Chapter 7

William A Schabas

Canada

1 A Short History of Domestic Prosecutions of International Crimes Prior to Implementing Legislation

Canadian case law presents a modest collection of decisions dealing with the law of armed conflict. A handful of reported cases dealt with escaped prisoners-of-war in Western Canada during World War II,[1] applying the 1929 Geneva Convention.[2] Canada was one of the few Allies not to participate actively in the United Nations War Crimes Commission. The war crimes prosecutions in the aftermath of World War II were of modest proportions,[3] although one precedent is still cited today as an authority on command responsibility.[4] Canada then became somewhat of a haven for fleeing Nazis.[5] It was only in the 1980s, under pressure from Jewish organisations,[6] that the Government established a commission of inquiry into the presence of war criminals in Canada. The Commission's president was a distinguished judge, Jules Deschênes.[7] A decade later, he was one of the first judges elected to the International Criminal Tribunal for the former Yugoslavia (ICTY), where he had the distinction of being part of the majority in the famous *Tadic* decision.[8]

The report of the Deschênes Commission identified more than 800 suspected Nazi war criminals who were resident in Canada. Parliament responded by enacting legislation allowing for prosecution of war crimes and crimes against humanity on the basis of universal jurisdiction. The amendments to the Criminal Code[9] authorised the courts to adjudicate crimes committed abroad by foreign nationals, to the extent that (a) they constituted crimes against humanity or war crimes under customary international law, and

1 *R.* v. *Shindler* (1944) 3 WWR 125, 82 CCC 2067 (Alta Police Court); *R.* v. *Brosig* (1945) 2 DLR 232, 83 CCC 199 (1945) OR 240 (1945) 1 WWR 566 (Alta SC, AD); *R.* v. *Kaehler & Stolski* (1945) 3 DLR 272, (1945) 83 CCC 353 (1945) 1 WWR 566 (Alta SC, AD).

2 *International Convention Relative to the Treatment of Prisoners of War* (1931-32) 118 *League of Nations Treaty Series (LNTS)* 343, (1942) CTS 6.

3 Patrick Brode, *Casual Slaughters and Accidental Judgments, Canadian War Crimes Prosecutions, 1944-1948*, Toronto: University of Toronto Press, 1997.

4 *Canada* v. *Meyer*, 4 LRTWC 98 (1948) (Canadian Military Court). See: Howard Margolian, *Conduct Unbecoming: The Story of the Murder of Canadian Prisoners of War in Normandy*, Toronto: University of Toronto Press, 1998.

5 Howard Margolian, *Unauthorized Entry: The Truth about Nazi War Criminals in Canada, 1946-1956*, Toronto: University of Toronto Press, 2000.

6 David Matas, *Justice Delayed: Nazi War Criminals in Canada*, Toronto: Summerhill, 1987.

7 Jules Deschênes, *Commission of Inquiry on War Criminals Report,* Ottawa: Minister of Supply and Services, 1986.

8 *Prosecutor* v. *Tadic*, ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (case no. IT-94-1-AR72).

9 Criminal Code, RSC, 1985, c. C-46.

(b) they had been punishable under Canadian law at the time they were committed. Canada's Constitution makes an exception to the principle of non-retroactivity of criminal offences where these are recognised at international law or the general principles of law recognised by the community of nations.[10]

Investigations of the cases identified in the Deschênes report led to only four prosecutions, none of them successful. The most important of them was that of a Hungarian collaborator named Imre Finta. Finta did not testify in his own defence, and never denied charges that he had participated in the 'de-jewification' of Szeged during the spring of 1944. This involved expropriation, ghettoisation, concentration, entrainment and eventual deportation (primarily to Auschwitz and Birkenau) of all Hungarian Jews, and was unquestionably part of the 'Final Solution'. Finta was charged with crimes against humanity involving the unlawful confinement, robbery, kidnapping and manslaughter of 8,617 Jews. The reasons for Finta's acquittal remain locked in the consciences of the jurors. Subsequent litigation focused on the trial judge's charge to the jury, which may or may not have been decisive in the ultimate determination of guilt or innocence. Essentially, the judge invited the jury to consider that even if Finta had committed the acts charged, they did not rise to the level of crimes against humanity, given that Finta might have assumed he was following lawful orders in the context of resistance to the Soviet troops, who were by then not far from Hungary's borders.

The Ontario Court of Appeal[11] and the Supreme Court of Canada[12] dismissed prosecution appeals directed at obtaining a new trial. *Finta*'s high threshold for the mental element of crimes against humanity has been significantly cut down by the case law of the international criminal tribunals.[13]

Finta dealt a body blow to the political will for war crimes prosecutions. The Canadian Government's focus shifted to immigration legislation as a more effective technique for challenging war criminals,[14] although obviously expulsion and deportation fall short of proper criminal prosecution. After a review of the prosecutions in 1997, the Government revived the war crimes programme and devoted significant resources for investigation and prosecution. It also oriented its work increasingly towards what are called 'modern war crimes', that is, those committed in contemporary humanitarian crises such as the Rwandan genocide, the wars in the former Yugoslavia, and atrocities committed under tyrannical regimes in Afghanistan, Haiti, Iraq and Somalia. This is not to say that there is no further interest in World War II cases. There have actually been several recent successes with respect to former Nazis involving revocation of citizenship, although there is a high rate of attrition as suspects pass away during the proceedings.

---

10 Canadian Charter of Rights and Freedoms, RSC 1985, Appendix II, No. 44, s. 11(g).

11 *R.* v. *Finta*, (1992) 92 DLR (4th) 1 (CA Ont.).

12 *R. v. Finta*, [1994] 1 SCR 701.

13 *Prosecutor* v. *Tadic*, ICTY Judgment of 15 July 1999 (case no. IT-94-1-A), para. 290.

14 For example: *Minister of Citizenship and Immigration* v. *Odynsky*, (2001) 196 FTR 1, 14 Imm LR (3d) 3; *Minister of Citizenship and Immigration* v. *Baumgartner*, (2001) 211 FTR 197, 17 *Imm L Rev* (3d) 85; *Minister of Citizenship and Immigration* v. *Fast*, [2001] 3 FC 373. See, for example: J. Rikhof, 'The Exclusion Clauses : The First Hundred Cases in the Federal Court', (1996) 24 *Imm L Rev* (2nd) 137.

2 Implementing Legislation

2.1 Title

The Canadian legislation intended to implement obligations assumed under the Rome Statute[15] is the Crimes Against Humanity and War Crimes Act (in full, An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts).[16] The Act reflects an important development in international criminal law, namely the elimination of the nexus between crimes against humanity and war crimes. At Nuremberg, the two concepts were intertwined but, as the Appeals Chamber of the ICTY insisted in its first major ruling, "customary international law no longer requires any nexus between crimes against humanity and armed conflict".[17] This progressive development in international law was confirmed by Article 7 of the Statute of the International Criminal Court (ICC). Parliament did not deem it necessary to include a reference to genocide in the short title, given that genocide is widely considered to be an aggravated form of crimes against humanity.[18]

The legislation received Royal Assent on 29 June 2000. Canada deposited its instrument of ratification of the ICC Statute a week later, on 7 July 2000, becoming the fourteenth State party.[19] The Crimes Against Humanity and War Crimes Act came into force on 23 October 2000.[20] It was the first major enactment of its kind in the Commonwealth. The Canadian legislation has been much studied by other legislators in their efforts to implement the Rome Statute in domestic law, in part because of the significant role Canada has played internationally in promoting ratification and implementation. Canadian experts have provided a great deal of guidance to other countries in this area, and they are, inevitably, influenced in their approaches by their country's own legislation.

2.2 Amendments to existing domestic legislation/laws in force

While the Act was aimed at ensuring that Canada can respect the obligations it has undertaken by ratification of the Rome Statute, it was also intended to strengthen the effectiveness of the existing programme for dealing with war criminals within Canada. For this reason, the Act contains several provisions that effect consequential amendments to

---

15 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

16 S.C. 2000, c. 24. See http://laws.justice.gc.ca/en/C-45.9/41465.html#rid-41472 For academic commentary, see: William A Schabas, 'Canadian Implementing Legislation for the Rome Statute', 3 *Yearbook Int'l Humanitarian L.* 337 (2000); Joseph Rikhof, 'Canada and War Criminals: The Policy, the Programme and the Results', in *ICC-International Criminal Court: Implementation in Central and Eastern Europe*, paper presented at Bucharest, 9-11 May 2003.

17 *Prosecutor* v. *Tadic*, note 8 above, para. 78; also paras. 140-141.

18 See, for example, Theodor Meron, 'International Criminalization of Internal Atrocities', 89 *American Journal of International Law (AJIL)* 554 (1995) at 557; 'Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996', UN Doc. A/51/10, p. 86. But see: *Prosecutor* v. *Krstic,* Judgment of 2 August 2001 (case no. IT-98-33-T), paras. 553, 683-684; *Prosecutor* v. *Krstic,* Judgment of 19 April 2004 (case no. IT-98-33-A), paras. 216-229.

19 Canada signed the Rome Statute on 18 December 1998.

20 *Canada Gazette* Part III, p 457, SI/2000-95, Vol. 134.

such existing legislation as the Immigration Act,[21] the Mutual Legal Assistance in Criminal Matters Act[22] and the Extradition Act.[23]

The two-pronged objective of the legislation is also manifested in parallel substantive law provisions, one set being applicable to crimes committed outside Canada at any time, the other to crimes committed inside Canada subsequent to the Act's entry into force.

3 Incorporating the Crimes

The Crimes Against Humanity and War Crimes Act repeals the existing definitions of crimes against humanity and war crimes in the Canadian Criminal Code, which were introduced in 1987 to give effect to the recommendations of the Deschênes report. It introduces three new definitions: genocide, crimes against humanity and war crimes. In fact, there are six provisions because each definition appears twice, once in the section of the Act describing crimes committed inside Canada, and the other in the section describing crimes committed outside Canada. The new provisions barely resemble the corresponding texts for the same three categories of crimes within the Rome Statute. Instead, the definitions in the Act make specific reference to customary international law, which they incorporate into Canadian law. These references mean that in prosecutions for genocide, crimes against humanity and war crimes, whether committed before or after the entry into force of the legislation, and whether committed inside or outside Canada, the courts will be required to rule on the state of customary law. It is an area in which, it must be said, they have little expertise.

As guidance for the courts, the Act makes two attempts to determine the state of customary law. A general provision, applicable to crimes committed both inside and outside Canada, states:

> "For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law."[24]

The second provision establishes that crimes against humanity have been recognised as part of customary international law since 1945. It is applicable only to crimes committed outside Canada (the legislation does not authorise retrospective application to crimes committed inside Canada). The provision states that:

> "[f]or greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognised by the community of nations before the coming into force of either of the following: (a) the Agreement for the prosecution and punishment of the major war criminals of the

---

21 RSC c. I-2. The Immigration Act was subsequently replaced by the Immigration and Refugee Protection Act, SC 2001, c. 27.

22 RSC c. 30 (4th Supp.).

23 SC 1999, c. 18.

24 Crimes Against Humanity and War Crimes Act, sections. 4(4), 6(4).

> European Axis, signed at London on August 8, 1945; and (b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946."[25]

That Parliament felt the need to make a declaration that crimes against humanity were punishable under customary international law or general principles of law at the time of the post-Second World War prosecutions may seem surprising. A close look at the 1994 *Finta* ruling of the Supreme Court of Canada may assist in understanding the rationale for this provision. Justice Peter Cory, who drafted the reasons of the majority, examined whether prosecution for crimes against humanity committed in 1944 violated the norm against retroactive prosecution. He noted that at the time, such eminent international lawyers as George Schwarzenberger and Hans Kelsen believed that the Nuremberg and Tokyo Charters were not in fact declarative of already existing international law.[26] Justice Cory endorsed these words of Kelsen:

> "A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against ex post facto laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions."[27]

Justice Cory said he found these remarks "eminently sound and reasonable", and used this as a basis to dismiss a constitutional challenge to the crimes against humanity provision that then applied in Canadian law.[28] The reference to the Nuremberg and Tokyo Charters in the new Crimes Against Humanity and War Crimes Act constitutes a legislative correction of Justice Cory's pronouncement in *Finta.*

---

25 Ibid, article 4(5).

26 *R.* v. *Finta* above p 872.

27 Ibid, p 873, citing Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', 1 Int'l LQ 153 (1947) at 165.

28 Ibid, p 874.

As for the other two categories, genocide and war crimes, they too may be prosecuted under the Act when they have been committed outside Canada prior to its entry into force, but Parliament has declined to provide any legislative direction to the courts as to where they may seek guidance in this area.

The declaration that the offences of genocide, crimes against humanity and war crimes as they are defined in the Rome Statute constitute customary law at the time of their adoption, on 17 July 1998, is a technique that is not without its potential difficulties. Customary law will continue to evolve; indeed, in a provision based on Article 10 of the Rome Statute, the Canadian legislation specifically contemplates this eventuality: "This does not limit or prejudice in any way the application of existing or developing rules of international law".[29]

The presumption seems to be that international law will become increasingly broad, although evolution in the other direction is not inconceivable, in which case Canada might find its courts applying definitions that are narrower than those in the Rome Statute.

The case law of the ICTY already provides some evidence of divergence between customary international law and the applicable law of the ICC. The Appeals Chamber of the ICTY would probably quarrel with the claim in the Canadian legislation that the Rome Statute is consistent with customary international law. For example, Article 7 of the Statute states that crimes against humanity must be committed "pursuant to or in furtherance of a State or organisational policy to commit such attack".[30] But in a 2002 case, the Appeals Chamber held that "no such requirement exists under customary international law" that "a policy or plan constitutes an element of the definition of crimes against humanity".[31] The ICTY has also held that some of the Elements of Crimes,[32] adopted pursuant to the Rome Statute, are inconsistent with customary international law.[33] However, because the Canadian legislation only declares that the Rome Statute is compatible with customary law, and does not refer to its subordinate legislation (such as the Elements of Crimes), Canadian judges could reason in the same way as the Appeals Chamber and disregard the Elements and adopt the position at customary international law.

3.1 Genocide

The definition of the crime of genocide presented in Article 6 of the Rome Statute is essentially identical with that of the 1948 Genocide Convention.[34] The Canadian legislation states that "'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

---

29 Ibid.

30 Rome Statute, Article 7(2)a).

31 *Prosecutor* v. *Kunarac* et al, Judgment of 12 June 2002 (case no. IT-96-23 & IT-96-23/1-A), footnote 114. Also: *Prosecutor* v. *Krstic,* Judgment of 19 April 2004 (case no: IT-98-33-A), para. 225.

32 ICC-ASP/1/3, pp 108-155.

33 *Prosecutor* v. *Krstic*, above, para. 224.

34 (1951) 78 UNTS 277, [1949] CTS 27. Canada signed the Convention on 28 November 1949 and ratified it on 3 September 1952.

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 recognised 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".[35] The Canadian definition contemplates the expansion of the Convention definition of genocide in two respects: (a) the punishable acts, and (b) the groups protected.

In Article 6 of the Rome Statute, there is an exhaustive list of five punishable acts. The Canadian enactment anticipates the development of customary law so as to include other punishable acts. At the time the Genocide Convention was being drafted, a lengthy list of punishable acts was considered, broadly grouped into three main categories, defined by the adjectives 'physical', 'biological' and 'cultural'. Ultimately, the Convention's scope was confined to physical and biological genocide, with the exception of the last punishable act – forcibly transferring children from one group to another – which is an act of cultural genocide. But there was no doubt in 1948 of the reluctance of States to recognise international criminal liability for acts such as prohibition of language and religion that might be intended to destroy a group.

Ironically, in 1948 Canada was one of a group of States who felt strongly that cultural genocide be excluded from the Convention. In the Sixth Committee of the General Assembly, the representative of Canada declared that if the Committee were to retain the cultural genocide provision, the Canadian Government would have to make certain reservations.[36] Documents in the National Archives show how sensitive and important this issue really was: The Canadian delegation to the seventh session of the Economic and Social Council was instructed to support or initiate any move for the deletion of Article III on 'cultural' genocide (see document E/794) and, if this move were not successful, it should vote against Article III and, if necessary, against the whole Convention. The delegation was instructed that the Convention as a whole, less Article III, was acceptable though legislation would naturally be required in Canada to implement it.[37] The delegation's report to Ottawa at the conclusion of the debate states:

> "According to instructions from External Affairs, the Canadian delegate had only one important task, namely to eliminate the concept of 'cultural genocide' from the Convention. He took a leading part in the debate on this point and succeeded in having his viewpoints accepted by the Committee. The remaining articles are of no particular concern for Canada."[38]

There is in fact some evidence of an evolution in the interpretation of the crime of genocide so as to encompass a broader range of punishable acts that might be characterised as cultural genocide, with the concept of 'ethnic cleansing' first and

35 Crimes Against Humanity and War Crimes Act, ss. 4(3), 6(3).

36 UN Doc. A/C.6/SR.83 (Lapointe, Canada).

37 'Commentary for the Use of the Canadian Delegation', NAC RG 25, Vol. 3699, File 5475-DG-3-40'2' (this text is also in NAC RG 25, Vol. 3699, File 5475-DG-1-40).

38 'Progress reports on work of Canadian delegation, in Paris, November 1, 1948', NAC RG 25, Vol. 3699, File 5475-DG-2-40.

foremost among them. The German courts have extended the definition of genocide in this way,[39] although the ICTY has been reluctant to follow out of fear of breaching the norm *nullum crimen sine lege* (no crime without a law*)*.[40]

Another area in which the definition of genocide may evolve is in the groups protected. Article 6 of the Rome Statute repeats the enumeration found in Article II of the 1948 Convention, namely 'national, ethnical, racial and religious' groups. Over the years, there have been many attempts to enlarge the coverage of the Convention. The International Criminal Tribunal for Rwanda (ICTR) proposed that the enumeration be interpreted so as to cover all permanent and stable groups,[41] although its counterpart for the former Yugoslavia has never given any support to such a view. Instead, it has suggested that the enumeration was meant to describe "a single phenomenon, roughly corresponding to what was recognised, before the second world war, as 'national minorities', rather than to refer to several distinct prototypes of human groups".[42]

There were some unsuccessful efforts to open up the enumeration when the Rome Statute was being drafted. In the final version of the draft statute, the Convention definition of genocide was accompanied by the following footnote:

> "The Preparatory Committee took note of the suggestion to examine the possibility of addressing 'social and political' groups in the context of crimes against humanity. N.B. The need for this footnote should be reviewed in the light of the discussions that have taken place in respect of crimes against humanity."[43]

The idea went no further, and was not even entertained at Rome. The reluctance to tamper with the 1948 definition[44] is evidence of its stability, and it would seem unlikely there will be any evolution in customary law in this area anytime in the near future. In any case, persecution of groups other than those listed in the definition of genocide is adequately captured under crimes against humanity.

---

39 *Nikolai Jorgic*, *Bundesverfassungsgericht* [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99, para. 23; *Novislav Djajic*, *Bayerisches Oberstes Landesgericht,* 23 May 1997, 3 St 20/96, excerpted in 1998 Neue Juristische Wochenschrift 392. See: Christoph J M Safferling, 'Public Prosecutor v. Djajic' 92 *AJIL* 528 (1998).

40 *Prosecutor* v. *Krstic,* Judgment of 2 August 2001 (case no: IT-98-33-T), para. 580.

41 *Prosecutor* v. *Akayesu,* Judgment of 2 September 1998 (case no. ICTR-96-4-T), para. 515. But the same Trial Chamber, in a subsequent decision, *Prosecutor* v. *Rutaganda*, Judgment of 6 December 1999 (case no. ICTR-96-3-T), seemed to hedge its remarks somewhat: "It appears from a reading of the *travaux préparatoires* of the Genocide Convention that certain groups, such as political and economic groups have been excluded from the protected groups, because they are considered to be 'mobile groups' which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups." (reference omitted). Also: *Prosecutor* v. *Musema,* Judgment of 27 January 2000 (case no. ICTR-96-13-T), para. 162.

42 *Prosecutor v. Krstic*, note 40 above, para. 556.

43 UN Doc. A/AC.249/1998/CRP.8, p. 2.

44 For detailed discussion of the various attempts at modification of the enumeration of groups, see: William A Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press, 2000.

3.2 Crimes against humanity

Crimes against humanity are defined in the Canadian legislation as "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 recognised 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".

The definition is inspired by its predecessor in the 1987 legislation, although the acts of torture and sexual violence have been added to the list.[45] As with genocide, of course, the definition of crimes against humanity in the Rome Statute is incorporated by reference into this definition. The list in the Canadian Act is striking for its omission of certain punishable acts of crimes against humanity listed in Article 7 of the Rome Statute, specifically enforced disappearance of persons and apartheid. Canada never signed or ratified the International Convention on the Suppression and Punishment of the Crime of Apartheid, perhaps out of unease with the grievances of the country's aboriginal population. The Act refers to 'sexual violence' rather than 'rape'; Canadian criminal law no longer defines the crime of rape, having opted, instead, for the unquestionably gender-neutral concept of sexual assault.[46]

The definition is left open to new crimes derived from customary law, general principles of law and conventional law. 'Conventional international law' is defined in the Act as "any convention, treaty or other international agreement (*a*) that is in force and to which Canada is a party; or (*b*) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved".[47]

3.3 War crimes

The definition of 'war crime' is the simplest, in that it is really no definition. It simply makes an offence "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". Similar issues as those referred to with respect to crimes against humanity arise. It is probably in the area of war crimes where the disconnect between the Rome Statute and customary law may raise the greatest difficulty, because in some respects the Statute studiously avoided customary law. It prohibits the employment of "material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate", but only to the extent they are part of a

45 Canadian courts have previously noted the inconsistencies of the definition with the recognised models derived from international law: *Canada* v. *Mehmet*, [1992] 2 FC 598 (CA), at 618.

46 SC 1980-81-82-83, ch. 125. See: Christine Boyle, *Sexual Assault*, Toronto: Carswell, 1984; David Watt, *The New Offences Against the Person: The Provisions of Bill C-127*, Toronto: Butterworths, 1984; G Parker, 'The "New" Sexual Offences', 31 CR (3d) 317 (1983).

47 Crimes Against Humanity and War Crimes Act, section 2(1).

comprehensive prohibition included in an annex to the Statute that does not as yet exist.[48] But Article 23(e) of the 1907 Hague Regulations, to which Canada is a party,[49] prohibits the employment of "arms, projectiles, or material calculated to cause unnecessary suffering" as a general principle.[50]. Might a Canadian judge consider that the use, or even the possession, of anti-personal mines falls within this prohibition, either by a creative application of conventional law or an innovative reading of customary law?

4 Principles of Liability

Article 25 of the Rome Statute, entitled '[i]ndividual criminal responsibility', presents a detailed scheme dealing with primary and secondary participation in crimes within the jurisdiction of the Court, as well as certain inchoate offences. There is no attempt to incorporate these provisions in the Canadian legislation – which is, in any event, subject to the general provisions in the Canadian Criminal Code. Because the Criminal Code provides for primary participation, as well as liability for aiding and abetting, it corresponds in a general sense to the Rome Statute.

According to its Article 25(3), a person is criminally liable under the Rome Statute who: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

Section 21 of the Criminal Code says that everyone is a party to an offence who: (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; (c) abets any person in committing it. Section 22 makes a person a party to an offence who 'counsels' the offence, a term that includes 'procure, solicit or incite'. Probably Article 25(3) of the Rome Statute and sections 21 and 22 of the Criminal Code cover much the same ground. The term 'orders' appears in the Rome Statute but not the Criminal Code, although a person who orders an offence would be convicted of either abetting or counselling under Canadian law. The possibility in the Rome Statute of a crime being committed 'through another person' who may not be criminally responsible – such as a child – find its equivalent in Canadian case law, although this is not formally codified.[51]

Most of the recent prosecutions by the *ad hoc* international tribunals for the former Yugoslavia, Rwanda and Sierra Leone have been based upon the 'joint criminal enterprise'

48 Rome Statute, Article 8(b)(xx).

49 International Convention Concerning the Laws and Customs of War by Land, [1910] TS 9. The Hague Convention came into force for Canada on 27 November 1909 as a consequence of ratification by the United Kingdom.

50 Similarly, see *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, [1996] ICJ Reports 226.

51 *Cardinal* v. *The Queen*, (1984) 18 CCC (3d) 96 (SCC); *R.* v. *Zanini*, [1968] 2 CCC 1 (SCC).

theory of criminal liability.[52] The concept is derived from both post-World War II prosecutions and national criminal justice systems. It has long been part of Canadian law, where it is known as 'common purpose' complicity and codified in section 21(2) of the Criminal Code.[53] The Trial Chamber of the ICTY that introduced the concept justified its recognition in customary international law by relying upon its inclusion in Article 25(3) of the Rome Statute.[54] Essentially, common purpose liability holds an individual liable for crimes committed by associates to the extent that these were a reasonably foreseeable outcome of the joint criminal enterprise.

It is doubtful, however, that Canadian courts would be prepared to convict offenders of genocide, war crimes and crimes against humanity based upon 'common purpose' liability. A line of cases decided under section 7 of the Canadian Charter of Rights and Freedoms has held that section 21(2) of the Criminal Code violates principles of fundamental justice because it has the potential to stigmatise offenders for very serious crimes even when they did not fully intend to commit them.[55] Thus, Canadian courts might be judged by the ICC to be "unable genuinely" to prosecute "the most serious crimes of concern to the international community as a whole". If a case were ever to arise, Canada's Parliament would still have the option of suspending section 7 of the Charter.[56]

A similar difficulty arises with respect to superior responsibility, which is a form of incrimination defined in Article 28 of the Rome Statute. Like common purpose complicity, it holds an individual liable for crimes committed by others, to the extent that the offender was in a superior-subordinate relationship with the primary perpetrator and failed to exercise proper control. It, too, would almost invariable fall afoul of section 7 of the Canadian Charter in prosecutions for genocide, crimes against humanity and war crimes. For this reason, Parliament decided not to incorporate superior responsibility in the Canadian legislation in the same form as it is presented in the Rome Statute. Instead, Parliament converted superior responsibility into an autonomous crime of negligence.

The new offence is labelled 'Breach of responsibility'.[57] The wording is based on Article 28 of the ICC Statute, but with several minor changes. The Rome Statute refers to "a military commander or person effectively acting as a military commander". To this, the Canadian legislation adds "a person who commands police with a degree of authority and control comparable to a military commander".[58] The Rome Statute defines superior responsibility as a superior-subordinate relationship other than that of the military commander; the Canadian legislation defines the term 'superior' as "a person in authority, other than a military commander". The Rome Statute provision applies to a commander who "knew or,

52 For example: *Prosecutor* v. *Kvocka* et al, Judgment of 2 November 2001 (case no. IT-98-30/1-T); *Prosecutor* v. *Krnojelac,* Judgment of 15 March 2002 (case no. IT-97-25-T); *Prosecutor* v. *Galic,* Appeals Judgement, 2 June 2002 (case no. IT-98-29-AR73.2); *Prosecutor* v. *Vasiljevic,* Judgment of 29 November 2002 (case no. IT-99-32-T).

53 As was noted by the ICTY Appeals Chamber in *Prosecutor* v. *Tadic* above, para. 224, fn 288.

54 *Prosecutor* v. *Furundzija,* Judgment of 10 December 1998 (case no. IT-95-17/1-T), para. 216.

55 *R.* v. *Logan*, [1990] 2 SCR 73, *R.* v. *Rodney*, [1990] 2 SCR 687; *R.* v. *Sit*, (1991) 66 CCC (3d) 449 (SCC).

56 Canadian Charter of Rights and Freedoms, above note 10, section 33.

57 Crimes Against Humanity and War Crimes Act, ss. 4(2),

58 Ibid, 5(4).

owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes"; the Canadian equivalent refers to the military commander who "knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence". The Canadian provision also adds the words "as soon as practicable" to the requirement that the military commander take necessary and reasonable measures to prevent, repress and denounce the criminal acts.

The Crimes Against Humanity and War Crimes Act does not incorporate an offence of direct and public incitement to commit genocide into Canadian law. This inchoate offence is included in Article 25(3)(e) of the Rome Statute, and gives effect to a provision in Article III of the 1948 Genocide Convention. Parliament enacted a crime of 'advocating genocide' in the late 1960s as part of an attempt to strengthen the criminal law in the area of hate speech.[59]

The Canadian Act includes a general provision dealing with other inchoate forms of commission, namely conspiracy, attempt and complicity after the fact.[60] Although the wording of Article 25(3)(d) of the Rome Statute leaves some room for interpretation, it seems that it does not contemplate an inchoate form of conspiracy, but rather something akin to the concept as it is known in Romano-Germanic codes, where it is really nothing more than a form of complicity in a crime that is subsequently committed following upon an agreement or *entente* between two or more persons. In contrast, common law conspiracy makes it an offence for two or more persons to agree to commit a crime, whether or not the crime is actually committed. Thus, the Canadian legislation goes beyond what is required by the Rome Statute, making the mere agreement to commit genocide, crimes against humanity and war crimes, a punishable offence. The *travaux préparatoires* of the Genocide Convention leave no doubt that the reference in Article III to 'conspiracy' addresses inchoate conspiracy as it is known in the common law. In this respect, the Canadian Act is more faithful to the Genocide Convention than the Rome Statute.[61]

5 Jurisdiction of Domestic Courts

Canadian criminal law bases jurisdiction principally on territory,[62] although in exceptional cases the Criminal Code allows jurisdiction based on the nationality of the offender and, even more exceptionally, on the nationality of the victim. A recently enacted provision governing sexual tourism even gives Canadian courts extraterritorial jurisdiction over permanent residents who are not citizens. Following the report of the Deschênes Commission, in 1987, the Criminal Code was amended in order to admit jurisdiction over war crimes and crimes against humanity if the offender was present in Canada, irrespective of the place where the crime was committed or the nationality of the offender

59 Criminal Code, above note 9, section 318, see Canada, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada*, Ottawa: Queen's Printer (1966), p 62. Also see *R.* v. *Andrews et al*, (1989) 43 (3d) 193, 65 *CR* (3d) 320 (CA Ont); Rosalie S Abella, 'Limitations on the Right to Equality Before the Law', in Armand de Mestral et al, eds, *The Limitation of Human Rights in Comparative Constitutional law*, Cowansville: Editions Yvon Blais (1986), pp 223-236, at p 235.

60 Crimes Against Humanity and War Crimes Act, sections 4(1.1), 5(2.1), 6(1.1), 7(2.1).

61 See: William A Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press (2000).

62 Criminal Code, above note 9, section 6(2).

or the victim.[63] This is a form of universal jurisdiction that is sometimes called custodial jurisdiction, to distinguish it from universal jurisdiction *in absentia.*[64] In other words, there must be some *nexus* with the prosecuting State, even if the only link with the offender is presence within Canada.

These provisions are repealed and replaced by similar texts in the Crimes Against Humanity and War Crimes Act.[65] Section 8 gives jurisdiction to Canadian courts where the offence was committed outside Canada if "after the time the offence is alleged to have been committed, the person is present in Canada". The legislation also allows for jurisdiction if, at the time the offence was committed, (a) the alleged offender was a Canadian citizen, or was employed by Canada in a civilian or military capacity; (b) 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; or (c) the victim was a Canadian citizen or a citizen of a State that was allied with Canada in an armed conflict.

There is a lingering ambiguity with respect to so-called *in absentia* jurisdiction. In the case of alleged offenders with no other personal link to Canada – in other words, universal jurisdiction as opposed to a form of active or passive personal jurisdiction – the text of the Act says they must have been "present in Canada…after the time the offence is alleged to have been committed". It does not say that they must be present in Canada at the time prosecution is initiated, however, or even during trial. Several scenarios can be imagined. An investigation might be carried out with respect to a suspect in Canada, but by the time it was completed and an indictment issued, the person might have fled the jurisdiction. Would this make the entire proceedings illegal, or void? In Canada it is not possible for a trial to begin without the presence of the accused, but the Criminal Code will allow one to proceed in the absence of the accused when he or she absconds.[66]

This seems to suggest that it is possible, at least theoretically, for Canadian courts to attempt to exercise jurisdiction over an individual who is not physically present in Canada for crimes not committed in Canada and where there is no other personal *nexus* with the country. If this interpretation seems far-fetched, the contrary construction appears to be even more unreasonable. Why should a prosecutor, at the time of issuance of an indictment, be required to ensure that the suspect is in Canada? Given the availability of air travel and the possibility of fleeing the jurisdiction within hours, a suspect might easily evade arrest by leaving Canada? Could this void the proceedings, or make them illegal under Canadian or international law? On a practical level, it might be unlikely that the authorities would want to devote the significant resources involved in a universal jurisdiction prosecution if they did not have physical custody of the offender. But in law, the prospect cannot be ruled out. The fact that the exceptions to presence of the accused at trial apply to proceedings under the Act is in fact specified by a distinct provision: "For greater certainty, in a proceeding commenced in any territorial division under subsection

63 Ibid, sections 7(3.71)-7(3.77).

64 On the ongoing debate in public international law about these concepts see: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Judgment, 15 February 2002, *Separate Opinion of President Guillaume*; *Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans*.

65 Crimes Against Humanity and War Crimes Act, section 42.

66 Criminal Code, section 475.

(1), the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings *and any exceptions to those requirements* apply" (my italics).[67]

For each of the three crimes defined in the Act, there are in fact two distinct definitional provisions – one for crimes committed within Canada and the other for crimes committed outside Canada. The two sets of provisions resemble each other closely. The provisions concerning crimes committed within Canada[68] are only prospective in effect. They will enable Canada to prosecute crimes within the temporal jurisdiction of the ICC, and thereby ensure that Canada is 'willing and able genuinely'[69] to investigate and prosecute. The preamble to the Rome Statute recognises "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

The part concerning crimes committed outside Canada is intended to update the earlier war crimes legislation. It authorises Canadian courts to exercise universal jurisdiction in the case of genocide, crimes against humanity and war crimes, and operates retrospectively. Consistent with Article 15 of the International Covenant on Civil and Political Rights and the Canadian Charter of Rights and Freedoms, it does not prohibit retrospective criminal law provisions to the extent that the offences were recognised under international law at the time of their commission. The new Crimes Against Humanity and War Crimes Act applies the definitions of the three core crimes as they are set out in the Rome Statute, although it is careful to limit these, in the case of offences committed prior to adoption of the Statute, to such crimes only insofar as they correspond to the state of customary law at the time of their commission.[70]

The provision dealing with 'breach of responsibility' committed outside Canada does not seem to have a retrospective effect, however. Section 6, which defines the three crimes, uses the phrase "either before or after the coming into force of this section", but this is absent in section 7, which deals with 'breach of responsibility'. This does not create a problem with respect to implementation of the Rome Statute, of course, because Canadian courts can prosecute 'breach of responsibility' that takes place outside Canada subsequent to 1 July 2002 in accordance with the Act. But it is surely of some interest that Parliament chose not to authorise prosecution of 'breach of responsibility' committed in the past. Did it think this was an obvious violation of the *nullum crimen sine lege* norm and unlikely to pass constitutional scrutiny? There is authority for the recognition of command responsibility of military superiors with respect to commission of war crimes in international armed conflict going back as far as 1945.[71] In a recent case, the ICTY Appeals Chamber ruled that customary international law authorised prosecutions of war crimes committed in internal armed conflict on the basis of command responsibility, although conceding that "[i]t is true that, domestically, most States have not legislated for command

67 Crimes Against Humanity and War Crimes Act, section 9(2).

68 Ibid, section 4.

69 Rome Statute, Article 17.

70 Crimes Against Humanity and War Crimes Act, section 6.

71 *United States of America* v. *Yamashita*, (1948) 4 LRTWC 1; In *re Yamashita*, 327 *US* 1 (1945). Also Protocol Additional I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts (1979) 1125 UNTS 3, [1991] CTS 2.

responsibility to be the counterpart of responsible command in internal conflict".[72] As for genocide and crimes against humanity, which may be committed in the absence of armed conflict of any kind, Trial Chamber II of the ICTY held, in *obiter*, that "the doctrine has been recognised as applying to offences committed either within or in the absence of an armed conflict".[73]

6. Available Defences

The earlier statutes of the Nuremberg and Tokyo tribunals, as well as those of the *ad hoc* tribunals, left many of the general principles of criminal law to be developed by the judges in the course of prosecution. The Rome Statute, however, makes an attempt at codification, including the definition of available defences.[74] The availability of certain defences can have a rather dramatic effect on the substance of the offences themselves. To the extent that implementing legislation attempts to facilitate prosecution by domestic courts, in pursuance of the principle of complementarity and in recognition of the duty of States to ensure that suspects are tried by their own courts, attention must be paid not only to the incorporation of the definitions of the crimes themselves but also of the regime applicable to defences. To this effect, the Crimes Against Humanity and War Crimes Act contains a distinct part entitled 'Procedure and Defences'.

The rule with respect to defences is set out in section 11 of the Act: "In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the Criminal Code, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings". One of the consequences of this provision is to permit the accused to benefit from changes in the law between the commission of the alleged offence and the proceedings. This is an exception to the ordinary rule by which an accused may only invoke defences that were available at the time the alleged acts were committed.

Defences under Canadian law are a subject of considerable complexity. They consist of a combination of statutory provisions, set out in the Criminal Code, and common law rules, elaborated by Canadian judges and, to a certain extent, those of other common law jurisdictions.[75] The Criminal Code describes in some detail such defences as insanity (known in Canadian law as 'mental disorder'),[76] duress[77] and self-defence.[78] Other defences, such as non-insane automatism[79] and *res judicata* (case already decided by

---

72 *Prosecutor* v. *Hadzihasanovic et al,* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility of 16 July 2003 (case no. IT-01-47-AR72), para. 17.

73 *Prosecutor* v. *Hadzihasanovic et al,* Decision on Joint Challenge to Jurisdiction of 12 November 2002 (case no. IT-01-47-PT), para. 94.

74 On general principles under the Rome Statute, see, for example, William A Schabas, *Introduction to the International Criminal Court*, Cambridge: Cambridge University Press, 2nd edition (2004).

75 Criminal Code, above note 9, section 8(3).

76 Ibid, section 16.

77 Ibid, section 17.

78 Ibid, sections 34 *et seq.*

79 *R.* v. *Parks*, [1992] 2 SCR 871.

another court between the same parties)[80] have been left solely to the discretion of judges. Some defences – voluntary intoxication[81] and mistake of fact[82] – are partially codified and partially defined by common law. Courts have on occasion declared certain codified defences to be unconstitutional; when this occurs, the common law defence is revived.[83]

As for international law, a number of defences are set out in Articles 31 to 33 of the Rome Statute itself. But the Statute recognises that the list is not exhaustive, and allows other defences "derived from applicable law as set forth in Article 21". These might include, for example, military necessity and reprisal.[84] Still other defences seem to be implicit in the nature of the crimes, and exist despite the silence of the Rome Statute. An example is consent, which can be a defence to such crimes as rape, enforced prostitution and enforced sterilisation.[85] Some have argued that aspects of the defence of self-defence, as set out in Article 31(1)(c) of the Rome Statute, are in fact contrary to international law and in violation of norms of *jus cogens*.[86]

Because there is considerable overlap between the available defences under Canadian law and those offered by international law, issues of conflict may arise. The Crimes Against Humanity and War Crimes Act seems quite clear that in such cases, the accused is entitled to the more favourable provision. For example, Canadian law explicitly excludes the defence of mistake of law,[87] something that is contemplated by Article 32 of the Rome Statute. In a prosecution for one of the core crimes, a defendant would therefore be entitled to invoke this defence (perhaps giving Canadian prosecutors a good reason to prefer to charge the traditional underlying offences of murder, theft and rape rather than the international offences of genocide, crimes against humanity and war crimes).

---

80 *R.* v. *Kienapple*, [1975] 1 SCR 729.

81 Criminal Code, above note 9, s. 33.1. For the common law, see: *R.* v. *Bernard*, [1988] 2 SCR 833; *R.* v. *Daviault*, [1994] 3 SCR 63.

82 Ibid, sections 150.1(4), 163.1(5), 265(4), 274.2. For the common law, see: *DPP* v. *Morgan*, [1976] 2 All. ER 347 (HL).

83 *R.* v. *Langlois*, [1993] RJQ 676, 80 CCC (3d) 28 (CA).

84 See: Albin Eser, '"Defences" in War Crime Trials', in Yoram Dinstein, Mala Tabory, eds, *War Crimes in International Law*, The Hague/Boston/London: Kluwer Law International (1996), pp 251-273, at pp 268-269.

85 That consent must exist as a defence to the crime of rape seems clear enough from the reference to it in the Elements of Crimes, note 32 above, art. 7(1)(g)-1, para 2 (rape), art. 7(1)(g)-3, para. 1 (enforced prostitution), art. 7(1)(g)-5, para. 2 (enforced sterilisation), art. 7(1)(g)-6, para. 1 (sexual violence), art. 8(2)(b)(xvi), para. 3 (pillaging), art. 8(2)(b)(xxii)-1, para. 2 (rape), art. 8(2)(b)(xxii)-3, para. 1 (enforced prostitution), art. 8(2)(b)(xxii)-5, para. 2 (enforced sterilisation), art. 8(2)(b)(xxii)-6, para. 1 (sexual violence), art. 8(2)(e)(v), para. 3 (pillaging), art. 8(2)(e)(vi)-1, para. 2 (rape), art. 8(2)(e)(vi)-3, para. 1 (enforced prostitution), art. 8(2)(e)(vi)-5, para. 2 (enforced sterilisation), art. 8(2)(e)(vi)-6, para. 1 (sexual violence). Also: Rules of Procedure and Evidence, ICC-ASP/1/3, pp 10-107, Rule 70, Principles of evidence in cases of sexual violence.

86 Éric David, *Principes de droit des conflits armés*, 2nd edition, Brussels: Bruylant (1999), p 694, para. 4.184c.

87 Criminal Code, above note 9, section 19. But see the remarks of Chief Justice Lamer in *R.* v. *Jorgensen*, [1995] 4 SCR 55.

The defence of insanity is set out in section 16 of the Criminal Code and in article 31(1)(b) of the Rome Statute in terms that are similar but not identical.[88] There would appear to be a fundamental difference respecting the burden of proof. Under Canadian law, a defendant must establish the defence of insanity on a preponderance of evidence.[89] But under the Rome Statute, the overriding presumption of innocence seems only to impose upon the defendant the need to raise a reasonable doubt; anything more would conflict with Article 67(1)(i) of the Statute, which protects an accused against "any reversal of the burden of proof or any onus of rebuttal".[90] The Crimes Against Humanity and War Crimes Act says nothing about the burden of proof of defences, however, and judges will have to decide whether section 11 of the Act applies not only to the substantive defences but also to the evidentiary onus.

An aspect of what international law knows as the defence of *ne bis in idem*, and what common law calls the defence of 'double jeopardy', is considered in section 12 of the Act, as well as in section 607(6) of the Criminal Code. Canadian law takes a larger view of the *ne bis in idem* defence than many other jurisdictions. Thus, an acquittal or conviction in a foreign jurisdiction may be set up as an obstacle to prosecution before Canadian courts. Section 607(6) of the Criminal Code allows for a special plea of 'previously convicted' (*autrefois convict*), 'previously acquitted' (*autrefois acquit*) or pardon in the case of international offences that have been tried outside of Canada, where the proceedings have been held *in absentia* or where the offender has not been punished in accordance with the sentence imposed. The provision is a codification of principles of common law.[91] The Crimes Against Humanity and War Crimes Act suspends the effect of section 607(6) and applies a special rule, which is set out in section 12.

Section 12 deems that a person who has been tried and dealt with outside Canada for an offence under the Act may invoke the defences of previously convicted, previously acquitted or pardon. The foreign proceedings must satisfy Canadian requirements for asserting a defence of double jeopardy before Canadian courts. The defence cannot be invoked where the foreign proceedings (a) have been essentially a sham conducted for the purpose of shielding the accused from criminal responsibility, (b) were not conducted independently or impartially according to international norms of due process or (c) were conducted in a manner "inconsistent with an intent to bring the person to justice". This language, which appears in section 12(2) of the Act, is drawn from Article 20(3) of the Rome Statute. Because *ne bis in idem* is enshrined in the Canadian Charter of Rights and Freedoms,[92] it is not inconceivable that Canadian defence lawyers will argue that this restriction is an unreasonable limitation upon a fundamental right.

The Rome Statute allows a defendant to invoke pardons by national governments in the context of a plea of *ne bis in idem.* This was a controversial compromise during the

88 The common law basis of the test in the two instruments is the same, however: *M'Naghten's Case*, (1843) 10 Cl. & Fin 200, 8 ER 718.

89 Criminal Code, above note 9, section 16(3).

90 But contrast this with the case law of the ICTY: *Prosecutor* v. *Delalic* et al, Judgment of 20 February 2001 (case no. IT-96-21-A), paras. 575-576.

91 *R.* v. *Riddle*, [1980] 1 WWR 592, 48 CCC (2d) 365 (SCC).

92 Canadian Charter of Rights and Freedoms, above note 10, section 11(*h*).

drafting. Canada is not required by the Rome Statute to observe the same rule in its domestic prosecutions, although this is the approach taken in the Act. But like the Rome Statute, the Canadian statute requires that, before any pardon, there must be an independent and impartial trial in accordance with international norms of due process conducted in a manner consistent with a genuine intent to bring the accused to justice. Presumably this will preclude those cases that most offend the rule of law, where pardon is granted before trial and conviction.

Section 13 of the Act declares the defence of obedience to law, set out in section 15 of the Criminal Code, to be unavailable to prosecution for the three core crimes.[93] According to section 15 of the Code, no one shall be convicted of an offence in respect of conduct that was in obedience to laws made by authorities in *de facto* possession of the sovereign power over the place where the conduct occurred. The 1987 amendments to the Code had attempted to exclude the defence of section 15, but the wording of the provision gave rise to some ambiguity, and it was argued that judges had a degree of discretion as to the admissibility of the defence of obedience to law.[94] Section 13 of the Act endeavours to correct the situation.

The Crimes Against Humanity and War Crimes Act offers the limited defence of superior orders as it is codified in Article 33 of the Rome Statute.[95] Section 14(3) of the Act addresses an issue raised by the *Finta* decision,[96] and in effect overrules one of the findings of the Supreme Court of Canada. The majority of the Court, in perhaps the more disturbing aspect of the decision, considered evidence of Nazi propaganda claiming Jews were disloyal to be relevant to the existence of an honest but mistaken belief that orders calling for deportation of Jewish civilians were lawful.[97] Accordingly, the Act declares that "[a]n accused cannot base their [*sic*] defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a 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".[98]

7 Sentencing

The Crimes Against Humanity and War Crimes Act imposes a maximum penalty of life imprisonment for genocide, crimes against humanity, war crimes and breach of responsibility.[99] Capital punishment was, of course, abolished in Canada long ago, and would now be considered to violate the Constitution even if Parliament were to consider its reintroduction.[100] Where an intentional killing forms the basis of the offence of

93 Crimes Against Humanity and War Crimes Act, section 13.

94 *R.* v. *Finta*, above, p. 829 (per Cory J). Also: M Cherif Bassiouni, *Crimes Against Humanity in International Law*, 2nd edition, The Hague: Kluwer Law International (1999), p 450.

95 Crimes Against Humanity and War Crimes Act, section 14.

96 Irwin Cotler, 'R. v. Finta', 90 *AJIL.* 460 (1996).

97 *R.* v. *Finta*, above pp. 816-817 and 847-848 (per Cory J).

98 Crimes Against Humanity and War Crimes Act, s. 14(3).

99 Ibid, sections 4(2)(b), 5(3), 6(2)(b), 7(4).

100 *United States* v. *Burns*, [2001] 1 SCR 183.

genocide, crimes against humanity or war crimes, the Act makes life imprisonment a mandatory sentence.[101] If this is imposed, the offender is not eligible for parole for 25 years if a planned and deliberate killing forms the basis of the offence,[102] or if the person had previously been convicted of a similar offence.[103] In all other cases of genocide, crimes against humanity and war crimes involving intentional killing, the parole ineligibility is a minimum of 10 years and a maximum of 25.[104] These provisions are essentially similar to those applicable to homicide in Canadian law.[105]

101 Crimes Against Humanity and War Crimes Act, sections 4(2)(a), 6(2)(a),

102 Ibid, section 15(1)(a).

103 Ibid, section 15(1)(b).

104 Ibid, section 15(1)(c)

105 Criminal Code, note 9 above section 745.