

THE UNBEARABLE LIGHTNESS OF INTERNATIONAL OBLIGATIONS: WHEN AND HOW TO EXERCISE JURISDICTION UNDER CANADA'S *CRIMES AGAINST HUMANITY AND WAR CRIMES ACT*

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This study offers an analysis of “when” and “how” Canada may –or must– exercise jurisdiction over suspected perpetrators of genocide, crimes against humanity and war crimes. The first part looks at the legislative choices made in the *Crimes against Humanity and War Crimes Act* as to temporal, territorial and extraterritorial jurisdiction, including universal jurisdiction and the requirement of the presence of the accused on Canada’s territory, in light of the correlative rules and obligations of international law. The second part of the study is concerned with “how” Canada will –or should– decide to exercise jurisdiction. It describes the political safeguards put in place by the *Act* and assesses the criteria that guide –or should guide– the exercise of prosecutorial discretion. The “when” and the “how” are clearly intertwined. Indeed, the criteria upon which the Attorney General should base his or her decision to prosecute a person cannot or should not- be dissociated from Canada’s international obligations and responsibilities in this regard. This study examines Canada’s approach regarding suspected war criminals present on its territory, which combines criminal and administrative remedies. It assesses some of the challenges it faces in living up to its commitment to fight impunity for the worst international crimes, in light of the “unbearable lightness” of international obligations.

Cette étude offre une analyse de « quand » et « comment » le Canada peut ou doit exercer sa compétence sur les présumés auteurs de génocide, de crimes contre l’humanité et de crimes de guerre. La première partie met de l’avant une analyse critique des bases temporelle, territoriale et extraterritoriale de compétence prévues par la *Loi sur les crimes contre l’humanité et les crimes de guerre*, notamment la compétence universelle et l’exigence de la présence de l’accusé sur le territoire canadien, à la lumière des règles et obligations corrélatives prévues par le droit international. L’aspect « comment » en seconde partie décrit le rôle du Procureur général du Canada dans l’ouverture de poursuites et les critères qui fondent – ou devraient fonder – l’exercice de sa discrétion à cet égard. Le « quand » et le « comment » sont intimement liés. En effet, les critères sur lesquels le Procureur général devrait fonder sa décision de poursuivre une personne ne peuvent pas être dissociés des obligations et responsabilités internationales du Canada. Cette étude examine l’approche du Canada relativement aux présumés criminels de guerre se trouvant sur son territoire, une approche qui combine des mécanismes pénaux et administratifs. Elle évalue les défis auxquels il fait face dans l’exécution de son rôle dans la lutte contre l’impunité pour les crimes internationaux les plus graves, face à « l’insoutenable légèreté » des obligations internationales.

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What do Léon Mugesera, Désiré Munyaneza, Jorge Vinicio Sosa Orantes, Branko Rogan and Jacques Mungwarere have in common? They are all present in Canada. And they are all suspected of having been involved, abroad, in the commission of genocide, crimes against humanity and/or war crimes. However, they face very different consequences for their alleged actions. Two have been criminally prosecuted (Munyaneza, Mungwarere), one has received a (yet to be executed) deportation order (Mugesera), one is the object of extradition proceedings (Sosa Orantes) and one faces revocation of his Canadian citizenship and possible removal from Canada (Rogan). Once a suspect is found on Canadian territory, Canada bears the responsibility of the international community to ensure accountability, here or abroad. This study examines Canada's approach and some of the challenges it faces in living up to its commitment to fight impunity for the worst international crimes.

Following a long-standing tradition as an international leader on human rights and humanitarian issues, Canada is now also considered a champion of the fight against impunity for genocide, crimes against humanity and war crimes on the international plane. It has been a fervent supporter of and a main actor behind the creation of the International Criminal Court (ICC), one of the first states to ratify the *Rome Statute of the International Criminal Court*¹ and the first to enact an implementing legislation, the *Crimes Against Humanity and War Crimes Act*.² The Canadian Government has adopted an aggressive "no safe haven" policy³, echoing other democracies that have vowed to ensure that their countries' borders would not harbour international criminals. The Canadian Government has developed over the years a Crimes Against Humanity and War Crimes Program, which included the creation of specialized units in the three original departments: Citizenship and Immigration Canada (CIC), the Department of Justice (DOJ) and the Royal Canadian Mounted Police (RCMP). In 2003, CIC's Modern War Crimes Program was moved to the newly formed Canada Border Services Agency (CBSA), which became the fourth partner in the program. The purpose of the War Crimes Program is to

support Canada's policy to deny safe haven to suspected perpetrators of war crimes, crimes against humanity or genocide, and to contribute to the domestic and international fight against impunity. The Program also aims to reflect the government's commitment to international justice, respect for human rights, and strengthened border security.⁴

The "no safe haven" policy encompasses many remedies, both criminal and administrative, which could be grouped in three categories. The first category aims at preventing the admission to Canada of people involved in war crimes, crimes against

¹ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002) [*Rome Statute*].

² *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 [*War Crimes Act*].

³ See e.g. Canada, Department of Justice, *Crimes Against Humanity and War Crimes Program – Summative Evaluation: (Final Report)* (Ottawa: Evaluation Division, Office of Strategic Planning and Performance Management, 2008) at 8, 43 [*Canada's War Crimes Program*].

⁴ Canada, Department of Justice Canada, *Canada's Crimes Against Humanity and War Crimes Program*, online: Department of Justice Canada <http://www.justice.gc.ca/warcrimes-crimesdeguerre/process-processus-eng.asp> [Department of Justice Canada, *Crimes Against Humanity and War Crimes Program*].

humanity or genocide. This includes the denial of visas overseas and denials at ports of entry. This effective measure has prevented roughly two thousand persons suspected of involvement in international crimes to gain access to Canada.⁵ Although various issues merit discussion, including the fairness of the determination procedure⁶, this paper will not be concerned with these preventive measures. Apart from measures aimed at preventing entry on the territory, once a suspect has entered or lives in Canada, numerous remedies are available, which can be grouped in two further categories. A second category comprises the most repressive measures that are prosecution in Canada under the *War Crimes Act*, extradition to a foreign Government (upon request) and surrender to an international tribunal (upon request). A third category contains the other remedies, which are more focused on national interests than in ensuring that justice is done for the suspected crimes: revocation of citizenship under the *Citizenship Act*⁷ and deportation under the *Immigration and Refugee Protection Act*⁸; exclusion from the protection of the 1951 United Nations *Convention relating to the Status of Refugees*⁹; as well as inquiry and removal from Canada under the *Immigration and Refugee Protection Act*, including by the designation of governments considered to have engaged in gross human rights violations under 35(1) (b) of the *Immigration and Refugee Protection Act*.¹⁰

Canada has a long and tortuous history with respect to the prosecution of war criminals. After some forty years of inaction following World War II¹¹, the Canadian Government amended the *Criminal Code*¹² in 1987 to allow Canada to exercise jurisdiction over crimes against humanity and war crimes committed outside Canada by deeming that such crimes took place in Canada.¹³ At that time, the Government chose to pursue primarily the option of criminal prosecution. This “made in Canada”¹⁴ solution was to be tested in the years that followed, without much success in terms of convictions. Four prosecutions were launched between 1987 and 1994, none of which led to a conviction.¹⁵ The *Finta* case has become a seminal case with respect to

⁵ *Canada's War Crimes Program*, *supra* note 3 at 44.

⁶ Stories are sometimes picked up by the media and will eventually call for clarification by the authorities. See e.g. Louise Leduc, “Un Haïtien accusé de crime de guerre par le Canada”, *Cyberpresse* (10 May 2011), online: <http://www.cyberpresse.ca/actualites/quebec-canada/justice-et-faits-divers/201105/09/01-4397748-un-haitien-accuse-de-crime-de-guerre-par-le-canada.php>.

⁷ *Citizenship Act*, R.S.C. 1985, c. C-29.

⁸ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

⁹ *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954).

¹⁰ Department of Justice Canada, *Crimes Against Humanity and War Crimes Program*, *supra* note 4.

¹¹ With the exception of the immediate post-war trials held in Europe pursuant to *War Crimes Act*, S.C. 1946, c. 73.

¹² *Criminal Code*, R.S.C. 1985, c. C-46.

¹³ This was made in accordance with the recommendation contained in the *Report of the Commission of Inquiry on War Criminals* (Ottawa: Minister of Supply and Services Canada, 1986). The report is widely known by the name of its sole commissioner, the late Jules Deschênes, former Chief Justice of the Superior Court of Quebec and later judge of the International Criminal Tribunal for the former Yugoslavia (ICTY).

¹⁴ See e.g. Irwin Cotler, “Bringing Nazi war criminals in Canada to justice: A case study” (1997) 91 *Am. Soc. Int'l L Proc.* 262.

¹⁵ *R. v. Finta*, [1994] 1 S.C.R. 701 [*Finta*]; *R. v. Pawlowski*, [1991] O.J. No. 2499 (Ont. Ct. J (Gen Div)) (QL) (unable to convince essential witnesses to change their minds about coming to Canada to testify,

international crimes in Canada, and to some extent a reference for other jurisdictions¹⁶, but paradoxically, the confirmation of the acquittal of the accused at the Supreme Court also signed the death warrant of any such future prosecutions under the *Criminal Code*. From then on, criminal prosecutions stopped being an option, and immigration measures would be preferred, until the *War Crimes Act* came into force and the first prosecution was launched in 2005, as discussed below.¹⁷

The *War Crimes Act* indeed has as one of its main objectives to enhance and reinforce Canada's capacity to prosecute and punish persons accused of the "core" international crimes, namely genocide, crimes against humanity and war crimes, wherever their commission took place. It is crucial to understand, though, that the actions, and mostly inactions, of the post World War II era, the ensuing attempts at criminal prosecutions and the subsequent change of governmental policy, represent the hesitations, false starts and failures that marked the slow coming about of the *War Crimes Act*. They also serve to explain the prudence shown by the Canadian authorities before launching the first prosecution pursuant to the new legislation in *Munyaneza*¹⁸, and their general reluctance to make use of the criminal law with respect to core crimes committed abroad. The judgement rendered in the *Munyaneza* case is historic from a Canadian perspective. Not only is it the first case under the *War Crimes Act*, but it also signals a possible return to a more aggressive stance regarding alleged war criminals found on Canadian territory.¹⁹

the Crown was forced to drop the charges and to contribute to Pawlowski's legal costs: *R. v. Pawlowski* (1992), 13 C.R. (4th) 228, [1992] O.J. No. 562 (Ont. Ct. J (Gen Div)) (QL), aff'd (1993), 12 O.R. (3d) 709, [1993] O.J. No. 554 (Ont. C.A.) (QL), leave to appeal to S.C.C. refused, [1993] 3 S.C.R. v.iii, 15 O.R. (3d) xvi, [1993] S.C.C.A. No. 187 (QL)); *R. v. Reistetter*, [1990] O.J. No. 2100 (Ont. Ct. J (Gen Div)) (QL) (the federal government eventually dropped charges against him on the ground that they no longer had sufficient evidence to proceed); *R. v. Grujicic* (1994), 25 W.C.B. (2d) 49, [1994] O.J. No. 2280 (Ont. Ct. J (Gen Div)) (QL) (proceedings were stayed as fundamentally unjust and oppressive in denying the accused, on the basis of mental and physical capacity, the opportunity for fair trial and full answer and defence).

¹⁶ *Finta* was quoted in ICTY jurisprudence, for instance, in *Prosecutor v. Duško Tadić*, IT-94-1-T, Judgement (7 May 1997) at para. 657 (ICTY, Trial Chamber II); *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgement (15 July 1999) at paras. 265-268 (ICTY, Appeals Chamber); *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, Judgement (3 March 2000) at para. 248 (ICTY, Trial Chamber I); *Prosecutor v. Dražen Erdemović*, IT-96-22-A, Judgement (7 October 1997), Separate and Dissenting Opinion of Judge Cassese, at para. 16, footnote 10 (ICTY, Appeals Chamber); *Prosecutor v. Zoran Kupreškić*, IT-95-16-T, Judgement (14 January 2000) at para. 553 (ICTY, Trial Chamber II) [*Kupreškić Trial Judgement*].

¹⁷ See e.g. Canada, Parliamentary Information and Research Service, *Bill C-19: Crimes Against Humanity and War Crimes Act* (Ottawa: Parliamentary Information and Research Service, 2000) at Background point D, online: Parliamentary Information and Research Service <[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C19&Parl=36&Ses=2#D.%20Canadian%20War%20Crimes%20Prosecutions\(txt\)](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C19&Parl=36&Ses=2#D.%20Canadian%20War%20Crimes%20Prosecutions(txt))>.

¹⁸ *R. v. Munyaneza*, 2009 QCCS 2201, [2009] R.J.Q. 1432 [*Munyaneza*]. For an analysis of the judgment, see Fannie Lafontaine, "Canada's Crimes against Humanity and War Crimes Act on Trial: An Analysis of the *Munyaneza* case" (2010) *J Int'l Crim Just* 269 [Lafontaine, *Munyaneza*]; Robert J. Currie & Ion Stancu, "R. v. *Munyaneza*: Pondering Canada's First Core Crimes Conviction" (2010) 10 *Int'l Crim L Rev* 829 [Currie & Stancu, *Munyaneza*].

¹⁹ Almost immediately after the sentencing judgment in *Munyaneza*, *ibid.*, a prosecution was launched against Mr. Jacques Mungwarere for acts allegedly committed during the genocide in Rwanda. See Department of Justice Canada, *Canada's Crimes Against Humanity and War Crimes Program*, online: Department of Justice Canada <<http://www.justice.gc.ca/warcrimes-crimesdeguerre/successes->

While Canada has resuscitated criminal enforcement mechanisms since the coming into force of the *War Crimes Act*, criminal prosecutions still represent a tiny fraction of the repressive mechanisms used against suspects, though they swallow a large part of the allocated budget.²⁰ Clearly, the costs involved in criminal prosecutions force a very selective approach, which may appear at odds with the objective of using national criminal justice systems to “close the impunity gap” left by the failures of other national systems and the inability of the international criminal jurisdictions to cope with the immensity of the task.²¹ National legislations such as Canada’s *War Crimes Act* are indeed called to play an increasingly important role in the global system put in place to fight against the impunity of those responsible of the most serious crimes of international concern. At the heart of the system put in place by the ICC to ensure accountability for the core crimes lies the principle of complementarity. States bear the primary responsibility to prosecute those responsible for international crimes. The ICC will exercise its jurisdiction only if the competent state is “unable” or “unwilling” to do so.²² The *Rome Statute*’s impact on national laws and policies - particularly if promoted “proactively” by the Courts’ organs - is probably the ICC’s most promising contribution to the fight against impunity and to lasting peace and security.²³

The adoption of the *War Crimes Act* aims at minimising the legal obstacles to national criminal prosecutions for genocide, crimes against humanity and war crimes in Canada. Clearly, the adequacy of the crimes’ definitions, as well as the adaptability of Canadian principles of individual criminal liability to the nature of international crimes, will be determinant factors in this endeavour.²⁴ However, these

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²⁰ While the overall budget of the program is \$78 million for a period five years (2005/06 to 2009/10), the cost of a single prosecution is evaluated to more than \$4 million. (*Canada’s War Crimes Program*, *supra* note 3 at 2, 47.) According to the report, “[t]here is a strong cost effectiveness argument for using the criminal prosecution remedy sparingly”. (*ibid.* at 48.)

²¹ The 2008 Summative Report of the War Crimes Program, while confirming that “[t]he 2007 decision of the War Crimes Steering Committee to place greater emphasis on immigration remedies (in terms of allocating resources) can be seen as appropriate from a cost effectiveness point of view given the apparent costs of prosecution cases and the budgetary limitations of the Program”, affirms at the same time that “[t]he limited resources available for criminal investigation, in relation to the inventory of serious cases, place an important limitation on the Program’s contribution to the objective of denying safe haven through non-civil remedies”. (*Canada’s War Crimes Program*, *supra* note 3 at 48 and 61.) The report thus concludes that “[t]here is considerable evidence that the Program will require increased financial resources if it is to be effective in addressing the no safe haven policy in the future” (*ibid.* at 60). See discussion below.

²² *Rome Statute*, *supra* note 1 at Preambular para. 6, ss. 1, 17.

²³ Fannie Lafontaine & Alain-Guy Tachou Sipowo, “The Contribution of International Criminal Justice to Sustainable Peace and Development” in Sébastien Jodoin, Marie-Claire Cordonier Segger & Maja Göpel, *Securing the Rights of Future Generations: Sustainable Development and the Rome Statute of the International Criminal Court in Practice* (Cambridge: Cambridge University Press, forthcoming in 2012); William W. Burke-White, “Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice” (2008) 49 *Harv. Int’l L.J.* 53; Mark S. Ellis, “International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions” (2009) 1 *Hague Journal on the Rule of Law* 79.

²⁴ For an analysis of some of the elements of the crimes under the *War Crimes Act* in light of the first judgment interpreting it, see Lafontaine, *Munyaneza*, *supra* note 18; for an analysis of some principles of liability under the *War Crimes Act*, see Fannie Lafontaine, “Parties to Offences under the Canadian

elements will only become relevant once criminal proceedings have been launched. The obvious prerequisite is the existence of jurisdiction of Canadian courts over particular crimes and suspected perpetrators – whether Canadian courts *can* be seized of a criminal case – and the decision by authorities to exercise such jurisdiction against a person – whether Canadian courts *will* actually be seized of the matter.

This study thus offers an analysis of whether, when and how Canada may exercise jurisdiction over suspected perpetrators of genocide, crimes against humanity and war crimes. The first part will be concerned with the issue of “whether” and “when” Canadian courts are *allowed* to exercise jurisdiction. It will look at the legislative choices made in the *War Crimes Act* as to temporal, territorial and extraterritorial jurisdiction, in light of the correlative rules and obligations of international law. The second part of the study will be concerned with “how” Canada will –or should- decide to *exercise* jurisdiction. It will describe the political safeguards put in place by the *War Crimes Act* and assess the criteria that guide – or should guide – the exercise of prosecutorial discretion. The “whether”, “when” and the “how” are clearly intertwined. Indeed, the criteria upon which the Attorney General should base his or her decision to prosecute a person cannot – or should not – be dissociated from Canada’s international (legal or moral) obligations in this regard. The analysis of the principles at international law with respect to jurisdiction and accountability for international crimes must therefore inform the manner in which Canada, politically or strategically, decides to exercise its jurisdiction in this regard.

I. Jurisdiction over Genocide, Crimes Against Humanity and War Crimes

This part of the paper will offer an overview of the jurisdiction *rationae temporis* provided for by the *War Crimes Act* (A), as well as of the traditional bases of territorial and extraterritorial jurisdiction that may serve as a basis for criminal proceedings in Canada for the core crimes (B). It will pay special attention to universal jurisdiction and the correlative obligation to extradite or prosecute, and endeavour to situate Canada’s legislative choices in light of the existing obligations and incentives that emanate from international treaty or customary law in this regard. This part will also provide an assessment of the requirement of the presence of the accused on Canadian territory as a pre-condition to prosecution on the basis of universal jurisdiction (C).

A. Temporal Jurisdiction

The *Crimes against Humanity and War Crimes Act* creates two categories of crimes according to whether they were committed in Canada or outside Canada. With respect to temporal jurisdiction, the *War Crimes Act* creates a dichotomy between

Crimes against Humanity and War Crimes Act: an Analysis of Principal Liability and Complicity” (2009) 50 *Cahiers de Droit* 967.

crimes committed in Canada and those committed outside of the country. Only the latter are subject to retrospective jurisdiction. Crimes committed in Canada prior to 23 October 2000 thus cannot be prosecuted under the *War Crimes Act*. Section 6(1) indeed provides that “[e]very person who, *either before or after the coming into force of this section*, commits outside Canada [a core crime]...”. [Emphasis added].²⁵

Interveners before the Standing Committee on Foreign Affairs and International Trade of the House of Commons made the argument that both the domestic and extraterritorial offences should have retrospective application. They claimed that all persons guilty of acts or omissions that were criminal according to international law at the time of their commission should be subject to prosecution, regardless of whether the crime took place inside or outside Canada.²⁶ The distinction was maintained nonetheless.

The justification for this dichotomy is left to speculation, but concerns about potential prosecutions for core crimes committed against Indigenous Peoples could serve to partly explain this otherwise unexplainable dichotomy. In any event, it appears unjustifiable to create a dual-regime jurisdictional basis according to where the crime was committed. The goal of ending impunity for the core crimes of genocide, crimes against humanity and war crimes is not well-served by this self-interested and untenable temporal distinction. Having said that, the *War Crimes Act* still represents advancement over the former *Criminal Code* provisions, which only provided jurisdiction to Canadian courts over genocide, crimes against humanity and war crimes committed outside Canada.²⁷ It is also more progressive than some other states’ implementing legislations, which do not provide for retrospective jurisdiction at all or which cannot be applied retroactively as decided by courts.²⁸ Clearly,

²⁵ *War Crimes Act*, *supra* note 2 at s. 6(1). By contrast, s. 4(1) only states: “Every person is guilty of an indictable offence who commits...”.

²⁶ See accounts of the comments of the Ukrainian Canadian Congress, B’nai Brith and Amnesty International in Goetz, *supra* note 17. The minutes are available in Canada, House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, 36th Parl. 2nd sess., No. 49 (30 May 2000) at 1055 (Alex Neve, Amnesty International Canada’s Secretary-General), online: Canada House of Commons <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040375&Language=E&Mode=1&Parl=36&Ses=2>>; Canada, House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, 36th Parl. 2nd sess., No. 50 (30 May 2000) at 1550-1555 (Eugene Czolij, Ukrainian Canadian Congress’ President), online: Canada House of Commons <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040376&Language=E&Mode=1&Parl=36&Ses=2>> [Canada, House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, No.50].

²⁷ *Criminal Code*, *supra* note 12, s. 7(3.71).

²⁸ See, for instance, South Africa’s *Implementation of the Rome Statute of the International Criminal Court Act 2002 (Implementation of the Rome Statute of the International Criminal Court Act 2002, No. 27 of 2002, s. 5(2) [South Africa ICC Act])*. The German *Code of Crimes against International Law*, entered into force on 30 June 2002, only applies to crimes committed after that date (Steffen Wirth, “Germany’s New International Crimes Code: Bringing a Case to Court” (2003) 1 J. Int’l Crim. Just. 151 at 152 [Wirth]; Amnesty International, “Germany: End impunity through universal jurisdiction” (2008) *No Safe Haven Series* No. 3 at 9, online: Amnesty International <<http://www.amnesty.org/fr/library/info/EUR23/003/2008/en>> [Amnesty International, “Germany”]). In Norway, the Supreme Court decided in *Repak* that the 2005 war crimes legislation could not be applied retroactively (“Norway court cancels Bosnian’s war crimes sentence” *The Telegraph* (3 December 2010), online: The Telegraph News World <http://www.telegraph.co.uk/news/worldnews/europe/bosnia/8179811/>

prosecutions for conduct that took place in Canada before the coming into force of the *War Crimes Act* would still be possible on the basis of existing domestic offences such as murder or sexual assault.

It may be mentioned that retrospective prosecutions are only allowed for crimes against humanity (similarly for genocide or war crimes) committed outside Canada if, “at the time and in the place of its commission, [the crime] 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”²⁹. Indeed, section 11(g) of the *Canadian Charter of Rights and Freedoms*³⁰ provides that a person has a right “not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations” (emphasis added). Canada’s constitutional guarantee against *ex post facto* criminalisation was directly inspired from article 11(2) of the *Universal Declaration of Human Rights*³¹, article 7 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*³² and article 15 of the *International Covenant on Civil and Political Rights*³³, which provide for similar wording.

The Supreme Court of Canada decided in *Finta* that the former *Criminal Code* provisions granting jurisdiction to Canadian courts over crimes against humanity and war crimes committed prior to their entry into force, including during the Second World War, did not violate the constitutionally protected principle.³⁴ The *War Crimes Act* also adopts this view regarding crimes against humanity –albeit for different reasons.³⁵ It also affirms that “[f]or 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, and may be crimes according to customary

Norway-court-cancels-Bosnians-war-crimes-sentence.html). The accused Misrad Repak was nonetheless found guilty on other charges in 2011 (“Norwegian Court Sentences Misrad Repak to Eight Years in Prison” *Balkan Investigative Reporting Network* (14 April 2011) online: Justice report <<http://www.bim.ba/en/265/10/32188/>>). English translation of the case on file with author.

²⁹ *War Crimes Act*, *supra* note 2, s. 6(3).

³⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

³¹ *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

³² *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, s. 7 (entered into force 3 September 1953).

³³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, s. 15, (entered into force 23 March 1976) [ICCPR].

³⁴ *Finta*, *supra* note 15 at 874.

³⁵ The Court in *Finta*, *ibid.*, had relied on the view that though the crimes were not necessarily prohibited by customary international law before the Second World War, their particular gravity justified the retroactive application of the law. This arguably incorrect statement of the law was redressed in the *War Crimes Act* at s. 6(5), which provides that: “...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”.

international law before that date...".³⁶

B. Traditional Bases of Jurisdiction

For crimes committed in Canada, the *War Crimes Act* asserts jurisdiction over “every person”³⁷ who has committed genocide, a crime against humanity or a war crime. For the same offences, but committed outside Canada, s. 8 of the *War Crimes Act* provides that every person can be prosecuted in Canada 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.

Broadly speaking, the *War Crimes Act* thus provides for territorial jurisdiction (offences committed on Canadian territory), and for active personality jurisdiction (the perpetrator is a Canadian citizen), passive personality jurisdiction (the victim is a Canadian citizen) and universal jurisdiction. The provisions allowing for extraterritorial jurisdiction, including universal jurisdiction, similarly to provisions found in other legislations or at s. 7 of the *Criminal Code*, for instance, are an exception to the general rule provided at s. 6(2) of the *Criminal Code* according to which no person can be convicted in Canada for an offence committed outside the country.

The *War Crimes Act* takes an expansive, but widely accepted, view of both active and passive nationality principles by including persons “employed by Canada in a civilian or military capacity” and victims who are “citizen[s] of a state that was

³⁶ *War Crimes Act*, *supra* note 2, s. 6(4). For a partial analysis of the impact of this legislative declaration, see Lafontaine, *Munyaneza*, *supra* note 18.

³⁷ Note that the use of the term “person” in the *War Crimes Act* could include physical as well as moral persons: The *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35 [*Interpretation Act*], contains a definition of “person” as follows: “[P]erson”, or any word or expression descriptive of a person, includes a corporation.” The definition of “person” contained in s. 2 of the *Criminal Code* states: “[E]very one”, “person”, “owner”, and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.” These definitions would be applicable to the terms used in the *War Crimes Act*: s. 2(2) of the *War Crimes Act*. See W. Cory Wanless, “Corporate Liability for International Crimes under Canada’s Crimes Against Humanity and War Crimes Act” (2009) 7 J. Int’l Crim. Just. 201.

allied with Canada in an armed conflict”. On the latter, one can refer to the example provided by the case of *Velpke Baby Home*, where the United Kingdom prosecuted German nationals for crimes committed against children who were nationals of a co-belligerent state, namely Poland.³⁸ More surprisingly perhaps is the assertion of jurisdiction at paragraph (ii) over a person who was a citizen or was employed by a state that was engaged in an armed conflict *against* Canada, while not requiring any explicit nationality requirement regarding victims. This can hardly be associated with the active personality principle (the accused does not owe allegiance to Canada, quite the contrary) or to the passive personality principle (it may be justified by the fact that the accused fought against Canada, but there are no explicit requirements as to the victims, who could very well be nationals of the accused state, in cases of genocide and crimes against humanity particularly). This paragraph is therefore perhaps better understood as an expression of the “protective principle”, which entitles states to “assert jurisdiction over extraterritorial activities that threaten State security”.³⁹ Though this principle is said to be of little relevance to international criminal law and is traditionally associated with activities such as counterfeiting of a state’s currency, spying or inchoate conspiracy to assassinate a head of state, it may be that the *War Crimes Act* takes an expansive view of this principle.⁴⁰ Another interpretation would associate this base of jurisdiction to universal jurisdiction as it will be defined below. Indeed, the assertion of jurisdiction by Canada over the offence cannot be based, at the time of the commission of the offence, on one of the recognised head of jurisdiction: the offence was committed outside of Canada, it was not committed by a Canadian national (or someone employed by Canada) and the victims are not Canadians (or nationals of an ally). Hence, it may be that section 8(a)(ii) is in fact an expression of universal jurisdiction which would, however, in those cases, not require the subsequent presence of the person in Canada as per paragraph (b).

C. Universal Jurisdiction (and the Obligation to Extradite or Prosecute)

The *Criminal Code* provisions that were repealed by the *War Crimes Act* provided for universal jurisdiction over the core crimes, but required the prosecutor to prove the existence of this head of jurisdiction for such crimes under international law at the time of commission of the offence.⁴¹ The *War Crimes Act* removes this requirement and therefore simplifies the prosecution of the core crimes in Canada on the basis of universal jurisdiction. Section 8(b) provides for jurisdiction on the basis of universality for all ICC crimes. In a significant expansion of the reach of Canadian law, the *War Crimes Act* provides for universal jurisdiction over war crimes

³⁸ George Brand, *Trial of Heinrich Gerike* (London: W. Hodge, 1950), cited in Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 2d ed. (Cambridge: Cambridge University Press, 2010) at 43.

³⁹ *Ibid* at 50.

⁴⁰ The protective principle in the past has been interpreted as including “protection” of its own nationals abroad, i.e. subsuming the passive personality principle: see *Case of the S.S. Lotus (France v. Turkey)* (1928), P.C.I.J. (Ser. A) No. 10 at 53-58, 91-92; see also Roger O’Keefe, “Universal jurisdiction: Clarifying the Basic Concept” (2004) 2 J. Int’l Crim. Just. 735 at 739.

⁴¹ *Criminal Code*, *supra* note 12, s. 7(3.71) (repealed 2000, ch 24, s. 42).

committed in internal armed conflicts. The former *Criminal Code* provisions only criminalised war crimes committed in the context of international armed conflicts. The *War Crimes Act* therefore follows the trend adopted in numerous other states to assert universal jurisdiction over these crimes although there is no treaty that allows it explicitly.⁴² The *Munyaneza* case also represents the first exercise of such jurisdiction by Canada. Section 8(b) only subjects the exercise of universal jurisdiction to the presence of the accused on Canada's territory after the commission of the offence, a requirement which will be discussed below.

Many different types of universal jurisdiction have been discussed in the literature and in jurisprudence at different levels. Debates were particularly fierce as regard the legality of exercising universal jurisdiction *in absentia* and whether imposing the presence of the accused on a state's territory would represent a form of "conditional" universal jurisdiction.⁴³ There is no need to enter these questions here. Some criteria can be developed by states with respect to the exercise of prescriptive universal jurisdiction. A growing number of states condition the exercise of jurisdiction to the presence of the accused on that state's territory⁴⁴ or to accused who subsequently become residents of the state.⁴⁵ However, requirements as to subsequent presence or subsequent residency status have no impact on the characterisation of this head of jurisdiction as one of universality, taken here to encompass all assertion of jurisdiction for crimes which, *at the time of commission*, had no territorial or national link with the state in question.⁴⁶ The requirement that the offender subsequently be present on the territory does not affect the qualification of the head of prescriptive jurisdiction, and may be better understood as a political choice as to the exercise of jurisdiction, i.e. as to enforcement.⁴⁷ Practical reasons may motivate states' decisions in this regard, such as the difficulties linked with evidence gathering, the fear of

⁴² On this issue, see Harmen van der Wilt, "Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court" (2008) 8 Int'l. Crim. L. Rev. 229 at 240-241.

⁴³ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] I.C.J. Rep. 3 at 35-45, 54-58, 91-94 [*Arrest Warrant Case*].

⁴⁴ See e.g. Argentina, *Ley de Implementación del Estatuto de Roma, aprobado por la Ley N° 25390 y ratificado el 16 de enero de 2001, de la Corte penal internacional. Disposiciones generales penas y principios generales. Delitos contra la administración de justicia de la Corte penal internacional. Relaciones con la Corte penal internacional*, Ley 26.200, s. 4; Denmark, *The Danish Criminal Code*, para. 8(a); The Netherlands, *Act of June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act)*, s. 2(1)(a) [*Dutch International Crimes Act*]; Democratic Republic of Congo, *Penal Code*, Book 1, Section 1, s. 3(7). See more generally: Isidoro Blanco-Cordero, "Compétence universelle. Rapport général" (2008) 79 Rev. I.D.P. 13 at 20 [Blanco-Cordero]; *The scope and application of the principle of universal jurisdiction – Report of the Secretary-General prepared on the basis of comments and observations of Governments*, UN GAOR, 65th Sess., UN Doc. A/65/181 (2010) at para. 76 [2010 *Secretary-General's Report*].

⁴⁵ See e.g. *International Criminal Court Act 2001* (U.K.), 2001, c. 17 [United Kingdom *ICC Act*]. The Act also contains provisions to cover Northern Ireland. The Scottish Parliament passed similar legislation: *International Criminal Court Act 2001*, A.S.P. 2001, c. 13, s. 51, 68. See also: *Loi no 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale*, J.O., 10 August 2010, 14678, s. 8 (add s. 689(11) C. proc. Pén.) [France *ICC Act 2010*].

⁴⁶ See e.g. O'Keefe, *supra* note 40 at 737; See also the various versions of the definition provided by states to the Secretary-General of the United Nations in the 2010 *Secretary-General's Report*, *supra* note 44 at para. 12.

⁴⁷ See O'Keefe, *supra* note 40 at 755-757, citing Judge ad hoc Van den Wyngaert in the *Arrest Warrant Case*, *supra* note 43 at para. 56.

overburdening the court system and the municipal law's requirements regarding the presence of the accused at trial.⁴⁸ Indeed, a distinction must be made between jurisdiction to prescribe and jurisdiction to enforce. As O'Keefe puts it:

Jurisdiction is not a unitary concept. [...] [it] must be understood in its two distinct aspects, viz. jurisdiction to prescribe and jurisdiction to enforce. Jurisdiction to prescribe or prescriptive jurisdiction [...] refers, in the criminal context, to a state's authority under international law to assert the applicability of its criminal law to a given conduct [...]. Jurisdiction to enforce or enforcement jurisdiction [...] refers to a state's authority under international law actually to apply its criminal law, through police and other executive action, and through the courts. More simply, jurisdiction to prescribe refers to a state's authority to criminalize given conduct, jurisdiction to enforce the authority, inter alia, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so criminalised. Universal jurisdiction [...] is a species of jurisdiction to prescribe.⁴⁹

Universal jurisdiction therefore "amounts to the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct".⁵⁰

The *Rome Statute*, in its preamble⁵¹ and by implication of the complementarity principle⁵², provides for states parties' duty to prosecute the international crimes contemplated therein. The Appeals Chamber of the ICC has recognised that states "have a duty to exercise their criminal jurisdiction over international crimes".⁵³ However, there is no explicit obligation in the *Rome Statute* on the part of states parties to establish jurisdiction over the crimes and certainly no obligation to assert it on the basis of universality.⁵⁴ Section 8(b) of the *War Crimes Act* certainly confirms Canada's position that international law at least allows states to assert universal jurisdiction for genocide, crimes against humanity and war crimes. Canada has explicitly espoused this view in official statements, including in a report

⁴⁸ O'Keefe, *supra* note 40 at 758, again citing Judge ad hoc Van den Wyngaert in the *Arrest Warrant Case*, *supra* note 43 at para. 56; see also Hervé Ascensio, "Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*" (2003) 1 J. Int'l Crim. Just. 690 at 700: "The presence of the accused on the territory of the prosecuting state, a prerequisite for the implementation of the universal jurisdiction doctrine in many domestic legal systems, is not a link in the sense of a basis of jurisdiction, but only a *procedural condition for the exercise of universal jurisdiction*, usually required for practical reasons". As far as Canada and most countries of common law tradition are concerned, municipal law forbids criminal trials *in absentia* as a general rule. Canada's *War Crimes Act* reiterates that general principle at s. 9(2).

⁴⁹ O'Keefe, *supra* note 40 at 736-737 (footnotes omitted).

⁵⁰ *Ibid.* at 737.

⁵¹ *Rome Statute*, *supra* note 1 at Preamble, paras. 4, 6.

⁵² *Ibid.*, at para. 6, ss.1, 17.

⁵³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (25 September 2009) at para. 85 (*Katanga and Ngudjolo*, ICC).

⁵⁴ See e.g. Payam Akhavan, "Whiter National Courts? The Rome Statute's Missing Half" (2010) 8 J. Int'l Crim. Just. 1245 at 1248. *Contra*: Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008) at c. 6 [Kleffner].

to the International Law Commission in respect of its work on the *aut dedere aut judicare* principle.⁵⁵

Canada has asserted universal jurisdiction over all core crimes, making no distinction as between crimes which are the object of obligations arising from specific treaties and those crimes for which no such clear obligations exist. This is a commendable (and widely used) approach that respects the fundamental principle of accountability for all core crimes. Having said that, asserting jurisdiction is different than exercising it. The following lines aim at clarifying the obligations arising from treaty law and from customary international law regarding the duty to extradite or prosecute genocide, crimes against humanity and war crimes. A clear understanding of the state of the law in this respect is crucial to inform how universal jurisdiction may or should be *exercised* once a suspect is found on Canadian territory.

The obligation *aut dedere aut judicare* is distinct from universal jurisdiction, but it overlaps with it to some extent.⁵⁶ As the Secretary-General noted: “Universal jurisdiction involved a criterion for the attribution of jurisdiction, whereas the obligation to extradite or prosecute was an obligation that was discharged once the accused was extradited or once the state decided to prosecute an accused based on any of the existing bases of jurisdiction”.⁵⁷ Where there exists an obligation *aut dedere aut judicare*, a state is “required either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime”. As a practical matter, “when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction...”.⁵⁸

Therefore, in a sense, an *aut dedere aut judicare* obligation is a direction as to how to “enforce” jurisdiction, which may or may not have been “prescribed” on the basis of universality.⁵⁹ International law may allow or mandate the assertion by states

⁵⁵ International Law Commission, *The obligation to extradite or prosecute (aut dedere aut judicare) - Comments and information received from Governments*, UN GAOR, 61st Sess., UN Doc. A/CN.4/612 (26 March 2009) at para. 37 [ILC, *Comments from Governments*].

⁵⁶ A more detailed analysis of this question can be found in Fannie Lafontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts*, Toronto: Carswell [forthcoming in 2012].

⁵⁷ 2010 *Secretary-General's Report*, *supra* note 44 at para. 19.

⁵⁸ Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London: Amnesty International Publications, 2001) c.1 at 11, reiterated in its 2009 report: Amnesty International, *International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)* (London: Amnesty International Publications, 2009) at 8-9, online: Amnesty International <<http://www.amnesty.org/en/library/info/IOR40/001/2009/en>>. See also Amnesty International, *Universal jurisdiction: UN General Assembly should support this essential international justice tool* (London: Amnesty International Publications, 2010) at 10, online: Amnesty International <<http://www.amnesty.org/en/library/info/IOR53/015/2010/en>> [Amnesty International, *Universal Jurisdiction 2010*].

⁵⁹ See AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction: EC, Council, *The AU-EU Expert Report on the Principle of Universal Jurisdiction* (Brussels: EC, 2009) at para. 11,

of prescriptive universal jurisdiction and may also oblige them to act in a certain way when an alleged offender is found on their territory. The obligation to extradite or prosecute imposed on custodial states is an obligation to *exercise* jurisdiction they were either obliged (for example, s. 9(1) of the *International Convention for the Protection of All Persons from Enforced Disappearance*⁶⁰ as regards territoriality and active and passive personality or s. 9(2) with respect to universality where a state does not extradite or surrender the suspect), or allowed to prescribe (ex. universality in other circumstances, s. 9(3)). It should be highlighted that the obligation *aut dedere aut judicare* is without prejudice to the competence of an international criminal court.⁶¹ The surrender of an alleged offender to a competent international criminal court may in fact be considered as a “third alternative” of the modern version of the *aut dedere aut judicare* obligation.⁶²

1. OBLIGATIONS TO PROSECUTE OR EXTRADITE ARISING FROM TREATY LAW AND FROM CUSTOMARY INTERNATIONAL LAW

Probably the most contentious issue concerning Canada’s methods with war criminals present on its territory is the extent of the international legal obligations binding upon it regarding prosecution or extradition. On the one hand, unquestionable treaty obligations exist, but are rather limited and do not cover all the core crimes subject to universal jurisdiction pursuant to the *War Crimes Act*. On the other hand, the prescriptions of customary international law are subject to the inevitable clashes of opinions that come with the interpretation of non-written law.

As for treaties, with the notable exception of the *Convention on the*

online: European Commission <http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf> [AU-EU Expert Report].

⁶⁰ *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Doc A/61/488 (entered into force 23 December 2010) [*Convention on Enforced Disappearance*].

⁶¹ *Draft Code of Crimes against the Peace and Security of Mankind*, s. 9, in International Law Commission, *Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May-26 July 1996)*, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996), s. 9, online: United Nations Treaty Base <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf>.

⁶² *Enforced Disappearance Convention*, *supra* note 60, ss. 9(2), 11. See International Law Commission, *Preliminary report on the obligation to extradite or prosecute (“aut dedere aut judicare”) by Mr. Zdzislaw Galicki, Special Rapporteur*, UN GAOR, 58th Sess., UN Doc. A/CN.4/571 (2006) at para. 52ff [ILC, *Preliminary report*]. The Special Rapporteur however later decided to refrain from examining this issue further: International Law Commission, *Third report on the obligation to extradite or prosecute (aut dedere aut judicare) by Zdzislaw Galicki, Special Rapporteur*, UN GAOR, 60th Sess., UN Doc. A/CN.4/603 (2008) at para. 107 [ILC, *Third report*]. Canada (and other States such as the UK and France) has expressed in comments that it “welcomes the Special Rapporteur’s decision to refrain from further examination of the “triple alternative”, as Canada considers surrender to an international criminal tribunal to differ substantively from an act of extradition, the latter involving bilateral State-to-State action”: ILC, *Comments from Governments, supra* note 55 at para. 35. This third alternative however was considered valid years ago: see e.g. Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, vol. 1 (Geneva: International Committee of the Red Cross, 1952) at 366.

*Prevention and Punishment of the Crime of Genocide*⁶³, which however provides for a duty with respect to extradition⁶⁴, the obligation to extradite or prosecute is mandated for grave breaches of the *Geneva Conventions* and the *First Protocol Additional*⁶⁵, and for some crimes against humanity that are subject of a specific convention, notably apartheid⁶⁶, enforced disappearances⁶⁷, and torture.⁶⁸ Various regional and international human rights treaties also provide for a general duty to repress serious violations of human rights that can be qualified as crimes against humanity.⁶⁹ Importantly, however, such human rights treaties provide very limited extraterritorial obligations and certainly do not oblige states to repress violations that

⁶³ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, s. V (entered into force 12 January 1951) [*Genocide Convention*]. Article VI of the *Genocide Convention* falls short of imposing a general *aut dedere aut judicare* obligation. It provides for territorial jurisdiction and for jurisdiction of an international penal tribunal. Some commentators, along with some national courts, have opined however that s. VI of the *Genocide Convention* does not exclude the possibility of exercising universal jurisdiction, but rather sets a minimal basis for the exercise of jurisdiction: see e.g. Orna Ben-Naftali & Miri Sharon, "What the ICJ did not say about the Duty to Punish Genocide: The Missing Pieces in a Puzzle" (2007) 5 J. Int'l Crim. Just. 859; *Jorgić case (Individual Constitutional Complaint Procedure)*, 12 December 2000, BVerfG, 2 BvR 1290/99 vom 12.12.2000, Absatz-Nr (I-49), ILDC 132 (DE 2000) (Judgement, Constitutional Court) as cited in Amnesty International, *Universal Jurisdiction 2010*, *supra* note 58 at 35: "the German Federal Constitutional Court rejected a constitutional challenge contending that customary international law and Article VI of the *Genocide Convention* prohibited the exercise of universal jurisdiction over genocide". The European Court of Human Rights rejected Jorgić's complaints: *Jorgić v. Germany*, no. 74613/01, [2007] E.C.H.R. 583. See also Spain's Tribunal Constitucional, Sentencia 237/2005, 26 September 2005 ("Guatemala Genocide Case") discussed e.g. in Naomi Roth-Arriaza, "Guatemala Genocide Case. Judgement No.STC 237/2005" (2006) 100 Am. J. Int'l L. 207. This opinion is supported by the International Court of Justice in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] I.C.J. Rep. 91 at para. 442. Other commentators go further and argue that an obligation to extradite or prosecute flows from a comprehensive and modern reading of the terms of the Convention: Éric David, *Principes de droit des conflits armés*, 4th ed. (Brussels: Bruylant, 2008) at 873-76; Lee A. Steven, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations" (1999) 39 Va. J. Int'l L. 425 at 460. See, generally, William A. Schabas, *Genocide in International Law*, 2d ed. (Cambridge: Cambridge University Press, 2009) at 426-443.

⁶⁴ *Genocide Convention*, *ibid*, s. VII. The *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, 754 U.N.T.S. 73 (entered into force 11 November 1970), admittedly suffering from a low level of ratification, also provides at article III for the need to make possible the extradition of those responsible for war crimes and crimes against humanity.

⁶⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, s. 49 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, s. 50 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, s. 129 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, s. 146 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, ss. 85-87 (entered into force 7 December 1978).

⁶⁶ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 U.N.T.S. 243, s. V (entered into force 18 July 1976). Note that, as an exception, at s. V, the exercise of jurisdiction is phrased in permissive terms ('may').

have occurred on other states' territories.⁷⁰ It may be noted that Canada has failed to sign and ratify the conventions related to apartheid and enforced disappearances. It is however party to the *Geneva Conventions* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and thus bound with respect to these crimes ("grave breaches" and torture) by the *obligation* to extradite or prosecute. As for the *Genocide Convention*, though, as noted above, it does not contain an explicit positive duty on states other than the territorial state to prosecute persons accused of genocide, it does provide for an obligation to allow extradition.

Apart from these specific treaty provisions, customary international law may also impose an obligation *aut dedere aut judicare* as regards the core crimes. It is outside the scope of this study to fully address this complex and controversial issue. Suffice it to say that it appears that a certain number of states and commentators support the concept of an obligation to prosecute or extradite based on rules of customary international law, at least for certain international crimes.⁷¹ One argument often advanced to support that view is the *jus cogens* nature of the prohibition concerning the "core crimes" of genocide, crimes against humanity and war crimes (at least those considered grave breaches): insofar as these crimes are prohibited by customary international law, the same can be said of the correlative obligation to extradite or prosecute them.⁷² Numerous "soft-law" instruments also support such an

⁶⁷ *Convention on Enforced Disappearance*, *supra* note 60, ss. 9-11.

⁶⁸ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, ss. 5-7 (entered into force 26 June 1987) [*Convention against Torture*].

⁶⁹ *ICCPR*, *supra* note 33, s. 2(3); Committee on Civil and Political Rights, *General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment (S. 7)*, UN HRC, 44th Sess. (1992) (amnesties are incompatible with the duty to investigate); Committee on Civil and Political Rights, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN HRC, 80th Sess., CCPR/C/21/Rev.1/Add.13 (2004) at para. 19 (disciplinary or administrative measures are not sufficient to satisfy the right to an 'effective remedy') [CCPR, *General Comment No. 31*]; *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, s. 2 (entered into force 18 July 1978); *VelasquezRodriguez Case (Honduras)* (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4, at para. 166 (recognising a duty to punish); *Almonacid Arellano et al Case (Chile)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 154; *Caso Gomes Lund y otros ("Guerrilha Do Araguaia") (Brasil)* (2010), Inter-Am. Ct. H.R. (Ser. C) No. 219.

⁷⁰ See e.g. *ICCPR*, *supra* note 33, s. 2(1) (on the territorial application of the obligations). On the limited extraterritorial reach of the human rights obligations, see CCPR, *General Comment No. 31*, *supra* note 69, para. 10. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136.

⁷¹ M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff, 1995) [Bassiouni & Wise]; Colleen Enache-Brown & Ari Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law" (1998) 43 McGill L.J. 613. See also discussion of that issue in ILC, *Preliminary report*, *supra* note 62 at 12; International Law Commission, *Second report on the obligation to extradite or prosecute ("aut dedere aut judicare")* by Mr. Zdzislaw Galicki, *Special Rapporteur*, UN GAOR, 59th Sess., UN Doc. A/CN.4/585 and Corr.1 (2007); ILC, *Third report*, *supra* note 62. *Cf.* see clear position of the United States which assert that no such obligation exist outside of treaties (A/CN.4/579/Add.2), a view that is shared by Canada (ILC, *Comments from Governments*, *supra* note 55 at para. 41), but not widely shared by the other states that have provided comments: see ILC, *Third Report*, *supra* note 62 at paras. 62, 98-99.

⁷² Bassiouni & Wise, *supra* note 71 at 24-25. The ICTY has ruled that the *jus cogens* nature of the crime of torture does give a right to states to assert universal jurisdiction: *Prosecutor v. Anto Furundžija*, IT-

obligation.⁷³ Having said that, the majority view seems to be that states are not obliged by customary international law to extradite or prosecute these crimes.⁷⁴ Indeed, a cursory and somewhat conservative analysis of the legal landscape leads to the conclusion that the obligation at international law to extradite or prosecute suspected international criminals may be limited to treaties which states have ratified and that provide for such an obligation. This view seems to be shared by the Canadian Government⁷⁵ and by members of the War Crimes Program.⁷⁶ There may be an emerging rule at customary law obliging states to exercise jurisdiction, including universal jurisdiction, over other ICC crimes⁷⁷, but a safer view at the moment is that the existing rule allows, rather than mandates, states to exercise criminal jurisdiction over these crimes.

As will be discussed below, regardless of the precise nature of the international legal obligations binding upon Canada, the principles underpinning Canada's legislative choice to assert universal jurisdiction over *all* core crimes, namely the fight against impunity and the international duty to cooperate in that endeavour, militate for a policy regarding war criminals present in Canada that does not distinguish between those crimes that are subject of a treaty duty to extradite or prosecute and the others, of indisputable equal gravity, that do not.

Having situated the assertion of universal jurisdiction by Canada in its international legal context, let us turn to the requirement in the *War Crimes Act* that conditions the exercise of universal jurisdiction to the presence of the accused in Canada after the time the offence is alleged to have been committed. This requirement

95-17/1-T, Judgement (10 December 1998) (ICTY, Trial Chamber II). See also *Kupreškić Trial Judgement*, *supra* note 16 at para. 520 on the *jus cogens* nature of the crimes. The Inter-American Court of Human Rights has gone further: *La Cantuta Case (Peru)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 162 (deciding that the prohibition against the forced disappearance of persons and the corresponding duty to investigate and punish have become *jus cogens*). The discussion is still open: 2010 *Secretary-General's Report*, *supra* note 44 at para. 26.

⁷³ See e.g. Commission on Human Rights, *Human Rights Resolution 2005/81: Impunity*, UN HRC, UN Doc. E/CN.4/RES/2005/81 (2005); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, UN GAOR, 60th Sess., UN Doc. A/RES/60/147 (2005); *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, GA Res. 3074 (XXVIII), UN GAOR, UN Doc. A/RES/3020/(XXVII) (1973) ss. 1, 4, 5. See, generally, Amnesty International, *Universal Jurisdiction 2010*, *supra* note 58 at 55-63.

⁷⁴ See e.g. Cryer et al, *supra* note 38 at 51; *AU-EU Expert Report*, *supra* note 59 at para. 13; Julia Geneuss, "Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction" (2009) 7 J. Int'l Crim. Just. 945 at 952 [Geneuss].

⁷⁵ ILC, *Comments from Governments*, *supra* note 55 at para. 41. But see para. 48 which seems to submit all crimes subject to universal jurisdiction to the obligation *aut dedere aut judicare*.

⁷⁶ Canada's War Crimes Program, *Summative Evaluation*, *supra* note 3 at 10.

⁷⁷ The May 2011 report by the Special Rapporteur to the ILC's Working Group on the obligation to extradite or prosecute, though failing short of confirming that the core crimes are subject to an obligation *aut dedere aut judicare* pursuant to customary international law, leans in that direction: International Law Commission, *Fourth report on the obligation to extradite or prosecute* ("aut dedere aut judicare") by Mr. Zdzisław Galicki, *Special Rapporteur*, UN GAOR, 63rd Sess., UN Doc. A/CN.4/648 (2011) at paras. 87-96, including draft article 4, which explicitly lists "serious violations of international humanitarian law, genocide, crimes against humanity and war crimes".

appears relatively simple in theory and may turn out to be so in practice. However, its exact scope of application is unclear and many questions remain open. The next subsection aims at highlighting these uncertainties and at offering tentative guidance as to the proper interpretation to be given to this requirement.

2. REQUIREMENT OF THE PRESENCE OF THE ACCUSED ON CANADIAN TERRITORY

As was noted above, the requirement of the presence of the accused on Canadian territory as a precondition to the exercise of universal jurisdiction is not mandated by international law⁷⁸, but rather is the result of a political choice by Canada. This legislative precondition certainly makes sense at the practical level, and is also consistent with the general requirement that the accused must be present at trial.⁷⁹ It is useful to recall the wording of s. 8(b) of the *War Crimes Act*, which provides that a person who is alleged to have committed a crime outside Canada may be prosecuted if: “after the time the offence is alleged to have been committed, the person is present in Canada”. The main question that remains uncertain with the presence requirement regards its scope of application, i.e. when it is meant to apply? In other words, can prosecutorial activities short of prosecution proper, like investigations or the issuance of an arrest warrant, be undertaken, or can a prosecution be launched, in the absence of a suspect in Canada?

Various scenarios can be imagined. For instance, as Schabas notes, “[a]n investigation might be carried out with respect to a suspect in Canada, but by the time it was completed and an indictment issued, the person might have fled the jurisdiction. Would this make the entire proceedings illegal, or void?”⁸⁰ We can also wonder whether the *War Crimes Act* would allow Canada to request the extradition of the suspect from a third state if the suspect was once present in Canada or even if he or she has never set foot on Canadian soil? We can also think of a scenario where inculpatory information is received from a refugee community in Canada regarding a suspect who is abroad. Can the Royal Canadian Mounted Police investigate with a

⁷⁸ *Contra*: Dapo Akande, “Arrest Warrant Case” in Antonio Cassese, ed., *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 587 (arguing that State practice suggests the existence of a rule restricting the enforcement of universal jurisdiction to circumstances where the suspect is present on the territory of the State); *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN SCOR, 2005, UN Doc. S/2005/60 (2005) at para. 614 [*Report on Darfur*] (“However, customary rules in question, construed in the light of general principles currently prevailing in the international community, arguably make the exercise of universal jurisdiction subject to two major conditions. First, the person suspected or accused of an international crime must be present on the territory of the prosecuting state.”); see also Matthias Goldmann, “Implementing the Rome Statute in Europe: From Sovereign Distinction to Convergence in International Criminal Law?” (2005) XVI *Finnish Yearbook of International Law* 5 at 22 (arguing that the presence requirement might be on the way towards becoming customary international law).

⁷⁹ *Criminal Code*, *supra* note 12 at s. 650; *War Crimes Act*, *supra* note 2 at s. 9(2).

⁸⁰ William A. Schabas, “Canada” in Ben Brandon & Max du Plessis, eds., *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (London: Commonwealth Secretariat, 2005) at 153.

view of arresting the suspect should he or she travel to Canada?⁸¹ Or would the temporary absence of a suspect, say vacations abroad, impact on the presence requirement in the *War Crimes Act*?

Clearly, it should be borne in mind that considering the scarce resources for criminal prosecutions under the *War Crimes Act*, it seems clear that the War Crimes Program will mainly focus on persons who have a constant presence in the country, i.e. who are present in Canada during the investigations and at the beginning of the proceedings. The tenth annual report of Canada's War Crimes Program in fact states that cases can be closed when the person "left Canada" and mentions that inactive files include "files in which suspects cannot be located in Canada".⁸² While this may be the result of sensitive policy and of practical constraints, it may not be legally mandated. It is therefore important to assess the legal boundaries imposed by the *War Crimes Act*. Furthermore, suspects cannot be expected to remain in Canada at *all times* during the time of the investigation, which may last for many years.⁸³ What if Mr. Munyaneza had left the country after the investigation had been going on for years, but before the information was laid? Would that invalidate the entire process and involve an enormous loss of financial and human resources? The scenarios identified above are thus not merely theoretical and the question of the scope of application of the presence requirement in the *War Crimes Act* is relevant even considering the few prosecutions that will be undertaken under the *War Crimes Act*. Furthermore, a proper understanding of the scope of application of the *War Crimes Act* as regards universal jurisdiction is essential not only for law enforcement officials, but also for all Canadian citizens and residents – among whom are many potential victims of international crimes – who should be able to know what *legal* constraints may impede the intervention of the Canadian criminal legal system as regards potential suspects of international crimes who have been, are or may eventually be found on Canadian territory.

The interpretation of the *War Crimes Act* may lead to one of two possible conclusions at the extremes: either (1) the accused must be present in Canada *at some time, anytime*, after the offence is alleged to have been committed, without specific requirements whatsoever related to the procedural steps the investigators or prosecutors might be at, or (2) the accused must be present *at all times* for Canadian authorities to have jurisdiction.

It should be mentioned at the outset that there have been no judicial

⁸¹ This scenario of the "accidental tourist" or of the "accidental medical patient" was envisaged in discussions at the Committee on Foreign Affairs and International Trade of the House of Commons. See: Canada, House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, 36th Parl., 2nd sess., Meeting 46 (16 May 2000) at 1050ff, online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040319&Language=E&Mode=1&Parl=36&Ses=2>> [Canada, House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, Meeting 46].

⁸² Canada, Canada Border Services Agency, *Canada's Program on Crimes Against Humanity and War Crimes: Tenth annual report, 2006-2007*, online: Canada Border Services Agency <<http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2007-eng.html>> [CBSA, *Canada's War Crimes Program: Tenth Annual Report*].

⁸³ The investigation of Mr. Munyaneza began in 1999 and he was arrested in October 2005.

pronouncements in Canada on this particular issue. The “presence” requirement was mentioned only in passing in the relevant cases and then again, erroneously so. In *Finta*, Justice Cory mentioned: “Canadian courts normally do not judge ordinary offences that have occurred on foreign soil but have jurisdiction to try individuals living in Canada for crimes which they allegedly committed abroad when the conditions specified in s. 7(3.71) are satisfied.”⁸⁴ [Emphasis added.] In *Munyaneza*, Justice Denis said: “In contrast to all Canadian laws that punish offences committed on Canadian territory, the Act provides that a person who has committed abroad a crime of genocide, a crime against humanity or a war crime can be prosecuted in Canada *if he or she resides here*.”⁸⁵ [Emphasis added.] These statements are clearly incorrect. Being a “resident” or “living in Canada” are undoubtedly different requirements – and much more restrictive – than being “present”. The presence requirement found in the *War Crimes Act* should thus not be confused with a “residence requirement”, as can be found in other national laws.⁸⁶ While the question of the presence of the accused was not crucial in these cases, they nonetheless serve to illustrate the possible confusion in the interpretation of this requirement.⁸⁷ This lack of precision represents perhaps an involuntary recognition that more often than not, persons normally living in Canada will be the focus of criminal investigations.

Section 8 thus provides that a person who *is alleged* to have committed an offence outside Canada *may be prosecuted* for that offence if, after the time the offence is alleged to have been committed, the person is present in Canada. The wording of s. 8(b) seems to make clear that the *temporal condition* of the presence is only linked to the commission of the offence, not to the prosecution: the person must be in Canada after he or she allegedly committed the crime. If he or she has been present after the commission of the crime, then a prosecution can be launched. The legislator has not conditioned *the timing* of the prosecution to the presence.⁸⁸ Indeed,

⁸⁴ *Finta*, *supra* note 15 at 811. This decision is relevant even if it dealt with the former provision of the *Criminal Code* (s. 7(3.71)) because it required the presence of the accused in Canada in similar terms as in the *War Crimes Act*.

⁸⁵ *Munyaneza*, *supra* note 18 at para. 65.

⁸⁶ See, for example, United Kingdom *ICC Act*, *supra* note 45 at ss. 51(2)(b), 67(2), 68. See also the law of South Africa that gives jurisdiction to its courts if the suspect is present *or* if he is ordinarily resident in the South Africa’s territory: South Africa, *ICC Act*, *supra* note 28 at s. 4(3)(b)(c). The Canadian *Criminal Code* also sometimes makes a distinction between residency and presence for jurisdiction: see e.g. *Criminal Code*, *supra* note 12 at ss. 7(3.71)(c)(d) (offences against United Nations and associated personnel), 7(3.72) (c) (Offences involving explosive or other lethal device) (d), 7(3.73) (c) (d) (offences relating to financing of terrorism). It also at times gives a specific meaning to “residence”: s. 7(4.1) provides jurisdiction over sexual offences against children committed abroad by a Canadian citizen or “permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*”.

⁸⁷ In fact, even the Summative Evaluation’s final report of the Crimes Against Humanity and War Crimes Program (October 2008) could lead to confusion because it underlies that prosecutions can be taken if the suspect is a *resident* of Canada: Canada’s War Crimes Program, *Summative Evaluation*, *supra* note 3 at 41. Again, this might simply be a reflection of how this requirement is applied in practice.

⁸⁸ The British Columbia Court of Appeals, in its analysis of the jurisdiction of the court below concerning torture committed abroad, considered the presence of the accused *at the time the information was laid*: *Davidson v. British Columbia (Attorney General)*, 2006 BCCA 447, [2006] B.C.J. No. 2630 (QL) at para. 9 [*Davidson*]. The presence requirement found at s. 7(3.7)(e) of the *Criminal Code* was however not at issue in that case and was merely referred to by the Court.

it could have said: “a person who is alleged to have committed an offence outside Canada may be prosecuted for that offence if the person is present in Canada”.⁸⁹ Moreover, the terms used with respect to presence seem to cover any moment after the commission of the offence and do not seem to require a continuous presence. The prosecution can only be launched if, at some time after the commission of the offence, the person is present in Canada.⁹⁰

If the timing of the prosecution is not conditioned to the presence of the suspect at that time, it remains that his or her presence at some time after the commission of the offence is a pre-requisite to the launching of a prosecution. This condition however does not seem to apply to the criminal investigations that necessarily precede the commencement of proceedings against a suspect, i.e. the laying of an information⁹¹ or the issuance of a preferred indictment pursuant to s. 577. The condition related to the presence of the person refers to the “prosecution”, not the pre-condition of determining whether the person is “alleged” to have committed a core crime or “*accusée*”⁹² of having committed it. Investigations therefore do seem not to be subject to the condition of presence at some time after the commission of the offence: only the *prosecution* would be.⁹³ This interpretation follows logically from the terms of the *War Crimes Act* and contributes to making Canada’s investigative capacities a potentially powerful ally in the global fight against impunity, not so much in terms of its potential regarding the prosecution of those responsible for

⁸⁹ The Dutch legislation provides at s. 2 that “...Dutch criminal law shall apply to: (a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands...”: Dutch *International Crimes Act*, *supra* note 44. In the *Bouterse* case, the Dutch Supreme Court referred to “present in the Netherlands” as meaning “present at the time of his arrest”. See Machteld Boot-Matthijssen & Richard v.an Elst, “Key provisions of the International Crimes Act 2003” (2004) Neth. Y.B. Int’l L. 251 at 283. See also Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, vol. 18, No. 5(D) (New York: Human Rights Watch, 2006) at 72 [Human Rights Watch].

⁹⁰ The use of the present tense (“*is present*”) rather than a past tense (“*was present*”) provides no indication as to the temporal effect of the law: Pierre-André Côté with the collaboration of Stéphane Beaulac & Mathieu Devinat, *Interprétation des lois*, 4th ed. (Montréal: Éditions Thémis, 2009) at 88-89.

⁹¹ *Davidson*, *supra* note 88 at para. 37: “...this Court decided in *Wren* that *proceedings commence when an information is laid*.” [Emphasis added.] See also Pierre Béliveau & Martin Vauclair, *Traité général de preuve et de procédures pénales*, 16th ed. (Cowansville: Yvon Blais, 2009) at 613; *Hébert c. Marx*, [1991] R.J.Q. 293, [1990] J.Q. No. 2202 at 296 (Qc. C.A.) (QL): “Enfin, la Cour Suprême du Canada dans *Kalani c. R.* (1989) 1 R.C.S. 1594, a affirmé qu’une personne était un accusé dès le dépôt de la dénonciation. Il est vrai que cette affaire traitait de la définition d’“inculpé” au sens de l’article 11b) de la Charte canadienne des droits et libertés. Mais je ne doute pas qu’elle affirmait une règle qui devait trouver application à l’article 579 C. cr.”.

⁹² The French version of s. 8(b) reads: “Quiconque *est accusé* d’avoir commis une infraction visée aux articles 6 ou 7 *peut être poursuivi* pour cette infraction si [...] après la commission présumée de l’infraction, l’auteur se trouve au Canada.” [Emphasis added.] This wording would seem to imply that the person may be prosecuted if he or she is already *accused*. Although ‘accused’ or ‘accusé’ is not defined in a general manner in the *Criminal Code* where it is, it refers to a ‘defendant’: see e.g. *Criminal Code*, *supra* note 12 at s. 716. The French wording appears imprecise considering, as was noted above, that a prosecution normally commences with the laying of an information. A person “accused” is therefore technically already “poursuivie”.

⁹³ See also Robert J. Currie, *International & Transnational Criminal Law* (Toronto: Irwin Law, 2010) at 236 [Currie, *International & Transnational Criminal Law*].

international crimes should they come to Canada⁹⁴- Canada's no safe haven policy clearly favours the denial of entry to those suspected of international crimes- but as "anticipated legal assistance" to third states as regards future prosecutions of particular individuals.⁹⁵

The interpretation according to which s. 8(b) does not require the suspect's presence on Canadian soil at *all times* is further supported by s. 9(1) of the *War Crimes Act*, which states:

(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.⁹⁶ [Emphasis added.]

This section unequivocally confirms that the presence of the accused in Canada is not necessary to commence proceedings, i.e. to lay an information or to issue a preferred indictment pursuant to s. 577. The only interpretation that conciliates s. 8(b) with s. 9(1) is one according to which the former provision imposes as a prerequisite to any prosecution that the suspect must have been present in Canada *at some time* after the commission of the offence so that the launching of the prosecution itself can be done whether or not that person is present in Canada, as per the latter provision.⁹⁷

Section 9(2) goes on to clarify the issue of the presence of the accused at trial, which is, as mentioned above, a general requirement in Canadian criminal law:

(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.⁹⁸ [Emphasis added.]

⁹⁴ Though this possibility is seen by many as an important component of universal jurisdiction's role in the fight against impunity: Human Rights Watch, *supra* note 89 at 28, 46-47; Geneuss, *supra* note 74 at 956.

⁹⁵ See e.g. Claus Kieß, "Universal Jurisdiction over International Crimes and the Institut de Droit international" (2006) 4 J. Int'l Crim. Just. 561 at 578 [Kieß]; Amnesty International: "Germany", *supra* note 28 at 61-62.

⁹⁶ *Criminal Code*, *supra* note 12 at s. 9(1).

⁹⁷ The relation of sections 8(b) and 9(1) was briefly discussed during the proceedings of the Standing Committee on Foreign Affairs and International Trade, and for the purpose of this study, suffice here to say that a commentator thought that s 9(1) permitted the beginning of the proceedings without the presence of the person, while others said that s 9(1) was more related to procedural aspects, and could not interfere with the question of jurisdiction in s 8(b). See Canada, House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, Meeting 46, *supra* note 81 at 1105-1110. For a similar interpretation of the presence requirement linked to the exercise of discretion of the Attorney General in Germany, see Salvatore Zappalà, "The German Federal Prosecutor's Decision not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?" (2006) 4 J. Int'l Crim. Just. 602 at 606 [Zappalà].

⁹⁸ *Criminal Code*, *supra* note 12 at 9(2).

The second reference to “proceedings” at s. 9(2) clearly refers to trial, as the “provisions of the *Criminal Code*” to which this paragraph refers deal with the trial stage only.⁹⁹ Nothing in s. 9(2) could be interpreted as preventing Canada from doing investigations or laying an information without the accused’ presence on Canadian soil. To the contrary, this provision confirms, “for greater certainty”, the presence requirement of an accused *at trial*, recognising that there is no such requirement for the commencement of a prosecution as per paragraph (1).

Finally, s. 9(3) of the *War Crimes Act* provides that “*no proceedings* for an offence...*may be commenced* without the personal consent in writing of the Attorney General or Deputy Attorney General...”¹⁰⁰ [Emphasis added.] Pursuant to the interpretation given above to the commencement of proceedings, no information can therefore be laid without the consent of the Attorney General of Canada or Deputy Attorney General¹⁰¹, though obviously prior investigations that lead to reasonable grounds to believe that a person has committed genocide, crimes against humanity or war crimes can be conducted without his or her consent. This requirement serves here to illustrate that both the laying of an information and the prior investigations that justify it are possible without the presence of the accused on Canadian territory.

Clearly, if the launching of proceedings is possible whether or not the person is present in Canada, it is theoretically possible for Canada to seek extradition of this person from a third country in order to ensure that he or she can be present at their trial. In such cases, the person was previously present on Canadian soil on a voluntary basis at some time after the commission of the offence, but has since left the country. Extradition is used not to comply with the presence requirement of s. 8(b) of the *War Crimes Act*, but only to allow the criminal process to proceed as the law mandates. It seems obvious that extradition cannot be used as a means to secure the presence of the accused on Canada’s territory after the commission of the offence as per s. 8(b) of the *War Crimes Act* if that person has not already voluntarily come to Canada at some time after the commission of the offence.¹⁰² Section 8(a), which does not condition the

⁹⁹ *Criminal Code*, *supra* note 12. Section 650 of the *Criminal Code* to which s. 9(2) implicitly refers, is clearly concerned with the presence of the accused “during the whole of his or her *trial*.” [Emphasis added.] See also s. 475, which is concerned with the trial, and the situation where the accused has absconded. The reference at s. 475(3) to ‘proceedings’ and ‘procédures’ clearly refer to procedural steps within the trial that may have been conducted in the accused’ absence. It must be acknowledged that the unfortunate and indiscriminate use of the term “proceedings” in different contexts throughout the *War Crimes Act* unnecessarily complicates matters. Section 8(b) clearly refers to prosecution. Section 9 regulates different instances of the “proceedings” against an accused and thus deals in turn with issues of (1) domestic jurisdiction between territorial divisions (which, as supported by paragraph 2, cover aspects of the proceedings that are broader than trial) and (2) the presence of the accused at trial (despite the use of the term “proceedings”). Hence, a logical reading of the paragraphs of s. 9 leads to the conclusion that the term “proceedings” is used at times to refer to trial and at times to broader aspects of the criminal process.

¹⁰⁰ *War Crimes Act*, *supra* note 2 at s. 9(3).

¹⁰¹ This is also the interpretation given in a recent annual report of the Canada’s War Crimes Program: “Under the Crimes Against Humanity and War Crimes Act, the Attorney General *must consent to charges before they are laid*.”: CBSA, *Canada’s War Crimes Program: Tenth Annual Report*, *supra* note 82.

¹⁰² Luc Reydam, *Universal Jurisdiction – International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003) at 123; this is also probably the argument made by Currie,

prosecution pursuant to other heads of jurisdiction to the presence of the accused in Canada after the commission of the offence, would however allow Canada to request extradition of a suspect who has never set foot on the Canadian territory.

To summarise, section 8(b) of the *War Crimes Act* restricts the exercise of universal jurisdiction to situations where the suspect is present on the state's territory after the commission of the offence. However, suspects cannot be expected to be present at *all_times* in Canada. A coherent interpretation of ss. 8 and 9 leads to the conclusion that investigative activities may be conducted in the absence of the person in Canada and that proceedings may also commenced in this situation, provided that the provisions of the *Criminal Code* regarding presence at *trial* are respected and that the Attorney General's consent is obtained to commence proceedings. Keeping the practical constraints noted above in mind, it would appear that Canada could thus legally exercise jurisdiction on the basis of universality if:

- The accused is present on Canada's territory at the time the proceedings are commenced (investigative activities may have been commenced before, even if the accused was not present);

-The accused is present on Canada's territory at the time the proceedings are launched, but has absconded during trial. In such cases, despite the accused' absence, the trial may proceed (s. 9(2) of the *War Crimes Act* and s. 475 of the *Criminal Code*); or

-The accused was present in Canada *at some time* after the commission of the offence, but has since left the territory. In such cases, provided the Attorney General consents, proceedings may be commenced (s. 9(1) of the *War Crimes Act*), but trial may only begin if the accused is present (ss. 9(2) of the *War Crimes Act* and 650 of the *Criminal Code*). In such a case, nothing prevents Canada from requesting extradition from a third state since the person was voluntarily present in Canada at some time after the commission of the offence.

II. Deciding to Exercise Jurisdiction

In light of the above theoretical framework regarding Canada's legislative choices on jurisdiction, and the correlative international sources and obligations, let us now turn to a discussion as to how Canada decides to *exercise* jurisdiction as regards suspects of international crimes found on its territory. At the core of this issue is prosecutorial discretion. Clearly, Canadian prosecutorial authorities possess discretion as to whether or not to prosecute all crimes under their jurisdiction. However, the special nature of international crimes and the inherent complexity of extraterritorial jurisdiction bring a distinct set of concerns and call for the application of somewhat adapted principles.¹⁰³

International & Transnational Criminal Law, *supra* note 93 at 236; see also Currie & Stancu, *Munyaneza*, *supra* note 18 at 836.

This part of the paper offers a discussion of the requirement that proceedings under the *War Crimes Act* be conducted by the Attorney General of Canada and with his or her personal consent in writing (or that of the Deputy Attorney General of Canada) (A). It also assesses the criteria that guide Canadian authorities in the exercise of their discretion as to who and when to prosecute (B), as well as the availability of judicial review of these broad ministerial powers (C).

A. The role of the Attorney General of Canada

Section 9(3) of the *War Crimes Act* gives two important roles to the Attorney General of Canada: it conditions the commencement of proceedings to its “personal consent in writing” and it provides it with exclusive jurisdiction to conduct proceedings under the *War Crimes Act*.¹⁰⁴

1. SCOPE AND MEANING OF THE EXCLUSIVE JURISDICTION AND OF THE REQUIREMENT OF CONSENT

As a general rule, the Attorney General of Canada has jurisdiction over *Criminal Code* offences committed in Yukon Territory, the Northwest Territories and Nunavut and over offences created by federal statute.¹⁰⁵ The *War Crimes Act*, a federal statute, does not depart from this general rule, but it is of note that it provides *exclusive* jurisdiction to the Attorney General of Canada, whereas other federal statutes at times allow provincial authorities to conduct the proceedings.¹⁰⁶ This exclusive authority to the federal authorities makes sense at the practical level: expertise concerning the core crimes has indeed developed at the federal level, for historical reasons and because of the fact that implementation of international treaties is, at least in the case of the *Rome Statute*, done through federal legislation. In the proceedings of the Standing Committee on Foreign Affairs and International Trade in 2000, commentators pointed out that the expertise in terms of international crimes had to be centralized at the federal level, in order to “build up a specialist core in this

¹⁰³ Daniel D. Ntanda Nsereko, “Prosecutorial Discretion before National Courts and International Tribunals” (2005) 3 J Int’l Crim. Just. 124 [Nsereko].

¹⁰⁴ *War Crimes Act*, *supra* note 2 at s. 9(3). Section 9(3) reads: “(3) No proceedings for an offence under any of sections 4 to 7 of this Act, ... may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf”.

¹⁰⁵ *Criminal Code*, *supra* note 12 at s. 2 under “Attorney General”, para. (b). The authority to prosecute offences under the *Criminal Code* is generally given to provincial Attorneys General (para. (a)). Certain *Criminal Code* offences however allow proceedings by the federal authorities: see e.g. *Criminal Code*, *supra* note 12 at s. 467.2 as regards the offense of participation in activities of criminal organization at s. 467.11.

¹⁰⁶ See e.g. *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 2; *Stevenson v. The Queen*, [1983] 1 S.C.R. 241, confirming the judgements of the New Brunswick Court of Appeal in *R. v. Sacobie and Paul*, [1979] N.B.J. No. 303 (QL) (NB CA), *R. v. Schriver*, [1979] N.B.J. No. 304 (QL) (NB CA) and *R. v. Stevenson*, [1979] N.B.J. No. 305 (QL) (NB CA).

area”¹⁰⁷, which would be necessary to have successful prosecutions of these offenses.¹⁰⁸

Section 9(3) of the *War Crimes Act* does not only provide the federal authorities with exclusive jurisdiction to prosecute; it also subjects the commencement of proceedings to the “personal consent in writing of the Attorney General of Canada or Deputy Attorney General of Canada”¹⁰⁹. This requirement is not unique in Canadian criminal law: the consent of the Attorney General of Canada is also required for certain *Criminal Code* offences before proceedings can be instituted¹¹⁰ or continued.¹¹¹ The consent of the Attorneys General of provinces can also be required for prosecution of crimes with an international component, such as offences in relation to sexual offences against children committed outside Canada, when the accused is a Canadian citizen¹¹², or of crimes that present an element of complexity such as advocating and promoting genocide.¹¹³

If this requirement is not exclusive to war crimes, crimes against humanity and genocide, it has to be acknowledged that federal statutes, including the *Criminal Code*, employ different terminology to describe actions to be taken by the Attorney General. Some require his or her “personal consent in writing” like the *War Crimes Act* and the *Geneva Conventions Act*¹¹⁴, while others require the Attorney General’s “consent in writing”¹¹⁵ or simply “the consent of the Attorney General”.¹¹⁶

The consequences of this different terminology are not obvious, but the *Federal Prosecution Service Deskbook*, which contains guidelines prepared by the Federal Prosecution Service of the Department of Justice regarding matters of prosecution policy, explains that where the “personal consent in writing” of the Attorney General is required, as in the *War Crimes Act*, no delegation of power will occur:

Thus, decisions in relation to matters affecting national security or

¹⁰⁷ Canada, House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, Meeting 46, *supra* note 81 at 1045.

¹⁰⁸ *Ibid.* at 1050. David Matas for one mentioned that the lack of prosecutions for torture, which, in the *Criminal Code*, is within provincial jurisdiction (ss. 7(3.7) and 269.1 *Criminal Code*), “is simply the result of the lack of specialization, so if we want to make that torture provision effective, it should be part of the federal jurisdiction to prosecute.” Note that the Attorney General of Canada’s consent is however required to continue proceedings in such a case if the accused is not a Canadian citizen (s. 7(7) of the *Criminal Code*).

¹⁰⁹ *War Crimes Act*, *supra* note 2 at s. 9(3).

¹¹⁰ See *Criminal Code*, *supra* note 12 at ss. 54, 119(2), 251(3) for instance.

¹¹¹ *Ibid.* at ss. 7(7), 477.2 for instance.

¹¹² *Ibid.* at s. 7(4.3). If the accused is not a Canadian citizen, it is the Attorney General of Canada’s consent which is required to continue the proceedings: s. 7(7).

¹¹³ *Ibid.* at s. 318(3). This is not the subject of the present article, but let us simply say that this exclusive jurisdiction of the Attorney General of Canada in term of ICC crimes creates a situation where certain international crimes which remain in the *Criminal Code*, will be prosecuted by the provinces, like torture as a discrete offence and the offence of advocating and promoting genocide, whereas the crimes contained in the *War Crimes Act* will be prosecuted by the federal authorities.

¹¹⁴ *Geneva Conventions Act*, R.S.C. 1985, c. G-3, s. 3(4).

¹¹⁵ See e.g. *Criminal Code*, *supra* note 12 at ss. 119(2), 251(3).

¹¹⁶ *Ibid.* at ss. 7(7), 172(4).

international relations, or decisions requiring the “personal consent in writing” of the Attorney General or Deputy Attorney General, will be made by one or other of those individuals. In all other situations, delegation will be the rule.¹¹⁷

The authority to exercise jurisdiction for prosecutions of international crimes under the *War Crimes Act* is thus exclusively conferred to the federal authorities, and the Attorney General of Canada, who is also the Minister of Justice¹¹⁸ and is thus a member of the Executive, or the Deputy Attorney General who is, pursuant to s. 3(4) of the *Director of Public Prosecutions Act*¹¹⁹, the Director of Public Prosecutions (DPP), have an important role to play in the decision to prosecute. There are pragmatic reasons for what can be considered a veto to a political entity for prosecutions under the *War Crimes Act*.

2. THE REASONS FOR SUCH REQUIREMENTS

There seem to be two main and correlated reasons that explain why prosecutions under the *War Crimes Act* can only be conducted by the Attorney General of Canada and with its personal consent in writing. The first is to limit the right of private citizens to invoke the criminal process in this context and the second is to allow for considerations of foreign policy to be assessed at the political level.

Section 9(3) of the *War Crimes Act* is clear that proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf, thus excluding private prosecutors to initiate or conduct such proceedings.¹²⁰ The necessary consent of the Attorney General to commence proceedings under the *War Crimes Act* acts as a further guarantee that criminal prosecutions for the core crimes will rest exclusively with federal authorities. Without the required consent, courts lack jurisdiction to hear the case.¹²¹ Thus, even where legislation does not expressly require proceedings to be conducted by the Attorney General, the consent requirement effectively limits the use of private complaints, as was the case on at least two occasions in privately initiated torture prosecutions.¹²² In Canada, recourse to private complaints is already very limited by the *Criminal Code*. The Attorney General

¹¹⁷ Canada, Public Prosecution Service of Canada, *The Federal Prosecution Service Deskbook* at s. 16.3, online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/toc.html>> [Deskbook]. At the federal level, this delegation rule was included in s. 24(2)(c)(d) of the *Interpretation Act* and was confirmed by the Supreme Court of Canada: see *Interpretation Act*, *supra* note 37 at s. 24(2)(c)(d). See *The Queen v Harrison*, [1977] 1 S.C.R. 238 at 245.

¹¹⁸ *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 2(2).

¹¹⁹ *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121 [Director of Public Prosecutions Act].

¹²⁰ See *Lynk v. Ratchford et al.* (1995), 142 N.S.R. (2d) 399 at para. 4 (C.A.), which confirms that clear and specific language is required to abolish private prosecution under a federal statute.

¹²¹ *Davidson*, *supra* note 88 at para. 4.

¹²² *Davidson*, *supra* note 88; *Zhang v. Canada (Attorney General)*, 2007 FCA 201 [Zhang], leave to appeal refused: [2007] S.C.C.A. No. 411 (QL). These decisions concern prosecutions of torture as a discrete crime pursuant to s. 269.1 of the *Criminal Code*. Consent of the Attorney General of Canada can be required to “continue” proceedings, which can have been commenced by a private complaint: s. 7(7): *Criminal Code*, *supra* note 12 at ss. 7(7), 269.1.

retains extensive control over the process.¹²³ The *War Crimes Act* however simply proscribes private prosecutions.

The experience of other states with respect to private complainants wishing to use universal jurisdiction provisions against foreigners suspected of international crimes serves to explain states' insistence in controlling the criminal process in this regard. The original legislation in Belgium¹²⁴ gave rise to a host of litigations against actual or former world leaders and high ranking officials¹²⁵, leading the country into a highly sensitive political situation.¹²⁶ Under international diplomatic pressure, especially from the United States, and because these cases were "causing damage to Belgium's foreign relations with several countries"¹²⁷, the Belgian Parliament amended its law in April 2003 in order to grant the Federal Prosecutor control and a veto over the process of *constitution de partie civile* for offenses having no link to Belgium.¹²⁸ Moreover, the Minister of Justice was given a central role in cases with minimal links to Belgium.¹²⁹ While Belgium later completely repealed this law to incorporate the relevant norms into the Penal Code and the Code of Criminal Procedure¹³⁰, the control of the Federal Prosecutor over the initiation of the

¹²³ *Ibid.* s. 507.1. The Attorney General cannot withdraw charges privately initiated before process has been issued (before the pre-enquete), but his or her power to do so after the issuance of a summons or an arrest warrant is firmly rooted in jurisprudence: *R v. McHale*, 2010 ONCA 361, leave to appeal refused: [2010] S.C.C.A. No. 290 (QL) [*McHale*]; *Bradley and The Queen* (1975), 9 O.R. (2d) 161 (Ont. C.A.). Moreover, the Attorney General always has the possibility to order a stay of proceedings under s. 579 of the *Criminal Code* at any moment after the proceedings are commenced, which means at any moment after the information has been laid (*McHale, supra*). For further details, see *Deskbook, supra* note 117 at s. 26.

¹²⁴ Belgium, *Loi relative à la répression des violations graves du droit international humanitaire*, Moniteur belge, 23 March 1999, 9286, ss. 1(1), 1(2), 1(3), 7 [Belgium, *Loi du 23 mars 1999*].

¹²⁵ Among others, President Bush Sr., Fidel Castro, Yasser Arafat, Ariel Sharon, Dick Cheney (Vice President and former Secretary of Defense), Colin Powell (Secretary of State and former chairman of the joint chiefs of staff). See Damien Vandermeersch, "Prosecuting International Crimes in Belgium" (2003) 3 J. Int'l Crim. Just. 400 at 407-408.

¹²⁶ Steve R. Ratner, "Belgium's War Crimes Statute: A Postmortem" (2003) 97 Am. J. Int'l L. 888 at 892 [Ratner]. The Belgium government itself considered that the broad field of application of its previous law quite improper: 2010 *Secretary-General's Report, supra* note 44 at para. 94.

¹²⁷ Roozbeh (Rudy) B. Baker, "Universal jurisdiction and the Case of Belgium: A Critical Assessment" (2009) 16 ILSA J. Int'l & Comp. L. 141 at 155.

¹²⁸ Belgium, *Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire*, Moniteur belge, 7 May 2003, 24846, s. 5 (which modified s. 7 of the previous law) [Belgium, *Loi du 23 Avril 2003*]. For further details, see Kai Ambos, "Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction" (2010) 42 Case W. Res. J. Int'l L. 405 at 411-413 [Ambos, "Guantanamo"]. The law was also amended for applicable immunities to be considered as a result of the ICJ's rulings in the *Arrest Warrant Case, supra* note 43.

¹²⁹ See Luc Reydam, "Belgium Reneges on universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law" (2003) 1 J. Int'l Crim. Just. 679 at 682-683; Belgium, *Loi du 23 Avril 2003, supra* note 124 at s. 5 (which modified ss. 7(2)(3)(4)).

¹³⁰ This was done through the *Loi relative aux violations graves du droit international humanitaire*, Moniteur belge, 7 August 2003, 40506. For the new rule, see Belgium, Penal Code (*Code pénal*), s. 136, online: Portail du droit belge <<http://www.droitbelge.be/codes.asp#pen>>, and the Belgium, Preliminary Title of the Code of Criminal Procedure (*Titre préliminaire du Code de procédure pénale*), c. I-II, online: Service public federal Justice <[http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=1878041701&table_name=loi&&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=\(text+contains+\(""\)\)#LNK0002](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=1878041701&table_name=loi&&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=(text+contains+()> [Belgium, *CCP PT*].

proceedings for crimes committed outside Belgium was nonetheless maintained, with the effect of “strip[ping] away the option of *constitution de partie civile* from alleged victims”.¹³¹ These new provisions were judged unconstitutional because no judicial oversight over the Federal Prosecutor’s decisions was possible, an issue discussed below.¹³² However, the Court of Arbitration made it clear that Federal Parliament had “the right to limit universal jurisdiction prosecutions in the country, given the adverse affect they could have on the country’s international relations”.¹³³ Legislations in other states, such as the United Kingdom¹³⁴ and France¹³⁵ illustrate a trend among states to limit the ability of private parties to use the criminal process regarding international crimes, particularly on the basis of extraterritorial and universal jurisdiction. These additional safeguards can be explained mainly by the repercussions on international relations that recourse to universal jurisdiction may have.

Canada has restricted the conduct of prosecutions under the *War Crimes Act* to the Attorney General of Canada and conditioned them to his or her personal consent in writing not only to prevent recourse to private complaints, which is in any case quite limited in Canadian law, but also to maintain a level of political control over all such prosecutions. Indeed, prosecutions of international offenses pursuant to universal jurisdiction have an added dimension of state-to-state relations¹³⁶ and may lead to “negative effects on Canada’s bilateral relations with some countries”.¹³⁷ The purpose of requiring the consent of the Attorney General in such contexts has been examined by the British Columbia Court of Appeal. The Court concluded that this requirement “recognizes the importance of Canada’s relationships with other states, and the role of the Federal Government in managing those relationships”.¹³⁸ The express personal consent required of the Attorney General is seen as an essential “political” safeguard. Some have alleged that it allows for the views of the foreign

¹³¹ Baker, *supra* note 127 at 158. However, the procedure of instituting civil indemnification proceedings was kept for “cases where an offence is perpetrated wholly or partly in Belgium or where the alleged perpetrator of an offence was Belgian or resided primarily in Belgium”: 2010 *Secretary-General’s Report*, *supra* note 44 at para. 94.

¹³² See C., below.

¹³³ Baker, *supra* note 127 at 160. For the reasons provided by the Court, see La Cour d’arbitrage, 23 March 2005, Judgment No. 62/2005, numéro du rôle 2913, para. B.5.1–B.6.3 [Belgian Cour d’arbitrage, Judgment no 62/2005].

¹³⁴ Amendments adopted in 2011 give control to the Director of Public Prosecutions for the issuance of arrest warrants regarding certain offences committed extraterritorially: *Police Reform and Social Responsibility Act 2011* (U.K.), 2011, c. 13, s. 153.

¹³⁵ France *ICC Act 2010*, *supra* note 45 at s. 689-11 al. 2. For a critical analysis, see Xavier Philippe & Anne Desmarest, “Remarques critiques relatives au projet de loi ‘portant adaptation du droit pénal français à l’institution de la Cour pénale internationale’: la réalité française de la lutte contre l’impunité” (2010) 81 Rev. fr. dr. constl. 41 at 52.

¹³⁶ Davidson, *supra* note 88 at para. 28. The judges in the *Arrest Warrant Case*, *supra* note 43 at para. 59 mentioned that “a State may choose to exercise universal jurisdiction *in absentia*, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States”. See also 2010 *Secretary-General’s Report*, *supra* note 44 at para. 109; Donald V. MacDougall, “Torture in Canadian Criminal Law” (2005) 24 CR (6th) 74 at 90.

¹³⁷ *Canada’s War Crimes Program*, *supra* note 3 at 45.

¹³⁸ Davidson, *supra* note 88 at para. 25.

ministry to be considered.¹³⁹ True as this may be, this will clearly depend of the internal collaboration that is developed within the branches of Government and on the respective influence that will ultimately play those involved in war crimes investigations- who might favour prosecutions or other repressive remedies against foreigners coming to Canada- and the Department of Foreign Affairs- who might view the same persons as essential to democratic reform, whose prosecution could “negatively affect Canada’s bilateral relationship with the countries involved”.¹⁴⁰ Clearly, legitimate inter-state concerns should not be invoked as a disguise to partisan or ideological political concerns, which should not have any bearing on the decision to prosecute.¹⁴¹

The political safeguard ensured by the requirement of the Attorney General’s consent is not unique to Canada.¹⁴² It is important to note, however, that the *War Crimes Act* provides for an alternative requirement. Consent can be provided not only by the Attorney General, who is undoubtedly a political entity because he also acts as Minister of Justice, but also by the Deputy Attorney General in criminal matters who is, as noted above, the Director of Public Prosecutions (DPP). The DPP acts under and on behalf of the Attorney General of Canada¹⁴³, but he or she is independent of the latter since the creation of this function was specifically designed to create a prosecution service independent from the Ministry of Justice.¹⁴⁴ Interestingly, in both *Munyaneza* and *Mungwarere*, consent was given by the Deputy Attorney General.¹⁴⁵ This flexibility in the *War Crimes Act* is probably only a reflection of the role that the DPP and the Public Prosecution Service of Canada will inevitably play in decisions to prosecute. The requirement of the Attorney General’s consent as regards a particular prosecution is partly justified in the *Deskbook* by the public accountability of the

¹³⁹ Ratner, *supra* note 126 at 896. *Contra* Human Rights Watch, *supra* note 89 at 9-10.

¹⁴⁰ *Canada’s War Crimes Program*, *supra* note 3 at 24.

¹⁴¹ See below, section B; *Deskbook*, *supra* note 117 at s. 15.4; Canada, Law Reform Commission of Canada, “Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor”, *Working Paper*, No. 62 (1990), at 10, concerning the application of the “Shawcross principle” –that the Attorney General should be free from political “partisan” influences- in Canada. See also David Matas, “From Nuremberg to Rome: Tracing the Legacy of the Nuremberg Trials” (2006) 10 *Gonz. J. Int’l L.* 17 at 30: this “requirement is there to stop politicized private prosecutions, not to allow the Attorney-General to refrain from prosecuting sound cases for political reasons”.

¹⁴² For instance, Australia, New Zealand, Israel and the United Kingdom require the Attorney General’s consent while Iraq and Malta require the Minister of Justice’s consent: 2010 *Secretary-General’s Report*, *supra* note 44 at para. 78. In Germany, the discretion, where applicable, is in hands of the Office of the Prosecutor, but this office is controlled by the Minister of Justice, Amnesty International, “Germany”, *supra* note 28 at 75; see also Zappalà, *supra* note 97.

¹⁴³ *Director of Public Prosecutions Act*, *supra* note 119 at s. 3(3).

¹⁴⁴ “Unlike the FPS [Federal Prosecution Service], which was part of the Department of Justice, the PPSC [Public Prosecution Service of Canada] is an independent organization, reporting to Parliament through the Attorney General of Canada. [...] The creation of the PPSC reflects the decision to make transparent the principle of prosecutorial independence, free from any improper influence” (information available on the site of the SPPC: Canada, Public Prosecution Service of Canada, *About the Public Prosecution Service of Canada*, online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/bas/abt-suj.html>>).

¹⁴⁵ The consent was given by John H. Sims in the *Munyaneza* case, at that time Deputy Attorney General, and by Brian J. Saunders in the *Mungwarere* case, Director of Public Prosecutions acting as the Deputy Attorney General for criminal matters, pursuant to s. 3(3)(4) of *Director of Public Prosecutions Act*, *supra* note 119.

Attorney General, who has to respond of the acts made on his behalf at the Parliament.¹⁴⁶ It seems likely that a decision to prosecute, particularly one which could affect Canada's international relations, would not be taken by the DPP without informing the Attorney General or even without his or her consent.¹⁴⁷ Let us now turn to the criteria that guide the decision to prosecute or not to prosecute in a given case, which obviously includes –but should not be primarily guided by– foreign policy considerations.

B. Criteria Guiding the Decision to Exercise Jurisdiction

In Canada, as in most common law countries, the prosecutor possesses a broad margin of discretion in the decision to prosecute. The prosecutors of international criminal tribunals have a similarly wide discretion, though a different set of considerations is at play.¹⁴⁸ This discretion has been characterized as fundamental for the administration of justice, in order to avoid the overburdening of the criminal system as well as to permit adaptation to particular circumstances.¹⁴⁹ The decision to prosecute also goes at the core of the public's perception of the criminal justice system: “[a] wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system”.¹⁵⁰ Criteria to guide such a decision cannot be applied as a “mathematical formula” and there is a need for both flexibility and consistency.¹⁵¹

The *Deskbook* elaborates on two fundamental principles that will guide the decision whether to prosecute: the existence of a reasonable prospect of conviction and public interest.¹⁵² These general criteria are applicable to decisions to prosecute under the *War Crimes Act*¹⁵³, though the particular nature of international crimes and the specific challenges linked to extraterritorial jurisdiction call for the consideration of distinctive issues. These two general criteria will be discussed in turn in light of some specific criteria that have been referred to for the purposes of prioritising the cases that will be investigated and prosecuted under the *War Crimes Act* and the others that will rather lead to administrative remedies. With respect to prosecutions under the *War Crimes Act*, the only available criteria that expand upon the general principles laid out in the *Deskbook* can be found on the War Crimes Program's website. The website once contained relatively detailed criteria that served as

¹⁴⁶ *Deskbook*, *supra* note 117 at s. 8.3.

¹⁴⁷ This is reinforced by s. 13 of the *Director of Public Prosecutions Act*, *supra* note 119, which provides that “[t]he Director must inform the Attorney General in a timely manner of any prosecution, or intervention that the Director intends to make, that raises important questions of general interest.”

¹⁴⁸ Luc Côté, “Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law”, (2005) 3 J. Int'l Crim. Just. 162 [Côté].

¹⁴⁹ Hassan B. Jallow, “Prosecutorial Discretion and International Criminal Justice” (2005) 3 J. Int'l Crim. Just. 145 at 145.

¹⁵⁰ *Deskbook*, *supra* note 117 at s. 15.1.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.* at s. 15.

¹⁵³ This general assumption is confirmed by a letter from Debbie Johnston, Senior Counsel at Public Prosecution Service of Canada, 2 February 2011, on file with author.

guidance for prioritization of cases, criteria which were also found in some early annual reports, but which disappeared from the website at the end of 2010 and were replaced by a brief list of four factors. Considering the importance that criteria for the exercise of discretion be made public, particularly where prosecution will be the exception, the previously accessible list will be discussed herein, as will be the extensive discussion on the matter that was included in the *Summative Evaluation of the War Crimes Program* in 2008, that built on these criteria.

1. REASONABLE PROSPECT OF CONVICTION

The sufficiency of evidence that may lead to a reasonable prospect of conviction is an obvious and important factor: “[a] proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused”.¹⁵⁴ This evaluation will also take into account potential defenses that can be raised by the accused as well as any human rights violations that may have occurred during investigation that may lead to exclusion of inculpatory evidence. The reasonable prospect of conviction standard applies to the decision to prosecute, obviously keeping in mind that an accused will only be found guilty at trial if the evidence convinces a judge or a jury beyond a reasonable doubt.

The criteria once present on the War Crimes Program’s website were listed under three categories: the nature of the allegation, the nature of the required investigation and “other considerations”. This evaluation is done in a “single screening process”, an approach which was adopted to clarify the overall program priorities.¹⁵⁵ The first two categories relate to the general criteria of the “existence of a reasonable prospect of conviction.”¹⁵⁶ As regards the “nature of the allegation”, the following factors were listed:

- credibility of allegation
- seriousness of allegation
- seriousness of crime (genocide – war crimes – crimes against humanity)
- military or civilian position
- strength of evidence¹⁵⁷

For a case to stay in the RCMP/DOJ inventory¹⁵⁸, “the allegation must

¹⁵⁴ *Deskbook*, *supra* note 117 at s. 15.3.1.

¹⁵⁵ *Canada’s War Crimes Program*, *supra* note 3 at 17-18.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ The RCMP/DOJ inventory contains all cases subject to investigations and to potential criminal prosecutions. This constitutes the first step in the prioritisation and all cases that are not in the inventory will not be investigated nor prosecuted. For a detailed analysis of the different steps for a case to reach prosecution, see *Canada’s War Crimes Program*, *supra* note 3 at 99.

disclose personal involvement or command responsibility on the part of the person alleged to be involved; and the evidence pertaining to the allegation must be corroborated”.¹⁵⁹ Furthermore, “the necessary evidence must be available in a reasonably uncomplicated and rapid fashion”.¹⁶⁰ This last point is linked to the next category, which is concerned with the “nature of the investigation required”:

- progress of investigation
- ability to secure cooperation with other country or international tribunal
- likelihood of effective cooperation with other countries
- presence of victims or witnesses in Canada
- presence of victims or witnesses in other countries with easy access
- likelihood of being part of a cluster of investigation in Canada
- likelihood of parallel investigation in other country or by international tribunal
- ability to conduct documentary research to test credibility of allegation
- likelihood of continuing offence/danger to the public related to crimes against humanity and war crimes allegations¹⁶¹

The prosecution of international crimes engenders significant practical difficulties, most notably where a State exercises extraterritorial jurisdiction.¹⁶² In the *Munyaneza* case, the investigation lasted over five years¹⁶³ and, once process was issued, rogatory commissions were held in Rwanda, Tanzania and France. The strength and availability of evidence is clearly an inescapable factor, once which goes at the core of the decision to prosecute, particularly where few international crimes cases will lead to criminal remedies. The failure of the *Finta* prosecution and of the other cases referred to above surely acts as a cruel reminder and an effective guarantee that those involved in prosecutorial decision-making will not launch criminal prosecutions absent solid evidence that shows a reasonable prospect of conviction.

¹⁵⁹ *Ibid.* at 17.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² “In some measure, the lack of actual prosecutions based on universality must result from practical difficulties in obtaining evidence and witnesses regarding crimes committed in other countries. Depending on the facts, prosecutors and ministries of justice may have little enthusiasm for devoting time, money, and resources to prosecutions having little enough to do with their own countries, citizens, and direct national interest.”: David Stewart, “Some Perspectives on Universal Jurisdiction” (remarks held in a panel on the topic “Universal Jurisdiction: It’s Back”, April 12, 2008), (2008) 102 *Am. Soc. Int’l L. Proc.* 397 at 406. For a review of the difficulties associated with the exercise of extraterritorial criminal jurisdiction, see Larissa van den Herik, “The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia” (2009) 9 *Int’l Crim. L. Rev.* 211.

¹⁶³ The investigation of Mr. Munyaneza began in 1999 and he was arrested in October 2005.

2. PUBLIC INTEREST: INTERNATIONAL OBLIGATIONS, FINANCIAL CONSTRAINTS AND THE “DILEMMA OF JUSTICE”

If satisfied that there is sufficient evidence to justify the institution of a prosecution, “Crown counsel must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued”.¹⁶⁴ As a general matter, the public interest criterion is used to ensure that suspected criminal offences are not automatically subject to prosecution. However, “[g]enerally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued”.¹⁶⁵ In the case of genocide, crimes against humanity and war crimes –the gravest international crimes- it is however difficult to see how the gravity factor could work *against* prosecution, although in comparison with one another in the particular circumstances of each case, this criteria could guide the prioritization of cases for prosecution purposes. This factor was indeed listed on the War Crimes Program’s website, as noted above.

The *Deskbook* elaborates on criteria that may guide prosecutors in the exercise of their discretion, including the seriousness or triviality of the offence; the accused’ personal circumstances such as age and background; the accused’ alleged degree of responsibility for the offence; the prosecution’s likely effect on the public’s confidence in the administration of justice; whether the alleged offence is of particular public concern; the prosecution’s likely effect on public order and morale or on public confidence in the administration of justice; the need for specific or general deterrence; the availability and appropriateness of alternatives to prosecution; the likely length and expense of a trial and the resources available; the entitlement of any person or body to reparation if prosecution occurs; whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest, etc. All these elements are relevant to war crimes prosecutions and similar ones have been referred to in that particular context.

These “other considerations” to decide on criminal prosecutions were detailed as follows on the old War Crimes Program’s website and in the early annual reports:

- no likelihood of removal (credible allegation of risk of torture upon return or Canadian Citizen)
- no reasonable prospect of fair and real prosecution in other country
- no indictment by international tribunal or no extradition request likely
- likelihood of continuing offence/danger to the public not related to crimes against humanity and war crimes allegations
- national interest considerations

¹⁶⁴ *Deskbook*, *supra* note 117 at s. 15.3.2.

¹⁶⁵ *Ibid.*

The *Summative Evaluation: Final Report* mentions that despite potential difficulties in the required investigation, a case may nevertheless stay in the DOJ/RCMP inventory if “the allegation pertains to a Canadian citizen living in Canada or to a person present in Canada who cannot be removed for practical or legal reasons; or policy reasons such as the national or public interest, or over-arching reasons related to the interests of the War Crimes Program, international impunity or the search for justice exist”.¹⁶⁶ The *Summative Evaluation: Final Report* highlighted that

External stakeholders in Canada and internationally pointed out that it remains important that the remedy of investigation and criminal prosecution is visibly present in the Canadian Program if Canada is to make an effective contribution to a global effort to combat impunity. In the view of the evaluation team, this last point is met by the fifth file review criteria allowing for cases to be assigned or maintained in the RCMP/DOJ inventory for policy reasons relating to international impunity.¹⁶⁷

This is crucial. As will be discussed below, despite important financial and practical constraints associated with the exercise of extraterritorial jurisdiction, the core principle of accountability should remain the main guiding principle in the exercise of prosecutorial discretion regarding the core crimes.

The current War Crimes Program’s website, as noted above, is much more succinct in its elaboration of criteria. After enumerating the different recourses available to deal with alleged offenders, it simply states that the decision to use one or more of these mechanisms is based on:

- the different requirements of courts and tribunals in criminal, civil and administrative cases to substantiate and verify evidence;
- the resources available to conduct the proceedings;
- the likelihood of success of the remedy; and
- Canada’s obligations under international law.¹⁶⁸

Whereas the first and third issues relate to the “reasonable prospect of

¹⁶⁶ *Canada’s War Crimes Program*, *supra* note 3 at 18.

¹⁶⁷ *Ibid.*

¹⁶⁸ Department of Justice Canada, *Crimes Against Humanity and War Crimes Program*, *supra* note 4. The longer list of criteria that was once on the website was first mentioned in the War Crimes Annual Report of 2001-2002, under the heading ‘Developments Under the Crimes Against Humanity and War Crimes Act’: Canada, Citizenship and Immigration Canada, *Fifth Annual Report: Canada’s Crimes Against Humanity and War Crimes Program 2001-2002*, online: Citizenship and Immigration Canada <http://epe.lac-bac.gc.ca/100/201/301/canada_crimes_humanity/20012002/english/pub/war2002/section04.html>. These criteria were modified and streamlined, as can be seen in the 2006-2007 Annual Report, under the heading ‘Criminal investigations and prosecution’, which says “in order for an allegation to be added to the RCMP/DOJ inventory, among other considerations, the allegation must disclose personal involvement or command responsibility, and the evidence pertaining to the allegation must be corroborated and obtainable in a reasonable and rapid fashion”: CBSA, *Canada’s War Crimes Program: Tenth Annual Report*, *supra* note 82. This was taken up in the *Summative Evaluation Report* as noted above and the longer list of criteria is no longer used in official documents.

conviction” criterion, which was discussed above, the two others pertain to the “public interest” consideration. These two criteria, however, virtually contradict each other: the currently available resources are not sufficient for Canada to fulfill its obligations under international law, as will be discussed below.

There is no strictly applicable formula that can determine how these factors must be balanced against one another. It is submitted that once it is established that there is sufficient and reasonably accessible evidence that can lead to a reasonable prospect of conviction in a criminal trial, the –perhaps self-evident- following core principle should be kept in mind: there should be no impunity for genocide, crimes against humanity or war crimes. Hence, where such a suspect is present in Canada, Canadian authorities bear the responsibility to ensure that this international legal and moral principle is respected.

In this context, they should favour two remedies: extradition to a third country (or surrender to an international tribunal) or prosecution in Canada. The procedures for transfers to international tribunals, including the ICC, and for extradition to third countries, are well provided for by legislation.¹⁶⁹ Extradition is generally restricted to those States with which Canada has entered into an extradition treaty or which are designated as extradition partners by legislation.¹⁷⁰ Extradition from Canada is usually done upon request from the third State or from the international tribunal. The recent extradition requests from the United States and from Guatemala, and a possibly upcoming one from Spain, regarding Jorge Vinicio Sosa Orantes are a case in point. Interestingly, Canada is faced with competing extradition requests, one from the United States that concerns immigration charges and one from Guatemala dealing with more serious charges linked to genocide, crimes against humanity, war crimes, torture, and/or murder.¹⁷¹ In such cases, it is submitted that Canada should prioritize the extradition request that will end impunity for genocide or another core crime, in accordance with its international responsibility regarding all core crimes and its clear legal obligations regarding extradition for genocide, torture and certain war crimes, as discussed above.¹⁷² Numerous options are open to the Government. The most respectful of international law and principles are clearly

¹⁶⁹ *Extradition Act*, R.S.C. 1999, c. 18 [*Extradition Act*].

¹⁷⁰ *Ibid.* at ss. 2, 3.

¹⁷¹ For the United States, see e.g.: The Canadian Press, “Guatemala war crimes suspect arrested in Alta.” *CBC News* (18 January 2011), online: CBC News <<http://www.cbc.ca/news/canada/calgary/story/2011/01/18/calgary-lethbridge-guatemala-war-crimes-arrest.html>>. For Guatemala, see e.g.: Canada, Canadian Centre for International Justice, *Public CCIJ Cases: Jorge Sosa Orantes*, online: Canadian Centre for International Justice <http://www.ccij.ca/programs/cases/index.php?WEBYEP_DI=16>. For Spain, see e.g.: LaToya Sawyer, “Spain court seeks extradition of Guatemalan massacre suspect” *Jurist Legal News & Research* (4 April 2011), online: Jurist Legal News & Research <<http://jurist.org/paperchase/2011/04/spain-court-seeks-extradition-of-guatemalan-massacre-suspect.php>>.

¹⁷² See also Pascal Paradis & Matt Eisenbrandt, “Canada can’t ignore alleged crimes against humanity” Letter to the Editor, *Calgary Herald* (8 April 2011) online: Adopt-a-Village in Guatemala <<http://adoptavillage.com/2011/04/12/canada-cant-ignore-alleged-crimes-against-humanity/>>. The decision in this regard appears to lie exclusively on the Minister of Justice, according to criteria not publicly accessible. *Extradition Act*, *supra* note 169 at s. 15(2): “If requests from two or more extradition partners are received by the Minister for the extradition of a person, the Minister shall determine the order in which the requests will be authorized to proceed”.

extradition to Guatemala (or to Spain should it also request it) or investigation and prosecution in Canada for the core crimes. However, if such options are sided by the Government in favour of the United States' request, because of bilateral relations or other non-legal issues that favours extradition there, nothing prevents Canada to use creative ways to ensure compliance with its international responsibility, such as requiring diplomatic assurances from the United States that it will extradite Sosa Orantes to be prosecuted for the core crimes once he has served his sentence for immigration crimes. Sequencing may not be ideal in such a scenario, but it might serve to alleviate some of the Government's possible external relations issues while at the same time respecting the spirit of the collective duty in the fight against impunity.

Lack of request or lack of an extradition treaty with a given third State could be invoked as justification for the rare recourse to extradition in war crimes cases.¹⁷³ However, lack of an extradition treaty is not an obstacle, as s. 10 of the *Extradition Act* allows the Minister of Foreign Affairs, with the agreement of the Minister of Justice, to "enter into a specific agreement with a State or entity for the purpose of giving effect to a request for extradition in a particular case".¹⁷⁴ Furthermore, nothing prevents Canadian authorities to actively engage with foreign governments with a view of encouraging extradition where circumstances so warrant. This is in line with the criteria once enunciated on the War Crimes Program's website and referred to above, which explicitly took into account the prospects of prosecution in a third country or in an international tribunal to decide on the launching of a prosecution in Canada. It is also clearly consistent with the *aut dedere aut judicare* principle discussed in the previous part of this paper, which offers an alternative to the custodial state: prosecute or extradite.

In fact, it is often advanced that a sensible exercise of universal jurisdiction would take into account the possibilities that the suspect be tried in the territorial or national state. The "subsidiarity principle" refers to the idea that a state who wants to exercise universal jurisdiction should primarily defer to the territorial state or a state possessing another basis of jurisdiction if the latter is able or willing to prosecute.¹⁷⁵ Whether this principle is now a firm rule of international law -i.e. a legal precondition to the exercise of universal jurisdiction- is beyond the scope of this study, but suffice it to say that while some support this idea¹⁷⁶, others have contested it.¹⁷⁷ In any case, it can be assumed that this principle should minimally be respected as a matter of good

¹⁷³ The 1983 *Rauca* case was the first war crimes extradition from Canada: *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225, 145 D.L.R. (3e) 638 (Ont. C.A.). He was extradited to Germany and died in prison while awaiting trial. Mr. Rauca was the last person to be extradited from Canada for war crimes until 2007, when Micheal Seifert, a former German SS member, was extradited to Italy: *Italy v. Seifert*, 2007 B.C.C.A. 407, 246 B.C.A.C. 46, leave to appeal to S.C.C. refused, [2007] S.C.C.A. 503 (QL).

¹⁷⁴ *Extradition Act*, *supra* note 169 at s. 10.

¹⁷⁵ Cedric Ryngaert, "Applying the Rome Statutes Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle" (2008) 19 *Crim. L.F.* 153 at 157 [Ryngaert].

¹⁷⁶ Kreß, *supra* note 95 at 579; Anthony J. Colangelo, "Double Jeopardy and Multiple Sovereigns: a Jurisdictional Theory" (2009) 86 *Wash. U.L. Rev.* 769 at 835.

¹⁷⁷ Geneuss, *supra* note 74 at 957; Ryngaert, *supra* note 175 at 173. See also *AU-EU Expert Report*, *supra* note 59 at para. 14.

policy¹⁷⁸, giving the opportunity to the state which is the most affected by the crime and which has the easiest access to evidence to prosecute. This principle is provided for in legislation in states such as Germany¹⁷⁹, Spain¹⁸⁰, and Belgium¹⁸¹, and has been subject to judicial interpretations or explanations by prosecutors.¹⁸² Considering the scarce resources for prosecution and the comparative inexpensive costs of extradition or surrender procedures¹⁸³, it seems that Canada should endeavour to promote more frequent recourse to the latter remedies.¹⁸⁴ Subsidiarity should be applied as a guiding principle for the exercise of prosecutorial discretion rather than as a strict rule that could lead to absurd or incoherent situations.¹⁸⁵ It should be seen as a pragmatic tool for the fulfilment of the fundamental obligation of accountability for international crimes. However, importantly, if there cannot be genuine and fair prosecution elsewhere, Canada bears the legal and moral responsibility to conduct such proceedings before its courts.¹⁸⁶ This might be the situation as regards Léon

¹⁷⁸ *AU-EU Expert Report*, *supra* note 59, para. R.9 at 42; Adam Abelson, “The Prosecute/Extradite Dilemma : Concurrent Criminal Jurisdiction and Global Governance” (2010) 16 U.C. Davis J. Int’l L. & Pol’y 101 at 109; Ryngaert, *supra* note 175 at 157.

¹⁷⁹ Germany, *The German Code of Criminal Procedure (Strafprozessordnung)*, s. 153f (2)(4), online: Bundesministerium der Justiz <http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> [*The German Code of Criminal Procedure*]. For further details on this issue, see Ambos, “Guantanamo”, *supra* note 128 at 422ff.

¹⁸⁰ Spain, *Ley organica del poder judicial* (Fundamental Law of the Judiciary), B.O.E 1985, 6/1985, 1 de Julio, 157 as modified by the Fundamental Law 1/2009 of 3 November (in effect since 5 November 2009), s. 23(4) [Spain, *LOPJ*]. For an English translation, see Ambos, “Guantanamo”, *supra* note 128 at 435-436. See also Hervé Ascencio, “The Spanish Constitutional Tribunal’s Decision in *Guatemalan Generals: Unconditional Universality is Back*” (2006) 4 J. Int’l Crim. Just. 586.

¹⁸¹ Belgium, *CCP PT*, *supra* note 130 at ss. 10(1bis)(4), 12bis(4).

¹⁸² See, for instance, the decision of the German General Federal Prosecutor in the *Rumsfeld* case: *Center for Constitutional Rights et al. v. Donald Rumsfeld et al.*, 45 I.L.M. 119 (2006) . For examples of interpretation of this principle by the Courts in Spain, France, Germany and Austria, see Ryngaert, *supra* note 175.

¹⁸³ *Canada’s War Crimes Program*, *supra* note 3 at 47: the costs of prosecution is slightly over \$4 million while extradition and surrender to an international tribunal range between \$471,251 and \$526,341.

¹⁸⁴ See Kleffner, *supra* note 54 at 279, who discusses the primary responsibility of territorial states as regards the prosecution of international crimes.

¹⁸⁵ For example, the German federal prosecutor dismissed a complaint and failed to open an investigation against the former U.S Defense Secretary Donald Rumsfeld in 2005 based on s. 153f(2)(4) of the *The German Code of Criminal Procedure*: See *The German Code of Criminal Procedure*, *supra* note 179 at s. 153f(2)(4). He took this decision because, in his opinion, the subsidiarity principle meant that “German courts could not exercise jurisdiction over allegations that Rumsfeld bore command responsibility for torture committed by the U.S military, because torture allegations against low-ranking soldiers were already under investigation in the United States.” (Human Rights Watch, *supra* note 89 at 32-33). The Federal Prosecutor approach could lead, according to Amnesty International, to a situation, for instance, where “Germany could not prosecute a single case arising in a situation on the scale of the killings in Rwanda in 1994 if a Rwandan court were prosecuting one person for one murder” (Amnesty International, “Germany”, *supra* note 28 at 64). Legal scholars also had criticized this decision. See, among others, Kai Ambos, “International Core Crimes, Universal Jurisdiction and § 153f of the German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Regional Court in the Abu Ghraib/Rumsfeld Case” (2007) 18 Crim. L.F. 43 [Ambos, “Rumsfeld”] and Andreas Fischer-Lescano, “Torture in Abu Ghraib: The complaint against Donald Rumsfeld under the German Code of Crimes against International Law” (2005) 6 German L.J. 689.

¹⁸⁶ See also Joseph Rikhof, “Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity” (2009) 20 Crim. L.F. 1 at 51, who also offers a useful review of domestic

Mugesera, whose expulsion order was confirmed by the Supreme Court of Canada in 2005 and who remains in Canada for reasons unexplained officially, despite alleged extradition requests from Rwanda, in a legal vacuum that has lasted long enough.¹⁸⁷

The most recent list of four criteria on the War Crimes Program's website includes "Canada's obligations under international law" and it has been an overarching principle since the inception of the program. As discussed in the previous part of this study, Canada's legal *obligations* with respect to the exercise of extraterritorial jurisdiction are probably limited to the *aut dedere aut judicare* obligations contained in treaties and thus limited to the discrete crime of torture and to grave breaches of the *Geneva Conventions*. There may be a gap at present in international law regarding the *obligation* to exercise universal jurisdiction over certain categories of ICC crimes. Faced with such a possible gap, which leads to possible inconsistency in the approach concerning varying types of conduct which are universally condemned, states can take one of two approaches: one is to exploit the gap, and thus justify inaction or selectivity, and the other is to fill the gap, and apply the same rule or obligation to all ICC crimes, thereby contributing to the creation of a more sensible rule at customary law and fulfilling the law's ultimate objective of accountability for all these crimes. Once universal jurisdiction has been asserted for all core crimes, as is the case in Canada, it becomes hardly justifiable to distinguish between those for which there exists an obligation to extradite or prosecute in certain treaties and those crimes, of indisputable equal gravity, for which the obligation is not provided by treaty and is subject to the inevitable clashes of opinion as regards its existence at customary law. The prosecutions against Mr. Munyaneza and Mr. Mungwarere for genocide and crimes against humanity, as well as for war crimes committed in a conflict not of an international character in the former case, are positive indications of the non-selective approach of the Canadian authorities in this regard.

It is interesting to note that the South African legislation provides that the international obligations incumbent on the Republic are a priority consideration in the exercise of prosecutorial discretion.

Institution of prosecutions in South African courts

5. (1) No prosecution may be instituted against a person accused of having committed a crime without the consent of the National Director.

prosecutions for core crimes worldwide. Note that immunities can block prosecutions in Canada. They are not discussed herein

¹⁸⁷ *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 CSC 40, [2005] 2 S.C.R. 100. States (and the ICTR) have had numerous difficulties to extradite or send back suspects to Rwanda, essentially because of concerns for their security or that they could not get a fair trial there. This long-standing debate, into which we do not enter here, has led to an important decision by a Chamber of the European Court of Human Rights, which dismissed the application by a Rwandan genocide suspect who was fighting extradition to Rwanda by Sweden because "he would not risk a flagrant denial of justice": Case of *Ahorugeze v. Sweden (Application no.37075/09)*, E.C.H.R., 27 October 2011. See also the decisions concerning Jean Bosco Uwinkindi at the ICTR (ICTR-01-75), where a Trial Chamber ruled that the transfer of the case to Rwanda could proceed. The appeal decision was expected in November 2011.

[...]

(3) The National Director must, when reaching a decision on whether to institute a prosecution contemplated in this section, give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in Article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime.¹⁸⁸ [Emphasis added.]

This guiding principle provided for by statute for the exercise of discretion by prosecuting authorities is of crucial importance. It recognizes that South Africa has a *responsibility* to play, in line with the principle of complementarity, in the prosecution of those suspected of involvement in core crimes. Belgium is among the other states that specifically recognize in legislation the role of international obligations in the decision to prosecute.¹⁸⁹ By taking the view that the *Rome Statute* creates an obligation to assert jurisdiction and imposes a responsibility upon states to prosecute persons accused of having committed a core crime, the South African legislation takes a firm and welcome stance regarding what legal principles should guide the exercise of jurisdiction.

The explicit mention of Canada's obligations under international law in the criteria guiding the authorities is to be commended. Clear legal obligations should obviously be respected. However, it is suggested that such obligations should not be understood in a restrictive manner so as to be limited to torture and grave breaches. Canadian authorities should consider the responsibility that Canada has accepted for itself in the global fight against impunity for all three core crimes of genocide, crimes against humanity and war crimes. Once a suspect is found on Canadian territory, Canada bears the responsibility of the international community to ensure accountability, in Canada or abroad.

As things currently stand, the vast majority of individuals excluded from Canada because it is alleged that they had committed international crimes are not sent

¹⁸⁸ *Implementation of the Rome Statute of the International Criminal Court Act 2002*, No. 23642 of 2002, s. 5(1)(3).

¹⁸⁹ Belgium, *CCP PT*, *supra* note 130 at ss. 10(1*bis*), 12*bis*: “Saisi d’une plainte en application des alinéas précédents, le procureur fédéral requiert le juge d’instruction d’instruire cette plainte sauf si : (4) des circonstances concrètes de l’affaire, il ressort que, dans l’intérêt d’une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l’Etat dont l’auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction présente les qualités d’indépendance, d’impartialité et d’équité, tel que cela peut notamment ressortir des engagements internationaux relevant liant la Belgique et cet Etat”. [Emphasis added.] According to Juliet Hay, the Attorney General of New Zealand will also consider the international obligations of the country in his decision to consent or not to a prosecution: Juliet Hay, “Implementing the ICC Statute in New Zealand” (2004) 2 J. Int’l Crim. Just. 191 at 197. The new Spanish law also specifically mentions international obligations. Under this new law, Spanish courts will not have jurisdiction if a link with Spain is not present, except if international treaties make mandatory that the crime be prosecuted: see Manuel Ollé Sesé, “Summary of the universal jurisdiction reforms in Spain”, *EU Update on International Crimes* 8 (November 2010) 5, online: EU Update on International Crimes <http://fidh.org/IMG/pdf/EU_Newsletter_Nov_2010.pdf>; Spain, *LOPJ*, *supra* note 180 at s. 23(4).

back to face trial abroad. The tenth annual report on Canada's War Crimes Program indicated the following numbers since the inception of the program in 1998 (as of March 2007): four hundred and forty-three removals and one prosecution.¹⁹⁰ During the 2007-2008 fiscal year, the CBSA removed twenty-three persons found to have been involved in war crimes or crimes against humanity¹⁹¹ and although the reports for the next fiscal years are not yet available, it is known that a second prosecution was launched against Jacques Mungwarere in 2009. As noted above, there has been one extradition in 2007.

These numbers are telling. In that regard, perhaps the obvious should be recalled: deportation or removal of war criminals from Canada certainly cannot replace criminal prosecutions nor can it be a substitute for extradition.¹⁹² The over-reliance on other remedies, such as deportation and removal from the country, may serve the limited purpose of not allowing Canadian soil to harbour war criminals, but does very little to serve the broader objective of ensuring accountability for the core crimes.¹⁹³ Deportation may be a first step in the right direction¹⁹⁴, but for that to be true, it must remain just that, a first step. The ultimate aim is to ensure that justice, at home or abroad, is rendered. The public release in July 2011 by the Canada Border Services Agency of a list of thirty men alleged to have committed crimes against humanity or war crimes and wanted for deportation has made the headlines, in Canada and abroad, and has brought to the fore the tension between Canada's obligations on the international plane and the limited role the War Crimes Program effectively allows it to play.¹⁹⁵

¹⁹⁰ CBSA, *Canada's War Crimes Program: Tenth Annual Report*, *supra* note 82.

¹⁹¹ Canada, Royal Canadian Mounted Police, *Eleventh Annual Report: Canada's Program on Crimes Against Humanity and War Crimes, 2007-2008*, online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/pubs/wc-cg-eng.htm>>.

¹⁹² Anne Warner LaForest, *Extradition To and From Canada*, 3d ed. (Aurora, Ont.: Canada Law Book, 1991) at 42: "The aims of extradition and deportation are clearly distinct. The object of extradition is to return a fugitive offender to the country which has requested him for trial or punishment for an offence committed within its jurisdiction. Deportation, on the other hand, is governed by the public policy of the state that wishes to dispose of an undesirable alien". See also Marie-Pierre Olivier, "L'obligation de juger ou d'extrader dans la pratique contemporaine du Canada" (1997) 10 R.Q.D.I. 137 at 165.

¹⁹³ See e.g. statement of December 2008 by Dr. Lloyd Axworthy, President and Vice-Chancellor of the University of Winnipeg and Canada's Foreign Minister from 1996-2000, speaking as a member of the Honourary Council of the Canadian Centre for International Justice: Canada, Canadian Centre for International Justice, *At critical moment for Sudan, human rights advocates call for criminal and civil trials* (Ottawa, 2008) online: Canadian Centre for International Justice <<http://www.cciij.ca/uploads/ccij-news-release-2008-12-02.pdf>>: "The International Criminal Court is premised on the idea that the majority of trials related to massive human rights abuses will take place in national courts in countries like Canada," he explained. "Currently there is an over-emphasis on deportation when alleged human rights abusers are found in Canada. This is about conflict prevention and redress for victims, and I believe Canadians are strongly in support of those goals".

¹⁹⁴ Joseph Rikhof, "Canada and War Criminals: The Policy, the Program and the Results" (Paper presented to the 18th International Conference of the International Society for the Reform of Criminal Law held at Montreal, Canada, 8 August 2004 to 12 August 2004), at 18, online: International Society for the Reform of Criminal Law <<http://www.isrcl.org/Papers/2004/Rikhof.pdf>>.

¹⁹⁵ There have been dozens of media reports and articles and a fierce exchange of public letters between a Minister and a prominent NGO. See, for instance, Jeff Davis and Robert Hiltz, "Prosecute, not deport, suspected war criminals: Amnesty", *National Post* (2 August 2011), online: National Post <<http://news.nationalpost.com/2011/08/02/prosecute-not-deport-suspected-war-criminals-amnesty/>>.

While resources will always be an inevitable criteria guiding the exercise by states of their criminal jurisdiction over international criminals found on their territory, this consideration cannot be the main guiding principle of the policy in this regard. The annual reports of Canada's War Crimes Program give hints as to the limitations imposed by the budget allocated to the Program, which remains at roughly \$15 Million per year since the coordinated program was established in 1998.¹⁹⁶ The current budget has not taken account of "increases in salary or inflation that impact operational costs, or accommodation and corporate support costs. The result is a significant reduction in real dollar terms (adjusted for inflation) of the value of funds available for all program activities."¹⁹⁷

The budget that Canada allows for its War Crimes Program must be proportional to the extent of its international obligations (and responsibilities) and to the ambitions it has set for itself as an international leader in the fight against impunity. It is not a call for Canada to become the world's prosecutor, nor is it a naïve assertion omitting to take into account practical and resource-based limitations to the recourse to criminal prosecutions. Rather, it is a legitimate appeal to a rich country, which has strong investigative capacities and a highly developed legal system, to allocate the necessary resources to a collective undertaking which will necessarily depend largely on the serious commitment of the richest and most developed nations. This commitment must be directed at the proper functioning of the international institutions that have collectively been established for that purpose, such as the ICC, but states must commit equally to put to use their national institutions towards realisation of the same fundamental objective of universal accountability for genocide, crimes against humanity and war crimes. It seems beyond doubt that "the current level of program resources will be inadequate to achieving the Program's goals in the future".¹⁹⁸

Having said that, it must be acknowledged that even if resources were significantly increased, numerous suspects of international crimes could not be prosecuted. Recourse to other remedies is inevitable in order to fulfil the War Crimes Program's objectives of ensuring both that Canada does not offer a safe haven to war criminals and that the principle of accountability is upheld. There is an apparently insoluble dilemma in the available recourses to deal with war criminals present in Canada. On the one hand, prosecution and extradition – the remedies most respectful of Canada's international responsibilities – are expensive, complicated and/or cumbersome. On the other hand, deportations and removals are quite unsatisfactory as they offer a very mild version of justice: there is no proper accountability of the alleged perpetrator, no satisfaction or reparation to the victims and very little truth-telling associated with the processes.¹⁹⁹ A debate ensues between those who call for

¹⁹⁶ *Canada's War Crimes Program*, *supra* note 3.

¹⁹⁷ *Ibid.* at 52-53.

¹⁹⁸ *Ibid.* at 52. See also the steady calls by civil society organisations, including the Canadian Center for International Justice, and interested citizens for an increase of budget: Canada, Canadian Centre for International Justice, *Public Criminal Prosecutions*, online: Canadian Centre for International Justice <http://www.cijj.ca/programs/policy-work/index.php?WEBYEP_DI=1>.

¹⁹⁹ Although administrative processes for the revocation of citizenship, for instance, do involve the presentation of evidence that goes at the core of crimes committed in certain conflicts or

more justice – the idealists – and those who insist on Canada’s inherently limited role in the global endeavour of putting an end to impunity for international crimes – the pragmatists.

However, it is suggested that more thought should be invested in finding alternatives to the two apparently irreconcilable positions. International law has faced a similar dilemma since the inception of international criminal justice. Recognising that criminal law cannot and will not cope with the immensity of the task of ensuring justice for thousands of victims and just as many perpetrators, alternative measures were crafted to attain the goals of justice and reconciliation, such as truth and reconciliation commissions and other truth-telling mechanisms, traditional forms of justice such as the Gacaca in Rwanda, reparations programs for victims and so on. “Transitional justice” encompasses various remedies, including criminal justice, that complement each other towards achievement of a common goal. Although these mechanisms were mainly conceived for the state where the crimes have occurred, very little thought, if any at all, was given to the possibility that similar mechanisms be used by third states, which are faced with similarly daunting challenges once international criminals are found in their territories, often living amongst communities that include their very victims.

Canadian criminal law is not foreign to the idea of alternative justice. Section 717 of the *Criminal Code*, for instance, provides that alternative measures to prosecution can be envisaged provided it is not inconsistent with the protection of society and if certain conditions are met, including the existence of a program authorized by the Attorney General, the free participation and consent of the person alleged to have committed an offence and, most importantly, the acceptance of responsibility for the act or omission that forms the basis of the offence by that person.²⁰⁰ Why couldn’t a program specific to suspects of international crimes be designed? More often than not, individuals who have participated in core crimes no longer represent a danger to the society, particularly to the society to which they integrated after the commission of the crimes (though, admittedly, the situation might be different in bordering states (the Democratic Republic of the Congo for Rwandans, for instance) than in far away lands (such as Canada for the same nationals)). Nothing prevents the crafting of a program in Canada that could include public apologies to victims, public recognition of involvement in crimes, compensation to victims or to communities, community service with the victims’ communities, etc. Measures could involve giving a number of hours per week to an NGO of the victims’ community, rendering a percentage of the suspect’s salary to an NGO, in Canada or abroad, or to a Trust Fund for Victims- that of the ICC or that contemplated in the *War Crimes Act*²⁰¹, etc. Such programs could include measures in Canada and/or in the country where the crimes were committed, according to circumstances, notably the presence

circumstances : see, e.g., such a recent process in the case of Branko Rogan, the first citizenship revocation case involving a modern war crime : Kim Bolan, “Port Coquitlam man denies he took part in war crimes” *Vancouver Sun*, (28 April 2011), online: canada.com <<http://www.canada.com/vancouver/news/westcoastnews/story.html?id=958cc63b-139e-4c0a-9873-ccdc9152c014> >.

²⁰⁰ See also *Deskbook*, *supra* note 117 at s. 14.

²⁰¹ *War Crimes Act*, *supra* note 2 at s. 30.

of communities of victims in Canada and the level of collaboration Canada enjoys with that third state. It could be accompanied with removal from Canada or –why not– with the permission to stay in Canada if the suspect’s compensation is considerable and remorse is genuine. Such programs could involve costs that could be kept at a reasonable level, even if investigations would still be required to identify suspects. Such investigations and information-gathering are already being done in relation to existing remedies as regards numerous potential suspects found on Canadian territory. More research and thought need to be given to what could be termed “alternative universal justice”, an innovative form of justice that would acknowledge the inherent practical impossibility of trying in a criminal court all potential suspects of international crimes present on a third state’s territory while giving due recognition to the fundamental principles of justice, accountability and reparation. The principles that underlie transitional justice, among which figure prominently reconciliation and reparation to victims, can – and perhaps must – be transposed to third states such as Canada that are confronted with the difficult dilemma of dealing with war criminals – and victim communities – on their territories.

3. TRANSPARENCY AND ACCOUNTABILITY

The criteria upon which Canada will decide whether to investigate or whether to prosecute are thus only contained in an internal guideline – the *Deskbook* – and on scarce information provided on the War Crimes Program’s website. No enforceable legal criteria exist so as to circumscribe the exercise of discretion. Other countries have asserted specific criteria in their legislations.²⁰² However, it is common that the principles governing prosecutorial discretion are found in internal guidelines or are taken on a case-by-case basis.²⁰³ The importance of discretion in relation to the prosecution of international crimes is beyond doubt. The fact that certain states such as Germany and Belgium, where there is normally an obligation to prosecute, have adopted a special regime with respect to the prosecution of international crimes is quite telling in this regard.²⁰⁴

²⁰² For instance, Germany through s. 153f of *The German Code of Criminal Procedure*: See *The German Code of Criminal Procedure*, *supra* note 179 at s. 153f. For Belgium see: Belgium, *CCP PT*, *supra* note 130 at ss. 10, 12*bis*. For Spain see: Spain, *LOPJ*, *supra* note 180 at s. 23(4). and South Africa, *ICC Act*, *supra* note 28.

²⁰³ Human Rights Watch, *supra* note 89 at 30. For instance, the United Kingdom has the same criteria as Canada in an internal guideline, and the Netherlands and Finland analyze the situation on a case-by-case basis: Blanco-Cordero, *supra* note 44 at 23.

²⁰⁴ In Germany, Nsereko mentions that this discretion was designed “to save the German state from the financial burden and the heavy workload that the obligation to prosecute in all cases would engender”: Nsereko, *supra* note 103 at 127. The German Federal Prosecutor is free to prosecute “when the accused is not present in Germany and such presence is not to be anticipated or in cases where neither the accused nor the victims is German, where criminal proceedings have been instituted outside Germany and the accused can be extradited or surrendered to that country”: Katherine Gallagher, “Universal Jurisdiction in Practice – Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture” (2009) 7 *J. Int’l Crim. Just.* 1087 at 1103 [Gallagher]; *The German Code of Criminal Procedure*, *supra* note 179 at s. 153f; see also Wirth, *supra* note 28 at s. 158ff. For Belgium: See Belgian Cour d’arbitrage, Judgment no 62/2005, *supra* note 133 at para. B.6.3, B.7.4; Belgium, *CCP PT*, *supra* note 130 at ss. 10(1*bis*), 12*bis*.

However, the need for broad prosecutorial discretion does not diminish the importance of transparency and accountability in the decision-making process.²⁰⁵ This is of particular concern for the victims who are sometimes faced with the presence of an alleged perpetrator in their neighborhood and who may question the subsequent inaction from the prosecutorial authorities. Inaction that is not followed by explanation may significantly lessen victims' and public's confidence in the administration of justice. It is thus crucial to ensure that the reasons of a decision not to prosecute are made available, as is frequently done by the German Federal Prosecutor²⁰⁶ or as is statutorily provided in the South African legislation.²⁰⁷

The need for such a mechanism was underlined in the work of the Standing Committee on Foreign Affairs and International Trade of the House of Commons regarding the decision of the Attorney General in the *War Crimes Act*.²⁰⁸ The *Deskbook* recommends that where a decision is made not to institute proceedings, a record of the reasons for that decision be kept. It also indicates that in certain circumstances, such reasons may have to be explained, to investigative agencies or to victims, and sometimes be publicly communicated in order to maintain confidence in the administration of justice.²⁰⁹ This recommendation is particularly important in the context of core crimes prosecutions, which will remain few in numbers in comparison to the number of potential suspects of war crimes present in Canada and to the much broader use of other remedies. In light of this discussion, let us now turn briefly to the possibility for victims to seek judicial review of a decision not to prosecute, which would obviously be the ultimate remedy to ensure transparency and accountability of the exercise of prosecutorial discretion.

C. Judicial Review of the Decision not to Prosecute

A complete overview of the delicate issue of whether any judicial review may be sought of a decision not to prosecute is beyond the scope of this study, as is the related issue of whether the *Deskbook* has any legal value or could serve as a basis for such a proceeding. However, considering that the decision of the authorities implicated in the exercise of prosecutorial discretion may contradict international treaty or customary law (the decision not to prosecute a crime which is subject to an obligation to exercise universal jurisdiction, for example), and considering the highly selective approach to prosecution in the policy regarding the core crimes, it will be

²⁰⁵ For a similar argument regarding the discretion of prosecutors of international criminal tribunals, see Côté, *supra* note 148 at 171.

²⁰⁶ The prosecutor must provide a reasoned decision if he decides to decline to file charges: see Gallagher, *supra* note 204 at 1103.

²⁰⁷ South Africa, *ICC Act*, *supra* note 28 at s. 5(5). The National Director of Prosecutions needs to provide the reasons of a decision not to prosecute, which are then forwarded to the Registrar of the ICC. According to Nsereko, this "reveal[s] the country's keen awareness of and sensitivity to the interest of the rest of the international community in the decisions of the National Director and in the way in which he arrives at those decisions": Nsereko, *supra* note 103 at 132.

²⁰⁸ Canada, House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, No.50, *supra* note 26 at 1610 .

²⁰⁹ *Deskbook*, *supra* note 117 at s. 15.3.2

briefly addressed.

The *Deskbook* opens as follows:

This deskbook deals with matters of prosecution policy, and does not have the status of law. It does not in any way override the *Criminal Code* or any applicable federal legislation. It is not intended to provide legal advice to members of the public, nor does it replace the specialized advice of lawyers or other experts. It is not intended to create any rights enforceable at law in any legal proceeding.²¹⁰

It seems generally accepted in Canada that the *Deskbook* does not have force of law.²¹¹ As for the availability of judicial review of a prosecutorial decision not to prosecute, it appears to be quite limited. In the extradition context, courts have held that the decision not to prosecute in Canada and rather surrender a suspect to a third country “attracts a high degree of deference”²¹², though “much less deference is due on the issue of whether the Minister properly considered the fugitive’s constitutional rights”.²¹³ Justice Charron (as she then was) at the Court of Appeal of Ontario had rejected the claim that the decision not to prosecute should be reversed on the following grounds:

In this case, Kwok, in essence, was seeking to obtain information which would permit a review of the prosecutorial **decision not to prosecute** in Canada. While this decision may be reviewable on grounds of bad faith or improper motives, there must be an air of reality to the application. There is none here.²¹⁴

Courts in Canada are generally unwilling to interfere with prosecutorial discretion and “the exercise of prosecutorial discretion is, within broad limits, effectively non-reviewable by the courts”²¹⁵. This cautious approach by the courts may be explained by numerous reasons, including the doctrine of separation of powers and the efficiency of the criminal justice system.²¹⁶ The Supreme Court of Canada however accepted judicial review of such decisions in cases of flagrant impropriety or malicious prosecution²¹⁷, noting that only “highly exceptional” cases

²¹⁰ *Deskbook*, *supra* note 117.

²¹¹ See: *R. v. Atomic Energy of Canada Ltd.*, [2001] O.J. No. 1580 (Ont. Sup. Ct.) (QL); *R. v. Wilder*, 2001 BCSC 1634; *Stucky v. Canada (Attorney General)*, 2004 FC 1769, [2004] F.C.J. No. 2155 (QL).

²¹² *United State v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532 at para. 93. The case concerned the scope of the *Charter* jurisdiction of an extradition judge at the committal stage of extradition proceedings and discussed the issue of the deference to be accorded to the prosecutorial decision not to prosecute in Canada and to surrender a suspected criminal to another country, even when they could be prosecuted for the same acts in Canada.

²¹³ *Ibid.* at para. 94.

²¹⁴ *United States v. Kwok* (1998), 41 O.R. (3d) 131 at 147 (Ont. C.A.).

²¹⁵ *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 at para. 168. According to Layton, two principles would permit judicial review, namely (1) abuse of process and (2) malicious prosecution. For details on these principles, see David Layton, “The Prosecutorial Charging Decision” (2002) 46 Crim. L.Q. 447 at 451ff [Layton].

²¹⁶ For further explanations on the reasons for this cautious approach, see *R. v. Power*, [1994] 1 S.C.R. 601 at 620, 623; *R. v. Beare*, [1988] 2 S.C.R. 387 at 410; Layton, *supra* note 215 at 452.

²¹⁷ *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 at para. 49. For a recent assertion of the criteria needed to prove malicious prosecution, see *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339.

would allow such a review and that the normal rule is immunity for bad decisions taken in good faith.²¹⁸

It thus appears that absent improper or arbitrary motives or bad faith, courts will not interfere with prosecutorial discretion, including a decision not to prosecute an alleged war criminal present on Canadian territory. A similarly high threshold has also found application in judicial review cases concerning the Attorney General's decision not to consent that a private prosecution be launched or continued, where such consent is required by law.²¹⁹ Considering the limited information provided by the authorities regarding the decision to prosecute and the absence of an obligation to provide reasons when they refrain from doing so, the probability for judicial review seems very thin.

The situation may be different in other states. In Great Britain, for instance, failure by the prosecution to follow the guidelines of the Crown Prosecution Service has given rise to successful administrative law remedies.²²⁰ Furthermore, applications for judicial review of decisions not to prosecute have been successful in a number of cases.²²¹ However, the situation is quite different in Australia where a specific provision has been included in the *International Criminal Court Act 2002*²²² to preclude judicial review of the Attorney General's decisions.²²³ In Belgium, a ruling from the Court of Arbitration forced the Government to amend its law in order to allow judicial review of the Federal Prosecutor's decision not to prosecute.²²⁴ Complainants in the Netherlands also have the possibility to seek judicial review of a prosecutor's decision not to prosecute.²²⁵ The system in Germany also permits victims in certain circumstances to challenge in court a decision not to initiate proceedings when the prosecutor is under an obligation to prosecute²²⁶, which is the normal rule.²²⁷ However, as noted above, a discretion rule was specifically designed for the prosecution of international crimes, thus creating an exception to mandatory

²¹⁸ *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9 at para. 44.

²¹⁹ See e.g. *Zhang, supra* note 122; *Kostuch v. Alberta (Attorney General)*, [1995] A.J. No. 866, 128 D.L.R. (4th) 440 (Alta. C.A.).

²²⁰ *R. v. DPP, ex p Manning and Another*, [2000] 3 W.L.R. 463 (Q.B.).

²²¹ See e.g. *R. v. DPP, ex p C*, [1995] 1 Cr. App. R. 136; *R. v. DPP, ex p Treadaway* (31 July 1997), (unreported) (though the civil court's determination awarding damages for assault was not binding on the Director of Public Prosecutions (DPP), the detailed findings and firm conclusions of the judge required very careful analysis if the DPP was not to institute a criminal prosecution); *R. v. DPP, ex p Manning*, [2001] QB 330, [2000] All ER (D) 674 (obligation to provide reasons not to prosecute); *R. (on the application of Peter Dennis) v. DPP*, [2006] E.W.H.C. 3211, [2007] All. E.R. (D) 43 (criteria which should guide courts in reviewing decision not to prosecute). See also Mandy Burton, "Reviewing Crown Prosecution Service Decisions not to Prosecute" [2001] Crim. L. Rev. 374; Simon P. Olleson & Matthew R. Brubacher, "Implementation of the Rome Statute in the United Kingdom" (2005) Finnish Yearbook of International Law 235 at 244.

²²² *International Criminal Court Act 2002* (Cth.).

²²³ *Ibid.* at s. 181; Gideon Boas, "An Overview of Implementation by Australia of the Statute of the International Criminal Court" (2004) 2 J. Int'l Crim. Just. 179 at 179-180.

²²⁴ Belgian Cour d'arbitrage, Judgment no 62/2005, *supra* note 133 at paras. B.7.6-B.9. For more details, see Baker, *supra* note 127 at 160-161.

²²⁵ Human Rights Watch, *supra* note 89 at 31.

²²⁶ *The German Code of Criminal Procedure, supra* note 179 at s. 172.

²²⁷ *Ibid.* s. 152(2).

prosecution.²²⁸ An attempt to force the Federal Prosecutor to act was nonetheless tried, the petitioners arguing that the prosecutor was under an obligation to prosecute pursuant to the *Geneva Conventions*.²²⁹ The Higher Regional Court in Stuttgart did not accept this argument and dismissed the complaint, stating that the legislator had purposefully refused to establish judicial review of the Federal Prosecutor's decisions with respect to international crimes.²³⁰ According to the Court, the decision not to prosecute international crimes was subject to the principal of discretionary prosecution and was thus not reviewable if not exercised inadequately or arbitrarily.²³¹ The possibility of administrative revision is however still available.²³²

Although, in Canada, judicial review of a decision not to prosecute regarding international crimes seems improbable, it should be highlighted that a decision not to investigate or not to prosecute *for policy reasons* (if sufficient evidence is otherwise available) may lead to a finding of “unwillingness” by the ICC. Considering the role that universal jurisdiction may be called to play in the system put in place by the ICC, and considering that the refusal to investigate or prosecute in such cases will in fact often be based on policy, political or financial considerations, “unwillingness” or “inability” on the part of a state that has jurisdiction over a case on the basis of universality is not merely a theoretical question. In such cases, provided the ICC requests the surrender of the suspect, Canada would fulfill its obligation under international law (there would not be impunity), but would arguably defeat the object and purpose of the *Rome Statute*, according to which states bear the primary responsibility for the prosecution of international crimes. The responsibilities of states other than the territorial or national ones as regard the proper functioning of the accountability system put in place by the ICC should not be underestimated.²³³

²²⁸ *Ibid.* s. 153f.

²²⁹ See Andreas Fischer-Lescano, “Introductory note to the decision of the General Federal Prosecutor: Center for Constitutional Rights v. Rumsfeld” (2006) 45 I.L.M. 115 at 116-117 [Fischer-Lescano, “Rumsfeld”].

²³⁰ Martin Hess, Nandor Knust & Christine Schuon, “Implementation of the Rome Statute in Germany” (2005) 16 Finnish Yearbook of International Law 133 at 146 [Hess, Knust & Schuon].

²³¹ Fischer-Lescano, “Rumsfeld”, *supra* note 229 at 117; Hess, Knust & Schuon, *supra* note 230 at 146. For a critical analysis of this decision, see Ambos, “Rumsfeld”, *supra* note 185 at 54-57. Another attempt was made in 2007 and the Stuttgart Regional Appeals Court also dismissed the petition, see Stuttgart Regional Appeals Court decision, 21 April 2009: See Center for constitutional rights, *German War Crimes Complaint Against Donald Rumsfeld, et al.*, online: Center for constitutional rights <<http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al>>.

²³² Human Rights Watch, *supra* note 89 at 32.

²³³ *Report on Darfur*, *supra* note 78 at 153-155; see also e.g. Darryl Robinson et al., *Informal expert paper: The principle of complementarity in practice* (Prepared for the Office of the Prosecutor of the ICC, 2003) at 3, 5, online : ICL Database and Commentary <<http://www.iclklamberg.com/Caselaw/OTP/Informal%20Expert%20paper%20The%20principle%20of%20complementarity%20in%20practice.pdf>>; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 340.

Proponents of criminal prosecutions, particularly on the basis of universal jurisdiction, need to recognize that states have a legitimate interest in maintaining a manageable caseload, which inevitably draws on public resources. States are also justified in taking into account the “potential political fallout of universal jurisdiction proceedings”.²³⁴ Though difficulties with respect to costs and evidence gathering are inherent to the exercise of universal jurisdiction, clear guidelines should be drawn and made public for the exercise of prosecutorial discretion. The preliminary efforts of the War Crimes Program in this regard are to be commended. However, these efforts need to be continued in order to have a better understanding of the criteria used in the decision to prosecute, especially where the prosecutorial discretion is broad and no judicial review is possible.

The *Crimes against Humanity and War Crimes Act*'s decisive assertion of universal jurisdiction, despite the absence of a clear *obligation* at international law for some of the core crimes, represents a progressive and welcome stance regarding the fight against impunity. The exercise of universal jurisdiction in some cases, notably where the territorial or national states are unable or unwilling to prosecute, is desirable, as an integral and complementary part of the range of available means to the international community to ensure accountability for international crimes. As LaForest J. said in *Finta*, “[e]xtraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity”.²³⁵

The *War Crimes Act*'s ultimate success perhaps thus depends not so much on the strength of its provisions or eventual judicial interpretations, but on the political will to use the *War Crimes Act* to its full extent against international criminals found on Canada's territory. Acting locally for the global accountability mission may well end up as Canada's most promising and needed contribution for the “sustainable development” of international criminal law.²³⁶ This can be done not only through costly prosecutions, but also by being more proactive in seeking extradition from third states, by requiring, where appropriate, diplomatic assurances that a country to which a suspect is deported will duly investigate crimes allegedly committed with a view of prosecution, by creatively thinking of “alternative universal justice” measures in Canada where prosecution, in Canada or elsewhere, is not a suitable option, etc. There is a need to be lucid and realistic about the limits imposed on Canada's ability to contribute to the fight against impunity using prosecutions under the *War Crimes Act*. However, there is also a need to be taking seriously Canada's role in that global endeavour. Widespread and ill-considered recourse to deportation is an unjustifiable retraction from our international responsibilities.

²³⁴ Bruce Broomhall, “Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law” (2001) 35 New Eng. L. Rev. 400 at 418.

²³⁵ *Finta*, *supra* note 15 at paras. 731-33.

²³⁶ See Fannie Lafontaine, “‘Think Globally, Act Locally’: Using Canada's Crimes against Humanity and War Crimes Act for the ‘Sustainable Development’ of International Criminal Law” (Proceedings of the 36th Annual Conference of the Canadian Council of International Law which focused on “Canada's Contribution to International Law”, Ottawa, October 2007); Fannie Lafontaine & Edith-Farah Ellassal, “La prison à vie pour Désiré Munyaneza - Vers un « développement durable » de la justice pénale internationale”, *Le Devoir* (2 November 2009), online: <http://www.ledevoir.com/2009/11/02/274892.html>.

Perhaps what is to blame is the perceived weight, or lack thereof, of international obligations and the lack of real sense of bindingness or duty arising from them. The “unbearable lightness of international obligations”, inspired by the great novel of Milan Kundera²³⁷, refers to this irresistible temptation, for those whose goal is “something higher”, to comfortably choose the easiness of the “lower” goal or value. The lack of concrete consequences for failing to fulfill international obligations regarding international crimes contrasts with the weight of the promise that underlies these obligations. The temptation to rely on empty political statements and to justify inaction with financial constraints is difficult to resist, yet must be so in order to rise to the challenge inherent in the commitment to the fight against impunity. With its ambition set as high as the principles it has vowed to uphold, Canada has accepted to bear the heavy responsibility of living up to its international moral and legal obligations, as light as the consequences for failing to do so could be, and as tempting, politically, as that may be.

²³⁷ Milan Kundera, *The Unbearable Lightness of Being* (New York: Harper Collins Publishers, 1984) at 59-60: “Anyone whose goal is 'something higher' must expect someday to suffer vertigo. What is vertigo? Fear of falling? No, Vertigo is something other than fear of falling. It is the voice of the emptiness below us which tempts and lures us; it is the desire to fall, against which, terrified, we defend ourselves”.