

Deputy Prosecutor
International Criminal Tribunal for Rwanda

Issue Numbers 39-41

Research and Analysis of Trials Held in Domestic
Jurisdictions for Breaches of International Criminal Law.

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INTRODUCTION

The issue of whether an individual or group may be prosecuted under international law for gross violations of international law in the absence of a positive municipal law of the state in which the violations occurred is recurrent in prosecutions in both international and domestic tribunals. International tribunals and domestic courts have applied a number of bases under which an alleged perpetrator of gross violations of international law may be prosecuted in such a situation.

THE PROBLEM OF PROSECUTIONS OF GROSS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW ABSENT POSITIVE DOMESTIC LAW¹

The events which transpired in Rwanda between January 1, 1994 and December 31, 1994 unquestionably fall into a class of offenses specifically prohibited by international law, but in some instances such crimes are not explicitly proscribed by the laws of Rwanda in effect at that time. Likewise, the prosecutors at the International Military Tribunal at Nuremburg were faced with a similar dilemma. At Nuremburg, it was argued by the defense that the establishment of the IMT was violative of the principle of *Nullem Crimen Sine Lege*, no crime without law. These arguments stressed the notion that it was a violation of due process to apply laws retroactively in a criminal proceeding.

The tribunal, in passing sentence on those found guilty of crimes against humanity, did so on the ground that the crimes with which the defendants were charged were contrary to the law of nations, and customary norms of international law. More recently, the Supreme Court of Canada held that “A retroactive law providing individual punishment for acts which were illegal, though not criminal at the time they were

¹ All references to cited material shall be noted as (Appendix, [number])

committed, seems...to be an exception to the rule against ex post facto laws.” *R. v. Finta*, 28 C.R. (4th) 265, 165 N.R. 1, 20 C.R.R. (2d) 1, p. 226 (Sup. Ct. Canada, 1994) (citing Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” (1947) 1 Int’l L.Q. 153, 165) (Appendix, 3)

As applied to the prosecutions in Rwanda, even if it can be argued that there existed no positive domestic law proscribing conduct with which the accused is charged, the statute of the ICTR still supercedes the authority, or lack thereof, of the domestic law and can be applied to past conduct. This is especially so in that the punishable offenses enumerated in the ICTR are recognized universally as violations either of customary or statutory laws of nations, or of treaties.

Sources of Law for Prosecutions of Gross Violation of International Humanitarian Law

Customary International Law-Law of Nations

Customary international law has long been recognized as a basis for prosecution or litigation. In determining whether a norm has attained the status of customary international law, courts take into account whether or not a general consensus exists in the legal community.

[The] law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’” *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2nd Cir 1980, citing *United States v. Smith*, 18 U.S. 153, 160) (Appendix, 2)

The United States Supreme Court explained the value of the such sources in *The Paquete Habana*, supra.

such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy

evidence of what the law really is. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (Appendix, 5)

In the case of Rwanda, the fact that a great number of the relevant provisions dealing with the proscription of enumerated offenses arose from the statute of the International Criminal Tribunal for Yugoslavia, which in turn arose out of international humanitarian law demonstrates the value and importance of customary international law in the prosecution of alleged violators of international law. During the formation of the ICTY, it was recognized that there may not be controlling municipal law addressing the events which were the subject matter of the Tribunal.

In establishing the ICTY the Secretary General dealt with this issue by asserting that in the application of the principle of *Nullum crimen sine lege*, the international Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. (*Rutaganda Judgment* ¶ 86) (Appendix, 6)

“[N]orms of Common Article 3 had acquired the status of customary law in that most states, by their domestic Penal Codes, have criminalized acts which, if committed during internal armed conflict, would constitute violations of Common Article 3.” *Rutaganda Judgment* ¶ 87, *id. citing Akayesu Judgment*,

In referring to the Akayesu judgment, the Trial Chamber based its finding on the precedents set by the ICTY, which established that Common Article 3 was customary international law.

In further examining the Akayesu judgment, the Rutaganda Court noted that while Common Article 3 was customary law, not all of the provisions of the Second Additional Protocol of 1977 were necessarily customary in nature with the exception of Article 4(2), which are supplemental to Common Article 3 and are embodied in Article 4 of the Statute of the ICTR.

Treaties and Conventions

Even if it can be argued that the acts committed in Rwanda between January 1, 1994 and December 31, 1994 are not proscribed by customary international law, such acts were committed in violation of international treaties and conventions. Therefore, even if Common Article 3 and Article 4(2) of the Second Additional Protocol of 1977 are not customary international law, Rwanda is nonetheless bound due to having signed each on May 5 1964, and November 19, 1984, respectively. Hence, these conventions were the law of Rwanda during the period between January 1, 1994 and December 31, 1994. *See Rutaganda Judgment*, ¶ 89. (Appendix, 6)

Bases for Prosecutions of Gross Violations of International Humanitarian Law in Domestic Courts

In domestic prosecutions for gross violations of international law which are conducted in the forum in which the violations occurred, courts have addressed the issue of whether international law should take precedence over municipal law. In France, the Court of Cassation in the *Barbie* case, (Appendix, 1) held that international law “can certainly take precedence over the rules of municipal law, but subject to the absolute condition that the norms laid down by international law have been properly rendered enforceable in France.” Id.

In order to be properly rendered enforceable, the court said either a treaty or municipal law which gives force to declarations, resolutions, or undertakings promulgated by organizations or international bodies must be first enacted. In applying this standard, the *Barbie* court held that Article 55 of the Constitution of 4 October 1958 integrated into the municipal law the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms and gave these conventions

superior authority over domestic law. Also, the court held that the Law of 26 December 1964, which adopted into French Law the provisions of the Charter of the IMT, confirmed the “integration into French law of both the criminality of [war crimes and crimes against humanity] and the fact that they are not subject to statutory limitation.”

(Appendix, 1)

The United States Constitution also recognizes the supremacy of treaties over domestic law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

USCA Constitution Art. VI cl. 2

While nothing in the Rwandan Constitution of 1991 states explicitly that international law takes precedence over municipal law, ratification of treaties, conventions, and agreements is provided for in Article 44(6), and hence Rwanda is bound by them. Furthermore, the Preamble to the Rwandan Constitution of 1991 makes clear reference to the Universal Declaration on Human Rights, and the African Charter on Human and Peoples’ Rights. (Appendix, 7, 8, 11)

Bases for Prosecutions of Gross Violations of International Humanitarian Law in Foreign Courts

Prosecutions for gross violations of international law outside of the forum in which the alleged acts occurred must also be provided for by that country’s domestic law, or treaty obligations. For example, section 6(2) of the Canadian Criminal Code provides that no person shall be convicted or discharged for an offense committed outside Canada. However, if the accused is not a Canadian

citizen and the alleged acts occurred outside of Canada, the accused may still be prosecuted if the alleged acts can be characterized as war crimes or crimes against humanity. (*R. v. Finta*, 28 C.R. (4th) 265 [Sup. Ct. Canada, 1994]) (Appendix, 3)

In determining whether the alleged conduct rises to the level of an international offense, the court must look to the nature of the act. The *Finta* court distinguished war crimes and crimes against humanity from the municipal offenses of murder, rape, theft and similar acts. In crimes against humanity, the acts could be characterized as “inhumane” and based on discrimination or persecution of an identifiable group. In the case of war crimes, the additional element is that the acts were committed in a time of war, as part of that war. Also, the alleged acts had to be criminalized in Canada at the time of the commission.

Imre Finta was a gendarme in Hungary during the Nazi occupation. In the course of his duties, he was also ordered to supervise the loading of Jews into train cars bound for concentration camps. In assessing the culpability of the accused, the *Finta* court held that the accused must be aware of or willfully blind to facts or circumstances which would bring the acts within the definition of war crimes or crimes against humanity.

The court held that Finta could rely on the defenses of obedience to superior orders, or the peace officer defense if the laws of Hungary at the time of the occupation were invalid unless a reasonable person in Finta’s position would have known that his actions had the factual quality of crimes against humanity or war crimes. In sum, the jury’s task was to determine whether a reasonable person in Finta’s position would have found that the orders given were manifestly illegal

and whether he had a choice to obey or not. The court held that while Finta's actions were illegal in Canada at the time of their commission, Finta lacked the requisite *mens rea* and knowledge that the orders were manifestly illegal to have committed a crime against humanity.

The court's attention to detail in assessing the nature of the offense and the *mens rea* of Finta highlights the caution of the court in a proceeding initiated against a non-native defendant for violations committed outside of Canada. The Canadian Federal Court of Appeal in *Mugesera v. Canada*, 2003 FCA 325 (2003) (Appendix, 4) likewise paid very close attention to the nature of the alleged act, and the context in which it occurred.

The legal criteria laid down in the *Criminal Code* and international law must be met for the speech to be considered as a crime against humanity. Those criteria are not met if the evidence only shows that there were reasonable grounds to believe that the speech 'could be classified as a crime against humanity'; the evidence must show that in fact the speech was a crime against humanity in law.

Mugesera, ¶ 29

In arriving at the conclusion that the speech made by Mugesera 18 months prior to the commencement of atrocities in Rwanda did not constitute incitement to genocide, and grounds for expulsion from Canada, the court very closely scrutinized the circumstances under which the speech was given, the divergence and omissions in translations, and the allegedly inciting passages read in the context of the entire speech.

The court concluded that all of the evidence did not show any intent on the part of Mugesera to counsel others to commit genocide. The court found that the speech, taken as a whole, did not demonstrate an intent to incite Hutus to commit genocide against the Tutsi. Even if the speech could be read in such a way to lead one to believe that Mr.

Mugesera intended to incite genocide, the lack of temporal proximity to the genocide requires the court to examine the speech and the allegations very cautiously.

In both the *Finta* and *Mugesera* cases, the courts conduct very detailed fact-finding inquiries. Such detailed fact-finding is necessitated not only by the displacement of the accused from the forum in which the alleged acts occurred, both in time and location, and the possible legal ramifications of applying a separate set of laws to the issues, but also by the gravity of the charges. In such cases, the nature of the acts alleged must be compared to the nature of the acts undertaken.

CONCLUSION

The acts which occurred in Rwanda between January 1, 1994 and December 31, 1994 and under the jurisdiction of the ICTR are illegal on a number of bases. Even absent specific positive domestic Rwandan law, the provisions of the Constitution of 1991 give effect to conventions and declarations signed by Rwanda. Furthermore, even absent ratification of these conventions and declarations, those of particular applicability through the statute of the ICTR are binding upon Rwanda as customary international law. However, in determining the culpability of an accused for a gross violation under international law, where they have jurisdiction, courts have conducted very detailed examinations of the factual and legal circumstances underlying the charges. These include very detailed fact-finding on the part of the justices, and great care to ensure that the violations with which the accused is charged have not only a basis in international law, but that such international law has been rendered enforceable in the jurisdiction.

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