



Summary Report

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Panel Theme: Enforcing, Deterring and Prosecuting Foreign Interference Activities

Key Issues: Is the criminal law an appropriate way of responding to foreign interference? Are there reasons why other approaches could be preferable? [...] Does law enforcement have the right powers to enforce the laws that exist? Can those powers be exercised in a way that makes them of practical value in foreign interference investigations?

Assessment:

Criminal law is an important tool, among several, which can and should be used to combat foreign interference. The main point made here is that it should be used with an explicit, textured focus on the international aspects of the situation. That is to say, our criminal law should be used with the international context in mind. It should be used in a way that is fully infused by relevant international legal norms, and specifically Canada's rights and obligations under international law. The nature of the threat stemming from foreign interference means that criminal law, as a tool, needs to be employed in such a way that it is fully protective of Canada's national interests, in an international setting where they are increasingly threatened.

International law is part of the law of Canada,¹ and is relevant to criminal law.² This is not well-understood; most police officers, criminal lawyers and judges in Canada have little to no working knowledge of the concepts discussed here.

Encouragingly, the Prime Minister recently invoked Canada's sovereignty in the context of foreign interference.³ Sovereignty is one of the bedrock principles of international law. It captures the idea that states like Canada are fully independent entities. Even in a

¹ See Gib van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin, 2008).

² See Robert J. Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 3d ed (Toronto: Irwin, 2020).

³ Catharine Tunney, Racey Rafique, "Trudeau accuses India of supporting violent crimes in Canada," *CBC News* (14 October 2024), online: <https://www.cbc.ca/news/politics/rcmp-india-expel-1.7351837>

state like Canada which is enriched and influenced by other cultures and diaspora communities, our government and our legal system make the decisions

Alongside the principle of state sovereignty is the principle of non-intervention.⁴ Foreign states are not permitted to interfere with Canada's domestic interests, nor can Canada do likewise to them. To do so is to breach a fundamental norm that is designed to allow countries to live in a state of relatively peaceful co-existence. This international law rule is, in part, why this proceeding is called the "Foreign Interference Inquiry."

The Prime Minister also recently mentioned Canada's "territorial integrity."⁵ In international law a sovereign state has a defined territory with borders. Despite the verbiage one hears about the increasing meaninglessness of territory and the so-called borderless world, territory is not obsolete and borders are not obsolete. Both matter. On a country's territory, only the state can act like the state.⁶ On Canada's territory, only the government of Canada can make and invoke the force of the law.

This is particularly relevant to criminal law. Criminal law has always been seen to be one of the areas of a country's law that is closest to the heart of its sovereignty.⁷ It is often described as an expression of the country's collective morality, but it has four other functions: 1) a deterrent function; 2) a protective function; 3) a communicative function; and 4) an accountability function

On the deterrent function, the other participants on this panel have provided solid views. Criminal law should be engineered, applied and policed in such a way that it deters foreign actors from engaging in criminal conduct on our soil.

Second, the protective function: criminal law is a direct expression of the international law of jurisdiction, specifically jurisdiction to enforce the law. Only the government of Canada and delegate institutions can lawfully enforce criminal law, which involves the use of coercive power against individuals. Criminal enforcement-type activities by foreign states on Canadian territory, even against individuals whom they view as "criminals" or "terrorists," constitutes a breach of the prohibition on the extraterritorial exercise of enforcement jurisdiction, a "hard" rule of customary international law.⁸

⁴ See Maziar Jamnejad & Michael Wood, "The Principle of Non-Intervention" (2009) 22 *Leiden Journal of International Law* 345.

⁵ Government of Canada, Statement by the Prime Minister on the ongoing investigation on violent criminal activity linked to the Government of India (14 October 2024), online: <https://www.pm.gc.ca/en/news/statements/2024/10/14/statement-prime-minister-ongoing-investigation-violent-criminal-activity-linked>

⁶ *Island of Palmas Case (Netherlands v United States)* (1928) 2 RIAA 829, online: http://legal.un.org/riaa/cases/vol_II/829-871.pdf

⁷ See Frédéric Mégret, "Are There 'Inherently Sovereign Functions' in International Law?" (2021) 115:3 *AJIL* 452 at 485.

⁸ See Currie & Rikhof, *supra*, at 97-101.

The state has a monopoly on the use of coercive power, and it has an obligation to protect everyone on its territory—not just citizens, but everyone—from any attempt by a foreign sovereign to use coercive power. A sovereign state that cannot do this is not worthy of the name.

Third, the communicative function: our criminal law should be part of the implementation of foreign policy, by which I mean a harder-edged statecraft that signals Canada's commitment to what is sometimes called the "rules-based international order." The way we use and enforce our criminal law, on our territory, before our courts, communicates Canada's demand that international law be respected; that an international system of sovereign equals which refrain from interfering with each other is sound policy to which Canada is committed.

Fourth, the accountability function: contrary to popular belief, international law is enforceable, by various means that exist along a spectrum of informal to formal. States do take each other "to court," including international courts. Canada itself is currently party to proceedings against several foreign states at the International Court of Justice

To be sure, criminal law is not directly part of such proceedings, which operate on the state-to-state level. But my point is that the way in which we create, administer and enforce our criminal law should be done with an awareness that it might eventually end up as a part of an international case. It should communicate that there is not only a prospect of local, criminal accountability for individual actors, but also the prospect of international accountability for foreign states that emerge as bad actors.

The prosecutorial charging decisions that are made, the selection of evidence that is gathered, the decisions to go to trial, the sentences that are imposed—all of this should operate, in appropriate cases, with the international context in mind. And the justice system players need to have the knowledge and toolboxes necessary to factor in this context.

Recommendations:

Because the context of the criminal acts we are discussing here is so internationalized, it is important that Canada maximize its use of the powers and tools at its disposal. Those tools can involve international law, and in fact international law can make them even more effective.

Here is one way: police and Crown prosecutors must become comfortable with the use of "extended territorial jurisdiction," which means charging and prosecuting people for criminal acts that do not take place entirely within Canada, but which have impacts on Canadian territory, and specifically that impact the lives of people in Canada.

Similarly, Parliament should become more comfortable with the extension of “extraterritorial jurisdiction,” which means charging and prosecuting people for criminal acts that take place entirely outside Canada, but which nonetheless are reasonably connected to Canada’s overall national interests. This includes offences which are: committed by Canadian nationals; injure Canadian nationals; are targeted at and/or affect Canada’s national security or core national interests.⁹

Historically there has been a reticence by Parliament in its law-making, and the Crown in its law-enforcing, to fully engage on cases that have international aspects. This is cultural, and it is unnecessary, because international law is actually quite permissive on this point. Subject to certain limits, states are very free to take jurisdiction over cases that affect their national interests, even when those cases have transnational features. The new offence provisions and amendments in Bill C-70 certainly make some inroads along this point, though arguably there is not as much recourse to extraterritorial jurisdiction as is available and appropriate.

Of course, all of this is best done in active collaboration with other states, which raises a second point. The federal departments of Justice and Global Affairs, as well as the RCMP’s international cooperation bureaus, are the contact points for our law enforcement partners in other countries. They do good work; they facilitate Canada’s collaboration with a wide variety of foreign countries, even outside the Five Eyes network. Canada has a strong network through which to accomplish extradition, mutual legal assistance and inter-state policing cooperation.

However, the ability to access this network of cooperation between countries needs to trickle down into the local law enforcement context much more than it does. Anecdotally, police and prosecutors the country over will often quickly abandon cases that have transnational aspects because they are viewed as being too time-consuming and administratively unwieldy.

In my home province of Nova Scotia, we have had a series of cases involving foreign states interfering in our criminal justice system, and the attempts made to deal with it were often not successful, either because of local unwillingness to engage with the international aspects, or federal unwillingness to help when they did.¹⁰

Moreover, many law enforcement personnel are not necessarily aware of what the international cooperation networks are or how they access them. Cooperation, even

⁹ Regarding extended territorial and extraterritorial jurisdiction, see Currie & Rikhof, *supra*, c. 2 and 8.

¹⁰ See Robert J. Currie, “Canada letting foreign fugitives get away with rape: Nova Scotia victims of international bail-jumpers deserve answers, and justice” *The Chronicle Herald* (12 June 2021), online: <https://www.saltwire.com/halifax/opinion/robert-j-currie-canada-letting-foreign-fugitives-get-away-with-rape-100597520/>

with our partners, can be complex and not all of the issues that arise are easily fixed; but what the government can do is ensure that there is more effective circulation and communication of information that makes policing and prosecuting of transnational cases more informed and effective.

And on the policing side, it is important that this does not begin and end with the RCMP. Policing of matters with transnational aspects will often ultimately fall into federal policing, but it is the front-line provincial and municipal police who will frequently encounter these cases first. Particularly when interacting with diaspora communities, especially those known to be targeted by foreign states, police need to go into the situation with an expectation that any criminal cases that emerge will have transnational aspects, and therefore that they will need to have knowledge, skills and access to networks that will enable more success.

It is worth noting that there are encouraging success stories in this regard even lately, such as the RCMP's investigation into alleged criminal activities in Canada by personnel and agents of the government of India, which appear to extend to very high levels of that country's government.¹¹

In my submission, it is within the Commissioner's mandate to recommend a country-wide effort to enable police and prosecutors, particularly when working with communities targeted by foreign interference, to have the knowledge base and operational toolboxes to ensure that Canada's criminal law can serve important international objectives, and most robustly protect Canadian sovereignty.

¹¹ Catharine Tunney, "Member of Modi's inner circle behind Canadian criminal plot, official says," *CBC News* (29 October 2024), online: <https://www.cbc.ca/news/politics/india-murder-extortion-canada-csis-rcmp-1.7365853>