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**THE IMPLICATIONS FOR COUNCIL OF  
EUROPE MEMBER STATES OF THE  
RATIFICATION OF THE  
ROME STATUTE OF THE  
INTERNATIONAL CRIMINAL COURT**

**LES IMPLICATIONS POUR LES ETATS  
MEMBRES DU CONSEIL DE L'EUROPE  
DE LA RATIFICATION DU STATUT DE  
ROME DE LA COUR PENALE  
INTERNATIONALE**

# **PROGRESS REPORT BY CANADA AND APPENDIX**

Canada ratified the Rome Statute of the International Criminal Court on July 7, 2000, and was the first country to adopt comprehensive implementing legislation (the *Crimes Against Humanity and War Crimes Act* [CAHWCA]), which received Royal Assent on June 29, 2000 and came into force on October 23, 2000. A copy of the Act, and a summary of its main elements, are attached.

### Cooperation with the International Criminal Court

Canada has implemented all of the cooperation obligations contained in the Rome Statute of the International Criminal Court (ICC), in some cases going further than the Statute in order to guarantee comprehensive and effective assistance to the ICC.

The CAHWCA implements Canada's obligation to arrest and surrender persons sought by the ICC for genocide, crimes against humanity and war crimes, by adopting a surrender process based on a streamlined version of Canada's existing extradition process. In 1999, Canada amended its *Extradition Act* to allow for surrender to the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The CAHWCA therefore provided for an additional amendment to add the ICC to this list. Canada also eliminated all grounds for refusal (such as the political offence exception) that are normally applicable in cases of a state-to-state extradition and indicated that they did not apply to a request for surrender by the ICC. The *Extradition Act* was also amended to ensure that a person who is the subject of a request for surrender would not be able to claim statutory or common law immunity as a bar to surrender to the ICC. Finally, Canada amended the *Extradition Act* to allow for evidence to be adduced in a summary form, whereby evidence can be submitted in the form of a record of the case.

The CAHWCA also allows Canada to assist the ICC in investigating offences of genocide, crimes against humanity and war crimes in much the same way that it currently assists other states with normal criminal investigations. Amendments to the *Mutual Legal Assistance in Criminal Matters Act* now permit Canada to provide a wide range of assistance to the ICC, such as the identification of persons, questioning of suspects, gathering of evidence in Canada for the purposes of prosecution and the protection of victims and witnesses. In addition, the CAHWCA has added the full range of offences against the administration of justice listed in the ICC Statute, and also extended existing Canadian *Criminal Code* administration of justice offences to protect ICC officials. Therefore the protections extended to ICC officials are broader than those required in the ICC Statute.

Canada has also amended its *Mutual Legal Assistance Act* to allow an ICC order for restraint, seizure or freezing of proceeds of crime and ICC orders for forfeiture, fines, and reparations to be filed in a Canadian court, therefore allowing the Canadian court to enforce those orders directly.

### Constitutional Issues

#### *Head of State Immunity*

The issue of head of state immunity did not pose constitutional problems for Canada, as the Crown may be bound by act of Parliament. Section 3 of the CAHWCA provides "This Act is binding on Her Majesty in right of Canada or a province."

### *Command Responsibility*

The matter of command responsibility raised complex constitutional questions for Canada. Article 28 of the Rome Statute sets out the principle that commanders - whether military, paramilitary or civilian commanders, including Heads of State - who fail to prevent or punish crimes committed by subordinates, when they knew or should have known (or in the case of non-military superiors, knew or consciously disregarded information) about these crimes, are to be held liable for the commission of such crimes as if they were actual perpetrators. Some countries, such as New Zealand, have incorporated command responsibility into their domestic law by way of reference to Article 28, while others like the United Kingdom reproduced the wording of the command responsibility article from the Rome Statute.

In Canada, jurisprudence of the Supreme Court of Canada has made it clear that the *Charter of Rights and Freedoms* requires that the mental element of certain serious crimes be based on a subjective test, since the conviction and sentence will reflect the high degree of moral stigma society ascribes to those convicted of such crimes. Holding persons criminally liable on the basis of constructive or vicarious liability may not meet these constitutional standards. Clearly, command responsibility as defined by the Rome Statute contains both subjective and objective mental tests, the objective test being reflected in the phrase "should have known", and the stigma attached to a conviction for the crime of genocide, crimes against humanity or war crimes would be considered as very serious.

In order to meet the objective of matching the stigma that attaches to the crimes in question with the proper level of intent, Parliament created a distinct new crime of "breach of command responsibility". As is the case with the Rome Statute, the crime of breach of command responsibility applies to both military commanders and civilian superiors. The commander/superior is not charged with committing genocide, crimes against humanity and war crimes, but is instead charged with breaching his or her responsibility as a commander/superior. The same penalties apply to the crime of breach of command responsibility under the CAHWCA as to the crimes of genocide, crimes against humanity and war crimes, therefore leading to the result required by Article 28 of the Rome Statute.

### Substantive Criminal Law Issues

Canada ensured that it could take advantage of the complementarity regime by adopting new crimes of genocide, crimes against humanity and war crimes. These crimes were defined by reference to customary and conventional international law that was applicable at the time and the place of their commission. In order to provide guidance to judges and prosecutors, examples of these crimes were included in the definitions. A direct reference to the ICC Statute was included in article 6(4), stating that, for greater certainty, all ICC crimes are to be considered crimes under customary international law as of July 17, 1998, and may be crimes according to customary international law before that date.

Under the CAHWCA, penalties for genocide, crimes against humanity and war crimes range up to and include life imprisonment. Where murder forms the basis of the offence, mandatory minimum sentences (life imprisonment) apply.

The CAHWCA incorporated the defences available under the ICC Statute, such as the defence of superior orders. These defences are available to an accused prosecuted in Canada alongside the defences available under the laws of Canada. The defence of superior orders is only a defence to a war crimes charge. The defence cannot be based on a belief that the order was lawful where the accused's belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group. In addition, the CAHWCA indicates that special pleas of *autrefois acquit*, *autrefois convict* or pardon may not be pleaded when the person was tried in a court of a foreign state and the proceedings in that court were for the purpose of, *inter alia*, shielding the person from criminal responsibility or were inconsistent with an intent to bring the person to justice.

## Appendix

### HIGHLIGHTS OF THE CRIMES AGAINST HUMANITY AND WAR CRIMES ACT<sup>1</sup>

The *Crimes Against Humanity and War Crimes Act* (the “Act”) implements in Canada the Rome Statute of the International Criminal Court. Highlights of the Act include:

#### **Genocide, Crimes Against Humanity and War Crimes**

The Act creates offences of genocide, crimes against humanity and war crimes based on customary and conventional international law, including the Rome Statute. The adoption of these crimes allows Canada to take advantage of the complementary provisions of the Rome Statute of the International Criminal Court (ICC).

#### **Jurisdiction**

The CAHWCA incorporates several grounds of jurisdiction. Canada adopted active nationality and territorial jurisdiction, in order to ensure that it asserted jurisdiction over crimes committed on Canadian territory and by Canadians anywhere in the world. In addition, Canada adopted passive nationality jurisdiction, to cover crimes committed against Canadian nationals. In some situations, active and passive nationality is also extended to include other persons who are associated with a state that was engaged in an armed conflict against Canada or was allied with Canada in an armed conflict. As well, the Act asserts universal jurisdiction, allowing Canada to prosecute anyone (regardless of nationality) who is subsequently present in Canada after the commission of the crimes listed in the CAHWCA. This approach is consistent with past Canadian war crimes policy.

#### **Offences of Breach of Command/Superior Responsibility**

The Act includes offences of breach of responsibility by military commanders and other superiors. Failure of a military commander or superior to exercise control over persons under his or her authority, which results in a subordinate committing genocide, a crime against humanity or a war crime, could result in the criminal responsibility of the military commanders, or superiors, if they fail to take measures to prevent or repress the crime or fail to submit the matter to the competent authorities for investigation.

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<sup>1</sup> The full text of the Crimes Against Humanity and War Crimes Act may be found on the internet at: <http://laws.justice.gc.ca/en/C-45.9/text.html>

## **Defences**

Canadian and international defences are available to persons accused of crimes listed in the CAHWCA, with some exceptions. It is not 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 in accord with that provided in the Rome Statute. In addition, the defence of superior orders cannot be based on a belief that the order was lawful if the accused's belief is based on information about an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the group. It is also not a defence that the offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

A person may not plead *autrefois acquit*, *autrefois convict* or pardon if the person was tried by a foreign court and the proceedings were for the purpose of shielding the person from criminal responsibility, or were not otherwise conducted independently or impartially and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice.

## **Sentences and Parole Eligibility**

The crimes listed in the CAHWCA provide for penalties ranging up to and including life imprisonment. Where intentional killing forms the basis of the offence, mandatory minimum sentences (life imprisonment) apply. The parole eligibility rules for crimes involving intentional killing are the same as those for the offence of murder under the *Criminal Code*. Ordinary parole rules apply for all other sentences.

## **Offences Against the Administration of Justice of the ICC**

The Act includes offences to protect the integrity of the processes of the Court and to protect judges and officials of the ICC, as well as witnesses. In particular, the Act includes the offences of obstructing justice, obstructing officials, bribery of judges and officials, perjury, fabricating or giving contradictory evidence, and intimidation. Witnesses who have testified before the ICC are protected under the *Criminal Code* from retaliation against them or their families. Other existing *Criminal Code* offences also apply to protect judges and officials from harm when they are in or outside of Canada. All of these offences apply when committed in Canada or by Canadian citizens outside Canada.

## **Proceeds of Crime Offences**

The Act also ensures that the possession and laundering of proceeds from these new offences are also offences. This ensures that proceeds located in Canada resulting from the commission of genocide, crimes against humanity or war crimes can be restrained, seized or forfeited in much the same way as proceeds from other criminal offences in Canada.

### **Crimes Against Humanity Fund**

Money in Canada obtained from the disposal of forfeited assets or the enforcement of fines or reparation orders of the ICC will be paid into the Crimes Against Humanity Fund, established under the Act. The Attorney General of Canada may then make payment from that Fund to the ICC, the ICC's Trust Fund established under the Rome Statute or directly to victims.

### **Surrender**

The Act implements Canada's obligation to arrest and surrender persons sought by the ICC for genocide, crimes against humanity and war crimes. Canada has adopted a surrender process which is based on a streamlined version of Canada's existing extradition process. In 1999, Canada amended its *Extradition Act* to allow for surrender to the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The CAHWCA therefore provided for an additional amendment to add the ICC to this list. Canada also eliminated all grounds for refusal that are normally applicable in cases of a state-to-state extradition and indicated that they did not apply to a request for surrender by the ICC. The *Extradition Act* was also amended to ensure that a person who is the subject of a request for surrender would not be able to claim statutory or common law immunity as a bar to surrender to the ICC. Finally, Canada amended the *Extradition Act* to allow for evidence to be adduced in a summary form.

### **Mutual Legal Assistance**

Canada will be able to assist the ICC to investigate offences of genocide, crimes against humanity and war crimes in much the same way that it currently assists states with normal criminal investigations. The *Mutual Legal Assistance in Criminal Matters Act* has been amended to permit Canada to provide a wide range of assistance to the ICC, from the identification of persons to gathering evidence in Canada for the purposes of prosecution.