This chapter considers the application and interpretation of substantive international criminal law in domestic courts. It first reviews cases that address hierarchical relations between the national and international legal order, in connection with the *nullum crimen sine lege* principle, before analysing decisions dealing with substantive international criminal law as applied and interpreted in domestic courts. The discussion focuses on the core crimes of genocide, crimes against humanity, and war crimes as defined in the Statute of the International Criminal Court (ICC). It also explores the issue of complementarity, addressed in Article 17 of the Rome Statute of the ICC. The available case law shows that some national courts are willing to apply (customary) international law freely in order to fill the gaps in national legislation, whereas others are far more reluctant to engage in such an exercise so as not to undermine the *nullum crimen sine lege* principle.

*nullum crimen sine lege*

relationship between international and domestic law

international criminal law

genocide

crimes against humanity

war crimes

international criminal court (ICC)

complementarity

customary international law

15

Substantive International Criminal Law

Harmen Van Der Wilt, J Craig Barker, and Bea Myers

I. Introduction

This chapter is concerned with the application of international criminal law in domestic courts. The first section concerns the direct application of international criminal law provisions. Whereas national jurisdictions (and human rights provisions in international treaties) require criminal prosecutions and trials to be sustained by explicit standards, the question arises whether international conventional provisions or standards of customary international law can serve that purpose. Closely related to this issue is the question whether the prohibition of the retroactive application of (criminal) law can be mitigated by relying on international sources. This section explores national case law addressing hierarchical relations between the national and international legal order, in connection with the *nullum crimen sine lege* principle.

The second section of the chapter will focus on the application and interpretation of substantive international criminal law in domestic courts. Particular focus will be given to the core crimes of genocide,[[1]](#footnote-2) crimes against humanity,[[2]](#footnote-3) and war crimes,[[3]](#footnote-4) as defined in the Statute of the International Criminal Court. Article 17 of the Rome Statute of the International Criminal Court deals with the issue of complementarity, according to which a case is inadmissible if it ‘is being [or has been] investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’.[[4]](#footnote-5) The implication of the decision to adopt the principle of complementarity in the Rome Statute is that it is expected that the majority of prosecutions of international criminal law will take place in domestic courts. Nevertheless, although the ICC Statute entered into force with the creation of the ICC in July 2002, the number of domestic prosecutions has not been substantial. Many prosecutions in domestic courts have failed through lack of jurisdiction,[[5]](#footnote-6) and others as a result of other processes such as amnesties and immunities.[[6]](#footnote-7) Furthermore, the prosecution of war crimes within a domestic context are most often undertaken by courts-martial or their equivalent, which are not part of the ILDC process and so do not feature within this chapter. On the other hand, consideration of issues of substantive international criminal law arises not only in criminal proceedings, but can also arise within the domestic context in cases relating, for example, to immigration and deportation. Accordingly, this chapter provides an early analysis of what may become, in the future, a particularly important area of the application of international law in domestic courts.

II. Direct Application of International Law and the *Nullum Crimen* Principle

**Hamdan v United States, Appeal judgment, ILDC 2022 (US 2012), 696 F 3d 1238 (DC Cir 2012), 16th October 2012, United States; Court of Appeals (DC Circuit) [DC Cir]**

Hamdan was a member of Al Qaeda and served as personal driver and bodyguard of Osama bin Laden. After the terrorist attacks on the Twin Towers in September 2001, he was captured in Afghanistan in November 2001 and transferred to the United States. Hamdan was charged and convicted by a military commission for having provided ‘material support for terrorism’ which was qualified as a war crime under the Military Commission Act of 2006. He was detained at Guantanamo Bay as an ‘unlawful enemy combatant’.

Hamdan appealed the verdict. As the Court of Appeals concluded that the Military Commission Act had no retroactive effect and the incriminating acts took place between 1996 and 2001, the court had to ascertain whether ‘material support for terrorism’ constituted a war crime under international law. Only in this way could the conviction be upheld. The Court of Appeals found that it did not.

**57** We turn, then, to the question whether material support for terrorism is an international-law war crime.

**58** It is true that international law establishes at least some forms of terrorism, including the intentional targeting of civilian populations, as war crimes. See, e.g., Rome Statute of the International Criminal Court art. 8(2)(b), July 17, 1998, 2187 U.N.T.S. 90; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS 1919, VIOLATION OF THE LAWS AND CUSTOMS OF WAR 17 (Clarendon Press 1919) (the Allied Nations condemned Germany for “the execution of a system of terrorism” after World War I).

**59** But the issue here is whether material support for terrorism is an international-law war crime. The answer is no. International law leaves it to individual nations to proscribe material support for terrorism under their domestic laws if they so choose. There is no international-law proscription of material support for terrorism.

**60** To begin with, there are no relevant international treaties that make material support for terrorism a recognized international-law war crime. Neither the Hague Convention nor the Geneva Conventions—the sources that are “the major treaties on the law of war”—acknowledge material support for terrorism as a war crime. See Hamdan, 548 U.S. at 604, 126 S.Ct. 2749 (plurality); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, Oct. 18, 1907, 36 Stat. 2277.

**61** Nor does customary international law otherwise make material support for terrorism a war crime. Customary international law is a kind of common law; it is the body of international legal principles said to reflect the consistent and settled practice of nations. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation”). It is often difficult to determine what constitutes customary international law, who defines customary international law, and how firmly established a norm has to be to qualify as a customary international law norm. Cf. Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004).10

**62** But here, the content of customary international law is quite evident. Material support for terrorism was not a recognized violation of the international law of war as of 2001 (or even today, for that matter). As we have noted, the Geneva Conventions and the Hague Convention do not prohibit material support for terrorism. The 1998 Rome Statute of the International Criminal Court, which catalogues an extensive list of international war crimes, makes no mention of material support for terrorism. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Nor does the Statute of the International Tribunal for the Former Yugoslavia, the Statute of the International Tribunal for Rwanda, or the Statute of the Special Court for Sierra Leone. See Statute of the International Tribunal for the Former Yugoslavia, adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1159, 1192; Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. Doc. S/ RES/955 (1994), reprinted in 33 I.L.M. 1598, 1602 (includes terrorism itself as a crime); Statute of the Special Court for Sierra Leone art. 3(d), Jan. 16, 2002, 2178 U.N.T.S. 138 (same). Nor have any international tribunals exercising common-law-type power determined that material support for terrorism is an international-law war crime.

(…)

**64** In short, neither the major conventions on the law of war nor prominent modern international tribunals nor leading international-law experts have identified material support for terrorism as a war crime. Perhaps most telling, before this case, no person has ever been tried by an international-law war crimes tribunal for material support for terrorism.

The case is interesting because it reveals the strong position of customary international law as a basis for criminal responsibility in the US legal system. The fact that any retroactive application of the Military Commissions Act would infringe the *nullum crimen* principle could be ‘repaired’ by the direct application of international (customary) law. However, the Court of Appeal did not find that ‘material support of terrorism’ was a war crime under international law, not at the time of commission, nor in 2012. The court indicated that ‘aiding and abetting’ of terrorism could qualify as a war crime (when committed during an armed conflict), but Hamdan had not been charged with aiding and abetting. In his concurring opinion, Judge Ginsburg wryly observed that Hamdan would not be able to benefit from this judgment, as he had long since been transferred to Yemen.

**Public Prosecutor (on behalf of Behram (Hussein) and ors) v Arklöf (Jackie), Judgment, Case No B 4084-04, ILDC 633 (SE 2006), 18th December 2006, Sweden**

The Swedish national, Jackie Arklöf, went to the Balkans in 1993 and served in a military unit of the Croatian Council of Defence. On his return, he was accused of and stood trial for having committed war crimes in a non-international armed conflict. The relevant question was whether criminal responsibility for war crimes could be imposed on the basis of a reference in a domestic penal code to customary international law.

The circumstances of the case related to a non-international armed conflict. The threshold requirement concerning the intensity of the conflict was also reached. Hence, the only applicable treaty-based provisions were Common Article 3 of the Geneva Conventions, 1949 and Additional Protocol II concerning non-international armed conflicts. In addition, several rules in international humanitarian law were applicable in the case on the basis of custom. Rules that were considered to have customary status in non-international armed conflicts included Article 18 of the Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, entered into force 21 October 1950 (‘Geneva Convention III’), Articles 33, 78, , and 95 of Geneva Convention relative to the Protection of Civilian Persons in Time of War ( 12 August 1949) 75 UNTS 287, entered into force 21 October 1950 (‘Geneva Convention IV’) and the grave breaches provisions in Article 130 of Geneva Convention III, Article 147 of Geneva Convention IV, and Additional Protocol I, Article 85. (paragraphs 124-39).)

Most of the counts were proven, and Jackie Arklöf was found guilty on counts concerning violence to life and person, humiliating and degrading treatment, torture (Common Article 3 and Article 4 of Additional Protocol II), unlawful confinement (Article 78 of Geneva Convention IV), employment of prisoners in work of humiliating and degrading character (Article 95 of Geneva Convention IV), inadequate care of prisoners, (Article 5 of Additional Protocol II), forced movements of civilians (Article 17 of Additional Protocol II), disrespecting the protection of women (Article 76 of Additional Protocol I), and pillage (Article 133 of Geneva Convention IV and Article 4 of Additional Protocol II). These provisions constituted customary international law, were applicable in both international and internal armed conflicts, and provided the basis for criminal responsibility. Criminal responsibility for war crimes could be imposed on the basis of a reference in a domestic penal code to customary international law. (paragraphs 138, 142-63).

The Swedish court thus applied customary international law, in the cloak of domestic law, as an adequate basis for criminal conviction. In this respect, the commentator observed:

‘The judgment was interesting in two respects. First, the Swedish legal system had traditionally been described as dualist—where international law and, more specifically, treaties were mainly implemented through transformation, but also through incorporation. As the Swedish Penal Code illustrates, […] parts of customary law could be incorporated into Swedish law by reference (*renvoi*). Second, Sweden, like many other states, subscribed to the principle of legality, at the core of which were the requirements on specificity, non-retroactivity, foreseeability, and accessibility of the law. Chapter 22, section 6, provided that a violation of “a generally recognized principle or tenet relating to international humanitarian law concerning armed conflicts” constituted a crime. This provision and the present case brought to the fore questions about foreseeability and accessibility of the law, as illustrated by the fact that the court based part of Arklöf’s criminal responsibility on customary principles. For example, with reference to an ICRC study on customary international humanitarian law, the court included unlawful confinement among the acts constituting war crimes in a non-international armed conflict’.[[7]](#footnote-8)

**Military Prosecutor v Massaba (Blaise Bongi), Criminal trial judgment and accompanying civil action for damages, RP No 018/2006, RMP No 242/PEN/06, ILDC 387 (CD 2006), 24th March 2006, Congo, The Democratic Republic of the; Ituri; Military Tribunal**

On 24 October 2005, Blaise Massaba, a captain in the Congolese army, and a group of soldiers under his command, arrested five pupils and stole goods belonging to civilians at various locations in Ituri, a district in eastern DRC. Later that same day, Blaise Massaba ordered his soldiers to shoot the victims on the pretext that the pupils were members of the armed militias in eastern DRC. The soldiers obeyed and shot the victims and buried their corpses.

The military prosecutor of the Military Tribunal of Ituri instituted criminal proceedings against Blaise Massaba. He was charged with the war crimes of wilful killing and pillaging, as provided for in Article 8(2)(b)(xvi) and 8(2)(a)(i), respectively, of the Rome Statute of the International Criminal Court and the Congolese military penal code. The DRC had ratified the Rome Statute in 2002.

**61** Whereas, by a referral decision of the Garrison Military Public Prosecutor, two charges falling under the jurisdiction of the International Criminal Court have been referred to the Military Tribunal of the Ituri Garrison; the charges were war crimes such as are provided for in Article 8(2)(b)(xvi) and Article 77 on the one hand, and, on the other, in Article 8(2)(a)(i) and Article 77 of the Rome Statute of the International Criminal Court of 17 July 1998;

**62** Whereas, this Statute applies to the crimes of genocide, crimes against humanity and war crimes committed since 1 July 2002, but not to the crimes of aggression until such time as these are defined;

**63** Whereas, the Democratic Republic of Congo ratified this statute by Decree-Law no 0013/002 of 30 March 2002;

**64** Whereas, Articles 161–175 of the Military Penal Code of 18 November 2002, Law no 024/2002, provide for the crimes of genocide, crimes against humanity and war crimes;

**65** Whereas, in consequence, the subject matter competence of the International Criminal Court is not exclusive, not only by virtue of the principles of complementarity and subsidiarity of that court in relation to national courts, but in the sense that a reading of the Statute shows that national courts are preferred to the ICC, which intervenes only on the conditions determined in that Statute;

**66** Whereas, however, the Congolese national legislation, in this case the Military Penal Code of 18 November 2002, in force since 30 March 2003, contains a glaring omission in that it does not sanction war crimes, for which there is no penalty;

**67** Whereas, clearly, the Congolese legislator had absolutely no intention of allowing this atrocious crime to go unpunished, having recognised its great gravity by ratifying the Rome Statute of the International Criminal Court;

**68** Whereas, consequently, the failure to penalise this crime is in fact a purely accidental error (see Articles 173–175 of Law no 024/2002 of 18 November 2002 providing for war crimes, an omission that has led certain Congolese military criminal law experts, in particular Frank Mulenda, to declare that the crime of genocide, crimes against humanity and war crimes provided for by the Military Penal Code have no relation to the Rome Statute; consequently, jurisdiction in this particular case is not essentially based on the recognition of these serious crimes by the Military Penal Code);

**69** Whereas, according to Article 2 of the Military Penal Code, “no offence may be punished by a penalty that had not been laid down by the law before the offence was committed”;

**70** In this case, this national law has never laid down a penalty for war crimes, not even by the mechanism of referral;

**71** Whereas, in these conditions, there is good reason for seeking to bridge these gaps in the national legislation by relying on the Rome Statute of the International Criminal Court ratified by the DRC, in order better to attain the Congolese legislator’s objective of having war crimes punished by national military courts (see point VII of the preamble to Laws 023 and 024/2002 of 18 November 2002 in the Official Journal of the RDC, in its special issue of 30 March 2003);

**72** Article 215 of the DRC constitution promulgated on 18 February 2006 stipulates that “legally concluded international treaties and agreements shall, once published, have an authority superior to that of the laws, provided that each treaty or agreement is applied by the other party”;

**73** For this reason, in its interlocutory judgment in case RP no 086/05, RMP 279/GMZ/WAB/2005, delivered on 12 January 2006, the Military Tribunal of the Mbandaka Garrison, to which a case concerning crimes against humanity provided for in Article 166 of the Military Penal Code had been referred, decided to investigate and try this charge in accordance with the provisions and penalties of the Rome Statute, which it deemed to be more clearly defined, better suited in that, unlike the Military Penal Code, it contains mechanisms to protect the rights of victims, and less severe in the penalties imposed in that it does not recognise the death penalty;

**74** These reasons justify the public prosecutor in this case who, in his official capacity, has referred to the Rome Statute. The ratification of the Statute by the DRC makes it part of the legal fabric of the law of the Democratic Republic of Congo, by virtue of legal monism with primacy accorded to international law, in this instance the ICC Statute, which inspired the introduction into the Military Penal Code of the crimes falling within the competence of the Statute.’

Courts of the DRC have, on several occasions, displayed an open and receptive attitude towards international (criminal) law. The monist system, as embodied by Article 215 of the DRC constitution, enables courts to apply self-executing norms of international law directly, superseding any conflicting national statutes. In the case under scrutiny, the military court applied the Rome Statute in order to fill the gaps in domestic law. In other judgments, the courts simply ignored the Military Code, arguing that the Rome Statute contained more precise definitions, was more accommodating to the interests of the victims or provided for more lenient punishment.[[8]](#footnote-9) It is questionable whether in these cases international law standards really conflicted with domestic law. After all, as long as domestic law does not prescribe the imposition of capital punishment, prosecutors and courts alike are allowed to resort to the more lenient standards under international law.

**Supreme State Prosecutor v Ribičič (Mitja), Order on Whether to Open Pre-Trial Criminal Investigation, Ks 962/2006, ILDC 523 (SI 2006), 27th June 2006, Slovenia; Ljubljana; Regional Court**

Eighty-six year old Ribičič was suspected of having ordered the murder of 217 people without trial while he was deputy head of the Slovenian branch of the Yugoslav communist secret service ‘OZNA’. As the dreadful event had occurred in the aftermath of the Second World War, the legal issue before the court was whether crimes against the civilian population, criminalized in Article 374 of the Criminal Code, could also be committed in time of peace as suggested by international instruments.

**21** The disposition of Article 374 of the Penal Code of the Republic of Slovenia, before its amendments in 2004, defines war crimes against civil populations in the time of war, armed conflict or occupation; but, as was already stated, in this context of evaluation it is important to take into consideration the quoted Charter of the International Military Tribunal at Nuremberg and the Decree ratifying the Convention on the Non-Applicability of Statutory Limitations to War Crimes and. Crimes Against Humanity. The quoted provisions on the one hand show that these two international treaties define the punishability of and the non-applicability of statutory limitations also for crimes against humanity which were committed in time of peace and on the other hand place themselves above provisions of national legal systems in the sense that they determine the punishability when such offences do not represent a violation of the national laws of the country in which the offence was committed. Here we should mention that the provision of Article 4 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity imposes the obligation on State Parties to adopt, in accordance with their own constitutional procedures, all legislative and other measures needed to ensure that the legislative and other provisions on statutory limitations do not apply to the prosecution and punishment of crimes under Article 1 and 2 of the Convention and that any such provisions on statutory limitation are nullified. The State Parties, one of which was the former Yugoslavia, and the Republic of Slovenia adopted the international treaties which were signed by Yugoslavia and which pertain to the Republic of Slovenia, which have therefore accepted the obligation that they will, also in the subsequent legislative provisions, enable the prosecution of criminal offences, including crimes against humanity as defined by the aforementioned international treaties.’

(…)

**23** From the Convention for the Protection of Human Rights and Fundamental Freedoms and its additional Protocols, the Act of Ratification of which is published in the Official Gazette of the Republic of Slovenia — international treaties, No 7/1994, an exception to the principle of legality in Article 7 arises. Paragraph 1 of the mentioned provision states that no one shall be convicted of any offence committed by acting or refraining from acting that was not defined as a criminal offence under national or international law at the time that it was committed. Furthermore, a sentence higher than prescribed at the time the offence was committed shall not be pronounced. However paragraph 2 of the same Article states that the Article is not an obstacle for the trial and punishment of persons for committing an act or refraining from acting which at the time when it was committed was punishable under the general principles of law recognised by civilised nations. Mutatis mutandis provide the provisions of Article 15 of the International Covenant on Civil and Political Rights, the Act of Ratification of which was published in the Official Gazette of SFRY, No 7/1971. This provision in paragraph 1 states that no one shall be convicted of offences or omissions which were not defined as a criminal offence under national or international law at the time they were committed. Furthermore, a higher sentence than would be pronounced at the time the offence was committed shall not be pronounced. If legislation defines a lighter sentence for the offence committed the perpetuator shall benefit from it. Paragraph 2 of the same Article states that the provisions of this Article do not prevent anyone from being convicted of an offence or omission which was, at the time it was committed or refrained from, defined as punishable under the general principles of law recognised by civilised nations. In both cases we are dealing with international conventions which are part of the Slovenian legal system and are so applied.

(…)

**24** The international community has therefore, by proceeding from protecting basic human rights (to life, personal freedom, equality, etc.), developed and amended international humanitarian law. With reference to the provisions on prosecution of such criminal offences, it allowed for exceptions to the principle of legality because of the realisations, which are included in the preambles to different international treaties, that these are important provisions which should ensure protection of these rights and that the protection of the rights of the victims of crimes against humanity and international law are even stronger than the principle of legality, but it has to be stated at the same time that this does not mean that the law, national or international, should not consider the rights of suspects. The International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, with additional Protocols, are internationally legal acts adopted at the level of the United Nations (the Covenant …) and the Council of Europe (the Convention …) which continue and complement what is written in the Martens clause (which, as already stated, appears in connection with laws of war, but international treaties also developed in the direction of proscribing crimes against humanity committed in time of peace). Therefore, this is confirmation of the fact that there exist some general principles of law recognised by civilised nations which allow for exceptions to the principle of legality.

(…)

**27** From the judgment of the Constitutional Court of the Republic of Slovenia, ref. no. U-1-6/93, of 01 April 1994, invoked by the charges and by the Motion of the investigating judge, when it ruled upon the use of provisions from the Decree on War Courts of 05 May 1944, it can be concluded that in constitutional and legal practices in the Republic of Slovenia it is permitted to use as a legal source the principles of law recognised by civilised nations. From this ruling it arises that in the Republic of Slovenia the provisions of the Decree on War Courts of 05 May 1944 that are not used are those which were, already at the time of drafting and use of the Decree, in breach of the general principles of law as recognised by civilised nations and are also in breach of the Constitution of the Republic of Slovenia. Such a judgment by the Constitutional Court of the Republic of Slovenia is also an additional argument which even further convinces this Senate that those provisions of the international treaties which were adopted by acts of ratification and which establish exceptions to the principle of legality by invoking the general principles of law recognised by civilised nations are not in breach of the Constitution of the Republic of Slovenia.

(…)

**32** In this case, the Constitutional Court of the Republic of Slovenia used the provision of paragraph 2 of Article 15 of the ratified International Covenant on Civil and Political Rights, as already quoted in the Explanation of the Decision by this Senate. At the time the judgment by the Constitutional Court of the Republic of Slovenia was issued, the European Convention for the Protection of Human Rights and Fundamental Freedoms was not yet ratified and nevertheless, the Constitutional Court of the Republic of Slovenia invoked the suitable formulation and logically the same provisions as in paragraph 3 of Article 7 of this Convention. The Constitutional Court of the Republic of Slovenia explicitly stated in point 20 of the Explanation that the aforementioned provision of the ratified international treaty (referring to the provision of paragraph 2, Article 15 of the International Covenant…) are binding on Slovenia in accordance with Article 8 of its Constitution, and the general principles of law invoked in the ratified treaty as interpreted here by this Senate prohibit retroactive proscription of all other offences which are not the subject of the quoted international treaties. Therefore, it can be concluded that in some cases, as assessed by this Senate, including the alleged criminal offence, an exception to the principle of legality or a prohibition of retroactivity as described in the ratified international treaties may be considered permissible.

Although Slovenian criminal law recognized ‘crimes against humanity’ as a separate category at the time of the massacre, the national interpretation at that time followed the well-known Nuremberg limitation, requiring a temporal link with armed conflict. The application of the Criminal Code (as amended in 2004), which had abolished the limitation, therefore implied an expansion to the detriment of the accused, which would normally be precluded by the prohibition of retroactive application. The court had to rely on Articles 7(2) of the European Convention on Human Rights and 15(2) of the International Covenant on Civil and Political Rights which allowed an exception to such a prohibition if a trial and conviction could be predicated on ‘general principles of international law recognized by all civilized nations’.

**Erdal (Fehriye) v Council of Ministers (Ministerraad), Decision, Decision No 73/2005, ILDC 9 (BE 2005), 20th April 2005, Belgium; Constitutional Court**

Belgium had refused the Turkish request for extradition of Fehriye Erdal, whose surrender was sought on the charge of possession of illegal arms, invoking the political offence exception. Alternatively, Belgium sought to prosecute Mrs Erdal for offences, mentioned in Article 2 of the European Convention on the Suppression of Terrorism, but the courts lacked the necessary—extraterritorial—jurisdiction. In order to remove that obstacle, the Belgian legislature adopted an Act granting the Belgian courts jurisdiction over the acts listed in Article 2 (Act of 13 March 2003), introducing Article 10(6) into the Preliminary Title of the Code of Criminal Procedure. By Article 379 of the Act of 22 December 2003, the legislature further declared Article 10(6) applicable to facts committed before its entry into force. The Act of 13 March 2003 became popularly known as the ‘Erdal Act’, because it had been adopted with a view to establishing jurisdiction over Erdal’s offences committed in Turkey. Erdal filed an action for annulment of the Erdal Act with the Constitutional Court, arguing that Article 379 violated the principle of non-retroactivity of criminal law.

The Law of 13 March 2003 does not create any new incriminations given that all the acts referred to in Article 2 of the European Convention on the Suppression of Terrorism were already punishable in themselves under Belgian criminal law, as demonstrated in the course of parliamentary proceedings (on this point, see *Parl. Doc.*, Chamber, 2000–2001, DOC 50–1179/001, pp. 5–7).

Nonetheless, Article 10 (6) of the Preliminary Title of the Code of Criminal Procedure, insofar as it extends the extraterritorial competence of the Belgian courts, provides a legal basis for prosecution in Belgium. Whereas previously, there was no legal basis for prosecution nor therefore, *a fortiori*, for sanction of such acts in Belgium, following the law of 13 March 2003 this is now the case.

As a result, the Law of 13 March 2003 must be considered as a provision of substantive criminal law.

(…)

B.8.1 Conformément à la jurisprudence de la Cour européenne des droits de l’homme, l’article 7 de la Convention européenne des droits de l’homme consacre le principe de légalité en matière pénale et interdit en particulier l’application rétroactive de la loi pénale lorsqu’elle joue en défaveur de l’intéressé (Kokkinakis c. Grèce, arrêt du 25 mai 1993, série A, n° 260-A, § 52; Coëme et autres c. Belgique, arrêt du 22 juin 2000, § 145). Il est ainsi requis qu’au moment où le prévenu a posé l’acte qui donne lieu aux poursuites et à la condamnation, une disposition législative existât qui rendait cet acte punissable (voy. Coëme et autres c. Belgique, *loc. cit.*, § 145).

B.8.2 It emerges from the above that at the moment when the applicant is thought to have performed the acts of which she is suspected, there existed no legal basis according to which she could have been prosecuted and sentenced for these acts by the Belgian criminal courts.

The most interesting aspect of this case is that the Constitutional Court took the legal interests of the accused as point of reference and accordingly interpreted the prohibition of retroactive application of criminal law as also covering an extension of the scope of criminal jurisdiction. In an earlier decision the Supreme Court had accepted that an Act of Parliament could itself declare its application with retroactive effect. This was exactly what the Erdal Act did, as the commentator correctly observed. However, this construction did not find mercy in the eyes of the Constitutional Court.

**Public Prosecutor****’s Office, de Lois (Graciela) (intervening) and ors (intervening) v Manzorro (Adolfo), Final Appeal Judgment, Case No 16/2005, Aranzadi JUR 2005/132318, ILDC 136 (ES 2005), 19th April 2005, Spain; National Court; Criminal Chamber**

The case concerned criminal proceedings before the High Court (*Audiencia Nacional*) against Adolfo Scilingo, an Argentine officer alleged to have been involved in the unlawful detention, torture and elimination of alleged subversive persons during the Argentine military regime since 1976, for crimes against humanity. The prominent issue was whether crimes against humanity committed in Argentina in the late 1970s were punishable in the Spanish legal order, *inter alia*, by effect of customary international law.

As mentioned earlier, the first and apparently most significant problem we will address for the application of the criminal provision contained in Article 607 bis of the PC relating to crimes against humanity is the fact that it was not valid at the time the acts in question were committed, due to its recent incorporation into Spanish law. In guaranteeing the principle of legality, Article 9(3) of the CE also refers to the principle of the non-retroactivity of the most favourable sanctions. Article 25 CE expressly states that “No person can be sentenced or sanctioned for actions or omissions that were not a crime at the time they occurred […] under legislation in force at the time”. Thus, a number of problems arise relating to the principle of legality and categorisation of criminal laws: the retroactivity, certainty and predictability of the applicable criminal law.

H3 The application to Scilingo of the norms penalizing crimes against humanity did not breach the principle of legality. Even considering that the Criminal Code did not penalize such crimes until October 2004, the crime already existed as a *ius cogens* norm of customary international law long before that date. Further, international custom was part of the Spanish legal order, and hence, the principle of *nullum crimen sine lege* was fully respected in this case. (paragraphs B.1-B.2 and B.4)

*Scilingo* was the first Spanish criminal case in which an accused stood trial for alleged commission of crimes against humanity. The High Court took the opportunity to deliver a much elaborated opinion in which it divulged a very friendly attitude towards international law. Customary international law did not have to be incorporated in the domestic legal order, but could autonomously serve as an adequate basis for prosecution.

Like many others, the ILDC commentator was critical:

‘The High Court held that the principle of legality and *nullum crimen sine lege* did not require the existence of a domestic legislative provision prohibiting a certain conduct: to meet the standards of this principle, it held, it was sufficient that a rule of international law concerning the crime existed at the time when the alleged offence was committed. The court thus presented an interesting view of the principle of legality. It argued that it was not necessary for a customary rule of international law proscribing the conduct to be incorporated in national law (one misses in the judgment, in any case, a short explanation of the principles on the incorporation and status of international law in the Spanish legal order); if the conduct was criminalized on the international legal plane, there was already a rule of “law” on the matter so that the principle *nullum crimen sine lege* was respected. This point has also been criticized, as international law would have no sufficient precision to satisfy the principle of legality’.[[9]](#footnote-10)

**Movement Against Racism and for Peoples****’ Friendship v Aussaresses, Appeal judgment, Appeal no 02-80719, Decision no 122, ILDC 775 (FR 2003), 17th June 2003, France; Court of Cassation [Cass]; Criminal Division**

In May 2001, French General Paul Aussaresses published a book entitled *Special Services, Algeria 1955–1957* (*Services spéciaux, Algérie 1955–7* (Editions Perrin, Paris 2001)). As army intelligence service co-ordinator, he detailed, without remorse, all the tortures, arbitrary executions, and massacres of civilians he had ordered and participated in during the conflict in Algeria. Following these revelations, the Movement Against Racism and for Peoples’ Friendship (‘MRAP’) filed a civil-party complaint against unnamed persons for crimes against humanity committed during the events in Algeria. Indirectly, they sought the repeal of the amnesty from which Aussaresses was benefiting.

The Court of Cassation was seized to answer the question whether prosecution and trial of Aussaresses could be predicated on either conventional or customary international law, qualifying his acts as crimes against humanity, or, alternatively whether the French Criminal Code of 1994 could be applied retroactively to that purpose.

**17** That, the provisions of the Law of 26 December 1964 and those of the Statute of the International Military Tribunal at Nuremberg, annexed to the Agreement of London of 8 August 1945, only relate to the acts committed for the European Axis countries;

(…)

**18** That, furthermore, the principles of the legality of the offences and the penalties and the non-retroactivity of the more severe criminal law, contained in Articles 8 of the Declaration of the Rights of Man and the Citizen, 7-1 of the European Convention on Human Rights, 15-1 of the International Covenant on Civil and Political Rights, 111-3 and 112-1 of the Criminal Code, prevent Articles 211-1 to 212-3 of this Code penalising crimes against humanity that apply to acts committed before the date of their entry into force, 1 March 1994;

(..)

**19** That finally, international custom may not compensate the absence of the incriminating text by categorising the acts reported by the injured party as crimes against humanity;

None of the three efforts to thwart the French reading of the legality principle was successful. The Court of Cassation harboured a restrictive interpretation of conventional international law (Statute of the IMT), denying its applicability to the French-Algerian conflict. It stressed the prohibition of retroactive application as a natural and logic corollary of the legality principle. And finally, the court held that customary international law could not palliate the lack of explicit domestic provisions, making it abundantly clear that customary international law as such could never serve as an adequate legal basis for prosecution and conviction within the French legal order.

**Bouterse (Desire), Re, Judgment on Appeal, Decision No LJN: AB1471, Case No HR 00749/01 CW 2323, NJ 2002, 559, ILDC 80 (NL 2001), 18th September 2001, Netherlands; Supreme Court [HR]**

Protracted proceedings preceded the landmark decision of the Dutch Supreme Court on the question whether Surinam’s former commander-in-chief Desi Bouterse could be prosecuted on the charge of having been involved in the 1982 December killings of fifteen prominent young Surinamese men who had criticized Bouterse’s government. In the judgement the legal issues of direct application of international law, *nullum crimen*, and universal jurisdiction were strongly intertwined. In this part, the former aspects will be addressed.

**4.5.** The findings at 4.4 above mean that the unreserved prohibition of Article 16 of the Constitution and Article 1, paragraph 1, of the Criminal Code (incorporating the legality principle. HvdW), as referred to at 4.3 above, should not be applicable in cases where this would be incompatible with provisions of treaties or decisions of international organisations binding on all persons. However, neither the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment nor any other treaties or decisions of an international organisation applicable here contains a provision entailing an obligation to treat acts as referred to in the Torture Convention Implementation Act as punishable with retroactive effect.

**4.6.** It follows that the provisions of the Criminal Code applicable at the time when the offences that are the subject of the complaint were committed in 1982 may be applied to the offences in so far as they were envisaged and made punishable at the time, but also that Articles 1 and 2 of the Implementation Act may not be applied to such offences since this legislation did not come into force until 20 January 1989. It also follows from the above that in so far as the obligation to declare such offences as punishable with retroactive effect results from unwritten international law, the courts are not free to decide not to apply the Torture Convention Implementation Act (which does not provide for this) on account of the fact that it is contrary to unwritten international law. According to the parliamentary history of Article 94 of the Constitution, as recounted at 4.4 above, the framers of the Constitution did not wish to accept the application of unwritten international law if such application would conflict with national legal regulations.

**4.7.** In view of the above findings, it is not necessary to answer the question of whether the offences referred to by the Court of Appeal can be deemed to be offences within the meaning of Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights, which provide that the rule referred to in the first paragraph of these provisions, namely that no one may be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, does not prevent the trial and punishment of anyone who commits an act or omission that constituted a criminal offence at the time of the act or omission in accordance with the general principles of law recognised by the community of nations.

(…)

**6.** Assessment of the third ground of appeal

**6.1.** This ground of appeal raises the question of whether the Netherlands has jurisdiction in relation to the relevant acts committed before the entry into force of the Torture Convention Implementation Act, in so far as such acts constituted criminal offences under the Criminal Code at the time when they were committed.

**6.2.** As regards the relevant offences of the Criminal Code, the jurisdiction rules of Articles 2-8 of the Criminal Code are applicable. These rules do not provide for jurisdiction in a case such as the present one, which involves — as it has been submitted — offences committed outside the Netherlands by a person not having Dutch nationality.

**6.3.** Neither in the Torture Convention Implementation Act nor elsewhere is retroactive effect given to the expansion in Article 5 of the Torture Convention Implementation Act of the jurisdiction rules as regards criminal offences under the Criminal Code, which also fulfil the definition of torture now provided for in the Torture Convention Implementation Act . Nor does the parliamentary history of this provision contain any basis for the granting of retroactive effect to the said Article 5, and indeed the parliamentary history as set out in the explanatory notes to the ground of appeal, at 59, could much more easily be interpreted as an indication to the contrary.

**6.4.** It is not necessary to answer whether a rule of unwritten international law exists on the basis of which the Netherlands has jurisdiction with retroactive effect with regard to the offences referred to in 6.3 because the courts, in accordance with the findings at 4.4–4.6 above, are not free to decide not to apply the national jurisdiction rules on account of conflict with unwritten international law.

The reasoning of the court was layered and rather complicated. The court started by taking the domestic provisions on the legality principle as point of reference. It conceded that international conventional law could trump these provisions, in view of the hierarchical supremacy of self-executing provisions of international conventions, but observed that the relevant provisions of the Torture Convention were not in force at the time of the December Killings, nor did the convention itself ordain its retroactive application. *Per argumentum a contrario*, customary international law did not supersede an Act of Parliament, so the alleged punishability of torture under customary international law was of no avail. Interestingly, the Dutch Supreme Court considered the retroactive application of expanded jurisdiction on the same par as the retroactive application of substantive criminal law, taking a similar approach as the Belgian courts in *Erdal v Council of Ministers* (ILDC 9 (BE 2005)).

**United States v Smith (Thomas), Appeal Judgment, 18 US (5 Wheat.) 153 (1820), 5 L.Ed. 57 (1820), ILDC 1053 (US 1820), 2nd February 1820, United States; Supreme Court [US]**

Thomas Smith seized a ship by violence, committed plunder and robbery on the sea, and was thereafter caught and charged with piracy. Piracy was punishable by death pursuant to an Act of Congress. For the definition of piracy, this Act simply referred to the law of nations. The legal issue that the Supreme Court had to decide was twofold: First, whether a statute that incorporated by reference international law regarding the criminal definition of piracy was consistent with the principle of legality. And next, whether the crime of piracy was defined by the law of nations with reasonable certainty.

**2** The first point made at the bar is whether this enactment be a constitutional exercise of the authority delegated to Congress upon the subject of piracies. The Constitution declares that Congress shall have power “to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.” The argument which has been urged in behalf of the prisoner is that Congress is bound to define, in terms, the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the 8th section of the Act of Congress of 1790, ch. 9, which declares that robbery and murder committed on the high seas shall be deemed piracy, and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the Constitution.

(…)

**5** It is next to be considered whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is may be ascertained by consulting the works of jurists writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature, and whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi,* is piracy. The same doctrine is held by all the great writers on maritime law in terms that admit of no reasonable doubt. The common law, too, recognizes and punishes piracy as an offense not against its own municipal code, but as an offense against the law of nations (which is part of the common law), as an offense against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28 Henry VIII, ch. 15, piracy was punishable in England only in the admiralty as a civil law offense, and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offense. Sir Charles Hedges, in his charge at the admiralty sessions in the case of *Rex v. Dawson,* 5 State Trials, declared in emphatic terms that “piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty.” Sir Leoline Jenkins, too, on a like occasion, declared that “a robbery, when committed upon the sea, is what we call piracy,” and he cited the civil law writers in proof. And it is manifest from the language of Sir William Blackstone in his comments on piracy that he considered the common law definition as distinguishable in no essential respect from that of the law of nations. So that whether we advert to writers on the common law or the maritime law or the law of nations, we shall find that they universally treat of piracy as an offense against the law of nations and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever with whom they are in amity is a conclusive proof that the offense is supposed to depend not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have therefore no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.

(…)

**7** It is to be certified to the circuit court that upon the facts stated, the case is piracy, as defined by the law of nations, so as to be punishable under the Act of Congress of the 3d of March, 1819.

In this classic case (the oldest in the collection of ILDC), the Supreme Court addressed quintessential aspects of the legality principle which naturally emerge whenever international law enters the scene. Is the law of nations accessible and sufficiently precise to be cognizable for the average citizen? The Supreme Court answered both questions in the affirmative. Probably, this decision was partially inspired by the consideration that pirates are not ‘average citizens, but have historically been considered as *hostes humani generis*’.[[10]](#footnote-11)

III. Substantive International Criminal Law

1. Genocide

Genocide is defined in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide 1984 (‘The Genocide Convention’)[[11]](#footnote-12) as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

This definition was adopted without change in the Statutes of the two ad hoc international criminal tribunals for the former Yugoslavia (ICTY)[[12]](#footnote-13) and for Rwanda (ICTR)[[13]](#footnote-14) and in the Rome Statute of the International Criminal Court (ICC).[[14]](#footnote-15) The crime of genocide is also considered to be part of customary international law[[15]](#footnote-16) and may in fact be a *jus cogens* crime. Although the subject of interpretation and application before the ICTY and the ICTR, there has been little consideration of the crime of genocide in domestic courts.

(a) Incitement to genocide

**Canada (Minister of Citizenship and Immigration), League for Human Rights of B****’nai Brith Canada (intervening) and ors (intervening) v Mugesera (Léon) and ors, Appeal to Supreme Court, 2005 SCC 40, [2005] 2 SCR 100, (2001) 254 DLR (4th) 200, ILDC 180 (CA 2005), 28th June 2005, Canada; Supreme Court [SCC]**

Mugesera was accused of delivering an inflammatory speech to a meeting of Hutu’s in 1992. He fled to Canada after an arrest warrant was issued against him in Rwanda. He achieved permanent residency status in Canada in 1993. On being informed of the existence of the arrest warrant, Canadian authorities sought to deport Mugesera back to Rwanda. His deportation was ordered by an immigration adjudicator. The decision was upheld by the Immigration and Refugee Board (Appeal Division) and the Federal Court (Trial Division) but overturned by the Federal Court of Appeal. The Supreme Court of Canada upheld the original decision to deport. Of particular interest were the findings of the Supreme Court in relation to the allegations of incitement to genocide and incitement to crimes against humanity.[[16]](#footnote-17)

**(2) Incitement to Genocide**

**81** The second offence that the Minister [of Citizenship and Immigration – ed] alleges Mr. Mugesera committed in giving the speech is advocating or promoting genocide. We will now consider the elements of the offence and whether they are made out on the facts as found by Mr. Duquette (who wrote the main reasons for the IAD decision – Ed).

**82** Genocide is a crime originating in international law. International law is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide. Section 318(1) of the *Criminal Code* incorporates, almost word for word, the definition of genocide found in art. II of the *Genocide Convention*, and the Minister’s allegation B makes specific reference to Rwanda’s accession to the *Genocide Convention*. Canada is also bound by the *Genocide Convention*. In addition to treaty obligations, the legal principles underlying the *Genocide Convention* are recognized as part of customary international law: see International Court of Justice, Advisory Opinion of May 28, 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, at p. 15. The importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada’s treaty obligations was emphasized in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 69–71. In this context, international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis.

**(a) The Elements of Advocating Genocide**

**83** Section 318(1) of the *Criminal Code* proscribes the offence of advocating genocide: “Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.” Genocide is defined as the act of killing members of an identifiable group or of deliberately inflicting conditions of life on an identifiable group calculated to bring about the physical destruction of that group, in whole or in part: subs. (2). Subsection (4), at the relevant time, defined an identifiable group as “any section of the public distinguished by colour, race, religion or ethnic origin”. There is no Canadian jurisprudence dealing specifically with s. 318(1) of the *Criminal Code*.

**(i) Is Proof of Genocide Required?**

**84** In *Prosecutor v. Akayesu*, 9 IHRR 608 (1998), the Trial Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) drew a distinction between the constituent elements of the crimes of complicity in genocide and incitement to genocide. In the case of a charge of complicity, the prosecution must prove that genocide has actually occurred. A charge of incitement to genocide, however, does not require proof that genocide has in fact happened:

In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator. [para. 562]

**85** In the case of the allegation of incitement to genocide, the Minister does not need to establish a direct causal link between the speech and any acts of murder or violence. Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone irrespective of the result. It remains a crime regardless of whether it has the effect it is intended to have: see also *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T (Trial Chamber I) (“*Media Case*”), 3 December 2003, at para. 1029. The Minister is not required, therefore, to prove that individuals who heard Mr. Mugesera’s speech killed or attempted to kill any members of an identifiable group.

**(ii) The Criminal Act: Direct and Public Incitement**

**86** The criminal act requirement for incitement to genocide has two elements: the act of incitement must be direct and it must be public: *Akayesu*, Trial Chamber, at para. 559. See also art. III(c) of the *Genocide Convention*. The speech was public. We need only consider the meaning of the requirement that it be direct.

**87** In *Akayesu*, the Trial Chamber of the ICTR held that the *direct element* “implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement” (para. 557). The direct element of incitement “should be viewed in the light of its cultural and linguistic content” (para. 557). *Depending on the audience*, a particular speech may be perceived as direct in one country, and not so in another. The determination of whether acts of incitement can be viewed as direct necessarily focusses mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof (para. 558). The words used must be clear enough to be immediately understood by the intended audience. Innuendo and obscure language do not suffice.

**(iii) The Guilty Mind for Direct and Public Incitement to Genocide**

**88** The guilty mind required for the crime of incitement to genocide is an “intent to directly prompt or provoke another to commit genocide” (*Akayesu*, Trial Chamber, at para. 560). It implies a desire on the part of the perpetrator to cause another to have the state of mind necessary to commit the acts enumerated in s. 318(2) of the *Criminal Code*. The person who incites must also have the specific intent to commit genocide: an intent to destroy in whole or in part any identifiable group, namely, any section of the public distinguished by colour, race, religion, or ethnic origin (s. 318(2) and (4) of the *Criminal Code*).

**89** Intent can be inferred from the circumstances. Thus, the court can infer the genocidal intent of a particular act from the systematic perpetration of other culpable acts against the group; the scale of any atrocities that are committed and their general nature in a region or a country; or the fact that victims are deliberately and systematically targeted on account of their membership in a particular group while the members of other groups are left alone: *Akayesu*, Trial Chamber, at para. 523. A speech that is given in the context of a genocidal environment will have a heightened impact, and for this reason the environment in which a statement is made can be an indicator of the speaker’s intent (*Media Case*, at para. 1022).

Although the case relates directly to the application of the immigration laws of Canada, this case has wider significance insofar as it addresses the substantive law of genocide (in particular, the matter of incitement to genocide). In determining whether the Immigration and Refugee Board (Appeal Division) (IAD) had correctly applied the law on genocide, the Supreme Court undertook an analysis of that law as contained in Section 318 of the Criminal Code (Canada).

On the specific question of incitement to genocide, the Supreme Court of Canada relied heavily on the jurisprudence of the ICTR, extensively citing the case of *Prosecutor v Akayesu*.[[17]](#footnote-18) The limited assertion by the Supreme Court that: ‘Genocide is a crime originating in international law [...] In this context, international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis’ is questionable given the fact that the jurisprudence of the ICTR does not in and of itself constitute a formal source of international law. Nevertheless, insofar as the relevant states are party to the Genocide Convention, and in light of the direct link between the ICTR Statute and the Genocide Convention highlighted above, it would seem that the jurisprudence of the ICTR is at least highly persuasive.

The analysis of incitement to genocide undertaken by the Supreme Court, although short, is clear and precise, bearing in mind that the court was concerned merely with the question of whether the IAD had correctly applied the law. Nevertheless, even in this context, the discussion of genocidal intent (the so-called *dolus specialis* of genocide) is rather limited. While the Supreme Court correctly acknowledges that the intent element of incitement to genocide requires not only ‘an intent to directly promote or provoke another to commit genocide’ but also the specific intent to commit genocide, it would have been beneficial had the Supreme Court provided further analysis of how that intent on behalf of Mugesera was present at the time he delivered his speech. Given the fact that the speech was delivered in 1992, some two years before the 1994 genocide in Rwanda, the need to evidence the specific intent to commit genocide on behalf of Mugesera was particularly important. The IAD found intent in the fact that Mugesera ‘knew approximately 2,000 Tutsis had been killed since October 1, 1990’, that ‘the context leaves no doubt as to his intent’ and that ‘he intended specifically to provoke citizens against one another’. The Supreme Court held that ‘the IAD came to the correct legal conclusion’.

(b) Complicity in genocide

**Van Anraat Case, Public Prosecutor and Fifteen anonymous victims v Van Anraat, Case No 2200050906-2, Decision No LJN: BA4676, ILDC 753 (NL 2007), 9th May 2007, Netherlands; The Hague; Court of Appeal**

Van Anraat was accused of supplying Thiodiglycol (a chemical solvent), also known as TGD, to the Iraqi regime from 1985 to 1988. The chemical was used by the Iraqi regime in the production of chemical weapons which were used during the war with Iran and against Kurdish citizens. Van Anraat was accused of complicity in genocide and with various violations of customary international law and violations of various provisions of the Geneva Convention as punishable under the Netherland’s War Crimes Act. Von Anraat was acquitted of complicity in genocide.

7. In the judgment of the question whether it can be proven that the defendant is liable to punishment on account of the actions he is charged with in the present criminal proceedings, the following issues should be considered.

**A.** Is it possible to deduct from the evidence whether the actions described in the indictment - concisely summarized - the air attacks with mustard gas carried out by the Iraqi regime (the perpetrators), were indeed the consequence of the intention (hereafter: the genocidal intention) to partially or totally destroy the Kurdish population group in (Northern) Iraq as such?

**B.** Article 48 of the Penal Code stipulates inter alia that persons who intentionally provide the opportunity, means or information necessary to commit criminal offences are considered to be accessories to those crimes. From the text of this article follows that the intention of the accessory should be focussed on all component parts of the crime under consideration. Consequently the question that needs to be answered is the following: to what extent is the Dutch criminal court entitled to apply Dutch law in judging the requirement of intention in the present case and to what extent should it (also) consider the application of international criminal law?

**C.** (If the answer to question A would be affirmative,) was the purpose of the defendant (also) focussed on the — possible — genocidal intention of the perpetrators?

Re A. The Court considers that, in answering the question whether the perpetrators had a genocidal intention, other completed actions committed by the perpetrators against the population group involved should also be taken into account. Although the aforesaid population group does not appear as such in the indictment, they do come forward from documents in the case file, especially from the reports inserted under H 74 and H 75, which were drawn up by the Special Rapporteur of the Commission on Human Rights of the United Nations, Mr. Van der Stoel, even if these actions as such do not (all) fulfil the description of the crime referred to as genocide. From a number of documents, including the afore mentioned reports and statements in the case file, it appears that the offences put forward in the charges refer to the air attacks that were carried out partly during the so-called Anfal Campaign by or under the command of the perpetrators. Moreover, they show that those attacks, however horrifying and shocking they were, formed part of a considerably larger complex of many years of actions against the Kurds in the Northern Iraqi territory, which is mainly inhabited by the Kurdish population. Apparently these actions involved the systematic destruction of hundreds of Kurdish villages. Hundreds of thousands of Kurdish civilians were chased from their home towns and deported to other places and tens of thousands of Kurds were killed. In one of his reports, Van der Stoel described the policy that constituted the basis for the so-called Anfal Campaign, as a policy that without a doubt had the characteristics of a genocidal design.

In view of the said facts and circumstances, the Court believes that the actions taken by the perpetrators, in any case even the ones that have not been included in the charges, as outlined in the above, as to their nature at least produce strong indications that the leaders of the Iraqi regime, also regarding the actions that have been put down in the charges, let themselves be guided by a genocidal intention with regards to at least a substantial part of the Kurdish population group in (Northern) Iraq.

Nevertheless, the Court deems that a final judicial judgment regarding the important as well as internationally significant question whether certain actions by certain persons as mentioned in the charges should be designated as genocide, deserves a better motivated judgment (which should be based on conclusive evidence) than the one on which the Court was able to establish its observation.

The Court would like to point out in this respect that Mr. Van der Stoel, in his capacity as witness, stated that he based his reports on human rights violations in Iraq (H 74 and H 75), reports which in this case should be regarded as highly relevant, on “a large stream of documents, fourteen tons” while, except for some annexes to those reports, there are no documents in the case file from which the findings and conclusions of the Special Rapporteur can be directly deduced and that could serve as evidence in these criminal proceedings to prove the offence of genocide with a sufficient degree of certainty.

In view of the consideration following hereafter under C, the Court thinks that only these observations need to be stated, and that any other observations could only be qualified as ‘unnecessarily’.

Re B. The international aspects of the case under consideration have given the Court cause for a focus on international criminal law, especially when answering the question whether the defendant had the legally required degree of intention in committing the offences that he has been charged with. In this respect the Court concludes that, especially regarding the question which degree of intention is required for a conviction on account of complicity in genocide, international criminal law is still in a stage of development and does not seem to have crystallized out completely. The main question, which has not yet been answered unanimously in all respects, is whether the accessory must have “known” that the perpetrator acted with a genocidal intention or that a lesser degree of intention is sufficient, compared to or similar to the conditional intention as accepted in the Dutch legal system, or in other words: willingly and knowingly accepting the reasonable chance that a certain consequence or a certain circumstance will occur. The Court wishes to add that it holds the opinion that the legal history of the International Crimes Act does not provide an unambiguous answer for this matter either. Seen the fact that a ruling by the Court on this matter — notwithstanding the circumstance that such a ruling could possibly make a contribution to the development of law —, in view of the following consideration could not produce more than an ‘obiter dictum’ which in the eyes of the Court does not fit in with the decision on the case concerned, the Court has decided to leave this question for what it is.

Re C. When answering the above mentioned question, it is important to focus on the circumstance whether especially those actions carried out by the perpetrators that have not been included in the charges contribute to the credibility of the fact that these perpetrators did have genocidal intentions.

The Court takes the grounds that the case file does not include enough facts and circumstances which, with a sufficient degree of certainty, could lead to the assumption

that the defendant, before or during the time of his actions in any way had knowledge about those actions of the perpetrators that have not been included in the charges, neither that he could reasonably suspect that these would occur or had occurred, nor did it become apparent that the defendant, in those days, had any other relevant information from which he could have concluded the genocidal intention of the perpetrators. In this respect the Court has taken into account that, as appears from the documents, the Iraqi authorities kept their actions against the Kurds away from publicity as much as possible. (Consequently) even a number of Dutch ambassadors, who were assigned to Bagdad at that time, as evidenced by their statements, appeared to have had no knowledge about the things that were actually happening to the Kurds.

Based on the above, the Court has come to the conclusion that it has not been established with a sufficient degree of certainty that the defendant, before or during this actions, disposed of the information that could give him the knowledge that by acting the way he did, which actions he has been charged with in the present proceedings, he would be assisting the perpetrators in the fulfilment of this alleged genocidal intention, or that could have made him aware that he willingly and knowingly accepted that reasonable chance. Seen that this criteria of intention, which is regarded as minimal, (also from an international criminal law point of view) has not been met, the Court believes that it has not been legally and convincingly proven that his intentional act, not even in a conditional way, was also targeted at the genocidal intention of the perpetrators.

Therefore the defendant should be acquitted of the principle charge under count 1.

It is disappointing that, having established that there were ‘strong indications that the leaders of the Iraqi regime […] let themselves be guided by a genocidal intention with regards to at least a substantial part of the Kurdish population group in (Northern) Iraq’, the court was unwilling to conclude that a genocide had taken place during the Anfil campaign, citing the international significance of such a finding as a reason not to provide it. Furthermore, in relation to the question of international criminal law, in direct contrast to the position taken by the Canadian Supreme Court in *Mugesera*, the Hague Court of Appeal appeared to refuse even to consider the jurisprudence of the ICTY or ICTR noting merely that ‘in relation to complicity in genocide, international criminal law is still in a stage of development and does not seem to have crystallized out completely’. In his ILDC commentary on the case, one of the co-authors of this chapter pointed out that: ‘Under international criminal law it is generally acknowledged that “knowledge” suffices as the required *mens rea* of accomplices to genocide’.[[18]](#footnote-19) A finding to this effect by the Hague Court of Appeal would have assisted in the ‘crystallization’ of the *mens rea* of complicity in genocide. The commentator, nevertheless, notes that: ‘Possibleignorance of genocide did not rule out, however, that Van Anraat knew or had reason to know that the commodities he had delivered to the Iraqi regime would be converted into chemical weapons which would be employed against both the Iranian enemy and the Kurdish population’.[[19]](#footnote-20) It is this knowledge which, when proven, led to Van Anraat’s conviction of complicity in war crimes and his eventual imprisonment for a period of 17 years.

2. Crimes against humanity

Crimes Against Humanity were defined in Article 6(c) of the Nuremberg Charter as including ‘[m]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated’. The link to armed conflict was maintained in Article 5 of the Statute of the ICTY but not in Article 3 of the ICTR Statute which introduced the notion of a ‘widespread or systematic attack against any civilian population’. Both Tribunals extended the relevant actus reus to include torture and rape. The Statute of the International Criminal Court defines crimes against humanity in Article 7 and further extends the relevant acts to include, additionally, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; enforced disappearances and the crime of apartheid.[[20]](#footnote-21) Article 7(2) introduces a policy-element to the definition by defining an attack directed against any civilian population as meaning ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’.[[21]](#footnote-22)

**Canada (Minister of Citizenship and Immigration), League for Human Rights of B****’nai Brith Canada (intervening) and ors (intervening) v Mugesera (Léon) and ors, Appeal to Supreme Court, 2005 SCC 40, [2005] 2 SCR 100, (2001) 254 DLR (4th) 200, ILDC 180 (CA 2005), 28th June 2005, Canada; Supreme Court [SCC]**

For a brief summary of the facts of this case, see section III1(a).

**(a)** **The Criminal Act of a Crime Against Humanity**

**1. Counselling an Enumerated Act That Is Not Committed and Murder as a Crime Against Humanity**

**132** The first question raised on the facts of this appeal is whether the fact that Mr. Mugesera counselled the commission of murders that were not committed meets the initial criminal act requirement for a crime against humanity. Section 7(3.77) of the *Criminal Code* provides that “counselling” an act listed in s. 7(3.76) will be sufficient to meet the requirement. Murder is one of the acts listed in s. 7(3.76). Mr. Duquette found, as a matter of fact, that Mr. Mugesera’s speech counselled the commission of murders. His findings of fact are sufficient to conclude, as discussed above, that Mr. Mugesera satisfied both the physical and mental elements of the “underlying offence” of counselling a murder that is not committed.

**133** This does not end our analysis, however. As we noted above, s. 7(3.76) expressly incorporates principles of customary international law into the domestic formulation of crimes against humanity. We must therefore go further and consider whether the prevailing principles of international law accord with our initial analysis. A review of the jurisprudence of the ICTY and the ICTR suggests that it does not.

**134** The statutes of the ICTY and the ICTR (U.N. Doc. S/RES/827 (1993) and U.N. Doc. S/RES/955 (1994), respectively) do not use the word “counselling”. This does not mean, however, that the decisions of these courts cannot be informative as to the requirements for counselling as a crime against humanity. Both statutes provide that persons who “instigate” the commission of a proscribed act may be liable under international law. This Court found in *Sharpe*, at para. 56, that counselling refers to active inducement or encouragement from an objective point of view. The ICTR has found that instigation “involves prompting another to commit an offence”: *Akayesu*, Trial Chamber, at para. 482. The two terms are clearly related. As a result, we may look to the jurisprudence of the ICTY and the ICTR on instigation in determining whether counselling an offence that is not committed will be sufficient to satisfy the initial criminal act requirement for a crime against humanity under s. 7(3.76) of the *Criminal Code*.

**135** In *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T (Trial Chamber I), 6 December 1999, the ICTR conducted a review of the jurisprudence of the ICTY and the ICTR on individual criminal responsibility. The ICTR found that instigation (other than of genocide) involves (1) direct and public incitement to commit a proscribed act; but (2) *only where it has led to the actual commission of the instigated offence*: para. 38; see also *Akayesu*, Trial Chamber, at para. 482. It should be noted that the second requirement does not mean that the offence would not have been committed “but for” the instigation. However, a sufficient causal link must be made out: *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T (ICTY, Trial Chamber III), 26 February 2001, at para. 387.

**136** Mr. Duquette of the IAD was unable to find that the commission of murders had actually occurred as a result of Mr. Mugesera’s counselling. An interpretation of ss. 7(3.76) and 7(3.77) of the *Criminal Code* in light of customary international law shows that Mr. Mugesera’s counselling of murder was not sufficient to satisfy the initial criminal act requirement for a crime against humanity.

(…)

**2. Speech That Incites Hatred and Persecution as a Crime Against Humanity**

**147** In *Keegstra*, this Court found that the harm in hate speech lies not only in the injury to the self-dignity of target group members but also in the credence that may be given to the speech, which may promote discrimination and even violence (p. 748). This finding suggests that hate speech always denies fundamental rights. The equality and the life, liberty and security of the person of target-group members cannot but be affected: see, e.g., *Prosecutor v. Ruggiu*, 39 ILM 1338 (ICTR, Trial Chamber I 2000), at para. 22. This denial of fundamental rights may, in particular instances, reach the level of a gross or blatant denial equal in gravity to the other acts enumerated in s. 7(3.76). This is particularly likely if the speech openly advocates extreme violence (such as murder or extermination) against the target group, but it may not be limited to such instances. In contrast to the case of counselling an enumerated violent act, whether the persecution actually results in the commission of acts of violence is irrelevant: *Media Case*, at para. 1073.

**148** What then can be said of Mr. Mugesera’s speech? Mr. Duquette found as a matter of fact that Mr. Mugesera’s speech had incited hatred of Tutsi and of his political opponents (para. 335). This incitement included the encouragement of acts of extreme violence, such as extermination (para. 336). Keeping in mind that acts of persecution must be evaluated in context, Mr. Duquette’s finding that Mr. Mugesera’s speech occurred in a volatile situation characterized by rampant ethnic tensions and political instability which had already led to the commission of massacres is also compelling (paras. 335–38). A speech such as Mr. Mugesera’s, which actively encouraged ethnic hatred, murder and extermination and which created in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents, bears the hallmarks of a gross or blatant act of discrimination equivalent in severity to the other underlying acts listed in s. 7(3.76). The criminal act requirement for persecution is therefore met.

**149** Having concluded that the criminal act requirement for persecution is made out, we must go on to consider whether the culpable mental element of persecution is made out. Mr. Duquette found that Mr. Mugesera had a discriminatory intent in delivering his speech (para. 335). He found that Mr. Mugesera targeted Tutsi and political opponents on the sole basis of ethnicity and political affiliation with the intent to compel his audience into action against these groups. The IAD’s findings of fact thus amply support a finding that Mr. Mugesera not only committed the criminal act of persecution, but did so with the requisite discriminatory intent.

**150** In sum, the criminal act requirement for a crime against humanity under ss. 7(3.76) and 7(3.77) of the *Criminal Code* contains two primary elements: (1) the accused has committed an underlying enumerated act; and (2) that act contravened international law. With respect to the first element, both the physical and mental elements of the underlying act must be made out. In the case at bar, there were two possible underlying acts: counselling of murder, and persecution by hate speech. For counselling of murder to be considered a crime against humanity under international law, murders must actually have been committed. Mr. Duquette’s finding that no murders were proven to have resulted from the speech therefore precludes a finding that Mr. Mugesera counselled murder within the meaning of s. 7(3.76). The other possible underlying act, persecution, is a gross or blatant denial of fundamental rights on discriminatory grounds equal in severity to the other acts enumerated in s. 7(3.76). Hate speech, particularly when it advocates egregious acts of violence, may constitute persecution. In this case, it does.

**(…)**

**157** A contentious issue raised by the “widespread or systematic attack” requirement is whether the attack must be carried out pursuant to a government policy or plan. Some scholars suggest that limiting crimes against humanity to attacks which implement a government policy is necessary due to the nature and scale of such crimes: see, e.g., Bassiouni, at pp. 243–46. Others point out that the existence of a government policy has never been required and suggest that crimes against humanity take on their international character simply by virtue of the existence of a widespread and systematic attack: see, e.g., Mettraux, at pp. 270–82.

**158** The Appeals Chamber of the ICTY held in *Prosecutor v. Kunarac, Kovac and Vukovic* that there was no additional requirement for a state or other policy behind the attack: Case Nos. IT-96-23-A & IT-96-23/1-A, 12 June 2002, at para. 98. The Appeals Chamber acknowledged that the existence of such a policy might be useful in establishing that the attack was directed against a civilian population or that it was widespread or systematic (particularly the latter). However, the existence of a policy or plan would ultimately be useful only for evidentiary purposes and it does not constitute a separate element of the offence (para. 98). It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement (see, e.g., art. 7(2)(*a*) of the *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998).

**159** Considering all these factors, was a widespread or systematic attack taking place when Mr. Mugesera gave his speech? With respect to whether the attack was widespread, Mr. Duquette found that, between October 1, 1990 and November 22, 1992, almost 2,000 Tutsi were massacred in Rwanda (para. 336). Mr. Duquette also found as a fact that in October 1990 approximately 8,000 people, 90 percent of them Tutsi, were falsely arrested on suspicion of complicity with the RPF (para. 26). The massacres occurred in various parts of the country and the number of victims grew to the thousands. This suggests a large-scale action directed against a multiplicity of victims.

The first point to note is that, as this is a case relating to deportation, the relevant Canadian immigration law does not require proof of the commission of a crime against humanity beyond reasonable doubt but, rather, requires that there be ‘reasonable grounds to believe’ that Mugesera committed such a crime. Nevertheless, in determining that question, the Supreme Court undertook a lengthy and detailed analysis of the *actus reus* and *mens rea* of incitement to commit a crime against humanity. The analysis is very clear and precise and the judgment will no doubt prove useful in developing the jurisprudence, both domestic and international, around the relevant issue.

As highlighted above in relation to the discussion of Mugesera’s involvement in the incitement of the crime of genocide, the reliance by the court on the jurisprudence of the ICTY and ICTR as a means of interpreting Canadian statutory provision is arguably controversial. Given that the relevant Canadian law on crimes against humanity are derived from customary law and not from treaty, as was the case in relation to genocide, the reference by the Supreme Court to ‘the expertise of these tribunals and the authority in respect of customary international law with which they are vested’[[22]](#footnote-23) requires further explanation, particularly given the fact that the approach was utilized by the Supreme Court as a grounds for reconsidering its own approach to the jurisprudence of the ICTR in *R v Finta*.[[23]](#footnote-24) Nevertheless, it is clear that the court did not apply this jurisprudence as constitutive of customary international law but rather as highly persuasive decisions that ‘should not be disregarded lightly by Canadian courts applying domestic legal provisions [...] which expressly incorporate international law’.[[24]](#footnote-25) This referential approach to the jurisprudence of the ICTR may be welcomed by international criminal lawyers but it is an approach that may not be followed in other domestic courts.

The final matter worthy of note is the reference of the Supreme Court to the non-requirement of a state or other requirement of a policy as an element of crimes against humanity, citing the decision of the ICTY in *Prosecutor v Kunarac, Kovac and Vukovic*.[[25]](#footnote-26) This correctly reflects both Canadian law and the customary international law applicable at the time of the speech. Such a requirement is not found in the Statutes of either the ICTY or ICTR. The Supreme Court, however, acknowledges the existence of Article 7(2)(a) of the ICC Statute which requires that an act committed against any civilian population requires to be committed ‘pursuant to or in furtherance of a state or organizational policy to commit such an attack’. This change in the definition of crimes against humanity might have resulted in a different decision in the present case had it been part of customary law at the time of the delivery of the speech by Mugesera.

**Public Prosecutor****’s Office, de Lois (Graciela) (intervening) and ors (intervening) v Manzorro (Adolfo), Final Appeal Judgment, Case No 16/2005, Aranzadi JUR 2005/132318, ILDC 136 (ES 2005), 19th April 2005, Spain; National Court; Criminal Chamber**

For a brief summary of the facts of this case see section II.

**2**. The definition of a crime against humanity in our Penal Code is based on the commission of a specific act, such as murder, bodily harm, illegal detention etc. (underlying crime) in the context of a general and systematic attack on the civilian population or part of the population, considering that in all cases the commission of such acts will be considered a crime against humanity: 1) Due to the victim’s status as a member of a group or community persecuted for political, racial, national, ethnic, cultural, religious, sexual or other reasons universally recognised as unacceptable under international law; 2) In the context of an institutionalised regime of systematic oppression and domination by one racial group of one or more racial groups with the intention of perpetuating this regime.

(…)

**4**. With regards to the elements that define a crime against humanity, the jurisprudence of the International Criminal Tribunal of the Former Yugoslavia, through various relevant judgments, has established a series of elements or points that define the crime and proof of the same, which due to their usefulness and applicability to this case we have listed below:

1) The crime must be committed directly against a civilian population. ICTY *Kunarac, Kovac and Vukovic* (Trial Chamber) 22.02.2001; (Appeals Chamber) 12.06.2002. par. 90.

2) The crime does not have to be committed against the whole population, but a sufficiently large number of the population (representative of the population) ICTY *Kunarac, Kovac and Vukovic*, (Appeals Chamber) 12.06.2002, par. 90.

3) The population must be predominantly civilian. ICTY *Kordic and Cerkez* (Trial Chamber) 26.02.2001, par. 180; *Naletilic and Martinovic*, (Trial Chamber) 31.03.2003, par. 235; *Jelisic*, (Trial Chamber) 14.12.1999, par. 54.

4) The presence of non-civilians does not deprive the population of its civilian status. *Prosecutor v. Kupreskic et al.* (Trial Chamber) 14.01.2000, par. 549.

5) An interpretation of the concept of a civilian population is made in broad terms. *Jelisic*, (Trial Chamber) 14.12.1999, par. 54; *Prosecutor v. Kupreskic et al.* (Trial Chamber) 14.01.2000, par. 547–549.

6) Protection refers to any civilian population independent of whether or not it is the civilian population proper. *Vasilejevic*, (Trial Chamber) 29.11.2002, par. 33;

7) At present, the requirement of an attack on the civilian population means an act in accordance with policies of the State or a non-government organisation, but which exercises de facto political power.

7) The attack must be “widespread or systematic”. *Kunarac, Kovac and Vukovic* (Trial Chamber) 22.02.2001, par. 431;

Widespread: *Kordic and Cerkez* (Trial Chamber) 26.02.2001, par. 179; *Blaskic* (Trial Chamber) 3.03.2000, par. 206; *Martinovic*, (Trial Chamber) 31.03.2003, par. 236.

Systematic: *Kunarac, Kovac and Vukovic*, (Appeals Chamber) 12.06.2002, par. 94; *Naletilic and Martinovic*, (Trial Chamber) 31.03.2003, par. 236; *Blaskic* (Trial Chamber) 3.03.2000, par. 203.

8) It is the attack that must be “widespread or systematic”, not the acts of the defendant.

9) A single act can be considered a crime against humanity if it is in connection with a “widespread or systematic” attack. *Kordic and Cerkez* (Trial Chamber) 26.02.2001, par. 178; *Kupreskic et al.* (Trial Chamber) 14.01.2000, par. 550.

10) It must be remembered that there are many factors that determine when an attack is “widespread or systematic” and which can be inferred from the context.

11) Attacks must occur on a large scale or be systematic or happen within the framework of a policy or plan of the state, but the latter need not necessarily apply.

12) Intent. The author must have the aim or intention to commit the underlying crimes. *Vasilejevic*, (Trial Chamber) 29.11.2002, par. 37;

13) The motives of the defendant are irrelevant. *Kunarac, Kovac and Vukovic*, (Appeals Chamber) 12.06.2002, par. 103; *Tadic* (Appeals Chamber) 15.07.1999, par. 270–272; *Kordic and Cerkez* (Trial Chamber) 26.02.2001, par. 187.

14) Whether an act is directly against the civilian population or a specific person is irrelevant. What is relevant is that the attack, and not the specific acts of the defendant, is against a civilian population. *Kunarac, Kovac and Vukovic*, (Appeals Chamber) 12.06.2002, par. 103.

15) Discriminatory intent is only necessary for the crime of persecution. *Tadic* (Appeals Chamber) 15.07.1999, par. 283, 292, 305; *Kordic and Cerkez* (Trial Chamber) 26.02.2001, par. 186; *Blaskic* (Trial Chamber) 3.03.2000, par. 244, 260; *Todorovic* (Trial Chamber) 31.07.2001, par. 113.

16) Awareness: The author must be aware that (s)he is participating in a widespread or systematic attack. *Kunarac, Kovac and Vukovic*, (Appeals Chamber) 12.06.2002, par. 102, 410, *Tadic* (Appeals Chamber) 15.07.1999, par. 271; *Kordic and Cerkez* (Trial Chamber) 26.02.2001, par. 185; *Blaskic* (Trial Chamber) 3.03.2000, par. 244, 247); alternatively, (s)he must accept the risk that the acts are part of such an attack. *Vasilejevic*, (Trial Chamber) 29.11.2002, par. 37; *Blaskic* (Trial Chamber) 3.03.2000, par. 257; *Krnojelac* (Trial Chamber) 15.03.2002, par. 59.

The defendant must be aware of the attack and the connection between his/her acts and the context.

17) Knowledge of the details of the attack is not necessary. *Kunarac, Kovac and Vukovic*, (Appeals Chamber) 12.06.2002, par. 102; *Krnojelac* (Trial Chamber) 15.03.2002, par. 59.

18) The defendant need not necessarily approve of the context of the attack of which his/her acts form part. *Kordic and Cerkez* (Trial Chamber) 26.02.2001, par. 185.

19) This knowledge of the context can be inferred from the concurrence of a series of elements, such as awareness of the political context in which the attack occurs, the role or position of the defendant within the attack, his/her relationship with the political or military hierarchy, the scope, seriousness and nature of the acts committed, etc. *Blaskic* (Trial Chamber) 3.03.2000, par. 258–259.

20) In terms of underlying crimes, in the case of murder there is no need to produce a corpse in order for the crime to exist. *Krnojelac* (Trial Chamber) 15.03.2002, par. 326

As noted previously, the High Court divulged a highly friendly attitude towards international law. The same can be said of its attitude to the jurisprudence of the ICTY, which it cited abundantly and without discussion as to its applicability either in terms of its own legal status or indeed to the factual situation before the court. Nevertheless, the citation of this jurisprudence is meticulous and helpful leading the ILDC commentator to conclude that ‘despite all its shortcomings, tenuous, and at times questionable reasoning, this decision constitutes a meritorious effort to bypass the defects of Spanish criminal law on crimes against humanity and to contribute to the fight against impunity’.[[26]](#footnote-27) Similar use was made by the Canadian Supreme Court of the jurisprudence of both the ICTY and ICTR in *Mugesera*.

**Prosecutor v Paulov (Karl-Leonhard), Cassation judgment, no 3-1-1-31-00, Official Gazette, Riigi Teataja-RT Part III 2000, 11, 118, ILDC 198 (EE 2000), 21st March 2000, Estonia; Supreme Court**

Paulov was accused of killing three members of the Estonian resistance against Soviet occupation in 1945 and 1948. The status of the victims as members of a resistance force was at issue at all levels of the proceedings, as was the meaning and effect of Article 61 of the Estonian Criminal Code which purported to deal with crimes against humanity.

**4.** In order to distinguish crimes against humanity from other criminal offences one must proceed from the following. In case of a convention criminal offence the perpetrator does not deny derogatory value in itself. The perpetrator does not place himself outside the existing value system. In killing the victim he acknowledges human life as having value, and its inviolability, even though he finds justification for his own specific act. In case of crimes against humanity the perpetrator places himself for various reasons (first and foremost religious, national or ideological) outside of the belief system. He acts in the name of other purposes (e.g. ethnic cleansing) and the values under attack (life, health, physical inviolability) are for him worthless in the given context. The attack need not have been directed against the specific victim; it could have been directed at a random member of the group.

**5.** The fact that genocide was not delimited from other crimes against humanity caused the Põlva County Court at first to proceed from the offence of genocide, then to use in the reasons partly such characteristics typical of crimes against humanity which cannot be considered as genocide, only to return to the offence of genocide at the end. The appeal proceeded only from the offence of genocide, without distinguishing genocide from other crimes against humanity. Neither did the Circuit Court distinguish between these two crimes, noting that ‘the acts described cannot be qualified as a crime against humanity since international agreements do not define the killing of a member of a group resisting an occupying regime as a crime against humanity’.

The Criminal Chamber of the Supreme Court emphasizes that ‘*a group initiating resistance against an occupying regime*’ as noted the composition of Section 611 of the Estonian Criminal Code, is a feature of an offence of genocide, not of a crime against humanity.

**6.** According to the determination of the County Court and the Circuit Court K.–L. Paulov:

6.1 was an agent of the Soviet Security with special authorisations;

6.2 he acted according to orders, taking part in the physical extermination of individuals called bandit groups and single bandits;

6.3 during such operations he murdered A. Sibul and Alfred and Aksel Pärl.

Based on these factual circumstances, both courts have come to the conclusion that K.–L. Paulov is guilty of murdering the victims, whereat the Circuit Court made a specification and noted that pursuant to clause 1 of Article 50 of the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1948 Relating to the Protection of Victims of International Armed Conflicts the victims have to be considered civilians

**7.** In the appeal in cassation only the concept of crimes against humanity is used and it is claimed that the victims hid in the forest as civilians to escape repression. The occupying powers, however, decided to deprive them of their right to fair trial and murder them, and so it is claimed that here a crime against humanity is involved.

**8.** The Supreme Court agrees with this last standpoint and notes that depriving an individual to their right to life and to fair trial could be qualified as a crime against humanity as stipulated in Article 6(c) of the Charter the Nuremberg International Military Tribunal. K.–L. Paulov committed the murders in the interest and knowledge of the occupying authorities and was aware that no criminal liability would follow from his actions pursuant to Article 136 of the Criminal Code of the Federal Russian Soviet Socialist Republic, which was applicable to the territory of the Estonian Soviet Socialist Republic at the time. Taking into account that neither the court of first instance, nor of the second instance, in deciding the application of Section 611 of the Criminal Code of Estonia clearly proceeded from the necessity of distinguishing between genocide and other crimes against humanity, the courts incorrectly applied subsection 1 of Section 39(2) of the Code of Criminal Court and Cassation Procedure by incorrectly interpreting the provision in question of the Criminal Code.

The various stages of this case evidence considerable confusion as to the different crimes of genocide, crimes against humanity and, indeed, war crimes. Even within the judgment of the Supreme Court, it is not entirely clear what the relevance of the discussion of genocide might be. Consequently, the suggestion that genocide is merely a sub-class of crimes against humanity should be resisted. Similarly, the case is deficient in terms of its discussion of the notion of widespread or systematic attack, which is overlooked in favour of a much lower threshold of attacking civilians hiding from repression. Nevertheless, the particular focus of the Estonian Supreme Court on the notion of humanity as a distinguishing factor in the identification of crimes against humanity is interesting.

3. War crimes

The term ‘War Crimes’ typically refers to serious violations of the body of law and customs of armed conflict, often referred to as international humanitarian law.[[27]](#footnote-28) Prior to the Second World War, there was a degree of acceptance that the intrinsic nature of war *necessarily* entailed a decline in the standards of human behaviour normally expected, to a degree that was necessary to reach the ultimate goal of victory. This ethos was arguably perpetuated by the difficulty of regulating breaches of international humanitarian law, and prosecuting individuals. Undoubtedly, the phrase *silent enim leges inter arma* (no law in war) is no longer accepted by the international community, as international humanitarian law attempts to govern behaviour during wartime. (There is, however, the perpetual problem of enforceability with respect to the laws of war during active hostilities.)

The Charter of the Nuremberg International Military Tribunal (NIMT) included the explicit definition of War Crimes as ‘violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity’.[[28]](#footnote-29) In the judgement of the Tribunal, it was stated that the crimes laid out in Article 6b of the Charter, ‘were already recognised as war crimes under international law’,[[29]](#footnote-30) including by provisions of the Hague Regulations of 1907.[[30]](#footnote-31)

The Geneva Conventions, which were responsive to the atrocities committed during the Second World War, do not refer to ‘War Crimes’ per se, but rather ‘grave breaches’:

‘Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.[[31]](#footnote-32)

Internatioanl criminal law, in its relative modernity, has since been much more explicit regarding breaching the laws of war. The next substantial contributions came from the ICTY and ICTR, which confirmed the grave breaches provisions as part of customary international law through their non-exhaustive definitions in their Statutes.[[32]](#footnote-33) The ICTY includes *customs* of war within its definition, whereas the ICTR refers solely to violations of Common Article 3 to the Geneva Conventions 1949 and Additional Protocol II 1977.

The ICC in contrast, however, includes an *exhaustive* list of fifty offences relating to war crimes. As such, it is by far the most detailed, and includes four main headings, primarily the grave breaches provisions of the Geneva Conventions 1949, followed by ‘other serious violations of the laws and customs applicable in international armed conflict’. Also included, are serious violations of Common Article 3 to the Geneva Conventions in relation to *international* armed conflict, as well as other serious violations of the laws and customs of war regarding *non*-international armed conflict.[[33]](#footnote-34) It is worth mentioning the wording of the first sentence of Article 8, which reads: ‘The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’.Unlike ‘Crimes Against Humanity’, there is in fact no scalar requirement for War Crimes, despite the use of the wording ‘large-scale’. A *single* act which meets the requirements of a war crime, even when committed in isolation, is sufficient.

(a) Required nexus to armed conflict

**Niyonteze and Military Prosecutor of the Military Tribunal of First instance 2 v Military Appeals Tribunal 1A, Cassation judgment, ILDC 349 (CH 2001), 27th April 2001, Switzerland; Military Supreme Court**

This case concerned a Rwandan citizen residing in Geneva, Niyonteze, who was accused of committing acts during the civil war in his role as *bourgmestre* (mayor). In 1999, the Military Tribunal at First Instance found him to be guilty of, among various counts, homicide, and consequently sentenced him to life imprisonment. On appeal in 2000, the Military Appeals Tribunal reversed the judgement in part, but upheld Niyonteze conviction of serious violations of Common Article 3 to the Geneva Conventions, and Article 4 of Additional Protocol to the Geneva Conventions 1949. Niyonteze then appealed to the Military Supreme Court; he argued that the acts he had committed were not breaches of international humanitarian law, as there was an insufficient link between those acts and the armed conflict that took place.

**9**. The defendant complains of a violation of criminal law (cf. Article 185 (1) (d) CPM), i.e. Articles 108 (3) CPM and 109 (1) CPM, Common Article 3 to the Geneva Conventions, Articles 146 and 147 of Geneva Convention IV and Article 4 of Additional Protocol II. He argues that the acts attributed to him (cf. supra paragraphs 6 and 7) do not fall within a link of close connection with the Rwanda conflict and consequently do not fulfill the objective conditions for him to be considered as the perpetrator of the aforementioned violations of international humanitarian law.

(…)

For Common Article 3 and Article 4 of Protocol to be applicable, it is still necessary, within the framework of Article 109 CPM — that these acts (and their perpetrator) are in a certain connective relationship with the armed conflict, because any attempt on a life in the territory of a country experiencing such a conflict would be covered by international humanitarian law. The Court of Appeal has found that this condition was met; the defendant contests this.

(…)

**e****)** In the Rwandan institutional system, the mayor is considered an agent of the State. It is a prominent position, as the communities are few in number (145 communities in 1991, formed, for the most part, by 40,000 to 50,000 inhabitants, cf. Des Forges, op. cit., p. 55). If the mayor does not formally have any military attributes, it follows from the file that the defendant was normally accompanied by soldiers over whom he in fact exercised some authority. Both at the time of the meeting at Mont Mushubati and his visits to Kabgayi, he acted in his capacity as mayor or making use of the authority conferred on him by this appointment, by issuing instructions to those under him. His objective was to “support or initiate efforts of war”, to use the terminology applied by the ICTR, in other words, to promote the causes and the objectives of the government in place aimed at the massacre of Tutsis and moderate Hutus.

(…)

It is clear on the one hand that the link between the offences committed at Mont Mushubati and Kabgayi, and the armed conflict is sufficient and, on the other hand, that as a result of his authority, and the manner in which he carried out his functions as mayor, the defendant met the required conditions for being found to be a perpetrator of the offences, under the scope of Common Article 3 and the provisions of Protocol II. The ground for appeal based on a violation of Article 109 CPM is consequently unfounded.

Although acknowledging that decisions of the ICTR do not constitute binding precedents, the Military Supreme Court draws heavily on the jurisprudence of the ICTR to establish that civilians can commit violations of Common Article 3 and of Additional Protocol II where a sufficient link is established between the individual and the relevant armed conflict. However, it is worth bearing in mind the opinion of the ILDC commentator, who noted that the Military Supreme Court could and should have gone further:

‘One could greet the attempts of the Military Supreme Court to apply faithfully the key concepts of international criminal law and to pay careful attention in this regard to the case law of the ICTR. However, in this particular case, one should recognize that the Military Tribunal of First Instance and the Military Appeals Tribunal were, in fact, better inspired. For they had rightly considered that not only persons related to the armed forces, but every individual could be held responsible for violations of Common Article 3 and Additional Protocol II. Indeed, less than two months after the decision was rendered by the Military Supreme Court, the Appeals Chamber of the ICTR itself found that the Trial Chamber had erred on a point of law in restricting the application of Common Article 3 to a certain category of persons. (See Prosecutor v Akayesu, [§ 630–646])’.[[34]](#footnote-35)

**Prosecutor v Joseph M. Rechtbank** **‘s-Gravenhage, 23-03-2009, ECLI:NL:RBSGR:BK 0520 09/750009-P0609/ 750007-07 (not in ILDC)**

On or around 13 April 1994, the defendant and others allegedly stopped an ambulance in Birogo, Rwanda, and killed two women occupants together with their children. Three days later he attacked Tutsi civilians who stayed at the Seventh Day Adventists Complex in Mugonero. He was also accused of the rape and murder of three other women as well as other offences. Although found guilty of committing acts of torture and sentenced to twenty years’ imprisonment, the defendant was cleared of charges of war crimes due to the lack of a nexus between the crimes and the armed conflict in Rwanda.

**20**. The Defendant has committed very serious violent crimes against the passengers of an ambulance.

(…)
**22**. The Defendant threatened the passengers of the ambulance with an attack on their lives, physical violence, death, mutilation, cruel (inhumane) treatment and torture. He threatened Mrs. [witness 3] and Mr. [witness 4] with violence against their lives and with murder.

(…)

**23**. Consequently the conclusion should be that the violent offences committed by the Defendant, both the ones against the passengers of the ambulance and against Mrs. [witness 3] and Mr. [witness 4], constitute gross violations of international humanitarian law, which result in individual criminal responsibility of the Defendant.

Requirements for war crimes

**25**. Based on CA 3 and APII, and the interpretation given to these treaties by (international) case law it is concluded that an offence can only be classified as a war crime on the following conditions.
(…)

(4) There must be a close correlation between the indictable offence and the armed conflict, a concept named ‘nexus’ in (international) literature and case law. After all the intended object of penalisation of war crimes is to offer protection against crimes which are (closely) related to the war.

(…)

**65**. The Court (…) recalls (that) the (…) intention of the penalisation of war crimes is to offer protection against the consequences of a war in a conflict between armed forces who are capable of fulfilling their obligations under international humanitarian law. It agrees that the explanation on this penalisation which was provided for by case law of the international tribunals has undoubtedly enlarged the scope of this penalisation, however without forgetting the intended interest of protection. Furthermore the Court is of the opinion that this case law, especially of the ICTR, has been formed in cases against accused who had a different status than the Defendant who is presently on trial and that the ICTR advocates to observe restraint regarding non-combatants, like the Defendant. In the opinion of the Court the sole circumstance that the armed conflict against the RPF provided the regime with an excuse for ethnic violence and the Defendant with a motive and a licence to commit his crimes, do not turn these criminal offences into war crimes. The connection between these crimes and the armed conflict, that was carried out at the same time by the RAF and the RPF, is too remote; in other words the required close relationship (the nexus) has not been established.

66. Consequently the Court acquits the Defendant of the criminal offences that he was charged with under the primary counts 1 and 3 of the indictment with case number 09/750009-06.

This decision is a challenging one for those seeking to bring an end to impunity for international crimes. On the face of it, it places a significant limitation on the extent of the war crimes regime as currently laid down in the ICC statute. On the other hand, the law does require a nexus between the conduct in question and a relevant armed conflict. The case provides a detailed and thorough analysis of the jurisprudence of both the ICTY and ICTR on the point at issue to conclude that in the circumstances of the case, there was not a sufficient nexus between the offences and the wider armed conflict.

It is worth noting that if offences were sufficiently widespread and systematic, they might have constituted crimes against humanity (or, indeed, genocide if the required *mens rea* is proven). Given that the defendant was ultimately convicted of torture, it is surprising that the case did not address crimes against humanity more directly. Nevertheless, the case does provide some interesting guidance to other courts facing the question of what is the required nexus between war crimes and an underlying armed conflict.

(b) Relationship between war crimes and domestic criminal law

**Public Prosecutor v K, Judgment, Case No 02853/02 U, Decision No LJN: AF6988, NS 2004, 199, ILDC 142 (NL 2004), 7th May 2004, Netherlands; Supreme Court [HR]**

This case concerned ‘Mrs K’, who was a leading figure in the Kurdish Labour Party, and the question of her extradition. It was argued by her Defence Counsel that her relevant acts were governed exclusively by international humanitarian law, which permitted the killing of enemy combatants. This meant, it was argued, that the double criminality requirement had not been met. The District Court of Amsterdam agreed on this point and declined the extradition request. The Supreme Court in the current case disagreed and allowed the extradition of Mrs K.

**3.3.6.** The cited Common Article 3 of the Geneva Conventions, in brief and to the extent it is important here, forbids any party to an internal armed conflict from making attacks on the life of or committing physical violence upon people taking no active part in the hostilities. Both The Netherlands and Turkey are party to the Conventions.

From the textual history of the aforesaid Article 3 it appears that the drafting of this provision resulted from the wish to have the rules on international armed conflict applicable to the humanitarian laws of war set as forth in the aforesaid Conventions, seen as essential to civilized Nations, applicable also to internal armed conflict. The goal was therefore the protection of the aforesaid people in case of an internal armed conflict and also to lay down a legal basis for humanitarian intervention by the International Red Cross or any other neutral international assistance organization, without having such intervention characterized as improper involvement in an internal matter of a State involved in the conflict. Article 3 contains minimum norms to which the parties in conflict must adhere with respect to the previously mentioned people, and are intended for their protection.

**3.3.7.** The circumstance that the previously mentioned Article, which contains no obligation for the parties to the Conventions to make any actions criminal, does not apply in any way reduces the authority of the States involved to prosecute and punish any criminal offences committed by members of an armed oppositional group in connection with an internal armed conflict. Article 3 does not by its nature withhold its protection from attacks on the life of or physical violence upon any people other than those not taking an active part in the hostilities. This article does not legitimize such actions. It is an incorrect opinion that the humanitarian law of war applies exclusively to cases of an internal armed conflict, so that application of general criminal law is switched off. One of the questions to be distinguished from the preceding, moreover, is whether in this concrete instance there has been a political offence, in which case extradition must, for this reason, be declared inadmissible. This question is examined in 3.4 below.

**3.3.8.** It follows from these considerations that the penalization of violations of the humanitarian law of war in internal armed conflicts under Article 6 of the International Crimes Act does not mean that these actions could not (also) be punishable under general criminal law and even less that other behaviour that might be carried out in the context of an internal armed conflict could not on that account be made punishable under general criminal law.

**3.3.9.** Under Netherlands law the offences for which extradition is requested, are made punishable by Article 140 of the Criminal Code in connection with Article 289 and/or Article 303 of the Criminal Code. Under these provisions, the offences can be punished under Netherlands law with imprisonment of a maximum of at least one year. It is true that the requesting State has not given consideration to the corresponding criminal provisions specified in the cited Articles 289 and 303 of the Criminal Code, but it is general knowledge also that the behaviours punishable under these Articles are also punishable under the law of the requesting State with a punishment in the spirit of Article 2 first paragraph of the European Convention on Extradition and that this penalty provision extends to the protection of the same right as does the Netherlands penalty provision.

**3.3.10.** It follows from the preceding that this satisfies the requirements with respect to double criminality within the meaning of Article 2 first paragraph of the European Convention on Extradition.

Although primarily concerned with questions of jurisdiction, in particular, the political offence exception, this case provides a useful discussion of the relationship between international criminal law relating to war crimes and domestic criminal law. The case makes clear that Common Article 3 does not override domestic criminal law in the case of non-international armed conflict.

As one of the present authors made clear in his ILDC commentary:

‘The Supreme Court’s opinion that the conduct was not exclusively governed by international humanitarian law was interesting as it shed a light on the question whether states were allowed to exceed international provisions in the field of international criminal law. Apparently, the Court was of the opinion that states’ hands were not completely tied by international law and that they had a certain measure of discretion to engage in further penalization on the basis of domestic criminal law. The Court itself, however, was cautious to restrict its view to the slightly elusive and immature body of standards applicable in non-international armed conflicts, as these did not contain explicit obligations to penalize certain acts. (paragraph 3.3.7) However, the ‘grave breaches’ provisions in the Geneva Conventions, which were applicable in international armed conflicts, precisely dictated state obligations in this respect and did not permit deviant state practice.’[[35]](#footnote-36)

**Public Prosecutor v F, First instance, Criminal procedure, LJN: BA9575, 09/750001-06, ILDC 797 (NL 2007), 25th June 2007, Netherlands; The Hague; District Court**

‘F’ was a high-ranking officer in ‘Khad-e-Nezami’, the Afghan Military Intelligence Service. He was accused on two counts, the second of most relevance here, that he had superior responsibility for acts committed against two victims.

**66** The District Court is of the opinion that at the time of the charged offences ‘superior responsibility’ for war crimes committed in a non-international armed conflict resulted from international customary law which was developed in the years following the Second World War. This judgment is also based upon the ruling pronounced by the Appeals Chamber of the ICTY in the case against Hadžihasanovic, which shows that the Appeals Chamber is of the opinion that already at the time of the conclusion of the two Additional Protocols to the Geneva Conventions in 1977, in relation to international as well as non-international armed conflicts, superior responsibility resulted from international customary law.

**67** This position of the Court implies that the offences committed by the defendant during the indicted period can be judged according to article 9 of the Criminal Law in Wartime Act. This article should be explained according to international (customary) law regarding the so-called superior responsibility. This (automatically) means that the Court will also take into consideration the legal precedents of ad-hoc tribunals, also in as far as they require the fulfillment of the condition of ‘effective command and control’.

(…)

**79** The defendant was one of the deputies to the Director of the Military Khad (Khad-e-Nezami), an organisation that in those days committed violations of human rights on a large scale, like torturing prisoners. It can be assumed that the defendant was closely involved in these practices. Nevertheless, it can not be established with adequate certainty, that the defendant was in a position to exercise effective command and control over the Head of the Investigation and Interrogation Department in all cases and under all circumstances. Although in the chain of command he was superior to [P4], there is still a lack of clarity about the fact whether the defendant was at any point in time in a position to exercise ‘effective command and control’ over the Military Khad as deputy to [P3] and likewise over the Investigation and Interrogation Department, a position that was undeniably held by [P3].

**80** For that reason it cannot be excluded that the defendant was not in a position to take disciplinary action against the responsible persons for the acts of violence committed against the victims referred to in the charges. In other words: the Court is of the opinion that the question whether the defendant had ‘effective control’ cannot be answered affirmatively with a sufficient degree of certainty.

**81** Therefore, the Court believes that one of the most important requirements necessary to be able to give an affirmative answer to the question whether the defendant carried ‘superior responsibility’ for the war crimes he is charged with, has not been fulfilled.

**82** This can only lead to the conclusion that the defendant should be acquitted of the offences he was charged with under count 2.

This case is primarily concerned with the question of universal jurisdiction and the effect of an amnesty in the territorial state. The case did, however, briefly consider the question of superior responsibility and adopted the position of the ICTY that the law on superior responsibility applied equally in both international and non-international armed conflicts. In the present case, however, the court found that the defendant was able to exercise effective command and control over the head of the Investigation and Interrogation Department in all cases and under all circumstances. Accordingly, the defendant was acquitted in relation to the charge that was dependent upon superior responsibility.

IV. Conclusion

As international criminal tribunals and the International Criminal Court can only prosecute and try a limited number of perpetrators of international crimes, law enforcement by domestic courts will remain of crucial importance. The preceding synopsis of case law demonstrates the varied attitudes of national courts. Some are prepared to apply (customary) international law freely in order to fill the gaps in national legislation. Others are far more reluctant to engage in such a dauntless interpretative exercise, as this would militate against the *nullum crimen sine lege* principle. Ultimately, this reflects the wide variety in legal systems’ position on the direct applicability of international law.

International criminal law is still in its infancy. It is a relatively young body of normative standards. This implies that concepts and doctrines have not yet fully crystallized, leaving both international and domestic courts some margin of appreciation to further develop the law. The summary of case law shows that national courts are often inclined to conform to the interpretations of international criminal tribunals. However, when international case law is inconclusive or contradictory, national courts sometimes take the opportunity to develop their own opinions, thus contributing to the further elucidation of international criminal law. There is nothing wrong with that. International criminal tribunals do not enjoy a monopoly of interpretation in the realm of international criminal law. The contributions of national courts may plug some loopholes and strengthen the normative framework of an evolving body of law.

1. <IBT>Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3</IBT>, Article 6. [↑](#footnote-ref-2)
2. ibid, Article 7. [↑](#footnote-ref-3)
3. ibid, Article 8. [↑](#footnote-ref-4)
4. ibid, Article 17(1)(a). [↑](#footnote-ref-5)
5. See C Ryngaert, H van der Wilt, and J S Vara, ‘Jurisdiction’ Chapter 3 in this volume. [↑](#footnote-ref-6)
6. See C Martin, ‘Amnesty Laws in Latin-America and the Principles of Accountability developed by the Inter-American Human Rights System’ Chapter 16 and R Pavoni, R van Alebeek, ‘Immunities of States and Their Officials’ Chapter 4 in this volume. [↑](#footnote-ref-7)
7. M Klamberg, Analysis, *Public Prosecutor (on behalf of Behram (Hussein) and ors) v Arklöf (Jackie)*, ILDC 633 (SE 2006) A2. [↑](#footnote-ref-8)
8. cf *Ituri District Military* *Prosecutor v Kahwa Panga Mandro*, First Instant Decision, RMP No 227/PEN/2006; ILDC 524 (CD 2006), 2 August 2006 and *Mbandaka Garrison Military Prosecutor v Kahenga Mumbere et al* RP 086/005 12 January 2006; not published. [↑](#footnote-ref-9)
9. L Paradell, B Montejo, Analysis, *Public Prosecutor**’s Office, de Lois (Graciela) (intervening) and ors (intervening) v Manzorro (Adolfo)*, ILDC 136 (ES 2005) A4, referring to A Gil Gil, ‘The Flaws of the Scilingo Judgment’ (2005) 3 *Journal of International Criminal Justice* 1082, 1086–1087. [↑](#footnote-ref-10)
10. *United States v Smith (Thomas)*, Appeal Judgment, 18 US (5 Wheat) 153 (1820) 5 L Ed 57 (1820), ILDC 1053 (US 1820), 2nd February 1820, United States; Supreme Court [US]. [↑](#footnote-ref-11)
11. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. [↑](#footnote-ref-12)
12. UNSC Res 827, Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993, as amended on 17 May 2002) UN Doc S/RES/827, Article 4(2). [↑](#footnote-ref-13)
13. UNSC Res 955, Statute of the International Criminal Tribunal for Rwanda (8 November 1994, as last amended on 13 October 2006) UN Doc S/RES/955, Article 2(2). [↑](#footnote-ref-14)
14. Rome Statute of the International Criminal Court (n 1) Article 6. [↑](#footnote-ref-15)
15. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15. [↑](#footnote-ref-16)
16. Incitement to crimes against humanity will be discussed below in section III.2. [↑](#footnote-ref-17)
17. *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998. [↑](#footnote-ref-18)
18. <IBT>H van der Wilt, Analysis, *Van Anraat Case, Public Prosecutor and Fifteen anonymous victims v Van Anraat*, ILDC 753 (NL 2007)</IBT> A3. [↑](#footnote-ref-19)
19. ibid, A4. [↑](#footnote-ref-20)
20. <IBT>Rome Statute of the International Criminal Court (n 1)</IBT> Article 7. [↑](#footnote-ref-21)
21. ibid, Article 7(2). [↑](#footnote-ref-22)
22. *Canada (Minister of Citizenship and Immigration), League for Human Rights of B**’nai Brith Canada (intervening) and ors (intervening) v Mugesera (Léon) and ors*, Appeal to Supreme Court, 2005 SCC 40, [2005] 2 SCR 100, (2001) 254 DLR (4th) 200, ILDC 180 (CA 2005), 28th June 2005, Canada; Supreme Court [SCC], para 126. [↑](#footnote-ref-23)
23. [1994] 1 SCR 701. [↑](#footnote-ref-24)
24. *Canada (Minister of Citizenship and Immigration) v Mugesera and others* (n) para 126. [↑](#footnote-ref-25)
25. Case Nos IT-96-23-A and IT-96-23/1-A. See above, para 158. [↑](#footnote-ref-26)
26. L Paradell, B Montejo, Analysis, *Public Prosecutor**’s Office, de Lois (Graciela) (intervening) and ors (intervening) v Manzorro (Adolfo)*, ILDC 136 (ES 2005) A12. [↑](#footnote-ref-27)
27. See C Ryngaert, ‘International Humanitarian Law’ Chapter 13 in this volume. [↑](#footnote-ref-28)
28. United Nations, Charter of the International Military Tribunal: Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (‘London Agreement’) (signed 8 August 1945) Article 6b. [↑](#footnote-ref-29)
29. Judicial Decision, International Military Tribunal (Nuremberg) 1st October 1946, see (1947) 41 *American Journal of International Law* 248. [↑](#footnote-ref-30)
30. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) Articles 46, 50, 52, and 56. [↑](#footnote-ref-31)
31. Convention (IV) Relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Article 147. [↑](#footnote-ref-32)
32. UNSC Res 827, Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993, as amended on 17 May 2002) UN Doc S/RES/827, Article 2; UNSC Res 955, Statute of the International Criminal Tribunal for Rwanda (8 November 1994, as last amended on 13 October 2006) UN Doc S/RES/955, Article 4. [↑](#footnote-ref-33)
33. Rome Statute of the International Criminal Court(n 1) Article 8(a), (b), (c), and (e). [↑](#footnote-ref-34)
34. C Bergmann, A Ziegler, Analysis, *Niyonteze and Military Prosecutor of the Military Tribunal of First instance 2 v Military Appeals Tribunal 1A*, ILDC 349 (CH 2001) A7. [↑](#footnote-ref-35)
35. H van der Wilt, Analysis, *Public Prosecutor v K*, ILDC 142 (NL 2004) A2. [↑](#footnote-ref-36)