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“The country’s planted thick with laws from coast to coast — Man’s laws, not God’s — and if you cut them down — d’you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake.” (Robert Bolt, *A Man for All Seasons*)

### I. *Introduction*

A Commission of Inquiry on War Criminals, headed by Mr. Justice Jules Deschênes, was established by the Federal Government on 7 February 1985 to determine whether or not alleged Nazi war criminals were resident in Canada and to recommend legal measures to ensure that such war criminals are brought to justice.<sup>1</sup> The Commission submitted a two part Report to the Governor General in Council on 30 December 1986. Part I has been published<sup>2</sup>, and Part II, concerned with allegations against specific individuals is confidential. The Commission, bearing in mind the concern of the Canadian public about all atrocities related to the activities of Nazi Germany during World War II, adopted a broad interpretation of its mandate and reviewed allegations concerning both war crimes and crimes against humanity.<sup>3</sup> War crimes and crimes against humanity are overlapping categories of offences. The distinctions and similarities of the categories will be discussed in more detail later in this article. In brief, war crimes are well established international offences committed in time of hostilities and, generally speaking, directed against enemy nationals. Crimes against humanity are a relatively new type of international crime involving state directed atrocities committed in war or peace and aimed at any distinctive group including a part of one’s own population. In Part I of the Report Mr. Justice Deschênes concluded that there were alleged Nazi war criminals resident in Canada and that existing legislation did not contain an appropriate vehicle for their prosecution. He recommended that the Criminal Code be amended so that war crimes

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\*Commander W.J. Fenrick, Director of International Law, Department of National Defense Ottawa. The views expressed herein are those of the writer and do not necessarily reflect either the policy or the opinion of the Canadian government.

1. P.C. 1985-348 7 Feb 1985.

2. Can. *Commission of Inquiry on War Criminals Report Part I: Public* (Ottawa: Minister of Supply and Services, 1986) — Deschênes Report.

3. *Id.*, at 37-44.

would be offences under Canadian law whether or not Canada had participated in the specific war in which the crimes were committed and so that crimes against humanity wherever and whenever committed would be offences under Canadian law. Although Mr. Justice Deschênes' mandate was confined to war crimes related to the activities of Nazi Germany during World War II, he considered it necessary to propose legislative changes directed at all war crimes and all crimes against humanity as "otherwise the legislation might be attacked as discriminatory and repugnant to the principles of fundamental justice prevailing in Canada and guaranteed under Section 7 of the Charter."<sup>4</sup>

The history of Canada's policy concerning Nazi war criminals is essentially an account of forty years of apathy.<sup>5</sup> Following World War II, Canada tried a total of seven individuals before four war crimes tribunals in 1945-46. In 1947, the Canadian Army War Crimes Investigation Unit submitted its final report. In 1948, the Canadian government agreed to a suggestion by the British government that no fresh trials be started after August 31, 1948. Little effort was expended in the post war years to keep war criminals out of Canada with the result that a small, but significant number of alleged war criminals became Canadian residents. Sporadic efforts were made by various pressure groups to arouse governmental interest in the war crimes issue. These efforts met with little success until 1985 when the Deschênes Commission was established. Canada's record on the war crimes issue is by no means unique. Most of the Allied Powers ignored the issue from approximately 1948 to 1980. Similarly, the recent positive action by Canada is being replicated in the United Kingdom, the United States and Australia, among other countries. Exactly why there should be a present resurgence of interest in crimes committed in 1945 and earlier, rather than in 1955 or 1965 is by no means clear. From a practical point of view, the major differences between now and then are that the potential accused, the witnesses and the evidence are older and probably less reliable and more difficult to locate.

Mere passage of time cannot erase the appalling horror of Nazi war crimes. The fact that an accused murderer has led an exemplary life for many years following his alleged offence is not considered a valid defence to a charge of murder before a Canadian court. Neither should subsequent conduct in Canada bar prosecution for monstrous offences committed outside of Canada provided that such a prosecution is in

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4. *Id.*, at 151.

5. *Id.*, at 25-33, D. Matas with S. Charendoff, *Justice Delayed — Nazi War Criminals in Canada* (Toronto: Summerhill Press, 1987), and A. Rodal, *Nazi War Criminals in Canada: The Historical and Policy setting from the 1940s to the Present* unpublished report prepared for the Commission of Inquiry on War Criminals September 1986.

compliance with both Canadian and international law. In order to determine whether or not alleged war criminals can be prosecuted before Canadian courts, it is necessary to review the law of war, war crimes, war crimes trials, jurisdiction in international law, the Canadian experience with the law of war, and the governmental response to the recommendations of the Deschênes Commission. In order to avoid turning an article into a treatise, certain relevant issues of domestic law, such as evidentiary matters and the general question of the impact of the lengthy delay between alleged deed and prosecution<sup>6</sup> shall not be addressed. Crimes involving the killing or mistreatment of civilians will be stressed as it is probable that current prosecutions for World War II incidents would focus on such offences. The article focuses on war crimes in the strict sense, not on crimes against humanity, as crimes against humanity raise a number of additional legal issues.<sup>7</sup>

## II. *The Law of War*

The law of war is the body of international law which regulates the conduct of parties to an international armed conflict. Although there is some controversy concerning the extent to which the law of war applies in the absence of a formal declaration of war, the generally accepted view at the present time, is that no such declaration is necessary and that the law of war applies whenever armed forces are committed to combat against foreign armed forces or are in combat outside of their own territory.<sup>8</sup> The law of war (also referred to as the law of armed conflict) applies to any interstate armed conflict without a requirement to meet a threshold of either violence or duration. For example, the law of war applied to the recent fighting between Iran and the USA in the Persian Gulf as well as to the fighting between Iran and Iraq. As a general

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6. Deschênes, *supra* note 2, at 148-50.

7. The two classic articles on crimes against humanity are E. Schwelb, "Crimes Against Humanity" (1946), 23 B.Y.I.L. 178-226, and S.L. Goldenberg, "Crimes Against Humanity — 1945-1970" (1971), 10 U.W.O. L. Rev. 1-55.

8. Older law of war treaties, such as the Hague Conventions of 1899 and 1907, indicate they apply where two or more parties are "at war" with one another. More modern treaties, such as the Geneva Conventions of 1949, indicate they "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The most recent general law of war treaty, Additional Protocol I of 1977, extends its scope of application to include a limited category of conflicts hitherto considered internal armed conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." Formal declarations of war were uncommon before the establishment of the United Nations. They are now extremely rare. The extension of the scope of application of Protocol I to include so-called CAR conflicts is binding only on states which are party to Protocol I.

statement, the law of war has limited application in internal armed conflicts (insurgencies, rebellions, civil wars, etc.) in the absence of agreement to the contrary by the parties to the conflict. The first law of war treaty provision specifically applicable to internal armed conflicts was Common Article 3 of the 1949 Geneva Conventions. The first general law of war treaty specifically designed for internal armed conflicts was Additional Protocol II of 1977. Also, generally speaking, the law of war does not regulate the treatment by a belligerent of its own nationals or those of co-belligerents.<sup>9</sup>

The law of war is traditionally divided into two components or streams each named after the city where most of the relevant agreements were drafted: the Law of Geneva, concerned essentially with the protection of victims of war, and the Law of the Hague, concerned essentially with methods and means of combat. The Law of Geneva is normally a much more developed body of law than the Law of the Hague as states are reluctant to limit the way in which they conduct warfare. In recent years, particularly since the Protocols Additional to the Geneva Conventions of 1949 were adopted in 1977, there has been a tendency for the Law of Geneva and the Law of the Hague to merge, as the Protocols address both the protection of victims of war and methods and means of combat. The generally accepted purposes of the law of war are: to protect both combatants and noncombatants from unnecessary suffering; to safeguard certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded, sick and shipwrecked, and civilians, and to facilitate the restoration of peace.

The law of war, as a field of international law, finds its sources in international conventions or treaties, international custom, and the general principles of law recognized by civilized nations. The major treaties concerned with the law of war prior to World War II were: Hague Convention IV of 1907 Respecting the Law and Customs of War on Land<sup>10</sup>, the two Geneva Conventions of 1929, the first concerning the wounded and sick<sup>11</sup> and the second concerning prisoners of war<sup>12</sup>, Hague Convention X of 1907 for the Adaptation to Maritime Warfare of the

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9. None of the treaty provisions applicable to internal armed conflicts uses the expression "war crime" or its more modern equivalent, "grave breach". Atrocities committed in internal conflicts are breaches of domestic law. Such acts might, in appropriate circumstances, constitute crimes against humanity. They would not be war crimes.

10. D. Schindler and J. Toman, eds., *The Laws of Armed Conflict* 2nd. ed. (Alphen aan den Rijn, the Netherlands: Sijthoff & Noordhoff, 1981) at 57-92.

11. *Id.*, at 257-270.

12. *Id.*, at 271-298.

Principle of the Geneva Convention<sup>13</sup> and the 1936 London Protocol concerning submarine warfare<sup>14</sup>. Canada was bound by all of these treaties during World War II. Japan and the USSR did not ratify the 1929 Geneva Convention on Prisoners of War. It is possible that these two failures to ratify, that is, become legally bound, contributed to the gross mistreatment of prisoners of war by Japan and to the gross mistreatment of each other's prisoners by the USSR and Germany during the Second World War. Article 2 of Hague Convention IV of 1907 contains a general participation clause whereby the Convention ceases to be binding if a country which is not a party to it takes part in the war. At least one belligerent power in each of the World Wars was not a party to Hague Convention IV with the result that Hague Convention IV, as a treaty, was not in effect during either war.

For post World War II conflicts, the major law of war treaties relevant to the war crimes issue are: Hague Convention IV of 1907, the four Geneva Conventions of 1949 concerned with: I the Wounded and Sick<sup>15</sup>, II the Maritime Wounded, Sick and Shipwrecked<sup>16</sup>, III Prisoners of War<sup>17</sup>, and IV Civilians<sup>18</sup>, and the 1954 Hague Cultural Property Convention.<sup>19</sup> Canada ratified the 1949 Geneva Conventions in 1965. More states are bound by the 1949 Geneva Conventions, 165 as of June 30, 1988, than are members of the United Nations, 159. The only state of substantial size which is not bound by the 1949 Geneva Conventions is Burma. Canada is not a party to the 1954 Hague Cultural Property Convention. For post 1977 armed conflicts, it is also necessary to determine whether or not Additional Protocol I of 1977<sup>20</sup> concerning international armed conflicts is in effect. Protocol I has been ratified by 76 states as of June 30, 1988. Canada has indicated it intends to ratify Protocol I, but it has not yet enacted the necessary implementing legislation.

Custom is one of the primary sources of international law. Whether or not a custom exists is, however, difficult to determine.<sup>21</sup> Custom which is relevant to the law of war is even more difficult to determine as, in warfare, the published views of states may not coincide with their actions.

13. *Id.*, at 245-252.

14. *Id.*, at 795-797.

15. *Id.*, at 305-331.

16. *Id.*, at 333-354.

17. *Id.*, at 355-425.

18. *Id.*, at 427-488.

19. *Id.*, at 661-688.

20. *Id.*, at 551-618.

21. M. Akehurst, "Custom as a Source of International Law" (1974-75), 47 B.Y.I.L. 1-53. Custom consists of a combination of state practice and a sense that such practice is legally required. The second element, *opinio juris*, is difficult to identify.

The law of war is rooted in customary law. As a general statement, however, most of the contemporary law of war is contained in treaty texts. The preamble to Hague Convention IV of 1907 contains a clause known as the Martens clause (named after Friedrich von Martens, the Russian delegate to the 1899 Hague Conference) which addresses the relationship of customary and conventional law of war:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>22</sup>

The Martens clause is frequently referred to in discussions of the law of war when no specific treaty provision appears to be relevant to a particular problem. Under certain circumstances, treaty provisions may be declaratory of customary law or provide a convenient statement of what has subsequently come to be recognized as customary law.<sup>23</sup>

The relationship of customary and conventional law is particularly relevant to World War II war crimes cases as, technically, Hague Convention IV of 1907 was not applicable as a treaty in that conflict and as the USSR and Japan were not party to the 1929 Geneva Prisoners of War Convention. As a result, unless the contents of these treaties were embedded in customary law, specific provisions could not be used to form the basis of war crimes charges. Concerning Hague Convention IV, the International Military Tribunal (IMT) at Nuremberg held:

The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt "to revise the general laws and customs of war", which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war . . .<sup>24</sup>

Although this statement is unsubstantiated in the judgement, it has been unchallenged since it was first uttered. The IMT also addressed briefly the defence argument that the accused could not be held liable for the murder or mistreatment of Soviet prisoners of war as the USSR was not a party to the 1929 Geneva Prisoners of War Convention. It rejected this

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22. Schindler and Toman, *supra* note 10, at 64.

23. R.R. Baxter "Multilateral Treaties as Evidence of Customary Law" (1965-66), 41 B.Y.I.L. 275-300, and "North Sea Continental Shelf, Judgement", [1969] I.C.J. Rep. 3.

24. *Judgment of the International Military Tribunal for the Trial of German Major War Criminals Nuremberg 30th September and 1st October, 1946* (London: HMSO, Cmd. 6964 (1946) at 65.

argument, holding that there were applicable principles of general international law concerning the treatment of prisoners of war and these principles prohibited murder or mistreatment.<sup>25</sup>

In the German High Command Trial, a US Military Tribunal sitting at Nuremberg in 1947-8 adopted the IMT position that Hague Convention IV of 1907 was binding as declaratory of international law and went on to detail how specific provisions of Hague Convention IV and of the 1929 Geneva Prisoners of War Convention were incorporated into customary law.<sup>26</sup> Although the 1949 Geneva Conventions have been so widely ratified it is unlikely they would not be applicable as treaties in an international armed conflict, the relationship of treaty law to customary law remains important<sup>27</sup>. In particular, the question of the relationship of the Additional Protocols of 1977 to customary law will remain of concern until they are as widely ratified as the 1949 Geneva Conventions.<sup>28</sup>

Although the general principles of law recognized by civilized nations constitute one of the accepted sources of international law, in general, as these principles are derived from the comparative study of domestic legal systems, they are of limited relevance to the law of war.<sup>29</sup> They are, however, of particular relevance where crimes against humanity are concerned, as these crimes can include mistreatment by a belligerent of its own nationals. Crimes against humanity will be discussed briefly in the following sections.

The law of war is not a static body of law. Additional Protocol I of 1977, for example, prohibits the type of carpet bombing which was common during World War II. It would be inappropriate to penalize World War II bombing practitioners for conduct which might contravene today's standards, but which may have been acceptable by the standards of the day. In order to determine the content of the law of war applicable in a particular conflict, it is necessary to determine the content of contemporary customary law and to determine which treaties are applicable to the conflict.

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25. *Id.*, at 48.

26. "The German High Command Trial", 12 Law Reports of Trials of War Criminals (LRTWC) 1 at 86-94.

27. T. Meron, "The Geneva Conventions as Customary Law" (1987), 81 A.J.I.L. 348-70.

28. "The Sixth Annual American Red Cross — Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions" (1987), 2 Am U.J. Int'l L. & Pol'y 415-538.

29. Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Grotius, 1987).



When appraising wartime conduct one must always distinguish between law as illusion and law as reality. All the major naval powers became party to the 1936 London Submarine Protocol which prohibited attacks by submarines without warning on merchant vessels. Technically, the London Protocol is still in effect. With the debatable exception of Japan, no major naval power complied with a strict interpretation of the Protocol during World War II. No one was punished following the war for attacking merchant vessels without warning. The German Admirals, Doenitz and Raeder, were convicted on charges of waging unrestricted submarine warfare, but no sentence was awarded on the charge because of similar allied practices. The few other naval war crimes cases concerned the massacre of survivors, not the normal practice of sinking on sight.<sup>30</sup>

Anyone engaged in trying to assess wartime conduct must bear in mind the bleak realities of war. In the grim words of Henry Stimson, U.S. Secretary of War during World War II; "The face of war is the face of death: death is an inevitable part of every order that a wartime leader gives".<sup>31</sup> War is about killing people and breaking things. Law does not and cannot prevent such activities. At best the law can have an impact on the margins of extreme situations by reducing the net amount of human suffering.

The concept of collateral injury is an important part of both the law of war and of military practice. One fact which soon becomes apparent to any officer concerned with military operations is that projectiles don't always go where you want them to go. Every type of weapons has what is called a circular error probable or CEP. The CEP for a given weapon is the radius within which 50% of the projectiles aimed at a given point may be expected to land. The corollary is that 50% of the projectiles may land outside this radius. Weapon accuracy is dependent upon the state of technology at a given point in time. It may also be dependent upon the quality of enemy opposition. As an example, one might expect the aircrew of a fighter bomber to have somewhat more difficulty delivering bombs on target if someone is firing missiles at them than if they are doing a practice run over the prairies of Saskatchewan. Related to the weapon accuracy problem is the fact that in many cases valid military objectives such as munitions factories or military headquarters are located in towns or cities adjacent to civilian population concentrations. Modern urban planners do not take into account the requirements of the

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30. W.J. Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare" (1986), 24 C.Y.I.L. 91 at 106-07.

31. R. Schaffer, *Wings of Judgment: American Bombing in World War II* (New York: O.U.P., 1985) at 168.

law of war when making planning decisions. The end result is that civilian casualties and property damage, that is, collateral injury, is a frequent consequence of military operations directed against valid military objectives in compliance with the law of war. The only way to avoid collateral injury is to avoid war. This is a desirable approach but contemporary history does not indicate it is universally practiced. At root, the law of war is an attempt to balance humanitarian and military imperatives. It is, and must be, a body of law which is workable during war.

### III. *War Crimes*

The term “war crimes” is used with a variety of meanings. In the widest, colloquial, sense, “war crime” includes crimes against peace and crimes against humanity within its scope. A review of narrower, more traditional definitions indicates “war crime” means “any violation of the laws of warfare (or usages of war) (or customs of war) committed by any person or persons, military or civilian.”<sup>32</sup> It is questionable whether one should consider all violations of the law of war as war crimes or adopt a more restrictive approach. The current British Manual of Military Law<sup>33</sup>,

32. The current (1956) *US Army Law of Land Warfare Manual* states: “The term “War Crime” in the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.” The 1929 UK *Manual of Military Law*, which was used by the Canadian Army during World War II states:

441. The term “War Crime” is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders. It is usual to employ this term, but it must be emphasized that it is used in the technical military and legal sense only, and not in the moral sense. For although some of these acts, such as abuse of the privileges of the Red Cross badge, or the murder of prisoners, may be disgraceful, yet others, such as conveying information about the enemy, may be highly patriotic and praiseworthy. The enemy, however, is in any case entitled to punish these acts as war crimes.

442. War crimes may be divided into four different classes: —

- (i) Violations of the recognized rules of warfare by members of the armed forces.
- (ii) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces.
- (iii) Espionage and war treason.
- (iv) Marauding.

The current UK *Manual of Military Law* (1958) states:

624. The term “war crime” is the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or by civilians. It has also been customary to describe as war crimes such acts as espionage and so-called war treason which, although not prohibited by International Law, are properly liable to punishment by the belligerent against which they are directed. However, the accuracy of the description of such acts as war crimes is doubtful.

33. *The Law of War on Land being Part III of the Manual of Military Law* (London: HMSO, 1958).

prepared with the assistance of that very distinguished British international lawyer, Sir Hersch Lauterpacht, contains a particularly intimidating triad of propositions: (a) war crimes include all violations of the law of war (para 624), (b) all war crimes are subject to universal jurisdiction (para 637) and (c) all war crimes are punishable by death (para 638). The triad may be a useful heuristic device for the military reader but one might question its accuracy as a statement of the law. Indeed, in one of his other writings, Sir Hersch Lauterpacht suggested that textbook writers and military manuals have erred on the side of comprehensiveness and that there should be a distinction between violations of rules of warfare, and war crimes. He proposed a narrower definition of war crimes as:

such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity.<sup>34</sup>

In any event, it is reasonable to presume that Canadian prosecutors today, when concerned with World War II events, would restrict charges to those which resulted directly or indirectly in death, serious injury or serious property damage.

It is necessary to distinguish between war crimes, crimes against peace, and crimes against humanity. The near classical differentiation of these categories is contained in Article 6 of the Charter of the International Military Tribunal (IMT) at Nuremberg which states:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any

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34. H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes" (1944), 21 B.Y.I.L. 58 at 79.

civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the forgoing crimes are responsible for all acts performed by any persons in execution of such plan.<sup>35</sup>

We are concerned essentially with war crimes in the narrower, Article 6(b) sense. The category of “crimes against peace” was used as the basis for a prosecution for the first time after World War II. Although crimes against peace might be considered to constitute the fundamental war crimes, no one has been charged with commission of crimes against peace since the immediate aftermath of World War II. The general tenor of the IMT decision makes it clear that a crime against peace charge may only be laid against major decision makers.

The Article 6 definitions of war crimes and crimes against humanity overlap to a considerable extent. In particular, both focus on murder and ill treatment of individuals. It is possible for the same act to be a war crime and a crime against humanity. As a general statement, war crimes were, at the end of World War II, traditional international law offences committed against traditional victims such as prisoners of war or the civilian population of occupied territory. Crimes against humanity were, however, recently crystalized international law offences committed against non-traditional victims such as offences committed by an enemy against its own citizens. There is very little evidence prior to World War II that international law took cognizance of how a state treated its own citizens.<sup>36</sup> The international law of human rights is essentially a post-World War II development.

Aside from their different times of origin, the major distinctions between crimes against humanity and war crimes under Article 6 are: (a) war crimes are offences committed by persons linked to one side to an armed conflict against neutral citizens or citizens of a belligerent on the other side, while the victims of crimes against humanity may be citizens of any country, (b) crimes against humanity must be carried out in pursuance of a policy of persecution on political, racial or religious grounds, while no such policy is required for war crimes, and (c) to be a war crime, an act must have been committed during a war or an international armed conflict. The requirement for a crime against humanity to be linked to an international armed conflict is less clear. It

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35. Schindler and Toman, *supra* note 10, at 826.

36. Schwelb and Goldenberg, *supra* note 7.

must, however, be noted that the IMT, in its judgement, excluded acts before 1939 from the crimes against humanity category of Article 6 on the ground that it was not adequately established that such acts were committed in the execution of or in connection with any other crime within the jurisdiction of the tribunal.<sup>37</sup>

The first international document which attempts to eliminate the IMT imposed time and place restriction on crimes against humanity is the Draft Code of Offences against the Peace and Security of Mankind transmitted to the UN General Assembly in 1954 by the International Law Commission. Art. 2, section II of the Draft Code defines crimes against humanity as follows:

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.<sup>38</sup>

In a report, the International Law Commission explained why it expanded the scope of crimes against humanity to include peace time offences.

'The commission', 'decided to enlarge the scope of the paragraph so as to make the punishment of the acts enumerated in the paragraph independent of whether or not they are committed in connection with other offenses defined in the draft code'. 'On the other hand', it continued, 'in order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State'.<sup>39</sup>

The Draft Code remains a draft. The first treaty to indicate that crimes against humanity were international crimes whether committed in war or peace was the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, to which, for other reasons, neither Canada nor any other Western country is bound.<sup>40</sup>

Unfortunately, there is no single generally accepted codification of the law of war nor is there what might be called a "war crimes" Criminal Code. Pre-World War II law of war treaties do not contain offence sections. Indeed Hague Convention No. IV of 1907 respecting the Laws

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37. IMT *Judgement*, *supra* note 24, at 65.

38. Quoted in Goldenberg, *supra* note 7, at 18.

39. *Id.*, at 19.

40. Schindler and Toman, *supra* note 10, at 837-43. The probable reason for non-ratification is the extended definition of crimes against humanity which includes "eviction by armed attack or occupation or inhuman acts resulting from the policy of apartheid."

and Customs of War on Land, breaches of which formed the basis of most war crimes charges, contains the following provision:

ARTICLE 3

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.<sup>41</sup>

Art. 3 appears to envisage state responsibility for financial compensation, not individual criminal responsibility.

The legal basis for the statement of the offence for World War II war crimes appears to be the applicable treaties and extrapolation therefrom, with particular reliance on the Martens clause, and customary law. For example, many charges involved the murder or mistreatment of the population of occupied territory. The only treaty provision specifically addressing the treatment of this group prior to World War II was Art. 46 of the Regulations Annexed to Hague Convention IV of 1907 and this stated simply: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected. . . ."<sup>42</sup> Although the relevant treaties did not specify that particular acts constituted war crimes, the various national law of war manuals did list the major violations. For example, para 443 of Chapter XIV (The Laws and Usages of War on Land) from the 1929 UK Manual of Military Law states:

443. The more important violations are the following: — making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request of quarter; maltreatment of dead bodies on the battlefield; ill treatment of prisoners of war; breaking of parole by prisoners of war; firing on undefended localities; abuse of the flag of truce; firing on the flag of truce; abuse of the Red Cross flag and badge and other violations of the Red Cross Convention; use of civilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings; improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill-treatment of inhabitants in occupied territory.

Art. 6 of the IMT Charter, quoted above, expanded upon Hague Rule 46 to indicate war crimes include murder, ill-treatment and deportation of the civilian population of occupied territory and also the killing of hostages. A lengthy analysis of post-World War II war crimes cases

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41. *Id.*, at 65.

42. *Id.*, at 83.

conclude that, under the above rubric, courts addressed charges on a wide variety of matters including:

- (a) unwarranted killing;
- (b) denial of a fair trial;
- (c) ill-treatment;
- (d) subjection to illegal experiments;
- (e) deportation;
- (f) forced labour of civilians;
- (g) enforced prostitution;
- (h) false imprisonment;
- (i) denunciation to occupying authorities;
- (j) illegal recruiting into armed forces;
- (k) incitement of civilians to take up arms against their own country;
- (l) genocide;
- (m) denationalisation;
- (n) invasion of religious rights; and
- (o) wholesale substitution of existing courts of law.<sup>43</sup>

Generally speaking, the major law of war treaties adopted since World War II have provisions differentiating between minor and major, or grave, breaches of the treaty. In particular, states which are party to the Geneva Conventions of 1949 are obligated to comply with the conventions in their entirety, but they are also obligated to enact legislation to provide effective penal sanctions for persons committing or ordering the commission of grave breaches and to search for and bring such persons to trial, or to hand them over to others for trial. For example, the Fourth Geneva Convention of 1949 which is concerned with the treatment of civilians, appears to codify the results of the war crimes trials concerning the treatment of civilians. It contains the following grave breach provisions:

#### ARTICLE 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such a High Contracting Party has made out a prima facie case.

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43. 15 L.R.T.W.C. 113.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

#### ARTICLE 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention; wilful killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body of health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>44</sup>

Additional Protocol I of 1977 concerning international armed conflicts also contains grave breach sections and some of these, for the first time, specify that certain wilful acts concerning combat operations, such as wilfully launching indiscriminate attacks, constitute grave breaches.<sup>45</sup> It is probable that specific implementing legislation detailing the elements of the Protocol I grave breaches will be necessary before Canada ratifies the treaty as it is very difficult to see how some of these grave breaches can be assimilated to Criminal Code offences.

The question of who is a party to an offence is an issue which cannot be glossed over in war crimes prosecutions. The obvious fact is that most acts committed in wartime are authorized or at least condoned by the state. If atrocities occur which are not authorized or condoned, one might presume that the state to whose armed forces the culpable individuals belong would take action to punish them. At the same time, unless one desires to punish all citizens of a state or all members of the armed forces, it is necessary to determine degrees of responsibility. For law of war purposes, Nazi Germany cannot be regarded as a gang of bank robbers or even as a Mafia organization. Quite obviously, individuals who performed certain acts and those who ordered the acts can be considered culpable, but what of the enormous cast of supporting players? What about advisers, intermediate commanders and those performing ancillary tasks? Has the railroad worker who loaded Jews onto boxcars for

44. Schindler and Toman, *supra* note 10, at 478-79.

45. *Id.*, at 601-02.



transportation to extermination camps committed a war crime? Has the intelligence officer who advised a commander that there were Jews in a particular area committed a war crime if the commander subsequently orders their extermination? Direct analogies with Criminal Code sections concerning offences and parties may be inappropriate when the state is a major actor in the incident. An argument that the railway worker has engaged in forcible confinement may oversimplify a complex situation.

Earlier in this part, the distinctions between war crimes and crimes against humanity were discussed. It is also necessary to distinguish between war crimes and domestic crimes in a country at war. On land, for an act to be a war crime, it must take place in a country involved in an international armed conflict. That condition, however, although necessary, is not sufficient. A single act such as the deliberate killing of an innocent person may be the domestic crime of murder in the country where it occurs, and also, depending on the existence or nonexistence of other factors, a war crime and a crime against humanity. In time of war, when anarchy prevails in many areas, it is possible there will be many deliberate unlawful killings. They may all be acts of murder; it is unlikely they are also all war crimes or crimes against humanity.

A few hypotheticals may illustrate the distinction. If, during World War II, a German national or a national of a state allied to Germany deliberately killed another innocent German national or a national of a state allied to Germany, the act might, under certain circumstances, constitute murder under the applicable domestic law and it might also constitute a crime against humanity, but it could not constitute a war crime unless the offender had substantial links to one side and the victim was a neutral or had substantial links to the other side. In order to constitute a crime against humanity the offender must be linked to a state involved in the conflict and the victim must be stateless or linked to any state involved in the armed conflict. As a general statement, for example, during World War II, the hypothetical killing of a Roumanian Jew by a Roumanian Fascist in Roumania prior to the entry of Roumania into World War II would not be a crime against humanity, because, at that time, involvement in the conflict by the relevant state was an essential element of the offence. In addition, for an act to be a crime against humanity, it must be carried out in pursuance of a state instigated or tolerated policy of persecution on political, racial or religious grounds.

If, during World War II, a German national or a national of a state allied to Germany killed an innocent national of a state not allied to Germany, the act might constitute murder according to applicable domestic law, a crime against humanity, if carried out, in pursuance of a state instigated or tolerated policy of persecution on political, racial or

religious grounds, and a war crime. As a general statement, there is no requirement that an act be carried out in pursuance of a state instigated or tolerated policy for it to be classified as a war crime. If a soldier kills a prisoner of war or an unoffending enemy national in occupied territory, he commits a war crime whether or not he carries out the act on his own initiative, as a result of state policy, or as a result of directions by his superiors. The question is: what, if any, state linkage must exist for an ordinary crime to become a war crime? A contribution to the leading *Encyclopedia of Public International Law* states: "War crimes include all grave violations of the laws of war *which are committed by the agents of a belligerent state against the citizens or property of the enemy*, of a conquered nation, or of forcibly occupied neutral territory. . . . *the perpetrators are usually combatants. . .*".<sup>46</sup> The accused in war crimes cases have a wide variety of backgrounds and it is debatable whether or not all of them could be described as agents of a belligerent state and it is even more debatable whether or not they were implementing their role as agents. For example, in the *Essen Lynching Case*<sup>47</sup>, German civilians were convicted and severely punished by a British War Crimes Court for participating in the activities of a lynch mob which murdered three captured British airmen. Members of a lynch mob would not appear to be agents of the state. Whether or not agent status exists, it would appear that an essential element distinguishing a war crime from an ordinary crime committed in war is that the offender must have some demonstrable links to one side in an armed conflict and the victim must not have a similar link to the same side. In most reported war crimes cases, it would appear that the existence of such links is so obvious that it is taken for granted. If for example, victim and offender belong to the armed forces of opposing sides or even if victim or offender belongs to the armed forces of one side and the other is a national of the opposing side, it is unlikely the issue would be argued.

The issue of a demonstrable link is, however, of particular relevance where victim and offender are of the same nationality or from countries which are on the same side in the conflict. The prime examples of problem situations would be incidents in concentration camps and incidents in occupied territory. If one concentration camp inmate beats or kills another inmate of the same or an allied nationality, it is unlikely a war crime has been committed unless the offender has some demonstrable link with the powers running the camp. In the *Belsen Trial*, a number of concentration camp inmates employed as minor

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46. H.H. Jeschek, "War Crimes", in *Encyclopedia of Public International Law* (North Holland: Amsterdam, 1982) Vol. 4, at 294-98.

47. *The Essen Lynching Case*, 1 L.R.T.W.C.

functionaries by camp authorities were convicted on war crimes charges.<sup>48</sup> If an inhabitant of occupied territory kills or mistreats another inhabitant of occupied territory, it would be necessary to show some link between the offender and the occupying authority to classify the offence as a war crime. It is suggested that this specific issue is not adequately addressed in either the literature or the case law concerning war crimes because individuals committing such acts would normally have been dealt with after World War II under the national laws before national courts as collaborators with the enemy. Examples of linkages would be working for the occupying authority, being paid, trained or equipped by the occupying authority, being under the command or direction of the occupying authority, or belonging to an organization with such links to the occupying authority. To use a recent example, the Lebanese militia which massacred Palestinians in the Sabra and Shatila refugee camps in 1982 were, in many cases, paid, trained, equipped, and after a fashion, under the control of Israeli authorities. They probably had an adequate link with Israel to be considered as committing Israeli war crimes.

One cannot determine whether or not particular acts constituted war crimes during World War II without considering the hostage and reprisal issues. In the event of serious or persistent breaches of the law by a belligerent, it may be necessary for the adverse party to resort to a reprisal in an attempt to terminate such illegality. A reprisal is an illegal act resorted to after the adverse party has himself indulged in illegal acts and refused to desist therefrom after being called upon to do so. The reprisal is not a retaliatory act or a simple act of vengeance. It must be proportionate to the original wrongdoing, and must be terminated as soon as the original wrongdoer ceases his illegal actions. The proportionability is not strict, for it will often be greater than the original wrongdoing. Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure. The doctrine of reprisals has been frequently and seriously criticized on the basis that it is not a particularly effective law enforcement device and that its end result is frequently the escalation of the conflict.<sup>49</sup> On the other hand, it is possible that the existence of the reprisals doctrine does deter some potential law breakers. At various periods in time, reprisals have been prohibited against certain categories of protected persons. During World

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48. *The Belsen Trial*, 2 L.R.T.W.C. 1 at 153-4.

49. The standard text on reprisals is F. Kalshoven, *Belligerent Reprisals* (Leyden: Sitjhoff 1971). See also A.R. Albrecht, "War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949" (1958), 47 AJIL 590, D. Bowett, "Reprisals Involving Recourse to Armed Force" (1972), 66 AJIL 1, and M. Bristol, "The Laws of War and Belligerent Reprisals against Enemy Civilian Populations" (1979), 21 Air Force L. Rev. 397.

War II, reprisals against prisoners of war were prohibited;<sup>50</sup> Art. 50 of the rules annexed to Hague Convention IV of 1907 prohibited the infliction of collective penalties upon the population of occupied territories unless in circumstances when the population was jointly and severally liable, but it did not explicitly prohibit reprisals against this population.<sup>51</sup> Para 458 of Chapter XIV (Laws and Usages of War on Land) of the 1929 British Manual of Military Law, which was used by British and Commonwealth forces, including Canadian Forces, during World War II clearly envisages reprisals directed against the inhabitants of occupied territory. The same publication indicates, in paras. 461 through 464, that the practice of taking hostages as a means of securing legitimate warfare was in former times very common, it is now obsolete, but it was not banned by Hague Convention No. IV of 1907. The manual clearly envisages the occasional need to take hostages, but also states that hostage prisoners should not be killed if the adverse party violates the law.

The distinction between hostage prisoners and reprisal prisoners is that hostage prisoners are taken before the opposing side violates the law on the understanding they will be punished if the opposing side does violate the law while reprisal prisoners are taken after the opposing side violates the law and then punished. Persons taken as reprisal prisoners or hostage prisoners may fail to appreciate the fine distinction in their statuses. In theory, hostage taking and reprisals are both intended as law enforcement devices. The German forces and those allied with them took hostages and reprisal prisoners and killed them on many occasions during World War II. Some of the war crimes tribunals, particularly those concerned with cases arising in Southern Europe, appear to have accepted that the execution of hostages or reprisal prisoners might be permissible in certain circumstances, notwithstanding the fact that the IMT Charter, quoted above, listed killing of hostages as a war crime. In the *List Case*, also known as the *Hostages Trial*, the tribunal listed a number of criteria which might legitimize the killing of hostages or reprisal prisoners before concluding the criteria were not met in that particular case.<sup>52</sup> The case has been severely criticized by Lord Wright, who concluded: "My own settled opinion, based both on principle and on authority, is that the killing of hostages (which includes reprisal prisoners) is contrary to the law of war, and that it is not permissible in any circumstances, and that it is murder."<sup>53</sup> The *List Case* was also distinguished in one of the other

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50. Art. 2 of 1929 Geneva Prisoners of War Convention, Schindler and Toman, *op. cit. supra* note 10, at 274.

51. *Id.*, at 83-4.

52. "Trial of Wilhelm List and Others" 8 L.R.T.W.C. 34 at 76-88.

53. Lord Wright, "The Killing of Hostages as a War Crime" (1948), 25 B.Y.I.L. 296 at 310.

major war crimes trials, the *Von Leeb Case*, also known as the *German High Command Trial*.<sup>54</sup> The 1949 Geneva Civilians Convention explicitly banned reprisals against the inhabitants of occupied territory (Art. 33) and also prohibited the taking of hostages (Art. 34).<sup>55</sup> Whatever the situation may have been during World War II, it is clear that such acts are now prohibited.

#### IV. *War Crimes Trials*

The reports of war crimes trials are of debatable relevance to present day courts concerned with war crimes because there is no rule of precedent in international law (although judicial decisions do have persuasive authority) the reporting is patchy at best, and the trials have been held before a wide variety of foreign and international tribunals. The reports do, however, provide useful evidence of the evolving content of customary law. The case which is normally referred to as the first war crimes trial is the trial at Briesach in 1474 of Peter Von Hagenbach for mistreating the inhabitants of occupied territory.<sup>56</sup> Hagenbach was subjected to severe torture and produced the predestined confessions. He repudiated the confessions in open court, but was convicted on the basis of other evidence. Hagenbach was sentenced to death and executed.

There are sporadic instances of war crimes trials of enemy nationals prior to and during the First World War. These trials are not well reported. A small number of German nationals were prosecuted, albeit ineffectually, before German courts in Leipzig following the First World War. In part as a result of these ineffectual proceedings, the Allied Powers decided to try Axis nationals before their own courts following the Second World War. The two best known Allied tribunals were the International Military Tribunals at Nuremberg and at Tokyo, both of which tried major war criminals and both of which had as their legal basis substantially similar Charters issued by the Allied Powers. In addition to the well reported proceedings of these two tribunals, there were many war crimes trials conducted by national tribunals. Briefs of a large number of these trials are contained in the *Law Reports of Trials of War Criminals* (L.R.T.W.C.) a series of fifteen thin volumes selected and prepared by the UN War Crimes Commission. In addition, the U.S. Government produced a large, fifteen volume series of verbatim proceedings of *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*. These two report series

54. "Trial of Wilhelm von Leeb and Thirteen Others", 12 L.R.T.W.C. 1 at 84-85.

55. Schindler and Toman, *supra* note 10, at 443.

56. G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II — The Law of Armed Conflict* (London: Stevens & Sons, 1968 at 462-66.

contain a formidable and inadequately explored jurisprudence of the law of war.

There have been very few war crimes trials since World War II, involving conflicts other than World War II. It is understood that UN forces in Korea gathered evidence for war crimes prosecutions, but no trials were held. It is also understood that Bangladesh intended to try some Pakistani prisoners on war crimes charges following the Bangladesh conflict, but it did not do so.<sup>57</sup> American forces tried a number of their own soldiers for war crimes type offences during the Vietnam conflict. All of the accused were, however, charged with breaches of the United States Uniform Code of Military Justice, not with war crimes as such.<sup>58</sup> As a general statement, if one is at all possible, military prosecutors handling war crimes type cases where the accused belong to the same armed forces as the prosecutor would endeavour to charge the accused with breaches of national law such as murder rather than with war crimes. There are two excellent reasons for the preferred approach, the court is more familiar with national law than with the law of war and the public relations impact is slightly less unfavourable. There were also a number of British and Israeli law of war cases in the 1960's and later, but these cases focused more on the issue of combatant status than on war crimes.<sup>59</sup>

A detailed review of the available war crimes case reports is not feasible within the confines of this article. It is, however, possible to indicate a few trends. First, most war crimes cases which go to trial concern events outside of actual combat. Very few reported war crimes cases concern offences committed during combat.<sup>60</sup> It is unquestionable that some war crimes are committed in combat and the reasons for the relative paucity of combat related cases is unclear. Perhaps those investigating war crimes pay particular heed to the extreme stresses and the probable lack of premeditation in combat situations. One must also concede that soldiers in combat have very short operational lives and that the difficulties of gathering evidence may be almost insurmountable. It does not appear that there were any war crimes cases concerning aerial

57. J.J. Paust & A.P. Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience" (1978), 11 Vand. J. of Transnat.L. 1-38.

58. For example, Lieutenant Calley, a platoon leader involved in the My Lai massacre was convicted of murder. *U.S. v Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973). See also *Calley v. Callaway* 519 F. 2d 184 (5th Cir. 1975), cert. denied 425 U.S. 911 (1976). An analysis of Vietnam cases focusing on operational and psychological aspects is W. Hays Parks, "Crimes in Hostilities" Marine Corps Gazette Aug 76 at 16-22 and Sep 76 at 33-39.

59. *Military Prosecutor v Omar Mahmud Kassem and Others* (Israeli Military Court, 1969) 42 Int. L. Rep.470-483, *Mohammed Ali and Another v Public Prosecutor*, [1968] 3 All. E.R. 488 (P.C.) and *Public Prosecutor v Koi*, [1968] 1 All. E.R. 419 (P.C.)

60. For a resume of the World War II experience, see 15 L.R.T.W.C. 109-112.

bombardment following World War II, probably because the Allies were the most effective practitioners of that form of warfare.<sup>61</sup> Second, war crimes are not strict or absolute liability offences. Intention or recklessness is an element of a war crime. War crimes tribunals must make decisions concerning culpability taking into account the state of facts as they appeared to the accused. They should not judge on the basis of hindsight.<sup>62</sup> Third, certain parts of the law of war are contentious and subject to interpretation. It is understood that soldiers and military commanders may not have ready access to lawyers and legal texts. For this reason, there is a tendency to prosecute only in cases where violations of the law are clear cut and to give the accused the benefit of the doubt when the law is unclear.<sup>63</sup>

Three topics have been the subject of considerable discussion in case law and in the literature, military necessity, superior orders and command responsibility. The law of war has its foundation in an attempt to reconcile military requirements or military necessity and humanitarian imperatives. Military necessity is a concept whereby a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realization of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources and money. The concept presupposes:

- a. the force used can be and is controlled;
- b. the use of force is necessary to achieve as quickly as possible the partial or complete submission of the enemy; and
- c. the amount of force used is not greater in effect on enemy personnel or property than needed to achieve his prompt submission.

Military necessity is not a concept which can be considered in isolation. In particular, it does not justify violation of the laws of armed conflict as military necessity was a factor taken into account when the laws were drafted. The principle of military necessity is not the 19th Century German Doctrine of *Kriegsraison* which asserted that war could justify any measures — even in violation of the laws of war — when the necessities of any particular action purportedly justified it. War crimes trials after World War II clearly rejected this view. Military necessity cannot justify actions absolutely prohibited by law as the means to achieve military victory are not unlimited. Armed conflict must be carried on within the limits of the prohibitions of international law,

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61. *History of the United Nations War Crimes Commission*. (London: HMSO, 1948) at 492.

62. *The Hostages Trial*, *supra* note 52, at 67-69.

63. *The German High Command Trial*, *supra* note 54, at 96-105.

including the restraints inherent in the concept of “necessity”.<sup>64</sup> Military necessity is particularly relevant when agreements on the law of war are being drafted, when explicit treaty law or generally accepted customary law does not adequately address a problem, and as a loophole provision in some treaties where certain actions are prohibited unless required by military necessity. After the Second World War, the plea of military necessity was raised by defendants before war crimes tribunals, usually in connection with two categories of cases:

- a. in regard to the treatment of prisoners of war and unarmed enemy prisoners, unsuccessfully; and
- b. in regard to the deportation of civilian inhabitants from and devastation of property in occupied enemy territory, occasionally successfully, as courts emphasized assessment of the situation as it appeared to the accused in determining culpability.<sup>65</sup>

The question of whether or not superior orders should constitute a defence to a war crimes charge against a subordinate is one which has vexed military officers and legal writers for a considerable period of time.<sup>66</sup> A successful army in combat is not and cannot be a debating society. Human lives can depend on whether or not orders to carry out very dangerous tasks are carried out promptly. Soldiers are trained to go in harm’s way and a substantial proportion of any soldier’s basic training is devoted to teaching him to respond to orders. At the same time, a soldier is a human being, not an unthinking automaton. As a general statement, soldiers are only obliged to obey lawful commands and they are obliged not to obey commands which are manifestly or obviously unlawful. Most violations of the law of war which result in war crimes charges are obviously unlawful, for example, orders to kill prisoners. Sophisticated doctrinal arguments notwithstanding, the argument of superior orders has rarely resulted in a successful defence to a war crimes

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64. Military necessity is a particularly complex subject. The two most searching studies are W.V. O’Brien, “The Meaning of ‘Military Necessity’ in International Law” (1957), 1 *World Polity* 109 and W.V. O’Brien, “Legitimate Military Necessity in Nuclear War” (1960), 2 *World Polity* 35. Other studies are N.C.H. Dunbar, “Military Necessity in War Crimes Trials” (1952), 29 *B.Y.I.L.* 442, W.G. Downey, “The Law of War and Military Necessity” (1953), 47 *Am. J. Int. L.* 251, and an unpublished study prepared by E. Rauch for the International Society of Military Law and Law of War, “The Concept of Military Necessity in the Context of the Law of War”. A useful collection of definitions is contained in R.W. Gehring, “Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I” (1980), 90 *Mil. L.R.* 49, 54-58.

65. Dunbar, *id.*, at 442-49.

66. The two leading studies are still Y. Dinstein, *The Defence of Obedience to Superior Orders in International Law* (Leyden, 1965) and L.C. Green, *Superior Orders in National and International Law* (Leyden, 1976).



charge. It has, however, on occasion been combined with other elements to raise a successful defence of duress.

The obverse of the defence of superior orders is the argument that a commander is always responsible for the acts of his subordinates.<sup>67</sup> The *Yamashita Case*<sup>68</sup>, in which a Japanese general was sentenced to death following World War II is often cited, erroneously, for the proposition that commanders are absolutely responsible for war crimes committed by their subordinates. A subsequent review of that case by Parks concluded:

“The value of the study of the Yamashita trial lies not in its often mistated facts nor in the legal doctrine of strict liability it purportedly espoused (but did not), but in the legal conclusions it actually reached. Yamashita recognized the existence of an affirmative duty on the part of a commander to take such measures as are within his power and appropriate in the circumstances to wage war within the limitations of the laws of war, in particular exercising control over his subordinates; it established that the commander who disregards this duty has committed a violation of the law of war. . . .<sup>69</sup>”

A commander giving an order to commit a war crime is equally guilty of the offence with the person actually committing it. He is also liable to punishment if he knew or had information which should have enabled him to conclude, in the circumstances at the time, that a subordinate was committing or going to commit a breach of the law, and failed to take all feasible steps to prevent or repress that breach.<sup>70</sup> Parks concluded that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, or (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein.<sup>71</sup>

## V. Jurisdiction

The word “jurisdiction” is used in international law to denote a wide

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67. The three best articles are considered to be: W. Hays Parks, “Command Responsibility for War Crimes” 62 *Mil. L. Rev.* 1-104, W.D. Burnett, “Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra” (1985), 107 *Mil. L. Rev.* 71-189, and L.C. Green, “War Crimes, Extradition and Command Responsibility”, in L.C. Green, *Essays on the Modern Law of War* (New York: Transnational, 1985) at 215-37.

68. *Trial of General Tomoyuki Yamashita*, 40 L.R.T.W.C. 1-96.

69. Parks, *supra* note 67, at 37.

70. There is an attempt to codify the law concerning command responsibility in Art. 86 and 87 of Additional Protocol I. Schindler and Toman, *op. cit. supra* note 10, at 602-03.

71. Parks, *supra* note 67, at 101-104.

variety of different things including the power of one state to perform acts in the territory of another state (executive jurisdiction), the power of a state's courts to try cases involving a foreign element (judicial jurisdiction) and the power of a state to apply its laws to cases involving a foreign element (legislative jurisdiction).<sup>72</sup> Here we are concerned with judicial jurisdiction in criminal trials, more particularly, the basis in international law for Canadian courts to try alleged war criminals. We are not concerned with the question of "venue" that is the allocation of jurisdiction among particular Canadian criminal courts.

The main principles on which the claim is made to exercise criminal jurisdiction in a particular case are:

- a. the territorial principle — the offence was committed in whole or in part on the territory of the state which purports to exercise jurisdiction;
- b. the nationality principle (also called the active nationality or active personality principle) — the offender is a national of the state concerned both at the time of offence and the time of trial;
- c. the passive personality principle (also called the passive nationality principle) — the victim is a national of the state concerned;
- d. the protective principle — the offence was prejudicial to a limited range of vital interests of the state claiming jurisdiction, such as counterfeiting or espionage, and
- e. the universality principle — any state which has the offender in custody may exercise jurisdiction over him because of the nature of the alleged offence.

As a general statement, if a state exercises jurisdiction on the basis of the territoriality or nationality principles, its right to do so is unlikely to be challenged. If it exercises jurisdiction on any other basis, it may be required to justify its position.

To a considerable extent, one's legal conclusion to the question of whether or not, in the absence of a treaty based right or a clear statement of customary law, a state is entitled to exercise jurisdiction on the basis of a rarely used universality principle. The universality principle is dependent on personal philosophical predisposition and an analysis of the 1927 decision of the Permanent Court of International Justice in the case of the *S.S. Lotus*<sup>73</sup>. In a split decision, decided by the casting vote of the President, the court addressed some fundamental aspects of international law:

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72. M. Akehurst, "Jurisdiction in International Law" (1972-73), 46 B.Y.I.L. 145-257.

73. *The S.S. Lotus* (P.C.I.J. 1927) 2 W.C.R. 20.

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed. . . .

It does not follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.<sup>74</sup>

A number of the dissenting judges strongly criticized the majority decision. Judge Moore observed:

No one disputes the right of a State to subject its citizens abroad to the operations of its own penal laws, if it sees fit to do so. This concerns simply the citizen and his own government, and no other government can properly interfere. But the case is fundamentally different where a country claims either that its penal laws apply to other countries and to what takes place wholly within such countries or, if it does not claim this, that it may punish foreigners for alleged violations, even in their own country, of laws to which they were not subject.<sup>75</sup>

The majority decision in the *Lotus*, which essentially holds that everything which is not explicitly prohibited is permitted, encourages jurisdictional experimentation by individual states which might be met with a distinct lack of enthusiasm by their neighbours.

Where war crimes are concerned, the right to exercise jurisdiction on the basis of the passive personality principle is generally accepted. This is the basis on which Canada actually exercised its right to try war criminals at the end of World War II. It is also considered that World War II war crimes cases provide overwhelming support for the argument that states, at that time, had a right to exercise jurisdiction over war crimes on the

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74. *Id.*, at 35.

75. *Id.*, at 82.

basis that the victims were co-belligerents, that is, an extension of the passive personality principle.<sup>76</sup> One factor which appears to indicate Canadian support for this position is s.7(4) of the War Crimes Regulations which allows allied officers to sit as members of Canadian courts when allied interests are involved.<sup>77</sup>

The real jurisdictional question concerning war crimes is: in the absence of treaty rights, may a state exercise jurisdiction over war crimes on the basis of the universality principle? Further, if universality is an accepted basis for jurisdiction over war crimes, when did it become acceptable? A review of state practice in this area is not as helpful as one might desire. Bearing in mind that Germany and Japan surrendered unconditionally at the end of World War II and that, to a considerable extent, the Allied Powers exercised sovereignty over them, it is difficult to find a war crimes case in which universality is an essential basis of jurisdiction. One of the few immediate post World War II cases which might be dependent upon the universality principle is the trial of *Remmele*, where the defendant was tried by a US Military Government Court for war crimes committed against Russian and Czechoslovakian nationals, although at the time of commission of the acts alleged the US had not yet entered the war.<sup>78</sup>

Four later decisions, the *Eichmann* decision and three decisions concerning *Demjanjuk*, all related to World War II incidents, also support the view that states have a customary law right to exercise jurisdiction over war crimes on the basis of the universality principle. All of these cases involve, directly or indirectly, the state of Israel which was not created until after World War II. The Supreme Court of Israel in its judgment in the *Eichmann* case, which concerned war crimes and crimes against humanity, provided a thorough review of the existing case law and doctrinal writing without citing cases where reliance on the universality principle was essential to establish jurisdiction.<sup>79</sup> The court referred to, among other material, an article by Sheldon Glueck, an American legal scholar:

“All this means that customary international law is never static but is found to be in a process of constant growth, as Glueck stressed (*in his article in Harvard Law Review*, vol. 59, p. 414):

“... Customary international law ... is as obviously subject to growth as has been the law of any other developing legal order, by the

76. A.R. Carnegie, “Jurisdiction Over Violations of the Laws and Customs of War” (1963), 39 B.Y.I.L. 402-24.

77. *War Crimes Act*, 1946 Geo VI, C.73 at 489-90.

78. *Remmele* referred to in 15 L.R.T.W.C. 44.

79. The Portion of the Israeli Supreme Court Judgement concerned with jurisdiction is in (1962) 36 I.L.R. 289-304.

crystallization of generally prevailing opinion and practice into law under the impact of common consent and the demands of general world security.”

And at p. 418:

“Every recognition of custom as evidence of law must have a beginning some time.”<sup>80</sup>

Concerning jurisdiction, the court concluded:

“Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.”<sup>81</sup>

The written decision of the Israeli court in the Demjanjuk case was not available at the time of writing. Two American cases concerning Demjanjuk do, however, buttress the decision of the Israeli Supreme Court in *Eichmann*. In *Matter of Extradition of John Demjanjuk*, a US District Court gave a relatively sketchy review of the law, assumed that as war crimes and crimes against humanity are international crimes then universal jurisdiction exists, and finally, relying on the *Lotus* case, concluded: “Respondent cites no authority to show that Israel would violate international law by asserting jurisdiction over respondent based on the universality principle . . . Israel’s assertion of jurisdiction does not impinge or interfere with any other state’s jurisdiction since no other nation has requested respondent’s extradition.”<sup>82</sup> In *Demjanjuk v Petrovsky*,<sup>83</sup> a US Appeals Court upheld the District Court decision. Concerning the Israeli claim to exercise jurisdiction based on the universality principle, the court observed that the post-war crimes tribunals must have derived jurisdiction from the universality principle, a questionable proposition, and concluded, “whatever doubts existed prior to 1945 have been erased by the general recognition since that time that there is a jurisdiction over some types of crimes which extends beyond the territorial limits of any nation.” The court also quoted the *Restatement (Revised) of the Foreign Relations Law of the United States* as an authority. Section 404 states in part: “A state may exercise jurisdiction to define and punish certain offences, recognized by the

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80. *Id.*, at 290.

81. *Id.*, at 304.

82. *In the Matter of the Extradition of John Demjanjuk* (1985), 612 F. Supp. 544 (D.C. Ohio) at 558.

83. *Demjanjuk v Petrovsky* (1985), 776 F.2d. 571 (USCA — 6th Circuit).

community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps terrorism. . .”<sup>84</sup>

National law of war manuals provide some indication of state practice concerning jurisdiction. As indicators of apparently differing views on the subject, the 1958 British Land Warfare Manual, prepared in part by Sir Hersch Lauterpacht, asserts at para. 637 that war crimes are crimes *ex jure gentium* and are thus triable by the courts of all states.<sup>85</sup> In contrast, the 1956 US Army Law of War Manual, prepared in part by Richard Baxter, a distinguished American international lawyer, asserts that war crimes are international crimes at para. 498 but at para. 507 (mislabelled Universality of Jurisdiction) it asserts merely that US military courts may try persons accused of committing war crimes against US nationals, nationals of allies and of co-belligerents and stateless persons.<sup>86</sup>

The major post-World War II law of war treaties, the Geneva Conventions of 1949 and Additional Protocol I of 1977 contain grave breach provisions listing major offences and provide for a variant of universal jurisdiction.<sup>87</sup> If these treaties apply to a conflict and an individual is alleged to have committed a grave breach then any party to the treaty may try the alleged offender. The Hague Cultural Property Convention of 1954 also contains an offence section which provides for a variant of universal jurisdiction, but as Canada is not a party to the treaty it would not be appropriate at this time for Canada to try alleged offenders against this Convention.<sup>88</sup>

Carnegie, in his 1963 study “Jurisdiction Over Violations of the Laws and Customs of War”, comes to a tentative conclusion:

“Where the right to exercise jurisdiction must be based on customary international law if it is to be exercised at all, the country of which the victim of the crime is a national may always exercise jurisdiction in virtue of the passive personality principle; probably, the ally of any such country may also exercise jurisdiction on the basis of the same principle. Finally, the development of the law in this field seems to be moving towards a recognition of universal jurisdiction over all serious war crimes; and it would not seem unreasonable to conclude that this recognition was already complete.”<sup>89</sup>

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84. *Id.*, at 582.

85. *UK Manual*, *supra* note 33.

86. *The Law of Land Warfare* Department of the Army Field Manual FM 27-10 (Washington, D.C. 1956) at 178-82.

87. See, for example, Art. 146 and 147 of the 1949 Geneva Civilians Convention quoted above footnote 44.

88. Art. 28, Schindler and Toman, *supra* note 10, at 672.

89. Carnegie, *supra* note 76, at 424.

For World War II related offences, the right to exercise jurisdiction must be based on customary international law.

At the end of this discussion of jurisdiction, we return to the *Lotus* decision and the philosophical predispositions underlying the majority and dissenting judgments. Do states have the freedom to articulate relatively new bases of jurisdiction which will result in persons who were foreign nationals at the time of the offences being subjected to criminal trials by their courts? Should jurisdictional principles which apply today, and major war crimes today are within the scope of the universality principle, be extrapolated into the past?

In any event, it is suggested that an assertion that jurisdiction is a procedural matter and that retrospective application of procedural provisions as the normal legal approach is unduly simplistic where war crimes and crimes against humanity are concerned. Jurisdiction may well be a procedural matter when one is concerned with the question of venue or the allocation of jurisdiction among particular Canadian criminal courts. When, however, the question is whether or not, as a matter of international law, any Canadian court has the right to exercise jurisdiction over an offender, the question is fundamental. At the very least, it verges on matters of substance.

## VI. *Canadian Experience With the Law of War*

In both World Wars, a large number of prisoners of war were taken by Canadian Forces and a substantial number were confined in prisoner of war camps in Canada. During World War II, Canada was bound by the three predecessors of the four Geneva Conventions of 1949: The 1929 Geneva Conventions on the Wounded and Sick in the Field and on Prisoners of War and Hague Convention X of 1907 which adapted the principles of the Geneva Conventions to Maritime Warfare. In Canada, during World War II, the War Measures Act<sup>90</sup> provided a legislative basis for a series of orders in council concerning "Regulations Governing the maintenance of discipline among the treatment of prisoners of war".<sup>91</sup> These regulations governed the treatment of both prisoners of war in the normal meaning of the words and of civilian internees such as enemy aliens detained under the Defence of Canadian regulations. The traditional prisoners of war, members of enemy armed forces, were referred to as Prisoners of War Class I and treated in accordance with the

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90. *War Measures Act* R.S.C. 1985, c. W-2.

91. *Regulations Governing the Maintenance of Discipline Among and Treatment of Prisoners of War* P.C. 4121 of 13 December 1939 as amended. Office Consolidation on file in the Office of the Judge Advocate General.

1929 Geneva Prisoners of War Convention. Civilian internees were referred to as Prisoners of War Class II and were treated in accordance with the 1929 Convention subject to certain exclusions. The regulations incorporated the 1929 Convention into Canadian law and established a disciplinary system for prisoners of war. Prisoners of war were subject to Canadian military law as if they were members of the various Canadian Forces. In addition, certain special orders applied to them, such as:

“11. Deliberate disobedience, coupled with resistance or apprehended resistance to officers, guards or sentries, or other conduct of a mutinous or riotous kind, will, if necessary, be dealt with by force of arms.

12. It is to be distinctly understood that any Prisoner of War attempting to pass the boundary fence, wall, or to go out through any gate, exit or other opening without a permit signed by the Commandant after being once duly warned and disregarding that warning, will be fired on.<sup>92</sup>

Prisoners of War could be tried by summary trial or by court martial. In certain circumstances, they could also be tried before civil courts.

During World War II, there were a number of cases concerning prisoners of war before Canadian civil courts. Four of the cases, *Krebs*, *Brosig*, *Kaehler*, and *Shindler* concerned offences committed in attempting to escape. In *Krebs*,<sup>93</sup> an Ontario Magistrate held that a prisoner of war who breaks and enters a dwelling house and steals a number of articles for the purpose of facilitating his escape from a prisoner of war camp, is not criminally responsible. On the other hand, in *Shindler*,<sup>94</sup> an Alberta Magistrate held simply that a prisoner of war who steals an automobile in the course of his escape from an internment camp is, by virtue of the 1929 Prisoners of War Convention, subject to the criminal law of Canada. Further, in *Brosig*,<sup>95</sup> the Ontario Court of Appeal reversed a magistrate's decision and held that a prisoner of war is criminally responsible for the looting of a mail bag and the taking of articles therefrom for his personal use in the course of an escape and may be convicted of theft in respect thereof. In *Kaehler*,<sup>96</sup> the Alberta Court of Appeal held that a prisoner of war is entitled to the protection of the laws of Canada and therefore owes obedience to the laws of Canada, although brought against his will within the territory where such laws are administered. A prisoner of war was not immune at common law from criminal liability for offences committed in furtherance of his escape and this liability is clearly recognized by Art. 51 of the 1929 Convention.

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92. *Id.*, at 4.

93. *R. v. Krebs* (1943), 80 C.C.C. 279 (Ont. Mag. Ct.).

94. *R. v. Schindler* (1944), 82 C.C.C. 206 (Alta Mag. Ct.).

95. *R. v. Brosig* (1945), 83 C.C.C. 199 (Ont. C.A.)

96. *R. v. Kaehler and Stolski* (1945), 83 C.C.C. 353 (Alta. C.A.)



(Art. 51 indicated that attempted escape should not be considered as aggravating related offences).

In *Perzenowski*,<sup>97</sup> the Alberta Court of Appeal was concerned with an incident in which a number of prisoners of war killed a fellow prisoner in a prisoner of war camp because they considered him to be a traitor. The accused were convicted of murder at trial and argued on appeal that the court had no jurisdiction to try them for the offence, that their act was an act of war, and that in any event only the military authorities had jurisdiction unless they transferred the jurisdiction to the civil court. The Court upheld the murder convictions. It held the civil court not only had jurisdiction, but it was the only tribunal with jurisdiction to try a prisoner of war for the murder of a fellow prisoner of war in a prisoner of war camp in Canada. The belief of the accused that their victim was a traitor to their common country was not sufficient provocation to reduce the offence to manslaughter; nor did their belief that they were compelled by their military law to comply with orders given them to commit the murder furnish any excuse or justification. The *Perzenowski* case is a strong statement against the idea of holding kangaroo courts in prisoner of war camps.

The direct utility of these World War II prisoner of war cases is limited. On the other hand, they do illustrate some of the problems which occur when Canadian courts are faced with unfamiliar international law problems.

The handling of war crimes cases is another area where the law of war impacts on Canadian law. An obvious question is “have Canadian servicemen ever committed war crimes or been tried for them?” The simple answer is we don’t know for certain, but we can make some educated guesses. First, it would be hypocritical to pretend that Canadian servicemen have never committed war crimes. There is some indication that Breaker Morant, an Australian executed for killing prisoners in the Boer War, and the subject of a fairly recent movie, learned some of his techniques from the members of the Canadian cavalry unit, Lord Strathcona’s Horse. There is no doubt Canadians have killed prisoners on occasion. A recent book by Tony Foster, *Meeting of Generals*<sup>98</sup> includes several references to orders given by Canadian commanders to kill prisoners. It is not clear if these orders were carried out. In addition, the recently published memoirs of General Vokes, one of our Divisional Commanders in Italy during World War II, displays in several places

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97. *R. v. Perzenowski and Others*, [1945] 3 W.W.R. 678 (Alta. C.A.)

98. Tony Foster, *Meeting of Generals* (Toronto: Methuen, 1986).

what can most charitably be described as a somewhat cavalier approach to the law of war.<sup>99</sup>

There is no indication Canadian servicemen have been tried for war crimes by foreign military courts. Nor have any Canadian servicemen been sentenced to death during the world wars for offences under military law which are analogous to war crimes such as murder of civilians. Whether or not Canadian servicemen have been court martialed for war crimes type offences under military law and been awarded sentences less than death is unclear as the records available are inadequate.

One rather bizarre war crimes case did involve a Canadian, but not a member of our forces. The Kamloops Kid was a Japanese Canadian who found himself in Japan after Pearl Harbor. He acted as a translator and interrogator for the Japanese troops at a prisoner of war camp where the Canadian Hong Kong survivors were being held. At the end of the war he was tried by a British military court on war crimes charges, convicted, and sentenced to death. His counsel subsequently raised the argument that his client was a Canadian citizen. Once this was confirmed, the finding of the court was quashed, and the Kamloops Kid was released from military custody. As a classic example of good news, bad news, however, he was then arrested by Hong Kong civil authorities, tried before a civil court under the British Treachery Act, convicted, and hanged.

Canada did hold a number of war crimes trials involving German nationals at the end of World War II. The domestic legal basis for these trials was the War Crimes Regulations and the War Crimes Act. The Governor in Council initially passed the War Crimes Regulations on 30 August 1945 under the authority of the War Measures Act.<sup>100</sup> "War crime" was defined as:

(f) "War crime" means a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939.<sup>101</sup>

The regulations governed the custody, trial and punishment of war crimes suspects. Basically, the regulations adapted and adopted the Canadian military law of the day, that is, British military law, for war crime trials. Some of the traditional evidentiary rules were relaxed. Here is an example:

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99. C. Vokes, *My Story* (Ottawa, 1985).

100. P.C. 5831 of August 30, 1945.

101. *Supra* note 77, at 488.

10. (1) At any hearing before a military court convened under these Regulations the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a field general court-martial.<sup>102</sup>

Here are some others:

10(4) Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes.

(5) Where there is evidence that a war crime has been committed by members of a formation, unit, body or group and that an officer or non-commissioned officer was present at or immediately before the time when such offence was committed, the court may receive that evidence as prima facie evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime.<sup>103</sup>

The Regulations provided for the imposition of the death penalty as a maximum punishment. On further legal review, it was pointed out to the Government that, as the War Crimes Regulations were passed under the War Measures Act which provided for a maximum punishment of five years imprisonment for violations, the legality of the death penalty provision in the War Crimes Regulations was debatable. In order to cure the perceived defect, The War Crimes Act was passed in 1946 to reenact the War Crimes Regulations and the Act was deemed to have come into force on 30 August 1945, the day on which the War Crimes Regulations were initially approved by Order-in-Council.<sup>104</sup>

Canada had War Crimes Investigation Units investigating a number of incidents in Europe and the Far East at the end of World War II and four war crimes trials were held before Canadian military courts in Aurich, Germany in 1945-46. The best known trial is that of *Kurt Meyer*.<sup>105</sup> Meyer was accused, while Commander of the 25th S.S. Panzer Grenadier Regiment, of having incited and counselled his men to deny quarter to allied troops, ordered (or in the alternative been responsible for) the

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102. *Id.*, at 491.

103. *Id.*, at 492.

104. *Id.*, at 489-90 also B.J.S. Macdonald, *The Trial of Kurt Meyer* (Toronto: Clark, Irwin, 1954) at 37-58.

105. *Trial of S.S. Brigadefuhrer Kurt Meyer*, 4 L.R.T.W.C. 97. A transcript of the trial is on file in the Office of the Judge Advocate General.

shooting of prisoners of war at his headquarters, and been responsible for other such shootings at his headquarters and during the fighting nearby. He pleaded not guilty. The prosecutor referred to the presumptions contained in Sections 10(4) and (5) of the War Crimes Regulations, quoted above, in his argument, as the case against Meyer was, understandably, based essentially on circumstantial evidence. For that matter, bearing in mind the importance of discipline in combat units, these presumptions probably merely codify the conclusions which would be drawn by any experienced military officer. Meyer was found guilty of the incitement and counselling, and was held responsible for the shootings at his headquarters, though not guilty of ordering them, and was found not to be responsible for the shootings outside his headquarters. He was sentenced to death, but Canadian military authorities commuted the sentence to life imprisonment. Meyer's sentence was eventually reduced to fourteen years and he was actually released in 1954. Following his release, Meyer was employed by a brewery and, in the words of his most recent biographer "he managed to introduce the delights of Andreas bottled beer to the messes of the Canadian armed forces serving in Europe."<sup>106</sup>

The other three cases all involved offences against RCAF prisoners of war. *Johann Neitz*<sup>107</sup> was sentenced to life imprisonment after being convicted of firing two shots into the body of Flying Officer Rudolph Anthony Roman, a prisoner of war, with intent to kill. Flying Officer Roman survived the war. *Wilhelm Jung*, a civilian Nazi party official, and *Johann Schumacher*,<sup>108</sup> a German soldier, were tried jointly on a charge of committing a war crime in that they, at the village of Oberweir, Germany, in July 1944, in violation of the laws and usages of war, were concerned in the killing of Conrad William Martins, a member of the RCAF, a prisoner of war. Both accused raised unsuccessful pleas of superior orders. Both were convicted, sentenced to death, and executed.

In the last case, *Robert Holzer, Walter Wigel and Wilhelm Ossenbach*<sup>109</sup> were tried jointly on a charge of committing a war crime in that they, near the town of Opladen, Germany, during the month of March, 1945, in violation of the laws and usages of war, were concerned in the killing of an unknown Canadian Airman, a member of the RCAF, a prisoner of war. All three accused attempted unsuccessfully to raise the plea of superior orders. All three were convicted. Holzer and Weigel were sentenced to death and executed. Ossenbach, presumably because he did

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106. Foster, *supra* note 98, at 513.

107. A transcript of the trial is on file in the Office of the Judge Advocate General.

108. A transcript of the trial is on file in the Office of the Judge Advocate General.

109. A transcript of the trial is on file in the Office of the Judge Advocate General.

not actually shoot the victim, was given a lesser sentence of fifteen years imprisonment.

There have been no prosecutions under the War Crimes Act, since these cases at the end of World War II. The Act remains in force, but it has not been republished in the various revised statutes. It is, however, archaic legislation which, if it was applied today, could result in a large number of successful arguments under the Canadian Charter of Rights and Freedoms.

In 1965, Canada ratified the Geneva Conventions of 1949 and passed implementing legislation, the Geneva Conventions Act.<sup>110</sup> As indicated earlier, grave breaches are major violations of the Geneva Conventions and constitute war crimes. Section 3 of the Geneva Conventions Act establishes jurisdiction concerning grave breaches.

2. (1) Any grave breach of any of the Geneva Conventions of 1949, as therein defined, that would, if committed in Canada, be an offence under any provisions of the Criminal Code or other Act of the Parliament of Canada, is an offence under such provision of the Criminal Code of other Act if committed outside Canada.

(2) Where a person has committed an act or omission that is an offence by virtue of this section, the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.

(3) No proceedings in respect of an act or omission that is an offence by virtue of this section shall be instituted without the consent in writing of the Attorney General of Canada.

Not all grave breaches become offences under Canadian law as a result of this section. The grave breach only becomes an offence if the act would be an offence under other Canadian law if committed in Canada. Section 7 of the Act subjects prisoners of war to the military Code of Service Discipline and s.8 authorizes the Minister of National Defence to make regulations respecting prisoners of war. No such regulations are in place at the present time. No one has ever been prosecuted in Canada by means of the Geneva Conventions Act; although it would appear to be particularly relevant legislation for the prosecution of war criminals in contemporary conflicts.

Prior to the establishment of the Deschênes Commission in 1985, the only Canadian statutes relevant to the war crimes issue were the War Crimes Act and the Geneva Conventions Act. Indeed, one of the recommendations made in Law Reform Commission Working Paper 37 of 1984 on Extraterritorial Jurisdiction was the following:

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110. *Geneva Conventions Act*, R.S.C. 1985, c.G-3.

That the Government of Canada authorize a study of the complex subject of war crimes including relevant aspects of international law, comparative law, constitutional law, criminal law and military law with a view to determining what war crimes legislation should be enacted by Canada to replace our present outdated legislation. Until that study is done, any other recommendations would be premature. Regardless of who undertakes the study, the Ministry of the Solicitor General of Canada and the Departments of Justice, National Defence and External Affairs should be included as participants in it.<sup>111</sup>

The extradition of Helmut Rauca, an alleged German war criminal, to the Federal Republic of Germany in 1983 to stand trial on war crimes charges constituted, however, a modest indicator of reviving interest in the war crimes issue.<sup>112</sup>

### VII. *The Deschênes Report and the Governmental Response*

The Deschênes Commission was established on 7 February 1985 to determine whether “persons responsible for war crimes related to the activities of Nazi Germany during World War II (hereinafter referred to as war criminals)” were resident in Canada and to recommend what present or proposed legislation could be used to ensure that such war criminals are brought to justice.<sup>113</sup> The Commission issued its Report on 30 December 1986, concluding that alleged war criminals, as defined in its terms of reference, were present in Canada and that neither the War Crimes Act, nor the Geneva Conventions Act were appropriate legal vehicles for prosecution of Nazi war criminals. In addition to its other recommendations, the Commission recommended that the Criminal Code should be used as the vehicle for the prosecution of war criminals in Canada and that s. 6 of the Code be amended by adding the following subsections:

(1.a) For the purposes of this section, “war crime” and “crime against humanity” mean respectively:

- a) War crime: a violation, committed during any past or future war, of the laws of customs of war as illustrated in paragraph 6(b) of the Charter of the International Military Tribunal which sat in Nuremberg, and irrespective of the participation or not of Canada in that war;
- b) Crime against humanity: an offence committed in time either of peace or of a past or future war, namely murder, extermination,

111. Law Reform Commission of Canada, *Working Paper 37: Extraterritorial Jurisdiction* (Ottawa: Supply & Services, 1984) at 86.

112. *R and Federal Republic of Germany v Rauca* (1983), 34 C.R. (3d) 97 and S. Littman, *War Criminal on Trial: The Rauca Case* (Toronto: Lester & Orpen Dennys, 1983).

113. Deschênes, *supra* note 2, at 17-18.

enslavement, deportation or other inhumane act committed against any civilian population or persecution on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated, as illustrated, but without limitation in time or space, in paragraph 67(c) of the Charter of the International Military Tribunal which sat in Nuremberg.

- (1.10) Notwithstanding anything in this Act or any other Act,
- a) where a person has committed outside Canada, at any time before or after the coming into force of this subsection, an act or omission constituting a war crime or a crime against humanity, and
  - b) where the act or omission if committed in Canada would have constituted an offence under Canadian law,
- that person shall be deemed to have committed that act or omission in Canada if
- c) the person who has committed the act or omission or a victim of the act or omission was, at the time of the act or omission,
    - (i) a Canadian citizen, or
    - (ii) a person employed by Canada in a military or civilian capacity;
 or
  - d) the person who has committed the act or omission is, after the act or omission has been committed, present in Canada.<sup>114</sup>

The scope of the proposed amendment is quite broad as it suggests that Canada could and should prosecute persons who have allegedly committed war crimes when Canada has not been involved in the war and persons who have allegedly committed crimes against humanity in time of peace or war. As indicated earlier, it is debatable whether or not Canada had a right under international customary law in the 1940's or earlier to exercise jurisdiction over alleged war criminals when Canada was not involved in the war. In contemporary international conflicts, Canada clearly would have a treaty-based right to exercise jurisdiction because the Geneva Conventions of 1949 would apply to the conflict and the alleged war crimes would be grave breaches of these Conventions. Further, whatever the current legal definition of crimes against humanity, it does not appear that anyone has ever been prosecuted for crimes against humanity committed in time of peace. Indeed, the IMT, in its judgment, deliberately failed to address alleged crimes against humanity committed before the commencement of World War II. As Canada was a participant in World War II, it is quite clear that it would have a sound basis in international law for prosecuting persons who allegedly committed war crimes or crimes against humanity while acting on behalf of Nazi Germany or its allies during that conflict.

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114. *Id.*, at 6-7.

In its initial response to the Deschênes Commission recommendations, the Federal Government indicated it would take certain measures to restrict the possibility of war criminals immigrating to Canada and that it would adopt a "made in Canada" approach whereby alleged war criminals would be tried for their offences under a new law before Canadian courts using Canadian evidentiary standards. The Canadian approach would differ from the American approach as war crimes prosecutions would be handled by the Federal Department of Justice and not by an Office of Special Investigations and as the accused would be tried for their offences before Canadian courts, rather than be stripped of Canadian citizenship and sent elsewhere for trial. It was, however, made clear that any new law would comply with international law as well as with the Charter of Rights and Freedoms, which specifies in section 11(g) that "Any person charged with an offence has the right (. . .) (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations".

The Government's legislative response was contained in Bill C-71, an Act to amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act,<sup>115</sup> which was introduced in the House of Commons for first reading on June 23, 1987, passed without amendment, and entered into force on September 16 and October 30, 1987. Bill C-71 amended Section 6 of the Criminal Code to make war crimes and crimes against humanity committed outside of Canada into offences triable before Canadian courts under certain circumstances. In lieu of the Deschênes Commission definitions, it defined "crime against humanity" and "war crime" as follows in the new Section 6 (1.96) of the Criminal Code:

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

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115. S.C. 1987, c.37.



Both definitions indicate that the prohibited acts or omissions must violate international law at the time when and in the place where they are committed. As indicated earlier, war crimes must be acts or omissions committed during an international armed conflict and, as a general statement, international armed conflicts can be considered to be conflicts between two or more states. It is obvious that atrocities may also occur in non-international armed conflicts but, if these acts are to be punishable as a result of Bill C-71, the acts must be classifiable as crimes against humanity. It should be noted that war crimes must constitute a violation of applicable customary or conventional international law while crimes against humanity might also be criminal according to the general principles of law recognized by the community of nations. The central features of both definitions are that they are open-ended, that they can develop over time, and that it is not possible to determine whether or not a particular act or omission constitutes a war crime or crime against humanity without reviewing the international law applicable when and where the act or omission occurred.

As suggested by the Deschênes Commission, war crimes and crimes against humanity committed outside Canada must cross the hurdle of double criminality before they are punishable as a result of Bill C-71. The act or omission must be a war crime or crime against humanity where and when it was committed and it must also be an act or omission which, is committed in Canada, would have constituted an offence under Canadian law applicable at the time. If the act or omission meets both criteria and, in addition, certain jurisdictional criteria are met, then the act or omission is deemed to have been committed in Canada. The double criminality approach is also used in the Geneva Conventions Act to penalize in Canada the commission of grave breaches outside of Canada. As a result of this approach, individuals are likely to be charged with violations of other sections of the Criminal Code rather than be charged directly with war crimes or crimes against humanity contrary to s.6.

Bill C-71 also establishes special extraterritorial jurisdictional criteria for trials before Canadian courts. As a matter of law, the acts of omissions are deemed to have been committed in Canada under s.6(1.91)(a) of the Criminal Code if:

- (a) at the time of the act or omission,
  - (i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity.
  - (ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or
  - (iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict;

It is suggested that Canada's right to exercise jurisdiction under international law over persons in the above categories alleged to have committed war crimes or crimes against humanity during or since World War II is, on the basis of the discussion of jurisdictional issues earlier in this article, unquestionable. These jurisdictional criteria are, however, somewhat narrower than those recommended by the Deschênes Commission. Two groups which are not covered under s.6(1.91)(a) are non-Canadians participating in an international armed conflict in which Canada is not engaged, for example, the Iran-Iraq conflict, and the citizens or employees of Canada's allies when Canada is engaged in an armed conflict, for example, the U.S.S.R. during World War II. The writer is unaware of any case in which a state had tried the citizens or employees of an ally for alleged war crimes committed against an enemy. Although one might question when, and to what extent, war crimes and crimes against humanity became international crimes to which universal jurisdiction attaches, it is probable that major war crimes are international crimes to which universal jurisdiction attaches today. In order to provide a domestic law basis for trying persons alleged to have committed war crimes or crimes against humanity which takes account of expanding jurisdictional bases in international law, s.6(1.91)(b) provides that acts or omissions are also deemed to have been committed in Canada if:

- (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada, and subsequent to the time of act or omission the person is present in Canada.

Under s.6(1.91)(b), the prosecution must establish that Canada could, at the time of the act or omission, have exercised jurisdiction in conformity with international law. Under s.6(1.91)(a) conformity with international law is presumed.

In any proceedings with respect to war crimes or crimes against humanity related charges must be conducted in accordance with the Canadian laws of evidence and procedure in force at the time of the proceedings (s.6(1.92)). An accused may, however, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the offence was allegedly committed or at the time of the proceedings (s.6(1.93)). As a result, it may be expected that Canadian courts will be required to deal with defences peculiar to the law of war such as military necessity, reprisals and superior orders. Section 6(1.94) specifies that the accused may not, however, use the fact that an act was in compliance with local law as a

defence. Here, at least, international law overrides domestic law. Bill C-71 also contains provisions specifying that no prosecution may take place without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada (s.6,(1.95)) and that certificates issued by or under the authority of the Secretary of State for External Affairs are admissible as proof that certain states were engaged in armed conflicts or that certain treaties were in effect (s.6(9)).

### VIII. *Conclusion*

As a result of the Deschênes Report and the governmental response to it, Canada now has an appropriate legal vehicle to prosecute persons who are alleged to have committed war crimes or crimes against humanity. Canada need not be in future, if it ever was in the past, a refuge for war criminals. One may, however, presume that the lawyers in the Department of Justice who are responsible for conducting war crimes prosecutions will have a very difficult task in front of them. To obtain a conviction, they must establish that the accused committed an act or omission which was a war crime or a crime against humanity at the time when and in the place where it was committed, that the court has a sound basis in international law for exercising jurisdiction, and that the act or omission would have constituted an offence under Canadian law at the time it occurred. They must do this in compliance with all of the procedural and evidentiary safeguards in current Canadian law and recognizing that the accused may, with one exception, rely on any justification, excuse or defence available under Canadian law or international law at the time of the occurrence or of the proceedings. The exception is that the accused may not raise the defence that his act was in compliance with the domestic law applicable at the time and place of the occurrence. Quite clearly, the prosecution must establish much more than the simple fact that the act or omission is analogous to an offence under the Criminal Code. To paraphrase the quotation from Robert Bolt with which this article begins, we give the Devil benefit of law, for our own safety's sake.