

Criteria for Prioritizing and Selecting Core International Crimes Cases

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Canada's Approach to File Review in the Context of War Crimes Cases

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11.1. Introduction

The Forum for International Criminal and Humanitarian Law has stated that the

main concern of the seminar is how criminal justice systems can make use of prioritization criteria with regard to case files that have already been opened.¹

The purpose of this paper will therefore be to explore Canada's use of selection criteria in the file review process. The ultimate objective of file review is the selection and application of the appropriate legal remedy, under Canadian law, where an alleged war criminal is

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¹ "080926 Seminar on criteria, concept paper (version 080725)". See <http://www.fichl.org/activities/criteria-for-prioritizing-and-selecting-core-international-crimes-cases/>

present in Canada. Before commencing an analysis on this specific process, it is important to first provide a contextual background of Canada's approach to the issue of war crimes.²

11.2. Canada's War Crimes Program

The Government of Canada established the War Crimes Program (hereinafter referred to as the "Program") in 1998. The goal of the Program is to enforce Canada's *no safe haven* policy, a policy asserting that "Canada is not a safe haven for anyone involved in crimes against humanity, war crimes, or genocide".³ The Program provides for a co-ordinated governmental response to specific allegations that individuals either already present in or attempting to gain entry into Canada were involved in war crimes. Canada's approach includes a robust effort at its ports of entry and processing overseas to screen out people ineligible to enter the country resulting from involvement in such crimes.⁴ Although these efforts are fundamental aspects of the Program, this paper will focus on the selection of remedies to be applied to individuals already located on Canadian soil.

The Program's objective is to respond to every credible allegation of the presence in Canada of an individual who may have committed war crimes. The Program's approach to the issue is consistent with the *no safe haven* policy. It also ensures respect for our obligations at international law. These international obligations include those arising from the various treaties adhered to over the years as well as those flowing from customary international law. The Program represents Canada's contribution to the international struggle against impunity for war crimes.

² For the purposes of this paper a reference to "war crimes" includes crimes against humanity and genocide.

³ See Canada's Program on Crimes Against Humanity and War Crimes, *Ninth Annual Report*, (Ottawa, ON: CBSA, 2005/2006), online: Canadian Border Services Agency <http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html>.

⁴ Section 35 of the *Immigration and Refugee Protection Act* provides that where there are "reasonable grounds to believe" that someone committed a war crime then that person is "inadmissible" to enter or remain in Canada. See *Immigration and Refugee Protection Act*, C., 2001 c. 27, s. 35, online: <http://laws.justice.gc.ca/en/ShowFullDoc/cs/I-2.5/en>.

The Program brings together four key government departments and agencies: The Department of Citizenship and Immigration (CIC), The Department of Justice (DOJ), The Canadian Border Services Agency (CBSA) and Public Safety Canada (represented by the Royal Canadian Mounted Police, (RCMP)). Other government departments also play critical functions in the enforcement of the *no safe haven* policy and include the Public Prosecution Service of Canada and Foreign Affairs and International Trade Canada to name but two.

The Program ensures that separate government bodies do not operate at cross-purposes. It also avoids duplication of effort through the co-ordination of activities respecting individual cases. All of this is carried out with care so as not to fetter the independence of specific government authorities when charged with executing a particular mandate. For example, when the RCMP conducts an investigation into allegations, they remain in full control of their operations to the exclusion of other government players. With that said, this independence does not prevent the RCMP from seeking advice from analysts or counsel from the Crimes Against Humanity and War Crimes Section of the Department of Justice. In fact, one of the strengths of the Program is the co-ordination of efforts of all of the Program partners as well as the sharing of information between the departments. These activities are of course carried out in accordance with Canada's legal regime governing access to information and privacy.

The Program infrastructure provides for co-ordination and periodic oversight by senior government officials from the operational tier up to the Assistant Deputy Minister (ADM) level for all four departments. The ADMs meet annually and on an *ad hoc* basis when needed to review the activities of the Program and to receive reports from the Program Coordination and Operations Committee (PCOC). PCOC is the principal governing body of the operations of the Program. PCOC meets monthly and consists of the senior managers of all four partners. PCOC develops policy, co-ordinates operations and through a sub-committee assesses cases. The work of the File Review Subcommittee (FRS) is the focus of the remainder of this paper. This committee is responsible for applying the selection criteria.

11.3. The File Review Subcommittee (FRS)

The FRS includes members of all four departments (CIC, CBSA, DOJ and RCMP) and reviews allegations of participation in war crimes made against individuals currently residing in Canada. The FRS recommends further review/investigation/analysis or legal action by a specific organization. The legal remedies include: deportation; revocation of citizenship and deportation; transfer to an international tribunal (upon request); extradition (upon request); criminal investigation and prosecution pursuant to Canada's *Crimes Against Humanity and War Crimes Act*.⁵

The most cumbersome and costly remedy is criminal investigation and prosecution in Canada. The majority of cases have been, and will no doubt continue to be, dealt with by employing remedies other than criminal investigation and prosecution. The practical realities surrounding the cost and complexity of carrying out international criminal investigations required to meet the rigorous legal burden on the prosecuting authority in Canada dictate that this remedy is to be used sparingly. What is meant by "sparingly" in this context is a discussion I leave for another day.

It is worth noting that the most recently published statistics indicate that there are 57 cases in the RCMP/DOJ criminal investigation inventory.⁶

In light of the foregoing, we now return to the Forum's current issue under study: "how criminal justice systems can make use of prioritization criteria with regard to case files that have already been opened".⁷ Translated into Canadian terms, the question would be: what criteria were employed to place the aforementioned 57 cases into an active criminal investigation inventory?

⁵ *Crimes Against Humanity and War Crimes Act*, C. 2000, c. 24, online: <http://laws.justice.gc.ca/en/C-45.9/FullText.html>.

⁶ *Supra*, note 3.

⁷ *Supra*, note 1.

11.4. FRS Selection Criteria

The criteria employed by the FRS has recently been published in the 2005-2006 Program annual report which states the following at page eight of the English version:

In order for an allegation to be added to the RCMP/DOJ inventory, the allegation must disclose personal involvement or command responsibility, the evidence pertaining to the allegation must be corroborated, and the necessary evidence must be able to be obtained in a reasonably uncomplicated and rapid fashion.⁸

In certain circumstances a file may be added to the RCMP/DOJ inventory where these conditions are not met. These include the following:

- 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.
- Policy reasons such as the national or public interest, or overarching reasons related to the interests of the war crimes program, international impunity or the search for justice exist.

The “inventory” is a pool of matters from which the RCMP selects specific files to investigate. Files are typically placed into groups with complementary crime-base elements. The crime-base can consist of a common element that may bring a number of investigations together enabling the RCMP to deal with several cases at one time. For example, a specific event or series of events that took place at a particular geographic location can serve as the crime-base to allow for the concurrent investigation of several files.⁹

⁸ *Supra* note 3.

⁹ Additionally, we must recall that Canada follows the British common law practice where the police are an independent investigative body that does not take direction from any other arm of the government. What is unique to the Program is the close co-operation between the police and the other departments involved in these investigations. Over time, Canadian police forces have formed “integrated” units to investigate complex crimes. Therefore the close co-operation between the RCMP and the other partners in the Program fits well in this modern trend. Other

The criteria outlined above are the result of having previously employed different methods to select cases to be placed in the investigative pool. Previously, we engaged a two-stage process whereby the emphasis was placed on our obligations at international law (extradite or prosecute or “aut dedere aut judicare”) and the seriousness of the crime. If either element was satisfied at an early stage of the analysis then the file was added to the inventory.¹⁰ Subsequently, the files were assigned a specific priority that would, in theory, determine the order in which the allegations would be examined.

The criteria that were previously employed to assign a priority consisted of the consideration of the following elements:

A. Nature of allegation

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

B. Nature of investigation

- progress of investigation
- ability to secure co-operation with other country or international tribunal

examples of Canadian integrated units include the Integrated Market Enforcement Teams (IMET) dealing with stock market fraud, the Integrated Proceeds of Crime units (IPOC) dealing with money laundering, possession of proceeds of crime and the Integrated Border Enforcement Teams (IBET) dealing with border enforcement issues including drug interdiction and people smuggling. All of these units have a combination of various experts including police officers, lawyers, accountants, and analysts working together to investigate these serious complex crimes.

¹⁰ In practical terms, we translated the “aut dedere aut judicare” obligation, outside of an extradition situation where we are the receiving state of the request for extradition, to the obligation to submit the file to national authorities for investigation and, where appropriate under national law, prosecution. In Canada the decision to prosecute is governed by the following policy: the evidence must demonstrate that there is a reasonable prospect of conviction and the prosecution must be in the public interest.

- likelihood of effective co-operation 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 group 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 allegations.

C. Other considerations

- no likelihood of removal (credible allegation of risk of torture upon return)
- no likelihood of removal (Canadian Citizen)
- no reasonable prospect of fair and real prosecution in other country
- high profile case (publicity, representations, or interest from other countries)
- 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.

For a myriad of reasons this procedure was untenable because it led to an inordinate number of files to investigate.

Another factor that contributed to the development of the current practice outlined above is that we had to consider the singular situation where Canada has jurisdiction over the offence and the offender, but where it would be unreasonable to expend resources to such an investigation at the expense of other ongoing matters. Canada's legislation provides for broad jurisdiction over offences and individuals where, in some circumstances, the offender need not be present in Canada in order for our courts to assert jurisdiction. For example, Section 8(a)iii

of the *Crimes Against Humanity and War Crimes Act* provides Canadian courts with jurisdiction if the victim of the alleged offence was a Canadian citizen.¹¹

When developing our criteria we had to ask ourselves the following questions: Is it appropriate to expend limited resources if the alleged perpetrator is not in Canada while we have a considerable number of other viable cases related to people currently located in Canada? What if there is no reasonable prospect that the individual can be brought to Canada to undergo a trial?¹² On this issue we decided that it would be consistent with our *no safe haven* policy to give priority generally to those files relating to individuals in Canada. Finally, what if the evidence is not available to Canadian authorities for investigation, assessment or trial?

The articulation of the criteria stated above flows from an analysis of these and other considerations. Perhaps one of the most important, if not *the* most important element in the decision-making matrix is cost. The investigation and prosecution of these matters are multimillion dollar undertakings. As in all major criminal investigations, a reasonable amount of money must be set aside for this work. Furthermore, there are justifiable limits to the amount of money to be attributed to such undertakings.

¹¹ Section 8 of the *Crimes Against Humanity and War Crimes Act* reads as follows:

“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.” See *supra* note 5.

¹² Canadian law does not provide for ex-parte criminal trials as the accused has the right to be present at his trial.

11.5. Conclusion

Like it or not, hard decisions must be made to demonstrate that public funds are spent wisely. Prosecutorial and police investigative discretion are recognized as important principles in the common law law-enforcement paradigm. Public interest considerations weighed by national law enforcement bodies combined with international public policy considerations all contribute to the complexity of establishing and applying criteria. I believe that regardless of the approach adopted and of the decisions made as to whether or not criteria should be developed and employed, national authorities will have to remain flexible in their approach. They must not hem themselves into a mechanical application of a specific standard. I believe that, for some countries, large inventories will have to be managed and difficult decisions made. Creativity and flexibility will be the key while staying true to the rule of law.

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This volume contains papers presented at a seminar of the Forum for International Criminal and Humanitarian Law in Oslo on 26 September 2008 with the same title as the publication. It has 24 contributions by some of the leading practitioners and experts in international criminal justice and policy. Armed conflicts tend to generate too many war crimes and crimes against humanity for all persons responsible to be held criminally accountable. This volume does not address what should be done with cases which probably can not go to trial due to limited capacity in criminal justice systems. That is the subject of FICHL Publication Series No. 9. Rather, this volume concerns the best way to select and prioritize the cases that should be investigated and prosecuted first. This is a question of the quality of discretion in the management of criminal justice for atrocities. The Forum seeks to start a debate on the role of criteria in case selection and prioritization through this volume.

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