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R. V. Munyaneza: Pondering Canada's First Core Crimes Conviction

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1. Introduction

On 19 October 2005, the following seven charges were laid against Desiré Munyaneza, a Rwandan national resident in Canada: two counts of genocide via intentional killing and through causing serious bodily or mental harm to the Tutsi people; two counts of crimes against humanity via intentional murder¹ and sexual violence against civilian Tutsi; and three counts of war crimes via intentional murder, sexual violence and pillage against people who were not taking a direct part in the conflict. The same day, Munyaneza was arrested and placed in

^{*}) The opinions expressed in this article, to the extent they are attributable to Stancu, are those of the author and do not necessarily represent the positions of the Department of Justice or the Government of Canada. Both authors wish to thank Joseph Rikhof, Senior Counsel, Crimes Against Humanity and War Crimes Section, Department of Justice Canada for his input.

¹) The English translation of the judgment, which was issued in French, uses the phrase 'intentional killing'; however, the original French version uses 'meutre intentionnel.'

custody. Later, the court dismissed the accused's motion for judicial interim release on the ground that his release could undermine the public's trust in the administration of justice. On 22 May 2009, in a landmark decision,² Justice Denis of the Quebec Superior Court in Montreal found Desiré Munyaneza guilty of the seven counts of genocide, crimes against humanity and war crimes. He was sentenced to the maximum penalty available in Canadian law: life imprisonment with no chance of parole for 25 years.³

The *Munyaneza* case is historic. It is the first time in the modern era that a Canadian court has convicted a person of such crimes perpetrated outside Canada.⁴ This was also the first prosecution under Canada's new *Crimes Against Humanity and War Crimes Act*,⁵ passed in 2000 in order to implement Canada's obligations under the *Rome Statute of the International Criminal Court*.⁶ It represented the culmination of decades of effort by the Canadian Government's War Crimes Program to invigorate the prosecution of the core crimes domestically—an effort which had been stalled after the failure of its first prosecution in 1994.⁷ It also put Canada among those states which are in the forefront of prosecuting international crimes successfully, particularly under the principle of universal jurisdiction.

Given the case's historic nature, it is worthwhile to comment on both the trial judgment and the legislative backdrop under which it was undertaken. Accordingly, this article will attempt to plumb the "secrets of Canada's success" and offer commentary on the *CAHWC Act*. This will be undertaken with an eye to whether the *Munyaneza* case augurs a positive future for Canadian prosecutions of international crimes, and whether the Canadian model has something to offer other states.

2. Background

As is well-known, on 6 April 1994 Rwanda's president Juvenal Habyarimana was killed when the airplane which he occupied was shot down in the vicinity of the

² *R. v. Munyaneza*, 2009 QCCS 2201, leave to appeal to the Quebec Court of Appeal granted 2009 QCCA 1279. The trial judgment can be found online in English, <<http://www.canlii.org/en/qc/qccs/doc/2009/2009qccs2201/2009qccs2201.html>>.

³ *R. v. Munyaneza*, 2009 QCCS 4865.

⁴ Some war crimes trials were held in the aftermath of WWII; see Robert J. Currie, *International and Transnational Criminal Law* (Toronto, Irwin Law, 2010), Chapter 5.

⁵ S.C. 2000, c. 24 [*CAHWC Act*].

⁶ A/CONF 183/9 17 July 1998. On 6 November 2009, a second Rwandan, Jacques Mungwarere, was arrested and charged under the *CAHWC Act*. He is alleged to have committed an act of genocide in Kibuye, Rwanda. See: <<http://www.cbc.ca/canada/story/2009/11/07/rwanda-war-crimes-arrest.html>> And see the profile by TRIAL Watch, which is following the case: <http://www.trial-ch.org/en/trial-watch/profile/db/facts/jacques_mungwarere_846.html>.

⁷ *R. v. Finta*, [1994] 1 S.C.R. 701, regarding which see below.

Kigali airport. Massive violence and killings of Tutsi and moderate Hutu followed after the killing of the President, in the capital and then extending all over the country. The Prime Minister was one of the victims assassinated at the beginning of the violence. An interim government was formed that was comprised of Hutu extremists. During the violence, which lasted three months, approximately 800 000 persons were killed.

The accused lived in Butare, the second largest city in Rwanda situated in the south of the country. In that area, the violence began on 19 April 1994 when then-President Theodore Sindikubwabo gave a speech inviting the population to join the government's efforts to get rid of the enemy. A new prefect was appointed to replace Prefect Habyalimana who was killed before the President's speech. The violence in the area began on the same day. Barricades were installed throughout the city. Tutsi and moderate Hutu were tracked down and systematically mistreated and killed. Tutsi women were raped and killed. The victim's houses were pillaged and burned down. The situation, as Justice Denis described it, was "apocalyptic."⁸

A number of people sought refuge in places they thought to be safe such as schools, the Hospital of Butare, the Office of the Prefecture, the University, churches and other public places. The military, police and gendarmerie forces, assisted by the Interahamwe and other civilians, attacked those undefended civilians including women and children at the places where they found refuge.⁹

The court ruled that the accused, the son of an important businessman in Butare, was one of the leading figures during the events that took place in the Butare area.¹⁰ Many witnesses saw him either in civil or military clothes and armed with a rifle and sometimes with grenades.¹¹ He distributed weapons such as machetes, small axes, grenades, guns, gasoline, as well as uniforms to the Interahamwe in the commune of Ngoma.¹² He pillaged stores belonging to Tutsis in Butare and in the Ngoma area.¹³ He beat and mistreated civilian persons, including young children aged four to five years.¹⁴ He forcefully loaded people into vehicles and transported them towards the massacre sites such as the university laboratory.¹⁵ He participated in and controlled roadblocks in the area.¹⁶ He participated in the killing of many young Tutsi in the area near to the Office of

⁸ *Munyaneza*, *supra* note 2 at para. 383.

⁹ *Ibid.*, at para. 579.

¹⁰ *Ibid.*, at paras. 576; 684; 710; 771; 791; 795; 829; 2057; 2070.

¹¹ *Ibid.*, at paras. 713; 738; 767; 794; 828; 2063.

¹² *Ibid.*, at paras. 480; 528; 2060.

¹³ *Ibid.*, at paras. 490; 500-502; 543-544; 2062, 2064.

¹⁴ *Ibid.*, at paras. 491-492; 708; 711-712.

¹⁵ *Ibid.*, at paras. 501; 522; 554; 556; 557; 573; 604; 669; 709; 764; 790; 792; 794; 835-837; 2063; 2065-2066.

¹⁶ *Ibid.*, at paras. 542; 553; 603; 2063.

the Prefecture in Butare.¹⁷ He also participated in the attack at the Ngoma Church where approximately 300 to 400 persons were killed.¹⁸ He raped many Tutsi women in the area of the Prefecture Office in Butare,¹⁹ and also raped a young Tutsi woman repeatedly in his family home.²⁰ He participated in local political meetings.²¹

The accused opted to be tried by a Superior Court judge without a jury. During almost two years, 66 witnesses testified in this case, 36 of whom were called by the defence. Among the prosecution witnesses, the late Alison des Forges was called as an expert witness while the Honourable Romeo Dallaire and Rony Zachariah were called as context witnesses. The vast majority of the fact witnesses expressed fear of consequences because of their testimony. In order to protect their identities, the Court allowed them to testify under pseudonyms, behind a screen and with parts of their testimony given *in camera*.²² Details of their testimony were included in an appendix to the judgment that was not publicly released.

Thirty-one witnesses who were not able to travel to Canada gave their testimony before Rogatory Commissions. The Canadian *Criminal Code* allows the court to appoint a Commissioner to take evidence of witnesses who are not able to attend the trial because of illness or some other good and sufficient cause.²³ This process is similar to the court hearing, the witnesses being examined in chief and cross-examined. Under the request of either the prosecution or the defense, the Court ordered four Rogatory Commissions in Kigali, Rwanda, Paris, France, and Dar es Salaam, Tanzania. Judge Denis appointed himself Commissioner of each Rogatory Commission. All testimonies were audio and video recorded and, before being tendered as evidence, they were provided along with the stenographic notes to the accused who did not attend the rogatory commissions since he was in custody. The vast majority of the witnesses testified in Kinyarwanda and their testimony was translated by court interpreters from Kinyarwanda to either

¹⁷) *Ibid.*, at paras. 685; 692; 712; 2069.

¹⁸) *Ibid.*, at paras. 591; 2067.

¹⁹) *Ibid.*, at paras. 616; 640-641; 658-659; 68-689; 714; 801-802; 810; 828; 2068.

²⁰) *Ibid.*, at paras. 727; 2075.

²¹) *Ibid.*, at para. 1970.

²²) The protection of the identity of witnesses was not absolute. In a recent decision (*Ministre de la Sécurité publique et de la protection civile du Canada et Munyaneza*, 2010 QCCA 579), the Appeal Court of Quebec ordered the disclosure of the transcripts of testimony that one of the witnesses gave *in camera* at the trial, in order to be used by Canadian authorities in the immigration case of that person. The Court of Appeal sent a clear message that it is in the interests of justice to disclose such information to prevent suspected international human rights violators from obtaining asylum in Canada.

²³) *Criminal Code*, s. 709(1)(b).

English or French. The judgment was written in French and an official translation in English was made available.

It is worthy of note that the accused admitted the existence of genocide, crimes against humanity and war crimes in Rwanda, including the Butare area, during the period subject to the Indictment. For his part, in addition to the evidence presented, Justice Denis appeared to take judicial notice “that genocide occurred in Rwanda between April 6 and mid-July 1994” by noting that this was a matter of “public knowledge.”²⁴

This finding, then, was commensurate with the admissions and with the ICTR Appeal Chamber’s *Karemera* and *Semanza* judgments, which took judicial notice that the 1994 conflict in Rwanda was not of an international character. Furthermore, the Appeal Chamber took judicial notice that both genocide and a widespread or systematic attack occurred in Rwanda in 1994. The Appeal Chamber stated that the Rwandan genocide is a fact of “common knowledge” documented by numerous ICTR judgments and national court decisions, books, scholarly articles, media reports, United Nations reports and resolutions, government and NGO reports.²⁵ Facts of “common knowledge,” it has held, are those that are not reasonably subject to dispute, commonly accepted or universally known such as general facts of history or geography, or the laws of nature. Such facts are beyond reasonable dispute.²⁶

In our view, taking judicial notice of those facts does not affect the presumption of innocence of the accused, since the prosecution has to prove beyond any reasonable doubt that the accused is guilty of the charged acts.²⁷ In any event, as a trial court judge, Denis J. was bound by the earlier finding of the Supreme Court of Canada, which held in the 2005 *Mugesera* case that “there is no doubt that genocide and crimes against humanity were committed in Rwanda between April 7 and mid July 1994”.²⁸

²⁴ *Munyaneza*, *supra* note 2 at paras 80, 115, and 116; the Court came to this finding citing *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73(c), Appeal Chamber, 16 June 2006, at paras. 33 to 38. and *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at para. 8. The *Karemera* judgment was confirmed by the Appeal Chamber on the *Decision on motion for reconsideration Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73(c), Appeal Chamber, 1 December 2006.

²⁵ *Karemera*, *ibid.*, at para. 37.

²⁶ *Prosecutor v. Semanza*, Case No. ICTR-97-20-A), Appeals Chamber, 20 May 2005, at para. 194.

²⁷ *Karemera*, *supra* note 24 at para 33. Though we recognize that there is controversy on this point; see R. Mamiya, ‘Taking Judicial Notice of Genocide? The Problematic Law and Policy of the Karemera Decision’ (2007) 25 Wis. Int’l L.J. 1.

²⁸ *Mugesera*, *supra* note 24 at para. 8. *Mugesera* was an immigration case, in which the Court decided that Leon Mugesera was inadmissible to Canada and subject to deportation based on evidence that he had committed incitement to genocide and crimes against humanity.

3. Prosecution of the Core Crimes and the Canadian Approach to Jurisdiction

3.1. Background

As noted above, the prosecution of this case took place under the *CAHWC Act* which affords jurisdiction to Canada to prosecute such crimes where committed both within and outside Canada. This legislation was adopted by the Canadian Parliament in 2000 in order to comply with Canada's international obligations in the international criminal law area. Thus, Canada was the first country to introduce comprehensive legislation by incorporating the provisions of the *Rome Statute*²⁹ into the domestic law.

From a policy standpoint, starting in the latter part of the 20th century the government of Canada has consistently striven to be one of the world leaders in combating impunity. The impetus came from a Royal Commission of Inquiry report in 1986 which identified the presence of a number of war criminals in Canada and recommended their extradition or prosecution.³⁰ In 1987 the government amended the *Criminal Code*³¹ in order to allow for the prosecution of gross human rights violations. At the same time, the Government of Canada developed a policy of refusing safe haven to war criminals and created the War Crimes Program,³² an interdepartmental initiative between the Department of Justice, Citizenship and Immigration Canada and the Royal Canadian Mounted Police. In 2003, the Canada Border Services Agency became a partner of the program. Prosecution in Canada is one of the remedies available under the Canadian program, along with immigration-based denaturalization and deportation.

However, the 1987 amendments were not successful. They did create expansive definitions of war crimes and crimes against humanity, which were linked to customary international law, and provided for broadly-based extraterritorial jurisdiction over the offences. However, the jurisdictional scheme was complicated, in that the universal jurisdiction provision (which applied only when the offender was found in Canada) operated only where Canada could have exerted universal jurisdiction "on the basis of the person's presence in Canada" under international

²⁹ *Rome Statute*, *supra* note 6; Canada ratified the Statute on 7 July 2000.

³⁰ Jules Deschênes, *Commission of Inquiry on War Criminals: Report* (Ottawa, Minister of Supply and Services, 1986). The author, Justice Jules Deschênes, was later one of the founding judges of the ICTY.

³¹ Sections 7(3.71) 7(3.76) of the 1987-1999 *Criminal Code*, R.S. C. 1985, C-46 These provisions were adopted by the Canadian Parliament in 1987 and then repealed in 2000 further to the adoption of the *CAHWC Act*.

³² For more information about the Canada War Crimes Program, including its history, see <<http://canada.justice.gc.ca/eng/pi/wc-cg/oms-ams.html>>.

law at the relevant time. This threw into question whether WWII-era crimes against humanity could be prosecuted at all, since it was not at all clear that such jurisdiction existed under international law before Nuremberg.³³ Also, the crimes were subject to prosecution only if, at the time they were committed, they had constituted offences against Canadian laws that were in force. This meant that for crimes taking place before 1987, prosecutors could have recourse only to the underlying “common crimes” (murder, assault, etc.) rather than prosecuting for war crimes or crimes against humanity proper.³⁴ As one commentator put it, this was “in hind sight, [a] rather simplistic or naïve approach.”³⁵

The War Crimes Section’s entire prosecutions strategy was gutted after the government lost the first case that went to a full-scale trial, *R. v. Finta*.³⁶ Finta was a Hungarian-Canadian who was alleged to have been part of a Hungarian paramilitary force that was involved in committing war crimes and crimes against humanity against Jews during WWII. His acquittal before a judge and jury was upheld by the majority of a divided Supreme Court of Canada. The Supreme Court made several problematic findings, including that the Crown had to prove subjective intention on the part of the accused, and that the accused was entitled to rely on evidence of anti-Semitic propaganda and the apparent state sanctioning of confiscations of property in order to ground his defences of superior orders and mistake of fact.³⁷

3.2. *The Crimes against Humanity and War Crimes Act*

Finta was roundly criticized,³⁸ and the government went back to the drawing board, emerging with a re-calibrated approach in the new *CAHWC Act*. The provisions of the Act allow for the prosecution of persons who have committed genocide, crimes against humanity or war crimes, either in Canada or outside of the country.³⁹ The Act thus specifically provides for extraterritorial jurisdiction over the crimes, which is an exception to Canada’s usual policy of limiting criminal

³³ S.A. Williams, ‘Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada’ in T.L.H. McCormack & G. Simpson, eds., *The Law of War Crimes: National and International Approaches* (Boston, Kluwer, 1997) 151 at 162.

³⁴ With the exception of a narrow range of grave breaches of the *Geneva Conventions* for acts taking place after 1965, in accordance with Canada’s *Geneva Conventions Act*, R.S.C. 1985, c. G-3.

³⁵ J. McManus, ‘A New Era of Accountability Through Domestic Enforcement of International Law’ in Hélène Dumont & Anne-Marie Boisvert, eds., *The Highway to the International Court: All Roads Lead to Rome* (Montreal, Éditions Thémis, 2003) 503 at 526.

³⁶ Above note 7.

³⁷ There were a number of other issues which divided the majority and dissent, including the definition of crimes against humanity and whether the 1987 amendments were procedural or substantive.

³⁸ See Irwin Cotler, ‘*R. v. Finta*’ (1996) 90 AJIL 460.

³⁹ Sections 4-5 and 6-7.

prosecution to crimes which took place on Canadian territory.⁴⁰ If the crimes were perpetrated outside Canada, however, prosecution is limited to cases where either the offender or the victim is a Canadian national⁴¹ or the perpetrator is present in Canada, regardless of where the offence occurred.⁴²

The latter, an approach maintained from the 1987 amendments, is a form of universal jurisdiction often called “custodial.”⁴³ In *Munyaneza*, Denis J. referred to these provisions and stated that prosecution was possible in Canada if the accused “resides here.”⁴⁴ However, this understates the impact of the wording, which provides that the offender may be prosecuted if, “after the time the offence is alleged to have been committed, the person is present in Canada.” The concern over the court’s use of the phrase “resides here” is that it may confuse jurisdiction over a *resident* of Canada with jurisdiction over someone who is simply present in Canada—the former need not be established, as the latter is clearly the intention of the statutory wording. Accordingly, an accused could be arrested upon their arrival at a Canadian airport or a border, and there is no requirement to prove any other contact with Canada than simple physical presence.

While under international law states may assert absolute universal jurisdiction over these crimes (and thus initiate proceedings regardless of whether the accused is on the state’s territory), the custodial approach reflects a policy choice on Canada’s part to focus on perpetrators who have made their way to Canada, rather than pursuing them. The effect of this is that while Canada was able to prosecute Munyaneza because he was residing in Canada, it could not have requested Munyaneza’s extradition from another state. To be sure, the provision does not appear to bar the government from initiating an investigation against an individual, and even submitting charges against him/her, in anticipation that he/she may arrive in Canada at some point and cause the prosecution to crystallize. However, *Munyaneza* and the more recent indictment⁴⁵ appear to indicate that the Crown will focus its resources on those perpetrators who are in Canada.

An interesting aspect of the Act’s jurisdictional structure is retrospectivity, another hangover issue from the 1987 amendments. Sections 6(1) and (3) of the Act allow for the prosecution of international criminal offences that took place

⁴⁰ See s. 6(2) of the *Criminal Code*, and also Robert J. Currie and Steve Coughlan, ‘Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?’ (2007) 11 *Canadian Criminal Law Review* 141.

⁴¹ Specifically, where the offender is a Canadian national or employed by the government in a civilian or military capacity, or a national or employee of a state engaged in armed conflict against Canada (an expanded version of the nationality principle; see *CAHWC Act*, ss. 8(a)(i) and (ii)); or where the victim is a national of Canada or of a state allied with Canada in an armed conflict (an expanded passive personality jurisdiction; see s. 8(a)(iii)).

⁴² *Ibid.*, section 8.

⁴³ See Currie, *supra* note 4 at 74-75.

⁴⁴ *Munyaneza*, *supra* note 2, at para. 65.

⁴⁵ *Supra*, note 6.

before the entry into force of the Act, so long as at the time and in the place of their commission, those offences were prohibited under international customary or conventional law or recognized by the international general principles of law, and regardless whether the law of the place and at the time when the acts or omissions occurred penalized them.⁴⁶ This is a change from the 1987 amendments, which had avoided full retrospectivity by way of the complicated regime described above.

The new provisions, however, retain one of the salutary aspects of the Supreme Court's decision in *Finta*. The majority had ruled that the 1987 provisions were not retroactive in nature vis-a-vis crimes committed during WWII, even though crimes against humanity had not been known pre-Nuremberg. This was because the offence provisions simply provided for *individual* responsibility for acts which were already illegal (and subject to state responsibility) under international law. Accordingly, the provisions did not offend s. 11(g) of Canada's *Charter of Rights and Freedoms*, which upholds the principle of legality by prohibiting conviction "unless, at the time of the act or omission, it constituted an offence under Canadian law or international law or was criminal according to the general principles of law recognized by the community of nations."

The *CAHWC Act* builds on this finding, avoiding retroactivity in favour of retrospectivity, since the provisions "[attach] new procedural or jurisdictional consequences to an act that was already criminal at the time of its commission."⁴⁷ In *Munyaneza*, Justice Denis utilized these provisions and made specific findings as to the existence in law of all of the offences with which the accused was charged,⁴⁸ often using the ICTR's jurisprudence as persuasive authority. This latter exercise is an interesting Canadian innovation, and will be discussed in more detail below.

3.3. Comparative European Approaches

It is instructive to compare Canada to other states which have adopted legislation allowing them to prosecute persons for core crimes under the principle of universal jurisdiction. A non-exhaustive review of the jurisprudence of some of the European national jurisdictions shows that in most of the cases their jurisdiction is limited, and that most do not use the retrospectivity tool as effectively as Canada has.

Belgium has been successful in three cases by obtaining seven convictions of persons that took part in the 1994 events in Rwanda. The prosecution of the

⁴⁶ Sections 6(1) and 6(3) of the *CAHWC Act*.

⁴⁷ D. Robinson, 'Implementing International Crimes in National Law: The Canadian Approach' in M. Neuner, ed., *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (Berlin, BWV, 2003) at 53-54.

⁴⁸ Genocide, paras. 72 and 75; crimes against humanity, para. 112; war crimes, paras. 133-35.

three cases were undertaken under the *1993 Law for the Repression of Grave Breaches of the Geneva Conventions of 1949*.⁴⁹ In 1999, this law was amended to confer on Belgian courts jurisdiction over the additional crimes of genocide and crimes against humanity. This legislation gave a broad jurisdiction to the Belgian courts allowing them to prosecute individuals even if the offence had no connection to Belgium. In 2003, a new *Act concerning Grave Breaches of the International Humanitarian Law* was adopted which limited the Belgian jurisdiction to the cases where there is a connection with Belgium, for example the presence of the accused on Belgian soil.

It is interesting to note that none of the Rwandan accused persons was charged with genocide or with crimes against humanity. Rather they were charged and found guilty of murder as a war crime.⁵⁰ This is understandable since at the time of the commission of the offences, Belgian law did not include provisions criminalizing genocide or crimes against humanity.

In the Netherlands, the District Court of The Hague issued an interlocutory decision in two cases stemming from the Rwandan genocide, *Bagaragaza* and *Mpambara*. The *Bagaragaza* case had been referred to the Netherlands by the ICTR⁵¹ pursuant to the ICTR Completion Strategy. Previously, the ICTR had refused to refer the case to Norway on the grounds that Norway did not have jurisdiction over genocide.⁵² It is to be noted that no charges of crimes against humanity or war crimes were laid against the accused. *Mpambara*, by contrast, was arrested while living in the Netherlands, and was prosecuted after the ICTR indicated lack of interest in prosecuting him itself. The question of jurisdiction over genocide for both cases was decided in the single interlocutory decision.⁵³

The District Court stated that Dutch legislation does not provide jurisdiction over the crime of genocide committed prior to October 2003 when the Dutch *International Crimes Act* was adopted.⁵⁴ It further stated that legislation cannot be applied retroactively. In 1966, the *Act Implementing the Genocide Convention* was adopted. However, after analysis, the Court stated that this act allows jurisdiction

⁴⁹ Copy online, <<http://www.crimeshumanite.be/approche/frameapproche.cfm?RUBRIC=1>>.

⁵⁰ See the judgment of the Cour d'Assises de Bruxelles, 8 June 2001 in the matter of the four Rwandans prosecuted in Belgium for crimes committed during the 1994 genocide, <<http://www.crimeshumanite.be/approche/frameapproche.cfm?RUBRIC=2>>.

⁵¹ *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-11bis, Trial Chamber, 13 April 2007, Decision on the Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands.

⁵² *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-11bis, Trial Chamber, 18 May 2006, Decision on the Prosecution Motion for Referral to the Kingdom of Norway.

⁵³ *Rechtbank* (District Court), The Hague, Judgment of 24 July 2007, LJ Number: BC0287 (English trans., LJ Number BB8462) (cited to English version). For commentary, see Larissa van den Herik, 'A Quest for Jurisdiction and an Appropriate Definition of Crime: *Mpambara* before the Dutch Courts' (2009) 7 JICJ 1117.

⁵⁴ *Ibid.*, paras. 6 and 29.

only for the cases of genocide committed in time of war and if “any Dutch interest is or can be impaired.”⁵⁵ The Hague Court of Appeal upheld the first instance judgment⁵⁶ and the Supreme Court dismissed the prosecution’s appeal.⁵⁷ It is to be noted that the Dutch Minister of Justice intends to remedy this situation, and recently submitted a bill to Parliament, which would extend Dutch jurisdiction over genocide back to the Act of 1966.⁵⁸ As for the crimes against humanity, it is clear that the Netherlands had jurisdiction only after October 2003.

In Germany, Nicolas Jorgic was convicted of genocide⁵⁹ in relation to his involvement in the murder of 30 persons. The accused challenged the first instance decision before the Appeal Court, the German Constitutional Court and the European Court of Human Rights. Among the grounds for his appeal, he argued that the German court had no jurisdiction over the crime of genocide. He lost his appeals at every level.

On 1 June 2009, François Bazaramba was charged with genocide⁶⁰ by the Finnish General Prosecutor Office for his alleged involvement in the massacre of more than 5,000 persons in the community of Nyakizu.

In Switzerland, in 1999, Fulgence Nyionteze was charged with genocide, crimes against humanity and war crimes for murder, as well as attempt and incitement instigation of murder. Division II of the Military Tribunal in Lausanne convicted the accused for charges related to war crimes but rejected the charges of genocide and crimes against humanity on the ground that the Swiss courts did not have jurisdiction over these crimes. The court stated that the Swiss legislation at that time did not include provisions recognizing those crimes.⁶¹

Recently, a Joint Committee of the British Parliament report⁶² underlined the gaps in the current British legislation on genocide, crimes against humanity and war crimes. In 2001, the United Kingdom adopted *The International Criminal Court Act 2001* in order to implement the *Rome Statute* into domestic legislation. This act established jurisdiction over the core crimes but only for British citizens

⁵⁵ *Ibid.*, paras. 18, 25.

⁵⁶ *Gerechtshof* (Court of Appeal), The Hague, Judgment of 17 December 2007, LJ Number BC0287 (English trans.: LJ Number BC1757) paras.12 and 13.

⁵⁷ *Hoge Raad der Nederlanden* (Supreme Court Neth.), The Hague, Judgment of 21 October 2008, LJ Number BD6568

⁵⁸ See Van den Herik, *supra* note 53 at 1131.

⁵⁹ http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/nikola_jorgic_283.html.

⁶⁰ http://www.trial-ch.org/en/trial-watch/profile/db/facts/fran%E7ois_bazaramba_810.html.

⁶¹ http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/fulgence_niyonteze_115.html.

⁶² House of Lords, House of Commons, *Joint Committee on Human Rights, Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims*, HL paper 153, HC 553, published on 11 August 2009, online, <<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/153.pdf>>.

and residents.⁶³ While the notion of a resident is unclear, the committee recognizes that not all persons being present in UK could qualify as residents. Before 2001, the UK only had jurisdiction over grave breaches of the Geneva Conventions of 1949.⁶⁴ *The Genocide Act of 1969* criminalized only genocide committed in UK. Thus, the committee concluded that the UK does not have jurisdiction to prosecute residents of the UK for war crimes committed in civil wars, genocide or crimes against humanity if the persons are not residents or citizens of the country.⁶⁵ As a result, the committee recommends that the law be amended to establish jurisdiction based on the presence of the accused in UK rather than residence or citizenship. The committee also recommended that the law be retrospective to the time the “crime [was] a crime in international criminal law” respectively, 1948 for genocide, 1949 for war crimes committed in an international context and 1998 for those crimes to have been first recognized by the *Rome Statute*; for example, war crimes in an armed conflict not of an international character or civil war.⁶⁶ One could note that the committee’s approach was very similar to that adopted by the Canadian legislator.

Spain is one of the countries having an extended universal jurisdiction over the crimes of genocide and crimes against humanity. In 2003, in an 8-7 decision, the Spanish Supreme Court stated that the Spanish court has jurisdiction only over cases in which there is a connection to a state interest. However, this Supreme Court decision was reversed in 2005 by the Constitutional Tribunal, which stated that the law does not provide such limitation. Thus, in 2005, Adolfo Scilingo, a former navy captain in the Argentine Army was convicted for crimes against humanity for his involvement in the disappearance of persons between 1976 and 1983. The court stated that by 1970, crimes against humanity was an offence under customary international law and genocide is included in this offence.⁶⁷ However, in May 2009, the Spain’s Congress adopted a resolution limiting the jurisdiction of the national courts to cases where there is a Spanish connection.⁶⁸ On October 15, 2009, the amendment limiting the jurisdiction was adopted by the Spanish Parliament and the new law came into force on 16 October 2009.⁶⁹

⁶³ *Ibid.*, at p. 9-10.

⁶⁴ *Ibid.*, at p. 9.

⁶⁵ *Ibid.*, at p. 11.

⁶⁶ *Ibid.*, at p. 19.

⁶⁷ Wolfgang Kaleck et al. (eds.), *International Prosecution of Human Rights Crimes* (New York, Springer, 2006), at 114-122.

⁶⁸ Thomas Catan, ‘Spain Is Moving to Rein In Its Crusading Judges – Congress Aims to Limit Human-Rights Inquiries, Such as the One Probing Torture Allegations at Guantanamo Bay’, *Wall Street Journal* May 20, 2009.

⁶⁹ See online: <<http://jurist.law.pitt.edu/paperchase/2009/10/spain-parliament-passes-law-limiting.php#>>. See also Ignacio de la Rasilla del Moral, ‘The Swan Song of Universal Jurisdiction in Spain’ (2009) 9 *Int’l Crim. L. Rev.* 777.

This short review of the jurisprudence of the above-mentioned countries allows us to conclude that Canada is the only country in which a tribunal convicted an accused in a single case for the crimes of genocide, crimes against humanity and war crimes. In most of the cases, the national courts denied jurisdiction over the crimes of genocide or crimes against humanity in relation with the 1994 events in Rwanda. In most of the cases as well, these courts stated that the international conventional or customary law, as it was implemented in the national legislations, contains many inconsistencies and gaps. The only other countries that were successful in prosecuting cases of genocide or crimes against humanity were Spain and Germany.

4. Modes of Liability

While Munyaneza was charged with having directly committed all of the offences with which he was indicted, it may be useful to provide a short *excursus* on how modes of liability are dealt with in Canadian law.⁷⁰ Canadian criminal law provides four modes of participation in an offence: direct participation; aiding; abetting; and counseling someone to be part of an offence⁷¹. There is no need to distinguish between the modes of participation as a principal offender or as an accomplice.⁷² It is for this reason that the *CAHWC Act* includes inchoate offences such as conspiracy or attempt to commit, but not specific offences related to the complicity.⁷³ In the immigration context, the Federal Court of Canada confirmed that the complicity rules in the *Criminal Code* are applicable to the *CAHWC Act*.⁷⁴ Thus, in a scenario involving more than one perpetrator, the accused is charged with the actual offenses and not as an accomplice. Based on the evidence presented, the tribunal will determine whether he or she is liable as a principal offender or as a party to the offence. This, however is not the case in other jurisdictions as we will see below.

Under the ICTR, ICTY and ICC jurisdictions a person is individually responsible for direct participation, planning, instigating, ordering, aiding or abetting in the planning, preparation or the execution of the crime.⁷⁵ In addition, the *Rome*

⁷⁰ Indeed, this issue may arise on the appeal, since, as Professor Lafontaine points out, part of the defence's appeal alleges that the trial judge neglected to properly characterize the facts in accordance with the law, and the facts might have sustained some findings on indirect modes of commission; see Fannie Lafontaine, 'Canada's Crimes Against Humanity and War Crimes Act on Trial: An Analysis of the *Munyaneza Case*' (2010) 8 *JICJ* 269 at 272.

⁷¹ Sections 21 and 22 *Criminal Code*.

⁷² *R. v. Thatcher*, [1987] 1 S.C.R. 652.

⁷³ *CAHWC Act*, sections. 4 (1.1) and 6(1.1).

⁷⁴ *Zazai v. the Minister of Citizenship and Immigration*, 2004 FC 1356, paras 45-48 (Federal Court), affirmed 2005 FCA 303 (Federal Court of Appeal).

⁷⁵ Article 6(1) *ICTR Statute*, Article 7(1) *ICTY Statute*, and Article 25 *Rome Statute*.

Statute criminalizes offences such as acting with a common purpose (as a member of a group) and attempt to commit a crime.⁷⁶ The ICTY and ICTR tribunals also developed the notion of criminal individual responsibility for participation in a joint criminal enterprise (JCE) in order to commit a crime.⁷⁷ The notion of JCE encompasses three categories⁷⁸:

JCE I- “[a]ll co-defendants acting pursuant a common design, poses the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design...”

JCE II- similar to the first category, “[e]mbrances the so-called concentration camp cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps...”

JCE III – concerns cases “[i]nvolving a common design to pursue one course of conduct where one of the perpetrators commits an act which while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose...”

At least the third category is similar to the notion of “common intention” in the Canadian criminal law.⁷⁹

This notion implies the participation of a plurality of persons who all have a common plan, design or purpose which amounts to or involves the commission of international crimes. This mode of participation is different from aiding and abetting. The one who aids or abets carries out acts to assist the commission of a specific crime, while a participant in a joint criminal enterprise commits acts in order to further a common objective through the commission of crimes. Also, in terms of the mental element, it must be proven that the aider or abettor has knowledge that his acts assisted in the commission of a specific crime, while the participant in a joint criminal enterprise has the intent to achieve the criminal objective.⁸⁰ As a result, the accused persons are indicted with individual criminal responsibility for direct participation and/or participation in a joint criminal enterprise or complicity in the crimes. While the tribunal analyzes the issue of complicity, the verdict refers to the individual responsibility as a direct perpetrator or participation in the commission of the offences via one or more

⁷⁶ Article 25 (3) d and 25 (3) f *Rome Statute*.

⁷⁷ *Prosecutor v. Tadic*, Case no ICTY-IT-94-1-A, Appeal Chamber, 15 July 1999, at para. 190; *Prosecutor v. Krstic*, Case No ICTY. IT-98-33-T, Trial Chamber, 2 August 2001, at para. 601; *Prosecutor v. Kvočka et al*, Case No. ICTY-IT-98/1-T Trial Chamber, 2 November 2001, at para. 307

⁷⁸ *Tadic*, *supra*, note 77, at paras. 195-196, 202-204

⁷⁹ S. 21(2) *Criminal Code*, *supra*, note 22 imposes criminal liability upon everyone part to a common intention, for criminal offences that each knew or have to known that would be a probable consequence of carrying out the common unlawful purpose.

⁸⁰ *Prosecutor v. Ziganyirazo*, Case No. ICTR-01-73-T, Trial Chamber, at paras. 383-385; *Prosecutor v. Momcilo Krajisnic*, Case No. ICTY- IT-00-39-T, Trial Chamber, 27 September 2006, at paras. 876-885.

modes of liability.⁸¹ The same principle could be found in other domestic jurisdictions such as Belgium or Switzerland.⁸²

With regard to the crime of genocide, the ICTY, ICTR and ICC statutes include conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity to commit genocide.⁸³ Similarly, the Canadian *Criminal Code* criminalizes the “advocating or promoting of genocide.”⁸⁴ Thus, the ICTR, ICTY and ICC indictments and convictions include counts of conspiracy, complicity or incitement to genocide.⁸⁵

A person could also be criminally responsible for the acts of other persons under his or her subordination and control. There are some slight differences under the various jurisdictions with regard to the command responsibility. While the *CAHWC Act* creates a distinct offence,⁸⁶ under the ICC, ICTR and ICTY *Statutes*, a commander or a superior is individually responsible for the crimes committed by the persons under his or her subordination.⁸⁷

However, in both cases, the prosecution must prove the crime was committed by the subordinate, the fact that the commander or superior had effective command or control over the perpetrator, and the superior’s failure to prevent the commission of the crime by exercising control.

The required mental element is not the same for the military commander and for the superior in a position of authority. The Canadian law holds a military commander responsible if he *knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence.*⁸⁸ Thus, criminal responsibility of the military commander under international law becomes criminal negligence in Canadian domestic law.

Since 2002, the ICTY and ICTR jurisprudence consistently held that negligence is not included in the “had reason to know” subjective standard in order to

⁸¹⁾ See for example *Krstic*, *supra* note 77 at paras. 653, 727; see also the indictment in this case.

⁸²⁾ See for example article 4 of the Belgian *Loi du 16 juin 1993 sur la répression des violations graves de droit international humanitaire*; see also the judgment of the Cour d’Assises de Bruxelles, 8 June 2001 in the matter of the four Rwandans prosecuted in Belgium for crimes committed during the 1994 genocide in which the accused persons were charged with individual personal responsibility for the crime of murder committed against many individuals and also for their involvement as accomplices in these crimes. In the *Niyonteze* case, *supra*, note 34 the accused was charged with genocide, incitement to genocide, crimes against humanity and complicity in crimes against humanity. However, the tribunal stated that the Swiss courts did not have jurisdiction over genocide and crimes against humanity. For further details, see also Luc Reydam, ‘Nyonteze v. Public Prosecutor’ (2002) 96 *AJIL* 231.

⁸³⁾ Article 2 (3) *ICTR Statute*, and Article 4(3) *ICTY Statute*, Article 25(3) e *ICC Statute*.

⁸⁴⁾ Section 318 *Criminal Code*, *supra*, note 23.

⁸⁵⁾ See for example *Prosecutor v. Akayesu*, Case No ICTR 96-T, Trial Chamber, 2 September 1998, at para. 23, and the Verdict.

⁸⁶⁾ *CAHWC Act*, sections 5 and 7.

⁸⁷⁾ Article 28 *Rome Statute*, Article 6 (3) *ICTR Statute*, and Article 7(3) *ICTY Statute*.

⁸⁸⁾ *CAHWC Act*, section 7 (1)(b).

hold a military commander criminally responsible for the offences that people under his or her subordination and control may have perpetrated. However, recently, the ICC Pre Trial Chamber adopted a stricter standard, ruling that “negligence in failing to acquire knowledge” amounts to command responsibility.⁸⁹ This approach is similar to the Canadian legal requirements of the objective standard of criminal negligence.

A superior is liable for offences of his subordinates only if he has knowledge of such offences or if he “consciously disregards information” that clearly indicates that such offences are about to be committed or are being committed. “Consciously disregarding information” is similar to being “wilfully blind.” This concept refers to a state of mind which is aptly described as deliberate ignorance. It means that a person is criminally responsible if he or she has a suspicion that objectively needs further inquiries, but deliberately chose not to make such inquiries. Canadian criminal law equates this state of mind to subjective knowledge.⁹⁰ Thus, the breach of the superior’s legal duties can be proven only if there is evidence of willfulness or deliberateness to disregard information about the perpetration of offences by his subordinates. These elements are not required to be proven when determining the military commander’s liability.

5. The Crimes and the Underlying Offences

In Canada, customary international law is directly incorporated as part of the common law, while treaties must be implemented via statute or other legislative instrument.⁹¹ Also, the *Criminal Code* provides that no criminal offences arise under the common law; rather, they must be statutory in nature.⁹² Accordingly, a goal of the *CAHWC Act* was to create domestic statutory versions of the core crimes which are prosecutable in Canadian courts. This was accomplished by incorporating the international law regarding the offences into the definitions of the crimes themselves—and so, to obtain a conviction the prosecution will be required to prove that the accused committed the proscribed *international* offence, with all of its attached mental, physical and contextual elements.

Notably, however, the definitions do not resemble those in the Rome Statute, nor do they incorporate any of the ICC Elements of Crimes. There are two

⁸⁹ *The Prosecutor v. Jean Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Pre Trial Chamber, 15 June 2009, at paras. 432-434. See also R. Cryer, ‘Command Responsibility at ICC and ICTY: In Two Minds on the Mental Element?’ 20 July 2009, <http://www.ejiltalk.org/command-responsibility-at-the-icc-and-icty-in-two-minds-on-the-mental-element/>

⁹⁰ *R. v. Briscoe*, 2010 SCC 13, J.E. 2010-680, [2010] A.W.L.D. 1889.

⁹¹ See generally Gibran van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin, 2008).

⁹² *Criminal Code*, s. 9(a).

definitions of each crime, for the territorial and extraterritorial provisions respectively, and each definition after setting out a general description of the particular criminal act⁹³ contains a phrase that incorporates the international law definition of the offence. For genocide and crimes against humanity, the phrase reads “that, at the time and in the place of its commission, constitutes [genocide, a crime against humanity] according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”⁹⁴ For war crimes the middle part of the phrase is varied slightly to read “that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts...”⁹⁵

The Parliamentary intent behind these provisions is both to adhere to the principle of legality, by restricting prosecutions to the law underpinning the *international* offence as it existed at the time of the offence, and to allow the definitions of the crime to develop as both customary international law and Canada’s treaty obligations provisions evolve. From a forward-looking perspective this is an efficient approach, since it prevents the need for ongoing legislative amendment to track the rapid developments in international criminal law. Some interpretive tools are provided, as the Act provides both that the offences as set out in the *Rome Statute* are considered to be crimes according to customary international law as of 17 July 1998,⁹⁶ and that crimes against humanity were criminalized under either custom or general principles of international law prior to Nuremburg.⁹⁷ However, in terms of cases like *Munyaneza* where the offence took place some years before the prosecution and prior to 1998, the court is required to determine as a matter of law what the state of the applicable customary and/or treaty-based international criminal law was at the time and place of the offence.

This regime clearly has the potential to be difficult in terms of methodology, particularly given that Canadian domestic courts often do not display great facility with international law. In this case, the Court was aided by the fact that the ICTR has canvassed the international law that was in effect at the time of the Rwandan genocide, and further aided by the fact that the Supreme Court of

⁹³ Robinson refers to these general descriptions as ‘touchstones’ and suggests that they are provided because a simple reference to customary or conventional international law might have been found to be void for vagueness under the *Charter*, an approach which had already been approved in *Finta* (Robinson, *supra* note 47, at 50).

⁹⁴ *CAHWC Act*, ss. 4(3) and 6(3).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, ss. 4(4) and 6(4).

⁹⁷ *Ibid.*, s. 6(5).

Canada had dealt with some of the relevant law of genocide and crimes against humanity in its earlier *Mugesera* decision.⁹⁸ Accordingly, Denis J. put a great deal of reliance on both the Tribunal caselaw and *Mugesera* in the formulation of his reasons.

The battle was joined, in fact, before the trial began. In a 2006 interlocutory motion, Mr. Munyaneza challenged the charges against him on the grounds that the provisions of the *Criminal Code* prohibit the joining of other counts to an indictment for murder (in this case sexual violence and pillage), unless those counts arise from the same transaction or consent is given by the accused.⁹⁹ Furthermore, he argued that “pillage” is not an offence under the Canadian law. The court stated¹⁰⁰ that the accused is not charged with murder but with genocide, crimes against humanity and war crimes. The underlying offences in the *CAHWC Act* are different from the offences under the *Criminal Code*. The court based its findings on the fact that the *CAHWC Act* refers to offences criminalized by the international treaties and conventions, including the *Rome Statute*, to which Canada is a party. The court also followed the *Mugesera* decision in which the Supreme Court of Canada states that the “[i]nternational law is thus called upon to play a crucial role as an aid in interpreting domestic law.”¹⁰¹

In the trial judgment three years later, Justice Denis continued to rely upon the *Mugesera* decision (including its fairly extensive canvassing of the contextual elements of crimes against humanity) and the ICTR jurisprudence.¹⁰² The definition of genocide he constructed was uncontroversial. He spoke to the specific intent requirement,¹⁰³ noting that the intent must have been “to physically destroy the targeted group, not only its national, linguistic, religious or cultural identity,”¹⁰⁴ and that the intent must be to destroy the group in “substantial part,” meaning “a high proportion of the group, or the most prominent members of the community, the effect of which on the whole group is significant.”¹⁰⁵

With regard to crimes against humanity, Justice Denis adopted the Supreme Court’s finding in *Mugesera* that the components of the *actus reus* of crimes against

⁹⁸ Above note 24. *Mugesera* was making the inquiry into the substantive law of the offences under the 1987 amendments, but the exercise did not differ greatly from that to be followed in the *CAHWC Act*.

⁹⁹ Section 589 *Criminal Code*.

¹⁰⁰ *R v. Munyaneza*, 2006 QCCS 8010, online (in French): <<http://www.canlii.org/fr/qc/qccs/doc/2006/2006qccs8010/2006qccs8010.html>>.

¹⁰¹ *Mugesera*, *supra* note 24 at para. 82.

¹⁰² In constructing a definition of genocide, His Lordship also relied on the ICJ’s decision in the *Serbian Genocide Case*.

¹⁰³ *Munyaneza*, *supra* note 2 at paras. 79, 97.

¹⁰⁴ *Ibid.*, para. 98, citing *Prosecutor v. Semanza* (ICTR-97-20-T), Trial Chamber, 15 May 2003 at para. 315.

¹⁰⁵ Para. 103, citing Art. 2 of the Genocide Convention and *Krstic*, *supra* note 77 at paras. 8 and 12.

humanity were that: 1) one of the underlying offences or prohibited acts had been committed; 2) it was committed as part of a widespread or systematic attack; and 3) that the attack was directed against any civilian population or any identifiable group of persons. His findings adopted two interesting decisions from *Mugesera*. First, the Supreme Court had held that the second element of the *actus reus* required that that attack be widespread *or* systematic, rather than widespread *and* systematic, a conclusion that it reached relying on ICTY jurisprudence. Second, the Supreme Court had held that at the time of the Rwanda genocide there was no requirement in customary international law that the attack be carried out pursuant to a government or organizational policy or plan. It did, however, note that the requirement had been inserted into the *Rome Statute* and explicitly did “not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement.”¹⁰⁶ Denis J. also relied on the ICTY’s decision in *Kunarac* to support the latter holding.¹⁰⁷ As Professor Lafontaine has remarked, this was justified, even though the *Act* deems the *Rome Statute* definitions to reflect customary international law as of 17 July 1998, since the genocide took place before 1998. However, “future prosecutions regarding crimes committed after that date would have to ignore both *Mugesera* and *Munyaneza* and come to a different conclusion regarding the policy element, regardless of whether the ICC statute effectively reflects customary international law on this issue.”¹⁰⁸

The law regarding war crimes has the potential to be the most difficult in any prosecution under the *CAHWC act*, as the court will be required to give close scrutiny to the development of war crimes law over time—for example, what the requirements were at a given time for a conflict to constitute an “armed conflict,” or whether international law provided for liability or war crimes in internal armed conflicts at that time. The contentious status of the *Additional Protocols to the Geneva Conventions*¹⁰⁹ will require court to take note of whether either Protocol applied in whole to a particular conflict, and/or what parts of these instruments reflected custom at a given time and place where the *Protocol* was not in force.

¹⁰⁶ *Mugesera*, *supra* note 24 at para. 158.

¹⁰⁷ *Munyaneza*, *supra* note 2 at para. 114.

¹⁰⁸ Lafontaine, *supra* note 70 at 281. There will inevitably be some tension as to whether customary international law on this point is best drawn from the jurisprudence of the ICTY and ICTR, which have some claim to authoritatively interpreting custom, or from the Rome Statute, which implemented the consensus view of well over 100 states. In any event, it is unlikely that the ICC will find the requirement to be only jurisdictional rather than substantive (as the *ad hoc* tribunals have done), given the recent decision of the ICC Pre-Trial Chamber regarding the situation in Kenya: Case No. ICC-01/04-01/06-003), *Decision Requesting Clarification and Additional Information*, 18 February 2010, online: < <http://www.icc-cpi.int/iccdocs/doc/doc825223.pdf> >.

¹⁰⁹ (1977) 1125 UNTS 3 and 609.

However, none of these problems arose in *Munyaneza*, as Justice Denis was content to adopt the findings of the *ad hoc* tribunals (particularly the ICTR) as to the fact that a non-international armed conflict was occurring in Rwanda in 1994, that the *Geneva Conventions* and the Second Geneva Protocol applied,¹¹⁰ what the elements of the war crime of pillage were,¹¹¹ and the definition of a “protected person” under the treaties.¹¹² He also relied on the findings of the ICTR in *Semanza* to the effect that “the prosecution must demonstrate that: (a) the armed conflict in Rwanda was non-international; (b) the victims were not taking part in hostilities at the time of the alleged violation; (c) there was a nexus between the accused’s alleged crimes and the conflict.”¹¹³

It is also interesting to examine Justice Denis’s approach to the underlying offences. The court followed the same reasoning and methodology as in the 2006 judgment, stating that the underlying offences such as “intentional killing,” “serious bodily and mental harm” or “pillage” do not exist under the *Criminal Code*.¹¹⁴ The international criminal law and jurisprudence, rather, acted as guidance for the court in defining those offences.

The court stated that the terms “intentional killing” (in French “meutre intentionnel”) are used in international criminal law but not in the *Criminal Code*. The international jurisprudence defines murder as the “unlawful international killing of a human being”,¹¹⁵ the elements of the offence being similar.¹¹⁶ In our view, the two terms are synonymous and describe the same reality. However, the court added that the difference between the definitions of murder under international law and domestic law is rather slim:¹¹⁷

Murder is the intentional killing of a person without any lawful justification or excuse or the intentional infliction of grievous bodily harm leading to death with knowledge that such harm will likely cause the victim’s death.¹¹⁸

The court also stated that the elements of crime are the same for intentional murder as an underlying crime of genocide, crimes against humanity and of war

¹¹⁰ Paras. 132-35.

¹¹¹ Paras. 143-46.

¹¹² Paras. 153-54.

¹¹³ Para. 138.

¹¹⁴ *Munyaneza*, *supra* note 2 at paras. 84-93, 143-146.

¹¹⁵ *Akayesu*, *supra* note 85 at para. 589.

¹¹⁶ *Prosecutor v. Kordic and Cerkez*, Case No. ICTY IT-95-14/2-T, Trial Chamber, 26 February 2001, at para 236.

¹¹⁷ *Ibid.*, at paras. 81-83, 94.

¹¹⁸ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Trial Chamber, 18 September 2008, para. 2169. It is noteworthy that most of the ICTR/ICTY decisions agree on the legal finding. However, there are a few ICTR decisions in which the Trial Chamber found that for murder as a crime against humanity requires an element of premeditation. See for example, *Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, 21 May 1999, paras 136-140; *Semanza* *supra* note 103, at paras. 334-339.

crimes.¹¹⁹ As a result, the prosecution shall prove that by act or omission, the accused caused the death of one or more persons, that he had the intention to cause the death or to inflict grievous bodily harm or injury and knowing that is likely to cause the death or being reckless whether the death ensues or not.¹²⁰ The accused's intent could be inferred from the circumstantial evidence.¹²¹ Proof that the dead body has been recovered is not required¹²².

The term "causing serious bodily or mental harm to members of a group" means harm that "seriously injures the health, causes disfigurement, or causes any serious injury to the external or internal organs or senses¹²³." The meaning of the term should be determined on a case by case basis and could include acts of rape, physical or mental torture, inhumane or degrading treatment, rape, sexual violence, or persecution¹²⁴. The injury need not be permanent or irremediable, however minor or temporary impairment of mental faculties could not be qualified as "serious mental harm."¹²⁵

Rape and sexual violence are considered as serious bodily and mental harm inflicted on a person. The court stated that the international and Canadian jurisprudence on the issue are similar.¹²⁶ Rape is the "non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator, by any other object used by the perpetrator or of the mouth of the victim by the penis of the perpetrator. Consent must be given freely, voluntarily and under no force or threat of force.¹²⁷ It must be proved that the perpetrator has the intention to commit the prohibited act while having knowledge of the absence of the victim's consent.

Sexual violence is a broad term and includes crimes such as rape, sexual slavery, molestation and sexual penetration. There is no necessity of physical contact. For example, the ICTR Trial Chamber, stated that forced public nudity was an act of sexual violation.¹²⁸ The notion of "sexual violence" does not exist under the Canadian law, which criminalizes many types of "sexual assault."¹²⁹ The material

¹¹⁹ *Munyaneza*, *supra* note 2, at paras. 118, 140.

¹²⁰ *Ibid.*, at para. 87.

¹²¹ *Prosecutor v. Brđjanin*, Case No. ICTY 99-36-T, Trial Chamber, 1 September 2004, para. 387.

¹²² *Ibid.*, at paras. 381-382; [*Semanza*], *supra*, note 104, at para. 319.

¹²³ *Kayishema and Ruzindana*, *supra* note 118, para 109; *Bagosora*, *supra* note 118, at para 2117.

¹²⁴ *Munyaneza*, *supra* note 2 at paras. 84, 87.

¹²⁵ *Ibid.*, at para. 87; *Bagosora* *supra* note 118, at para. 2117; *Krstic*, *supra* note 77 at para. 513; *Prosecutor v. Kayishema and Ruzindana* *supra* note 118 at paras. 108-113.

¹²⁶ *Munyaneza*, *supra* note 2 at paras. 95.

¹²⁷ *Bagosora*, *supra* note 118 at para. 2199; *Prosecutor v. Kunarak*, Case No: IT-96-23 and IT-96-23/1A, Appeal Chamber, 12 June 2002, paras. 127-132; *Semanza*, *supra*, note 104 at paras. 344, 346;

¹²⁸ *Munyaneza*, *supra* note 2 at paras. 94, 95; *Akayesu*, *supra*, note 85 at para. 598; *Semanza*, *supra*, note 104 at para. 345;

¹²⁹ *Criminal Code*, sections 265 Assault, 271(1) Sexual assault, 272(1) Sexual assault with a weapon, and 273(1) Aggravated sexual assault.

element of this offence is the act of touching a person in a sexual manner without his or her consent, which ultimately violates the sexual integrity of the victim.

The principle of the respect for private property and the unlawful appropriation of property is found in many international conventions.¹³⁰ The unlawful appropriation is qualified under various terms such as plunder of public or private property,¹³¹ spoliation or pillage.¹³² Although Article 8(2)(e)(v) of the *Rome Statute* prohibits pillaging a town or place, the court states that the international jurisprudence establishes that the elements of crime associated with this offence are the same with those of pillaging or plunder. Thus those elements are:¹³³

The perpetrator appropriated certain property;
The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
The appropriation was without the consent of the owner;
the conduct took place in the context of and was associated with an armed conflict not of an international conflict; and
The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
The appropriation includes the theft or plunder by individuals for their own private gain. However, the property that was unlawfully appropriated must have “sufficient monetary value” and involve the “grave consequences for the victim.”¹³⁴

What is clear from the foregoing review is that Justice Denis was willing to embrace the internationally-oriented, outward-looking view that the *CAHWC Act* clearly demands of Canadian law. This was in spite of the fact that domestic criminal law commands a certain presence in these trials: section 2(2) of the Act states that, “[u]nless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.” Also, section 34(2) of the federal *Interpretation Act*¹³⁵ states that “All the provisions of the *Criminal Code* relating to

¹³⁰⁾ See *Hague Regulations*, Article 46; the *Charter of the International Military Tribunal 1945*, Art. 6(b); Article 18 of *Geneva Convention III* protect the property of prisoners against unlawful deprivation; Article 15 of *Geneva Convention I* and Article 18 of *Geneva Convention II* protect wounded and sick against pillage; Article 33 of *Geneva Convention IV* prohibits the pillage of protected persons.

¹³¹⁾ See Article 3(e) of the *ICTR Statute*.

¹³²⁾ For example, Article 4(f) of the *ICTR Statute* and Article 4 (g) of the *Additional Protocol II to the Geneva Conventions*;

¹³³⁾ *Munyaneza*, supra note 2, at para. 146. See also International Criminal Court, Elements of Crime, U.N. Doc. PCNICC/2000/1/Add.2., Article 8(2)(e)(v).

¹³⁴⁾ *Munyaneza*, supra note 2 at paras. 143-146; *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-T, Trial Chamber, 15 March 2006, at paras. 49-56; *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Trial Chamber, 26 February 2001, paras 351-353; *Prosecutor v. Delalic and al*, Case No.: IT-96-21-T, Trial Chamber, 16 November 1998, at para. 591.

¹³⁵⁾ R.S.C. 1985, c. I-21.

indictable offences apply to the indictable offences¹³⁶ created by an enactment... except to the extent that the enactment otherwise provides.” While these devices are designed simply to smoothen the interface between the international criminal law and Canadian criminal law and procedure for the purposes of a trial, in the hands of a more resistant judge these provisions might have been used to dilute the international aspects. And yet, Justice Denis rose to the challenge and underscored the importance of Canada’s adherence to the international standards which have been developed in the battle against the core crimes and impunity.

In terms of the law, as noted above, Justice Denis essentially followed the methodological model set out in *Mugesera*, using international treaties (including the *Rome Statute*) and the jurisprudence of the *ad hoc* tribunals to reach his findings as to what the international criminal law was at any given point, and then applying them. Because that process was channelled through the provisions of the *Act*, which directly implements the international law offences as they existed at the time of the alleged crimes, the Court was able to avoid the methodological problem in *Mugesera*—namely that the Supreme Court simply relied upon the Tribunal jurisprudence as “the law” without making its own express findings as to what the customary law on point was and recognizing that law as being incorporated into the law of Canada.¹³⁷

Justice Denis essentially canvassed the law, reviewed the witness testimony, made credibility findings and pronounced himself convinced beyond a reasonable doubt that Munyaneza committed the crimes as charged. Based on the credibility rulings the convictions are eminently supportable on the facts found.

6. Conclusions

There is an obvious salutary effect to Canada having successfully tried and convicted a Rwandan génocidaire under the principle of universal jurisdiction. More importantly, perhaps, *Munyaneza* demonstrates, in our view, the effectiveness of the manner in which Canada has approached the implementation of its international criminal law obligations. Specifically, it has done so in a manner that complies with its obligations under the *Rome Statute* and customary international law, and that is conducive to successful trials. That Justice Denis was effectual overall in his wrestling match with some intricate international law and its application in

¹³⁶ In Canadian criminal law, there are two levels of offence: summary conviction, the less serious, and indictable, the more serious. The main offences in the *CAHWC Act* are all indictable.

¹³⁷ Professor Lafontaine has noted certain shortcomings in the judgment with regard to the legal analysis of the substantive international law; see Lafontaine, above note 70 at 271-272.

a domestic courtroom¹³⁸ further demonstrates this effectiveness, which is underscored by the fact that Canada compares favourably with other states in this regard.

The fact of this success, combined with a clear intention to proceed with another prosecution,¹³⁹ raises the prospect that Canada may become more active in prosecuting international criminals. Indeed, Canada has been a target for criticism on this point in the past, which speaks to the troubled legacy of the *Finta* case *inter alia*. Since Canada now clearly has effective tools, however, is it not likely that Canada will “step up to the plate” more often?¹⁴⁰

Criminal prosecutions are but one arm of the Canadian government’s overall policy towards combating impunity, a policy that also involves a successful record of immigration-based remedies against perpetrators of international crimes,¹⁴¹ along with a recent extradition.¹⁴² Criticism has been levelled at the War Crimes Program for not focusing enough on prosecution, since the goals of combating impunity and depriving perpetrators of safe haven cannot ultimately be accomplished by immigration mechanisms.¹⁴³ It should be noted that the selection of the appropriate remedy is made after the careful assessment of many factors such as the gravity of the offence, the strength of evidence, and the logistical difficulties in assembling the required proof. Immigration based mechanisms are also much less expensive than a criminal prosecution which, in this case at least, cost more than CAND 4 million.¹⁴⁴ The Canadian policy also likely reflects the fact that

¹³⁸ Richard Perras, one of Desiré Munyaneza’s lawyers, has raised the issue of equality of arms. Though there are some Canadian lawyers with defence experience before the *ad hoc* tribunals, Canada does not have anything like an international criminal defence bar. Even its most high-quality and experienced defence lawyers will be taking on a team of prosecutors, with essentially unlimited resources, who specialize in this very rarified area of law. This may be tempered somewhat by the demonstrated willingness of Canadian prosecution officials to assist the defence where it is able to do so. Perras addressed the issue recently in a conference paper (‘The Canadian War Crimes Act: Defence Witnesses Are Somewhere on the Planet,’ Keynote Address at the 2010 International Humanitarian Law Conference, held at the University of New Brunswick Law Faculty, Fredericton, New Brunswick, 29 January 2010).

¹³⁹ Above note 6.

¹⁴⁰ See Lafontaine, above note 40, at 287-288.

¹⁴¹ The 2006-2007 report of the War Crimes Program noted that by the end of the 2006-2007 fiscal year, over 33,000 cases had been heard and settled, and this resulted in 3,271 people who were found to have been complicit in war crimes or crimes against humanity being prevented from entering Canada, while 595 people were expelled; see War Crimes Program Annual Report, 2006-2007, online: <<http://cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2007-eng.html>>.

¹⁴² *Italy v. Seifert*, 2007 BCCA 407, leave to appeal to the Supreme Court of Canada denied, [2007] SCCA No. 503.

¹⁴³ See T. Cruvellier, ‘Immigration First, Justice Second,’ *International Justice Tribune* (2 April 2007).

¹⁴⁴ L. Perreux, ‘Court finds Rwandan guilty of war crimes,’ *The Globe and Mail*, 23 May 2009, online: <<http://www.theglobeandmail.com/news/national/court-finds-rwanda-guilty-of-war-crimes/article1150495/>>.

immigration-based mechanisms are deemed to be a better way to deal with lower-level perpetrators, with prosecution reserved for more powerful individuals or those, like Desiré Munyaneza, whose crimes were quite numerous and horrific.¹⁴⁵ There is also potential for prosecutions of Canadian military personnel for war crimes abroad, a possibility that has been mooted (albeit controversially) in connection with the involvement of the Canadian military in Afghanistan.

That said, we think it is now clear that the Canadian legislative and prosecutorial model has a great deal to offer other states. The *Munyaneza* judgment strengthens the effectiveness of Canada's approach, and the overall good work it will do as a partner in the worldwide battle against impunity.

¹⁴⁵ This comment is attributable only to Currie.