

Canada, Crimes Against Humanity and War Crimes Act

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: “Crimes Against Humanity and War Crimes Act”, in *Annual Statutes of Canada 2000*, Chapter 24, <http://laws-lois.justice.gc.ca/Search/Search.aspx>]

[...] An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts [Assented to 29th June, 2000] [...]

INTERPRETATION

2. (1) The definitions in this subsection apply in this Act. [...]

“conventional international law” means any convention, treaty or other international agreement

(a) that is in force and to which Canada is a party; or

(b) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved. [...]

(2) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.

HER MAJESTY

3. This Act is binding on Her Majesty in right of Canada or a province.

OFFENCES WITHIN CANADA

4.

(1) Every person is guilty of an indictable offence who commits

(a) genocide;

(b) a crime against humanity; or

(c) a war crime.

(1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

(2) Every person who commits an offence under subsection (1) or (1.1)

(a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and

(b) is liable to imprisonment for life, in any other case.

(3) The definitions in this subsection apply in this section.

“crime against humanity” [...]

“genocide” [...]

“war crime” means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

5. (1) A military commander commits an indictable offence if

(a) the military commander

(i) 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 section 4, or

(ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;

(b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and

(c) the military commander subsequently

(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or

(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

(2) A superior commits an indictable offence if

[identical to section 5(1)(a) and (b)]

(c) the offence relates to activities for which the superior has effective authority and control; and

(d) [identical to section 5(1)(c)]

(2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

(3) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

(4) The definitions in this subsection apply in this section.

“military commander” includes 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.

“superior” means a person in authority, other than a military commander.

OFFENCES OUTSIDE CANADA

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada

(a) genocide,

(b) a crime against humanity, or

(c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.[sections 6(1.1)-6(4) are identical to sections 4(1.1)-4(4)]

(5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:

(a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and

(b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

7. (1) A military commander commits an indictable offence if [identical to section 5(1)]

(2) A superior commits an indictable offence if [identical to section 5(2)]

(2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

(3) A person who is alleged to have committed an offence under subsection (1), (2) or (2.1) may be prosecuted for that offence in accordance with section 8.

(4) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

(5) Where an act or omission constituting an offence under this section occurred before the coming into force of this section, subparagraphs (1)(a)(ii) and (2)(a)(ii) apply to the extent that, at the time and in the place of the act or omission, the act or omission constituted a contravention of customary international law or conventional international law or was criminal according to the general principles of law recognized by the community of nations, whether or not it constituted a contravention of the law in force at the time and in the place of its commission. [...]

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

- (a) at the time the offence is alleged to have been committed,
- (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
- (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
- (iii) the victim of the alleged offence was a Canadian citizen, or
- (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict;
or
- (b) after the time the offence is alleged to have been committed, the person is present in Canada.

PROCEDURE AND DEFENCES

9. (1) Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

(2) For greater certainty, in a proceeding commenced in any territorial division under subsection (1), the provisions of the *Criminal Code* relating to requirements that an accused appear at and be present during proceedings and any exceptions to those requirements apply.

(3) No proceedings for an offence under any of sections 4 to 7, 27 and 28 may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, [...]

(4) No proceedings for an offence under section 18 may be commenced without the consent of the Attorney General of Canada.

10. Proceedings for an offence alleged to have been committed before the coming into force of this section shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

DEFENCES

11. In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the *Criminal Code*, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the

proceedings.

12. (1) If a person is alleged to have committed an act or omission that is an offence under this Act, and the person has been tried and dealt with outside Canada in respect of the offence in such a manner that, had they been tried and dealt with in Canada, they would be able to plead *autrefois acquit*, *autrefois convict* or pardon, the person is deemed to have been so tried and dealt with in Canada.

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

(a) were for the purpose of shielding the person from criminal responsibility; or

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

13. Despite section 15 of the Criminal Code, [N.B.: Section 15 of the Criminal Code states: “No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in de facto possession of the sovereign power in and over the place where the act or omission occurs.”] it is not a justification, excuse or defence with respect to an offence under any of sections 4 to 7 that the offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

14. (1) In proceedings for an offence under any of sections 4 to 7, it is not a defence that the accused was ordered by a government or a superior – whether military or civilian – to perform the act or omission that forms the subject-matter of the offence, unless

(a) the accused was under a legal obligation to obey orders of the government or superior;

(b) the accused did not know that the order was unlawful; and

(c) the order was not manifestly unlawful.

(2) For the purpose of paragraph (1)(c), orders to commit genocide or crimes against humanity are manifestly unlawful.

(3) An accused cannot base their defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions

against the population or group. [...]

PROCEEDS OF CRIME

27. (1) No person shall possess any property or any proceeds of property knowing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of

(a) an act or omission in Canada that constituted genocide, a crime against humanity or a war crime, as defined in section 4;

(b) an act or omission outside Canada that constituted genocide, a crime against humanity or a war crime, as defined in section 6; [...]

(2) Every person who contravenes subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term of not more than two years.

(3) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under this section by reason only that they possess property or the proceeds of property mentioned in subsection (1) for the purpose of an investigation or otherwise in the execution of the peace officer's duties. [...]

COMING INTO FORCE

[Law in force the 23 October 2000, see Order of the Governor in Council Nr. TR/2000-95]

Discussion

1. What relationship is there between this law and the Statute of the International Criminal Court (ICC)?
2. Does the Act meet the requirements of the Geneva Conventions and Protocol I? Does it allow the prosecution of any grave breach of IHL? Of any war crime? (GC I-IV, Arts 49/50/129/146 respectively; P I, Arts 11(4) and 85)
3. Does the Act apply to violations of IHL occurring in non-international armed conflicts?
4. On issues relating to jurisdiction:
 - a. Does Canada's jurisdiction as laid down in Art. 8 of the Act meet the requirements of IHL? Does it go further than required by IHL? Does it go further than allowed by public international law? (GC I-IV, Arts

49/50/129/146 respectively)

b. Before this Act was adopted, the Canadian Criminal Code laid down that any crime which may constitute a war crime or a crime against humanity committed abroad must also constitute, in Canada, an infringement of Canadian law. This was a condition for the Canadian courts to have the jurisdiction to try the crime. How does the Act improve the prospects of having a case heard by the Canadian courts? Consider the question from the standpoint of cases involving the use of chemical weapons, perfidy, or the misuse of the red cross or red crescent emblems (Art. 6 of this law).

5. Does a person charged with an offence necessarily have to be in Canada to be prosecuted? In what cases is this presence necessary? Is this compatible with the obligation to prosecute on the basis of the principle of universal jurisdiction, as laid down in IHL? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively)

6.

a. Does the command responsibility provided for in Arts 5.1-2 and 7.1-2 of the Act correspond to the command responsibility stipulated by IHL? By the ICC Statute? Does it go further? (P I, Art. 86(2); CIHL, Rule 153; ICC Statute, Art. 28 [See The International Criminal Court [A. The Statute]])

b. Are the limitations provided for under Art. 7(5) compatible with IHL? Are they required by public international law?

7.

a. Is the stipulation that no proceedings may be commenced without the consent of Canada's Attorney General, as provided for under Art. 9(3)-(4), compatible with IHL? Why do you think these provisions have been included? Are there similar provisions in your country's law? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively)

b. In what circumstances could Canada's Attorney General, without any violation of IHL by Canada, deny his consent to proceedings against a person accused of war crimes? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively)

8.

a. Does Art. 14(1) lay down cumulative or alternative conditions? Does this provision correspond to the IHL rule? To that of the ICC Statute? (ICC Statute, Art. 33 [See The International Criminal Court [A. The Statute]])

b. Why did Canada feel itself obliged to withdraw from the accused the right to a "mistake of law" defence when his belief is based on hate propaganda? Does this rule correspond to that of the ICC Statute? (ICC

Statute, Art. 32 [See The International Criminal Court [A. The Statute]]

9. Does Art. 27 go beyond the provisions of Chapter VII of the ICC Statute [See The International Criminal Court [A. The Statute]] which concern confiscation of the proceeds of crime?

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