
Centre for International
Governance Innovation

Canada in International Law at 150 and Beyond | Paper No. 16 – March 2018

Canada and the Development of International Criminal Law What Role for the Future?

Valerie Oosterveld



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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Valerie Oosterveld is the associate dean of research and an associate professor at the University of Western Ontario Faculty of Law. Her research and publications focus on gender issues within international criminal justice. She is a member of the SSHRC-funded Canadian Partnership for International Justice. She is also a Western University Faculty Scholar (2017-2019) and a member of the Royal Society of Canada's College of New Scholars, Artists and Scientists. She is the associate director of Western University's Centre for Transitional Justice and Post-Conflict Reconstruction, and is affiliated with the Department of Women's Studies and Feminist Research. Before joining Western Law in 2005, Valerie served in the Legal Affairs Bureau of Canada's Department of Foreign Affairs and International Trade. In this role, she provided legal advice on international criminal accountability for genocide, crimes against humanity and war crimes, especially with respect to international criminal tribunals. She was a member of the Canadian delegation to the International Criminal Court negotiations and subsequent Assembly of States Parties. She also served on the Canadian delegation to the 2010 Review Conference of the Rome Statute of the International Criminal Court in Kampala, Uganda.

Introduction

Canada's role in the development of international criminal law has significantly changed over time. Canada was active in military prosecutions of war crimes immediately after World War II, but then entered a dormant period for three decades. In the 1980s, the Department of Justice made addressing the issue of the presence of Nazi war criminals in Canada a priority. For the next two decades, Canada's domestic focus saw some successes and high-profile failures in the country's attempts to enforce international criminal law norms. However, the creation of the international criminal tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively, turned Canada's focus to the international stage. Canada became a recognized world leader in the development of international criminal law in the drafting and adoption of the Rome Statute¹ of the International Criminal Court (ICC), as well as in the Rome Statute's domestic implementation. Canada also played a crucial role in creating and sustaining other international criminal tribunals.

This paper will begin with a historical review of Canada's role in the development of international criminal law from the post-World War II prosecutions to the late 1980s. It will turn to an examination of Canada's engagement with international criminal law from the early 1990s to the present, explained through Canada's international actions on the ICC and other international institutions. This description will demonstrate that, over the past two decades, Canada has been deeply involved in the development and implementation of international criminal law abroad, providing legal, financial and political support to particular tribunals at particular periods. However, this support has shifted over time, leaving gaps in the substantive commitment. The paper will then discuss Canada's engagement with international criminal law at home, in particular through Canada's passage of the Crimes Against Humanity and War Crimes Act² (CAHWCA) in 2000. The adoption of the CAHWCA reflected a high point in the domestic implementation of international

criminal law, which led to the successful prosecution of Désiré Munyaneza for crimes committed during the Rwandan genocide. However, Canada's Crimes Against Humanity and War Crimes Program has remained arguably underfunded, necessitating a focus on non-criminal, administrative remedies rather than criminal prosecutions. This paper concludes by considering Canada's role in the future of international criminal law.

Canada and the Development of International Criminal Law from World War II to the 1980s

The first Canadian war crimes legislation, the War Crimes Act,³ was adopted in 1946, largely to provide jurisdiction to Canadian military tribunals based in post-World War II occupied Europe and Asia. Canada was quite active in the period immediately after the war, investigating 171 cases of war crimes and prosecuting seven individuals in Canadian military tribunals in Aurich, Germany.⁴ The most well-known trial was that of Kurt Meyer, who was prosecuted for, and convicted of, ordering the execution of Canadian prisoners of war.⁵ There were also trials of escaped prisoners of war in Alberta.⁶ By 1948, Canadian troops had been repatriated and criminal prosecution files were transferred to Britain, which "marked the end of Canada's active contribution to the handling of Nazi war criminals."⁷ After

3 *War Crimes Act*, SC 1946, c 73.

4 Canada, *Commission of Inquiry on War Criminals, Report, Part 1: Public* (Ottawa, ON: Minister of Supply and Services, 1986) at 25, 33 [Deschênes Commission].

5 P Whitney Lackenbauer & Chris Madsen, *Kurt Meyer on Trial: A Documentary Record* (Kingston, ON: Canadian Defence Academy Press, 2007) at 93–94, 520.

6 *R v Shindler* (1944), 3 WWR 125 (Alta Police Ct); *R v Brosig*, [1945] OR 240 (CA); *R v Kaehler & Stolski* (1945), 83 CCC 353 (Alta SCAD), cited in Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 2nd ed (Toronto, ON: Irwin Law, 2014) at 237.

7 Fannie Lafontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto, ON: Carswell, 2012) at 19.

1 *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc A/CONF 183/9, 37 ILM 1002, 2187 UNTS 90 (entered into force 1 July 2002).

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

this time, the issue of criminal accountability for World War II crimes largely disappeared from Canada's domestic and foreign policy agenda.⁸

From 1947 until the 1970s, Canada adopted a policy of inaction on crimes against humanity and war crimes committed during World War II.⁹ This was somewhat reflective of the approach of other Western countries, such as the United Kingdom and the United States.¹⁰ The Canadian position during this time was that "Canadian courts have no jurisdiction over such offences."¹¹

However, this position changed in 1980. At that time, Robert Kaplan — who had, as a member of Parliament, introduced a private member's bill in 1978 on the prosecution of war criminals, due to the growing concern that Canada was a haven for war criminals — became solicitor general.¹² He created an interdepartmental committee to examine the issue and contacted foreign countries with an interest in requesting extradition of alleged war criminals present in Canada.¹³ As a result of these activities, a new Canadian approach was adopted to address the issue of the presence of Nazi war criminals in Canada.¹⁴

In 1982, Canada agreed to extradite Albert Helmut Rauca, a German-born Canadian citizen, to the Federal Republic of Germany to face charges that he had aided and abetted the murder of 10,500 Jewish persons in Lithuania as a member of a Schutzstaffel (SS) security unit.¹⁵ The Ontario Court of Appeal found that, while the extradition request violated Rauca's Charter¹⁶ right to enter, remain and leave Canada, the violation was saved by section 1 of the Charter as a reasonable limit prescribed by law.¹⁷ Rauca was extradited

and died in prison in Germany prior to his trial.¹⁸ However, this extradition was not followed by any other extraditions for war crimes until 2007, when Michael Seifert was extradited to Italy in connection with murder charges related to his role as a member of the German SS.¹⁹

In January 1985, an article was published in *The New York Times* alleging that Dr. Josef Mengele, the infamous "Angel of Death" of Auschwitz, had applied in Buenos Aires (using an alias) for a Canadian visa in 1962.²⁰ The issue was raised in the House of Commons, and Prime Minister Brian Mulroney announced that he had instructed the minister of justice and the solicitor general to initiate an inquiry to ascertain whether there was any truth in the accusations.²¹ A judge of the Court of Appeal of Quebec, Jules Deschênes, was appointed as head of the inquiry (the Deschênes Commission) under these terms of reference:

to conduct such investigations regarding alleged war criminals in Canada, including whether any such persons are now resident in Canada and when and how they obtained entry to Canada as in the opinion of the Commissioner are necessary in order to enable him to report to the Governor in Council his recommendations and advice relating to what further action might be taken in Canada to bring to justice such alleged war criminals who might be residing within Canada, including recommendations as to what legal means are now available to bring to justice any such persons in Canada, or whether and what legislation might be adopted by the Parliament of Canada to ensure that war criminals are brought to justice and made to answer for their crimes.²²

The final report of the Deschênes Commission was issued in 1986 in two parts. The first, public, part recommended that Parliament amend the

8 *Ibid*; Currie & Rikhof, *supra* note 6 at 238.

9 Lafontaine, *supra* note 7 at 19; Deschênes Commission, *supra* note 5 at 27.

10 Deschênes Commission, *supra* note 5 at 31–33.

11 *Ibid* at 28.

12 *Ibid* at 29.

13 *Ibid*.

14 Lafontaine, *supra* note 8 at 20.

15 *Federal Republic of Germany v Rauca*, (1992) 38 OR (2d) 705 (HC), *aff'd* 41 OR (2d) 225 (CA) [Rauca CA]; Sol Littman, *War Criminal on Trial: Rauca of Kaunas* (Toronto, ON: Key Porter Books, 1998) at 19–20.

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

17 *Rauca CA*, *supra* note 16.

18 Deschênes Commission, *supra* note 5 at 30.

19 *Italy v Seifert*, 2007 BCCA 407, leave to appeal to SCC refused, 32155 (17 January 2008).

20 Deschênes Commission, *supra* note 5 at 67.

21 This occurred on January 23, 1985: Grant Purves, *War Criminals: The Deschênes Commission* (Ottawa, ON: Library of Parliament, 1998) at 4.

22 Deschênes Commission, *supra* note 5 at 17–18.

Criminal Code²³ to allow for the prosecution and punishment of crimes against humanity and war crimes committed in World War II and after.²⁴ The commission also recommended that immigration and citizenship laws be amended to allow for revocation of citizenship and expulsion of those who lied to immigration authorities about their links to serious international crimes.²⁵ The second, confidential, part of the commission's report provided an analysis of 29 specific cases considered to contain grave allegations of war crimes and listed suspects.²⁶ The public portion of the report recommended that the government pursue criminal prosecutions in these cases, and to examine the possibility of doing the same in 220 other cases.²⁷ In connection with the Mengele issue that prompted the inquiry, the commission found that Mengele did not apply for a visa to enter Canada and had never entered Canada.²⁸

In 1987, Bill C-71, An Act to Amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act, was passed, providing legal jurisdiction and the political impetus for criminal prosecution of war crimes.²⁹ The Department of Justice and the Royal Canadian Mounted Police (RCMP) created specialized war crimes units.³⁰ The first case brought under these amendments was against Imre Finta, who was accused of crimes against humanity and war crimes, due to his role in detaining and deporting to death 8,617 Jewish persons while he was a commander of the Gendarmerie in Hungary during World

War II.³¹ After the war, Finta immigrated to Canada and became a citizen in 1956.³²

At trial and on appeal, Finta was acquitted. The Supreme Court of Canada's (SCC's) judgment, while positive in confirming the retrospective criminalization of crimes against humanity and war crimes,³³ interpreted the Criminal Code so as to impose additional elements of crime, creating a very high threshold for the proof of crimes against humanity and war crimes.³⁴ The SCC also accepted the defences of superior orders and mistake of fact as submitted to the jury, implicitly accepting the use of hate propaganda in the creation and implementation of those superior orders (referred to by John McManus as the "I believed the hate propaganda" defence).³⁵ As well, the SCC imposed a double burden on the prosecution to prove both the international offence and the Canadian offence.³⁶ As a result of these findings, the SCC's *Finta* judgment essentially stopped the federal government from using criminal prosecutions to address serious international crimes, forcing the government to focus instead on administrative remedies of exclusion, denaturalization and deportation.³⁷

While the *Finta* case was progressing through the various court levels, three other criminal cases were launched. In 1989, Michael Pawlowski was charged with eight counts of murder as a crime against humanity and a war crime for his role in the death of approximately 400 Jewish persons in 1942 in a section of Poland that later became part of the Republic of Belarus.³⁸ The prosecution applied to take commission evidence from 12

23 RSC 1985, c C-46.

24 Deschênes Commission, *supra* note 4 at 6–7.

25 *Ibid* at 7–11.

26 Jules Deschênes, "Toward International Criminal Justice" (1994) 5 Crim LF 249 at 260.

27 Deschênes Commission, *supra* note 4 at 11–14.

28 *Ibid* at 76, 82.

29 *An Act to Amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act*, RSC 1987, c 37. The Bill C-71 amendments to the Criminal Code are reproduced in Lafontaine, *supra* note 7 at Appendix 2. The amendments provided jurisdiction over individuals who committed crimes against humanity and war crimes outside of Canada (see section 3.71).

30 The federal government created the Crimes Against Humanity and War Crimes Section within the Department of Justice and the War Crimes and Special Investigations Section of the RCMP: Currie & Rikhof, *supra* note 6 at 240.

31 *R v Finta*, [1994] 1 SCR 701 at 725–26 [*Finta*].

32 *Ibid* at 725.

33 *Ibid* at 874. The SCC confirmed that, if "the persons who committed these acts were certainly aware of their immoral character" at the time, then retrospective criminal prosecution of those individuals for those acts was permissible (*ibid*).

34 *Ibid* at 813, 816, 820. See the analysis in Lafontaine, *supra* note 7 at 27–28.

35 *Finta*, *supra* note 31 at 824–41. For critiques, see John McManus, "A New Era of Accountability through Domestic Enforcement of International Law" in Hélène Dumont & Anne-Marie Boisvert, eds, *The Highway to the International Criminal Court: All Roads Lead to Rome* (Montreal, QC: Editions Thémis, 2004) at 503–06; Lafontaine, *supra* note 7 at 28.

36 *Finta*, *supra* note 31 at 812.

37 Lafontaine, *supra* note 7 at 31; Currie & Rikhof, *supra* note 6 at 244.

38 See *R v Pawlowski*, (1992), 13 CR (4th) 228 (Ct J (Gen Div)), *aff'd* (1993), 12 OR (3d) 709 (CA) [*Pawlowski CA*], leave to appeal to SCC refused, (1993), 15 OR (3d) xvi.

witnesses in the Soviet Union and West Germany, but these requests were dismissed as prejudicing the rights of the accused to a fair trial.³⁹ The Crown was unable to persuade the witnesses to travel to Canada to testify, dropped the charges and was required to contribute to the accused's legal costs.⁴⁰ Another criminal case involved Stephen Reistetter, who was charged with the persecution and deportation of approximately 1,000 Jewish persons from the former Czechoslovakia.⁴¹ His case was stayed, due to the death and illness of crucial witnesses.⁴² A final unsuccessful prosecution was that of *R v Grujicic*, launched in 1994 and dropped in 2004, due to the defendant's illness.⁴³

In contrast to the lack of success in criminal prosecutions in *Finta*, *Pawlowski*, *Reistetter* and *Grujicic*, administrative proceedings were successful in the case of Jacob Luitjens. The Federal Court of Canada found that Luitjens, originally from the Netherlands, had fraudulently obtained his Canadian citizenship because he had concealed that he had worked for the Nederlandsche Landwacht (Dutch Land Guard), which had collaborated with the Gestapo and had detained and tortured individuals.⁴⁴ In 1948, a Dutch court had convicted Luitjens *in absentia* for "aiding and abetting the enemy in time of war" and sentenced him to life in prison.⁴⁵ Luitjens' Canadian citizenship was revoked; he was deported to the Netherlands, and he served his sentence (which was reduced).⁴⁶

Canada and the Development of International Criminal Law at the International Level: The ICC and Other Initiatives

The 1990s were a time of rapid development in the field of international criminal law, prompted by the creation of the international criminal tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively.⁴⁷ Canada was engaged in these developments, both through its diplomatic presence at the United Nations in New York,⁴⁸ and through assistance provided to these tribunals as a result of tribunal requests.⁴⁹ However, the most far-reaching contribution to the field of international criminal law of Canada during the 1990s was the result of Canada's involvement in the drafting and adoption of the Rome Statute.

Canada's leadership on the ICC was directly linked to the rise of then-Foreign Affairs Minister Lloyd Axworthy and the human security agenda, which attempted to shift the focus within the international community from the protection of state sovereignty

39 Summarized in *Pawlowski CA*, *supra* note 38.

40 *Purves*, *supra* note 21 at 8; *R v Pawlowski and Pawlowski CA*, *supra* note 38.

41 *R v Reistetter*, [1990] OJ No 2100 (QL) (Ct J (Gen Div)).

42 *Currie & Rikhof*, *supra* note 6 at 242, n 82.

43 *R v Grujicic* (1994), 25 WCB (2d) 49, [1994] OJ No 2280 (QL) (Ct J (Gen Div)).

44 *Canada (Secretary of State) v Luitjens* (1991), 46 FTR 267 (TD), *aff'd* 1992 CarswellNat 1315 (CA); leave to appeal to SCC refused, [1992] 2 SCR viii [*Luitjens*]; Clyde H Farnsworth, "Canada Revokes Citizenship of Nazi Collaborator", *The New York Times* (12 November 1991), online: <www.nytimes.com/1991/11/12/world/canada-revokes-citizenship-of-nazi-collaborator.html>.

45 Farnsworth, *supra* note 44.

46 *Luitjens*, *supra* note 44.

47 *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827, UNSCOR, 48th Sess, 32 ILM 1159 (1993); *Statute of the International Criminal Tribunal for Rwanda*, SC Res 955, UNSCOR 49th Sess, 33 ILM 1598 (1994).

48 The UN Security Council created the international criminal tribunals, and, therefore, the tribunals reported regularly on their progress to the council. As well, budgetary matters were considered on an annual basis within the UN General Assembly's Fifth Committee.

49 For example, by providing voluntary funding and gratis personnel: International Criminal Tribunal for the Former Yugoslavia (ICTY), Press Release, UN Doc CC/PIO/280-E, "The International Tribunal Welcomes with Appreciation Canada's Support" (22 December 1997) (on the provision of an assistance package worth up to CDN\$600,000 for the construction of a new courtroom and mass grave exhumations, as well as witness protection assistance); High Commission of Canada in Kenya, "Canada-Rwanda Relations", online: <www.canadainternational.gc.ca/kenya/bilateral_relations_bilaterales/canada_rwanda.aspx?lang=eng> (indicating that Canada has provided CDN\$1 million in voluntary contributions to the International Criminal Tribunal for Rwanda).

to protection of civilians.⁵⁰ In 1995, discussions began at the United Nations on an ICC statute, based on a draft created by the International Law Commission. Canada began its leadership role by coordinating and chairing a group of like-minded states (the like-minded group) to advance the negotiations toward the adoption of an ICC statute: by the end of 1995, the like-minded group had grown from an initial handful to 20 states.⁵¹ From 1996 to 1998, these discussions intensified into preparatory negotiations, which focused on crafting a widely acceptable draft ICC statute. During this time, the like-minded group grew to include nearly 60 states, including many from Latin America, Africa and Asia.⁵² Canada at first urged, and then actively assisted, the like-minded group in its adoption of substantive, shared cornerstone positions around which proposals were made and strategizing took place.⁵³

During this period, Canada focused on “negotiating up from principle,” trying to avoid descent to the lowest common denominator.⁵⁴ It also adopted a five-pronged approach to raising support for an ICC: deep involvement in all aspects of the negotiations, public statements, diplomatic lobbying, financial support and cooperation with non-governmental

organizations (NGOs).⁵⁵ First, Canadian diplomats and lawyers were deeply involved in virtually every aspect of the negotiations on a draft ICC statute, presenting proposals and commenting on and coordinating formal and informal discussions aimed at resolving differences of opinion among states. Second, Axworthy and Canadian officials publicly supported the creation of an independent and effective ICC through statements and speeches. Third, Axworthy, Canadian parliamentarians and Canadian officials undertook pro-ICC lobbying efforts, both bilaterally and multilaterally, in capitals and at the United Nations.⁵⁶ Fourth, Canada provided financial assistance to the United Nations trust fund to enable least-developed countries to participate in ICC negotiations and assisted the participation by NGOs of least-developed countries.⁵⁷ Fifth, Canada had a proactive relationship with NGOs, meeting regularly with Canadian and international NGOs, including the rapidly growing Coalition for an ICC, to share views and information.⁵⁸

The preparatory ICC negotiations culminated in a five-week diplomatic conference from June 15 to July 17, 1998, in Rome. Canada’s approach shifted somewhat to accommodate the new role of senior Canadian diplomat Philippe Kirsch, who was appointed to chair the pivotal Committee of the Whole negotiating body.⁵⁹ This led Canada to pass the chair of the like-minded group to Australia,⁶⁰ although Canada remained active throughout the conference in growing and consolidating the efforts of that group. “The Canadian delegation played a brokering role in all areas of the negotiations — the definition of crimes, jurisdiction, general principles, procedures, and the structure of the institution — by bridging gaps and finding creative ways to address legitimate concerns while maintaining a

50 In his September 24, 1996, speech to the UN General Assembly, Axworthy outlined his conception of human security, which focused on the security needs of the individual, as opposed to those of the state: Department of Foreign Affairs and International Trade, Statement, “Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, to the 51st General Assembly” (24 September 1996), online: <<http://publications.gc.ca/site/eng/63996/publication.html>>.

51 William R Pace & Jennifer Schense, “The Role of Non-Governmental Organizations” in Antonio Cassese, Paola Gaeta & John RWD Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford, UK: Oxford University Press, 2002) 112.

52 *Ibid* at 119, 121.

53 Those cornerstones required the ICC to have the following: inherent jurisdiction over international and internal war crimes, crimes against humanity, genocide and aggression; a relationship with the Security Council that preserves the independence and impartiality of the ICC; the ability to initiate proceedings through an independent prosecutor, concerned states and referrals by the UN Security Council; and an awareness of the experiences of victims, women and children in particular, in armed conflict and the criminal law process; Chris Tenove, “Canada and the ICC: Part 1 — The Backstory” (2010), online: Liu Institute Reports from the Field <<https://blogs.ubc.ca/ligi/2010/05/31/canada-and-the-icc-part-one-the-backstory/>>.

54 Axworthy explicitly referred to “negotiating up from principle” in his April 1998 statement to the Preparatory Committee on the Establishment of an International Criminal Court, reprinted in Lloyd Axworthy, “Canada’s Statement to the Preparatory Committee on the Establishment of an International Criminal Court”, *Inter-Press Service TerraViva* (15 June 1998) 6.

55 Darryl Robinson, “Case Study: The International Criminal Court” in Rob McRae & Don Hubert, eds, *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (Montreal, QC & Kingston, ON: McGill-Queen’s University Press, 2001) 172.

56 Lloyd Axworthy, *Navigating a New World: Canada’s Global Future* (Toronto, ON: Vintage Canada, 2003) at 202–03; Robinson, *supra* note 55 at 172.

57 Robinson, *supra* note 55 at 172.

58 The Coalition for an ICC grew from 25 member organizations at its inception to more than 800 organizations at the time of the diplomatic conference: Pace & Schense, *supra* note 51 at 115.

59 Robinson, *supra* note 55 at 173.

60 Philippe Kirsch & Darryl Robinson, “The Path to Rome and Beyond” in Cassese, Gaeta & Jones, *supra* note 51 at 70.

strong court.”⁶¹ In other words, Canada positioned itself as a consensus builder.⁶² Apart from its deep involvement within the actual negotiations, Canada continued its previous strategies, with Axworthy attending the start and close of the negotiations.

By the end of the diplomatic conference, there were certain divisive issues that could not be resolved through negotiations — for example, the scope of the court’s jurisdiction, the definition of certain crimes and the prosecutor’s ability to initiate an investigation. Kirsch and the bureau of coordinators prepared a final package proposal to balance these views where possible. The package was accepted by the vast majority of states and the Rome Statute was adopted.⁶³ After the final adoption of the statute, Axworthy referred to the statute’s “delicate balance,” and indicated that he hoped that those states that were hesitant about the court would have their concerns allayed once it began its operations.⁶⁴

After the 1998 adoption of the Rome Statute, Canada’s focus shifted to making the ICC a reality. Domestically, the departments of foreign affairs and justice were tasked with drafting Canadian legislation to quickly implement the Rome Statute into domestic law, explained below. This domestic action allowed Canada to become the fourteenth country to ratify the Rome Statute on July 7, 2000.⁶⁵ Internationally, Canada pursued a dual diplomatic track. First, it continued its strong leadership role in the subsequent ICC-related negotiations to draft the court’s rules of procedure and evidence, elements of crimes and other subsidiary documents. Given his deft handling of the Rome negotiations, Kirsch was again approved to chair these negotiations. In addition, Canada remained involved in the like-

minded group (which continued under Australian leadership), and helped it to eventually transition into a new group, called the Friends of the ICC, with a new mandate. Canada also continued to meet regularly with NGOs to exchange views. Second, in September 2000, Canada launched its International Criminal Court Campaign, later renamed the International Criminal Court and Accountability Campaign. This campaign, launched by Axworthy and funded through the Department of Foreign Affairs and International Trade’s Human Security Program, aimed to promote universal ratification of the Rome Statute. It did so by providing direct legal and technical assistance by Canadian officials to countries wishing to ratify or implement the Rome Statute, and financial support to NGOs also qualified to provide such assistance. This combined effort and financial support was meant to demonstrate leadership and convince other states to follow.⁶⁶

Axworthy retired from politics in the fall of 2000. Ensuing Liberal foreign affairs ministers (John Manley, Bill Graham and Pierre Pettigrew) largely continued Axworthy’s original innovative approach. For example, they conducted regular bilateral and multilateral diplomacy on ICC-related issues, took a firm pro-ICC position when the United States pressured Canada to enter into a bilateral agreement to shield US citizens from ICC scrutiny and increased the funding provided to the ICC and Accountability Campaign.⁶⁷

The Rome Statute entered into force on July 1, 2002. The post-Rome ICC negotiations concluded shortly thereafter, and the main focus of the states parties turned to setting up an operational court. Canadian officials were deeply involved in many of the initial phases of the court’s physical creation. Canada also decided to put forward Kirsch as a judicial candidate for the ICC. He was successfully elected, and was chosen by his fellow judges to serve as president of the ICC. He served from 2003 to 2009. In addition to the physical creation of the ICC, Canada also became an active participant in the annual gathering of the Assembly of States Parties of the ICC — which sets the ICC’s budget, elects the

61 Robinson, *supra* note 55 at 173.

62 Andy W Knight, “Soft Power, Moral Suasion, and Establishing the International Criminal Court: Canadian Contributions” in Rosalind Irwin, ed, *Ethics and Security in Canadian Foreign Policy* (Vancouver, BC: UBC Press, 2001) 133.

63 The final package was adopted on July 17, 1998, by a vote of 120 states for, seven opposed and 21 states abstaining.

64 Roy S Lee, ed, *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (Netherlands: Kluwer Law International, 1999) at 579–80.

65 ICC Assembly of States Parties, “Canada” (11 March 2003), online: <https://asp.icc-cpi.int/en_menus/asp/states%20parties/western%20european%20and%20other%20states/Pages/canada.aspx>; Global Affairs Canada, “Canada and the International Criminal Court” (12 June 2017), online: <www.international.gc.ca/court-cour/index.aspx?lang=eng>. Canada’s early ratification contributed to the Rome Statute’s rapid entry into force in 2002, only four years after the adoption of the Rome Statute.

66 Antonio Franceschet & Andy W Knight, “International(ist) Citizenship: Canada and the International Criminal Court” (2001) 8:2 *Can Foreign Pol’y* 51 at 68.

67 Manley made it clear that there would be no more crusades and campaigns: Greg Donaghy, “All God’s Children: Lloyd Axworthy, Human Security and Canadian Foreign Policy 1996–2000” (2003) 10:2 *Can Foreign Pol’y* 39 at 52. Even so, he approved funding increases for the ICC and Accountability Campaign.

judges of the court and considers a range of other issues — and in the Hague Working Group (a group of states parties based in the Hague, working to resolve key issues between assembly meetings).⁶⁸ Additionally, Canada ratified the ICC's agreement on privileges and immunities of the court⁶⁹ in 2004.⁷⁰ During this same time period, Canada also took a leading role in the creation of, and support for, another international criminal tribunal, the Special Court for Sierra Leone.⁷¹ It also provided support to the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia.⁷²

Under the 2006–2015 Conservative governments, Canada's role with respect to the ICC underwent a shift. Canada remained actively involved in the ICC Assembly of States Parties, but became known primarily for its strong promotion of a “zero nominal growth” budget, leading to views that Canada's earlier broad-based leadership on international criminal justice had waned or was waning.⁷³ In terms of rhetoric, Canada no longer concentrated on international criminal justice within the promotion of human security writ large and instead focused on how the ICC could contribute to the rule of law and accountability in specific countries of

particular interest to Canada.⁷⁴ Canada seemed to change its policy of respecting the independence of the ICC, sometimes publicly criticizing its decisions.⁷⁵ Statements of Canadian support for the ICC were more tempered,⁷⁶ and the visibility of its international ICC-focused initiatives dwindled when the ICC and Accountability Campaign was cut.

That said, during this period, Canada continued to provide financial and personnel support for Justice Rapid Response, an innovative international organization that manages the rapid deployment of international criminal justice professionals from a standby roster to investigate, analyze and report on situations involving atrocity.⁷⁷ However, during this same time period, on the closure of the Special Court for Sierra Leone in 2013, Canada did not fund its successor, the Residual Special Court for Sierra Leone.⁷⁸

Under the current Liberal government, Canada's approach to international criminal justice has again shifted. In 2016, when ICC states parties South Africa, Burundi and the Gambia announced that they would be withdrawing from the Rome Statute, evoking fears that more states would follow, then-Minister of Foreign Affairs Stéphane Dion took an active role within the Assembly of States Parties and exerted international diplomatic efforts to

68 For example, Canadian Ambassador to the Netherlands Colleen Swords coordinated the Hague Working Group, and Canadian Ambassador to the Netherlands Sabine Nölke served as chairperson of the Oversight Committee on Permanent Premises.

69 *Agreement on the Privileges and Immunities of the International Criminal Court*, 9 September 2002, ICC-ASP/1/3, at 215, & Corr 1, 2271 UNTS 3 (entered into force 22 July 2004) [ICC Agreement].

70 Canada ratified the ICC Agreement, *ibid.*, on June 22, 2004.

71 Canada supported the creation of the Special Court for Sierra Leone during its 1999–2000 term on the UN Security Council, provided voluntary funding throughout the life of the court, nominated and provided personnel and chaired the court's management committee; Department of Foreign Affairs and International Trade, News Release, “Canada Supports Creation of Special Court for Sierra Leone” (14 August 2000); Department of Foreign Affairs and International Trade, News Release, “Canada Announces Support for Sierra Leone Special Court” (31 July 2001); Department of Foreign Affairs and International Trade, News Release, “Canadian Appointed to Sierra Leone Special Court” (25 July 2002).

72 On the Special Tribunal for Lebanon, see Embassy of Canada to Lebanon, “Bilateral Relations” (May 2016), online: <www.canadainternational.gc.ca/lebanon-liban/bilateral_relations_bilaterales/index.aspx?lang=eng&menu_id=8>; on the Extraordinary Chambers in the Courts of Cambodia, see Embassy of Canada in Thailand, “Canada-Cambodia Relations” (April 2016), online: <www.canadainternational.gc.ca/thailand-thailande/bilateral_relations_bilaterales/Canada-Cambodia-Cambodge.aspx?lang=eng>.

73 Canada, Department of Justice, *Crimes Against Humanity and War Crimes Program Evaluation: Final Report* (Ottawa, ON: Department of Justice, 2016) at vii, 71–72 [War Crimes Program Evaluation].

74 For example, Sudan. This selection of foreign policy focus countries was termed “economic diplomacy”: see e.g. Asa Mc Kercher & Leah Sarson, “Dollars and sense? The Harper Government, Economic Diplomacy, and Canadian Foreign Policy” (2016) 71:3 *Intl J: Canada's J Global Pol'y Analysis* 351.

75 For example, in its vocal opposition to the Palestinian accession to the Rome Statute: Mike Blanchfield, “Canada Opposes Palestinian Attempts to Join United Nations Treaties”, *Macleans's* (16 February 2015).

76 This can be seen in the change in tone and language in the Canadian statements made in the general debate of the Assembly of States Parties. During the first part of the Conservative mandate, Canada, Australia and New Zealand presented a joint statement with effusive expressions of engagement and support (such as “full and unequivocal support” in 2007 and “steadfast support” in 2008). These statements provided detail on how each state was supporting the ICC (for example, by reference to Canadian support for Justice Rapid Response). This approach was a continuation of a practice initiated under the previous Liberal government. In 2013 and 2014, however, Canada presented its own statements, which were relatively spare in comparison and focused on Canada's position on zero nominal growth in the ICC budget. Strong language of support re-entered Canada's statements in 2015 and 2016, following the change in government.

77 See e.g. Justice Rapid Response annual reports from 2012 to 2016, online: <www.justicerapidresponse.org/news/annual-reports/>.

78 Canada notes, however, that it chairs the Residual Special Court for Sierra Leone Oversight Committee and a judge serves on the roster: High Commission of Canada in Ghana, “Canada-Sierra Leone Relations” (June 2016), online: <www.canadainternational.gc.ca/ghana/bilateral_relations_bilaterales/canada_sierraleone.aspx?lang=eng>.

press for unity in support of the ICC.⁷⁹ In Canada's statement at the 2016 ICC Assembly of States Parties, the minister argued that "[w]e need more of the International Criminal Court, not less" and recommended the assembly as a forum to continue dialogue with states expressing concerns about the ICC.⁸⁰ Canada has re-engaged in the judicial election process by nominating a well-qualified candidate, Kimberly Prost, for the 2017 ICC judicial elections.⁸¹ However, as of the 2016 Assembly of States Parties, Canada remained committed to pressing for zero nominal growth in the ICC's overall budget.⁸²

Reflecting the inability of obtaining UN Security Council approval for the referral of the Syria situation to the ICC, the current government has prioritized international criminal justice in Syria and Iraq by funding the International, Impartial and Independent Mechanism (IIIM) through the Office of the United Nations High Commissioner for Human Rights, as well as the International Commission of Missing Persons, the non-governmental Commission for International Justice and Accountability and The Day After's Transitional Justice Coordination Group.⁸³

It is worth mentioning that, apart from Canada's governmental support for international criminal justice, Canadians were and are represented within contemporary international criminal justice institutions, including at the highest levels. For example, as mentioned above, Kirsch served as the first president of the ICC, and the deputy prosecutor of the ICC is currently James Stewart.⁸⁴ Deschênes was appointed among the first judges of the International Criminal Tribunal for the

former Yugoslavia from 1993 to 1997. Louise Arbour was the tribunal's prosecutor from 1996 to 1999, and both Prost (2006–2010) and Sharon Williams (2001–2003) were appointed as *ad litem* judges of the tribunal.⁸⁵ Pierre Boutet was appointed as a judge of the Special Court for Sierra Leone (2002–2009) and Robert Petit was international co-prosecutor of the Extraordinary Chambers of the Courts of Cambodia (2006–2009). Preceded by Daniel Bellemare (2009–2012), Norman Farrell is currently the prosecutor of the Special Tribunal for Lebanon.⁸⁶ There are also many others not mentioned in this list who have served within offices of the prosecutor and registries of international criminal tribunals, or as defence counsel to accused at the tribunals.

The next section will turn to a consideration of Canada's role in the development of international criminal law through the country's domestic legislative, judicial and administrative actions.

Canada and the Development of International Criminal Law at the Domestic Level

After Canada's contributions to the drafting of the Rome Statute and the creation of the ICC, Canada's second most far-reaching contribution to the field of international criminal law has been the adoption of key domestic legislation through the CAHWCA.⁸⁷ The CAHWCA was introduced in Parliament on International Human Rights Day, December 10, 1999, to underscore the role of the ICC, and of ICC-supportive states, in ending impunity for genocide,

79 See e.g. Geoffrey York, "African Union Vote Boosts Canada's Bid to save the ICC", *The Globe and Mail* (20 January 2017).

80 Canada, "Statement by The Hon. Stéphane Dion, Minister of Foreign Affairs, Global Affairs Canada, Fifteenth Assembly of States Parties to the Rome Statute" (16 November 2016) at 2–3, online: <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-CANADA-ENG-FRA.pdf>.

81 Prost was successfully elected as a judge of the ICC in December 2017. Her C.V. is available among the nominees: ICC, Assembly of States Parties, Elections, Judges, 2017, Nominations [ICC, Judges], online: <https://asp.icc-cpi.int/en_menus/asp/elections/judges/2017/Nominations/Pages/PROST.aspx>.

82 Lisa Barrett, "International Criminal Court: Report from the 15th Assembly of State Parties to the ICC", *Lawyers Rights Watch Canada* (23 January 2017).

83 Global Affairs Canada, "Canada's Support for People of Iraq and Syria" (17 March 2017), online: <www.canada.ca/en/global-affairs/news/2017/03/background-_-canadassupportforpeopleofiraqandsyria.html>.

84 ICC, "James Kirkpatrick Stewart" (16 Nov 2012), online: <www.icc-cpi.int/about/otp/who-s-who/Pages/James-Stewart.aspx>.

85 ICTY, Press Release, "Judge Deschenes Resigns for Medical Reasons" (29 April 1997); ICTY, "Former Prosecutors", online: <www.icty.org/en/about/office-of-the-prosecutor/former-prosecutors>; ICTY, "Former Judges", online: <www.icty.org/en/about/chambers/former-judges>; Prost is currently an ICC judicial candidate: ICC, Judges, *supra* note 81.

86 Residual Special Court for Sierra Leone, "RSCSL Roster of Judges", online: <www.rscsl.org/RSCSL-Roster_of_Judges.html>; Extraordinary Chambers in the Courts of Cambodia, "Mr. Robert Petit", online: <www.eccc.gov.kh/en/judicial-person/mr-robert-petit>; Special Tribunal for Lebanon, "Prosecutor – Norman Farrell", online: <www.stl-tsl.org/en/about-the-stl/biographies/principals/1445-prosecutor-norman-farrell>.

87 CAHWCA, *supra* note 2.

crimes against humanity and war crimes.⁸⁸ It received royal assent on June 24, 2000.⁸⁹ On passage of the CAHWCA, Canada became the first country in the world to incorporate the obligations of the Rome Statute into its national laws.⁹⁰ Canada ratified the Rome Statute shortly after, on July 7, 2000.⁹¹

The CAHWCA had two main goals, the first of which was to implement Canada's obligations under the Rome Statute to ensure its ability to cooperate fully with investigations and prosecutions by the ICC.⁹² The second goal was to "re-energize Canada's ability to prosecute core crimes committed both domestically and abroad."⁹³ In other words, the CAHWCA was aimed at correcting the challenges created by the SCC's 1994 *Finta* judgment and to fill gaps in the law.

The CAHWCA addresses eight different themes: crimes, jurisdiction, defences, sentences, offences against the administration of justice of the ICC, proceeds of crimes offences, the creation of a Crimes Against Humanity Fund, extradition and mutual legal assistance. Each of these themes will be described in turn.

The CAHWCA criminalizes genocide, crimes against humanity and war crimes as domestic crimes based on treaty and customary international law, including the Rome Statute.⁹⁴ Additionally, it adds a new offence of breach of command or superior responsibility.⁹⁵ The CAHWCA incorporated into domestic law the international law definitions of the offences. In this manner, the definitions are flexible because they evolve as the international definitions evolve, thereby eliminating the need to

amend Canadian law as international law changes.⁹⁶ The definitions meet the principle of legality by adapting to the international law offences in place at the time of the crime.⁹⁷ However, this flexibility also means that, in every case, the trial judge will need to determine the exact definition of genocide, crimes against humanity or war crimes applicable at the time period specified in the charges.⁹⁸

The CAHWCA adds some clarity to the definitions by specifying that, for crimes occurring after July 17, 1998, the Rome Statute's definitions of crimes are a sort of "minimum baseline for courts to draw on in constructing a definition in a particular case."⁹⁹ The CAHWCA also indicates that crimes against humanity were part of customary international law or were criminal under general principles of international law prior to "(a) the Agreement for the prosecution and punishment of the major war criminals of the 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."¹⁰⁰ This was meant to clarify a point raised by the SCC in *Finta*, forestalling any defence attempts to relitigate the question of whether crimes against humanity were criminal under customary international law during the World War II era.¹⁰¹

The CAHWCA sets out several grounds of jurisdiction for offences committed within and outside of Canada. For offences committed within Canada, the CAHWCA establishes territorial jurisdiction.¹⁰² The temporal jurisdiction for these offences is prospective only, applying to crimes committed after the entry into force of the CAHWCA.¹⁰³ For offences committed outside of Canada, the CAHWCA provides jurisdiction based on the nationality principle ("the person was a Canadian citizen or was employed by Canada in a civilian

88 Morris Rosenberg, "Canadian Legislation against Crimes against Humanity and War Crimes" in the International Centre for Criminal Law Reform & Criminal Justice Policy (ICCLR & CJP), *The Changing Face of International Criminal Law: Selected Papers* (Vancouver, BC: ICCLR & CJP, 2002) 229 at 231–32.

89 CAHWCA, *supra* note 2, s 1.

90 Global Affairs Canada, "Canada's Crimes Against Humanity and War Crimes Act" (30 April 2013), online: <www.international.gc.ca/court-cour/war-crimes-guerres.aspx?lang=eng>.

91 ICC Assembly of States Parties, *supra* note 65.

92 David Goetz, *Bill C-19: Crimes against Humanity and War Crimes Act* (Ottawa, ON: Parliamentary Research Branch, 2000) LS-360E (revised 15 June 2000), online: <https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C19&Parl=36&Ses=2>.

93 Currie & Rikhof, *supra* note 6 at 247.

94 CAHWCA, *supra* note 2, ss 4, 6.

95 *Ibid*, ss 5, 7.

96 Currie & Rikhof, *supra* note 6 at 251.

97 *Ibid* at 251–52.

98 *Ibid* at 252. The *Munyaneza* case provides an illustration that this is certainly possible and not necessarily a roadblock to successful prosecution: Fannie Lafontaine, "Canada's Crimes Against Humanity and War Crimes Act on Trial" (2010) 8:1 *J Intl Crim Justice* 269 at 274–82; Robert J Currie & Ion Stancu, "R v Munyaneza: Pondering Canada's First Core Crimes Conviction" (2010) 10 *Intl Crim L Rev* 829 at 844–51.

99 Currie & Rikhof, *supra* note 6 at 251.

100 CAHWCA, *supra* note 2, s 6(5).

101 Currie & Rikhof, *supra* note 6 at 252.

102 CAHWCA, *supra* note 2, ss 4, 5.

103 *Ibid*, s 4.

or military capacity,” “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”) and the passive personality principle (“the victim...was a Canadian citizen” or “a citizen of a state allied with Canada in an armed conflict”).¹⁰⁴ The CAHWCA also provides for universal jurisdiction for crimes committed by any individual subsequently present in Canada, regardless of the individual’s nationality or of where the crimes were committed.¹⁰⁵ The temporal jurisdiction for these offences is both prospective and retrospective.¹⁰⁶

Both Canadian and international defences are available to accused persons under the amendments set out in the CAHWCA, which contributes to respect for the rights of the accused. However, the CAHWCA makes it clear that it is not a defence that “an offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission.”¹⁰⁷ Additionally, the CAHWCA indicates that an accused cannot base his or her defence of superior orders 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.”¹⁰⁸ This amendment directly reversed the “I believed the hate propaganda” defence of *Finta* mentioned above.

The CAHWCA indicates that those convicted of committing genocide, crimes against humanity and war crimes “shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence” or can be sentenced for a term up to life, in any other case.¹⁰⁹ The CAHWCA contains a number of offences against the administration of justice of the ICC. These offences include obstruction of justice, obstruction of officials, bribery of judges and officials, perjury, fabrication or provision of contradictory evidence and intimidation.¹¹⁰ They cover all persons inside of Canada, and Canadians

who commit these offences outside of Canada.¹¹¹ These sections of the CAHWCA represent a crucial aspect of implementation of the Rome Statute, as they allow Canada to cooperate with the ICC on matters central to the protection of the integrity of the ICC’s proceedings. The CAHWCA also sets out offences for possessing or laundering proceeds obtained from genocide, crimes against humanity and war crimes.¹¹²

The Rome Statute broke new ground by providing for the creation of the Trust Fund for Victims,¹¹³ something that had never been done before in an international criminal tribunal. The trust fund has a two-fold mandate: first, to implement court-ordered reparations and, second, to provide physical, psychological and material support to victims and their families.¹¹⁴ Canada responded to this in the CAHWCA through provision for the Crimes against Humanity Fund.¹¹⁵ Money obtained through the enforcement in Canada of the ICC’s orders for reparations, fines or forfeitures, as well as through the disposal of forfeited assets, is to be paid into this fund.¹¹⁶ The Attorney General of Canada may then make payments from that fund to the ICC’s trust fund or to the victims of offences under the CAHWCA.¹¹⁷ This fund must be established via federal regulations,¹¹⁸ but this has not yet occurred.

The CAHWCA also obliges Canada to arrest and surrender persons sought by the ICC for genocide, crimes against humanity and war crimes, and makes clear that surrender is different from state-to-state extradition.¹¹⁹ That said, most procedures of the Extradition Act¹²⁰ apply to individuals who are the subject of a surrender request by the ICC, except that the person is not able to claim immunity, and grounds of refusal for extraditions do not apply in cases of surrender.¹²¹

104 *Ibid*, s 8(a).

105 *Ibid*, s 8(b).

106 *Ibid*, s 6(1).

107 *Ibid*, s 13.

108 *Ibid*, s 14(3).

109 *Ibid*, ss 4(2)(a), 4(2)(b), 5(3), 6(2)(a), 6(2)(b), 7(4).

110 *Ibid*, ss 16–23.

111 *Ibid*, ss 25, 26.

112 *Ibid*, ss 27–29.

113 Rome Statute, *supra* note 1, art 79.

114 ICC Trust Fund for Victims, “The Trust Fund for Victims”, online: <www.trustfundforvictims.org/>.

115 CAHWCA, *supra* note 2, s 30.

116 *Ibid*, ss 30(1), 31.

117 *Ibid*, s 30(2).

118 *Ibid*, s 30(3).

119 *Ibid*, ss 47–53.

120 Extradition Act, SC 1999, c 18.

121 CAHWCA, *supra* note 2, ss 48, 52.

The CAHWCA allows Canada to cooperate with the ICC in its investigations of genocide, crimes against humanity and war crimes in a manner similar to that of providing mutual legal assistance to foreign states. The Mutual Legal Assistance in Criminal Matters Act¹²² was amended to permit Canada to assist the ICC through enforcement of ICC orders for restraint, search, seizure, reparation, forfeiture and fines, as well as questioning, production of records or things and other forms of evidence collection.¹²³

As Canada was the first country in the world to adopt comprehensive legislation implementing the Rome Statute, many other states looked to Canada to provide insights into its experience in drafting and passing this legislation. As a result, through its ICC and Accountability Campaign, Canada sponsored the creation and global dissemination of a manual on the implementation of the Rome Statute into domestic law.¹²⁴

The ratification of the Rome Statute and the CAHWCA prompted changes within Canada in its domestic application of international criminal law. It became clear that Canada needed to shift its focus beyond World War II crimes to crimes committed, for example, in the conflicts in the former Yugoslavia, the genocide in Rwanda and elsewhere. To this end, Canada revised the War Crimes Program in 1998 to be an interdepartmental initiative between the Department of Justice, the RCMP and the Department of Citizenship and Immigration, with the Canada Border Services Agency joining on its inception in 2003.¹²⁵ The purpose of the program was — and still is — to support Canada’s policy of denying safe haven to persons believed to have committed or to have been complicit in genocide, crimes against humanity or war crimes, and to contribute to the international and domestic fight against impunity.¹²⁶ Additionally, the program is involved in responding to requests from international criminal tribunals for assistance from Canada.

The War Crimes Program takes two approaches to apply its “no safe haven” purpose: criminal prosecutions and administrative remedies. The program views criminal investigations and prosecutions of those suspected of committing genocide, crimes against humanity and war crimes as “sending a strong message to Canadians and the international community that the Government of Canada does not tolerate impunity” for these crimes.¹²⁷ In 2005, Munyaneza, a Rwandan national living in Canada, was charged under the CAHWCA with two counts of genocide through intentional killing and causing serious bodily or mental harm to Tutsi, two counts of crimes against humanity through intentional murder and sexual violence against Tutsi civilians and three counts of war crimes through intentional murder, sexual violence and pillage for acts committed in 1994 in Butare.¹²⁸ He was charged on the basis of the universal jurisdiction provision in the CAHWCA, due to his presence in Canada. On October 29, 2009, Munyaneza was sentenced to life in prison with no chance of parole for 25 years.¹²⁹ The Quebec Court of Appeal affirmed his conviction in 2014.¹³⁰ Leave to appeal was denied by the SCC.¹³¹ These judgments represent a high point in Canadian criminal law on the prosecution of genocide, crimes against humanity and war crimes, based on international criminal law standards. Unfortunately, they currently represent the *only* high point in this regard.

On November 6, 2009 — shortly after the release of the *Munyaneza* judgment — the RCMP arrested Jacques Mungwarere in Windsor, Ontario. He was the second person charged under the CAHWCA, this time with two counts of genocide and two counts of crimes against humanity for allegedly participating in the killing of Tutsi in Kibuye.¹³² Justice Charbonneau of the Ontario Superior Court of Justice found Mungwarere not guilty. Justice Charbonneau ruled that, although he did not give credibility to Mungwarere’s testimony, the Crown had not proven its case beyond a

122 *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c 30 (4th Supp).

123 CAHWCA, *supra* note 2, ss 56–69.

124 ICCLR & CJP, *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*, 3rd ed (Vancouver, BC: ICCLR & CJP, 2008).

125 Canada, *Canada’s Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report* (Ottawa, ON: Government of Canada, 2016) at 5 [13th Report].

126 *War Crimes Program Evaluation*, *supra* note 73 at i.

127 13th Report, *supra* note 125 at 5.

128 *R v Munyaneza*, 2009 QCCS 2201 at Appendix 2 (Indictment).

129 *R v Munyaneza*, 2009 QCCS 4865.

130 *Munyaneza v R*, 2014 QCCA 906, leave to appeal to SCC refused, 35993 (18 December 2014).

131 *Ibid.*

132 *R v Mungwarere*, 2013 ONCS 4594.

reasonable doubt.¹³³ This prosecution failure seems to have marked the end — for the time being — of the use of criminal prosecutions in Canada to address serious international crimes.

A 2016 evaluation of the War Crimes Program noted that other comparator countries, such as Belgium and Sweden, had conducted more prosecutions in a shorter time period.¹³⁴ The same review also noted that the program's relatively low budget of CDN\$15.6 million — which is the same budget amount since the program's inception in 1998, and, therefore, a shrinking budget, due to inflation — has restricted the program's ability to undertake prosecutions, which are far more expensive (at \$6 million) than the remedies of denial of visas (\$6,280), refugee exclusion (\$55,162), challenging admissibility and removal under the Immigration and Refugee Protection Act¹³⁵ (\$122,908) and revocation of citizenship (\$1.58 million).¹³⁶

Given the budget limitations, the War Crimes Program emphasizes immigration remedies as “effective and cost-efficient.”¹³⁷ In this respect, the program has had a number of successes. For example, after 17 years of legal challenges, Canada successfully deported Leon Mugasera, due to his role in encouraging the Rwandan genocide,¹³⁸ and, in 2011, the Federal Court found that Branko Rogan had been untruthful in his 1994 application to come to Canada with respect to his work as a reserve police officer and guard at detention facilities in Bosnia-Herzegovina and that he had participated in the abuse of Muslim prisoners in detention facilities in Bileca.¹³⁹ Continuing that

success, from 2009 to 2015, the program was involved in cases in which 140 individuals were denied refugee protection, 47 claimants were found inadmissible and 138 individuals were removed from Canada, based on reasonable grounds to believe that they had been involved or were complicit in genocide, crimes against humanity or war crimes.¹⁴⁰ On the other hand, the 2016 evaluation mentioned above indicated that the number of removals per fiscal year has been declining since 2006 and that the number of outstanding warrants for removal remains at close to 200.¹⁴¹

In sum, Canada has made a significant contribution to the development of international criminal law through the adoption of its groundbreaking CAHWCA. The CAHWCA allows Canada to prosecute individuals who have committed serious international crimes and also serves as a guide to others on how the Rome Statute might be fully implemented into domestic law. Canada has also set a positive precedent in its successful domestic prosecution under the CAHWCA in *Munyaneza*. It has made strides in applying administrative remedies to modern-day serious crimes. However, with increased political and financial support, it could do more, thereby truly “sending a strong message to Canadians and the international community that the Government of Canada does not tolerate impunity.”¹⁴²

Conclusion: Canada and International Criminal Law – What Role for the Future?

Canada's most energetic and progressive period in the development of international criminal law took place from the mid-1990s to the early 2000s. It then stepped back from this role somewhat for political and legal reasons: a change in government, a shrinking budget within the domestic War Crimes Program and a significant

133 13th Report, *supra* note 125 at 5. One challenge faced in this case related to Crown witnesses who had previously been questioned about the events at issue by other law enforcement jurisdictions. The defence successfully relied upon inconsistencies between the previous statements and the testimony in trial, which the judge accepted as raising a question of credibility: Canadian Centre for International Justice, “Jacques Mungwarere (Rwanda), Weekly Trial Summaries” at 2, 16, 48, online: <www.cciij.ca/content/uploads/2015/07/Mungwarere-trial-summaries-ALL-ENGLISH-published-to-website.pdf>. This highlights a difficulty in prosecuting international crimes committed extraterritorially, when witnesses are often questioned by a number of international actors.

134 War Crimes Program Evaluation, *supra* note 75 at vii, 53.

135 Immigration and Refugee Protection Act, SC 2001, c 27.

136 War Crimes Program Evaluation, *supra* note 73 at 72–73.

137 13th Report, *supra* note 125 at 5.

138 *Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100; *Mugesera v Canada (Citizenship and Immigration)*, 2012 FC 32; and *Mugesera v Kenney*, 2012 QCCS 116.

139 Case described in 13th Report, *supra* note 125 at Appendix 1.

140 War Crimes Program Evaluation, *supra* note 73 at 71.

141 *Ibid.*

142 13th Report, *supra* note 125 at 5.

loss in a criminal prosecution. Even so, Canada's past steps position it well to once again become an international criminal justice innovator — not to replicate the past, but to be responsive to current priorities. It can do so in three main ways.

First, it can and should strengthen Canada's domestic War Crimes Program by increasing the budget enough to permit the launching of one prosecution every two to three years and to increase staff resources for administrative remedies, such as visa review and refugee exclusion monitoring. Maintaining the very real potential for prosecutions along with active administrative remedies would significantly raise the profile of Canada's no safe haven policy, here and abroad. In so doing, increasing transparency for victims on how to communicate with, and be updated by, the program would also be important. On a related note, the program has developed some excellent practices: while program employees have shared these practices with other countries and entities in the past,¹⁴³ dedicated funding should be provided to allow program employees to share expertise more often by conducting international training projects (in particular with other ICC states parties to promote complementarity). Also from a domestic perspective, the federal government should adopt the regulations required to make the Crimes Against Humanity Fund operational.

Second, Canada should consider appointing a focal point, such as an ambassador-at-large or an envoy, on international criminal justice issues to consolidate and coordinate Canada's foreign policy voice in this realm.¹⁴⁴ Doing so would amplify Canada's impact in international criminal justice on the international stage.

Finally, Canada should continue demonstrating its support for international criminal justice through coordinated and sustained actions across the international criminal justice spectrum. These actions include continuing or establishing financial, legal and/or political support for initiatives that boost accountability responses (for example, Justice Rapid Response and evidence-gathering organizations, such as the UN Commissions of Inquiry and the IIIM), institutions that preserve and protect past gains in international criminal

law (such as the Residual Special Court for Sierra Leone and the UN Mechanism for International Criminal Tribunals) and viable new and established independent international, regional and localized justice mechanisms meeting human rights standards. This effort would include easing somewhat Canada's position on the ICC budget, so as to permit some growth in the ICC's response to an increasing caseload, while still ensuring the efficient use of funds.

Criminal prosecutions, the rule of law, reconciliation and secure transitions to peace are undeniably linked. Current and future ICC, regional and domestic prosecutions, and current and future tribunals benefit from foreign policy approaches that understand and reflect this complexity. These steps would reinforce the constructive advances made by Canada at the domestic and international levels while, at the same time, international criminal justice faces ever-greater challenges in the form of protracted armed conflicts, state non-cooperation, state resistance to norms of individual responsibility and the rise of destructive nationalism and terrorism linked to conflicts. There is, indeed, a valuable role for Canada to play in the future development of international criminal law.

¹⁴³ *War Crimes Program Evaluation*, *supra* note 73 at 34.

¹⁴⁴ Fannie Lafontaine et al, "How Canada can Reclaim its Reputation for International Justice", *Huffington Post* (5 October 2015).

ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

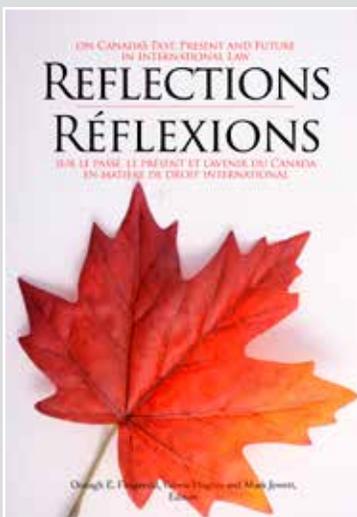
Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors



Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

Part I explores the history and practice of international law, including sources of international law, Indigenous treaties, international treaty diplomacy, domestic reception of international law and Parliament's role in international law. Part II explores Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Economic law topics include international trade and investment, dispute settlement, subnational treaty making, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Part III explores Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, child soldiers and gender.

Reflections on Canada's Past, Present and Future in International Law/ Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future.



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