

Sine Qua Non: Canadian Criminalization of
War Crimes, Crimes Against Humanity and Genocide

by

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Abstract

This dissertation provides a socio-historic analysis of the ethos of war crimes criminalization articulated in three general historical eras: the First World War era, the Second World War era, and the contemporary era. Both primary (i.e. archival material, legislative documents, and law) and secondary (i.e. journals articles and books) materials informed this analysis. Although these three eras were not entirely discrete (e.g. criminalization during the Second World War era was influenced by the failure of Leipzig trial that followed the First World War, and policy decisions following the Second World War had a great deal of impact upon the criminalization process in the contemporary era) or unified (varying levels of disagreement occurred amongst important lobby groups and policy makers in each era), important policy shifts occurred in each period as the Canadian government attempted to grapple with the issue of war crimes and war criminals.

The Canadian criminalization of war crimes, crimes against humanity and genocide was marked by six prominent features: (1) the *sine qua non* of the criminalization process in each era was a distinct conception of the nature of war crimes and/or war criminals; (2) the articulation and application of war crimes policies rarely matched; (3) Canadian identity shaped the criminalization process, and the criminalization process helped to shape Canadian identity; (4) although a distinct conception of war criminals was prominent in each era, remnants of past conceptions of war criminals still influenced the criminalization process; (5) an examination of the

criminalization of war crimes within the military justice system is essential in order to understand the criminalization process writ large; (6) it is impossible to fully separate the different justice systems in play during the criminalization process.

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Dedication

This is dedicated to Alison, Jordana and Sofia. You have all sacrificed as much as I did,
and more, during each stage of the writing process.

In loving memory of my father, Witold Wolejszo.

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Section I: Introduction

In 1997 Désiré Munyaneza, who was a mid-level perpetrator in the 1994 genocide in Rwanda, obtained a falsified passport and immigrated to Canada disguised as a Cameroonian citizen. After a six-year investigation that included travel to Rwanda in order to interview witnesses, the Royal Canadian Mounted Police (RCMP) arrested Munyaneza in October of 2005 to face charges of genocide, crimes against humanity and war crimes under the *Crimes Against Humanity and War Crimes Act*. Munyaneza was charged with crimes committed in another sovereign state, and neither the perpetrator nor the victims were Canadian citizens at the time of the offenses. Laurence Cohen, defense attorney for Munyaneza, questioned the legitimacy of the proceedings as follows:

What we're talking about here is a crime committed totally within another country that really pertains specifically to that other country, yet Canada is taking the role in place of Rwanda of prosecuting this man. It begs the question, I suppose, other than the fact he's present in its borders, why are we doing this? (cited in Hamilton: March 17, 2007)

Munyaneza was ultimately found guilty on all counts, and both the verdict and the sentence (25 years in prison without the chance for parole, which is the toughest possible under Canadian law) have been appealed by the defense.

At least two types of approaches can be used to address the question “why are we doing this?” The first focuses upon the legal framework of Munyaneza’s trial. Specifically, a key component of the legal process, which was particularly relevant in

historic war crimes trials such as the International Military Tribunal held at Nuremberg following the Second World War, is the principle of *nullum crimen sine lege* (i.e. there has been no crime, and can be no punishment, unless a prohibition under existing law was in place at the time of the offence). Eve la Haye (2008: 332) notes that the existence of prohibitions at the time of the offence is a *sine qua non* (i.e. essential condition) of fair legal proceedings:

A reasoned opinion firmly establishing the basis in customary law of all offences and forms of liability for which an accused is convicted, is a condition *sine qua non* for the respect of the principle *nullum crimen sine lege* and as a result an indispensable component of a right to receive a fair trial.

Munyaneza's actions during the Rwandan genocide clearly violated the Geneva Convention and contravened the customary international laws of war. The Genocide Convention (1948) establishes universal jurisdiction for the punishment of this crime (Van der Vyver 1999), meaning that any nation can try an individual for genocide regardless of the nationality of the accused. The *Crimes Against Humanity and War Crimes Act*, which came into force in Canada in October of 2000, was expressly worded to give jurisdiction to Canadian courts to try offenses (i.e. war crimes, crimes against humanity and genocide) that were already illegal under international law. The key prohibitions were in place at the time of the offense, and the legal requirements for a fair trial were met. However, although the response "because we can" addresses the issue of *how* the trial came into being, it provides limited insight into the question of *why* Canadian authorities chose to create such legislation to begin with.

A second possible approach to address the question “why are we doing this,” which is the approach utilized in this dissertation, focuses upon the criminalization of war crimes, crimes against humanity and genocide in Canada. The criminalization process, through which criminal law is "*selectively* applied to social behavior" (Beirne and Messerschmidt 2000: 15, emphasis added), is always situated within a particular socio-historic setting. To address the question of *why* certain activities are criminalized in specific moments in history, theories of criminalization commonly focus upon the process through which popular approval for the marginalization and exclusion of categories of individuals is mobilized and legitimated at particular moments in time (Scranton and Chadwick 2004). From this perspective, it is not enough to simply identify the *sine qua non* of fair legal proceedings. The analysis must instead move to a deeper level in order to identify the *sine qua non* of existing Canadian war crimes legislation.

Dissertation Summary

This dissertation provides a socio-historic analysis of the ethos of war crimes criminalization articulated in three general historical eras: the First World War era, the Second World War era, and the contemporary era. Although these three eras are not entirely discrete (e.g. criminalization during the Second World War era was influenced by the failure of Leipzig trial that followed the First World War, and policy decisions following the Second World War had a great deal of impact upon the criminalization process in the contemporary era) or unified (varying levels of disagreement occurred amongst important lobby groups and policy makers in each era), important policy shifts

occurred in each period as the Canadian government attempted to grapple with the issue of war crimes and war criminals.

Section II provides an overview of the theory and methods that informed this project. The development of laws of war is shown to be a complex process, largely due to the fact that such laws or codes of conduct are situated within particular social contexts, and evolve considerably over time. Attempts to apply existing criminological theories, particularly those with rigid assumptions, to the topic of war crimes, crimes against humanity and genocide have produced decidedly mixed results. Theories of criminalization are utilized in this analysis because they provide the flexibility necessary to account for important changes that occur over time with regard to the criminalization process. A socio-historic approach, which is also flexible, is used to analyze both primary (i.e. archival material, legislative documents, and law) and secondary (i.e. journals articles and books) material collected during the research process.

Section III analyzes the Canadian criminalization process during the First World War era. The most common viewpoint to emerge in international legal debates in this era was that war criminals were a part of a primitive race, and the notion that war criminals were primitive became the *sine qua non* of the criminalization process. As the war progressed "enemy aliens" living in Canada, who were cast as inferior, and inherently criminal, were targeted for exclusion and physical removal from the country. Although he was a staunch believer in the distinction between civilized and uncivilized races, Prime Minister Robert L. Borden rejected the notion that Germans and Austro-Hungarians were inferior races and steadfastly opposed war crimes trials. *A de facto*

policy for dealing with war criminals emerged in Canada, as the “uncivilized” races were to be dealt with through means other than war crimes trials both internationally (through colonial policies in which civilized nations were to adopt a parental role) and in Canada (through exclusion and removal). The racialization of war crimes, which was based upon a strict distinction between “civilized” and “uncivilized,” was a part of a larger struggle over who is to be included, and excluded, from the definition of “Canadian.”

The criminalization of war crimes by Canada during the Second World War era, which is the central topic of Section IV, was once again influenced by developments in international law. Although Nuremberg was a watershed in international law, it was not used as a point of reference. Instead, newly formed Canadian legislation was used to try individuals who had committed war crimes against Canadian military personnel. In the Pacific Theatre, Canada did not have the required military command presence to conduct its own war crimes trials, and opted instead to send representatives to assist in cases involving Canadian victims. The Tokyo trials generally followed the models established at Nuremberg, while trials conducted by British Authorities were convened under the Royal Warrant. Although a limited number of Canadians were charged for offences related to the treatment of prisoners of war in the Pacific Theatre, none were specifically charged for committing war crimes.

Section V provides an analysis of the Canadian criminalization of war crimes, crimes against humanity and genocide during the contemporary era. The Canadian criminalization process occurred against a backdrop of significant achievements in international law, including the passage of the Genocide Convention and the Universal Declaration of Human Rights, the use of domestic courts to prosecute Nazi-era war

criminals, the establishment of international criminal tribunals following genocides in the former Yugoslavia and Rwanda, the passage of the Rome Statute, and the establishment of the International Criminal Court. The most significant steps in the Canadian criminalization process were the formation of the Deschênes Commission, the acquittal of Imre Finta, the creation and application of new war crimes legislation based upon the tenets of the Rome Statute, and the prosecution of Canadian soldiers stemming from events in Somalia inquiry and Afghanistan.

The conclusion outlines six themes that were prominent features of the Canadian criminalization of war crimes, crimes against humanity and genocide: (1) the *sine qua non* of the criminalization process in each era was a distinct conception of the nature of war crimes and/or war criminals; (2) the articulation and application of war crimes policies rarely matched; (3) Canadian identity shaped the criminalization process, and the criminalization process helped to shape Canadian identity; (4) although a distinct conception of war criminals was prominent in each era, remnants of past conceptions of war criminals still influenced the criminalization process; (5) an examination of the criminalization of war crimes within the military justice system is essential in order to understand the criminalization process *writ large* and (6) it is impossible to fully separate distinct justice systems in play during the criminalization process.

Section II: Literature Review and Methods

The core question at the heart of this analysis is: *Why* have war crimes, crimes against humanity and genocide been criminalized in Canada? Closely related to this are secondary questions of *how* war crimes, crimes against humanity and genocide have been criminalized in Canada, and the *impact* of the criminalization processes upon patterns of inclusion and exclusion within Canadian identity formation. At first glance criminology, which is concerned with making laws, breaking laws, and the reaction to breaking laws (Sutherland 1934), appears well-suited to provide a framework of analysis to answer such questions. However, the discipline of criminology has only recently developed a substantial body of literature related to this form of criminal activity. As late-comers to ongoing discussions in international law related to such crimes, criminologists must carefully outline the type of contribution they can make.

Chapter 1

Literature Review and Theoretical Orientation

This chapter will begin by illustrating how the laws of war differ from place to place, and have evolved over time. Although the focus of this dissertation is squarely upon the criminalization of war crimes, crimes against humanity and genocide in Canada, it is important to briefly assess what can be learned using international and historical examples. The second section will outline key statements made by criminologists to this point in time. As a general rule, rigid application of existing criminological theories have been less successful than flexible approaches that either allow for the modification of existing theory or the development of new theory. The final section provides a brief overview of theories of criminalization, which will help to inform and guide this socio-historic analysis.

1.1 The Ever-Changing Laws of War

Although a complete review of the development of the laws of war across time and place is well beyond the scope of this dissertation, it is prudent to draw upon several historic examples in order to illustrate key points that are critical to any understanding of a specific national formulation of and response to war crimes, crimes against humanity and genocide. To this end, this section utilizes historic examples to illustrate six interrelated points. (1) The process through which emergent laws of war develop, and ways in which war crimes are categorized, reflects deeply rooted, culturally-based interpretations of the

world. (2) Once laws of war are established, they function to reinforce group identity and protect the group from outside forces that are defined as threatening. (3) The formulation and articulation of a particular form of the laws of war may lead to unanticipated consequences. (4) Considering that society is never completely homogenous and unified, it is not surprising to find key debates emerge regarding the nature of war crimes and war criminals. (5) Once formulated, the laws of war continue to shift and evolve over time. (6) However, residual categorizations from previous incarnations of the laws of war are never fully expunged from the social discourse.

While not wanting to be murdered, raped or tortured may be natural, prohibitions against such actions during wartime emerged through a distinctly social set of processes. For this reason, the laws of war are not static and uniform, but have instead varied significantly from place to place and have changed considerably over time. For example, in his classic Sixth Century B.C.E. treatise *The Art of War*, Sun Tzu appeals to practical considerations when arguing that prisoners of war and the civilian population of captured territories should be treated with care. The reason for offering fair treatment is practical in the sense that large armies operating in distant lands have inherent issues relating to supply lines, making cooperation from local populations indispensable to waging war. The codes of conduct during wartime found in *The Art of War* are quite different from those based upon religious texts and doctrine that existed during the same era. In such instances, the rules found in religious texts and doctrine focused upon ensuring that conduct during wartime did not violate core spiritual principles. For example, in India the Codes of Manu contained a series of guidelines regarding when to enter a war, proscriptions against killing captured enemy soldiers, and placed limitations upon the

types of weapons that may be used.¹ The teachings found in the Qur'an were applied by Muslim armies to the treatment of prisoners of war.² Despite the large degree of variation between different formulations of the laws of war across time and space, it is safe to say that in all instances the laws of war were intelligible by virtue of the fact that they reflected the social milieu in which they were created.

The process through which emergent laws of war develop, and ways in which war crimes are categorized, reflects deeply rooted culturally-based interpretations of the world. For example, in Europe during the Middle Ages the blending of Christian doctrine with the rules of war epitomized emergent codes of chivalry that governed conduct among knights both on and off the battlefield. The word "chivalry" is rooted in the French term *chevalier*, which refers to people who ride horses. This etymology is telling, because the knights responsible for developing codes of chivalry were a part of a small group of nobility who were wealthy enough to own horses. Thus, class distinctions that were of critical importance in that era became deeply embedded within the emergent codes of Chivalry. As a result, the courtesy to other knights and upper class women, which were among the hallmarks of chivalry, did not extend to the peasant classes who could expect no such courtesy or mercy (Braudy 2005).³ Complex rules of ransom also emerged during the middle ages which largely ensured that knights captured by the

¹ Barbed weapons, poison arrows, and the use of burning substances as a weapon, are examples of the prohibitions listed in *Codes of Manu*.

² The Qur'an contains the following passage: "And when you meet in regular battle those who disbelieve, smite their necks; and, when you have overcome them, bind fast the fetter—then afterwards either release them as a favor or by taking ransom—until the war lays down its burdens" (47:5).

³ It is important to note that the existence of codes of conduct does not mean that they are always, or often, followed. A good account of how knights often ignored the rules outlined in Chivalric codes can be found in *War and Chivalry: The Conduct and Perception of War in England and Normandy, 1066-1217* (Strickland 1996).

enemy during battle would be freed, providing their personal fortunes were large enough to afford the ransom (Contamine 1986). Individuals who had not accumulated personal fortunes were not typically offered mercy when captured.

Once laws of war are established, they function to reinforce group identity and protect the group from outside forces that are defined as threatening. For example, in the middle ages a “just war” doctrine developed in the Holy Roman Empire that was rooted in principles laid out in the Bible.⁴ At the core of the principles of just war is the premise that although wars are destructive, there are instances in which initiating war is the right thing to do. The Church positioned itself as the final arbiter of whether or not a war was just or, in instances in which feudal lords were in conflict, which side was fighting a just war (Maogato 2004).⁵ When Pope Urban II launched the First Crusade to recapture Jerusalem and the Holy Land from the Muslims in 1095, he drew upon the just war doctrine and justified the action by arguing that the war is God’s will, and that taking up arms in a Holy War is a form of penitence for past sins. European discourse reinforced group distinctions rooted in religion: Crusaders were *milites Christi*, *fideles Christi* and *exercitus Dei*, while the enemy was referred to as *infideles*, *barbari*, *pagani*, and *les satellites du diable* (Alkopher 2005). Significantly, as more crusades were launched over the course of almost two hundred years, the laws of war authored by the Church

⁴ This task was enormous, because the Bible is rife with conflicting interpretations of proper conduct during wartime. To cite just one example, Samuel (15:3) states: "Now go and smite Am'alek, and utterly destroy all that they have, and spare them not; but slay both man and women, infant and suckling, ox and sheep, camel and ass" while Kings (6:21-22) states: "And the king of Israel said unto Elisha, when he saw them, My father, shall I smite them? And he answered, Thou shall not smite them. Wouldest thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread and water before them, that they may eat and drink, and go to their master."

⁵ The role of the church in deciding which side is just evolved over time, partially due to the fact that Lords in conflict were each able to find a high ranking Church official to back their side (Maogato 2004), but also due to a crisis stemming from increasing numbers of external invasions from the North (Alkopher 2005).

created different levels of protection based upon religion. For example, the Third Lateran Council ruled that crossbows could not be used against Christians, but could lawfully be used against infidels.

The formulation and articulation of a particular form of the laws of war may lead to unanticipated consequences. For example, contradictions emerged during the medieval era regarding the application of religious principles to the laws of war. Specifically, the universal principles laid out in the Bible appeared to be at odds with the fact that the rules governing the conduct of soldiers fighting in the name of Christianity offered protection to only a select few. Seeing this contradiction, Pope Innocent IV significantly reinterpreted the necessity of the Crusades. Innocent IV blurred the distinction made between Christians and non-Christians, arguing that infidels established civil societies with advanced systems of law and customs. He further reasoned that everyone is bound by the principles of the gospel, meaning the pope has to be concerned with the souls of Christian and infidel alike (Nardin 2003: 14). Innocent IV concluded that the pope has the authority, and obligation, to wage war when two conditions are met: (1) infidels violate “natural law” (such as idolatry), and (2) existing local authorities do not act to prevent or punish such violations. The argument fashioned by Innocent IV, which drew upon the work of St. Aquinas, presupposed the existence of universal laws that govern all human conduct. The unanticipated consequence of this argument was that it effectively expanded the concept of “humanity” to include all religious groups. This established an imperative to intervene when these universal laws are violated, regardless of the religious affiliation of the persecuted group.

Considering that society is never completely homogenous and unified, it is not surprising to find key debates emerge regarding the nature of war crimes and war criminals. For example, during the conquest of the Americas European interests were searching for justifications for the invasion (Cirkovic 2006). Of particular importance was the development of racial distinctions that emerged within the ensuing debate when news spread of the brutal treatment of indigenous peoples by Spanish colonials. On one side of this debate, jurists influenced by the Thomist position⁶ argued that indigenous peoples should be included in the larger category of Humanity on the provision that they did not transgress natural laws.⁷ Opposing this was the view that indigenous people were not humans at all, but “natural slaves”⁸ who could reasonably be exploited in the process of extracting natural resources in order to fill Spanish coffers. Based upon the latter position, a view of race as an unchanging biological quality emerged. This led to a categorization of races that underpinned the supposed distinction between conquerors and indigenous peoples (who were all lumped together, despite a wide range of differences between the existing groups) that was at the heart of colonial philosophy (Youngblood 2000). The expulsion from the category of “humanity” experienced by colonized groups effectively removed any protections, however weak, they may have had under international law. As a result, the laws of war, which had previously offered unequal protection based upon religion and class, were further stratified by racial categorizations.

⁶ The most famous of these jurists is Francisco de Vitoria, who argued against the notion that the conquest of the Americas was lodged against immoral barbarians.

⁷ The implication of this “enlightened” position was that indigenous peoples had to adopt European customs and values in order to show that they follow “natural laws.” Thus, indigenous peoples would either be colonized forcibly, or they could voluntarily adopt European customs and values.

⁸ A.W. Price (1990: 175) provides a useful overview of how both Plato and Aristotle conceived of “slave” as being categorically different (largely in terms of temperament and biology) from other types of humans.

Once formulated, the laws of war continue to shift and evolve over time. For example, concepts of “just” and “unjust” war, which centered upon differences in the spiritual purity of the sides engaged in a conflict, were gradually superimposed upon, and then replaced by, categories of biological purity such as “civilized” and “uncivilized” warfare. The type of war fought by civilized nations was described in a treatise known as *On War* (1832), written by the Prussian General Karl von Clausewitz. To Clausewitz, “uncivilized” people fight unrestricted warfare marked by utilizing the most extreme measures possible in order to win (which is the natural state of war), while “civilized” people are tempered by concerns stemming from the political context in which the conflict occurs:

If the Wars of civilized people are less cruel and destructive than those of savages, the difference arises from the social condition both of States in themselves and in their relations to each other. Out of this social condition and its relations War arises, and by it War is subjected to conditions, is controlled and modified. But these things do not belong to War itself; they are only given conditions; and to introduce into the philosophy of War itself a principle of moderation would be an absurdity.⁹

While the capacity of war to destroy is theoretically limitless, Clausewitz argued civilized nations understand that only the minimum amount of destruction necessary to compel the enemy to do as you require should be inflicted. According to Clausewitz, war conducted by civilized nations is so closely tied with politics that war is simply politics by another means, while wars fought by uncivilized races were driven by passion and marked by seemingly limitless levels of destruction.

⁹ This quote is taken from Chapter 1 (“What is War?”), section 3 (“Utmost Use of Force”).

However, residual categorizations from previous incarnations of the laws of war are never fully expunged from the social discourse. The discourse of civilized warfare, for example, is an undercurrent that runs through the formalized international laws of war that developed in latter half of the nineteenth century. The first of four Geneva Conventions—the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field¹⁰—was established in 1864. The Hague Conventions of 1899 and 1907, which outlaw specific types of weapons, such as asphyxiating gas and the launching of explosives from balloons, were important steps toward the codification of the laws of war. The Martens Clause within the Hague Convention clearly linked the adoption of these conventions with being a part of a family of “civilized” nations that voluntarily submit to “the laws of humanity” and the dictates of “public conscience.” However, the voluntary nature of these agreements meant that they were not universal, and the laws of war encoded in these agreements did not fully bind the signatories.¹¹ For example, Article Two of the initial Hague Convention carefully stipulates that:

The provisions contained in the Regulations mentioned in article one are only binding on the Contracting Powers, in case of war between two or more of them. These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents.

Thus, at the outset of World War I, the laws of war were structured to govern and protect a group of civilized nations while excluding nations (and non-state combatants) that were

¹⁰ The three subsequent Geneva Conventions and associated protocols have covered a range of issues including treatment of prisoners of war, war at sea, and the treatment of civilian populations.

¹¹ The fact that Japan did not adopt the Geneva Convention led to serious legal challenges to the validity of the Tokyo Trials following the Second World War.

not “civilized” enough to adopt the core principles laid out in the Geneva and Hague Conventions.

Based upon this brief overview of historical tendencies within the formation and application of the laws of war, an effective analysis of the criminalization of war crimes must take a wide range of factors into account, including: the impact of social context upon the development of the laws of war; the impact of the criminalization process upon the identities of multiple groups; the unanticipated consequences that follow the criminalization process; the significant debates that emerge as the criminalization process unfolds; and the somewhat fluid nature of the criminalization process, in which some elements of criminalization change significantly over time while others are re-shaped to conform with key discourses in a particular era. The central question is whether criminological theory in its present form is equipped to address these challenges.

1.2 The Application of Criminological Theory to the Study of War Crimes, Crimes against Humanity and Genocide

Until the past three decades, social scientists in general, and sociologists and criminologist in particular, largely ignored the topic of genocide. Helen Fein’s (1979) survey of sociology textbooks found that they either ignored the topic entirely or, at best, dealt with it very briefly in a paragraph or two. The relative silence of criminology toward the topic is puzzling, considering a case can be made that genocide is a form of large scale crime (e.g. Friedrichs 2000). More recently, some criminologists have forayed into genocide scholarship, often working under the assumption that existing

criminological theory will add to our understanding of how and why such large scale crimes occur. This section begins with an account of a small number of early criminologists who included statements regarding war crimes, crimes against humanity and genocide. Such individuals were the exception rather than the rule. The second portion of this section provides an overview of the reasons why, until relatively recently, criminology excluded genocide and war crimes from its subject matter. This is followed by a brief summary of select important attempts to apply existing criminological theory to this topic area.

The overwhelming majority of criminologists have, until recently, followed the trend in the social sciences to ignore the topic of genocide, war crimes and crimes against humanity. Interestingly, the exceptions to this general rule were not criminologists working on the margins of the discipline. The earliest criminologist to make note of what we now refer to as war crimes is Cesare Lombroso (2006), a former doctor in the Italian Army who was extremely influential in the latter part of the nineteenth century. In the second edition of *Criminal Man*, Lombroso added “crimes of passion” to his taxonomy of crimes. The category crimes of passion included several types of crime, including murders committed by individuals who feel an “intense love for their countries” and hope to “render a great service by killing men they consider to be their nation’s worst enemies.” It is worth noting that Lombroso added the category “criminals of passion” to distinguish between individuals who are “natural born criminals” from those who engage in criminal acts due to environmental factors. Lombroso also distinguishes between criminals who act upon noble passions (who have “sublime” passions) and those who act upon “primitive” passions such as revenge, lust, and “alcoholic rage.” Contrary to racial

explanations for war crimes that were common at the time (see Segesser 2006), Lombroso, who had personally experienced the impact of armed conflict, rejected biological determinism in favor of environmental explanations.

Another very early exception to the general silence of criminologists toward genocide, war crimes and crimes against humanity is Sheldon Glueck. Glueck is best known for producing (along with his wife, Eleanor) biologically reductionist accounts of juvenile delinquency commonly referred to as “developmental criminology.” A less-known fact about Glueck is that he made an important contribution to the development of the Nuremberg trials, where he primarily advocated for charges of “crimes against humanity” (Hagan and Greer 2002). Glueck argued that the application of international law to such crimes establishes strong norms (and the resulting consequences for breaking such norms) that will discourage individuals from committing such acts in the future. The type of social engineering that is at the heart of his position was a hybrid of the influence of his mentor Roscoe Pound (who advocated the position that the law was an important mechanism for social engineering) and his own perspectives regarding the influence of environmental factors upon future crime. Following this line of theoretical reasoning, Glueck was a strong advocate for the establishment of a fully international criminal court that could monitor future enforcement of the laws laid out at Nuremberg.

The willingness of Lombroso and Glueck to include genocide, war crimes, and/or crimes against humanity in their analysis of crime represented aberrations within the field of criminology in their respective times, and the relative silence of criminology with respect to genocide continued into the 1990s. George Yacoubian (2000) conducted a

content analysis of the most prestigious periodicals in the field of criminology, along with major conference presentations and papers, between 1990 and 1998. He found that out of 19,304 conference papers presented at the *American Society of Criminology* and the *Academy of Criminal Justice Sciences*, only 18 were related to genocide. Similarly, of the 13 leading criminology journals only one out of 3,138 articles published during this period dealt with genocide. Yacoubian concludes that these startling figures support the contention that genocide has been overlooked within the field of criminology.

Although the relative silence of criminology with regard to genocide, war crimes and crimes against humanity can be measured in a relatively straightforward and uncomplicated manner, the reasons for this silence are considerably more difficult to identify. Alex Alvarez (2001) presents five main reasons for the exclusion of genocide from criminology: (1) the topic is too overwhelming and complex for many social scientists; (2) there has been a demise of the “criminological imagination”—meaning that criminology a) is more concerned with techniques of measurement than with what is being measured, and b) focuses upon less problematic and easy to measure behaviours; (3) the perception that genocide is a foreign phenomenon; (4) the marginality of state crime in general to the field of criminology; and (5) the study of genocide demands a response that many researchers are unwilling to give—specifically, it requires abandoning all claims of being a detached and impartial observer. While some of these rationales may be called into question (e.g. considering the complexity of the social world in general, how is it that social scientists ignore genocide because they are overwhelmed by complex topics?), Alvarez does provide a useful starting point for understanding why criminologists have ignored the topic for so long.

Maier-Katkin, Mears and Bernard (2009) also attempt to understand why criminologists have historically ignored genocide. They identify four largely structural reasons related to criminology as a discipline for why genocide research has for so long been excluded from criminological scholarship: (1) criminologists point out that state-sanctioned genocide has often been legal within the context in which it occurs, and is therefore outside of the scope of criminological investigation; (2) the politics of the discipline led to an emphasis upon domestic concerns such as street crime, drug use, and delinquency; (3) the practical concern of research funding and enrollment numbers in a field that is an uneasy mixture of criminology and criminal justice led to an emphasis on the concerns of the criminal justice system and de-emphasis of state crime; and (4) criminologists who are concerned with their careers are often better off focusing upon traditional topics and the refinement of existing (largely quantitative) analyses than blazing new trails by studying esoteric topics. They usefully add that an “uneasy marriage” has developed between criminology and criminal justice, and the influence of the latter has directed criminologists toward the “concerns of the criminal justice system” rather than international crime (Maier-Katkin, Mears and Bernard 2009: 231).

The narrow subject matter that sociologists tend to address is taken to task by Zygmunt Baumann (1989), who argues that genocides such as the Holocaust are portrayed as being either unique (meaning there is no pattern to analyze), or too extreme (meaning there are no lessons learned for “normal” everyday life) to be of use to sociological analysis. Baumann goes on to argue that “the Holocaust has more to say about the state of sociology than sociology in its present shape is able to add to our knowledge of the Holocaust” (3). Criminology has similar blind spots, as criminologists

have often been slow to tackle instances of state-organized crime (Chambliss 1988). William S. Laufer (1999: 73) points out that “the fact that acts of genocide often originate from those in sovereign power, the makers of law, the majority rule, seems to prompt a deference to sovereignty that has an immunizing effect.” In other words, when a sovereign nation creates a policy of mass extermination that is implemented within the confines of an established criminal code it creates an aura of legality. Furthermore, laws passed by government to legalize forms of marginalization that often form a component of the genocidal process add to the illusion of legality (Alvarez 2010). While this aura of legality may serve to exclude genocide, crimes against humanity and war crimes from mainstream criminological analysis, critical criminological perspectives that do not strictly adhere to state definitions of crime and critique the state and other apparatuses of government may be successfully applied.

Wayne Morrison (2006) further elaborates on how the organization of the field of criminology has created sets of assumptions regarding appropriate subject matter for the discipline. According to Morrison, criminology is an enlightenment project that is inextricably bound to the existence of modern sovereign states. Laws are defined and outlined within respective criminal codes, and each state is responsible for punishment of transgressions that occur within its borders. The *raison d'être* of the criminological enterprise is to facilitate progress within the state through the understanding, and accompanying elimination or management, of crime that occurs within its borders. Existing outside of the civilized space of the state, the field of international affairs is a wild domain governed by the naked self-interest of individual nation-states. A solid foundation for criminology is denied in the international realm, because the interests of

one nation will invariably conflict with those of another. Morrison is highly critical of the exclusion of genocide from criminology which, he argues, occurs for two main reasons: (1) the study of the Holocaust (or genocide in general) cannot enter into criminology so long as the nation state defines foundational concerns of the discipline; and (2) the contexts in which genocide occurs are commonly viewed as being “truly exceptional places that could never exist again” (253), and are thus also viewed as irrelevant to the process of mapping out generalized principles of criminal activity. To Morrison, the core foundational assumptions of criminology have to be reconstituted in order to accommodate the study of genocide.

The long-standing bias against the inclusion of genocide within the scope of the social sciences is gradually deteriorating, and a number of sociologists and criminologists have made significant contributions to our understanding of how and why genocide occurs (e.g. Baumann 1989, Fein 1990, Chalk and Jonassohn 1990, Doubt 2000, Alvarez 2001, Shaw 2007a, Liwerant 2007, Mullins and Rothe 2008). Although criminologists have presented persuasive arguments regarding why the study of genocide, crimes against humanity and war crimes should be included as appropriate subjects for criminological investigation, there is little consensus regarding what criminological theory adds to the existing discussions. Roberts and McMillan (2003: 316), for example, argue that criminologists are well equipped to counter a tendency among legal scholars to present an account in which criminal law is portrayed as an “abstract system of norms without history and social context” (316). In other words, criminological theory, through the systematic application of existing theoretical concepts, brings something new to the analysis by situating law within particular historic and social settings. However, this

argument badly underestimates the importance of history and social context in existing legal theory. A case in point is the position adopted by legal realists, who argue that key developments in international law stem from political expediency and national self interest (Maogoto 2004), both of which are always situated specifically within a particular time and place.

Day and Vandiver (2000: 43) adopt a position that directly contradicts that of criminologists such as Roberts and McMillan, and argue that the inclusion of genocide research into the field of criminology is appropriate because existing criminological theories resonate with what genocide scholars are already finding:

Scholars of genocide and mass killings have proposed several theories explaining how the behaviors of governments, political leaders, and ordinary citizens contribute to extreme violence. Many of the explanatory constructs developed in these theories bear a striking resemblance to core concepts of criminology or could be readily integrated with criminological ideas.

However, this argument is problematic for at least three reasons. First, Day and Vandiver are comparing criminological theory to an older form of genocide studies. The field has undergone considerable changes as a new generation of scholars familiar with the non-Western world has entered into the discussion (e.g. Moses 2008; Levene 2005; Shaw 2007; Bloxham 2005). Second, care must be taken to avoid justifying the inclusion of criminological theory in the study of genocide, war crimes and crimes against humanity on the basis of apparent similarities with existing approaches utilized by other disciplines. If criminologists are simply restating what is already known, the potential contribution of criminological theory would appear to be limited (at best), or even redundant. Lastly,

scholars such as Andrew Woolford (2006) point out that an engagement between criminology and genocide must be reflexive. Rather than focusing solely upon the application of existing theory to new topics such as genocide, war crimes and crimes against humanity, it is important to also consider how this critical engagement can challenge or even reshape such theories, and perhaps even lead us to question the foundational assumptions of the discipline.

Despite the fact that criminology as a discipline has a history of ignoring genocide, war crimes, and crimes against humanity, a groundswell of interest in these topics has emerged in past two decades. For example, a recent issue of *Theoretical Criminology* (2009, volume 13) contained seven articles related to the Hagan and Rymond-Richmond's *Darfur and the Crime of Genocide* (2008), which applies empirical criminological analysis to the questions of genocide and human suffering in Darfur. This is striking, considering the dearth of articles related to genocide only a decade or two earlier. The remainder of this section will provide a brief summary of select instances of the application of key criminological theories to the topic of genocide, war crimes and/or crimes against humanity. The goal is not to provide a comprehensive overview of the ways in which criminological theory has been applied. Instead, illustrative examples will be used in order to gain an initial understanding regarding why some applications of criminological theory fail while others succeed.

The core concept within criminology that has arguably had the most resonance with genocide scholars is Sykes and Matza's neutralization theory (1957). At the heart of neutralization theory is the premise that a tension may develop between the moral

obligations to both follow the law and avoid illegitimate acts. Sykes and Matza were well aware that individuals who broke the law often experienced guilt over their actions. They outlined five techniques of neutralization—denial of the victim, denial of injury, denial of responsibility, condemning the condemners, and appeal to higher loyalty—that were commonly utilized by offenders to mute or replace moral obligations during the course of committing a crime or deviant act. The techniques of neutralization essentially help to resolve or dampen the tension one feels when committing actions that contradict one's values. They are largely internal mechanisms used to quell the guilt associated with engagement in illegal and/or immoral acts. Alvarez (1997) outlines the utility of neutralization theory to the study of genocide: an explanation of why individuals follow orders to kill is provided by denial of responsibility; denial of injury provides insight into why perpetrators employ euphemisms to mask the grim reality of the killing process; denial of victim can be used to understand why perpetrators often justify genocide as self defense; condemning the condemner explains why those who stand trial for genocide often accuse other nations of committing the exact same offences; and the appeal to higher loyalties explains how patriotism may be mobilized during a genocidal campaign. Alvarez adds a sixth technique, "denial of humanity", in which other groups are considered inhuman or less human than one's own. The utility of this approach is evident in the fact that neutralization theory has been applied to genocide more often than any other existing criminological theory (e.g. Alvarez 1997; Day and Vandiver 2000; Yacoubian 2006; Cohen 2001).

The assumption that neutralization theory can be unproblematically transplanted to the study of genocide may be challenged. For example, Alex Alvarez (2001: 112) states that:

These processes, or techniques of neutralization, allowed delinquents to suppress their normative system of values and engage in deviant behavior. This is the same process engaged in by participants in genocide.

The troubling question that is not addressed is whether the rationalizations offered by young offenders are substantively the same as those offered by individuals engaged in genocide. For example, the state may issue the command for genocidal action and a potential perpetrator may hold a strong moral commitment to obeying state orders. Resisting the call to participate in the destruction of the group targeted for extermination may therefore be the morally challenging decision, which would mean that neutralization theory may be more appropriately applied to those who refuse to take part in the killing process than those who offer full support. Furthermore, neutralization theory provides limited insight into individuals who do not feel guilt or remorse for their crimes, and are motivated by hatred, racism, or anti-Semitism.

In another attempt to apply existing criminological theory to the subject matter, Brannigan and Hardwick (2003) draw upon Gottfredson and Hirschi's (1990) general theory of crime. According to Gottfredson and Hirschi, perpetrators of "ordinary crimes" (i.e. those that require little skill or planning, and derive very simple benefits to the offender) characteristically have low levels of self control. This theory presents the argument that self control is developed during childhood, through attentive parenting, and

remains relatively consistent throughout later stages of the life cycle. Although Gottfredson and Hirschi recognize that the propensity to commit crime must be accompanied by criminal opportunities, they argue that most offenses are relatively easy to commit and that opportunities to do so arise continually. Countering the belief that pressure or influence exerted by groups and gangs can motivate an individual to commit crime, Gottfredson and Hirshi (2000) argue that individuals tend to associate with others who are like-minded. In this way, participation in groups facilitates, rather than causes, criminal activity. As the name suggests, the general theory of crime is intended to have a broad scope. Gottfredson and Hirschi (1990:117) claim that it “explains all crime, at all times, and, for that matter many forms of behavior that are not sanctioned by the state.”

Given that genocide is often sanctioned by the state, and that it is doubtful that attentive parenting is the key to lowering predispositions to commit genocide, it appears as though this form of crime is outside the intended scope of Gottfredson and Hirschi’s general theory of crime. To their credit, Brannigan and Hardwick acknowledge that the model of persistent low self control is a poor fit in terms of genocide. For example, the German police reserve battalions used to round up and execute Jews in newly occupied territories during the Second World War were clearly made up of very ordinary, and even upstanding, citizens with no hint of prior self control issues. Brannigan and Hardwick circumvent this issue in two ways. First, Brannigan and Hardwick correctly note that the general theory of crime is concerned with criminality rather than crime, and that the opportunity to commit a crime must be present in order for that particular crime to occur. The implication of this argument is that structures of opportunity and low self control are viewed as being of relatively equal importance. Second, Brannigan and Hardwick shift

the emphasis of theory away from parenting, and the position that the level self control remains relatively constant throughout the lifetime of an individual, and toward situational factors (specifically the development of a mob mentality, racism, hatred of the target group, and the use of alcohol) that serve to temporarily lower self control in situations marked by high levels of conflict. Important steps are taken to outline the acknowledged limitations of the theory with regard to the subject at hand. However, the central question remains of whether it would have been more prudent to opt for a different theoretical approach than to attempt to salvage and rehabilitate a theory that clearly is not appropriate to the topic (e.g. the theory is not intended to explain state crime, the theory presents self control as being largely consistent over time, and the general theory of crime systematically downplays of the role of external factors such as gangs or other groups).

Not all attempts to apply existing criminological theories and methodologies have been unsuccessful. Hagan, Rymond-Richmond and Parker (2005) use quantitative (survey) methodology, underpinned by conflict theory, to provide a very good explanation of the role played by racism in the genocide in Darfur. This analysis is expanded and elaborated upon in *Darfur and the Crime of Genocide* (Hagan and Rymond-Richmond 2009: 177) to fully illustrate how “racial epithets” form the “spark that transforms the specific forms of racial intent” into genocide. The research is grounded in several criminological theories, including: Robert Sampson’s (2006) model of collective efficacy, which is used to explain how government and militia leaders utilize racial dehumanization in order to transform both perpetrators (who become willing to kill) and victims (who are dehumanized) groups; and Edwin Sutherland’s (1973) theory

of differential social organization which, following the work of Ross Matsueda (2006), is used explain how access to resources drives collective social action. A link is drawn between micro and macro level processes using James Coleman's (1990) "critical collective framing approach." In this model, the construction of Arab and Black identities is understood to have occurred in a context in which there is a great deal of competition for land. Race becomes a vocabulary of motive utilized by field commanders, with support from the Sudanese government, in order to create collective action.

Despite the fact that this project is certainly praise-worthy, and represents a significant achievement in the field of criminology, at least two issues emerge. First, Hagan and Rymond-Richmond analyze what is essentially victimization data in order to create a model describing the perpetrators of the genocide. This is inevitable considering the considerable restrictions placed upon the data collection process. However, it is a cause for concern because victimized groups may have limited knowledge of key pieces of information, including behind the scenes interactions between leaders, planners, and those responsible for directly carrying out the genocide. Second, the researchers ground their analysis in research findings from criminological studies of street level crime in North America. While this may once again be inevitable considering the dearth of comparable quantitative information drawn from other genocides, it highlights the Western-centric nature of the discipline (see Agozino 2003). As noted by Augustine S.J. Park (2009: 958-9):

the authors treat criminal-racial violence in Darfur as parallel to legal-racial violence (e.g., at the hands of police) in the contemporary US. The gravity of

genocide is not only greatly diminished by the comparison, but a powerful critique of North American racism is not aided by the analogy.

In other words, the linkage between genocide and street crime in North American may detract from, rather than enhance, our understanding of both.

Another example of a project that was largely successful is *Blood, Power, and Bedlam: Violations of International Criminal Law in Post-Colonial Africa* (Mullins and Rothe 2008). The goal of the researchers is to develop an integrated theory of crime that can account for mass violence and crimes against humanity in Rwanda, Uganda, Sudan, and the Democratic Republic of Congo. The application of existing criminological theory to scholarship in Africa in the past has exposed it as being laden with North American assumptions and biases (Agozino 2003), which adds a layer of difficulty to an already complex undertaking. To their credit, rather than soldiering forward with a systematic application of existing theory, Mullins and Rothe utilize a largely inductive approach in their analysis. The term “largely” is critical here, because the research is informed by theories of state crime. The inclusion of state crime into the field of criminologist is traced to the work of William Chambliss, who is widely credited for drawing criminological attention to this issue. According to Chambliss, the definition of crime must be expanded to include:

State organized crimes, environmental crimes, crimes against humanity, human rights crimes, and the violations of international treaties increasingly must take center stage in criminology...Criminologists must define crime as behavior that violates international agreements and principles established in the courts and treaties of international bodies. (cited in Mullins and Rothe 2008: 8)

The framework of analysis utilized by Mullins and Rothe focuses upon state crime as a starting point, and widens this research focus to include non-state groups such as paramilitary organizations.

Although Mullins and Rothe utilize a flexible framework of analysis that is not overly constrained by limitations imposed by existing criminological approaches, and are largely successful in this enterprise, their reach proves to exceed their grasp. Despite the fact that the opening section of the book states that the results of an analysis based upon a “purposeful sample” of case studies is not generalizable, their goals, conclusions, and even the title of the book appear to ignore the limitations inherent within their methodology. Specifically, the researchers often slip into speaking about “Africa” in unified and highly generalized terms, which is highly problematic considering the vast diversity that exists among the four nations covered in this research, and among African nations and social contexts in general. Despite these criticisms, this research represents an important step in the development of the criminology of genocide, war crimes, and crimes against humanity.

As is shown in the above examples, research that is marked by a higher degree of theoretical fidelity tends to be problematic. This is understandable, given that criminological theories have, by and large, not been designed with genocide, war crimes, and crimes against humanity in mind. Constructing a criminological account of genocide, war crimes and crimes against humanity forces the researcher to walk the fine line between drawing upon existing tools of the discipline (which is the component that makes the project “criminology”) while at the same time avoiding too rigid an application

of the existing concepts (which would confound, rather than illuminate, existing knowledge). In essence, the process of creating a criminological account of genocide, war crimes and crimes against humanity entails simultaneously drawing upon, and recreating, the discipline of criminology. Genocide, crimes against humanity and war crimes are not simply street crimes *writ large*. Instead, they involve the specific targeting of groups in a manner that is resonant in symbolic terms and often transgressive in that efforts to brutalize and diminish targeted groups requires actions that go beyond ordinary crimes (see Stone 2004). An understanding of perpetrators of such crimes occurs within historically and socially contingent forms of localized knowledge that allow us to make sense of acts of brutality that are largely incomprehensible.

1.3 Theoretical Orientation

This section provides an overview of theoretical perspectives regarding the criminalization process relevant to the ensuing analysis of the Canadian criminalization of war crimes, crimes against humanity and genocide. Criminalization theorists argue that law is created within particular socio-historic settings, and what is legal in one setting may be made illegal in another. A mutual effect exists in which the socio-historic setting influences the criminalization process, and the criminalization process helps to define and shape the socio-historic context. At the core of the criminalization process is the creation of legislation, the surveillance of specific groups and individuals, and punishment of offenders. The criminalization process is not value-free, but is instead ideologically driven. Power is a key component in the criminalization process, especially

with respect to the labeling and stigmatization of particular groups. Discursive strategies frame knowledge of offenders, who are often categorized on the basis of gender and race. Important disagreements often occur regarding the criminalization process related to question of who to criminalize, and how to criminalize that particular group. A disconnect may also occur between the intentions and implementation of a given law or policy. When a law or policy does not work as intended, unexpected uses may arise as that law or policy is applied in other ways. Lastly, the criminalization process functions to exclude categories of individuals from society. The process of exclusion is an important component of how social groups define themselves, because who we are as a society depends in part upon whom we elect to exclude from the social order.

A fundamental component of the criminalization process is the interaction between the creation of law, the enforcement of law, and the socio-historic setting. Laws and their enforcement are created and maintained within specific social contexts (Des Rochier and Bittle 2004), and activities that are of major concern in one time and place may not be a concern in another. While it is clear that social context will influence legal developments, it is important to note that the relationship between law and society is not unidirectional. As Elizabeth Comack and Steve Brickey (1991) point out, a dual relationship develops in which an existing social context shapes the development of law, while law reproduces, recreates or fundamentally alters that social milieu. Furthermore, the influence of social factors does not disappear once a law is successfully established. Such forces continue to influence policy decisions and administration strategies long after laws are passed to quell the tide of given “social wrongs” that have been identified (Des Rosiers and Bittle 2004).

The fact that law is fundamentally shaped by the social setting in which it is created means that what is illegal in one time and place may not be illegal in another. This leads to a focus upon the process through which law is created and applied, as the following definition of criminalization offered by Beirne and Messerschmidt (2000: 15) illustrates:

The term "criminalization" refers to the process whereby criminal law is selectively applied to social behavior. This threefold process involved (1) the enactment of legislation that outlaws certain types of behavior; (2) the surveillance and policing of that behavior; and (3) if detected, the punishment of that behavior.

Beirne and Messerschmidt's definition of criminalization replaces the "breaking laws" component of Sutherland's formulation "making laws, breaking laws and reaction to breaking laws" with "surveillance and policing". This modification is significant because it shifts the focus of investigation away from the question of why offenders commit crimes. Instead, the norms of those responsible for enforcing the law (i.e. police officers, prosecutors, judges and juries), and the process through which groups are demonized and targeted for surveillance, are scrutinized.

An important component of the categorization of crimes, enforcement of law, and punishment of offenders, is that such processes are ideologically driven rather than impartial and value-free (Comack and Balfour 2004). The process through which offences, and offenders, are defined and categorized is deeply embedded within existing power relations in a given socio-historic context. Austin Turk (1969), who emphasizes the struggle for power among groups in society, points out that individuals facing

criminal prosecution have engaged in a series of interactions with individuals involved in the criminal justice process. Actions that are offensive to individuals who enforce the law are more likely to lead to higher rates of arrest and convictions, and to result in more severe sentences. To Turk (1966: 340), an ongoing process of labeling and stigmatization lies at the core of the criminalization process:

Indeed, a person is evaluated, either favorably or unfavorably, not because he *does* something, or even because he *is* something, but because others react to their perceptions of him as offensive or inoffensive. (emphasis in original)

Thus, to Turk, the reactions to individuals and particular types of activities at a given time, rather than the nature of the offenders themselves, become subject to investigation. Furthermore, the relative power of the enforcers (e.g. police) and resisters (those who break the law) is a critical determinant in the criminalization process, as powerful resistor groups are less likely to be arrested, jailed, or otherwise defined as criminals.

Feminist criminologists, who are at the forefront of criminalization literature, pay close attention to how the criminal justice process draws upon existing discursive strategies that frame our knowledge about offenders. For example, Comack and Balfour (2004: 10) contend that:

The very nature of how legal actors choose to carry out their assigned tasks opens the way for particular constructions to enter the legal arena—constructions of the accused, complainant and witnesses in a criminal case, as well as of the event itself and the social space in which that event occurs.

Thus the criminalization of particular actions often has the effect of categorizing individuals, or entire groups, in particular ways (e.g. immoral, evil, monster, negligent, bad parent, etc). Membership in criminalized groups may be based upon common activities (e.g. drug use), or it may simply stem from perceived biological qualities (e.g. gender, or “race”). It is important to note that the categorization of some individuals as “evil” is particularly important to the field of sociology, which has a tendency to either ignore evil, or treat it as a residual category of good, rather than directly examining how evil is constructed (Alexander 2001; Smith 2004). The fact that evil is constructed, rather than merely reflecting the essence of particular individuals or groups, places it within the domain of sociology and criminology.

The processes through which individuals are labeled, stigmatized and criminalized are situated within the power relations that exist in a given socio-historic setting:

Criminalization, the application of the criminal label to an identifiable social category, is dependent on *how* certain acts are labeled and on *who* has the power to label, and is directly limited to the political economy of marginalization. The power to criminalize is not derived necessarily in consensus politics but it carries with it the ideologies associated with marginalization, and it is within these portrayals that certain actions are named, contained and regulated. (Scranton and Chadwick 2004: 299, emphasis in original)

However, the power to criminalize is not monolithic. According to Michel Foucault, power is interwoven within the social fabric, and allows, amongst other things, individuals to define and to create “legitimate” knowledge. Understandings of deviance, crime and punishment are formulated into “discourses” (i.e. “historically specific systems

of meaning or ways of making sense of the world”¹²) that emerge from disciplines such as psychiatry, medicine, law and criminology. Foucault (2003: 24) rejects the argument that there is a single, dominant source of discourse and power in society (such as the state), and argues that “multiple relations of power traverse, characterize, and constitute the social body.” The discourses that emanate from diverse sources of power and authority may be mutually reinforcing, or they may contradict one another.

The process of governance is not as clear-cut as establishing a particular law or policy that is followed to the letter by those charged with its implementation. According to Foucault (1994a: 385), institutions have an idealized “rational schema” composed of the aim of the institution as well as the means at its disposal for achieving those ends. However, things never work out precisely as they are planned, and the results often do not match the aims. When the goals of an institution are not reached, the options are to either institute reforms or else focus upon the “unexpected uses” of existing policies. For example, although prisons failed in the promise to reform individuals, they were very adept at “the mechanism of elimination,” which refers to the removal of individuals from the population (1994d: 386). Such “unexpected uses” lead to new “rational courses of action” which are organized in terms of new goals and objectives. It is within these new “strategic configurations” that strategies belonging to different groups can converge and find their place. Foucault (1994b: 231) notes that there is no guarantee that any given possible strategy will be utilized, and simply asserts, “some are chosen and not others.” However, the different strategies “produce permanent and solid effects that can perfectly well be understood in terms of their rationality, even though they don’t conform to the

¹² This definition is taken from *The Power to Criminalize* (Comack and Balfour 2004: 32)

initial programming: this is what gives the resulting apparatus its solidarity and suppleness” (232).

Regardless of whether the result is part of a set strategy, and conforms to an expected application of policy, the result of the criminalization process is often the exclusion of particular groups or individuals from society. Foucault (1994c: 178) notes that in modern society “crime tends to be no more than the event that signals the existence of a dangerous element—that is, more or less dangerous—in the social body.” Of these dangerous elements, none is more troublesome to modern jurists than the individual who commits a “monstrous murder, without reason, without preliminaries” (182). In fact, disciplines such as psychiatry and criminology rose in prominence in the nineteenth century through a promise to categorize, contain, cure, and/or remove such dangerous individuals. The process through which such individuals are removed from society affirms their difference from the rest of the social body. This process creates or maintains the identity of the social group at large. Foucault (1994d: 403-4) notes that

we have indirectly constituted ourselves through the exclusion of some others: criminals, mad people, and so on. And now my present work deals with the question: How did we directly constitute our identity through certain ethical techniques of the self that developed through antiquity to now? [...] There is another field of questions I would like to study: the way by which, through some political technology of individuals, we have been led to recognize ourselves as a society, as a part of a social entity, as a part of a nation or of a state.

In other words, the formation of who we are as a society depends in part upon whom we elect to exclude from the social order. This process of exclusion, which begins with an understanding of the (condemned) nature of the individual or group targeted for

exclusion, and extends to form an understanding of the (reaffirmed and positive) nature of the larger group (e.g. Canadian citizen), is enacted through a wide range of techniques, including imprisonment, institutionalization, deportation and the screening of potential immigrants. Just as Mary Douglas notes that "dirt is a by-product of a systematic ordering and classification of matter" (1966:35), in Foucault's account certain groups and individuals are excluded from the social body.

In summary, this project draws upon the core tenets of criminalization theory in order to examine how war crimes, crimes against humanity and genocide have been criminalized during the First World War era, the Second World War era, and the contemporary era. The criminalization process can be broken down into the following components, which will guide this analysis. (1) Law is created within particular socio-historic settings, and what is legal in one setting may be made illegal in another. (2) A mutual effect exists in which the socio-historic setting influences the criminalization process, and the criminalization process helps to define and shape the socio-historic context. (3) The creation of legislation, the surveillance of specific groups and individuals, and punishment of offenders are the core components of the criminalization process. (4) The criminalization process is not value-free, but is instead ideologically driven. (5) Power is a key component in the criminalization process, especially with respect to the labeling and stigmatization of particular groups. (6) Discursive strategies frame knowledge of offenders, who are often categorized on the basis of gender and race. (7) Power is not monolithic, and important disagreements regarding who to criminalize, or how to criminalize, often occur. (8) A disconnect may occur between the intentions and implementation of a given law or policy. (9) When a law or policy does not work as

intended, unexpected uses may arise as that law or policy is applied in other ways. (10)

The criminalization process functions to exclude categories of individuals from society.

(11) The process of exclusion is an important component of how social groups define themselves, because who we are as a society depends in part upon whom we elect to exclude from the social order.

Chapter 2

Method

The central question that will be answered in this dissertation is: How have war crimes, crimes against humanity and genocide been criminalized in Canada? Closely related to this are secondary questions of *why* war crimes, crimes against humanity and genocide have been criminalized in Canada, and the *impact* of the criminalization processes upon patterns of inclusion and exclusion within Canadian identity formation. Chapter 1 presented the argument that a flexible approach is required in order to successfully apply criminological tools to the analysis of the criminalization of war crimes, crimes against humanity and genocide. To this end, a socio-historic approach, informed by elements of Foucaultian theory, was utilized to analyze the data collected for this dissertation. This section provides an overview of aspects of Foucault's genealogy that informed this analysis, the periodization utilized in this analysis, the data collection process, and the method of data analysis.

2.1 Genealogy

Genealogy stems from Friedrich Nietzsche's *On the Genealogy of Morality* (1994). In this book, Nietzsche addresses the question of the origin of evil, and asks: "under what conditions did man invent the value judgments good and evil? *and what value do they themselves have?*" (5, emphasis in original). As outlined by Nietzsche, the genealogical approach attempts to access the nuances and complexities of morality, replaces a black

and white conception of right and wrong with shades of grey, and rejects approaches to historical and social analyses which seek to map out a series of unbroken steps between an identifiable point of origin and a given historical or social phenomenon. Two aspects of Foucault's genealogical approach have influenced the data analysis in this dissertation: (1) the rejection of the belief that history unfolds as a linear progression, and (2) the removal of the subject as a transcendental force within history.

Following the approach used by Nietzsche, and echoing his distrust of history told as a linear progression from one point to another, Foucault (1977a: 139-140), describes genealogy as a:

gray, meticulous, and patiently documentary. [...] Its "cyclopean monuments" are constructed from "discreet and apparently insignificant truths and according to a rigorous method"; they cannot be the product of "large and well-meaning errors." In short, genealogy demands relentless erudition. Genealogy does not oppose itself to history [...] on the contrary, it rejects the metahistorical deployment of ideal significations and indefinite teleologies. It opposes itself to the search for "origins."

Genealogy is, to Foucault (1977a: 31), a "history of the present." The questions we pose, and the conclusions we reach, take particular forms at specific times. Foucault's genealogy engages with the past in order to "unsettle and destabilize the self-evidence of the conceptual bedrock of present understandings and analyses" (Meadwore, Hatcher and McWilliam 2000:464). Thus, rather than searching for the origin of war crimes legislation in Canada, and attempting to draw a line from that point to the present, this

dissertation focuses upon three distinct eras¹³ in which the Canadian government answered the question “what should we do about the war criminals?” in distinctly different ways.

Within his genealogical analyses, Foucault (1980: 117) attempts to purge the subject as a transcendental historical force:

One has to dispense with the constituent subject, to get rid of the subject itself, that's to say, to arrive at an analysis which can account for the constitution of the subject within a historical framework. And this is what I would call genealogy, that is, a form of history which can account for the constitution of knowledges, discourses, domains of objects etc., without having to make reference to a subject which is either transcendental in relation to the field of events or runs in its empty sameness throughout the course of history.

The key influence of this aspect of Foucault's genealogy is his rejection of universal statements that refer to a transcendental subject, such as “war crimes and war criminals have always been an issue.” This universal statement relies on notions of a transcendental subject in two ways: 1) it implies that war crimes and war criminals are categories that transcend history, rather than being rooted within particular social contexts, and 2) it assumes that people have always reacted to war criminals and war crimes in the same manner. Instead, war crimes, crimes against humanity, genocide, and war criminals will emerge as significant legal categories following debates and disagreements occurring in specific historical contexts. The war criminal subject will be continually constituted and reconstituted through this process. Thus the question “what are war criminals?” may be answered in very different ways in each of the eras under consideration.

¹³ A discussion of the periodization utilized in this project can be found in section 2.2.

2.2 Periodization

This dissertation provides an analysis of the criminalization process that occurred during three eras in Canadian history in which important decisions regarding war crimes and war criminals were made: the First World War era, the Second World War era, and the contemporary era (which is defined as being the time leading up to, and following, the formation of the Deschênes Commission in 1985). In each of these eras, the Canadian government experienced intense pressure to “do something” about war criminals, and in each of these eras the response of the respective governments was formulated within a particular ethos.

During each era, the creation of specific types of laws and policies regarding war crimes and war criminals was not random or accidental. Instead, the laws and policies reflected particular viewpoints regarding the nature of war crimes and war criminals. In other words, the response to the question of what to do about war criminals was inextricably linked with beliefs regarding the nature of such criminals. The answer to the question “what are war criminals?” formed the *sine qua non* of the criminalization process, which is defined as a guiding rationale existing in each of the three eras that has either been directly (as in the case of war criminals being biologically different) or indirectly (as in the case of war criminals being objects of interconnected risks) articulated by Canadian policy makers as they addressed the question of “what do we do about war criminals?”. The *sine qua non* of each era was formulated after careful examination of all archival and legal documents relating to the formal criminalization process, and functions as an heuristic device designed both to articulate the distinction

between the three ethos or criminalization under consideration and make this distinction intelligible to the reader.

Rather than being the “totalitarian periodizations” (i.e. the characterization of a particular era as being unified) of which Foucault is critical in *The Archeology of Knowledge* (1989), the periods utilized in this analysis are divided by significant ruptures in the ways in which war criminals are understood.¹⁴ The approach to periodization adopted in this dissertation is similar to the approach used by Foucault in *Discipline and Punish* (1977b: 7), which focuses upon the development of a “new age” of punishment in Western society:

We have, then, a public execution and a time-table. They do not punish the same crime or the same type of delinquent. But they each define a certain penal style. Less than a century separates them. It was a time when, in Europe and in the United States, the entire economy of punishment was redistributed. It was a time of great ‘scandals’ for traditional justice, a time of innumerable projects for reform. It saw a new theory of law and crime, a new moral or political justification of the right to punish; old laws were abolished, old customs died out. ‘Modern’ codes were planned or drawn up: Russia, 1769; Prussia, 1780; Pennsylvania and Tuscany, 1786; Austria, 1788; France, 1791, Year IV, 1808 and 1810. It was a new age for penal justice.

Just as the new age of penal justice described by Foucault (that “does not punish the same crime or the same type of delinquent”) emerged in quick succession among Western nations, new ages in the punishment of war criminals emerged in Canada during the First and Second World Wars, and with the establishment of the Deschênes Commission.

Although important disagreements regarding how to best deal with war criminals

¹⁴ An excellent discussion of the evolution of Foucault’s varying statements and approaches to periodization can be found in *The Challenge of Periodization: Old Paradigms and New Perspectives* (Besserman 1996).

occurred, and were particularly evident in the discrepancies between the intent and application of given legislation and policies, the strategies that emerged in each of these three points in Canadian history (to paraphrase Foucault) “[did] not punish the same type of crime or the same type of [war criminal].”

2.3 Data Collection

This analysis utilizes both primary and secondary information. The majority of primary sources used are a part of the collections housed at the Library and Archives of Canada (LAC) and the Canadian War Museum (CWM), which are both located in Canada in the city of Ottawa. Considering the topic is the Canadian response to war crimes and war criminals, these archives proved to be excellent sources of information. The fact that the LAC and the CWM were the two best archives in the world in terms of the material needed for this project did not mean that all material housed in the respective archives were available for this project. A large collection of correspondence and other documents related to the Deschênes Commission are not scheduled for release until January 2015, and could not be accessed. This limitation is not fatal, because several other boxes of Deschênes Commission documents were available and used in this analysis. Similarly, only a limited portion of the massive volume of documents collected by the Somalia Inquiry is currently available to the public. Once again, this omission is not serious because the veil of secrecy was put in place in order to either protect the privacy of some individuals involved, or to protect operational secrecy. The large volumes of information published by the Somalia inquiry contain most of the information

relevant to this project (the exception being trial documents for the courts martial of those who stood trial, which were not available from any source).

Other types of primary documents include: Hansard transcripts, governmental committee reports, organizational records of war crimes units, public statements made by special interest groups (e.g. Ukrainian, Jewish, and Rwandan organizations in Canada), key pieces of Canadian legislation, trial records and transcripts, and published memoirs. Citations of primary documents appear as footnotes in this dissertation.

Primary documents have been supplemented by secondary sources, including legal analyses of trials proceedings (accessed through the E.K. Williams Law Library at the University of Manitoba), scholarly books, and journal articles. Secondary documents are referenced using in-text citations, and a complete list of secondary sources will be found in the bibliography. It should be noted that secondary sources occasionally make reference to a relevant primary source. In such instances, an in-text reference is made to the primary source being “cited in” the secondary source, with the secondary source appearing in the bibliography.

Other forms of data collection, such as interviews and surveys, were not conducted for two reasons. First, sorting through, categorizing and analyzing the exceptionally large volume of existing primary and secondary documents utilized in this project was a major undertaking. Adding separate interview and/or survey components was simply not possible within the given time frame. Second, surveys and interviews can only be conducted with living individuals, and as a result these methods could only be employed to collect information from key informants in the contemporary era. This lack

of consistency between data sources would likely cloud, rather than refine, the distinction between the contemporary era and the First and Second World War eras (i.e. is this distinction between the respective eras real or simply a product of different types of information gathered?).

2.4 Data Analysis

A large volume of information was utilized in this analysis: research at the LAC alone involved ordering and sifting through 57 boxes of information and 27 microfilms over the course of 22 visits to these archives, which is significant considering that each box held anywhere from five to thirty files containing hundreds of pages of information in total, while each microfilm contained several times the amount of information than could be stored as hard copies in a box. In addition to primary archival material, hundreds of journal articles and published books were consulted during the research process. This information was analyzed with the following four principles in mind: (1) data used in the analysis was considered to be consecutive, but not teleological; (2) data analysis continued until theoretical saturation was reached (see Strauss and Corbin 1998); (3) sensitizing concepts drawn from theories of criminalization guided the initial analysis (see Strauss and Corbin 1990); and (4) an inductive analysis was also used, in which new concepts drawn from the data were incorporated into the findings (See Seale 1999).

Initial areas of analysis were drawn from existing theories of criminalization, while other themes emerged during the process of data analysis. For example, although

theories of criminalization account for the influence of socio-historic context, it was clear that special attention had to be paid to the role played by international law in shaping the process through which Canadian criminalization of war crimes, crimes against humanity and genocide occurred. Furthermore, the fact that a parallel justice system from within the Canadian Forces was at play meant that the interaction between at least three distinct justice systems (i.e. international law, Canadian law, and military law) needed to be explored. A second theme that emerged from the data is the selective connection between a particular era and past eras. Although emergent war crimes policies were grounded in particular understandings of what war criminals are, and these understandings were specific to a given era, the formation of policies were legally grounded by selectively drawing upon existing jurisprudence. For example, during the Second World War era, war criminals were understood as being ordinary individuals caught up in extraordinary circumstances. Although the understanding of what war criminals are was very different, the legal precedents established during the Second World War were drawn upon as an integral part of the criminalization process that occurred during the contemporary era.

Data analysis continued until theoretical saturation was reached. In the case of predetermined concepts designed to provide theoretical sensitivity, theoretical saturation occurred when new dimensions of these questions were no longer uncovered. In the case of concepts that arose through inductive analysis, theoretical saturation occurred when new concepts were no longer being found, and when the process of finding novel dimensions newly-found concepts was exhausted. Three summary tables, included below, were created during the coding process and formed the basis for the findings of

this project. These tables were used individually during the summaries at the end of Sections III, IV and V, and were compared and contrasted to form the key theoretical points found in the conclusion of this dissertation. Military examples are highlighted (as bold text) in order to distinguish between civilian and military processes of criminalization.

Table 1: Canadian Criminalization during First World War Era

Components of Criminalization	First World War Era (Military examples in bold)
International Context	Jurists-link between war crimes and "uncivilized" races; Political leaders divided on issue of war criminals; <i>Realpolitik</i> and Personal beliefs became a factor; propaganda campaign influenced Canadians more than developments in international law
Canadian Legislation	Bounded within Dominion law; Right to deport enemy aliens confirmed by Dominion officials; War Measures Act-targets enemy aliens and is legal basis for internment camps; Immigration Act eliminates post-war immigration from enemy nations
Surveillance	Enemy aliens monitored within Canada; Surveillance unevenly applied
Punishment	Internment of enemy aliens; deportation of selected enemy aliens; exclusion of immigrants from enemy nations
Ideological Factors	Racial categorizations prominent in Canada prior to the War; Prime Minister's personal belief system regarding whether Germany and Austro-Hungary are civilized and the impact of war crimes trials
Power	Lobbies formed to increase likelihood of influencing policy; Jobless Targeted; "Enemy Alien" groups rendered powerless; Policy direction set by Prime Minister
Discourse	Racialized-war criminals "uncivilized"; accounts of Canadian war crimes omitted from discourse ; lobby groups advocate for war crimes trials; gendered-the BWWWL criminalized German women;
Counter Discourse	Borden did not believe Germans and Austro-Hungarians were uncivilized; Targeted groups formed own lobbies
Policy Implementation Disconnect	Zealots expanded the net of criminalization; policies restricting marginalized groups from enlisted in CEF lifted as casualties mount
Unexpected Use or Impact of Policy	Citizens lobby to intern or deport unwanted minority groups
Exclusion	Racialized; All enemy aliens labeled and excluded; exclusion of supposedly uncivilized races used to define Canada as a civilized nation
Interaction between Legal Systems	Canada did not engage in international war crimes trials; Canada operated under Dominion law with respect to citizenship and ability to pass legislation

Table 2: Canadian Criminalization during the Second World War Era

Components of Criminalization	Second World War Era (Military examples in bold)
International Context	Formation of the UNWCC; Differences in legal systems led to disagreements regarding definition of war crime to be used at Nuremberg, but US wins out; civilians charged with crimes against humanity for first time; Tokyo trials fraught with irregularities; Control Council Law No. 10 provides legal basis for continuing trials
Canadian Legislation	War crimes legislation fast-tracked under War Measures Act
Surveillance	POW camps established in Canada; Internment Camps established; Screening of refugees in DP camps; RCMP monitors German and Italian groups
Punishment	Canadian trials held in European Theatre allow full range of punishments, including death by firing squad
Ideological Factors	Racism-Japanese Canadians interned longer, lose possessions; Canadian defendants not charged with war crimes; Canadian trials refuse to reference international tribunals
Power	Canadian military authority in Europe, British military authority in Far East
Discourse	War criminals thought to be ordinary people caught in extraordinary circumstances; Focus upon Meyer trial; Use of forensic evidence to determine guilt
Counter Discourse	Defenses of those on trial ranging from superior orders, rejection of command responsibility, and duress
Policy Implementation Disconnect	Canadian Air Force holds own trials; Use of British Law during Far East trials meant that European trials and Far East trials may classify same act in different manner; Canadians charged with crime during war for first time; Nazi scientists allowed to enter into Canada
Unexpected Use or Impact of Policy	RCMP targets communist groups; Inouye uses Canadian citizenship as defense against war crimes
Exclusion	Enemy aliens are physically removed through internment; immigration excludes individuals on basis of political affiliation and link with Nazi regime
Interaction between Legal Systems	Canadian law interacted with British law in war crimes trials in Far East, and with military law during trials in European Theatre

Table 3: Canadian Criminalization during the Contemporary Era

Components of Criminalization	Contemporary Era (Military examples in Bold)
International Context	UN Conventions; Domestic courts used to try war criminals in cold war era; ICTY and ICTR expand definitions of war criminals and refine procedures; Adoption of Rome Statute and formation of the ICC; Rules of Engagement
Canadian Legislation	War crimes added to criminal code following Deschênes Commission; Immigration Act Amended; War crimes legislation recreated in light of Rome Statute; Seven distinct legal mechanisms in place
Surveillance	Three distinct war crimes units in Canada; Social Media
Punishment	Extradition, denaturalization and deportation, criminal charges in civilian court; Loss of rank and discharge from CF
Ideological Factors	Crusade of Robert Kaplan; End of impunity; Racism among some members of Airborne; CF personnel not charged with war crimes, but are instead charged with individual offenses
Power	Ukrainian and Jewish lobby groups; Judicial-Supreme Court; Public Inquiry
Discourse	Legalistic, firmly entrenched within existing law; Moral panic regarding war criminals in Canada; Shield Canada from external threats; “A few bad apples in a barrel”
Counter Discourse	Defense-defendants are being unfairly persecuted; Mercy killing
Policy Implementation Disconnect	Initial war crimes legislation creates additional legal threshold; Faye Board of Inquiry given no real powers
Unexpected Use or Impact of Policy	Ukrainian and Jewish ethnic tension fueled by war crimes trial; Holocaust survivors re-victimized during trial; Minimal protection offered during immigration proceedings makes it preferred choice
Exclusion	Canadian identity does not include having war criminals in our midst; Racialization that is source of war crimes; Immigration screening; Racial exclusion within Airborne
Interaction between Legal Systems	Domestic law brought into line with international law (Rome Statute); Military law still separate, although subject to review by civilian Inquiry

Summary of Section II

The study of war crimes, crimes against humanity and genocide is complex. The process through which emergent laws of war develop, and ways in which war crimes are categorized, reflects deeply rooted, culturally-based interpretations of the world. Once laws of war are established, they function to reinforce group identity and protect the group from outside forces that are defined as threatening. The formulation and articulation of a particular form of the laws of war may lead to unanticipated consequences. Considering that society is never completely homogenous and unified, it is not surprising to find key debates emerge regarding the nature of war crimes and war criminals. Once formulated, the laws of war continue to shift and evolve over time. However, residual categorizations from previous incarnations of the laws of war are never fully expunged from the social discourse.

Criminological research into the topic of genocide, crimes against humanity and war crimes that is marked by a higher degree of theoretical fidelity tends to be problematic. This is understandable, given that criminological theories have, by and large, not been designed with these types of crimes in mind. Constructing a criminological account of genocide, war crimes and crimes against humanity forces the researcher to walk the fine line between drawing upon existing tools of the discipline (which is the component that makes the project “criminology”) while at the same time avoiding too rigid an application of the existing concepts (which would confound, rather than illuminate, existing knowledge). In essence, the process of creating a criminological account of genocide, war crimes and crimes against humanity entails simultaneously

drawing upon, and modifying, the discipline of criminology. Genocide, crimes against humanity and war crimes are not simply street crimes *writ large*. Instead, they involve the specific targeting of groups in a manner that is resonant in symbolic terms (see Stone 2004). An understanding of perpetrators of such crimes occurs within historically and socially contingent forms of localized knowledge that allow us to make sense of acts of brutality that are largely incomprehensible.

With the goal of employing a flexible approach, this analysis draws upon the core tenets of criminalization theory. Criminalization theorists argue that law is created within particular socio-historic settings, and what is legal in one setting may be made illegal in another. A mutual effect exists in which the socio-historic setting influences the criminalization process, and the criminalization process helps to define and shape the socio-historic context. At the core of the criminalization process is the creation of legislation, the surveillance of specific groups and individuals, and punishment of offenders. The criminalization process is not value-free, but is instead ideologically driven. Power is a key component in the criminalization process, especially with respect to the labeling and stigmatization of particular groups. Discursive strategies frame knowledge of offenders, who are often categorized on the basis of gender and race. Important disagreements often occur regarding the criminalization process related to question of who to criminalize, and how to criminalize that particular group. A disconnect may also occur between the intentions and implementation of a given law or policy. When a law or policy does not work as intended, unexpected uses may arise as that law or policy is applied in other ways. Lastly, the criminalization process functions to exclude categories of individuals from society. The process of exclusion is an

important component of how social groups define themselves, because who we are as a society depends in part upon whom we elect to exclude from the social order.

Information used in this analysis is drawn from journal articles, published books, and primary archival material. A qualitative analysis was conducted using the following four core principles: (1) data used in the analysis was considered to be consecutive, but not teleological; (2) data analysis continued until theoretical saturation was reached; (3) sensitizing concepts drawn from theories of criminalization guided the initial analysis; and (4) an inductive analysis was also used, in which new concepts drawn from the data were incorporated into the findings. The periods utilized in this analysis (i.e. the First World War era, the Second World War era, and the contemporary era) are divided by significant ruptures in the ways in which war criminals are understood.

Section III: The First World War Era

This section provides an overview and analysis of the criminalization of war crimes in Canada during the First World War era (circa 1914-1920). Chapter 3 provides an overview of key developments in the international criminalization of war crimes and crimes against humanity (the term “genocide” did not exist at this point in time) during the nineteenth and early twentieth centuries that shaped understandings of war crimes and war criminals during the First World War era. The most common viewpoint to emerge in international legal debates in this era was that war criminals were a part of a primitive race. However, political factors played a prominent role during the process of defining criminality, establishing war crimes tribunals and ensuring that sentences were carried out.

Chapter 4 focuses specifically upon the criminalization of war crimes and crimes against humanity within Canada during the First World War era. The notion that war crimes were only committed by the enemy, coupled with a belief that such crimes were only committed by members of inferior races, became the *sine qua non* of the criminalization process. A *de facto* policy for dealing with war criminals emerged in Canada, as the uncivilized races were being dealt with both internationally (through colonial policies in which civilized nations were to adopt a parental role) and in Canada (through exclusion and removal). The racialization of war crimes, which was based upon a strict distinction between “civilized” and “uncivilized,” was a part of a larger struggle over who is to be included, and excluded, from the definition of “Canadian.”

Chapter 3

The International Criminalization of War Crimes in the First World War Era

The criminalization of war crimes and war criminals that occurred in Canada during the First World War era was situated within a broader international socio-historic context. For this reason, it is important to examine how war crimes and war criminals were understood in international law at that time. The most common viewpoint to emerge in international legal debates in this era was that war criminals were a part of a primitive race. However, political factors played a prominent role during the process of defining criminality, establishing war crimes tribunals and ensuring that sentences were carried out. *Realpolitik* (political decision guided by practical rather than moral considerations), and the individual belief systems of global leaders, trumped the ideological arguments presented by jurists of the age. The war propaganda campaigns, which originated internationally but extended into Canada, portrayed the enemy as bands of war criminals. This characterization challenged the notion that Germany was to be counted among the civilized nations of the world. Such propaganda was an important component of the criminalization of German and Austro-Hungarian communities within Canada.

3.1 A “reversion to type”: War Crimes and War Criminals in International Law

Among Western nations in the nineteenth and early twentieth century, legal discourses concerned with the conduct of individuals during wartime, and punishments for those

who violate the laws of war, became increasingly prominent. While many civilian activists and jurists were working “to humanize war through the application of reason” (Maogoto 2004: 19), in the latter half of the Nineteenth Century informal codes of conduct among soldiers were increasingly considered to be a binding rule by military personnel (Hoffman 2000: 101). War crimes trials did take place in this era, but they did not typically catch the attention of either the public (due to a lack of media attention) or international legal scholars (Segesser 2007). In this context the most significant development in international law was the establishment of the first of four Geneva Conventions in 1864, which was the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.¹⁵ This was followed by the Hague Conventions of 1899 and 1907, which outlawed specific types of weapons, including asphyxiating gas and the launching of explosives from balloons. The Geneva and Hague Conventions provided a set of laws regarding conduct during wartime that were agreed upon by nations signing the documents, and were thus significant steps in the codification of the laws of war.

Despite the united front presented by signatories with respect to the specific contents of the Geneva and Hague Conventions, many significant legal debates regarding the nature of war crimes, and responsibility for the punishment of war criminals, became embedded within international legal discourses of the age. For example, a tension emerged between the principle of state sovereignty and calls for the establishment of international mechanisms of justice. Those who advocated state sovereignty argued that individuals violating the laws of war as a result of following orders of their government

¹⁵ The three subsequent Geneva Conventions and associated protocols have covered a range of issues including treatment of prisoners of war, war at sea, and the treatment of civilian populations.

“are not war criminals and may not be punished by the enemy” (Oppenheim cited in Lippman 2001: 159). On the other hand, a call for the creation of an international court mandated to deal with war crimes emerged in response to the fact that sovereign states commonly opted to grant wholesale amnesties, rather than criminal prosecutions, of nationals accused of committing atrocities (Maogoto 2004). The question of whether war criminals could be brought to justice by an international legal entity was ultimately held in abeyance as no such organization existed.

During the World War I era, racial categorizations shaped key statements about war crimes made by Western jurists, who argued that war crimes were committed by members of inferior races. Races labeled as inferior, such as the Turks, or indigenous peoples residing in colonized nations, were expected to commit atrocities as they expressed their supposedly uncivilized nature on the battlefield (Segesser 2007). Although some degree of doubt existed regarding whether members of races defined as civilized would be able to refrain from violating the Geneva and Hague Conventions if a brutal war developed in Europe (Segesser 2006), Western jurists, for the most part, were content with classifying war criminals as being a part of “other” races. It is not a coincidence that groups categorized as uncivilized had no representation within the emerging discourses relating to international law at that time.

An unintended consequence of the focus upon racial categorizations of war crimes and war criminals was that debates emerged regarding whether a particular group should be cast as “civilized” or “uncivilized.” For example, Arnold Toynbee, who was responsible for gathering intelligence for the British Foreign Office before becoming a prominent historian in the post-war era, was a key figure in exposing the Armenian

massacres (which became known as the Armenian genocide once the term genocide entered into the lexicon) to Western politicians and citizens. A key part of the process of gaining support for the Armenians was to establish in the minds of his readers, and those who listened to his speeches, that the Armenian massacre was not a case of one uncivilized race slaughtering members of another uncivilized race. This approach was necessary because members of Western nations were not typically outraged, or even surprised, when members of one uncivilized race slaughter members of another (Segesser 2007). In order to draw attention to his cause, Toynbee (1916:31) stated that the Armenians were in fact as civilized as those in the West, and:

not savages like the Red Indians who retired before the White Man across the American continent. They were not nomadic shepherds like their barbarous neighbours the Kurds. They were people living the same life as ourselves, townspeople established in the town for generations and the chief authors of its local prosperity. (1916: 30)

To set the stage for his account of the large scale rape of Armenian women, Toynbee goes on to state that “their women were as delicate, as refined, as unused to hardship and brutality as women in Europe or the United States” (31).

Just as it was necessary to argue that groups were civilized before they could be identified as victims of war crimes or crimes against humanity, it was also necessary, in some instances, to present a convincing case that a group was uncivilized before arguing that members of the group had committed war crimes or crimes against humanity. For example, from the earliest stages of the war it became clear that members of apparently civilized enemy nations (specifically the Germans) were committing war crimes on a large scale. In an attempt to explain this anomaly, many jurists argued that it is an error

to list Germany among civilized nations. For example, in an article published by *The Canadian Law Times*, Hugh H.L. Bellot (1916: 754), a professor of constitutional law at the University of London, and the first honorary secretary of the Grotius Society (which was focused upon the advancement of laws of war and peace in the greater context of international law), explained that:

It has been left to Prussianism to relapse into that barbarism in the conduct of war which we had thought had been left behind with the Thirty Years War of the 17th Century, although perhaps certain conduct of the Germans in the Franco-German War of 1870, might have prepared us for this reversion to type. (754)

To Bellot, the conduct of Germany in the first portion of the First World War was marked by an atavistic reversion to a lower state of being, and was an indication that the German “race” was barbaric and uncivilized. Bellot (1916b) further argued that in responding to German war crimes it is important to use rational legal processes to exact justice upon those responsible for the crimes in order to avoid revenge and other “methods of barbarism” characteristic of the German race. This approach functioned to both preserve and sharpen the distinction between “us” (civilized, modern, following the laws of war) and “them” (uncivilized, primitive, barbaric and engaged in criminal conduct during war) that underpinned conceptions of war criminals in that era.

Although the distinction between civilized and primitive races underpinned legal conceptions of war crimes, this system of classification was trumped by political factors during the post war era. Immediately following the end of the First World War, the Allied Powers were committed to the prosecution of German and Turkish war crimes. To this end, the fifteen member international Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties was established at the

preliminary peace conference held in Versailles in 1919 and given the mandate to explore options for dealing with war criminals. Of particular importance was the issue of what to do with Kaiser Wilhelm II of Germany, who had been singled out amongst the victor nations as the individual most responsible for the start of the war, and thus for the ensuing carnage. As Canadian Prime Minister Robert L. Borden noted in his memoirs, the Hang the Kaiser campaign was a prominent force in the post war era:

Not only in Great Britain but throughout the Empire the cry went forth that the Kaiser must be punished and that Germany must pay the full cost of the War. (Borden 1938: 867)

While the Hang the Kaiser campaign was prominent among citizens, there was little consensus among political leaders regarding whether the Kaiser should be placed on trial and, if so, what the nature of the charges would be. Britain, France, Serbia, Belgium and Rumania were all in favour of placing the Kaiser on trial for the violation of Belgian neutrality, the use of unrestricted submarine warfare, and the execution of prisoners of war (Kampmark 2007). David Lloyd George, the British Prime Minister, went so far as to pledge, during his post war election campaign, both that the Kaiser would stand trial and that those responsible for atrocities would be punished. Other prominent leaders opposed the idea of the Kaiser being placed on trial. The Americans steadfastly opposed the notion that sovereign immunity should be cast aside for purposes of placing the Kaiser on trial, while the Japanese were concerned that such a trial would establish an international precedent in which heads of state face criminal prosecution after losing a war.¹⁶ A compromise was eventually reached in which the criminal aspect of the charges

¹⁶ The position of the Japanese frustrated Lloyd George, who inaccurately dismissed their position as follows: "the Mikado is a god who cannot be held responsible" (cited in Kampark 2007: 525).

were supplanted by moral offenses, and the Kaiser was indicted for violating “international morality” and “the sanctity of treaties” rather than for war crimes (Kampmark 2007).

The specter of the Kaiser being indicted for war crimes led to intensely emotional reactions among political leaders. For example, when he found out about Lloyd George’s pledge, King George V of England was furious and “subjected [Lloyd George] to a ‘violent tirade’ on the subject” but refused to intervene (Carter 2009: 416). The King’s position can be understood in light of the fact that he and the Kaiser were first cousins.¹⁷ King George had never been particularly close to the Kaiser (Cecil 1982), and the relationship was further distanced and embittered by the war (Clay 2007). However, the British King was in a precarious position, as monarchies throughout Europe were being cast aside (Carter 2009). If the Kaiser stood trial as a war criminal, and war criminals were understood as being members of inferior races, such a trial would surely function to undermine King George’s creditability.

War crimes trials during the post war era collapsed, as the will to strongly advocate for such trials quickly evaporated. Despite international pressure, the Dutch Royal family refused to extradite the Kaiser, and the trial did not happen. Germany refused to hand the accused over to any proposed international court, and the idea of an international tribunal was replaced by trials before the Supreme Court of Leipzig. Of the 890 who were originally accused, only 46 were actually tried, with most either being acquitted or receiving light sentences (Lippman 2004: 964). Although Germany refused to extradite Talat Pasa, who was effectively the head of the Turkish state during the war,

¹⁷ Czar Nicholas of Russia was also a cousin, albeit more distantly related.

by August of 1920 118 other Turkish prisoners were being detained for future war crimes trials (Maogoto 2004). The majority of these individuals were released during a post-war prisoner exchange with England, and the remainder faced charges in domestic Turkish courts related to the Armenian massacre (Dadrian 1989). Light sentences were given to those who were found guilty, and the courts eventually collapsed in 1920 due to inner turmoil (Dadrian 1997). An amnesty was eventually granted in 1923 to all Turkish officials who had been indicted for war crimes.¹⁸

3.2 “One vast gang of Jack the Rippers”: International Popular References Related to War Crimes and War Criminals

The criminalization process during the First World War era was driven by the belief that war criminals were atavistic and uncivilized. Although formal legal debates regarding war crimes that occurred in the nineteenth and early twentieth centuries were extremely important, during the Great War era, the average citizen of a country such as Canada probably had less than a passing acquaintance with the particulars of international law. However, an insatiable thirst for information existed regarding why the war was taking place, and against whom Canada was fighting. Messages regarding the nature of war crimes and war criminals trickled down to the average Canadian citizen in the form of propaganda. While publications released during the propaganda campaign agree that the Germans had unilaterally committed war crimes, and functioned to criminalize the

¹⁸ The Peace Treaty of Lausanne in 1923, which replaced the Treaty of Sevres (which was the legal basis for the prosecution of Turkish war criminals), did not contain any provisions for war crimes trials, while adding a secret amnesty clause for Turkish officials. Thus, along with formally ending existing proceedings, it provided amnesty for those who had been found guilty, and effectively eliminated any possibility that further war crimes trials may be initiated in the future (Maogato 2004).

enemy, a surprisingly wide variety of opinions were presented regarding why such war crimes were committed. Despite important differences between these texts, the wide net cast by the propaganda campaign, which presented a picture in which members of uncivilized enemy nations were the sole culprits of wartime atrocities, contributed to the stigmatization of immigrants from enemy nations who were living in Canada.

Propaganda campaigns were launched by all nations participating in the First World War (Tate 1998). Although some form of propaganda was used in the majority of conflicts prior to the nineteenth century, the scope and scale of propaganda campaigns during the Great War were unmatched in previous human history (Williams 2003). In England, Wellington House was created with two purposes in mind: (1) to facilitate the large scale distribution of propaganda; and (2) to mask the fact that the British government was involved, so that the propaganda would remain appealing to the economic elites (Kennedy 2008). By the end of the war, Wellington House was responsible for the creation of 150 books or pamphlets, as well as the distribution of over one million copies of these titles among citizens of key nations across the world. Among these key nations were the United States and Canada.

Such propaganda was one-sided in terms of assigning blame, and established very clear distinctions between “us” (noble, righteous, civilized) and “them” (savage, criminal, uncivilized). It therefore served the dual purpose of establishing a cause of war great enough to convince some to sacrifice their lives and that the war itself was just. For example, during the opening moves of the war, “first-hand eyewitness accounts” were circulated in France of how German soldiers were cutting off the arms of young French boys to ensure they would never be able to fight in the future. New stories continually

emerged in which enemy soldiers cut off the arms of babies, raped nuns, or tattooed German military insignia on the faces of POWs. Although there is no way of knowing how many Canadians believed in the existence of factories in Germany that turned Allied corpses into a wide variety of products (depending on the particular audience), such tales were widely circulated and were highly effective in terms of generating support for the war (Tate 1998).

During the course of the war hundreds of private citizens and special interest groups issued publications outlining alleged German atrocities, many of which are preserved at the Library and Archives of Canada and the Canadian War Museum.¹⁹ Most Canadians, at least in the English speaking parts of the country,²⁰ were exposed to the steady stream of pamphlets that outlined apparent German atrocities, and cast the German high command as a group of thugs or bandits who deserved to be punished. Such documents were widely read, and served to stoke an already strong anti-German sentiment within the Canadian public (Keshan 1996). The influence of these publications upon public perceptions of war crimes, and specifically the nature of German criminality, necessitates a brief overview of the types of arguments found in these documents.

One of the earliest entries in this genre is *In the Trail of the German Army* (Originally published by The Daily Chronicle in 1914), which is an oversized book containing 58 photographs of alleged German atrocities during the Belgian campaign at the outset of the war. The photographs are accompanied by a textual description of what

¹⁹ The documents held at NAC can be found in RG 24 Vol 22,039 and RG 24 Vol 22,033, and similar documents are held in the “World War One Documents” section of the Canadian War Museum.

²⁰ French Canadian participation in the war was poor, with only about 1.4% of the population of Quebec enlisting by 1916 (Granatstein 2005). As a result, the war was never considered to be “big news” among French speaking Canada, unless the issue of conscription was raised (Mackenzie 2005).

is being represented. The series of photographs are bracketed by a brief introduction and conclusion. A notable feature of this work is that the introduction and conclusion attempt to establish a direct link between the evidence presented and existing international law. The introduction provides an overview of German violations of the laws of war, and argues that although Germany had given adhesion to the Hague Convention of 1907, it had broken every component of this convention. The conclusion is composed of excerpts from a report commissioned by the Belgian government on German Violations of the Laws of War that was prepared as a formal legal protest and sent to the German government. Despite the fact that the book is couched in legal arguments and specific matters of international law, the imagery of the photographs, and the contents of the accompanying text, was clearly intended to evoke an emotional response. For example, the overwhelming majority of the pictures are of churches that were destroyed by German artillery, and the photograph of the Bequinage Church at Termonde shows ruins the fallen church surrounding an untouched statute of Mary holding the crucified Christ at the foot of the cross. Although the introduction and conclusion draw upon existing legal discourses related to the laws of war, the main body of text focuses upon the level of destruction inflicted upon these holy buildings rather than providing linkages to specific elements of the Hague Convention that had been violated.

Other books pay less attention to sophisticated legal arguments related to German guilt, focusing instead upon the sources of German criminality. For example, in *The American Versus the German View of War*, Morton Prince (1915) argues that the Germans conduct war in ways that are significantly different from Americans. According to Prince, officers in the German army are encouraged to hold retributions against

populations that refuse to submit, kill hostages, assault women and young girls, and generally terrorize civilian populations: “it is the German contention that under circumstances nearly everything is permissible in war is shown both by their writings and acts” (40). This argument is rooted in, and draws specific citations from, the “Usages of War on Land”, a war manual prepared for the instruction of German officers. For example, Prince (41) cites a section of this manual that apparently disregards any humanitarian considerations during wartime:

A war conducted with energy cannot be directed merely against the combatants of the enemy state and the positions they occupy, but it will and must in like manner seek to destroy the total intellectual and material resources of the latter. Humanitarian claims, such as the protection of men and their goods, can only be taken into consideration in so far as the nature and object of war permit.

In this way, Prince damns the German army by using its own words and doctrine, and indirectly identifies German leadership as the source of the outrages attributed to the German forces.

In a similar vein as discourses found in international law, some of the books available to Canadians during the war argued for the inclusion of the Germans amongst the list of “savage” races. William Le Queux, who authored well over one hundred books (publishing several anti-German books prior to the war), provided an indictment of German leadership and the German army in *German Atrocities: A Record of Shameless Deeds* (1915). This book largely relied upon the use of outlandish arguments to evoke extreme emotional responses from the reader. A reader opening the book finds “The Culprits” written in bold letters at the top of the first page, with photographs below of the Kaiser, German Chancellor Von Benmann-Hollweg, and General Von Moltke. Le Queux

begins his account by attempting to establish a linkage between the Germans and Attila the Hun, arguing that German Army tries to emulate Attila's army by showing no quarter to innocents and using fear as a weapon. This linkage is noteworthy because Le Queux (15) takes care to detail the savagery of the Huns, arguing that Attila the Hun "may best be described as the worthy leader of one vast gang of Jack the Rippers."

According to Le Queux (5), German leaders had willfully stimulated and encouraged a type of atavistic regression amongst the German people:

Modern Germany, frothing with military Neitzshism [sic], seems to have returned to primate [sic] barbarism. Belgium, a peaceful modern nation, has been swept by fire and sword, and its honest, pious inhabitants tortured and massacred, not because the German soldiery desired to wreak such vengeance upon a people with whom they have to quarrel, but because they had been encouraged "to act with unrelenting severity, to create examples which by their frightfulness would be warning to the whole country."

Despite the loaded language, the "primate barbarism" to which Le Queux refers is not, in the strictest sense, presented as the *sine qua non* of the commission of war crimes.

Instead, Le Queux appears to advocate the position that although the German race may inherently contain the seed of primitive barbarism, war crimes were committed only when this seed was germinated by the dictates of German leadership.

Various governmental reports from assorted nations, which were likely to be given a great deal of credence as impartial and authoritative documents, were also available to the Canadian public during the First World War. Rather than being neutral and unbiased, these reports mix relatively straightforward (but deeply emotional) accounts of death and destruction with elements of German conduct that offend the particular sensibilities of the author nation. *German Atrocities in France: A Translation*

of the Official Report of the French Commission focuses upon a religious dimension to the litany of crimes committed by the German Army that is not seen in official reports from most other nations (the exception being Belgium). Most of the religious “crimes” outlined in sections of this report called “Bacchanalian Dance in Church,” and “sacrilege,” do not conform to existing international views of war crimes. Instead, they are examples of poor conduct on the part of German soldiers that would be deeply offensive to religious individuals.

A further example of how such documents were shaped with particular audiences in mind is *British Civilian Prisoners in German East Africa : A Report by The Government Committee on the Treatment by the Enemy of British Prisoners of War (1917)*, which was issued in London. In this report, the blurring of distinctions between indigenous populations of Africa and English colonizers was especially offensive. For example, in Zanzibar during the forced march to Mrogoro (which was the seat of government of the colony), British subjects were, part way through the march, told by their German captors that they were to fend for themselves for food even though food was initially promised:

And even at this early date there was manifested by the Germans that desire to humiliate the British civilians in the eyes of the natives which was so constant a characteristic of their subsequent conduct. (7)

The same report tells the story of Herr Dorrendorf, a camp commandant who was legendary for his brutal treatment of natives and extended this cruel treatment to British colonizers. The main focus of the descriptions of the forced march and the cruel treatment of British prisoners was the fact that the Germans sought to treat the British

colonizers in the same manner as they treated those who were colonized. Surprisingly, the fact that British prisoners of war were treated badly, in contravention of international law, was treated as a secondary concern.

Large quantities of these and other publications relating to the crimes committed by the German Army were distributed in Canada during the course of the Great War. At first glance, these publications appear to be quite similar. However, although the common theme of such propaganda was the vilification of the Germans, no unified argument is presented across the assorted books and pamphlets regarding the nature of war crimes and those who have allegedly committed them. While all of these publications agree that the Germans had committed war crimes, there is some degree of disagreement regarding what those crimes were (the exceptions being murder and rape), and little consensus regarding why such war crimes were committed. Bothwell, Drummond and English (1987: 384) also note that some unanticipated consequences of the propaganda campaign became apparent after the war:

The vivid retailing of imaginary excesses by the beastly Hun proved an effective means of stimulating patriotism, but it had its side effects. During the war it made rational communication difficult and encouraged more and more excessive language and threats directed at the enemy, threats that came home to roost when peace was negotiated. After the war, when the truth about German atrocities (some real but mostly imaginary) came to be known, the public recoiled.

The emergence of a groundswell of anti-enemy sentiment will be discussed in more detail in the next chapter.

Chapter 4

The Criminalization of War Crimes in Canada during the First World War Era

During the First World War an astounding 619,586 Canadians joined the Canadian Expeditionary Force (CEF) out of a total population of about eight million, meaning that a large proportion of Canadians were either in uniform or knew someone who was. The casualty figures are both startling and appalling: 234,741 (almost 70%) of the approximately 345,000 members of the CEF who fought on the front lines were either killed or wounded (Cook 2008). These casualty figures do not include roughly 4,000 Canadians who became prisoners of war. Although the number of individuals who had offered surrender to the enemy, only to be cut down, cannot be determined with a high degree of accuracy, historian Richard Holmes (2006) estimates that the odds that a soldier would make it to the rear as a prisoner of war was less than 50%. In this depersonalized, industrial warfare little mercy was shown by any side, and the fact that the Canadians developed a reputation for not taking prisoners meant that, in turn, the likelihood of survival when attempting to surrender to the enemy was exceptionally low.

Given the scale of the slaughter, and that violations of the customary laws of war were common, it is not surprising that at the end of the Great War many Canadian citizens were calling for vengeance. Somewhat more difficult to understand is that at the close of the war, despite the large scale participation of Canadian citizens and veterans in the “Hang the Kaiser” campaign that had grown to prominence among allied nations, the Canadian government did not appear to have any policies relating to war crimes and war criminals. The herculean effort put forth by Canada during the war, and the reputation of

Canadian soldiers as being among the best in the world, ensured that Canada had a place at the Paris Peace Conference of 1919. However, there is no record of Canada exerting any influence to attempt to hold one of the two seats allotted to the British Empire in the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, which was given the mandate by the Peace Conference to explore options for dealing with war criminals. In fact, Borden noted in his memoirs that:

Many letters and telegrams urging the trial and punishment of the ex-Kaiser reached me from Canada; and a strong feeling existed that some punishment should be inflicted upon him. I was strongly of the opinion, which I had expressed in the Imperial War Cabinet, that if any action should be taken it should be by a resolution of the Peace Conference and not through a long drawn-out trial before a tribunal constituted for that purpose and really having only such authority as could be conferred upon it by the Peace Conference itself. (876)

It is interesting that only the letters calling for the trial of the Kaiser made an impression on Borden, and he did not acknowledge in his memoirs that calls for punishment of German military personnel were also prominent. Borden's hostility toward the Hang the Kaiser campaign and the establishment of war crimes trials appears to signify, at first glance, that the criminalization of war crimes and crimes against humanity (genocide did not yet exist as a category) failed to take root in Canada during this era. However, upon closer examination it is clear that although there were no provisions for war crimes and war criminals within the Criminal Code of Canada, by the end of the war a coherent strategy for dealing with war crimes and war criminals was, in fact, in place.

The main argument presented in this chapter is that the criminalization of citizens from enemy nations had already effectively occurred through internment camps, the deportation of enemy aliens residing in Canada, and changes to the Immigration Act that

excluded members of these “uncivilized races” from entering into Canada in the future. These processes of criminalization were supported by propaganda campaigns that cast members of enemy nations as natural born killers, and reinforced the belief that Canadians were inherently superior and, as civilized beings, would never commit atrocities. For his part, Borden did not believe that Germany and Austria were uncivilized races. However, he believed that looking forward to prevent future wars was preferred to the backwards-looking approach inherent in war crimes trials. Borden argued that war crimes trials would be *ad hoc proceedings*, that the League of Nations would dampen the likelihood of future wars, and that colonialism could proactively lessen, or eliminate war crimes in the future. Such solutions could have little or no impact upon individuals who committed atrocities during the Great War, and who applied for entrance into Canada after the war was over. However, due to the racialized nature of immigration policies, the issue of war criminals entering in Canada was never posed as a problem in and of itself.

This chapter will begin with an account of how official and unofficial military histories helped to forge critical distinctions between Canadian soldiers and the monstrous “other.” The second section provides an overview of the racialized exclusion of “enemy aliens” in Canada. The arguments provided by groups of Canadian citizens who lobbied the government regarding the issue of war crimes and their punishment is then provided. This chapter concludes with an overview of how, at the nexus of all of these factors, a *de facto* policy emerged in Canada that effectively managed the problem of war crimes and war criminals.

4.1 “They all dropped dead sir”: Official and Unofficial Accounts of Canadians at the Front

The criminalization of the enemy during the First World War era depended upon a sharp distinction between the actions of enemy soldiers (who were portrayed as barbaric, uncivilized and criminal) and Canadian soldiers (who were portrayed as pure, civilized and heroic). While accounts of enemy conduct during the war were almost entirely filtered through the lens of the propaganda campaign, Canadians eagerly awaiting information about the war and the battles fought by Canadian soldiers depended upon three sources of information: stories presented in newspapers or on the radio, official histories that were published during the course of the war, and letters from loved ones who were on the front lines. Although the focus of the news accounts and official histories were upon the deeds of Canadian soldiers, and the letters home were usually of a personal nature, such official and unofficial accounts of the war from the front lines played a very significant role in shaping perceptions of war crimes and war criminals in Canada.

Until March of 1915, more than a half a year after the start of the war, journalists were faced with a six month jail term for traveling within 20 miles of the front lines. This limitation on the fourth estate is not surprising, considering the fact that the Allies were retreating during the initial stages of the war. Control of the news, especially of bad news from the front, was also viewed as being necessary to avoid dampening enlistment rates during the early part of the war. Despite the fact that reporters were not allowed to gather their own information, news stories were still issued in Canada during this time. During the first six months of the war, practically every account of the war published in

newspapers across the British Empire was written by Colonel Earnest Swinton. Swinton, who was employed by the *Daily Chronicle* in London, was given the title “eye-witness” rather than reporter. His stories focused upon the heroism of British troops and mounting casualties inflicted upon the Germans. The size of the gap between the rosy reports produced by Swinton and the actual situation at the front led other newsmen to refer to his stories as “eye-wash” (Keshen 1996).

At the heart of the impact of news sources upon Canadian perceptions of war crimes and war criminals was the issue of what was excluded from, or included in, the news that reached Canadians. The main cause of exclusion was censorship by military authorities. When a cadre of six newspaper reporters was eventually allowed to publish stories about the war, each was subjected to military censors who used a blue pencil to remove sensitive information, which included things such as troop and unit locations, criticism of leaders, or drops in morale among the troops. Stories of shootings of German prisoners by Canadians were non-existent in media accounts of the war. Conversely, accounts of atrocities committed by German soldiers, regardless of whether they were true or outright fabrications, were widely circulated in the Canadian media. Jeff Keshen (1996: 29) aptly summarizes the bias of such accounts as follows: "with few exceptions, their accounts exaggerated Entente gains while deriding both the accomplishments and behaviour of the enemy." The bias toward presenting soldiers from the Axis powers in a negative light extended to American newspapers, some of which enjoyed a large readership in Canada. For example, a story in *The Times* in 1915 repeated the unsubstantiated legend that a Canadian soldier had been crucified by the Germans:

There is, unhappily, good reason to believe that the story related by your Paris Correspondent [on 10 May] of the crucifixion of a Canadian officer during the fighting at Ypres on April 22-23 is in substance true. The story was current here at the time, but, in the absence of direct evidence and absolute proof, men were unwilling to believe that a civilized foe could be guilty of an act so cruel and savage. (cited in Tate 1998: 44)

The tale of the crucified Canadian soldier was one of the most repeated legends of the Great War. It exemplified the barbarism of the German soldiers, and it gave Canadian soldiers informal license to mistreat, or not take, German prisoners of war.

The demand in Canada for news and stories from the front lines was also addressed during the war by the publication of official histories. The Canadian War Records Office (CWRO) was created during the early stages of the war, when it became apparent that unique Canadian contributions to the war effort would be lost or subsumed under the banner of British contributions. Sir Max Aitken, who would later become Lord Beaverbrook, leveraged his influence in both England and Canada in order to be designated as “Eye Witness” on behalf of the Canadian government (Cook 2006a). In this role he began to collect stories from the front, and essentially began to create an archive of accounts of the war. He used this information to write an account of Canada’s heroic stand at the Second Battle of Ypres in which Canadian soldiers heroically stemmed the tide of a German offensive in which chlorine gas was used for the first time. Aitken followed this success with the immensely popular publication of *Canada in Flanders*, which was a highly patriotic account of the British Expeditionary Force that sold 40,000 copies in the first week, and sold out four printings in the first month after the initial release (Cook 2003). The portrayal of Canadian soldiers in *Canada in*

Flanders stood in stark contrast with representations of German soldiers found in propaganda literature of the era:

No mere jackboot militarism inspired [Canadian soldiers]. They sought neither the glory of conquest nor the rape nor the loot of sacked cities. No selfish ideal led them to leave their homes and exchange the ease and comforts of civil life for the sufferings of war and the risk of death. [...] The first contingent was born partly of the glory of adventure but more of the spirit of self-sacrifice; and this spirit, in its turn was born of the deepest emotions of the Canadian people-its love of Country, of Liberty, and of Right. (1916: 3-4)

The galvanizing effect of the over-the-top patriotism forced military censors to allow Aitken to publish information about units engaged in battle that would never had been approved otherwise.

Along with other accounts of key battles fought by Canadians, the CWRO also published *Canada in Khaki*, which was a blend of writing, photographs, poems, and drawings from both journalists and soldiers. This publication also focused exclusively upon the success of Canadian soldiers on the battlefield. However, a contradiction appeared to emerge: if primitive races are warlike by their nature, how was it that the Canadians were excelling in battle to such a large degree? One answer, which appeared in the first issue of *Canada in Khaki*, was that Canadians were toughened by the Canadian climate and exposure to harsh conditions of a rugged Canadian life:

Men from the prairies, from the wheat fields, and the lumber-yards of the West; men accustomed to the saddle and to sport of all kinds; men who wield an axe more deftly than I can hold a pen; men accustomed to face death twenty times a year or more, and who have waged war with Nature or with wild beasts all of their lives – what wonder that they sprang to the call of war as surely never men sprang before. The clash of battle was music to their ears. (de Beck 1917: 36)

Although talk of battle being music to their ears probably sounded hollow to the average Canadian soldier, it was immensely popular among those back at home who were eager for news.

History is produced, and is never neutral. The CWRO was specifically, and overtly, designed as a mechanism for enhancing the reputation of Canadian soldiers during the Great War. As such, published accounts did not include episodes which could tarnish the reputation of the BEF. For example, in 1916 Max Aitken sent out a call for first person accounts written by soldiers for use in a commemorative war book. One of the responses received was simply titled “Fact”, and told of how a Commanding Officer (CO) ordered two Highlanders to escort four German POWs about a mile and half to the rear. The soldiers returned ten minutes later, and when the CO asked what had happened they stated: “they all dropped dead Sir, and we didna [sic] want to miss this fight, so we returned” (cited in Cook 2006b: 23). Although many accounts of the killing of prisoners were collected, none appeared in official histories produced by the CWRO. The Canadian public thus received a steady stream of information from the media regarding war crimes committed by the German army, and no information from the media that would give any indication that a Canadian soldier had ever engaged in war crimes.

It is important to note that the CWRO was not the sole source of official documents and information for the BEF. Action reports, war diaries, and unit histories were produced as a matter of procedure. It is somewhat shocking to find that accounts of the killing of German prisoners of war are contained in several reports. One example is a report written after a trench raid at Vimy Ridge that occurred on the night of 12-13 February 1917. More than 900 Canadian soldiers took part in the assault, and they

collected a large number of prisoners. However, due to the precarious nature of crossing no man's land at night to conduct raids, the prisoners proved to be a liability that could have resulted in Canadian casualties. The after action report coldly notes that: "owing to the very high parapet of trench and difficulty of leading these men as prisoners, it was found necessary to kill them" (cited in Cook 2003: 643). It is shocking to see an official document that contains an admission of a war crime. However, the fact that this account, and others like it, are present in the official records indicate two things: (1) the person writing the report did not view the act as a war crime, and (2) the person writing the report could be reasonably sure that the higher ranking individuals reading the report would not view the act as a war crime. No Canadian soldiers faced official disciplinary action during the war for killing POWs, which confirms that at least the second proposition is true.²¹ In fact, the only offences related to the treatment of prisoners of war that existed in the Army Act, which governed Canadian soldiers during the First World War, were related to releasing prisoners without proper authority or allowing a prisoner to escape.²²

Media accounts and official histories were not the sole source of information about the experiences of Canadian soldiers on the front lines. Valuable information was also contained in letters written by soldiers to their loved ones. Although it is impossible to generalize regarding the content of such letters, based on surviving letters collected by

²¹ Desmond Morton (1972) provides a useful analysis of the application of military law to Canadian soldiers on the front lines. In all, 25 Canadian soldiers were executed under the authority of the Army Act, which governed British soldiers during the First World War. Of those, 23 stemmed from charges of desertion and/or cowardice, and the remaining two were the result of the murder of fellow countrymen while on the front lines.

²² Clauses outlining offences related to prisoners of war are found in Section 20 of the Act. An overview of the act can be found on the Library and Archives of Canada web page: <<http://www.collectionscanada.gc.ca/databases/courts-martial/001006-130-e.html?PHPSESSID=759ojgbql3nkea71ati2ujv5t5#database>> (last accessed 10 April 2011).

Canadian War Museum (CWM) and Library and Archives of Canada (LAC), it is safe to say that in many instances soldiers writing from front line trenches tried to make sense of what they were experiencing. It is also safe to say that in many instances these soldiers also tried to tell stories that would help loved ones to understand what they were experiencing. In some instances, these letters included descriptions of war crimes they had committed, and the rationale for committing such acts. An example of this is found in a letter from a member of the 20th Canadian Light Infantry Battalion to his parents:

I don't know how I escaped [the machine gun fire] because I was lying right out in the front. After losing half of my company there, we rushed them and they had the nerve to throw up their hands and cry, "Kamerad." All the "Kamerad" they got was a foot of cold steel thro [sic] them from my remaining men while I blew their brains out with my revolver without any hesitation. You may think this rather rough but if you had seen my boys go down you would have done the same and my only regret is that too many prisoners are taken.²³

The fear experienced by the soldier as he felt he would be killed, and the anguish of losing half of his company, was fueled by the heat of battle to produce lethal results for Germans attempting to surrender. However, it is important to note that the letter must have been written at some point well after the battle was over, when the soldier had the chance to sit and write. At this point in time the fear had probably subsided, and the heat of battle had long disappeared. All that was left was the anguish of losing his friends, which was enough to lead him to note that "too many prisoners are taken."

The complex experiences of Canadian soldiers immersed in industrialized warfare challenged key components of the criminalization of enemy soldiers found in propaganda literature. Specifically, although the source of enemy criminality varied from one source of propaganda to another, there was never any question in such literature that enemy

²³ Lieutenant R. C. "Buster" Germain to mother and father, 29 August 1918. CWM 58A 1 67.6.

soldiers were the sole source of atrocities committed during the war. While official accounts from the front that were widely circulated during the war also present black and white distinctions between the enemy and Canadian soldiers, war diaries and other accounts of the war that directly came from Canadians on the front lines provided ample evidence that challenged the distinction between “us” and “them,” or “civilized” and “uncivilized.” However, such accounts were often hidden until well after the war, or directed to a very small audience, and had little impact upon the course of the criminalization process.

4.2 “Feeling intense against enemy aliens”: Exclusion under Canadian Law

As shown in this section, in the early part of the twentieth century, war crimes were commonly conceived as being committed by members of uncivilized races. Propaganda campaigns directed toward stirring up support for the war through resentment of the enemy, often cast enemy soldiers, or at least the military and political leaders, as uncivilized. Such campaigns consistently bombarded Canadians with the message that war crimes and atrocities were being committed by the uncivilized enemy, while Canadian soldiers were pure of heart and spirit, and would never commit war crimes. The criminalization of the enemy was intended to arouse anti-enemy sentiments within Canada that would fuel enlistment and enhance support for the war.

The unanticipated consequence of racial categorizations that distinguished between “us” and “them” was the stigmatization of groups of immigrants already living in Canada. Immigrants from nations with which Canada was at war became categorized as “enemy aliens”, and were targeted for exclusion from Canadian society. The

exclusion process was based upon the notion that the individual was a part of an uncivilized race, and had little to do with past contributions to Canada or the war effort (although a perceived lack of a contribution was always noted). This process of exclusion was buttressed by the fact that a number of groups were already denied full participation in Canada at the time. As enemy aliens were formally criminalized and excluded under Canadian law, citizen groups formed powerful lobbies directed toward the removal of enemy aliens from the country. The end goal of the formal and informal processes was the purification of Canadian identity, which (it was argued) does not include the membership of supposedly inferior races.

In the early part of the twentieth century, exclusion from Canadian society on the basis of race was already prominent. For example, in the immediate pre-war era, discussion in Canadian Parliament regarding Aboriginal peoples revolved around the power to establish industrial schools, the withdrawal of “half-breeds” from treaty and status rights, the legal status of Indian women, and (in by far the longest and most detailed of these debates) how to effectively seize reserve land when a private company wants to access resources found upon it.²⁴ Owing to the fact that Aboriginal peoples were in Canada from “time immemorial,” physical removal from the country was not an option. The exclusion process directed toward the Aboriginal populations thus focused upon the seemingly contradictory policy goals of segregation and assimilation.

For other groups targeted for exclusion on the basis of race, the preferred approach was to either remove them from Canada, or prohibit their entrance into the country. Immigration rates were peaking in 1912-13, resulting in calls to tighten existing

²⁴ E.g. See Third Session Twelfth Parliament (Vol 4), 11 May 1914 p. 3532-3553.

restrictions and prohibitions lest the resulting changes to “racial composition” lead to the deterioration of Canadian society (McLean 2004). Chinese and East Indian individuals were especially targeted in such debates. Despite the fact that the Head Tax levied against Chinese individuals wishing to immigrate to Canada was raised to \$500 in 1902 (an average full year’s wages), and Chinese individuals could not legally hold public office or take jobs in professions such as law or medicine, prior to the outbreak of war debates ensued regarding whether even these draconian measures were sufficient to curb Chinese immigration. In a House of Commons debate regarding Chinese immigration Frank Oliver, who was the Minister of the Interior and Superintendent-General of Indian Affairs, argued that:

time has demonstrated that that the Chinese have adjusted themselves to the conditions of the head tax and that while the Government of British Columbia and of Canada are levying much revenue on the Chinese, the standard of Canadian civilization is being seriously affected by the large and increasing numbers of Chinese who are entering into Canada.²⁵

During the same debate cited above, Hindu immigration was discussed alongside the “Chinese question.” Immigration from India was thought to have been effectively ended with the disenfranchisement of East Indians living in Canada in 1907,²⁶ and the establishment of the Continuous Passage Legislation in 1908.²⁷ However, during this session of Parliament (held on 10 June 1914) an incident was underway in which a group of 376 passengers (340 Sikhs, 24 Muslims, 12 Hindus), all British Subjects from India,

²⁵ F. Oliver, Third Session Twelfth Parliament (Vol 5), 10 June 1914, p. 5213.

²⁶ Restrictions were also placed upon the types of jobs East Indians could hold in Canada. This was done to curb what was referred to as “the brown invasion.”

²⁷ This legislation prohibited entry into Canada unless the means of passage traveled a continuous route between the place of origin and the Canadian destination. As there was no continuous passage from India to Canada the result (and the goal of the legislation) was the end of immigration from India.

aboard the Komagata Maru were in Vancouver Harbour awaiting a court to rule on whether they could stay in Canada. As is shown in these examples, racial categorizations and divisions were a part of the fabric of Canadian society before the First World War had started.

The unequal status of Canadian citizens based upon racial categorizations and stereotypes was also reflected in military recruitment policies. At the outset of the war, individuals from First Nations, Japanese, and black communities, among others, were a part of the rush to enlist. While it is impossible to determine all of the motivations for doing so, wanting to do their part to help Canada and the British Empire, along with trying to secure future rights for their respective groups, were clearly factors that drove many members of these communities to recruitment centres. However, the popular belief that the non-white races were biologically inferior and ill-equipped for modern warfare initially led to their exclusion from the armies on all sides of the conflict (Waller 1989). The fear that First Nations would develop a taste for killing whites, and the belief that Germans might not offer non-white soldiers the protections offered to combatants under the Geneva and Hague conventions are two oft-quoted justifications for the exclusion of non-white races from the Canadian Forces (CF). Canada did not succumb to the pressure to enlist minorities in the CF until the end of 1916, when the Canadian government pledged 500,000 troops in Europe. Horrible casualty rates meant that 300,000 new recruits were needed each year to maintain an army of 500,000. Flagging enlistment, and an increasing demand for new troops, compelled the Canadian Forces to accept non-white soldiers.

While some groups viewed the war as an opportunity to reverse the exclusion process, immigrants from nations with which Canada was at war were cast as “aliens” and became subject to exclusion. The exclusion process for groups such as German – Canadians did not begin immediately, but gradually emerged over time. In fact, during a special session of Parliament convened to formally authorize Canada’s entry into the First World War, Prime Minister Robert Laird Borden was conciliatory towards Canadians of German descent:

We have absolutely no quarrel with the German people. I believe they are a peaceable people, that they are not naturally a warlike people, although unfortunately they are dominated at the present by time by a military autocracy. No one can overestimate what civilization and the world owe to Germany. In literature, in science, art and philosophy, in almost every department of human knowledge and activity, they have stood in the very forefront of the world’s advancement. Nearly half a million of the very best citizens of Canada are of German origin, and I am sure that no one would for one moment desire to utter any word or use any expression in debate which would wound the self-respect of any of our fellow citizens of German descent.²⁸

Of particular importance is Borden’s description of Germans as “a peaceable people” who are “not naturally warlike.” From Borden’s perspective, the issue was that Germany was being run by a “military autocracy” that started the war. Considering that 500,000 citizens of a nation with a population of less than eight million were of German descent, Borden’s initial response was somewhat inevitable.

The positive attitude of Canadian Parliament in general, and Prime Minister Borden in particular, toward Canadians of German descent continued through the early stages of the war. This is illustrated in a remarkable exchange that occurred at the outset of 1915 between William G. Weichel (an Ontario-born son of German immigrants who

²⁸ R.L Borden, 19 August 1914, Special Session of House of Commons Debates, p. 140.

defeated William L. MacKenzie King to represent the Waterloo riding), Wilfrid Laurier (who was then leader of the opposition), and Borden. Weichel spoke first and presented a message of unity that did not recognize any distinction between individuals of the nations at conflict: “Think of the unhappy homes in England, France, Russia, and Germany; think of the wives and mothers who will weep because the husband and son will never return...thank God we live in Canada where war will not reach our shores.”²⁹ Weitchel goes on to express his conviction that German-Canadians are still desirable as Canadian citizens:

Although born in Canada, I am of German origin; and, needless to say, along with many hundred thousand other people living here at the present time, I feel keenly the situation that developed five months or so ago in Europe. ...I am also going to touch on a delicate subject, but also aware of the fact that I am speaking to broad-minded men who desire above everything else the unification of all races throughout Canada to-day into one harmonious whole. For a great many people of German origin, thrifty and frugal in their habits, possessed of energies and business abilities that have aroused the admiration of all classes in Canada. They have always been looked upon as desirable citizens...

Weitchel noted that “insinuations” from a few newspapers attempted to “discredit and cast suspicion” upon German citizens (which signaled the start of the propaganda campaign), but that Germans were “as true as steel” toward their newfound country.

Weichel cast blame for the war upon Germany’s leaders, and argued that many escaped the fatherland to avoid “military domination.” Lastly, he stated that German-Canadians were proud of “their race”, which had been at the forefront of art, literature, music, and science, but not proud of the violation of Belgium.

Far from objecting to any of this, Laurier stated that he wished to “associate” himself with Weichel, pointed out that the situation of German-Canadian citizens was a

²⁹ W.G. Weichel 8 February 1915, Fifth Session Twelfth Parliament (Vol 1), p. 8.

“trying and painful one,” and because “blood is thicker than water” no one in Canada would think of extracting more of a sacrifice from Germans than of any other Canadian citizen.³⁰ Borden was even more glowing in his praise of German, and Austro-Hungarian, Canadians, and stated that:

We have those in Canada who although of German descent, were born in Canada and are Canadian as we are ourselves, understanding as we do with perfect appreciation the liberties which are ours of right. We have also in this country those who were born in Germany or in Austria-Hungary, who have been asked to come to Canada as immigrants and to join with us in the task of upbuilding this dominion... those of German birth and those born in the empire of Austria-Hungary who have come to this country to be citizens of Canada have with very few exceptions borne themselves worthily and well.³¹

The display of goodwill and unity expressed in the House of Commons that day, however, was to be short lived. In fact, by the time the above exchange occurred, the criminalization of “enemy aliens” was already underway, as individuals of Austro-Hungarian and German heritage were already either interned or required to register with local authorities.

The development of laws and policies designed to facilitate the exclusion process targeting immigrants from enemy nations began, albeit in limited form, shortly after the start of the war. At the outset of the Great War, the legal status of “enemy aliens,” who were born in countries with which Canada was at war but who were often naturalized Canadian citizens, was a complex issue. In the early part of the twentieth century, Canada’s status as a British colony resulted in important legal limitations placed upon the newly-formed Dominion. Specifically, while the British North America Act (1867) established Canadian jurisdiction over domestic matters, foreign policy explicitly

³⁰ W. Laurier, 8 February 1915, Fifth Session Twelfth Parliament (Vol 1), p. 15.

³¹ R.L Borden, 8 February 1915, Fifth Session Twelfth Parliament (Vol 1), p. 20.

remained under the purview of the British government. This limitation of jurisdiction led to significant distinctions related to the legal status of immigrants entering into Canada: although Canada was able to confer citizenship to individuals under naturalization legislation, only individuals born in the British Empire, or who resided in England for a period of five years or more, were British subjects (Farney and Kordan 2005). Significantly, section 2 (e) of the Immigration Act of 1910 defined “alien” as a “person who is not a British subject,” which meant at that time an individual who gained Canadian citizenship could still be legally regarded as an “alien.”

An Act to confer certain powers upon the Governor in Council in the Event of War, Invasion, or Insurrection, otherwise known as the War Measures Act was implemented by an Order in Council on 22 August 1914 and was in effect until 1920. The War Measures Act gave the government of Canada broad powers to use whatever means deemed necessary to defend Canada and promote peace and order within its borders. Amongst other things, the Act made it illegal for aliens of enemy origin to possess firearms, and to publish or read anything in a language other than English or French. Such enemy aliens were required by law to register with local authorities and carry identification at all times, and could not leave the country without a permit. Actions taken under the auspices of the War Measures Act did not have to undergo democratic rigour, and were not subject to the scrutiny of Canadian Parliament.

Foucault argues that the implementation of a particular policy does not necessarily reflect the intentions of those who created the policy in question. This is certainly the case with respect to the internment process that was created under the auspices of the War Measures Act. At the close of 1914, enemy aliens who defied the

following conditions were to be arrested and detained as prisoners of war in concentration (later called internment) camps established in Canada:

- a) All German or Austrian or Austro-Hungarian officers, soldiers or reservists who attempt to leave Canada
- b) All subjects of the German Empire or of the Austro-Hungarian Monarchy in Canada, who attempt to leave Canada, and in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assisting the enemy; and
- c) All subjects of the German Empire or of the Austro-Hungarian Monarchy in Canada engaging or attempting to engage in espionage or acts of a hostile nature, or giving or attempting to give information to the enemy, or assisting or attempting to assist the enemy, or who are on reasonable grounds suspected of doing or attempting to do any of the said acts.³²

By 27 November 1914, 328 Germans were already being held as prisoners of war in Canada.³³ From 1914 to 1920, a total of 8579 enemy aliens were interned as prisoners of war in 21 internment camps, which were under the control of the Department of Militia and Defence.³⁴ While the internment process was ostensibly designed to protect Canadian society from a potentially dangerous foreign element during times of war, in practice a far wider net was cast. For example, more than half of those who were actually interned under the War Measures Act were Ukrainians who left their native land due to oppression at the hands of the Austro-Hungarian Empire. The majority of interned individuals did not represent any type of threat to the security of Canada. A further example is found in restrictions against free movement that were intended to prevent individuals from either being able to engage in acts of sabotage against Canada, or leaving Canada to join the armies of the nations with which Canada was at war. However, in reality most individuals interned under movement restriction provisions

³² NAC, RG 25 G-1 Volume 1150, Report prepared by Eugene Fiset on 27 November 1914.

³³ *Ibid.*

³⁴ <http://www.britishcolumbia.com/general/details.asp?id=44> <last accessed 28 February 2010>

were simply late in reporting to the local authorities, or were moving for mundane reasons.

The surveillance and policing of enemy aliens in Canada during the Great War was uneven, and the treatment received by members of criminalized groups varied greatly depending on the zeal individual police officers brought to the cause. The Royal North West Mounted Police (NWMP), which was charged with monitoring the movements of enemy aliens in Canada, compiled “Arrested, Detained and Paroled” reports which show the nationality of the person in question, the reasons the individual was arrested or detained, and the action taken by the NWMP. One Austrian, for example, was processed by an officer who followed the purpose of movement restrictions to the letter:

Arrested at North Portal while attempting to cross into the United States, where he wished to attend college. Would have to join the Army if he went back to Austria. Escorted from Regina to Brandon and interned Decr. 2nd 1915.³⁵

In another case, an individual was arrested in Winnipeg while travelling to deliver subscriptions for Canadian-Rutherian, German Canadian and Polish Canadian Newspapers. The police office in Winnipeg showed personal initiative and conviction by contacting the NWMP by phone, and was told: “Rozdolfki broke parole in January, kindly intern him.”³⁶ The hard line taken in the above cases are the polar opposite of the lenient approach employed by the officer who filed the following report relating to the detainment of an Austrian:

This man came from the United States to work on a threshing gang. He was desirous of going back home and was arrested in the attempt to get across the

³⁵ NAC, RG 18 Volume 474, file 10.5.

³⁶ NAC, RG 18 Volume 474, file 10.7.

Line. As there was nothing against this man and he would have thrown upon the country for support, I have granted him this exeat in order that he will be able to get back to his home in the States.³⁷

In this case the officer felt that it was enough that the individual was leaving Canada, and was not concerned with the possibility that the detainee would return to Austria and be subject to military service. To the officer in question the spirit of the law revolved around removal, rather than the neutralization, of unwanted enemy aliens.

It should be noted that although NWMP files contain examples of both hard line and softer approaches taken toward enemy aliens, the hard line approach was far more commonly utilized. In fact, the NWMP files contain many examples of individuals who can best be categorized as “zealots” regarding the internment of any and all enemy aliens. Such individuals were not always members of the NWMP. For example, the Chief Commissioner of Police Canada sent a letter to the comptroller RNWM Police in Ottawa asking for the arrest of Hans Dinkelmeier, who resided in Langenburg, Sask.³⁸

Dinkelmeier wrote the following letter to his wife in Oberwesel Germany, which was translated by the police (irrelevant personal items were removed):

I enclose five dollars on American paper money. I changed it this morning at the Bank, for you cannot dispose of Canadian Money there now. In about four weeks time I shall make another attempt to reach the States.....Last week they took three or four more Germans away. One lives in continual apprehension.....For the present you can only send letters to the “Staats-Zeitung” since I do not know yet whether I can reach the States, or where to go. Perhaps I shall be lucky this time and they will not catch me.

To the Chief of Police the letter spoke for itself, and he argued that Dinkelmeier should be interned before he attempts to reach the United States once again. Of note is the fact

³⁷ *Ibid.*

³⁸ NAC, RG 18 Volume 474, file 10.5, 7 October 1915.

that the person in question was leaving as a result of the climate of fear created by the processes of criminalization and internment.

In the harsh, anti-alien climate that existed in Canada during the Great War, which demanded unquestioned loyalty and allegiance to the British Empire and the Dominion of Canada, no one living with the label “enemy alien” was immune from the machinations of the criminalization process. This is perhaps most evident in the case of Rev Father Stuhlmann, who was accused of manifesting “pro-German feelings.”³⁹ The pro German feeling that Father Stuhlmann was accused of was that, after reading the newspaper, he commented that it appears that the Germans had the upper hand in the war. J. MacPherson, a bishop advocating for the release of Stuhlmann, received a very terse and unapologetic reply from the commander of K Division of the NWMP, stationed in Lethbridge:

I would respectfully submit that in my opinion, the punishment meted out to Father Stuhlmann is certain to have a deterrent effect on any other persons likely to have inclinations to make statements against the Empire, and I would recommend that Father Stuhlmann be released from Detention and be placed on Parole to report to the Police as directed. I think this will tend to show that our action in the matter was not an act of oppression, and will probably have a good effect on the minds of the Foreign Element amongst whom Father Stuhlmann and his confereres may minister.⁴⁰

The letter from the commander of K Division did not close the file on Father Stuhlmann.

In fact, the NWMP began to track two other priests, Father Rosenthal and Father Minweigen, who came under suspicion as a result of their association with father

³⁹ NAC, RG 18 Volume 474, 1915, file 10.5, J. MacPherson to Officer Commanding NWMP, 7 October 1915.

⁴⁰ NAC, RG 18 Volume 474, 1915, file 10.5, Commander K Division NWMP to J. MacPherson, 6 December 1915.

Stuhlmann. In an attempt to remove his priests from being under the microscope of suspicion, Bishop MacPherson had Father Rosenthal and Father Miweigen moved to Edmonton, which prompted NWMP Commissioner, A.P. Berry, to write the commanding officer of the NWMP detachment in Edmonton to ask that he keep an eye on them. This degree of surveillance was deemed necessary despite the fact that Father Rosenthal was admitted to a hospital in Edmonton due to illness.

Individuals charged with implementing policies related to enemy aliens and expulsion were also occasionally moderate, and as a result a small number of Canadian citizens were spared the torment of being deported to a nation to which they had no real connection. For example, George Hamaan, a 36 year old Russian man with Canadian children born out of his marriage to a British wife, had been living in Canada for 11 years but admitted to being in the German army prior to that. He was interned and when his case was reviewed after the war for possible deportation, Assistant Deputy Minister of Justice W. Stuart Edwards opined that deportation would be unjust in this instance:

It would seem a great hardship to deport to Germany the British born wife of a German prisoner of war and it would be most unfortunate to send Canadian born children back...As the war is now over Hamaan cannot do very much harm in Canada and for the sake of his family it would appear to us not unreasonable to allow him to remain with his family.⁴¹

The Hamaan case is an illustration of how the interpretation of laws and policies designed to criminalize and exclude were interpreted differently based on the personal beliefs of enforcement officials.

⁴¹ NAC, RG 13, Vol 240, File 1918, W.Stuart Edwards to Department of Immigration and Colonization, 28 August 1919.

During the course of the war, the scope of the criminalization of some Canadian citizens continued to broaden. Some of this can be attributed to changes in allegiances of nations during the course of the war. For example, when Bulgaria entered into the war on the opposing side the following wire was issued by Chief Commissioner of Police A.P. Sherwood to police departments across Canada:

War officially declared with Bulgaria. Treat Bulgarians as Alien Enemies, same as Germans and Austrians. Kindly advise your officers by wire In order that they may detain any attempting to leave Canada.⁴²

A further example is the addition of writing or publishing “socialist and communist” materials that was put into place following the Russian Revolution in 1917. Social class also figured prominently in the criminalization process. For instance, a great many individuals who were placed under arrest and interned were jobless, meaning that the poor and unemployed were being disproportionately targeted by law enforcement.⁴³ In most instances, it is safe to say that distinct differences emerged as individuals enforcing the War Measures Act, which was designed to protect Canada from internal enemies, utilized personal judgments with respect to who was to be counted among the array of internal enemies.

The anti-alien sentiment that was expressed among some enforcement officials was also displayed by the civilian population and the level of anger and resentment directed toward enemy aliens continued to rise in the aftermath of the war, particularly (but not exclusively) in the Western provinces. While immersed in the peace talks that were held in Paris, Prime Minister Borden received hundreds of messages from Canadian

⁴² NAC, RG 18 Volume 474, 1915, file 10.5, 15 October 1915.

⁴³ <http://www.britishcolumbia.com/general/details.asp?id=44> <last accessed 28 February 2010>

cities, groups, and individuals submitting declarations and offering suggestions regarding issues such as what to do with interned enemy aliens now that the war was over, and what form of punishment would be the most appropriate in the administration of justice for enemy war criminals. The proposals submitted by Canadian citizens and organizations ran the gamut between hard line and moderate positions, and were a key part of the discourses that shaped Canadian society in the post war era.

Questions were put forth in Parliament regarding the repatriation of enemy aliens once formal peace was declared, as well as the status of immigration from enemy nations. The legality of future legal exclusion of immigrants from enemy nations also caused considerable debate. Such questions and issues were conveyed to Prime Minister Borden (who was at the Paris Peace Conference) via Acting Prime Minister Sir Thomas White.⁴⁴ The Canadian legal response was necessarily situated with the framework of British law, and Borden discussed these issues with British representatives who were at the peace conference, and sent the following reply to White:

British Government have had same question under consideration and have been advised by Law Officers that no special stipulations are necessary. In the absence of Treaty subjects of one country have no recognized rights to enter another country and legislation to exclude them is quite within the powers of any state. It is my understanding that our Immigration Act confers necessary powers upon Governor in Council.⁴⁵

Two days after receiving this reply, Acting Prime Minister Sir Thomas White sent a more urgent message regarding the deportation of enemy aliens and the import of goods from enemy nations:

⁴⁴ An example of such questions can be found at NAC, BP, 2 January 1919, f. 83025.

⁴⁵ NAC, BP, 9 February 1919, f. 83049.

Feeling intense against all enemy aliens. Consider whether any stipulations necessary in Peace Treaty to permit us under legislation to deport after conclusion of Peace Canadian residents of enemy nationality who have been here many years.⁴⁶

White went on to note that “public opinion will force legislation” along such lines, and that there was a “danger of outbreak against enemy aliens in many parts Canada [sic] and feeling growing daily.” Borden’s reply the following week, after once again consulting with British authorities, was direct:

Do not consider stipulation necessary in Peace Treatment for purposes mentioned. Our right to deport under legislation Canadian residents of enemy nationality and to prohibit importation of goods from enemy countries after conclusion of Peace and obligation of enemy countries to admit such of their citizens or subjects as may be so deported seem clear without such stipulation.⁴⁷

This brief chain of messages ushered in the era of post-war deportation of illegal aliens that culminated in changes to the Immigration Act in 1919 that expressly allowed the Government of Canada to ban immigration from nations with which Canada had been at war, or groups (such as Mennonites, Doukhobors and Hutterites) who had distinct practices that were identified as being different from the remainder of Canada. This Act also allowed the government to cast citizens who promoted the overthrow of government or other such political objectives as “undesirable,” which subjected them to deportation.

As is clear in Sir Thomas White’s call for deportation, Canadian sentiment toward enemy aliens had taken a dangerous turn. However, as will be shown in the following two sections, a diverse range of positions were advocated by Canadian citizen groups and the extreme position does not tell the whole story. Furthermore, it will be shown that

⁴⁶ NAC, BP, 11 February 1919, f. 83054.

⁴⁷ NAC, BP, 19 February 1919, f. 83073.

while criminalization grew out of an already existing process of exclusion in which several groups were denied full participation in Canadian society, a more severe form of exclusion directed toward physical removal of entire groups developed out of the process of criminalization related to enemy aliens.

4.3 “Unknown even in the warfare of our aboriginal tribes of untutored savages”: Lobbying the Canadian Government

Although the last shots of the Great War were fired on 11 November 1918, formal peace was not declared until the Treaty of Versailles was signed on 28 June 1919—almost a full year later. A great deal of speculation emerged during this time regarding the nature of the ensuing terms of peace. What would Canadian society look like after the war was over? What would happen to individuals who were currently interned or awaiting deportation? Would the German Kaiser and his confederates be brought to justice? With the goal of having a say in the formulation of answers to such questions, Canadian citizens banded together into numerous groups to lobby the government. Such lobby groups attempted to both direct future law and to lodge complaints in order to initiate deportation proceedings under existing law. In each of these forms, lobby groups were representations of governance from below the state.

Many calls for the deportation of all enemy aliens reached the Prime Minister. These messages were most commonly (but by no means exclusively) from the citizens living in the Western part of Canada, the majority of which originated from British Columbia. Not coincidentally, anti-alien sentiments had reached a fever pitch as uncertainty arose regarding the status of such aliens in the post war era. In many places

citizens began to take matters into their own hands through informal mechanisms of exclusion such as vigilante justice. For example, the Army and Navy Veterans Association in Vancouver sent a telegram to the Prime Minister stating that the “situation here very serious” and that policy needs to be declared. The chilling declaration that the association which is composed of “over two thousand members here stand by the enforcement of law and order but can hold our members for a short time only”⁴⁸ catches the anti-alien fervor perfectly. The government was thus pressed into action regarding enemy aliens not only because their removal from Canadian society was a part of a larger mandate of criminalization and exclusion, but also because physical separation from vigilante groups was the only way the physical safety of such stigmatized groups could be ensured.

The multitude of lobby groups that emerged across Canada articulated a diverse range of positions regarding the exclusion of enemy aliens from Canadian society. The hard line position advocated by some groups and individuals was the wholesale deportation of all enemy aliens from Canada. This position was adopted by city councils in South Vancouver, which sent Borden a brief resolution calling for “the expulsion from Canada of all undesirable aliens,”⁴⁹ and West Vancouver, which stated that “Canada’s doors should be locked” and “all enemy aliens in Canada shall be deported forthwith.”⁵⁰ Although the desired end result was the same, the rationale provided for this wholesale deportation, when offered at all, varied from group to group. Loyalty to the British Empire and the Dominion of Canada was at the core of many of the arguments. For

⁴⁸ NAC, BP, 1 February 1919, f. 83031.

⁴⁹ NAC, BP, 31 January 1919, f. 83032.

⁵⁰ NAC, BP, 6 February 1919, f. 82058.

example, the Kitchener Loyal Orange Lodge argued that the foreign born population was “a menace to the safety of the land”, and due to their allegiance to other nations cannot be truly categorized as loyal British Citizens.⁵¹ Similarly, A.S. Stanger, a private citizen from the Western part of Canada, argued that Mennonites were disloyal because they avoided conscription during the war.⁵² Stanger claimed that “The Mennonites are about as loyal to Britain as any German” and put forth that “when it comes to deportation we sincerely [sic] hope this class of people will not be overlooked.” Although Stanger signed his letter individually, he used the term “we as voters” to strengthen his call to confiscate land owned by Mennonites for distribution to returning soldiers.

Other rationales for deportation of aliens focused on “what was best” for Canadian soldiers who, starting in late 1918 and continuing throughout 1919, were returning from the battlefields of Europe. In the latter portions of the war, when labour shortages in Canada became acute, enemy aliens were conscripted to work in many essential trades such as farming, mining, and forestry. The Loyal Orange Association of British Columbia noted that jobs now held by aliens could be filled by men returning home from war and calls were made for “the expelling from Canada all enemy aliens” on these grounds.⁵³ While the “returning soldiers” theme was the currency used in this argument, it should be noted that being a member of an Orange Order also involved a certain degree of nativism and anti-immigrant sentiment that is illustrated by previous lobbying efforts to disenfranchise all new arrivals to Canada on the grounds that immigrants diminish the voting strength of “true Canadians.” The Council of Penticton

⁵¹ NAC, BP, 6 February 1919, f. 83042.

⁵² NAC, BP, A.S Stanger to Borden, 10 February 1919, f. 83041.

⁵³ NAC, BP, 21 January 1919, f. 83026.

went the furthest in terms of their proposals, offering that “all interned and many uninterned enemy aliens in the Dominion of Canada are ‘undesirable’”, and that all enemy aliens should be expelled “whether interned or not.” Shockingly, the Council of Penticton went on to argue that enemy aliens who left to fight for Canada and the British Empire in war were also undesirable and should simply not be allowed to return.⁵⁴

Lobbying efforts were occasionally directed toward specific individuals rather than the development of overarching policies.⁵⁵ Rampant nativism or outright prejudice and racism were often at the core of such efforts. For example, the Department of Justice received a petition on 27 August 1919 from the people of Vernon BC to arrest and intern as a prisoner of war a bookkeeper named A. Fuehr (who, as a result of this petition, became POW #1007) on the grounds that he was trying to help the enemy. According to the petitioners, suspicions amongst members of the community stemmed from the fact that Fuehr “always had money,” “had a motor car” (that was not registered in his name), that his family was “disliked by neighbours”, and that “Hindoos meet in his house occasionally, causing comment.” In an attempt to elaborate upon this last point, which was apparently self-evident in the minds of the petitioners, the document simply stated: “In public interest” it is “not advisable that a German should be so familiar with Hindoos.” The petition went on to relay that a “Returned soldier killed recently while working for Hindoo Company of which Fuehr is manager,” which apparently inflamed public opinion to demand the immediate internment of Fuehr and his entire family. If this were not enough, the document ends with the following seemingly unsubstantiated accusation: “Supposed to be a deserter from the German Navy.” In a letter of appeal

⁵⁴ NAC, BP, 18 February 1919, f. 83071.

⁵⁵ The documentation for this case can be found in NAC, RG 13, Volume 240, File 2149.

written to the Department of Justice on 18 Aug 1919, after his arrest and interment, it was clear that Fuehr could hardly believe what was happening to him. He argued that he had been living in the British colonies for twenty years, including the past thirteen years in Canada, where all his children were born. He had always obeyed the law and had no criminal record of any kind. Furthermore, he was never given reason for why he was interned to begin with, and his entire family was now facing deportation to Germany even though his three children, having been born in Canada, did not understand a word of German.

In an example of what Foucault (1978) refers to as a “reverse” or “unintended” discourse, members of the groups that had been excluded began to articulate and advocate their own positions. In response to such hard line anti-alien sentiments, and associated actions taken by members of some anti-alien groups, several groups of enemy aliens banded together to petition Borden. For example, a group of 181 Ukrainians signed a petition asking to either have the rights they were promised when they immigrated to Canada or be given passage to another country willing to treat them as equals:

Give us the means to leave or else open up the lines and give us a chance to go to some country where we will be able to get work so that we may live. We would also remind the Canadian Government that we were invited to come to this country, being promised the same rights as extended to other people.⁵⁶

Another example of enemy aliens banding together to lobby the government occurred in Sudbury, Ontario, where a group of 16 Austrians indicated that with the return of Canadian soldiers from overseas they became fearful for their lives:

⁵⁶ NAC, BP, 18 February 1919, f. 83069.

some of said returned men uttered threats that they intend to kill off all Austrians...we feel in imminent danger...petitioners humbly pray that your Government will take active measures at once to restrain these returned men from the assaults which they appear to contemplate against your petitioners.⁵⁷

A key feature of this reverse discourse was that the targeted group identified crimes that would be committed by other citizens, which cast the zealots engaged in informal acts of violence as the true criminals. However, groups banded together under identities within the enemy alien rubric lacked the power to force the government to take their claims seriously.

While the most radical elements of Canadian society garnered the most attention, it is important to note that a large number of Canadian groups and individuals took a more moderate view regarding enemy aliens. The most common suggestion amongst such moderate groups was similar to the position of the Municipal Council for the City of London, Ontario, which asked to only deport enemy aliens who had been interned.⁵⁸ Similarly, the Sons of England Benefit Society in Winnipeg advocated “the deportation of all enemy aliens at present in prison or detained under the Enemy Alien Act, and that their property be confiscated.”⁵⁹ A common belief amongst groups and individuals adopting this position was that those interned were the ones that were the most likely to cause trouble in the post war era, while enemy aliens who were not interned had displayed that they were trustworthy enough to remain in Canada.

The strict racial determinism found in hard arguments was not found in more moderate positions. Like their radical counterparts, moderate groups and individuals

⁵⁷ NAC, RG 13, Volume 240, File 2104, Alex Wowchuk et al to Governor General of Canada, 23 July 1919.

⁵⁸ NAC, BP, 4 February 1919, p. 83036.

⁵⁹ NAC, BP, 31 January 1919, p. 83031.

often emphasized the loyalty of enemy aliens in their arguments. The key difference between the two positions is that while hard liners rejected the notion that enemy aliens could be loyal to the British Empire and Dominion of Canada, moderates tended to argue that shows of loyalty could be: a) displayed in practice, and b) judged individually on a case-by-case basis. For example, the Penticton Imperial League advocated that deportation should ensue for “all pro-Germans (naturalized or otherwise) who have been interned, or who were disloyal to the Empire at the commencement of, or during the War.”⁶⁰ The Fernie District Great War Veterans Association placed even more caveats and exemptions upon deportation and expulsion, arguing that “exception however should be made for anyone who has served with honour in any branch of Naval and Military service including NWMP,” and those who:

have taken the oath of Allegiance to His Majesty’s Government in some part of His Dominion and have proven their [sic] bona fide as loyal subjects by a term of years, particularly during the war, of good neighborhood and loyal citizenship within British Dominions.”⁶¹

The difference between hard line and moderate positions adopted by lobby groups illustrates that there was no single position regarding enemy aliens in the post war era that was supported by all Canadians. Similarly, a unified position did not exist with respect to war crimes and their punishment. While some groups advocated for the trial and execution of Kaiser William Hohenzollern, other lobbies called for the trial of all German leaders, or that trials be limited to those who directly committed war crimes. Interspersed within discussions of war crimes trials was the position that Canada should collect indemnities and monetary reparations from Germany. Several groups did not

⁶⁰ NAC, BP, 7 January 1919, p. 83040.

⁶¹ NAC, BP, 9 March 1919, p. 83109.

believe that accountability for the war was limited to German leadership, and lobbied to have indictments served to a wide sphere of individuals. The Canadian Club of Hamilton, for example, stated that all Axis leaders engaged in “barbaric cruelty and inhuman torture”, and offered that punishment should extend to “those of the German, Austro-Hungarian, Bulgarian and Turkish people who have been responsible for the numerous atrocities which have scandalized Christendom during the past four years.”⁶²

Although the majority specifically named the Kaiser in their calls for justice, very few argued that the Kaiser should be the only individual placed on trial. Only the most general references to the tenets of international law accompanied the assorted petitions that flooded into Borden’s office. For example, the city council of Toronto sent a dispatch that simply stated “offenses were committed by Germany against humanity and civilization” and that the council advises Borden to ensure, in his capacity as a member of the Paris Peace Conference, that “adequate punishment be meted out to the Ex-Kaiser and his confederates in accordance with the law.”⁶³ Instead, almost all of the lobbies focused upon vengeance and justice in general terms as the core motivations for such trials. For instance, the Board of Education in Collingwood Ontario sent a petition to Borden which stated “many offenses were committed by Germany against humanity and civilization.” The position of this education board was that punishment of German leadership was in the best interests of future generations, and “adequate punishment may be meted out to the ex-Kaiser and his confederates in accordance with the heinousness of the crimes committed.”⁶⁴

⁶² NAC, BP, 28 November 1918, f. 89650.

⁶³ NAC, BP, 3 December 1918, f. 138506.

⁶⁴ NAC, BP, 3 December 1918, f. 138508.

Regardless of whether they advocated for the trial of the Kaiser alone, or widespread trials, each group provided a rationale for why Borden should pay particular attention to their lobby. First World War veterans had perhaps the easiest time, due to the fact that they had a more direct and personal stake in the trial and punishment process. Veterans groups such as the Men's auxiliary to Great War Veterans were actively involved in the process of pressuring Borden to ensure that the "Kaiser and all responsible for this awful war be brought to justice and made suffer as justice demands for their unspeakable actions."⁶⁵ The fact that the opinion of veterans was believed to carry a great deal of weight is evident in a number of cases in which lobbies made note of the fact that their recommendations followed what veterans were saying, or that veterans were a part of their group. For example, the Canadian Club of Montreal noted that they were motivated to petition the government after a former POW spoke at one of their meetings. Upon realizing "more than ever the frightful crimes of the late Emperor of that country," and taking note that the sons and daughters of Canadians have been victim of Kaiser's "barbaric cruelty," they decided that punishment must be inflicted upon "all those of the German people, who have been responsible for the numerous atrocities which have scandalized Christendom during the past four years."⁶⁶ Borden also received several heart wrenching messages from parents who lost sons in the war who were, perhaps, the only voices more powerful than those of veterans. One such letter began with the simple statement the author is looking at photos of his two sons, who were both killed in the war. This parent advocated the use of the peace conference to create a

⁶⁵ NAC, BP, 30 November 1918, f. 89659.

⁶⁶ NAC, BP, 23 November 1918, f. 89638.

democratic world without war, “especially an Anglo-Saxon understanding [of democracy] based on reason, good-will and sentiment.”⁶⁷

Municipal and civic leaders used their status as elected officials to bolster their arguments. The weight of the votes within their respective ridings was tacitly behind their petitions. For example, the City of Kamloops was one of a number of cities and municipalities that lobbied for the punishment of German officials. From the perspective of the authors of the telegrams, the “numberless crimes against the laws of God, of humanity, and of the nations” must be avenged, and “the trial and punishment of every enemy leader, officer, non-commissioned officer or man regardless of rank or station, believed to be guilty of any offence against Divine, Human or Nations laws” should be punished as a condition of any peace treaty that was to be signed.⁶⁸

Other groups used the sheer weight of numbers to enhance the likelihood that Borden would be influenced by their respective petitions. The best example of how the weight of numbers was used came from the Montreal Athletic Association, which pointed out in its petition that it had a membership of 4550, 1000 of which joined various parts of the military, and “130 of them having made the supreme sacrifice.”⁶⁹ They argued that Axis “rulers and people” “with the aim of universal domination” launched an unprovoked attack upon peaceful neighbours, and that:

in defiance of international conventions and disregard of all humane considerations, have committed unspeakable atrocities, alike upon enemy combatants and defenseless civilian populations, unknown even in the warfare of our aboriginal tribes of untutored savages.

⁶⁷ NAC, BP, 25 January 1919, f. 89722.

⁶⁸ NAC, BP, 14 December 1918, f. 89680.

⁶⁹ NAC, BP, 25 November 1918, f. 89640.

As is clearly illustrated in the wide variety of groups that sent messages and petitions to Borden, the possible punishment of German leadership was a hot topic in Canada. In a move that would be certain to raise eyebrows today, a priest at Emmanuel Church in Montreal sent a telegram to Borden. The previous Sunday the priest had apparently asked his congregation about their views of possible trials and the punishment of German leadership. This priest conveyed that his congregation is in universal agreement that the Kaiser should stand trial, and that they were fearful that the “ex-Kaiser may be permitted to escape the just judgment of outraged civilization.”⁷⁰ The telegram tellingly ends with an acknowledgement that many of the individuals in the congregation were already involved in the campaign to have the Kaiser put on trial through their association with the Canadian Club of Montreal (which was apparently motivated to lobby after a former POW held a talk for its members). Unfortunately, it is unclear whether parishioners from the Canadian Club of Montreal had used the church as a mechanism for disseminating information about their cause, or if the priest brought up the topic on his own accord.

Perhaps the most unique perspectives regarding post war trials and punishment were offered by women’s groups in Canada. Borden received lengthy telegrams from the Dominion Women’s Christian Temperance Union (DWCTU) and the Brandon Women’s Win the War League (BWWL). These two groups presented arguments that were similar in some respects. Specifically, they each highlighted crimes against women committed by Axis soldiers during the war, and both favoured indicting those who had directly committed the listed crimes. In fact, these groups paid scant attention to the

⁷⁰ NAC, BP, 23 November 1918, f. 89639.

Kaiser or military leaders of Axis nations. Despite these similarities, there were significant differences in the arguments made by these two groups. The DWCTU preferred to indict “monstrous crimes committed during the war by the Powers upon the women of the invaded countries,” and offered three resolutions: (1) to associate themselves with the women of France and other protesting nations, (2) demand the trial before an international tribunal of “every officer, soldier or civilian of any of the of the said Central Powers who shall be accused whether as principle of accomplice, of any sexual offence against a women in the course of the war”, with the label “criminal” attached to any convicted, and (3) that women who have been injured should be treated and regarded both officially and in the public mind “not as shamed, but as wounded in war”⁷¹

The BWWL also focused upon “the unspeakable cruelties and degradation” inflicted by the men of the German Army upon “Our Sister Women of Northern France, Belgium, Poland and Serbia.” However, they were clearly more directly influenced by a maternal feminist perspective, which emphasized the belief that the public role of women should reflect their domestic (and, it was argued, their natural) maternal role as nurturers. From their perspective, the women of Germany should be held partially accountable for atrocities committed by German soldiers against women of occupied nations because they did not proper protest the actions of their sons and husbands:

We are also shocked to realize that never yet (as far as known) has a word of protest against these unspeakable cruelties been uttered by the women of Germany; nor has any attempt been made by the German women to mitigate the privations and sufferings of the women and children, or to restrain their men from

⁷¹ NAC, BP, 20 January 1919, f. 89721.

their horrible conduct towards the women and girls, whose very helplessness should have appealed to their mercy.⁷²

The BWWWL also took aim at German women over treatment of prisoners of war, “which could have been so greatly bettered by the efforts of German women.” They conclude that they wish to:

voice our shame and horror at the German men who have perpetrated these acts, at the German women who have countenanced their actions, and at the Rulers of Germany who have allowed such iniquities, especially towards the women and girls who were in their power. (emphasis in original)

The position of the BWWWL is unique in two respects. First, the BWWWL is the only group to cast a degree of blame upon the women of Germany. Second, this criminalization of German women is the only example in the set of petitions received by Borden of women being cast as anything but victims.

The process of governance from below was fully evident in the formation and lobbying of a multitude of special interest groups. However, aside from an overarching acceptance of enemy culpability for the war, significant differences emerged in the demands presented by these groups with regard to the exclusion process, and in the ways such groups defined war crimes and war criminals. Although an imperative to do something about enemy aliens within the country, and to ensure that war criminals were brought to justice, there was no general consensus from which a clear mandate for what was to be done could be established. Prime Minister Borden was forced to either choose from among the various options presented, or to articulate his own unique position regarding what to do with war criminals and enemy aliens.

⁷² NAC, BP, 2 December 1918, f. 89663.

4.4 “Underdeveloped territories and backward races”: A *De Facto* Policy for War Crimes and War Criminals

In the post war era, Prime Minister Borden had many options to consider regarding the establishment of policies related to war crimes and war criminals. On the international level, he could advocate for the establishment of an international tribunal to punish Axis military leaders. If he had taken this step, he could have gone so far as to lobby for the indictment of soldiers who had committed war crimes against Canadians over the course of the war. On the domestic front, Borden could have established immigration and deportation policies that were directed specifically toward those who had committed war crimes against Canadian soldiers. However, Borden found the idea of the Hang the Kaiser campaign to be repugnant (Granatstein and Morton 2003; Stanton 2000) and, with only one exception,⁷³ did not even acknowledge the topic of punishment for those who had directly committed war crimes against Canadian soldiers. To Borden, the criminality of the Kaiser was, to a degree, a separate matter from the criminality of members of the German military.

Borden was directly involved in the debates regarding war crimes and war criminals that occurred after the war. On 10 April 1919, Borden represented Canada at a three hour long meeting attended by delegates from the Dominions and the Council of

⁷³ The sinking of the Llandoverly Castle, which had a largely Canadian crew composed mainly of medical personnel, led to bitter calls for reprisal from Canadian citizens and members of Parliament. During the Paris Conference Borden asked to be kept informed of whether the ones responsible were to be tried, and when they were tried he asked for permission to send representatives to the proceedings.

Four.⁷⁴ Issues related to the culpability of the Kaiser, along with the prosecution of war criminals in general, were discussed. In many ways, Borden's position regarding the trial of the Kaiser was similar to the positions advocated by both the Americans and King George. Reacting to the King's address at the Royal Hall in London on 19 Nov 1918, Borden noted in his personal diary that:

He (the King) hopes we will not undertake trial of Kaiser. Thinks he may be left to present condition of contempt and humiliation. In this view I heartily concur. (Borden 1938: 869)

In an uncharacteristically passionate entry in his diary, Borden (1938: 874) expressed a belief that, due to an undo focus upon a specific individual (the Kaiser) rather than a category of crime, such trials would be specific to the events leading up to the Great War rather than a general indictment of crimes of war:

I raised my voice as to establishing an *ad hoc* tribunal to try in a long drawn out proceeding the ex-Kaiser for an *ad hoc* crime. Said if we did anything by way of indictment general principles should be affirmed.

The term *ad hoc* referred to the trials being singular rather than an established legal mechanism guided by well-defined legal principles entrenched within existing law. Borden believed trials that were not rooted in the application of international law in general would be correctly perceived as victor's justice, and this perception would be counter-productive with regard to the development of a lasting peace during the fragile post-war recovery period.

⁷⁴ The Council of Four was composed of leaders of the four major Allied powers during the war: Woodrow Wilson of the United States, David Lloyd George of Britain, Vittorio Orlando of Italy, and Georges Clemenceau of France.

Close examination of Borden's memoirs and his speech to the House of Commons regarding the terms of the Paris Peace Accord reveals that Borden was strongly opposed to war crimes trials in general.⁷⁵ In an approach that echoed that of the father who lost two sons in the war, Borden preferred to focus upon the prevention of further wars over extracting vengeance. Borden argued that a newly-formed League of Nations, with the United States occupying a leadership role, could curtail the possibility of future wars among both civilized and uncivilized races. He believed that the threat of economic and commercial sanctions enacted by the newly formed League of Nations, and the accompanying International Court of Justice, would ensure that any civilized nation would refrain from engaging in aggressive wars. The League of Nations would also serve to maintain international peace among uncivilized nations through the prevention of "trade with uncivilized races in noxious drugs, intoxicating liquors, and munitions of war."

Borden was a strong advocate of colonialism, and he firmly believed that civilized nations, particularly the United States, had a responsibility to guide and mentor the development uncivilized races:

Whether the establishment of a League of Nations is possible or not, there is at least possible a league of the two great English-speaking Commonwealths, and, with a view to arriving at such a league, I should like again to urge that the United States should be invited to undertake world-wide responsibilities in respect of underdeveloped territories and backward races. (872)

He later cites President Wilson, to whom the following statement is attributed: "It was his [President Wilson's] opinion that there should be no annexations and that all backward

⁷⁵ This argument is based upon a speech given by Robert Laird Borden to House of Commons, 2 September 1919, which deals with the role of the League of Nations.

nations and underdeveloped territories should be placed under the mandate of the League of Nations” (904). It is certainly true that Borden keenly supported American policy suggestions with the goal of developing good will between Canada and the United States. However, Borden’s arguments also reflect the imperialist assumption that civilized nations have a paternal responsibility to engage in colonization in order to guide uncivilized races. Following the logic of the day, colonialism was viewed as a proactive process in terms of preventing future war crimes: if the guidance given by the colonial power was effective, and the civilization process took hold upon a particular race, then that race would no longer be prone to committing war crimes.

Each of the arguments outlined above reflect Borden’s belief that looking forward to prevent future wars was preferred to the backwards-looking approach inherent in war crimes trials: that war crimes trials would be *ad hoc proceedings*, that the League of Nations would dampen the likelihood of future wars, and that colonialism could “civilize” the “savage” races through a long term process intended to proactively lessen, or eliminate war crimes in the future. When assessing Borden’s arguments, it is important to note that due to the racialized nature of immigration policies, the issue of war criminals entering in Canada was never posed as a problem in and of itself. Long standing practices of identifying desirable groups for exclusion were already embedded in the Canadian Immigration Act of 1910, and in the immediate post-war era the Immigration Act (1919, Section 3) was broadened to further exclude:

Enemy aliens or persons who have been alien enemies and who were or may be interned on or after the eleventh day of November, one thousand nine hundred and eighteen, in any part or His Majesty's dominions or by any of His Majesty's allies.

War criminals, as noted, were conceptualized as being a part of an “uncivilized” race. Thus, the issue of war criminals was settled in a *de facto* manner through changes in the Immigration Act, which effectively rendered the establishment of legal mechanisms (e.g. changes to the Criminal Code of Canada, and war crimes trials) unnecessary.

Summary of Section III

The Canadian criminalization of war crimes during the First World War era was influenced by both international and domestic factors. The distinction between “civilized” and “uncivilized” races that was prominent in international legal discourse surrounding war crimes reached Canadian citizens indirectly through an intense propaganda campaign. A pronounced division between supposedly superior and inferior races was already embedded within Canadian society at the time, as First Nations groups, along with those of Chinese, Japanese and East Indian descent, were already subject to exclusion through existing legislation. The list of excluded groups grew as a result of the criminalization process, with individuals of German or Austro-Hungarian descent subject to surveillance and internment under the War Measures Act. Individuals were defined on the basis of supposed racial characteristics in both the propaganda campaign, which emphasized the inherent criminality of enemy nations, and Canadian legislation passed during the war, which grouped all individuals of German and Austro-Hungarian heritage as “enemy aliens.” The use of racial characteristics to explain war crimes effectively criminalized entire populations rather than individuals, and this criminality was extended to groups of Canadians on the basis of their ethnicity.

The goal of the War Measures Act, and the ensuing registration and internment processes, was to protect Canada from internal threats, such as sabotage. When the Act was implemented, a significant measure of good will still existed in Canadian Parliament toward Canadians of German and Austro-Hungarian descent. However, once in place, the enforcement varied based on the personal belief systems of the individuals charged with implementing the policies. Zealots were of particular importance, because they significantly widened the net of criminalization that was established by the government. When the distinction between civilized and uncivilized races in international law and the divisions between citizens and enemy aliens under Canadian law lined up with xenophobic and racist beliefs of individuals charged with surveillance and policing, the result was a particularly virulent form of exclusion in which a hospitalized elderly priest was cast as a significant danger to public safety on the basis of his ethnic background. The disproportionate number of jobless individuals who were targeted for internment and deportation is a further example of how the beliefs of individuals enforcing policies impacted upon the criminalization process.

Citizen lobby groups attempted to pressure the government of Canada to both widen and deepen the existing criminalization process. Lobbies to widen the criminalization process included arguments in favour of Canadian involvement in war crimes trials for the Kaiser and/or enemy military leaders, and the position that German women should be held accountable for not stopping their husbands and sons from raping women and mistreating prisoners. Those in favour of deepening the process advocated deportation of all those already interned, or for the seizure and redistribution to returning Canadian soldiers, of all land and property owned by enemy aliens. The deepening of the

criminalization process was commonly rooted in a particular vision of Canadian identity that simultaneously valorized some, and demonized others, on the basis of ethnicity. Although the process of criminalization did not create this schism, it did serve to shift the boundaries of Canadian identity by excluding members of “enemy alien” communities. Although members of criminalized communities did form lobby groups, they were politically powerless and were thus forced to present arguments rooted in obligation (we were promised a particular form of life in Canada, or Canada has an obligation to protect our physical safety). The powerlessness experienced by criminalized populations had both legal and physical consequences. The fact that lobbies from criminalized groups, and messages from policing agents, refer to ongoing threats to the physical safety of enemy aliens hints at the brutality of the informal social control inflicted upon criminalized ethnic communities.

Prime Minister Borden set the official agenda for the criminalization process in Canada during the First World War era and, like all other Canadians, he had a distinct viewpoint regarding the nature of war crimes and war criminals. Although the *sine qua non* of war crimes in international law was that such crimes were committed by members of uncivilized races, Borden never accepted that Germans and Austro-Hungarians were uncivilized. The Kaiser in particular was problematic because he was a close blood relative of the King of England, which meant that either both or neither were a part of an uncivilized race. However, Borden did fully believe in the inherent superiority and inferiority of certain racial groups, and that uncivilized races were likely to commit atrocities during times of war. To Borden, this inferiority was social and cultural rather than biological and, as such, it could be overcome with proper guidance from civilized

nations. The exclusion of groups that were believed to be uncivilized from Canadian society, coupled with a paternalistic approach in which uncivilized races are mentored by civilized nations, became a *de facto* policy for dealing with war criminals.

Section IV: The Second World War Era

The criminalization of war crimes (crimes against humanity and genocide were not considered during Canadian trials in this era) by Canada during the Second World War era (circa 1939-1950) was once again influenced by developments in international law. Chapter 5 will argue that although the establishment of the International Military Tribunal at Nuremberg was an historic achievement, there was no general consensus amongst Allied powers regarding the nature of war crimes. Debates ensued over the list of individuals who would stand trial, the charges to be laid, the punishment to be inflicted upon those found guilty, and even the goals of the Tribunal. Despite these debates, Nuremberg served as a model for subsequent trials.

Chapter 6 outlines how the influence of international law upon the Canadian criminalization of war crimes was uneven. In the European Theatre, the limited number of Canadian war crimes trials did not utilize Nuremberg as a point of reference, and prosecuted individuals for war crimes as defined by newly formed Canadian legislation. This legislation was created to enable war crimes proceedings against individuals who had committed war crimes against Canadian military personnel. In the Pacific Theatre, Canada did not have the required military command presence to conduct its own war crimes trials, and opted instead to send representatives to assist in cases involving Canadian victims. The Tokyo trials generally followed the models established at Nuremberg, while trials conducted by British Authorities were convened under the Royal Warrant. The type of justice received by defendants in war crimes trials involving Canada varied depending on where, and under which law, the trial was held.

Chapter 5

The International Criminalization of War Crimes in the Second World War Era

The topic of war crimes committed by Axis forces (i.e. Germany, Japan, and Italy) generated a great deal of media attention during the Second World War, and ever increasing numbers of atrocities reported in both the European and Pacific theatres of war became a rallying point for Allied forces (Landsman 2005). This chapter will provide an overview of the development of the Trial of the Major War Criminals before the International Military Tribunal, which was held in Nuremberg, and the International Military Tribunal for the Far East at Tokyo. This account of the criminalization process at work in these contexts focuses upon three interrelated questions. (1) Why were war crimes trials viewed to be a reasonable option at the time? (2) How were war criminals defined, identified and selected for prosecution? (3) What steps were taken to bring these individuals to justice?

5.1 “The bestiality from which these crimes sprang”: The Establishment of International Tribunals

The blueprint for the Trial of the Major War Criminals before the International Military Tribunal (IMT) was conceptualized well in advance of the end of the Second World War. The amount of newsreel footage, and individual accounts, of Nazi war crimes and atrocities grew at an astonishing rate throughout the war, which led Winston Churchill and Franklin D. Roosevelt to issue a joint declaration that “the punishment of [Nazi] crimes should now be counted among the major aims of the war” (cited in Bloxham 2001: 6). The initial outrage leveled by both leaders and citizens of Allied nations was

commonly expressed in moral terms. For example, President Roosevelt appealed to common virtue rather than the rule of law when he stated that “it is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized atrocities which have violated every tenet of the Christian faith.”⁷⁶

Stemming from this commitment to place the “arch criminals” of the Third Reich on trial following the war, the United Nations War Crimes Commission (UNWCC) was established on 26 October 1943. Led by the United States and Great Britain, fifteen Allied nations—the notable exclusion being Russia⁷⁷—were included in the UNWCC, which became the first formal organization of the not yet established United Nations.

The UNWCC operated within a limited mandate:

The Commission would investigate crimes committed against nationals of the United Nations, recording the testimony available, and the Commission would report from time to time to the Governments of those nations in which such crimes appeared to have been committed, naming and identifying, wherever possible, the persons responsible. The Commission would direct its attention in particular to organized atrocities; atrocities perpetrated by, or on the orders of, Germany in occupied France should be included. The investigation should cover war crimes of offenders irrespective of rank. The aim would be to collect material, supported wherever possible, by depositions or other documents, to establish such crimes, especially where they were systematically perpetrated, and to name and identify those responsible for their perpetration.⁷⁸

Although it had no formal authority to indict and prosecute war crimes, and was dissolved in 1949, the UNWCC still made a significant contribution to the development of war crimes legislation. Along with fulfilling its core responsibility to collect

⁷⁶ Cited in Finch (1943).

⁷⁷ Russia did not initially agree to a fully international mechanism for documenting war crimes and punishing war criminals. That is not to say that the Russian government ignored the issue of atrocities committed by the Nazis. A month after the formation of the UNWCC (i.e. November 1942), the Russian government established the Soviet Extraordinary State Commission to Investigate War Crimes.

⁷⁸ Lord Chancellor, House of Lords, 7 October 1943. Cited in Finch 1943.

information regarding war crimes, the UNWCC also painstakingly compiled the judicial decisions of almost 2,000 war crime trials conducted by nine countries from 1945-1949. It is important to note that the 2000 trials documented represents only a small fraction of the tens of thousands of war crimes trials that were held in the mid to late 1940s (see Bloxham 2001). However, few records exist regarding such trials outside of those documented by the UNWCC. Lastly, and perhaps most importantly in terms of the legacy of this commission, the UNWCC also compiled both a list of the adoption of relevant legislation by a number of countries and a categorization of the types of defenses used in such trials.

As the conflict in the European Theatre drew to a close, the Allies were faced with two interrelated problems regarding what to do with alleged war criminals. First was the question of appropriate punishment for those who had committed atrocities. During the last three years of the war, Allied leaders had repeatedly promised citizens in their respective nations that those responsible for war time atrocities would be punished. Such promises meant that a significant political dimension was in play when the question of appropriate punishment of Nazi war criminals was addressed. Closely related to the question of punishment was the issue of selecting a mechanism through which an appropriate punishment would be decided and inflicted. Winston Churchill's view with regard to these issues was that captured Axis leaders should be formally charged for their crimes and then summarily shot (Conot 1993). Josef Stalin, who by the end of the war had warmed to the idea of an international trial for the main Nazi leaders, had no issue with executions as a form of punishment, but was opposed to summary executions due to the fact that no formal trial is involved in such a process. Instead, he preferred to

implement trials designed both to establish the collective (rather than individual) legal guilt of the Nazis and to deter citizens from colluding with outside powers in the future (Prusin 2003). Stalin and Churchill also disagreed regarding the selection of defendants. Churchill was repulsed by Stalin's thesis that between 50,000 and 100,000 German officers needed to be "liquidated" in order to avoid Germany rising up to start another war in 15 to 20 years, and argued that this amounted to nothing more than a "cold blooded execution of soldiers who fought for their country."⁷⁹

American positions regarding what to do with war criminals were initially divided. The main line of division amongst Americans regarding the mechanism of punishment and nature of justice is best encapsulated in the respective positions espoused by Henry Morgenthau Jr. and Lieutenant Colonel Murray C. Bernays. Henry Morgenthau Jr., who was the United States Secretary of Treasury at the time, advocated permanently destroying Germany's ability to wage war by dividing the nation in two and transforming it into an agricultural state. Morgenthau accepted and adopted Churchill's view that summary executions were the most appropriate mechanism for dealing both with those who ordered atrocities and those who carried them out. This position was countered by Lieutenant Colonel Murray C. Bernays, a World War I veteran who was given the task of collecting evidence of atrocities committed against American servicemen in the European Theatre. Bernays argued that the approach advocated by Churchill and Morgenthau was overly emotional, and could come across as a Judaic act of revenge. Furthermore, he argued that a summary execution is a poor substitute for justice. Bernays' view, which was more akin with the Russian rather than the English

⁷⁹ The minutes of this conference can be found at <<http://teachingamericanhistory.org/library/index.asp?document=879>> (last accessed 14 January 2011).

position, emphasized the adoption of a rational approach designed with future generations in mind:

Not to try these beasts would be to miss the educational and therapeutic opportunity of our generation. They must be tried not alone for their specific aims, but for the bestiality from which these crimes sprang. (cited in Conot 1993: 11)

In other words, Bernays believed that meting out individual punishment fundamentally missed the point, which was that the evil nature of Nazi regime had to be unmasked in order to educate future generations.

Initially the United States, England, France and Russia engaged in separate proceedings. The United States launched the Dachau Trials⁸⁰ at the site of the former concentration camp. The Russians were early proponents of well-publicized show trials of large numbers of Nazi leaders who fell into captivity as the Russian army reclaimed territory during the latter stages of the war.⁸¹ The French were as aggressive as the Americans in launching their own trials and, under the authority of a Royal Warrant,⁸² the British also conducted a series of war crimes trials.⁸³ The idea for establishment of the

⁸⁰ The Dachau Trials were held by the United States in November, 1945, only months after the end of the war in Europe. During these trials, the Americans prosecuted more than 1600 individuals both for crimes committed against American soldiers during the war, and for crimes associated with the concentration camps.

⁸¹ The Russian trials are commonly referred to as “show trials” due to the pre-determination of the guilt of many of the individuals prosecuted. However, many of the trials did conform to existing Russian legal standards, and they are a valuable source of information regarding war crimes and genocide. A complex examination of these trials can be found in Prusin’s (2003) “Fascist Criminals to the Gallows!: The Holocaust and Soviet War Crimes Trials, December 1945–February 1946”.

⁸² The reasons the British selected a Royal Warrant, rather than an act of Parliament, as the preferred legal basis for establishing war crimes trials has never been fully established (Rogers 1990). The two most plausible arguments are that a Royal Warrant could be applied to military court martial proceedings (thus avoiding the use of civilian judges or courtrooms), and because a Royal Warrant could be brought into effect anywhere in the world in which British Forces were in operation during the war.

⁸³ The most famous British-led war crimes proceedings of this era were what became known as the “Belsen Trials.”

Trial of the Major War Criminals before the International Military Tribunal (IMT)⁸⁴ came from the Americans, with initial support from the Russians (albeit with a different perspective of how the trial should be conducted). The British were the least enthusiastic of the Allied nations. This lukewarm response stemmed in large part from lingering concerns pertaining to the legality of the trial. British politicians were also fearful that public trials prosecuting key Nazi figures were likely to be highly unpopular among German citizens—a possibility that needed to be taken seriously lest post war German unhappiness and unrest during the fragile rebuilding years foment into a groundswell of support for Communism.

The identification of war criminals became the subject of considerable consternation and debate. Biological accounts of war crimes and war criminals that were prominent in the First World War Era, which portrayed entire enemy nations as uncivilized, were no longer in play. The rejection of biological models of war crimes meant that guilt, rather than being a cut and dried category, was often measured by degrees of responsibility. This shift toward assessments of guilt that do not rely upon biological litmus tests is reflected in a lecture given by Karl Jaspers (2001) at Heidelberg University shortly after the war, in which he unraveled four distinct types of guilt: criminal guilt (directly committed criminal acts), political guilt (degree of allegiance to Nazi party), moral guilt (private feelings of guilt felt by yourself or among your circle of friends), and metaphysical guilt (universally shared responsibility among those who lived rather than dying in protest against Nazi policies). Logistical considerations were also prominent, as Stalin's thesis that upwards of 50,000 German leaders should stand trial

⁸⁴ This is distinct from the twelve subsequent trials that took place in Nuremberg from 1946-1949, which focused on particular groups such as doctors, judges, and industrialists.

was viewed as being impractical. Rather than casting all Germans as the enemy, the IMT defined war criminals on the basis of status and political affiliation. Specifically, high ranking members of the Nazi party were identified as war criminals. However, the selection of individuals to stand trial in Nuremberg was not a straightforward process, and political considerations of all nations involved were taken into account before the indictments were served.

Prior to resigning from the IMT team, Bernays compiled a master list of 122 major German war criminals. However, the four nations involved with the IMT had different views regarding who should be charged, and only 10 individuals from Bernays' list were universally agreed upon (Conot 1993). The Americans advocated the inclusion of three individuals responsible for the economic working of the Third Reich: Hjalmar Schacht (the economics minister of Germany from 1933-1938), Walter Funk (Schacht's replacement, who served until the end of the war), and Albert Speer (chief of Nazi war production during the last 3.5 years of the war). The British successfully advocated for the inclusion of Baldur von Schirach, who was the primary organizer of the Hitler Youth. The French were initially annoyed at the fact that the initial list of names did not contain any individuals in their custody, and suggested the inclusion of Baron Constantin von Neurath, who had been a head of the "Secret Cabinet Council" in Nazi Germany. Despite the fact that no one on the prosecution team had any inkling of its mandate and responsibilities, this council sounded "appropriately menacing" and von Neurath was indicted (Conot 1993: 27). For their part, the Russians successfully lobbied for the inclusion of two second-tier Nazi officials in their custody: Admiral Eric Raeder (commander of the Germany Navy prior to 1943), and Hans Fritzsche (a newscaster and

mid rank official within the German propaganda ministry, who could serve in place of Joseph Goebbels, the deceased head of the German Propaganda Ministry).

National self-interest was not the only factor that came into play during the selection of defendants. The Americans believed that at least one leader from each of the main organizations within Nazi Germany should be prosecuted in order to illustrate the scope of culpability for Nazi atrocities with a number of defendants. However, while the initial list of names included heads of the air force (Hermann Goering), navy (Karl Doenitz) and armed forces (Wilhelm Keitel), there was no representative from the army. To address this gap, General Alfred Jodl was added as a defendant. The name of Adolf Hitler was initially viewed as natural and appropriate, due to his status as the Fuehrer (i.e. leader) of Germany. However, his name was removed from the final list of defendants for fear that it would spark rumours that Hitler had in fact survived the war. When Hitler was excluded it created a void in the docket, and to address this gap Franz von Papen (who preceded Hitler as Chancellor of Germany and served as vice Chancellor under Hitler for a short amount of time) was included amongst the list of defendants.

In some instances a decision had to be made regarding who would best represent a particular organization during the ensuing trial. For example, the prosecution team opted to include the industrialist Baron Gustav Krupp rather than his son Alfried, which was a mistake considering that the advanced age of the elder Krupp made it impossible for him to stand trial. In fact, Alfried was responsible for initiating the request for the use of slave labour in Krupp munitions factories, and was thus a far better candidate for

indictment.⁸⁵ A substitution of the younger Krupp was suggested by prosecutors when it was apparent that the elder was not medically fit to stand trial. However, this proposal was denied by the judges because it was put forth too close to the start of the trial, which made it impossible for the defendant to prepare an adequate defense.

The question of the contents of the indictment against the defendants was also the subject of a great deal of debate among representatives of the United States, Great Britain, France and Russia. Prominent differences regarding the substance of the trial initially stemmed from important distinctions between Anglo-American law, practiced in the US and Britain, and the continental system of law prominent in France and Russia. Unlike the adversarial approach favoured in Anglo-American legal systems, in continental law the prosecutor, defense council and judge are all charged to work in unison to uncover the pertinent facts of the case. These facts are then presented to an examining judge, who is responsible for deciding whether the case will proceed. If the case moves to the next level the defendant is, in effect, already considered guilty, and is responsible for proving his or her innocence during the ensuing trial.

The distinction between legal systems among Allied nations had serious repercussions during the planning stages of the IMT. For example, the Russians could not understand the necessity of a conspiracy charge. From the perspective of the Russians, such institutions were already declared criminal by the Moscow and Yalta declarations, and the only task left for the ensuing courts was to measure degree of guilt and appropriate punishments (Conot 1993). From the perspective of the Americans, a

⁸⁵ Alfried Krupp was indicted in the tenth of twelve Nuremberg Trials held by the United States following the close of the IMT. He was sentenced to 12 years imprisonment, and all of Krupp's wealth and holdings were to be seized. However, he was pardoned after only three years, and the seizure of his assets was reversed.

conspiracy charge provided the means through which Nazi zealots responsible for driving the Nazi agenda forward, and key institutions essential for bring Hitler's plan into action, could be declared criminal in one fell swoop. The American view reigned supreme during such debates, largely due to the fact that they held the vast majority of Nazi war criminals, had collected the overwhelming majority of evidence regarding war crimes that had occurred, and were contributing the lion's share of the resources that were essential to the trial.

Significant differences between the Anglo-American and continental legal systems were not the only source of debate regarding the inclusion or exclusion of specific charges in the indictment. From the perspective of the UNWCC, charges relating to waging aggressive war had little basis in international law, and should not be included in the indictments. The British were opposed to the inclusion of charges relating to waging aggressive war because they were concerned that their own actions in Norway, when they invaded within a few days of the Nazi occupation of that country, would become suspect. The Russians were almost certain to be embarrassed if this charge was included, because they had partitioned Poland in a secret pact with Germany, invaded Finland, and annexed several Baltic nations as well as Bessarabia (which was, at the time, a part of Romania). Despite the fact that all of these territories were a part of the Russian Empire prior to the end of the First World War, the one-sided inclusion of such a charge would smack of hypocrisy and victor's justice. Robert Jackson, the American lead prosecutor, insisted on the necessity of condemning the war of aggression waged by the Nazis. Jackson believed (correctly) that international law was weak in terms of dealing with atrocities. The combination of charges relating to conspiracy and

waging aggressive war was intended to make the atrocities committed by the Nazis, both inside their borders and beyond, an international concern:

The reason that this program of extermination of Jews becomes an international concern is this: It was part of a plan for making an illegal war. Unless we have a war connection, I would think we have no basis for dealing with the atrocities...committed inside Germany, under German law, or even in violation of German law.⁸⁶

Jackson's argument eventually won out, albeit with considerable consternation on the part of the other Allied nations. This victory had little to do with convincing other nations that the American position was correct. Instead, when apparently irreconcilable differences appeared to grind the trial to a halt before it even began, the Americans threatened to cancel the IMT in favour of holding separate trials. During the final pre-trial negotiations, Jackson stated "I would much rather see us *agree* that a trial is impossible than *demonstrate* it is impossible."⁸⁷ This ultimate threat brought the other nations into line, and in every instance the American position regarding the charges to be laid eventually won out over the others.

In the end, the defendants were charged with up to four counts: war crimes, conspiracy to wage a war of aggression, crimes against peace, and crimes against humanity. Raphael Lemkin, a Polish-Jewish jurist who had written an overview of Nazi atrocities titled *Axis Rule in Occupied Europe* (2005),⁸⁸ unsuccessfully lobbied the IMT to include "genocide" within the list of charges. He argued that the scope of the charge of "crimes against humanity," which was enshrined in the Hague Convention, was

⁸⁶ Justice Robert Jackson, cited in Conot 1993: 25.

⁸⁷ Cited in Conot 1993: 25.

⁸⁸ In this book, which was originally published in 1944, Lemkin famously argued that new concepts require new terms. To this end, Lemkin coined the term "genocide", which is an amalgam of two latin words: "genos", which means "race", "tribe" or "nation", and "cide", which means "killing."

limited to crimes committed in foreign nations during wartime. The charge of genocide, from Lempkin's perspective, would effectively challenge the right of a given state to murder its own citizens during times of both war and peace (Lippman 1992). However, the IMT opted to utilize the charge of "crimes against humanity,"⁸⁹ which had some precedent in international law. As a result, the prosecution teams at the IMT focused solely upon the illegality of the extermination of people in occupied countries.

The application of "universal" legal principles at Nuremberg led to a host of legal issues. First, the proceedings had a tenuous legal status stemming from the fact that *ex post facto* (i.e. retroactive) law was specifically forbidden by the German constitution. State officials had never been charged with crimes against humanity prior to the IMT, which meant that from the outset the legality of the trial was on shaky ground (Hoffman 2000). That there was no established precedent for the charge of "crimes of aggression" was also problematic (Maogoto 2004). However, the Nuremberg Charter (which outlined the legal basis for the trial) stipulated that the Hague Convention specifically forbids certain actions during wartime, and that German officials were aware of these rules prior to the start of the war. By waging a war of aggression, German officials also violated the Kellogg-Briand Peace pact of 1928, which prohibited the usage of war as an instrument of national policy and required states to settle disputes using peaceful means (Lippman 1992). In the final analysis, despite objections about the legality of the proceedings, the weight of evidence and the scope of the crimes committed "overshadowed anything that the defendants or their lawyers could say in defense" (Maogoto 2004: 107).

⁸⁹ The term "genocide" only occurs in one paragraph of the indictment, and was only referred to fleetingly by French and British prosecutors in their closing arguments (Lipmann 1998a: 426-427).

A second legal issue that arose from the Nuremberg Trials relates to the inclusion of a “conspiracy” charge against the Nazi leaders. This conspiracy charge was rooted within American criminal law, where similar charges of conspiracy were successfully implemented in order to prosecute organized crime (Conot 1993). The conspiracy charge was hotly disputed by the other three Allied nations, who argued that an overarching plan extending throughout Nazi rule probably did not exist in the form suggested by American prosecutors. Instead, it was more likely that the Nazi plan emerged in a gradual fashion as a response to ever-changing and unpredictable circumstances.⁹⁰

A third legal issue stemmed from the prohibition of a *tu quoque* (i.e. “you also”) defense. Although the *tu quoque* defense is not generally allowed in domestic courts (Conot 1993), the fact that only individuals from the losing side were put on trial when certain atrocities were committed by both sides created the appearance that the proceedings were merely “victor’s justice.” Despite the fact that the *tu quoque* defense was explicitly disallowed, during the first Nuremberg trial Justice Francis Biddle of the United States succeeded in allowing the defense for Admiral Dönitz and Admiral Radar, both naval officers, to introduce evidence showing that unrestricted submarine warfare (which violates the laws of war by attacking civilian targets) was also lodged by American commanders in the Pacific campaign. Prosecutors attempted to disallow this type of evidence as being *tu quoque*, but the defense eventually won out by arguing that such evidence was not being presented to show that the Americans also broke international law. Instead, the evidence showed that both sides equally acted in full accordance with international standards at the time (Yee 2004).

⁹⁰ For verification of the argument that there was no over arching plan among Nazi leaders see "A Reply to Martin Broszat Regarding the Origins of the Final Solution" (Browning 1984).

That the Nuremberg Trials violated the very essence of state sovereignty constituted a fourth legal issue. This concern was particularly important due to the linkage with the superior orders defense, which become prominent in specific instances in which individuals are faced with the choice of whether to adhere to obligations outlined by the state or to follow international standards of conduct such as those outlined in the Geneva and Hague Conventions. To deal with this issue the Nuremberg Charter outlined that “the very essence of the Charter is that individuals have International duties which transcend the national obligations of obedience” (cited in Lippman 1992: 6). In other words, the Nuremberg Charter explicitly elevates international laws and responsibilities over domestic ones.

The IMT established important precedents in International law, and can be considered a landmark in the prosecution of war criminals. However, interpretations of the IMT and its relative level of success have been somewhat mixed. For example, while the IMT remains important for breaking down the notion that state officials are immune from prosecution (Cassese 2004), the decision to defer to the right of a sovereign nation to treat its own citizens in any manner it chooses resulted in the embedding of crimes against humanity within the legal foundation of crimes against peace (Douglas 1995: 461). Many scholars argue that as a result of this linkage, the IMT did not effectively challenge the belief that state has the sovereign right to destroy its own citizens. For example, Samantha Power (2002:49) somewhat pessimistically argues that “if the Nazis had exterminated the entire German Jewish population but never invaded Poland, they would not have been liable at Nuremberg.” While there may be some truth to this interpretation, it ignores the strategy for prosecuting the genocide plan utilized by Justice

Jackson. Jackson argued that systematic murder of Jews, both inside Germany and in captured territory, was inextricably linked with the aggressive war conducted by the Nazis. From this perspective, Jackson's approach was perfectly sound. The main issue is that the charges outlined in the IMT were specifically designed to prosecute Nazi leaders, which means that the charges designed for the limited scope of the IMT may not always be an appropriate template for other war crimes prosecutions.

The criminalization process is not static over time, and significant developments regarding how war crimes and war criminals are understood continued to occur in the immediate post-war era. The four main charges of the IMT established a precedent for trying perpetrators of Nazi atrocities that became entrenched into Control Council Law No. 10, which formed the legal basis for the twelve subsequent Nuremberg trials. These trials continued to the process of expanding the concept "crimes against humanity" that had begun during the IMT prosecutions of Julius Streicher and Baldur von Shirach. Streicher, who was the civilian editor of the rabidly anti-Semitic publication *Der Sturmer*, was charged with crimes against humanity despite the fact that this crime originated from the Marten's Clause of the Hague Convention, which relates to the laws of war. The IMT ruled that it could not "make a general declaration" that action prior to 1939 constituted crimes against humanity (Lippman 1998: 428), which forced the prosecution to ignore statements made by Streicher prior to the start of the war. Both before and during the war, Streicher stoked anti-Semitic fires in order to facilitate the eventual extermination of the Jews. From the perspective of the prosecution, despite the fact that Streicher was a civilian, such actions were closely related to the overall war effort and thus constituted a crime against humanity. Baldur von Shirach was the only other defendant to be charged

with crimes of humanity but not war crimes. A Reich governor for Vienna, von Shirach organized the deportation of Jews in the region to what he knew to be death camps.⁹¹ As was the case with Streicher, from the perspective of the Nuremberg prosecutors the crimes of von Shirach were limited to actions that took place during the war, and actions prior to the war were viewed as irrelevant and outside the scope of the charges (Lippman 1998). Thus, while the application of crimes against humanity was widened, it was still inextricably connected to crimes against peace or war crimes (Maogoto 2004).

A further significant development in the scope and application of crimes against humanity occurred in the post-war context, specifically during the *Einsatzgruppen* and *Justice* cases. The judges in the *Einsatzgruppen* case ruled that crimes against humanity as outlined in Control Council Law No. 10 was not restricted to crimes against peace or war crimes, but extended to protect all individuals at all times. In this way it was “the embodiment and fulfillment of the universal sentiment for justice” (Lippman 1998: 437). A sharp distinction was made between civilian deaths that occurred during a military attack on a city, and the intentional targeting of civilian populations that were marked for extermination. Although Control Council Law No. 10 specifically applied to attacks against civilian populations rather than individuals, and the term “genocide” was more prominent during this trial than at the initial Nuremberg proceedings, these judges elected to view the mass killings as an extreme form of murder (Lippman 1998).

The *Justice* trial, which took place in 1947, also marked a step forward for the legal application of crimes against humanity. The judges ruled that charges of crimes against humanity could extend to time periods prior to the outset of war, and could

⁹¹ Von Shirach later referred to this expulsion and extermination as “a contribution to European culture” (cited in Lippman 1998: 429).

encompass actions not directly related to waging war. The proceedings were influenced by a United Nations Resolution that identified genocide as an international crime that is subject to retributive sanctions, and although the legal proceedings were still based upon “crimes against humanity” this case marks the first instance in which the term “genocide” was explicitly used in the charges (Lippman 1998).

Overshadowed by the ongoing proceedings at Nuremberg was The International Military Tribunal for the Far East at Tokyo, otherwise known as the Tokyo Trial.⁹² The Tokyo Trial took place from May 1946-November 1948 under the auspices of the Far Eastern Commission, which was under the direct influence of General Douglas MacArthur. Following the precedent of the IMT, not all of the major “war criminals” were military personnel: nine of the twenty eight individuals standing trial were civilians. Although the Tokyo Trial was modeled after Nuremberg (which is evident in the inclusion of “conspiracy” based charges), it differed in the sense that it followed the model of a military court martial rather than a criminal court (Maogoto 2004: 101). In his account of the Tokyo Trial, Jackson Maogoto (2004: 103) bluntly asserts that:

The proceedings at Tokyo were fraught with procedural irregularities and marred by abuses of judicial discretion. The defendants were chosen on the basis of political criteria, and their trials were generally unfair. The execution of sentences was also inconsistent, controlled by the political whims of General MacArthur, who had the power to grant clemency, reduce sentences, and release convicted war criminals on parole.

A further element of *realpolitik* emanated from MacArthur’s (and America’s) interest in establishing positive relations between America and Japan. As a result of this, mention

⁹² The role played by Canada in these proceedings will be explored in Chapter 6.

of Emperor Hirohito, who was still revered within a large portion of Japanese society, was carefully avoided during the trial (Yakatori 2005).

Despite the questionable application of law, the Tokyo Trial formed the legal basis of further domestic war crimes trials taking place in victim countries. During this phase, many war crimes trials occurred in countries that were impacted by the war in the Pacific, including ten separate war crimes trials held in China alone. However, the Far Eastern Commission was greatly influenced by an emerging political initiative to rebuild a strong partnership with Japan, and recognized that the war crimes trials were unpopular among the Japanese population, who largely believed that those standing accused were heroes and that the trials were unfair and rooted in victor's justice. The Far Eastern Commission issued a directive to the nineteen Allied Powers in the Far East that all war crimes trials should be complete no later than 30 September 1949 (Maogoto 2004: 105). After this point, the Japanese government successfully negotiated to oversee the sentences of convicted war criminals, and eventually passed Law no. 103 which allowed for the release of these prisoners.

The "international legal context" during the Second World War era was composed of many distinct legal processes, including the IMT at Nuremberg, the twelve subsequent Nuremberg trials, the Tokyo Trial, and other trials held by occupying nations.⁹³ International law at this time was not entirely unified, or even consistent, in the post-war context. The Canadian criminalization of war crimes during the Second World War era took place within this diverse, and rapidly changing, context of international law.

⁹³ Nations such as France did hold local war crimes trials without the aid of an occupying power, but there is no evidence that such trials impacted upon the Canadian criminalization of war crimes.

Chapter 6

The Canadian Criminalization of War Crimes during the Second World War Era

Canadian beliefs surrounding the nature of war crimes, and those who commit them, radically changed during the Second World War era. The view that war crimes were committed by atavistic individuals was absent from discussion amongst Canadian policy-makers as they grappled with the issue of what to do about war criminals. Instead, in the few instances in which a view of the nature of war crimes and war criminals was articulated, military personnel accused of war crimes were conceptualized by as victims of circumstance, responding to extreme situations that are incomprehensible to anyone who had not been directly exposed to the depredation of war. When atrocities did occur, they were considered to be the exception rather than the rule:

There is some justification for the view that atrocities committed may have been confined to the brief period of time before proper discipline was restored in the occupied territory.⁹⁴

War crimes legislation created under the War Measures Act, which was shaped by the view that war crimes were caused by situational factors and committed by ordinary (rather than biologically different) individuals, focused upon individual culpability while immigration application forms did not even ask whether applicants had committed war crimes.

This somewhat compassionate perspective had an important limitation in that everyday people were still expected to understand and follow the rules of warfare as articulated (sometimes in advance, but often after the fact) in both local and international

⁹⁴ "Minutes of the War Crimes Special Committee" 29 December 1943, RG 25, 3246, file 5908-40/1.

law. Thus a soldier who had been a farmhand in civilian life, and who had not received more than four or five years of elementary level education, was still expected to avoid membership in an “evil organization” such as the Nazi party and to understand his obligation to refuse to follow orders that contravene international law. What was once believed to be a biological deficiency was now largely cast as poor decision making—a shift that proved problematic both during war crimes trials, and in the screening of immigrants hoping to enter into Canada following the war. This chapter will provide an overview of Canadian war crimes trials held at the end of the Second World War, followed by an analysis of how Canada’s reaction to post war migration was rooted within a particular vision of Canadian identity.

6.1 “I cannot understand your justice”: Canada and War Crimes Trials

Canadian participation in war crimes trials following the Second World War can be divided into three categories: participation in International Military Tribunals, convening trials of individuals accused of committing war crimes against Canadian personnel, and participating in the British-led trials of individuals who were accused of committing war crimes against Canadian personnel. Although war crimes were formally criminalized through newly formed Canadian war crimes legislation, a disjuncture occurred between assumptions regarding the nature of war criminals among those who created the legislation and those charged with and implementing it during war crimes trials held in the European Theatre. The war crimes trials held in the Pacific Theatre included prosecutions of Canadian citizens, and were thus notable for the unanticipated consequence of challenging key assumptions regarding war criminals, who were always

defined as “other,” and Canadian identity, which always precluded the possibility that Canadians could commit war crimes.

Canada was a reluctant participant in war crimes trials that followed the Second World War. The war crimes trials conducted by Canada were clearly intended to be *ad hoc* proceedings and not to form precedents for future war crimes trials. Although Canada had been asked to participate in the UNWCC, Canadian leaders declined the invitation, citing that: a) such a body was not likely to be effective, and b) Canadian interests would be better served by independently prosecuting individuals who had committed war crimes against Canadian soldiers, rather than participating in international tribunals (Brode 1997). As a result, Canadian participation at the thirteen tribunals held at Nuremberg was minimal, and largely limited to the provision of documents and other evidence uncovered through Canadian investigations. However, Canada did not escape involvement in the Tokyo tribunals as easily, sending a judge and legal team to the proceedings.

John Stanton (2000) notes that the reluctance of the Canadian government to participate in the Nuremberg and Tokyo war crimes tribunals stemmed from four sources. First, the Canadian government recognized that the Leipzig Trials following the First World War were ultimately a fiasco in the sense that high-ranking officials escaped punishment, and few individuals were convicted. Second, the victims of war crimes were largely European or Asian, and such trials were not a primary concern for Canada. Third, a public opinion poll taken in 1942 found that Canadians believed that the threat of war crimes tribunals would serve to lengthen the duration of the war. Fourth, Canadian legal opinions presented to the government at the time indicated that such trials would likely be

interpreted as “victor’s justice” due to a reliance on *ex post facto* (i.e. after the fact) law, the rejection of the *tu quoque* (i.e. you did it too) defense, and (in the case of Japan) questionable interpretations regarding whether a nation that did not sign the 1929 Geneva Convention, which was in effect during the Second World War, could be held accountable for violating its core principles.

Although the Canadian government wanted to distance itself from the large war crimes tribunals, the political will was emerging to initiate war crimes proceedings in a limited number of cases in which Canadians were the victims of violations of the customary laws of war. The Canadian War Crimes Advisory Committee, headed by J.E. Read, was formally established in the latter part of 1943, and included a representative from the Judge Advocate General’s office as well as a representative from the Department of Justice (Stanton 2000). This committee established a limited mandate to gather evidence that could be used at future trials that the Canadian government might, or might not, conduct. The shift away from racial categorizations of war criminals and toward a rational-legal approach is illustrated in a debate that occurred during a preliminary meeting in December 1943. During this meeting the question of crimes against European Jews was raised, and the committee came to the conclusion that under existing international law, which upheld state sovereignty above all else, “the atrocities against Jews in Germany could not be considered war crimes” (cited in Brode 1997: 31).

Canadian war crimes investigations became centered upon atrocities committed against Canadian soldiers. The Department of National Defence (DND), which had collected evidence from returning soldiers and POWs, found that the number of such cases was exaggerated (Brode 1997) and presented the Canadian government with a list

of 58 individuals that it wished to prosecute. However, there was no legislation in Canada at the time for dealing with war crimes. The British offered to allow the Canadians to prosecute individuals using the Royal Warrant, but the Canadians declined, opting instead to prosecute individuals using their own laws (Madsen 1999). Following the advice of the War Crimes Advisory Committee, Prime Minister King created legislation under the War Measures Act.⁹⁵ Once war crimes legislation was passed through an order-in-council, Canada initiated four military tribunals in the European Theatre of Operations: the Kurt Meyer trial, the Johan Neitz trial, the Jung and Schumacher trial, and the Opladen trial. However, despite the fact that the Canadian government had decided the best approach was to “temper avowals of retribution,” and believed it was an error to “weigh too heavily in the punishment of war criminals,”⁹⁶ the war crimes trials initiated in the European Theatre were very much about retribution and punishment.

The Kurt Meyer trial, which convened in Aurich Germany from 10-28 December 1945, was undoubtedly the most famous of the Canadian war crimes trials held following the Second World War. Meyer was a highly decorated Waffen-SS General who had served with distinction in the Normandy campaign of 1940 and Operation Barbarossa in 1941. In 1944, he was assigned as the company commander of the 12th SS Panzer Division Hitlerjugend, which was known both for its fanatical loyalty and ruthlessness. Information regarding this unit was compiled for the court in a report titled:

⁹⁵ There were two advantages to this approach. First, the legislation could be passed quickly (and was ultimately passed within a week), which meant that the trials would not delay the de-occupation process. Second, legislation passed in this manner was not subject to Parliamentary debate, which avoided criticism of the legislation as well as undue publicity.

⁹⁶ "Canadian Participation in the United Nations Commission for the Investigation of War Crimes" 26 July 1943, LAC, RG 25, file 3247.

“Supplementary Report of the Supreme Headquarters Allied Expeditionary Force Court of Inquiry re Shooting of Allied Prisoners of War by 12 SS Panzer Division (Hitler Jugend) in Normandy, France 7-21 June, 1944.”⁹⁷ According to this report, the 12 SS Panzer Division was composed mainly of 17-18 year-old men drawn largely, but not exclusively, from the ranks of the Hitler Youth. There were essentially no enlistment qualifications, and a few draftees were a part of the group as they fought in the Normandy campaign. The 12 SS Panzer Division, who earned the nickname “the Murder Division,” gained significant notoriety by exhibiting a consistent pattern of brutality and ruthlessness.

On 7 June 1944, the day after the Allied invasion of Europe, the Germans were frantically counter-attacking the Allies with the goal of tossing the invasion force back into the sea. The North Nova Scotia Highlanders, supported by tanks from the 27th Canadian Armoured Regiment (commonly known as the Sherbrooke Fusiliers), were engaged in heavy fighting around Authie. The Canadian force was overwhelmed by the 12 SS Panzer Division, and the Germans recaptured the position. In the aftermath of this battle growing numbers of prisoners of war were brought to Meyer’s headquarter at the Abbaye d’Ardenne, which was a massive collection of mediaeval buildings encircled by stone walls. Ten of the Canadians were randomly picked and sent to the chateau adjacent to the abbey, and an 11th POW, Lieutenant Thomas Windsor, was brought out to join the group several minutes later. That evening, the 11 POWs were taken to the chateau’s garden and were killed either by bullets to the backs of their heads or through bludgeoning. The murder of Canadian prisoners continued the next day, when at

⁹⁷ This report can be found in RG 24 Vol 5300.

approximately noon seven North Novas who had been fighting around Authie and Buron were brought to the abbey, interrogated and sent one by one into the garden where each was shot in the back of the head with a machine pistol. Sadly, when the doomed prisoners realized their fate after the first execution, they each shook hands with their comrades before being escorted to the garden.

As many as 156 Canadian prisoners of war are believed to have been executed by the 12th SS Panzer Division (the Hitler Youth) in the days and weeks following the D-Day landings (Margolian 2000a). The bodies of these men were not uncovered until the late winter and early spring of 1945, and the shock of this discovery had not yet abated when Meyer was indicted with five counts of war crimes. The Canadian public was astonished with the scope of the atrocities inflicted against Canadian prisoners of war, and the Meyer trial drew widespread media attention. This interest proved to be a double-edged sword, because other Canadian war crimes trials did not receive the same level of fanfare. As a result, the Canadian public generally believed that the work of punishing war criminals was complete once the Meyer verdict was announced (Brode 1997).

The Kurt Meyer was the first Canadian prosecution of war crimes committed against Canadian soldiers. The fact that the trial was breaking new ground, and as such carving out a path for future Canadian prosecutions to follow, meant that a part of the trial was devoted to defining the legal space in which the trial existed. Significantly, the Canadian insistence on eschewing international proceedings and “going it alone” rippled through the trial, which explains the following terse exchange that occurred during the

opening statement of lead prosecutor Lieutenant Colonel Bruce MacDonald, who was a lawyer in Windsor in pre-war civilian life, and the Judge Advocate:

Macdonald: In the last few days in the Yamashita case, one almost the same as to its facts as this one, the US courts have held a commander...

Judge Advocate: I don't think you should continue with what you are just about to start.

Macdonald: With reference to the American case?

Judge Advocate: Yes. Let us not be influenced by that at this stage.

In fact, a stage never occurred in which influence from war crimes trials held by other nations entered in Canadian proceedings. From the opening address of the Meyer trial, and throughout the remainder of the Canadian war crimes trials, no mention is made during the proceedings of other war crimes trials such as the IMT at Nuremberg.

Aside from the novelty of being the first Canadian war crimes trial, the Meyer trial broke little new legal ground. The prosecution argued that Meyer issued a secret order to his men to execute prisoners, and the testimony of Private Jan Jesionek, a Polish soldier who had been pressed into service with the 12 SS Panzer Division, supported this claim. A statement taken from the interrogation of Private Friedrich Torbanisch confirmed that there was a secret order, offering that such an order was justified on the grounds that "the British... don't take any prisoners when they come to SS prisoners, so we wouldn't take any either."⁹⁸ However, a statement made by Grenadier George Mertens, who deserted from the Division at a later point, indicates that secret orders were issued, but that most did not believe it: "we thought it was propaganda to get us to fight

⁹⁸The statement made by Torbanisch was entered into evidence by the prosecution as Exhibit 5. RG 24 Vol 5300.

to the last.”⁹⁹ This apparent contradiction could not have been comforting to the prosecution, who also had to explain why, if a secret order to murder prisoners of war was issued by the individual in command, only 11 of the 150 men held in captivity by the 12 SS Panzer Division were killed on the night of 7 June.

Speaking in his own defence at the end of the trial, Meyer provided an alternate account of the events that were based upon an entirely different formulation of the nature of war crimes and war criminals. Meyer stated that although the 17 and 18 old year men in his unit were initially well trained by him, the unnatural experiences of wartime effectively brutalized some of them. According to Meyer, his division fought for three months without relief, suffering bloody losses along the way. While the younger soldiers held up well, and as an aggregate he believed his unit was well-disciplined, in his estimation some of the older soldiers who had been exposed to conflict for four or five years had been forever changed by their experiences:

I am convinced of it, that in the Division there were elements who, due to the year long battles, due to five years of war, had in a certain respect become brutalized. As Regimental Commander and as Divisional Commander I take every responsibility for what I, in the framework of tactical possibilities, ordered. I, during the battles in Normandy, as Regimental Commander and as Divisional Commander, bore a responsibility which cannot be compared with the ordinary tactical possibilities in armies. The situations for me were basically unnatural.

Thus, although Meyer did not accept that he had a command responsibility regarding the conduct of his men, he did not accept that his men were entirely at fault either. Instead, he argued that the exceptional circumstances the unit experienced, both in Normandy and in past campaigns, had a cumulative effect upon the men of the 12th SS Panzer Division.

⁹⁹ The statement made by Mertens was entered into evidence by the prosecution as Exhibit 6. RG 24 Vol 5300.

In other words, a fuse was lit during the brutal campaigns at the Russian front that reached a powder keg in Normandy.

The court, for its part, did not fully share Meyer's belief that he had no responsibility for the actions of his men, and sentenced him to death by firing squad after finding him guilty of inciting and counselling his troops to commit a war crime, of being responsible for the murder of 23 Canadian prisoners at or near the villages of Buron and Authie on June 7th by soldiers under his command, and of being responsible for the murder of 11 Canadian prisoners at the Abbaye d'Ardenne on June 7th by soldiers under his command. He was found not guilty on two counts related to the murder of seven more Canadian prisoners of war at the Abbaye d'Ardenne on June 8th. On two separate occasions Meyer's appeal reached Christopher Vokes who, as the General Officer Commanding of the Canadian Army Occupation Force, was the Convening Authority for the Meyer trial. Although Vokes denied Meyer's appeal on the first occasion, he upheld the second appeal on the grounds that he was unsure whether command responsibility could reasonably be extended to Meyer in this case (Brode 1999). Meyer eventually served ten years of his life sentence, evenly split between penitentiaries in New Brunswick and West Germany, before his parole was granted.

Kurt Meyer was the only individual tried for war crimes committed against Canadian army personnel during the European campaign, and the remaining cases dealt with the mistreatment and murder of Canadian air force personnel who had been taken into captivity. With the goal of paralyzing industry, disrupting munitions productions, and eliminating oil reserves that were essential to the war effort, Allied air crews had been bombing targets within Germany well before the invasion of Europe. Members of

such air crews were always in a precarious position, because they were forced to fly along a relative straight path in order to locate and attempt to eliminate targets. German flak from anti-aircraft guns, as well as Luftwaffe fighter planes, worked feverishly to knock the bombers out of the sky. Large numbers of planes were shot down over enemy territory, and even if crew members survived they were often located and beaten by angry mobs of civilians. Rather than discouraging this practice amongst the citizens of Germany, Nazi officials were instrumental in arousing anger directed at the airmen. In a classic case of moving from the frying pan into the fire, airmen who survived being shot down and found were placed in prisoner of war camps. Despite the fact that air force personnel were treated better by the Germans than other prisoners of war, such prisoner of war camps became the site of many atrocities.

Although Canadian legislation made no such distinction, the Royal Canadian Air Force (RCAF) believed that the war crimes inflicted upon their airmen were somewhat different from those inflicted upon army personnel, and successfully lobbied to conduct their own war crimes trials. While McDonald, who was the lead investigator with the Number One War Crimes Unit, remained on board in the preparation of cases, Wing Commander T.W O'Brien became the commander of the RCAF War Crimes Administration Unit in Aurich. The two main cases tried by the RCAF (the Neitz trial and the Jung and Schumacher trial) were eventually held from 15-25 March 1945 in the same courtroom as the Kurt Meyer proceedings. The RCAF insistence upon holding its own trials was legally problematic in the sense that Canadian regulations expressly stated that the accused was to be judged by individuals from the same branch. The fact that most war crimes would have been committed by army personnel (who captured and held

the prisoners) meant that army officials should preside over the court, but this objection was brushed aside by the judges.

The Neitz trial, which took place during a five day break in the proceedings against Schumacher and Jung (which will be covered next), is substantially different from any other Canadian war crimes trial in this era because Rudolph Anthony Roman, the victim of the war crime, not only survived but also testified against the accused. Although attempting to kill a single prisoner of war clearly violates the Geneva Convention, in practice the focus of war crimes trials tends to be murder or large scale atrocities. The fact that Neitz stood trial for attempted murder reflects the difficulties experienced by the Number One War Crimes Unit as they searched for a match between existing evidence and accessible suspects. Although dozens of Canadian airmen shot down over Germany were killed after becoming prisoners, more often than not the alleged perpetrator could not be located, or evidence of the alleged crime simply could not be found (Brode 1999). It is unlikely that the war crimes legislation was created with the prosecution of attempted murder in mind, and the Neitz trial reflected a broadened net of criminalization that stemmed from the logistical difficulties of finding specific offenders in a limited amount of time within a chaotic post-war setting.

On 15 October 1944, Roman was a part of a bomber crew that was attacking Wilhemshaven, Germany.¹⁰⁰ The plane was struck by flak at approximately 2000 hours (8 PM), and Roman was forced to bail out. He made his way to a lighthouse and was found by a lighthouse keeper (Paul Bornert, who was 60 years of age at the time), who

¹⁰⁰ The following account is drawn from "Record of Proceedings of the Trial by Canadian Military Court of Johann Neitz held at Aurich, Germany, 15-25 March 1946", RG 25 F.3 Vol 2608.

forced him to strip down to his underwear to ensure he was not armed before offering him food and blankets. The next morning, Bornert suggested he turn himself in, but Roman refused. The lighthouse keeper then went ashore to the military establishment (a searchlight battery) to report the capture, and Johann Neitz was sent to collect the Canadian prisoner. Neitz was a 37 year old married father of two who, possibly due to his ill health, served as cook for the searchlight division. He had been a member of the German army since June of 1940. At this point, the story told by the lighthouse keeper is quite different from that of Neitz. According to Bornert, while en route to the lighthouse Neitz had threatened to shoot the prisoner. Neitz claimed that no such threat was ever made. Regardless of which version of the story is correct, there was no doubt that on way back to the military establishment the victim was shot (non-fatally) twice, with one shot striking the left side of his body and the other bullet hitting him on the right.

Neitz was charged on two counts of war crimes based on the fact that he: a) shot a prisoner of war, and b) showed intent to kill a prisoner of war. Despite the relatively straightforward nature of the charges, the prosecution had problems from the outset. The main witness for the prosecution was the lighthouse keeper, whose memory continually failed during the trial as a result of his advanced age. Confusion on the part of this witness was evident during the initial line of questioning, at which point Bornert could not identify whether the man he had spoken to on the morning of the shooting was in the courtroom. A flustered Wing Commander Durdin, who was lead prosecutor in the case, continued to press the witness to repeat the identification made by Bornert during pre-trial interviews. Eventually, the defence team objected to the repetition of a question which, in their view, had already been answered by the defendant in the negative (i.e. no, he

could not identify the man he had spoken to on the morning of the shooting).

Remarkably, the Judge Advocate stepped in and not only pointed out that continuing to ask Bornet to identify Neitz was quite proper, but gave the prosecution a more general question to ask in order to elicit the desired response:

Judge Advocate: Wing Commander Durdin, would you put the question to the witness in somewhat the following language: “will you point to the man whom you believe to have been the cook?”

Despite the shift in language (from positively identifying the man in question to identifying the person he believes may be that man) the witness continued to hedge, and stated:

I cannot say on oath here that he was the man because he looks older. At the time when I first saw him in prison when he did not have such a large moustache I recognized him immediately.

After fighting this losing battle for a while, the prosecution moved to the key point of the testimony, which is whether the accused had intended to shoot the prisoner from the outset:

Q: Now, Mr. Bernard, will you tell the Court what the conversation was that you had with the German cook on the morning in question?

A: Yes. The cook was making the remarks while we were walking towards the lighthouse that he intended to shoot or bump off the fellow.

When asked to recall the exact words used by the accused, Bernard answered: “I am not going to take him back ashore. I am going to bump him off along the way.” The testimony of this witness, who clearly had a poor recollection of the events, was one of two pillars of evidence in this case. It was the only evidence presented that dealt with intent and pre-meditation on the part of the accused.

The second pillar of evidence came from witness testimony of Rudolph Anthony Roman. This was the only instance during Canadian war crimes trials held in the European Theatre in which the victim of the crime testified during the proceedings. According to Roman, the accused searched him for weapons prior to leaving the lighthouse. After leaving the lighthouse, while on their way back to shore, the accused ordered him to drop his 70 pound flare, and shot him twice. In Roman's view, the accused deliberately aimed at him and attempted to hit him both times. The testimony of Roman was followed by expert medical testimony that confirmed that either of the wounds was likely to be fatal, and Roman was lucky to have survived the encounter.

The Neitz trial featured a very competent defence. In his testimony, Neitz pointed out that he had actually saved two Allied airmen who had been shot down the previous night. When asked about the incident in question, he testified that he believed he saw Roman reaching for a weapon. He demanded that Roman put his hands in the air, and when the airman refused he fired a shot. Roman still refused to put up his hands and he shot again, this time aiming at his right hand. Neitz pointed out that he immediately administered first aid to Roman after he had been shot. During cross examination, the prosecution jumped on the apparent inconsistency in the testimony offered by Neitz, who had stated in pre-trial interrogations that the second shot had been aimed at the victim's "right side" rather than "right hand." From the perspective of the prosecution, the defendant was modifying his testimony in order to place himself in a more positive light. The defence angrily countered that they should be given the same amount of leeway for faulty memory that was offered to the prosecution in the testimony of their key witness.

During the closing arguments the defence correctly pointed out that it is a case with two conflicting testimonies, and the verdict ultimately depended on which story the court chose to believe. Did Neitz plan to shoot the airman all along, or did he only fire after mistakenly believing that Roman was reaching for a weapon? Considering the flawed memory of Bornet, the verdict should have been favourable for Neitz. However, the court chose to believe the story of the lighthouse keeper, and sentenced Neitz to life imprisonment with hard labour. Neitz was stunned by the verdict, and stated in his appeal that “I cannot understand your justice.” Aside from his anger at the testimony presented by Bornet he could not fathom his sentence, which he believed to be more fitting for cases in which an actual murder had been committed. It was very likely that Neitz was unaware of the how narrowly he escaped (a vote of 3-2) being sentenced to death by firing squad (Brode 1999).

Although the witness testimony portion of the trial was interesting due to the issues relating to the flawed memory of the key prosecution witness, and due to heated exchanges between the prosecution and defence, very little new ground was broken in terms of how war crimes are defined. Although it is unusual to convene a war crimes trial when the accused did not murder the victim, Neitz’s actions were in violation of the Geneva Convention. The most interesting feature of this case was the summary presented by the Judge Advocate at the close of the trial, which included an extended argument regarding the substantive nature of war crimes. Cases in which airmen are shot down pose difficulties, because civilian populations tend to harbour a hatred for bomber pilots in particular due to what appears to be an indiscriminate bombing of civilian targets. From the view of many individuals living in areas targeted for air attacks, the

airmen have themselves committed war crimes by killing large numbers of civilians. From the point of view of many civilians and military personnel who captured airmen shot down over enemy territory, the members of bomber crews in particular were themselves war criminals who deserved summary justice for their crimes. The Judge Advocate directly addressed the issue of whether Allied airmen captured by the enemy were, in fact, war criminals:

The term "war crime" is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment on 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 a prisoner, 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 acts as war crimes. The test of criminal responsibility is therefore not properly applicable, and the issue upon any charge is not "did the accused commit a crime?" as we understand the word 'crime' under our criminal law, but "did he violate the laws and usages of war?"

Two important points arise from this summary. First, the Judge Advocate restricts the definition of war criminal to enemy soldiers and civilians, which means that Allied personnel are entirely excluded from the category. Second, the position of the Judge Advocate was that war crimes cannot be conflated with civilian conceptions of right or wrong, or legal and illegal. While bombing cities may be viewed as immoral, such practices were a part of the regular usages of war during the World War II era. Therefore, an airman cannot be held accountable for war crimes for doing his job during war time, but war crimes are committed if such airmen are harmed after being taken prisoner by the opposing military or even civilians.

The trial of Wilhelm Jung and Johann Georg Schumacher, which dealt directly with issues of both command responsibility and the distinction between military personnel and civilians, is arguably the most interesting of the Canadian war crimes trials related to the Second World War. Early on the morning of 29 July 1944 an Allied airman bailed out of his aircraft, which was shot down near the village of Oberweier.¹⁰¹ The airman was captured by civilians and brought to the town hall, where he offered his formal surrender. He gave up his identification card, removed his coveralls and other items, and was taken to a camp that held French prisoners of war. When the airman entered into the camp he had contact with Johann Georg Schumacher for this first time. Schumacher, 42 years old at the time of the trial, was the father of six children ranging from 5-19 years of age. Coming from a farming background, the extent of his education was eight years of elementary schooling. Schumacher had never left home prior to military travel.

Wilhem Jung was an Ortsgruppenleiter (a low-level group leader responsible for a particular region) in the Nazi Party at Oberweier and the surrounding area, as well as Burgomeister of that village. In a fit of rage over the fact that the airman was taken into captivity rather than being dealt with by civilian mobs, Jung apparently ordered two men to beat the airman to death or shoot him. After the two men refused, he ordered Schumacher to take the airman outside and shoot him. At first Schumacher refused to carry out this order, but he eventually relented and simply refused to go alone. Oscar Anselm, who did not face charges, was ordered to accompany Schumacher.

¹⁰¹ The trial manuscripts and documentation used in this section are drawn from "Record of Proceedings of the Trial by Canadian Military Court of Wilhelm Jung and Johann Georg Schumacher held at Aurach, Germany, 15-25 March 1946 Vol 1", RG 255 Vol 2609.

The captured airman was taken to a place about 200 yards outside the village and shot twice, and his body was left on grass by the side of the road. Later that day Schumacher gave orders for the airman to be stripped of ID tags and buried. When Allies captured the area, the body was exhumed and examined by Marvin Kuschener, a New York pathologist who had previously worked at Bellevue hospital. Kuschener confirmed to the court that the victim died as a result of being shot twice in the head at close range. This marked the first time that extensive forensic evidence, which in this case detailed the method of execution and identified the victim (William Martens), was used in a Canadian war crimes trial.

Jung and Schumacher were tried as co-defendants in the second trial convened and administered by the Air Force. The perspective of the prosecution was clear cut: both men were guilty of the war crime committed, and both should be executed. It should be noted that although civilians were charged with Crimes against Humanity at Nuremberg, the Canadian prosecution opted to ignore this precedent for two reasons. First, the judges at Canadian trials refused to allow references to Nuremberg or other war crimes trials. Second, the civilians accused at Nuremberg were indicted on the charge of Crimes against Humanity, which did not exist in the Canadian proceedings. The fact that the Geneva and Hague Conventions assume that prisoners of war would be taken by the military represented a substantial grey area in the proceedings. During the Canadian trials in Europe, Jung was the only civilian who faced charges that were grounded in the laws and usages of warfare, which are generally intended to govern conduct of military personnel.

Jung and Schumacher each provided a plausible legal argument that assigned blame for the murder on the other. Jung's defence focused upon the fact that he was a civilian rather than a part of the military, which meant that it was inappropriate to hold him accountable for violating the customary laws and usages of warfare outlined in the Geneva and Hague Conventions.¹⁰² Jung's lawyer also argued that because he was a civilian he was outside of the military chain of command, and thus had no military authority to issue Schumacher an order. As a result, any instructions he may have given were not binding in any way. This powerful line of defence clearly had merit because, for instance, if a civilian on the street yelled out "kill him" to a soldier who was guarding a prisoner of war, that civilian would not typically be viewed as violating the laws and usages of war if the soldier killed the prisoner at a later point.

For his part, Schumacher never denied having fired the shots that killed this individual. In fact, he initially pleaded guilty, albeit in a limited sense, to the charges before his lawyers counselled him regarding the implications (i.e. a likely death sentence) for such a plea. Schumacher testified that:

I was a mere common soldier, uneducated and bucolic. Jung was a man of authority in the community, and one from whom I was accustomed to take orders in my daily work. He was an educated man, I was an ignorant farmer, drafted into the Wehrmacht. I foolishly thought that I was in no position to question any orders that he gave to me.

In other words, his defence is based on two grounds: (1) Even though Jung was not in the formal chain of command, due to his status within the community Jung was in a

¹⁰² The laws and usages of warfare outlined in The Hague Convention apply to civilians in only a small number of instances, including: "illegitimate hostilities in arms", "espionage and war treason", and "marauding." None of these provisions deal with command responsibility on the part of civilians.

position of authority over Schumacher. The difference of perspective regarding whether Jung was in a position of authority was reinforced during the testimonies of the two defendants: on no occasion did Jung make reference to any of his formal titles, while Schumacher uses “Burgomeister” or “Orsgruppenleiter” in every instance in which he refers to Jung. In any event, Schumacher emphasizes that he did try to disobey the order when it was first presented to him. (2) Schumacher was uneducated, and could not reasonably be expected to understand all of the nuances of international customs and treaties related to the laws and usages of warfare. He simply followed an order that he believed he was obligated to follow.

The Jung and Schumacher case raised at least three important issues that could have been addressed by the court: (1) whether civilians were to be included in the definition of war criminals, (2) whether the chain of command is strictly military, or if it can reasonably be extended to authority figures in a given community, and (3) whether an individual with a limited amount of formal education could be expected to understand the nuances of international laws and customs of warfare. The verdict, in turn, could have shifted blame to one defendant or the other. Such a verdict would have functioned as an elaboration of how war crimes, and war criminals, are defined. Disappointingly, however, the decision issued by the court did none of these things. Despite the fact that the two defendants each presented persuasive arguments supporting the notion that the other was the one who had actually committed the war crime, both were found guilty and sentenced to death by firing squad. The final appeals were denied on 15 April, and the sentences were carried out that same morning.

The last of the Canadian trials held in the European Theatre, held from 25 March to 6 April 1946, featured three defendants: Robert Holzer, Walter Weigel, and Wilhelm Ossenbach.¹⁰³ This trial was criticized by historians such as Patrick Brode (1999) as being driven more by vengeance than by law. There is merit to this argument for many reasons, the most prominent of which is that the hearing began shortly after Kurt Myers' death sentence was commuted to a prison term on 14 January 1946. A public outcry emerged from Canadian citizens, and veterans in particular were upset that justice, in their view, was not served. However, such interpretations miss key elements of the development of an understanding of the nature of war crimes and war criminals. At issue were whether a claim of duress on the part of the defendants was permissible, the blurred distinction between civilians and Axis military personnel during the final stages of the war in Europe, and the extent of the sphere of responsibility for the commission of war crimes.

In March of 1945, three Canadian airmen had been shot down near Opladen, Germany, and were turned in to the local militia. Two had escaped with relatively light injuries, while the third was badly wounded and in desperate need of medical attention. After being brought into captivity, the three men were driven off separately (and by different combinations of individuals) to a forest, where they were shot to death. Two of the individuals who stood accused of the crime (Ossenbach and Weigel) were recently enlisted members of the *Volkssturm*, which was a militia force raised by Adolf Hitler during the final months of the war when Germany was being overrun by enemy forces.

¹⁰³ The evidence presented in this section is drawn from the "Record of Proceedings of the Trial by Canadian Military Court of Robert Holzer, Walter Weigel and Wilhelm Ossenbach held at Aurich, Germany, 25 March-6 April, 1946", RG 255 Vol 2609.

Holzer and a fourth individual named Robert Schaefer, who was never found and thus did not stand trial for the crime, were a part of the regular German Army.

The Opladen case was different from other Canadian war crimes trials because, for the first and only time, German lawyers were allowed to represent the accused. The impact of this was felt most heavily in the defence presented by Wilhelm Schapp on behalf of Holzer. Although Holzer was a highly decorated member of the German army, he had systematically refused to have anything to do with National Socialism and the Nazi Party. In fact, he was arrested prior to the outbreak of war for refusing to take “appropriate actions” against his Jewish employers. The moral character of Holzer was evident in the fact that he refused Schaeffer’s order to shoot one of the Canadian airmen on several occasions, covertly forcing his gun to jam three times, and only gave in when Schaefer put a gun to his head and threatened his life. After Holzer shot the prisoner, he refused Schaefer’s order to bury the airman. As a result of the string of disobedience he faced summary execution, and was only saved because he was taken into captivity by the Allies before he was caught by the Gestapo.

Although Holzer systematically defied the Nazis, and attempted to avoid shooting the prisoner, there was no escaping the fact that in the end Holzer did execute one of the Canadian airmen. In his defence, Schapp asked the judge to consider question “what could I have done in the circumstances?” The only two options available to avoid following the order were to defy the order and be shot, or to “shoot the bully” and kill Schaefer. The most interesting thing about the use of duress as a defence is that duress was not considered to be a mitigating factor in the court charter. While duress had a long history in German law, the Canadian judges were not obligated to give any consideration

to the fact that Holzer would likely have been shot himself if he disobeyed the order to kill. In the end, the defence presented by Schapp was completely ineffective in the context of a Canadian war crimes trial.

The case against Weigel was meagre at best. Weigel was not initially counted amongst the defendants when the Number 1 War Crimes Unit began interrogations related to the Opladen killings. However, when being interrogated Ossenbach stated that after one of the killings Weigel had leaned over to him and said “I have shot him.” This single sentence, presented in court by another defendant who was attempting to minimize his own guilt in an attempt to avoid the firing squad, was the sum total of the case against Weigel. De Wall, his attorney, duly attempted to cast doubt on Ossenbach’s testimony. He also questioned whether Weigel, who was a member of the *Volkssturm* for only two weeks prior to the shootings, could possibly be expected to understand the laws of warfare:

Weigel was a very young man who wore the tunic first 14 days at the time of the act [sic]. Until there he had not had any drill as a soldier and with that he didn’t know and could not criticize whether he might oppose or not to the order of the first lieutenant [Schaefer] as a simple soldier.¹⁰⁴

De Wall continued with this line of argument, stating that Weigel had a spotless record prior to the Opladen incident in which he “came under control of a fanatic.” Weigel had, in fact, refused to transport another airman who would have been shot by Schaefer.

A large portion of the testimony against the other defendants came from Ossenbach, whose role in the murders appeared to be limited to driving the airmen and their executioners to the forest. His lawyer, Dr. Peter-Arnold Plenter, presented the

¹⁰⁴ “Record of Proceedings of the Trial by Canadian Military Court of Robert Holzer, Walter Weigel and Wilhelm Ossenbach held at Aurich, Germany, 25 March-6 April, 1946”, LAC, RG 255 Vol 2609.

relatively straightforward argument that his client had, in fact, committed no crime. He had been ordered by a superior officer (Schaefer) to transport the prisoners from one place to another. Such orders were common, and were in no way illegal. Furthermore, as a relatively new member of the *Volkssturm*, Ossenbach had little or no chance of differentiating between legal and illegal orders. Plenter argued that Ossenbach was in essence a non-participant who did not leave the vehicle, and did not directly witness any of the murders. Although his lawyer noted that no one involved was “completely innocent”, Ossenbach’s degree of guilt was clearly well below that of the other defendants.

The judge advocate utilized his closing address to the court to point out that duress is not listed among the acceptable defences for war crimes in either the court charter or in British manuals distributed to all military personnel. The judges agreed with this assessment, and verdicts handed down were uniformly harsh. Holzer and Weigel were each sentenced to death by firing squad, and were executed shortly after their final appeals were denied. This brought the number of executions of German military personnel to four, which is a startling figure in light of the fact that the Canadian military had been reticent in utilizing capital punishment during the war.¹⁰⁵ Despite the fact that Ossenbach did not execute any of the Canadian airmen, and provided key witness testimony that sealed the fates of the other defendants, he was sentenced to 15 years of

¹⁰⁵ During the Second World War, the Canadian military court martial proceedings could no longer issue death sentences for desertion, as was the case during the First World War (Madsen 1999). Of the eight Canadian Forces personnel sentenced to death for murdering Canadian soldiers, only one was carried out (Lackenbauer and Madsen 2007). Private Harold Joseph Pringle of Flinton, Ontario had lied about his age during enlistment, and fought in Italy at the age of 16. He deserted after experiencing shell shock, joined a gang of black market profiteers, and eventually murdered another Canadian deserter who was in the same gang. Pringle was executed by firing squad on 5 July 1945, and remains the last Canadian soldier executed by the Canadian Military (Clark 2004).

hard labour. Upon learning his fate, the reaction of Ossenbach was eerily similar to Neitz, as he stated “I do not understand your justice.”

Proceedings dealing with war crimes committed against Canadian personnel during the Pacific were fraught with difficulties, not the least of which stemmed from Canadian war crimes regulations. These difficulties were captured perfectly in a statement regarding Canadian representations in Trials at Hong Kong that was read to the House of Commons in 1946:

Canadian participation in the trials of the lesser far eastern war criminals has been complicated by the fact that under existing international arrangements military courts for the trial of such war criminals may be only convened by states now in occupation of areas formerly dominated by Japan. Moreover, under the war crimes regulations (Canada), Canadian military courts can only be convened by senior officers in command of “Canadian Forces”; since Canada has had no occupation force in the far east, no such courts could be convened in that area.¹⁰⁶

Despite the fact that Canada could not independently hold war crimes trials, arrangements were made with the UK and USA to send a cadre of Canadian officers responsible for the following: a) to assist in the collection and collation of further evidence of atrocities against Canadians b) to assist in providing the United Kingdom (or United states) evidence that was in Canadian hands, c) to request military courts be held by the UK and USA, if Canadian victims were involved and a *prima facie* (i.e. appears to be correct at first glance) case is established, d) to assist in prosecution of Canadian cases, and e) to act as liaisons with other war crimes officers.

In the end, Canada followed the above agreement to the letter, and sent representatives, some of whom acted as prosecutors, to the trials of individuals who had

¹⁰⁶ MG 30 E 567 Vol 1 (G.B. Puddicombe Fonds), File 1-2 “House of Commons Debates Vol LXXXV” – No 22 Friday 12 April 1946.

committed war crimes against Canadian soldiers. While this agreement functioned relatively smoothly on the ground level, it created an awkward situation in which two different definitions of war crimes were being used with respect to crimes committed against Canadian soldiers:

It is interesting to note that the definition of “War Crimes” employed in the prosecution of Far Eastern War Crimes is different from that employed in the case of European War Crimes. With respect to the latter, “War Crime” was defined by P.C. 5831 of the 30th August, 1945, as “violation of the laws or usages of war”; whereas the Far Eastern definitions includes “the planning and waging of aggressive war, violations of the laws and usages of war, and inhumane acts. Thus in the Far Eastern prosecutions, high ranking Army and Navy officers could be prosecuted on the basis that they planned and waged aggressive war, regardless of the question of whether they were personally implicated in violation of the laws and usages of war.¹⁰⁷

Despite the legal contradiction inherent in attempting to form prosecutions based upon two entirely different definitions of the same crime, Canada did play an important role in the prosecution of war crimes trials in Hong Kong, including the trial of Major-General Ryosaburo Tanaka, Japanese Commander Takeo Ito, Colonel Takunga and medical officer Choichi Saito.

With respect to themes of identity discussed in this dissertation, the most interesting of the Pacific theatre cases involved Canadian born defendants. Kanao Inouye¹⁰⁸ was born in Kamloops, British Columbia. His father was a decorated veteran who was one of a small number of Japanese Canadian who had fought for Canada in the First World War. Inouye had moved from Canada to Japan at an undetermined point prior the outbreak of war. In his capacity as a translator during interrogations, Inouye

¹⁰⁷ RG 24 Vol 8074, File NSS 1270-131, Memorandum from Judge Advocate of the Fleet to CNS, DM (N) Deputy Minister of Naval Services, and CNP.

¹⁰⁸ Information regarding Inouye and his trial is drawn from RG 25 Vol 3824.

was known for being especially brutal toward all Canadian prisoners of war. The common theory expressed by his victims was that as a young boy, Inouye had been mistreated in Canada due to his nationality. If such theories are correct, it was his thirst to avenge the bullying that was inflicted upon him that led to the commission of war crimes. In any event, the fact that Inouye was Canadian born led External Affairs to refer his case to the Cabinet and recommend that his trial be moved to Canada. However, there was no political will in Ottawa to endorse this request, and the trial proceeded in Hong Kong from 22-27 May 1946.

Somewhat predictably, Inouye's defence fell along two lines. The first was that he was merely a translator, and did not personally abuse any of the prisoners. Following this line of argument, Inouye testified that he had been badly mistreated by Japanese military personnel due to his foreign heritage. His second line of defence was that he was a subject of the British Empire, based upon the fact that he was born in Canada, and as such he was not subject to prosecution in war crimes trials based upon the Royal Warrant. Surprisingly the latter argument was upheld by the military commander in the area who was the confirming authority in the trial. Despite the fact that a verdict of guilty had been reached, with the death penalty being deemed the appropriate punishment, on 19 November 1946 the court was ruled to have no authority to continue the trial due to Inouye's status as a British subject. This ruling, however, was not the last word on the matter. As a subject of the British Empire who had colluded with the enemy, Inouye was charged with treason and was tried in a Hong Kong civilian court from 15-18 April 1947. His defence quickly adapted to the new charges, and presented the argument that Inouye had abandoned any allegiance to the crown when he was sworn into Japanese military

service, and was thus not a British subject during the time under consideration. This defence was unsuccessful, and Inouye was found guilty once again on 22 April 1947 and once again the sentence was death. Inouye was unable to escape this fate a second time, and was hung in Stanley Prison in Hong Kong on 27 August 1947.

The Inouye trial was not the only war crimes trial that dealt with complex issues revolving around the definition of war crimes as “other”, and the commission of war crimes by Canadian citizens. In March of 1946 the Fort Osborne Barracks, located on Tuxedo Avenue in Winnipeg, were converted into a courthouse (Brode 1997).¹⁰⁹ In this trial several members of the British forces, and one member of the Canadian forces, stood accused of a variety of offences, including manslaughter and collaboration. The rules of the court, as in all trials involving Canadians that stemmed from events in the Pacific war, were based upon British military law rather than Canadian law. The court tended to be lenient in the sense that the harsh reality of life in a Japanese prisoner of war camp was always a mitigating factor in determining guilt and punishment. For example, Sergeant J.J. Harvey of the Royal Medical Corps faced a charge of manslaughter stemming from the death of a Canadian prisoner of war (Private John Friesen of the Winnipeg Grenadiers), who passed away as a result of a beating Harvey had inflicted. Harvey described the event to the court, outlining how the Canadian entered into the hospital suffering from malnutrition. Friesen became hysterical, which forced Harvey to subdue him physically due to the absence of sedatives at the hospital. Harvey clearly

¹⁰⁹ There are no official records of these proceedings. This account is based on the summary of events found in chapter 10 of *Casual Slaughters and Accidental Judgments* (Brode 1997). Brode based his account of these events on newspaper coverage at the time the trial was taking place, and of testimonies of several of the key witnesses.

expressed remorse over the death and the court, which was composed of veterans, acquitted him of the manslaughter charge.

The last of the trials held in Winnipeg was that of Company Sergeant-Major Marcus Tugby. Japanese punishment for even minor offenses in prisoner of war camps was severe. To mitigate such punishments in the Hong Kong camp, a “Big Four” of senior non commissioned officers (NCOs) was formed. The Big Four controlled life in the camp to a large degree, and ensured that prisoners complied with camp regulations. They also inflicted punishment (albeit not as harsh as the punishment one would receive from the guards) upon other prisoners who broke the rules. Tugby became a part of the Big Four on the recommendation of the only Canadian officer in the camp, who asked Tugby to restore discipline that was rapidly deteriorating amongst the men. The court was sympathetic to the impossible situation Tugby had been in, and acquitted him of eleven of twelve charges.

The respective cases of Tugby, Harvey and Inouye, were the first instances in which Canadians were accused of committing acts that could fall into the category of war crimes. However, with the exception of the first Inouye trial when the citizenship of the accused was in doubt, the labels “war crimes” and “war criminals” were not used. Instead, specific crimes that fall under the auspices of either the domestic criminal code or military law were listed in the indictments. This linguistic shift, coupled with exclusionary laws within Canada that came into being during the war, functioned to preserve the vestiges of a Canadian identity that precluded war criminals.

6.2 “A constant source of difficulty”: Identity, Migration and Borders

The criminalization during the Second World War of groups from specific nationalities living in Canada was reminiscent of the processes of exclusion that occurred in Canada during the Great War. The War Measures Act provided the legal basis for the establishment of 23 internment camps during the war. An Order in Council passed in 1940 initially defined “enemy aliens” as all persons of German or Italian “racial origin” who became naturalized British subjects after 1 September 1922 as “enemy aliens” (Caccia 2010). Ironically, interned German and Italian Canadians had fewer rights than the 34,051 German and Italian prisoners of war housed in 26 compounds across Canada, who were protected by the Geneva Convention (Rettig 1999).

The 500,000 individuals of German heritage living in Canada represented the single largest ethnic group in Canada, and officials within the Royal Canadian Mounted Police feared that an espionage apparatus had formed within this group. As noted by Robert H. Keyserlingk (1985), this fear was unfounded in two respects. First, the belief that Germans living in Canada were exceptionally loyal to their homeland was deeply flawed. Only 18% of the Germans living in Canada emigrated directly from Germany, while the remaining 82% living in another (usually European) country prior to entry into Canada. Second, no evidence of subversive activity among German-Canadians was ever uncovered.

The exclusion process was not limited to Italian and German Canadians. A further Order in Council outlawed the Communist Party, which was an unusual move considering the fact that Russia, which was a large communist nation, was an ally during the war. The RCMP, who had a long standing bias against Communist organizations

within Canada, immediately targeted Communist organizations for infiltration and surveillance. The extent to which the RCMP monitored Communism, rather than Fascism, is evident in a communiqué from the Prime Minister's Office from 1940, which states that, based upon RCMP surveillance activities, "one would scarcely realize that Canada was at war with Germany" (cited in Keyserlingk 1985: 219). Many prominent members of the business community applauded as the RCMP seized the opportunity to settle old scores with Communists in Canada in the name of protecting national security.

Following the bombing of Pearl Harbour on 7 December 1941, the Canadian Government issued an Order in Council authorizing the removal of enemy aliens from areas within 100 miles of the Western coast. When this was implemented in March of 1943, 22,000 Japanese Canadians were given 24 hours notice before being moved to internment camps (Caccia 2010). The internment of the Japanese was different from other groups because the process of exclusion was deeper and more severe. For example, the property of interned individuals was confiscated by the government and sold in order to fund the internment. A further example of the depth of the stigmatization, as well as the tenacity of the exclusion, is that while interned Austrian and Italian Canadians were being released as early as 1941, and many German Canadians were being released in 1943, interned Japanese Canadians were not allowed to return to Vancouver until 1949.

Along with establishing policies directed toward enemy aliens living within Canada, the government was forced to make important decisions regarding the immigration of displaced persons into Canada following the war. This issue was particularly vexing because ardent Nazis and suspected war criminals were likely to attempt to enter into Western nations, including Canada, amidst the tide of refugees. The

Allies initially conducted military screening of these refugees to determine whether an individual was a collaborator, perpetrated war crimes, volunteered for service in the German army, or was a *Volkdeutsch* (Margolin 2000b:11). Such screenings began almost immediately after the Allied invasion of Europe, and intensified as territory was gained and prisoners captured. The main issue became a lack of both physical and human resources to screen thousands of refugees who were converging into camps. The following daily report issued by an interrogator in one of the screening camps illustrates how officials became overwhelmed by the sheer volume of cases:

With the approach of winter the accommodation situation for Camp 030 is becoming increasingly difficult. Quarters have to be found in which the comparatively sedentary work of interrogation can be carried out and furthermore some kind of suitable accommodation has to be provided for the increasing number of detainees. The accommodation and segregation of known German agents is a constant source of difficulty and though arrangements have been made for this category to be confined in prison of ANTWERP the already overcrowded state of this prison renders the complete segregation of individuals impossible.¹¹⁰

With segregation of detainees quickly becoming impossible, the likelihood of receiving unprejudiced information from the individuals in the camp was seriously undermined.

Large numbers of displaced persons moved throughout Europe, leading to a massive refugee crisis (Margolin 2000b). Largely due to pressure exerted by Allied nations to accept refugees with the goal of alleviating an emerging displaced persons crisis, immigration laws were gradually relaxed, and approximately one million people left Europe for Canada. Canadian immigration procedures were directed toward screening out “unsatisfactory” groups such as:

¹¹⁰ RG 24 Vol 16, 408 File 2383 #5 Canadian Interrogation Team (Camp 030), Oct 31 1944 in “General Comments.”

Anyone who had collaborated with the enemy during 1939-45, had past connections with a foreign intelligence service, had demonstrated sympathy with fascism, Nazism, or any other undesirable political tenets (including, presumably, communism), or was seeking asylum from a country with a duly constituted government. (Margolian 2000b:39)

This marked a complete change in approach from immigration policies that dealt with possible war criminals entering into Canada after the First World War, as voluntary membership in particular groups replaced what were presumed to be ascribed racial categories at the core of the criminalization process. Individuals were simply never asked whether they had committed war crimes.¹¹¹ Rather than attempting to exclude all Germans through immigration guidelines, the Canadian government actively courted select groups (such as scientists) that were identified as being able to benefit Canada.

Although race was removed from discussion of war crimes and war criminals, ethnicity, which refers to a group of people with shared traditions and heritage, emerged as a key issue. Following the war, when the sheer number of immigrants quickly overwhelmed immigration officials, very few immigrants were adequately screened, and the vast majority was cleared within 14 days (Matas and Charendoff 1987). One group that initially did not gain entry into Canada was the Galicia Division, a group of Ukrainians who voluntarily entered into the Waffen SS. While the group settled in the United Kingdom, the status of their application was hotly debated among Canadian officials, who in 1947 once again denied their request to enter Canada. However, their application for admittance into Canada was brought before the House of Commons in 1950 by Liberal backbencher John Decore, and the prohibition against their entry was

¹¹¹ This omission became important during the contemporary era, and the implications of this will be discussed in Section 8.1.

lifted. While this move was popular among the Ukrainian community in Canada, who argued that the unit did not participate in any war crimes (McCarrick 1990: 172), the Jewish community was stunned by the decision (Troper and Weinfeld 1988).

Procedures that came into being during this time were designed to screen out groups espousing ideologies that were repugnant to Canadian values. However, one group that bypassed screening procedures when entering into Canada was former German scientists. Under the name “Operation Matchbox”, 20 German scientists, some of whom had previously utilized slave labour while working for companies such as I.G. Faben, were secretly sent to Canada by British intelligence (Hunt 1991: 35). By the time the Deschênes Commission investigated the matter in 1985, the secret section of the Commission’s final report listed 55 German scientists who were covertly living in Canada. The decision to allow German scientists who had utilized slave labour into Canada, coupled with inadequate screening mechanisms for immigrants at the close of Second World War, set the stage for the further re-formulation of war crimes and war criminals that occurred during the contemporary era.

Summary of Section IV

Domestic pressures initially had a greater impact than international law in the Canadian criminalization of war crimes during the Second World War era. Although the Canadian government preferred to keep international tribunals at an arm’s length, pressure from Canadian citizens to hold individuals responsible for the mistreatment of Canadian prisoners led to creation of an Order in Council that provided the legal basis for Canadian

war crimes trials. This legislation could not be applied in the Pacific Theatre of war due to the fact that Canada had no occupation force in place, so Canada's participation in war crimes trials in the Pacific Theatre was limited to sending legal representatives and advisors to war crimes trials held by the British under authority of the Royal Warrant. Even when the Canadian legislation led to the formation of Canadian trials, it was applied by military judges and lawyers. The Canadian criminalization of war crimes thus played out across three distinct legal systems: Canadian civilian law, British military law, and Canadian military law.

From the perspective of civilian jurists in Canada, war criminals were ordinary people caught in extraordinary circumstances. External factors, specifically carnage of war, became the *sine qua non* of this highly contextualized account of the nature war crimes. Immigration screening protocols implemented during the post war period drew upon similar assumptions, as individuals were excluded from immigration to Canada on the basis of voluntary (association with Nazi regime, political affiliation) rather than compulsory (military service, German citizenship) factors. However, military personnel charged with carrying out Canadian war crimes trials operated under a different set of assumptions regarding war crimes. External factors, such as duress and superior orders, were not given any weight during Canadian war crimes trials. The small number of individuals who stood accused (particularly those who were defendants in trials held by the Canadian Air Force) became symbolic representations of all those who committed war crimes against Canadians during the war, and were subjected to harsh sentences.

Canadians were categorically excluded when war criminals were defined as members of "uncivilized" races. However, Canadians could conceivably be war

criminals if such individuals were conceptualized as ordinary people caught in extraordinary circumstances. Although the net of criminalization did not widen to the point in which Canadian were prosecuted for war crimes committed against the enemy, a very small number of Canadians were charged with crimes committed against Canadian prisoners of war. In all instances the prosecutions were conducted under British law for offences stemming in Pacific Theatre and, despite the fact that the prosecution of Canadians stemmed from the mistreatment of Canadian prisoners of war, the defendants were prosecuted for a series of individual offences under British military law rather than war crimes. This was largely due to the fact that the Royal Warrant was directed solely toward members of enemy nations. However, the structure of the Royal Warrant, and the lack of prosecutions for Allied soldiers who had committed war crimes, suggests that a residual categorization of war criminals as being the enemy “other” continued to shape war crimes policy and legal practice.

A further residual categorization was evident in the exclusion of groups of Canadians on the basis of ethnic identity. During the war, individuals of German, Italian and Japanese heritage were subjected to forced relocation into internment camps. Racism was a significant factor during this component of the criminalization process, as Japanese individuals were interned for a longer period of time than other groups, and land and property owned by Japanese individuals was confiscated in order to pay for their internment. The belief system of RCMP leaders contributed to a significant widening of the net of criminalization, as Communist groups were selectively targeted for surveillance under policies designed to protect Canada from enemy saboteurs.

Although the assumption that anyone could be a war criminal underpinned the establishment of Canadian war crimes legislation, the criminalization process was specifically directed toward either external threats (enemy soldiers prosecuted for war crimes, unwanted groups attempting to enter into Canada in the post war era) or marginalized groups within Canada (ethnic groups originating from enemy nations, communists). War criminals were thus outside of the boundaries of Canadian identity, and the belief that Canadians would never commit war crimes was buttressed by the Canadian criminalization process. The prosecution of Canadians under British law posed significant challenges to the notion that Canadians would never commit war crimes. However, the belief that war criminals were ordinary people caught in extraordinary circumstances, which was all but abandoned in Canadian war crimes trials held in the European Theatre, once again emerged during the Winnipeg trials. The belief that war criminals were an external threat was preserved on two bases: (1) the accused were not specifically charged with war crimes; and (2) the context (Japanese POW camps) was interpreted as being the cause of criminal conduct, which meant that the accused would return to being upstanding citizens once the war was over and they were on Canadian soil. The trial of Inouye also failed to significantly challenge the belief that war criminals were an external threat because in the end the locus of his crime was an undying loyalty to Japan.

Section V: The Contemporary Era

With the goal of establishing a larger context in which Canadian policies toward war crimes and war criminals were formulated, Chapter 7 begins with an overview of important changes in relevant international law that occurred in the post World War II era. During the Cold War era key Conventions were passed by the United Nations, but the bitter division between Eastern and Western nations meant that the dream of an international court was beyond reach. However, domestic courts were used to prosecute Nazi-era war criminals. The end of the Cold War marked a new phase of international justice. International Criminal Tribunals were held following genocides in the former Yugoslavia and Rwanda, and the passage of the Rome Statute led to the establishment of the International Criminal Court.

Chapter 8 provides an overview of key developments in the Canadian criminalization of war crimes, crimes against humanity and genocide during the contemporary era. This includes an account of why the Deschênes Commission was formed, the ways in which this Commission formulated its recommendations, and the impact of these recommendations upon the criminalization of war crimes, crimes against humanity and genocide in Canada; an analysis of the trial of Imre Finta and the impact of the not guilty verdict; the creation and application of new war crimes legislation based upon the tenet of the Rome Statute; and the prosecution of Canadian soldiers stemming from events in Somalia inquiry and Afghanistan. The prosecution of Canadian soldiers posed a significant challenge to the assumption that war criminals are an external threat, and the construction of a Canadian identity that precluded war criminals.

Chapter 7

The International Criminalization of War Crimes in the Contemporary Era

During the First and Second World Wars, the Canadian criminalization of war crimes and the international criminalization process crystallized at the same historic moment.

However, the contemporary era in the criminalization of war crimes in Canada began with the Deschênes Commission which, although groundbreaking, was not a watershed in international law. This chapter will address this issue by dividing the international criminalization into two eras based upon the rise and fall of the Cold War. During the Cold War era (circa 1947-1989), the most important developments in the international criminalization process were the birth of the Genocide Convention and the Universal Declaration of Human Rights, and the use of domestic courts in the trial of Nazi-era war criminals. The most significant developments in the international criminalization process following the end of the Cold War were the birth of international criminal tribunals in the former Yugoslavia and Rwanda, the passage of the Rome Statute, and the establishment of the International Criminal Court.

7.1 “Any peace loving civilization”: Key Developments in International Law during the Cold War Era

As was the case during the First and Second World War eras, Canadian responses to war crimes and war criminals during the contemporary era were situated within key developments in international law. Among these developments was the formation of the United Nations, which led to the passage of the Genocide Convention and the Universal

Declaration of Human Rights; the use of domestic courts to try war criminals; the establishment of international tribunals following genocides in Rwanda and the former Yugoslavia; the creation of the International Criminal Court; and the widening and extension of the criminalization process through the inclusion of non-state combatants and the application of universal jurisdiction by domestic courts.

The Nuremberg Trials provided a brief glimmer of hope to individuals who pressed to try to establish a permanent international criminal court. However, in light of the politics of the Cold War—which polarized the two competing world powers—it was quickly apparent that such a court would not be established (Hagan and Greer 2002). Furthermore, with the onset of the Cold War in the late 1940's, which prompted the need to establish a strong, democratic Germany to buffer Europe from the spread of communism from the East, the political will to continue prosecuting Nazi perpetrators all but evaporated. Governments of the Commonwealth received a telegram on 13 July 1948 from the British Commonwealth Relations Office asking them to cease prosecutions of Nazi war criminals. The British provided the following rationale for this decision:

Punishment of war crimes is more a matter of discouraging future generations than of meting out retribution to every guilty individual...it is now necessary to dispose of the past as soon as possible. (cited in Purvis 1998: 2)

The necessity to dispose of the past stemmed from the fact that the continuing war crimes trials were unpopular amongst German citizens. In fact, many German citizens pointed to ruined and bombed out cities, occupation by foreign powers, and the loss of loved ones during the war (including many who were alive but enslaved in Russian work camps) to argue that they were, in fact, victims (Kellenbach 2003). The continuing trials were

viewed by many Germans as yet another example of their continued victimization during the post-war era.

Despite the fact that the implementation of an international court was put on hold once again, the formation of the United Nations in 1945 led to other key international developments related to the prosecution of war crimes and crimes against humanity, such as Universal Declaration of Human Rights (which was ratified on 10 December 1948) and the International Convention on the Prevention and Punishment of the Crime of Genocide (ratified on 9 December 1948). The language within the Universal Declaration of Human Rights embodied an important shift with regard to how the category “war criminal” was constructed. The preamble of the document states that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.” Individuals who commit barbarous act, such as war crimes, crimes against humanity and genocide do so because they have a disregard the rights of others. This is a dramatic shift away from the nineteenth and early twentieth century perspective that such acts were committed by barbaric individuals from inferior races. The ratification of the Universal Declaration of Human Rights set the stage for Non-Governmental Organizations to track human rights abuses and draw attention to atrocities. This increased scrutiny represented an important “soft control,” because public pressure could be brought to bear upon groups engaged in genocidal action and human rights abuses (Maogoto 2004: 134).

The issue of *ex post facto* law plagued war crimes trials following both the First and Second World Wars. The passage of the Convention on the Prevention and Punishment of the Crime of Genocide (commonly known as the Genocide Convention)

on 9 December 1948 provided a legal basis for the prosecution of perpetrators of genocide, which was defined as the intended destruction of national, ethnic, racial or religious groups. The Genocide Convention formed both a legal basis under international law to treat genocide as a crime, and universal jurisdiction for its punishment (Van der Vyver 1999: 287). While the Holocaust clearly influenced the formation of the Genocide Convention, the Cold War was a lesser known but equally important driving force behind the terms of the final agreement. Neither the United States nor the Soviet Union would endorse articles that would lead to criticism or condemnation of their conduct (Lippman 1998). For example, Soviet influence prevented political groups from being listed alongside national, ethnical, racial, and religious groups within the convention (Power 2002). The Genocide Convention was thus simultaneously progressive and regressive. It was progressive in the sense that it provided a legal means to prosecute individuals who were involved in carrying out genocide. On the other hand, the Genocide Convention was regressive in that it excluded the types of crimes likely to be committed by the most powerful nations which, in effect, reinforced the belief in the West that perpetrators of such crimes were part of “other” nations (i.e. the types of state crimes committed by less powerful nations were criminalized, while the types of state crimes committed by the most powerful nations were not).

Although major powers such as Great Britain, the United States and Russia had agreed that war crimes trials would close with the end of international tribunals in 1948, the call for the punishment of war criminals did not end. While the direction of the criminalization of war criminals was established through the Human Rights and Genocide Conventions, as well as the precedents set through the Nuremberg and Tokyo

Tribunals, the lack of a permanent international court meant that war crimes trials had to be conducted in domestic courts. Furthermore, due to the lack of political will to pursue cases against Nazi war criminals, it was left to motivated groups and individuals to advocate for such trials. The most important of such individuals was Simon Wiesenthal, who was a concentration camp survivor. At the close of the war, Wiesenthal had established the Jewish Historical Documentation Center to gather evidence for the prosecution of Nazi war criminals. However, when the political will to continue such prosecutions ended, Wiesenthal turned over all of the files except one, that of Adolf Eichmann, to the Yad Vashem Archives in Israel. The evidence that Wiesenthal continued to collect led to Eichmann's capture and arrest in Buenos Aires in 1960, and a subsequent trial in Israel in 1961.¹¹²

The Eichmann trial led to moral questions regarding the nature of war criminals as well as legal questions regarding their apprehension and punishment. Eichmann was a bureaucrat who was involved in “almost all aspects of the concentration camps,” from transportation of groups targeted for extermination to the concentration camps, to selecting locations for the camps, providing supplies and issuing orders to kill (Lippman 1982: 4). Despite the fact that Eichmann's influence was evident at all stages of a killing process that led to the deaths of millions of people, during the trial—which was broadcast in Israel—he appeared to be an ordinary individual. While individuals accused of war crimes and crimes against humanity had in the past been conceived as being barbaric or uncivilized, the killing machine of the Third Reich was largely run by petty bureaucrats

¹¹² Success in bringing Eichmann to justice led Wiesenthal to continue hunting former Nazis and, by the time of his death in 2005, Wiesenthal had been involved with the capture of more than 1,100 Nazi war criminals.

who approached the task of extermination in the exact same way that they would approach running an efficient factory (Bauman 1989). There was a “banality of evil” among individuals like Eichmann that was marked by a dispassionate approach to mass murder (Arendt 1963).

Although international law established the general direction of the criminalization of war crimes, the prosecution of war criminals in domestic courts meant that the socio-historic setting of the nation hosting the trial influenced how the criminalization process played out. For example, although the fact that Eichmann should stand trial was not disputed, the fact that the trial would take place in Israel, which did not exist at the time of Eichmann’s offenses, raised important legal questions relating to jurisdiction. The principle of universal jurisdiction, which allows a sovereign state to prosecute crimes outside of its territorial boundaries, was applied to this case by the trial judges and upheld by the Supreme Court of Israel. While universal jurisdiction had been applied predominantly to crimes such as piracy and the slave trade, the Israeli courts ruled that the Genocide Convention extends this principle to crimes against humanity. This interpretation of universal jurisdiction is questionable because no convention regarding universal jurisdiction had ever been ratified (Reydams 2003a: 16) and, as a result, the application of universal jurisdiction had not been well established in either domestic or international law (see Reydams 2003b; Reydams 2003c; Bassiouni 2001: 83). The inherent issues regarding universal jurisdiction were compounded because Eichmann was abducted by Israeli agents while living in Argentina, and brought to Israel to stand trial. The response of the Argentine government was to demand Eichmann’s immediate release and extradition to Argentina as well as the extradition of those who carried out the

capture (Lippman 1982: 7). Although these demands were not ultimately met, the debate regarding this issue reached the United Nations, where Argentina presented the case that all states should condemn the Eichmann proceedings on the basis that they threaten the safety and security of all refugees and immigrants “who seek protection outside of their native land” (cited in Lippman 1982: 9).

Other issues, including whether an international tribunal was a more appropriate venue for dealing with the Eichmann case than an Israeli court, and regarding whether a domestic Israeli court could render a fair verdict, were also hotly debated both inside and outside of Israel (Arendt 1963). These issues were well founded with respect to the main motivations for the capture and trial of Eichmann, which were more closely related to themes of Holocaust education, remembrance, and group unity than to justice:

The Israeli government perceived the trial as a vehicle for educating the peoples of the world—and Jews in particular—concerning the dangers of totalitarianism, to chronicle the suffering of the Jews during the Third Reich, and to demonstrate the justification and necessity for the Jewish state of Israel. (Lippman 1982: 12)

From a legal standpoint, the state of Israel had appropriated the right to speak on behalf of all Jews murdered during the Holocaust—a right that was not challenged by European states at the time, or by Jewish groups who could have petitioned the court for separate representation during the proceedings (Shapira 2004). In an exchange between the defense and prosecution at the outset of the trial, the defense argued that despite the fact that Eichmann’s crimes were against the human race, the fact that Eichmann lived as a law-abiding citizen after the war showed that “humanity is under no danger from Eichmann” (cited in Lippman 1982: 22). The prosecution rebuffed that “any peace loving civilization has the right, nay the duty, to try a person charged with crimes against

humanity” (cited in Lippman 1982: 22). Eichmann was charged and tried and convicted on all counts under Israel’s Nazis and Nazi Collaborators (Punishment) Act of 1950, which deals with “crimes against the Jewish people,” “crimes against humanity” or any “war crime” that was perpetrated by Nazis and their accomplices in any country of Europe under the Nazi regime.¹¹³ He was executed at a prison in Israel on 31 May 1962.

The influence of international law upon domestic criminalization processes varied from nation-state to nation-state. For example, a series of war crimes trials were initiated in West Germany only months after the Eichmann verdict. These trials came into being largely as a mechanism to offset possible political fallout stemming from the fact that other nations were charging Nazi war criminals while West Germany was not (Lipmann 1982; Arendt 1963). The most important of these trials was the Frankfurt Auschwitz trial, in which key individuals who were directly involved in the killing process at Auschwitz were placed on trial at Frankfurt from 1963-65. The Frankfurt Auschwitz trial, like the Eichmann trial, illustrated the importance of venue. Rather than being rooted in Control Council Law No. 10,¹¹⁴ this trial was instead grounded within German laws that were in effect during the time of the Second World War. The decision to utilize existing law over Control Law No. 10 stemmed from several factors: 1) the German criminal code that had been entrenched since 1871 was in effect during the entire period of Nazi rule, and contained prohibitions against murder that could form the basis of the

¹¹³ Eichmann was charged with four counts of Crimes against the Jewish People, three counts of Crimes against Humanity directed against the Jews, four counts of Crimes against Humanity directed at other groups, three counts of membership in a “hostile criminal organization” and one count of War Crimes.

¹¹⁴ The Control Council was made up of commanders from each of the four post-war occupation zones. The IMT at Nuremberg, which focused upon “arch criminals”, proceeded under the authority of the London Charter. Control Council Law No. 10 utilized the legal framework established at the IMT, and provided the legal basis for further prosecutions of individuals accused of war crimes who were not considered to be arch criminals by the IMT.

trial; 2) the German constitution, which was suspended only from the period of 1945-1949, expressly prohibited retroactive laws, including those established at the IMT; 3) the German judiciary was increasingly reluctant to work under the constraints of laws imposed by foreign powers, which led to the eventual prohibition of the use of Control Council Law No. 10 in German courts in 1951, and 4) German citizens often viewed de-Nazification proceedings enacted under Control Council Law No. 10 as being unjust (Wittmann 2003).

The criminalization of war crimes in Germany, and through domestic German law rather than international law, had a profound influence upon both the types of charges found in the indictment and the purpose of the trial. Stemming from a strict focus on categories of crime, as well related mitigating factors and punishments, found within German Penal Code of 1871, charges of war crimes and crimes against humanity were not used in the proceedings. Furthermore, while the IMT held at the end of the Second World War was self-consciously concerned with establishing an accurate history and catalogue of Nazi war crimes that could be used by future generations (Conot 1993), the local courts at Frankfurt were only interested in establishing criminal responsibility under German Law.¹¹⁵ In this way, the Frankfurt trials differ considerably from the domestically run war crimes in Turkey following the First World War, which established an historically invaluable catalogue of crimes committed against the Armenians.

The decision to utilize the German Penal Code of 1871 as the basis of the trial had important repercussions both in terms of who would be found guilty, and the nature of

¹¹⁵ A report was prepared by historians that outlined the history of the Nazi movement and the concentration camps, later published in book form as *The Anatomy of the SS State* (Krausnick and Broszat 1970), was not used during the proceedings because the judges did not view it as being relevant (Arendt 1966).

that guilt. German legislation relating to murder makes an important distinction between principal perpetrators and accomplices which significantly influenced the course and outcome of the trial. The category of principal perpetrator is considered to be far more serious than accomplice, and the latter was the foundation of charges against those accused at Frankfurt. Guilt under the greater charge is established by showing individual initiative on the part of the offender, and motivations are interpreted as resulting from the individual disposition of the offender: “lust for killing, sexual desire, treachery, cruelty, and other base motives” (German Penal Code Para 211, cited in Wittmann 2003: 511). The novelty of the Frankfurt Auschwitz trial was that former Nazi guards stood trial for violating the domestic legal norms and regulations that were in place under the Nazis, rather than for violating international law (Pendas 2006).

Although the entire Auschwitz complex was the intended target of the prosecution, reliance upon the German Penal Code limited the conditions for successful prosecution to proving individual guilt: individuals were found guilty only if they engaged in killing outside of the established parameters of German law and camp regulations. Wittmann (2003) correctly notes that a paradox developed at the Frankfurt Trials: as prosecutors came closer to achieving a conviction by the standards of German law, which focused upon individual guilt and inner motivation of the perpetrators, the trial became increasingly removed from understanding the horrors of state sanctioned mass murder. In the end, while all were charged with the greater offense, the majority of the defendants were found guilty only of the lesser offense, and the structure of Auschwitz complex was never put on trial.

7.2 “An opportunity has been regained”: Key developments in International Law following the Cold War Era

The end of the Cold War, symbolized by the destruction of the Berlin Wall in 1989, led to a renewed focus on international measures for dealing with war crimes and genocide. A sense of optimism developed surrounding the potential of international law to deal with difficult issues, as is evidenced in a speech given to the United Nations in 1992 by then Security General Boutros Boutros-Ghali:

[A]n opportunity has been regained to achieve the great objectives of the UN Charter—a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, “social progress and better standards of life in larger freedom.” (cited in Maogoto 2004: 143)

The opportunity for change in the ways in which the UN Charter could be applied described by Boutros-Ghali was immediately apparent. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY) was formed in 1993 under Chapter VII of the UN Charter.

There was concern among member states of the UN that the implementation of a war crimes tribunal could prolong the conflict. However, the view that such a tribunal was necessary eventually won out,¹¹⁶ despite protest from the Republic of Yugoslavia that such war crimes trials were a matter for domestic courts. Three reasons are commonly presented to explain the establishment the ICTY: (1) it deflected criticism that

¹¹⁶ Negotiations were not possible with the prospect of such a tribunal on the table, and the end result was that the investigative body of the ICTY was drastically under-funded, receiving only \$1.3 Million to carry out their investigations (Maogoto 2004: 153). This led to the termination of the Commission of Experts in April of 1993, which had the effect of obstructing the prosecution of high ranking officials (Bassiouni 1993).

more direct measures were not taken to prevent or end the conflict, (2) domestic courts were unwilling or unable to deal with the perpetrators of war crimes and genocide, and (3) a great deal of international pressure to “do something” about the alleged atrocities arose as a result of a public awareness campaign launched by NGOs:

The ICTY was not established because of the intrinsic value of punishing war or of upholding the rule of law; rather, it came about as a result of the mobilization of NGOs. (Maogoto 2004:145)

Despite the success of NGOs and dedicated individuals in establishing the ICTY, however, the lasting legacy of the Cold War immediately made its mark on the process. The group charged with creating the ICTY and making it work had only the Nuremberg Charter and CCL No. 10 as models, and these legal instruments were 50 years old and hardly contemporary (Johnson 2004: 369).

While the laws and customs of war could be viewed as falling within *jus cogens*,¹¹⁷ the procedures for the prosecution of offenses relating to such laws is far from clear. Although the ICTY explicitly rejected “progressive” interpretations of international law, instead opting to carefully root itself within existing customs and procedures (Johnston 2004: 371), 154 rules of procedure and evidence were created (Meron 2004: 521). Furthermore, such rules continued to shift and evolve based on practical experience within the courtroom. Judicial decisions also greatly impact on existing international laws. William Fenrick (1998: 78) argued that:

Judicial decisions affect the development of the law of armed conflict insofar as they address legal lacunae (treaty negotiators can and do accept gaps in the law—judges cannot), as they add flesh to the bare bones of treaty provisions or to

¹¹⁷ *Jus cogens* refers to a principle or norm within international law that is viewed as being fundamental, and that it may not be violated by any country.

skeletal legal concepts such as military necessity or proportionality, and as they identify and give legitimacy to new legal developments, such as emergent custom.

In terms of both procedure and the development of international law, the work of the ICTY thus established important legal precedents.

One of the most important of the emergent legal precedents established by the ICTY is the treatment of rape as a category of offense. The “ethnic cleansing” that occurred in the former Yugoslavia, which involved the systematic mass rape of thousands of women (particularly in Bosnia-Herzegovina), drew global media attention. Intense pressure was exerted upon the creators of the ICTY by NGOs and feminist organizations to alter the ways in which rape had (and often had not) been prosecuted by past war crimes tribunals (Engel 2005). Although the prohibition against rape was well established within the customary laws of war,¹¹⁸ and was thus already criminalized (in a limited sense), rape never appeared among the list of indictments during war crimes trials prior to the ICTY (Niarchos 1995).¹¹⁹ In the final analysis, while the inclusion of rape as a specific indictable offence within the ICTY Charter did not create an entirely new direction for international law (Engel 2005), it did effectively broaden categories of

¹¹⁸ Theodor Meron (1993: 425) points out that the military codes of Richard II (1385) and Henry V (1419) included prohibitions against rape, as did the Lieber Code (1863), and rape committed by soldiers under “individual volition” had been commonly prosecuted in national courts. Matthew Lippman (1997: 158) cites the inclusion of rape as a category of crimes against humanity (along with murder and perjury) in the von Hagenbach trial of 1474. Rape is addressed in Article 27 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which describes the offenses against women that include “any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.”

¹¹⁹ For example, article 1(c) of CCL No. 10 makes explicit reference to rape as a crime against humanity,¹¹⁹ but the position of rape as a category of offense during the Nuremberg proceedings was ambiguous due to the linkage between crimes against humanity and conflict, the emphasis placed on crimes motivated on racial, ethnic or religious grounds, the fact that a population rather than an individual had to be targeted, and the necessity to prove high level government planning in order to sustain the charge of rape being a crime against humanity (Chinken 1994: 8).

crimes against humanity and genocide to include the systematic use of rape to destroy the “social viability” of a particular ethnic group (Card 2003: 73).

Despite the fact that critical new ground was broken in terms of the prosecution of war crimes, issues emerged from the outset of the ICTY. Judges and prosecutors were frustrated by the lack of evidence that had been collected in the first eight months of the ICTY’s existence (Goldstone 2004), and very few people, including the appointed judges, believed that the court would ever become fully operational (Casses 2004). As Jonathon Charney (1996: 64) points out, the authority of the newly established tribunal was challenged in the prosecution of Duško Tadić, which was the first case heard before the ICTY, on three grounds: (1) the UN Security Council did not have the authority to establish the tribunal, (2) the ICTY’s jurisdiction over national courts was unlawful, and (3) Articles 2, 3 and 5 of the ICTY Charter¹²⁰ relate only to international armed conflict, while the conflict in the former Yugoslavia was a domestic conflict. The objections were overruled and the judges determined that Chapter VII of the UN Charter allows such tribunals to take primacy over domestic courts, that crimes of such magnitude could best be tried in an international court, and that the Geneva Convention accounts for grave breaches of the laws and customs of war in both an international and domestic setting.¹²¹ Despite this favourable ruling, prosecutors were hindered by issues related to gathering evidence, hostile public opinion fueled by the media, and arresting individuals once evidence had been gathered (Harmon and Gaynor 2004). The entire proceedings were

¹²⁰ Article 2 of the Charter relates to grave breaches of international law, Article 3 relates to violations of the laws and customs of war, and Article 5 relates to crimes against humanity.

¹²¹ The individuals drafting the Charter for the ICTY had taken such possible criticisms into account, and only included crimes that were within the scope of customary laws of war. Larry Johnson (2004: 370) points out that Common Article 3 of the Geneva Convention, which had never been used in cases relating to individual criminal responsibility, and the Additional Protocols of 1977, which had not been ratified by all states, were excluded.

also marred by spiraling costs associated with multi-year cases with an average legal defense cost of \$360,000 per year, per case (de Bertano 2004).¹²²

A second instance of genocide which captured global attention shortly after the end of the Cold War occurred in Rwanda in 1994. Faced with criticism once again for inaction during the genocide, in 1995 the United Nations established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January 1994 and 31 December 1994 (ICTR) in Tanzania to try those accused of the most serious crimes stemming from the Rwandan genocide. The statute of the ICTR is similar to that of the ICTY in most respects,¹²³ the exceptions being that the ICTR did not require proof that an armed conflict took place in order to establish a foundation for crimes against humanity, and that crimes against humanity in the ICTR were more clearly linked to group policies than individual decisions (Badar 2004: 87).

Like the ICTY, the ICTR was only able to prosecute a small number of cases (Yacoubian 2001). The slow and very expensive proceedings, expensive prosecutions occurred in a court in Tanzania, and had little impact upon average Rwandan citizens:

The largest part of the population, however, has little or no opinion on the matter, largely because it has little or no knowledge of the ICTR. The main sentiment in Rwanda regarding the ICTR may well be massive ignorance:

¹²² The initial legal defense budget was set at \$200 per defendant per day, which led to issues relating to whether the court has met the mandate of ensuring that the accused has adequate representation in the court.

¹²³ An interesting feature of the statutes of both the ICTY and the ICTR is that the death penalty is not a sentencing option, which distinguishes these tribunals from the Nuremberg proceedings.

ordinary people know or understand next to nothing about the tribunal's work, proceedings, or results. (Ulvin and Mironko 2003: 221)

An added dimension to dealing with war crimes that occurred during the Rwandan genocide was the sheer number of suspected perpetrators: approximately 125,000 individuals were initially detained to await trial, and thousands of other individuals either committed suicide prior to standing trial or fled the country before charges could be laid. Vandeginste (2003:251) noted that "from a purely quantitative perspective, it is extremely difficult to organize criminal trials against the suspected perpetrators within a reasonable period of time." The collection of evidence was a project of staggering proportions, and there was acknowledgement that adequate resources to fully complete the tasks at hand were simply not available. To deal with such issues, Rwanda turned to using informal *gacaca* courts (which literally means "justice on the grass"), and international aid poured in to help bolster the local Rwandan justice system. The recognized strengths of the *gacaca* courts and domestic trials were the ample availability of witnesses and evidence, the avoidance of excessive costs associated with international trials, and the ability of local judges and lawyers to fully understand the crimes that were being prosecuted (Cassese 2004:4-6). The weaknesses of these informal courts included issues related to retroactivity, definitions of crimes, due process and fairness of trials, and possible interference from political authorities (Fierens 2005).

The establishment and success of International Criminal Courts following the genocides in the former Yugoslavia and Rwanda strengthened the argument that a permanent International Criminal Court was needed. The first step in the process of creating the International Criminal Court (ICC) was the adoption of the Rome Statute in

1998. The Rome Statute established ICC jurisdiction over crimes against humanity, genocide, war crimes, and the crime of aggression. Nations that signed the Rome Statute were obligated to modify their individual criminal codes in three fundamental ways: (1) criminal codes were to be amended to include crimes against humanity, genocide, and war crimes, (2) the definitions of such crimes were to be consistent with those found in the Rome Statute, and (3) provisions for the transfer of individuals accused of such crimes to the ICC were to be put into place. The requirement that states include crimes against humanity, genocide and war crimes within their respective criminal codes reflects the fact that individual state courts are often the most effective mechanism for dealing with such crimes (Kaul 2005).

Although the final United Nations vote related to the adoption of the Rome Statute was 120 in favour and 7 against,¹²⁴ the Rome Statute and the establishment of the ICC were by no means a foregone conclusion. When Bill Clinton was president, the United States, which pays for approximately one-quarter of the total budget of the United Nations, signed the Rome Statute. However, the document was “unsigned” by George Bush when he took office. Bush’s fear was that American citizens could face charges abroad for actions condoned by their government, and he lobbied to include exemptions from the jurisdiction of the court for certain state officials (Leigh 2001: 124).¹²⁵

The adoption of the Rome Statute led to the formal establishment of the International Criminal Court (ICC) in 2002, which is mandated to prosecute genocide, war crimes and

¹²⁴ Those voting against were the United States, Iran, Iraq, China, Israel, Sudan and Libya.

¹²⁵ There is a significant debate regarding the position of the US with respect to the Rome Statute. Some legal scholars have advanced the position that the US could not sign the Statute in the form that was presented (e.g. Leigh 2001) while other commentators are more critical of the US position (e.g. Axworthy 2003). In the wake of the Rome Statute and the creation of the ICC the United States, under President Bush, has established a series of multilateral non-surrender agreements with assorted nations (for a detailed overview of this process and its implication see Tan 2004).

crimes against humanity, and to end impunity for such major crimes. The jurisdiction of the court is both expansive in terms of ending impunity and decreasing the occurrence of such crimes, and reductive in the sense that it respects existing state sovereignty and is only called to action if existing courts cannot, or will not, prosecute crimes of the greatest magnitude (Nissel 2003). Despite this clear mandate, contentious issues have emerged with regard to the jurisdiction of the ICC including the question of whether amnesties granted by a sovereign state to individuals, such as those who testify before a national Truth and Reconciliation Commission, extend to the ICC.¹²⁶ Such issues reflect an ongoing tension in which the criminalization of a group or individual under international law may not extend to domestic law, and vice versa.

The ICC effectively widened the net of the criminalization of war crimes, crimes against humanity and genocide to include extra-state combatants. International law is deeply rooted in international legal customs and state sovereignty, and relies to a large degree upon international pressure and state motivations to uphold a positive international image. However, developments relying on these principles have traditionally been poorly equipped to deal with extra-state combatants operating outside the boundaries of sovereign states, such as the Freikorps in Germany following the First World War or the Lord's Resistance Army (LRA) in Uganda. Hoffman (2002: 107-8) notes that three important limitations to the development of international justice in the Twentieth Century arise when dealing with these extra-state combatants: a) states are reluctant to bring emerging combatants into the international legal system, b) states are also reluctant to commit military resources to end war crime, and c) emerging combatants

¹²⁶ The literature related to this question is extensive. A balanced overview of this issue can be found in Newman (2004).

are not interested in acceptance by, or membership in, the international community.

However, the ICC, which is not encumbered by such limitations, issued arrest warrants for five LRA leaders in 2005 on charges of war crimes and crimes against humanity. The reason these indictments were possible is that the jurisdiction of the court was directly rooted to the particular crimes in question, and was not constrained by national boundaries.

The impact of the Rome Statute upon the criminalization process is not limited to cases which are directly heard by the ICC. The jurisdiction of the ICC is carefully limited to cases in which a domestic legal system cannot, or will not, prosecute individuals for war crimes, crimes against humanity and genocide. However, the ICC has drawn significant attention to such crimes, which has led to public pressure to “do something” about notorious war criminals who are at large. The result has been an increase in usage of “universal jurisdiction,” which is defined as “the jurisdiction of a state to prosecute and punish foreigners who commit crimes abroad against foreigners” (Reydams 2003a:1), to deal with war criminals. Initially utilized to control piracy, and (at a later date) the slave trade, universal jurisdiction has quickly become the preferred method of dealing with war crimes in international law (Bassiouni 2001:82), and more cases involving universal jurisdiction have been initiated in the past decade than in the entire history of international law (Reydams 2003a). The nation state invoking universal jurisdiction to prosecute war criminals within a domestic court is commonly a signatory to the Rome Statute and, as such, the definition of the crime in question found in the criminal code of that nation is identical to the definition found in the Rome Statute.

Thus, domestic courts effectively extend the reach of the ICC with regard to challenging impunity and prosecuting war crimes, crimes against humanity and genocide.

The use of universal jurisdiction as the legal basis for trying cases involving war crimes, genocide, and crimes against humanity has always been problematic and contentious. A common recurring question that continues to haunt such proceedings is whether it is lawful to use domestic courts to prosecute cases in which neither the perpetrator nor the victim is a national (Cassese 2003; Fletcher 2003; and Abi-Saab 2003). A further criticism of universal jurisdiction is that its application is prone to becoming heavily politicized. For example, the 1993 *Act Concerning Grave Breaches in International Humanitarian Law* in Belgium was criticized for being “systematically abused by persons and organizations with their own political agenda” (cited in Reydams 2003c: 679). The two central issues with the original version of this Act were that it did not follow international law with respect to functional immunities for individuals still in office, and that charges could be brought forth by individuals who were not Belgian citizens. Following a confrontation with the United States regarding the possibility of charges being laid against American political leaders for alleged war crimes committed during the invasion of Iraq, Belgium amended the act to bring it into line with regard to diplomatic immunities existing under international law. Lastly, cases utilizing universal jurisdiction are distanced from the location of the crime, leading to issues relating to the collection of evidence, the gathering testimony of witness, the expense of the trial, and the massive gulf that is established between the trials and the victims (i.e. if the victims cannot access the court, and can only read about it through media account, do those who have been wronged feel that justice has been served?).

The modification of the Criminal Code of Canada, which was required following the signing the Rome Statute, was an important step in the criminalization of war crimes in Canada. However, this was not the first attempt to amend domestic law to allow domestic courts to prosecute individuals for war crimes, crimes against humanity and genocide. The contemporary era of the criminalization of war crimes within Canada was, in fact, ushered in with the establishment of the Deschênes Commission in 1985.

Chapter 8

The Canadian Criminalization of War Crimes during the Contemporary Era

During the First World War, war criminals were primarily defined using supposedly biological characteristics such as race, while in the World War II era war criminals were most often viewed as being either victims of circumstance or willing members of criminal organizations. A shift in emphasis occurred by the mid-1980s, and the criminalization process that emerged in Canada was centered upon the belief that war criminals were an external, and largely undefined, mass of individuals. Some of these individuals were either attempting to immigrate to Canada, or had already done so. In this context, the question of why individuals committed war crimes was not addressed. Instead, war criminals were conceptualized as constituting the locus of complex set of material and symbolic risks to the social fabric of Canada. As such, interlocking mechanisms (three war crimes units and seven legal mechanisms) were devised to prevent their entry in to Canada, facilitate their removal from Canada and to mitigate future risks through the prosecution of a small number of war criminals already in the country. Given these circumstances, questions of national security and Canadian identity were at the core of this later criminalization process.

This chapter begins with an overview of why the Deschênes Commission was formed, the ways in which this Commission formulated its recommendations, and the impact of these recommendations upon the criminalization of war crimes, crimes against humanity and genocide in Canada. This is followed by an analysis of the trial of Imre Finta, and the impact of the not guilty verdict upon the criminalization process. The third

portion of this chapter focuses upon the creation and application of new war crimes legislation based upon the tenets of the Rome Statute. Lastly, an analysis of the prosecution of Canadian soldiers stemming from events in Somalia, and the Robert Semrau case, is provided.

8.1 “Made to answer for their crimes”: The Deschênes Commission

The Commission of Inquiry on War Criminals in Canada (most commonly referred to as the Deschênes Commission) was a watershed in the criminalization of war crimes, crimes against humanity and genocide in Canada. Headed by retired Quebec Superior Court judge Jules Deschênes this commission, which was established in 1985, was given the dual mandate of ascertaining how many war criminals were in Canada, and providing recommendations for how to deal with these war criminals.

Although the question of what to do with war criminals was not, for the most part, considered to be a pressing issue in Canada during in the Cold War era, a steady trickle of pre-Deschênes Commission events kept the issue of war criminals (particularly perpetrators of the Holocaust) in the public consciousness. According to Erlean McCarrick (1990: 172), these include: the 1961 trial of Adolf Eichmann; the refusal of the Canadian government to extradite Nazi war criminals to the Soviet Union; the adoption by the United States Congress of the Holtzman amendment, which established the mandate to deport war criminals; the Arab-Israeli war; the airing the television miniseries *Holocaust*; the publication of the book *None is too Many*, written by Irving Abella and Harold Troper in 1982, which carefully documents Canadian policies to restrict Jewish immigration to Canada during the Holocaust; and allegations that Nazi

scientists had been allowed into the country at the end of the war. Two additions can safely be made to this list: the introduction, and subsequent death, of Bill C-215 – An Act Respecting War Criminals in Canada; and the extradition of Helmut Rauca from Canada.

Bill C-215 was introduced to the House of Commons by Liberal MP Robert Kaplan on October 30, 1978. Kaplan was influenced by the lobby of the Canadian Holocaust Remembrance Association, which was led by Sabina Citron, who was a Holocaust survivor. Citron formed this lobby after she had become increasingly disillusioned with what she perceived as the Canadian Jewish Congress's overly political and weak positions with regard to both former Nazis and the growing Neo-Nazi movement (Troper and Weinfeld 1988). The proposed legislation would amend the Canadian Citizenship Act to include a clause that automatically revokes the citizenship of any person convicted of having committed a “grave breach”, which was defined as follows in Article 50 of the 1949 Geneva Convention:

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 Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

However, this private member's bill was not supported by the remainder of the Liberal caucus, and the proposed legislation was, in effect, dead on arrival. Kaplan continued to press the issue upon becoming Solicitor General of Canada in 1980, forming an inter-departmental committee to examine possible legal responses. The final report, *Alleged War Criminals in Canada*, presented to Parliament in 1981 by committee chair Robert

Low (who was a lawyer for the Department of Justice), found no legal mechanisms in existing Canadian law that could be used to deal with the issue of war criminals (Matas and Charendoff 1987).

Despite the fact that the Low Committee had found no legal remedies that could be used to remove or prosecute war criminals in Canada, Helmut Rauca was extradited to West Germany in 1983 in order to face war crimes charges related to the murder of more than 10,500 people in Kaunas, Lithuania. West Germany had initially requested extradition of Rauca in 1973, but the Canadian authorities were, at the time, unable to locate him (Littman 1983). Rauca was eventually arrested in Toronto by the Royal Canadian Mounted Police (RCMP) on 17 June 1982, and was extradited on 20 May 1983, after a prolonged extradition hearing in which Rauca's lawyers (ironically) argued that many legal mechanisms existed in Canada that could be applied to Rauca, and that extradition was to be considered the last of those options. As a result of the Rauca extradition, RCMP policy was changed to make investigation of alleged war criminals in Canada mandatory:

Upon receipt of information that a suspected war criminal is in Canada, an investigation shall be conducted to substantiate the information. (RCMP policy, cited in Matas and Charendoff 1987)

Between this change in policy and the start of the Deschênes Commission, 252 RCMP investigations into alleged war criminals in Canada were launched (Matas and Charendoff 1987).

Following Rauca's extradition, stories—originating with Sol Littman—circulated in the media that a significant number of former Nazis, including Josef Mengele, had

allegedly made Canada their home (Rosenbaum 1987). Mengele, a medical doctor who among other terrible deeds had performed horrendous (and often lethal) experiments on twin children at Auschwitz, was without a doubt the most notorious of the Nazi fugitives who had escaped justice after the war. The issue of war criminals in Canada (particularly Mengele) was raised in the House of Commons in January of 1985 by, unsurprisingly, Robert Kaplan. Estimates of the number of war criminals living in Canada rose from several hundred in the early 1970s to over 6000 by the mid-1980s (Hatt, Caputo and Perry 1992: 253). The growing moral panic stemming from such allegations reached its zenith at precisely the same moment that Brian Mulroney's Progressive Conservative Party earned a landslide victory in the 1984 Canadian federal election. Mulroney had campaigned using a law and order platform and, under the banner of the neo-conservative tough on crime approach, the issue of war criminals would no longer be ignored.

One of Mulroney's first acts as the Prime Minister of Canada was to establish the Commission of Inquiry on War Criminals in Canada in 1985, led by the Quebec appellate judge Jules Deschênes (Hatt, Caputo and Perry 1992). The Deschênes Commission was issued the broad mandate of investigating the existence of war criminals in Canada, ascertaining how they arrived, and providing recommendations regarding what types of actions could be taken by the government of Canada to deal with the situation.¹²⁷ The most striking feature about the establishment of the Deschênes Commission is the unilateral action taken by Mulroney, who was apparently so convinced that he was right to take this step that he did not bother to consult anyone about it:

¹²⁷ The Commission was also asked to ascertain whether Mengele was, in fact, in Canada. It responded that Mengele had never entered into the country.

Content his course was morally right and politically astute, Mulroney allegedly acted without consultation—not even with Jewish leaders, not with his caucus, not with close colleagues and certainly not with the public service... What is more, there is no evidence Mulroney consulted his Cabinet, not even those with portfolios touched by the Prime Minister's initiative. (Troper and Weinfeld 1989: 148)

It therefore may have come as a surprise to Mulroney that the initiation of the Deschênes Commission fueled ethnic tensions between Ukrainian and Jewish groups within Canada.

It is not surprising that members of the Ukrainian community reacted negatively to the creation of this commission. During the Second World War, manpower shortages caused by nearly catastrophic losses on the Russian front forced German military leaders to accept (and in some cases demand) volunteers into the Waffen SS from occupied territories. This led to the formation of the Galacia Division, which was largely made up of Ukrainian volunteers who wanted to participate in the fight against Stalin. Although there is no documentation to prove the allegation, some Jewish groups argued that the Galacia Division had, in fact, participated in the extermination of Ukrainian Jews (Margolian 2000b). On the basis of such allegations, coupled with the fact that members had often volunteered to join the Nazis, members of the Galacia Division had been prevented from entering into Canada. Many members of this group settled in the United Kingdom while the status of their application was debated among Canadian officials who, in 1947, once again denied their request to enter Canada.

Despite these initial difficulties, the immigration of former members of the Galacia Division was brought before the House of Commons in 1950 by Liberal backbencher John Decore, and the prohibition against their entry was lifted. Although this move was largely popular among the Ukrainian community in Canada, who argued

that the unit did not participate in any war crimes but were in fact patriots who bravely fought against the hated Russians (McCarrick 1990: 172), the Jewish community was stunned by the decision (Troper and Weinfeld 1988). The Galicia Division case fueled long-standing animosity between the two groups in Canada, as can be seen in the following editorial that appeared in *Nasha Meta*, a popular Ukrainian newspaper:

International communism and Jewry for some reason choose to condemn only Ukrainians and their “Philo-Germans” although they offered the very smallest number to the German army and they choose to shut their eyes to the many volunteers who were offered by other nationalities. And this communist-Jewish propaganda besmirches [the] entire Ukrainian nation and blames her for crimes she never committed and was in no position to commit. At Moscow’s order these Ukrainian soldiers are smeared by this propaganda because the Ukrainian soldier is the most dangerous one for communist Moscow and her tyranny. (cited in Troper and Weinfeld: 80)

Somewhat surprisingly, leaders of the larger Jewish organizations in Canada also expressed reservations regarding the establishment of the Deschênes Commission. The specific concern was that the large scale investigation of war criminals living in Canada would quickly undermine the effort made by both Jewish and Ukrainian leaders to bridge the differences between the two communities (Troper and Weinfeld 1989). This concern was well justified, and the Commission once again drove a wedge between these two communities. The Deschênes Commission received 14 applications from groups requesting standing (which refers to the right to provide the Commission with legal briefings), all of which were either Jewish or Eastern European groups, and granted standing to four: the League of Human Rights of B’nai B’rith of Canada, the Ukrainian Canadian Commission, the Canadian Jewish Congress, and the Brotherhood of Veterans of the 1st Division of the Ukrainian National Army in Canada (the Galicia Division).

The Ukrainian and Jewish groups were at odds throughout the proceedings, as Jewish groups focused upon crimes of the Holocaust while Ukrainian groups lobbied the Commission to consider the forced starvation of Ukrainians by Stalin as an act of genocide (Troper and Weinfeld 1989).

As its terms of reference show, the Deschênes Commission had the broad mandate to assess how many war criminals were living in Canada (including how they entered into the country), and to provide recommendations for dealing with these individuals:

To conduct such investigations regarding alleged war criminals in Canada, including whether any such persons are now resident in Canada and when and how they obtained entry into Canada, as in the opinion of the Commissioner are necessary in order to enable him to report to the Governor in Council his recommendations and advice relating to what further action might be taken in Canada to bring to justice such alleged war criminals who might be residing within Canada, including recommendations as to what legal means are now available to bring to justice any such persons in Canada, or whether and what legislation might be adopted by the Parliament of Canada to ensure that war criminals are brought to justice and made to answer for their crimes. (Purvis 1998: 3-4)

But what definition of war criminal was to be used? Reflecting the specific concern regarding Nazi-era war criminals (such as Mengele), the definition of war criminal used was:

All persons, whatever their past and present nationality, currently resident in Canada and allegedly responsible for crimes against peace, war crimes or crimes against humanity related to the activities of Nazi Germany and committed between 1 September 1939 and 9 May 1945, both dates inclusive.¹²⁸

¹²⁸ This is the definition of war criminals provided by Deschênes to legal teams contracted to answer specific questions relating to the prosecution, denaturalization and deportation, and extradition of war criminals. See, for example, NAC RG 33, file 10006-B2.

With this definition of war criminals in place, Deschênes collected the information needed to answer questions relating to the number of war criminals in Canada, and the legal mechanisms that could be applied to ensure that such individuals are brought to justice. The information needed to answer these questions was drawn using two distinctly different processes and sources of information.

The question of the number of war criminals living in Canada was addressed using public hearings and witness testimony. The public proceedings ran for 28 days, while an additional 38 days were used for *in camera* proceedings. During this time, the Commission heard testimony from a total of 85 witnesses, including Holocaust expert Raul Hilberg and suspected war criminals such as Imre Finta. During the examination of over 800 cases of suspected war criminals in Canada, the Commission utilized evidence drawn from a dizzying array of sources, including:

Yad Vashin, Israel's Holocaust memorial and documentation center; Simon Wiesenthal, an outspoken Jewish activist who had devoted his life to searching for Nazi murderers; the Simon Wiesenthal Center in Los Angeles; the Canadian Jewish Congress; Sol Littman, a Canadian citizen working with various groups on Holocaust-related issues; B'nai B'rith of Canada; the Canadian Holocaust Remembrance Association; the Israeli Police; and even the Soviet Government. (Landsman 2005: 174)

A major concern was whether information could be collected from sources outside of Canada, particularly those located in Eastern Bloc nations. Considering many of the concentration camps and killing centers used by the Nazis were in the East, there was a high degree of likelihood that vital information regarding war crimes suspects was located in such regions. Deschênes ruled that although he should not personally travel to these locations, there was no reason to exclude important evidence from the Eastern Bloc

on the provision that the following six conditions were ensured: the protection of reputations through confidentiality, the use of independent interpreters, access to original documents, access to witnesses' previous statements, freedom of examination of witness in agreement with Canadian rules of evidence, and videotaping such examinations. In the end, Deschênes did not receive a response in time from the Soviet Union, and this potential source of information was excluded from his report (Landsman 2005).

The final report of the Deschênes Commission, entitled *War Criminals: The Deschênes Commission*, was released in 1986. The Commission had traveled across Canada with the purpose of establishing the number of suspected war criminals in the country, and was able to generate a master list of 774 individuals who were suspected of being war criminals. In a secret section of the report, an addendum was added which listed an additional 38 names, as well as the names of 71 German scientists and technicians who were not included in the final total (Purvis 1998). The final report found that estimates of “thousands” of war criminals living in Canada had been “grossly exaggerated.” Nearly half the individuals on the master list never resided in Canada (341) while many others had either left the country (21), were deceased (86), or could not be located (4). At the end of two years, and at a cost of over \$60 million, the Commission was able to establish *prima facie* evidence that only 20 Nazi war criminals were living in Canada.

The finding that 20 war criminals were living in Canada was markedly better than the allegation that thousands of war criminals were living in our midst. However, the fact that even a small number of war criminals had entered into Canada raised the question of what to do with such individuals. This question formed the second part of Deschêne's

mandate, which was to provide suggestions regarding what actions could be taken to bring such war criminals to justice. To answer this question adequately, Deschênes enlisted various law firms to provide opinions regarding the use of existing legal remedies (i.e. extradition, denaturalization and deportation, and prosecution) to bring war criminals living in Canada to justice.

Deschênes utilized the St. John, New Brunswick law firm McKelvey, Macaulay, Machum Barristers and Solicitors to answer the question: “when there is no treaty between Canada and a requesting state can there exist, nevertheless, a legal basis for a request for extradition of a war criminal from Canada?”¹²⁹ E. Neil McKelvey, one of the partners in this firm, responded that according to the Extradition Act the extradition of a person to face charges in another country can only occur if the crime is listed in the existing extradition agreement between the two nations, and if it is a crime in both countries. McKelvey noted that courts have tended to apply a fair and liberal interpretation to extradition arrangements in attempting to fulfill Canada’s international obligations. Existing international agreements to which Canada is a party, which may form the basis of an extradition under existing Canadian law, include the Convention on the Protection of Civilian Persons in Time of War (i.e. “the Civilian Convention”) signed on 12 August 1949, and the grave breaches clause of the Geneva Convention (brought into Canadian law by Act R.S.C. 1970).

The report concludes that extradition of war criminals may legally occur within the existing legal framework in the following three scenarios:

¹²⁹ The report is housed at the NAC as RG 33, file 1000-6-M1, received by the Deschênes Commission Sept 4, 1985.

- a) There is a legal basis for such a request under Part I of the Extradition Act R.S.C. Chap. E-21 where Canada is a part to an international convention or other arrangement, to which the requesting state is also a party, to the extent that the convention or arrangement provides for extradition. An extradition treaty between Canada and the requesting state is not necessary.
- b) Extradition of war criminals is available by virtue of the Convention on the Protection of Civilian Persons in Time of War, covered by the Geneva Convention Act R.S.C. 1970 Chap. G-3, for the crimes to which it applies.
- c) It is also possible that extradition of war criminals may also be available by virtue of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, for the crimes to which it applies. (3)

In an interesting side note, McKelvey noted that Canada did not sign on to several key international agreements, which effectively removed options from the table. For example, Canada was not a part of the 1943 Moscow Declaration, which provided for the return of war criminals to the nation in which the crimes were committed. As well, Canada's attempt to distance itself from the international tribunals at the close of the Second World War resulted in the decision to not sign on the agreement of 8 August 1945 regarding the Prosecution and Punishment of the Main War Criminals of the European Axis, which also contained provisions for the extradition of war criminals.

Two lawyers familiar with immigration laws, Sharon A. Williams and Donald P. Brick, were each assigned the task of assessing whether existing Canadian legislation allowed for the denaturalization (i.e. the removal of citizen status) and deportation of war criminals. The linkage between denaturalization and deportation was important: Canadian law does not allow for the deportation of its citizens, which means that in the event that a war criminal has obtained Canadian citizenship a process of denaturalization must first be successful before a deportation hearing can be invoked. Sharon A. Williams

argued that denaturalization and deportation of war criminals can occur under existing Canadian law under immigration provisions related to “crimes of moral turpitude”, “enemy alien status”, and “membership in the Nazi Party.”¹³⁰ However, she took care to note that the process may be complicated because an individual was not obligated to reveal incriminating information not covered in existing application forms and procedures. She also pointed out that denaturalization and deportation should not be used as “extradition in disguise.” Williams ended with a poignant message that focuses upon the moral, rather than strictly legal, aspect of denaturalizing and deporting war criminals:

Deportation can be used, coupled with denaturalization, to emphasize Canada’s abhorrence of war crimes, crimes against peace and crimes against humanity. Divesting war criminals of their Canadian citizenship would be symbolic of this. The removal of war criminals to a place outside of Canada would indicate that we as persons living in Canada do not want to be associated with such criminals. It is a repudiation of our adoption. (99-100)

Thus the responsibility to deal with war criminals was not simply a matter of law or morality. Instead, the criminalization, and subsequent exclusion, of such individuals was directly linked with the creation of a Canadian identity that precluded war criminals.

Donald P. Brick’s assessment of existing denaturalization and deportation laws, and their applicability to war criminals, was distinct from Williams in at least two respects: moral messages were absent, and potentially problematic nuances in existing law were more fully articulated.¹³¹ Brick noted that prior to the Proclamation of the first Canadian Citizenship Act on 1 January 1947, persons immigrating to Canada could not acquire Canadian citizenship. Instead, they could acquire “naturalized” status pursuant to the provisions listed in Chapter 138 of the Naturalization Act, contained in the Revised

¹³⁰ NAC RG 33, file 144.

¹³¹ NAC RG 33, file 10006-B2.

Statutes of Canada 1927. The 1947 Citizenship Act was, in turn, replaced by the 1977 Citizenship Act. While provisions were in place to denaturalize individuals who had lied on application forms in the post war era, the transitional clauses in the 1977 Citizenship Act created two important legal wrinkles. First, Article 35(1) of the 1977 Citizenship Act stated that:

Proceedings commenced under the former Act that are not completed on the coming into force of this Act may be continued as proceedings under the former Act or under this Act and any regulations made thereunder, as the Minister may, in his discretion, determine, but any proceedings continued under the former Act and resolutions made thereunder may not be so continued for more than one year from the coming into force of this Act.

This meant that any revocation proceedings held under the 1946 Act could not continue past 15 Feb 1978. A second issue identified by Brick is that under the transitional terms of the 1977 Citizenship Act, individuals who were citizens at the time the Act came into force were automatically considered citizens. The key provision in the 1946 Citizenship Act that allowed for the denaturalization and deportation of war criminals was the provision that individuals had retained citizenship under false representation or fraud. However, Brick noted that it is especially problematic to prove that false representation or fraud occurred to obtain citizenship when the source of that citizenship stemmed from simply being a citizen in Canada in 1977.

Two law firms were asked to address “whether there exists any possibility of criminal prosecution in Canada against war criminals under present Canadian legislation or by virtue of some international instrument or otherwise.” John I. Laskin (from Davies, Ward & Beck, located in Toronto) argued that while war crimes are clearly so heinous that universal jurisdiction can successfully be applied, express jurisdiction rooted

in Canadian law was required before Canadian courts could hear such cases.¹³² In his opinion, there was no basis in existing Canadian law to carry out the prosecution of war criminals in Canadian courtrooms. Laskin noted that there were only four possible bases for prosecution of war criminals in Canada: a) the Criminal Code of Canada, b) the War Crimes Act, c) the Geneva Convention, and d) the 1948 Genocide Convention together with Section 281.1 of the Criminal Code. Each of these four existing sources of law is problematic with regard to the prosecution of war criminals in Canada. Section 5(2) of the Criminal Code of Canada stated that “Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada.” The only Criminal Code option left was to consider war crimes, crimes against humanity and genocide to be common law offenses under international law. Utilizing the War Crimes Act (S.C. 1946, c. 73), which came into effect following the Second World War and was never repealed, appeared promising. However, this option was ruled out for three reasons: a) the retroactive component of the Act would likely be deemed unconstitutional, b) the War Crimes Act was a piece of war time legislation designed to be implemented in theatres of war rather than in Canadian courtrooms, and c) the trial procedures outlined in this act would never stand up to the scrutiny of a modern, civilian courtroom. The “grave breaches” clause of the Geneva Convention appeared to be a good option, except that Canada did not sign on to this Convention until 1965, which meant that it would be retroactive legislation with regard to war criminals from the Second World War era. Use of the Genocide Convention would cause two problems: 1) the Genocide Convention arguably creates a new crime, and is

¹³² NAC RG 33, File 1000-6-L1, Feb 17 1985 (Received by Deschênes Commission on Feb 19).

thus substantive in nature. Since it was not enacted until 1948, and was not expressly stated to be effective retroactively, it had no application to offences committed during WWII.¹³³ 2) Article VI of the Convention provided jurisdiction for the prosecution of Genocide to the state in whose territory the acts were committed or an international penal tribunal. Since crimes were committed abroad it did not provide a means for criminal prosecution in Canada.

In the opinion of Gowen Guest (from the law firm Owen, Bird Barristers & Solicitors, which was located in Vancouver, British Columbia), the framework utilized by Deschênes to define war criminals was inherently problematic. Guest argued that by limiting the time frame cited in the definition of war crimes to 1939-1945, the prosecution of such crimes in Canadian courts would be viewed as being discriminatory and repugnant to Canadian Law. A second potentially problematic issue regarding the definition of war criminal stemmed from the passive personality principle in international law. This principle was the basis for extending the jurisdiction of national courts in order to prosecute an individual who committed a crime against one of their nationals. In hijacking cases, this principle was often extended to allow jurisdiction to a given country over individuals within its borders, regardless of the nationality of the perpetrators or the victims. Developing this line of argument, Guest warned that the prosecution of war criminals by virtue of the fact that they were in Canada would create a type of ontological confusion in which the crime in question would be that the individual was in Canada, rather than the commission of specific acts regarded as war crimes. Moving past these

¹³³ Laskin argues that this is the reason Israel did not charge Eichmann with Genocide.

limitations, Guest argued that the Criminals Code of Canada needed to be amended in the following ways before war crimes trials could occur:

1.1 A definition of war crime which includes any act of omission, wherever occurring during any war in which Canada has been or may be engaged after the 9th day of September, 1939, that is a crime against peace, a war crime or a crime against humanity as those offences are defined in Article 6 of the Charter of the International Military Tribunal” at Nuremberg.

1.2 A section declaring that an offence under the Act shall be tried by a jury as if it were an indictable offence under the Criminal Code to be tried in the place where the offender is found in found in Canada or in any other court to which jurisdiction is legally transferred pursuant to Canadian criminal procedure.

1.3 A prescription of punishment.

1.4 A section repealing the War Crimes Act, S.C. 1945, C. 73.

Guest clearly worked under the assumption that the process of criminalization would be constitutionally valid only if the ensuing war crimes legislation applied equally to all war criminals residing in Canada.

Deschênes was forced to sift through such legal opinions, which were occasionally contradictory, and provide an approach to the formal criminalization of war crimes that could be successfully applied in Canada. In Part II of the Deschênes Commission’s final report, which was kept confidential and was not released to the public, the Commission recommended making changes to the extradition act to facilitate the removal of individuals charged with war crimes in other countries. The second recommendation was to amend laws governing denaturalization (i.e. removal of citizenship) and deportation, and the third option involved changing the Criminal Code of Canada to make it possible to prosecute war criminals in Canadian courts. In response to the report of the Deschênes Commission, on 12 March 1987 the Government of Canada announced that it would create a series of legal mechanisms that could be applied to war

criminals in Canada: the pursuit of criminal charges, the extradition of individuals, and, in cases in which the individual falsified information during the immigration process, denaturalization and deportation. The legal changes to the Immigration Act, the Citizenship Act, and the Criminal Code of Canada were encapsulated in Bill C-71, which was fast-tracked by the government and received Royal Assent in 1987 (Bello and Cotler 1996).

The two portions of the *Immigration Act* that relate to war crimes are Section 19(1)(j), which came into being as a result of the Deschênes Commission, and exclusion ground 1F(a) of the Refugee Convention of 1951 (Goodes 2002: 177). The Refugee Convention excludes individuals who have committed crimes against humanity, war crimes, or crimes against peace from claiming refugee status. Section 19(1)(j) of the Immigration Act has a broader application due to the fact that it extends to heads of state and government officials in regimes that are designated as oppressive by the Government of Canada. Individuals who are screened out have little recourse to an appeal, while those in Canada who fall under these provisions may enter into a restricted form of the appeals process (Goodes 2002). The use of screening procedures to deny entrance into Canada occurs hundreds of times every year, and is by far the most commonly applied mechanism to deal with alleged war criminals. Denaturalization and deportation of alleged war criminals is somewhat less common, with such proceedings being held an average of once or twice per month over the course of a year.

To facilitate the prosecution of war criminals in Canadian courts, section 6, subsection 1.9 of the Criminal Code of Canada was amended in 1987 to extend the jurisdiction of Canadian courts with regard to crimes against humanity and war crimes.

The definitions of “war crimes” and “crimes against humanity” were encapsulated in s. 7 (3.76), which reads:

‘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 or 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 or conventional international law applicable in international armed conflicts.

Of critical importance is the fact that the crimes against humanity and war crimes were not new offenses, and there was no listing of punishments following these definitions. Instead, in cases where war crimes and crimes against humanity were shown to have been committed by Canadian citizens while living abroad, courts in Canada were given the jurisdiction to prosecute specific related actions defined as crimes within the Criminal Code. So if an individual committed a war crime by killing civilians during a genocide that occurred in Europe, that person could be charged with murder in Canadian courts on the provision that the prosecution could demonstrate that the acts constituted a war crime and/or a crime against humanity. The prosecution, in effect, would have to first prove that the genocide occurred, and then prove that the defendant had, in fact, committed the crimes for which he was indicted.

The comprehensive approach recommended by Deschênes demanded a significant increase in the amount of resources devoted to the identification and removal of war

criminals. The passage of war crimes legislation led to the establishment of new war crimes units in both the Department of Justice and the RCMP to accompany the existing war crimes unit housed in the Department of Immigration. Initially, the war crimes division of the RCMP was the “custodian for evidence” in war crimes cases, and was responsible for acting as a liaison with foreign legal entities. The war crimes division of the Department of Justice provided legal and historical support once charges were initiated. When a case was established, the authority to initiate criminal proceedings was vested in the Attorney General of Canada. This mechanism was applied to suspected war criminals living in Canada on only four occasions. However, due to the inherent limitations associated with trials for crimes that were committed more than 40 years before the charges were laid, only one of these trials proceeded to completion and culminated in a verdict. This case challenged the newly formed Crimes against Humanity and War Crimes provisions in the Criminal Code, and exposed the limitations of this legislation.

8.2 “This is Canada”: The Finta Trial

Allegations that Imre Finta was a war criminal, stemming from his alleged participation in the extermination of 8,617 Jews in Szeged, Hungary, pre-dated the newly-formed war crimes provisions in the Criminal Code of Canada. Sabina Sabon accused Finta of being a war criminal, and he responded by publically calling her “a liar” (Matas 1994). Sabon launched a defamation action, and won a settlement of \$30,000 plus court costs. CTV aired a story that named Finta as a war crimes suspect, which led him to launch a defamation action against the network. The news station, which had deep pockets and

numerous resources, did extensive fact checking to prove that their allegations were, in fact, well-founded. During its investigation, CTV uncovered the fact that Finta had been convicted *in absentia* for Holocaust related crimes by a court in Hungary (Landsman 2005). Finta dropped the defamation case, and was ordered to pay for the court costs of the network. When he refused, the network seized his house and sold it at auction (Matas 1994). Still reeling from these events, Finta testified at the Deschênes Commission to answer charges that he had committed war crimes.

Although the criminalization process was well developed from a legal standpoint, the prosecution of Nazi war criminals in Canadian courts was found to be problematic in practice. Only four individuals were indicted for war crimes during the first three years in which the newly formed Canadian legislation was in place. Imre Finta was among those who were charged using the new war crimes and crimes against humanity provisions in the Criminal Code. Stephen Reistetter, Michael Pawlowski, and Radislav Grujicic were also slated to stand trial under section 7 of the newly formed War Crimes Act, but by 1992 charges in all three of these cases were dropped due to logistical difficulties. According to a summary of these proceedings provided by Paul Richards (2002: 222), charges were stayed in *R. v. Pawlowski* when an Ontario court refused to allow witness testimony taken from the *Byelorussia via Rogatory Commission*. In *R. v. Reistetter* charges were dropped after a key witness died, and in *R. v. Grujicic* charges were stayed due to the poor health of the accused (who died a year later). Such issues are inherent, and to a large degree predictable, challenges associated with prosecuting World War II era cases more than 40 years after the fact.

Regina v. Finta is the most interesting of the first round of war crimes charges laid after the Deschênes Commission partly because it is the only one of the four to reach trial (and it was subsequently appealed to the Supreme Court of Canada in 1994), but mainly due to the fact that as the first trial of its kind in Canada it tested the constitutionality of the newly formed legislation and provided a benchmark for future applications of the legislation. Finta was acquitted on all charges and, while standing in front of the courtroom after the verdict was read, he declared: “This is Canada!”¹³⁴ The acquittal was upheld by the Supreme Court of Canada, which was a clear indication of the inadequacy of the newly formed war crimes and crimes against humanity statutes. The Finta trial was also important because it provided ample evidence of the type of vigorous cross-examination of witnesses defense councils were likely to utilize when Holocaust survivors were invited to testify.

The opening statement from the prosecution, which used “recent changes in the Criminal Code allow this prosecution to occur” as the reason for prosecuting a 77 year old man for crimes committed 45 year earlier, was disappointing, particularly for jury members who were hoping to understand the larger purpose of the trial (Landsman 2005). To support the prosecution’s case, 43 witnesses were called to testify. The first three of these witnesses were Holocaust experts, who were asked to provide the background necessary to establish that war crimes and crimes against humanity had taken place (although they could not directly speak to Finta’s specific role). Survivor testimony was then utilized with the goal of placing Finta at the camp in question, and to outline the role of Finta’s unit in their removal from the ghetto and onto trains destined for concentration

¹³⁴ The video clip can be found at http://archives.cbc.ca/war_conflict/war_crimes/topics/1435-9267/ (“Imre Finta: Not Guilty” originally aired May 25, 1990, last accessed Feb 21, 2011).

camps. Key documents that showed Finta's culpability in the liquidation of the ghetto were also presented to the court.

Defense council Douglas Christie had a track record of initiating aggressive defenses, and had represented white supremacists (such as John Keesstra) and Holocaust deniers (such as Ernst Zundel) in a series of high profile Canadian cases. In sharp contrast to the somewhat muted account of the importance of the trial offered by the prosecution, Christie opted to use an inflammatory example to argue that Finta had simply been doing his job, and to sow the seeds of a larger strategy in which a moral equivalency is drawn between the victims and Finta:

You had better have moral certainty if you are to convict, because if somebody 45 years from now puts you on trial in another country for persecuting Imre Finta and that country might be as hostile to Jews as we are to Nazis, who would you be calling? Don't call me. (cited in Matas 1984: 283)

As noted by Landsman (2005: 190-191), during his cross-examination of the court historians, Christie introduced three lines of argument: 1) he sought to establish a link between the Hungarian Jews and Communism; 2) he asked the historians to describe the role of Jewish councils in the deportation of Jews, and sought to create a moral equivalence between Finta and the victims of the Holocaust; and 3) he questioned whether gas chambers had even existed to begin with questions such as "But sir, you recognize that historians now hold that there's very little evidence for those gas chambers, and what there is is unreliable."

As harsh as the cross examination of expert witness had been, the attack on Holocaust survivors launched by the defense was far worse. The fact that the prosecution employed a Hungarian-speaking nurse to monitor the health of the witnesses provides

ample evidence that they were advanced in years and often in poor health. Christie challenged the memory of each of the Holocaust survivors, which is well within the realm of acceptable defense strategies. Christie, however, appeared to cross the line of acceptable behaviour throughout the trial, and was warned by the judge on several occasions to stop yelling at the witnesses. When he was called to the bench to address his hostile treatment of an elderly witness, which included standing very close to her, his response was that he was the one who was being treated unfairly:

I am a little concerned that although your lordship is, of course, concerned about the decorum and propriety of the court, I am sure the jury might get the impression I am some kind of wild animal that shouldn't come close to the witness box. (cited in Landsman 2005: 200)

The assaults launched by Christie effectively re-victimized the Holocaust survivors testifying at the trial.

The closing argument of the prosecution once again relied on the existence of statutes to explain why Finta was standing trial for a crime allegedly committed 45 years earlier. This is analogous to providing the answer “because we can” to the question “why are we doing this?” Christie’s closing arguments also paid particular attention to the statute, which he described as being “diabolical” and, to a large degree, arbitrary. In his analysis of the case, David Matas (1994) argues that war crimes and crimes against humanity are *malum in se* (crimes that are wrong in themselves) rather than *malum prohibitum* (crimes that are wrong only because they are prohibited). The emphasis placed upon the statute by both the prosecution and defense made it appear as though the crux of the case was *malum prohibitum*.

Bello and Cotler (1996) provide an extremely useful breakdown of the trial. Finta challenged the constitutionality of the legislation on six different grounds, the core of which was the issue of retroactivity. The position of the court was that the law was not *retroactive* but *retrospective*,¹³⁵ meaning it did not create new laws and apply them to the past but instead created a legal mechanism to enforce prohibitions of the customs of war that existed at the time of the offenses. The most important issue that emerged in the Supreme Court ruling in *R v. Finta* relates to the thresholds that were established in terms of both *actus reus* (the elements of the act) and *mens rea* (the mindset of the perpetrator). The *actus reus* that applies to international cases of war crimes focuses upon whether the actions occurred during wartime, the direction of violent action against a civilian population, with crimes against humanity having the additional element of being directed toward an identifiable group. According to Bello and Cotler (1996), in their verdict the judges added elements of *actus reus* that are not a part of the international threshold: that such crimes “shock the consciousness” of people, that crimes against humanity has an element of “discrimination” against an identifiable group, that war crimes involve “cruel” “barbaric” and “terrible” actions, that the crimes evoked a high degree of moral outrage, and the exclusion of crimes that occur in the heat of battle (i.e. “foresight and calculated malice” was used as the standard).

This shift in *actus reus* resulted in a higher threshold for *mens rea*. For example, when the Canadian domestic threshold for murder (“reasonable foreseeability of harm”)

¹³⁵ This involves reference to a past decision made by Mr. Justice David H. Doherty, which reads as follows: “A *retrospective statute* is one which proclaims that the consequences of an act done prior to proclamation are to be given different legal effect after proclamation as a result of the enactment of the statute. It operates only in the future, after proclamation, but changes the legal effect of an even which occurred prior to proclamation” (cited in Bello and Cotler 1996: 464).

was applied to interpret section 7 (3.71) of the Criminal Code in light of the higher standard for *actus reus*, the court argued that this new legislation “is aimed at those who inflicted immense suffering with foresight and calculated malevolence” (cited in Bello and Cotler 1996: 470). The judges also insisted that the *mens rea* requirement be extended to include knowledge of every circumstance surrounding the war crime.¹³⁶ The effect of this maneuver is that even if an individual is shown to have knowledge of the actions that constitute the war crime, if it is not proven that this individual has knowledge of the contextual elements that turn the offense into a war crime then the individual must be acquitted. However, when evidence of contextual elements, such as orders from higher authorities to engage in the deportation of the Jews, are presented in court they function as exculpatory evidence (i.e. they invoke “superior orders” and “mistake of fact” defenses).

8.3 “Anyone can sneak in”: The (Re-) Creation of the *Crimes Against Humanity and War Crimes Act*

In the immediate aftermath of the Finta acquittal, immigration screening mechanisms, along with denaturalization and deportation, became the preferred ways of dealing with war criminals. However, the passage of the Rome Statute, along with accompanying changes in the Criminal Code of Canada, led to the prosecution of another suspected war criminal in Canadian Courts. This section begins by outlining the nature of the changes in war crimes strategies that followed the Finta decision, and then provides an overview of impact of the Rome Statute upon Canadian law. It ends with an account of the

¹³⁶ See the dissenting opinion of Justice LaForest for a detailed account of the implications of this standard.

prosecution of Desiré Munyaneza, who was the first individual charged under the new war crimes legislation.

With the initial failure of the prosecution of war criminals within the criminal justice system of Canada, in 1995 the Canadian government—which measured the success of the war crimes programs in terms of systemic efficiency—shifted strategies. Immigration screening, denaturalization and deportation became the preferred ways of dealing with suspected war criminals who are about to enter, or who have entered, into the country (Quiggan and Rikhof 2002). The perceived benefits of using immigration policy and legislation over criminal justice were threefold: (1) it was easier to prevent individuals from entering the country than to remove or prosecute these individuals once they are in Canada, (2) the immigration screening process was less resource-intensive, meaning that a higher volume of cases can be handled in this manner, and (3) the standard of proof set for the immigration process was lower than the standard of proof during criminal proceedings, resulting in a far higher success rate. Higher levels of efficiency were made possible through use of modern policing techniques, such as internet searches of open source documents, databases of suspected war criminals, information sharing between policing bodies, and access to established databases by immigration representatives abroad. Despite the fact that screening coupled with denaturalization and deportation of suspected war criminals was effective from an actuarial perspective, such approaches were problematic in that they were not specifically linked to bringing war criminals to justice:

The over-reliance on administrative remedies such as removal from the country may serve the limited purpose of not allowing Canadian soil to harbour war

criminals, but does very little to serve the broader objective of ensuring accountability for some of the worst international crimes. (LaFontaine 2010)

Stemming from obligations under the Rome Statute, coupled with a desire to bring war criminals to justice, Canada re-created its *Crimes Against Humanity and War Crimes Act* on June 4th of 2000 (C-19). An important goal of the new legislation, as outlined by Lloyd Axworthy (2003: 206), the Canadian Justice Minister at the time, was to eliminate any ambiguity and make C-19 a new part of the Criminal Code :

In drafting Bill C-19, which was eventually named the Crimes Against Humanity and War Crimes Act, we opted for a comprehensive rewrite of our Criminal Code and associated legislation, rather than just barebones enabling legislation. It was a combined effort of the Department of Justice and DFAIT and was followed with parliamentary consultation and input from a variety of civil interest groups. The rationale was to embed the principles of the Rome Statute right into the heart of our own criminal code so that international crimes would be an inherent part of our core national justice system.

C-19 clearly accomplished the goal of embedding the principles of the Rome Statute within the Canadian Criminal Code. Articles 6 through 8 of this act repeated existing definitions of war crimes, genocide, and crimes against humanity outlined by the Rome Statute, and a key clause stipulated that Canada will surrender individuals wanted by the ICC. The Act also clearly establishes Canadian jurisdiction over war crimes, crimes against humanity and genocide, regardless of whether these crimes were committed in Canada.¹³⁷

Considering the lack of success of war crimes trials in Canada and other third-party nations, why did Canada persist in exploring the prosecution of war criminals?

¹³⁷ This act contains two sections dealing with war crimes, crimes against humanity and genocide—one directed toward such crimes when they are committed in Canada, and another that deals with cases in which such crimes have occurred in a foreign country.

Examination of House of Commons debates regarding the passage of C-19 reveals two possible answers to this question. First, policy makers argued that there was a direct link between impunity for past war crimes and those that may be committed in the future. The link between punishment and crime reduction was prominent, and remains prominent, within conservative discourses that emphasize the importance of “getting tough on crime.” In the late 1990s, at approximately the same point when C-19 was moving through the House of Commons, the debates regarding young offenders featured similar language. For example, John Williams of the Federal Alliance Party stated that “if we are tough on crime, if we punish crime, then people get the message” (cited in Hogeveen 2005: 74). The message that people were supposed to get, with respect to both the Young Offender legislation and war crimes legislation, was that there is no longer impunity for this type of crime (i.e. “if you attempt to commit this crime, you will be caught”). An argument was made that if war criminals are caught and punished now, individuals will think twice about committing atrocities in the future.

The second justification for pressing war crimes legislation, and war crimes prosecutions in Canadian courts was that Canada can only insulate itself from external threats, such as the entrance of war criminals, by utilizing an interlocking system of defenses. The following statement from Mr. Gurmant Grewal (Canadian Alliance MP), who is only moderately supportive of C-19, illustrates how war crimes legislation is believed to close gaps that exist in other parts of the network of systems designed to protect us from external threats: “Because our immigration laws are such that anyone can abuse them, they are like sieves, the back door is wide open and the front door is

comparatively closed, anyone can sneak in.”¹³⁸ In other words, we can protect ourselves best from having war criminals enter into the country by casting as wide a net as possible.

As was the case with the previous war crimes and crimes against humanity statutes, the newly formed Crimes Against Humanity and War Crimes Act had to be tested in court. Désiré Munyaneza, who was allegedly a key perpetrator in the 1994 genocide in Rwanda, obtained a falsified passport in 1997 and immigrated to Canada disguised as a Cameroonian citizen. Upon arriving in Canada, Munyaneza settled in Toronto, married, and fathered two children. While attending a concert, he was recognized by a survivor of the genocide, who contacted the RCMP war crimes division. The RCMP arrested Munyaneza in October of 2005, after a six-year investigation that included travel to Rwanda in order to interview witnesses. Seven charges were laid against Désiré Munyaneza: two counts of genocide stemming from intentional killing and causing serious bodily or mental harm to Tutsis; two counts of crimes against humanity stemming from both the intentional murder of, and sexual violence against, civilian Tutsi; and three counts of war crimes based on acts of intentional murder, sexual violence and pillaging against civilians who had not taken part in the conflict. On 22 May 2009, Munyaneza was found guilty on all accounts and sentenced to the maximum penalty under Canadian law: 25 years in prison with no chance of parole. The defense appealed both the verdict and the sentence.

Munyaneza opted to be tried without a jury. Over the course of the two years in which the trial was in session, 30 witnesses were called by the prosecution and 36 were called by the defense. Among the prosecution's expert witnesses was the Hon Romeo

¹³⁸ House of Commons, 6 April 2000.

Dallaire, who had led the failed United Nations peacekeeping contingent during the Rwandan genocide. To gather testimony from 31 individuals who were unable to travel to Montreal, the court established Rogatory Commissions in Kigali (Rwanda), Paris (France), and Dar es Salaam (Tanzania). Regardless of the forum of testimony, the majority of witnesses whose testimony specifically linked Munyaneza to the alleged crimes expressed concerns for their safety, which led the judge to allow them to testify using pseudonyms, or to give parts of their testimony *in camera* (Currie and Stancu 2010).

Based on provisions outlined in the Crimes Against Humanity and War Crimes Act, the court utilized custodial universal jurisdiction for the Munyaneza proceedings. Custodial universal jurisdiction simply means that although the alleged perpetrator and victims of the crimes were not Canadian, Canadian authorities can still prosecute and try the alleged perpetrator if he or she is physically present in Canada (Currie and Stancu 2010). When this type of jurisdiction is invoked, it is understood that if the individual in question did not enter into Canada, Canadian authorities would have no interest in extraditing the person from another state. This is the precise form of jurisdiction that troubled Gowen Guest in his report to the Deschênes Commission. Guest noted that when an individual is charged for a war crime on the basis of being in a particular country, it invites the question of whether the war crime or the presence in the nation is being criminalized.

The line of argument articulated by Guest complicates the question posed by Munyaneza's lawyer: "why are we doing this?" The goal of ending impunity for such crimes could have been accomplished by extraditing Munyaneza to Rwanda in order to

stand trial in the country in which the crimes were committed.¹³⁹ If the goal of the trial was to somehow prevent future genocides, it is questionable whether the threat of a prison term in a Canadian jail will prevent future genocides. Instead, the goal of the trial may have been to set an example so that future war criminals will be more hesitant to enter into Canada. Although Munyaneza clearly deserved to be punished for his role in the Rwandan genocide, the use of Canadian courts was as much about protecting the social body of Canada as punishing crimes committed against individuals in another nation.

Canada's first success in the domestic prosecution of war criminals stemmed from the application of legislation adopted through international obligations under the Rome Statute. The marriage of domestic and international law proved beneficial in terms of the agenda to end impunity for war criminals residing in Canada. However, a third legal system, which is not entirely synchronized with domestic and international law with regard to how war criminals were defined, was also at play with respect to the criminalization of war crimes in Canada. The next section will consider the application of military law in the Canadian criminalization of war crimes, crimes against humanity and genocide.

¹³⁹ Canadian reluctance to extradite individuals to nations which enforce the death penalty were quelled when Rwanda abolished the death penalty in 2007.

8.4 “A proud legacy was dishonoured”: The Prosecution of Canadian Forces Personnel

The Canadian Forces (CF) has participated in a wide range of missions in the post-Cold War era. These missions are quite distinct from the state against state warfare that typified the First and Second World Wars. Instead, in the contemporary era the CF has typically been given a Peacekeeping mandate (under the banner of the United Nations) or, in some instances, has engaged in asymmetrical warfare (i.e. fighting an extra-state group). Each of these highly complex types of missions is exceptionally difficult for CF personnel operating on the ground level for many reasons, not the least of which is the fact that members of hostile forces, which are not signatories to the Geneva or Hague Conventions, are interspersed within civilian populations. CF personnel are expected to follow pre-determined rules of engagement, fully understand and apply the laws and usages of warfare, identify the enemy quickly and accurately, and switch from the role of “humanitarian” or “protector” to “aggressor” and back in a heartbeat. The murders of two civilians in Somalia, and the unlawful killing of a prisoner of war in Afghanistan, are instances in which CF personnel did not live up to these high standards.

In 1992, Somalia was a country in disarray. No centralized government existed to ask for assistance, and warring factions fought for control of the country. The threat of famine in the region, coupled by an inability to get supplies past warlords who essentially ruled different parts of the nation, meant that a disaster was quickly looming on the horizon. The United Nations established a Chapter VII intervention (i.e. it was authorized to use force), which was a high profile mission led by the United States that required relatively quick action. The short deployment timeline was not ideal for the

Canadian Forces for many reasons, including the fact that mission-specific training would be limited, and that the Canadian Forces was already stretched thin from a number of other missions (including a large contingent in Bosnia). Although not a particularly good choice for a peacekeeping mission, 900 members of the Canadian Airborne Regiment, which modeled itself after the Green Berets (known as the toughest fighting unit in the United States), were deployed to Somalia in December 1992.

The offenses in question both occurred in March of 1993, on and around the airfield of Belet Huen. On 4 March 1993, Canadian Forces personnel shot and killed one Somali (named Ahmed Afraraho Aruush), and wounded another, as they were attempting to steal food from the base. Major Barry Armstrong, a physician who accompanied the Airborne Regiment to Somalia, was called to the scene. Upon inspecting the wounds, and measuring the amount of omentum that had flowed from the exit wound, Armstrong determined that two fatal shots were fired into the head and neck of the victim 2-3 minutes after the initial wounds (O'Reilly 1998). Appropriately, Armstrong informed his commanding officer of the incident. To his surprise, rather than launching an investigation, his Commanding Officer contacted Canadian Headquarters in Mogadishu. Armstrong received a call from a Canadian officer in Mogadishu informing him that a "damage-control operation" was underway (cited in O'Reilly 1998).

Before anything could be resolved regarding the killing of Aruush, a second murder had taken place. On the night of 16 March 1993, a 16 year old Somali boy named Shidane Abukar Arone was caught in the Canadian compound. The Canadian soldiers on duty observed the intruder for 15 minutes prior to capturing him, and had determined that Arone's only weapon was a ceremonial dagger that had not been drawn (Somolia Inquiry

1997). After being captured, Arone was brought to a bunker that was used for holding thieves, and tortured throughout the night by his captors. The gruesomeness of this was captured by the Somalia Inquiry:

MCpl Matchee stayed in the bunker with Pte Brown after 2200 hours, during which time both men hit and kicked the prisoner in his ribs and legs. MCpl Matchee also kicked Mr. Arone in his face. MCpl Matchee said to Pte Brown, "I want to kill this fucker, I want to kill this guy", and continued to beat the young Somali until his mouth bled. [...] MCpl Matchee said that Pte Brown had been hitting Mr. Arone and that he, Matchee, intended to burn the soles of the Somali's feet with a cigarette. Sgt Boland reportedly said, "Don't do that, it would leave too many marks. Use a phone book on him." [...] MCpl Matchee returned to the bunker at about 2245 hours and proceeded, with the acquiescence or assistance of Pte Brown, to beat Mr. Arone to death. (189)

A number of Canadian soldiers passed by the bunker, but none attempted to stop the beating. There were also a number of personnel at command and sentry posts who were well within range to hear what was happening. Only one sentry who had stopped at the bunker as a part of his rounds questioned MCpl Clayton Matchee. Matchee responded by arguing that Somali police shoot individuals for thievery, and stated that "in Canada we can't do it but here they let us do it, and the NCOs are aware of it" (190).

Trophy photos of Arone taken shortly after he was beaten were leaked to the press, causing a media firestorm that forced the Canadian Forces to respond to the killings. A wide range of individuals were indicted under the authority of National Defence Act, ranging from those who directly participated in the murders to commanding officers who gave permission to mistreat prisoners. A number of bystanders who were in position to stop the killings, but did not, were also charged. After being charged with second degree murder and torture, Matchee attempted to hang himself. Although he was unsuccessful, he suffered serious brain damage as was declared unfit to stand trial. The

fact that the star defendant would not stand trial meant that those calling for justice were unlikely to be satisfied with the ensuing courts martial.

Pte Kyle Brown, who was second only to Matchee in terms of culpability in the torture and murder of Arone, was charged with second degree murder and torture.¹⁴⁰ The prosecution argued that Brown had violated his duty to protect the victim or, at the very least, to report the incident to someone who could stop it. It also presented the argument that Brown also personally tortured the victim. For their part, the defense argued that Brown's culpability was limited to an assault, and that his actions did not actually contribute to the death of the prisoner. The defense also argued that Brown's duty to intervene was no greater than any of the others who heard or witnessed the beating. Essentially, the defense was arguing that since his superiors knew of the incident, and had even authorized it, to whom was Brown supposed to report the crime? Brown was convicted of both counts and sentenced to five years in prison. He also received a dismissal with disgrace from the Canadian Forces, which meant that he was transferred to a civilian penitentiary.

The courts martial of bystanders in the beating of Arone were largely ineffective. Of this group Sgt Mark Boland, who was on guard duty in the bunker where the prisoner was being abused, faced the most serious charges. Boland pleaded guilty to the charge of negligent performance of duty for his role in the death of Arone, but pleaded not guilty to torture. The panel largely agreed with this division, convicting him of negligent performance of duty while staying the torture charge. He was sentenced to 90 days of detention, and suffered an automatic reduction in rank to private. The prosecution

¹⁴⁰ Summaries of prosecution and defense arguments are drawn from the final report of the Somalia Inquiry (1997).

successfully appealed the sentence, which was increased to one year's imprisonment. Sergeant Perry Gresty, who was the duty officer in the Command Post situated 80 feet from the bunker area, was acquitted on each of two counts of negligent performance of duty. Pte David Brocklebank, who was charged with torture and negligent performance of duty, had watched the beating for several minutes before leaving to make a phone call to Canada. The prosecution argued that Brocklebank had a legal duty to protect civilians in his care from acts of violence, that a reasonable soldier would not have watched the beating and torture of an unarmed youth, that by handing Matchee his loaded pistol Brocklebank participated in the torture, and that any order to abuse prisoners contravened the Geneva Convention and was thus unlawful. Despite the relatively sound arguments presented by the prosecution, Brocklebank was acquitted on both charges.

Culpability for the killings in Somalia extended beyond lower ranking personnel and to the individuals who had given the orders to abuse prisoners. Maj Anthony Seward was charged with unlawfully causing bodily harm and negligent performance of a military duty. The prosecution argued that he had given an order to "abuse" intruders. Anticipating Seward's defense, the prosecution further argued that it was irrelevant whether Seward had intended personnel under his command to abuse Arone. Regardless of intentions, that abuse had occurred. The defense countered that Seward's instructions were more limited, and that infiltrators were to be *captured* with physical force. Any abuse that occurred after capture, according to the defense, was done on the volition of Matchee and Brown. Seward was acquitted of unlawfully causing bodily harm, but was found guilty of negligent performance of duty for giving instructions to abuse detainees. For this crime, he was issued a severe reprimand. The Court Martial Appeal Court

allowed the prosecution's appeal of the sentence, and upon appeal the sentence was increased to three months imprisonment and dismissal from the Canadian Forces.

Among the most interesting of the courts martial relating to Somalia is the case of Capt Michael Sox. Sox allegedly planned the March 16th mission in which food was left out to entice thieves to enter into the compound, at which time they could be captured. As platoon leader, he also passed along instructions that prisoners could be abused. Sox was charged with unlawfully causing bodily harm, negligent performance of duty, and an act to the prejudice of good order and discipline. The prosecution argued that his conveyance of an abuse order to his subordinates was reckless and led to the harming of a prisoner, and that he had failed to exercise appropriate control over his subordinates. Sox's defense council argued that he had instructed that only necessary force could be used to capture infiltrators. The word "abuse," it was argued, only applied to the capture of thieves. Based on this, it was argued that Sox should not be held responsible for Boland's misstatement of his instructions. His council went on to argue that, in any event, Matchee had formed the intent to harm the prisoner before Boland conveyed the instruction. Lastly, there was no evidence that Sox knew what Matchee was doing to the prisoner when the abuse was underway. Sox was acquitted of unlawfully causing bodily harm, but convicted of negligent performance of duty. A stay of proceedings was entered for the charge that he committed an act to the prejudice of good order and discipline. He was sentenced to a reduction in rank to lieutenant and a severe reprimand.

Two officers were charged in connection to the March 4th shooting of Ahmed Afraraho Aruush. LCol Carol Mathieu, who had ordered personnel to shoot at the legs of thieves, was charged with negligent performance of duty. The prosecution argued that

Mathieu's interpretations of the Rules of Engagement, and related instructions to his personnel, were negligent on the basis that they confused the criminal intent of looters with hostile enemy intent. Furthermore, Mathieu's orders also ignored existing conceptions of proportionality and disengagement in responding to threats. For their part, the defense countered that the Somalia mission was not solely a peace-keeping mission, and that Mathieu's instructions were reasonable in that they curtailed the use of deadly force (i.e. by aiming at the legs rather than killing). The defense also pointed out that Mathieu had met with local elders to warn them that deadly force would be used against thieves in order to protect equipment and supplies. Lastly, the defense correctly pointed out that the precise wording of the order was important, because allowing soldiers to shoot for the legs would not amount to ordering excessive force unless the soldiers' discretion was removed. Mathieu was initially acquitted on all counts. The Crown appealed on the on basis of confusion on the part of the Judge Advocate regarding the applicable standard of negligence applicable to the charge. A second court martial was convened on these grounds, which also acquitted Mathieu of all charges.

Captain Michael Rainville, who led the reconnaissance platoon responsible for the shooting of Aruush and the wounding of a second man, was charged with unlawfully causing bodily harm and negligent performance of duty. The Judge Advocate granted the defense motion to deal with charges related to the two victims separately. The prosecution's case was relatively straightforward: in telling his subordinates that they could use deadly force, and to "get them" (i.e. the two Somalis running from the scene), Rainville had counseled his men to commit an illegal armed assault. The defense attempted to shift responsibility upwards, arguing that Mathieu ordered Rainville to

secure the camp perimeter and to treat any attempt to breach the camp perimeter as a hostile act (which allowed soldiers to shoot to kill under the Rules of Engagement). The mission, as understood by platoon members, was to apprehend anyone attempting to breach the perimeter wire. Rainville was found not guilty on both counts.

Despite the fact that a number of Canadian soldiers had been charged in connection with the murders in Somalia, and were facing court martial, the ongoing negative publicity was a source of concern at the upper echelons of leadership. Kim Campbell, who was Minister of National Defence at the time of the Somalia incidents, was leading the Conservative Party into an election in 1993 (Madsen 1999). The Department of National Defence launched the Faye Board of Inquiry (named after Major General T.F. de Faye) to examine “leadership, discipline, operations, actions, and procedures of the Canadian Airborne Regiment in Somalia (Madsen 1999: 144). This board of inquiry was composed of individuals who were closely connected to, or a part of, the Canadian Forces. The fact that the board was concurrent with the trial process meant that it could not interview key individuals who were awaiting court martial. The Faye Board of Inquiry offered some suggestions that directly related to the issues at hand (e.g. a clarification of orders related to the detention of individuals), and many recommendations that were puzzling in light of the incidents in Somalia (e.g. improved rifle magazines, improvements in in-theatre rations). In the end, however, it was a largely ineffective and politicized exercise that did little to explain how Canadian soldiers could violate the laws and usages of war.

On 20 March 1995, the Liberal government established the Somalia Inquiry which was, in almost every respect, the polar opposite to the Faye Board of Inquiry. The

Somalia Inquiry was called after videos of hazing rituals of Airborne Regiment members were made public, which brought the Somalia affair back into the public eye. Although the Airborne Regiment was disbanded prior to the start of the Inquiry, many Canadians were still searching for answers regarding why the Somalia Affair had happened, and whether it could happen again (Kelp and Winslow 2000). The three member panel was completely independent from the military, the result of which was a distrust of the military by panel members, accompanied by a distrust of the panel by the military (Madsen 1999). It reached the highest levels of authority, and had the power to subpoena witnesses to testify at the proceedings, which were broadcast on national television. While Inquiries are not established with the intention that they turn into trials, the Somalia Inquiry effectively indicted the core principles of the Canadian Forces in effect at the time of the Somalia Affair (Winslow and Kelp 2004). In the process of outlining deficiencies within the military system, the Somalia Inquiry accounted for the war crimes committed by Canadian Forces personnel in a particular way:

From its earliest moments the operation went awry. The soldiers, with some notable exceptions, did their best. But ill-prepared and rudderless, they fell inevitably into the mire that became the Somalia debacle. As a result, a proud legacy was dishonoured. (Somalia Inquiry: 2)

This statement, drawn from the “Preface” of the report, illustrates that the crimes committed by Canadian Forces personnel in Somalia were explained as a breakdown in leadership rather than pathology amongst CF personnel. The “notable exceptions” to this general rule were simply bad apples in the barrel, and who did not represent the average Canadian soldier. Such bad apples violated Canadian standards by being racists and conducting hazing rituals, and were clearly capable of committing war crimes. The

criminalization process had effectively come full circle: racist beliefs, which informed definitions of war criminals during the First World War era (i.e. the belief in the inherent inferiority of certain ethnic groups) were themselves criminalized during the contemporary era.

While events in Somalia forced Canadians to confront the possibility that Canadian could commit war crimes, the trial of Capt Robert Semrau led to questions regarding the ways in which war crimes are defined. Semrau was the youngest son in a devoutly Christian family, and had a promising military career. On October 19, 2008, he was leading a four man mentoring team in the Helmand Province of Afghanistan. In his mentoring capacity, Semrau was responsible for training Afghan forces in battlefield tactics and ethics. The lead elements of Semrau's team encountered the enemy (Taliban soldiers), and United States Apache helicopters were called in to destroy that position. These helicopters decimated the enemy, leaving one dead and another critically wounded. Semrau had the scenes photographed for intelligence purposes, and then fired two quick shots into the wounded man. Although the body was never recovered (it was removed in the interim between Semrau's group leaving and investigators entering into the area), witnesses testified that the man was still alive when the shots were fired.

Semrau faced a court martial for the shooting of the wounded man.¹⁴¹ The charges included second degree murder, attempting to commit murder using a firearm, negligent performance of a military duty, and behaving in a disgraceful manner. The prosecution contended that at the point when the Taliban fighter was critically wounded, his status changed to that of a prisoner of war. As such, he should have provided medical

¹⁴¹ The account is taken directly from the summary of *R. v. Semrau*, 2010 CM 4010.

aid to the insurgent, or called in a medical team. The prosecution called a witness who testified that prior to the shooting Semrau had asked him to look away to avoid being a part of what was about to happen. Semrau's lawyers argued that it was, in fact, a mercy killing because the insurgent had no chance of survival, and was (in the mind of Semrau) suffering needlessly. This line of defense is both fascinating and troubling, because the Geneva Convention does not recognize mitigating factors, such as "mercy killing" of the wounded, in provisions related to prisoners of war. Given that Semrau and his legal team were undoubtedly aware of this, the possibility exists that they were appealing to the court of public opinion rather than the rule of law.

Semrau was found not guilty of second degree murder, attempting to commit murder using a firearm, and negligent performance of military duty. However, he was found guilty of behaving in a disgraceful manner. The judge's summary focused upon whether Semrau displayed the discipline necessary to continue as an officer in the Canadian Forces:

The fact that you committed this most serious breach of the Code of Service Discipline when you were in command of call sign 72A as well as the fact that you put your subordinates in such a predicament raises serious questions as to whether you fully understand your responsibilities as an officer. You also demonstrated a lack of self-discipline and of respect for fundamental principles and orders.

Although the "mercy killing" argument clearly appealed to the panel, during sentencing the judge showed frustration over the fact that Semrau "never appeared to take responsibility for [his] actions." The punishment assigned by the court was a reduction in rank to second lieutenant, and a dismissal from the Canadian Forces.

Summary of Section V

The contemporary era was marked by a significant expansion of international law related to genocide, crimes against humanity and war crimes. Of these developments, the passage of the Rome Statute had the most profound impact upon the Canadian criminalization process. Canada was obligated to adapt its Criminal Code to conform to the tenets of the Rome Statute, and in so doing the Canadian justice system effectively operated as an extension of the International Criminal Court.

The *sine qua non* of Canadian war crimes criminalization during the contemporary era was the conceptualization of war criminals as the locus of complex set of material and symbolic risks to the social fabric of Canada. The specific source of the criminality was largely undefined, and the main point of consideration was that they were an external entity. This external threat was *managed*, not eliminated, by seven distinct legal mechanisms administered by three separate war crimes units, and success was measured in actuarial terms on a balance sheet (number of individual screened, deported, and convicted contra the cost of each approach). The probabilistic logic that was used is similar to the notion that if an individual consistently leaves a car unlocked, it will eventually be stolen. This logic represents a shift away from attempting to understand offenders and toward target hardening and other preventative measures. The focus upon war criminals attempting to enter into Canada, and upon the refinement of preventative measures designed to minimize their rate of success, simultaneously reinforced the notion that war criminals were “other” and buttressed the belief that Canadians would never commit such crimes.

There were unintended consequences to the criminalization process. Witnesses in Canadian trials were also re-victimized, either by aggressive attorneys attempting to cast doubt upon their memory of the events in question, or through the act of testifying and articulating their experiences to the court. Some individuals suffered procedural victimization as deportation hearings were utilized to bypass standards of evidence found in criminal trials. Ethnic tension between Jewish and Ukrainians in Canada were fueled by the prosecution of Nazi-era war criminals. Each of these communities formed powerful lobby groups that constituted opposing forces with respect to the expansion (Jewish lobby) or contraction (Ukrainian lobby) of the criminalization process. The realization that Canada is composed of two tiers of citizenship, one that can be denaturalized and deported and one that cannot, represented a further unintended consequence experienced by the Ukrainians.

To a degree, the prosecution of Canadian Forces personnel for crimes against prisoners committed in Somalia and Afghanistan problematized the notion that war criminals were an external threat. However, it is important to note that indictments in the respective cases did not include the charge of war crimes. Thus although a Canadian soldier (Robert Semrau) was prosecuted for crimes committed against an enemy soldier, which was a novel legal development, he was charged with violations of military regulations. By excluding war crimes from the charge sheet in the courts martial of Semrau and those indicted in the Somalia Affair, the assumption that war criminals were an external threat was once again preserved. The belief in a binary distinction between “Canadian” and “other” (“us” and “them”, “civilized” and “uncivilized”), which rests at the heart of the criminalization process, was thus maintained. However, racialized belief

systems, which were fueled by the belief that some racial groups were inherently inferior, not only ceased to underpin conceptions of war criminals, but were also specifically singled out as a cause of such crimes.

Section VI: Conclusion

This section will provide a summary of the general findings of this project, followed a summary of limitations. It will conclude with a list of contributions made to the field of criminology by this project.

Findings

This dissertation provides a socio-historic analysis of the ethos of war crimes criminalization articulated in three general historical eras: the First World War era, the Second World War era, and the contemporary era. Presented below are the findings, which are grouped into the following six themes: (1) the *sine qua non* of the criminalization process in each era was a distinct conception of the nature of war crimes and/or war criminals; (2) the articulation and application of war crimes policies rarely matched; (3) Canadian identity shaped the criminalization process, and the criminalization process helped to shape Canadian identity; (4) although a distinct conception of war criminals was prominent in each era, remnants of past conceptions of war criminals still influenced the criminalization process; (5) an examination of the criminalization of war crimes within the military justice system is an essential in order to understand the criminalization process *writ large* and (6) it is impossible to fully separate distinct justice systems in play during the criminalization process.

(1) *Sine qua non*: The *sine qua non* of the criminalization process in each of the three eras was a particular conception of the nature of war criminals: during the First World War era war criminals were thought to be members of inferior races, war criminals were thought to be ordinary individuals caught in extraordinary circumstances during the Second World War era, and in the contemporary era war criminals were conceptualized as housing a complex set of material and symbolic risks to the social fabric of Canada. These three distinct views regarding the nature of war criminals were historically situated within both international and Canadian socio-legal contexts. In each of these eras, the response to the question “what are war criminals?” shaped the criminalization process. Specifically, the belief that war criminals were a part of inferior races led to an emphasis on immigration screening and deportation focused upon particular ethnic groups during the First World War era, the belief that war criminals were ordinary individuals caught in extraordinary circumstances led to trials for individual crimes, and a lack of screening for war crimes, during the Second World War era, while in the contemporary era the conceptualization of war criminals as a series of interrelated risks to Canadian society led to a multifaceted approach in which individuals were screened, removed or quarantined from the social body of Canada.

(2) *Policy and application*: Although a particular conceptualization of war criminals was the *sine qua non* of the criminalization process in each era, individuals charged with carrying out the criminalization process often re-interpreted the policies based upon their own belief systems. The disjuncture between policy and its application occurred when police widened and deepened surveillance during each of the World Wars, when Canadian military tribunals focused upon vengeance during the Second World War,

and when judges utilized higher thresholds for both *mens rea* and *actus reus* during the trial in Imre Finta during the contemporary era. The law was not a neutral entity in any of the three eras under consideration. Instead, the “human process”¹⁴² of law was evident at every stage of the criminalization process.

(3) *Criminalization and Canadian identity*: The fact that processes of criminalization simultaneously draw upon and shape the socio-historic contexts in which they emerge has been outlined by criminalization theorists. However, the manner in which the criminalization of war crimes shaped Canadian identity has not been articulated. The Canadian criminalization of war crimes in each of the three eras drew upon a binary distinction between “us” and “them.” Canadian society was consistently defined as being civilized and free of war criminals, which meant that populations criminalized during the respective wars were targeted for exclusion and even removal. Foucault argued that disciplines such as psychiatry and criminology rose in prominence in the nineteenth century through a promise to categorize, contain, cure, and/or remove dangerous individuals. In the Canadian example, war crimes units and immigration screening officials were predominantly responsible for protecting the social body from being infected by the presence of war criminals.

(4) *Remnants*: Particular conceptualizations of war crimes and war criminals do not vanish when new ones emerge. Instead, remnants of older articulations become embedded within the larger discourse. For example, the binary logic used in the

¹⁴² The term “human process” of law is borrowed from John Hogarth (1973), who argued that the biography of judges and magistrates provides a better understanding of sentencing patterns than objectively defined facts and legal arguments.

distinction between “civilized” and “uncivilized” races that was prominent during the First World War era remained embedded within future incarnations of the criminalization process as “us” and “them” or “Canadian” and “other.” Furthermore, although socio-historic contexts shift and evolve, established legal precedents (such as the IMT at Nuremberg) are used repeatedly over time. Such precedents become a part of the socio-legal context in which future events unfold. For example, the prosecutions of war criminals in Canadian Courts during the contemporary era would not have occurred were it not for the precedent set both by the Nuremberg tribunals, and by the use of domestic courts to try German war criminals during the Cold War era. For these reasons, changes in the criminalization process across the three eras under consideration have both linear and non-linear components.

(5) *Inclusion of military justice system:* As outlined in the theoretical overview (section 1.3) many criminologists have identified that international law, or systems of law within other nations, have to be taken into account during the study of crimes against humanity, genocide and war crimes. This is problematic for existing criminological theory, which is typically orientated around particular forms of domestic crime (such as street crime). However, most criminologists have failed to recognize that the problem runs even deeper, as military justice systems, which are separate from civilian law but still internal to individual nations, must also be taken into account. The linkage between the Canadian criminalization of war crimes and Canadian identity is particularly problematic with respect to Canadian military personnel, who cannot simply be removed from the category “Canadian” if they violate the laws of war. CF personnel who have violated the laws of war have, to this point, never specifically been charged with war

crimes. However, with the adoption of the Rome Statute and with a functioning International Criminal Court in play, it is likely that the government of Canada will at some point be pressured to prosecute Canadian military personnel who violate the laws of war. If and when this occurs, it would be an extremely potent challenge to the notion that war criminals are an external entity. Such a challenge would undoubtedly trigger a reconstitution of how war criminals are defined, and would act as a catalyst for a new era of criminalization of war crimes in Canada.

(6) *Inability to separate justice systems*: The Canadian criminalization process was, to some degree, influenced (or directly shaped) by external legal factors during each of the three eras under consideration. During the First World War era, Canadian law had to conform to Dominion standards. In the Second World War era, the influence of British law led directly to the prosecution of Canadian military personnel. The contemporary era, by contrast, is marked by Canadian courts acting as arms of the ICC, and by civilian inquiries governing military justice. In some cases the separate justice systems were mutually supporting (e.g. Commonwealth law and Canadian law during the First World War era, Canadian law and international law following the adoption of the Rome Statute in the contemporary era) while in others significant contradictions and difficulties emerged (e.g. domestic law and military law, as well as Canadian and British military law, during the Second World War era). The fact that multiple justice systems may be at play during the criminalization process poses problems for existing criminological theories, including theories of criminalization. For example, Austin Turk (1966) argues that actions that are offensive to individuals who enforce the law are more likely to lead to higher rates of arrest and convictions, and to result in more severe

sentences. However, what happens when an action is highly offensive to those working within one legal system, but is less offensive to those working within another? For instance, following the Second World War the British military prosecuted Canadian soldiers for crimes committed in POW camps, while the Canadian military did not prosecute any Canadian soldiers for actions in POW camps in the European theatre. Furthermore, existing theories of criminalization provide little insight into debates surrounding whether Désiré Munyaneza should stand trial in a Canada or Rwanda. Taking multiple legal systems into consideration is arguably the biggest challenge facing criminologists who enter into the study of genocide, crimes against humanity and war crimes.

Limitations

This project is limited in three main ways: it relies upon existing historic documents, some contemporary documents that could have been used are currently restricted, and the findings are not generalizable. Each of these limitations will be outlined below:

(1) This project necessarily relies upon existing records, and perspectives that do not appear in the records consulted during the research process can not be a part of this analysis. For example, during the First World War many groups sent letters to Prime Minister Borden expressing their views regarding what action should be taken against war criminals. These letters have been preserved on microfilm as a part of the Robert Laird Borden collection at the LAC, and form an important component of this research.

However, viewpoints not expressed in this form, and that did not move through official channels, were not recorded and are thus not a part of the analysis conducted for this dissertation.

(2) Some contemporary information is currently classified or restricted. For example, many documents collected as a part of the Somalia Inquiry are currently inaccessible to civilian researchers. In instances in which the researcher has the appropriate clearance to access these documents, they still cannot be used unless all committee members have the required level of clearance. In any event, the use of classified documents ultimately means that the finished product is also classified, which is undesirable for the current project.

(3) Canada is an officially bilingual nation, and key documents could potentially be written in either English or French. However, due to that fact that the author only speaks one of the official languages (English), documents written in French could not be integrated into the final analysis.

(4) This research is limited to a discussion of the criminalization of war crimes, crimes against humanity and genocide in the Canadian context. Due to this narrow focus, the results will not be directly generalizable to other contexts. A comparison with other countries will likely illustrate both differences and similarities in the respective criminalization processes. However, such a comparison is outside the scope of this project and is left to other researchers.

The limitations listed above are important with respect both to the types of conclusions that can be drawn from this research, and to the generalizability of the findings. Specifically, this dissertation can only claim to examine official, or public, responses to the issue of war crimes and war criminals in Canada during the three eras under consideration.

Contributions

Despite these limitations, this dissertation provides at least four contributions to existing scholarship:

(1) It is among the first attempts to apply theories of criminalization to the topic of war crimes, crimes against humanity and genocide. To date, the majority of applications of criminological theory to the topic of genocide have drawn upon rigid theoretical constructs that often expose disciplinary biases and limitations (e.g. a focus upon street crime, an emphasis placed upon domestic criminal codes and a general lack of attention to state crime). However, a flexible theoretical approach that draws upon inductive analysis is more appropriate when entering into new substantive areas. Simply put, when entering into a largely unexplored area of research it is more prudent to develop categories based upon the collection and close examination of information related to that topic at hand (inductive analysis) than to directly apply and test existing theoretical constructs (deductive analysis). In this dissertation, theories of criminalization were used to establish a broad framework that allowed sufficient maneuverability to

explore new theoretical ground, such as the link between Canadian identity and the criminalization process, or the interplay between different systems of justice that shape the criminalization process.

(2) It is among the first analyses of the Canadian criminalization of war crimes, crimes against humanity and genocide. In the past two decades, increasing numbers of criminologists have turned to the study of genocide. However, few if any criminologists have examined changes over time in Canadian responses to genocide, crimes against humanity and war crimes. The Canadian criminalization of such crimes is a particular instructive case study because Canada has used military and domestic courts to try war criminals, has initiated three distinct versions of war crimes legislation (one at the end of the Second World War, and two in the contemporary era), and has drawn upon a wide range of legal mechanisms in order to address the issue of war criminals. Furthermore, the criminalization process in Canada has occurred in at least three distinct stages, which highlights the influence of socio-historic context upon responses to such crimes. Lastly, the Canadian example illustrates the connection between the criminalization process and the construction of national identity.

(3) This dissertation broadens the scope of criminological investigation to include war crimes along with genocide and crimes against humanity. Although criminologists have, in the past two decades, entered into the academic of genocide and (to a far lesser degree crimes against humanity), they have largely ignored war crimes committed by front line military personnel. This omission is understandable to a degree because war crimes may be considered outside the scope of criminological inquiry for two main

reasons: a charge of war crimes that is not accompanied by additional charges of genocide and/or crimes against humanity is normally only found in military rather than civilian courts, and charges of war crimes are commonly based upon crimes committed in other nations. The fact that such crimes occur during war, coupled with the increasing prominence of asymmetric warfare in which the distinction between combatants and non-combatants is blurred, also present serious problems for criminological investigation (e.g. If the line between combatant and non-combatant is blurred, what determination can be made regarding the legality of killing? Is it legitimate to expect front line soldiers to understand the nuances of international law, and to distinguish between legal and illegal orders?). The inclusion of war crimes in this analysis provided critical insight into how the binary divisions between civilized and uncivilized, us and them, Canadian and war criminal were significantly challenged by the fact that Canadian soldiers have, on occasion, committed atrocities during times of war. This challenge has been managed by restrictions placed upon information from the front lines (First World War era), and definitional restrictions that do not allow Dominion citizens to be charged with war crimes (Second World War era and contemporary era).

(4) This dissertation is among the first examinations of the interaction between domestic Canadian law, international law and military law during the criminalization process. The extension of criminological theory to foreign or international systems of justice is already viewed as problematic, and consideration of military systems of justice substantially increases the level of complexity. This issue is exacerbated by the fact that many criminologists are largely unaware of how systems of military justice operate. However, the inclusion of genocide, war crimes and crimes against humanity into the

field of criminology does not simply involve understanding types of crimes that have previously been ignored in the discipline. This inclusion also necessitates an understanding of the complex interaction that occurs between international, domestic and military legal systems. For example, in the Second World War era the IMT at Nuremberg provided a legal precedent that was used in many future war crimes trials. However, the Canadian military refused to draw upon the Nuremberg precedent in their own war crimes trials held in Europe. Prosecutions for war crimes committed against Canadians in the Pacific Theatre were held under British military law, which prosecuted several Canadians for crimes committed against other Canadians. Moving forward to the contemporary era, legal scholars and jurists barely acknowledge Canadian war crimes trials held during the Second World War and focus instead upon precedents established at the IMT at Nuremberg. The account of the interaction between legal systems found in this dissertation functioned to situate the criminalization process within three diverse and complex socio-legal contexts.

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