



# COMPARATIVE ANALYSIS OF PROSECUTIONS FOR MASS ATROCITY CRIMES IN CANADA, NETHERLANDS, AND AUSTRALIA

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## ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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# EXECUTIVE SUMMARY

The Rome Statute and the principle of complementarity maintain the role of national courts as the primary forum for achieving effective prosecution of serious international crimes. The International Criminal Court (ICC) is a court of last resort, prosecuting only those cases where the national jurisdiction has been proved unwilling or unable to do so. At the time of publication, there are 110 state parties to the Rome Statute, of which, 39 have adopted legislation implementing the subject matter jurisdiction of the Statute into their domestic penal codex. Canada, the Netherlands and Australia are all states parties to the Rome Statute that have adopted implementing legislation. While all three jurisdictions have tackled the prosecution of mass atrocity crimes prior to the advent of the Rome Statute, each has maintained distinct attitudes toward the influence of international criminal law upon their domestic structures. The distinct attitudes are illustrated by the disparities between the states in how they have prosecuted international crimes, as well as, how each state has drawn their legislation implementing the Rome Statute.

This report examines how Canada, the Netherlands and Australia have constructed their implementing legislation and to what extent they have been influenced by the jurisprudence of the international criminal courts in applying the legislation and prosecuting for international crimes.

Canada has maintained a comparatively liberal approach toward the influence of international criminal law and jurisprudence on their domestic prosecutions for international crimes. The courts in Canada have utilized the jurisprudence of international tribunals in their judgments as guideposts in determining certain issues, such as how the offences are defined under the law. Additionally, Canada's liberal acceptance of international influence is illustrated through its implementing legislation, the Crimes Against Humanity and War Crimes Act (CAHWA). The CAHWA, for example, defines international offences in broad terms and on the basis of customary international law, thus, inherently including within the definitions the evolutions of custom that may occur over time.

The practice of the Netherlands falls in the comparative middle ground. The Netherlands adopted the International Crimes Act as its implementing legislation and, in

the process, maintained its commitment to upholding the international standards for the prescribed offences. In practice, the Netherlands, has accepted the influence of international criminal courts while recognizing the importance of national norms. Additionally, in contrast to Canada, the Netherlands has been less enthusiastic in acknowledging customary international law.

Finally, Australia has taken the narrowest of approaches in accepting the influence international criminal law and the jurisprudence from the international criminal courts. Australia's implementing legislation, the International Criminal Court Act and Consequential Amendments is a comprehensive piece of legislation that incorporates the Elements of Crimes very nearly in whole. The legislation also makes no room for customary international law. In practice, Australian courts have equally rejected the influence of custom and international norms on defining offences and applying law within the domestic courts.

This report relied directly on the domestic legislation and jurisprudence from the three jurisdictions. The findings of the report indicate that while all three jurisdictions have ratified and implemented the Rome Statute, the influence of the legislation and corroborative international jurisprudence is remarkably varied. This study will be used as a comparative basis for further studies that will analyze to what extent international criminal law and jurisprudence have impacted courts in states with legal traditions that have experienced rebuilding after wartime or mass atrocity.

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# LIST OF ABBREVIATIONS

CAHWCA.....	Crimes Against Humanity and War Crimes Act
EOC.....	Elements of Crimes
ICC.....	International Criminal Court
ICTR.....	International Criminal Tribunal for Rwanda
ICTY .....	International Criminal Tribunal for the Former Yugoslavia
ILC.....	International Law Commission
OTC .....	Oriental Timber Company
RTC.....	Royal Timber Company

# 1. INTRODUCTION

## 1.1 OBJECTIVE OF PAPER

The role of national courts in combating impunity for genocide, crimes against humanity and war crimes<sup>1</sup> has historically been a dubious one. In recent years, particularly in the wake of the implementation of the Rome Statute and the International Criminal Court, this role has become more cognizable. Indeed, the Rome Statute iterates, in both the preamble and the Articles, that national courts are the primary forum for achieving *effective prosecution* of serious international crimes.<sup>2</sup> The following is a comparative analysis of core crimes prosecutions by three member states to the Rome Statute; Canada, Australia and the Netherlands. Application and enforcement of international law is not prescribed to national jurisdictions, thus the history of international criminal law in each state reflects dichotomies intra-jurisdictionally, as well as, in comparison to one another. The legal histories of all three states have culminated in the respective ratification of the Rome Statute and the implementation of national legislation that has incorporated, to varying degrees, the subject matter jurisdiction articles of the Rome Statute and, in one case, the Elements of Crimes.

This paper will examine how each of the respective states have implemented legislation criminalizing international crimes within their national legal systems, culminating in their respective implementation of the subject matter jurisdiction of the Rome Statute; how each state has utilized or been influenced by international jurisprudence in the prosecution of international crimes within their national courts, and, in particular, how this influence has affected the interpretation of the elements of the crimes; and what are the key similarities and differences between the states in implementation and adjudication of international crimes. Ultimately, the analysis of each state's practice is poised toward the future and examining how the implementation of the Rome Statute into the domestic legal systems will affect each state's own practice and the goal of achieving effective prosecution of core crimes.

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<sup>1</sup> "Core Crimes"

<sup>2</sup> Preamble to The Rome Statute, [...] "*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."

Article 1: An International Criminal Court ("The Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions..."

## 1.2 METHODOLOGY AND PURPOSE

The goal of WP2 is to examine the normative impact of jurisprudence by international courts on domestic prosecution of mass atrocity cases. The jurisdictions chosen for this report are a representation of states that have implemented and utilized legislation reflecting the subject matter jurisdiction of the Rome Statute. The report is not meant to provide an exhaustive account of jurisdictions that have followed this course but, rather, to provide a representative example of states in order to assess important issues that arise through the process. To that end, Canada, Australia and the Netherlands were chosen as the representative jurisdictions in light of their divergent attitudes toward the implementation and recognition of international criminal law into their domestic penal structures. Canada sits at one end of the spectrum with an open policy toward accepting and utilizing international criminal law and the work of international criminal courts as guiding tenets in their domestic prosecutions of mass atrocity crimes, while Australia maintains a strict adherence to their domestic code and a reliance on the notion of state sovereignty that influences a more tenuous attitude toward the influence of international criminal law. The Netherlands represents a medium in between Canada and Australia, with a system that recognizes the influence of international criminal law but maintains a reliance on certain tenets of national law.

Some key issues that arise from the states varying attitudes toward international criminal law that will be examined in the following report include, *inter alia*, the jurisdiction of the courts to try the cases, the method the courts use to define the crimes alleged and to what extent international jurisprudence may or may not be utilized in the process of the defining the crimes. The report relies primarily on an examination of the implementing legislation of each jurisdiction and an analysis of the case law for prosecutions of international crimes. Secondary sources such as journal and newspaper articles are also incorporated within the report in an effort to reflect the legal and social responses to the actions taken by the jurisdictions.

The report will also provide a comparative basis for future research conducted by WP2. In this respect, this report stands as an examination of jurisdictions that have long standing legal structure that have not been affected by mass atrocity upon their own soil. Subsequent reports will examine jurisdictions that are engaged in prosecuting for international crimes for acts perpetrated at the *situs* of the prosecutions. The aim will be to compare studies in order to assess issues that arise within the jurisdictions. Thus, this

report is a first step in a more comprehensive and comparative analysis conducted by WP2 and the other WPs within the project.

## 2. CANADA

### 2.1 Legislative History

Article 11 (g) of the Canadian Charter of Rights and Freedoms grants Canadian courts jurisdiction over international crimes.<sup>3</sup> The article's inclusion of "the general principles of law recognized by the community of nations," reflects a history of Canadian legislation and jurisprudence that has recognized a growing acceptance of the role of custom in shaping international criminal law.

Canada follows the dualist principle of international law and thus requires implementation of intentional criminal law through domestic legislation. In 1946, Canada enacted The War Crimes Act, its first post war legislation dealing with the prosecution of war crimes in Canada. The War Crimes Act made punishable any violations of war committed in a war in which Canada was engaged after 9 September 1939.<sup>4</sup> The War Crimes Act reflected the tenets of Canadian military law and provided for prosecutions within Canadian military courts.<sup>5</sup> Although few trials were carried out under the auspices of the War Crimes Act, it remained in effect as Canada's war crimes legislation for several decades. In 1965, Canada ratified the Geneva Conventions and enacted the Geneva Conventions Act which reproduced the four Conventions in the Schedules I through IV of the Act respectively.<sup>6</sup> The Act was amended in 1990 to include both Additional Protocols. It must be noted that the Geneva Conventions Act was not retroactive in application, thus prosecution for the enumerated offences could only take place under the Act for those acts committed after its enactment. Consequently, no prosecutions for war crimes committed during World War II were admissible under the

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<sup>3</sup> Canadian Charter of Rights and Freedoms 1982.

section 11: Any person charged with an offence has the right

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations

<sup>4</sup> War Crimes Act 1946.

<sup>5</sup> See C A Amerasinghe, 'The Canadian Experience' in M. Cherif Bassouini (ed), *International Criminal Law, Vol. III* (Martinus Nijhoff Publishers, Leiden 1999) 245.

<sup>6</sup> Ibid. p.248

Geneva Conventions Act<sup>7</sup> and a gaping hole was left in regard to the jurisdiction of municipal courts over war crimes.

In 1985, the government of Canada, galvanized by the accusation that Dr. Josef Mengele had applied for a Canadian visa in 1963 and may have been living within Canadian borders, established an independent commission of inquiry ('The Deschênes Commission') to investigate the question of Nazi war criminals living in Canada.<sup>8</sup> After a lengthy investigation process that included both public and private hearings of witnesses, the commission released a brief of its conclusions and recommendations. The recommendations included, *inter alia*, amendments to the criminal code to allow for prosecution of war crimes and crimes against humanity within the municipal courts, including those acts committed outside the territory of Canada, amendments to the Extradition Act to include offences committed before the Act came into force, and amendments to the Citizenship Act and the Immigration Act to allow for greater ability to detect, prevent admission of and/or revoke citizenship of suspected war criminals.<sup>9</sup>

In the wake of the findings of the Deschênes Commission, the Canadian parliament amended the Criminal Code, the Immigration Act and the Citizenship Act. The amended provisions to the Criminal Code conferred subject matter jurisdiction to Canadian Courts for acts which met the level of crimes against humanity and war crimes as defined within the Code and which were also deemed offences under Canadian law.<sup>10</sup> The Code provisions defined war crimes and crimes against humanity in similar light as the Nuremberg Charter and included customary international law within the definition of the offences. The provisions amending the Immigration Act precluded entry into Canada for those persons who had committed war crimes or crimes against humanity as defined by the Criminal Code.<sup>11</sup> Finally, the Citizenship Act was amended to preclude the

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<sup>7</sup> Ibid. p.249. Note that in the case of *Rauca v. Germany* 41 O.R. (2d) 225, Rauca argued for prosecution under the Geneva Conventions Act as an alternative to extradition, but the Ontario Court of Appeals determined that the Act was indeed a piece of substantive legislation and not statute of general application thus it could not be applied retroactively to acts that took place before it came into force. In addition, the Deschênes Commission denied retroactive application of the Act as a means to prosecute Nazi war criminals.

<sup>8</sup> See J Deschênes in R S Clark and M Sann (eds), 'Toward International Criminal Justice', *The Prosecution of International Crimes* (Transaction Publishers, New Jersey 1996) 35.

<sup>9</sup> See G Purves, 'War Criminals: The Deschênes Commission', *Current Issue Review*, Library of Parliament, Revised 16 October 1998. available at <http://www.parl.gc.ca/information/library/PRBpubs/873-e.htm>.

<sup>10</sup> Thus fulfilling the dual criminality principle.

<sup>11</sup> See Immigration Act, R.S.C. 1985, C I-2, section 19(1)(j).

granting of citizenship to anyone under investigation, on trial or convicted of war crimes and crimes against humanity as defined by the Criminal Code.<sup>12</sup>

The Crimes Against Humanity and War Crimes Act (CAHWCA),<sup>13</sup> Canada's legislation implementing the subject matter jurisdiction of the Rome Statute, came into force in 2000. The Act has been recognized as not only fulfilling the goal of implementation, but also of amending Canadian legislation to better utilize in the effort to prosecute for war crimes, crimes against humanity and genocide within municipal courts.<sup>14</sup> It is important to note this second goal and its influence on creating the current international criminal legislation. Canada has iterated its commitment to combating impunity for core crimes within its domestic courts and has allowed for a "flexible" approach to better accommodate this goal.<sup>15</sup> For example, the CAHWCA specifically states that, in the matter of extraterritorial jurisdiction, the definition of the offences as iterated in articles 6 through 8 of the Rome Statute are part of customary international law as of and before 17 July 1998, and that the definitions do not "...limit or prejudice in anyway the application of existing or *developing* rules of international law."<sup>16</sup> Thus, the CAHWCA not only implements the Rome Statute into Canadian domestic law, it creates an evolving legal foundation to prosecute for extraterritorial offences committed in the past and the future.

Sections 4 and 6 of the CAHWCA define the elements of core crimes offences committed in and outside of Canada. Both sections prescribe the offences in reference to customary and conventional law, as such, genocide and crimes against humanity may be defined "according to customary international law or conventional international law or by the virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at time and in the place of its commission," and war crimes may be defined "according to customary international law or conventional international law applicable to armed

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<sup>12</sup> See Citizenship Act, R.S.C. 1985, c. C-29, section 22.

<sup>13</sup> See Crimes Against Humanity and War Crimes Act, S.C. 2000, C.24, (CAHWCA).

<sup>14</sup> See D Robinson, in Matthias Neuner (ed), 'Implementing International Crimes in National Law: The Canadian Approach', *National Legislation Incorporating International Crimes* (Berliner Wissenschaft-Verlag, Berlin 2003) 35.

<sup>15</sup> Ibid 50.

<sup>16</sup> CAHWCA, s.6(4).

conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”<sup>17</sup>

The definition of crimes against humanity includes a list of qualifying enumerated acts closely resembling those listed in Art. 7 of the Rome Statute,<sup>18</sup> while the definition of genocide includes only an amended version of the chapeau of Art. 6, substituting “an identifiable group of persons” for the list of enumerated groups given in the Statute. However, s. 318(4) of the Criminal Code defines an identifiable group as “any section of the public distinguished by color, race, religion, ethnic origin or sexual orientation.”<sup>19</sup> Thus, limitations based upon the criminal code provision apply to the definition of a group in close similarity to the Rome Statute.

Canada’s legislation of the core crimes has embraced a broad interpretation of international criminal law, accepting customary international law as well as conventional law as a guiding tenet, thus opening the door for future amendments in law brought about through legislative/conventional means or through custom. How has this broad interpretation been reflected in Canadian case law, particularly in regards to the interpretation and application of the elements of the core crimes? Just as the legislative acts followed a historical evolution that grew to embrace a broad application of international criminal law, case law reveals an evolving trend toward embracing the influence of international criminal law and the jurisprudence of international courts as a guiding force in challenging impunity for core crimes in the domestic courts.

## 2.2 CANADA: CASE HISTORY

During the post-war period, Canada engaged in a brief tenure of prosecuting individuals for crimes committed during WWII. Following the parliamentary adoption of the War Crimes Act in 1946,<sup>20</sup> four war crimes trials were brought before Canadian military courts in Germany.<sup>21</sup> By 1948, however, Canadian courts, military or otherwise, were silent as

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<sup>17</sup> Ibid, s.4(3) and s.6(3).

<sup>18</sup> Note that the CAHWCA does not include the offence of disappearance of persons as appears in Art. 7(1)(i) of the Rome Statute and the crime of apartheid as appears in Art. 7(1)(j). However, the offences are ultimately covered by the inclusion of customary international law and/or by reference to the Rome Statute as treaty law.

<sup>19</sup> See Criminal Code, R.S.C. 1985, C-46.

<sup>20</sup> See War Crimes Act, S.C. 1946, c.73.

<sup>21</sup> Amerasinghe (n 5) 245.

to the prosecution of war crimes and remained as such for a period of almost four decades.<sup>22</sup>

In 1987, former Hungarian national Imre Finta was charged in Canadian court with crimes against humanity and war crimes stemming from acts committed while serving in the Royal Hungarian Gendarmerie as commander of an investigative unit at Szeged in 1944.<sup>23</sup> Charges against the accused were brought under The Criminal Code of 1927<sup>24</sup>, specifically under s. 7(3.71)-(3.76) which *inter alia* allowed prosecutions for crimes committed outside of Canada<sup>25</sup> if the conduct alleged constituted a crime against humanity or war crime as defined in the Code s. 7(3.76).<sup>26</sup>

The legacy of *Finta* has been oft discussed and almost universally recognized as one marred by a problematic application of the standards and tenets of international criminal law. Most notably, Justice Cory, writing for the Majority of the Supreme Court of Canada, interpreted the elements of the crimes in a manner so elevated as to preclude any chance of conviction in the case.

In defining the *actus reus* of crimes against humanity, J Cory utilized language that created both a legal threshold and an improbable moral threshold that was seemingly erroneous for the offence. For example, J Cory, in referring to the elemental values of war crimes and crimes against humanity juxtaposed against those of ordinary crimes, stated that “...those persons indicted for having committed crimes against humanity or war crimes stand charged with committing offences so grave they shock the

<sup>22</sup> Ibid.

<sup>23</sup> *R v. Finta*, [1994] 1 S.C.R. 701.

<sup>24</sup> Amended in 1987.

<sup>25</sup> Criminal Code, R.S.C. 1927. Under s. 6 of the Criminal Code, jurisdiction over crimes was restricted to territoriality. S. 7(3.71) enabled prosecution for those crimes committed outside the territory of Canada by stating that such crimes shall be deemed to have been committed in Canada. The trial court interpreted this section as conferring jurisdiction to the Canadian courts and that it was the jury’s duty to decide whether the acts by the accused amounted to crimes against humanity and war crimes. The Appeals court expanded the meaning, stating that the section not only conferred jurisdiction, but created two new categories of offences under the Code.

<sup>26</sup> s. 7(3.76) For the purposes of this section

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“crime against humanity” means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group or persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.

“war crime” means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

conscience of all right thinking people. The stigma that must attach to a conviction for such a crime is overwhelming.”<sup>27</sup> In addition, J Cory affirmed the trial judge’s instructions to the jury vis-a-vis an offence meeting the threshold of crimes against humanity. The trial judge had instructed the jury that “one of the ways the domestic offences of kidnapping, confinement and robbery could achieve the level of a crime against humanity was if the acts could be considered inhumane.”<sup>28</sup> The judge then defined “inhumane” acts in terms such as “barbarous cruelty”, “brutal”, and “not having qualities proper or natural to a human being.”<sup>29</sup> Arguably, this language is heavy handed when read consistent with the offences as described in the applicable sections of the Criminal Code.

While it is in the purview of the court to interpret and apply the definitions of the crimes, very little bases for such a narrow interpretation had been established up to that point. First, in examining existing treaty law, no such indication of a threshold element as described by the *Finta* court appears in reference to war crimes or crimes against humanity.<sup>30</sup> Second, case law stemming from prosecutions of crimes against humanity in the aftermath of World War II did not reflect such a moral threshold within the definition of the offense. Admittedly, the construct of the offence of crimes against humanity up to this period received much debate, however, most of the case law reflected contentions revolving around elemental issues such as whether the attack on a civilian population need be widespread and systematic or whether a not a policy behind the attack be required, and not the heightened moral opprobrium of the crime.<sup>31</sup>

Finally, the commentaries to Draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission (ILC) qualify several points to its fairly exhaustive list of prohibited acts under the offence of crimes against humanity.<sup>32</sup> While it provides explanatory paragraphs as to the conditions set out in the chapeau of the offence as well as to the list of enumerated acts, nowhere within the explanatory notes does it set out a threshold as high as perceived in *Finta*. Specifically, in referring to subparagraph (k) and “other inhuman acts”, the commentaries form two requirements as

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<sup>27</sup> See *Finta* (n 23) para. 74.

<sup>28</sup> *Ibid* para. 91.

<sup>29</sup> *Ibid* para. 90.

<sup>30</sup> See Geneva Conventions 1949.

<sup>31</sup> See *Public Prosecutor v. Eichmann*, Judgment (1962) 36 ILR 277; *France v. Klaus Barbie*, judgment of 6 October 1983, Cass. Crim. 1984 D.S. Jur. 113.

<sup>32</sup> Article 18, Crimes Against Humanity, Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, International Law Commission 1996.

meeting the threshold of inhumane; 1. the acts are “similar in gravity to those acts listed in the preceding subparagraphs,” and 2. the act “cause[s] injury to a human being in terms of physical or mental integrity, health or human dignity.”<sup>33</sup> The commentaries do not offer any indication that inhumane acts must reach the level of barbarism indicated by the *Finta* court. While the Draft Code was not adopted until 1996, two years after the *Finta* decision, the final product had been a working draft for decades and represented the culmination of principles of law as recognized by the Nuremberg Charter and Tribunal. While there is little doubt of the severity of the acts that constitute crimes against humanity or, indeed, the moral outrage that accompanies the commission of such acts upon the international stage, language used to describe and evaluate the moral threshold of the crime should remain as dicta within the judgment and not cross the barrier into creating elemental thresholds that have a questionable bases in law.

In constructing the *mens rea* requirements for the offence of crimes against humanity, the majority again interpreted the elements in a way that proved problematic. First, J Cory established that, in order to meet the elemental requirements, the prosecution must prove that the accused has the requisite *mens rea* for the underlying domestic offences, as well as, for those offences that constitute crimes against humanity and war crimes. This ultimately proved confusing and problematic because, just as the majority created erroneous definitions and threshold requirements in regard to the *actus reus* of the offences charged, it too erred in creation of standards of *mens rea* for international crimes. For example, in further interpreting the mental elements, J. Cory stated that the *mens rea* of a war crime or crime against humanity should be gauged by a subjective test, as such, crimes against humanity “...must involve an awareness [by the accused] of the facts or circumstances which would bring the acts within the definition of a crime against humanity”<sup>34</sup> or, alternatively, must involve willful blindness “...to the facts or circumstances that would bring his or her actions within the provisions of these offences.”<sup>35</sup> This interpretation emanated from the testimony of the Crown’s expert witness on international law, Professor Cherif Bassouini. Professor Bassouni testified that a state action or policy was a requisite element to crimes against humanity and the trial court, ultimately supported by the Supreme Court majority, instructed the

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<sup>33</sup> Ibid subparagraph 17.

<sup>34</sup> *Finta* (n 23) para 95

<sup>35</sup> Ibid para 97.

jury as illustrated above.<sup>36</sup> J Cory did reject the Appeals Court's standard of requiring the accused to have awareness that his or hers acts were inhumane. Nonetheless, the majority's standard created complications and ultimately, when read in light of standards set for *actus reus*, by inferring knowledge of each of the "facts and circumstances" that make up the international offence, created a threshold far too high. In addition, the Court's acceptance of the requirement put forth by Bassouini that the accused must be shown to have known that his actions violated international law infers a possible defence of ignorance of law in international criminal law.

J La Forest, in his dissenting opinion, recognized the inherent problematic nature of the majority's interpretation of the mental elements by acknowledging the difficulty in clearly understanding what were the *mens rea* requirements under international law.<sup>37</sup> In addition, J La Forest illustrated the hazards posed by the majority's interpretation by arguing that knowledge of a circumstance, such as, whether the attack was on *a civilian population or identifiable group*, is irrelevant to establish individual culpability for the offence.<sup>38</sup> As J La Forest stated, "To forcibly confine or kidnap 8,617 people is equally blameworthy whether he knew or did not know they were Jews."<sup>39</sup> It is also clear that in light of the majority's interpretation of the *actus reus* of the offense in such heightened terms, requiring a *mens rea* standard of knowledge or willful blindness of every circumstance of the offence in order to meet the threshold of an international crime created a gratuitous barrier to prosecution.

Reflecting yet another questionable aspect of the majority's interpretation of the mental elements of an international crime, J. Cory seemingly added an element to the *mens rea* of crimes against humanity by stating that it is distinguishable from ordinary crimes under the Code because the conduct in question must take place pursuant to a discriminatory policy.<sup>40</sup> While there had been some debate regarding the inclusion of discriminatory intent as a *mens rea* element for all of the enumerated acts of the offence of crimes against humanity, the issue was far from decided in the way interpreted by the *Finta* court. The ICTY Appeals Chamber in *The Prosecutor v. Tadic* offers a concise

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<sup>36</sup> Ibid. para 106.

<sup>37</sup> Ibid para 292. " ...the requirements for the mental element under international law are not often as clearly established as under our national law."

<sup>38</sup> Ibid para. 296. Emphasis added.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid para 79.

background and decision to this very issue. The Appeals Chamber noted that international instruments relevant to the definition of crimes against humanity offered no such basis for the requirement of discriminatory intent.<sup>41</sup> Thus, in order for it to be accepted as a mental element of the offence in accordance with customary international law, there would have to be proven evidence of consistent state practice in support of this deviation from treaty law. The Chamber found no evidence of such consistent state practice, noting itself that the *Finta* judgment was one of a few isolated examples of national jurisprudence that diverged from the majority view on the subject.<sup>42</sup> Finally, the Chamber recognized the debate that had preceded *Tadic* in regards to the issue of discriminatory intent and acknowledged that both the ILC and the Preparatory Committee of the ICC considered and ultimately dropped the requirement of discriminatory intent from the Draft Code and the Rome Statute respectively.<sup>43</sup> Thus, the *Finta* court's acceptance of a discriminatory policy as an element of the *mens rea* of crimes against humanity not only created a greater barrier to prosecution, but it signified an approach that was not universally accepted by the international community.

In retrospect, it seems that the *Finta* court was struggling to determine which aspects of the acts of the accused would raise them to the level of an international crime, specifically a crime against humanity. Without a thorough and decisive body of jurisprudence to rely upon, the court made missteps in concluding that the barbarous nature of the acts, ignorance of international criminal law and a requirement of discriminatory intent were needed to constitute a crime against humanity. While the Court may not have been wrong in concluding that something more was indeed needed, such as the element of a widespread and systematic attack upon a civilian population, their approach was flawed in not acting in congruence with the legislation and jurisprudence regarding crimes against humanity at that time.

The aftermath of *Finta* sparked tremendous reaction from many inside and outside of the legal arena. Groups that had been working toward challenging impunity for those who committed crimes during WWII were especially critical of the outcome of the case and the legal reasoning employed to define the crimes alleged. Leo Adler, criminal lawyer and Director of National Affairs for Friends of Simon Wiesenthal Center for

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<sup>41</sup> *Prosecutor v. Tadic* (Appeals Chamber Judgment) ICTY-94-1-A (15 July 1999) para 289.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid* para 291.

Holocaust Studies, stated that the *Finta* decision put an end to war crimes prosecutions in Canada.<sup>44</sup> The legal precedents established by the case created a sizable hurdle to challenging impunity for core crimes directly under the Criminal Code. In response to this, Canada implemented a process of denaturalization and deportation to fill the gap.<sup>45</sup> The Canadian Council on International Law stated that the *Finta* failure led the Federal Government of Canada to pursue international criminal law efforts through the civil remedy of deportation proceedings, a situation deemed safer than criminal proceedings because the burden of proof was lower.<sup>46</sup> While it didn't surmise the direct cause of the *Finta* court in its failed determinations, the Council's analysis pointed to several factors including, the tentative understanding of international law by the experts called on during the case and the lack of established jurisprudence on the crimes alleged.<sup>47</sup> Regardless, the general reception of the decision was tenuous and the cases that followed it for the next decade were relegated outside of the criminal forum.

In 2003, deportation proceedings were brought by the Minister of Citizenship and Immigration against former Rwandan national Leon Mugesera under s. 27 of the Immigration Act,<sup>48</sup> which states that a permanent resident of Canada may be deported if he is determined to be a member of an inadmissible class. S. 19 of the Act governs inadmissibility and states *inter alia* that a person may be found inadmissible if there is reasonable grounds to believe that he has committed a criminal act or offence, including the offences enumerated in ss. 4 through 7 of the Crimes Against Humanity and War Crimes Act. Proceedings were brought against Mr. Mugesera in response to a speech he delivered at a partisan meeting in Rwanda on 22 November, 1992.<sup>49</sup> The Immigration and Refugee Board alleged that the speech constituted an incitement to murder, hatred, genocide and a crime against humanity. After a series of appeals, the case eventually reached the Supreme Court of Canada where the decision of the Board was held valid and the original deportation order was restored. In examining the elements of the alleged

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<sup>44</sup> P Lundgen, 'Finta Case Changed War Crimes Prosecutions in Canada', *The Canadian Jewish News* (23 December 2003) <[http://www.cjnews.com/index.php?option=com\\_content&task=view&id=5271&Itemid=86](http://www.cjnews.com/index.php?option=com_content&task=view&id=5271&Itemid=86) accessed 10 July 2009.>

<sup>45</sup> *Ibid.*

<sup>46</sup> C Eboe-Osuji, 'In Sync at Last: Canadian Law and International Law of Crimes Against Humanity' (web exclusive for the Canadian Council on International Law, November 2005) <[http://www.ccil-ccdi.ca/index.php?option=com\\_content&task=view&id=124&Itemid=30](http://www.ccil-ccdi.ca/index.php?option=com_content&task=view&id=124&Itemid=30)> accessed 10 July 2009.

<sup>47</sup> *Ibid.*

<sup>48</sup> R.S.C. 1985, c. I-2 [repealed].

<sup>49</sup> An arrest warrant was issued against Mr. Mugesera following the speech, however, he fled the country, eventually seeking permanent residence in Canada in 1993.

offences, the Court fully embraced international jurisprudence, specifically that of the ad hoc tribunals, as a guiding tenet for interpretation.

While affirming that international jurisprudence is not binding upon the national jurisdiction, the Court recognized the necessity in utilizing international law as a tool for interpreting the elements of offences that have a particular genesis in the international arena. For example, in regards to incitement to genocide, the Court looked directly to the ICTR Trial Chamber in *The Prosecutor v. Akayesu* in proscribing and defining the elements of both the *actus reus* and the *mens rea* of the inchoate crime of incitement to commit genocide. Section 318 of The Criminal Code of Canada states that anyone who advocates or promotes genocide is guilty of an indictable offence.<sup>50</sup> The Supreme Court utilized the jurisprudence of the ad-hoc tribunals in order to determine the elements for advocating and promoting genocide. First, the Court stated that it was not necessary to prove a causal link between the incitement and any acts of murder or violence because the inchoate nature of the crime of incitement makes it punishable by virtue of the act alone, not the end result.<sup>51</sup> Second, the Court determined, pursuant to the holding of the Trial Chamber in *Akeyesu*, that incitement must be direct and public.<sup>52</sup> The direct element “implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act...”<sup>53</sup> In addition, the direct element must be perceived in context of the intended audience and whether they immediately grasped the implication of the message.<sup>54</sup> Finally, the Court determined that the *mens rea* of incitement was the intent to directly prompt or provoke another to commit genocide and that the person who incites must also have the specific intent to commit genocide.<sup>55</sup> Specific genocidal intent may be inferred from the circumstances surrounding the act, thus giving a speech in a genocidal environment may be perceived to have a heightened impact and be considered a marker of the intent of the accused.<sup>56</sup> Ultimately, the Supreme Court upheld the IAD finding that Mr. Mugesera’s speech constituted

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<sup>50</sup> S. 318(1). Note that in common law, incitement is always a separate offence. The Statutes of both the ICTY and ICTR also list incitement as a separate offence under their respective articles dealing with the offence of genocide. The Rwandan penal code includes incitement as a form of complicity in Article 91 of its code.

<sup>51</sup> *Mugesera v. Canada*, 2005 SCC 39, [2005] S.C.R. 91, para 85. The Court cited *Prosecutor v. Nahimana, Barayagwiza and Ngeze* (“the Media Case”) ICTR-99-52-T-I (3 December 2003) para. 1029 as support.

<sup>52</sup> *Ibid* para. 86.

<sup>53</sup> *Ibid* para 87, quoting *Prosecutor v. Akayesu* (Judgment) ICTR-96-4 (2 September 1998) para 557.

<sup>54</sup> *Ibid* quoting *Akayesu* at para. 558.

<sup>55</sup> *Ibid* para 88, relying on *Akayesu* at para. 560.

<sup>56</sup> *Ibid* para. 89, relying on The Media Case at para. 1022.

incitement to commit genocide. It is important to note that the Rome Statute does not follow the ICTR and ICTY in defining incitement as a separate inchoate crime, but rather defines incitement as a mode of responsibility under Article 25: Individual Criminal Responsibility.<sup>57</sup> The Canadian Criminal Code maintains incitement to genocide as a punishable inchoate crime that can be read consistent with the CAHWCA.

Additionally, the Supreme Court of Canada was tasked with determining whether Mr. Mugesera committed a crime against humanity under s.7(3.76) and 7(3.77) of the Criminal Code. Relying on the code and international customary law for guidance, the Court stated that a crime against humanity consisted of four elements: 1. an enumerated act; 2. committed as part of a widespread or systematic attack; 3. directed against a civilian population; and 4. the person committing the act knew of the act and knew or took the risk that his or her act comprised a part of the attack.<sup>58</sup> Again, the court sought out the jurisprudence of the ICTY and ICTR as guiding reference for interpreting the elements. Specifically, in determining whether “counseling” a murder (as specified under s. 7(3.77)) may be considered murder as a crime against humanity and whether incitement to hatred may meet the requirement for persecution as a crime against humanity.<sup>59</sup> The Court determined that Mugesera’s speech did not rise to the level of murder as a crime against humanity because there was no evidence of a sufficient causal link between the speech and any murders that occurred in its aftermath.<sup>60</sup> Conversely, the Court held that the speech did in fact rise to the level of persecution as a crime against humanity. The court relied upon the ICTY jurisprudence to define the criminal act. The Court stated that pursuant to s. 7(3.76) and s. 7(3.77) of the Criminal Code, a crime against humanity requires two primary elements: 1. the commission of one of the enumerated acts, and 2. the act contravenes international law.<sup>61</sup> It determined that hate speech in the context of the case met the definition of the enumerated act of

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<sup>57</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9 <<http://www.unhcr.org/refworld/docid/3ae6b3a84.html>>

Article 25 (3): In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

...

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

<sup>58</sup> *Mugesera* (n 51) para 119.

<sup>59</sup> *Ibid* para. 134.

<sup>60</sup> *Ibid* para. 135-6. The Court relied upon *Prosecutor v. Rutuganda* ICTR-96-3-T (6 December 1999), stating that “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.”

<sup>61</sup> *Ibid.*, para 150.

persecution.<sup>62</sup> In defining the second element, the Court stated that, “Customary international law tells us that the enumerated acts will become crimes against humanity if they are committed as part of a widespread or systematic attack against a civilian population or any identifiable group.”<sup>63</sup> Most importantly, in regard to the *mens rea* element of crimes against humanity, the Court roundly overturned the decision in *Finta* and followed the jurisprudence of the ICTR and ICTY in holding that discriminatory intent is a required element only for persecution as a crime against humanity and no other enumerated act.<sup>64</sup>

The Supreme Court did two very important things in *Mugesera*: 1. overturn its own narrow construct of the elements of crimes against humanity as written in *Finta*, and 2. firmly establish an internationalist foundation in interpreting the core crimes within their domestic courts. The reaction to the *Mugesera* case in legal circles was positive in that is perceived as a marked turn from the limiting constructs of the *Finta* decision and the first step in establishing a system more incorporative of international norms. However, it should be noted that the decision in *Mugesera* did not lead to the deportation of the accused. Canada refused deportation at the time of the judgment due to the fact that Rwanda’s penalty structure still included the death penalty. Although Rwanda repealed the death penalty in July 2007, Leon Mugesera remains in Canada.<sup>65</sup> By 2007, it was reported extradition requests were made by Rwanda for five men in total in regard to acts committed during the genocide. According to the prosecutor general of Rwanda, hundreds of suspects from the Rwanda genocide are living in Canada.<sup>66</sup> Canada recognized the problem and established a full time “Rwanda” division in the Royal Canadian Mounted Police to investigate the situation of genocide suspects in Canada.<sup>67</sup> Thus, from a public perspective, the *Mugesera* judgment establishes the understanding that measures will be taken to deal with suspects living in Canada, however, the measures may not always lead to the outcome hoped by the victims of the genocide

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid. para. 151. The Court relied upon the *Tadic* Trial Chamber at paras. 648 and 653.

<sup>64</sup> Ibid. para. 143, “...the judgement of our Court in *Finta* appears to be inconsistent with the recent jurisprudence of the ICTR and ICTY. The close relationship between our domestic law and international law on this question mandates that the nature and definition of crimes against humanity should be closely aligned with the jurisprudence of the international criminal courts.”

<sup>65</sup> In April 2009, Leon Mugesera appeared as a witness in the ICTR case of *The Prosecutor v. Karamera et al.*

<sup>66</sup> Hirondele, ‘Canada: Five Alleged Genocidaires Still Awaiting Extradition’ (11 December 2007), <<http://www.hirondellenews.com/content/view/1339/461/>>

<sup>67</sup> Ibid.

living in proximity with suspected perpetrators.<sup>68</sup> From the legal perspective, the *Mugesera* decision established the foothold for international law and jurisprudence to be utilized in domestic courts. The question in the future will be whether that influence will be used with respect to the Rwandan genocide in further deportation proceedings or whether the door will be open to prosecute suspects on their own soil?<sup>69</sup> As will be discussed further in this report, Canada has already taken the step to prosecute suspects for the Rwandan genocide in its own courts, it remains to be seen if further actions will be taken with the many suspects still at large.

The deference to international tribunal jurisprudence was again illustrated by the Federal Court of Appeal in 2005 in *Zazai v. Canada*.<sup>70</sup> The Court dismissed the appellant's argument that the s. 6(3) of the CAHWCA, defining crimes against humanity, does not include complicity as a mode of responsibility.<sup>71</sup> The Court held that complicity "contemplates a contribution to the commission of a crime"<sup>72</sup> and is considered, throughout common law and domestic penal law, a mode of commission of a crime. As in *Mugesera*, the Court relied upon the jurisprudence of the ICTY<sup>73</sup> and ICTR to support their finding that complicity was included within the definition of crimes against humanity in the CAHWCA. In addition, the appellant argued that complicity to commit crimes against humanity was no longer a punishable offence in so far as the CAHWCA repealed section s. 7(3.77) of the Criminal Code which defined the offence.<sup>74</sup> The court denied this argument, stating that s. 7(3.77) was a provision added to provide more certain understanding of the offence and that its non-inclusion did not alter the law in

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<sup>68</sup> Ibid.

<sup>69</sup> Leon Mugesera himself argued against deportation and for prosecution in Canada under the CAHWCA.

<sup>70</sup> *Zazai v. Canada (Minister of Citizenship and Immigration)* 2005 FCA 303. Zazai was denied a refugee claim on the basis that there was serious reason to believe he was complicit in committing crimes against humanity for acts such as torture, carried out while a lieutenant, then captain of the KHAD Afghan secret police. The Court determined that Zazai was willingly and voluntarily a member of the organization and had participated by attending training sessions and providing names of individuals who did not cooperate with the regime. In addition, it stated that he knew that the organization existed for limited brutal purposes and that he assisted in committing crimes of torture and murder. Paras 25-26.

<sup>71</sup> Ibid para. 12.

<sup>72</sup> Ibid para. 13.

<sup>73</sup> Ibid para. 16. Quoting *Prosecutor v. Kvočka* (Judgment) ICTY-98-30-T (2 November 2001), "...Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability."

<sup>74</sup> Criminal Code, 1987 s.7(3.77): In the definitions "crime against humanity" and "war crime" in subsection (3.76), "act or omission" includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission."

recognizing complicity as a mode of commission. It is important to note that, here again, the court utilized international law to buttress their argument by flatly stating that complicity as a mode of commission was a principle "...generally accepted under domestic and customary international law."<sup>75</sup> Thus, it becomes clearer that the picture which has unfolded in the decade between *Finta* and *Zazai* is one that accepts a respectively broader influence in domestic legislation vis-a-vis the core crimes and the jurisprudence which has put that legislation into practice.

Ultimately, the *Finta*, *Mugesera* and *Zazai* judgments highlight an important aspect of the evolution of international criminal law in general, namely the interplay between national and international jurisprudence. In *Finta*, the national courts relied on international experts like Professor Bassouini in creating the standards of offences that had been recognized by treaty such international courts as the Nuremberg Tribunals. Particularly in the case of crimes against humanity, an offence that had been little clarified in the international order since Nuremberg, reliance upon international experts seemed key to understanding. Interestingly, the decisions of the Canadian court were thus used in future international proceedings to aid in defining offences as well. Thus a circular reasoning emerged between the national and international level in regards to defining the offence of crimes against humanity. This is theme repeated throughout national and international jurisprudence in prosecution of core crimes cases. In *Mugesera* and *Zazai*, the court relied upon the judgments of the ad-hoc tribunals in order to aid in defining the offences at bar.

In 2005, Canadian resident Desire Munyaneza was arrested, following a five year investigation, under the Crimes Against Humanity and War Crimes Act for crimes committed during the Rwandan genocide. He is currently facing trial in the Superior Court of Montreal for two counts of genocide, two counts of crimes against humanity and three counts of war crimes.<sup>76</sup> He is accused, under the indictment, of committing murder, psychological terror, physical acts and sexual acts with intent to wipe out the Tutsi population. The Trial of Mr. Munyaneza marks the first time since *Finta* that an accused is brought before the Canadian court for violating a criminal code for an international crime. The import of the case may be realized on several levels. First, it is the

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<sup>75</sup> *Zazai* (n 70) para. 21.

<sup>76</sup> For information regarding the case see Trial Watch – Desire Munyaneza at [http://www.trial-ch.org/en/trial-watch/profile/db/facts/desire\\_munyaneza\\_423.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/desire_munyaneza_423.html).

manifestation of the goals iterated by the implementation of the CAHWCA, namely to challenge impunity and prosecute, in the domestic sphere, for genocide, crimes against humanity and war crimes. In addition, it will likely set precedent for future genocide adjudication in terms of procedural and substantive issues of international core crimes. Finally, it sends a clear message to the international community that domestic courts have the power and willingness to prosecute core crimes cases thus buttressing the primacy of the domestic sphere in accordance with the rule of complementarity and the aspirations of the drafters of the ICC and international legal community as a whole.

## 3. AUSTRALIA

### 3.1 AUSTRALIA: LEGISLATIVE HISTORY

Australia, similar to Canada, requires transference of international criminal law into the domestic legal system in order to recognize international offences punishable under Australian law. Australia first incorporated international criminal law into its domestic scheme in 1945 with the implementation of The War Crimes Act,<sup>77</sup> later amended in 1988 by the War Crimes Amendment Act. The purpose of the Act, as stated in its preamble, was to bring to trial in national criminal court persons who committed serious war crimes in Europe during World War II who may be living in Australia as a citizen or resident. Specifically, s. 9 of the Act proscribed liability under the Act to war crimes committed “on or after 1 September 1939 and on or before 8 May 1945”. A war crime was defined, through sections 6, 7 and 8, as a serious crime that fit into one of the enumerated circumstances.<sup>78</sup> Despite the entry into force of the Act and its amendment, Australian courts saw few attempts at prosecuting individuals responsible for wartime offences.

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<sup>77</sup> The original act provided for prosecutions by military court of “violations of the laws and usages of war.” [preamble].

<sup>78</sup> War Crimes Act, 1988. Section 7:

- (1) A serious crime is a war crime if it committed:
  - a. In the course of hostilities in a war;
  - b. In the course of an occupation;
  - c. In pursuing a policy associated with the conduct of a war or with an occupation; or
  - d. On behalf of, or in the interests of, a power conducting a war or engaged in an occupation
- ...
- (3) A serious crime is a war crime if it was:
  - a. committed;
    - (i) in the course of political, racial, or religious persecution;
  - or

In 2002, Australia enacted the International Criminal Court Act and International Criminal Court (Consequential Amendments) Act as its domestic legislation adopting the subject matter jurisdiction of the Rome statute.<sup>79</sup> The Explanatory Memorandum for International Criminal Court (Consequential Amendments) Bill states that the goals of the Bill are, *inter alia*, to "...create in Australia crimes that are the equivalent of genocide, crimes against humanity and war crimes in the International Criminal Court Statute, so that Australia retains the right and power to prosecute any person accused of a crime under the statute in Australia rather than the [ICC]."<sup>80</sup> Adopting a unique approach to the implementation of the Statute, the Consequential Amendments incorporates the Elements of the Crimes nearly in whole. Each of the offences as provided by Articles 6, 7 and 8 of the Rome Statute are represented as separate sections within the Consequential Amendments, each section is divided further into subsections that define all of the separate forms of the core offence. Thus, the Act creates a comprehensive set of crimes incorporated into the Australian domestic legal system. In stark contrast to the Canadian legislation, this list is exclusive, with no mention of customary international law affecting the definitions provided or any future amendments as to how the offences should be interpreted.

As stated above, the Consequential Amendments incorporate the Elements of the Crimes very nearly in whole with only a few alterations in definition. Subdivision B, which proscribes the crime of genocide, adopts all of the 5 offences of genocide as listed in the EOC, however, it does not include the requirement to each offence that "the conduct took place in the context of a manifest pattern of similar conduct directed against that [targeted] group or was conduct that could itself effect such destruction."<sup>81</sup> Subdivision C, which proscribes the offences of crimes against humanity, has only a slight deviation to the Elements in that it splits the crime of forced disappearance of persons into two

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(ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and

b. committed in the territory of a country when the country was involved in a war or when the territory of the country was subject to occupation.

<sup>79</sup> For a discussion of the legislation, see, T L. McCormack in M. Neuner (ed), 'Australia's Legislation for the Implementation of the Rome Statute', *National Legislation Incorporating International Crimes* (Berliner Wissenschaft-Verlag, Berlin2003).

<sup>80</sup> International Criminal Court (Consequential Amendments) Bill Explanatory Memorandum, Parliament of the Commonwealth of Australia, 2002.

<sup>81</sup> Ibid 70. McCormack suggests that the lack of this requirement will make prosecutions for genocide easier in Australian courts than in ICC. It is also important to note that Subdivision B represents the first time that the crime of genocide has been introduced into Australian law.

categories.<sup>82</sup> Finally, subdivisions D, E, F and G proscribe the offences of war crimes as rendered in the EOC. Subdivision H which proscribes ‘War Crimes That are Grave Breaches of Protocol I to the Geneva Conventions’ is an addition separate from the EOC, created in order to bring all war crimes under Australian law into one legislative body.<sup>83</sup>

The International Criminal Court Act and Consequential Amendments have been commended by some, such as the Australian Red Cross,<sup>84</sup> for its comprehensive approach which some hope offers a measure of certainty in guiding the Australian courts in prosecuting the core crimes. Australian jurisprudence stemming from prosecutions of core crimes, as detailed below, reflects an adherence to transforming domestic legislation to reflect international norms rather than incorporating international law directly into the domestic legal system. As Hilary Charlesworth noted, Australia’s ratification of the Rome Statute took place amidst anxiety over the impact of international law on state sovereignty.<sup>85</sup> Ms. Charlesworth quoted Coalition members of the Australian Cabinet as stating that “...we have to ensure that we protect our people against political or malicious interpretations of international instruments...” and that “...the decision to ratify does not compromise Australia’s sovereignty.”<sup>86</sup> Thus, a comprehensive approach to adopting the ICC Statute into domestic law seems a logical choice for a state that mandates domestic legislation as the basis for prosecuting core crimes. It remains to be seen how such a comprehensive piece of legislation will be utilized in prosecuting within the national system.

### 3.2 AUSTRALIA: CASE HISTORY

While it has been shown that Canada’s case law, even prior to the implementation of the CAHWCA, reflected a growing acceptance of the influence of international criminal law and an active perusal of the jurisprudence of international criminal courts in aiding interpretation, Australia’s history of national prosecutions of core crimes reflects a far

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<sup>82</sup> Ibid 71. Section 268.2(1) criminalizes the perpetrators conduct in arresting, detaining or abducting persons with authorization or support of government with the government refusing to acknowledge the deprivation of freedom; section 268 (2) criminalizes the same conduct where the perpetrator refuses to acknowledge the deprivation of freedom.

<sup>83</sup> Ibid 73.

<sup>84</sup> See Submission to the Joint Standing Committee on Treaties in Relation to the Implementing Legislation for the Rome Statute of the International Criminal Court at <http://1.redcross.org.au/?fuseaction=NEWSROOM.archive&sub=184>.

<sup>85</sup> H. Charlesworth, ‘Deep Anxieties: Australia and the International Legal Order’, *SydLRev* 21, p. 434.

<sup>86</sup> Ibid.

less effusive acceptance of the influence of international criminal law within the domestic sphere.

Following the implementation of the 1988 amended War Crimes Act, Australia's tried its first case before a domestic court dealing with the prosecution of core crimes. In 1990, Ivan Polyukhovich, an Australian citizen, was charged under the War Crimes Act for war crimes offences, including murder and complicity to commit murder, he had allegedly committed in the Ukraine between during the years of 1941 and 1943. Polyukhovich brought action in the High Court of Australia<sup>87</sup> claiming that the War Crimes Act was invalid because the acts did not occur on Australian territory. The High Court ultimately dismissed Polyukhovich's claim and ordered him to stand trial.<sup>88</sup> The High Court decision not only affirmed the mandate of The War Crimes Act, it offered an important insight into the Australian Court's interpretation of the enumerated offences and its understanding of the role international law played in aiding interpretation and application of the Act. Similar to Canada's Supreme Court in *Finta*, the Australian High Court sought to examine the offences through the domestic lens. However, the language utilized by the *Polyukhovich* court mandated that the offences enumerated in the Act were to be read as domestic offences and domestic offences only.<sup>89</sup> Specifically in regard to the elements of the offences, the court stated, "...it is clear that the elements of the statutory offence purportedly created by s. 9 are to be found *solely* in the provisions of the Act itself, except for the limited purposes of s. 17, by reference to the municipal systems of law to which the Act refers. Indeed, s. 8(2) and (3) are consistent only with that view."<sup>90</sup> The effect of such a finding is to create a general tenor of opprobrium for looking beyond the domestic sphere in proscribing the definition of war crimes. One possible consequence for such a narrow interpretation is that the law itself does not evolve as the concept of war crimes evolves within the international sphere. The effects

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<sup>87</sup> *Polyukhovich v. Commonwealth*, (1991), 172 CLR 501.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* "[Polyukhovich] is charged with offences against the municipal law of Australia, created by s.9 of the Act. The validity of the Act depends upon the legislative power of the Parliament to create the offence defined by the Act and to vest jurisdiction in Australian courts to try persons charged with that offence." 548.

<sup>90</sup> *Ibid.* 547. (emphasis added).

Section 8 of the War Crimes Act: Effect of sections 6 and 7

- (1) Subject to subsection 7(2), nothing in section 6 or 7 limits the generality of anything else in that section.
- (2) An act may be a serious crime by virtue of either or both subsections 7(1) and (3), but not otherwise.
- (3) A serious crime may be a war crime by virtue of either or both of subsections 7(1) and (3), but not otherwise
- (4) Two or more serious crimes may together constitute a war crime by virtue of subsection 7(4), but not otherwise.

of custom would be seemingly moot in the face of such a narrow construct. This stands in stark contrast to Canada's acceptance of custom as an important part of defining the core crimes. Ironically, although the *Finta* court and the *Polyukhovich* court were divergent in interpreting their applicable legislation, both courts created narrow readings on the elements. However, the legacy of *Finta* was followed by important changes in the way the domestic sphere incorporated international law. The *Polyukhovich* decision, in contrast, seemingly did not spark a similar call for change.

In 1999, the Aboriginal community made an application to the Court of the Australian Capital Territory for the arrest of the Prime Minister and two members of Parliament for the offence of genocide stemming from their sponsorship of the Native Title Amendment Act 1988.<sup>91</sup> The warrants of arrest were refused issue on the grounds that the crime of Genocide was not known to the Australian Capital Territory. The appellants then applied to the Supreme Court of Australia for review. The case was ultimately heard by the Federal Court of Australia where the majority affirmed the trial courts holding that the crime of genocide is not a part of the domestic law of Australia.<sup>92</sup> Both Courts grounded their reasoning in the fact that Australia had never implemented legislation making genocide a crime under law. In 1949, Australia passed the Genocide Convention Act which approved Australia's ratification of the Genocide Convention, however, no legislation was ever implemented to prescribe the crime itself.<sup>93</sup>

What is most significant about the decision, vis-à-vis the role of international law in the domestic court, is that the majority blatantly denied genocide as a part of Australian law while recognizing it as a peremptory norm of customary international law which gave "...rise to a non-derogable obligation by each nation State to the entire international community."<sup>94</sup> The court elaborated by stating that such an obligation imposed the duty of *aut dedere aut judicare* upon each nation State.<sup>95</sup> However, the majority argued that, while there was indeed an obligation imposed upon Australia, that obligation was not enforceable without domestic legislation enacting it into Australian law.<sup>96</sup> Enforcing such an obligation without enacting domestic legislation would lead, the

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<sup>91</sup> *Nulyarimma v. Thompson*, 96 FCR 153, [1999] FCA 1192.

<sup>92</sup> *Ibid.*

<sup>93</sup> D. Guilfoyle, 'Nulyarimma v. Thompson: Is Genocide a Crime at Common Law in Australia' (2001) FedLRev 1,1.

<sup>94</sup> *Nulyarimma* (n 91) para. 18.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid* para 20.

Court argued, "...to the curious result that an international obligation incurred pursuant to customary international law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention."<sup>97</sup> This argument is a debatable one in light of the fact that the Court was ruling on the application into the domestic legal order of genocide only and not any other offence recognized under customary international law. Genocide is one of a handful of *jus cogens* peremptory norms recognized by the international community and is arguably one of the crimes recognized as most obligatory to prosecute. The Court also relied on the holding of *Polyukhovich v. Commonwealth* to support their finding for the need of enacting legislation, stating that, "where there is a positive obligation to provide trial, pursuant to international customary law, the argument in favor of legislative validity is even more compelling."<sup>98</sup>

The court also recognized its own position in accepting the influence of international criminal law without domestic legislation in relation to other states systems. In an interesting act of self-analysis, the court recognized Australia's stance as unclear. The Court juxtaposed the ruling tenets of the Australian legal system against those of Canada, England and New Zealand,<sup>99</sup> recognizing their systems as those which utilize the incorporation theory to implement the rules of international law into their domestic legal systems.<sup>100</sup> Incorporation theory suggests that the international rule is integrated within the national legal system with the goal of harmonization between the legal orders. Thus, as has been shown in the case of Canada, such a theory favors opening the door to customary international law in that international law can be applied so long as it does not conflict with domestic legislation or the common law.<sup>101</sup> Conversely, the theory of transformation requires that national law must be implemented in order to enforce the

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid para. 19. "...the High Court [in *Polyukhovich*] held that legislation providing for the trial in Australia of persons alleged to have committed war crimes outside Australia during the Second World War was a valid exercise of the Commonwealth Parliament's power to make laws with respect to external affairs. None of the Justices thought it necessarily that Australia be under an obligation to enact the legislation..."

<sup>99</sup> In response to Merkel J's dissent.

<sup>100</sup> Ibid para 23.

<sup>101</sup> The Court recognized that Canada's history had been less than certain in regards to the role of customary international law within its domestic structure, however, it acknowledged Canada as ultimately maintaining an incorporation approach that embraced customary international law, Quoting Taschereau J, "I have come to conclusion that there exists such a body or rules adopted by the nations of the world...I have to acknowledge their existence, and treat them as incorporated in our domestic law...and I see nothing in the laws of the land inconsistent with their application within our territory." This excerpt was quoted by J Merkel in his dissent and the majority distinguished Australian practice.

rules mandated by the relevant international law. Such a theory recognizes that international law and domestic law are two separate bodies of law and international law must be transformed into the domestic law for jurisdiction to apply.<sup>102</sup> While the majority recognized that Australia's practice led to no clear acceptance of either theory, they argued that Australian jurisprudence seemingly reflected a view more in favor of transformation theory than incorporation theory.<sup>103</sup>

Merkel J, in his dissenting opinion, engaged in a thorough analysis before determining that genocide was indeed a part of the common law of Australia. Merkel noted that Australian jurisprudence reflected no real concrete answer as to how customary international law was to be applied in Australian domestic law.<sup>104</sup> Thus, in fomenting his conclusions regarding genocide as common law in Australian law, Merkel examined the practice and jurisprudence of other common law countries in adopting customary international law, as well as, various Australian legal authorities on the issue. He noted first that both the United Kingdom and Canadian jurisprudence reflected an incorporation approach to accepting customary international law within their respective domestic jurisdictions.<sup>105</sup> He then argued that Australia had seemingly favored what he termed the "common law adoption" approach.<sup>106</sup> Thus, he acknowledged that the issue at hand was whether adoption of an offence that has been recognized as meeting the status of a *jus cogens* is an "...a fortiori example of customary international law that is to be adopted a part of municipal law [provided it satisfies the illustrated principles of

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<sup>102</sup> Note that transformation may occur by judicial or legislative decision. Transformation as the Supreme Court recognized in *Nulyarimma*, through legislation, is often referred to as "hard" transformation theory.

<sup>103</sup> *Nulyarimma* (n 91) para. 23.

<sup>104</sup> Merkel J referred to *Chow Hung Ching v. The King* (1949) 77 CLR 449, as indicative of representing a recognition of the incorporation approach in Australian law. The High Court faced the issue of whether civilians who accompanied a Chinese army team convicted of assault in Papua Guinea had immunity under customary international law on the grounds that they were members of a visiting armed force not subject to jurisdiction of the court. The Court found the civilians were not members to the armed force and did not have a right to immunity. The Court interpreted the common law recognition of customary international law by stating that "International law is not as such a part of Australian law, but a universally recognized principle of international law would be applied by our courts." Quoted in *Nulyarimma* at para 125. Merkel J then noted that subsequent jurisprudence such as *Bonser v. La Macchia* (1969) 122 CLR 177 reflected a recognition of the transformation approach, stating. "...the present case must be decided by the law of Australia, not by recourse to doctrines of international law, except so far as they have been taken into and become part of the law of the land." Quoted at para 127. Merkel acknowledged that although Australian jurisprudence held observations concerning the relation between customary international law and municipal law, no decision had been made in point.

<sup>105</sup> *Ibid* paras 83 and 118.

<sup>106</sup> Merkel J stated that this theory was representative of the "source" view defined by J Dixon in *Chow Hung Ching*. In essence, Merkel J describes the formula for this approach as requiring the relevant rule of customary international law be generally accepted by the community of nations, not inconsistent with rules made by statute or common law. Insistency in this regard is described as "inconsistency with the general policies of our law, or lack of logical congruence." Para. 132.

common law adoption] or is the one exception to the application of those principles.”<sup>107</sup> Interestingly, Merkel J relied on the dissenting opinion of Brennan J in *Polyukhovich* to support his argument that no domestic legislation is needed for offences in which universal jurisdiction vests in all courts.<sup>108</sup> It is also important to note that in response to the argument put forth by the majority that the Commonwealth that courts were no longer able to create criminal offences,<sup>109</sup> Merkel J argued that recognizing genocide within the domestic system was not in effect creating a new criminal offence, but adopting and recognizing by the court an existing offence under international law.<sup>110</sup> Genocide is a clearly defined offence and does not conflict with the principles of common law,<sup>111</sup> thus it is not incorrect to recognize genocide as universal under international and municipal law vis-à-vis common law adoption.

It is important to note that transformation into domestic legal systems of international treaties is a common method of incorporating international law, and other national jurisdictions have also found it within their purview to deny the validity of the law of international texts that have been recognized or ratified but not implemented through domestic legislation. In the recent case, *Medellin v. Texas*,<sup>112</sup> the United States Supreme Court argued this very issue in denying enforcement of the ICJ decision in *The Case Concerning Avena and Other Mexican Nationals v. US*. The Court held, *inter alia*, that the judgment of the ICJ was not binding because, although the US had ratified the Vienna Convention, it was a non self-executing treaty and was not enforceable without legislation implementing into federal law.

The position of the Australian Supreme Court vis-à-vis genocide, however, arguably reflects a more questionable practice especially in regards to a criminal offence that, by the admission of its own court, represents a *jus cogens* norm and an obligation to states parties to prosecute. Indeed, there has been recognition of the general lack of Australian prosecutions for war crimes, especially in regards to nationals alleged to have

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<sup>107</sup> Ibid para. 140.

<sup>108</sup> Ibid para. 143.

<sup>109</sup> Ibid paras 163-166.

<sup>110</sup> Ibid para. 167.

<sup>111</sup> Namely the principle of *nullum crime nulla poena*. Merkel J argued that because genocide is a recognized *jus cogens* offence there is a recognized standard and knowledge of the offence.

<sup>112</sup> 552 U.S.\_(2008).

committed offences in World War II.<sup>113</sup> Following the decision in *Nulyarimma*, the Anti-Genocide Bill was introduced in Parliament as a legislative guarantee that genocide would be considered a crime under Australian law.<sup>114</sup> However, the Bill was never made into law in light of the drafting and implementing of the International Criminal Court Act in the following years. Thus, lawmakers took note of the lacunae present regarding genocide under Australian law and acted in accordance to fill the gap, while buttressing the legal rule that domestic legislation must be implemented for a crime to be considered such under Australian law, regardless of the crimes status under custom.

## 4. NETHERLANDS

### 4.1 NETHERLANDS: LEGISLATIVE HISTORY

In 1952, the Netherlands adopted the Wartime Offences Act as a means to incorporate into its domestic legal system legislation for the prosecution of violations of the laws and customs of war.<sup>115</sup> Although the Netherlands allows treaty law and custom to become valid national law,<sup>116</sup> limitations have been determined vis-à-vis the application of criminal law into the domestic legal structure. Article 16 of the Constitution, in conjunction with Article 1 of the Dutch penal code, have been construed to allow that criminalization of offences must be published in Dutch in order to be valid law. Therefore, in the Netherlands as in Canada and Australia, treaties proscribing international crimes must be implemented within the domestic legal structure in order to be enforced. Thus, in 1962, the Netherlands adopted the Genocide Implementation Act as a means of incorporating the offence of genocide as proscribed by the Genocide Convention into its domestic legal system. In addition, in 1989, The Torture Convention Implementation Act was implemented. By virtue of this implementing legislation, the core crimes offences were arguably incorporated into the Netherlands domestic law.<sup>117</sup>

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<sup>113</sup> See M Arons, 'No Refuge for War Criminals' *The Australian* (25 April, 2008) <<http://www.theaustralian.news.com.au>>

<sup>114</sup> Anti-Genocide Bill 1999.

<sup>115</sup> Article 8 of the Wartime Offences Act criminalized violations of the laws and customs of war.

<sup>116</sup> Constitution of the Netherlands, 2002.

Article 93:

Provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published

<sup>117</sup> Crimes against humanity specifically were not codified under Dutch law although, under the War Crimes Act, crimes under customary international law that may have fit within the purview of crimes against humanity may have

In 2003 the Netherlands implemented the International Crimes Act, the act not only codified into Dutch law the crimes contained in the Rome Statute, but also brought together all of the international law from varying instruments into one legislative body.<sup>118</sup> The Explanatory Memorandum to the International Crimes Bill states that the objectives of the Bill is to implement the crimes of the Rome Statute, thus fulfilling the obligations that arise from the principle of complementarity, and to fill in the lacunae which existed in regards to legislation on the core crimes, crimes against humanity in particular. The Memorandum also states that it was decided not to translate the offences into typically Dutch definitions since it may open the door to the risk that Dutch application would drift far from the internationally accepted concept of the offences.<sup>119</sup> Thus, the Memorandum instructs Dutch courts to adopt an international law orientation when dealing with various aspects of crimes and the limits of criminal responsibility.<sup>120</sup>

Section 2(3)(1) of the International Crimes Act, which defines the crime of genocide as identical to the definition provided in Article II of the Genocide Convention. Section 2(4)(1) adopts the definition of crimes against humanity as it is provided in the Rome Statute. Sections 5 through 7 define war crimes in a manner more encompassing than was previously seen through the Wartime Offences Act. While the Wartime Offences Act proscribed acts that violated the laws and customs of war, the International Crimes Act adopts the same general scheme in addition to listing enumerated offences under the definition. The offences are listed in three distinct categories representing war crimes applicable to international armed conflicts,<sup>121</sup> internal armed conflicts,<sup>122</sup> and those applicable to both international and internal conflicts.<sup>123</sup> The sections dealing with war crimes do vary from the definition given in the Rome Statute in that they do not limit the jurisdiction over war crimes "...in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes."<sup>124</sup> In addition to the sections dealing with genocide, crimes against humanity and war crimes, the International Crimes Act

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been prosecuted. In addition, the crime of torture was specifically codified under Dutch law with the implementation of the 1984 Torture Convention through the 1989 Torture Convention Implementation Act.

<sup>118</sup> The International Crimes Act replaced s. 8 and 9 of the War Crimes Act, The Genocide Implementation Act and the Torture Convention Implementation Act.

<sup>119</sup> Explanatory Memorandum, NYIL 236.

<sup>120</sup> Ibid.

<sup>121</sup> Section 5.

<sup>122</sup> Section 6.

<sup>123</sup> Section 7.

<sup>124</sup> Rome Statute, Article 8.

includes a separate section for the crime of torture.<sup>125</sup> The inclusion of this section allows the Dutch courts to prosecute for the crime of torture those acts which fall into the definition of the offence but that do not occur in conjunction with a widespread or systematic attack or an armed conflict.

## 4.2 NETHERLANDS CASE HISTORY

It is clear from its history of applying international law that the Dutch legal system favors transformation of international criminal law into the domestic legal structure. While international law has been generally incorporated into Dutch law through both treaty and custom, as stated, the Constitution has set limitations on this principle, excepting custom from forming a basis of prosecution for international crimes.<sup>126</sup> Jurisprudence reflects this constitutional bar by confirming the importance of domestic legislation proscribing international offences in order to establish the jurisdiction of the domestic court. For example, in 2001, the Netherlands Supreme Court heard, on appeal, the case of Desire Bouterse, a former commander in chief of the Suriname army who was alleged to have ordered the torture and execution of 15 people.<sup>127</sup> At issue in the case was whether the Dutch Torture Convention Act could be applied retroactively in prosecuting Bouterse for acts committed in 1982, seven years before the Torture convention was enacted into the Dutch legal system.<sup>128</sup> The Appeals Court of Amsterdam had overturned the denial by the Public Prosecutor in Amsterdam of an order for prosecution, claiming that offences alleged against Bouterse were punishable as crimes against humanity and/or torture under customary international law. The Supreme Court set aside this decision. In arguing against the Appeals Court decision, The Supreme Court looked to the Dutch Constitutional provisions dealing with principles of legality and ultimately held that the Appeals court was in violation of the principle of *nulla poena sine lege* as iterated in Article 16 of the Constitution<sup>129</sup> and Article 1, paragraph 1 of the Criminal Code.<sup>130</sup> The foundation for this decision rests in Article 94 of the Constitution which states that, “statutory regulations in force within the Kingdom shall not be applicable if such

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<sup>125</sup> Section 8.

<sup>126</sup> W. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (T.M.C. Assser Press, The Hague 2005) 78-79.

<sup>127</sup> *Wijnegaarde v. Bouterse*, Supreme Court of the Netherlands, 18 September 2001, LJN AB1471 <[www.rechtspraak.nl](http://www.rechtspraak.nl)>. English translation available at (2001) 3 Ybk of Int'l Hum L 710.

<sup>128</sup> The Torture Convention Implementation Act was entered into force on 20 January 1989.

<sup>129</sup> Article 16: No offence shall be punishable unless it was an offence under the law at the time it was committed

<sup>130</sup> Article 1, paragraph 1: No crime is punishable without a law.

application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions. Thus, the Supreme Court held that pursuant to Article 94, the principles regarding retroactivity put forth in Article 16 and the Criminal Code could be reviewed vis-à-vis treaties or resolutions but not by unwritten or customary international law.<sup>131</sup> In support of this argument, the Court referred to an excerpt from the Explanatory Memorandum for the Bill which denied the proposal, put forth in an advisory opinion by the Advisory Committee on Issues of Public International Law, to expand the relevant provision to allow unwritten international law to overcome municipal law. The memorandum acknowledged the use of customary international law within the judiciary, even stating that “unwritten international law can be regarded as binding in Dutch legal systems.”<sup>132</sup> However, it argued that unwritten international law cannot trump municipal law or, as the parliament argued, such a practice would extend the power of review of the judge and raise the potential for uncertainty. Noting that neither the Torture Convention nor the Torture Implementation Act included provisions regarding retroactivity, the Supreme Court held to the constitutional mandate in deciding that the relative provisions of the Act could not apply to the offences alleged.<sup>133</sup> In addition, the Court refused analysis of the nature of customary international law based upon recognition by other treaties.<sup>134</sup> Thus, like Australian jurisprudence recounted above, The Netherlands created a narrow construct for the admissibility of customary international law and validated the primacy of domestic legislation in prosecuting for international crimes.

It is important to note that Dutch jurisprudence had ruled in favor of extraterritorial jurisdiction in cases of war crimes,<sup>135</sup> but the jurisdiction to prosecute particular offences

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<sup>131</sup> *Bouterse* (n 127) para 4.4.1.

<sup>132</sup> *Ibid* para. 4.4.2.

<sup>133</sup> *Ibid.* para 4.6. “...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.”

<sup>134</sup> *Ibid.* para 4.7. The Supreme Court held that these findings precluded any need to answer the question of whether the acts could be considered offences under article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights both of which recognize as punishable those acts which are considered criminal in accordance with the general principles of law recognized by the community of nations.

<sup>135</sup> See *Prosecutor v. Knesevic*, Supreme Court of the Netherlands, Criminal Division, case no. 3717, 11 November 1997. English translation available at (1998)1 *Yearbook of International Humanitarian Law* 600. Knesevic, a resident of the Netherlands, was convicted in 1997 for violations of common article 3 of the Geneva Conventions which were included under Article 8 of the Wartime Offences Act for acts committed in Bosnia during 1992. Knesevic ultimately appealed before the Supreme Court arguing that Dutch courts did not have the legal authority to prosecute a case under the Wartime Offences Act for acts committed in a war or armed conflict in which the Netherlands was not directly involved. Knesevic argued that Article 1 of the Act did not extend to wars not involving the Netherlands in the same way section 2 of the Article only applied to armed conflicts involving the Netherlands. The Supreme Court denied the argument and upheld the findings of the Arnhem Court of Appeals, Military Chamber which stated that Article 8

was subject to the offence being recognized under domestic law through legislation or treaty. This principle, outlined in *Bouterse*, was followed in the 2002 decision of the District Court in *In re Zorreguieta*.<sup>136</sup> In 2004, the Netherlands prosecuted Sebastien Nzapali under the Torture Convention Implementation Act for acts committed in the Republic of Zaire in 1996.<sup>137</sup> Nzapali's acts fit within the guidelines proscribed in *Bouterse*, thus, prosecution was successful, marking the first of its kind in the Netherlands.<sup>138</sup> With the enactment of the International Crimes Act, subject matter jurisdiction over the core crimes is now established within the domestic law of the Netherlands.

Throughout the last decade, Dutch courts have adjudicated a handful of cases dealing with international core crimes. The cases have been brought to trial under the various international acts implemented into Dutch municipal legislation prior to the International Crimes Act. The cases reflect the dialogue between international jurisprudence and the national court and how the Dutch legal system has chosen to utilize international criminal law within its system. In 2005, Frans van Anraat, a Dutch businessman, was charged, under the Genocide Convention Implementation Act and the Wartimes Offences Act, in the Hague District Court with complicity in genocide and complicity in war crimes for supplying chemical materials to Iraq that were ultimately used to produce mustard gas that was used by the regime of Sadaam Hussein in attacks against civilian populations in Northern Iraq. The District Court acquitted van Anraat for complicity in genocide and convicted him for complicity in war crimes.<sup>139</sup> The case was appealed and the Appeals Court upheld the acquittal and conviction respectively,

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and 9 of the Wartimes Offences Act make punishable offences against the laws and customs of war in order to meet the obligations arising from the Geneva Conventions and that Article 3 of the Act allows for direct applicability of Dutch criminal law for the violations of those provisions of the Act, thus application to wars in which the Netherlands was not a party is admissible. The Supreme Court supported their findings with reference to the *travaux préparatoires* of parliament prior to the Act in which it is clear, despite the ambiguous language found in Article 1, that the drafter's intent was to provide a means under the Act to meet all treaty obligations. Thus, the Supreme Court inferred a broad interpretation to the Act.

<sup>136</sup> Amsterdam Court of Appeals, 25 April 2002.

<sup>137</sup> *Prosecutor v. N*, Rotterdam District Court, case no. A071718, 7 April 2004, available at [www.rechtspraak.nl](http://www.rechtspraak.nl), English translation available at (2004) 51 *Netherlands Intl L Rev* 439.

<sup>138</sup> W Ferdinandusse, 'Prosecutor v. N Case No'. A07178, *AJIL*, VOL.99, NO.3 (JUL., 2005) 686-690.

<sup>139</sup> *Judgment in the Case of Frans van Anraat*, District Court of the Hague, 23 December 2005. English translation available at: [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=lijn&lijn=AX6406&u\\_lijn=AX6406](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=lijn&lijn=AX6406&u_lijn=AX6406).

although adding two years to van Anraat's sentence due to the repeated nature of the acts.<sup>140</sup>

The District Court determined that the campaign of attacks against Kurdish civilians did indeed amount to genocide.<sup>141</sup> In assessing the criminal responsibility of the accused for complicity in genocide, the Court looked to the jurisprudence of the ICTY and ICTR to form its basis for understanding.<sup>142</sup> Specifically, in regards to the mental element of intent, the court determined that the current jurisprudence of the ad-hoc tribunals reflected the standard of "knowing", in that the accused must know of the genocidal intent of the perpetrator.<sup>143</sup> The Court forthrightly denied the application of the broader Dutch national standard of *dolus eventualis*, stating, "...the requirement of knowledge of the accomplice in relation to the main offence of genocide is an essential component of liability under international criminal law on this subject and that Dutch law, which seems to result in larger liability, can not be applied in this respect."<sup>144</sup> The court seemingly took a bold, if not conservatively internationalist, approach to the subject.<sup>145</sup> As Professor Harmen van der Wilt noted, "neither international nor national law precludes domestic courts from applying their own criminal law."<sup>146</sup> In addition, in cases such as *Van Anraat* where no cogent liability standard for the offence can be determined from existing international jurisprudence, a more nuanced approach may be sought.<sup>147</sup>

Indeed, the ad hoc tribunals have left a complex legacy in dealing with complicity in genocide, particularly in regards to defining the level of intent required for criminal responsibility for the offence. In *Prosecutor v. Akayesu*, the ICTR Trial Chamber

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<sup>140</sup> *Appeal Judgment in the Case of Frans van Anraat*, Court of Appeal of The Hague, LJN: BA4676, 9 May 2007. Available at <http://www.rechtspraak.nl>. English translation available at <http://www.haguejusticeportal.net>.

<sup>141</sup> The District Court stated that pursuant to the Genocide Convention Implementation Act, it would have to be proven that genocide was committed before addressing the issue of complicity to genocide. The Court found that genocide against the Kurdish population, defined by the court as an ethnic group in accordance with the Act, was indeed committed.

<sup>142</sup> *Ibid* para. 6.4. "Because the actions of the accused will explicitly and exclusively be prosecuted as international crimes, the court will focus on the international boundaries of liability."

<sup>143</sup> *Ibid* para 6.5.1. The court relied upon the findings of the *Krstic* Appeals Chamber, Sentence on Appeal, 19 April 2004, at para. 144 and *E. and G. Nakirtumana* cases number ICTR-96-10-A and ICTR-96-17-A (Sentence on Appeal), 13 December 2004, at paras. 500 and 501.

<sup>144</sup> *Ibid*.

<sup>145</sup> The Court looked to the language of the Explanatory Memorandum on the Code of International Crimes to determine that if international rules on liability under criminal law concerning international crimes essentially deviate from national criminal law, the international rules should apply. Thus, a thorough analysis of legislation and international case law must precede a determination of liability standards.

<sup>146</sup> H G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction' (2006) JICJ 4, 255.

<sup>147</sup> *Ibid* 254.

differentiated between the definition of individual criminal responsibility as it appeared in article 6(1)<sup>148</sup> of the ICTR statute and complicity as proscribed under Article 2(3) definition of genocide.<sup>149</sup> The Court determined that under article 6(1) there was a requirement that the accused acted with specific intent to commit genocide,<sup>150</sup> but for complicity in genocide under 2(3), such specific intent was not needed.<sup>151</sup> This proved a problematic if not confusing definition. It created a distinction between aiding and abetting and complicity, a distinction that was hardly met with resounding acceptance by the international community and subsequent tribunal jurisprudence. Professor William Shabas noted that on comparative criminal law both concepts essentially mean the same thing.<sup>152</sup> In addition, both the Trial chambers in *Prosecutor v. Stakić* and *Prosecutor v. Semanza* took issue with the approach endorsed in *Akayesu* and supported the conclusion that there was no basis in law to differentiate between the *mens rea* requirement of aiding and abetting and complicity in genocide.<sup>153</sup>

Diverging further from the *Akayesu* decision, the ICTY Appeals Chamber in *Prosecutor v. Krstić*, found that "...the terms 'complicity' and 'accomplice' may encompass conduct broader than that of aiding and abetting."<sup>154</sup> The court determined that Krstić's responsibility was that of an aider and abettor, and the *mens rea* standard for the alleged crime as such was that the accused had knowledge of the perpetrator's genocidal intent.<sup>155</sup> The court then went on to determine that the *mens rea* standard for complicity as it is described in article 4(3) of the Statute required that the accused also possess the specific intent to destroy the group.<sup>156</sup> It is important to note that Judge Shahabuddeen, in his partial dissenting opinion, considered that there did not exist a separate standard for each definition under the statute, as such, aiding and abetting was

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<sup>148</sup> 6(1): "A person who planned, instigated, ordered, committed or otherwise *aided and abetted* in planning, preparation, or execution of a crime referred to in articles 2 and 4 of the...Statute, shall be individually responsible for the crime."

<sup>149</sup> 2(3): "the following acts shall be punishable:

...

e) *complicity* in genocide."

<sup>150</sup> *Akayesu* (n 53) para 547.

<sup>151</sup> *Ibid.* para 545.

<sup>152</sup> W Shabas, *Genocide in International Law* (Cambridge University Press, Cambridge 2000) 293.

<sup>153</sup> See *Prosecutor v. Stakić*, (Decision on Rule 98 Motion for Judgement of Acquittal), ICTY-97-24-T, (31 October 2002) para. 60 and *Prosecutor v. Semanza*, (Judgement) ICTR-97-20-T, (15 May 2003).

<sup>154</sup> *Prosecutor v. Krstić*, (Appeals Chamber Judgement), ICTY-98-33-A, (19 April 2004) para 139

<sup>155</sup> *Ibid.* para 140.

<sup>156</sup> *Ibid.* para 142.

part of complicity in genocide under 4(3).<sup>157</sup> Therefore, the *mens rea* standard requirement for the aider and abettor (and, in turn, one accused of complicity) does not have to include the intent to commit genocide, but only the knowledge that the perpetrator had such intent.<sup>158</sup> Chile Oboe-Osuji extrapolates upon a similar approach in his article “Complicity in Genocide versus Aiding and Abetting.” He argues that the Akayesu decision did not simply fall short in the face of numerous critical responses regarding the distinction between the two concepts, but also in its construct of the *mens rea* for an aider and abettor of genocide as requiring a finding of genocidal intent.<sup>159</sup> Citing the Appeals Chamber in *Prosecutor v. Kayishema and Ruzidana*, he argued that a growing uniformity in accepting knowledge as the required *mens rea* formulation for accomplice liability was being recognized.<sup>160</sup> In addition, he suggested a more nuanced approach in which complicity stands as an omnibus concept that is inclusive of different modes of involvement in crime.<sup>161</sup> Thus, while a distinction may arise between the concepts of complicity as iterated in the differing Articles of the Statutes of the tribunals, the *mens rea* standard would ultimately remain knowledge, regardless of which provision is applied.

The International Law Commission defined the *mens rea* standard for complicity in general as “knowingly [providing] assistant to the perpetrator of the crime.”<sup>162</sup> “Knowledge” has seemingly been accepted as the international norm for *mens rea* in complicity in genocide yet it is clear that a proper consensus of that standard has not yet been met within international jurisprudence. As stated above, the Dutch court in *Van*

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<sup>157</sup> Ibid, (Partial Dissenting Opinion), para 64.

<sup>158</sup> Id para 66. Shahabuddeen posed an explicit example of his definition by stating that one who sold chemicals with the knowledge that the purchaser was to use the material in the killing with intent to destroy members of a protected group would be held responsible under Genocide convention for complicity in genocide despite not having the intent to destroy the group himself. Para 67.

<sup>159</sup> C Oboe-Osuji, ‘Complicity in Genocide versus Aiding and Abetting’ (2005) JICJ 3, 62. Oboe-Osuji also argues against Professor Shabas’s construct of the *mens rea* for complicity in genocide which requires the accused to possess genocidal intent. Oboe-Suji states, *inter alia*, that such a requirement will render meaningless the entire idea of complicity because should the complicit party need and/or have the requisite genocidal intent, he can then be inferred as having committed the crime of genocide. See also H G van der Wilt (n 146) at pp. 241-246. Professor van der Wilt argues, *inter alia*, that requiring a standard of genocidal intent for all perpetrators is hardly appropriate when recognizing the context of war and who acts out of own intent or upon orders. He advocates a differential attribution approach in which different standards apply to those who plan versus those who merely carry out the acts. In addition, he also takes issue with Shabas’ approach to complicity to genocide, again pointing out the requirement of genocidal intent for the aider and abettor may result in confusion in understanding between complicity as a crime and participation vis-à-vis joint criminal enterprise.

<sup>160</sup> Ibid.63.

<sup>161</sup> Ibid.76.

<sup>162</sup> See Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10.

*Anraat* accepted knowledge as the international norm and the proper standard to apply to the case. Ultimately, the court determined that the evidence was insufficient to prove that he knew of the genocidal intent of the perpetrating regime and he was acquitted of the charge of complicity to genocide. The court did find van Anraat guilty of complicity in war crimes, noting that the *mens rea* standard did not require a special intent of the perpetrator and that the intent requirement for the accused was seemingly similar in both the Dutch penal code and the international standard.<sup>163</sup> In addition, the court determined no sizable difference between the domestic and international constructions of the *actus reus* of the crime. The judgment of the District Court was appealed.

In 2007, the decision of the Court Appeal in The Hague was handed down in the *van Anraat* case. While the Court maintained the acquittal for complicity in genocide and conviction for complicity in war crimes, the judgment revealed persistent complications in understanding the influence of international criminal law within the national court. First, the Appeals Court diverged somewhat from the Trial Courts determination that genocide did in fact exist by claiming that a better motivated judgment based on conclusive evidence was needed to support a finding of genocide.<sup>164</sup> In addition, the Appeals Court recognized that international law had not reached consensus on certain aspects of the offence, namely the appropriate level of intention required for complicity in genocide. As in the case of the District Court, the Court of Appeal faced the issue of what standard to apply in determining the *mens rea* of the offence. The court recognized that international law required that the accused must have known that the perpetrator acted with genocidal intent, while the Dutch legal system proscribed the level of intent of *dolus eventualis*. However, in a marked departure from the District Court, the Appeals Court ultimately determined that there was insufficient evidence to show that the accused had knowledge or willingly and knowingly accepted the reasonable chance that the perpetrator had genocidal intent. The Court essentially circumvented the question of what standard to apply in Dutch courts for cases of complicity to genocide by claiming that evidence was

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<sup>163</sup> *Van Anraat* Judgement (n 139) para. 6.5.2. Note that the jurisprudence of the ICTY has determined that the *mens rea* requirement for aiding and abetting is knowledge that his acts assist the commission of the offence. The aider and abettor must have the intent to provide assistance or accept that assistance in the commission of the offence would be a possible and foreseeable consequence of his actions. Finally, the aider and abettor need not know that the precise crime was intended but he should at least be aware that crimes will probably be committed, and one of those crimes is committed, he intended to facilitate the commission. *Prosecutor v. Blaskić*, (Judgment), ICTY-95-14-T, (3 March 2004) paras. 286-87.

<sup>164</sup> *Ibid* para. 7. It should be noted that the court did state that at least there were powerful indicators that the Iraqi leaders had genocidal intent.

not available to prove either the international or national standard. Unfortunately, the Appeals judgment only obfuscates the problem of understanding which mental standard for complicity in genocide should be applied in Dutch courts. It remains to be seen how the issue will materialize in future jurisprudence.

The requirements for complicity in non-genocide international crimes recognized within the international forum have been somewhat less contentious than for genocide but not entirely without question. The ICTY Trial Chamber in *Prosecutor v. Knorleac* enumerated the requirements in terms of aiding and abetting recognized by the ad hoc tribunals. They include, *inter alia*, that the acts of the aider and abettor have a substantial affect on the commission of the crime by the principal offender, the aider and abettor knew and/or was aware that his acts assisted in the commission of the crime, and that he knew of the principal offender's *mens rea*, however, he need not share in that *mens rea*.<sup>165</sup> Furthermore, the aider and abettor need not know the particular crime that was intended so long as he is aware of the probability of the commission of one of a number of crimes and one of the crimes is committed which he intended to facilitate.<sup>166</sup> The Rome Statute proscribes aiding and abetting done for "the purpose of facilitating the commission of a crime."<sup>167</sup> This has been recognized as forming a higher *mens rea* threshold than recognized by the case law of the ad-hoc tribunals.<sup>168</sup> The Dutch national standard for complicity as an accessory require that the accused intentionally assist the commission of the crime or intentionally provide the opportunity, means, or information necessary to commit the offence.<sup>169</sup> As previously stated, the level of intent required is *dolus eventualis* or the likelihood that the accused could have foreseen the consequences of his acts. Following the *van Anraat* case, the Dutch courts adjudicated a handful of complicity cases for non-genocide international crimes. The jurisprudence suggests an adherence to the Dutch national standard and the standard of the ad-hoc tribunals in so far as they are congruent. However, this understanding is not without difficulty in application as will be exemplified.

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<sup>165</sup> *Prosecutor v. Milorad Knorleac*, (Judgment) ICTY-97-25-T, Trial Chamber II, (15 March 2002) paras. 88-90.

<sup>166</sup> *Prosecutor v. Furundzija*, (Judgment) ICTY-95-17/1, Trial Chamber II, (10 December 1998) para 246.

<sup>167</sup> Article 25(3).

<sup>168</sup> E van Sliedrecht, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T.M.C Asser Press, The Hague 2003) 93.

<sup>169</sup> Criminal Code of the Netherlands, Article 48.

In 2005, the Hague District Court handed over convictions in two complicity in war crimes cases stemming from acts that took place during the war in Afghanistan. In the cases against Heshamudin H and Habibullah J (tried together), the District Court convicted the accused of complicity to torture and violations of the laws and practices of war under the Wartime Offences Act and the Torture Convention Implementation Act for participation in acts that occurred while working for the military intelligence service Khad throughout the 1980's and into 1990.<sup>170</sup> The defense argued, *inter alia*, that complicity to torture was not chargeable under the Torture Convention Implementation Act as it was not enumerated as a mode of liability within the Act itself.<sup>171</sup> The Court disregarded this argument and determined that a charge under the Act was allowed pursuant to the Dutch Criminal Code.<sup>172</sup> The Court determined that by transferring suspects to the Khad, the accused "consciously accepted the substantial risk" that suspects would be tortured and, furthermore, the evidence showed that the accused was aware of this risk.<sup>173</sup> The fact that the accused did not actually participate in torturing suspects himself did not obstruct a finding that the accused was complicit in torture. The court stated that "...the cooperation between the suspect and his co-perpetrators has been conscious, close and complete in such a way that with regard to the torture of the victims...this concerns complicity."<sup>174</sup> The finding of the court reflects the acceptance of Dutch penal requirements for complicity. While recognition and acceptance of a uniform standard is indeed advantageous for future adjudication, the standard itself is not without difficulty

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<sup>170</sup> Hague District Court, 14 October 2005.. English translation available at <http://www.haguejusticeportal.net/eCache/DEF/5/104.html>.

<sup>171</sup> Ibid.

<sup>172</sup> The Court stated that the penalization of complicity to torture pursuant to Dutch law arises from the provision in Article 91 of the Netherlands Criminal Code that *inter alia* declares Article 48 applicable to all other statutes, unless otherwise provided for by such other statutes. The Torture Convention Implementation Act does not provide for an exclusion of penalization for complicity and the Torture Convention...even explicitly in Article 4, first paragraph, states that, apart from the torture itself, every state should also make the attempt at and complicity and participation in torture punishable.

<sup>173</sup> *Trial Judgment in the Case Against Heshamuddin H and Habibullah J*, Hague District Court, Criminal Law Section, 14 October 2005.

<sup>174</sup> Ibid. Compare this to the findings of the Canadian Federal Court of Appeal in the *Zazai* case. The Canadian court found the accused guilty of complicity in torture for being a member of Khad and providing names of those who did not cooperate. The Federal Court of Canada had summed up its position regarding complicity in terms of membership in an organization in its 1993 decision in *Sivakumar v. Canada*. The court had determined that mere membership in an organization was not enough to determine complicity unless the organization in question possesses the particular goal of committing international crimes. The Court also determined that a stronger finding for complicity may be based upon the fact that the individual held a position of importance within the organization and remained in such a position while knowing the organization was committing crimes against humanity. The ad-hoc tribunals discussion on the issue of membership in an organization most often hinge upon the issue of joint criminal enterprise and have held that mere membership in the criminal organization is not sufficient to merit personal liability. This issue will be dealt with further in forthcoming drafts.

and the Dutch courts have been met with a case which exemplifies a problematic issue for certain complicity cases in general.

In 2006 another complicity in war crimes case was heard in the Dutch courts, this time against a suspected arms dealer. The case presented a dilemma that has been recognized in the international community, namely the difficulty in presenting a case for accomplice liability for a supplier of arms. Dutch businessman, Guus Kouwenhoven was brought to trial for war crimes and breaking the UN arms embargo with Liberia.<sup>175</sup> Mr. Kouwenhoven, director of the Oriental Timber Company and Royal Timber Company, was charged with participation in war crimes under the Wartime Offences Act for allegedly facilitating the import of arms for use in killings by militia members and for participating in other war crimes. Counts 1, 2 and 3 of the indictment charged offences under Article 8 and 9 of the Wartime Offences Act including, *inter alia*, cruel treatment, torture and rape. The accused was charged with abetting in the crimes through such means as supplying weapons to Charles Taylor, the government and the armed forces, allowing employees to join in fighting, allowing use of helicopters and trucks for transport of armed forces, weapons and supplies. The Trial Court determined that the evidence was not sufficient enough to prove that the accused was involved in or had knowledge of the events described within counts 1-3. The Court stated that it was unable to determine whether the witness testimonies and documentary evidence provided was in reference to similar events. In addition, although the accused testified to his own personal and professional relationship with Charles Taylor and to the fact that employees at the OTC and RTC were former fighters of Taylor's National Patriotic Front of Liberia, the evidence was not sufficient to prove that those employees were involved in the acts alleged with either Mr. Kouwenhoven consent or his knowledge. Nor did the Court find that supplying weapons to Taylor and his regime constitutes a sufficient enough evidential link to prove that the accused participated in the offences alleged in the first three counts of the indictment. Thus, the trial court acquitted the accused of all charges of war crimes alleged in counts 1-3. Counts 4 and 5 of the indictment dealt exclusively with the selling and supplying of weapons in violation of the arms embargo. Testimonial evidence was given concerning the shipments of goods and weapons brought into Liberia on a ship owned by the OTC and Mr. Kouwenhoven. The trial court concluded that there was

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<sup>175</sup> *Judgment in the case against Guus van Kouwenhoven*, District Court of the Hague, Criminal Law Section, 07 June 2006. Available at [www.rechtspraak.nl](http://www.rechtspraak.nl). English Translation available at <http://www.haguejusticeportal.net>.

enough evidence to prove that the OTC had direct relationship with the import of weapons to Charles Taylor and that the accused had continuously played an important role in structural weapons importation into Liberia. The court convicted the accused of complicity in the intentional violation of article 2 of the Sanctions Act of 1977 and sentenced him to 8 years. Ultimately the case was appealed and overturned due to insufficient evidence and the contradictory nature of the testimony given at trial.

The Kouwenhoven case demonstrates the difficult nature of prosecuting arms brokers for complicity in war crimes even with the seemingly lower threshold requirements utilized by the Dutch courts. First, the elements of complicity in themselves are difficult to apply in cases such as van Kouwenhoven's and second, there is little jurisprudence available to directly ascertain how far complicity in war crimes may extend to the players in the present day contexts of war and/or armed conflict. Professor Shabas noted the complexities in applying complicity principles in contemporary settings of mass atrocity, questioning whether the net can be cast as far as suppliers and traders that deal with merchandise used directly or on the fringes of current conflicts.<sup>176</sup> In terms of the material elements of complicity, can, for example, the trading of weapons be considered a substantial contribution to the commission of war crimes? In turn, can the *mens rea* requirement of *dolus eventualis* be proven? Shabas notes that "most gun merchants will argue that they know little of the end use of the firearms they sell."<sup>177</sup> Indeed, with regard to *dolus eventualis*, it is uniformly required that the likelihood of foreseeability by the accused of the consequences of his actions be relatively high.<sup>178</sup> Thus, an outcome like the one seen in the van Kouwenhoven case is understandable. Indeed, the District Court, in determining that the supply of weapons to Taylor and his forces was not sufficient evidence to prove the accused participated in the war crimes charged, noted that "...weapons can also be used for acts that are legally permitted or acts that cannot be included in the criminal offences as charged under 1, 2 and 3."<sup>179</sup> While this is true, it seems to suggest a very high standard for the mode of commission by this type of accomplice. Arguably, under Dutch law of complicity as recognized in the cases

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<sup>176</sup> W. Shabas, 'Enforcing International Humanitarian Law: Catching the Accomplices', *Report of the International Committee for the Red Cross*, June 2001, Vol. 83 No. 842.

<sup>177</sup> *Ibid* 452.

<sup>178</sup> D W Morkel, 'On the Distinction between Recklessness and Conscious Negligence' (Spring 1982) *AJCL*, Vol. 30, 328.

<sup>179</sup> *Van Kouwenhoven*, Judgement (n 175).

mentioned above, supplying weapons would fit the definition of aiding through supplying means for the perpetrator to commit the offence. However, the District court did not seem to accept from the evidence presented that the accused knew or could have foreseen the acts committed by the perpetrators. It is interesting to note that the recognition of an arms embargo on Liberia was seemingly not sufficient to place van Kouwenhoven on notice to the likelihood that the imported weapons would be used in conjunction with the offences perpetrated by Taylor's regime. By his own admission, van Kouwenhoven knew of the embargo.<sup>180</sup> In addition, the arms embargo on Liberia, established by Security Council Resolution 1521, recognized the connection between the timber industry, the importation of illegal arms and the perpetuation of conflict in Liberia.<sup>181</sup> Yet, the court determined that, despite his knowledge of the state of Liberia and the context of his acts, the link between van Kouwenhovens supply of weapons during the embargo and the attacks against civilian populations by Taylor's regime was not sufficient for a conviction. It is important to note that the Court was profuse in questioning the veracity of much of the evidence provided by the prosecution and this ultimately led to an inability to find for conviction. However, the outcome, in terms of the general understanding of the offence, suggests a more raised standard of complicity to war crimes than recognized in the Dutch code, particularly in light of the fact that the District Court convicted van Kouwenhoven for violations of the embargo and stated the primacy of his role in supplying weapons to Taylor. Arguably, the District court's decision infers that the mental element in this particular situation is something akin to what is recognized by the ICC. At the very least, it seems to infer that aside from the material element, a high standard is required in proving the likelihood that the accused could have foreseen the acts of the perpetrator.<sup>182</sup>

The Dutch case history of core crimes prosecutions reflects one that utilizes a unique interplay between international and national standards. While in some instances the courts have eschewed making definitive decisions regarding the application of law for international offences, in other instances the courts have been firm in recognizing the similarities and differences between the international standards and advocating the

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<sup>180</sup> Ibid para. 7.29

<sup>181</sup> Security Council Resolution 1521, s/res/1521, 22 December 2003.

<sup>182</sup> The Appeals Court has upheld the findings of the District Court in terms of complicity in war crimes and overturned the conviction for violating the arms embargo. A further discussion of the Appeals findings will be made pending an official translation of the judgment.

application of the standard the court deems most fit. The advent of International Crimes Act is important in that it proscribes all of the core crimes in one document under domestic law. In terms of the elements of the crimes and the definitions of the modes and responsibilities, the Dutch courts have, similar to but perhaps not as profuse as Canadian courts, accepted the influence of international jurisprudence while continuing to recognize the primary input of national norms. This will likely continue the course in shaping how international and national law will intersect in the Dutch courts in the future.

## 5. CONCLUSIONS

Canada, Australia and the Netherlands represent three distinct approaches to accepting and integrating international criminal law into their respective domestic legal systems. As all three states recognize the dualist tradition in respect to incorporating international criminal law, it is the domestic legislation implementing the offences that stands as the point of genesis in this analysis. As the histories reflect, each state embraced differing maxims in constructing their domestic legislation. The culmination of these histories has led to the adoption and implementation of The Rome Statute in each respective state. At first blush, the implementation legislation of all three states reflects the common goal of making punishable the crimes enumerated in the Rome Statute within each national jurisdiction. However, it is clear from analyzing the legislative history of each state in leading up to the implementation of their respective Acts, that differing aspirations colored the implementation process and the ultimate outcome of the legislation. Canada, for example, has emphasized not only the intention to implement the core crimes of the Rome Statute into its domestic legal structure but also the commitment to strengthen its capacity in challenging impunity for international crimes committed outside of Canada whether in the past, present or future. The result of that commitment is the enactment of the CAHWCA, a broad and malleable piece of legislation that includes customary international law within its definitions of the crimes and which makes room for the acceptance of amendments or developments through custom and international case law in regards to the elements of the core crimes. In contrast, Australia's International Criminal Court (Consequential Amendments) Act is a very narrowly constructed piece of legislation that adopts a strict understanding of the Elements of Crimes and allows little to no room for development under custom or case law stemming from outside of Australian borders. The importance of the implementation legislation for all three states

is that they establish the legal framework for prosecution of core crimes and for the primacy of the domestic realms over the ICC in carrying out this goal. However, it is clear that each of the analyzed states have taken their own unique approach.

Legislation criminalizing core crimes, of course, is not interpreted in a vacuum, and it is the interplay with the adjudication of core crimes cases that allow the words on the page to come to life and grow their teeth, so to speak. Again, in this realm, each state has embraced a different approach. At primary issue seems to be the degree of influence international jurisprudence has upon domestic prosecutions of core crimes cases and ultimately how that influence, or lack thereof, has guided the understanding of the elements of the crimes. In this regard, Canada and the Netherlands have, to varying degrees, embraced international jurisprudence as a guiding force in defining and understanding the elements of core crimes. Both The Supreme Court in Canada and the District Court in the Netherlands have stated the importance of utilizing international jurisprudence in defining international crimes. Indeed, both states have structured judgments based upon the elements of offences as recognized by international jurisprudence. Canada has arguably taken an even broader stance than the Netherlands with its reliance in many cases upon the findings of the ad-hoc tribunals and its acceptance of customary international law as a guide in applying and interpreting international law. It is important to note, however, that both Canada and the Netherlands have buttressed their implementation of international standards with application of certain national legal norms, particularly in cases where the under-inclusiveness of the legislation applied has created lacunae in the proscribed crimes or modes of responsibility. For instance, Courts in both states relied upon national penal codes to aid in prosecuting for varying forms of accomplice liability. Thus, it should be said that in both States the interplay between domestic and international law advocate for a more effective application of the punishability of core crimes.

Australia, in contrast to Canada and the Netherlands, has adjudicated in international crimes cases mostly on issues of jurisdiction. The running theme in the Australian cases analyzed has been a denial of the influence of international law and jurisprudence unless it has been transformed into Australian domestic law. Consequently, it is impossible to determine how the Australian courts utilized international jurisprudence in aiding the prosecution of international crimes. There is little to no evidence to illustrate whether Australian courts have taken influence from

international jurisprudence in applying and defining the elements of the crimes. The lack of adjudication simply precludes any cogent analysis or conclusion on this issue.

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