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Canada's prevention and repression of war crimes

When dealing with matters of war crimes, no country wants to see its image smeared by the blood of its victims of war crimes. A country as sensitive as any to this perception is Canada.

Canada tries very hard to maintain the image of a welcoming and tolerant land, where values of respect and human rights are inculcated to its population in general and to the members of its Canadian Forces in particular. Despite this, it is unavoidable that through their implication in conflicts such as the First and Second World War, Korea, as well as peacekeeping and peacemaking missions in Rwanda, Somalia, Kosovo, Cyprus, Bosnia and Herzegovina and countless others, bad situation breeds wrongful actions from individuals in the Canadian Forces and result in the commission of war crimes.

At the other end of the spectrum, Canada is known throughout the world as a safe haven for terrorist, criminals of all stripes and war criminals. Due to its welcoming immigration policies, Canada has always had a tendency to grant the benefit of the doubt first and let claimants in rather than have them wait and risk murder in their country of origin.

As a result, Canada has been given a reputation as a safe haven for war criminals, 'génocidaires', and other terrorists. It is therefore necessary to analyse Canada's record on war crimes from two perspectives. First, from the point of view of the commission of war crimes by members of the Canadian Forces, and then from the perspective of Canada's record with regards to its evaluation of claims, refusal and grant of refugee status and prosecution of war crimes resulting from these inquiry. This will lead us through a circumvulated legal path of problematic policies and flawed legislation to a sense of progression, but with much left to be done.

CANADA'S RECORD AT WAR

Canadians have committed war crimes. Even before we argue the notion of applicable laws of armed conflicts and laws of war at the time of their commission, there is no doubt that massacres and attempted genocide against aboriginals are as much a part of Canadian history

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as it is part of the American one. The fact that these acts were committed first by Dutch, French, Spanish and English colonials do not take away their repercussions in history, or the collective responsibility of the Nations related to these commissions. There is ample evidence of British attempts to have Canada eradicate its aboriginal populations through neglect and assimilation policies during the 19th century, including after the Confederation of the four founding provinces of Canada in 1867 and the following federation of further provinces, up until 1949 and the creation of territories up to the creation of Nunavut in 2002.

However, no Canadian was ever brought to trial for these actions as the notions of crimes against humanity and war crimes had not permeated the collective consciences of the so-called 'civilised' Nations and most were committed not during wars but during periods of peace. As such, the notion of war crimes did not apply with the laws of the time.

The Canadian participation in the Great War (1914-1918) changed this perception tremendously. To urge their civilians to enrol, the Allies created some much pervaded propaganda accusing the German and Austrian troops of committing the most incredible aberrations, such as the crucifixion of nuns or the impaling of babies². To simple country boys enrolling and city dwellers desiring to avenge their European forebears and cousins, this type of psychological incitement to commit acts not in accordance with the *Hague Conventions* of 1899 and of 1907 have been said to be successful to a limited extent. To which, no one will never know, but to this that of the 500,000 Canadians who served in the Great War none have committed any sort of war crimes is pure delusion.

Prisoner of war camps and civilian internment camps, such as Fort Henry in Kingston, have acquired a certain aura of 'none-too-tasteful' behaviour for its treatment of detainees. As well, testimonies of war veterans, even if not corroborated, tend to certain transgressions. Nonetheless, considering the scope and intensity of the conflict, there is no doubt that any happenstance of war crimes by Canadians during the Great War was reduced to individual deportment and isolated incidents.

The Second World War (1939-1945) does not lend itself to such a clear slate. A relatively known incident occurred in Normandy shortly after D-Day. Oral tradition has transmitted in military circle that Canadian prisoners of war made on June 6 and following days by the 12 SS Panzer Hitlerjugend were executed at the Abbey d'Ardennes and that, in reprisals, the Commanding Officer of the Régiment de la Chaudière declared one day without quarters for each Canadian killed. It supposedly resulted in a week without quarters given by Canadians in this sector. This oral tradition has endured since and influenced the writing of a relatively known book from French-Canada in military literature called *Les Canadiens Errants*, where this incident and the fanaticism of the Hitlerjugend is presented in all its horror as opposed to the silent glory of Canadian soldiers³.

The facts are less romanced than this oral tradition. The trial of SS Brigadeführer Kurt Meyer under Canadian jurisdiction brought forth other elements regarding this case. The first is that Meyer only became the commanding officer of the 12 SS Panzer Division on June 14, 1944 as the General Commanding had been killed in an air raid that day. Meyer previously commanded

² Richard, Jean-Jules, *Neuf jours de baine*, Montréal, CFL Poche Canadien 1968, 361p.

³ Vaillancourt, *Les Canadiens Errants*

the 25th regiment of this division and did not have effective command immediately⁴. Furthermore, what prompted the massacre is not the same story depending on the research. According to historian Howard Margolian in his book *Conduct Unbecoming*⁵, it was solely German fanaticism that prompted it. But, further research in *Meeting of Generals*⁶, by Tony Foster, son of Canadian Major-General Harry Foster who presided over Meyer's court-martial, the massacre was prompted by the fact that a German officer had been shot in cold blood after surrendering and because a Canadian officer was captured with written orders to give no quarters to the Germans⁷. Whichever was the case, 11 German prisoners of war were executed in retaliation by Anglo-Canadian forces on June 17, 1944. Ironically, it is said that the commanding officers of both the German and Allied forces were not only strenuously opposed to such actions but also reprimanded them severely⁸.

An indication of the muddling of the facts regarding which crime came first and which was retaliation, is the fact that General Meyer saw his sentence reduced on appeal from shot by firing squad – which is usually not granted to war criminals as they are hung from the neck until death ensues – to a commutation of life imprisonment. He served 5 years in a Canadian prison and a further 3 in a German prison. He was released in 1954⁹.

Another 'urban legend' of the Canadian military concerns the much known picture, enlarged and exposed in 'live format' at Normandy Hall of Fort Frederick (Kingston), of a German officer being captured and searched by Canadian soldiers. According to the 'legend' after seeing this photo in the press during the war the mother of this officer said: "But they [the Canadians] told me he died in battle!"

Yet another case is that of veterans telling the author that he had been told during the war to escort prisoners to the rear. As they were escorted, prisoners were conveniently "shot while trying to escape". Whether these stories are embellished or not has no bearing on the question. The burden is that Canadians have indeed committed war crimes. The difference is perhaps that those crimes were not authorised or encouraged by the chain of command but a matter of individuals acting out of revenge or any emotional urge.

Past offences of Canadians committed prior, during or after the heat of battle have been somewhat substantiated, among other by the award-winning miniseries of the Canadian Broadcasting Corporation (CBC) entitled "The Valour and the Horror", in which a veteran testified that while posted in Hong Kong in 1941, prior to the Japanese invasion of the island, he was counselled by his sergeant that if he was to run his armoured car into a Chinese civilian, to stop and verify that he was dead. If he was still alive but badly injured, it was advised to back up the armoured car on him because it cost less to bury one than to pay the hospital

⁴ On <http://overlord44.free.fr/php/elargissement.php>.

⁵ Margolian, Howard, *Conduct Unbecoming: The Story of the Murder of Canadian Prisoners of War in Normandy*, Toronto, University of Toronto Press, 2000.

⁶ Foster, Tony, *Meeting of Generals*, Toronto, Authors Choice Press, 2000.

⁷ On <http://www.ukar.org/mcllell16.html#Canadian>.

⁸ *Supra*, note 3.

⁹ Brode, Patrick, *Casual Slaughters and Accidental Judgments: Canadian War Crimes Prosecutions, 1944-1948*, Toronto, University of Toronto Press, 1997, <http://www.windsorpubliclibrary.com/digi/macdonald/kurt.htm>.

fees¹⁰. In the same manner, Canadian participation to area bombings remain a forgotten aspect of civilian targeting that took place on express orders of Allied High Command during the war which does not meet the standards of even the *St-Petersburg Declaration*.

While American cases are being discovered from Korea, Canada's 26,000 men contribution has been mainly forgotten and no report of war crimes have been described although it is known that this conflict was conducted in extremely difficult conditions.

Since then, Canadian participation to some actions during the Second Gulf War of 1991 has been deemed devoid of such violations and the participation of NATO countries to the bombing of Serbia and Montenegro during the Kosovo intervention of 1999 are still pending while Canada has argued the following:

“The Government of Canada requests the Court to adjudge and declare that the Court lacks jurisdiction because the Applicant has abandoned all the grounds of jurisdiction originally specified in its Application pursuant to Article 38, paragraph 2, of the Rules and has identified no alternative grounds of jurisdiction. In the alternative, the Government of Canada requests the Court to adjudge and declare that:

- the Court lacks jurisdiction over the proceedings brought by the Applicant against Canada on 29 April 1999, on the basis of the purported declaration of 25 April 1999;
- the Court also lacks jurisdiction on the basis of Article IX of the Genocide Convention;
- the new claims respecting the period beginning 10 June 1999 are inadmissible because they would transform the subject of the dispute originally brought before the Court; and,
- the claims in their entirety are inadmissible because the subject matter of the case requires the presence of essential third parties that are not before the Court.”¹¹

While this would be a question of technicality and not of the merits, it appears that U.N. Resolutions following the intervention and continued support in the international community, while limited, would be sufficient to justify the actions and have them not considered as war crimes but application of necessity and proportionality.

Where the question of war crimes being committed by Canadians during international mandates comes into questions, two cases are of actual use. One springs from the Canadian peacekeeping mission in UNPROFOR II in Bosnia during the 1994 siege of Sarajevo while the other concerns a torture and murder case in Somalia in 1993.

¹⁰ Canadian Broadcasting Corporation, “The Valour and the Horror, Episode 2: A Savage Christmas Hong Kong, 1941” , 1992 at <http://www.valourandhorror.com/HK/HKsyn.htm>. There is no indication of actual commissions of such actions, but such testimonies are circumstantial evidences of the attitude of part of the Canadian troops deployed during the war and the prejudice that accompanied racial differences. These factors led to a very bloody war in the Pacific theatre of operations and no Anglo-Saxon literature differs on accounts of atrocities being committed by Allied forces. Books like Norman Mailer's *The Naked and the Dead*, and other such work of veterans demonstrates the viciousness of the fighting and Canadians were no more immune to these psychological pressures than any other troops.

¹¹ *Legality of the Use of Force (Serbia and Montenegro v. Canada)*, Press Release 2004/18, The Hague, 3 May 2004 at <http://www.icj-cij.org/icjwww/idocket/iyca/iycaframe.htm>.

Somalia 1993

The case of Somalia is extremely well documented because revelation of this murder and cover-up attempts by the military and politicians led to extraordinary measures being taken in the Canadian Forces and a profound shakedown of the government.

The U.N. intervention in Somalia in 1992 was the first such operation following the crumbling of the Berlin wall and the Second Persian Gulf War of 1991. As such, it reflected a new approach to humanitarian operations by which peacekeeping measures of Chapter VI of the U.N. Charter¹² were reinforced with a strong mandate to use force to under Chapter VII to “establish a secure environment for humanitarian relief operations in Somalia as soon as possible”¹³. As such, the confusion between the use of force to secure humanitarian operations and for the protection of the troops on the ground appeared to have been muddled in legal terms to start with, leading to a problematic interpretation of the rules of engagement. But, more importantly, the background that led to the death of Shidane Abukar Arone was a tragedy of errors and incompetence on the part of the military and political leadership of Canada.

It is also the most heart-wrenching case as it soiled the good name of the 1988 Nobel Peace Prize Winner - namely the Canadian Forces as a whole for their contribution to peacekeeping – and for the tragedy that brought about the death of a 16 years old Somali while pleading: “Canada! Canada!” as expectations of mercy and fair treatment. All this was caused by the events following his capture at around 2045 hours on 16 March 1993, by a Canadian patrol in an abandoned American military compound adjacent to the Canadian one.

This capture was the result of a deliberate attempt by Canadian to capture Somalis engaged in looting. Captain Sox, commanding 4th Platoon, 2nd Commando was charged with implementing a trap to capture such a person and succeeded in his attempt

Arone was brought to the Canadian compound and detained in a bunker with his wrists and ankles bounds. Then, a baton was place through his elbows behind his back, and from this he was suspended from the ceiling. After suffering random physical abuse from Master Corporal Clayton Matchee and Private Kyle Brown, Arone was systematically beaten and burned with cigarettes as well as ‘pistol whipped’. Arone died at approximately 0014 hours on 17 March 1993 from repeated blows to the head.

The *Somalia Inquiry Commission* produced a 1292 pages, five volumes report on every aspects pertaining to the events that led to this debacle and is available and exploring in depth the dysfunctions of the military system¹⁴. Its main analysis and conclusions can be found in Volume 2, where it analyses in details the problems of the personnel screening, the leadership inadequacies and the general attitude of the troops on the ground.

But this report was not the first to be done. Previously, a Board of Inquiry led by Major-General de Faye had already explored the issues and concluded on 23 April 1993 that while

¹² SC Res. 775, UN SCOR, 47th Sess., 3110th Meet., S/RES/775 (1992).

¹³ SC Res. 798, UN SCOR, 47th Sess., 3145th Meet., S/RES/798 (1992) at par. 7.

¹⁴ *Somalia Inquiry Report*, 2 July 1997, at http://www.forces.gc.ca/site/Reports/somalia/index_e.asp.

discipline in the unit under discussion – the 2nd Commando, Canadian Airborne Regiment – had flaws, it was prepared to meet the needs of its mission and its training was adequate¹⁵. However, this was not fully satisfactory and consisted only in the first phase of the examination of structural problems leading to the commission of war crimes.

At the end of September 1993, as reports of attempted cover-up were surfacing in the press, the Minister of National Defence ordered the creation of a *Somalia Working Group* with a mandate to “collate all ongoing departmental activities associated with the Somalia Affair”¹⁶. This *Somalia Working Group*, under the command of Major-General Jean Boyle, submitted its report in July 1994 and, contrary to the conclusion of the *de Faye Inquiry*, found “significant discrepancies in the de Faye’s Board’s findings and recommendations”¹⁷. This prompted the creation of a *Commission of Inquiry into the Deployment of Canadian Forces to Somalia* on 20 March 1995¹⁸. From this time, the *Commission* held a series of public hearings and collected over 600,000 pages of documents.

On 1 January 1996, now-promoted to Lieutenant-General Boyle was promote to full General rank, with the title of Chief of the Defence Staff making him the overall commander of the Canadian Forces. He was plagued with the *Commission*’s inability to get hold of documents of major importance, especially the computer logs of the 1st and 2nd Commandos of the Canadian Airborne Regiment, which were in effect the equivalent of their war journals. The first were said to have been lost due to water damages during ship transport, while the second had simply disappeared. Conveniently, both sets concerned the incidents in questions.

In an extraordinary step, General Boyle sent a message to all Canadian Forces personnel and civilian defence employees to “stand down all but essential operations and to conduct a thorough search of all their files , to identify and forward to NDHQ/SILT any Somalia-related document not previously forwarded”¹⁹. This resulted in a further 200,000 pages in 39,000 documents sent to the *Commission*.

The logs of 2nd Commando were finally recovered in a file cabinet at Canadian Forces Base Petawawa, and these had proved to have been altered. On 17 April 1996, the Minister of National Defence, David Collenette, enlarged the mandate of the Commission to “look into a cover-up. The Inquiry is to look into the destruction of documents. The Inquiry is to determine if there is wrongdoing...”²⁰ Yet, delays and poor results left the distinct impression of a government dragging its feet and the military obstructing the conduct of the inquiry through a wall of silence.

On 4 October 1996, the Minister of National Defence resigned his appointment, but remained in Parliament as a Member of the Liberal Party elected for Toronto. General Boyle resigned his appointment as Chief of Defence Staff on 8 October 1996 and retired from the Canadian Forces.

¹⁵ *Somalia Inquiry Report*, 2 July 1997, Volume 1 at 277, at <http://www.dnd.ca/somalia/vol1/v1c14e.htm>.

¹⁶ *Ibid.*, at 280.

¹⁷ *Ibid.*, at 281.

¹⁸ *Ibid.*, at 283, [hereinafter the *Commission*].

¹⁹ *Ibid.*, at 284.

²⁰ *Ibid.*, at 287.

From the *Commission's* report, it became clear that the long road to light being shed on the events of 16 March 1993 was a string of leadership fumbles, legal miscomprehensions and political meddling. The *Commission* found that the training received by the members of 2nd Commando had been inadequate to prepare them for peacekeeping or peacemaking tasks. Furthermore, the simple choice of 2nd Commando as a unit to deploy in such a mission had been extremely ill-judged from the beginning as the main purpose of this unit was to parachute behind enemy lines and conduct very aggressive operations against a well-trained and professional enemy. Even more so, in terms of aggressiveness, 2nd Commando was renowned for a level over and above any other unit in the Canadian Forces. It was furthermore affected with deep structural and disciplinary problems, as well as a weak leadership. Incidence of racism were rampant, the Confederate flag being used as a rallying symbol²¹ and a least four of its officers were under reprimands or under careful observations for lack of leadership, incompetence and/or disciplinary problems²².

To these inadequacies must be added the fact that these over-aggressive troops were committed to an environment of intense frustrations as the UN mandate was unclear and the constraints imposed on the troops severe. The *Commission* accounted for this in its finding²³. The inadequacies of the chain-of-command translated itself also in the incomprehension of the Rules of Engagement. These are the soldiers' only directive to their use of force. As such, it is interpreted and passed to them through training.

In the case of the Somalia Rules of Engagement, their inadequacies were signalled from the start but the procedure to amend them was so taxing that changes only came well after the deployments and its incidents. Furthermore, once the review got underway, the person responsible for it was its original drafter, who found nothing wrong with his initial submission. Furthermore, their interpretation on the ground by Lieutenant-Colonel Mathieu authorised "the use of deadly force against Somalis found inside the Canadian compound or absconding with Canadian kit, whether or not they were armed"²⁴ This is truly an interesting enlargement of their Paragraph 7(C)a permitting the use of force only when:

²¹ *Somalia Inquiry Report, supra*, note 14, Volume 2, at 55 and 66.

²² *Ibid.*, at 86 and 139 and Of these, Brigadier-General Beno, Commander of Land Forces Central Area, asked for the relief of the Commander of the Canadian Airborne Regiment, Lieutenant-Colonel Morneau for failure in the application of training and discipline. His replacement, Lieutenant-Colonel Mathieu, was deemed as feeble and was mistrusted by his officers. The Officer Commanding the Second Battalion, Major Seaward, was deemed incompetent and one of his main officer, Captain Rainville, was already under investigations for actions unbecoming and usurpation of his authority during an exercise conducted in Québec the year prior. LCol Morneau was indeed relieved, LCol Mathieu was relieved of command in September 1993, Major Seaward would be court-martialed for his actions (or lack thereof) and Captain Rainville got away with a reprimand for all his actions.

²³ *Ibid.*, at 267, in a section entitled 'Soldier Mounting Resentment' at not being able to fight back to the thieving and the injuries and insults to which they were submitted. Testimonies given to the Commission spoke of a: "mounting resentment of continuing thievery and their confusion about the proper application of the ROE became an increasingly dangerous mix. Maj Mansfield, as OC of the engineer squadron, found that Somalis who penetrated the Canadian compound frustrated his men greatly and he was worried about retaliation. WO Ashman believed that Somali infiltrators caused CF members to feel violated. MWO Amaral asserted that Somalis spat on various CF members and hurled rocks at them. On March 3, 1993, an American soldier died when a U.S. vehicle struck a mine near the village of Matabaan, approximately 80 to 90 kilometres north-east of Belet Huen, and Cpl Chabot testified that the American's death engendered a thirst for revenge against the Somalis. Perhaps it is not mere coincidence that Mr. Aruush perished on the following day."

²⁴ *Ibid.*, at 266.

“An opposing force or terrorist unit commits a hostile act when it attacks or otherwise uses armed force against Canadian forces, Canadian citizens, their property, Coalition forces, relief personnel, relief materiel, distribution sites, convoys and non-combatant civilians, or employs the use of force to preclude or impede the mission of Canadian or Coalition forces.”²⁵

Even to the more obtuse of soldier, this would definitely induce the question of what is meant by an attack. Some soldiers were left under the impression that anybody penetrating the perimeter of the Canadian compound was a legitimate target, which was absolutely not the case. Attempts to clarify by authorising to aim at the legs were not helpful as soldiers are trained to shoot at the center of the visible mass, which usually mean the area comprised between the chest and the lower belly. Nonetheless, most of the troops did act with sound judgment by giving fair warning, ordering to stop and being cautious about the use of fire against unknown targets. Still, this climate of confusion and frustration, coupled with the disciplinary problems and aggressiveness of the 2nd Commando's sub-culture did not wait long to assert itself.

The interpretation of the Rules of Engagement by Lieutenant-Colonel Mathieu confused the criminal intent of looting with the hostile intents of armed forces against Canadians. This led his immediate subordinate, Major Seaward, the Officer Commanding 2nd Commando, to give a formal order to “abuse” intruders. Major Seaward's subordinates included the commander of 4th Platoon, Captain Sox, who passed this order to his troops and set about capturing a Somali for that purpose. Once the capture was successful, the prisoner was brought under the guard of Sergeant Boland, who then charged Master-Corporal Matchee, Private Brown and Private Brocklebank with the direct watch of the prisoner at 2200 hours.

From this point, it took 2 hours to kill Arone through beating. After Arone was found dead, Master-Corporal Matchee was ordered arrested on 18 March 1993 by Major Seaward. At around 1300 hours on 19 March 1993, Master-Corporal Matchee was found hanging by a bootlace off the beam of the ceiling of his bunker where he was detained in an apparent suicide attempt.

As a result of this war crime, court-martials were ordered against a string of officers, non-commissioned officers and lower ranks members, all mentioned above, as well as a Sergeant Gresty, who was on guard duty in the Command post about 25 meters away from the bunker where Arone was being held.

Lieutenant-Colonel Mathieu was brought twice to court-martial, once in May 1994 and again on retrial in January 1996. He was acquitted of all counts of negligent performance of duty from giving an order allegedly on the use of deadly force and contrary to the Rules of Engagement.

Major Seaward was charged with unlawfully causing bodily harm and negligent performance of duty. He was acquitted of the first charge but held accountable to the second as he should have realised that his order to “abuse” intruders was contrary to the law and would cause soldiers

²⁵ *Idem.*

under his command to harm prisoners. He was at first sentenced to a severe reprimand. But, the Prosecution asked permission for appeal to the Court Martial Appeal Court of Canada for review of the sentence. The Court agreed and Major Seaward was condemned to three months imprisonment and release from the Canadian Forces. Major Seaward left prison in August 1996.

Captain Sox was charged with unlawfully causing bodily harm by passing along an order permitting abuse, with negligent performance of duty and with an act to the prejudice of good order and discipline. He was acquitted of causing bodily harm, but convicted of negligent performance of duty. He was reduced to the rank of lieutenant and given a severe reprimand.

Sergeant Boland pleaded guilty to charges of negligent performance of duty but not guilty to torture. He was on guard duty in the bunker before Master-Corporal Matchee's turn at the guard. Sergeant Boland passed along the order of Captain Sox to "rough up" the prisoner, to which Master-Corporal Matchee answered: "Oh Yeah!"²⁶ This prompted Matchee to go in the bunker and beat the prisoner with Private Brown. But, when Brown asked him to stop, Matchee answered "no" because he believed that "Captain Sox wants him beaten for when we take him to the police station tomorrow." Upon leaving the bunker, Sergeant Boland had said to Master-Corporal Matchee: "Just don't kill him." thereby giving him latitude in his treatment of the prisoner. Sergeant Boland was initially sentenced to 90 days' detention, but on appeal the Court Martial Appeal Court of Canada increased the sentence to one year's imprisonment.

Sergeant Gresty was acquitted on all counts of negligent performance of duty even though he was 25 meters from the bunker where Arone was being beaten and did not respond when told of the treatment of the prisoner. No appeal was made.

Private Brocklebank, present during the beating and torture of Arone, was acquitted of the charges of torture and negligent performance of duty.

Private Brown was charged with second degree murder and torture. He was found guilty of torture and of the lesser charge of manslaughter. Ironically, he was convicted exactly one year after the death of Arone on 16 March 1993 and sentenced to 5 years imprisonment, as well as dismissal from Her Majesty's service. No appeals were granted. Brown was transferred from his military jail to a civilian penitentiary on 24 May 1995. He was released on parole in November 1995.

Master-Corporal Matchee was left brain-damaged from his suicide attempt and therefore unable to stand trial. The charges against him remain and he could be tried if he became competent to stand trial, but this is highly unlikely.

The lesson from all this has clearly been that officer commanding rarely get the blame, even when their incompetence is such that their commanding officer demands them relieved and their subordinate mistrust them. This was the case of Lieutenant-Colonel Mathieu.

²⁶ *Her Majesty the Queen v. Major A.G. Seaward*, Court Martial Appeal Court of Canada, CMAC-376, cited in Sassoli, Marco and Bouvier, Antoine, *How Does Law Protect in War?*, Geneva, International Committee of the Red Cross, 1999 at 1080.

Major Seaward got his just deserves but even that does not complete the lack of accountability given to the senior officers in the chain of command who failed to assess and communicate clearly the importance and interpretation of the rules of engagement.

The acquittal of Captain Sox, save for a reduction in rank to a lesser charge, Sergeant Gresty and Private Brocklebank demonstrates a lack of severity to a definitely important aspect of modern soldiering: accountability regardless of the rank.

With the suicide of Master Corporal Matchee, the only person deemed as directly participating was Private Brown, the lowest denominator in the chain of command. For that, he was given a stiff sentence indeed. But even then, he only served a year of it in military prison, whilst the usual standard is of two years minus one day, and followed by a few months in a civilian penitentiary.

Of all the participants of this sad episode, the only person who took responsibility for his actions is Sergeant Boland who pleaded guilty and recognised his negligent performance of duty, but not to torture. While Sergeant Boland's contrition will never give life back to Mr. Arone, it does demonstrate that he understands that he failed his duty as a non-commissioned officer. It must be stated that the Court Martial Court of Appeal did recognise that even demoted and awaiting trial, then-demoted-to-Private Boland was given good evaluation reports and showed a positive attitude after his initial sentence and detention and was rapidly promoted again to Corporal in light of his performance before being given a year in prison.

Of all the persons implicated from far and away to being close by on the ground, the torture and murder of a young Somali boy destroyed many lives, forced a powerful minister and the top general of the Canadian Forces to resign and gripped both the military members and the civilian population of Canada in such a way that the issue is now unavoidable in teaching the laws of armed conflicts. Indeed, when the author built the first course on the laws of armed conflicts given to the Officer-Cadets of the Royal Military College of Canada, the issue was pervasive and demands of the respect of the Geneva Conventions and the military ethos were constantly put forward in order to avoid a repetitions of these events.

As a result, such course are becoming mandatory training and the Office of the Judge-Advocate General are more implicated then ever in training Canadian officers so the accountability of the Officer Corps is brought forth. But, what of Canadian citizens not submitted to the Canadian interpretations and jurisdictions of the laws of armed conflicts?

Bosnia 1995

Such a twisted and convoluted story would have been a Hollywood scenarist's dream. And yet, it is the reality where two Canadians are pitted one against the other and one commits a war crime against the other.

In 1992, Nicholas Ribic, an Edmonton native of Serbian ancestry, left Canada to fight for the Bosnian Serb Army (*Vojska Republika Srpska* (VRS)). In 1995, he was in Pale, the self-proclaimed capital of the self-declared *Republika Srpska*. During that time, a Canadian officer,

Captain Patrick Rechner, was acting as a U.N. military observer. Ribic and Rechner had met in May 1995 through social contacts in Pale.

At about 1000 hours on 26 May 1995, it is alleged that Mr. Ribic and several other armed men entered the UN office in Pale and, outraged at the recent NATO bombardment of 25 May 1995, they took the UN personnel hostage and moved them to a military compound 10 kilometres away. There, Capt Rechner and 2 other UN observers were chained to lightning rods and other places next to a bunker filled with mortar round and used as hostages against NATO bombardments. Despite warnings of executions, the hostages were finally released unharmed on 18 June 1995.

Mr. Ribic was captured in Mainz, Germany on 20 February 1999 and later extradited to Canada. He was held in an Ottawa jail on arrival and released on a 50,000\$ cash and 150,000 bond bail. He was forbidden to own a passport and subjected to a geographical limit of 80 kilometres from his residence outside of Edmonton²⁷.

He was the first Canadian to be subjected to the latest legislation amending the *Criminal Code of Canada*, permitting the prosecution of Canadians accused of committing hostage-taking, and which carries a maximum sentence of life imprisonment²⁸. The trial started on 23 October 2002 and lasted only eight days before a request for mistrial was presented to the Ontario Superior Court of Justice, arguing that the case could not proceed until the Federal Court of Canada dealt with issues of national security upon which the prosecution's case rests, creating unusually long delays whereby the jurors were under the court's sequestration for too long. The request was granted and a mistrial declared. A date of 7 March 2003 was set for a new trial but nothing ever came of it. The only case concerning Ribic that is left on record is the disbursement of his travel fees for court attendance due to the fact that the government elected to press charges in Ottawa yet imposed the injunction of residence in Edmonton. As a result the Crown was ordered to disburse all cost incurred for travel and decent lodging and meals for Mr. Ribic, but no trial took place²⁹.

THE CANADIAN REPRESSION OF WAR CRIMES AND CRIMES AGAINST HUMANITY

The Queen v. Imre Finta

This was yet again a missed opportunity of the Canadian legal system to prosecute a war criminal coming under its jurisdiction. In fact, the matter of the prosecution of war criminals by Canada can be summed up as a non-event. The first war crimes related trial to take place was that of a naturalized Canadian of Hungarian origin, Imre Finta, who immigrated to Canada after the Second World War and who was accused of:

“alternate counts of unlawful confinement, robbery, kidnapping and manslaughter (one count of each pair fell under the Criminal Code, 1927, while the other count was characterized as a war

²⁷ “Mistrial declared in Canadian's hostage case”, Canadian Tele-Vision (CTV.ca), 20 January 2003 at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1043085937904_151?hub=TopStories.

²⁸ “Case collapses against Canadian Serb soldier”, National Post, 22 January 2003 at <http://www.balkanpeace.org/hed/archive/jan03/hed5436.shtml>.

²⁹ *R. v. Ribic*, [2000] 45 W.C. B. (2nd) 352 (Ontario Superior Court of Justice).

crime or crime against humanity under the predecessor of s. 7(3.71) of the present Criminal Code)³⁰

Basically, then-Captain of the Royal Hungarian Gendarmerie Imre Finta was accused of implementing a “barbarous policy” of the Hungarian Ministry of the Interior, known as the *Baky Order*, by which he sequestered in a brickyard in Szeged, stripped of their valuables and deported to concentration camps 8,617 Hungarian Jews³¹.

At the trial, 19 witnesses who were so detained and deported testified against Finta. Six knew the accused before the events and attested to his actions. Three others who did not know him beforehand identified him as the culprit. Three others identified him through hear-say accounts, which were nonetheless deemed admissible as evidences, and eight other witnesses testified to the events in the brickyard, but not to the identity of Finta³². The Court also relied on the physical and expert evidences presented to it, comprising expert and documentary evidences establishing the historical context, the command structure in Hungary in 1944 and the state of international law in 1944. The statements and testimonies of three witness presented to the Hungarian trial following the end of the war were presented and accepted despite a certain nature of hear-say to one of them. Yet, despite a previous conviction of ‘crimes against the people’ *in absentia* by a Hungarian Court and even benefiting afterward of a general amnesty, both the convicted and the amnesty were deemed *nullities* under Canadian law [the Court’s euphemism for the non-recognition of Communist laws] and therefore the trial processed as a new trial without reference to the pleas of *autrefois convict* or *pardonné*, and against the weight of evidences and testimonies, this trial was a non-event as the respondent was acquitted of all counts³³. After 6 years of legal wrangling, Imre Finta was declared not guilty by the Supreme Court of Canada.

The effects on Canadian legislation

How the Finta case came to its end in such a way is based in a large part on the nature of the Canadian judicial system. As a constitutional monarchy, Canada has a dualist system for the incorporation of international law in its national legal system. It is only by an act of Parliament that international legal norms become part of Canadian law.

³⁰ *R. v. Finta*, [1994] 1 S.R.C. 701 at 701: “Imre Finta served during the Second World War as commander of the investigative subdivision of the Gendarmerie et Szeged, Hungary. He became a Canadian citizen in 1956. In 1988, he was charged under alternate counts of unlawful confinement, robbery, kidnapping and manslaughter (one count of each pair fell under the Criminal Code, 1927, while the other count was characterized as a war crime or crime against humanity under the predecessor of s. 7(3.71) of the present Criminal Code). These allegations arose from the deportation of Jews from Hungary in 1944. In a pretrial motion, Finta challenged the constitutionality of the war crimes provisions in the Criminal Code. The trial judge found that these provisions did not violate the Charter. The jury subsequently acquitted Finta on all counts. The Crown's appeal of this conviction was dismissed by a majority of the Ontario Court of Appeal with two dissenting judges in favour of ordering a new trial. The Court of Appeal was unanimous, however, in upholding the constitutional validity of the war crimes provisions in the Code.”

³¹ *Ibid.*, at 702.

³² *Ibid.*, at 703.

³³ *Ibid.*, at 702 *in fine* and 703.

In matters of war crimes, Canada had been known to be a common safe haven for war criminals and those having committed crimes against humanity. To remedy this situation, a *Commission of Inquiry on War Criminals (Deschênes Commission)* was instituted by the Federal Parliament, alongside with a War Crimes and Special Investigations Unit of the Royal Canadian Mounted Police as well as a Crimes against Humanity and War Crimes Section of the Department of Justice. On 30 December 1986 the *Deschênes Commission* recommended changes to the *Criminal Code*³⁴ as to contain a Section 6 providing a vehicle to prosecute war crimes. This came into effect on 17 September 1987, with *Bill C-37* amending the *Criminal Code* in this manner.

It is of interest that while the *Deschênes Commission* initially listed 774 suspects³⁵ and put forth an addendum of 38 other names plus 71 German scientists, the total amount of suspected war criminals was nowhere near the 'thousands' claimed in the medias. In fact, on the 774 initial list of suspects, the *Deschênes Commission* found that 341 had never landed or resided in Canada, 21 had landed in the country but had left it for other places, 86 had died while residing in Canada and 4 could not be located. It further had not found any *prima facie* evidence of the commission of war crimes in 154 cases. As a result, 606 of these initial suspected cases were closed. In 97 of the remaining cases, the *Deschênes Commission* had not *prima facie* evidences of the commission of war crimes, but had indications that such potential evidence might exist in Eastern European countries. Another 34 cases were left pending because of the answers not being forwarded by foreign services and the cases of German scientists was not examined in depth. As such, on the initial 883 list of suspects, only 20 cases had *prima facie* evidences of the commission of war crimes.

From these, four cases were brought to court between 1987 and 1994, none resulting in a conviction, due to the acquittal of the Finta case and the reasons given by the Supreme Court of Canada, where only Canadian citizens were concerned with the extra-territoriality of the law, therefore necessitating changes to the current legislation of the time.

Section 6 was therefore amended to Section 7 whereby a person who commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at that time shall, subject to the conditions set out in s. 7(3.71)(a) and (b), be deemed to commit that act or omission in Canada. Section 7(5) provides that proceedings may be commenced against such a person in any territorial jurisdiction in Canada. This includes crimes committed by or against a Canadian citizen even if this person became a Canadian after the fact, thereby granting jurisdiction to Canadian courts.

Regardless of these legislative efforts, it appeared clearly that the length and costs of investigations and trials were not effective in timely stopping them from gaining entry in Canada or in securing convictions. As a result, another mechanism was put in action through the Department of Immigration and Citizenship. On 30 October 1987, the *Immigration Act* was amended to refuse admission to persons believed on reasonable grounds of having committed war crimes or crimes against humanity. This was further enhanced on 1 January 1989 to

³⁴ *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

³⁵ *Canada's War Crimes Program Annual Report 1998-1999*, Department of Justice, Canada at <http://canada.justice.gc.ca/en/dept/pub/cca/cwcp.html>.

provide a clear mechanism of such determination and on 1 February 1993 to prohibit the admission of senior members of regimes known for widespread abuses of human rights. In April 1996, a Modern War Crimes Unit was set up within the Department of Immigration and Citizenship. As a result, by the end of March 1998, a total of 440 cases had been investigated, resulting in the exclusion of 300 persons from the refugee determination process, a further 80 persons were removed from Canada and 40 visas were refused overseas³⁶.

Since 1999, progress has been marked. In 2000, the Canadian Parliament passed the *Crimes Against Humanity and War Crimes Act*³⁷, which incorporates the notions of the *Rome Statute of the International Criminal Court*³⁸, and extend the power of extra-territoriality to include anyone who, before or after the entrance in force of the statute, commits genocide, a crime against humanity or a war crime outside Canada³⁹. Interestingly however, the *Act* is silent on the crime of aggression, which is not defined by his mentioned at Article 5(1)(d) of the *Rome Statute*⁴⁰, and which is not exactly a coincidence due to the pending case on the *Legality of the Use of Force (Serbia and Montenegro v. Canada)*⁴¹ at the International Court of Justice.

This omission does not take away the forcefulness of the Act, in that it also make the obstruction of justice in such a case, including bribery, perjury, fabrication of evidence and intimidation, stiff punishment of up to 14 years' imprisonment. It further creates the financial means to prosecute such persons through the establishment of a 'Crime Against Humanity Fund', legislated upon at Section 30⁴².

However, it is not because special investigative teams are created and that laws are put in place that effectiveness is guaranteed. The question is therefore to look into the numbers since the establishment of all these mechanism to discover is a preventive disposition is in place to prevent war crimes from being committed and if the mechanism to repress those who have committed them have borne any fruits.

Of course, one must always be circumspect about a government's own numbers. Nonetheless, since the amendments to the *Immigration and Citizenship Act* in 1999, there have been a number of revocations of citizenship and deportations, signalling efforts and a rise in efficiency.

From the inability of the Canadian judicial system to obtain conviction in the 1987 to 1999 period, the following amendments to the applicable legislations and the creations of special units seem to have had positive effects. By the time of the *Fifth Annual Report of Canada's Crimes Against Humanity and War Crimes Program*⁴³, seven important cases were presented to the courts and numerous revocations of citizenship and deportations have taken place. Of 59 removal orders issues, 46 were effected. Still, the cumulative number of uneffected removal orders

³⁶ *Ibid.*, at 3.

³⁷ *Crimes Against Humanity and War Crimes Act*, R.S.C. 2000, c. C-24 [hereinafter the *Act*]

³⁸ *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), entered into force July 1, 2002, [hereinafter the *Rome Statute*]

³⁹ *Ibid.*, Section 6.

⁴⁰ *Rome Statute*, *supra*, note 37 at Article 5(1)(d).

⁴¹ *Legality of the Use of Force (Serbia and Montenegro v. Canada)*, *supra*, note 8.

⁴² *Crimes Against Humanity and War Crimes Act*, *supra*, note 34 at Section 30.

⁴³ *Canada's War Crimes Program Annual Report 1998-1999*, Department of Justice, Canada at <http://www.cic.gc.ca/english/pub/war2002/section04.html>.

climbed to 157 since the program's inception. Of these 157, 91 did not report for removal and were the targets of warrants, 22 were awaiting travel documents from a foreign government, 6 were under review by the Federal Court, 28 were under appeal at the Appeal Division of the Immigration Review Board and 10 were stayed because of the requirement of the person to judicial proceedings. In total, between 1997 and 2002, 2011 persons deemed complicit in war crimes or crimes against humanity were refused visas to Canada while 233 were deported from Canada to stand trial in their country of origins or of commission of war crimes⁴⁴.

But, by the *Sixth Annual Report* of 2002-2003, the numbers seemed to have reached a *plateau*: while all the legislative processes are in place and the number of cases investigated is on the rise, success with the case engaged earlier has been of a limited nature. In fact, when one looks at the cases springing from the Second World War, 19 revocation of citizenship and deportations cases have been initiated since 1995. Of these, the government reports as having been "successful in six denaturalization cases before the Federal Court of Canada"⁴⁵. What the report omits is that of these six cases, none have completed the rounds of appeals to the Federal Court, the Immigration Review Board of the Department of Immigration and Citizenship or the Supreme Court of Canada.

Of the remaining 13 cases, 1 is still referred to the Federal Court, 2 are awaiting decisions from the Federal Court, 2 left Canada voluntarily, 1 awaits a decision of the Immigration Review Board. In fact, the delays in the legal procedure almost seem to be deliberate as of the 19 cases, 6 have had the privilege of dying while the procedures were still ongoing⁴⁶. While nobody argues for kangaroo courts, it is obvious that the number of appeals granted to the defendants borders on the ridicule and that these delays gives the oldest war criminal the privilege of dying in peace instead of being incarcerated as they should be.

Nonetheless, the Canadian government has been proud to publish a press release on 4 May 2004, expressing pride at investigating 86 modern war crimes allegations and "it is expected that several WWII investigations will also be completed this year"⁴⁷. Cynics could be tempted to show dissatisfaction as some of these case will be 10 years in the making.

CONCLUSIONS

The prevention and repression of war crimes, crimes against humanity and the crime of genocide is difficult everywhere in the world, but nowhere is it more difficult than in a liberal democracy that prides itself for its human rights record and a welcoming and tolerant society.

This tolerance is one of the hallmark of Canada and justly so: its immigration policy of multiculturalism has permitted a century-long development of the second largest national land-mass in peace and prosperity. However, the price for this is a tendency to be blind to the

⁴⁴ *Ibid.*, at 4.

⁴⁵ *Canada's War Crimes Program Activities for the Period of April 1, 2002 to March 31, 2003*, Department of Justice, Canada at <http://www.canada.justice.gc.ca/endept/pub/ccareport0203/05.html>.

⁴⁶ *Canada's War Crimes Program Annual Report 1998-1999*, Department of Justice, Canada at http://www.canada.justice.gc.ca/en/news/fs/2004/doc_31174.html.

⁴⁷ *Canada's War Crimes Program Continues Progress*, Department of Justice, Canada at http://www.canada.justice.gc.ca/en/news/fs/2004/doc_31172.html.

possibility that members of this society could also be war criminals. The attempted cover-up of the Somalia case was such a case where both the military and the politicians attempted to hide the fact that the dark side of individuals can surface in conditions of stress and hardship. By attempting to protect the image of righteousness and tolerance, both groups of leaders actually demonstrated the worst of Canadians when rigorous attempt to meet the reality face on should have been the course to follow.

The inability to prosecute a Canadian citizen, in the case of the Pale hostage-taking, and Canadian naturalized citizens known to have been condemned for their participation to war crimes demonstrate a further lack of will and means to meet this reality. This inability is further more extraordinary even after so many amendments to the legislation, the creation of a punishment-heavy *Crimes Against Humanity and War Crimes Act*, as well as the creation of inter-department teams to prevent entry and prosecute such crimes.

To the credit of the Canadian military, justice was handed down, even if not to the full force it should have been and programs to deal against racism, anti-Semitism and white supremacists were put into place in such a stringent way that such persons are given a short probation and dismissed from Her Majesty's service in a hurry.

Furthermore, military training encompasses ever more legalistic comprehension of the laws of armed conflicts and the ethos expected of members of the Canadian Forces. This author has had the privilege of laying some of those foundations at the Royal Military College of Canada, but it was by no means the only effort. The Office of the Judge-Advocate General of the Canadian Forces has instituted a program to further increase the training of officer on the laws of armed conflicts. And others have developed even more the first efforts of education and training. Awareness, reporting procedure and regulations has been amended to reflect the duty to act to the honour of the profession of arms, not to its discredit.

As for the legislative and procedural efforts of the Department of Justice, the Royal Canadian Mounted Police and the Department of Immigration and Citizenship, it is to hope that 2004 will be the year when progress is truly made. Until then, one can nonetheless say that Canada has progressed since 1985 and is now in a position to refuse access to potential war criminals to Canada and to communicate information about those known to have committed war crimes so they can be judged by the International Criminal Court.