

Permanent Mission of Canada  
to the United Nations



Mission permanente du Canada  
auprès des Nations Unies

Note: PRMNY-2886

The Permanent Mission of Canada presents its compliments to the Office of Legal Affairs of the United Nations.

The Permanent Mission of Canada is writing in response to the letter of December 31, 2015 from the Office of Legal Affairs requesting excerpts of national provisions that Member States may wish to submit regarding the establishment of jurisdiction over their nationals whenever they serve as United Nations officials or experts on mission relating to crimes as known in their existing national criminal law, particularly those of a serious nature. Please find attached two documents; a Government of Canada Compilation of National Provisions on Criminal Accountability for UN Officials or Experts on Mission and Annex 1 - Relevant Statutory Provisions.

The Permanent Mission of Canada to the United Nations avails itself of this opportunity to renew to the Office of Legal Affairs of the United Nations the assurances of its highest consideration.

New York, June 09, 2016



Enclosed:

- Government of Canada Compilation of National Provisions on Criminal Accountability for UN Officials or Experts on Mission
- Annex 1 - Relevant Statutory Provisions

## **GOVERNMENT OF CANADA COMPILATION OF NATIONAL PROVISIONS ON CRIMINAL ACCOUNTABILITY FOR UN OFFICIALS OR EXPERTS ON MISSION**

Canada's capacity to hold to account its nationals, whenever they serve as United Nations officials or experts on mission, for criminal and other unacceptable conduct is embodied in several pieces of legislation. These include:

- a) The *Criminal Code of Canada (Criminal Code)*
- b) The *National Defence Act (NDA)*
- c) The *Royal Canadian Mounted Police Act (RCMP Act)*
- d) The *Crimes Against Humanity and War Crimes Act (CAHWCA)*
- e) The *Corruption of Foreign Public Officials Act (CFPOA)*

Canadian law also extends Canada's territorial jurisdiction to adjudicate criminal offences where there is a "real and substantial connection" to Canada and this may also apply in some scenarios, bearing in mind that the connection must be based on the offence (e.g., part of the offence or substantial effects in Canada) and not the nationalities of offenders, victims or other persons.

### **National Provisions**

Canadians engaged as United Nations (UN) officials and experts on foreign missions broadly fall into two categories: military and non-military personnel. Generally speaking, the *Criminal Code* largely extends criminal law jurisdiction over civilian personnel, while the NDA and the RCMP Act have specific regimes that regulate the conduct of members of the Canadian Forces and members of the RCMP (inside and outside of Canada) respectively.

Provisions relating to jurisdiction, offences, and procedural matters thought most likely to apply in scenarios where Canadian nationals or other persons in Canada may have committed criminal offences outside of Canada in the course of service as UN as officials or experts on mission are referenced in the following text and have been included *verbatim* as an annex. All Canadian legislation is enacted in English and French and can be accessed online at:

<http://laws-lois.justice.gc.ca/eng/> (English texts)

<http://laws-lois.justice.gc.ca/fra/> (French texts)

Official versions in two-language format may also be downloaded in PDF format from either site. Other provisions mentioned but not included below may be found at those locations.

#### **a) *Criminal Code*, R.S.C. 1985, c. C-46**

The exercise of criminal law jurisdiction under the *Criminal Code* is primarily premised on the principle of territoriality. The *Criminal Code* applies to all persons in Canada and, in accordance with this principle, Canadian criminal law generally applies to offences committed within Canada. The Parliament of Canada may, however, expressly extend extraterritorial application of Canadian criminal offences under its prescriptive jurisdiction and has enacted several statutory exceptions to the territorial ambit of Canadian Criminal law jurisdiction. The statutory exceptions to the territorial ambit of Canadian criminal law jurisdiction are primarily contained in section 7 of the *Criminal Code*. The nature of the conduct covered by these extraterritorial provisions is described generally below:

- i. offences that occur on an aircraft (subsections 7(1) & 7(2))

- ii. offences in relation to cultural property (subsection 7(2.01))
- iii. offences against or on board fixed platforms or international maritime navigation (subsection 7(2.1))
- iv. offences against or on board fixed platforms or navigation in the internal waters or territorial sea of another state (subsection 7(2.2))
- v. nuclear terrorism offence committed outside Canada (subsection 7(2.21))
- vi. space station — Canadian crew members (subsection 7(2.3))
- vii. hostage taking (subsection 7(3.1))
- viii. certain offences against internationally protected persons (subsection 7(3))
- ix. certain offences against UN or associated personnel (subsection 7(3.71))
- x. offences involving nuclear material, explosives, or other lethal devices (subsections 7(3.2) and 7(3.72))
- xi. offences in relation to the financing of terrorism (subsection 7(3.73))
- xii. terrorism offence committed outside Canada (subsection 7(3.74))
- xiii. terrorist activity committed outside Canada (subsection 7(3.75))
- xiv. Offences committed by public servants (subsection 7(4))
- xv. Offences in relation to sexual offences against children (subsection 7(4.1))
- xvi. Certain offences related to trafficking in persons (subsection 7(4.11))

The structure of each section 7 provision is unique: some apply to specific listed offences, some apply to classes of offences and some extend jurisdiction to all offences “punishable on indictment,” which includes all serious offences in both the *Criminal Code* and every other federal statute. Where adjudicative jurisdiction is extended, each specific offence provision must usually be read in conjunction with section 7 to determine if the actual offence applies to specific extraterritorial fact scenarios.

The full texts of the section 7 offences described above, as well as other federal offences that are most likely to arise in scenarios where the accused is a Canadian national serving as a UN official or expert on mission have been attached as an Annex.

Whether adjudicative jurisdiction over criminal offences would apply to persons of Canadian nationality or residence serving with the UN would depend on the specific legislation and circumstances. For greater clarity, some offences are discussed in greater detail below.

### **Extraterritorial jurisdiction under subsection 7(4) – offences committed by public servants**

Canadian courts are vested with criminal law jurisdiction over certain government officials deployed abroad under subsection 7(4) of the *Criminal Code*:

*Everyone who, while employed as an employee within the meaning of the Public Service Employment Act in a place outside Canada, commits an act or omission in that place that is an offence under the laws of that place and that, if committed in Canada, would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.*

This extraterritorial jurisdiction is intended to complement the immunities from which these employees generally benefit outside Canada. Persons asked by the Government of Canada to serve with the UN consistent with their official functions (e.g. an associate expert) may be covered by subsection 7(4).

The scope of this section does not cover *all* employees of the Government of Canada serving outside Canadian territory. For example, subsection 7(4) would not apply to members of the Royal Canadian Mounted Police or the Canadian Armed Forces, non-federal (e.g.

provincial or municipal) officials or ordinary Canadians who might be serving with the UN as they would not fall within the definition of "employee". However, the Royal Canadian Mounted Police and the Canadian Armed Forces are covered under their own respective legislation and codes of conduct, which will be discussed in more detail below.

Further, offences which apply to Canadian officials by virtue of their status (other than military personnel) would generally not extend to service with the UN as an appointed Special Representative, Secretariat official or expert on mission. Where a Canadian official takes up such a position, some form of leave will be granted consistent with the need to maintain the same degree of independence and neutrality of the international civil service as applies to the Federal Public Service in Canada.

### **Extraterritorial jurisdiction under subsection 7(4.1) – offences in relation to sexual offences against children**

This provision authorizes Canadian courts to exercise jurisdiction over Canadian citizens or Canadian permanent residents with respect to a wide range of sexual exploitation and abuse offences against children and young adults even when committed outside Canada:

*Notwithstanding anything in this Act or any other Act, everyone who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171, 171.1, 172.1, 172.2 or 173 or subsection 286.1(2) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act.*

This provision extends jurisdiction in respect of sexual offences in which the age of the victims is a factor, including the various forms of sexual exploitation or assault against minors and offense in relation to child prostitution and child pornography that implement the *Second Optional Protocol to the Convention on the Rights of the Child*.

### **Procedural provisions regarding the commencement of *Criminal Code* proceedings**

Of note, the consent of the Attorney General of Canada is required to commence or continue proceedings when they are deemed to have been committed in Canada (see subsections 7(4.3) and 7(7)).

In respect of all offences listed under section 7 of the *Criminal Code*, subsection 7(5) addresses the place in which proceedings may be commenced and dealt with.

The requirement for the presence of the accused at trial and any exceptions are set out in subsection 7(5.1). Protections for an accused who has already been tried outside of Canada for the alleged conduct are set out in subsection 7(6).

Sections 481.1 to 481.3 of the *Criminal Code* incorporate similar procedural mechanisms regarding the commencement of proceedings and the appearance of the accused at trial, applicable to other extraterritorial *Criminal Code* offences.

### **b) *National Defence Act*, R.S.C. 1985, c. N-5**

The *Code of Service Discipline (CSD)* is the legislative authority of the Canadian Armed Forces military justice system and establishes the following:

- who is subject to the military justice system;
- the service offences for which a person can be charged and the maximum punishment that may be imposed;
- who has the authority to arrest, hold and release CAF members from custody;
- service tribunals and their jurisdiction to conduct trials of persons charged with service offences; and
- establishes processes for the review and appeal of findings and sentence after trial

Specifically, section 60 of the NDA outlines who is subject to the CSD and extraterritorial jurisdiction is addressed in sections 67, 130(1)(b) and 132.

Pursuant to section 60 members of the Canadian Armed Forces ("CAF") are subject to the CSD when deployed on UN missions abroad. The NDA extends to civilians in certain circumstances, where civilians are "attached to" or "accompanying" Canadian Forces units. As a result, civilians who would not otherwise be subject to the *Code of Service Discipline* are subject to the CSD if they are:

- *a person serving in the position of an officer or non-commissioned member of any force raised and maintained outside Canada by Her Majesty in right of Canada (paragraph 60(1)(e))*
- *a person who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place (paragraph 60(1)(f))*
- *a person who, in respect of any service offence committed or alleged to have been committed by the person, is in civil custody or in service custody (paragraph 60(1)(i))*
- *a person who while serving with the Canadian Forces under an engagement with the Minister whereby the person agreed to be subject to [the Code of Service Discipline] (paragraph 60(1)(j))*

Service offences under the *CSD* include uniquely military offences ordinary Canadian criminal offences, other federal offences and in certain circumstances, offences under foreign laws.

### **c) *Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10***

The Royal Canadian Mounted Police ("RCMP") is Canada's federal and national police force primarily engaged with law enforcement at the federal level. Members of the RCMP may be deployed to serve in UN operations abroad in various capacities, as envisioned by section 4 of the *Royal Canadian Mounted Police Act* ("RCMP Act").

Part IV of the RCMP Act regulates the conduct of the members of the RCMP regardless of where they serve. The underlying purposes of Part IV include:

- *to ensure that members are responsible and accountable for the promotion and maintenance of good conduct in the Force (paragraph 36.2(c))*

- to provide for the establishment of a Code of Conduct that emphasizes the importance of maintaining the public trust and reinforces the high standard of conduct expected of members (paragraph 36.2(b))
- to respect the rights of all persons (paragraph 37(a))
- to maintain the integrity of the law, law enforcement and the administration of justice (paragraph 37(b))
- to perform the member's duties promptly, impartially and diligently, in accordance with the law and without abusing the member's authority (paragraph 37(c))
- to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue (paragraph 37(e))
- to maintain the honor of the Force and its principles and purposes (paragraph 37(h))

Members of the RCMP are subject to a code of conduct, the breach of which renders them liable to be tried by the Conduct Board and the criminal justice system. According to section 39 of the RCMP Act such members of the RCMP may be dealt with under the RCMP Act either in or outside Canada:

*39(1) Every member who is alleged to have contravened a provision of the Code of Conduct may be dealt with under this Act either in or outside Canada,*

*(a) whether or not the alleged contravention took place in or outside Canada and*

*(b) whether or not the member has been charged with an offence constituted by, included in or otherwise related to the alleged contravention or has been tried, acquitted, discharged, convicted or sentenced by a court in respect of such an offence.*

*No interference with jurisdiction of courts*

*(2) Nothing in this Act affects the jurisdiction of any court to try a member for any offence triable by that court.*

The *Code of Conduct of the Royal Canadian Mounted Police* also mentions that the *Code* applies to every member of the Force and establishes responsibilities and the standard of conduct for members, on and off duty, in and outside Canada.

#### **d) Crimes Against Humanity and War Crimes Act, S.C. 2000, c.24**

Canada became the first State to incorporate the obligations of the *Rome Statute of the International Criminal Court* ("Rome Statute") into its domestic laws, with the enactment of the *Crimes Against Humanity and War Crimes Act* ("CAHWCA") in June 2000. The CAHWCA criminalizes the most serious crimes of concern to the international community, as defined under Articles 5-8 of the Rome Statute. Under the CAHWCA, Canadian courts have jurisdiction to prosecute acts of genocide, crimes against humanity, and war crimes (section 6) and breaches of responsibility by military commanders or superiors (section 7), when alleged to have been committed abroad and when the jurisdictional requirements of section 8 of the CAHWCA are met.

Section 8 of the CAHWCA provides:

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

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

Under section 9 of the CAHWCA, a person may be tried in any territorial division in Canada in respect of offences alleged to have been committed outside of Canada.

The *Criminal Code* provisions relating to the presence of an accused at trial, and any exceptions, also apply to these prosecutions (subsection 9(2) of the CAHWCA). Proceedings under sections 6 and 7 of the CAHWCA may be commenced only with the personal consent of the Attorney General of Canada.

#### **e) *Corruption of Foreign Public Officials Act, S.C. 1998, c.34***

The *Corruption of Foreign Public Officials Act* ("CFPOA") is Canadian legislation that implements the Organisation for Economic Co-operation and Development *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. Offences created by the CFPOA (bribing foreign public officials, falsifying accounts, etc.) apply to Canadian nationals and permanent residents deployed as UN officials and experts on mission. The CFPOA applies to natural persons – Canadian citizens and permanent residents – as well as legal persons, such as corporations organized under the federal or provincial/territorial laws of Canada.

Section 5 of the CFPOA extends jurisdiction to acts committed outside Canada:

5 (1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 or 4 — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under that section — is deemed to have committed that act or omission in Canada [ ].

The definition of "foreign public official" includes officials of international organisations such as the UN. This means that a Canadian who offered or paid a bribe to a UN official could be prosecuted regardless of where the offence took place.

The CFPOA does not address "passive corruption" scenarios where bribes are solicited or accepted by a person who is an international official of Canadian nationality or residence. This means that a Canadian who solicited or accepted a bribe in the course of working as a UN official or expert on mission could not be prosecuted.

#### **Conclusion**

The Government of Canada agrees with the Secretary General that criminal malfeasance by persons exploiting their status and positions as UN officials or experts on mission represents a serious threat to the credibility and work of the UN and the thousands of international civil servants who serve the public interest with honesty, integrity and professionalism. We also

agree that, as the UN has neither the jurisdiction nor the capacity to deal with serious criminal cases, this is primarily a matter for the Member States whose nationals serve with the UN in various capacities to address, bearing in mind that a balance must be struck in which criminality of any kind can be investigated, prosecuted and punished quickly and effectively, while at the same time protecting the human rights of accused persons and the functional independence and neutrality of the UN and its officials. Canada is committed to finding jurisdictional and practical responses to this problem and to the investigation and prosecution of any offences alleged to have been committed by Canadians to the full extent of our capacity and jurisdiction.