Canada's Crimes against Humanity and War Crimes Act on Trial

An Analysis of the *Munyaneza* Case

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Abstract

Canada was the first state to adopt implementing legislation following its ratification of the ICC Statute. Adopted in 2000, the Crimes against Humanity and War Crimes Act was tested for the first time in the Munyaneza *case. In May 2009, Mr Munyaneza was convicted on all counts of genocide, crimes against humanity and war crimes and, in October, was sentenced to life imprisonment. The first case under the Act provides an opportunity to reflect on certain issues that will have an impact on Canada's ability to effectively contribute to the enterprise of international criminal justice. This article focuses on two such issues that were relevant to the* Munyaneza *case, namely the definitions of offences, which rely heavily on customary international law and on the ICC Statute, and the sentencing scheme provided by the Act.*

1. Introduction

On 22 May 2009, Justice André Denis of the Superior Court of Quebec convicted Désiré Munyaneza of seven counts of genocide, crimes against humanity and war crimes for acts of murder, sexual violence and pillage committed in Rwanda in 1994.[1] On 29 October 2009, Mr Munyaneza was sentenced to

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1 *R. v. Munyaneza* [2009] QCCS 2201 [hereafter, '*Munyaneza*']. The accused chose, with the consent of the Attorney General, to be tried without a jury by a judge of a superior court of criminal jurisdiction pursuant to § 473(1) of the Criminal Code, R.S.C. 1985, c. C-46 [hereafter, 'Criminal Code'].

Journal of International Criminal Justice **8** (2010), 269–288 doi:10.1093/jicj/mqq002

life in prison with no chance of parole for 25 years, the harshest sentence available in Canadian law.[2] The defence has appealed both the conviction and sentence. The Quebec Court of Appeal will hear the case sometimes in 2010.[3]

One of the main objectives of the Crimes against Humanity and War Crimes Act[4] is to enhance and reinforce Canada's capacity to prosecute and punish persons accused of the 'core' international crimes, namely genocide, crimes against humanity and war crimes. Universal jurisdiction can be exercised provided the accused is present subsequently on Canada's territory.[5] The judgment rendered in the *Munyaneza* case is historic from a Canadian perspective. It is the first case under the Crimes against Humanity and War Crimes Act (hereafter, 'War Crimes Act', or 'Act') and it signals a possible return to a more aggressive stance regarding alleged war criminals found on Canadian territory.[6]

Canada has a long and tortuous history with respect to the prosecution of war criminals. After some 40 years of inaction following World War II,[7] the Canadian Government amended the Criminal Code in 1987 to allow the exercise of jurisdiction over crimes against humanity and war crimes committed outside Canada by deeming that such crimes took place in Canada.[8] At that time, the Government chose to pursue primarily the option of criminal prosecution. This 'made in Canada' solution was to be tested in the years that followed, without much success. Four prosecutions were launched between 1987 and 1994, none of which led to a conviction.[9] The confirmation of the acquittal

2 *R. v. Munyaneza* [2009] QCCS 4865 [hereafter, '*Munyaneza* Sentencing Judgment'].

3 For the Court of Appeal's decision to grant leave to appeal on mixed questions of fact and law, see *Munyaneza v. R* [2009] QCCA 1279. The decision on Mr Munyaneza's motion to appeal the sentence was deferred to the judges who will hear the appeal on the conviction: *Munyaneza v. R*, 2009 QCCA 2326 (27 November 2009); see also *Requête pour permission d'en appeler de la sentence imposée*, C.A.Q. 500-10-004416-093, 23 November 2009.

4 Crimes against Humanity and War Crimes Act, S.C. 2000, c. 24 [hereafter, 'War Crimes Act' or 'Act']. It entered into force on 23 October 2000.

5 § 8(b) of the Act. Universal jurisdiction is taken here to encompass assertion of jurisdiction for crimes which, *at the time of commission*, had no territorial or national link with the prosecuting state. The requirement that the offender *subsequently* be present on the territory does not affect this qualification and may be better understood as a political choice as to the exercise of jurisdiction. Denis J in *Munyaneza*, *supra* note 1, § 65, mentions that the alleged perpetrator must 'reside' in Canada, which is clearly a mistake.

6 Almost immediately after the sentencing judgment in *Munyaneza*, a prosecution was launched against Jacques Mungwarere for acts allegedly committed during the genocide in Rwanda.

7 With the exception of the immediate post-war trials held in Europe.

8 § 7 (3.71) provided: 'Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if … '. This change was made in accordance with the recommendations contained in the Commission of Inquiry on War Criminals Report—Part I: Public (1986), chaired by the late Justice Jules Deschênes.

9 *R. v. Finta* [1994] 1 S.C.R. 701 [hereafter, '*Finta*']; *R. v. Pawlowski* [1991] O.J. No. 2499 (QL) (unable to convince essential witnesses to change their minds about coming to Canada to testify, the Crown was forced to drop the charges and to contribute to Pawlowski's legal costs: *R. v. Pawlowski* [1992] O.J. No. 562 (QL) upheld at 12 O.R. (3d) 709 (Ont. C.A.), application for leave

of Imre Finta by the Supreme Court in March 1994 gave the hardest and final blow to what had been a long overdue but laudable effort by Canada to address the issue of impunity.[10] From this point on, criminal prosecutions stopped being a viable option, and immigration measures became the preferred solution.

The most problematic effects of the *Finta* decision[11] have been addressed by legislative amendments through the Act and in the subsequent jurisprudence of the Supreme Court in *Mugesera*.[12] It is crucial to understand, though, that this difficult debut in regard to war crimes prosecutions serves to explain the prudence shown by the Canadian authorities before launching the first prosecution pursuant to the new legislation against Mr Munyaneza.

The *Munyaneza* judgment is carefully drafted so as to limit the possibility of reversal on appeal, at least on the law. The 200-page judgment mainly focuses on the evidence substantiating the indictment, as the judge methodically summarizes and weighs the credibility of the 66 testimonies (30 on the part of the Crown, 36 from the Defence (the accused did not testify)) heard over the course of the trial, which lasted over two years including the deliberations of the Court. A confidential annex contains longer summaries of the testimonies while protecting the identity of many of these witnesses who were granted anonymity during the trial. Defence counsel have focused their grounds of appeal on issues of facts or of mixed facts and law, such as defects in the indictment as formulated, the judge's errors in the application of the rules regarding admissibility of evidence or his assessment of the evidence, process of identification of the accused, fair trial and presence of the accused during rogatory commissions, etc.[13]

The legal analysis in regard to the substantive international crimes is contained in some 25 pages. It lacks breadth, both in terms of the proportion of the judgment devoted to substantive analysis and as regards the depth into

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to appeal dismissed with costs (without reasons) on 23 September 1993: [1993] S.C.C.A. No. 187 (QL)); *R. v. Reistetter* [1990] O.J. No. 2100 (QL) (the federal government eventually dropped charges against him on the ground that they no longer had sufficient evidence to proceed); *R. v. Grujicic* [1994] O.J. No. 2280 (QL) (proceedings were stayed as fundamentally unjust and oppressive in denying the accused, on the basis of mental and physical capacity, the opportunity for fair trial and full answer and defence).

10 *Ibid.*

11 For a comment, see I. Cotler, 'Bringing Nazi War Criminals in Canada to Justice: A Case Study', 91 *American Society of International Law Proceedings* (1997) 262.

12 *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 S.C.R. 100, 2005 SCC 40 [hereafter, '*Mugesera*']. This case was not concerned with criminal proceedings, but rather with expulsion of Mr Mugesera from Canada. The decision has nonetheless profoundly influenced the domestic approach to international crimes.

13 *Avis d'appel amendé et mis à jour*, C.A.Q. 500-10-004416-093, 19 November 2009 [hereafter, '*Avis d'appel*']. Procedural or evidentiary issues are not discussed in this comment. As regard rogatory commissions, it may be noted that in accordance with § 709(1)(*b*) of the Criminal Code, evidence of a witness who is outside Canada may be taken outside the country by a commissioner. In this case, Denis J himself, accompanied by counsel, travelled to Rwanda, Tanzania and France to take evidence from witnesses who could not travel to Canada.

which the issues are addressed. It essentially defines the offences, and, while it is not infallible, it does so in general conformity with international law. The main flaw of the judgment may be that the application of the law to the facts is somewhat lacking. The judge quite correctly states the law as regards the core crimes, reviews the facts at length, but his final discussion fails to distinctly connect the two. As a result any legal challenge to the judgment is therefore rendered far more difficult.[14]

This article will first discuss the substantive definitions of the core crimes provided for in the Act in light of the analysis contained in the *Munyaneza* judgment. Second, it will look at certain aspects of the sentencing scheme of the Act in light of the rules applicable before international jurisdictions.

Prior to these discussions it should be noted that Denis J appears to have concluded that Mr Munyaneza personally committed the crimes, hence there is no specific discussion on modes of liability.[15] This runs in the face of the fact that the factual conclusions rendered by Denis J do not in all circumstances appear to support a finding of principal liability under Canadian law.[16] In order to analyse differing modes of criminal responsibility, a more thorough legal characterization of the facts would have been warranted, which was not the case in this judgment.[17] Furthermore, defences, justifications and excuses will not be discussed herein either, as none were specifically raised by the accused.

Needless to say, this analysis will not look to comprehensively deal with the entire spectrum of the Act, and cannot look to comprehensively address the promises and limits of Canadian law as regards accountability for the worst international crimes. This comment is a mere starting point for further future analysis.

2. Substantive Definitions of Genocide, Crimes against Humanity and War Crimes

A. Reliance on Customary International Law

The War Crimes Act presents an interesting mosaic of different applicable law. As we shall see, the definitions regarding offences refer essentially to international law. However, the available defences, justifications and excuses are those of both Canadian law and international law,[18] whereas the modes of

14 *Avis d'appel*, *supra* note 13, § 29, ground of appeal 12A.

15 Arguments had been made by both parties in this regard. For a discussion of modes of liability under the Act, see F. Lafontaine, 'Parties to Offences under the Canadian *Crimes against Humanity and War Crimes Act*: an Analysis of Principal Liability and Complicity', 50 *Cahiers de droit* (2009), forthcoming in nos 3-4.

16 See e.g. §§ 2059 (lending his vehicles to facilitate the commission of crimes), 2060 (distributing weapons to *Interahamwe*), etc.

17 This aspect has been raised as a ground for appeal: *Avis d'appel*, *supra* note 13, § 29.

18 § 11 of the Act.

participation to the (international) offences are exclusively those of Canadian law.[19]

Different states have taken different approaches in their task of implementation of the Rome Statute of the International Criminal Court (ICC Statute) and, more particularly, of the core crimes. In analysing implementing legislation, we may find the same definition of crimes as in the ICC Statute, a broader definition, a more restrictive definition, or an absence of definition altogether.[20] The Canadian legislation is somewhat harder to categorize. It refers to the ICC Statute, but only as an interpretative device of customary international law. Indeed, Sections 4(3) and 6(3) of the Act, which define the core crimes, do not refer to the ICC Statute. For instance, '"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law …'. The definition thus expressly provides for essential constitutive elements of the crime of genocide, namely (1) an act or omission committed; (2) with intent to destroy, in whole or in part; (3) an identifiable group of persons, as such. However, the exact content of these and other constitutive elements of the crime of genocide is to be determined in accordance with customary international law.

Such an approach certainly has the advantage of flexibility and dynamism, i.e. the capacity to adapt to developments in the law. However, the identification of customary international law is a difficult task indeed, and the Act does provide some guidance as to its content:

> For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the *Rome Statute* are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.[21]

Clearly, customary international law can be broader or more restrictive than the definition contained in the ICC Statute. However, Canadian judges will have limited latitude to go beyond this clear statutory pronouncement.[22] A further indication as to the content of customary international law is found

19 See Lafontaine, 'Parties to Offences', *supra* note 15.

20 For an interesting overview of the consequences of each such approach, see J. Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC', 5 *Journal of International Criminal Justice* (*JICJ*) (2007) 421.

21 § 6(4) of the Act. See also § 4(4) concerning crimes committed in Canada.

22 Briefly put, it would not be possible for a judge to decide that customary international law is narrower than what is provided for in the ICC Statute because of the clear statutory pronouncement. The somewhat unsatisfactory legislative declaration as to the content of customary international law has not only the advantage of guiding the judge in a complex area of international law, but also of ensuring the jurisprudential developments in Canada are in keeping with the ICC Statute, in conformity with the complementarity principle. However, nothing prevents a judge to interpret customary international law more broadly than the ICC Statute. The Act is clear that it does not aim at freezing the content of customary law: §§ 4(4) and 6(4) of the Act, *in fine*.

at Section 6(5) of the Act, which confirms that crimes against humanity were crimes before 1945.[23]

Though there is no explicit mention of the ICC Elements of Crimes in the Act, nothing prevents a Canadian court from referring to them while attempting to define the contours of international customary law regarding a particular crime. Denis J in *Munyaneza* mentions them in passing.[24] It is logical that a domestic system which treats the Rome Statute as expounding customary international law will see the Elements as an important interpretative tool. In fact, they represent a guiding tool for the ICC and will help shape the jurisprudence from this court,[25] while ICC jurisprudence will, in turn, 'not be disregarded lightly' by Canadian courts interpreting the Act.[26] As a result the Elements will find themselves being indirectly applied here in Canada. Whether this result is, in the end, truly consistent with the current state of customary international law is far from clear, as exemplified by the fact that the International Criminal Tribunal for the former Yugoslavia (ICTY) has held that some of the Elements are inconsistent with customary international law.[27] Though Canadian judges could theoretically disregard the Elements and adopt the position held to be customary international law,[28] the legislative declaration that the crimes under the ICC Statute are crimes under customary law, and the authoritative value of the jurisprudence of the ICC, may indirectly give the status of customary international law to the Elements of Crimes in Canadian jurisprudence regarding the core crimes. Examples of this possible situation are provided below.

B. Genocide

1. Definitional Issues

By not listing the five punishable acts or the groups protected, the Act's definition of genocide, reproduced *supra*, contemplates that customary international

23 Cory J for the majority in *Finta*, *supra* note 9, had relied on Kelsen's view that the gravity of the crimes allowed retroactive prosecution, instead of finding that the principle was not violated because these crimes existed at customary international law. § 6(5) of the Act aims at redressing this arguably incorrect statement of the law as it stood prior to World War II.

24 *Munyaneza*, *supra* note 1, § 86.

25 There are disagreements as to the legal status of the Elements. See e.g. Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4 March 2009, §§ 126–128, and Judge Ušacka's dissent, § 17 [hereafter, '*Al Bashir* Decision'].

26 *Mugesera*, *supra* note 12, §§ 126, 82. Also see *Munyaneza*, *supra* note 1, e.g. §§ 82, 87, 93, 95, 105, 114, 146.

27 Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, § 224. See generally R. Cryer, 'Elements of Crimes', in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 308, at 308–309.

28 See W.A. Schabas, 'Canada', in B. Brandon and M. du Plessis (eds), *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (London: Commonwealth Secretariat, 2005) 153, at 158.

law may evolve so as to include other punishable acts and new protected groups. It is interesting to note that the French version of the definition — which has equal value as the English version[29] — does not contain the expression '*comme tel*', whereas the English version does mention 'as such'. This requirement is part of customary law and thus inherent to the definition of genocide in the Act, despite the puzzling omission in the French version.[30]

It should be noted briefly that Section 318 of Criminal Code provides for a separate offence of 'advocating and promoting' genocide. Though this offence has been interpreted by the Supreme Court as equivalent to the international offence of 'incitement to genocide',[31] the definition of genocide contained in the Criminal Code is different than that under customary international law.[32] Theoretically, individuals who have participated at different levels in a genocide could be prosecuted in Canada according to two different definitions of the same crime. This co-existence undermines the all-encompassing role of the *Act* with respect to the prosecution, and definition, of all core crimes.

One brief point will be highlighted regarding Denis J's discussion on genocide. In his brief analysis of the *dolus specialis* of the crime, he notes that '[t]he existence of a plan or policy for the destruction of the group is also not one of the elements essential to the offence'.[33] Without entering into the detail of this complex question, the controversy regarding the necessity of a plan or policy should be mentioned. Though the tribunals have held that it is not 'a legal ingredient of the crime',[34] commentators have argued the opposite on the basis that a policy always underlies the commission of genocide.[35] The ICC Elements of Crimes have added a contextual element to the definition of genocide, requiring that '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group …'. The Pre-Trial Chamber in *Al Bashir* seemingly interpreted this condition so as to require a

29 Official Languages Act, R.S.C. 1985, c. 31, § 13.

30 In *Munyaneza, supra* note 1, § 107, Denis J overlooks this omission and discusses the meaning of 'comme tel'.

31 *Mugesera, supra* note 12, §§ 82.

32 The definition excludes three important underlying offences of the crime of genocide (those contained at §§ (b) (d) (e) of the definition), but it covers distinctions which are not protected by the definition under customary international law, such as 'colour' and 'sexual orientation'.

33 *Munyaneza, supra* note 1, §§ 98–99. To reject the policy requirement, the judge cites Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004 [hereafter, '*Brđanin*, Trial Chamber'], § 704.

34 Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 48; Judgment, *Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 94; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, at 373.

35 See e.g. W.A. Schabas, *Genocide in International Law* (2nd edn., Cambridge: Cambridge University Press, 2009), at 244 and following. See review and proposals in A. Cassese, 'Is Genocidal Policy a Requirement for the Crime of Genocide?' in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 128.

genocidal policy as a prerequisite to individual genocidal intent.[36] Depending on how the ICC jurisprudence on this issue will evolve, it is one situation where the Elements may have an indirect influence on the Canadian interpretation of customary international law where crimes were committed after 17 July 1998.

Denis J quickly moves to a discussion of the underlying offences of genocide, which he interprets in the same manner where they are constitutive of crimes against humanity and war crimes.[37] The following discussion is thus also relevant to these crimes.

2. *Underlying Offences: Murder and Sexual Violence*

(a) Murder

Denis J begins with an analysis of 'intentional killing', which is used in the English version of the judgment as a translation for '*meurtre intentionnel*' used in the official French version. He notes that '[t]he notion of "intentional killing" does not exist in the Canadian *Criminal Code*'.[38] He concludes thus:

> By using in the Act a term that differs from the one used in the *Criminal Code*, the Canadian legislator wished to refer to the definition of "intentional killing" found in international law and its jurisprudence.
> But the difference is rather slim. In international law, it must be demonstrated that:
>
> a. the person is dead;
> b. the accused caused the death by means of an act or omission, or contributed substantially to the death;
> c. the accused intended to cause the death of the victim or inflict grievous bodily harm that he knew was likely to result in death.[39]

Two issues warrant further discussion. First, Denis J's conclusion as to the applicability of international law to the definitions of the underlying offences is correct, though his reasoning is imperfect. Indeed, the Act, in so far as the definitions of offences are concerned, does not use 'a term that differs from the one used in the *Criminal Code*'. Furthermore, the term 'intentional killing' does not exist as such in international law. The Act's definition of crimes against humanity lists 'murder' as underlying offence, like in the ICC Statute. The definitions of genocide and war crimes in the Act do not list underlying offences. They refer to customary international law, which uses the terms 'killing' ('*meurtre*') for genocide and 'wilful killing' ('*homicide intentionnel*') and

36 *Al Bashir* Decision, *supra* note 25, §§ 149–152; C. Kreß, 'The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the *Al Bashir* Case', 7 *JICJ* (2009) 297.

37 *Munyaneza*, *supra* note 1, §§ 118, 121, 140, 142.

38 *Ibid.*, § 81.

39 *Ibid.*, §§ 82–83, citing, *Mugesera*, *supra* note 12, § 130, and *Brđanin*, Trial Chamber, *supra* note 33.

'murder' ('*meurtre*') for war crimes.[40] There is thus no mention of '*meurtre intentionnel*' or of 'intentional killing' in international law. Denis J seems to confuse the terms used in the indictment (or perhaps in the provisions of the Act regarding sentences) with those used in the definitions of crimes contained in the Act. Having said that, the judge's conclusion that international law applies to the definitions of the underlying offences constitutive of all three core crimes is important and legally sound. An attempt at justifying this conclusion is offered *infra*.

The second issue concerns the judge's conclusion as to the 'slim' difference between Canadian law and international law concerning the definition of murder. As regards the *actus reus*, the standard in international law seems to be stricter than under Canadian law. Indeed, causation between the conduct of the accused and death, as a minimum under international law, requires a 'substantial' contribution by the accused. In Canadian law, all that is required is that the conduct be a 'contributing cause of death, outside the *de minimis* range'.[41] The Supreme Court explicitly rejected the terminology of 'substantial cause' to describe the requisite degree of causation for all homicide offences and indicated that this involved a 'higher degree of legal causation'.[42] Murder as constitutive of genocide, crimes against humanity and war crimes will thus require a higher level of contribution from the accused. Denis J did not elaborate on causation; having apparently no doubt that the accused directly killed numerous Tutsis on various occasions.[43]

Moreover, as regards *mens rea*, the standard referred to by Denis J, which emanates from a line of jurisprudence of the ad hoc tribunals,[44] is almost identical to that of murder under Section 229(a)(ii) of the Criminal Code. This provision has an element of recklessness as to whether death is 'likely' to result.[45] Hence an interesting question is whether 'murder' will be interpreted similarly before the ICC? It should be recalled that the Act refers to the definitions of crimes in the ICC Statute as constitutive of customary international law after 17 July 1998. However, Article 30 ICC Statute most likely excludes recklessness

40 See e.g. Arts 6(a), 8(2)(a)(i) and 8(2)(c)(i) ICCSt.

41 *Smithers v. The Queen* [1978] 1 S.C.R. 506, also expressed as a 'more than trivial' cause. In *R. v. Nette* [2001] 3 S.C.R. 488, § 71, the Supreme Court did not change the requirement, but reformulated it as a 'significant contributing cause'.

42 *Ibid.*, §§ 61, 64, 66. The 'substantial' causation requirement is relevant to prosecutions under §§ 231(5) or (6) of the Criminal Code which allow a first degree murder conviction absent premeditation (*R. v. Harbottle* [1993] 3 S.C.R. 306, confirmed in *Nette*).

43 *Munyaneza*, *supra* note 1, notably §§ 1949, 1951, 1955, 1958, 1963, 1964, 2065, 2067, 2069, 2074, 2082.

44 It should be noted that some cases put the standard thus: '… intention to kill or to cause serious bodily harm *which he/she should reasonably have known* might lead to death': Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001 [hereafter, '*Krstić*, Trial Chamber'], § 485 (emphasis added). This objective description of the *mens rea* requirement would clearly be in violation of the Canadian Charter of Rights and Freedoms, Enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, which came into force on April 17, 1982: *R. v. Vaillancourt* [1987] 2 S.C.R. 636; *R. v. Martineau* [1990] 2 S.C.R. 633.

45 The Supreme Court has, however, said that it was only a 'slight relaxation' from 'intention to kill'. *R. v. Cooper* [1993] 1 S.C.R. 146 at 154–155.

(defined here as foresight of a risk that is lower than certain or substantially certain) as a basis for liability.[46] It requires awareness that the consequence *will* occur in the normal course of events. The term 'likely' used in the above-mentioned standard arguably requires foresight of a lower level of likelihood of the occurrence of death than that required under the ICC Statute. Therefore, for prosecutions under the Act for crimes involving murder committed after 17 July 1998, the mental element may have to be reviewed according to the higher standard of the ICC Statute. As a final note, it may be said that while premeditation is not a required element of the underlying offence of murder,[47] it is, as we shall see *infra*, a relevant consideration for sentencing purposes, both in international law[48] and in Canadian law.[49]

(b) Sexual violence

As for other underlying acts of genocide, Denis J turns to an analysis of 'serious bodily or mental harm' which, he states, can be caused by 'physical or mental torture; inhumane or degrading treatment; rape; sexual violence; persecution'.[50] Though he begins with an analysis of inhumane or degrading treatment (strangely defined according to international jurisprudence dealing with war crimes, thus requiring that victims be 'protected persons'), his factual findings are focused on sexual violence, which will thus be discussed herein. The following analysis, should it be recalled, also applies to this offence as constitutive of crimes against humanity and war crimes.

Denis J states that '[i]nternational jurisprudence, which does not differ from Canadian jurisprudence in this regard, defines sexual violence as "any act of a

46 Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba Gombo* (ICC-01/05-01/08-424), Pre-Trial Chamber II, 15 June 2009, §§ 357–369. It also confirmed the applicability of Art. 30 to murder as constitutive of crimes against humanity, § 138; *contra* on the level of risk: Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04/-01/06-803), Pre-Trial Chamber I, 29 January 2007, §§ 352–355. See discussion and authorities in Lafontaine, 'Parties to Offences', *supra* note 15.

47 Despite early hesitation, the view that prevailed excludes premeditation as an element of murder: see e.g. Judgment, *Blaškić* (IT-95-14-T), Trial Chamber, 3 March 2000 [hereafter, '*Blaškić*, Trial Chamber'], § 216; Judgment, *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 26 February 2001 (hereafter, '*Kordić and Čerkez*', Trial Chamber), § 235; Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998 [hereafter, '*Akayesu* Trial Chamber'], §§ 588–589; *Krstić*, Trial Chamber, *supra* note 44, at footnote 1119; *Brđanin*, Trial Chamber, *supra* note 33, § 515. There is no derogation from Art. 30 in the ICC Statute with respect to murder and the crime must be committed with intent and knowledge, excluding any requirement of premeditation.

48 Premeditation has been considered an aggravation factor: see e.g. Judgment and Sentence, *Kambanda* (ICTR-97-23-S), Trial Chamber, 4 September 1998, §§ 61–62; Sentence, *Serushago* (ICTR-98-39-S), Trial Chamber, 5 February 1999, §§ 27–30; *Krstić*, Trial Chamber, *supra* note 44, § 711; *Blaškić*, Trial Chamber, *supra* note 47, § 793.

49 See § 15 of the Act.

50 *Munyaneza*, *supra* note 1, § 84.

sexual nature which is committed on a person under circumstances which are coercive" '.[51] He opines that '[t]he following acts, among others, are considered sexual violence: (a) forcing a person to undress in public; (b) sexual penetration; (c) rape; (d) sexual molestation'.[52] Aside from his strange omission of the many other acts of sexual violence now codified in the ICC Statute,[53] considering the aims of this article, two brief comments will be made as regards this characterization of sexual violence.

First, despite the undeniable importance of the landmark decision in *Akayesu*, the focus on coercion as an element of rape and sexual violence was criticized and reversed in subsequent jurisprudence. The Appeals Chamber in *Kunarac* confirmed that the correct requirement was lack of consent of the victim, which better reflected 'national legal systems and indeed the underlying principle of sexual autonomy'.[54] This latter interpretation, rather than the one referred to in *Munyaneza*, 'does not differ from Canadian jurisprudence in this regard'.[55] Denis J's review of relevant principles of international law should have taken at least a minimum notice of these issues, most notably because the crimes' definitions refer to customary international law which, in the case of sexual violence, is likely different — and was likely different in 1994 — than the standard as it was first elaborated in *Akayesu*.

The Elements of Crimes of the ICC Statute were drafted before the Appeals Chamber's decision in *Kunarac* and they depart from it, requiring as they do that the acts be committed 'by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent'.[56] The ICC Statute thus arguably departs from customary international law by requiring that force or threat of force be a material element of the crimes of rape and of sexual violence rather than an element to consider in assessing the existence of consent by the victim.[57]

This is a good example of the difficult situation in which Canadian judges might find themselves where the Elements of Crimes do not exactly reflect customary international law. By relying on the jurisprudence of the ICC, which will likely interpret the crime of rape in light of the Elements of Crimes, Canadian judges may involuntarily depart from the Act's prescription that the

51 *Ibid.*, § 95, citing *Akayesu*, Trial Chamber, *supra* note 47.

52 *Ibid.*, § 96.

53 See Arts 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) ICCSt.

54 R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), at 210. Judgment, *Kunarac et al.* (IT-96-23&23/1-A), Appeals Chamber, 12 June 200 [hereafter, '*Kunarac et al.*, Appeals Chamber'].

55 J. Desrosiers, *L'agression sexuelle en droit canadien* (Cowansville: Yvon Blais, 2009).

56 Arts 7(1)(g)-1 and 7(1) (g)-6, Elements of Crimes.

57 Though the test may be, ultimately, lack of consent: Rule 70 ICC RPE; M. du Plessis, 'ICC Crimes', in B. Brandon and M. du Plessis (eds), *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (London: Commonwealth Secretariat, 2005) 35, at 50.

crimes be defined according to customary international law. In such a case, the Elements should be disregarded. However, considering the difficulty, particularly for a domestic judge, to identify customary international law, it may be that custom in Canada will soon take the same meaning as the ICC Elements of Crimes.

As a second remark regarding sexual violence, it is noteworthy that Denis J does not provide for a definition of rape, particularly considering that his factual findings often refer to this form of sexual violence. The Act lists 'sexual violence' in its definition of crimes against humanity. It avoids reference to rape which is, however, a recognized underlying offence of all three core crimes in international law. It is obviously listed at Article 7(1)(g) ICC Statute, which is deemed by the Act to constitute customary international law. In Canadian law, the crime of rape was replaced in 1983 by the more gender-neutral and broader term of sexual assault.[58] The Act thus reintroduces the crime of rape in Canadian law where international crimes are involved. Considering that the underlying offences of these crimes must be interpreted in light of international law, as will be argued, and, in any case, in the absence of any definition in domestic law, it would have been necessary to delineate its constitutive elements as a prerequisite to a finding of guilt on this basis.

C. Crimes against Humanity

Only one issue will be discussed here considering the scope of this comment. In *Mugesera*, the Supreme Court of Canada addressed the debatable issue of whether the attack must be carried out pursuant to a government policy or plan, and concluded as follows:

> The Appeals Chamber of the ICTY held in *Prosecutor v. Kunarac, Kovac and Vukovic* that there was no additional requirement for a state or other policy behind the attack … . It seems that *there is currently no requirement in customary international law that a policy underlie the attack*, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement (see, e.g., art. 7(2)(a) of the *Rome Statute* …).[59]

The Canadian legislator chose, implicitly through its declaration in the Act that the ICC Statute constitutes international customary law, to impose a requirement that a policy underlie the attack.[60] The Supreme Court's decision was taken on the basis of the former provisions of the Criminal Code, but when the Act had already been adopted. The Court in fact specifically mentioned that the differences in the manner that crimes against humanity are defined in the Act were 'not material' to its discussion on this issue.[61] However, the

58 § 271 of the Criminal Code. For an analysis of the constitutive elements, see *R. v. Chase* [1987] 2 S.C.R. 293, *R. v. Ewanchuk* [1999] 1 S.C.R. 330. See, generally, Desrosiers, *supra* note 55.

59 *Mugesera*, *supra* note 12, §§ 157–158 (emphasis added).

60 Art. 7(2)(a) ICCSt.

61 *Mugesera*, *supra* note 12, § 118.

interpretation it gave to the 'attack' element of the *actus reus* departs not insignificantly from the legislative choice reflected in the Act.

In *Munyaneza*, Denis J refers to *Kunarac* to support his conclusion that the attack need not be the result of state policy.[62] His reasoning is justified considering that the impugned conduct took place in 1994 and that the Act only deems the ICC Statute to be constitutive of customary international law as of 17 July 1998. Nevertheless, future prosecutions regarding crimes committed after that date would have to ignore both *Mugesera* and *Munyaneza* and come to a different conclusion regarding the policy element, regardless of whether the ICC Statute effectively reflects customary international law on this issue.

D. War Crimes

The Act confirms the reach of Canadian law to cover a broad range of war crimes, notably those committed in conflicts not of an international character. Mr Munyaneza was accused of murder, sexual violence and pillage. Denis J concluded, based on International Criminal Tribunal for Rwanda (ICTR) jurisprudence, that the conflict in Rwanda in 1994 was a conflict not of an international character, noting that both Canada and Rwanda were parties to the Four Geneva Conventions and the Additional Protocols in 1994, and declared Article 4 of the ICTR Statute as constitutive of international customary law at the time.[63]

The Defence argues on appeal that Denis J misapprehended the required nexus between the crimes and the armed conflict and takes issue with his definition of pillage. They argue pillage should have been defined according to the ICC Statute, which prohibits '[p]illaging *a town or place*, even when taken by assault'.[64]

It is true that while the judge considered existing jurisprudence on the nexus, he did not elaborate on this requirement in light of the facts. Similarly to his other conclusions, his application of the facts to the law could have been more systematic, particularly since some of the alleged crimes could possibly have been considered common crimes. Moreover, a differentiation between the genocidal context (destroy all Tutsis, as such) and the conflict against the RPF (justifying attacks against Tutsi collaborators) may have been warranted while assessing the existence of the required nexus. However, his statement of the law is essentially correct, and he seemed to have had no doubt that the crimes were committed 'in the context of' the armed conflict. With respect to pillage, though the ICC Statute prohibits the pillaging of a town or place, the Elements do not seem to limit it in the sense implied by the Defence.[65] Clearly, the judge had to apply customary international law as it

62 *Munyaneza*, *supra* note 1, § 114.

63 *Ibid.*, §§ 134–135.

64 Art. 8(2)(e)(v) (emphasis added), for the two grounds of appeal, see *Avis d'appel*, *supra* note 13, appeal grounds 10 and 1-G.

65 Art. 8(2)(e)(v), Elements of Crimes. It has been said that 'the reference to town, place and assault within the definition [in the Rome Statute] are highly confusing, legally redundant,

stood in 1994 and the ICC Statute is thus not directly relevant. However, even if it were, the Elements are similar to the principles enunciated by Denis J at Section 146 and seem to adequately reflect customary international law. The judge's conclusions on the facts[66] support a finding of pillage thus defined, though, again, his legal justification could have been more explicit.

E. Applicable Law to the Underlying Offences

There could be domestic equivalents for the underlying offences of murder, torture and sexual violence (though 'sexual assault' likely does not cover such acts as sexual slavery, enforced prostitution,[67] forced pregnancy, enforced sterilization) constitutive of all core crimes. The question thus arises as to which body of law should govern their interpretation. The Act is silent in this regard, but Section 2(2) states: '[u]nless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*'. It is less than certain that 'words and expressions' should include the definition of offences such as murder mentioned in the Act.

It is not clear from the *Mugesera* decision which body of law the Supreme Court referred to with respect to the crime of 'murder'.[68] However, it could be implied that the Court would rely on domestic law where the crime exists therein and to international law where it does not: '[i]n contrast with murder, for instance, it is not evident from our domestic law what types of acts will constitute persecution'. [69] In this author's respectful view, to choose the domestic definition where available, like in the case of murder, and to refer to the principles developed in international law in other cases, would create an undesirable disparity in the way the international offences are defined and applied in Canada. As noted above, Denis J decided in *Munyaneza* that international law should apply. This conclusion is, in this author's view, correct, for the following reasons.

Where the legislator chose, in the War Crimes Act, to apply the provisions of the Criminal Code with respect to murder, it did so explicitly. For instance, Sections 4(2)(a) and 6(2)(a) of the Act provide:

> Every person who commits an offence under subsection (1) or (1.1)
>
> a. shall be sentenced to imprisonment for life, if an *intentional killing* forms the basis of the offence (emphasis added)

and historically passé': J.G. Stewart, 'The Future of the Grave Breaches Regime: Segregate, Assimilate or Abandon?' 7 *JICJ* (2009) 855, at 871 (note 66).

66 See §§ 1943, 1944, 1945, 1948, 2061, 2062.

67 Arguably, § 212 (1) of the Criminal Code, particularly subparagraph (h), could be found as equivalent to 'enforced prostitution'.

68 See *Mugesera*, *supra* note 12, § 130. The elements it lists as constitutive of murder could be taken from either body of law.

69 *Ibid.*, § 139.

As Denis J had found, the terms 'intentional killing' are not used in the Criminal Code; hence, Section 2(2) of the Act, referred to above, cannot apply. Section 15 of the Act, which governs parole eligibility, reads:

> 15. (1) The following sentence shall be pronounced against a person who is to be sentenced to imprisonment for life for an offence under section 4 or 6:
>
> a. imprisonment for life without eligibility for parole until the person has served 25 years of the sentence, if a planned and deliberate killing forms the basis of the offence;
> b. imprisonment for life without eligibility for parole until the person has served 25 years of the sentence, if an intentional killing that is not planned and deliberate forms the basis of the offence, and c
>
> (i) *the person has previously been convicted of an offence under section 4 or 6 that had, as its basis, an intentional killing, whether or not it was planned and deliberate, or*
> (ii) *the person has previously been convicted of culpable homicide that is murder, however described in the Criminal Code*; (emphasis added)

The legislator clearly distinguished between 'intentional killing' as an underlying offence of genocide, crimes against humanity and war crimes (i), and 'ordinary' murder, as understood in the Criminal Code (ii). It also did so at Section 15(2) where, for instance, at (b), it states that 'a reference [in sentencing provisions of the Criminal Code] to second degree murder is deemed to be a reference to an offence under section 4 or 6 of this Act when an intentional killing that is not planned and deliberate forms the basis of the offence'.[70] There would be no need to make these distinctions and cross-references were 'intentional killing' to be always interpreted as 'murder' in the Criminal Code.

The reference to the terms 'intentional killing' where the international offences are concerned might be explained by the fact that murder has different appellations in international statutes. As mentioned above, it is in turn called 'murder', 'wilful killing' and 'killing' according to which international crime they relate. They have been interpreted similarly[71] and the choice in the Act to use the term 'intentional killing' might have been precisely to avoid confusion with the offence of murder in the Criminal Code and to use, for sentencing purposes, a unique term for this underlying constitutive offence of all three core crimes.

Finally, it should be stressed that underlying offences may have a different meaning according to whether they are constitutive of the core crimes or treated as discrete offences. An example in point is the crime of torture. The Criminal Code provides at Section 269(1) for the crime of torture. The definition aims at implementing Canada's obligations under the Convention against Torture,[72] and hence reflects the requirements of the Convention. However, the definition of torture as a discrete offence differs from that of torture as

70 See also § 745 of the Criminal Code. § 26 also explicitly refers to murder under the Criminal Code for crimes committed against ICC witnesses abroad.

71 For example, Judgment, *Krnojelac* (IT-97-25-T), Trial Chamber, 15 March 2002, §§ 323–324; *Kordić and Čerkez*, Trial Chamber, *supra* note 47, § 236.

72 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 UNTS 85, Arts 4–7 [hereafter, 'Convention against Torture'].

war crime or crime against humanity. The tribunals adopted a wider definition, which did away with the requirement of involvement of a state official.[73] The ICC Elements of Crimes adopt the same view.[74] Furthermore, the Elements are accompanied by a note that states that 'it is understood that no specific purpose need be proved for this crime',[75] departing in that sense quite significantly from the definition of the Convention against Torture, which requires that torture be imposed for specific purposes.[76]

The Act ensures that torture as crime against humanity and as war crime is criminalized and punishable in Canada. By referring in its definitions of these crimes to international customary law and to the ICC Statute as constitutive of custom, the Act's definition of torture is thus fundamentally different than that of the Criminal Code. It confirms that the underlying offences constitutive of genocide, crimes against humanity and war crimes must be interpreted according to international law as it has developed precisely for these crimes.

3. Sentencing Scheme

In the *Munyaneza* sentencing judgment, Denis J imposes life imprisonment for all six counts of genocide, crimes against humanity and war crimes involving murder and sexual violence. He imposes eight years for the war crime of pillage, which is equivalent to the time already spent in prison by the accused, taking into account the custom of doubling the time spent in preventive detention (the accused was arrested on 19 October 2005, i.e. four years before the sentencing judgment).[77] For the crimes involving murder, he concludes that the killing was planned and deliberate and thus conditions parole eligibility at 25 years spent in prison. For the crimes involving sexual violence, parole eligibility is fixed at 10 years.

This sentence of life imprisonment without parole eligibility for 25 years is the harshest sentence in Canadian law. It is also a severe sentence where compared with the sentences imposed by the ad hoc tribunals. Life imprisonment was imposed by the ICTR in 43.6% of the cases (17 on 39) and in only 2.9% of

73 Judgment, *Kunarac et al.* (IT-96-23-T&23/1-T), Trial Chamber, 22 February 2001, § 459, confirmed in *Kunarac et al.*, Appeals Chamber, *supra* note 54, §§ 145–148; See also Judgment, *Kvočka et al.*. (IT-98-30/1-A), Appeals Chamber, 28 February 2005, § 284; Judgment and Sentence, *Semanza* (ICTR-97-20-T), Trial Chamber, 15 May 2003 [hereafter, '*Semanza*, Trial Chamber'], §§ 342–343.

74 Arts 7 (1) (f), 8 (2) (a) (ii)-1 and 8 (2) (c) (i)-4, Elements of Crimes.

75 *Ibid.*, note 14 at Art. 7(1)(f). Notably, according to the Elements, the crime of torture *as a war crime* requires a specific purpose: Arts 8 (2) (a) (ii)-1 and 8 (2) (c) (i)-4. For an excellent overview of the different legal regimes applicable to the crime of torture, see P. Gaeta, 'When is the Involvement of State Officials a Requirement for the Crime of Torture?' 6 *JICJ* (2008) 183.

76 Art. 1 of the Convention against Torture. § 269(1)(a) and (b) requires the same purposes.

77 Denis J does not take into consideration this custom when fixing parole eligibility for the crimes involving murder and sexual violence (*Munyaneza* Sentencing Judgment, *supra* note 2, § 63).

the cases before the ICTY (2 on 70).[78] The sentence imposed for sexual violence is also a severe one, both with respect to Canadian law[79] and to international law. Where a specific sentence for sexual violence is discernible in international sentencing judgments, it shows sentences varying between 8[80] and 15[81] years of imprisonment to life imprisonment.[82]

The principles regulating parole eligibility differ as between the ICTR and the ICTY, most notably because they are governed first and foremost by the law of the state of imprisonment.[83] Many ICTY detainees have benefited from early release, usually after having spent two-thirds of their sentences.[84] The practice at the ICTR is more difficult to assess and reveals a worrying disparity of treatment as between persons convicted by the ad hoc tribunals. No person convicted before the ICTR has benefited from early release, with the exception of Georges Ruggiu in quite controversial circumstances.[85] This may be explained by the fact that Mali, where most sentences were served up until recently, has no legal mandatory system for evaluation of early release,[86] contrary to the system in most European States where ICTY detainees are serving their sentences.

The system put in place by the ICC will ensure more consistency in the treatment afforded to detainees, regardless of their place of detention. Article 110

78 See I.M. Weinberg de Roca and C.M. Rassi, 'Sentencing and Incarceration in the Ad Hoc Tribunals', 44 *Stanford Journal of International Law* (2008) 1: statistics contained therein were updated as of 16 November 2009 and include sentences modified on appeal. Some of the cases included in these statistics are under appeal (e.g. *Lukić* at the ICTY; *Bagosora, Nchamihigo, Nsengiyumva, Ntabakuze, Renzaho* at the ICTR).

79 See the review in *R. v. Cloutier* [2005] R.J.Q. 287 (Cour du Québec, chambre criminelle et pénale); and the update of this analysis as of 15 July 2009 in Desrosiers, *supra* note 55, at 262, showing that sentences normally range from 12 months to 13 years except where consecutive sentences are imposed in exceptional cases.

80 Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, the Disposition: outrages upon dignity, including rape, as a violation of the laws or customs of war. Note the sentences of 7 and 10 years for instigation to commit different crimes of sexual violence in *Semanza*, Trial Chamber, *supra* note 73, § 588.

81 Sentence, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 October 1998: rape as crime against humanity; Sentencing Judgment, *Delić et al.* (IT-96-21-T *bis*-R117), Trial Chamber, 9 October 2001, § 29: torture by way of rape as grave breaches of the Geneva Conventions.

82 Judgment and Sentence, *Muhimana* (ICTR-95-1B-T), Trial Chamber, 28 April 2005, § 618: rape as crime against humanity.

83 Arts 26–27 ICTRSt, Rules 124–126 ICTR RPE; Arts 27–28 ICTYSt, Rules 123–125 ICTY RPE.

84 A cursory assessment indicates that of the 28 convicted that were released, the vast majority have been so after having spent the two-third of their sentence. The states involved in the incarceration of some of these convicts were all in Europe (and in Norway). Accused themselves can make the request to the Tribunal: *Practice Direction in order to establish an internal procedure for the determination of applications for pardon, commutation of sentence, and early release of persons convicted by the International Tribunal*, IT/146/Rev.2, 1 September 2009. For practice before September 2009: see Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, *Krnojelac* (IT-97-25-ES), ICTY President, 9 July 2009, § 1.

85 On 21 April 2009, the Italian justice released Ruggiu three months before the end of his sentence without the consent of the ICTR as required by Art. 27 ICTRSt.

86 *Les Conditions d'exercice du droit de grâce*, Loi no. 82-117/AN-RM of 23 December 1982, http://www.justicemali.org/www.justicemali.org/pdf/46-droitgrace.pdf (visited 16 November 2009).

ICC Statute reserves the power to grant early release to the Court. Such release can be determined no earlier than '[w]hen the person has served two thirds of the sentence, or 25 years in the case of life imprisonment …'[87] This system is more akin to Canada's rules regarding parole. It remains to be seen, however, how similar the two systems will be regarding sentences in the first place.

The Act provides for mandatory sentence of imprisonment for life if an intentional killing forms the basis of the offence.[88] In cases not involving intentional killing[89] as well as for offences of breach of responsibility by a superior,[90] the perpetrator is liable to imprisonment for life. These sentences are harsher than those provided for by the ICC Statute. Indeed, Article 77 does not impose any mandatory sentence. The Court *may* impose one of the following penalties:

(i) imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
(ii) a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

The drafters of the ICC Statute were keenly aware of the importance of leaving a margin to states in their approach to sentences.[91] Mandatory life sentence in Canada for murder is the rule[92] and the Act follows this scheme.

Considering that many core crimes prosecuted in Canada will involve killings, life sentence may be imposed quite frequently, contrary to the ICC, which reserves it for cases of 'extreme gravity'. Clearly, the ICC will normally prosecute those who bear the greatest responsibility for the crimes, whereas States like Canada may end up having before them a majority of lower-level perpetrators, particularly where prosecutions are based on universal jurisdiction. Concretely, this means that harsher sentences will be imposed on those at the lower-end of the chain of responsibility for the commission of the worst crimes. This is the illogical result of an otherwise understandable compromise reached in Rome regarding sentences.[93]

At Section 15 of the Act, reproduced *supra*, parole eligibility where a life sentence is imposed depends on whether a 'planned and deliberate' killing formed the basis of the offence. These terms are extracted directly from the Criminal Code, i.e. from the very definition of first degree murder at Section 231(2). This creates an odd situation where 'murder' as an underlying offence of any of the core crimes must be interpreted according to international law, as argued above, but where the issue of whether it is 'planned and deliberate'

87 Art. 110 (3) ICCSt.
88 §§ 4(2)(a) and 6(2)(a) of the Act.
89 §§ 4(2)(b) and 6(2)(b) of the Act.
90 § 7(4) of the Act.
91 See Art. 80 ICCSt. See R. Fife, 'Penalties', in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer, 1999) 319.
92 § 235 of the Criminal Code.
93 See, generally, M.A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007).

seems to mandate an interpretation according to Canadian law.[94] Since sentencing issues were deliberately left to states in the ICC system, it may be justified to resort to domestic law to fix the appropriate sentence, even if it means that the same conduct will be analysed in turn from the prism of international law and that of domestic law.

Denis J seems to apply the 'planned and deliberate' standard not so much with respect to each underlying offence, but rather in general terms, as regards the 'genocide' or the 'crime against humanity'.[95] This approach may be criticized on account of the manner in which such assessment is normally conducted in Canadian law, i.e. with respect to precise individual murders. It is also at odds with the formulation of the relevant provisions of the Act, which refer to 'planned and deliberate killing' as 'the basis of the offence', thereby implying that 'premeditation' must be looked at with respect to the underlying offence. However, Denis J's approach echoes that adopted in international cases.[96] The Canadian standard may have to be adapted to the nature — massive and collective — of the crimes involved.

4. Conclusion

Criminalization of the core international crimes in domestic criminal legal systems is essential for the success of the ICC, which is founded on the principle of complementarity, and, more broadly, of the enterprise of international criminal justice. The broad exercise of jurisdiction over these crimes, including on the principle of universality, will be indispensable for the system to function effectively.

It remains to be seen whether the new legal landscape in Canada will change the arguable effect of the failure of the *Finta* prosecution, i.e. whether it will impact on the rather timid willingness of the Government to prosecute war criminals. The over-reliance on administrative remedies such as removal from the country may serve the limited purpose of not allowing Canadian soil to harbour war criminals, but does very little to serve the broader objective of ensuring accountability for some of the worst international crimes.

The War Crimes Act's ultimate success depends as much on the strength of its provisions and judicial interpretations than on the political will to use it to its full extent against international criminals found on Canada's territory.

94 In *Munyaneza*, the Crown relied on international law for the definition of murder and on domestic law to determine whether such murder was 'planned and deliberate'. *Arguments juridiques de la poursuivante*, No: 500-73-002500-052 (§ 38). In *Munyaneza* Sentencing Judgment, *supra* note 2, Denis J. does not elaborate on the law that should govern the terms 'planned and deliberate'. Various sentencing provisions in the Act explicitly indicate that 'planned and deliberate killing' should be understood similarly as 'first degree murder': e.g. § 15(2)(a) of the Act.

95 *Munyaneza* Sentencing Judgment, *supra* note 2, at § 27.

96 For example, *Semanza*, Trial Chamber, *supra* note 73, § 339.

Acting locally for the global accountability mission may well end up as Canada's most promising and needed contribution for the 'sustainable development' of international criminal law.[97] *Munyaneza* is a first step in that desirable direction.

97 See F. Lafontaine, '"Think Globally, Act Locally": Using Canada's Crimes against Humanity and War Crimes Act for the "Sustainable Development" of International Criminal Law', forthcoming in the *Proceedings of the 36th Annual Conference of the Canadian Council of International Law*, Ottawa, 2007. See also a similar opinion expressed by Dr Lloyd Axworthy, on behalf of the Canadian Centre for International Justice: http://www.ccij.ca/uploads/ccij-news-release-2008-12-02.pdf (visited 17 November 2009).