

CANADA AND WAR CRIMINALS: THE POLICY, THE PROGRAM AND THE RESULTS

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Introduction

There is a strong connection and overlap between international humanitarian law and international criminal law. International criminal law deals with the parameters of the criminal responsibility of individuals who have committed acts which have been deemed criminal by the international community; crimes such as terrorist acts, war crimes, crimes against humanity and genocide. International humanitarian law regulates the conduct of states and individuals during armed conflicts, including the liability of individuals who commit grave breaches of international humanitarian law, also known as war crimes. These two areas of international law specifically intersect where war crimes is concerned but are connected in various other ways.

As will be explained in more detail below, the last decade has seen a veritable explosion of means of addressing individuals who have been involved in the commission of atrocities. The development resulted in the establishment of the International Criminal Court in 2002. However, it would be a mistake to think that with this court in place there would be no reason for individual states to take actions against persons involved in international crimes. There are two reasons for this. First of all, the Statute of the International Criminal Court operates on the complimentary principle¹, which means that States should first attempt to try a person involved in genocide, war crimes or crimes against humanity before having the ICC undertake such a prosecution. Secondly, based on the examples of the ICTY and the ICTR, the costs of mounting international prosecutions are extremely high as a result of which the ICC will never be able to deal with every single person who has committed international crimes. This will result in an impunity gap, which arises in part when perpetrators leave the country where the crime was committed and seek asylum elsewhere. Recipient countries can play an important role in filling this gap by adopting a universal jurisdiction approach that allows for legal action against individuals who have committed crimes outside their borders.

Given the fact that national implementation of international humanitarian and criminal law will continue, the experience of Canada in this area might serve as one example of how a national prosecution policy for war criminals can be achieved. This paper will explain the measures taken by the government of Canada to address the problem posed by the presence of persons in Canada who have been involved in genocide, war crimes or crimes against humanity. It will discuss the policy of the Canadian government in dealing with persons involved in serious international crimes, the implementation of that policy, both from a legal and operational perspective and the result of this policy.

¹ See Rome Statute (<http://www.un.org/law/icc/statute/romefra.htm>), article 17 which says that the ICC will only take jurisdiction when such countries are unwilling or unable to undertake a prosecution.

Historical and global context

Over the last 50 years and especially the last 10 years, there have been a number of legal responses to deal with the perpetrators of genocide, war crimes and crimes against humanity. They can be roughly divided into two types of responses, namely prosecutions and civil remedies.

Prosecutions of war criminals cover a wide spectrum both from a historical perspective and in the variations used. After the Second World War criminal prosecutions took place with a number of different formats, from the two International Military Tribunals in Nuremberg (with representatives of the US, UK, USSR and France) and Tokyo (with representatives from China, UK, USSR, US, Australia, Canada, France, the Netherlands, New Zealand, India and the Philippines) to special military courts (of the US, UK, France and the USSR) exercising jurisdiction in Germany, to special criminal domestic courts and tribunals in various countries in Europe, the Far East and Australia to ordinary criminal courts in the same continents. Thousands of trials were conducted in the immediate aftermath of the Second World War which trickled down to dozens a year and then even less as that War was replaced in importance by the Cold War in the early fifties and afterwards. Sporadically, prosecutions of WWII criminals made the news in the eighties and nineties, as was the case in Australia, UK, Canada, France, Germany, the Netherlands and Italy.

The fact that there were few war crimes trials between 1950 and 1990 had nothing to do with a reduction in the number of armed conflicts or repressive regimes since countless war crimes and crimes against humanity (and even genocides depending how this term is interpreted) occurred during that time period. The political climate stemming from the Cold War mentality was the culprit for inaction both at the domestic and international level. While protection of human rights has been given a great deal of impetus with the adoption of international instruments, it had to compete with the concept of national sovereignty which had seen a resurgence after the Second World War. The strong adherence to sovereignty, especially by socialist and communist regimes, meant that examination of the internal affairs of individual states was all but impossible. The consequences were that atrocities could be committed with impunity, that the United Nations Security Council could not act because of a lack of consensus and that governments with an interest in taking perpetrators to court had difficulty obtaining evidence.

This all changed in the early nineties with the fall of the Berlin wall, the end of the Cold War and the transition in large parts of the world from socialist/communist regimes to democratic governments meant that the balance between protection and enforcement of human rights on one hand and the strict adherence to the principle of sovereignty on the other was slowly tipping towards the former. The willingness of the international community to address the problem of war criminals more effectively was one important example of this new world view.

The last decade has seen a veritable explosion, both internationally and domestically, in the willingness of the international community to create opportunities for and to conduct war crimes trials. The formation of the ICTY in 1993, the ICTR in 1994, both as a result of consensus in the Security Council to address the terrible experiences in the Former Yugoslavia and Rwanda attests to this new-found commitment. The establishment of the International Criminal Court² was not only supported by a large number of governments and of civil society around the world but also functioned as a catalyst for changes in domestic legislation³ and the concomitant willingness for the prosecution of nationals as war criminals in especially Europe, as well as Ethiopia and Rwanda.

Not only has this new attitude in the international community meant a new interest in the application of the substantive law to war criminals but also in the attempt to reach further to capture them. While after the Second World War the jurisdiction of the court to try war criminals was based on narrow grounds related to a strong connection to the state in which the court operated such as the territorial or nationality (either active or passive) principle, there is now a renewed use of the application of universal jurisdiction⁴, although at the moment still with some connection to the state such as the presence of the perpetrator.

Recently there have over a dozen cases using this type of jurisdiction, namely four cases in Germany between 1997 and 2001 for genocide and war crimes against persons from the former Yugoslavia (all resulting in convictions); three cases in Denmark, one arising out of the Yugoslav conflict (in 1996 resulting in a conviction), one against an Iraqi general (charged in 2002 but who is at large at the moment) and one against an Ugandan national (charged in 2004 although based on common criminal offences such as robbery and hostage taking committed in Uganda for which Denmark has also jurisdiction); two cases in Belgium, arising out of the Rwandan genocide and resulting in the convictions of the four persons charged in 2001 and the laying of charges against two others in 2004; one conviction of a Rwandan genocidaire in Switzerland in 1997; one conviction of crimes against humanity in the Netherlands in 2004 against a person from Congo who was active during the Mobutu regime; one case involving torture and kidnapping committed in the 1990s against an Afghani warlord in the UK in 2003; one charge laid, but subsequently lead to an acquittal in Austria in 1995, against a person from the former Yugoslavia.

² As of July 1, 2004 139 countries have signed or acceded to the Rome Statute while 94 have ratified it (http://web.amnesty.org/web/web.nsf/pages/icc-signatures_ratifications-eng); the ICC came into being on July 1, 2002 when 60 states had ratified the Statute.

³ Over 20 countries have enacted or amended existing legislation to allow for the prosecution of war crimes, crimes against humanity and genocide (Armenia, Australia, Belgium, Bosnia-Herzegovina, Canada, Congo-Brazzaville, Costa Rica, Denmark, Estonia, Ethiopia, Finland, Georgia, Germany, Ireland, Malta, the Netherlands, New Zealand, Rwanda, South Africa, Spain, Sweden and the United Kingdom) while another 7 (Argentina, Brazil, Ecuador, Panama, Portugal, Uruguay and Venezuela) are in the process of doing so (see <http://web.amnesty.org/web/web.nsf/pages/implementation>).

⁴ According to Amnesty International 15 countries have used universal jurisdiction since the Second World War to investigate or prosecute alleged war criminals (<http://web.amnesty.org/web/web.nsf/pages/uj-index-eng>).

A number of countries have established special war crimes units in order to investigate such crimes more efficiently (Canada, Denmark, Ethiopia, Norway, the Netherlands and the United Kingdom) and international efforts are underway for sharing of information and closer co-operation between countries with such special units or with a special interest in war crimes investigations.

Another recent manifestation of this phenomenon has been the establishment of internationalized courts and tribunals which use a combination of domestic and foreign judges who apply a mix of international and domestic law. The criminal tribunals in East Timor, Kosovo and Sierra Leone are already in existence while negotiations have been recently completed for a similar structure in Cambodia.

Still within the realm of criminal remedies have been two important developments in extradition law, both of which have to do with the notion of immunity for heads of state. Traditionally, heads or ex-heads of state cannot be prosecuted or extradited anywhere for any crime committed while functioning as head of state. An exception has now been made by the British House of Lords in the Pinochet case⁵ and by the ICTY when it indicted the Yugoslav president Milosevic⁶, which has been confirmed by the International Court of Justice in the Democratic Republic of the Congo versus Belgium case⁷. In both situations, one involving an ex head of state accused by a domestic court, and the other a serving head of state indicted by an international tribunal, it has now been accepted that immunity cannot be invoked in this specific situations if the crime in question is torture, genocide, a war crime or a crime against humanity. The result of these two developments has been that some (ex-) heads of state have considered it prudent not to leave their countries for fear of extradition requests⁸. As well, in the Pinochet situation, Argentina and a number of European states, apart from Spain, which initiated the original request for his extradition, also wanted him for trial in their countries.

The civil side of conducting trials has equally benefited from the change in global outlook in respect to war criminals. The only civil remedy applied before 1990 was the revocation of citizenship of WWII war criminals in the United States and Canada as a prelude to deporting persons to their country of origin. On the whole it has become clear that prosecution of WWII war criminals in recent times has been less successful than the revocation/deportation remedy. Of the less than 10 prosecutions attempted in Canada, Australia and the United Kingdom in the last fifteen years, only one was successful, namely in the United Kingdom in 1999⁹. The success rate for the revocation/deportation approach has been much higher¹⁰, especially in the United States

⁵ See Colin Warbrick, Elena Martin Salgado and Nicholas Goodwin, "The Pinochet Cases in the United Kingdom", in Yearbook of International Humanitarian Law – Volume 2, 1999, pages 91-117.

⁶ See <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>

⁷ See <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>.

⁸ As well, the Pinochet case is cited as inspiration to attempt to bring the ex-dictator of Chad, Hissene Habre, to trial in Senegal where he is living at the moment; see the Washington Post, November 27, 2000.

⁹ Namely the Sawoniuk case; for a commentary, see Ian Bryan and Peter Rowe, "Role of evidence in war crimes trial the Sawoniuk case", in Yearbook of International Humanitarian Law – Volume 2, 1999, pages 307-323 ; another case, Serafimovich, was not successful. Canada launched four cases between 1985 and

However, in the last decade a number of countries became more serious in applying the so-called exclusion clauses of the 1951 Refugee Convention. One of these clauses states that a person, who has committed crimes against peace, war crimes or crimes against humanity, is not entitled to become a refugee in the country of refuge. Countries such as Australia, New Zealand, France, Belgium, the Netherlands, the United Kingdom, the United States and Canada have started to apply these clauses more rigorously and in some cases have also deported persons against whom such allegation were levelled.

In the same time period another type of civil action has gained ground, primarily in the United States, by suing perpetrators of war crimes and crimes against humanity. The action is not taken by the government in such cases but by private citizens seeking monetary compensation for the pain suffered by them as victims of such atrocities. A combination of the provisions in the *Alien Tort Claims Act* and *Torture Victim Protection Act* allows a US court to take jurisdiction if a perpetrator has been served with court documents while on US soil¹¹. There is similar legislation in some South American countries. A variation of a victim using the route of the private suit was unsuccessful in Canada, primarily because the suit was directed at a foreign government rather than a national of that country¹².

Lastly, an entirely different means to confront the past has been utilized by a number of countries, namely the route of truth and reconciliation commissions. They preferred a more contextual approach as opposed to bringing to justice a limited number of individuals. The best known are such commissions in South America (Bolivia, Uruguay and Argentina in the eighties and Chile in the nineties), Latin America (El Salvador and Guatemala in the nineties) and Africa (Uganda and Zimbabwe in the eighties, Chad, South Africa and Rwanda in the nineties and even more recently in Nigeria and Sierra Leone), although there have also been such work done in the Philippines and Germany¹³.

1990; they were the cases of Finta, Pawlowski, Reistetter and Grujicic. Only the Finta case was completed at trial where he was acquitted which decision was upheld by both the Ontario Court of Appeal and the Supreme Court of Canada (For trial decision, see 69 O.R. (2nd) 557 (Ont. H.C.); for the pre-trial motions, see 50 C.C.C. (3d) 236 (Ont. H.C.); for the Ontario Court of Appeal decision, see 73 C.C.C. (3d) 65 (O.C.A.); for the Supreme Court decision, see [1994] 1 S.C.R. 701 (S.C.C.)). There have been three criminal prosecutions in Australia, namely the cases of Berezovsky, Wagner and Polyukhovich, none of which resulted in a conviction; the decision of the High Court of Australia regarding pre-trial motions in the last case can be found in 101 Australian Law Reports 545 and 91 International Law Reports 1.

¹⁰For Canada, see Canada's War Crimes Program, Annual Report 2002-2003.

(<http://www.justice.gc.ca/en/dept/pub/cca/report0203/01>); for the US, see <http://www.house.gov/judiciary/rosenbaum071103.htm>

¹¹ For instance by the Center for Justice & Accountability in San Francisco (<http://www.cja.org/>)

¹² See Bouzari case, Ontario Court of Appeal, June 30, 2004 (<http://www.canlii.org/on/cas/onca/2004/2004onca11204.html>).

¹³ For an overview of the various means of bringing war criminals to justice see: *Judging War Criminals* by Yves Beigbeder (MacMillan Press, 1999); for truth commissions, see *Human Rights Quarterly*, Volume 16, Number 4, pages 597-675, articles by Priscilla B. Hayner "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" and Mark Ensalaco "Truth Commissions for Chile and El Salvador: A Report and Assessment".

Finally, sometimes more one than remedy to deal with atrocities have been employed. The Rwandan genocide resulted in the establishment of an international tribunal, prosecutions of its own nationals by Rwanda, prosecutions by other countries, deportations, transfers to the ICTR tribunal and a Truth and Reconciliation Commission. In Sierra Leone a Truth and Reconciliation Commission is active at the same time as the Special Court for Sierra Leone.

Policy of Canada

The policy of the Canadian Government is unequivocal that Canada is not and will not become a safe haven for persons who have committed war crimes, crimes against humanity or other reprehensible acts regardless of when or where they were committed.

The government of Canada has the ability to take action against individuals who are suspected of committing modern war crimes or crimes against humanity (Canada still also pursues Second World War criminals but that program which is administered by the RCMP and Justice is outside the parameters of this paper) by using the most appropriate of seven complementary tools: criminal prosecution, extradition to other countries, transfer to the international tribunals or future International Criminal Court, revocation of citizenship, denial of access to Canada, denial of refugee protection and deportation.

Because of the specific requirements of each remedy some have been and will continue to be used more than others. For instance, in order to extradite a person to another country or to transfer them to an international tribunal the person has to be in Canada and Canada has to have received a request for extradition from that country or organization; to date, this has only happened once, namely in the case of Rauca in the eighties involving a person who had been involved in atrocities in WWII in Lithuania. Similarly, revocation of citizenship can only be used if a person has already acquired such status and since the Department of Citizenship and Immigration has put in place rigorous checks during the citizenship procedure and during the process of granting permanent resident status which proceeds it, only a relatively few people have and will be able to get through these screens.

For those reasons, the prosecution option and the three immigration remedies--denial of access to Canada, denial of refugee protection and deportation when in Canada--are the most obvious legal weapons against human rights abusers who are in Canada or want to come here.

Implementation of policy

One of the unique aspects of the war crimes program is that there are actually three distinct war crimes units within the federal government, namely the Crimes against Humanity and War Crimes Section within the Department of Justice; the War Crimes Section of the Royal Canadian Mounted Police (RCMP); and the Modern War Crimes Section of the Department of Citizenship and Immigration. This is the result of historical developments. The division of labour between the three departments is in general quite

clear in that the RCMP conducts investigations for the purpose of laying charges for criminal prosecutions and that the Department of Justice prepares these cases for criminal court while the Department of Citizenship and Immigration (CIC) (the Canadian Border Services Agency or CBSA since December 12, 2003) ensures that persons involved in war crimes, genocide or crimes against humanity will not enter Canada or when have been able to come into Canada are removed or are not given asylum.

The three War Crimes Sections have developed a modus operandi which processes in an efficient and coherent manner all allegations which have been received by the government of Canada. The Operations Committee makes an assessment of each individual allegation to determine whether the allegation should be investigated by the RCMP/Justice for possible prosecution or by the Department of Citizenship and Immigration in order to prevent persons from obtaining refugee status, becoming an immigrant and to remove them from Canada.

If the allegation discloses a possible war crime, genocide, a terrorist activity or torture, the file is automatically referred to the RCMP/Justice. If the allegation discloses a crime against humanity the file is not automatically referred but a further examination is conducted to assess the seriousness of the crime against humanity. Only for the most serious ones the RCMP/Justice will open their own file. So far over 1500 allegations of atrocities have been examined by the interdepartmental operations group of which about 5% were referred to the RCMP/Justice.

This system ensures that Canada's international obligations to investigate and prosecute persons who have been involved in atrocities are respected without compromising the policy of zero tolerance for war criminals by using immigration remedies if it is not possible or necessary to utilize the extradition or prosecution option, thereby preventing that Canada becomes an attractive place for human rights abusers to hide.

When a case has been determined to have potential for a criminal investigation as opposed to a decision to apply only immigration remedies, it will be added to the Justice/RCMP inventory. This inventory consists at the moment of 85 files with allegations stemming from events, which occurred in 25 countries on four continents. In order to prioritize these files in a manner, which will ensure that the most important files will receive immediate attention while the other files will still be developed but at a slower pace, a mechanism incorporating a number of factors was developed by representatives of the three sections.

The most important of these factors are:

- the allegation discloses either personal involvement or command responsibility, only those files with allegations of war crimes (in international armed conflicts), genocide, torture or terrorism and which show personal involvement or command responsibility will remain in the Justice/RCMP inventory;
- there is a good possibility of access to corroborative evidence; this requirement relates primarily to the ability of the RCMP/Justice to secure the co-operation of foreign governments or international tribunals to locate witnesses or provide other

- mutual legal assistance; however, not only evidence stemming from witnesses can be considered under this factor but also documentary evidence from a reliable source as a result of a large, specific study regarding the commission of atrocities which has attached a listing of names (such as the work of Truth Commissions);
- the seriousness of the allegations; an allegation of murder should rank higher than allegation of unlawful detention;
 - the presence of victims or witnesses in Canada; this would give a case a higher priority than a case of similar seriousness where all the testimonial evidence is in other countries; similar approach will be taken where witnesses or victims are not in the country of origin or Canada but a third country from which co-operation can be expected;
 - if it is impossible to remove the person from Canada under immigration legislation, either because the person is a Canadian citizen or the person cannot be removed as a result of a substantial risk of torture upon return, it should result in a higher priority than a case of a similar nature in terms of seriousness and access to evidence;
 - the fact that there is a reasonable prospect that the person will be subject to a fair and real prosecution in another country will result in a lower priority;
 - the ability to group cases; if there is a choice between a larger number of cases which can be combined into one larger investigation on one hand and an investigation pertaining to only one person from a country with which no previous contact has been made, the larger investigation should prevail;
 - ongoing parallel investigation; if an investigation with respect to the same persons or group of persons is taking place, either in Canada, other countries or by international tribunals or the International Criminal Court, this fact should weigh positively for the ranking of a file;
 - the ability to conduct research to test credibility; if a file shows a prima facie problem with the credibility of the allegations and this can be confirmed by research in a relatively easy fashion, this should be done as soon as possible.

Legal basis of implementation of policy

In determining whether or not to pursue the prosecution option in a given case, Canada takes into account its international obligations related to the prosecution or extradition of war criminals. In international law, states incur obligations from the operation of conventional or customary international law. In conventional international law, the instruments which are applicable are the *1949 Geneva Conventions and Additional Protocols*, the *Genocide Convention*, the *Convention against Torture*, and various terrorism conventions, the latter two in so far as the activities mentioned in these conventions can also amount to war crimes or crimes against humanity. Crimes against humanity finds its source in customary international law.

The four *Geneva Conventions* are primarily directed towards international armed conflict, that is, armed conflict between two High Contracting Parties or situations of occupation of territories. The Conventions can also apply to non-international armed conflicts where the parties to the conflict have agreed to apply the provisions of the Conventions.

The four *Geneva Conventions* contain similar definitions of grave breaches or war crimes, that is, serious breaches of the obligations under the Conventions, and require High Contracting Parties to take the following measures with respect to grave breaches:

- enact legislation to provide penal sanctions for persons committing (or ordering to be committed) any of the grave breaches of the Convention;
- search for persons alleged to have committed such grave breaches;
- bring such persons, regardless of their nationality, before their own courts.

On the latter point, if the state prefers, it may "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." This is the basis for what is known as the "prosecute or extradite" provision of the *Geneva Conventions*.

Additional Protocol I, Article 88 imposes on High Contracting Parties the obligation to provide the greatest measure of assistance in connection with criminal proceeding brought in respect of grave breaches of the *Conventions* or of the *Protocol*. States are required to co-operate in the matter of extradition and give due consideration to the extradition request of the State in whose territory the alleged offence has occurred.

While there is no positive obligation on States Parties to the *Genocide Convention* to prosecute persons accused of committing genocide unless the genocide was committed in the States' territory, there is a positive obligation on States Parties to grant an extradition request "in accordance with their laws and treaties".

In addition to being covered by the grave breaches provisions of the *Geneva Conventions*, the prohibition against torture is also covered by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. This convention applies during times of armed conflict, as well as during times of peace.

The convention places an obligation on States Parties to make acts of torture offences under their criminal law and, if persons alleged to have committed such offences are found on the State's territory, an obligation, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution or extradition.

At the moment there are twelve conventions which regulate certain aspects of terrorism and to which Canada is a party. They are:

Convention for the Suppression of the Unlawful Seizure of Aircraft (1971) (the Hijacking Convention);

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1973);

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1977);
Convention on the Physical Protection of Nuclear Material (1980);
Convention Against the Taking of Hostages (1983);
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) (IMO Convention);
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988);
Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation (1989);
Convention on the Marking of Plastic Explosives for the Purposes of Detection (1991);
Convention on the Safety of UN and Associated Personnel (1995);
International Convention for the Suppression of Terrorist Bombings (1997);
International Convention for the Suppression of Terrorist Financing (1999).

They all contain a duty to extradite or prosecute of which the latter is expressed as follows: “The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”

Although it is argued that there exists a general duty to prosecute or extradite those accused of crimes against humanity, there is no convention which covers crimes against humanity stating this. Therefore, one must look to customary international law to determine whether an obligation exists to extradite or prosecute persons who have committed crimes against humanity.

Although Canada is not party to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, this Convention could be considered, in some respects, to be an expression of customary international law. The Convention does not contain a prosecute or extradition provision but reflects the general obligation on States to extradite those accused of war crimes in accordance with international law.

There are also two United Nations General Assembly Resolutions which speak to the issue of war crimes and crimes against humanity in this context. The 1970 *UN Resolution on War Criminals* only refers to extradition in the same general terms as the convention mentioned in the preceding paragraph. The 1973 *UN Resolution on Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity* states that war crimes or crimes against humanity, wherever committed, are subject to investigation and prosecution. Although it states that, as a general rule, prosecution should occur in the

countries in which the offences are committed, it does not exclude prosecution in other countries. There is no explicit “prosecute or extradite” provision but there is a call for cooperation among states in the prosecution of such crimes. Furthermore, whether UN General Assembly Resolutions constitute customary international law is a controversial issue among international legal scholars and not free from doubt by any means.

The statutes of the two International Criminal Tribunals, established by the UN Security Council and thus binding on all states, do not contain “prosecute or extradite” provisions with respect to alleged criminals within their jurisdiction. There are, however, obligations on States to cooperate with the Tribunals in the investigation and prosecution of accused persons, as well as the obligation to transfer accused persons to the Tribunals. A similar limited obligation exists with respect to the surrender of persons under the Statute of the International Criminal Court.

The following conclusions, which underlie Canada’s policy for pursuit of an investigation for possible prosecution or extradition can be drawn from the above:

- there is a duty to extradite or prosecute persons who have committed war crimes during international armed conflicts;
- there is also a duty to extradite persons who have committed genocide;
- there is a duty to extradite persons who committed genocide, war crimes or crimes against humanity in the Former Yugoslavia since 1991 or in Rwanda in 1994 to the International Criminals Tribunals established for this purpose;
- there is a duty to surrender persons who have committed genocide, war crimes or crimes against humanity to the International Criminal Court as of July 1, 2002;
- there is at the moment no positive legal obligation to prosecute or extradite people who have committed war crimes during non-international armed conflicts or who have committed crimes against humanity unless:
 - these same acts also amount to torture;
 - these acts fall within the definitions of the nine “terrorism” conventions;
 - it has been determined that there is sufficient evidence to commence a prosecution for torture or for the limited number of terrorist acts.

Legal means for implementing policy

Criminal prosecution

In the year 2000 the *Crimes against Humanity and War Crimes Act*¹⁴ came in force on October 23 after Royal Assent had been received on June 29, 2000 which enabled

¹⁴ Statutes of Canada 2000, Chapter 24; the text can be found at <http://laws.justice.gc.ca/en/C-45.9/index.html>. Together with the new *Extradition Act* which received Royal Assent on June 17, 1999 and which allows extradition to the two International Criminal Tribunals and the International Criminal Court, Canada has now all the necessary criminal legislation in place to deal with war criminals.

Canada to ratify the *Rome Statute of the International Criminal Court* on July 7 of the same year¹⁵, the 14th country to do so.

This new legislation defines genocide, which was not an offence before in Canada, war crimes and crimes against humanity offences as follows:

- “crime against humanity” means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is 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.
- “genocide” means 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 in the 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.
- “war crime” means 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, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.¹⁶

The *Act* also contains a specific reference to the Rome Statute by indicating that “for greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.”¹⁷

Command/ superior responsibility¹⁸ and the defence of superior orders¹⁹ are defined in detail in the *Act* by using the language of the *Rome Statute*²⁰.

Other highlights of this *Act* are:

- new offences have been created to protect the administration of justice at the ICC, as well as the safety of judges, officials and witnesses; Canada can prosecute any individual present in Canada for any of these offences;
- it recognizes the need to provide restitution to victims;

¹⁵ See <http://www.un.org/law/icc/statute/status.htm>.

¹⁶ Subsections 4(3) and 6(3); a distinction is made in the legislation whether an offence is committed within Canada for which prosecution is possible after the *Act* came into force or whether an offence is committed outside Canada for which prosecution is possible before October 23, 2000.

¹⁷ Subsections 4(4) and 6(4); the reference is stated slightly different in the two sections; section 4(4) is more positive in saying that the Rome Statute is customary international law after July 17, 1998 while section 6(4) states that the crimes set out in the Statute “may be crimes according to customary international law before that date”.

¹⁸ Subsections 5(1), 5(2), 7(1) and 7(2).

¹⁹ Subsections 14(1) and 14(2).

²⁰ Articles 28 and 33.

-it created new proceeds of crime offences and mechanisms to enforce orders of the ICC for restraint and forfeiture of assets. Money obtained will be paid into a Crimes Against Humanity Fund, established under the *Act*, and will be distributed by the Attorney General of Canada to victims of offences under the *Act* or the *Rome Statute*.

Canada has the jurisdiction to commence a prosecution in the following circumstances:

- (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 Canada²¹.

Immigration remedies

There are two provisions in the *Immigration and Refugee Protection Act*²² which deal with war crimes and crimes against humanity, namely section 35(1)(a)²³ and exclusion ground F(a) which is contained in the Schedule attached to the *Act*.

Section 35(1)(a) renders inadmissible to Canada persons who there are reasonable grounds to believe have committed an act or omission outside Canada which constitutes genocide, a war crime or crime against humanity as described in the *Crimes against Humanity and War Crimes Act*. Exclusion ground F(a), which is derived from the 1951 *Refugee Convention* and came into force on January 1, 1989, states that the provisions of the *Refugee Convention* shall not apply to any refugee claimant with respect to whom there are serious reasons for considering that this person has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

The main difference between these two provisions is that while the schedule containing exclusion ground F(a) is only mentioned twice in the *Act* section 35(1)(a) is found throughout the *Act* and as such has a much wider application. For instance, persons who have come to Canada and claimed refugee status can be refused access to the Convention Refugee Determination Division of the Immigration Refugee Board or can be refused landing after having obtained refugee status if they had been involved in war crimes and crimes against humanity; as well, permanent residents who usually have a full appeal to the Immigration Appeal Division of the Immigration and Refugee Board are not entitled to this right if they fall within the provisions of section 35(1)(a).

²¹ Section 8.

²² The *Act* came into force in June 28, 2002 as Statutes of Canada, Chapter 27, and can be found at the following website: http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-11/C-11_4/C-11_cover-E.html

²³ This section already existed in almost identical format in the predecessor of the *Immigration and Refugee Protection Act*, namely the *Immigration Act*, since 1993 as section 19(1)(j).

In addition to section 35(1)(a), the *Immigration and Refugee Protection Act* contains a unique feature compared to immigration legislation of other countries, namely section 35(1)(b) and section 16 of the *Immigration Regulations*²⁴ which read as follows:

“being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*;”

“For the purposes of paragraph 35(1)(b) of the Act a prescribed official in the service of a government is a person who, by virtue of the position they hold or held, is or was able to exert a significant influence on the exercise of government power or is or was able to benefit from their position, and includes

- (a) heads of state or government;
- (b) members of the cabinet or governing council;
- (c) senior advisors to persons described in paragraph (a) or (b);
- (d) senior members of the public service;
- (e) senior members of the military and of the intelligence and internal security services;
- (f) ambassadors and senior diplomatic officials; and
- (g) members of the judiciary.”

Designation of such regimes is made in consultation with the Department of Foreign Affairs. The following are among the factors considered by the Minister when determining whether a regime should be designated under the Act: condemnation by other countries and organizations; the overall position of the Canadian government including whether a refugee claim by a senior member of the government would undermine Canada’s strong position on human rights; the nature of the human rights violations; and immigration concerns such as the number of persons seeking to come to Canada from that specific country and whether there might be a concern for the protection of Canadian society.

The Minister of Citizenship and Immigration has designated nine regimes under the 35(1)(b) regime, namely:

- the former Marxist regime of Afghanistan (1978-1992);
- the former military governments in Haiti (1971-1986, and 1991 to 1994 except the period August-December 1993);
- the Bosnian Serb regime between 27 March 1992 and 10 October 1996;
- the Siad Barré regime in Somalia (1969-1991);
- the governments of Ahmed Hassan Al-Bakr and Saddam Hussein in power since 1968; the government of Rwanda under President Habyarimana between October

²⁴ These two sections already existed in almost identical form in the predecessor of the *Immigration and Refugee Protection Act*, namely the *Immigration Act*, since 1993 as sections 19(1)(l) and 19(1.1).

- 1990 and April 1994, as well as the interim government in power between April 1994 and July 1994;
- and the governments of the Federal Republic of Yugoslavia and the Republic of Serbia (Milosevic) between February 28, 1998 and October 7, 2000.
- the Taliban regime in Afghanistan from September 27, 1996
- the Mengistu regime in Ethiopia between September 12, 1974 and May 21, 1991.

Practical means of implementing policy

General

Since 1998 when the government embarked on an aggressive war crimes program resources allocated to the three departments per year have been as follows:

- Justice: \$5.739 million Canadian (for both WWII and modern cases);
- Citizenship and Immigration: \$9.179 million Canadian (for modern case);
- The RCMP: \$682,000 Canadian (for modern cases).

RCMP

The RCMP has responded to allegations of war crimes and crimes against humanity from victims, witnesses, foreign governments, ethnic communities, non-governmental organizations (NGO), open source information as well as allegations, which may have come to light through refugee, immigration and citizenship applications.

The RCMP works closely with the DOJ Crimes Against Humanity and War Crimes Section to investigate allegations arising out of World War II. This process requires that investigators, relying on archival research by DOJ historians, confirm the presence of suspects in Canada and develop initial witness lists. Working with DOJ counsel, RCMP officers arrange and conduct witness interview trips with the assistance of foreign governments and police officials under bilateral Memoranda of Understanding; these trips are mainly to central and eastern Europe. The investigation results are then reviewed by DOJ counsel and RCMP investigators to determine if there is sufficient evidence to bring criminal charges. If not, a further analysis of the evidence is conducted and, if warranted, revocation and/or deportation proceedings are initiated. Since 1996, the RCMP has investigated a number of suspects alleged to have committed war crimes/crimes against humanity during World War II. Many of these files are concluded because the suspects have died or are in poor health. Other files have been concluded due to a lack of evidence. The majority of the most recent WW II allegations fall within the latter category.

With respect to modern crimes against humanity, the RCMP War Crimes Section has received allegations regarding persons from Afghanistan, Angola, Bosnia, Burundi, Chile, China, Colombia, Croatia, El Salvador, Ethiopia, Guatemala, Honduras, Iraq,

Lebanon, Nigeria, Peru, Philippines, Rwanda, Senegal, Serbia & Montenegro, South Africa, Sri Lanka and Sudan. In essence, individuals assigned to internal security duties in countries known to violate basic human rights are potential targets for investigation if they elect to come to Canada. Additionally, as a result of one RCMP investigation, a Canadian citizen has been criminally charged with the hostage taking of U.N. observers during the Bosnian conflict; this case is currently before the Canadian courts. Other individuals alleged to have engaged in crimes against humanity from recent conflicts might not be prosecuted; nevertheless, the information acquired by the RCMP regarding these individuals is often instrumental in their exclusion from refugee protection and removal from Canada²⁵.

Department of Justice

The Crimes Against Humanity and War Crimes Section of Canada's Department of Justice is located in Ottawa and consists of eleven lawyers, six historians/analysts, two paralegals, a historical support group, legal assistants and support staff. The Section also hires contract analysts and related experts on an *ad hoc* basis as required.

The Section's primary purpose is to participate in the investigation of allegations that individuals, presently in Canada, have engaged in the commission of the crimes enumerated in the *Crimes against Humanity and War Crimes Act*, regardless of where or when those offences were committed. These complex and multi-faceted investigations are conducted in conjunction with officers from the RCMP War Crimes Section. Initial archival checks and basic research activities are carried out by in-house historians and analysts who possess background knowledge of the area where the crimes allegedly occurred. RCMP officers assigned to the file, working with Justice counsel, prepare an initial witness list, and conduct interviews with individuals identified as possible witnesses in the allegation documents or by the complainant. A more extensive witness list is then produced, and interviews are conducted by RCMP officers working in conjunction with Justice counsel. These interviews can take place anywhere in the world. Throughout the investigation process, in-house historians and analysts provide ongoing and ad hoc advice as required. As the investigation nears completion, they begin the search for and initiate contacts with outside experts or analysts to provide expert evidence at trial.

Once an investigation is completed, counsel and RCMP officers jointly evaluate the evidence obtained during the investigations. If sufficient evidence is found which substantiates the allegations, counsel prepare reports recommending either that the file should proceed to enforcement action under the *Immigration Act* and/or the *Citizenship Act* or that the Attorney General consider laying an indictment under the *Crimes Against Humanity and War Crimes Act* or the *Criminal Code*.²⁶

²⁵ See Annual Report of Canada's War Crimes Program, 2002-2003. (<http://www.justice.gc.ca/en/dept/pub/cca/report0203/04.html>).

²⁶ See Annual Report of Canada's War Crimes Program, 2001-2002. <http://www.cic.gc.ca/english/pub/war2002/section03.html#b>

Citizenship and Immigration/Canadian Border Services Agency

Citizenship and Immigration Canada (CIC)/(Canadian Border Services Agency (CBSA) takes a three-pronged approach in dealing with modern-day war criminals: preventing suspected war criminals from reaching Canada by refusing their immigrant, refugee or visitor visa applications from abroad; excluding them from the refugee determination process in Canada; and removing war criminals who have already entered Canada through the immigration inquiry process. Most applicants overseas are identified through the visitor visa screening process. The majority of modern war criminals in Canada are not permanent residents but have come to Canada as refugee claimants. Many in this group have been able to bypass the overseas screening process by travelling to Canada with fraudulent or improperly obtained travel documents, often posing as persons from countries whose citizens do not require a visa to visit Canada.

A Resource Centre, established as part of the CBSA Modern War Crimes Section, was designed primarily to provide research support to regional field officers, immigration analysts and other enforcement partners in identifying visa applicants and individuals in Canada who may have been involved in war crimes. The Resource Centre also serves as a central repository of current information such as news reports or bulletins gathered from media sources and international human rights organizations.

The Modern War Crimes Intelligence Co-ordination Unit is another result of the government's review of war crimes operations in 1997 and presently consists of a Director, a Senior Intelligence Adviser, and five analysts, with some additional staff hired on contract. As the Modern War Crimes Section was formed, it became apparent that the connection between intelligence information and war crimes investigations needed to be strengthened. Information and intelligence relevant to war crimes, previously held randomly throughout other departments, is now co-ordinated by the Intelligence Unit to assist in examining war crimes allegations. Functioning as a "central clearing house" for intelligence within the government, the Intelligence Co-ordination Unit is in contact with all other departments that might have intelligence information concerning governments, countries, places or perpetrators of war crimes that would enhance Canada's Crimes Against Humanity and War Crimes Program. Given that most war crimes cases are dealt with under the *Immigration and Refugee Protection Act*, it was decided to place co-ordination of modern war crimes intelligence within CIC.

Apart from resources at the National Headquarters in Ottawa, there are also specialized war crimes units in the three major urban centers of Toronto, Montreal and Vancouver. The total resources dedicated to war crimes work within Citizenship and Immigration, both in Canada and abroad is about 70 persons.

Results

RCMP and Justice have finalized the process of setting priorities for the 85 cases in their inventory and are investigating a number of cases.

Since the inception of the program in 1998, a total of 2366 persons complicit in war crimes or crimes against humanity have been refused visas to come to Canada. CIC intervened on behalf of the Minister at the Immigration and Refugee Board (IRB) in 1028 cases, and 382 cases, thus far, having been excluded from the refugee determination process by the IRB. A total of 281 persons complicit in war crimes or crimes against humanity have been removed from Canada to date²⁷.

Conclusion

Recent history suggests that the dichotomy between the principle of state sovereignty, which for so long discouraged outside examination of state action within its borders on one hand, and respect for human rights, which has been expanding steadily since the Second World War, on the other, is being resolved in favour of human rights.

In trying to draw lessons from some of the horrors we have witnessed, the international community has learned that the notion of impunity—the lack of negative consequences for violators of human rights—is an integral part of the cycle of atrocities. If we are going to break that cycle, we have to attack impunity. Simply put, human rights abusers need to be taught that war crimes do not pay.

One way of doing this is to have a system in place where, similar to national criminal law systems, perpetrators are investigated and then brought to justice. Whether they are brought to justice by the international community or by the courts and tribunals of individual countries may matter less than the fact that perpetrators know that at some point in the future their actions will have consequences and that they will not be able to act with impunity. What does matter in this war against impunity is the effectiveness of the remedies employed. For instance, it could be argued that deporting war criminals to their country of origin is at best an imperfect response when assessed against the desire to provide a deterrent, exact retribution or compensate the victims of atrocities. Nevertheless, like other efforts made in this area in the last decade, it is a first and an important step to show violators of human rights that their actions do have consequences.

²⁷ See Annual Report of Canada's War Crimes Program, 2002-2003. (<http://www.justice.gc.ca/en/dept/pub/cca/report0203/04.html>).

To conclude, Canada's approach provides an example of a combination of immigration remedies with the likelihood of criminal prosecution for the most egregious cases. If this example has resonance in the future with other members of the international community, leading to similar action taken by other countries, the world will become a much smaller and more unpleasant place for human rights abusers .