

The Challenges of National Prosecutions for International Crimes – Canada

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Introduction

In order to explain the challenges of prosecutions for international crimes in Canada, it would be useful to put such prosecutions in the larger context of the Canadian criminal law system and the manner in which criminal investigations are conducted.

The Canadian substantive law with respect to international crimes is contained in the Crimes against Humanity and War Crimes Act². This law regulates the international crimes of genocide, crimes against humanity and war crimes by providing partial definitions of genocide and crimes against humanity while also making reference for those crimes and for war crimes in its entirety to international criminal law, both conventional and customary³. This methodology allows the law pertaining to international crime to remain current with international developments and jurisprudence.

For procedure and evidence the normal rules of criminal law apply which were of course not originally developed with international crimes in mind. Two aspects of such rules are worthwhile mentioning. The first one is that bar a few exceptions the rule against hearsay is still dominant in the sense that hearsay evidence is inadmissible in Canada (rather than admissible but the weight of it will be determined at trial together with other evidence as is the case in civil law countries and international tribunals). This means that in any criminal trial, including one with international offences, viva voce evidence will form the backbone of criminal proceedings. Secondly, there is an expectation that witnesses in a trial will testify in Canada; it is possible to have witnesses give evidence outside by way of rogatory commission where a Canadian judge, the prosecution and the defence all go to a country where the witnesses are living but this is only possible if those witnesses are not willing or able to travel to Canada due to old age, sickness or because they are incarcerated. In the first modern criminal war crimes case, the Munyaneza trial, the prosecution called 27 witnesses in 2007, 14 during a rogatory commission in Rwanda in January and February and another 13 in Canada between March and the middle of October.

The manner in which criminal investigations are conducted in Canada is different from civil law countries and the international tribunals in that the police in Canada are solely responsible for the carrying out of such investigations. War crimes investigations are the purview of the War Crimes Section of the Royal Mounted Canadian Police (RCMP).

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² See <http://laws.justice.gc.ca/en/showtdm/cs/C-45.9?noCookie>.

³ See sections 4(3) and 6(3).

While there is close co-operation between the Crimes against Humanity and War Crimes Section of the Department of Justice and while the RCMP seek out on an on-going basis legal and strategic advice from the Department of Justice, it is the police who ultimately decide which cases to investigate and the path the investigations will take. The one difference between regular criminal investigations and war crimes investigations is that it is not the RCMP who will lay criminal charges but the Attorney General or his deputy who needs to give personal consent before proceedings under the Crimes against Humanity and War Crimes Act can be commenced; the Crimes against Humanity and War Crimes Section of the Department of Justice will make recommendations in this regard.

The Investigation

Due to the close co-operation between the war crimes office of the RCMP and the Department of Justice, investigations have a number of distinct phases in some of which Justice takes a lead role while the RCMP does the same for other parts but always with the understanding that the RCMP is ultimately responsible for the investigation. At the moment there are about 60 files in the criminal inventory, which is the result of a screening process in which all four partners of the Canadian War Crimes Program (in addition to the RCMP and Justice, the Canadian Border Services Agency or CBSA and Citizenship and Immigration Canada or CIC are also part of this program) participate through the so-called file review process. This file review process is designed to ensure that the appropriate remedies in the war crimes program are applied to persons living in Canada; these remedies can vary from refusing asylum and deporting war criminals from Canada to applying criminal remedies such as extradition or a criminal trial and a determination is made during the file review process which remedy will be applied to which case based on predetermined criteria. The main criteria are that only cases with allegations of personal involvement or command/superior responsibility will be added to the criminal inventory plus a positive assessment that the evidence pertaining to the allegation is corroborated, and that the necessary evidence can be obtained in a reasonably uncomplicated and rapid fashion⁴. All other files (which is the vast majority) will become subject to a civil remedy.

The first phase of a criminal investigation is to seek co-operation with international institutions or other countries where leads or evidence can be found. The co-operation with the ICTY and ICTR has been excellent with all the cases investigated so far. Since the criminal inventory include cases originating from over 15 countries, co-operation has also been sought out with individual countries. At times, the parameters of such co-operation are based on informal understandings while in other cases Memoranda of Understanding have been signed with such countries; Croatia and Honduras are examples of the latter. The informal or more formalized forms of co-operation are negotiated not only to ensure that research and investigations can be conducted in these countries but

⁴ See Canada's Program on Crimes Against Humanity and War Crimes, Ninth Annual Report, 2005-2006, <http://www.cbsa.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html#cip> under "Criminal Investigation and Prosecution".

also to have an agreement that the methods and results of such research and investigations are acceptable in Canadian criminal courts. For instance, it is essential for investigators to be able to ask their questions and receive their answers directly from the persons they are interviewing without any interference; at times, this means a departure of the normal way in which investigations are being conducted in the country from which Canada is seeking co-operation and the arrangements in place are designed to find a compromise whereby both the requirements of both legal systems are adhered to without affecting the Canadian investigation. Similarly, documentary research conducted in the archives of the countries of interest to Canada will often have as result that copies of documents have to be made and returned in a manner acceptable to the Canadian law of evidence which is also addressed in such bi-lateral arrangements.

To bring this issue back to the theme of this conference, it is hoped that any arrangement made by the international tribunals with other institutions for the transfer of documents or information about witnesses will not only be made accessible to countries involved in the investigation of war criminals but that the means of using these types of evidence by other countries will already be part of such an arrangement without the need for countries such as Canada to negotiate such use according to national standards.

After the negotiation of access to documents and witnesses the next step in a Canadian investigation is the research phase whereby an analyst from the Department of Justice war crimes section will study the holdings of either international tribunals or individual countries in order to obtain both information about the organization a suspect belonged to and to obtain leads to possible witnesses to the crimes in which the suspect had been involved in; if the suspect or his organization has been the suspect of another investigation the analysts will also search for previous statements made by witnesses or the suspect. The analyst pursuant to the arrangement made would ideally be able to make notes of the information looked at while also in limited circumstances be able to make copies of essential documents without any limitation imposed. It is important that the details of the arrangements made are conveyed from the negotiating authority to the holders of the documents or witness statements so that no time is lost renegotiating such access.

When the analyst has completed his research and has provided the RCMP investigators with both a historical and contextual report of the situation in which the international crimes under investigation occurred and a list of leads for the investigators to follow up on, the RCMP will start interviewing witnesses, so far almost always outside Canada. Apart from logistical problems such as finding places to interview, especially outside cities or large villages, and finding competent interpreters, police officers usually have to confront four main issues when interviewing witnesses. The first one is the fact that some or a larger number of the witnesses have been contacted beforehand by local authorities in a manner that all the witnesses requested to be seen by the RCMP are aware of who else will be visited by foreign police officers resulting in the witnesses talking to each other before meeting with the RCMP.

Secondly, and related to this issue whereby it is difficult to discern whether a witness's observation or narrative is his or her own or inspired by previous conversation, is the fact that the police officers have to be very careful not to lead the witnesses as they are not familiar with Canadian rules of evidence, especially hearsay, and want to be as helpful as possible to the investigators. This is sometimes exacerbated by the fact that, in spite of the initial arrangements made, local authorities, which will often accompany the Canadian investigators, will attempt to have the RCMP conduct a witness interview according to the rules known to them.

Thirdly, with respect to witness interviews is the fact that in Canada statements taken by the police, which amounts to a summary of what the witness has said is frowned upon by the criminal courts. For that reason witness interviews are at a minimum audiotaped and often videotaped; a transcript of such a tape constitutes the statement of the witness.

Lastly, issues of safety to the witnesses and to police officers can arise, especially in countries where colleagues of the person being investigated still are or have become powerful and might feel threatened by such an investigation.

The Decision to Prosecute

After the RCMP has finished the investigation, the Department of Justice makes a recommendation to the Attorney General whether to initiate a prosecution. Not every completed criminal investigation will result in a criminal prosecution since the Department of Justice has the discretion to determine whether the evidence provided by the RCMP will be sufficient to lay criminal charges⁵.

If criminal charges are not laid, the persons who were investigated can become the subject of a citizen revocation proceeding if they have acquired Canadian citizenship and there is evidence that they obtained their immigration or citizenship status by misrepresentation and were involved in war crime⁶ or immigration related allegations can be levelled against them if the evidence against them meets the lower standard of proof applicable in immigration law with respect to war crimes allegations⁷.

A decision to utilize other than criminal remedies against such persons raises the issue of the procedure to be used for information obtained during a criminal investigation and for a criminal prosecution. While in immigration cases the rules of evidence are more relaxed than in criminal law and in the one case so far only witness statements were used, it was necessary not only to obtain consent from the witnesses to use their statements for a different process but information obtained from international tribunals or foreign

⁵ The discretion to initiate a war crimes prosecution and the criteria to exercise such discretion was discussed by the Federal Court level in the Zhang case, decided in 2006 (<http://decisions.fct-cf.gc.ca/en/2006/2006fc276/2006fc276.html>) which was confirmed on appeal by the Federal Court of Appeal a year later (<http://decisions.fca-caf.gc.ca/en/2007/2007fca201/2007fca201.html>).

⁶ This happened in the Rogan case, which is now before the Federal Court in such a proceedings, see http://cas-nrc-nter03.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=T-1769-07.

⁷ This was the case in the Budimcic file in which CBSA started a revocation of refugee status hearing; see <http://www.cbc.ca/canada/british-columbia/story/2007/12/03/bc-refugee.html>.

countries had also been cleared for the same reason. The use of information received from other countries or international tribunals is not only an issue in the Canadian context where a different procedure was used than originally anticipated but can also become a matter for consideration where witnesses in an investigation by Canada are of interest for criminal investigations in other countries; again, not only witnesses need to be approached to obtain their consent for such a different use but also the international tribunals who might have provided documentation, leads or previous witness or suspect statements.

The tribunals have been again very co-operative in such instances but when their holdings will be transferred to other institutions, it would be very useful to have prior arrangements in place for such alternative uses rather than each country to have to negotiate a bi-lateral or even a multi-lateral agreement between a number of countries on one hand and the new holders of the information on the other. This would apply for information the use of which would not raise question of security of confidentiality; in the latter situation, some special arrangements would need to be made which would need to find a balance between the need for such security and confidentiality and the requirements for national authorities to have such information to conduct an investigation or a prosecution.

The Prosecution

When a decision has been made to prosecute the first issue to be considered is the one of disclosure. In Canadian law all relevant information has to be disclosed to the lawyers of the accused. Disclosure raises two aspects with respect to the interaction of Canadian prosecutors and international tribunals and other countries where evidence was obtained. On the documentary side, all materials originally received need now to be transformed into evidence acceptable to a Canadian court; while it is not necessary to have original documents, an affidavit needs to be provided by the holder from which the materials were obtained which ensures the proper provenance of the materials. Secondly, all statements of the witnesses to be used by the prosecution who have given also interviews in different contexts need to be obtained and disclosed, which can sometimes only be done through an order of the international tribunal or foreign court.

These stringent requirements in Canadian law raises the spectrum of how such co-operation at the prosecution stage can be resolved if their holdings are removed to other institutions. Will the holders of the materials in these new institutions be able and willing to provide a similar type of provenance declaration as has been done in the past? From which institution will a court order be obtained if a confidential document or witness statement is required?

Another issue re disclosure is the fact that a transcript of the audio or videotape needs to be provided to the defence lawyers of all relevant witnesses even if the witness will not be called during the trial. This is a massive undertaking, which not only calls for the actual transcription and translation of the statements but also quality control. Apart from needing professional translators for this aspect of the trial, professional interpreters are

also needed during the criminal trial itself; given the competition for the limited pool of such people among the international tribunals and a number of countries, the identification and training of such people is an essential ingredient for the successful completion of criminal cases, especially if such a trial is conducted in a language not widely spoken. In the cases involving Rwandan suspects such issues came to the fore with respect to Kinyarwanda and the language section of the OTP of the ICTR was extremely helpful to Canada in finding and training interpreters. It is hoped that such a role will continue in the future by other institutions after the completion strategy for the ICTY and ICTR especially has been played out.

Conclusion

Because of the Canadian rules with respect to criminal investigations and prosecutions, a number of hurdles are faced in such processes. Thanks to the co-operation and the understanding of the international tribunals and other countries we were able to overcome most of these hurdles during our criminal investigations.

As mentioned a number of times, the specific challenges were met in investigations and we hope that any plans to transfer information, documentation and materials to other institutions will be carried out in a fashion which will take into account these on-going investigations of Canada and other countries active in this important work to fight against impunity.