



Note 0211

The Permanent Mission of Canada to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to Resolution A/RES/65/20 entitled *Criminal Accountability of United Nations Officials and Experts on Mission* (the “Resolution”), dated 10 January, 2011, as well as to Note LA/COD/50, wherein the Secretary-General requested input on the Resolution, specifically to operative paragraphs 3, 4, 5, 15.

The Permanent Mission has the further honour of referring the Secretary-General to annex “A” attached to this note, wherein the Government of Canada offers its input on the Resolution, specifically to paragraphs 3, 4, 5, 15.

The Permanent Mission of Canada to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

New York, 21 July, 2011



APPENDIX "A"

PARAGRAPH 3 - ESTABLISHMENT OF JURISDICTION

While there is no comprehensive basis for jurisdiction in all of the foreseeable cases, Canada does have nationality-based jurisdiction to prosecute the actions of Canadians serving abroad:

i) Ss.60 and 61 of the *National Defence Act (NDA)* state that members of the Canadian Forces, persons who accompany the Canadian Forces or who serves with the Canadian Forces under an engagement whereby the person agrees to be subject to it, are subject to Part III of that Act, being the Code of Service Discipline (CSD). The CSD establishes all service offences from which a person subject to it can be charged, dealt with and prosecuted, including but not limited to, offences under any other act of Parliament amongst which is the *Criminal Code of Canada (CCC)*. S.67 of the *NDA* establishes that every person alleged to have committed a service offence pursuant to the *NDA*, may be charged, dealt with and tried under the CSD, whether the alleged offence was committed in Canada or outside Canada. Additionally, pursuant to *NDA* s.132, an act or omission that takes place outside Canada and would, under the law applicable in the place where the act or omission occurred, be an offence if committed by a person subject to that law is a service offence. Every person found guilty by a service tribunal of these offences is liable to suffer a punishment that the service tribunal considers appropriate, having regard to the punishment prescribed by the law applicable in the place where the act or omission occurred and the punishment prescribed for the same or a similar offence in the *NDA*, the *CCC* or other Acts of Parliament."

ii) Canadian public servants employed abroad are subject to prosecution in Canada under subsection 7(4) of the *CCC*. The conduct must be an offence both in Canada and in the place where it is committed.

Canadian courts also have territorial jurisdiction over any offence established in Canadian law if there is a real and substantial connection to Canada. This includes offences where any part of the offence itself took place in Canada, where an offence was planned in Canada and committed elsewhere, and most forms of transnational conspiracy, but does not include cases where the offender is a Canadian national and there is no other connection to Canada. This would permit the prosecution in Canada of a range of criminal offences that might be committed in the context of service with the UN whether the offender is a Canadian national or not.

Canada also takes jurisdiction over a number of offences based on other exceptions to customary international law or pursuant to international legal instruments to which Canada is a party.

Examples include:

- piracy;
- terrorism; and

- abuse of the Canadian immigration system such illegal migration and false documents.

These would certainly apply to the conduct of a Canadian national who committed an offence while serving with the UN.

PARAGRAPH 4 - COOPERATION WITH OTHER STATES AND THE UN IN THE EXCHANGE OF INFORMATION AND IN FACILITATING THE CONDUCT OF INVESTIGATIONS AND, AS APPROPRIATE THE PROSECUTION OF UN OFFICIALS

Canada can investigate within Canada in order to generate and share evidence, but Canada cannot conduct any enforcement actions (arrest, detention, search and seizure etc.) or any investigative operations in another State without its consent.

PARAGRAPH 5 - COOPERATION WITH RESPECT TO EVIDENCE, ETC

In the case of a prosecution in Canada there are often practical problems associated with the importation of foreign-source evidence into Canadian legal proceedings. These include the fact that evidence sent by the UN would probably have to be supported by viva voce testimony, which raises practical issues such as travel costs, and in the case of UN witnesses raises the question of their privileges and immunities (e.g. from perjury offences) when they come to Canada. Some forms of evidence may be obtained under mutual legal assistance processes and laws, and in some scenarios video-link evidence might be an option. In general, however, the costs and logistical obstacles to actually mounting a successful prosecution in some of these scenarios can pose as serious a challenge as legal obstacles, if not more so. The question of the protection of victims and witnesses may also pose practical problems. A witness who appears locally via video link or through documentary means would be difficult for Canada to protect, and one who comes here to testify may claim refugee status and seek to remain, which in some scenarios might reduce the value of the testimony itself. While there are a number of practical difficulties associated with the prosecution of a Canadian national on facts which have arisen in the context of UN service outside of Canada, these do not raise any major legal or constitutional obstacles, provided that the constitutional rights of the accused can be met.

PARAGRAPH 15 - CONTINUE TO TAKE MEASURES

Canada will continue to consider the desirability of amending Canadian law to establish offences appropriate to UN service and jurisdiction to prosecute conduct outside of Canada that would be an offence if committed in Canada if it is committed by a national or permanent resident of Canada while serving with the UN.