Crimes Against Humanity: From Finta to Mugesera

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In Sync at Last: Canadian Law and International Law of Crimes Against Humanity

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The recent judgment of the Supreme Court of Canada in the *Mugesera* case**[1]** has once again cast in relief one social fact of Canada that is often taken for granted from within. From an international perspective, Canada is a most alluring country—notwithstanding its bone-chilling Arctic winds during winter. It is not surprising then that many seeking to escape from the bogeyman of their own native lands head for Canada, even from such lands of glorious, perennial sunshine and warmth as Rwanda. The bogeyman is often oppression or want or both. Occasionally, however, it is a past that is murky with questions of criminal behaviour.

Imre Finta and Leone Mugesera had pasts, back in their respective native countries of Hungary and Rwanda, that were murky with questions of complicity in the genocides against Hungarian Jews and Rwandan Tutsis respectively. They fled into the soothing bosom of unsuspecting Canada. However, sooner or later (much, much later for Mr Finta), the smell of their pasts caught up with them.

For Mr Finta, a rare attempt was made to prosecute him in Canada for sundry crimes connected to the Holocaust. But, at the end of his trial, he was acquitted by the jury, on all counts. An appeal by the Crown was dismissed by a majority of the Court of Appeal for Ontario. A further appeal to the Supreme Court also was dismissed—by a narrow majority of four-to-three.**[2]**

The failure of the *Finta* prosecution no doubt led the Federal Government to limit its subsequent efforts to the seemingly safer method of deportation proceedings against suspects of international crimes found in Canada.**[3]** Perhaps, the more famous of these deportation proceedings in recent years was that against Mr Mugesera. The immigration tribunals ordered that the Minister of Citizenship and Immigration may indeed deport him, as the Minister had sought to do. This was on the grounds that Mr Mugesera had made a speech in 1992 (two years before the Rwandan Genocide) in which he was found to have called for genocide, crimes against humanity and murder to be committed against Rwandan Tutsis. The speech thus rendered him inadmissible in Canada before he was admitted in 1993. On an application for judicial review, the Trial Division of the Federal Court partly upheld the tribunals' decision, specifically agreeing that the speech made him answerable for crimes against humanity. Upon further appeal, however, the Appeal Division completely reversed the deportation order—holding that the speech, although quite awful in its message, did not amount to a crime against humanity. As with *Finta*, the Government appealed to the Supreme Court. In a unanimous judgment, the Supreme Court overturned the decision of the Appeal Division and upheld the deportation order.

The judgments of the Supreme Court of Canada in these two cases, rendered respectively in March 1994 and June 2005, form, thus far, the entire corpus of the Supreme Court's jurisprudence in the area of international criminal law.

Questions linger about the real reason for the failure of the *Finta* prosecution. It may have had much to do with a tentative, if not foggy, understanding of international criminal law at the time, not only by the Canadian lawyers and judges involved in the case, but also by some of the famous foreign international lawyers who gave expert evidence in that case. The fog is clear enough from a reading of the *Finta* judgment. One notes, for example, the clash of understanding between Justice La Forest (a most capable international lawyer himself) and Professor Cheriff Bassiouni (a renowned professor of international law who featured in the trial as the Government's expert witness in international law). Professor Bassiouni had opined, among other things, that culpability for a crime against humanity requires that the accused be shown to have known that his action was a violation of international criminal law,**[4]** thus suggesting that ignorance of the law affords a defence in international criminal law.**[5]** Understandably, La Forest J found this an odd view. This clash of understanding resulted in his lordship scoffing at the learned professor for expressing 'impoverished' views of international law that confused the trial judge who then erroneously instructed the jury.**[6]**

La Forest J, for his part, delivered what I consider a classic lecture (in international criminal law) from the

Bench. But it only impressed, as noted earlier, a minority of his colleagues (L'Heureux-Dubé and McLachlin JJ). And the lecture was not made law. So it remains a classic occasional lecture from the Bench. The majority of his colleagues (Lamer CJ, Gonthier, and Major JJ), as also noted earlier, went along with the judgment of Cory J. For present purposes and for reasons that will become apparent later, it suffices now to touch only upon the following notable point in *Finta*. In pronouncing upon what constitutes a crime against humanity, the majority held that in order to sustain conviction for any crime against humanity, as proscribed in international law, the accused must be seen to have possessed the *mens rea* of discrimination on the basis of race, religion, nationality, ethnicity, political persuasion,**[7]** etc. La Forest J did not agree.**[8]**

In fairness, the confusion seen in *Finta* must be situated in the context of the development of international criminal law from then to now, both from the perspective of evolution of jurisprudence on the international plane, as well as from the perspective of updated relevant Canadian statutory law.

As regards the evolution of jurisprudence in international criminal law, the *Finta* judgment was rendered in 1994. The legal minds there in action had not the benefit of the existence, at the time, of the wealth of experience of the specialist international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) who since their establishment, respectively in 1993 and 1994, have rendered scores of judgments on the specific subjects of genocide, crimes against humanity and war crimes, as international crimes.**[9]**

With the rapid growth of jurisprudence at the international criminal tribunals, the correctness of *Finta* quickly became questionable—at least in part. For one thing, it has since been settled at the international criminal tribunals that there is, with the exception of persecution, no general requirement to show a discriminatory mind in a person accused of a crime against humanity.**[10]**

The other context in which the *Finta* judgment must fairly be viewed is the updating of Canadian statutory law since that judgment. In that case, the Court was dealing with s 7(3.76) of the Criminal Code of Canada that defined crimes against humanity with no allusion to the element of 'widespread or systematic attack'. As the definition then stood:

"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 of 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; ....**[11]**

This definition must be contrasted with the current international law standard description which the general part of Article 3 of the ICTR Statute typifies in its provision that requires the underlying enumerated crimes to be 'committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds …'.

This standard definition has now been incorporated into Canadian law in virtue of the Crimes against Humanity and War Crimes Act, enacted in 2000 to replace the old provisions of the Criminal Code with which *Finta* was concerned. While the definition in the old s 7(3.76) has been moved into the Act of 2000, almost verbatim, the new statute now also implements, in Canada, the Rome Statute of the International Criminal Court which defines crimes against humanity in the same manner as the ICTR Statute.**[12]**

Given the absence of the specific indication of the additional element of 'widespread or systematic attack against a civilian population' as part of the definition of crimes against humanity, it is not surprising that the judges in the *Finta* case were left to argue among themselves as regards whether something more was required to constitute a crime against humanity than was required under regular Canadian criminal law which already outlawed, in one form or other, all the underlying crimes against humanity in international law. The majority thought there was; but the minority thought generally not. The point has now been clearly confirmed by the international criminal tribunals that there is an additional element that must be shown for a viable case of crime against humanity: *ie* the crime must have been committed as part of a widespread or systematic attack against a civilian population.

In *Mugesera*, the Supreme Court was afforded the opportunity to consider the manner in which Canadian courts should view the case law of the international criminal courts when Canadian courts must decide

questions sounding in international criminal law.

Mugesera was procedurally an administrative law case, involving, as noted earlier, whether the Minister of Citizenship and Immigration may deport Mr Mugesera who, prior to admission into Canada, had made a speech in his native country, which speech was said to constitute incitement to genocide; instigation of extermination, murder and persecution, as crimes against humanity; and persecution in itself. If found to have committed these international crimes, a landed immigrant, as also noted earlier, becomes liable to deportation, having falsely declared in his application for admission to Canada that he had done nothing in his past life that might have amounted to a crime against humanity or any other international crime.

In considering what amounts to a crime against humanity, being a violation of international law, the Supreme Court decided in *Mugesera* that it is wiser for Canadian courts to defer to the expertise of the international criminal tribunals in these things, not as a matter of judicial precedent, of course, but as a matter of judicial prudence. Having so decided, the Supreme Court led by example and reversed itself in *Finta*, to the extent that the judgment was inconsistent with the settled jurisprudence of the international criminal tribunals. In specific terms, the Court reversed the point made in *Finta* that a discriminatory *mens rea* was required for conviction for all crimes against humanity.

From a geopolitical perspective, the internationalist aptitude shown by the Supreme Court in *Mugesera* comes as no surprise at all, given Canada's firmly established reputation as a leading supporter of the international order.**[13]** But more importantly, from the perspective of legal development, it is expected that, in the years to come, *Mugesera* (together with the *Finta* case that it revised and reversed) will form the baseline of understanding of what is hoped to be an important aspect of Canadian domestic law, as irrigated by international criminal law. The importance of this area of Canadian domestic law stems from the attractiveness (noted earlier) of Canada to all manner of immigrants (including suspects of international crimes committed in much of the world's conflicts that refuse to abate), combined with the evident resolve of Parliament**[14]** and Government**[15]** to make Canada a rough and unwelcoming place for the Mugesera brand of immigrants.

One can only hope that with this disposition of Canadian courts to tap into the wealth of jurisprudence of the international criminal tribunals, as exemplified in the *Mugesera* judgment, Canadian authorities will be emboldened again, as the recent indictment of Désiré Munyaneza appears to portend, to revert to prosecution, without prejudice to deportation, of genociders and kindred international criminals found in Canada. This will immensely aid the global fight against impunity for these crimes, especially given the decision of the United Nations to wind up the work of the ICTR and ICTY in 2008 (for trials) and 2010 (for appeals);**[16]** and given that the International Criminal Court lacks jurisdiction over offences committed before the coming into force of its statute on 1 July 2002,**[17]** coupled with the limitation of resources that it will certainly face in the trials of even the crimes over which it has jurisdiction.

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[1] *Canada* v *Mugesera et al* 2005 SCC 40.

[2] [1994] 1 SCR 701; Cory J wrote on behalf of himself, Gonthier and Major JJ, with Lamer CJ siding with them; La Forest J rendered the minority judgment of himself, L'Heureux-Dubé J and McLachlin J (as she then was).

[3] See *Oberlander* v *Canada* (2004), 241 DLR (4th) 146; *Obodzinsky* v *Canada* (2001), 278 NR 182; *B(A)* v *Canada* (2001), 269 NR 381; *Canada* v *Nemsila* (1996), 120 FTR 132; *Arica* v *Canada* (1995), 182 NR 392; *Gonzalez* v *Canada* (1994), 115 DLR (4th) 403; *Sivakumar* v *Canada* (1993), 163 NR 197.

[4] See *Finta*, pp 760—761. Bassiouni's expert report in the *Finta* trial was the foundation to a book he later published in 1992 under the title *Crimes Against Humanity in International Criminal Law*.

[5] In this connection, it is noteworthy that Article 32(2) of the Rome Statute of the International Criminal Court provides as follows: 'A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law

may, however, be a ground for excluding responsibility if it negates the mental element required by such a crime, or as provided for in Article 33.' For its part, Article 33 provides as follows: '1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility: unless (a) the person was under a legal obligation to obey orders of the Government or the superior in question; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful. ¶ 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.'

[6] See *Finta*, p 764.

[7] It may be noted here that 'political' animus is not one of the forbidden grounds of genocide. Hence, the tyrant that subjects every member of the opposition party to extra-judicial execution may be convicted for 'extermination' as a crime against humanity, but he may not be convicted for genocide. This leads one to wonder what the difference is between 'extermination' and 'genocide'. The constraint of space happily affords me the escape route from discussing this question here.

[8] See *Finta*, p 757. In *Mugesera*, the Court suggested that La Forest J disagreed with the view of the majority that the accused must be shown to be aware that his action was part of a widespread or systematic attack against a civilian population based on discriminatory grounds. There is some doubt about the accuracy of this perception of Justice La Forest's point. One may equally see that he was disagreeing with the majority's view that the accused must possess a discriminatory *mens rea* underneath the *actus reus* of the crime against humanity. If that was the point being made by La Forest J, he would have then been since vindicated by developments in international criminal law.

[9] Though established in 1993 and 1994 respectively, these international tribunals began articulating principles of international criminal law only later, starting with the 1997 judgment of ICTY in *Prosecutor* v *TadiÄ‡ (Judgment)* 7 May 1997 (Trial Chamber) and the 1998 judgment of ICTR in *Prosecutor* v *Akayesu (Judgment)* 2 September 1998 (Trial Chamber).

[10] See *Prosecutor* v *Akayesu (Judgment)* 1 June 2001 (ICTR Appeals Chamber), paras 447 to 469.

[11] Section 7(3.76) of the Criminal Code of Canada, RSC, 1985, c C-46.

[12] See Article 7 of the Rome Statute which is attached as a schedule to the Act of 2000.

[13] The Deputy Secretary-General of the UN is Canadian; a Canadian Chief Prosecutor saw the ICTR and ICTY through the critical years of those Tribunals' work; Canadian generals led multinational peace-keeping forces during the conflicts in the Balkans and in Rwanda; Canada played a leading role in the establishment of the International Criminal Court and now a Canadian is serving as the President of that Court; a Canadian is serving as the UN High Commissioner for Human Rights; and a Canadian general is the head of NATO forces.

[14] One must note here the enactment of the War Crimes and Crimes against Humanity Act (2000), being in a way the revision and updating of old s 7(3.71) to (3.73) of the Criminal Code, RSC, 1985, c C-46, passed in 1986, following Report of the Deschênes Commission on War Criminals, Commission of Inquiry on War Criminals Report, Jules Deschênes, Commissioner (1986). The Commission was established by Order-in-Council No 1985-348, which stated, in part, that the 'Government of Canada wishes to adopt all appropriate measures necessary to ensure that any ... war criminals currently resident in Canada ... are brought to justice'. See *Finta*, pp 744 and 807.

[15] One also notes (1) the series of denaturalisation and deportation of suspects of crimes against humanity the latest of whom is Mugesera, and (2) the establishment within the Department of Justice of a unit dedicated to the investigation and prosecution of suspects of international crimes found in Canada.

[16] See UN Security Council resolutions 1503 of 28 August 2003 [Doc S/Res/1503 (2003)] and 1534 of 26 March 2004 [Doc S/Res/1534 (2004)].

[17] See <www.un.org/law/icc/>