Ratification and Implementation

Implementation of the obligations set out in the

Statute of the International Criminal Court: Canada's experience

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I. BACKGROUND

It took a hundred years[1] of dodging the issue in international criminal law, and unfortunately of terrible crimes against humanity, for a genuine international criminal law to emerge that goes beyond the sovereignty of individual states. For example, Nuremberg made it possible for important principles of international criminal law to be laid down, but Nuremberg itself was too closely associated with the unique atrocity of Nazi crimes, and so it was only very recently that the theory of international crimes was grafted onto the practice of a true international court capable of trying the people responsible for serious violations of international humanitarian law.[2]

On June 10, 1998, more than 140 government delegations, hundreds of non-governmental organizations and representatives of inter-governmental organizations met in Rome to address the creation of an international criminal court. On July 17, 1998, 120 countries, represented by their experts and senior officials, adopted the Statute of the International Criminal Court (ICC) in the form of a treaty[3].

That Statute will enter into force on the first day of the month after the 60th day following the date of the deposit of the sixtieth ratification (see the list of signatory countries and countries which have ratified, in the appendix).

Canada signed the Statute of the ICC on December 18, 1998, and ratified it on July 7, 2000, thereby become one of the many countries that have taken measures to implement the Statute in their national legal systems.

After participating actively in the negotiations that led to the establishment of the Rome Statute of the International Criminal Court, Canada was one of the first countries in the world to have in place such comprehensive legislation. The *Crimes Against Humanity and War Crimes Act* was enacted on June 29, 2000 and came into force on October 23, 2000. This new Act was created and other legislation, such as the *Criminal Code* and legislation respecting extradition, mutual legal assistance and witness protection, was amended.

We shall now examine how the *Crimes Against Humanity and War Crimes Act* meets the *obligations* set out in the Statute of the ICC.

II. THE CANADIAN ACT

Unlike many other countries, Canada already had legislation respecting crimes against humanity and war crimes, which was part of the *Criminal Code* of Canada, even before it was necessary to consider how it would implement the Rome Statute of the International Criminal Court. Those provisions, as well as other Canadian statutes and legal rules in general, were examined having regard to the Rome Statute.

The *Crimes Against Humanity and War Crimes Act* was enacted to respond to two needs. The first was the need to implement the Statute of the ICC in order to be able to assist and cooperate with the Court and secure the advantages of the complementarity scheme; the second was to strengthen Canada's legislative foundation for the prosecution of genocide, war crimes and crimes against humanity, to ensure that Canada would not become a refuge for perpetrators of those crimes.

(a) Crimes committed in Canada (s. 4)

First, in conformity with the definitions and provisions of the Rome Statute, the Canadian Act creates new crimes comprising genocide, crimes against humanity and war crimes. Those provisions apply to acts committed in Canada. The crimes in question may be prosecuted in Canada, or the alleged offender may be surrendered to the International Criminal Court to be tried.

(b) Crimes committed outside Canada (s. 6)

Second, the Act provides that acts of genocide, crimes against humanity and war crimes committed outside Canada are defined by reference to conventional and customary international law, as it was in force at the time and in the place of their commission, whether in the past or the future. Accordingly, persons who commit genocide, crimes against humanity or war crimes could be brought to justice regardless of when or where the acts were committed.

(c) Breach of responsibility by military commanders and civilian superiors (ss. 5 and 7)

The new Act also creates offences relating to breach of responsibility by military commanders and civilian superiors, whether in Canada or outside Canada. Failure by a military commander or civilian superior to exercise proper control over persons under their command or authority which results in their subordinates committing genocide, crimes against humanity or war crimes may result in the military commander or civilian superior being criminally responsible, if the commander or superior failed to take all necessary and reasonable measures to prevent or repress the commission of the offence or to submit the matter to the competent authorities for investigation and prosecution.

Given the *Canadian Charter of Rights and Freedoms* and the jurisprudence of the Supreme Court of Canada, and bearing in mind the stigma and punishment attached to a conviction for genocide, crimes against humanity and war crimes, it was deemed advisable to create a specific offence of breach of responsibility and to replace the "should have known" standard, applicable to military commanders, with a criminal negligence standard.

(d) Jurisdiction (s. 8)

A person may be charged in Canada with genocide, a crime against humanity or a war crime committed outside Canada (s. 6), or with a breach of responsibility committed outside Canada (s. 7) if one of the following requirements is met:

- at the time the offence is alleged to have been committed:

(1) the person was a Canadian citizen or employed by Canada in a civilian or military capacity,

(2) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state;

(3) the victim was a Canadian citizen, or

(4) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or

- after the time the offence is alleged to have been committed, the person is present in Canada.

(e) Defences (ss. 11 to 14)

The *Crimes Against Humanity and War Crimes Act*represents, for Canadians, a balance between the values of justice, fairness and the rule of law and the need to prosecute people who commit genocide, crimes against humanity and war crimes.

The Act contains specific provisions to protect the rights of accused persons, while at the same time adapting to the reality of modern international crime.

As a general rule, justifications, excuses or defences available under the laws of Canada or under international law, at the time of the commission of the offence or at the time of the proceedings, may be relied upon by persons accused of genocide, crimes against humanity, war crimes or breach of responsibility by military commanders or civilian superiors. There are, however, certain exceptions.

It would not be a defence that an offence was committed in obedience to the law in force at the time and in the place of its commission.

The defence of superior orders is consistent with that provided in Article 33 of the Rome Statute. As a further restriction, the defence, which would only apply as a defence to war crimes, cannot be based on a belief that the order was lawful where the accused's belief was based on information about an identifiable group of persons that encouraged the commission of inhumane acts or omissions against the group.

Special pleas of *autrefois acquit, autrefois convict* or pardon in respect of the offence of genocide, crimes against humanity, war crimes and breach of responsibility of military commanders and civilian superiors may not be pleaded in certain situations. They may not be pleaded if the person was tried in a court of a foreign state or territory and the proceedings in that court were for the purpose of shielding the person from criminal responsibility or were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice[4].

This test in subsection 12(2) of the *Crimes Against Humanity and War Crimes Act* is similar to the test set out in Article 20 of the Rome Statute.

(f) Sentences and parole eligibility (s. 15)

The sentences and rules of parole eligibility that apply to a person convicted of genocide, crimes against humanity or war crimes where there was intentional killing are the similar to those that apply to murder under the *Criminal Code*.

For example, this means that a person who is convicted of a crime of this nature would be sentenced to imprisonment for life (if the offence has as its basis an intentional killing) or liable to imprisonment for life (in the other cases, including breach of responsibility).

(g) Offences against the administration of justice

Article 70 of the Rome Statute contains offences against the administration of justice by the ICC over which it has jurisdiction. They include perjury, corruptly influencing a witness or bribing an official of the Court, retaliating against a witness, and tampering with the collection of evidence. Article 70 also requires that states extend their criminal laws penalizing offences against the integrity of their own investigative or judicial process so that they apply to offences against the administration of justice by the ICC, where such offences are committed on their territory or by one of their nationals.

Consequently, in addition to the new offences relating to genocide, crimes against humanity and war crimes, the *Crimes Against Humanity and War Crimes Act* includes offences to protect the administration of justice of the ICC. These new offences were based generally on *Criminal Code* offences, which address the sort of conduct specified in the Rome Statute. We wanted to be certain that all offences against the administration of justice - the list of which is longer than what is found in the Statute of the ICC - became offences against the administration of justice by the ICC. We also decided not to restrict ourselves to the list of crimes that appears in the *Criminal Code* of Canada. The list now includes obstruction of officials of the ICC, bribery of judges or officials of the ICC, perjury, fabricating evidence and giving contradictory evidence, offences relating to affidavits, and intimidation[5].

Individuals who have testified before the ICC are now protected under the *Criminal Code*[6]from reprisals against them or members of their family. Other offences in the *Criminal Code* now apply to protect judges and officials of the ICC from harm that might be done to them.

Of course, these offences apply if they are committed in Canada or by Canadian citizens outside Canada.

III. Extradition

The ICC will only be effective if it receives cooperation from states. One of the most important forms of cooperation on the part of a state is to comply with a request for a person to be arrested and surrendered to the Court.

In the final negotiations held in Rome, the states could not agree on the process that should be used to bring persons before the Court. Some countries favoured a simple transfer mechanism, by which a state would send someone before the ICC with few or no further internal formalities. Other countries could not agree to this approach, particularly for the transfer of nationals, and sought to

have extradition used. The solution was therefore to require that states surrender a person to the Court, leaving it up to the state to select the procedure to be followed. However, the Statute of the ICC provides that the procedure for surrendering a person to the Court need not be more complex than the provisions made for extradition.

There are therefore two options available to states to fulfil the obligation to surrender a person to the Court: they may create a mechanism for surrender to the ICC or they may amend the existing statutory provisions relating to extradition so that they apply to the Court.

(a) Surrender

In its Act, Canada has opted for a simplified form of the usual extradition process, for surrendering persons to the Court. We chose to use a modified version of the extradition process, because that process has been submitted to our highest judicial authorities and has been held to be constitutional.

In order to amend the extradition process to make it applicable to the ICC, we incorporated the word *surrender* into the*Extradition Act*[7], because that is the word used in the Rome Statute and it allows for a distinction to be made between *surrender of a person* by a state to the ICC and*extradition* between states. As well, we have provided that the grounds for refusal now listed in the *Extradition Act* do not apply to a request for surrender made by the ICC.[8] In addition, we have provided that evidence may be presented in the form of a summary.

The *Extradition Act* has also been amended so that a person who is the subject of a request for surrender by the ICC may not claim immunity from arrest or surrender to the ICC.[9]

- Immunity

In addition, article 48 of the Statute of the ICC provides that the judges, the Prosecutor, the Deputy Prosecutors and the Registrar enjoy the same privileges and immunities as are accorded to heads of diplomatic missions. That was made possible by amending the existing laws that relate to heads of diplomatic missions[10] so that they apply those privileges and immunities to officials of the ICC, which is what Canada has done.

Other members of the staff of the ICC (Deputy Registrar, the staff of the Office of the Prosecutor) must also enjoy privileges and immunities, but the nature of those privileges and immunities must still be defined, in negotiations on that point. Consequently, countries such as the United Kingdom, New Zealand and Canada have decided to implement that agreement, once it has been concluded, by regulation or order-in-council.

(b) Arrest

Some changes have been made to enable the ICC to participate in the surrender process. For example, the *Extradition Act* has been amended to permit the ICC to submit its recommendations where a person has been arrested at the request of the ICC and Canada is considering interim release.[11] If the ICC submits recommendations, a Canadian judge must consider them before rendering a decision.

IV. OTHER FORMS OF ASSISTANCE - Mutual Legal Assistance

Of course, the ICC also relies on the cooperation of states in cases other than arrest and surrender - for example, in collecting evidence or finding potential witnesses.

Amendments have been made to our *Mutual Legal Assistance in Criminal Matters Act* to enable Canada to provide a number of forms of assistance, such as collecting evidence, identifying persons, freezing or seizing proceeds of crime, and reparations to victims. Our intention was to ensure that Canada would be able to assist the ICC in more or less the same manner as we currently assist other states in the conduct of the usual type of investigations and prosecutions in criminal cases.

(a) Search

For example, the *Mutual Legal Assistance Matters Act*[12]has been amended to allow for a search warrant to be issued for a place or site in Canada, including by means of the exhumation and examination of a grave, instead of simply applying the general provisions of the law relating to searches.[13]

(b) Preservation of evidence

Article 19(8) of the Rome Statute would permit the Prosecutor of the ICC to seek authorization to take investigative steps, including seeking the co-operation of states to preserve certain evidence, pending a ruling by the ICC on a jurisdictional challenge. Under our former Act, before a preservation order could be obtained, a Canadian court had to determine that the foreign state or entity had *jurisdiction* over the alleged offence. Of course, it would be difficult to demonstrate to a Canadian judge that the crime in question was within the jurisdiction of the ICC when that question was being argued before the ICC itself.

We therefore amended the *Mutual Legal Assistance* ***in Criminal Matters*** *Act* to overcome this potential difficulty. The judge will no longer have to consider the jurisdiction of the requesting state or entity over the offence before granting an order. A Canadian court will simply have to be satisfied that there are grounds to believe that an offence has been committed.[14]

(c) Other changes

Other aspects of the *Mutual Legal Assistance Matters Act*have been amended, to allow for:

· questioning of suspects;

· service of documents;

· protection of victims;

· the temporary transit of an accused to the ICC via another country.

To enforce the obligations in respect of cooperation with the ICC, Canada has also adopted investigative methods that will facilitate prosecutions based on charges of genocide, crimes against humanity and war crimes - as well as offences against the administration of justice by the ICC - in Canada. For example, wiretapping and other forms of electronic surveillance may now be used to assist police forces to collect evidence that will be used in investigations and prosecutions in Canada.

(d) Restraint and Forfeiture

Under the Statute of the ICC, states must:

· restrain, seize or freeze proceeds of crime;

· give effect to fines and forfeitures ordered;

· enforce orders of reparation.

States may therefore institute a new system, amend the existing legislation or adopt a combination of the two in order to enforce these obligations. New Zealand is a good example of a country that has chosen to institute a new system, while the United Kingdom and Canada both decided to create a new system and amend the legislation.

We amended our *Mutual Legal Assistance Matters Act* to allow for an order of the ICC to be filed in Canada in order to restrain or seize proceeds of crime, or for the filing of an order of reparation or forfeiture or the enforcement of fines.[15] The Canadian court will then be able to enforce those orders *directly*.

We also decided to go farther than the requirements[16]of the Statute of the ICC and create a Crimes Against Humanity Fund.

The money obtained through enforcement in Canada of orders of the ICC for reparation or forfeiture or orders of the ICC imposing a fine will be paid into the Fund. Money may also be donated to the Fund, and the net proceeds from the disposition of seized property will be paid into the Fund.

The Attorney General of Canada may make payments out of the Crimes Against Humanity Fund to the ICC, the ICC's Trust Fund, victims of offences within the jurisdiction of the ICC or under the Canadian Act, and families of victims, or otherwise as the Attorney General of Canada sees fit.

CONCLUSION

The adoption of the Rome Statute is a major event on the legal scene, in that it strikes at the clearly defined concept we had developed of the state, and of our classical concept of state sovereignty as the foundation of international law. With the Rome Statute in place, we must now realize that there are limits to "reasons of state" and on anyone who violates certain values. This does not mean extending one state's law into another state; rather, we are together, internationally, giving ourselves the tools to put a halt to acts that are contrary to internationally recognized values that peoples hold dear and to which they are deeply attached.

It must be recalled that punishment is not the sole purpose of the international criminal justice system. It also aims to prevent and deter, and even has a pedagogical" goal. When war crimes and crimes against humanity occur, reparation is most often impossible, and any sanction imposed cannot help but be disproportionate to the horror; all we have is the search for truth, the determination of the facts, in the face of all the revisionism, the duty of justice to the victims and the rejection of excuses. To do this will take time and ongoing effort.

The Rome Statute marks the crystallization of a new "spirit of the law", one that departs from codes and judgments and takes us into the realm of morality. To do this, we must have a settled and coherent body of rules, and that is why we encourage all countries to adhere to it in and with

their own legal structures, as the Statute suggests. Drawing as it does on both international law and criminal law, international criminal law is indeed an edifice still under construction, but it now has a solid foundation.

REFERENCES

International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute, May 2000, Vancouver, Rights& Democracy - International Centre for Human Rights and Democratic Development and the International Centre for Criminal Law Reform and Criminal Justice Policy

Rome Statute of the International Criminal Court [as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999], A/CONF.183/9, 17 July 1998

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, 2000, c. 24

Criminal Code, R.S.C. 1985, c. C-46

Extradition Act, S.C. 1999, c.18

Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.)

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[1]Hague Conference of 1899 and 1907 establishing the "laws and customs of war".

[2] We are referring of course to the International Criminal Tribunal for acts committed in the former Yugoslavia, created by Resolution 827 of 25 May 1993 of the United Nations Security Council, and the International Criminal Tribunal for Rwanda created in 1994 by Resolution 955 of the same body.

[3] 160 States participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Seventeen intergovernmental organizations, 14 United Nations agencies and 124 NGO participated in the work of the conference. The Statute of the International Criminal Court was adopted in the night of July 17 - 18, 1998, by a vote of 120 for, 7 against (China, United States, India, Israel, Bahrain, Qatar and Vietnam) and 21 abstentions.

[4] Two trends may be observed in international law in respect of the use of the superior orders argument as a defence. The first trend may be seen in the Nuremberg Charter and in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, which reject this defence, but recognize that an order given by a superior could considered in mitigation of punishment, if justice so requires. The second trend is seen in national military and criminal codes and judicial decisions, such as the decision of the Supreme Court of Canada in *Finta*. That trend allows for a superior order to be argued in defence where the order was not manifestly unlawful. Section 14 of the Act therefore reflects both trends, as expressed by the Rome Statute, i.e. prohibiting the use of superior orders as a defence, if the order in question was to commit an act of genocide or crimes against humanity, or a manifestly unlawful war crime, but permitting the argument if the crime ordered was a war crime that was not manifestly unlawful.

[5] The following offences have been created:

obstructing justice (s. 16), obstructing officials (s. 17), bribery of judges and officials (s. 18), perjury (s. 19), giving contradictory evidence with intent to mislead (s. 20), fabricating evidence (s. 21), offences relating to affidavits (s. 22), intimidation (s. 23), offences against the International Criminal Court - outside Canada (s. 25), retaliation against witnesses - outside Canada (s. 26).

[6]**26.** (1) *War Crimes Act*: Every person who, being a Canadian commits outside Canada an act or omission against a person or a member of the person's family in retaliation for the person having given testimony before the International Criminal Court, that committed in Canada would be an offence under any of sections 235, 236, 264.1, 266 to 269, 271 to 273, 279 to 283, 430, 433 and 434 of the *Criminal Code*, is deemed to have committed that act or omission in Canada.

[7]*Extradition Act,* S.C. 1999, c.18

[8]**47.1** The grounds for refusal set out in sections 44, and 47 do not apply in the case of a person who is subject of a request for surrender by the International Criminal Court.

[9]Subs. **6.1** Despite any other Act or law, no person who is the subject of a request for surrender by the International Criminal Court or by any international criminal tribunal that is established by resolution of the Security Council of the United Nations and whose name appears in the schedule, may claim immunity under common law or by statute from arrest or extradition under this Act.

As well, the Pinochet case showed that the traditional immunity of heads of state no longer applied to certain acts that violate international standards, in that case the prohibition on committing acts of torture as defined in international law, as defined in the 1984 United Nations Convention.

[10]**24.** For greater certainty, the definition "internationally protected person" in section 2 of the *Criminal Code* includes judges and officials of the International Criminal Court.

[11]**18 (1.2)** If the Pre-Trial Chamber of the International Criminal Court submits recommendations, the judge shall consider them before rendering a decision.

[12]*Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c.30 (4th suppl.)

[13]11. (1) When the Minister approves a request of a state or entity to have a search or a seizure, or the use of any device or investigative technique or other procedure or the doing of any other thing to be described in a warrant, carried out regarding an offence, the Minister shall provide a competent authority with any documents or information necessary to apply for a search warrant or other warrant.

and **23.1** (1) When the Minister approves a request of a state or entity to examine a place or site in Canada regarding an offence, including by means of the exhumation and examination of a grave, the Minister shall provide a competent authority with any documents or information necessary to apply for an order.

[14]**22.2** (1) The judge may make the order if satisfied that there are reasonable grounds to believe that

(*a*) an offence has been committed; and

(*b*) the state or entity believes that the person's evidence or statement would be relevant to the investigation or prosecution of the offence.

[15]When a request is presented to the Minister by the International Criminal Court for the enforcement of an order of reparation or forfeiture, or an order imposing a fine, the Minister may authorize the Attorney General of Canada to make arrangements for the enforcement of the order.

[16]**30.** (1) There is hereby established a fund, to be known as the Crimes Against Humanity Fund, into which shall be paid

(*a*) all money obtained through enforcement in Canada of orders of the International Criminal Court for reparation or forfeiture or orders of that Court imposing a fine;

(*b*) all money obtained in accordance with section 31; and

(*c*) any money otherwise received as a donation to the Crimes Against Humanity Fund