

SCOPE AND APPLICATION OF UNIVERSAL JURISDICTION IN CANADA

The Scope of Universal Jurisdiction

Canada recognizes universal jurisdiction as a well-established principle of international law over the most serious international crimes. Some crimes are sufficiently serious so that universal or global denunciation is warranted. These crimes attack the interests of all States; and as such, it is in the interests of all States to ensure that these crimes are suppressed and that the perpetrators are prosecuted.

These serious international crimes are established in customary international law (e.g., piracy, slavery, or torture) and some have been codified in international legal instruments (e.g., crimes established by the *Rome Statute of the International Criminal Court*) and exist independent of domestic criminal law.

The Application of Universal Jurisdiction in Canada

Canada has incorporated the principle of universal jurisdiction into domestic legislation by allowing Canadian courts to prosecute certain crimes that did not take place in Canada.

The Government of Canada takes seriously its responsibility to ensure that Canada is not a safe haven for perpetrators of serious international crimes. In 2000, Canada enacted the *Crimes Against Humanity and War Crimes Act* (CAHWCA)¹ to implement into Canadian law violations of international criminal law and international humanitarian law that are subject to individual criminal responsibility in the *Rome Statute of the International Criminal Court* (the *Rome Statute*).² The CAHWCA extends criminal liability in a manner consistent with the *Rome Statute* and at times goes beyond it, including within its ambit war crimes arising out of customary international humanitarian law and international criminal law. As a result, the CAHWCA is structured to accommodate new developments in international criminal law, whether originating from the International Criminal Court or other international law sources.

¹ S.C. 2000, c. 24.

² UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

The *Criminal Code* of Canada also extends criminal liability under universal jurisdiction for certain offences, for the most part when linked to the presence of the person in Canada after the commission of the alleged offence.

The cases of *Munyaneza*³ and *Mungwarere*⁴, are two examples in which Canadian domestic courts prosecuted individuals in Canada for crimes committed in Rwanda in 1994.

Complementarity:

Canada recognizes that the primary responsibility for investigating and prosecuting international crimes rests with the State in which the criminal conduct occurred and the State of nationality of the perpetrators. States with the territorial jurisdiction are often in the best position to achieve justice, given their access to evidence, witnesses and victims, and their ability to enforce sentences.

However, universal jurisdiction is an important complementary mechanism that can fill a jurisdictional gap in circumstances where the territorial State is unwilling or unable to exercise jurisdiction. In addition, all States, consistent with their international obligations and domestic law, should assist national courts and international tribunals in prosecuting serious international crimes by providing all available means of cooperation, including mutual legal assistance to assist them in obtaining evidence.

Presence in Canada:

Canada generally conditions its universal jurisdiction on presence of the perpetrator in Canada after the commission of the alleged offence. Due to limited resources and investigative challenges, Canadian officials will not open an investigation where the alleged perpetrator is not present in the country or where he or she has not been identified.

³ *R. v. Munyaneza*, Que Sup. Ct, 2009 QCCS 2201. Convicted of genocide, crimes against humanity, and war crimes. On October 29, 2009 he was sentenced to life imprisonment after a 2-year trial. On May 7, 2014, the Quebec Court of Appeal dismissed his appeal and on December 18, 2014, the Supreme Court of Canada dismissed his motion for leave to appeal.

⁴ *R. v. Mungwarere*, Ont. Sup. Ct. Case number 2011 CSON 1254. On July 5, 2013, he was acquitted after a 26-week trial of charges of genocide, crimes against humanity, and war crimes.

The definition of “present in Canada” has not been litigated, but in practice, it is defined as longer than a fleeting visit. Should an alleged perpetrator depart Canada during an investigation, Canadian officials assess whether it is permanent or temporary. If the individual is determined to have permanently left Canada, officials then consider whether or not to continue with the criminal investigation. It may be, in such instances, that a different type of remedy implicating immigration status is preferred.

Decision to initiate an investigation:

Once a partner in Canada’s War Crimes Program receives a criminal allegation pursuant to the CAHWCA, a preliminary assessment of the allegation is submitted to the File Review Committee (FRC) that is composed of the Department of Justice, Canadian Border Services Agency, Immigration, Refugees and Citizenship Canada and the Royal Canadian Mounted Police. The FRC decides how to proceed with the allegation, (i.e., no action, commence a criminal investigation, commence immigration proceedings). The criteria deliberated are: the level of personal involvement of the suspect, the type of crime, and the likelihood of success. In practice, authorities consider the alleged perpetrator’s presence in Canada, as noted above; whether they have the ability to conduct investigations; and what type of crimes are alleged. To assess their ability to conduct investigations, authorities take into consideration access to the evidence, the availability of the evidence, access to the country where the crime was committed, and the possibility of cooperation with that country.

Prosecutorial Discretion:

All crimes in Canada are subject to prosecutorial discretion. The Public Prosecution Service of Canada Deskbook (PPSC Deskbook) contains guidelines to assist prosecutors in deciding whether to proceed with a prosecution for crimes pursuant to the *Criminal Code* and pursuant to the CAHWCA.⁵ The PPSC Deskbook articulates two fundamental principles that guide decisions on whether or not to prosecute: the existence of a reasonable prospect of conviction and public interest.

The “reasonable prospect of conviction” test requires that there be more than a *prima facie* case, but does not require a probability of conviction. The assessment takes into account the availability and credibility of witnesses, admissibility of evidence and possible defences. The consideration of possible defences includes potential immunities or amnesties that may apply. The public interest criterion is

⁵ Public Prosecution Service of Canada Deskbook, 1 March 2014, available at: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> (PPSC Deskbook 2014).

informed by the gravity of the alleged offence; the accused person's circumstances, including age and background; the accused's alleged degree of culpability; the prosecution's likely effect on the public's confidence in the administration of justice; the need for specific or general deterrence; the entitlement of other persons to reparations if the prosecution proceeds; whether the prosecution would necessarily entail the disclosure of sensitive or confidential information; and the degree of public concern surrounding the alleged offence. In addition, for universal jurisdiction cases, the international context of the case will be considered. The decision to prosecute is assessed on an on-going basis throughout the case. For instance, if key evidence becomes no longer available, the viability to continue will be re-assessed. A decision not to prosecute can be challenged by way of judicial review.

Double jeopardy

If a person was previously tried in another State for the same act, he or she can plead *autrefois acquit*, *autrefois convict* or pardon and the person is deemed to have been so tried and dealt with in Canada.⁶ The person will not be deemed to have been so tried and dealt with under the CAHWCA, if it is found that the court proceedings in that foreign State "(a) were for the purpose of shielding the person from criminal responsibility; or (b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice."⁷

Consent of the Attorney General of Canada:

The CAHWCA, the *Criminal Code* and the *Geneva Conventions Act* include provisions for the consent of the Attorney General of Canada or the Deputy Attorney General of Canada for universal jurisdiction offences in an effort to permit foreign policy, concurrent claims of jurisdiction and other implications to be considered. Therefore, it is not possible for private actors to lay charges.

⁶ *Criminal Code*, R.S.C., 1985, c. C-46, s. 7(6), s. 607; CAHWCA s.12(2).

⁷ CAHWCA s. 12(2).

**Provisions of Canadian legislation implementing international conventions and
applying universal jurisdiction**

Crimes or category of crimes	Legislation⁸	Relevant treaties (international, regional, bilateral, customary international law)
Crimes against humanity	s. 6(1) CAHWCA	<i>Rome Statute</i> , customary international law, conventional international law and criminal according to the general principles of law recognized by the community of nations (see ss.6(3), (4) and (5) CAHWCA)
War crimes	s. 6(1) CAHWCA *s. 3(1) <i>Geneva Conventions Act</i>	<i>Rome Statute</i> , customary international law, conventional international law applicable to armed conflicts (see ss. 6(3) and (4) CAHWCA), <i>Geneva Conventions</i>
Genocide	s. 6(1) CAHWCA	<i>Rome Statute</i> , customary international law, conventional international law and criminal according to the general principles of law recognized by the community of nations (see ss. 6(3) and (4) CAHWCA), <i>Convention on the Prevention and Punishment of the Crime of Genocide (1948)</i>
Conspiracy, attempt, etc. to commit crimes against humanity, war crime and genocide	s. 6(1.1) CAHWCA	<i>Rome Statute</i>
Breach of responsibility by military commander	s. 7(1) CAHWCA	<i>Rome Statute</i>
Breach of responsibility by a superior	s. 7(2) CAHWCA	<i>Rome Statute</i>
Conspiracy, attempt, etc. for breach of responsibility by military commander or superior	s. 7(2.1) CAHWCA	<i>Rome Statute</i>
Hijacking, endangering the safety of aircraft or airport	s. 7(2) <i>Criminal Code</i>	<i>Convention for the Suppression of Unlawful Seizure of Aircraft (1970)</i> , <i>Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)</i> and <i>Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation supplementary to the Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988)</i>
Seizing control of ship or fixed platform attached to continental shelf	s. 7(2.1) <i>Criminal Code</i>	<i>Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)</i> , <i>Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988)</i>

⁸ Prior to the *Crimes against Humanity and War Crimes Act* coming into force, war crimes and crimes against humanity were charged under the *Criminal Code* (e.g., *R. v. Finta*, [1994] 1 SCR 701). These sections have now been repealed.

Crimes or category of crimes	Legislation⁸	Relevant treaties (international, regional, bilateral, customary international law)
Seizing control of ship or fixed platform not attached to continental shelf	s. 7(2.2) <i>Criminal Code</i>	<i>Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf</i> (1988)
Possession, use, commission of indictable offence to obtain, or threat to commit offence with nuclear material outside Canada	s. 7(2.21) <i>Criminal Code</i>	<i>Convention on the Physical Protection of Nuclear Material</i> (1980) as amended by the <i>Amendment to the Convention on the Physical Protection of Nuclear Material</i> (2005); <i>International Convention for the Suppression of Acts of Nuclear Terrorism</i> (2005)
Offence against internationally protected person	s. 7(3) <i>Criminal Code</i>	<i>Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents</i> (1973)
Hostage taking	s. 7(3.1) <i>Criminal Code</i>	<i>International Convention against the Taking of Hostages</i> (1979)
Torture	s. 7(3.7) <i>Criminal Code</i>	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> (1984)
Offence against United Nations or associated personnel	s. 7(3.71)	<i>Convention on the Safety of United Nations and Associated Personnel</i> (1994)
Explosive or other lethal device at government or transportation infrastructure	s. 7(3.72) <i>Criminal Code</i>	<i>International Convention for the Suppression of Terrorist Bombings</i> (1997)
Providing property for terrorist activity	s. 7(3.73) <i>Criminal Code</i>	<i>International Convention for the Suppression of the Financing of Terrorism</i> (1999)
Piracy	* s. 74 <i>Criminal Code</i>	<i>United Nations Convention on the Law of the Sea</i> (1982)

* denotes full universal jurisdiction. All other references in the table, are custodial universal jurisdiction meaning that they only apply in cases where a person is, after the commission of the offence, present in Canada