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INTERNATIONAL CRIMINAL LAW

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INTRODUCTION

The concept of international criminal law usually refers to two distinct fields of law: the international dimensions of domestic criminal law; and what one might call international criminal law properly speaking, that is, the development of substantive criminal law and legal institutions at the international level itself.

INTERNATIONAL ASPECTS OF DOMESTIC CRIMINAL LAW

A. Overview

Although domestic police, prosecutors and courts are constrained to operating within their particular territorial jurisdiction, criminal behaviour recognizes no borders. Therefore, states have had to develop legal tools to deal with cases where one or more of the following – the location of the crime, the accused, evidence, or criminal proceeds – is in another country.

These international aspects of national criminal law enforcement include extraterritorial jurisdiction as well as various mechanisms of inter-state cooperation in penal matters, such as extradition, mutual legal assistance, and seizure and forfeiture of criminal proceeds.

B. Extraterritorial Criminal Jurisdiction

1. Overview

Every state assumes jurisdiction over the prosecution and punishment of crimes committed within its borders (the territorial principle of jurisdiction).

In addition, states generally assert some criminal jurisdiction over at least certain of their nationals when they commit crimes abroad (the active personality principle of jurisdiction). States' global criminal jurisdiction over their military personnel is a common example of this. Some states – particularly, many continental European states – exercise general extraterritorial criminal jurisdiction over all their citizens.

States sometimes assert extraterritorial jurisdiction in cases where one of its nationals is the victim of a crime (the passive personality principle of jurisdiction). However, this basis of jurisdiction is less common than either the territorial principle or the active personality principle.

For states such as Canada whose criminal law is based on English law, the territorial principle of jurisdiction is the rule and extraterritorial jurisdiction is the exception. Section 6(2) of the Canadian *Criminal Code* (R.S.C. 1985, c. C-46, as amended) provides that, subject to the Code or other federal legislation to the contrary, no person may be convicted of an offence committed outside Canada. However, even for states such as Canada, which favour the territorial principle, there has been a progressive increase in assertions of extraterritorial criminal jurisdiction to deal with international and trans-national crime, often pursuant to international treaty commitments.

2. Canadian Extraterritorial Jurisdiction

Canadian law currently provides for general extraterritorial jurisdiction in the following contexts:

Context	Legislative Provision
Offences committed by Canadian military personnel and other persons subject to the Code of Service Discipline.	*National Defence Act*, R.S.C. 1985, c. N-5, as amended, sections 67, 130 and 132
Any indictable offence committed by a Canadian federal public servant.	*Criminal Code*, section 7(4)
Any indictable offence committed on or in respect of Canadian aircraft.	*Criminal Code*, section 7(1)(a)
Any indictable offence committed on an aircraft in flight where the aircraft lands in Canada.	*Criminal Code*, section 7(1)(b)
Various offences pertaining to Canada's exclusive economic zone or continental shelf.	*Criminal Code*, section 477.1(a) and (b)
Offences committed in the course of "hot pursuit" from Canada.	*Criminal Code*, section 477.1(d)

Context	Legislative Provision
Any offence committed by a Canadian citizen which is outside the territory of any state.	*Criminal Code*, section 477.1(e)
Any indictable offence committed during a space flight in connection with the Civil International Space Station by a Canadian crew member.	*Criminal Code*, section 7(2.3)
Any indictable offence committed during a space flight in connection with the Civil International Space Station by a non-Canadian crew member: against a Canadian crew member; or on, or in relation to, a Canadian flight element of the Space Station.	*Criminal Code*, section 7(2.31)

Canada also asserts specific extraterritorial jurisdiction over the following offences where there is some specified nexus between Canada and the offender, the victim or intended victim, or the circumstances of the offence:

Offence	Legislative Provision
High treason or treason against Canada	*Criminal Code*, section 46(3)
Piracy	*Criminal Code*, sections 74 and 75
Forgery or fraud in relation to Canadian passports	*Criminal Code*, section 57
Fraudulent use of Canadian citizenship certificate	*Criminal Code*, section 58
Bigamy	*Criminal Code*, section 290
Hijacking or endangering the safety of an aircraft or airport	*Criminal Code*, section 7(2)
Seizing control, or endangering the safety of, a ship or fixed platform at sea	*Criminal Code*, section 7(2.1) and (2.2)
Various offences directed against "internationally protected persons" (i.e., various national and international officials and their families)	*Criminal Code*, section 7(3)
Hostage taking	*Criminal Code*, section 7(3.1)
Various offences involving nuclear material	*Criminal Code*, section 7(3.2), (3.3) and (3.4)
Torture	*Criminal Code*, section 7(3.7)
Genocide	*Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, sections 6 and 8
Crimes against humanity	*Crimes Against Humanity and War Crimes Act*, sections 6 and 8
War crimes	*Crimes Against Humanity and War Crimes Act*, sections 6 and 8
Breach of command responsibility in relation to genocide, a crime against humanity or a war crime	*Crimes Against Humanity and War Crimes Act*, sections 7 and 8
Various sexual offences against children	*Criminal Code*, section 7(4.1)
Conspiracy to commit an offence	*Criminal Code*, section 465(3) and (4)

C. Extradition

Extradition is the delivering up of a person by a state for trial and/or punishment in another state or to an international tribunal.

States' extradition obligations are generally set out in bilateral treaties or multilateral conventions, although internally, extradition is governed by domestic laws.

A state is generally not obliged to extradite someone for conduct which is not also a crime under its own laws (this rule is known as the double criminality requirement). Also, those states which exercise general extraterritorial criminal jurisdiction over their own nationals (e.g., many continental European states) often do not extradite them, but will instead prosecute them at home.

In Canada, extradition is governed by the *Extradition Act* (S.C. 1999, c. 18). (For more information on the Act, see Parliamentary Research Branch Legislative Summary 320-E.) The extradition process is divided into two phases:

- The role of the **judicial phase** is to determine that the person before the court is the person sought by the requesting state and that there is some evidence to indicate that the person is guilty of a crime for which they may be extradited. If the court is satisfied as to these matters, then the person is committed for surrender.
- In the **executive phase**, the federal Minister of Justice decides whether and on what conditions, if any, the person is actually to be surrendered to the requesting jurisdiction.

Extradition and Human Rights

Canada, like other countries, has reserved the right to seek assurances that certain punishments (such as the death penalty and corporal punishment) will not be imposed if a person is surrendered. This is intended to give Canada the flexibility needed to ensure that it is not handing people over to foreign countries to suffer treatments or punishments which are unacceptable by Canadian or international human rights standards, while at the same time ensuring that offenders do not escape justice entirely.

However, successive Canadian governments have been relatively sparing in their use of this option. There has been a concern that, if such assurances are sought too readily on behalf of foreign fugitives, Canada could become a destination of choice, or "safe haven," for the world's worst criminals. In general, the courts have upheld this approach, ruling that only where the punishment in a case would "shock the conscience" of Canadians would the *Canadian Charter of Rights and Freedoms* compel the government to exercise this option. In this context, the courts have ruled that lengthy mandatory jail terms for drug offenders (see: *Johnson* v. *United States of America* (September 18, 1997), Doc. CA C23556, C24767 (Ont. C.A.), leave to appeal refused 111 O.A.C. 396 (note) (S.C.C.); and *United States of America* v. *Whitley* (June 28, 1993) (Ont. Gen. Div.), affirmed (1994), 94 C.C.C. (3d) 447, 119 D.L.R. (4th) 693 (Ont. C.A.), affirmed [1996] 1 S.C.R. 467) do not "shock the conscience" of Canadians; and, until recently, the Supreme Court of Canada had reached the same conclusion with respect to extradition of persons to face the death penalty for first degree murder (see: *Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779).

On 15 February 2001, however, the Supreme Court of Canada revisited its previous opinion on death penalty extradition and held that – given the growth in abolitionist sentiment internationally, as well as the finality of the penalty combined with increased evidence of the fallibility of even advanced criminal justice systems – extradition to face the death penalty generally does "shock the conscience" and is therefore contrary to the principles of fundamental justice of section 7 of the Charter (see: *United States* v. *Burns*, [2001]1 S.C.R. 285).

D. Mutual Legal Assistance

Mutual legal assistance refers to judicial forms of inter-state cooperation in criminal law enforcement, apart from extradition. Canada's *Mutual Legal Assistance in Criminal Matters Act* (R.S.C. 1985, c. 30 (4th Supp.), as amended) provides for such legal assistance as:

- conducting searches and seizures;
- having witnesses examined under oath;
- providing for witness testimony in foreign proceedings via audio-visual link;
- transferring detained persons outside Canada for foreign criminal investigations or proceedings;
- lending exhibits of evidence from Canadian court proceedings; and
- enforcing foreign fines.

Giving effect to such requests for legal assistance generally requires the existence of a bilateral or multilateral agreement providing for such assistance on a reciprocal basis and the approval of the Minister of Justice, as well as the involvement of Canadian courts and competent federal and provincial law enforcement authorities.

Canada's *Criminal Code* provisions governing the seizure and forfeiture of proceeds of crime extend to crimes committed outside of Canada (see definition of "proceeds of crime" in Part XII.2, section 462.3). Section 11 of the *Seized Property Management Act* (S.C. 1993, c. 37) permits Canada to share forfeited proceeds with foreign governments on a reciprocal basis where their law enforcement agencies have assisted in the investigation of the offences leading to forfeiture.

Less formal cooperation between police forces from different countries is also available, either on an *ad hoc* bilateral basis, or multilaterally through the International Criminal Police Organization (Interpol).

INTERNATIONAL CRIMES AND TRIBUNALS

A. International Crimes

The development of substantive international criminal law reflects a relatively recent recognition that individuals, as well as states, are proper subjects of international law. The sources of international criminal law, as with international law generally, include: conventional international law (i.e., treaties), customary international law, and general principles of law recognized by the world's major national legal systems (see *Statute of the International Court of Justice*, Article 38). Customary international law includes a body of peremptory rules of

international law, known as *jus cogens* ("the compelling law"), from which states may not derogate. International criminal law is derived primarily from international conventions and *jus cogens*.

However, it is not always easy to determine what are crimes under international law.

International treaties rarely explicitly declare something to be an international crime, but rather impose certain penal duties on states parties in relation to the conduct in question: criminalization, establishment of certain bases of criminal jurisdiction, prosecution, extradition, and mutual legal assistance.

Determining whether a crime has risen to the level of international *jus cogens* requires a review of: international pronouncements which reflect a recognition that the crime is part of customary international law (also called *opinio juris* evidence); treaty language which suggests that the criminal prohibition in question has a higher status among international law rules; the number of states which have ratified treaties related to the crime; the record of international investigations or prosecutions of the crime; and scholarly writings.(1) *Jus cogens* crimes under international law would generally be those which affect the interests of the world community as a whole because they represent a threat to international peace and security or shock the conscience of humanity.(2)

A review of relevant international conventions and the indicia of *jus cogens* suggests the existence of the following categories of crimes under international law:

1) aggression;
2) genocide;
3) crimes against humanity;
4) war crimes;
5) crimes against United Nations and associated personnel;
6) unlawful use or possession of prohibited weapons;
7) theft of nuclear materials;
8) apartheid;

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(1) M. Cherif Bassiouni, *International Criminal Law*, 2nd ed., Vol. 1: "Crimes," Ardsley, N.Y.: Transnational Publishers, Inc., 1999, p. 41.

(2) *Ibid*., p. 42.

9) slavery;
10) torture and other forms of cruel, inhuman or degrading treatment;
11) piracy;
12) aircraft hijacking and other acts against international air safety;
13) acts against the safety of maritime navigation and platforms;
14) threat and use of force against internationally protected persons;
15) taking of civilian hostages;
16) unlawful use of the mail;
17) unlawful traffic in drugs;
18) destruction or theft of national treasures;
19) unlawful acts against certain protected elements of the environment;
20) international traffic in obscene materials;
21) falsification and counterfeiting;
22) unlawful interference with submarine cables; and
23) bribery of foreign public officials.(3)

Of the foregoing crimes, the following are thought to rise to the level of *jus cogens*: aggression; genocide; crimes against humanity; war crimes; piracy; slavery; and torture.(4) In other words, for these crimes, the penal obligations of states arise independent of, and notwithstanding, any treaty obligations.

Unlike most national legal systems, there is as yet no comprehensive and authoritative codification of offences and principles of liability at the international level. However, the International Law Commission's 1996 Draft Code of Crimes Against the Peace and Security of Mankind, and now the 1998 *Rome Statute of the International Criminal Court*, represent at least partial efforts at such a codification.

(3) *Ibid*., pp. 32-33.

(4) *Ibid*., p. 41.

B. International Criminal Tribunals

1. The *Ad Hoc* Tribunals

The notion of an international court to deal with persons accused of international crimes dates back to 1919 when the Treaty of Versailles called for the creation of an *ad hoc* international tribunal to try German war criminals of World War I, including the German Kaiser. No such body was established. An alternative arrangement was made whereby German war criminals would be tried by a German court.

After World War II, international tribunals were established at Nuremberg and Tokyo to try the key "war criminals" of the Axis powers for crimes against peace (aggression), crimes against humanity (including genocide), and traditional war crimes.

Almost 50 years after the establishment of the Nuremberg and Tokyo tribunals, as a result of vicious civil wars in Yugoslavia and Rwanda, the world was again moved to action in this area. In 1993 and 1994, respectively, the United Nations Security Council established international criminal tribunals to deal with war crimes and crimes against humanity in the former Yugoslavia and Rwanda.

However, all these efforts were *ad hoc* and temporary, so that international criminal justice has so far been inherently selective. What has been missing is a permanent and independent tribunal with global jurisdiction.

2. The Road to Rome: Establishment of a Permanent International Criminal Court

In the late 1940s and early 1950s, building on the experience with the Nuremberg and Tokyo tribunals, an attempt was made at the United Nations to both codify the relevant principles of international criminal law that had been developed and to create a permanent international criminal court. However, the onset of the Cold War diminished the political will for the creation of such an institution and the project languished for more than three decades.

In 1989, the UN General Assembly requested the International Law Commission (ILC) to prepare a report on the establishment of an international criminal court to deal with the problem of international drug trafficking. The ILC responded in 1990 with a report on the broader question of a permanent international court to deal with international crimes generally. The ILC's mandate was extended and, by 1994, it had completed a draft statute for an international criminal court. In 1996, the General Assembly referred the matter to a preparatory committee which proceeded to do further work on the Draft Statute. Finally, in December 1997,

the General Assembly called for a diplomatic conference to be held in Rome from 15 June to 17 July 1998 to consider the Draft Statute.

The *Rome Statute for the International Criminal Court* was adopted by the representatives of 120 states at the Rome diplomatic conference, on 17 July 1998. Seven states voted against the Statute and there were 21 abstentions.

As of 15 October 2001, a total of 139 countries had signed the Rome Statute and 43 states had ratified it. The International Criminal Court (ICC) will come into existence after 60 states have ratified the Rome Statute.

The ICC's jurisdiction will be limited to the crimes of aggression (yet to be defined for the purposes of the Rome Statute), genocide, crimes against humanity and war crimes, and will complement the jurisdiction of national criminal justice systems which will retain primary responsibility for the prosecution of international crimes. The Court's purpose will be to close the gaps in the current system by acting where states that would otherwise exercise jurisdiction are either unwilling or unable to do so. Furthermore, either the state where the offence took place (the territorial state) or the state of the accused's nationality will have to be a party to the ICC Statute before the Court could take jurisdiction, unless the case is referred to the Court by the UN Security Council.

As with the current *ad hoc* UN tribunals for the former Yugoslavia and Rwanda, the ICC will have to rely largely on states' voluntary cooperation with the Court. However, a state's refusal to fulfill its obligations to the ICC or the *ad hoc* tribunals could in theory, be taken up by the UN Security Council and dealt with as a threat to international peace and security with the possibility of enforcement measures being taken against the state.

Canada signed the Rome Statute on 18 December 1998. In June 1999, Bill C-40 (1st Session, 36th Parliament) was enacted (S.C. 1999, c. 18) modifying Canada's extradition and mutual legal assistance laws to enable Canada to cooperate with requests from international criminal tribunals as well as other states (for more information on this Act, see Legislative Summary 320-E, prepared by the Parliamentary Research Branch, Library of Parliament). In June 2000, Bill C-19 (2nd Session, 36th Parliament) was adopted (S.C. 2000, c. 24), which ensures Canada's ability to cooperate fully with the International Criminal Court (for more information on this Act, see Legislative Summary 360-E, prepared by the Parliamentary Research Branch, Library of Parliament). The adoption of Bill C-19 put Canada in a position to ratify the ICC Statute, which it did on 7 July 2000, thereby becoming the 14th state to do so.