Crimes Against Humanity and War Crimes, 2007-2008* (Ottawa: Canada Border Services Agency et al., 2008).
- Canadian Department of Justice, *Victims Fund*, online: Government of Canada, Department of Justice <<http://www.justice.gc.ca/eng/pi/pb-dgp/prog/vf-fv.html>>.
- Canadian Department of Justice, *War Crimes and Crimes Against Humanity*, online: Canadian Department of Justice <<http://canada.justice.gc.ca/eng/cj-jp/wc-cdg/index.html>>.
- Citizenship and Immigration Canada, *ENF-18 War crimes and crimes against humanity*, online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/manuals/enf/enf18-eng.pdf>>.
- Court Martial Appeal Court of Canada, *Appeals From Courts Martial*, online: Court Martial Appeal Court of Canada <http://www.cmac-cacm.ca/business/military_law4_e.shtml>.
- David Goetz, Parliamentary Research Branch, Law and Government Division, *Bill C-19: Crimes Against Humanity Act, LS-230E*, 5 April 2000, online: Government of Canada Publications <<http://publications.gc.ca/Collection-R/LoPBdP/LS/362/c19-e.htm>>.
- Department of Justice Canada, *Canadian Statement of Basic Principles of Justice for Victims of Crime* (2003), online: Department of Justice Canada <<http://www.justice.gc.ca/eng/pi/pcvi-cpcv/pub/03/princ.html>>.
- Department of Justice Canada, *Crimes against humanity and war crimes program – Summative evaluation (Final report)* (Ottawa: Evaluation Division, Office of Strategic Planning and Performance Management, 2008) online: <<http://www.justice.gc.ca/eng/pi/eval/rep-rap/08/war-guerre/war.pdf>>.
- Department of Justice Canada, *Final Report: Crimes Against Humanity and War Crimes Program Summative Evaluation* (Ottawa: Evaluation Division Office of Strategic Planning and Performance Management, 2008).
- Department of Justice, *Crimes Against Humanity and War Crimes Program Evaluation: Final Report*, (Ottawa: Evaluation Division Corporate Services Branch, 2016).
- Federal Ombudsman for Victims of Crime, *Victims' rights in Canada*, online: Federal Ombudsman for Victims of Crime <<http://www.victimsfirst.gc.ca/serv/wvr-qdv.html>>.
- Foreign Affairs, Trade and Development Canada, *Canada's Crimes Against Humanity and War Crimes Act*, online: Foreign Affairs, Trade and Development Canada <www.international.gc.ca/court-court/war-crimes-guerres.aspx?view=d>.
- Government of Canada, *Canada's list of bilateral and multilateral conventions*, online: Canada Treaty

Information <<http://www.treaty-accord.gc.ca>>.

National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) online: <<https://www.mmiwg-ffada.ca/final-report/>>.

Public Prosecution Service of Canada, *The Federal Prosecution Service Deskbook*, online: Public Prosecution Service of Canada, <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/index.html>>.

Royal Canadian Mounted Police, *Beyond the Red Serge* (Fact Sheet), online: Royal Canadian Mounted Police, <<http://www.rcmp-grc.gc.ca/about-ausujet/mod-eng.htm>>.

Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015): <http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>.

INTERNATIONAL MATERIALS

INTERNATIONAL INSTRUMENTS

- 1907 Hague Convention IV Respecting the Laws and Customs of War on Land*, reprinted in Adam Roberts & Richard Guelff, *Documents on the Laws of War* 67, 3rd ed (Oxford: Oxford University Press, 2000).
- 1996 Draft Code of Crimes against the Peace and Security of Mankind*, *supra* note 261, art 5; UNTAET, 'On the Establishment of Panels with Executive Jurisdiction Over Serious Criminal Offences', UN Doc UNTAET/Reg/2000/15 (6 June 2000).
- Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, 13 October 1995, 1380 UNTS 370 (entered into force 30 July 1998).
- Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal*, UNGA Res 95 (I) (11 December 1946).
- Allied Control Council Law No.10, Punishment of persons guilty of war crimes, crimes against peace and against humanity*, 20 December 1945, published in the Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946.
- Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, 21 December 2001, 2260 UNTS 89 (entered into force 18 May 2004).
- Amendments on the crime of aggression to the Rome Statute of the International Criminal Court*, 11 June 2010, RC/ Res 6.
- Amendments to article 8 of the Rome Statute*, 10 June 2010 RC/ Res5 (entered into force 26 September 2012).
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res A/RES/60/147, UN Doc E/CN4/2005/35 (2005).
- Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004* (NS/RKM/1004/006).
- Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, London, 8 August 1945.
- Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1951).
- Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1951).

- Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956).
- Convention on Cluster Munitions*, 30 May 2008, UNTS No 47713 (entered into force 1 August 2010).
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III)*, 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983).
- Convention on the Elimination of All Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970).
- Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 10 December 1976, 1108 UNTS 151 (5 October 1978).
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975).
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, 13 January 1993, 1974 UNTS 317 (entered into force 24 April 1997).
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 18 September 1997, 2056 UNTS 241 (entered into force 1 March 1999).
- Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).
- Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1951).
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34 (1985).
- Draft Code of Crimes against the Peace and Security of Mankind*, 51 UN GAOR Supp (No 10) at 14, UN Doc A/CN.4/L.532, corr1, corr3 (1996).
- Draft Code of Crimes against the Peace and Security of Mankind*, UN Doc A/CN.4/L.459 [and corr1] and Add1 (1991).
- Draft Code of Offences against the Peace and Security of mankind*, Yearbook of the International Law Commission, 1954, vol II.
- Guidelines on the Role of Prosecutors*, adopted by the 8th UN Congress on the Prevention of the Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
- Hague Conference on Private International Law: Collection of Conventions (1951-1980)*, (The Hague: Permanent Bureau of the Hague Conference on Private International Law) 106.

Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS TS 67 (entered into force 28 February 1987).

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006 UNTS 2715 (entered into force 23 December 2010).

International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976).

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

International Military Tribunal for the Far East Charter, 19 January 1946.

Nuclear Terrorism Convention (International Convention for the Suppression of Acts of Nuclear Terrorism), 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007).

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, 25 May 2000, A/RES/54/263 (entered into force 12 February 2002).

Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission, 1950, vol II.

Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, recommended by Economic and Social Council Resolution 1989/65, 24 May 1989.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007).

Protocol amending the Single Convention on Narcotic Drugs, 1954, 25 March 1972, 976 UNTS 3 (entered into force 8 August 1975).

Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America, 3 December 1971.

Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, 17 June 1925, 94 LNTS 65 (entered into force 8 February 1928).

Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 28 November 2003, 2399 UNTS 100 (entered into force 12 November 2006).

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, 3 May 1996, 2048 UNTS 93 (entered into force 3 December 1998).

Resolution ICC-ASP/16/res.4 (14 December, 2017).

Rome Statute of the International Criminal Court, 17 July 1999, 2187 UNTS 90 (entered into force 1 July 2002).

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, December 15, 1989, UN Doc A/44/128 (entered into force 11 July 1991).

Second Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America, 12 January 2001 (entry into force 30 April 2003).

Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 172 (entered into force 9 March 2004).

Single Convention on Narcotic Drugs, 30 March 1961, 520 UNTS 204 (entered into force 13 December 1964).

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, adopted by S/RES/955 (1994) amended by S/RES/1165 (1998), S/RES/1329 (2000), 1411 (2002) and 1431 (2002).

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by S/RES/827 (1993).

Statute of the Special Court for Sierra Leone adopted by A/RES/1315 (14 August 2000).

Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, Can TS 1990 No 19, art XVII (2).

Treaty on Extradition between the Government of Canada and the Government of the United States of America, 3 December 1971, E101323-Can TS 1976 No 3 (entered into force 22 March 1976).

Universal Declaration of Human Rights, GA Res 217 (111), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71.

Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN4/2005/102/Add1 (2005).

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

CASES

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion [1988] ICJ.

Barrios Altos v. Peru, IACHR Judgment, 14 March 2001.

Case of the “Las Dos Erres” Massacre v Guatemala (2009), Preliminary Objection, Merits, Reparations and Costs (24 November 2009), IACHR (Ser C) No. 211.

Democratic Republic of the Congo v Belgium, [2002] ICJ Rep 3.

Judge v Canada, Communication No 829/1998, UN Doc CCPR/C/78/D.829/1998 (view adopted 5 August 2003) in *Report of the Human Rights Committee*, UN GAOR, 58th Sess, Supp No 40, UN Doc A/58/40, vol 2 (2003) annex VI.G reprinted in (2003) 42 ILM 1214 and (2004) 11 IHRR 125.

Prosecutor v Akayesu, (Judgment) 1 June 2001 (ICTR Appeals Chamber).

Prosecutor v Akayesu, [1998] 9 IHRR 608.

Prosecutor v Bagaragaza, Decision on Rule 11 *bis* Appeal, ICTR-05-86- AR11 *bis*, Appeals Chamber (30 August 2006).

Prosecutor v Bagaragaza, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11 *bis* of the Rules of Procedure and Evidence, ICTR-2005-86-11 *bis*, Trial Chamber (19 May 2006).

Prosecutor v. Dominic Ongwen, Case No ICC-02/04-01/15, judgement (23 March 2016).

Prosecutor v. Dusko Tadic aka “Dule”, Case No IT-94-1, ICTY Appeals Chamber (2 October 1995).

Prosecutor v Dusko Tadic, Case No IT-94-1-A, 15 July 1999.

Prosecutor v Furundzija, ICTY Judgment, IT-95-17/1-T, 10 December 1998.

Rodriguez v Uruguay, UNHRC Communication No 322/1988, 19 July 1994.

UN DOCUMENTS

Committee against Torture, *General Comment 2 (Implementation of article 2 by States parties)*, 2008, UN Doc CAT/C/GC/2.

Committee against Torture, *Concluding observations – Spain*, UN Doc CAT/C/ESP/CO/5.

Committee against Torture, *General Comment 3 (Implementation of article 14 by States parties)*, 2012, CAT/C/GC/3.

Human Rights Committee, *General Comment 31, Nature of the Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev1/Add13 (2004) (scope of Article 2 of the ICCPR).

Human Rights Committee, *General Comment 20 on Art 7: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment*, 44th Sess, 10 March 1992.

SECONDARY SOURCES

BOOKS

- Bassiouni, Cherif. *International Extradition: United States Law and Practice*, 5th ed (Oceana: Oxford University Press, 2007).
- Béliveau, Pierre & Vauclair, Martin. *Traité général de preuve et de procédure pénales*, 17th ed (Cowansville: Yvon Blais, 2010).
- Boot, Machteld, Dixon, Rodney & Hall, Christopher K. "Article 7 (Crimes Against Humanity)" in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (Munich: C. H. Beck; Oxford: Hart & Baden-Baden: Nomos, 2008).
- Bossuyt, Marc J. *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987).
- Botting, Gary. *Canadian Extradition Law Practice*, 2012 ed, (Markham, ON: LexisNexis Canada, 2012).
- Castel, Jean-Gabriel & Walker, Janet. *Canadian Conflict of Laws*, 6th ed (Toronto: Butterworths, 2005).
- Colwin, Eric & Anand, Sanjeev. *Principles of Criminal Law*, 3rd ed (Toronto: Thomson & Carswell, 2007).
- Currie, John H, Forcese, Craig & Oosterveld, Valerie. *International Law: Doctrine, Practice and Theory* (Toronto: Irwin Law, 2007).
- Currie, Robert J. *International and Transnational Criminal Law* (Toronto: Essentials of Canadian law, 2010).
- Currie, Robert J. *International and Transnational Criminal Law*, 2nd ed (Toronto: Essentials of Canadian law, 2013).
- Fujita, H, Suzuki, I & Nagano, K. *War and the Rights of Individuals, Renaissance of Individual Compensation*, (Tokyo: Nippon Hyoron-sha Co Ltd.Publishers, 1999).
- Goldstein, Gérald & Alan Talpis, Jeffrey. *L'effet au Quebec des jugements étrangers en matière de droits patrimoniaux* (Montréal: Themis, 1991).
- Hage, Robert. "Implementing the Rome Statute: Canada's Experience" in Lee, Roy S. ed, *States' Responses to Issues Arising from the ICC Statute: Constitutional Sovereignty, Judicial Cooperation, and Criminal Law*, (Ardsey NY: Transnational Publishers, 2005).
- Henckaerts, Jean-Marie & Doswald-Beck, Louise. *Customary International Humanitarian Law* (Geneva: International Committee of the Red Cross & Cambridge University Press, 2005).
- Jennings, Robert & Watts, Arthur, *Oppenheim's International Law*, (London and New York: Longman, 1992).

- Kok, Ruth. *Statutory Limitations in International Criminal Law*, (London: Blackwell, 2008).
- Krivel, Elaine F, Beveridge, Thomas & Hayward, John W. *A Practical Guide to Canadian Extradition* (Toronto: Carswell, 2002).
- Lafontaine, Fannie. *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012).
- McGoldrick, Dominic. *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991).
- Morgan, Edward M. *International Law and the Canadian Courts: sovereign immunity, criminal jurisdiction, aliens' rights and taxation powers*, (Toronto: Carswell, 1990).
- Nowak, Manfred. *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: NP Engel, 1993).
- Roach, Kent. *Criminal Law*, 4th ed (Toronto: Irwin Law, 2009).
- Joseph Rikhof, "Update on Exclusion and Inadmissibility Jurisprudence: New developments since the decisions of the Supreme Court of Canada in the Ezokola and Febles" *Canadian Association for Refugee and Forced Migration Studies*, Working Paper 2017/2 (2017) at 6-9, online (pdf): <<http://carfms.org/wp-content/uploads/2017/04/CARFMS-WPS-No10-Joseph-Rikhof.pdf>>.
- Schaus, Anemie. "Article 27" in Corten, Olivier & Klein, Pierre eds. *Les Conventions de Vienne sur le droit des traités. Commentaire article par article* (Bruxelles : Bruylant-Centre de droit international-Université Libre de Bruxelles, 2006).
- Shaw, Malcolm N. *International Law*, 4th ed (Cambridge: Cambridge University Press, 1997).
- Villiger, Mark E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Martinus Nijhoff, 2009).

LAW JOURNAL ARTICLES

- Akhavan, Payam. "Enforcement of the Genocide Convention: A Challenge to Civilization" (1995) 8 Harv Hum Rts J 229.
- Bailey, Jane. "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44 UBCL Rev 255.
- Besner, Jennifer & Attaran, Amir. "Civil liability in Canada's courts for torture committed abroad: The unsatisfactory interpretation of the State Immunity Act 1985" (2008) 16 Tort L Rev 150.
- Black, V & Babin, E. "Mareva Injunctions in Canada: Territorial Aspects" (1997) 28 Can Bus LJ 431.
- Borchard, Edwin. "The relation between international law and municipal law" (1940) 27 Va L Rev 137.
- Currie, Robert J & Stancu, Ion. "*R. v. Munyaneza*: Pondering Canada's First Core Crimes Conviction" (2010) 10 International Criminal Law Review.

Fitzmaurice, Gerald. "The Law and Procedure of the International Court of Justice 1954-9 General Principles and Sources of International Law" (1959) 35 Brit YB Int'l L at 183.

Krebs, Beatrice. "Justification and Excuse in Article 31(1) of the Rome Statute" (2013) 2:3 Cambridge Journal of International and Comparative Law 382.

Lafontaine, Fannie. "Canada's Crimes against Humanity and War Crimes Act on Trial: An Analysis of the *Munyaneza* case" (2010) 8 Journal of International Criminal Justice 269.

Schabas, William A. "Canadian Implementing Legislation for the Rome Statute" (2000) 3 YB Int'l Human L 337.

Walker, Janet. "Muscutt Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48 CBLJ 135.

CONFERENCE PAPERS

Rikhof, Josphe. "Canada and War Criminals: The Policy, the Program and the Results" presented at the 18th International Conference of the International Society for the Reform of Criminal Law held at Montreal Canada from 8-12 August 2004, online: <<http://www.isrcl.org/Papers/2004/Rikhof.pdf>>.

OTHER DOCUMENTS

AMNESTY INTERNATIONAL

Amnesty International Canada, *Amnesty International Canada Open Letter to Ministers Toews and Kenney about "Wanted by the CBSA"* (2 August 2011), online: Amnesty International Canada <<http://www.amnesty.ca/news/news-item/amnesty-international-canada-open-letter-to-ministers-toews-and-kenney>>.

Amnesty International Canada, *Briefing to the UN Committee against Torture 48th Session*, AI Index: AMR 20/004/2012.

Amnesty International Canada, "Ezokola v. Canada", (November 20, 2016), online: <www.amnesty.ca/legal-brief/ezokola-v-canada>.

Amnesty International Canada, *Human rights abuses prevalent among vulnerable groups: Amnesty International Submission to the UN Universal Periodic Review*, AI Index: AMR 20/008/2012 (Amnesty International Canada, 2012).

Amnesty International, *14-Point Program for the Prevention of Extrajudicial Executions*, AI Index: POL 35/002/1993 (Amnesty International, 1993); Amnesty International, *"Disappearances" and Political Killings – Human Rights Crisis of the 1990s: A Manual for Action*, AI Index: ACT 33/01/94 (Amnesty International: 1994).

Amnesty International, *Improving the effectiveness of state cooperation*, AI Index: 53/004/2009, (Amnesty International, 2009).

Amnesty International, *Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law*, AI Index: AI: AFR 51/012/2003, (Amnesty International, 2003).

Amnesty International, *The International Criminal Court: Making the Right Choices – Part I: Defining the Crimes and Permissible Defences*, AI Index: IOR 40/01/1997, (Amnesty International, 1997), s VI E 6.

Amnesty International, *Universal Jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings*, AI Index: EUR 53/001/2002 (Amnesty International, 2002).

Amnesty International, *Universal Jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad*, AI Index: IOR 53/001/2003 (Amnesty International, 2003).

Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, AI Index: 53/014/2001 (Amnesty International, 2001).

Amnesty International, *Universal jurisdiction: The scope of universal civil jurisdiction*, IOR 53/008/2007 (Amnesty International, 2007).

Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool*, AI Index: IOR 53/015/2010 (Amnesty International, 2010).

CANADIAN ORGANISATIONS

Canadian Centre for International Justice, *George W Bush and the "War on Terror"*, online: Canadian Centre for International Justice <<http://www.ccij.ca/programs/cases/guantanamo/index.php>>.

Canadian Centre for International Justice, *CCIJ's Public Cases and Interventions*, online : Canadian Centre for International Justice <http://www.ccij.ca/programs/cases/index.php?DOC_INST=19>.

MEDIA

Trial of ex-Quebec resident on Rwanda genocide charges stirs tensions, 17 November 2013, online: CTV News <<http://www.ctvnews.ca/canada/trial-of-ex-quebec-resident-on-rwanda-genocide-charges-stirs-tensions-1.1547147>>.

APPENDIX I – LIST OF PAPERS IN THE *NO SAFE HAVEN* SERIES PUBLISHED SO FAR

Bulgaria (<http://www.amnesty.org/en/library/info/EUR15/001/2009/en>);

Germany (<http://www.amnesty.org/en/library/info/EUR23/003/2008/en>);

(<https://doc.es.amnesty.org/cgi->

[bin/ai/BRSCGI/ALEMANIA%20LA%20LUCHA%20CONTRA%20LA%20IMPUNIDAD%20A%20TRAVES%20DE%20LA%20JURISDICCION%20UNIVERSAL?CMD=VEROBJ&MLKOB=27141201313](https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/ALEMANIA%20LA%20LUCHA%20CONTRA%20LA%20IMPUNIDAD%20A%20TRAVES%20DE%20LA%20JURISDICCION%20UNIVERSAL?CMD=VEROBJ&MLKOB=27141201313))

(Spanish)

Solomon Islands (<http://www.amnesty.org/en/library/info/ASA43/002/2009/en>);

Spain (<http://www.amnesty.org/es/library/info/EUR41/017/2008/es>) (Spanish only);

Sweden (<http://www.amnesty.org/en/library/info/EUR42/001/2009/en>);

Venezuela (<http://www.amnesty.org/en/library/info/AMR53/006/2009/en>);

(<http://www.amnesty.org/es/library/info/AMR53/006/2009/es>) (Spanish)

APPENDIX II – LIST OF ABBREVIATIONS OF IHL TREATIES LISTED ON CHARTS III AND V

| | |
|--------------------------------------|--|
| 1925 Geneva Protocol Geneva | Protocol of 17 June 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. |
| 1954 CCP | Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, art. 28 |
| Hague Prot. 1954 | Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954 |
| BWC 1972 | Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Opened for Signature at London, Moscow and Washington, 10 April 1972, art. IV |
| ENMOD Conv. 1976 | Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976, art. IV |
| CCW 1980 | Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980. |
| CCW Prot. I 1980 | Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980; |
| CCW Prot. II 1980 | Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980 |
| CCW Prot. III 1980 | Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980 |
| CWC 1993 | Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993 |
| CCW Prot. IV | Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 |

| | |
|------------------------------|--|
| 1995 | October 1995 |
| CCW Prot. II a 1996 | Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) |
| AP Mine Ban Conv. 1997 | Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997. |
| Hague Prot. 1999 | Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999 |
| Opt Prot. CRC 2000 | Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000 |
| CCW Amdt 2001 | Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 (Amendment article 1, 21 December 2001) |
| CCW Prot. V 2003 | Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003 |
| Cluster Munitions 2008 | Convention on Cluster Munitions, 30 May 2008 |

Amnesty International
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW

www.amnesty.org

**AMNESTY
INTERNATIONAL**

