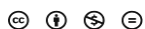


# Universal Jurisdiction Law and Practice in Canada

April 2020

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## Introduction

This briefing paper was written by the Open Society Justice Initiative in partnership with TRIAL International. It provides an overview of the Canadian national legal framework on universal jurisdiction, including statutory and case law, and its application in practice.

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners who operate in the field of universal jurisdiction, to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.<sup>1</sup>

The content is based on desk research with the support of pro bono lawyers from the relevant jurisdiction. In addition, interviews with national practitioners were conducted on the practical application of the law. Respondents are not named as they did not wish their identity and affiliation with certain institutions or organizations to be disclosed.

Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the investigating and prosecuting jurisdiction. This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

The authors would like to thank Rebecca Fleming, Nina Ippolito, Fiona McKay, Valérie Paulet, Joseph Rikhof, Coline Schupfer, as well as all experts and practitioners who agreed to be interviewed for their invaluable contribution to this briefing paper.

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<sup>1</sup> All briefing papers are available at: <https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-willingness/> and at <https://www.justiceinitiative.org/search?q=universal+jurisdiction>.

## Crimes invoking universal jurisdiction

Canada has implemented legislation that establishes universal jurisdiction for the prosecution of certain international crimes.<sup>2</sup> According to Section 6(1) of the Crimes Against Humanity and War Crimes Act (CAHWCA), genocide, crimes against humanity, and war crimes are criminalized in Canada when committed abroad.<sup>3</sup> In addition, Section 8 of the CAHWCA sets out the conditions for Canada to exercise (universal) jurisdiction for such crimes (see below on [Universal Jurisdiction Requirements](#)).

The definitions of these three international crimes are set out in Section 6(3) of the CAHWCA. They are mostly defined by reference to international law, rather than by setting out the specific elements of the crimes. It is assumed that the Elements of Crimes of the Rome Statute of the International Criminal Court, even if not incorporated into Canadian domestic law, would be a persuasive tool for interpreting the corresponding crimes in the CAHWCA.<sup>4</sup>

Torture is also criminalized as a separate, stand-alone crime in Section 269.1(1) of the Criminal Code (CC)<sup>5</sup> and, when committed by a foreigner abroad, falls under different jurisdictional requirements that are set out in Section 7(3.7) of the CC. Enforced disappearance as a stand-alone crime is not criminalized in Canada.

In addition, the CAHWCA lists a number of other crimes to which universal jurisdiction applies.<sup>6</sup>

### 1. Genocide

Section 6(3) of the CAHWCA defines genocide as

“[...] an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”

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<sup>2</sup> In Canada international law does not become enforceable at the time it is signed and ratified by the executive. Rather, international law becomes enforceable only after it is incorporated into domestic law through implementing legislation, unless the rules are based on customary international law, which is automatically incorporated into domestic common law provided there is no Canadian legislation that expressly derogates from that custom.

<sup>3</sup> Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (**CAHWCA**). Section 4 CAHWCA criminalizes genocide, crimes against humanity and war crimes committed on the territory of Canada but contains the same definitions.

<sup>4</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>5</sup> Criminal Code, R.S.C. 1985, c. C-46 (**CC**).

<sup>6</sup> E.g. air piracy (Section 7(2) CC), offences against cultural property (Section 7(2.01) CC), hostage taking for the purpose of terrorism (Section 7(3.1) CC), terrorism offences (Section 7(3.74) CC).

The interpretation of the term “crimes according to customary international law” set out in Section 6(4) of the CAHWCA incorporates genocide, as defined in Article 6 of the Rome Statute of the International Criminal Court (Rome Statute),<sup>7</sup> as a crime punishable under Section 6(3) of the CAHWCA. At the same time, Canadian law allows for a wider interpretation of genocide by stipulating that the reference to the Rome Statute “does not limit or prejudice in any way the application of existing or developing rules of international law.”<sup>8</sup>

Unlike the Rome Statute, Section 6(3) of the CAHWCA does not provide a list of underlying acts that constitute genocide, nor does it provide examples of protected groups that if targeted with an intent to destroy could constitute grounds for a charge of genocide. Moreover, under the CAHWCA genocide can be committed both through acts and omissions.<sup>9</sup> As a result, genocide under Section 6(3) of the CAHWCA, read together with Section 6(4) of the CAHWCA, may be interpreted more broadly than genocide under the Rome Statute. The formulation in the CAHWCA represents an acceptance that customary international law may evolve so as to include other punishable acts and new protected groups.<sup>10</sup> There has not been any jurisprudence on such a wider definition of genocide. However, the Court of Appeal in the *Munyaneza* case emphasized that the definitions of crimes under the CAHWCA must be interpreted in a manner consistent with developments in international law and the definitions of those crimes under international law.<sup>11</sup>

## 2. Crimes Against Humanity

Section 6(3) of the CAHWCA defines crimes against humanity 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 recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”

As with genocide, Section 6(4) of the CAHWCA incorporates crimes against humanity as defined in Article 7 of the Rome Statute into the scope of Section 6(3) CAHWCA, without limiting or prejudicing “in any way the application of existing or developing rules of international law.”

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<sup>7</sup> Rome Statute of the International Criminal Court of 17 July 1998, Treaty Series, vol. 2187, no. 38544, entered into force 1 July 2002 (**Rome Statute**).

<sup>8</sup> Section 6(4) CAHWCA.

<sup>9</sup> Section 6(3) CAHWCA.

<sup>10</sup> Lafontaine, Canada’s Crimes against Humanity and CAHWCA on Trial: An Analysis of the Munyaneza Case, *Journal of International Criminal Justice*, 2010, p. 273 at footnote 22, and pp. 274-275; Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>11</sup> Court of Appeal of Province of Quebec, *Munyaneza v. Her Majesty the Queen*, 2014 QCCA 906, 7 May 2014, para 128, available at: <https://www.canlii.org/en/qc/qcca/doc/2014/2014qcca906/2014qcca906.html> (**Munyaneza Judgment**).

Section 6(3) of the CAHWCA cited above does not explicitly list all of the underlying crimes of crimes against humanity that are enumerated in Article 7(1) of the Rome Statute. The following are omitted: forcible transfer of population, other severe deprivation of physical liberty, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, enforced disappearance, and apartheid. However, the Quebec Court of Appeal noted in its judgment in the *Munyaneza* case that the list in Section 6(3) of the CAHWCA is non-exhaustive, as “any other act or omission that contravenes customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations may constitute a proscribed underlying act”.<sup>12</sup>

Other than requiring that the relevant crimes must be “committed against any civilian population or any identifiable group”, Section 6(3) of the CAHWCA does not include the contextual elements set out in Article 7(1) Rome Statute. Article 7(1) requires that the underlying acts are committed as part of a widespread or systematic attack against any civilian population. However, the Quebec Court of Appeal in *Munyaneza* as well as case law on immigration disputes suggests that the same following three contextual conditions as are set out in Article 7 of the Rome Statute must be met for a crime to be considered a crime against humanity:<sup>13</sup>

- “(i) one of the enumerated proscribed acts is committed;
- (ii) it is committed as part of a widespread or systematic attack; and
- (iii) the attack is directed against any civilian population or any identifiable group.”

Whether or not the attack must be “pursuant to or in furtherance of a State or organizational policy to commit such attack” as required by Article 7(2)(a) of the Rome Statute has not been decided yet by the Canadian courts, but practitioners are of the view that it is not a requirement under Canadian law.<sup>14</sup>

The CAHWCA does not contain a specific set of elements for each of the underlying crimes, along the lines of the Rome Statute’s Elements of Crimes. However, the Quebec Court of Appeal in *Munyaneza* stated that underlying crimes, such as murder, must be defined according to international law, of which the Rome Statute is a crucial tool.<sup>15</sup>

### 3. War Crimes

Section 6(3) of the CAHWCA defines war crimes as:

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<sup>12</sup> *Munyaneza* Judgment, para. 130.

<sup>13</sup> *Munyaneza* Judgment, para. 132-133; see also immigration cases in: Supreme Court of Canada, *Mugesera v. Canada* (Minister of Citizenship and Immigration), 2005 S.C.R. 100, SCC 40, 26 June 2005, para 119, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2273/index.do>; Federal Court, *Mungwarere v. Canada* (Minister of Public Safety and Emergency Preparedness), 2017 FC 708, 21 July 2017, para 9, available at: <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/235798/index.do>.

<sup>14</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>15</sup> *Munyaneza* Judgment, para. 127.

“[...] 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.”

In the same vein as genocide and crimes against humanity, Section 6(4) of the CAHWCA incorporates all specific war crimes listed under Article 8(2) of the Rome Statute by reference, without listing them explicitly. Accordingly, the definition of war crimes under the CAHWCA reflects the Rome Statute, except that Section 6(3) CAHWCA explicitly includes omissions whereas the Rome Statute refers only to acts. As above, Section 6(4) of the CAHWCA allows for a wider interpretation where the application of existing or developing rules of international law calls for it.<sup>16</sup>

## 4. Torture

According to Section 269.1(2) of the CC, torture as a stand-alone crime (i.e. not as a crime against humanity, war crime or genocide) is defined as:

“any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

- (a) for a purpose including
    - (i) obtaining from the person or from a third person information or a statement,
    - (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
    - (iii) intimidating or coercing the person or a third person, or
  - (b) for any reason based on discrimination of any kind,
- but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.”<sup>17</sup>

The crime of torture under the CC requires that the act or omission is committed by an official or a person “acting at the instigation of, or with the consent or acquiescence of, an official”.<sup>18</sup> Officials include peace officers, public officers, members of the Canadian Forces, and anyone who exercises powers like the aforementioned in a foreign state, whether the powers are exercised inside or outside of Canada.<sup>19</sup>

This definition reflects Article 1(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1987). It differs from the definition of torture as a crime against humanity as set out in Article 7(2)(e) of the Rome Statute which

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<sup>16</sup> Interviews with former and current members of Department of Justice Crimes Against Humanity and War Crimes Section on 25 and 27 June 2019.

<sup>17</sup> Section 269.1(2) CC.

<sup>18</sup> Section 269.1(1) CC.

<sup>19</sup> Section 269.1(2) CC.



does not require the involvement of an official or that the act or omission was for a specific purpose.

## 5. Breach of Military / Superior Responsibility

Section 7 of the CAHWCA establishes two separate offences for breaches of responsibility by a military commander or a superior which, according to Section 7(3) and 8 of the CAHWCA, can be prosecuted under universal jurisdiction when committed abroad by a foreigner if certain conditions are met (see below under [Universal Jurisdiction Requirements](#)). A military commander is a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander. A superior refers to a person in authority, other than a military commander.<sup>20</sup>

The elements of these offences are similar to the criteria for establishing command / superior responsibility under Article 28 of the Rome Statute. Whereas the Rome Statute considers these to be modes of liability, the CAHWCA treats such breaches as separate crimes.<sup>21</sup> Consequently, all modes of liability under domestic law are applicable (see below under [Modes of Liability](#)).<sup>22</sup>

A military commander is liable for committing an offence under the CAHWCA if:

- (1) the commander fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under the CAHWCA;
- (2) the commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing a core offence under the CAHWCA; and
- (3) the commander subsequently fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence or further commission of the offence, or take all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.<sup>23</sup>

A superior is liable for committing an offence under the CAHWCA if:

- (1) the superior fails to exercise control properly over a person under their effective authority and control, and as a result the person commits a core offence under the CAHWCA;

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<sup>20</sup> Section 7(6) CAHWCA.

<sup>21</sup> Interview with academic on 10 September 2019.

<sup>22</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>23</sup> Section 7(1) CAHWCA.

- (2) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;
- (3) the offence relates to activities for which the superior has effective authority and control; and,
- (4) the superior subsequently fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence or further commission of the offence, or take all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.<sup>24</sup>

There has been no case law so far in relation to these two crimes.

## 6. Other Crimes

The CAHWCA contains a number of offences beyond crimes against humanity, war crimes, and genocide that can be prosecuted when committed abroad, including offences against the administration of justice, and against the International Criminal Court,<sup>25</sup> and retaliation against witnesses.<sup>26</sup> These crimes, however, are only prosecutable in Canada if committed by a Canadian national and a detailed discussion goes beyond the scope of this report.

Section 7 of the CC lists additional offences, for example offences against cultural property,<sup>27</sup> hostage taking for the purpose of terrorism,<sup>28</sup> and terrorism offences,<sup>29</sup> which can be prosecuted under certain conditions if they are committed abroad. A detailed discussion of these crimes goes beyond the scope of this report.

## Modes of liability

The modes of liability for genocide, crimes against humanity, war crimes and torture are governed by Section 6 of the CAHWCA and by the rules of general criminal law in Canada, as set out in Sections 21, 22 and 23 of the CC. The latter applies to crimes listed in the CAHWCA by virtue of Section 34(2) of the Interpretation Act, which states that all the provisions of the CC relating to indictable offences apply to indictable offences created by

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<sup>24</sup> Section 7(2) CAHWCA.

<sup>25</sup> Section 16 to 23 in conjunction with Section 25 CAHWCA.

<sup>26</sup> Section 26 CAHWCA.

<sup>27</sup> Section 7(2.01) CC.

<sup>28</sup> Section 7(3.1) CC.

<sup>29</sup> Section 7(3.74) CC.

any enactment.<sup>30</sup> This provides the basis for the modes of participation codified in the CC to apply to offences prosecuted under the CAHWCA.<sup>31</sup>

## 1. Principal Liability

The CAHWCA recognizes principal perpetrator liability under Section 6(1), which states that “[e]very person who [...] commits outside Canada” genocide, a crime against humanity, or a war crime is responsible for these crimes. In addition, Section 21(1)(a) of the CC, which applies to torture as a stand-alone crime, stipulates expressly that everyone is liable for an offence “who actually commits it.”

## 2. Co-Principals

The CC recognizes that there may be co-principals of a crime, even though there is no explicit mention in the law. Section 21(1)(a) of the CC states that *every one* is party to an offence who actually commits it. This has been interpreted in case law to extend to “co-principals” (referred to in the case law variously as “co-principals”, “joint-principals”, “co-perpetrators” or “joint-perpetrators”) whereby two persons may both be actual committers even though each has not performed every act that makes up the *actus reus* of the offence.<sup>32</sup>

Co-principals are persons who “acted in concert, pursuant to a common motive”, and are to be distinguished from accomplices (see below under [Counsel to an Offence](#) and [Aiding/Abetting](#)).<sup>33</sup> In order to establish a person as a co-principal, the prosecution must show that the co-principal physically committed at least an aspect of the *actus reus* of the offence, unlike co-perpetration under the Rome Statute, which permits an alleged offender to be prosecuted as a co-perpetrator even if he or she has “not physically committed an element of the *actus reus* of the offence that was materially perpetrated by others, but which nonetheless contributed in an essential manner and according to a common concerted plan.”<sup>34</sup>

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<sup>30</sup> According to Section 6(1) CAHWCA, genocide, crimes against humanity and war crimes are indictable offences.

<sup>31</sup> Interpretation Act, R.S.C., 1985, c. I-21 (**Interpretation Act**); Lafontaine, Parties to Offences Under the Canadian Crimes against Humanity and CAHWCA: An Analysis of Principal Liability and Complicity, *Les Cahiers en Droit*, vol. 50, Issue 3-4, 2009, p. 982; see also jurisprudence in immigration cases: Federal Court of Appeal, *Zazai v. Canada* (Minister of Citizenship & Immigration), 2005 FCA 303, 20 September 2005.

<sup>32</sup> Court of Appeal for British Columbia, *Regina v. Adam Gerald Ball and Regina v. Paul Philip Rosborough*, 2011 BCCA 11, 14 January 2011, para. 23, available at: <https://www.bccourts.ca/jdb-txt/CA/11/00/2011BCCA0011.htm>; Supreme Court of Canada, *Robert William Pickton v. Her Majesty The Queen*, 2010 SCC 32, [2010] 2 S.C.R. 198, 30 July 2010, para. 63, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7872/index.do>; Superior Court of Justice of Ontario, *Her Majesty the Queen v. Jacques Mungwarere*, 211 CSON 1254, 5 July 2013 (only available in French), para. 52.

<sup>33</sup> Ontario Court of Appeal (ONCA), *Regina v. Wood*, 51 C.C.C. (3d) 201ff, 10 July 1989, p. 220f.

<sup>34</sup> Lafontaine, Parties to Offences Under the Canadian Crimes against Humanity and CAHWCA: An Analysis of Principal Liability and Complicity, *Les Cahiers en Droit*, vol. 50, Issue 3-4, 2009, p. 978.

### 3. Common Intention

The mode of liability of common intention is codified in Section 21(2) of the CC which states:

“Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.”

This mode of liability applies to torture as a stand-alone crime and to the international crimes listed in the CAHWCA by virtue of Section 34(2) of the Interpretation Act. It corresponds to the concept of Joint Criminal Enterprise III under international criminal law.<sup>35</sup> Each person can be ultimately convicted of a different crime, depending on what was foreseeable for each person.<sup>36</sup>

### 4. Counsel to an Offence

Section 6(1.1) of the CAHWCA stipulates that every person who “counsels in relation to” genocide, crimes against humanity or war crimes is criminally responsible. The corresponding provision in the CC applicable to torture as a separate crime can be found in Section 23(1) and (2) of the CC.

“Counsel” under this section is more than simply advising, it has the meaning of “actively inducing”.<sup>37</sup> The *mens rea* of counselling requires evidence that “an accused either intended that the offence counseled be committed, or knowingly counseled the commission of the offence while aware of the unjustified risk that the offence counseled was in fact likely to be committed as a result of the accused’s conduct”.<sup>38</sup> In addition, Section 23(3) of the CC states that “counsel includes procure, solicit or incite”.

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<sup>35</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019; interview with legal practitioner on 22 August 2019; see also discussion of Joint Criminal Enterprise III e.g. in International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dusko Tadic, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 228, available at: <http://www.icty.org/x/cases/tadic/acjuq/en/tad-aj990715e.pdf>.

<sup>36</sup> For example, in Supreme Court of Canada, Her Majesty the Queen v. Jackson, [1993] 4 S.C.R. 573, 16 December 1993, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1091/index.do>: Both parties formed a common intention for robbery but one of them murdered the victim. The other party was ultimately found guilty of manslaughter instead of murder because the court found he did not foresee the probability of murder but a reasonable person in all the circumstances would have foreseen at least a risk of harm to another as a result of carrying out the common intention.

<sup>37</sup> Supreme Court of Canada, Her Majesty the Queen v. John Robin Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, 26 January 2001, para. 56, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1837/index.do>.

<sup>38</sup> Supreme Court of Canada, Her Majesty the Queen v. René Luther Hamilton, [2005] 2 S.C.R. 432, 2005 SCC, 29 July 2005, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2280/index.do?r=AAAAAQALMjAwNSBTQ0MgNDcB>; see also in immigration case: Supreme Court of Canada, Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40, 28 June 2005, para. 63-64, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2273/index.do>.

Pursuant to Section 464(a) of the CC, counselling another person to commit an offence is punishable even if the actual crime is not committed.

## 5. Aiding and Abetting

According to Section 21(1)(b) and (c) of the CC, a person who “does or omits to do anything for the purpose of aiding any person” or “abets any person” in committing an offence is criminally liable. These modes of liability apply to torture as a stand-alone crime and to genocide, crimes against humanity, and war crimes by virtue of Section 34(2) of the Interpretation Act.

Aiding and abetting is not defined in the CC. Definitions used in case law have largely been based on legal dictionaries, according to which abetting is defined as instigating, promoting or procuring a crime to be committed, while aiding means assisting or helping without necessarily encouraging or instigating the actor.<sup>39</sup> In contrast to counselling where the counsellor initiates the crime, for aiding and abetting the principal perpetrator has already decided to commit a crime and only receives assistance.<sup>40</sup>

In the case against *Mungwarere*, who was charged with genocide and crimes against humanity but eventually acquitted, the Court seems to import international jurisprudence into the notion of aiding and abetting by requiring a “significant contribution” by the aider/abettor, thereby adding a new element into Canadian law.<sup>41</sup>

An aider or abettor is charged with the same offence and is subject to the same range of sentences as a principal, and he or she is equally culpable.<sup>42</sup> This can be contrasted with the approach taken by international criminal law, which generally sees aiders and abettors as less culpable and subject to lesser sentences than co-perpetrators.<sup>43</sup>

## 6. Accessory after the Fact

A person may also be liable under Section 6(1.1) of the CAHWCA as an “accessory after the fact” in relation to genocide, crimes against humanity, or war crimes. The definition of this mode of liability is contained in Section 23(1) of the CC, according to which a person is an accessory after the fact if he or she, “knowing that a person has been party to the [principal] offence, receives, comforts or assists that person for the purpose of enabling that person to escape.” For torture as a stand-alone crime, Section 23(1) of the CC applies directly.

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<sup>39</sup> Ontario County Court, *R v Jupiter*, [1983] O.J. No. 2408, 29 August 1983, para. 8.

<sup>40</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>41</sup> Superior Court of Justice of Ontario, *Her Majesty the Queen v. Jacques Mungwarere*, 211 CSON 1254, 5 July 2013 (only available in French), para. 62; see also Einarsen and Rikhof, *A Theory of Punishable Participation in Universal Crimes*, 2018, available at: <https://www.toaep.org/ps-pdf/37-einarsen-rikhof>, p. 509.

<sup>42</sup> Supreme Court of Canada, *W. Colin Thatcher v. Her Majesty the Queen*, [1987] 1 S.C.R. 652, 14 May 1987, para. 68, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/216/index.do>.

<sup>43</sup> Lafontaine, *Parties to Offences Under the Canadian Crimes against Humanity and CAHWCA: An Analysis of Principal Liability and Complicity*, *Les Cahiers en Droit*, vol. 50, Issue 3-4, 2009, p. 985.

## 7. Conspiracy

According to Section 6(1.1) of the CAHWCA, criminal liability also extends to anyone who conspires to commit genocide, crimes against humanity or war crimes. The correlating provision for torture as a separate crime can be found in Section 465(1)(c) of the CC. Conspiracy is an agreement between two or more persons to commit an unlawful act, even though this act does not materialize.<sup>44</sup>

## 8. Corporate Liability

Whether legal entities, including corporations, can be held criminally liable in Canada for international crimes has not yet been tested.<sup>45</sup> Article 8 of the CAHWCA, which sets out the conditions for (universal) jurisdiction over genocide, crimes against humanity and war crimes committed abroad, stipulates that “a person” can be prosecuted for such offences. According to the definitions set out in Section 2 of the CC, a “person” includes an “organization”. This suggests that both natural and legal persons could be covered, thereby allowing corporations to be prosecuted.<sup>46</sup>

The elements required to establish criminal responsibility of a legal entity would follow Section 22.2 of the CC, which stipulates that:

“[...] an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.”<sup>47</sup>

Other modes of liability would not apply to corporations but the individual employee could be prosecuted separately under the general rules.<sup>48</sup> A guilty verdict for a corporation would result in a fine.<sup>49</sup>

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<sup>44</sup> Supreme Court of Canada, *Her Majesty the Queen v Daniel O'Brien*, S.C.R. 666, 21 October 1954, p. 669, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7227/index.do>.

<sup>45</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019; interview with Canadian advocate on 1 July 2019; interview with Canadian academic on 21 August 2019.

<sup>46</sup> *Ibid.*

<sup>47</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>48</sup> Interview with Canadian academic on 21 August 2019.

<sup>49</sup> Interview with Canadian academic on 21 August 2019.

## Temporal jurisdiction over crimes

The crimes listed in the CAHWCA on the one hand, and torture as a stand-alone crime on the other, follow different regimes of temporal jurisdiction, as the two are based on laws that entered into force at different times.

### 1. Beginning of temporal jurisdiction

#### 1.1. Genocide, crimes against humanity and war crimes

The CAHWCA came into force on 23 October 2000.<sup>50</sup> Section 6(1) of the CAHWCA explicitly states that genocide, crimes against humanity and war crimes can be prosecuted if they are committed outside of Canada “either before or after the coming into force of this section”. However, the CAHWCA requires that an act constitutes a crime “at the time and in the place of its commission [...] according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations.”<sup>51</sup>

For Rome Statute crimes, Section 6(4) of the CAHWCA acknowledges that they were crimes according to customary international law as of 17 July 1998. As a result, genocide, crimes against humanity, and war crimes committed **after 17 July 1998** can always be prosecuted if committed abroad. If any of these crimes was committed abroad **before 17 July 1998**, Sections 6(3) and 6(4) of the CAHWCA allow retroactive application if it is shown that it was a crime under customary international law at the relevant time and place.

For crimes against humanity, Section 6(5) of the CAHWCA acknowledges that this type of crime was “part of customary international law or was criminal according to the general principles of law recognized by the community of nations”, even prior to 17 July 1998. Consequently, it allows for retroactive application back to the coming into force of two international instruments established at the end of the second World War, namely the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945 and the Proclamation by the Supreme Commander for the Allied Powers of 19 January 1946.

#### 1.2. Breaches of military or superior responsibility

Breaches of military or superior responsibility under Section 7(1) and 7(2) of the CAHWCA can be prosecuted if committed **after 23 October 2000** when the Act came into force.<sup>52</sup> However, an act is prosecutable if **committed before 23 October 2000**, provided that, at the time and in the place of the act or omission, it constituted a contravention of customary or conventional international law or the general principles of international law.<sup>53</sup>

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<sup>50</sup> Section 77 CAHWCA.

<sup>51</sup> Section 6(3) CAHWCA.

<sup>52</sup> Section 77 CAHWCA.

<sup>53</sup> Section 7(5) CAHWCA.

### 1.3. Torture

Torture as a stand alone crime was introduced into the CC in 1985.<sup>54</sup> Therefore, torture as a stand-alone crime can only be prosecuted after this date.<sup>55</sup>

Torture as a crime against humanity or a war crime can be prosecuted even if committed prior to the coming into force of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (see above under [Genocide, Crimes against Humanity and War crimes](#)).

## 2. Statute of limitations

Genocide, crimes against humanity and war crimes under Section 6(1) of the CAHWCA, and breaches of military / superior responsibility under Section 7(1) and 7(2) of the CAHWCA as well as torture under Section 269.1 of the CC, are all indictable offences. Indictable offences, unlike summary conviction offences, are not restricted by a limitation period, thus there is no time limit within which a legal action must be brought.<sup>56</sup>

## Universal jurisdiction requirements

### 1. Presence of suspects

#### 1.1. Crimes under the CAHWCA

Section 8 of the CAHWCA sets out the circumstances in which the presence of the suspect is required for investigation and prosecution to be commenced in Canada if the crime was committed abroad by a foreigner.<sup>57</sup>

Presence of the suspect is not required if at the time of the offence:

- (1) the perpetrator with foreign nationality is employed by Canada in a civilian or military capacity;<sup>58</sup> or
- (2) the perpetrator is 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,<sup>59</sup> or

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<sup>54</sup> R.S. 1985, c. 10 (3<sup>rd</sup> Supp.), s. 2.

<sup>55</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>56</sup> Supreme Court of Canada, *Kristy Leanne Dudley v. Her Majesty the Queen*, 2009 SCC 58, [2009] 3 S.C.R. 570, 17 December 2009, para 61.

<sup>57</sup> According to Article 8(a)(i) and 8(a)(iii) CAHWCA, Canadian jurisdiction applies also when the perpetrator or the victim of the crime is a Canadian national, i.e. there is both active and passive personality jurisdiction.

<sup>58</sup> Section 8(a)(i) CAHWCA.

<sup>59</sup> Section 8(a)(ii) CAHWCA.



- (3) the victim was a citizen of a state that was allied with Canada in an armed conflict.<sup>60</sup>

In all other situations, the law does not explicitly mention the need for the suspect to be present in Canada in order for an investigation to be opened but, in practice, it is a decisive factor when decisions on initiating investigations are made (see below).<sup>61</sup>

Section 9(1) of the CAHWCA allows for “proceedings for an offence under this Act alleged to have been committed outside Canada [...], whether or not the person is in Canada, be commenced”. There is no definition of the term “proceedings” in the CAHWCA. In practice, it is read as meaning the initiation of a prosecution when charges are laid.<sup>62</sup> Therefore, charges can be laid even if the accused is not, or is no longer, in Canada.<sup>63</sup> However, it should be noted that according to Section 9(2) of the CAHWCA and Section 650 of the CC, in principle the accused must be present in court for the trial. Therefore, a trial for charges laid against an absent accused can only begin once the accused is arrested in Canada.<sup>64</sup>

## 1.2. Torture

For torture as a stand-alone crime under Section 269.1 of the CC, the presence of the suspect in Canada is not required for an investigation to be commenced if the crime is committed on a ship or aircraft registered or licensed in Canada.<sup>65</sup> In all other cases, presence is required.<sup>66</sup>

Section 9(1) of the CAHWCA is identical to Section 7(5) of the CC, allowing for the commencement of a prosecution whether or not the person is in Canada.

## 1.3. Practice

In practice, due to limited resources and unfeasibility of investigations, the authorities in Canada will not open an investigation where the suspect is not present in the country or where no suspect has been identified.<sup>67</sup> The presence of the suspect is the first criterion the

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<sup>60</sup> Section 8(a)(iv) CAHWCA.

<sup>61</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 2 October 2019.

<sup>62</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>63</sup> Interview with legal practitioner on 22 August 2019.

<sup>64</sup> Ibid.

<sup>65</sup> Section 7 (3.7)(a) and(b) CC.

<sup>66</sup> Section 7 (3.7)(c) CC; according to Section 7(3.7)(c) and 7(3.7)(d) CC, Canadian jurisdiction also applies when the perpetrator or the victim of the crime is a Canadian national, i.e. there is both active and passive personality jurisdiction.

<sup>67</sup> Interviews with former and current members of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019 and on 27 June 2019.

authorities assess when considering whether or not to open an investigation into crimes allegedly committed by foreigners abroad.<sup>68</sup>

The meaning of presence in Canada, for instance whether permanent residence is required or a short visit is sufficient, is debated among practitioners but has not yet been decided by the courts.<sup>69</sup> In practice, the authorities are unlikely to open an investigation if a suspect is in Canada for only a short amount of time, due to a concern there would not be enough time to investigate and prosecute the person. Nor will they, in practice, investigate a person who is expected to come to Canada but has not arrived yet.<sup>70</sup>

If the suspect leaves Canada during on-going investigations, the authorities will assess whether the absence is temporary or permanent.<sup>71</sup> In case the suspect is unlikely to return, investigations will be closed, but other measures, such as revoking legal status to reside or alerting other countries, can be invoked.<sup>72</sup>

As regards prosecution of corporations, it remains unclear what the requirement of presence would entail due to the lack of practice or jurisprudence on this issue.<sup>73</sup>

## 2. Double criminality

Section 6(3) of the CAHWCA explicitly states that a crime of genocide, crimes against humanity and war crimes is punishable, “whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.” Thus, double criminality, meaning the criminalization of these crimes in the country where they are committed as well as in Canada, is not required in order to investigate and prosecute them in Canada. The same applies to breaches of military / superior responsibility as stipulated in Section 7(5) of the CAHWCA.

As for the separate crime of torture, the CC does not require double criminality.

## 3. Prosecutorial discretion

In Canada, the prosecution of crimes of universal jurisdiction, whether genocide, crimes against humanity and war crimes under the CAHWCA or torture as a separate crime, is subject to broad prosecutorial discretion.<sup>74</sup>

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<sup>68</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>69</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>70</sup> Interviews with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 and 27 June 2019.

<sup>71</sup> Interviews with former and current members of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019 and on 27 June 2019.

<sup>72</sup> *Ibid.*

<sup>73</sup> Interview with Canadian academic on 21 August 2019.

<sup>74</sup> Interviews with former and current member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019 and on 27 June 2019.

The Public Prosecution Service of Canada Deskbook (PPSC Deskbook) contains guidelines to assist prosecutors in deciding whether to proceed with a federal prosecution, including offences pursuant to the CAHWCA.<sup>75</sup> The PPSC Deskbook articulates two fundamental principles that guide decisions on whether or not to prosecute: the existence of a reasonable prospect of conviction and public interest.<sup>76</sup> These criteria also apply to whether or not to prosecute crimes under the CAHWCA.<sup>77</sup> Prosecutors have discretion over the assessment of both of these tests.<sup>78</sup> Where both conditions are met, prosecutors will proceed.<sup>79</sup>

The “reasonable prospect of conviction” test requires that there be more than a prima facie case, but does not require a probability of conviction.<sup>80</sup> The assessment must take into account the availability and credibility of witnesses, admissibility of evidence and possible defences.<sup>81</sup> The consideration of possible defences includes potential immunities or amnesties that may apply.<sup>82</sup>

The public interest criterion is informed by the gravity of the alleged offence; the accused person’s circumstances, including age and background; the accused’s alleged degree of culpability; the prosecution’s likely effect on the public’s confidence in the administration of justice; the need for specific or general deterrence; the entitlement of other persons to reparations if the prosecution proceeds; whether the prosecution would necessarily entail the disclosure of sensitive or confidential information; and the degree of public concern surrounding the alleged offence.<sup>83</sup> In addition, for universal jurisdiction cases, the international context of the case will be considered.<sup>84</sup>

In practice, due to the significant resources necessary to complete a case up to a final judgment, Canadian authorities select only the most “promising” cases.<sup>85</sup> The decision to prosecute is assessed on an on-going basis throughout the case. For instance, if key evidence becomes no longer available, the viability to continue will be re-assessed.<sup>86</sup>

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<sup>75</sup> Public Prosecution Service of Canada Deskbook, 1 March 2014, available at: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> (PPSC Deskbook 2014).

<sup>76</sup> PPSC Deskbook 2014, Chapter 2.3 p. 3; interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>77</sup> Lafontaine, *The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada’s Crimes Against Humanity and CAHWCA*, 2010, 23:2 *Revue québécoise de droit international* 1, p. 31; interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>78</sup> Interview with legal practitioner on 22 August 2019.

<sup>79</sup> *Ibid.*

<sup>80</sup> PPSC Deskbook 2014, Chapter 2.3, p. 4; interview with legal practitioner on 22 August 2019.

<sup>81</sup> PPSC Deskbook 2014, Chapter 2.3, p. 4.

<sup>82</sup> Interview with legal practitioner on 22 August 2019.

<sup>83</sup> PPSC Deskbook 2014, Chapter 2.3 p. 5-10.

<sup>84</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

A decision not to prosecute can be challenged by way of judicial review (see below under [Possible Challenges by Victims or NGOs](#)).

In addition to exercising discretion when taking the decision whether or not to prosecute, the Canadian authorities also consider certain criteria when deciding whether or not to open an investigation (see below under [Initiation of Investigations](#)).

## 4. Political approval

In Canada, the same individual serves as the Attorney General of Canada and the Minister of Justice.<sup>87</sup>

According to Section 9(3) of the CAHWCA, the personal consent in writing of the Attorney General or the Deputy Attorney General is necessary in order to commence proceedings for genocide, crimes against humanity, war crimes and breaches of military / superior responsibility. There is no definition of “proceedings” under the CAHWCA. However, the case law suggests that this does not include pre-trial procedures such as investigation and arrest.<sup>88</sup> This is confirmed by practitioners who point to the independence of the Royal Canadian Mounted Police (RCMP) in matters relating to investigations.<sup>89</sup>

Similarly for torture under Section 269.1 of the CC, Section 7(7) of the CC requires the consent of the Attorney General within eight days after the proceedings are commenced.

The Attorney General’s refusal to consent to proceedings, which is equivalent to a decision not to prosecute, can be challenged via judicial review (see below under [Possible Challenges by Victims or NGOs](#)).

The Attorney General has delegated the authority to consent to the Director of Public Prosecutions (DPP).<sup>90</sup>

## 5. Subsidiarity

There is no provision in either the CAHWCA or the CC that would prevent Canada from launching an investigation or prosecution of a person who is subject to investigation or prosecution by another State or by the International Criminal Court.<sup>91</sup> However, the test for reasonable prospect of a conviction would appear to make it unlikely that charges would be laid where parallel investigations or prosecutions are under way (see above under [Prosecutorial Discretion](#)).<sup>92</sup>

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<sup>87</sup> Department of Justice Act, RSC, 1985, c J-2, Section 2(1)-2(2).

<sup>88</sup> Supreme Court of British Columbia, *Regina v. Ayelech Ejigu*, 2012 BCSC 1673, 8 November 2012, para. 16.

<sup>89</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>90</sup> Interview with legal practitioner on 22 August 2019.

<sup>91</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019 and 27 June 2019.

<sup>92</sup> Interview with legal practitioner on 22 August 2019.

So far, there have been no cases that overlap with the jurisdiction of the International Criminal Court, which has been put down to the fact that cases in Canada have not so far dealt with individuals carrying the greatest responsibility for crimes.<sup>93</sup> As to investigations at domestic level in another State, where these are on-going, in practice the Canadian investigation authorities will exchange information and seek confirmation whether that State might request extradition.<sup>94</sup>

## 6. Pending extradition

In a situation where a request for the same person to be extradited elsewhere is pending, investigations can still be opened by the Canadian authorities (see below under [Initiation of Investigations](#)).<sup>95</sup> However, the need to consider whether there is a reasonable prospect of a conviction would appear to make it unlikely that charges would be laid where there is a pending extradition request (see above under [Prosecutorial Discretion](#)).<sup>96</sup>

## Key steps in criminal proceedings

### 1. Investigation Stage

The majority of allegations that international crimes have been committed by foreigners abroad against foreign nationals are dealt with through alternative measures, such as immigration measures.<sup>97</sup>

#### 1.1. Initiation of investigations

In 1998, the Government of Canada established the Crimes Against Humanity and War Crimes Program. This program partners the Canadian Border Services Agency (CBSA), Immigration, Refugees and Citizenship Canada (IRCC), the Department of Justice Canada (DoJ) and the Royal Canadian Mounted Police (RCMP) in a coordinated effort to prevent individuals who have committed core international crimes from entering or remaining in Canada, as well as to investigate those individuals present in Canada who may have perpetrated such crimes.<sup>98</sup>

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<sup>93</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>94</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>95</sup> Interviews with former and current members of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019 and 27 June 2019.

<sup>96</sup> Interview with legal practitioner on 22 August 2019.

<sup>97</sup> Ibid.

<sup>98</sup> Department of Justice, Crimes Against Humanity and War Crimes Program Evaluation: Final Report 2016, August 2016) p. i - ii, available at: <https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/cahwc-cchcq/cahwc-cchcq.pdf> (DOJ Final Report 2016).

The program conducts external outreach operations to engage with diaspora communities in order to obtain information about potential perpetrators of international crimes.<sup>99</sup> In addition, the CBSA plays a role in identifying potential criminality through the immigration admissibility screening process.<sup>100</sup>

Individuals with information on the possible commission of such crimes can also file a complaint to the RCMP.<sup>101</sup> There are no requirements as to the form of such complaints, so for example an anonymous phone call would suffice.<sup>102</sup> Such complaints do not automatically trigger investigations or any proceedings, but the authorities can decide to open investigations according to the process described below.<sup>103</sup>

After such information is received, the RCMP's Sensitive and International Investigations Unit (SII Unit) conducts a preliminary assessment in order to decide whether or not to open investigations. This involves looking at information regarding the potential suspect, verification of the suspect through the special unit on open source intelligence, and validation of information.<sup>104</sup> The results of this preliminary assessment are provided to the File Review Committee, which consists of representatives of the DoJ, RCMP, CBSA, and IRCC.<sup>105</sup>

The File Review Committee decides which measures to take in a specific case, which might include immigration measures and criminal investigations.<sup>106</sup> Criteria taken into account by the File Review Committee include the level of personal involvement of the suspect, the type of crime, and the likelihood of success.<sup>107</sup> In practice, the authorities mainly look at whether the suspect is present in Canada (see above under [Presence of Suspect](#)), whether they have the ability to conduct investigations and what type of crimes are alleged.<sup>108</sup> To assess their ability to conduct investigations, the authorities take into consideration access to evidence, availability of evidence, access to the country where crime was committed, and the possibility of cooperation with that country.<sup>109</sup>

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<sup>99</sup> DOJ Final Report 2016, p. iv.

<sup>100</sup> DOJ Final Report 2016, p. 8-10.

<sup>101</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>102</sup> Interview with Canadian academic on 21 August 2019.

<sup>103</sup> *Ibid.*

<sup>104</sup> Interview with member of Royal Canadian Mounted Police Sensitive and International Investigations Unit (RCMP SII Unit) on 27 June 2019.

<sup>105</sup> *Ibid.*; interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>106</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>107</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>108</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>109</sup> *Ibid.*

In order to use limited resources most effectively and handle the volume of potential matters drawn to their attention, the File Review Committee has established a prioritization system for using different measures. The highest priority is given to measures to prevent a person from entering the country by denying a visa; the second priority is given to immigration remedies; and the last priority given to citizenship revocation and criminal prosecutions. The last category are used selectively given the resources they require.<sup>110</sup>

If the File Review Committee determines that a criminal investigation should be launched, the RCMP SII Unit will open an investigation.<sup>111</sup> If there is insufficient information to further pursue criminal investigations (see below under [Necessary Evidence to Open Investigations](#)), but still potential for the CBSA to pursue regulatory enforcement, the RCMP may transfer an investigation to the CBSA through the DoJ so that admissibility hearings, refugee exclusion, and deportation proceedings can be considered as measures to remove those suspected of having committed international crimes.<sup>112</sup>

A decision of the File Review Committee not to open an investigation cannot be challenged by victims.<sup>113</sup>

## 1.2. Conducting Investigations

Within the RCMP SII Unit, the Extra-Territorial Response Unit, which is staffed in part by specialized war crimes investigators, is charged with gathering evidence against those suspected of international crimes under the CAHWCA.<sup>114</sup> In 2013, its mandate was expanded to include extra-territorial crimes beyond the core international crimes.<sup>115</sup>

During investigations, the RCMP SII Unit collects physical evidence and testimony from sources both in Canada and abroad.<sup>116</sup> It uses the same tools as for serious domestic crimes, including undercover police agents, informants, surveillance, document seizures, bank account access, interception of private communication, and witness and victim statements.<sup>117</sup> Mutual legal assistance is only resorted to where measures are considered necessary to compel others to take certain actions.<sup>118</sup>

The Department of Justice's Crimes Against Humanity and War Crimes Section (DoJ CAHWC) assists the RCMP SII Unit during the investigations by providing background

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<sup>110</sup> DOJ Final Report 2016, p. 39-40.

<sup>111</sup> DOJ Final Report 2016, pp. 10, 155-156.

<sup>112</sup> DOJ Final Report 2016, p. 41-42.

<sup>113</sup> Interviews with former and current members of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019 and on 27 June 2019.

<sup>114</sup> DOJ Final Report 2016, at pp. 9-10.

<sup>115</sup> Interview with member of RCMP SII Unit on 27 June 2019.

<sup>116</sup> DOJ Final Report 2016, p. 9.

<sup>117</sup> Interview with member of RCMP SII Unit on 27 June 2019.

<sup>118</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

information, legal research, and evidence assessment for all pending RCMP files.<sup>119</sup> It also assists by negotiating access to evidence in the relevant country, for example access to archives or modalities by which witnesses can be interviewed, and where possible establishes a Memorandum of Understanding between Canada and the territorial state.<sup>120</sup>

During the investigations, the Public Prosecution Service of Canada (PPSC) can also be consulted for advice.<sup>121</sup>

### **1.3. Completion of investigations**

#### **1.1.1. Possible outcomes**

After an investigation has been completed, the RCMP SII Unit prepares a report and disclosure package, containing all evidence that has been gathered and its analysis, which is sent to the DoJ CAHWC.<sup>122</sup> On the basis of this information, the DoJ CAHWC lawyers prepare a legal analysis and final report specifying whether or not they would recommend charges, and forward this report to the PPSC.<sup>123</sup>

The PPSC, in turn, analyses the report and provides a recommendation to the Attorney General of Canada, who ultimately decides whether or not to approve the laying of charges.<sup>124</sup> The PPSC does not have a specialized unit for international crimes due to the limited number of prosecutions so far.<sup>125</sup> Cases of international crimes will usually be assigned to prosecutors with experience on the subject matter and in high-profile cases.<sup>126</sup>

#### **1.1.2. Possible challenges by victims or NGOs**

The decision of the Attorney General not to consent to a prosecution, which is equivalent to a decision not to prosecute, can be challenged by judicial review filed before the Federal Court of Canada.<sup>127</sup> However, Canadian courts tend to take a deferential approach when

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<sup>119</sup> DOJ Final Report 2016, at p. 10; interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>120</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>121</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>122</sup> DOJ Final Report 2016, p. 8.

<sup>123</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>124</sup> DOJ Final Report 2016, p. 156; interview with former and current members of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019 and on 27 June 2019.

<sup>125</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>126</sup> Interview with legal practitioner on 22 August 2019.

<sup>127</sup> See Federal Courts Act, RSC 1985, c F-7 (**FCA**), Section 18.1(1); Frater, *Prosecutorial Misconduct*, 2009, p. 40-48.



reviewing discretionary decision-making by Crown counsel, and such applications are unlikely to be successful.<sup>128</sup>

In the case of *Zhang v. Canada (Attorney General)*, Mr Zhang alleged that he was arrested on four occasions because of his *Falun Gong* (Chinese sect) beliefs and practices, and was subjected to physical and mental torture during his detention in China.<sup>129</sup> Mr Zhang requested the consent of the Attorney General, pursuant to Section 7(7) of the CC, to launch a private prosecution in Canada of his alleged torturers. His request was denied (see below under [Private Prosecution](#)). Mr Zhang brought a motion for judicial review of the Attorney General's refusal to consent, which was dismissed by the first instance court. The Federal Court of Appeal agreed with the first instance court that prosecutorial decisions are reviewable when "flagrant impropriety" can be demonstrated, which is a high threshold and requires misconduct that borders on corruption, violation of the law or bias.<sup>130</sup> The Federal Court of Appeal confirmed the first instance court's finding that in this case the denial of consent did not meet this threshold.

In addition to bringing a judicial review, victims can write a letter to the Attorney General requesting that he or she reconsiders the decision not to prosecute an individual accused of a crime.<sup>131</sup>

#### 1.4. Arrest warrant

The RCMP or the Attorney General may request an arrest warrant to be issued by a provincial superior court under Section 507(1)(b) of the CC. This happens after the Attorney General renders a written decision to prosecute and at the time charges are laid, in order to compel the accused to appear before a court.<sup>132</sup> The judge will then hear, *ex parte*, the allegations of the informant and the evidence of any witnesses.<sup>133</sup> If convinced that the case for issuing a warrant is made out, the judge will issue a warrant for the arrest of the accused.<sup>134</sup>

In practice, arrest warrants are issued when the trial is imminent and the judge is convinced the accused might not turn up for trial.<sup>135</sup> The arrest warrant can also be issued if the accused cannot be found immediately.<sup>136</sup>

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<sup>128</sup> Public Prosecution Service Deskbook, 2008, available at: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpq/fps-sfp/fpd/toc.html>, Chapter 15.1 fn. 1; interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019; interview with legal practitioner on 22 August 2019.

<sup>129</sup> Federal Court of Appeal, *Kunlun Zhang v. Attorney General of Canada*, 2007 FCA 201, 25 May 2007.

<sup>130</sup> *Ibid*, para. 13.

<sup>131</sup> Interview with victimologist on 12 August.

<sup>132</sup> DOJ Final Report 2016, p. 156; interview with member of RCMP SII Unit on 27 June 2019.

<sup>133</sup> Section 507(1)(a) CAHWCA.

<sup>134</sup> Section 507(1)(b) CAHWCA.

<sup>135</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>136</sup> Interview with member of RCMP SII Unit on 27 June 2019.

## 1.5. Victim rights at the investigation stage

### 1.5.1. Definition of victim

Under the Canadian Victims Bill of Rights (CVBR), a victim is “an individual who has suffered physical or emotional harm, economic loss or property damage as a result of the commission or alleged commission of an offence” under the CC or the CAHWCA.<sup>137</sup> A person who is charged with or found guilty of the same offence cannot be considered a victim.<sup>138</sup>

Given the use of the term “individual”, legal persons cannot be considered victims.<sup>139</sup> According to Section 19(2) CVBVR, the victim needs to be present in Canada or be a Canadian citizen or permanent resident in Canada in order to be considered a victim.

In addition, the following individuals are entitled to exercise a victim’s rights when the victim is dead or incapable of acting on his or her own behalf:

- the victim's spouse or co-habiting partner;<sup>140</sup>
- a relative or dependant of the victim<sup>141</sup> and
- anyone who has custody of the victim, or is responsible for the care or support of the victim's dependant.<sup>142</sup>

### 1.5.2. Victims’ rights at the investigation stage

The CVBR provides victims of crime with the following rights at the investigation stage:

- **Right to information**, in particular about “the status and outcome of the investigation into the offence”;<sup>143</sup>
- **Right to security and protection**: right to “have their security considered by appropriate authorities in the criminal justice system” and to be protected from intimidation and retaliation;<sup>144</sup>
- **Right to privacy**: right to have their privacy considered by the appropriate authorities;<sup>145</sup>
- **Right to protection of their identity**.<sup>146</sup>

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<sup>137</sup> Canadian Victims Bill of Rights, SC 2015, c 13 (hereinafter: **CVBR**), Section 2.

<sup>138</sup> Section 4 CVBR.

<sup>139</sup> Interview with victimologist on 12 August 2019.

<sup>140</sup> Section 3(a) and (b) CVBR.

<sup>141</sup> Section 3(c) CVBR.

<sup>142</sup> Section 3(d) and (e) CVBR.

<sup>143</sup> Section 7 CVBR.

<sup>144</sup> Section 9-10 CVBR.

<sup>145</sup> Section 11 CVBR.

<sup>146</sup> Section 12 CVBR.

Victim support, in particular provision of information and crisis intervention, is handled by victim support offices across the country.<sup>147</sup>

Victims can also provide information to the RCMP in the form of a complaint (see above under [Initiation of Investigations](#)). In such cases, the RCMP will interview the complainant about the allegations, even if this requires travel outside of Canada.<sup>148</sup> During investigations, the RCMP protects the identity of victims through standard police procedures on confidentiality.<sup>149</sup>

The rights set out in the CVBR can be curtailed if they interfere with certain decisions made by the authorities, in particular police or prosecutorial discretion.<sup>150</sup>

### **1.5.3. Remedies for denial of rights**

Where victims' rights under the CVBR are denied or infringed, victims can file a complaint to the respective authority. If that proves to be unsatisfactory, they can file a complaint to any authority that can review such complaints.<sup>151</sup> However, violations of the CVBR do not give rise to damages nor can they serve as grounds for an appeal.<sup>152</sup>

In relation to federal bodies, such as the RCMP and the Attorney General who are competent to deal with crimes under the CAHWCA, victims can file a complaint to the Federal Ombudsman for Victims of Crime.<sup>153</sup> The Ombudsman for Victims of Crime does not have extensive powers but can issue a report or use the media to put pressure on the federal bodies to respect the CVBR.<sup>154</sup>

## **2. Trial Stage**

At the time of writing this report, two trials of universal jurisdiction cases have been completed in Canada using the CAHWCA. In the *Munyaneza* case, the accused, who resided in Canada, was prosecuted for his role in the Rwandan genocide and sentenced to life imprisonment (25 years) upon appeal.<sup>155</sup> In the *Mungwarere* case, the accused, who

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<sup>147</sup> Interview with victimologist on 12 August 2019.

<sup>148</sup> DOJ Final Report 2016, p. 156.

<sup>149</sup> Interview with member of RCMP SII Unit on 27 June 2019.

<sup>150</sup> Section 20 CVBR.

<sup>151</sup> Section 25(1) and (2) CVBR.

<sup>152</sup> Sections 28 and 29 CVBR.

<sup>153</sup> Interview with victimologist on 12 August 2019; see website of the Office of the Federal Ombudsman for Victims of Crime, Mandate, at: <https://www.victimsfirst.gc.ca/abt-apd/orfi-nrnf.html>, last accessed on 16 August 2019.

<sup>154</sup> Interview with victimologist on 12 August 2019.

<sup>155</sup> First instance judgment: Quebec Superior Court Criminal Division, Her Majesty the Queen v. Désiré Munjanzea, 2009 QCCS 2201, 22 May 2009, available at: <https://www.canlii.org/en/qc/qccs/doc/2009/2009qccs2201/2009qccs2201.html>; appeal judgment: Quebec Court of Appeal, Désiré Munjanzea v. Her Majesty the Queen, 214 QCCA 906, 7 May 2014, available at: <https://www.canlii.org/en/qc/qcca/doc/2014/2014qcca906/2014qcca906.html>.

was residing in Canada as a refugee, was prosecuted for his alleged involvement in the Rwandan genocide but was acquitted.<sup>156</sup>

Indictable offences, including crimes under the CAHWCA and torture under the CC, are tried by provincial superior courts.<sup>157</sup> The court in charge of the territory where the accused is found, arrested or in custody has jurisdiction.<sup>158</sup> Indictable offences are presumptively tried by jury unless the parties elect otherwise.<sup>159</sup>

When a case goes to trial, it is brought before a provincial superior court with both PSSC and DoJ lawyers present.<sup>160</sup> RCMP investigators are also present to give *viva voce* evidence.<sup>161</sup> Witnesses may be brought from outside of Canada to testify in person, or may testify abroad or by video link.<sup>162</sup> A finding of either guilty or not guilty is made at the end of the criminal trial.<sup>163</sup>

## 2.1. Possible challenges by victims or NGOs

Victims or NGOs cannot challenge a finding of not guilty in relation to charges brought under the CAHWCA because according to Section 9(3) of the CAHWCA, “proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf.”

However, a victim who is permitted to bring a private prosecution against a person suspected of having committed the crime of torture under Section 269.1 CC (see below under [Private Prosecution](#)) could, if he or she conducted the prosecution, appeal a verdict of not guilty. This is because Section 7 of the CC, which establishes jurisdiction for the stand-alone crime of torture, does not contain a provision similar to Section 9(3) of the CAHWCA.

Appeals by the prosecution or the accused can be filed before the applicable provincial Courts of Appeal<sup>164</sup> and, in certain instances, the Supreme Court of Canada.<sup>165</sup>

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<sup>156</sup> Superior Court of Justice of Ontario, *Her Majesty the Queen v. Jacques Mungwarere*, 211 CSON 1254, 5 July 2013 (only available in French).

<sup>157</sup> Section 468 CC.

<sup>158</sup> Section 470 CC.

<sup>159</sup> Section 471 CC; on the challenges of using a jury trial in cases of international crimes, see Lafontaine and Bousquet, *Défendre un accusé pendant un procès pour génocide, crimes contre l'humanité et crimes de guerre au Canada : mission impossible ?* (unofficial translation: Defending an accused in a trial on genocide, crimes against humanity and war crimes in Canada: Mission impossible?), *Canadian Criminal Law Review*, 22 C.C.L.R., 2017, p. 159 ff (only available in French).

<sup>160</sup> DOJ Final Report, p. 157.

<sup>161</sup> Interview with legal practitioner on 22 August 2019.

<sup>162</sup> DOJ Final Report, p. 157.

<sup>163</sup> See Section 660 CC; on challenges for the defense, see Lafontaine and Bousquet, *Les Douze Travaux de Me X: La Défense d'un Accusé Avant Procès Sous la Loi sur les Crimes Contre L'Humanité et les Crimes de Guerre* (unofficial translation: The twelve labors of Advocate X: The defense of an accused at trials under the Crimes Against Humanity and CAHWCA), *Canadian Criminal Law Review*, 19 Can. Crim. L. Rev. 295, August 2015.

<sup>164</sup> See Section 673 CC.

<sup>165</sup> Supreme Court Act, RSC, 1985, Section 37.

## 2.2. Victim rights at the trial stage

Under the CVBR, a victim has the following rights during a trial in addition to the rights during the investigation stage (see above, [Victim Rights at the Investigation Stage](#)):

- **Right to information**, in particular about the location of proceedings in relation to the offence, when they will take place and their progress and outcome.<sup>166</sup>
- **Right to protection**, in particular the right to request measures to facilitate their testimony when appearing as a witness, such as giving testimony by video-link or behind a screen (see below and under [Witness and Victim Protection](#)).<sup>167</sup>
- **Right to seek restitution** from the offender (see below under [Reparation for Victims in Criminal Proceedings](#)).<sup>168</sup>
- **Right to participation**, which allows a victim to convey his or her views concerning decisions in the criminal justice system that affect his or her rights under the CVBR, and to have those views considered.<sup>169</sup> In practice, participation is solely exercised through a victim impact statement (see below).<sup>170</sup>
- **Right to present an impact statement.**<sup>171</sup>

According to Section 722(1) of the CC, victim impact statements are statements filed by victims to the court during the sentencing phase. They may describe the physical or emotional harm, property damage or economic loss suffered as a result of the crime as well as the impact the crime has had on the victim. Such impact statements are taken into consideration when the court is determining the sentence to be imposed on the defendant.<sup>172</sup> They can also be filed by victims who live abroad.<sup>173</sup>

Victim impact statements need to be in writing and to use a specific form provided by the authorities.<sup>174</sup> Reportedly, the number of victims who submit an impact statement in practice largely depends on how much effort the authorities make to send out the forms to them.<sup>175</sup>

As regards the content of impact statements, certain information is not allowed, including statements about the crime or the perpetrator that are not relevant to the harm suffered, unproven allegations, crimes outside the scope of the conviction,

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<sup>166</sup> Sections 6-8 CVBR.

<sup>167</sup> Sections 9-13 CVBR, interview with victimologist on 12 August 2019.

<sup>168</sup> Sections 16-17 CVBR.

<sup>169</sup> Section 14 CVBR.

<sup>170</sup> Interview with victimologist on 12 August 2019.

<sup>171</sup> Sections 15 CVBR.

<sup>172</sup> Section 722(1) CC; interview with victimologist on 12 August 2019.

<sup>173</sup> Interview with victimologist on 12 August 2019.

<sup>174</sup> Section 722(4) CC; interview with victimologist on 12 August 2019.

<sup>175</sup> Interview with victimologist on 12 August 2019.

and recommendations relating to the sentence.<sup>176</sup> An impact statement must be submitted to the prosecutor in advance, who will review it to ensure inadmissible information is not included.<sup>177</sup>

The victim can read the statement either directly in court, via video-link or from behind a screen, or the court can designate another way for it to be presented.<sup>178</sup> Reading a statement in court has the advantage that the victim can make sure the court hears the statement; otherwise it is in the hands of the prosecutor whether or not the statement is presented.<sup>179</sup> The defence has the option to question a victim on their impact statement, but reportedly this does not tend to happen in practice.<sup>180</sup>

In addition to impact statements made by individuals, a representative of a community can also file an impact statement describing the harm or loss suffered by the community as a result of the crime, and the impact on the community.<sup>181</sup> The same rules as for individual impact statements apply with regard to form, content and presentation.<sup>182</sup>

In practice, impact statements are usually presented in court during the sentencing phase by being read out in court by the Prosecutor.<sup>183</sup> The RCMP will provide the necessary form to victims who will complete it and return it to the police officer.<sup>184</sup> The police officer does not help the victim fill in the form but can answer questions.<sup>185</sup> In universal jurisdiction trials, the impact statement form has been translated into local languages.<sup>186</sup>

Where federal bodies, such as the RCMP or the Attorney General, infringe or deny the rights listed in the CBVR, victims can file a complaint to the Federal Ombudsman for Victims of Crime (see above under [Remedies for Denial of Rights](#)).

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<sup>176</sup> Form 34.2 to Section 722(4) CC.

<sup>177</sup> Interview with victimologist on 12 August 2019.

<sup>178</sup> Section 722(5) CC; interview with victimologist on 12 August 2019.

<sup>179</sup> Interview with victimologist on 12 August 2019.

<sup>180</sup> Interview with victimologist on 12 August 2019.

<sup>181</sup> Section 722.2(1) CC.

<sup>182</sup> Section 722.2(2) and (3) CC.

<sup>183</sup> Interview with member of RCMP SII Unit on 27 June 2019.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

## 2.3. Third party interventions

Third parties can make submissions to the court in order to express an opinion on a matter at issue during a trial with the permission of the court, provided that the third party can meet the test for intervener status which requires that:<sup>187</sup>

- The application describes the nature of the intervention in detail;
- The applicant has a genuine interest in the matter;
- The applicant offers different and valuable insights that will further the determination of the matter;
- The intervention is in the interests of justice; and
- The intervention does not affect the expeditiousness and cost of the proceedings.

In practice, third party interventions in criminal trials are exceedingly rare.<sup>188</sup> They are more common on appeal.<sup>189</sup>

# 3. Private prosecution

## 3.1. CAHWCA Crimes

A private person may not bring a private prosecution in relation to crimes under the CAHWCA because Section 9(3) of the CAHWCA stipulates that proceedings against a person accused of crimes against humanity, war crimes, and genocide “may be conducted only by the Attorney General of Canada or counsel acting on their behalf.”

## 3.2. Torture

Since Section 7(3.7) of the CC regulating jurisdiction for torture committed abroad does not contain such a stipulation, and torture as a stand-alone crime under Section 269.1 of the CC is an indictable offence, a private individual or organization may bring a private prosecution against the suspect under Section 504 of the CC, if there are reasonable grounds to believe that the offence was committed.

### 3.2.1. Procedure

A private prosecution is initiated by providing information in writing and under oath before a judge using a form provided by the authorities.<sup>190</sup> Thus in contrast to public prosecutions, where information is provided via a simple complaint to the RCMP and the authorities

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<sup>187</sup> Federal Court of Appeal, *Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle*, 2014 FCA 21, 29 January 2014, at para 11, available at: <https://www.canlii.org/en/ca/fca/doc/2014/2014fca21/2014fca21.html>.

<sup>188</sup> See Court of Appeal of Alberta, *Her Majesty the Queen v. Bradley Barton*, 2016 ABCA 68 (CanLII), 8 March 2016, at para 5, available at: <https://www.canlii.org/en/ab/abca/doc/2016/2016abca68/2016abca68.html>; see also commentary in Giordano, *Court Opens Opportunities for Parties Seeking Leave to Intervene in Criminal Appeals*, 16 March 2016, available at: <https://canliiconnects.org/en/summaries/41240>.

<sup>189</sup> Interview with legal practitioner on 22 August 2019.

<sup>190</sup> Section 502 and 506 CC; Ontario Crown Prosecution Manual, Criminal Law Division – Ministry of the Attorney General, *Prosecution Directive*, 14 November 2017, available at: [https://files.ontario.ca/books/crown\\_prosecution\\_manual\\_english\\_1.pdf](https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf) (**Prosecution Directive**), p. 117.

retain the power to open an investigation (see above under [Initiation of Investigations](#)), private prosecution proceedings are initiated formally before a judge.<sup>191</sup>

Following receipt of the information, the judge schedules a preliminary hearing (*pre-enquete*) where, in the presence of a public prosecutor, the allegations of the private prosecutor are heard, and the evidence is presented and examined, including any evidence presented by the public prosecutor.<sup>192</sup> At the end of the *pre-enquete*, the judge will decide whether or not there is enough evidence for the case to proceed and if a summons or arrest warrant will be issued.<sup>193</sup>

If the judge decides the case should proceed, the public prosecutor must review the charges in order to decide whether to proceed to trial or to withdraw the charges.<sup>194</sup> The threshold for this decision is the same as in public prosecution cases (see below under [Necessary Evidence for Indictment](#)).<sup>195</sup> If the threshold is not met, the public prosecutor can withdraw the charges, otherwise the case goes to trial.<sup>196</sup>

### **3.2.2. Consent of the Attorney General**

In order for a case relating to torture committed by a foreigner abroad to proceed, the Attorney General must consent to the prosecution within eight days of its commencement (see above on [Political Approval](#)).<sup>197</sup> In practice, this requirement makes it difficult for private prosecutions to lead to a trial.<sup>198</sup>

In the case of *Davidson v. British Columbia (Attorney General)*, the appellants attempted to bring a private prosecution against George W. Bush, the then President of the United States, for counselling, aiding and abetting torture (as a stand-alone crime) in the Abu Ghraib prison in Baghdad, Iraq, and at the U.S. Naval Base at Guantanamo Bay, Cuba.<sup>199</sup> When the first instance court dismissed the case because the Attorney General did not issue the consent as required under Section 7(7) of the CC, the appellants sought to appeal this ruling arguing that the Attorney General's consent was not required until a summons or warrant was issued. The Court of Appeal for British Columbia ruled that the Attorney General's consent was already required as soon as the information was presented under oath by the private prosecutor.

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<sup>191</sup> Interview with Canadian academic on 21 August 2019.

<sup>192</sup> Section 507.1(3) CC; Prosecution Directive, p. 118.

<sup>193</sup> Section 507.1(2) CC; Prosecution Directive, p. 118.

<sup>194</sup> Prosecution Directive, p. 119; interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>195</sup> Prosecution Directive, p. 119.

<sup>196</sup> Prosecution Directive, p. 119.

<sup>197</sup> Section 7(7) CC.

<sup>198</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019; interview with Canadian academic on 21 August 2019.

<sup>199</sup> Court of Appeal for British Columbia, *Gail Davidson and Lawyers Against the War v. Attorney General of British Columbia*, 2006 BCCA 447, 11 October 2006.



The denial of consent by the Attorney General can be challenged through a judicial review. This was attempted unsuccessfully in the *Zhang* case (see above under [Possible Challenges by Victims and NGOs](#)).<sup>200</sup>

In 2015, an NGO called Sikhs for Justice initiated a private prosecution against the sitting Prime Minister of India, Narendra Modi, for his role in the massacre of Muslims in Gujarat in 2002, alleging this constituted torture under Section 269.1 of the CC and genocide under Section 6 of the CAHWCA.<sup>201</sup> Following the *pre-enquete*, the judge ordered the summons of Prime Minister Modi but the Attorney General withdrew the charges.<sup>202</sup>

At the time of writing this report, no private prosecution in a universal jurisdiction case has resulted in a trial.<sup>203</sup>

## Rules of evidence

Prosecutions on the basis of universal jurisdiction are subject to the ordinary rules of evidence for criminal proceedings applicable in Canada.

### 1. At the investigation stage

#### 1.1. Necessary information for a complaint

There is no official system or procedure for filing criminal complaints in Canada.<sup>204</sup> In practice, the most common way information comes to the attention of the authorities is that NGOs hear about the presence of a suspect in Canada, collect testimonies and open source information and submit it to the RCMP SII Unit or the DoJ CAHWC.<sup>205</sup> The RCMP has indicated that it is helpful for complaints to include as much detail as possible, including location of the crime, names, dates, documents, videos, etc.<sup>206</sup>

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<sup>200</sup> Federal Court of Appeal, *Kunlun Zhang v. Attorney General of Canada*, 2007 FCA 201, 25 May 2007.

<sup>201</sup> Sack Goldblatt Mitchell LLP Lawyers, Request to Prosecute Narendra Modi for the 2002 Massacre of Muslims in Gujarat, 8 April 2015, available at: <https://www.dropbox.com/s/a7a3tinasgcayqg/Letter%20to%20the%20Hon.%20Peter%20Gordon%20Mackay%20C%20April%208%202015%20%2800743255%29.pdf?dl=0>.

<sup>202</sup> Sniderman, Prosecuting Modi – Alumnus Louis Century and the legal case against the Indian Prime Minister, *Nexus* Volume 25 Number 1, 2015, p. 26 ff, available at: [https://www.law.utoronto.ca/utfl\\_file/count/documents/Nexus/nxus\\_ss15\\_online.pdf](https://www.law.utoronto.ca/utfl_file/count/documents/Nexus/nxus_ss15_online.pdf).

<sup>203</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>204</sup> Interview with Canadian advocate on 1 July 2019.

<sup>205</sup> *Ibid*; interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>206</sup> Interview with member of RCMP SII Unit on 27 June 2019.

The authorities tend not to give feedback on such complaints, or contact complainants, until they have decided whether or not to pursue the case.<sup>207</sup> On rare occasions, the RCMP SII Unit or DoJ CAHWC will seek a meeting with the complainant to discuss the investigations or explain their decision.<sup>208</sup> The investigating authorities prefer to conduct investigations themselves rather than through NGOs, out of a concern to avoid possible contamination of evidence.<sup>209</sup>

### 1.1. Threshold for opening investigations

When deciding whether or not to open investigations, the File Review Committee initially assesses a set of criteria, including the level of personal involvement of the suspect, the type of crime, the likelihood of success, the presence of the accused, the ability to conduct investigations, access and availability of evidence, and the possibility of cooperation with territorial state, rather than whether a specific evidentiary threshold is met (see above on [Initiation of Investigations](#)).<sup>210</sup>

### 1.2. Threshold for indictment

The threshold for an indictment is a reasonable prospect of conviction and public interest (see above under [Prosecutorial Discretion](#)).<sup>211</sup> There is no requirement for specific types of evidence, so evidence can be direct or circumstantial, testimonial or documentary, video or audio, as long as it is admissible.<sup>212</sup>

## 2. At the trial stage

### 2.1. Principle of disclosure

At the outset of a trial, the PPSC has the duty to disclose to the defense all evidence in its possession and in the RCMP's possession if it is relevant and not privileged.<sup>213</sup> Information that is privileged can include the identity of a confidential informer or materials that cannot be disclosed for reasons of national security.<sup>214</sup> The rules on disclosure are complex and a comprehensive description is beyond the scope of this report.

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<sup>207</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019; interview with Canadian advocate on 1 July 2019.

<sup>208</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>209</sup> *Ibid.*

<sup>210</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>211</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019; PPSC Deskbook, Chapter 2.3, p. 3.

<sup>212</sup> Interview with legal practitioner on 22 August 2019.

<sup>213</sup> Supreme Court of Canada, *William B. Stinchcombe v. Her Majesty the Queen*, Case No. 21904, [1991] 3 SCR 326, 7 November 1991, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/808/index.do>.

<sup>214</sup> Interview with legal practitioner on 22 August 2019.

## 2.2. General principles of admissibility of evidence

Ordinary Canadian rules of evidence apply to prosecutions of international crimes on the basis of universal jurisdiction. The rules on admissibility of evidence in criminal proceedings derive from a number of sources, including the CC, the Canada Evidence Act,<sup>215</sup> and the common law. A full description of all rules goes beyond this report due to the complexity of evidentiary rules in Canada.

As a key principle, courts can generally only consider admissible evidence, which means evidence that is relevant, and not subject to any exclusionary principles.<sup>216</sup> Relevance requires a nexus between one fact and another “which makes it possible to infer the existence of one from the other.”<sup>217</sup> In addition to exclusionary rules on unlawfully obtained materials (see below), hearsay is excluded, but with certain principled exceptions when the hearsay evidence is necessary and reliable.<sup>218</sup>

In universal jurisdiction cases, where witnesses may reside abroad, Section 709(1)(b) of the CC permits a party to “apply for an order appointing a commissioner to take the evidence of a witness who is out of Canada.” Such witness testimony taken by a commissioner is admissible as evidence in the trial according to Section 712(2) of the CC. In the case of *Munyaneza*, pursuant to this provision, the presiding judge personally travelled to Rwanda to conduct a rogatory commission, during which 14 prosecution witnesses who could not travel to Canada were given the opportunity to submit *viva voce* evidence.<sup>219</sup>

## 2.3. Unlawfully obtained materials

Evidence obtained unlawfully may be inadmissible where an accused’s rights under the Canadian Charter of Rights and Freedoms annexed to the Constitution Act 1982 (Charter) have been infringed. Section 24(2) of the Charter stipulates that where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

For example, when search and seizures or detentions are conducted without a warrant or in any way infringe the Charter, the evidence obtained can be excluded as unlawful.<sup>220</sup> Upon application by the defence for exclusion of such evidence, the court will weigh the injury to the accused and to the long-term confidence in the administration of justice against the

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<sup>215</sup> Canada Evidence Act, R.S.C., 1985, c.5 (CEA).

<sup>216</sup> Supreme Court of Canada, *R v Cloutier*, [1979] 2 S.C.R. 709, 13 December 1979 and 28 June 1979, p. 13.

<sup>217</sup> *Ibid.*

<sup>218</sup> Supreme Court of Canada, *Sameer Mapara v. Her Majesty the Queen*, [2005] 1 S.C.R.358, 2005 SCC 23, 27 April 2005, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2223/index.do>.

<sup>219</sup> *Munyaneza Judgment*, para 15.

<sup>220</sup> Interview with legal practitioner on 22 August 2019.

value of the material for the prosecution, and decide whether or not to admit the evidence.<sup>221</sup>

These rules on unlawfully obtained evidence only apply to materials obtained by state actors since the Charter only imposes duties on public authorities, and not on non-state actors.<sup>222</sup> Therefore, evidence obtained in violation of the rights of the defendant by non-state actors would not be excluded on the basis that they were unlawfully obtained, but would nonetheless have to comply with other admissibility rules.<sup>223</sup>

## 2.4. Open source materials

Open source materials, including social media materials, may be admissible as electronic documents under Section 31.1 of the Canada Evidence Act which states:

“Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.”

Authentication may be done through direct or circumstantial evidence.<sup>224</sup> It requires the introduction of evidence to support a finding that the electronic document is “that which it is purported to be”.<sup>225</sup> This can be done by presenting a witness for the purpose of identifying the electronic document and articulating the basis for authenticating what it purports to be.<sup>226</sup>

In addition to authentication, Section 31.2(1) of the Canada Evidence Act requires “proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored”. This is a separate test to authenticity.<sup>227</sup> Integrity can be presumed according to Section 31.3 of the Canada Evidence Act, if the electronic documents system was operating properly, the electronic document was stored by the adverse party to the one introducing it, or was stored by someone who is not a party.

The RCMP has a special unit charged with authenticating open source materials.<sup>228</sup>

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<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Section 31.5 CEA; Court of Appeal for Saskatchewan, *Christopher Donald Hirsch v. Her Majesty the Queen*, 2017 SKCA 14 (CanLII), 24 February 2017, para 18, available at: <https://www.canlii.org/en/sk/skca/doc/2017/2017skca14/2017skca14.html>.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid; interview with legal practitioner on 22 August 2019.

<sup>227</sup> Court of Appeal for Saskatchewan, *Christopher Donald Hirsch v. Her Majesty the Queen*, 2017 SKCA 14 (CanLII), 24 February 2017, para 18, available at: <https://www.canlii.org/en/sk/skca/doc/2017/2017skca14/2017skca14.html>.

<sup>228</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

## 2.5. Introduction of evidence

Victims and NGOs do not have the right to introduce evidence at trial. They may provide information to the public prosecutor or may be called to testify as witnesses.

# Witness and victim protection

## 1. Protection during trial

During a trial, the court can take certain measures to protect a witness who is testifying. These include closing hearings to the public (*in camera* hearings), or allowing anonymous testimony (towards the public), the giving of testimony via video-link, use of pseudonyms, or a screen to shield the witness from the accused.<sup>229</sup> These measures can be ordered after a judge has applied various tests established by case-law and legislation.<sup>230</sup> As part of the process of disclosure of evidence by the prosecution, the identity of all witnesses must be revealed to the accused but irrelevant personal information does not need to be disclosed.<sup>231</sup>

Pursuant to section 714.1 and 714.2 of the CC, witnesses may testify in court via video-link, if the court finds it appropriate, taking into consideration the location and personal circumstances of the witness, the costs that would be incurred if the witness had to be physically present, and the nature of the witness' anticipated evidence.<sup>232</sup> If the witness is located outside of Canada, a court in Canada is required to accept testimony via video-link provided the reception of such testimony would not be contrary to the principles of fundamental justice, and provided sufficient notice is given to the opposing party.<sup>233</sup> The CC also permits the submission of evidence through audio-link, for witnesses both inside and outside of Canada, in prescribed circumstances.<sup>234</sup>

The RCMP, on its own initiative or upon request by a witness or the prosecutor, can also take special measures to protect witnesses outside of the courtroom, such as safe houses, accompanied travel, escort to the court and emotional support during trial.<sup>235</sup> If the witness resides abroad, the RCMP works with the local police to provide protection.<sup>236</sup>

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<sup>229</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019.

<sup>230</sup> Interview with legal practitioner on 22 August 2019.

<sup>231</sup> Interview with legal practitioner on 22 August 2019.

<sup>232</sup> Section 714.1 CC.

<sup>233</sup> Section 714.2 CC.

<sup>234</sup> Sections 714.3-714.4 CC.

<sup>235</sup> Interview with member of Department of Justice Crimes Against Humanity and War Crimes Section on 27 June 2019; interview with legal practitioner on 22 August 2019.

<sup>236</sup> Interview with member of RCMP SII Unit on 27 June 2019.

## 2. Witness protection program

Under the Witness Protection Program Act, persons who are involved directly or indirectly in providing information or assistance to law enforcement can apply or be recommended for participation in a witness protection program if their security is at risk.<sup>237</sup> Persons who are at risk due to their relationship with a witness are also eligible.<sup>238</sup>

Protection measures available under this program may include relocation, accommodation, change of identity, counselling and financial support to ensure security or facilitate the person's re-establishment or self-sufficiency.<sup>239</sup> The decision to admit a person into the Witness Protection Program and the type of protection provided is issued by the Commissioner of the RCMP.<sup>240</sup>

In the two trials conducted so far on the basis of universal jurisdiction, no witness has been placed under witness protection.<sup>241</sup>

## Reparation for victims in criminal proceedings

### 1. Restitution

In the event of a conviction, the court may order reparation in favour of the victims. Pursuant to Section 16 of the CVBR, victims have the right to “restitution” from the offender. Accordingly, Section 737.1(1) of the CC requires the court that convicts a defendant to “consider making a restitution order”. Restitution only includes financial compensation.<sup>242</sup>

Victims and other persons who are seeking restitution can indicate their request through a form provided by the authorities or by any other means approved by the court.<sup>243</sup> The request for restitution must establish the loss and damage by indicating a readily

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<sup>237</sup> Witness Protection Program Act, SC 1996, c 15 (WPPA), Section 2 and 3.

<sup>238</sup> Section 2 WPPA.

<sup>239</sup> Section 2 WPPA.

<sup>240</sup> Section 5 and 2 WPPA.

<sup>241</sup> Interview with former member of Department of Justice Crimes Against Humanity and War Crimes Section on 25 June 2019.

<sup>242</sup> Interview with victimologist on 12 August 2019.

<sup>243</sup> Section 737.1(4) CC.

ascertainable amount and attaching evidence, such as receipts.<sup>244</sup> This can be submitted to the public prosecutor or to the court.<sup>245</sup>

Upon application by the Attorney General or upon the court's own motion, the court may, upon a conviction, order restitution in the form of:<sup>246</sup>

- (1) An amount not exceeding the replacement of destroyed or lost property; and
- (2) An amount not exceeding all pecuniary damages incurred as a result of bodily or psychological harm, including loss of income or support.<sup>247</sup>

A restitution order can be issued regardless of the defendant's financial means or ability to pay.<sup>248</sup> Restitution to victims takes priority over an order of forfeiture or a fine.<sup>249</sup>

The judgment containing the restitution order can be enforced in the same way as a judgment of a court in civil proceedings.<sup>250</sup> Where a restitution order is made, victims may also seek civil remedies for the same act or omission.<sup>251</sup>

In the *Munyaneza* case, the only conviction based on universal jurisdiction at the time of writing, victims did not claim restitution.<sup>252</sup>

## 2. Crimes Against Humanity Fund

Section 30(1) of the CAHWCA establishes the Crimes Against Humanity Fund. Money paid into the fund is collected from various sources, including through enforcement in Canada of orders of the International Criminal Court for reparation, forfeiture, or fines, amounts collected by the Minister of Public Works and Government Services received from certain seized property, and funds collected through regular donations.<sup>253</sup>

The Attorney General may make payments out of the Crimes Against Humanity Fund to the International Criminal Court, the Trust Fund for Victims established by the Rome Statute, victims of offences under the CAHWCA or of offences within the jurisdiction of the International Criminal Court, to the families of those victims, or otherwise as the Attorney General sees fit.<sup>254</sup>

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<sup>244</sup> Ibid; interview with victimologist on 12 August 2019.

<sup>245</sup> See Section 737.1(2) and (3) CC.

<sup>246</sup> Section 738(1)(a) and (b) CC.

<sup>247</sup> Section 738(1)(c), (d) and (e) CC set out additional forms of restitution for specific crimes other than international crimes, such as domestic violence.

<sup>248</sup> Section 739.1 CC.

<sup>249</sup> Section 740 CC.

<sup>250</sup> Section 741(2) CC.

<sup>251</sup> Section 741.2 CC.

<sup>252</sup> Interview with victimologist on 12 August 2019; interview with legal practitioner on 22 August 2019.

<sup>253</sup> Sections 30(1) and 31 CAHWCA.

<sup>254</sup> Section 30(2) CAHWCA.

## Immunities

The concept of diplomatic immunity derived from the 1961 Vienna Convention on Diplomatic Relations is imported into Canadian law under the Foreign Missions and International Organizations Act. The Act specifically grants immunity to the diplomatic mission and consular posts of any foreign state, and to persons connected with it.<sup>255</sup>

Canada is not a signatory or party to the Convention on Special Missions, and thereby, has no domestic laws in place importing the articles of this convention into Canadian law.

Immunities under customary international law<sup>256</sup> apply in Canada. The Supreme Court of Canada held that customary international law is automatically incorporated into Canadian common law unless Canadian legislation provides an express derogation.<sup>257</sup>

Immunities have not been raised in the two universal jurisdiction cases that have been completed at the time of writing.

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<sup>255</sup> Foreign Missions and International Organizations Act, SC 1991, c 41, Section. 3(1).

<sup>256</sup> On customary international law on immunities see International Law Commission, Second report on the immunity of State officials from foreign jurisdiction by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/661, 4 April 2013.

<sup>257</sup> Supreme Court of Canada, *Lawrence Richard Hape v. Her Majesty the Queen*, [2007] 2 S.C.R. 292, 2007 SCC 26, 7 June 2007, para. 38-39, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do>.



The **Open Society Justice Initiative**, part of the Open Society Foundations, uses strategic litigation and other kinds of legal advocacy to defend and promote the rule of law, and to advance human rights. We pursue accountability for international crimes, support criminal justice reforms, strengthen human rights institutions, combat discrimination and statelessness, challenge abuses related to national security and counterterrorism, defend civic space, foster freedom of information and expression, confront corruption and promote economic justice. In this work, we collaborate with a community of dedicated and skillful human rights advocates across the globe, and form part of a dynamic and progressive justice movement that reflects the diversity of the world.

**TRIAL International** is a non-governmental organization fighting impunity for international crimes and supporting victims in their quest for justice. TRIAL International takes an innovative approach to the law, paving the way to justice for survivors of unspeakable sufferings. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward. TRIAL International believes in a world where impunity for international crimes is no longer tolerated. Only when victims are heard and perpetrators held accountable can the rule of law prevail.