500-10-004416-093
QUÉBEC COURT OF APPEAL
(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on May 22, 2009, by the Honourable Mr. Justice André Denis

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No 500-73-002500-052 S.C.M.

DÉSIRÉ MUNYANEZA

APPELLANT
(Accused)

v.

HER MAJESTY THE QUEEN

RESPONDENT
(Prosecutor)

- and -

THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE AND CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS

INTERVENERS

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INTERVENERS' ARGUMENT

PART I – THE FACTS

1. The Interveners – the Canadian Centre for International Justice and Canadian Lawyers for International Human Rights – are Canadian organizations with extensive experience in international criminal law. They make no submissions on the facts alleged by the parties.

PART II – ISSUES IN APPEAL

2. The Interveners have been granted leave to intervene on the following issues:

   (a) whether an accused can be convicted for conduct that occurred prior to the coming into force of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 (the "**Act**"); and

   (b) the differing perspectives of the parties as to the effect of subs. 6(4) of the Act.

3. The first question concerns retrospectivity. The Interveners submit it should be answered in the affirmative.

4. Subsections 6(1) and (3) of the Act allow for the prosecution of international crimes[1] that were committed before the entry into force of the Act, so long as at the time and in the place of their commission, those offences were prohibited under international law. This legislative choice complies with the *Canadian Charter of Rights and Freedoms*[2] and international law, and reflects the evolution of Canada's approach to international criminal prosecutions since World War II.

5. The second question deals with the determination of the content of international crimes in the Act, and with the relationship between the Act and the *Rome Statute of the International Criminal Court* (the "**Rome Statute**").[3] The

[1] In this factum, "international crimes" means genocide, crimes against humanity and war crimes.
[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11 (the "***Charter***").
[3] A/CONF.183/9, 17 July 1998.

Interveners submit that under the Act, international crimes are determined based on relevant sources of international law, which include – but are not limited to – the Rome Statute.

6. In subs. 6(3), the Act defines international crimes based on customary international law, conventional international law, and – except with respect to war crimes – general principles of law recognized by the community of nations. In s. 6(4), while the Act deems the crimes described in the Rome Statute to be crimes according to customary international law as of July 17, 1998, the Act still leaves the door open for the prosecution of other acts or omissions constituting international crimes under international law.

PART III – ARGUMENT

(A) CAN AN ACCUSED BE CONVICTED UNDER THE ACT FOR CONDUCT THAT OCCURRED PRIOR TO ITS COMING INTO FORCE?

7. The question of what new consequences can be attached to prior conduct has permeated the development of international criminal law. Over the last several decades, the law has evolved so as to reconcile the effective punishment of international crimes with respect for the principle of legality.[4] In Canada, the Act allows for retrospective application of criminal sanctions so long as the conduct incurred individual criminal responsibility under international law at the time it was committed.

8. Retrospectivity, in contrast to retroactivity, does not make criminal what was not criminal at the time but rather attaches new procedural or jurisdictional consequences to conduct that was already prohibited under international law.[5] The legislative history outlined below demonstrates that Parliament carefully chose the Act's retrospective approach.

(i) Legislative Attempts in the Post WWII Period

9. World War II, the Holocaust, and the Nuremburg trials that followed ushered in a new era of international criminal law – one in which individuals bear direct responsibility for violating basic human rights.[6]

10. The *Geneva Conventions Act* (the "**GCA**")[7] was one of Canada's first attempts at incorporating individual responsibility for international crimes into domestic law. The GCA implemented the *Geneva Conventions* and created offences in Canada for various "grave breaches" of the conventions, even if committed outside

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[4] See K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (New York: Cambridge University Press, 2009) at pp. 352-358.
[5] See *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at para 39.
[6] See, e.g., Judgment, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (Nuremberg: IMT, 1947) (vol. 1) 171, reprinted in (1947) 41 AJIL 172, at p. 221.
[7] RSC 1985, c. G-3 (the "**GCA**").

Canada. However, the GCA had no retrospective effect, meaning it applied only to crimes committed after the GCA came into force. Thus, the GCA could evidently not be used to prosecute Nazi war crimes,[8] and indeed, the GCA has never given rise to a single attempt at criminal prosecution.[9]

11. This shortcoming of the GCA highlighted a common paradox: the moral imperative for prosecuting international crimes was derived, in large part, from the egregious crimes of World War II and the Holocaust; yet these very crimes would go unpunished if the legal instruments enacted in their wake did not apply to acts committed before these enactments came into force.

(ii) The Solution Adopted under the *Charter*

12. As the *Charter* was being drafted, the issue of retrospective prosecution returned to the fore. The drafters of the *Charter* sought to strike a balance between respecting the rights of accused persons, while clearly allowing for the prosecution of those who committed offences under international law. The wording of s. 11(g) was deliberately chosen based on the model of post-War international instruments,[10] with a view towards ensuring that "impoverished" allegations of "retroactivity" would not interfere with the effective prosecution of those charged with international crimes.[11]

13. Section 11(g) states:

> Any person charged with an offence has the right… not to be found guilty on account of any act or omission **unless, at the time of the act or omission, it constituted an offence under Canadian or**

[8] See Commission of Inquiry on War Criminals, *Report, Part 1: Public* (Minister of Supply and Services: Ottawa, 1986), at p. 123-126.
[9] See F. Lafontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto: Thomson Reuters, 2012), at p. 20.
[10] *Ibid.*, at pp. 22-23. The international instruments in question include the *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc A/810, (1948) 71, at art. 11(2); the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, at art. 7; and the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, at art. 15.
[11] *R. v. Finta*, [1994] 1 S.C.R. 710 ("***Finta***"), at p. 784 *per* La Forest J.

> **international law or was criminal according to the general principles of law recognized by the community of nations**.
>
> [Emphasis added]

(iii) The 1987 Criminal Code Amendments

14. On September 16, 1987, Parliament adopted significant amendments to the Criminal Code in order to enable the prosecution of Nazi war criminals in Canada (the "**Amendments**").[12]

15. The Amendments were the product of the Commission of Inquiry on War Criminals (the "**Commission**"), presided over by Jules Deschênes, former Chief Justice of the Superior Court of Québec. The mandate of the Commission was to investigate the presence of Nazi war criminals in Canada, to determine whether Canadian law provided mechanisms for their prosecution, and to recommend, as necessary, the legislative enactments that could make such prosecution possible.[13]

16. The Commission concluded that, while the *Charter* legally allowed for the prosecution of Nazi war criminals in Canada, domestic criminal law did not adequately provide for the effective prosecution of international crimes committed outside Canada. Therefore, the Commission suggested important amendments to the *Criminal Code*,[14] the bulk of which were adopted.

17. The Amendments provided for the prosecution in Canada of war crimes and crimes against humanity committed outside Canada by deeming such acts to have occurred in Canada. However, the retrospectivity of the Amendments was

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[12] S.C. 1987, c. 37.
[13] See F. Lafontaine, *supra*, at p. 24. The Commission was instituted on February 7, 1985 pursuant to Order-in-Council PC-1985-348.
[14] Commission of Inquiry on War Criminals, *supra*, at pp. 167-168.

limited in that they required the conduct in question to have constituted an offence under Canadian law at the time it was committed.[15]

(iv) Constitutionality of Retrospectivity: *R. v. Finta*

18. *Finta* was the first case under the Amendments. A former captain of the Royal Hungarian Gendarmerie, Imre Finta was charged with unlawful confinement, robbery, kidnapping and manslaughter in connection with the transport, confinement and deportation of over 8,000 Jews from Szeged during the Holocaust. The underlying acts were crimes under the *Criminal Code*, but pursuant to the Amendments they were also alleged to have constituted crimes against humanity and war crimes at the relevant time.

19. Finta was acquitted by the jury at first instance, and the Supreme Court was seized with the Crown's appeal from this decision. It was also seized with a cross-appeal in which Finta argued that the Amendments violated the *Charter* based on ss. 7 and 11(g), arguing that the law was both vague and retroactive.

20. All justices (with the exception of Lamer C.J., who did not rule on the issue) rejected Finta's *Charter* arguments. Specifically, on the s. 11(g) argument, the Supreme Court unanimously affirmed that the "retroactivity" in the Amendments was permissible under Canadian law[16] - if, indeed, they were even properly called "retroactive" in the first place.[17]

21. Despite the Amendments passing scrutiny under the *Charter*, the majority of the Court upheld Finta's acquittal. Because of this result, the reaction of the federal government to *Finta* was overwhelmingly negative, and it became clear that

[15] Repealed s. 7(3.71) of the *Criminal Code*.
[16] See *Finta*, *supra*, at pp. 872-874 *per* Cory J., and at p. 784 *per* La Forest J.
[17] La Forest J. (for L'Heureux-Dubé and McLachlin J.J., as she then was) argued that Amendments were simply not "retroactive": see p. 781. His holding that the Amendments passed *Charter* scrutiny was presented as a subsidiary point.

Canada needed to further refine its approach to international criminal prosecutions.[18]

(v) The Crimes Against Humanity and War Crimes Act

22. In 1998, the International Criminal Court (the "**ICC**") was established. There are presently 121 State Parties to the Rome Statute, including Canada. The Rome Statute was adopted on July 17, 1998 and came into effect on July 1, 2002.

23. The Act was adopted by Parliament in June 2000 as a prelude to Canada's ratification of the Rome Statute. The Act has two major functions: to provide a legislative basis for Canada's cooperation with the ICC, and to strengthen Canada's capacity to carry out its own prosecution of international crimes.[19] For the purposes of the present case, the second of these functions is the most relevant.

24. The Act addresses the issue of retrospectivity directly through the combination of subs. 6(1) and 6(3):

> 6. (1) Every person who, <u>either before or after the coming into force of this section</u>, commits outside Canada
> (a) genocide,
> (b) a crime against humanity, or
> (c) a war crime,

[18] See Department of Justice, Department of Citizenship and Immigration, *Public Report: Canada's War Crimes Program* (1998), Introduction, online: http://epe.lac-bac.gc.ca/100/202/301/can_war_crimes_public_report/1998/english/pub/war1998.html. See also F. Lafontaine, *supra*, at p. 31.

[19] See D. Goetz, *Bill C-19: Crimes Against Humanity and War Crimes* (Ottawa: Parliamentary Research Branch, 2000) LS-360E (revised 15 June 2000), online: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C19&Parl=36&Ses=2#A.%20Overview%28txt%29. See also the comments of the Hon. Lloyd Axworthy, Minister of Foreign Affairs of Canada, upon introducing *Bill C-19, an Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other acts*, upon second reading, 36th Parliament, 2nd Session, (6 April 2000) 80 *Hansard* 1550 at 1555, online: http://www.parl.gc.ca/HousePublications/Publication.aspx?pub=Hansard&doc=80&Language=E&Mode=1&Parl=36&Ses=2#LINKT63.

> is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

25. Section 6(3) then defines an international crime to be an act or omission that,

> at the time and in the place of its commission… constitutes [a crime] according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.[20]

26. By emphasizing the status of the act or omission in international law, while not according any importance to its status in domestic law at the time of its commission, the Act fully embraces the approach to retrospectivity that has marked international criminal law in the decades following the Nuremberg trials.[21]

27. Subsections 6(1) and 6(3) make it clear that there is no need to examine Canadian law at the time the act or omission was committed. After *Finta*, Parliament realized that the requirement under the Amendments that an act be criminal under both domestic and international law was unnecessary and too burdensome.[22] Donald Piragoff, general counsel of the criminal law policy section of the Department of Justice, explained this purpose of the Act:

> The bill resolves a number of difficulties that resulted from judicial interpretations of the existing Criminal Code provisions, particularly in the Finta case. […]
>
> This particular bill resolves that problem because it doesn't require proving both an international offence and a Canadian offence. It now creates Canadian offences that incorporate, by reference, international law. So we would be prosecuting a Canadian offence, but the exact definition of that Canadian offence would be the

[20] The Act, at s. 6(3). The formulation is identical for crimes against humanity, genocide and war crimes, except that the latter refers to international law "applicable in armed conflicts", and omits reference to the "general principles of law".
[21] See K.S. Gallant, *supra*, at pp. 352-358.
[22] See F. Lafontaine, *supra*, at p. 28.

> international offence. There would only be one set of laws being put forward to a jury, which makes it a lot easier.[23]

28. The deliberate change reflects Canada's commitment to prosecuting international crimes committed before the Act came into force. By attaching new domestic consequences to acts that were already criminal under international law at the time of their commission, the Act simplified and strengthened Canada's legislative response to international crimes while remaining within the bounds of permissible retrospective legislation.[24]

(B) DOES THE ACT LIMIT THE PROSECUTION OF CRIMES TO THOSE ACTS THAT MEET THE DEFINITION IN THE ROME STATUTE?

29. The determination of international crimes pursuant to the Act is not limited to the definitions contained in the Rome Statute. While the crimes contained in the Rome Statute are deemed to form part of international customary law after July 17, 1998, a Canadian court seized of a prosecution for acts committed before that date is compelled to make its own determination of international criminal law.

(i) The Relationship between the Act and other Sources of Law

30. The system of international criminal justice is a complementary one, which relies on both national courts and international adjudicative bodies to prosecute those who commit international crimes.[25] Pursuant to the "complementarity" principle,[26] a case becomes inadmissible before the ICC when a genuine domestic

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[23] Proceedings of the Standing Committee on Foreign Affairs and International Trade (11 May 2000), online: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040316&Language=E&Mode=1&Parl=36&Ses=2.

[24] See D. Robinson, "Implementing International Crimes in National law: The Canadian Approach", in M. Neuner, ed., *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (Berlin: BWV, 2003) at pp. 53-54.

[25] This paradigm was true even before the Rome Statute was adopted: see I. Cotler, "Bringing Nazi War Criminals to Justice", *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 91 (April 9-12, 1997), at p. 269; see also *Finta*, *supra*, at pp. 731-732 *per* La Forest J.

[26] See the Preamble and art. 1 of the Rome Statute.

investigation or prosecution of the offence in question is taking, or has already taken, place.[27]

31. At the domestic level, the Act affirms Canada's commitment to the domestic prosecution of international criminals. Notably, the Act defines international crimes purely by reference to international law.[28] This symmetry implies that any act or omission that constituted an international crime under international law at the time of its commission can be prosecuted under the Act.

32. The Rome Statute provides much of the substance of the Act's content. For instance, with respect to acts or omissions that occurred after the Rome Statute was adopted, Parliament facilitated the task of courts by deferring to the definitions of crimes contained in the Rome Statute:

> 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**.[29]

33. Accordingly, if an act or omission committed after July 17, 1998, falls within the scope of crimes in the Rome Statute, it necessarily falls within the scope of crimes under the Act.

34. Nonetheless, the overlap between the Act and the Rome Statute is not complete.

35. First, even for acts or omissions committed after July 17, 1998, the Act leaves room for the development of international criminal law beyond what can be found in the Rome Statute.[30] Section 6(4) specifically states that deference to the definitions in the Rome Statute "does not limit or prejudice in any way the application of existing or developing rules of international law".

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[27] See arts. 17 and 20 of the Rome Statute.
[28] See subs. 6(3) of the Act.
[29] Section 6(4) of the Act. Emphasis added.
[30] See *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 ("***Mugesera***"), at para. 158.

36. Second, and of critical importance for the case at bar, the Act does not limit international law to the definitions in the Rome Statute for acts or omissions that were committed before July 17, 1998.

37. For offences committed before the adoption of the Rome Statute, independent scrutiny of other applicable sources of international criminal law is not only desirable, but essential. Faced with "conduct that took place prior to the adoption of the *Rome Statute*, the judge will have to make his or her own assessment of customary international law."[31] This determination can be made "without having to turn to the *Rome Statute*" at all.[32]

38. It is incorrect, therefore, to conceive of the Act as a mere domestic duplication of the Rome Statute. As Professor Fannie Lafontaine explains:

> ...the *Act* is not meant as an incorporation statute of the *Rome Statute per se*. The *Act* relies expressly on the *Rome Statute* only as an interpretative guide of customary international law and only with respect to the definitions of the crimes.[33]

39. The relevant touchstone for the Act is always international criminal law:

(a) Acts and omissions committed after the adoption of the Rome Statute are analyzed based on the definitions of crimes contained in the Rome Statute, under reserve of any developments in international law that have arisen since.

(b) Acts or omissions committed before the adoption of the Rome Statute are determined through a Canadian court's independent analysis of international law.

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[31] F. Lafontaine, *supra*, at p. 108. Prof. Lafontaine continues to note that the court "may depart from the *Rome Statute* if [it] is seen as broader in scope [than the international criminal law at the time]". With these words, however, Prof. Lafontaine did not intend on excluding the inverse possibility (i.e., that the Rome Statute is *narrower* in scope than international criminal law): see Prof. Lafontaine's comments referenced at fn. 32, below.
[32] *Ibid.*, at pp. 109-110.
[33] *Ibid*., at p. 103.

40. In all cases, other domestic statutes – such as the GCA[34] – are irrelevant in determining the scope of international crimes under the Act. Only the international legal sources referenced at subs. 6(3), 6(4) and 6(5) of the Act should be considered.[35]

(ii) Independent Determination of International Crimes

41. Before convicting an individual under the Act for offences committed before the Rome Statute was drafted, Canadian courts therefore have a significant responsibility to determine the scope and content of international crimes based on relevant sources of international law. In the majority of cases, this interpretive exercise will require the courts to correctly determine customary international law at the time the alleged offence(s) were committed.

42. Customary international law is "a general practice accepted as law",[36] meaning that it is state practice undertaken in the belief that it is required or authorized by law (*opinio juris*), and is not simply a matter of usage, convenience or equity.[37] Evidence of custom is typically found in any number of sources, including policy statements, legal opinions, diplomatic correspondence, manuals of military or other law, comments on draft documents issued by the International Law Commission or other bodies, resolutions of the United Nations General Assembly, decisions by national courts, domestic legislation, records of international meetings, as well as treaties and their *travaux préparatoires*.

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[34] According to Prof. Lafontaine, *ibid.*, at p. 185, the Act has rendered the GCA "obsolete, at least insofar as the criminalisation of the grave breaches are concerned". The only usefulness of the GCA is, for the purposed of the determination of customary international law, as evidence of Canada's state practice prior to the enactment of the Act.

[35] The situation may be different, however, when it comes to the question of defences. Section 11 of the Act states: "the accused may, subject to sections 12 to 14 and to subsection 607(6) of the *Criminal Code*, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings".

[36] *Statute of the International Court of Justice*, at art. 38(1)(b).

[37] State practice need not be completely consistent, provided that it conforms in general with the purported rule and that states that act inconsistently with the rule explain their actions in a way that reinforces rather than undermines the rule: International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Judgment* (27 June 1986), at para. 186.

Generality and consistency are more important than duration in the formation of custom, which can emerge in a short period of time provided that state practice has been "both extensive and virtually uniform..."[38]

43. For facts alleged to have taken place at the time of the Rwandan genocide, the statutes and jurisprudence of international tribunals help provide a picture of the status of customary international law at that time. As the Supreme Court stated in *Mugesera v. Canada (Minister of Citizenship and Immigration)*:

> Since *Finta* was rendered in 1994, a vast body of international jurisprudence has emerged from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the [International Criminal Tribunal for Rwanda – the] ICTR. These tribunals have generated a unique body of authority which cogently reviews the sources, evolution and application of customary international law. Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions ... which expressly incorporate customary international law. ...[39]

44. Following this instruction, Canadian courts should pay particular attention to the decisions of international courts and tribunals as part of their assessments of international law, owing to the great expertise held by these international courts and tribunals in selecting and weighing the sources of state practice.

45. As the Supreme Court stated in *Mugesera*, "the close relationship between our domestic law and international law […] mandates that the nature and definition of crimes against humanity should be closely aligned with the jurisprudence of international criminal courts."[40] The same reasoning would apply for genocide and war crimes.

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[38] International Court of Justice, *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands), Judgment* (20 February 1969), at para. 74.
[39] *Mugesera*, *supra*, at para. 126.
[40] *Ibid.*, at para. 143.

46. In all cases, Canadian courts must take care to assess the *state of international law at the time the alleged offence was committed*.

47. While it is beyond the scope of the present intervention to review the content of international criminal law at different times, some general observations can be offered concerning "war crimes", which appear to be the source of the differing perspectives of the parties concerning subs. 6(4) of the Act:

(a) In the case of international armed conflict, acts outlawed under the laws and customs applicable in armed conflict were criminalized by the time of World War II, as affirmed in the reasoning of the International Military Tribunal at Nuremberg and in the reasoning of subsequent national military courts.[41]

(b) After World War II, the question will be when the acts giving rise to individual criminal responsibility as grave breaches of the 1949 Geneva Conventions and the 1977 First Additional Protocol entered into customary law. In keeping with the jurisprudence of the ICTY and ICTR, as well as with scholarly consensus, this will have been well before the time of the various armed conflicts that followed the end of the Cold War in the early 1990s.[42]

(c) In the case of non-international conflicts, the inquiry will involve determining when customary international law came to criminalize serious violations of Common Article 3 of the 1949 Geneva Conventions, the prohibitions contained in the 1977 Second Additional Protocol and other war crimes corresponding to the "laws and customs applicable in armed

[41] *Trial of the Major War Criminals before the International Military Tribunal*, *supra*, at pp. 248-249. See also R. Cryer,et al., *An Introduction to International Criminal Law and Procedure* (New York: Cambridge University Press, 2007), at pp. 227-228; J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law,* vol. I (International Committee of the Red Cross, 2005), at pp. 572 and 575-590.
[42] R. Cryer et al., *ibid.*, at p. 228 (pointing out continuing debate as to whether all acts included as "grave breaches" in Art. 85 of Additional Protocol I amount to war crimes under customary law); see also J.-M. Henckaerts & L. Doswald-Beck, *ibid.*, at pp. 551-552, 572 and 574-590.

conflict". There is strong scholarly and jurisprudential evidence – particularly through the case-law of the ICTY and ICTR – to suggest that such sources formed part of customary international law by the early 1990s.[43]

(C) CONCLUSION

48. The case at bar concerns acts that took place in Rwanda, in 1994. Based on the foregoing legal principles, the Interveners respectfully submit that, pursuant to the Act, the law that should be used to analyze the international crimes implicated in this appeal is customary international law as it existed in 1994.

PART IV – CONCLUSIONS

49. The Interveners take no position on the outcome of this appeal.

THE WHOLE respectfully submitted.

MONTREAL, December 27, 2012

IRVING MITCHELL KALICHMAN LLP

Counsel for the Canadian Centre for International Justice and Canadian Lawyers for International Human Rights

[43] See Cryer et al., *ibid.*, at pp. 229-232; J.-M. Henckaerts & L. Doswald-Beck, *ibid.*, at pp. 552-553 and 590-603. See also *Prosecutor v. Akayesu, Judgment,* Case No. ICTR-96-4-T (2 September 1998), at paras. 601-617 [appeal dismissed].

PART V – AUTHORITIES

Doctrine (cont'd) **Paras.**

Other Sources

Other Sources (cont'd) **Paras.**

CERTIFICATE OF COUNSEL

We, the undersigned, Irving Mitchell Kalichman LLP, do hereby certify that the above Interveners' Factum does comply with the requirements of the *Rules of Procedure of the Court of Appeal*.

Length of time requested for the oral presentation of the arguments: Pursuant to the judgment rendered by the Honourable Justices Pierre Dalphond, Allan Hilton and Jacques Léger JJ.A. on 11 October 2012, this question has been deferred until after the panel hearing the appeal has received the present factum and any reply factums thereto.

MONTREAL, December 27, 2012

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