THE INTERNATIONAL CRIMINAL COURT AND CANADIAN BUSINESS

1. What Is It?

The question of responsibility for mass crimes such as genocide, crimes committed in wartime (“war crimes”), and certain serious crimes (“crimes against humanity”) has become an important one in recent decades. Many people believe that perpetrators of such acts should not be allowed to escape responsibility because they are high government officials, because of pardons, or because national court systems fail to properly operate.

The detention of ex-Chilean dictator Augusto Pinochet in Britain in November 1998 underlined these points. Pinochet was under investigation at the time by prosecutors in several countries who wanted to know what role he had played in connection with the disappearance of their citizens in Chile during his time in office. Pinochet was eventually released after it was determined that he was unfit to stand trial, but his case and others highlight the fact that more could and should be done to counter impunity. Legal action could serve to try and punish perpetrators of certain serious crimes who would otherwise escape prosecution. It would also serve as a deterrent to those who would contemplate committing crimes in future.

For these reasons, several countries proposed the creation of an International Criminal Court (ICC) in the early 1990s. However, a number of complex issues had to be decided before the Court could begin operation:

- How would an ICC interact with domestic courts? Most countries already have effective criminal laws and court systems. An international criminal court might infringe these functions.
- What crimes would be prosecuted by the ICC? The purpose of the ICC was to deter and prosecute serious crimes, but there was no international agreement on the definition of “serious crimes.” To build support for the Court, negotiators realized they would have to limit the ICC’s jurisdiction to only the most grave crimes.
- Who would fall under the ICC’s jurisdiction? The issue of who could be prosecuted by the ICC was an important one since most countries reserve the right to protect and try their own citizens. Prosecution also raises the issue of whether other entities, such as governments or companies, could be subject to the court’s jurisdiction for their involvement in serious crimes.

2. What Does It Do?

Countries subsequently decided on a Statute for a Court that dealt with most of the above issues. The Statute is known as the “Rome Statute for an International Criminal Court” because it was concluded at Rome, Italy in July 1998. The Statute establishes an
International Criminal Court at The Hague, in the Netherlands, with limited jurisdiction. The ICC is limited to prosecuting four types of serious crimes:

- **Genocide** — the systematic killing of members of a national or ethnic group with the intent to destroy the whole group.
- **War crimes** — crimes committed in the course of launching a war, such as a premeditated attack or a violation of neutrality, or crimes committed in wartime, such as the use of excessive force or the deliberate targeting of civilians.
- **Crimes against humanity** — the most serious crimes of concern to the international community, such as murder, extermination and enslavement, when they are committed as part of a widespread or systematic attack on a civilian population.
- **Aggression** — the basis of this crime has yet to be defined under the Statute, but it is thought to include resort to armed force in order to threaten or violate a country’s sovereignty, territorial integrity or political independence.

The ICC’s jurisdiction is supplementary to national courts. This means that the Court, which is composed of 18 judges drawn from the ICC’s member countries, can only prosecute where a national court fails or is unable to do so. Of course, the question of when a national court fails or is unable to do so is a sensitive one that can be influenced by both legal and political considerations. In Canada, for instance, courts will not take jurisdiction in most criminal matters unless there is a real and substantial link between the offence and Canada. In other countries, prosecutors may decide not to prosecute based on the passage of time or the need for national reconciliation, as seen in post-apartheid South Africa. These practices raise difficult questions about when the ICC should “second guess” domestic actions and proceed to prosecute.

The ICC has an independent prosecutor, Luis Moreno Ocampo of Argentina, who receives and reviews submissions from individuals and groups concerning any of the above crimes. If the prosecutor decides that there has indeed by a failure to prosecute, his decision must be approved by the ICC before the prosecution proceeds. The United Nations Security Council is also given power to block any prosecution for a renewable 12-month period pending a political resolution of the matter. ICC jurisdiction is further limited by the fact that the Court can only prosecute crimes committed after the entry into force of the Rome Statute in July 2002 and where the crime has been committed in the territory of a country that has ratified the Rome Statute or by its citizen. As of mid-2003, 91 countries, including Canada, had ratified the Rome Statute.

The attitude of the United States towards the ICC has been controversial. The U.S. was a strong supporter of an ICC during the negotiations that led to the Court’s creation. However, as plans for the Court matured, concerns were raised that the ICC’s jurisdiction would be used to prosecute American officials and military personnel. American negotiators asserted that this would be unfair given that the U.S. is frequently called upon to use force in many regions of the world on behalf of the global community. For this
reason, although the U.S. signed the Rome Statute, it subsequently notified the ICC of its
decision to withdraw entirely from the Statute in May 2002. Existing U.S. legislation
prohibits financial support for the ICC and takes a generally antagonistic view of the
Court’s operation. Nevertheless — and somewhat inconsistently — it also reaffirms the
U.S. desire to work with the ICC to bring perpetrators of genocide, war crimes, crimes
against humanity and aggression to justice.

As of mid-2003, there have been no prosecutions authorized by the ICC. However, a
number of groups have come forward with complaints and allegations, which are now
being reviewed by the prosecutor.

3. Canadian Implementation of the ICC Rome Statute

Existing Canadian law already criminalizes most of the crimes set out in ICC Rome
Statute, provided they were committed in Canada. To fully implement the Rome Statute
in Canadian law, however, the federal government amended several pieces of legislation,
including the Criminal Code, in order to make it clear that these crimes can now be
prosecuted in Canada even if they occur outside Canada. Nevertheless, the accused must
be a Canadian citizen or permanent resident. If the accused is not, Canadian law now
gives the federal government the authority to transfer suspects to the ICC in The Hague.

4. The ICC and Canadian Business

The question of whether or not the Rome Statute should cover the acts of both natural
and legal persons — that is, of individuals and companies — was debated during
negotiations that led to the creation of the ICC. In the end, it was decided to leave
companies out of the ICC’s jurisdiction, principally because of the difficulty of ascribing
intent to a company and because of the variety of corporate forms across many countries.

The Rome Statute makes clear that the Court’s jurisdiction extends to individuals. At the
same time, however, it also makes clear that criminal responsibility can arise where
someone has ordered, solicited or induced the commission of one of the specified crimes,
or assisted in their commission — whether the crime in fact occurs or is only attempted.
This development should be borne in mind by Canadian companies and businesspeople,
particularly when they are operating internationally in zones of disturbance or civil
unrest. Individuals working for Canadian enterprises can be held criminally responsible
for taking part in such activities, or in certain circumstances, for allowing them to occur.

Questions

1. Consider the following statements. Do you agree with either of them?

   “Given their inevitably political nature, international criminal courts, like the
court at Nuremburg following World War II, simply dispense ‘winner’s justice.’
They are long on spectacle and symbolism, but short on substance.”
“There is a risk that the international criminal court could be used as an instrument of political vengeance against countries, like the United States, who occasionally and justifiably need to use force to fight evil.”