The Proposed International Criminal Court

Implications for Correctional Service Canada

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1. Introduction

In July 1998, the international community overwhelmingly adopted a Statute for a permanent International Criminal Court, after more than half a century of political struggles over the content of such a Statute.[ii] The establishment of this new institution has the potential to change the nature of international relations on a scale similar to that of the creation of the United Nations. The International Criminal Court ("ICC") will have the power to prosecute Heads of State who commit genocide and other humanitarian atrocities, and all States Parties to the Statute will have an obligation to assist the Court in arresting and surrendering such persons to the Court.

On 7 July 2000, Canada became a State Party to the *Rome Statute of the International Criminal Court* ("Rome Statute"), which is the treaty that will bring the Court into being. Canada was also the first country to implement comprehensive legislation to allow national authorities to cooperate with the Court, under the *Crimes Against Humanity and War Crimes Act* ("CHA").[iii]

The purpose of this paper is to provide a brief guide to the potential impact of this Court on Correctional Service Canada ("CSC"). It will first present a very general introduction to the Rome Statute, then provide an overview of relevant provisions of the CHA – including the new crimes and procedures introduced to Canada under the CHA. The final two sections of this paper will highlight the features of the ICC that are most likely to have an impact upon CSC, including international co-operation requirements and the main considerations involved if Canada were to offer to supervise prisoners convicted by the Court.

1.1 Projected time frames

At the international level, since January 1999 a Preparatory Commission for the ICC ("Prepcom") has been meeting at United Nations Headquarters in New York, to negotiate practical arrangements for the establishment of the Court.[iv] One of the Prepcom's first tasks was to negotiate the *Rules of Procedure & Evidence* for the ICC ("RPE"). A "finalized draft text" of the RPE was adopted by consensus at the Prepcom in June 2000, and is also referred to in this paper.[v] This "finalized draft text" of the RPE will most likely be adopted without amendment at the first meeting of the ICC's Assembly of States Parties, since the text already represents the consensus view of all 160 or so States participating in the Prepcom. The Assembly of States Parties will be the managerial body for the ICC – just as the General Assembly manages the United Nations – and it has to approve all the supplemental agreements to the Rome Statute before they are open for ratification by States.[vi]

However, the Assembly of States Parties cannot convene and the ICC itself will not come into being until after the Rome Statute enters into force and becomes binding on its Parties, which has yet to occur. The Rome Statute will enter into force approximately two to three months after sixty States have become Parties to the Statute.[vii] As at 31 December 2001, forty eight States had become Parties to the Statute, and many others had signalled their intention to do so over the next few months.[viii]

Given these figures, the Rome Statute will most likely enter into force towards the middle of 2002, allowing the Court to receive its first complaint and theoretically to commence its first investigation at that time. However, the practical arrangements to launch a full-scale criminal investigation will most likely **not** be in place from "day one" of the Court's operations. It is more likely to take several months

before the ICC is in a position to commence any form of investigation. The Netherlands Government has assigned temporary accommodation and some interim staff for the Court, which will be based in the Hague. But employment of key personnel has to be agreed upon by all members of the Assembly of States Parties. As mentioned previously, only after the Rome Statute enters into force can the Assembly hold its first meeting to choose such important figures as the Prosecutor and the judges.[ix] At subsequent meetings, the Assembly will still have to consider a number of important issues, such as staffing regulations and procurement rules.

A "Road Map" prepared by the Prepcom Bureau in September 2001 suggests that it may be desirable to hold these first two meetings of the Assembly of States Parties immediately after one another, followed shortly thereafter by the inaugural Meeting of the Court, at which the judges and the Prosecutor will be sworn in.[x] However, this appears to be an overly ambitious agenda, which ignores the fact that political considerations are likely to slow the negotiating processes down considerably, given the potential ambit of this new institution and the crucial role of the Prosecutor and judges.

In the meantime, practical arrangements for the Court continue to be negotiated as far as possible, with an ever-increasing sense of urgency. The Prepcom has been scheduled to meet in both April and July 2002, and the United Nations General Assembly has been requested to consider providing assistance to the first meeting of the ICC's Assembly of States Parties, tentatively scheduled for September 2002. Over the next few months, "intersessional" meetings of the Prepcom will also discuss operational issues such as provision of legal aid and rules on detention at the Hague.

All of these preparations suggest that for the duration of 2002, the ICC is unlikely to be in a position to act upon any information it may receive, even after the Rome Statute has entered into force. If the first meeting of the Assembly of States Parties proceeds in September 2002, and a Prosecutor is chosen at this time, it will still take a few months before that person can take any real investigative steps, particularly those requiring the cooperation of national authorities. Therefore, it appears safe to assume that the ICC's first request for any form of international cooperation will not be made before 2003. Thus, national detention and corrections facilities still have approximately twelve months within which to prepare for possible requests from the ICC to detain accused persons.

Nevertheless, at the national level, countries all over the world are rapidly making the necessary amendments to their domestic laws, in order to empower all relevant national authorities to be able to cooperate with the ICC as soon as possible. In Canada, the CHA entered into force on 23 October 2000, thereby bringing into effect most of its provisions from that date.[xi] Clearly, those provisions in the CHA relating to cooperation with the ICC will not actually be required until the ICC is in a position to make a request for cooperation. But they should be implemented at an operational level as soon as possible after the Rome Statute enters into force, to ensure there are no embarrassing delays for Canada, should it be among the first few countries requested to provide some form of assistance to the ICC in the near future.

2. Overview of the International Criminal Court

The *Rome Statute of the International Criminal Court* is a compromise between a wide range of views as to the most suitable mechanism for preventing impunity for international crimes. It blends the common law and other internationally recognized legal systems, in a manner that was considered acceptable to the widest possible diversity of diplomatic representatives at the negotiating conference in Rome in July 1998.

The Statute also achieves a delicate balance between the need for judicial independence, and recognition of existing mechanisms for maintaining international peace and security, such as the Security Council. The ICC will be an independent institution, and not part of the United Nations system. As such, all of its functions have to be devised and implemented from scratch, by those countries who are Parties to the treaty establishing the Court. Since the ICC is a treaty-based institution, and not an organ of the United Nations, it will have a unique relationship with the UN system, which is detailed in a special agreement negotiated by the Prepcom.[xii]

Once established, the ICC will have the power to prosecute individuals who commit genocide, crimes against humanity, or war crimes. However, the ICC will **not** be able to investigate and prosecute international crimes that may have happened in the past. It can only prosecute crimes that are committed after entry into force of the Rome Statute, so that world leaders and their military authorities have time to educate and re-train personnel, if necessary.[xiii]

2.1 Key features of the ICC

The jurisdiction of the ICC can be triggered in any one of three ways: (i) upon the referral by the Security Council of a "situation" – in the same way that the Council has used its powers previously to establish *ad hoc* tribunals as and where it was considered necessary to maintain international peace and security;[xiv] (ii) where a State Party refers to the Court a crime allegedly perpetrated by a national of a State Party, or committed on the territory of a State Party;[xv] or (iii) the ICC Prosecutor may also initiate an investigation of a crime allegedly committed by a State Party national or on State Party territory, even without a State Party referral.[xvi]

However, the ICC's jurisdiction will be "complementary" to national jurisdictions, unlike most of its predecessors.[xvii] This means that State authorities will retain primary responsibility for investigating and prosecuting the crimes within the jurisdiction of the Court.[xviii] The ICC will merely be a court of "last resort", where no other court in the world is willing and able to prosecute a particular ICC crime. Therefore, the ICC has been designed to defer to domestic investigations and prosecutions of ICC crimes, in all but the most exceptional circumstances.[xix] In an ideal world, the ICC will never have to prosecute or investigate anything, because competent national authorities will be taking responsibility for enforcing all international criminal laws.[xx]

The Rome Statute also clarifies some areas of international criminal law that have previously appeared to limit the jurisdiction of national authorities. The official capacity of an individual, as well as sovereign and other immunities, will be irrelevant to the Court in determining whether it may exercise jurisdiction over a particular individual.[xxi] The Rome Statute also provides expressly for the criminal

responsibility of commanders for crimes committed by persons under their effective authority or control.[xxii] It is hoped that all national legislators will follow these principles, when preparing new ICC-related legislation.[xxiii]

The Court will be comprised of several different Chambers, to deal with the various stages of trials: pre-trial hearings, trial hearings, and appeals.[xxiv] Each of these Chambers may request the cooperation of national authorities. All the judges and the Prosecutor will be nominated and voted upon by States Parties, and must meet high standards for selection.[xxv] The Rome Statute is designed to uphold the highest standards of international justice for all stakeholders, including the right of the accused to a fair trial (article 63) and the right of victims to participate in proceedings (article 68).[xxvi] In the event that the Statute is found wanting in any way, there is a mechanism for amendments, involving a Review Conference to be held seven years after entry into force of the Statute.[xxvii]

The ICC will rely extensively on State authorities when it is carrying out its investigations and prosecutions, since it does not have an enforcement body of its own. The primary obligation of States Parties under the Rome Statute is to "co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court" (article 86). States Parties must also "ensure that there are procedures available under their national law for all of the forms of co-operation which are specified under [Part 9 of the Statute on International Cooperation and Judicial Assistance]".[xxviii] In other words, it is envisaged that States will use their national laws to establish all the procedures necessary to be able to assist the Court. The ICC will generally make its requests for cooperation through diplomatic channels, but States may specify an alternative channel at any time (article 87). At this stage, Canada will receive any requests through its diplomatic channel, and then forward the request to the appropriate national authority.

The Statute provides some very limited exceptions to the duty to cooperate with the Court. The first is where the request concerns the production of documents or disclosure of evidence which relates to the requested State's national security.[xxix] The second is where a State Party is requested to produce a document or information that was provided to it in confidence, and the originator of the document does not consent to disclosure.[xxx] The third ground for denying requests is provided for in the combined language of articles 93(1)(l) and 93(5), which outline a procedure for consultations and possible modification of the request by the ICC, where the type of assistance is prohibited by the law of the requested State.[xxxi]

The ICC will also rely on States to volunteer their correctional facilities for the supervision of persons sentenced to imprisonment by the Court (article 103). Since the need for such facilities seems a long way off, Canada has yet to make a decision as to whether it will offer to supervise these prisoners. The maximum penalty that can be imposed by the Court is a term of life imprisonment, but only "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person" (article 77). In all other cases, the maximum penalty is thirty years imprisonment. However, the ICC must review every sentence once a person has served two thirds – or 25 years in the case of life imprisonment – to determine if the sentence should be reduced (article 110). The factors the Court will take into account when reducing a sentence are outlined in article 110, paragraph 4, subparagraphs (a) to (b), plus rule 223, subparagraphs (a) to (e). In addition to empowering the ICC to imprison convicted persons, article 77 also provides for the imposition of fines, forfeiture orders, and reparations orders for victims.[xxxii]

3. Details of the *Crimes Against Humanity and War Crimes Act* that potentially could impact upon Correctional Service Canada

The Canadian *Crimes Against Humanity and War Crimes Act* was drafted jointly by experts from a range of departments, especially the Department of Justice and the Department of Foreign Affairs & International Trade. Other relevant departments were also consulted throughout the drafting process, including the Office of the Solicitor General, which had considerable input on the sections pertaining to parole eligibility and witness protection.

3.1 New crimes and penalties

In order to take advantage of the "complementary" jurisdiction of the ICC, the CHA introduces a number of new crimes to Canada, as well as revised definitions of those offences previously included within the *Criminal Code*, and it repeals subsections 7(3.71) to (3.77) of the *Criminal Code*.[xxxiii] The crimes addressed by the CHA include genocide, crimes against humanity, war crimes, and breach of responsibility by a military commander or superior (sections 4 to 7). Canadian courts now have jurisdiction to prosecute all persons who commit these offences within or outside of Canada, as long as there is sufficient nexus with Canada (see section 8 for the nexus requirements). This includes persons with no apparent connection to Canada, who may be present in Canada after the offence is committed (subsection 8(b)).

These crimes have also been added to Schedule I to the *Corrections and Conditional Release Act*.[xxxiv] The maximum penalty for most of these offences is imprisonment for life. However, subsection 15(3) CHA provides that where an intentional killing forms the basis of a crime of genocide, a crime against humanity, or a war crime, a sentence of life imprisonment is to be considered a minimum punishment.[xxxv]

The CHA also introduces offences against the administration of justice of the ICC, where committed on Canadian territory or by Canadian citizens anywhere in the world (sections 16 to 26). The relevant penalties are set out under each section, and range from a maximum of two years imprisonment to a maximum of fourteen years imprisonment.

In addition, sections 27 to 29 CHA establish new offences pertaining to dealing with the proceeds of the crimes introduced under the Act. This includes laundering such proceeds, which may incur a penalty of ten years imprisonment. The evidence to establish such offences is often gathered after the evidence pertaining to the initial crime itself, and sometimes not until after a conviction is recorded and the person is imprisoned. Therefore, corrections facilities will need to make prisoners available as necessary to assist the authorities with such investigations. The revenue obtained from any property forfeited in relation to these offences will be paid into a special "Crimes Against Humanity" Fund, as will any amounts imposed by way of a fine (sections 30 to 32, CHA). The Attorney General of Canada will then determine whether any of those funds should be paid to the victims of offences under the CHA.

3.2 Parole issues

Subsection 15(1) CHA outlines the parole eligibility for a person sentenced to life imprisonment for genocide, a crime against humanity, or a war crime, according to the nature of the crime committed. This subsection must now be taken into account when determining full parole eligibility, where an offender who is serving a sentence receives an additional sentence.[xxxvi] Subsection 15(1.1) provides that a military commander or superior sentenced to life imprisonment for a breach of responsibility will have normal eligibility for parole.

Sections 745.1 to 746.1 of the *Criminal Code* will also apply, with appropriate modifications, to life imprisonment sentences imposed under the CHA, in accordance with subparagraphs 15(2)(a) to (e), CHA. These deeming provisions have led to consequential amendments to the following provisions of the CCRA: subsections 17(1),[xxxvii] 18(2),[xxxviii] 107(1),[xxxix] 119(1),[xl] 119(1.1),[xli] 119(1.2),[xlii] 120(1),[xliii] 120.2(3),[xliv] and section 120.3[xlv].

The CHA does not set out a special regime of parole for offences against the administration of justice of the ICC. Therefore the normal parole regime would seem to apply to persons convicted of such offences.

3.3 Special considerations

Most of these crimes are committed by persons at high levels of authority within their government. Theoretically, this means that senior government officials from Canada, its allies, or any other country, may be arrested and detained in Canada, pending trial by a Canadian court, which may require special arrangements at correctional facilities. There are only likely to be a very small number of such individuals. But each case is likely to be high profile and politically contentious at the national and international level. Therefore, each rare case has the potential to impose much greater demands upon correctional services than most other cases.

However, it is extremely unlikely that an international criminal with no connection to Canada would actually be prosecuted by a Canadian court and imprisoned in a Canadian prison. The *Immigration Act* already prevents suspected war criminals and the like from claiming refugee status in Canada, in accordance with the *United Nations Convention Relating to the Status of Refugees*.[xlvi] Section 55 CHA has also amended the *Immigration Act* so that suspected war criminals and the like may not be admitted to Canada through the regular channels either, "except persons who have satisfied the Minister that their admission would not be detrimental to the national interest."[xlvii] This includes senior officials from governments that may have been "engaged in terrorism, systematic or gross human rights violations".[xlviii] Presumably, if the relevant Minister decides to allow the person to enter Canada, the Canadian government would **not** then turn around and arrest the person for the crimes.

4. Details of Rome Statute obligations that potentially could impact upon correctional jurisdictions

As stated previously, once the ICC has determined that no State is willing and able to prosecute a person suspected of genocide, crimes against humanity, or war crimes, the Court will still rely predominantly on national authorities to carry out a range of tasks related to the investigation and prosecution of these crimes.

The main obligation that is likely to impact upon Correctional Services is the arrest and surrender of suspects to the Court. The Rome Statute sets out detailed procedures for national authorities to follow, should a suspect be found in a particular country. These procedures merely provide the most basic rights to an accused person, with which Canadian authorities would all be familiar. Nevertheless, for the sake of completeness, these procedures are set out below, in addition to a number of related considerations, such as access to defence counsel. Several other obligations relating to persons being held in custody are then discussed as well.

The Rome Statute was drafted to try and avoid the usual delays and problems associated with State-to-State extraditions. However, because of the need for consultations on a potentially wide range of issues between the ICC and national authorities, it is likely that there will still be lengthy delays during the process of surrendering a person to the ICC. Those persons in charge of remand and/or detention facilities should familiarize themselves with the steps that need to be taken at various stages of the process, to ensure that adequate resources are allocated to supervising and caring for persons wanted by the ICC, as well as for transporting such persons back and forth to national courts while consultations with the ICC proceed.

In order to avoid potential conflicts with the *Charter of Rights and Freedoms*[xlix], Canada has decided to adapt its normal extradition procedures to allow for surrender to the ICC, rather than introducing an entirely separate regime for cooperation with the ICC, which some other States have done. It appears that once the Rome Statute enters into force, it will be treated as an "extradition agreement", for the purposes of the *Extradition Act*.[l] However, the CHA has made certain consequential amendments to the *Extradition Act* for situations where the ICC has made a request for surrender, in order to implement the particular requirements of the Rome Statute, as outlined below.[li]

4.1 Overview of ICC's arrest procedures, as they relate to various national authorities:

4.1.1 Arrest warrants

The ICC's Pre-Trial Chamber ("PTC") must satisfy itself there are reasonable grounds to believe that a particular person has committed a crime within the ICC's jurisdiction, before issuing a warrant or summons for that person.[lii] Once the PTC is satisfied of all the matters set out in article 58, there are three means by which it can seek to have suspected perpetrators detained by national authorities in order to ensure their subsequent surrender to the ICC, or otherwise put on notice that their presence is required before the Court:

- Issuing an arrest warrant along with a request for arrest and surrender of the person, in accordance with articles 58, 89 & 91, and rules 117, 123 & 187;

- Issuing an arrest warrant along with a request for provisional arrest, in accordance with articles 58(5) & 92, and rules 117, 123, 188, & 189, in urgent cases where the required supporting documentation is not yet available; and
- Issuing a summons, with or without conditions restricting liberty (other than detention) if provided for by national law, in accordance with article 58(7) and rules 119(5) & 123, where the Pre-Trial Chamber is satisfied that a summons is sufficient to ensure the person's appearance.

Article 89 provides that the ICC may request any State on the territory of which the person may be found, to authorise its national authorities to execute the arrest warrant or the request for provisional arrest. National authorities are entitled to follow the relevant procedure under their national law (article 89(1)).

Article 91 outlines the required contents of ICC requests for arrest and surrender, while article 92 outlines the required contents of requests for provisional arrest. These requests are likely to include information describing the person sought and their probable whereabouts, plus a copy of the warrant of arrest. In addition, States may specify other documents and information that they require for their national laws, as long as these requirements are not more burdensome than the State's requirements for meeting a request for extradition to another State (article 91(2)).

4.1.2 "Interim release pending surrender"

Once a person has been arrested by national authorities, article 59 requires that the person "be brought **promptly** before the competent judicial authority in the custodial State", and provided the opportunity to apply for "interim release pending surrender". Paragraphs 59(4) & (5) set out the factors that the State judicial authority must take into account when considering whether to grant interim release pending surrender. The ICC's PTC must be notified and make recommendations if a person applies for interim release, and national authorities must "give full consideration to such recommendations" before rendering any decisions on interim release (paragraph 59(5)). If the person makes the request for interim release at the initial judicial hearing, then there will most likely need to be a subsequent hearing once the PTC's recommendations have been received by the State judicial authority.

Where a person has been provisionally arrested and denied interim release, the national authorities may subsequently release the person from custody if the request for surrender and the documents supporting the request are not received within 60 days from the date of the provisional arrest (paragraph 92(3) and rule 188). However, once the requisite documents do arrive, the person must be arrested again, and brought back before the competent judicial authority as described above (paragraph 92(4)). Note, however, that a provisionally arrested person may voluntarily consent to being surrendered to the ICC before the requisite documents arrive, if this is permitted by national laws (paragraph 92(3)). In that case, the requested State must surrender the person to the Court as soon as possible (paragraph 92(3) and rule 189).

If a person has been granted interim release, the PTC may request periodic reports on the status of the interim release (paragraph 59(6)). The PTC must inform the custodial State how and when it would like to receive these periodic reports (subrule 117(5)).

4.1.3 Surrender to the ICC

In most cases, the national judicial authority must order the surrender of the person to the ICC (paragraph 59(7)). If the competent judicial authority perceives any difficulties or conflicts in meeting the request for surrender, it must consult the ICC (article 97). If the arrested person is already being investigated by the requested State for the same offence, then the State should inform the Court in accordance with article 18. If the ICC decides to continue with its investigation, the State may bring an admissibility challenge under articles 18 and 19, and seek to postpone execution of the request in accordance with article 95.

If the arrested person is already being investigated, or serving a term of imprisonment, for a different offence, then the requested State is still obliged to grant the request for surrender, but must consult with the Court after granting the request for surrender, in order to determine the most appropriate course of action (paragraph 89(4)). Article 94 provides that the requested State may postpone the execution of the request for a period of time agreed upon with the Court, if the immediate execution of the request would interfere with an ongoing investigation or prosecution of a different matter.

Where the requested person has already been prosecuted for the same offence, or conduct that relates to that offence, the person sought for surrender may bring a challenge before a national court on the principle of *ne bis in idem* (paragraphs 20(3) & 89(2)). If the person makes such a challenge, the requested State is required to "consult immediately with the Court to determine if there has been a relevant ruling on admissibility" by the Court. If the Court has already determined that the case is admissible, then the requested State must proceed with the surrender. If, however, an admissibility ruling is pending, then the requested State may postpone execution of the request until the ICC makes its determination on admissibility (paragraph 89(2)). The ICC Prosecutor may then seek an order from the Court requesting the State to prevent the absconding of the person who is the subject of the warrant of arrest (article 19(8)(c)).

Article 101 provides that the rule of specialty applies where a person is surrendered to the ICC. In other words, the Court can only proceed against the person for the crimes which formed the basis of the request for surrender. Rules 196 and 197 provide that the authorities who have custody of the person prior to surrender, may have to arrange to obtain the views of the person, if s/he is concerned that the rule of specialty is not being observed, or if the ICC is requesting a waiver of the rule.

Clearly, a considerable amount of consultation between the ICC and national authorities may be required at various stages throughout the surrender process, and CSC needs to have resources and expertise in place to facilitate this when appropriate. Rule 184 sets out the practical requirements for actually surrendering the person to the ICC, including "immediate" notification to the ICC Registrar once the person is available for surrender (paragraph 1), and negotiating the arrangements for surrender between national authorities and the Registrar (paragraph 2). CSC will have a key role to play in these negotiations.

4.1.4 Rights of the accused

The basic rights of the accused should be respected at all times. Canadian authorities are unlikely to require any additional training in this area, since the rights of accused persons under the *Charter of*

Rights and Freedoms[liii] are already far greater than persons who are being investigated by the ICC (see articles 55 and 67, Rome Statute). However, note article 57, subparagraph(3)(c) and article 64, subparagraph(6)(e), which both provide that the ICC may request national authorities to provide special protective measures for accused persons, in addition to their basic rights. These measures may be required as soon as the person is arrested by national authorities, given the high profile nature of most of these cases, as mentioned previously.

One issue that has yet to be clarified is the exact procedure for appointment of legal representation to accused persons, to ensure timely coordination between national authorities and the ICC. The Rome Statute provides that all persons suspected of having committed a crime within the jurisdiction of the ICC have the right to free legal assistance from the time they are about to be questioned through to the end of the trial (article 55, subparagraph(2)(c) and article 67, subparagraph(1)(d)). Rule 117(2) further provides: "At any time after arrest, the person may make a request to the PTC for the appointment of counsel …". Presumably, this request to the PTC in the Hague will take some time to process, given the geographical distances involved, unless the person is arrested in the Netherlands. Thus, national arresting and/or remand authorities may be required to facilitate the appointment of local "interim" counsel, in situations where questioning of the accused needs to be carried out expeditiously.

The privileges and immunities of defence counsel has proven to be a particularly contentious issue during the Prepcom negotiations, given the range of different and particularly non-adversarial legal systems represented. A special *Draft agreement on the privileges and immunities of the Court* was finally adopted by the Prepcom in October 2001, which will also become relevant in terms of international criminal lawyers being able to have unimpeded access to their clients, no matter where in the world their clients are detained.[liv] Section 54 CHA grants such "counsel" all the relevant privileges and immunities under both the Rome Statute and the *Draft agreement*.

4.1.5 Time in detention

Once an order for surrender has been issued by a custodial State, the person must be delivered to the ICC as soon as possible (article 59(7)). The ICC is required to take into account any time the person spends in detention in accordance with an order of the Court, when imposing a sentence of imprisonment (article 78(2)). Therefore, national corrections authorities should keep accurate records of the person's time in their custody, and forward this information to the ICC when the person is surrendered.

4.2 Other ICC Obligations that may impact upon correctional services

As suggested previously, national authorities may be requested to question accused persons, which may occur before or after the latter are arrested. In addition to the basic rights of the person discussed above, rule 112 sets out specific requirements for recording any statements made by suspects in ICC cases. Article 69 Rome Statute sets out the general principles relating to the admissibility of evidence at trial, which will already be familiar to most Canadian authorities.

The ICC may also request the attendance at the Court of a person already in custody for a different offence, “for purposes of identification or for obtaining testimony or other assistance” (paragraph 93(7), Rome Statute). Both the person in question and the custodial State must consent voluntarily to such transfer.

Article 89, paragraph (3) also requires States Parties to authorize transportation through their territory of persons in custody, being surrendered to the Court. If there is an unscheduled landing on the way, the “transit State” may be required to detain the person up to 96 hours (subparagraph (e)).

4.3 Costs

Article 100 Rome Statute sets out the division of costs in executing requests, between the requested State and the Court. The State will generally need to cover the costs incurred within its territory, while the Court will pay for costs to bring witnesses and accused persons being surrendered to the Court.

5. Requirements for supervising ICC prisoners

The ICC will not have its own long-term detention facilities, and will rely on national correctional services to supervise sentences of imprisonment imposed by the Court. The ICC will determine where its prisoners should serve out their sentences, based upon a list of States that have indicated to the Court their willingness to accept sentenced persons, and in accordance with certain principles set out in article 103, Rome Statute. In most cases, the prisoner may also request to be transferred to another custodial State at any time (article 104). The relevant provisions dealing with supervision of sentenced persons by State authorities are contained in articles 103 to 111, and rules 198 to 216, & 223 to 225. However, these provisions only apply *in toto* to prisoners who are convicted of the substantive crimes set out in articles 5 to 8, Rome Statute. Only some of these provisions apply to prisoners who are convicted by the ICC under article 70, of offences against the administration of justice, namely articles 103, 107, 109 and 111 (see subrule 163(3)).

Canada has yet to decide whether to accept any such prisoners. Discussions are currently taking place amongst the relevant departments. In the event that Canada offers to supervise an ICC sentence of imprisonment, the following steps will need to be taken:

(a) determine any conditions that Canada may wish to attach to the acceptance of the sentenced person, which are to be agreed upon with the Court, and may include further prosecution, punishment or extradition to a third State at the conclusion of the person’s sentence (articles 103(1)(b) & 108);

(b) require the relevant authority to inform the Court promptly if Canada chooses to accept a particular designation by the Court (article 103(1)(c));

(c) once Canada has accepted the sentenced person, require the relevant authority to notify the Court at least 45 days in advance of any known or foreseeable circumstances, including the exercise of conditions, which could materially affect the terms or extent of the imprisonment, and ensure that the relevant authorities do not take any prejudicial action during that 45 day period (article 103(2)(a));

(d) assist the Court as far as possible in transferring the person to another custodial State, either during or after the term of imprisonment (articles 104 & 107);

(e) ensure that any sentence imposed by the ICC cannot be modified or reduced by national authorities, including releasing the person before expiry of the sentence imposed by the Court, subject to any conditions which Canada may have specified when it accepted the sentenced person (articles 105(1) & 110) – note that this provision does not apply to persons convicted of offences against the administration of justice;

(f) ensure that the sentenced person is not subject to prosecution or punishment or extradition to a third State for any conduct engaged in prior to that person's delivery to Canada, unless such prosecution, punishment or extradition has been approved by the Court at the request of Canada (article 108) – note that this provision does not apply to persons convicted of offences against the administration of justice;

(g) ensure that all communications between the prisoner and the ICC are unimpeded and confidential and in particular that the person is not impeded from making applications to the ICC for appeal and revision (articles 105(2) & 106(3)) – note that these provisions do not apply to persons convicted of offences against the administration of justice;

(h) ensure that the conditions of imprisonment for the sentenced person are consistent with widely accepted international treaty standards governing treatment of prisoners and that they are not more or less favourable than those available to prisoners convicted of similar offences in Canada (article (106(2)) – note that this provision does not apply to persons convicted of offences against the administration of justice;

(i) be prepared to assist the Court with obtaining certain information from the prisoner (see in particular the factors that the ICC will need to take into account when it reviews a person's sentence – article 110 and rule 223; see also rules 211, 212 and 216); and

(j) be prepared to cover the "ordinary costs for the enforcement of the sentence in the territory of enforcement", but not any other costs, including those for the transport of the sentenced person, travel and subsistence costs of ICC personnel, or costs of any expert opinion requested by the Court (rule 208).

These are the minimum requirements for compliance with the Rome Statute. As suggested earlier, ICC prisoners are likely to be fairly high-ranking officials, who may also require special detention arrangements. These arrangements may include increased security to protect them from politically-motivated assaults, greater access to them by diplomatic officials from their country of origin, and arrangements to transfer them out of the country for appeal and sentence review hearings before the ICC, as well as at the end of their sentence.

In conclusion, it seems highly likely that Canada will offer to accept persons sentenced by the ICC. Canada has been one of the main supporters of the ICC since the Rome Statute was adopted in July 1998. Throughout the subsequent Prepcom negotiations, Canada has paid particular attention to the practical arrangements that will ensure the effectiveness of this new institution – as evidenced by Chairman Philippe Kirsch's detailed "Road Map".[lv] Canada is also far ahead of most other countries in terms of implementing its obligations under the Rome Statute. Therefore, the ICC is likely to be a high priority for Canada for many years to come, including the supervision by CSC of life sentences imposed by the ICC within the next few years.

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[ii] The *Rome Statute of the International Criminal Court* [UN Doc. A/CONF.183/9, 17 July 1998] was adopted by States participating in a Diplomatic Conference in Rome, with a non-recorded vote of 120 in favour, 7 against, and 21 abstentions:

UN Press Release L/ROM/22, "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court", 17 July 1998, available online via <*http://www.un.org/law/icc/*> Cf. para. 24, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/10, 17 July 1998 [hereinafter "Final Act"]. For a comprehensive history of the negotiations that resulted in the Rome Statute, cf. R.S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results,* (The Hague: Kluwer Law International, 1999).

[iii] S.C. 2000, c. C-24

[iv] The Prepcom was established in accordance with Resolution F, *Final Act*, supra, adopted in Rome at the same time as the Rome Statute. The documents it has concluded so far include the *Finalized draft text of the Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2. All documents finalized by the Prepcom are available via the UN website for the ICC: <*http://www.un.org/law/icc/*>.

[v] *Finalized draft text of the Rules of Procedure and Evidence,* UN Doc. PCNICC/2000/1/Add.1, 2 November 2000, adopted by consensus in June 2000, by States participating in the Prepcom, in accordance with Resolution F, Final Act, supra. The RPE will enter into force upon adoption by a two-thirds majority of the members of the Court's Assembly of States Parties, and are subservient to the Rome Statute in all cases (article 51). Cf. C.K. Hall, "The First Five Sessions of the UN Preparatory Commission for the International Criminal Court", (2000) 94 Am. J. Int'l L. 773.

[vi] Article 112, Rome Statute.

[vii] Article 126, Rome Statute provides that the Statute will enter into force "on the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

[viii] According to statements made during recent public meetings at the United Nations, as well as research conducted by the author on the situation in Southeast Asia and Africa during October/November, 2001. For an up-to-date list of States Parties to the Rome Statute, please visit <*http://www.un.org/law/icc/*> For more information on progress being made towards ratification in other States, please visit the website of the NGO Coalition for an International Criminal Court ("CICC"): <*http://www.iccnow.org*>

[ix] See article 112, Rome Statute.

[x] Cf. *Road map leading to the early establishment of the International Criminal Court,* UN Doc. PCNICC/2001/L.2, 26 September 2001.

[xi] Entry into force of sections 76 & 76.1 were contingent upon the passing of other bills introduced during the 36th Parliament, relating to Citizenship and Proceeds of Crime (Money Laundering), respectively.

[xii] *Draft relationship agreement between the United Nations and the International Criminal Court*, UN Doc. PCNICC/2001/WGICC-UN/RT.2, 2 October 2001.

[xiii] Articles 11 and 24, Rome Statute. However, note para. 2 of article 11, which provides that if a State becomes a Party to the Statute after the Statute enters into force, "the Court may exercise its jurisdiction only with respect to crimes committed after entry into force of this Statute for that State," unless that State makes a declaration to the contrary under article 12(3). Also note article 124, which specifically allows States Parties to make a declaration of non-acceptance of the jurisdiction of the Court over war crimes listed in article 8 - where committed by their nationals or on their territory - for a period of seven years after entry into force of the Statute. To date, France appears to be the only State Party to make such a declaration.

[xiv] The Court may also decide not to prosecute anyone in relation to the "situation" referred by the Security Council, in accordance with the relevant provisions of the Statute on admissibility (articles 17-20), general principles of criminal law (articles 22-33), and initiation of investigations and prosecutions (especially article 53). The Security Council will still have the power to establish its own tribunals when the ICC comes into being, and those tribunals created to prosecute crimes committed prior to the Court's creation will continue their work (such as those being considered in East Timor, Sierra Leone, and Cambodia). But once the Rome Statute enters into force, the Court is intended to reduce almost entirely the need for any future *ad hoc* tribunals.

[xv] Articles 13(a) and 14, Rome Statute. Note that States Parties may only refer "situations" for investigation, not individuals or specific acts. Under article 12(3), non-States Parties may also choose to accept the jurisdiction of the Court over particular crimes involving their nationals or committed on their territory.

[xvi] Articles 13(c) and 15, Rome Statute. Note that the Security Council may request the Court to defer a particular investigation or prosecution for a period of twelve months (article 16).

[xvii] See article 1, Rome Statute. The Statutes for the two existing international criminal tribunals (for Yugoslavia and Rwanda, respectively) specifically provide that those international tribunals will have primacy over all national courts, even though article 9 of the Statute for the ICTY and article 8 of the Statute for the ICTR both provide for "concurrent" jurisdiction between these tribunals and national courts.

[xviii] See preambular para. 6, Rome Statute. The existing obligations of States to investigate and prosecute these crimes arise from various treaties, such as the four Geneva Conventions of 1949 and the 1948 Genocide Convention.
[xix] These "exceptional circumstances" are outlined in article 17, Rome Statute. The first exceptional circumstance is where a State Party is "unable" to prosecute a person for a crime within the jurisdiction of the ICC. Under article 17(3) of the Rome Statute, "inability" to prosecute refers to situations where there has been a "total or substantial collapse or unavailability of ... [a State's] national judicial system". The second exception is where a State Party is perceived to be "unwilling" to prosecute a person for a crime within the jurisdiction of the ICC. History has shown that some States prefer to allow perpetrators of atrocities to avoid any kind of responsibility for their actions. Therefore, in order to prevent one of these perpetrators from escaping justice, due to the assistance of a "rogue State", the ICC has the power to override national authorities at a certain point. This point is only reached after a lengthy series of procedures has been followed, as outlined in various parts of the Statute. In particular, Article 17(2) sets out the factors the Court will consider when determining the "unwillingness" of a State to prosecute.
[xx] Most States that have signed or ratified the Rome Statute are currently preparing legislation to empower their national authorities in this regard, if they have not already done so. For example, Canada's *Crimes Against Humanity and War Crimes Act,* supra, allows Canadian courts to prosecute a far wider range of international crimes than ever before.
[xxi] Article 27, Rome Statute.
[xxii] Article 28, Rome Statute. However, note the distinction in this article between military commanders and other "superiors", when determining the responsibility of a particular individual.
[xxiii] See discussion below on how Canada has implemented these principles in its CHA.
[xxiv] Article 34, Rome Statute.
[xxv] See article 36, Rome Statute.
[xxvi] These high standards are also emphasised and reflected throughout the RPE, supra.
[xxvii] Articles 121 & 123, Rome Statute.
[xxviii] Article 88, Rome Statute. Part 9 includes articles 86 - 102.
[xxix] Article 93, paragraph(4), Rome Statute. Article 72 provides further detail on the procedures to be followed when a State has national security concerns. See also Rule 81.
[xxx] Article 73, Rome Statute.
[xxxi] Article 93, subparagraph (1)(l) provides that any type of assistance which is not listed in subparagraphs (a) - (k) of paragraph 93(1) is only compulsory where it is not prohibited by the law of the requested State. If the type of assistance requested is *not* listed in article 93, paragraph(1), *and* it is prohibited by the law of the requested State, *and* the State has considered whether the assistance can be provided in accordance with article 93, paragraph(5), it would seem that a State may then deny that request for assistance. By contrast, article 93, paragraph(3) provides that where execution of a particular measure of assistance is prohibited in the requested State "on the basis of an existing fundamental legal principle of general application", the State must consult with the Court promptly to resolve the matter, and should consider whether the assistance can be rendered in another manner or subject to conditions, before denying the request. However, the provision requires the Court to "modify the request as necessary", if the matter cannot be resolved by consultation. Therefore, it would seem to imply that a requested State may refuse to comply with a request until the Court has modified the request so that it would not be prohibited in the State on the basis described. Thereafter the State must comply with the request.
[xxxii] See also article 75, Rome Statute, on reparations to victims.
[xxxiii] R.S.C. 1985 c. C-46
[xxxiv] S.C. 1992, c. C-20, hereinafter "CCRA" – see subparagraphs 6(a) to (d), as amended by section 41, CHA.
[xxxv] See also subsections 4(2)(a) and 6(2)(a), CHA.
[xxxvi] Section 120.3, CCRA, as amended by section 40, CHA.
[xxxvii] Escorted temporary absences.
[xxxviii] Work releases.
[xxxix] Jurisdiction of the Parole Board.
[xl] Eligibility for day parole.
[xli] Eligibility for day parole in the case of certain crimes.
[xlii] Day parole for young offenders sentenced to life imprisonment.
[xliii] Eligibility for full parole.
[xliv] Reduction of period of ineligibility for parole.
[xlv] Maximum period where more than one sentence.
[xlvi] A person cannot claim to be a refugee for the purposes of the Convention, where there are "serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international

instruments drawn up to make provision in respect of such crimes" – see section 108 and Schedule, *Immigration Act,* R.S.C. 1985, c. C-1 – 2.

[xlvii] See now subparagraphs 19(1)(j) & (l), *Immigration Act*.

[xlviii] Subsection 19(1)(l), *Immigration Act.*

[xlix] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982.

[l] S.C. 1999, c. C-18, s.2: " 'extradition agreement' means an agreement that is in force, to which Canada is a party and that contains a provision respecting the extradition of persons, other than a specific agreement".

[li] See sections 47 to 53, CHA.

[lii] Article 58 – note there are additional factors that must also be taken into account by the PTC.

[liii] *Canadian Charter of Rights and Freedoms,* supra.

[liv] The final version of this *Draft agreement* has yet to be released officially. It should be added soon to the UN website for the Prepcom: www.un.org/law/icc/prepcomm/prepfra.htm

[lv] Philippe Kirsch is Canada's Ambassador to Sweden.