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# Somebody Else's Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals

Nicholas P. Weiss

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A stylized world map in shades of blue and white, overlaid on a grid of latitude and longitude lines. The map is centered on the Atlantic Ocean.

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SOMEBODY ELSE'S PROBLEM:  
HOW THE UNITED STATES AND CANADA  
VIOLATE INTERNATIONAL LAW AND FAIL TO  
ENSURE THE PROSECUTION OF  
WAR CRIMINALS

*Nicholas P. Weiss*

# SOMEBODY ELSE’S PROBLEM: HOW THE UNITED STATES AND CANADA VIOLATE INTERNATIONAL LAW AND FAIL TO ENSURE THE PROSECUTION OF WAR CRIMINALS

*Nicholas P. Weiss\**

*The United States and Canada have created programs to ensure that they will not be havens for war criminals and human rights violators. This, however, fails to meet their international legal obligation to ensure that suspected war criminals and human rights violators will be prosecuted for their crimes. This Note analyzes and compares the war crimes prosecution policies of Canada and the United States. It concludes that both countries take inadequate measures to ensure war criminals are prosecuted for their crimes, and thus, these countries are failing to meet their international obligations. This Note recommends both countries implement statutes to ensure suspected war criminals are prosecuted, forcing Canada and the United States to conform to their international obligations.*

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## I. INTRODUCTION

In June 2011, the Canadian government asked its citizens to help it in the hunt for thirty suspected war criminals living in Canada.<sup>1</sup> However, instead of bringing the war criminals to justice, Canada began to remove them from the country without any guarantee the suspects would be prosecuted.<sup>2</sup> Addressing criticism for failing to ensure prosecution, Canada's Safety Minister, Vic Toews, declared "Canada is not the UN. It's not our responsibility to make sure each one of these [suspected criminals] faces justice in their own countries[.]"<sup>3</sup> Thirty people suspected of war crimes may never be prosecuted. Instead, they will simply go back to their lives. When faced with the responsibility of ensuring that war criminals are prosecuted, Canada chose practical expediency over justice.

This Note argues that both the United States and Canada have abrogated their legal obligations by failing to ensure that war criminals and perpetrators of crimes against humanity are brought to justice.<sup>4</sup> These countries must either prosecute for substantive offenses, or ensure that other states prosecute for the substantive offenses if they are to prevent those who have committed atrocities

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1. *See Ottawa Seeks 'War Criminals' Hiding in Canada*, BBC, July 21, 2011, <http://www.bbc.co.uk/news/world-us-canada-14243919>.
  2. *See War Crimes Suspects' Prosecution Uncertain*, CBC NEWS, July 27, 2011, <http://www.cbc.ca/news/politics/story/2011/07/27/pol-war-crimes-prosecution.html>.
  3. Laura Payton, *War Crimes Prosecution Not Up to Canada*, Toews Says, CBC NEWS, Aug. 3, 2011, <http://www.cbc.ca/news/canada/story/2011/08/03/war-crimes-suspect-toronto-arrest.html>.
  4. This Note in no way intends to denigrate the incredible work done by both the United States and Canada in ensuring that war criminals and those who commit crimes against humanity do not find safe harbor within their borders. However, both countries still have not met the obligations that have been established through international agreement.

from going free.<sup>5</sup> Both the United States and Canada have overcome their decades-long problems of insufficient temporal and geographic jurisdictions to prosecute for war crimes and crimes against humanity.<sup>6</sup> However, simply possessing jurisdiction to prosecute is not sufficient to achieve the obligations set by treaty and custom. To fulfill their international obligations, Canada and the United States must ensure the war criminals and human rights violators within their borders are prosecuted.

This Note is divided in five parts. Part II outlines the jurisdiction and history of Canada's successes and failures in ensuring the prosecution of war criminals. Part III does the same for the United States. Part IV analyzes the international obligations the United States and Canada, failing to ensure prosecution of war criminals, have violated. Part V advocates some statutory remedies both Canada and the United States should enact to meet their legal obligations.

Canada and the United States have made it a priority to identify and apprehend individuals found in their borders who have committed war crimes and crimes against humanity.<sup>7</sup> Within the past twenty years, the different strategies employed by each country to apprehend and bring to justice such individuals have begun to converge.<sup>8</sup> Starting in 1979, the United States began a serious effort to locate,

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5. Thanks to Professor David Crane, former Chief Prosecutor of the Special Court of Sierra Leone, for introducing me to the concept of the beast of impunity and the absolute necessity of ensuring that those who committed the worst atrocities cannot escape justice. Thanks to Eli Rosenbaum, Director of Strategy and Policy of the Human Rights and Special Prosecutions Section of the US Department of Justice; Robert Petit, Counsel for the War Crimes and Crimes Against Humanity Section of the Canada Department of Justice; and Matt Eisenbrandt, Legal Counsel for the Canadian Center for International Justice for agreeing to be interviewed for this Note.
  6. The United States has jurisdiction to prosecute for grave breaches of international law, crimes against humanity, and war crimes through several statutes. *See* Torture, 18 U.S.C. § 2340(A) (2001); War Crimes, 18 U.S.C. § 2441 (2006); Recruitment or Use of Child Soldiers, 18 U.S.C. § 2442 (2008); Genocide, 18 U.S.C. § 1091 (2009); Section to Enforce Human Rights Laws, 28 U.S.C. § 509B (2010). Canada now has jurisdiction through the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).
  7. Canada instituted a statute in 1987 granting jurisdiction to prosecute for war crimes and crimes against humanity for any person in Canada as if they had committed the crime in Canada. Act to Amend the Criminal Code, S.C. 1987, c. 37 (Can.). Canada replaced the 1987 legislation in 2000 with the Crimes Against Humanity and War Crimes Act. *See* Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).
  8. For the purposes of this Note, I will not address civil damages, only criminal punishment.

apprehend, and deport war crimes suspects, particularly those associated with the Nazi genocide.<sup>9</sup> Canada, on the other hand, held the unfortunate stigma of being a haven for Nazi war criminals and did not truly begin apprehending suspected war criminals until 1995.<sup>10</sup>

The United States has largely either removed suspected war criminals from the country or prosecuted these individuals for naturalization or immigration fraud.<sup>11</sup> This is partly because the United States only recently passed legislation granting universal jurisdiction for war crimes and crimes against humanity.<sup>12</sup> Canada, on the other hand, tends to remove suspects from Canada rather than seek any kind of criminal prosecution.<sup>13</sup> Both are responding to the

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9. The Simon Wiesenthal Center, an NGO that monitors and ranks countries' effectiveness at investigating and prosecuting Nazi war criminals, has given the United States the highest ranking of any country every year since the center's inception in 2002. EFRAIM ZUROFF, *WORLDWIDE INVESTIGATION AND PROSECUTION OF NAZI WAR CRIMINALS* 27 (2010). The Wiesenthal Center notes:

Since its establishment in 1979, the [Office of Special Investigations], recently renamed the Human Rights and Special Prosecution Section, (HRSPS) [sic] currently headed by Eli M. Rosenbaum, Esq., has conducted the most successful program of its kind in the world, and has been a model of proactive investigation and prosecution of Holocaust perpetrators for the past three decades. Its outstanding performance has earned it unique status, as the only agency to have received the highest possible grade every single year since this report was launched in 2002.

*Id.*

10. Until 1982, no action, not even a deportation, was enacted against the estimated 3,000 Nazi war criminals living in Canada following World War II. See Clyde H. Farnsworth, *Canada Says It Will Punish War Criminals*, N.Y. TIMES, Apr. 9, 1995, <http://www.nytimes.com/1995/04/09/world/canada-says-it-will-punish-war-criminals.html>. In the mid-1990s, Canada created an organization to coordinate the search for war criminals. CANADA BORDER SERVICES AGENCY ET AL., *ELEVENTH ANNUAL REPORT: CANADA'S PROGRAM ON CRIMES AGAINST HUMANITY AND WAR CRIMES 2007-2008*, at 2 (2008), available at <http://www.rcmp-grc.gc.ca/pubs/wc-cg-eng.pdf> [hereinafter CBSA REPORT 2008].
11. Though the United States often will deport those who have lied on naturalization forms, lying about especially heinous crimes can result in severe punishment. In one instance, a former Guatemalan death squad member was sentenced to ten years for lying about his involvement in a massacre. See *U.S. Jails Guatemalan Ex-Soldier for Hiding Massacre Role*, BBC, Sept. 16, 2010, <http://www.bbc.co.uk/news/world-latin-america-11338246>; Telephone Interview with Eli Rosenbaum, Dir. of Hum. Rts. Enforcement Strategy and Pol'y, Hum. Rts. and Special Prosecution Sec., U.S. Dep't of Just. (Dec. 9, 2011) [hereinafter Rosenbaum Interview].
12. Section to Enforce Human Rights Laws, 28 U.S.C. § 509B (2010).
13. See *War Crimes Suspects' Prosecution Uncertain*, *supra* note 2.

difficulties inherent in prosecuting war crimes that occurred far outside their borders but are doing so in a way that violates international legal obligations. The United States and Canada have declined to prosecute suspected war criminals and opted instead to either prosecute for immigration-related violations or deport without assurances that those suspected of war crimes and crimes against humanity will be prosecuted. Both states are bound by international agreements to ensure prosecution, yet both have failed to meet their international obligations.<sup>14</sup>

## II. CANADA DOES NOT ENSURE THE PROSECUTION OF WAR CRIMES AND CRIMES AGAINST HUMANITY

While Canada has enacted legislation to prosecute war criminals and human rights violators, the actual effect in prosecuting war criminals has been fairly impotent. A combination of little political will and restrictive Supreme Court rulings<sup>15</sup> has stymied domestic prosecution of war criminals. To date, Canada has prosecuted, convicted, and sentenced only a single war criminal.<sup>16</sup> Canada's record in ensuring that war criminals are prosecuted abroad once they have

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14. These agreements are spelled out in Section III, but include the Geneva Conventions and the Torture Convention. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6, U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention]. Article 49 reads:

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

*Id.* art. 49. *See generally* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

15. *See* Irwin Cotler, *International Decision*, 90 AM. J. INT'L L. 460, 461 (1996). The Canadian Department of Justice justified their change in strategy in prosecuting suspected war criminals by saying of the *Finta* case that "the Court established a higher standard of proof for the prosecution of war crimes and crimes against humanity than is recognized at international law. For the World War II cases, this decision has made prosecution of these crimes much more difficult and less likely." *Id.*

16. *See* CBSA REPORT 2008, *supra* note 10, at 9–10 (reporting on the fate of Desiré Munyaneza, a Rwandan citizen convicted in Canada for war crimes committed in Rwanda).

been removed from Canada is equally dismal. Canada has become very effective at removing suspected war criminals, but not nearly as effective in ensuring they face justice.

A. *Canada's Jurisdiction*

Canada has statutory jurisdiction to prosecute suspected war criminals under the Crimes Against Humanity and War Crimes Act ("Canada War Crimes Act" or "the Act").<sup>17</sup> The Canada War Crimes Act was enacted on June 29, 2000 to domesticate the Rome Treaty.<sup>18</sup> It grants Canada the statutory jurisdiction to prosecute genocide, crimes against humanity, and war crimes, regardless of where or against whom the crimes took place, and specifically permits Canadian courts to prosecute crimes committed before the Act was enacted.<sup>19</sup> With its retroactive provision, the Act grants Canada greater jurisdiction to prosecute war criminals than even the Rome Statute permits the International Criminal Court (ICC).<sup>20</sup> The Canada War Crimes Act states that if an intentional killing forms the basis of the offense, the perpetrator shall be imprisoned for life.<sup>21</sup> This

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17. *See* Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).

18. *See id.* pmbl. ("An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts.").

19. *Id.* § 6(1)–(1.1). The statute reads:

(1) Every person who, either before or after the coming into force of this section, commits outside Canada

- (a) genocide,
- (b) a crime against humanity, or
- (c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

(1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

*Id.*

20. Rome Statute of the International Criminal Court, art. 11, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Article 11 of the Rome Statute limits temporal jurisdiction of the International Criminal Court (ICC) to the date of its founding. *Id.* Article 25 denies jurisdiction over persons under 18 at the times of their alleged offense. *Id.* art. 25. The Canada War Crimes Act has no imposed age limitations for prosecution. *See* Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).

21. Crimes Against Humanity and War Crimes Act, art. 4(2), S.C. 2000, c. 24 (Can.).



is a substantially more stringent standard than the Rome Statute, which merely permits the ICC to imprison a suspect for a term of years up to life.<sup>22</sup>

*B. Canada's History of Investigation and Prosecution of War Crimes and Crimes Against Humanity*

Canada's expansion of jurisdiction was driven in large part by Canada's unfortunate legacy of permissiveness towards war criminals.<sup>23</sup> Some organizations estimate that as many as 3,000 Nazi war criminals fled to Canada after World War II.<sup>24</sup> Following condemnation by international organizations, Canada adjusted its criminal code in 1987 to enable the prosecution of Nazi war criminals living in Canada.<sup>25</sup> Yet, the 1987 legislation is largely considered a failure.<sup>26</sup> Only four prosecutions were ever attempted.<sup>27</sup> Three of the accused had their charges dropped outright, and the fourth ended in acquittal.<sup>28</sup>

The last attempt to prosecute Nazi war criminals in Canada resulted in the acquittal of Imre Finta.<sup>29</sup> Canada charged Finta with manslaughter, kidnapping, unlawful confinement, and robbery in relation to his alleged activities as a police officer assisting the Nazis in the forced deportation of 8,617 Jews from Szeged during the Holocaust.<sup>30</sup> The Canadian Supreme Court made a bewildering ruling in which it established a broad defense of superior orders that

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22. See Rome Statute, *supra* note 20, § 77 (limiting punishment to a maximum of thirty years except in cases of extreme gravity, which allow a sentence of life imprisonment).
23. See *About Us*, CRIMES AGAINST HUMANITY AND WAR CRIMES PROG., DEP'T OF JUST. CANADA, <http://www.justice.gc.ca/warcrimes-crimesdeguerre/crime-crime-eng.asp> (last updated May 19, 2010).
24. See Anthony DePalma, *Canada Called Haven for Nazi Criminals*, N.Y. TIMES, Feb. 3, 1997, at A6.
25. See *About Us*, *supra* note 23. This followed a 1986 report by the Commission of Inquiry on War Criminals which found that reports of widespread Nazi war criminals living in Canada were true. *Id.*
26. See DePalma, *supra* note 24. Until the legislation was updated in 2000, Canada had prosecuted only four Nazi war criminals out of the estimated thousands living in Canada with no convictions. *Id.*
27. See *id.*
28. See *id.*; *Public Report, Canada's War Crimes Program*, CITIZENSHIP AND IMMIG. CANADA (July 21, 1998) [hereinafter *Public Report 1998*], [http://epe.lac-bac.gc.ca/100/202/301/can\\_war\\_crimes\\_public\\_report/1998/english/pub/war1998.html](http://epe.lac-bac.gc.ca/100/202/301/can_war_crimes_public_report/1998/english/pub/war1998.html).
29. See *R. v. Finta*, [1994] 1 S.C.R. 701, 705 (Can.) (dismissing the appeal of acquittal at the trial level).
30. See *id.* at 702.

departed from international practice.<sup>31</sup> The court also applied a heightened *actus reus* requirement found nowhere in either international or Canadian law.<sup>32</sup>

This ruling handicapped Canadian prosecution of war crimes and reinforced the perception that Canada was not serious about addressing the issue of suspected war criminals living in Canada.<sup>33</sup> While Canada could have reacted to this setback by increasing the total deportation of war criminals, Canada successfully extradited or deported only two suspected war criminals between 1980 and 1997.<sup>34</sup>

Since the implementation of the War Crimes Prosecution Act, only one person has been successfully prosecuted to conviction.<sup>35</sup> In 1997, Désiré Munyaneza emigrated from Rwanda to Canada.<sup>36</sup> In 2000, the same year as the passage of the Canada War Crimes Act, the Immigration and Refugee Board rejected his application for refugee status, finding reason to believe that Munyaneza had participated in the 1994 Rwandan genocide.<sup>37</sup> Munyaneza was finally charged in

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31. *See id.* at 707. The court stated:

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test: the defences are not available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. There can be no moral choice where there was such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders.

*Id.*

32. *See generally* Irwin Cotler, *War Crimes Law and the Finta Case*, 6 SUP. CT. L. REV. 577 (1995) (critiquing the court's legal evaluation in *Finta*); *see also* Cotler, *supra* note 15, at 467 (arguing the court mischaracterized the elements of the *actus reus*).

33. *See* Irwin Cotler, *Bringing Nazi War Criminals in Canada to Justice: A Case Study*, 91 AM. SOC'Y INT'L L. PROC. 262, 268 (1997) (asserting that the ruling in *Finta* demonstrates "inadequate appreciation" for either international law or the international aspects of national law and creates "disturbing precedents and principles for war crimes generally") [hereinafter Cotler, *A Case Study*].

34. *See* DePalma, *supra* note 24.

35. *Nazi War Criminals in Canada*, CBC, May. 12, 2011, <http://www.cbc.ca/news/business/story/2011/05/12/f-nazi-war-criminals-canada.html>.

36. *See Desire Munyaneza*, TRIAL, <http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/423/action/show/controller/Profile.html> (last visited Dec. 14, 2012).

37. *See id.*

2005, after Rwandan-Canadians recognized him living in their community.<sup>38</sup>

Munyaneza was charged and convicted of seven counts of genocide, crimes against humanity, and war crimes for acts of murder, sexual violence, and pillage committed in Rwanda in 1994.<sup>39</sup> He was sentenced by the Quebec Superior Court on October 29, 2009.<sup>40</sup> The court gave Munyaneza life without the possibility of parole for twenty-five years.<sup>41</sup>

The second and only other person to be indicted under the Canada War Crimes Act is Jacques Mungwarere, also a Rwandan.<sup>42</sup> He was arrested on November 6, 2009, several weeks after Munyaneza's sentencing.<sup>43</sup> Mungwarere was ultimately charged with one count of genocide and one count of crimes against humanity.<sup>44</sup> The trial began on April 30, 2012.<sup>45</sup>

### *C. Canada's Preference for Removal of War Crimes Suspects*

The Munyaneza and Mungwarere cases could have signaled an end to the impunity granted to suspected war criminals in Canada. Unfortunately, Canada has adopted a policy of deportation of suspected war criminals, rather than seeking criminal prosecution.<sup>46</sup> Canada currently prosecutes suspected war criminals through the Crimes Against Humanity and War Crimes Program (War Crimes Program) in Canada's Department of Justice.<sup>47</sup> Since 1998, the War Crimes Program has been the coordinating force between the Department of Justice, the Royal Canadian Mounted Police, Citizen and Immigration in Canada, and the Canada Border Service Agency (CBSA) in the search for and disposition of suspected war criminals.<sup>48</sup>

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38. *Nazi War Criminals in Canada*, *supra* note 35.

39. *R. v. Munyaneza*, 2009 Q.C.C.S. 2201, § 3.4 ¶ 129 (Can.)

40. *Id.* § 9.

41. *Nazi War Criminals in Canada*, *supra* note 35.

42. *Successes*, CRIMES AGAINST HUMANITY AND WAR CRIMES PROGRAM, DEP'T OF JUST. CANADA, <http://www.justice.gc.ca/warcrimes-crimesdeguerre/successes-realizations-eng.asp> (last updated Apr. 20, 2010).

43. *See id.*

44. *CCIH's Public Cases and Interventions, Jacques Mungwarere*, CAN. CTR. INT'L JUST., [http://www.ccij.ca/programs/cases/index.php?DOC\\_INST=19](http://www.ccij.ca/programs/cases/index.php?DOC_INST=19).

45. *Id.*

46. *See Payton*, *supra* note 3 (presenting Canada's Public Safety Minister Vic Toews's argument that it is the responsibility of other countries, not Canada, to prosecute war criminals).

47. *See About Us*, *supra* note 23.

48. *Id.*

This combination of authorities focuses on denying entry and removing war crimes suspects from Canada.<sup>49</sup>

The goal of the War Crimes Program is to ensure that Canada is not a safe haven for war criminals.<sup>50</sup> Rather than prosecute war criminals, the preferred method of justice has been the prevention of the immigration of war criminals and the deportation of war crimes suspects.<sup>51</sup> Although the current administrators of the War Crimes Program tout their model as an example to the world,<sup>52</sup> Canada faces significant criticism that its War Crimes Program does not go far enough in ensuring that war criminals face justice.<sup>53</sup>

In 1995, partially in response to the failed prosecution efforts, the Canadian government switched its focus from prosecutions to revocations of citizenship and deportations of suspected war criminals.<sup>54</sup> These efforts were assisted in 2001 when Canada granted itself power to deport suspected war criminals through the

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49. *See id.* The stated operational objectives are:

To prevent the admission to Canada of people involved in war crimes, crimes against humanity or genocide; [t]o detect, at the earliest possible opportunity, alleged perpetrators of war crimes, crimes against humanity or genocide who are in Canada, and take steps to prevent them from obtaining status or citizenship; [t]o revoke the status or citizenship of individuals involved or complicit in war crimes, crimes against humanity or genocide who are in Canada, and remove them from Canada; and [t]o examine all claims that there are suspected perpetrators of war crimes and crimes against humanity living in Canada and, where appropriate, investigate and prosecute these individuals.

*Id.*

50. *Id.*

51. CANADA BORDER SERVICES AGENCY ET AL., TWELFTH ANNUAL REPORT: CANADA'S PROGRAM ON CRIMES AGAINST HUMANITY AND WAR CRIMES 2008–2011, at 3 (2011), available at <http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/bsf5039-eng.pdf> [hereinafter CBSA REPORT 2011].

52. *See Crimes Against Humanity and War Crimes Program*, DEPT. OF JUST. CANADA, <http://www.justice.gc.ca/warcrimes-crimesdeguerre/crime-crime-eng.asp> (last updated May 19, 2010) (stating that Canada's War Crimes Program is internationally recognized as being a highly effective inter-departmental initiative).

53. *See* Fannie Lafontaine, *Canada's Crimes Against Humanity and War Crimes Act on Trial: An Analysis of the Munyaneza Case*, 8 J. INT'L CRIM. JUST. 269, 287 (2010) (criticizing, among other things, Canada's overreliance on administrative remedies instead of criminal prosecution when dealing with war criminals); Cotler, *A Case Study*, *supra* note 33, at 262–63 (arguing Canada has failed to enforce international criminal law).

54. *See Public Report 1998*, *supra* note 28.

Immigration and Refugee Protection Act.<sup>55</sup> Between 1997 and 2008, Canada removed 466 people under the Act for suspicion of war crimes and crimes against humanity.<sup>56</sup>

Canada's politicians have found it far easier to simply deport suspected war criminals rather than extradite or prosecute them.<sup>57</sup> Many Canadian policymakers support the deportation option, and many have commented that Canada has no intention, and should have no intention, of using the power of the Canada War Crimes Act to prosecute foreigners.<sup>58</sup> Other Canadian officials see this as the natural right of Canada to protect its own borders.<sup>59</sup>

Canada's policymakers also seem to be responding, in part, to public opinion on suspected war criminals generally. In a public opinion poll, CBC News found that a majority of Canadians polled favored deportation without condition of prosecution for suspected war criminals living in Canada.<sup>60</sup> In response to this public sentiment,

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55. See Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.). Section 35 states:

(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act* . . . .

*Id.* § 35.

56. CBSA REPORT 2008, *supra* note 10, at 14. The Immigration Act itself was amended in several times. Its current status is a result of 2002 legislation, renaming it the Immigration and Refugee Protection Act. Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).

57. See CBSA REPORT 2008, *supra* note 10, at 1 (“The primary goal of the War Crimes Program is to deny safe haven in Canada to war criminals . . .”).

58. See Payton, *supra* note 3 (noting Canada's Public Safety Minister Vic Toews's preference for other countries to conduct prosecutions)

59. Telephone Interview with Robert Petit, Counsel, Crimes Against Humanity and War Crimes Sect., Canada Dep't of Just., (Feb. 29, 2012) [hereinafter Petit Interview]. When asked what factors were taken into consideration in choosing to deport those being sought by the government, Mr. Petit responded “there is really only one [factor], if the individual has no right to be in Canada.” *Id.*

60. See *How Should Canada Handle Alleged War Criminals?*, CBC NEWS, July 29, 2011, <http://www.cbc.ca/news/yourcommunity/2011/07/how-should-canada-handle-alleged-war-criminals.html> (revealing a non-

Canada's politicians have attempted to frame the decision to expel war criminals rather than prosecute as a response to public opinion.<sup>61</sup>

Recently, Canada has become more public and aggressive in identifying and removing suspected war criminals. In July of 2011, the CBSA sought the public's assistance in apprehending and deporting thirty suspected war criminals living in Canada.<sup>62</sup> As of this writing, five war criminals have been apprehended by the CBSA and three have been removed as a result of the program.<sup>63</sup> Canada has no statutory obligation to verify that any person removed for suspicion of war crimes and crimes against humanity will be prosecuted once they are removed.<sup>64</sup>

### III. THE UNITED STATES DOES NOT ENSURE THE PROSECUTION OF WAR CRIMES AND CRIMES AGAINST HUMANITY

The United States has an excellent record of locating suspected war criminals, especially former Nazis.<sup>65</sup> However, once it has located them, the United States has largely chosen either to try them for immigration or naturalization fraud, or remove the suspects from the United States without adequate assurance that they will be prosecuted. This violates the United States' legal obligation to ensure the prosecution of suspected war criminals.

#### A. *United States' Jurisdiction*

The United States has statutory jurisdiction to prosecute war criminals for war crimes,<sup>66</sup> genocide,<sup>67</sup> torture,<sup>68</sup> or use of child

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scientific survey of reader responses showing support for deportation without due process).

61. See Payton, *supra* note 3 (noting Towes's preference for removal was a matter of safety for the Canadian public and public interest).
62. *Id.*
63. *Fifth Suspected War Criminal in Custody*, PUB. SAFETY CANADA (July 28, 2011), <http://www.publicsafety.gc.ca/media/nr/2011/nr20110728-eng.aspx?rss=false>; *Third Individual on CBSA 'Wanted' List Removed from Canada*, CANADA BORDER SERV. AGENCY (Aug. 11, 2011), <http://www.cbsa-asfc.gc.ca/media/release-communique/2011/2011-08-11-eng.html>.
64. See Payton, *supra* note 3.
65. See ZUROFF, *supra* note 9, at 5 (awarding the highest grade to the United States for successful war crime prosecutions).
66. War Crimes, 18 U.S.C. § 2441(a)–(b) (2006).
67. Genocide, 18 U.S.C. § 1091(e) (2009).
68. Torture, 18 U.S.C. § 2340A(b) (2001).

soldiers.<sup>69</sup> These acts have limited temporal jurisdiction.<sup>70</sup> They do not permit prosecution for any crime committed prior to their enactment, and, in the case of war crimes and the 1988 genocide statute (pre-revision), do not apply to non-United States citizens unless the crimes were committed against U.S. citizens.<sup>71</sup>

The limits of jurisdiction have resulted in creative prosecution. For many years, criminal proceedings against suspected war criminals for substantive crimes were not possible in the United States due to lack of statutory jurisdiction.<sup>72</sup> If the United States wanted to initiate any criminal proceeding, prosecutors were forced to prove immigration fraud or naturalization fraud.<sup>73</sup> Even this proved difficult, as the statutes of limitations on naturalization fraud and visa fraud were ten years and five years respectively.<sup>74</sup>

*B. The United States' History of Investigation and Prosecution of War Crimes and Crimes Against Humanity*

Until 1979, prosecution and deportation of suspected Nazi war criminals living in the United States were conducted through the Immigration and Naturalization Service.<sup>75</sup> This arrangement was an enormous failure. From the end of World War II to 1979 only two Nazi persecutors were removed from the United States.<sup>76</sup> Some evidence indicates that the Immigration and Naturalization Service

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69. Recruitment or Use of Child Soldiers, 18 U.S.C. § 2442(c) (2008).

70. The United States Constitution prohibits the prosecution of crimes that were not illegal at the time they were committed through the ex post facto clause. U.S. CONST. art. I, § 9, cl. 3; but see Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COL. L. REV. 1515, 1528 (1987) (arguing that crimes of universal jurisdiction may be prosecuted without violating the ex post facto clause).

71. 18 U.S.C. § 2441(b).

72. See Eli M. Rosenbaum, *An Introduction to the Work of the Office of Special Investigations*, USA BULLETIN, Jan. 2006, at 1 (noting the constitutional limitations on criminal proceedings, which have forced the Department of Justice to turn to deportation and removal actions); but see Michael P. Scharf, *Application of Treaty-Based Jurisdiction to Nationals of Non-State Parties*, 35 NEW ENG. L. REV. 363, 366 (2001) (arguing, in part, that certain crimes, including torture, genocide, and other crimes against humanity are subject to universal jurisdiction even without direct statutory approval.)

73. Rosenbaum Interview, *supra* note 11.

74. *Id.*

75. Rosenbaum, *supra* note 72, at 2.

76. *See id.*

actually intentionally assisted many Nazis in their attempts to enter the country.<sup>77</sup>

To rectify the situation, in 1979 the United States created the Office of Special Investigations (OSI) to investigate and prosecute suspected Nazi war criminals living in the United States.<sup>78</sup> The program was enormously successful in seeking out former Nazis. By 2008, the OSI had launched—and won—proceedings against 107 people linked to Nazi-era war crimes.<sup>79</sup>

The United States gradually began shifting their focus from Nazi war criminals to a more general search for modern war criminals and human rights abusers. This shift was motivated, in part, by a series of reports in the early 1990s, which concluded that the United States was being used as a safe haven for human rights violators, especially torturers.<sup>80</sup> In 2004, Congress passed the Intelligence and Terrorism Prevention Act, giving OSI the added responsibility of bringing civil and criminal denaturalization cases against modern day war criminals and human rights abusers.<sup>81</sup> In 2009, OSI was merged into the Human Rights and Special Prosecution Section within the Department of Justice.<sup>82</sup>

Other organizations cooperate with the Human Rights and Special Prosecution Section. The Human Rights Violators and War Crimes Unit of Immigration and Customs Enforcement is tasked with preventing foreign war crimes suspects, persecutors, and human rights abusers from entering the United States.<sup>83</sup> It also identifies, prosecutes, and removes suspected war criminals and human rights abusers from the United States.<sup>84</sup>

The US record on successful prosecution and conviction for war crimes and crimes against humanity is less impressive than that of Canada. In 2008, Charles “Chuckie” Taylor, son of Charles Taylor,

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77. See Eric Lichtblau, *Nazis Were Given ‘Safe Haven’ in U.S.*, *Report Says*, N.Y. TIMES, Nov. 14, 2010, at A1.

78. Rosenbaum, *supra* 72, at 2.

79. See Rosenbaum Interview, *supra* note 11.

80. See William J. Aceves, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS 22–24 (2002) (noting the United States has failed to prosecute a single individual for torture since criminalizing acts of torture committed outside the United States in 1994).

81. See Intelligence Reform and Terrorism Prevention Act, 50 U.S.C. § 5505(b)(1) (2004).

82. See Human Rights Enforcement Act, 28 U.S.C. § 1(a) (2009).

83. See *Overview, The Human Rights Violators and War Crimes Unit*, US IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/human-rights-violators/> (last visited Dec. 17, 2012) [hereinafter *War Crimes Unit Overview*].

84. *Id.*



former president of Liberia and convicted war criminal, received a 97-year sentence under the 1994 Torture Statute.<sup>85</sup> He was the first, and so far only, person to be prosecuted under the Torture Statute.<sup>86</sup> Aside from Taylor, the United States has not completed any kind of domestic criminal prosecution for war crimes or crimes against humanity.

*C. The United States' Preference for Using Immigration Law Against War Crimes Suspects*

The United States' general policy towards those suspected of war crimes and crimes against humanity has been to deny them a safe haven.<sup>87</sup> If a suspected war criminal enters the United States, the United States has several options to deal with the suspect. It may criminally prosecute for the underlying offense,<sup>88</sup> criminally prosecute for naturalization or immigration fraud,<sup>89</sup> extradite the suspect to another country,<sup>90</sup> or deport the suspect.<sup>91</sup>

Like Canada, the United States' most common solution for suspected war criminals and human rights violators is removal from the country. The removal process does not require any guarantee that the recipient country prosecute. Since 2004, the Human Rights Violators and War Crimes Unit, the unit responsible for apprehending and removing suspects of war crimes and crimes against humanity,

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85. See *United States v. Belfast*, 611 F.3d 783, 793 (11th Cir. 2010) (affirming the trial court's 97-year sentence).
86. See *Q & A: Charles 'Chuckie' Taylor, Jr.'s Trial in the United States for Torture Committed in Liberia*, HUMAN RTS. WATCH (Sept. 23, 2008), <http://www.hrw.org/news/2008/09/23/q-charles-chuckie-taylor-jr-s-trial-united-states-torture-committed-liberia> (noting Taylor was the first ever prosecuted under the Torture Statute).
87. See *War Crimes Unit Overview*, *supra* note 83 (describing the "No Safe Haven Initiative").
88. See *supra* Part III(A) (outlining the United States' jurisdiction over war crimes).
89. See Naturalization, Citizenship or Alien Registry, 18 U.S.C. § 1015(f) (2000); Fraud and Misuse of Visas, Permits and Other Documents, 18 U.S.C. § 1546(a)–(c) (2002). For suspected war criminals, this duty falls on the Human Rights and Special Prosecution Section of the Department of Justice. See *Our Mission, The Human Rights and Special Prosecution Section*, DEP'T OF JUST., <http://www.justice.gov/criminal/hrsp/>.
90. See *Fugitives from State, Territory, or Possession into Extraterritorial Jurisdiction of United States*, 18 USC § 3183 (2002).
91. See *War Crimes Unit Overview*, *supra* note 83 (describing the unit's authority to deport suspected war criminals and human rights violators).

has removed over 540 suspected human rights violators.<sup>92</sup> While this mass deportation of suspected war criminals is consistent with the goal of denying war criminals a safe haven, it does nothing to ensure that human rights abusers are actually brought to justice.

This does not mean that the United States will always choose to deport rather than extradite or prosecute. “We do have a strong national interest in seeing that our immigration and citizenship laws are not violated,” said Eli Rosenbaum, Director of Human Rights Enforcement Strategy and Policy of the Human Rights and Special Prosecution Section of the US Department of Justice.<sup>93</sup> “[I]f we have a provable case of visa or naturalization fraud, we generally are interested in prosecuting those cases,” he explained.<sup>94</sup> Generally, the legal and economic value of deportation wins out, as “[f]rom the standpoint of the American taxpayer, it is very cost effective.”<sup>95</sup>

Ensuring that war criminals stand trial for their substantive crimes is often incredibly difficult. According to Rosenbaum “extradition is a much faster process than denaturalization and deportation. Alas, there were very few requests for extradition. There were many attempts made by the Justice Department to persuade other countries . . . to request extradition, but they very rarely did.”<sup>96</sup>

The United States’ policy in choosing whether to prosecute or deport is determined case-by-case.<sup>97</sup> The United States generally prefers human rights violators be tried in their home countries.<sup>98</sup> In Rosenbaum’s view, “we generally favor extradition both because the evidence tends to exist in the country in which the crimes took place . . . [and it] permits the community whose laws were violated to see justice being done.”<sup>99</sup>

If the United States chooses not to remove a war crimes suspect, it will frequently use domestic immigration law to prosecute suspected war criminals, but not for the actual war crime or crime against humanity.<sup>100</sup> Some of these prosecutions have resulted in significant punishment but nowhere near the punishment of a war crimes

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92. *Id.*

93. Rosenbaum Interview, *supra* note 11.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* (“[T]here is a preference in the law for people to be tried in the locality in which the crime occurred. Or, at least, in the country in which the crime occurred, if that’s possible.”).

99. *Id.*

100. *See id.* (noting the United States will prosecute for immigration or naturalization crimes if those crimes are provable).

conviction. In 2010, the U.S. Department of Justice charged Gilberto Jordan with naturalization fraud.<sup>101</sup> Jordan was a Guatemalan soldier who helped to commit one of the most brutal mass killings in the history of the Guatemalan civil war, the massacre of Dos Erres, in 1982.<sup>102</sup> Jordan was sentenced to ten years in federal prison, the highest sentence allowed for criminal naturalization fraud.<sup>103</sup>

In 2009, Immigration and Customs Enforcement agents arrested Lazare Kabaya Kobagaya of Topeka, Kansas.<sup>104</sup> Mr. Kobagaya was suspected of participating in the 1994 Rwandan genocide.<sup>105</sup> Rather than charging Kobagaya with genocide, for which the United States has jurisdiction under the Genocide Statute,<sup>106</sup> the United States charged him with one count of unlawful procurement of naturalization and one count of misuse of an alien registration card.<sup>107</sup> Kobagaya faces up to ten years in prison, automatic revocation of his citizenship, and a fine of up to \$250,000 for the unlawful procurement of citizenship charge.<sup>108</sup> He also faces up to ten years in prison and a fine of up to \$250,000 for the misuse of an alien registration card charge.<sup>109</sup> Lacking the statutory jurisdiction to prosecute for the underlying crime, the United States sought prosecution for the next most serious offense available.

#### IV. INTERNATIONAL LEGAL OBLIGATIONS VIOLATED BY THE UNITED STATES AND CANADA

##### A. *Obligation to Ensure Prosecution*

The international obligation to ensure that suspected war criminals and human rights violators are prosecuted comes from the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva

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101. *Id.*

102. *Id.*

103. *Id.*

104. Press Release, Dep't of Just., Kansas Man Charged with Immigration Crimes in Connection with 1994 Genocide in Rwanda (Apr. 23, 2009) [hereinafter Press Release, Kansas Man Charged], *available at* <http://www.justice.gov/opa/pr/2009/April/09-crm-385.html>.

105. *See id.*

106. *See* Genocide, 18 U.S.C. § 1091 (2009) (providing the United States with jurisdiction over any person in the United States for the crime of genocide).

107. Press Release, Kansas Man Charged, *supra* note 104.

108. *Id.*

109. *Id.*

Convention),<sup>110</sup> the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention),<sup>111</sup> and from emerging customary international law.<sup>112</sup> Both conventions mandate ratifying countries to either prosecute or remove for the purpose of prosecution persons suspected of committing war crimes and crimes against humanity.<sup>113</sup> Unfortunately, the plain language of the agreements has been ignored by many signatories, including the United States and Canada.<sup>114</sup>

The Geneva Conventions, to which Canada and the United States are parties,<sup>115</sup> mandate states party to the convention to ensure prosecution for grave breaches under international law.<sup>116</sup> While the Conventions do not refer explicitly to war crimes or crimes against humanity, the grave breaches condemned in the Conventions overlap with the definitions of war crimes and crimes against humanity.<sup>117</sup>

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110. Geneva Convention, *supra* note 14, art. 49.

111. Torture Convention, *supra* note 14, art. 7(1).

112. *See, e.g.*, Rome Statute, *supra* note 20; *see generally* G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law); S.C. Res. 1325, ¶ 11, U.N. Doc. S/RES/1325 (Oct. 31, 2000) (emphasizing the need for all states to prosecute genocide, crimes against humanity, and war crimes, including sexual violence); S.C. Res. 1820, ¶ 4, S/RES/1820 (June 19, 2008) (noting states' responsibility to prosecute war crimes, including sexual violence).

113. *See* Geneva Convention, *supra* note 14, art. 49; Torture Convention, *supra* note 14, art. 6(1).

114. *See* Telephone Interview with Matt Eisenbrandt, Legal Counsel for Canadian Ctr. for Int'l Just. (Nov. 23, 2011) (noting Canada's preference for deportation of suspected war criminals, despite the concerns about the suspect being subjected to torture or show trials).

115. *See Geneva Conventions of 12 August 1949, State Signatories*, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Dec. 17, 2012).

116. *See* Geneva Convention, *supra* note 14, art. 49.

117. For the purpose of this Note, war crimes and crimes against humanity, while evolving in definition, for the purpose of this Note fit into the definition established by the International Military Tribunal created at Nuremberg to try major German war criminals. Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 82 U.N.T.S. 284. The Charter defines war crimes as:

[M]urder, ill-treatment or deportation to slave labor . . . of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities . . . or devastation not justified by military necessity.

Article 49 of the First Geneva Convention requires states to enact legislation punishing grave breaches and to search for and bring suspected war criminals before their own courts unless another State has made a case for prosecuting them.<sup>118</sup> Article 50 defines grave breaches as willful killing, torture or inhuman treatment, and extensive destruction, and appropriation of property that is not militarily justified.<sup>119</sup>

Many commentators take for granted that Article 49 imposes an obligation to either prosecute or extradite those who commit grave breaches of international law.<sup>120</sup> While some have argued international criminal law has allowed substantial discretion in ensuring prosecution,<sup>121</sup> it is difficult to escape the plain language of the Convention:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>122</sup>

This language shows a clear and unequivocal duty to ensure the prosecution of those who commit grave breaches, which includes war crimes and human rights violations.

The Torture Convention also creates an obligation to ensure prosecution. Article 6(1) of the Torture Conventions requires

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*Id.* art. 6(b).

Crimes against humanity under the Charter include “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions . . . in connexion [sic] with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” *Id.* art 6(c).

118. See Geneva Convention, *supra* note 14, art. 49.

119. *Id.* art. 50.

120. See, e.g., Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 564 (1995) (“The penal system of the Conventions requires the states parties to criminalize certain acts, and to prosecute or extradite the perpetrators.”).

121. See Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2551 (1991).

122. Geneva Convention, *supra* note 14, art. 49.

signatories take all alleged torturers in their borders into custody.<sup>123</sup> Article 7 of the Torture Convention states that if parties fail to extradite suspected torturers, they must prosecute the torturers domestically for the underlying offense.<sup>124</sup> (Organizations such as the Canadian Center for International Justice frequently argue that both the United States and Canada ignore the obligations to prosecute or extradite torturers.<sup>125</sup>)

Article 7(1) of the Torture Convention states “[t]he State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”<sup>126</sup> For the United States and Canada, this means that any person suspected of committing torture anywhere must either be tried domestically or extradited for the purposes of being tried for torture.

Some observers have argued Article 7(2) of the Torture Convention exempts signatories from a strict obligation to prosecute.<sup>127</sup> Article 7(2) states:

[A]uthorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.<sup>128</sup>

In both the United States and Canada, the dominant view is that Article 7(2) only requires that states party to the Torture Convention

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123. See Torture Convention, *supra* note 14, art. 6(1) (“[A]ny State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence.”)

124. *Id.* art. 7.

125. See Eisenbrandt Interview, *supra* note 114 (“If you’re talking about torture then [the obligation] is the UN Convention on Torture. There it is very clearly spelled out. The obligation is to either extradite for prosecution or, if that is not an option, to prosecute in your own country.”).

126. Torture Convention, *supra* note 14, art. 7(1).

127. Cf. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN TIMES OF NATIONAL EMERGENCY, 86–87 (2006) (arguing prosecutorial discretion is essential, even though the exercise of such discretion is essentially a decision to not enforce a law). Posner stresses the power of the executive. However, he also argues that broad prosecutorial discretion is given to Torture Convention signatories. *Id.*

128. Torture Convention, *supra* note 14, art. 7(2).

exercise the same level of prosecutorial discretion they exercise in prosecuting any domestic crimes.<sup>129</sup>

The view that Article 7(2) merely permits the same discretion to prosecute torture as any other domestic crime ignores basic treaty interpretation. The Vienna Convention on Treaties states “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>130</sup> This means signatories of the Torture Convention must maintain the same standards of fair prosecution for suspects of torture that they would for any other trial.<sup>131</sup> It does not and cannot mean a signatory may elect not to prosecute, or extradite for prosecution, suspected torturers without proper cause.<sup>132</sup>

The International Court of Justice (ICJ) recently adopted this interpretation of the Torture Convention in its landmark case *Belgium v. Senegal*.<sup>133</sup> *Belgium v. Senegal* concerned the fate of the former President of Chad, Hissène Habré. Before being ousted from Chad in 1990, Habré had presided over 40,000 political killings and widespread torture.<sup>134</sup> Habré then sought refuge in Senegal.<sup>135</sup> In 2009,

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129. See Rosenbaum Interview, *supra* note 11 (remarking that the United States had an obligation only to deny human rights violators safe haven); Petit Interview, *supra* note 59 (“I don’t think there [is an international obligation to prosecute crimes against humanity] yet . . . . You may be able to argue that in a generation or two, but I don’t think at this stage you can certainly say it is part of international customary law.”) In fairness to Mr. Rosenbaum, he qualified his answer in saying that the United States has been prohibited by the ex post facto clause of the U.S. Constitution from prosecuting many instances of torture which occurred outside the United States. He anticipates many more cases to be tried domestically now that the United States has statutory jurisdiction. See Rosenbaum Interview, *supra* note 11.
130. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].
131. See CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 357 (2001) (“[T]he discretionary power could not extend so far as to allow those responsible for torture to escape punishment.”)
132. See *id.*
133. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (July 20, 2012), <http://www.icj-cij.org/docket/files/144/17064.pdf> [hereinafter *Belgium v. Senegal*].
134. See US Inst. of Peace, *Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habre, His Accomplices and/or Accessories*, in TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 81 (Neil J. Kritz ed., 1992).
135. See Aaron Solomon, *The Politics of Prosecutions Under the Convention Against Torture*, 2 CHI. J. INT’L L. 309, 310 (2001) (noting Senegal’s failure to prosecute Habré while he resided there, despite indicting him).

Belgium, after numerous attempts to extradite Habré for trial, initiated an action against Senegal seeking Habré's extradition or prosecution based on the Torture Convention.<sup>136</sup> Belgium alleged that Senegal's refusal to prosecute Habré domestically or extradite him to Belgium for prosecution violated provisions under the Torture Convention and customary international law.<sup>137</sup>

The ICJ accepted Belgium's argument that the Torture Convention creates a duty for signatories to prosecute, or extradite for prosecution, suspected torturers. Moreover, the ICJ held that Senegal's failure to seek prosecution or extradition of Habré constituted a breach of the Torture Convention.<sup>138</sup> It found unanimously that Senegal must either prosecute Habré or extradite him for the purpose of prosecution immediately.<sup>139</sup>

*B. Customary International Law is Changing to Support Ensuring Prosecution of War Criminals*

Under customary international law, there does not yet appear to be an obligation to prosecute or extradite war criminals and those who have committed crimes against humanity.<sup>140</sup> Customary international law has been defined as evidence of a general practice accepted as law<sup>141</sup> and consists of state practice and *opinio juris*.<sup>142</sup> State practice refers to general and consistent practice by states, while *opinio juris* means the practice is followed out of a belief of legal obligation.<sup>143</sup> Overwhelmingly, most countries have chosen to deport suspected war criminals; extraditing or prosecuting has proven to be the exception rather than the rule.<sup>144</sup> The offices responsible for the prosecution of war criminals in both the United States and Canada do

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136. Belgium v. Senegal, *supra* note 133, ¶ 1.

137. *Id.*

138. *See id.* ¶¶ 88, 95, 122.

139. *Id.* ¶ 122.

140. *See id.* ¶ 122(2) (finding the court does not have authority to entertain the claims of Belgium relating to alleged breaches of international law).

141. Statute of the International Court of Justice, 59 Stat. 1055, art. 38(1)(b) (1945) [hereinafter ICJ Statute].

142. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4–11 (5th ed. 1998); MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES 130 (1999).

143. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW, *supra* note 142, § 102(2).

144. *See supra* Part III.



not see any custom requiring prosecution of foreign war criminals for their underlying offenses.<sup>145</sup>

This custom, however, is changing.<sup>146</sup> Canada, along with many other nations, has enacted legislation to domesticate the Rome Statute.<sup>147</sup> The preamble of the Rome Statute implies a duty to prosecute the universal crimes of genocide, war crimes, and crimes against humanity.<sup>148</sup> In Judge Antonio Cassese's iconic commentary on the Rome Statute, he states that signatories have obligations to see that serious breaches of international criminal law are punished.<sup>149</sup> Another commentator argues that the preamble of the Rome Statute, while not formally creating a duty to prosecute, still presupposes a duty to ensure prosecution.<sup>150</sup>

The preamble of the Rome Statute is strong evidence for a change in customary international law favoring state prosecution of war criminals. It recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes[.]"<sup>151</sup> This is consistent with the basic tenants of treaty interpretation as laid out in the Vienna Convention.<sup>152</sup> Under Article 31(2) of the Vienna Convention, the preamble of any treaty is to be used in interpreting the meaning of it.<sup>153</sup> While this may not be

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145. See Rosenbaum Interview, *supra* note 11 (remarking that often it is impossible to get a country to even seek extradition for its nationals); Petit Interview, *supra* note 59 (remarking that although such an obligation may arise in a coming generation, there is nothing close a customary obligation to prosecute at the current time).

146. See, e.g., G.A. Res. 60/147, *supra* note 112, at III(4) (recognizing that in cases of gross violations of international human rights law and serious violations of international humanitarian law, states party have an obligation to prosecute criminals or extradite such criminals found within their borders for prosecution).

147. See Crimes Against Humanity and War Crimes Act, pmbl., S.C. 2000, c. 24 (Can.).

148. See Rome Statute, *supra* note 20, pmbl.

149. See Antonio Cassese, Paola Gaeta & John R.W.D. Jones, *The Rome Statute: A Tentative Assessment*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1906* (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

150. See Otto Triffterer, *Legal and Political Implications of Domestic Ratification and Implementation Processes*, in *THE ROME STATUTE AND DOMESTIC LEGAL ORDERS 15-17* (Claus Kreß & Flavia Lattanzi eds., 2000).

151. See Rome Statute, *supra* note 20, pmbl.

152. See Vienna Convention, *supra* note 130, art. 31 (noting the preamble is part of a treaty and shall be taken into account in interpretation).

153. See *id.* art. 31(2). The Vienna Convention says:

enough to create an explicit duty within the Rome Statute itself, the assumption of a duty stated in the preamble creates an inference that there is already a pre-existing duty in customary international law to seek out and ensure the prosecution of war criminals.

The General Assembly of the United Nations has referenced this duty in several resolutions. In 2005, the General Assembly passed Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>154</sup> The preamble of the resolution clearly stated that international law contains the obligation to prosecute perpetrators of certain international crimes, and that the duty to prosecute reinforces international legal obligations.<sup>155</sup> Section III(4) of the Resolution states that in serious violations of international humanitarian law constituting crimes under international law, states have a duty to investigate, submit to prosecution, and punish war criminals and human rights abusers.<sup>156</sup> The General Assembly also passed Resolution 3074, Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity.<sup>157</sup> The resolution calls for member states to take necessary domestic and international measures to halt and prevent war crimes and crimes against humanity, including prosecuting or extraditing

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The context for the *purpose* of the *interpretation* of a treaty shall comprise, in addition to the text, including its *preamble* and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

*Id.* (emphasis added).

154. See G.A. Res. 60/147, *supra* note 112.

155. See *id.* pmbl. The Resolution recalls:

[T]hat international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity[.]

*Id.*

156. See *id.* § III(4).

157. G.A. Res. 3074 (XXVII), U.N. GOAR, 28th Sess., U.N. Doc. A/3074 (Dec. 3, 1973), at 78.

suspects for prosecution.<sup>158</sup> Other UN agencies support this position. In the draft code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission in 1996, Article 9 explicitly states that there is an obligation by states to prosecute or extradite an individual alleged to have committed genocide, crimes against humanity, or war crimes.<sup>159</sup>

The UN Security Council has also supported the idea of an obligation to ensure the prosecution of war criminals. In 2000, the Security Council passed Resolution 1325, which emphasized it is the “responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes.”<sup>160</sup> Eight years later, the Security Council passed another resolution, in which it called upon member states to “comply with their obligations for prosecuting persons responsible for [war crimes and crimes against humanity]” and stressed the importance of “ending impunity . . . as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.”<sup>161</sup>

Even if the prevailing customary international law does not suggest that states must ensure the prosecution of war criminals, only in limited circumstances will customary international law override the enforcement of a treaty.<sup>162</sup> Using customary international law as an excuse to ignore treaty obligations, as the United States and Canada have done, would allow a collection of nations to effectively say one thing, yet do another. Perhaps customary law does not yet support a

158. *Id.*

159. *Draft Code of Crimes Against the Peace and Security of Mankind*, reprinted in 1996 U.N.Y.B. 15, U.N. Doc. A/CN.4/SER.A/1996/Add.1.

160. See S.C. Res. 1325, *supra* note 112, ¶ 11.

161. See S.C. Res. 1820, *supra* note 112, ¶ 4. The Resolution specifically addresses gender-based crime, in the context of war crimes and crimes against humanity. See *id.*

162. See OPPENHEIM'S INTERNATIONAL LAW: PEACE 7 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

States may . . . dispense altogether with most rules of international law. There are, however, a few rules from which no derogation is permissible. The latter—rules of [*jus cogens*, or peremptory norms of general international law—have been defined in Article 53 of the Vienna Convention of the Law of Treaties 1969 . . . as norms accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character; and Article 64 contemplates the emergence of new rules of [*jus cogens* in the future.

*Id.* (footnote and internal quotation marks omitted).

hard rule that states must ensure that war crimes suspects are prosecuted, but that time is certainly approaching.

*C. Criticism of Canada's Policies*

Canadian officials have made clear that they do not consider actual prosecution of suspected war criminals to be a priority.<sup>163</sup> As Public Safety Minister Vic Toews said, "Canada is not the UN. It's not our responsibility to make sure each one of these [suspected criminals] faces justice in their own countries."<sup>164</sup> Various organizations and commentators have taken issue with Canada's overwhelming preference for deportation rather than prosecution or extradition.<sup>165</sup> Lawyers Rights Watch Canada,<sup>166</sup> Amnesty International,<sup>167</sup> and the Canadian Center for International Justice<sup>168</sup> are among the loudest voices. They claim Canada is failing its legal obligations by not adequately ensuring that suspected war criminals are prosecuted.<sup>169</sup>

Unfortunately, Canada has chosen to address the issue of suspected war criminals not with prosecution, or with extradition in

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163. See, e.g., Payton, *supra* note 3.

164. *Id.*

165. Foremost among these are Amnesty Canada and the Canadian Center for International Justice. The sole mandate of the Canadian Center for International Justice is to work on accountability for torture and war crimes when there is some connection to Canada. See Eisenbrandt Interview, *supra* note 114.

166. See Letter from Catherine Morris, B.A., L.L.B., L.L.M. & Gail Davidson, Exec. Dir., Lawyers Rights Watch Canada, to The Honourable Jason Kenney, P.C., M.P. (Aug. 21, 2011), available at <http://www.lrwc.org/recent-public-statements-against-amnesty-international-canada/> ("[I]mmigration proceedings are not intended to take the place of criminal proceedings.").

167. See Jeff Davis & Robert Hiltz, *Prosecute, Not Deport, Suspected War Criminals: Amnesty*, NAT'L POST, Aug. 5, 2011, <http://news.nationalpost.com/2011/08/02/prosecute-not-deport-suspected-war-criminals-amnesty/>.

168. See Stewart Bell, *Man Deported in Alleged Cannibalism, War Crimes Case*, NAT'L POST, Apr. 28, 2011, <http://news.nationalpost.com/2011/04/28/man-deported-in-alleged-cannibalism-war-crimes-case/>.

169. Eisenbrandt points out:

The actual international legal obligation is to either prosecute someone here or to extradite them to a country where they will then stand trial . . . so deporting them does not comply with Canada's legal obligations. On top of that . . . generally they are almost always going to be returned to a situation where they just go free, and that's not really advancing the accountability cause at all.

*Id.*

the hope of prosecution, but by simply deporting war crime suspects.<sup>170</sup> The Canadian Center for International Justice in particular has criticized the Canadian government heavily for their policies.<sup>171</sup> They see this as an abrogation not only of obligations under international agreements to ensure prosecution, but also as violations of the rights of the deportees themselves.<sup>172</sup>

*D. Criticism of the United States' Policies*

Amnesty International has many of the same critiques of the United States as it does of Canada.<sup>173</sup> Amnesty reports that the United States has improved but that focusing on immigration law solutions “isn't ideal.”<sup>174</sup> Immigration- or deportation-based policies “[don't] help to stop atrocities,” Amnesty says.<sup>175</sup> “You're sending back someone who is a severe abuser to those countries where they were committing those crimes.”<sup>176</sup>

The current Director of the Human Rights and Special Prosecution, Eli Rosenbaum, accepts the risk of deportation without the guarantee of prosecution.<sup>177</sup> He also disagrees that the Geneva

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170. See Sandro Contenta, *At Large in Canada: Alleged War Criminals*, GLOBAL POST, Aug. 25, 2011, <http://www.globalpost.com/dispatch/news/regions/americas/110824/canadas-wanted-war-criminals>.

171. See Eisenbrandt Interview, *supra* note 115. Specifically, Eisenbrandt worries that the targets of Canadian investigations are not the ones Canada should be focusing on:

[T]hose really aren't the most wanted, because if you look at the list, these aren't the people who they are prosecuting. These are people who have allegations against them and we don't necessarily know what the evidence is. They are allegations that these people were involved in war crimes or part of an organization that had been involved in war crimes.

*Id.*

172. See *id.* (explaining that if someone is an alleged war criminal, Canada is under an obligation to extradite or prosecute that person, and that Canada's deportation of such individuals opens the opportunity for them to be tortured).

173. See Paloma Esquivel, *U.S. Immigration Authorities Boost Efforts to Hunt War Criminals*, L.A. TIMES, Oct. 23, 2011, <http://articles.latimes.com/2011/oct/23/local/la-me-ice-war-crimes-20111019> (“‘The U.S.,’ [Vienna Colucci, senior policy advisor at Amnesty International] said, ‘needs to be more willing to use criminal prosecution at home.’”).

174. *Id.*

175. *Id.*

176. *Id.*

177. See Rosenbaum Interview, *supra* note 11 (“Normally, the priority is to enforce US immigration law and get [the criminal] out. We try whenever

Convention creates an obligation that could supersede US law, creating a duty to ensure prosecution.<sup>178</sup> “It’s not a perfect system,” said Rosenbaum, “so it does not provide a guarantee of fair trial or proper treatment. But, I can’t think of a system, a workable system that would guarantee that.”<sup>179</sup>

## V. RECOMMENDATIONS FOR THE UNITED STATES AND CANADA

### A. *Solutions Going Forward: Canada*

Canada has jurisdiction to prosecute suspected war criminals and those who committed crimes against humanity.<sup>180</sup> Despite this, Canada has focused on ensuring that suspected war criminals do not find safe haven in Canada, instead of ensuring that they are prosecuted for their crimes.<sup>181</sup> If Canada is to meet its international legal obligations, which require Canada to ensure the prosecution of suspected war criminals, Canada must change course. Canada must put in place legislation that ensures suspected war criminals are prosecuted.

Canada can reach its international obligations by amending its Immigration Statute to prohibit the removal of suspected war criminals without a guarantee of criminal prosecution. Canada’s Immigration Statute restricts removal of suspects if the suspect is at risk of persecution, torture, or cruel and unusual punishment.<sup>182</sup> It does not address the likelihood of a war crimes suspect being prosecuted.

To meet its international obligations, Canada must, at a minimum amend the Canada War Crimes Act and Immigration Statutes to address this weakness. Hypothetical language for the statute could read:

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we can to get them prosecuted, but only in a small minority of cases do we succeed in that.”).

178. *See id.* (“The Geneva Convention is not something that supersedes US law.”)

179. *Id.*

180. Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).

181. *See Eisenbrandt Interview, supra* note 114 (noting the government’s stated preference for deportation).

182. *See* Immigration and Refugee Protection Act, § 115 S.C. 2001, c. 27 (amended 2012) (Can.) (stating a person “shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment”).

- 1) Canada shall assign agencies to search for and locate persons suspected of war crimes or crimes against humanity.
- 2) If Canada locates persons suspected of war crimes or crimes against humanity, Canada shall:
  - a) prosecute the person under the Crimes Against Humanity and War Crimes Act, or
  - b) extradite or remove the person to a country that has given reasonable assurance that the person shall be prosecuted for war crimes or crimes against humanity.

Part 1 of the hypothetical statute addresses the mandate that Canada seek out war criminals and human rights violators.<sup>183</sup> Part 2 addresses the obligation to ensure, either by prosecution or by assurance of prosecution, that suspected war criminals do not escape justice for their crimes. If Canada enacts a statute with this language, or substantially similar language, and implements procedures to carry out the new language, Canada can conform to its international obligations.

*B. Solutions Going Forward: United States*

A statutory solution in the United States is also preferable but slightly more complicated. The United States now has the jurisdiction to prosecute genocide, torture, and war crimes, but lacked jurisdiction as recently as twenty years ago.<sup>184</sup> This creates a temporal limitation on jurisdiction, as the United States cannot prosecute anyone for war crimes and crimes against humanity that occurred before the statutes were enacted. For example, the new genocide statute permits the prosecution of any person suspected of committing genocide provided that person is physically in the United States,<sup>185</sup> but the older statutes required that the perpetrator or victim be a US citizen or the genocide be carried out in the United States.<sup>186</sup> Some are hopeful the

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183. *See supra* Part II.

184. *See* Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 421 (2000) (noting the United States courts' uneven jurisdiction to prosecute genocide, war crimes, and crimes against humanity).

185. Genocide, 18 U.S.C. § 1091(e)(2)(D) (2009).

186. Rosenbaum laments that the United States waited so long, until 1988, to provide any statutory jurisdiction for the crime of genocide, and then only with limited jurisdiction. *See* Rosenbaum Interview, *supra* note 11.

new jurisdiction will allow the United States to finally take the lead in ensuring that those who commit war crimes and crimes against humanity are brought to justice.<sup>187</sup> However, without a statute forcing the hand of the United States to actually use its newfound jurisdiction, it is likely that the United States will continue to use the easier avenues of immigration law.<sup>188</sup>

Hypothetical statutory language could read:

- 1) The United States shall assign agencies to search for and locate persons suspected of war crimes or crimes against humanity.
- 2) If the United States locates a person suspected of war crimes or crimes against humanity, the United States shall:
  - a) prosecute the person under the relevant statutory authority, or
  - b) extradite or remove the person to a state that has given reasonable assurance that the person shall be prosecuted for war crimes or crimes against humanity.
- 3) If the United States cannot prosecute the person for lack of temporal jurisdiction, and no other state grants reasonable assurances that the person shall be prosecuted for war crimes or crimes against humanity, the United States shall prosecute the person under the next most serious charge applicable to the person, including immigration or naturalization fraud.

This hypothetical statute forces the United States to live up to its international obligations.<sup>189</sup> Part 1 of the statute mandates that the United States locate suspected war criminals and human rights violators. Part 2 provides the options available to the United States that would allow it to comply with its obligation to ensure prosecution. Part 3 deals with the tricky issue of temporal

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187. Rosenbaum is among the optimistic:

As times go on as, regrettably, these crimes continue to be committed around the world, these people will continue to come to the United States. Eventually, we won't be seeing cases in which prosecution was barred because the crime was committed before the statute went into force. I'm absolutely confident that we will be seeing more of these cases prosecuted.

*Id.*

188. See 18 U.S.C. § 1091(e) (demonstrating that the prosecution of war criminals with the statute's jurisdiction is not mandatory).

189. See *supra* Part IV.



jurisdiction. While still not fully complying with the obligation to seek prosecution for the underlying offense, the new statute at least guarantees human rights violators and war criminals will see some justice, even if it is not the justice mandated by international agreement.

## VI. CONCLUSION

Canada and the United States have made great strides in creating agencies to seek out and bring to justice war criminals, but they have not gone far enough to meet their international legal obligations. Canada and the United States have given themselves jurisdiction to prosecute those who are enemies of all mankind and worked to deny them safe harbor in their borders. However, it is not enough to ensure that war criminals cannot find safe harbor. To meet the international obligations imposed by the Geneva Conventions, the Torture Convention, and emerging customary international law, Canada and the United States must act to ensure that those who commit the gravest breaches are brought to justice. Unfortunately, neither country has sufficient procedures in place to ensure war criminals are prosecuted for their crimes.

One possible way to ensure the prosecution of suspected war criminals and human rights violators is to create statutes requiring all avenues be taken to see war criminals tried for their crimes. Even with the temporal limitations imposed in the United States, the statutes proposed in this Note will force Canada and the United States into compliance with their international obligations.

Canada and the United States must implement these legislative statutes which mandate that they search for, locate, and ensure the prosecution of suspected war criminals and human rights violators. They must bring themselves in conformity with the international agreements they signed and emerging customary international law. It is no longer enough, if it ever was, to simply deny safe harbor to the war criminals. Canada and the United States must live up to their international obligations and end impunity for the war criminals and human rights violators of the world.