Permanent Mission of
Canada to the United Nations

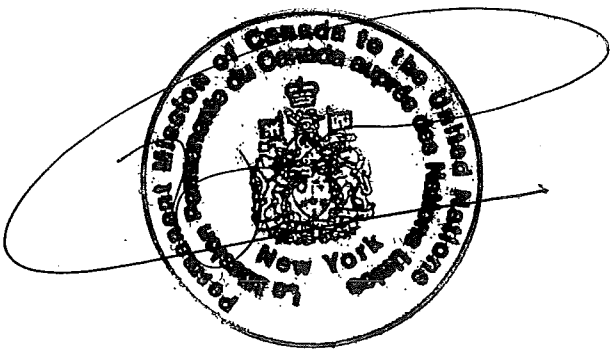
Mission permanente du
Canada auprès des Nations Unies

No. 0305

The Permanent Mission of Canada to the United Nations presents its compliments to the Office of Legal Affairs and has the honour to submit information as requested by operative paragraphs 3 and 4 of General Assembly resolution 62/63 of 6 December 2007 entitled "Criminal accountability of United Nations officials and experts on mission."

The Permanent Mission of Canada to the United Nations avails itself of this opportunity to renew to the Office of Legal Affairs of the United Nations the assurances of its highest consideration.

NEW YORK, 8 July, 2008



JLA-0435

Criminal Responsibility of Canadian Citizens Serving as United Nations Personnel or Experts

Owing to its common law tradition, Canada's, law, policy, and practice take a conservative approach to the extension of jurisdiction to investigate and prosecute criminal offences outside of Canada's territorial jurisdiction. There has been some judicial extension of territorial jurisdiction to include cases where only part of an offence has taken place in Canada, or there is some other real and substantial connection, but the general rule is to limit the application of Canada's criminal law to events occurring within Canada's territorial jurisdiction. There are some narrow exceptions to this principle, the majority of which are found in s. 7 of the *Criminal Code* (available online in English and French: http://laws.justice.gc.ca/en/showdoc/cs/C-46) and the *Crimes Against Humanit and War Crimes Act* (available online in English and French: http://laws.justice.gc.ca/en/showdoc/cs/C-45.9). These exceptions are based on three principles. First, several exceptions fulfil international legal obligations to prosecute the acts of Canadians committed outside of Canada or to prosecute others accused of extraterritorial offences who are found in Canada at some later time. These include subject matter such as terrorism, war crimes and crimes against humanity, piracy, torture and sex tourism. The second principle is the protection of Canada's essential interests (ie: the protective principle), particularly with respect to offences in areas such as immigration law, the integrity of the Canadian passport and similar matters The third principle is maintaining control over Canadian officials and military personnel working abroad. Canada will thus extend jurisdiction over crimes committed by Canadian nationals while serving as UN officials or experts on mission only when they fall within one of these exceptions.

When Canadian citizens and residents commit offences outside Canada which do not fall within these exceptions, Canada takes the position that such offences should be prosecuted in the courts of the countr(ies) on whose territory they were committed. In most cases, this will be the country which is in the best position to prosecute successfully from a jurisdictional and evidentiary standpoint, and Canadian intervention in what would otherwise be purely domestic criminal matters could be seen as an infringement on national sovereignty. In order to meet *aut dedere aut judicare* requirements, Canada's *Extradition Act* allows and regularly authorizes the extradition of its citizens and residents to countries and international criminal tribunals with which it has concluded extradition treaties or in accordance with commitments made in multilateral treaties (the *Extradition Act* is available online in English and French at: http://laws.justice.gc.ca/en/showdoc/cs/E-23.01).

Canada also provides assistance to other states and international tribunals in the investigation of crimes committed abroad or on its territory by persons subject to diplomatic or consular immunity. Various forms of cooperation can be extended pursuant to treaties, letters rogatory, and non-treaty requests.

Canada is pleased to provide the following overview of Canadian law in this regard.

1. Criminal Liability of Canadian Nationals While Serving as UN Officials or Experts on Mission

Canadian courts have the jurisdiction to try a criminal case where there is a "real and substantial link" between the conduct alleged and Canadian territorial jurisdiction. This includes any case where an essential element of the offence took place in Canada, and may also include other substantial connections, such as planning or preparation. The normal rule against conviction in Canada for an offence committed outside of Canada is found in s. 6(2) of the *Criminal Code* and is a fundamental precept of the common law tradition. As noted above, exceptions to this principle include exceptions needed to conform to international legal obligations, exceptions needed to protect Canadian essential interests, and several scenarios where Canada's domestic criminal law is extended to Canadian officials, including military personnel and diplomatic personnel who are employed by Canada outside of Canadian territory. As noted, Canadian citizens and residents who commit crimes that do not fall within these exceptions may be subject to extradition.

a) Offences established or extended extraterritorially in conformity with international legal obligations

The practice in Canada has been to implement the criminalization requirements of international legal instruments either by establishing new domestic and extraterritorial offences if required (e.g. terrorist bombing or attacks on diplomatic premises, *Criminal Code* ss.431-431.1), or if the conduct identified by the instrument is already a crime in Canada, by providing for extraterritorial jurisdiction over the existing offences, persons and/or circumstances required by the instrument (e.g. *Criminal Code* subpara.7(1)(d), deeming any indictable offence that occurs in an aircraft in flight to have been committed in Canada, if the flight terminates in Canada). Given the evidentiary and other practical obstacles to prosecuting cases where there may be relatively tenuous links to Canada, Canada would generally only do so where there is a sufficiently compelling policy justification. The major subject areas dealt with in this way include measures with respect to offences on marine vessels or aircraft, offences against internationally protected persons or United Nations personnel, terrorism offences, torture, war crimes and crimes against humanity, and sexual offences against children.

b) Offences for which prosecutorial jurisdiction is extended extraterritorially on the basis of Canada's essential interests

Examples of scenarios where Parliament has claimed extraterritorial jurisdiction based on other essential interests under grounds first set out in the 1935 *Harvard Research Draft Convention*[1] are not common, but do exist. For example, under the protective principle, offences which protect the integrity of the Canadian Passport (*Criminal Code* s.57), such as forgery or making false applications, and offences under Canada's *Immigration and Refugee Protection Act* (ss.134-35) (available online in English and French: http://laws.justice.gc.ca/en/showdoc/cs/I-2.5) which affect the immigration system can be prosecuted in Canada even if committed outside of Canadian territorial jurisdiction. As with many Member States, Canada asserts extraterritorial

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[1] *Harvard Research draft Convention on Jurisdiction with Respect to Crime* (1935) 29 Am. J. Int'l Law, Supp., p.480, cited *inter alia*, Shaw, *International Law*, 4th ed., Cambridge 1997, p. 458 *et seq* and Harris, D. *Cases and Materials on International Law*, 4th ed. London, 1991, chapt. 6, p.250 *et seq.*

jurisdiction over treason (*Criminal Code* s.46) and offences against national security or the good order of the Canadian armed forces (e.g. *Security of Information Act*, s.26 (available online in English and French: http://laws.justice.gc.ca/en/showdoc/cs/O-5), and *National Defence Act* ss.60 and 78 (available online in English and French: http://laws.justice.gc.ca/en/showdoc/cs/N-5)). Many of these also incorporate elements of active personality, in the sense that various offences only apply to accused persons who are Canadian nationals, members of or others accompanying the Canadian Forces, or who owe some form of allegiance to Canada. In contrast, Canada rarely invokes the passive personality principle in order to prosecute crimes where the victim is a Canadian citizen. One such exception is with respect to terrorism offences where there are Canadian victims, where the act or omission is committed against a Canadian government or public facility outside of Canada, or where the act or omission is committed with the intent to compel the Government of Canada or a Canadian province to act or refrain from acting (*Criminal Code* subs.7(3.75) and s.83.01).

c) Offences for which prosecutorial jurisdiction is extended extraterritorially on the basis of the employment status of the accused

Canada also extends jurisdiction to prosecute all Canadian criminal offences committed by its own officials in places outside of Canada's territorial jurisdiction. Any Canadian official within the meaning of Canada's *Public Service Employment Act* (available online in French and English: http://laws.justice.gc.ca/en/showdoc/cs/P-33.01) who commits an act or omission which is an offence under the laws of both Canada and the place where it was committed is deemed to have committed the offence in Canada (*Criminal Code*, subs.7(4)). This includes virtually all of Canada's federal public servants, whether resident abroad on diplomatic or other lng-term assignments or on short-term or travel assignments, provided that the conduct relates to the official's employment as a Canadian public servant. The provision does not include employees of Canada's provincial or local governments, and it does not include persons employed as locally-engaged staff in Canadian diplomatic missions or other offices outside of Canada, although some specific offences in Canada's *Security of Information Act* do apply to such personnel (see essential interests, above).

Canada's military law and justice system also extends the application of Canada's general criminal offences and prosecutorial jurisdiction to acts and omissions of members of the Canadian Forces and other persons accompanying the Forces outside of Canada (*National Defence Act*, s.130). The extension of general criminal and other offences is based on the general policy of extending Canadian law to military and associated personnel by reason of their status as such and the desire to subject them to Canadian law and proceedings as opposed to the legislation and proceedings of the place where the acts or omissions in question took place. Additional offences included in the *National Defence Act Code of Service Discipline* can also be seen as implementing or enforcing Canadian essential interests, in the sense that preserving good order and discipline in the Canadian Forces themselves and deterring conduct such as espionage and other activities that would aid an enemy are included as essential interests (e.g. *National Defence Act*, s.74 *et seq*). Reflecting the unique challenges of administering criminal justice, the *Code of Service Discipline* also allows for the prosecution of an act or omission which is an offence under the laws of the place where it was committed in some cases even if not a

Canadian offence (s.132) and provides for the conduct of criminal trials of all of these offences under Canadian law by a Canadian military tribunal sitting inside or outside of Canada (s.68).

While Canada may assert territorial or extraterritorial jurisdiction over criminal offences in appropriate cases, we would note that, as a matter of fundamental law, such offences must be prescribed by law, in the sense that they have been established and enacted by the Parliament of Canada or a competent provincial legislature. The constitutional viability of offences prosecuted in Canada under Canadian jurisdiction is also subject to applicable requirements for dual criminality and clarity and certainty with respect to scope of application and legislative drafting. No person can be convicted in Canada of an offence which is not so enacted and/or does not meet minimum constitutional standards. While the "applicable United Nations rules and regulations" referred to in A/RES/62/63 might provide guidance with respect to the laying and prosecution of criminal charges in Canada, they could not, absent some specific legislative enactment to the contrary, form the basis of a criminal offence or prosecution in and of themselves.

d) Extradition

With respect to acts not covered by these exceptions, Canada does not require extraterritorial jurisdiction in order to meet *aut dedere aut judicare* requirements because Canada's constitution and legislation do not preclude extradition. States may request the extradition of persons located in Canada, including Canadian citizens, who are wanted for criminal prosecution or for the imposition or enforcement of a sentence in the requesting State. Extradition requests to Canada may be made on one of three bases. First, Canada may initiate extradition proceedings pursuant to a bilateral extradition agreement (see list at Annex I) or a multilateral convention to which both Canada and the requesting State are party, and which contain provisions on extradition (see list of conventions to which Canada is currently a party at Annex IV). Second, States or entities that are designated in the Schedule to the *Extradition Act* R.S., 1985, c. 30 (4th Supp.) (available online at http://laws.justice.gc.ca/en), may submit extradition requests to Canada (see list of designated partners at Annex II). Third, in exceptional circumstances, Canada may enter into a case specific agreement with a state or entity with which it has no existing extradition relationship to give effect to a particular extradition request. All three options are subject to the principle of double criminality. In addition, a minimum penalty requirement under the laws of both Canada and the Requesting State applies.

Under Canadian law, extradition has both Ministerial and judicial phases. Extradition is only possible if (1) the Minister of Justice authorizes the commencement of extradition proceedings; (2) a Canadian extradition judge determines there is sufficient evidence to justify the person's committal for extradition; and (3) the Minister of Justice concludes it would not be unfair or contrary to Canadian laws or values to order the person's surrender to the requesting State or entity. In ordering surrender, the Minister may impose appropriate conditions. A person sought for extradition may appeal a committal order and seek judicial review of the Minister's decision to order surrender before the provincial appellate courts and with leave to the Supreme Court of Canada.

2. Cooperation in the Investigation and Prosecution of UN Officials

A foreign state or entity, including the ICC, ICTY and ICTR may request assistance from Canada in the gathering of evidence through treaty requests, court issued requests (Letters Rogatory), and non-treaty Letters of Request. The type and extent of assistance that may be provided to a requesting State or entity in any given circumstance will depend on which of the foregoing channels is available to them. While double criminality is not, as a general rule, required in the granting of mutual legal assistance, some mutual assistance treaties do make it a condition to cooperation.

a) Treaty Requests, Requests from Designated Entities, and Treaty Requests

The *Mutual Legal Assistance in Criminal Matters Act* (available online: http://laws.justice.gc.ca/en/showdoc/cs/M-13.6) is Canada's domestic legislation for implementing mutual legal assistance treaties in criminal matters. This *Act* applies, to all treaty requests for mutual legal assistance. not only to requests submitted under a bilateral treaty (See Annex III) or a multilateral convention containing mutual legal assistance provisions (See Annex IV), but also to requests made by the entities designated in the Schedule to the *Act*, namely, the ICC, the ICTY and the ICTR, or pursuant to an Administrative Arrangement which would give effect to a specific request from a non-treaty partner.

The most common types of assistance sought by requesting partners are production orders, search warrants and video-link evidence. With respect to production orders, a Canadian court must be satisfied, before it will issue an order, that there are reasonable grounds to believe that an offence has been committed and that evidence of the commission of the offence will be found in Canada. With respect to a search warrant, a Canadian court must be satisfied that there are reasonable grounds to believe an offence has been committed, that evidence of the commission of the offence will be found in a specific location in Canada and that a production order would not be appropriate in the circumstances. In both of these circumstances, a separate order to send the materials gathered or seized to the requesting partner is required, and challenges to these orders are possible. With regard to video-link evidence, a Canadian court must be satisfied that there are reasonable grounds to believe an offence has been committed and the requesting State or entity believes the person's evidence or statement would be relevant to the foreign investigation or prosecution.

Under the *Act*, if the Minister of Justice approves a request for assistance, Canadian courts may issue the following types of compulsory measures:

- Seizing evidence by search warrant ;
- Obtaining documentary evidence by production order;
- Obtaining evidence through the execution of other warrants described in the *Criminal Code* of Canada;
- Compelling witness testimony, including compelling witnesses to give evidence in foreign proceedings by means of audio or video-link;
- Lending exhibits which have been tendered in Canadian court proceedings;
- Obtaining an order for the examination of a place or site in Canada (including the exhumation and examination of a grave);

- The transfer of a sentenced prisoner (with his or her consent) to testify or assist in a foreign investigation; and
- Enforcing criminal fines, restraint, seizure and forfeiture orders (to a limited extent).

b) Letters Rogatory

Section 46 of the *Canada Evidence Act* (available online: http://laws.justice.gc.ca/en/showdoc/cs/C-5) gives Canadian courts the discretion to order the examination of a witness and/or the production of writings or other documents at the request of a foreign court or tribunal (Letters Rogatory). The assistance is available only if a criminal matter is "pending" before the requesting foreign court or tribunal. No other compulsory measures are available through this channel of cooperation.

c) Non-treaty Requests

Canada cannot compel the production of evidence pursuant to a non-treaty request but may be able to assist non treaty partners through voluntary measures such as the taking of voluntary statements or the service of documents.

Annex I: States and Entities Designated as Extradition Partners in the *Extradition Act*

STATES

Antigua and Barbuda
Australia
The Bahamas
Barbados
Botswana
Costa Rica
Ghana
Grenada
Guyana
Jamaica
Japan
Lesotho
Maldives
Malta
Mauritius
Namibia
Nauru
New Zealand
Papua New Guinea
Singapore
Solomon Islands
South Africa
St. Kitts & Nevis
St. Lucia
St. Vincent & The Grenadines
Swaziland
Trinidad and Tobago
Tuvalu
United Kingdom of Great Britain and Northern Ireland
Vanuatu
Zimbabwe

Entities

International Criminal Court
International Criminal Tribunal for the Former Yugoslavia
International Criminal Tribunal for Rwanda

Annex II: States With Which Canada Has Bilateral Extradition Treaties

States		Date of Entry into Force
1.	Albania	October 20, 1928
2.	Argentina	February 9, 1894
3.	Austria	October 2, 2000
4.	Belgium	March 17, 1902
5.	Bolivia	November 4, 1898
6.	Chile	August 22, 1898
7.	Colombia	December 16, 1899
8.	Cuba	May 22, 1905
9.	Czech Republic	December 15, 1926
10.	Denmark	February 13, 1979
11.	Ecuador	July 2, 1886
12.	El Salvador	January 13, 1883
13.	Estonia	September 18, 1928
14.	Finland	February 16, 1985
15.	France	December 1, 1989
16.	Germany	September 30, 1979, October 23, 2004
17.	Greece	February 26, 1912
18.	Guatemala	December 13, 1886
19.	Haiti	February 21, 1876
20.	Hong Kong	June 13, 1997
21.	Hungary	March 30, 1874
22.	Iceland	July 7, 1873
23.	India	February 10, 1987
24.	Israel	December 19, 1969
25.	Italy	June 27, 1985
26.	Korea	January 29, 1995
27.	Latvia	September 18, 1928
28.	Liberia	March 23, 1894
29.	Lithuania	September 18, 1928
30.	Luxembourg	March 15, 1881
31.	Mexico	October 21, 1990
32.	Monaco	May 23, 1892
33.	Netherlands	December 1, 1991
34.	Nicaragua	August 24, 1906
35.	Norway	October 17, 1873
36.	Panama	August 26, 1907
37.	Paraguay	July 17, 1911
38.	Peru	May 20, 1907
39.	Philippines	November 12, 1990
40.	Portugal	March 19, 1894
41.	Romania	May 21, 1894
42.	San Marino	March 19, 1900
43.	Slovakia	December 15, 1926
44.	South Africa	May 4, 2001
45.	Spain	August 15, 1990
46.	Sweden	October 30, 2001
47.	Switzerland	March 19, 1996
48.	Thailand	November 24, 1911
49.	Tonga	November 29, 1879
50.	United States	March 22, 1976
51.	Uruguay	March 20, 1885

Annex III: States with which Canada has bilateral mutual legal assistance agreements and publication information

STATE	Date
Argentina	December 20, 2001
Austria	December 1, 1997
Australia	March 14, 1990
Bahamas	July 10, 1990
Belgium	April 1, 2003
China	July 1, 1995
Czech Republic	November 1, 2000
France	May 1, 1991
Hellenic Republic	January 28, 2000
Hong Kong	March 1, 2002
Hungary	September 1, 1996
India	October 25, 1995
Israel	March 16, 2000
Italy	December 1, 1995
Korea	February 1, 1995
Mexico	October 21, 1990
Netherlands	May 1, 1992
Norway	January 14, 1999
Peru	January 25, 2000
Poland	July 1, 1997
Portugal	May 1, 2000
Romania	June 30, 1999
Russia	December 18, 2000
South Africa	May 4, 2000
Spain	March 3, 1995
Sweden	December 1, 2001
Switzerland	November 17, 1995
Thailand	October 3, 1994
Trinidad Tobago	October 11, 2003
Ukraine	March 1, 1999
United Kingdom	September 17, 1993
United States	January 24, 1990
Uruguay	March 1, 2002