FEDERAL COURT OF AUSTRALIA

SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 42

MIGRATION – application for a protection visa refused by the Administrative Appeals Tribunal on the ground that there were serious reasons for considering that the applicant had committed war crimes and crimes against humanity – whether the Tribunal fell into jurisdictional error by applying the definitions of war crimes and crimes against humanity set out in the Rome Statute of the International Criminal Court – whether the Tribunal fell into jurisdictional error by not applying the defence of superior orders – whether there was a constructive failure by the Administrative Appeals Tribunal to exercise its jurisdiction

INTERNATIONAL LAW – consideration of the principles to be applied in defining war crimes, crimes against humanity and the defence of superior orders

Convention relating to the Status of Refugees as amended by the *Protocol relating to the Status of Refugees* Art 1F(a)
Rome Statute of the International Criminal Court Arts 7, 8 and 33
Vienna Convention on the Law of Treaties Arts 31(1), 31(3), 32
Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal Arts VI and VIII
Control Council Law 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace Art II(4)(b)

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SRYYY v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
N57 OF 2004

MERKEL, FINKELSTEIN AND WEINBERG JJ
17 MARCH 2005
MELBOURNE (BY VIDEO LINK FROM SYDNEY)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N57 OF 2004**

On appeal from a single Judge of the Federal Court of Australia

BETWEEN:	**SRYYY** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**MERKEL, FINKELSTEIN AND WEINBERG JJ**
DATE OF ORDER:	**17 MARCH 2005**
WHERE MADE:	**MELBOURNE (BY VIDEO LINK FROM SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by Lindgren J on 19 December 2003 be set aside and in lieu thereof it be ordered that:
   (a) the decision of the Administrative Appeals Tribunal made on 19 September 2003 be set aside;
   (b) the appellant's application for review of the decision of the delegate of the Respondent be remitted to the Administrative Appeals Tribunal to be determined according to law.

3. In the event that a costs order is sought by the appellant, he file and serve a short outline of submissions in relation to costs within 10 days and the Minister file and serve a short outline of submissions in response within 10 days of receiving the appellant's submissions.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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DATE:	**17 MARCH 2005**
PLACE:	**MELBOURNE (BY VIDEO LINK FROM SYDNEY)**

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The appellant, a national of Sri Lanka, arrived in Australia on 17 November 2000. He applied for a protection visa on the basis that he was a person to whom Australia owed protection obligations under the *Convention relating to the Status of Refugees* (done at Geneva, 28 July 1951) as amended by the *Protocol relating to the Status of Refugees* (done at New York, 31 January 1967) ("the Refugees Convention"). The basis of his application was that he had served as a soldier in the Sri Lankan army, had been involved in action against the Liberation Tigers of Tamil Elan ("the LTTE") and would be killed if he returned to Sri Lanka.

2 During the course of his application for a protection visa the appellant disclosed that during his service he was required to interrogate Tamil civilians, including children, who had been detained on suspicion that they may have links with or information about the LTTE. The appellant also disclosed that during those interrogations he was required to engage in violent acts against the detainees and to make threats, including death threats to the children, in order to extract information from them.

3 A delegate of the respondent ("the Minister") refused to grant the appellant a protection visa. The delegate determined that, by reason of Art 1F(a) of the Refugees Convention (the text of which is set out below), the Convention did not apply to the appellant because of the delegate's view there were serious reasons for considering that the appellant was "complicit in the crimes against humanity and the war crimes of the Sri Lankan Army".

4 Section 500(1)(c) of the *Migration Act 1958* (Cth) ("the Act") confers jurisdiction on the Administrative Appeals Tribunal ("the AAT") to review a decision to refuse to grant a protection visa as a result of the application of Art 1F of the Refugees Convention. The appellant applied to the AAT to review the delegate's decision but the AAT affirmed the decision. The appellant then appealed to the Court under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the *AAT Act*") alleging error of law on the part of the AAT. Although the appellant was represented before the AAT he was not represented before the primary Judge when his appeal came on for hearing. The primary Judge concluded that the AAT was entitled on the evidence before it to conclude that by reason of Art 1F(a) the provisions of the Refugees Convention did not apply to the appellant. However, his Honour dismissed the appeal as incompetent because s 483 of the Act provides that s 44 of the AAT Act does not apply to a privative clause decision and, as the primary judge found that there was no jurisdictional error, the AAT's decision was a privative clause decision.

5 The appellant applied for leave to appeal out of time on the assumption that the decision of the primary judge was an interlocutory decision and that the appeal period had expired. The day on which the application was filed was within the time allowed for an appeal from a final order. The application for an extension of time was referred by a single judge to a Full Court. When the application was called on for hearing the Minister did not oppose the grant of leave and appropriate orders were made in case they were necessary. Accordingly, the Full Court heard submissions from the parties (the appellant now being represented by pro bono counsel) on the merits.

Statutory framework

6 A criterion for the grant of a protection visa is that the Minister is satisfied that the appellant

is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention: see s 36(2)(a) of the Act and cl 866.221 of Sch 2 of the *Migration Regulations 1994* (Cth). Under Art 1A(2) of the Refugees Convention a person is owed protection obligations if that person has a well founded fear of religious, racial or political persecution, or persecution by reason of their membership of a particular social group, if they were to return to their country of nationality. However, Art 1F of the Refugees Convention provides:

> *"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
> *(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
> *(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
> *(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."*

The decision of the AAT

7 In the proceeding before the AAT the parties proceeded on the basis that the *Rome Statute of the International Criminal Court* ("the Rome Statute") was a relevant international instrument that defined war crimes and crimes against humanity for the purposes of Art 1F(a). The AAT determined to apply the definitions contained in the Rome Statute on the basis that it was the "most recent authoritative statement on this matter".

8 The AAT was satisfied on the basis of the country information before it that "the Sri Lankan Army was involved in systematic persecution of a civilian group, namely the Tamil population". The AAT considered the appellant's various accounts of the nature and level of his involvement in the interrogation of Tamils at the Sri Lankan Army camp at Jaffna and was satisfied on the basis of that evidence that there were "serious reasons for considering that the [appellant] was involved in acts which could be characterised as lower level torture or cruel and inhuman treatment involving the intentional infliction of both physical and mental pain and suffering". The AAT said that, even if the physical pain inflicted by the appellant was not always severe, the physical threats and lower level violence could have led to more severe mental suffering, especially in the case of children.

9 The AAT accepted that the appellant had been acting in accordance with the orders of his superior officer and that he protested over the interrogation techniques which he was instructed to use. It did not refer to the defence of obedience to superior orders in Art 33 of the Rome Statute but stated that although the defence of acting in obedience to superior orders and under compulsion "is not specifically referred to in Articles 7 and 8 of the Rome Statute, the relevant provisions suggest that there should be an element of intention or wilfulness in the conduct". The AAT, however, found that the appellant had not been subjected to such pressure or threat as removed that element of intention and wilfulness on his part. In the result, the AAT was satisfied that there were serious reasons for considering that the appellant had committed crimes against humanity and war crimes as defined in Arts 7 and 8 of the Rome Statute.

The decision of the primary judge

10 The primary judge outlined the history of the matter and dealt with two matters raised by the appellant in his challenge to the AAT's decision. The first matter was whether the level of harm inflicted was sufficiently serious to amount to a crime against humanity or a war crime. As to this, his Honour found that on the evidence before it the AAT was entitled to conclude that there were serious reasons for considering that the appellant was involved in acts which could be characterised as lower level torture or cruel and inhuman treatment involving the intentional infliction of both physical and mental pain and suffering. Accordingly, his Honour was not satisfied that the AAT erred in finding that the appellant's conduct was capable of amounting to a crime against humanity and a war crime.

11 The second matter was whether the AAT erred in dealing with the appellant's claim that he was "obeying superior orders". His Honour concluded the AAT did not err in concluding that it was not satisfied on the evidence that the appellant was subject to such pressure or threat as removed the element of intention and wilfulness on his part.

12 Consequently, the primary judge dismissed the appeal as incompetent because the appellant failed to establish jurisdictional error: see *SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1588.

The issues on the appeal

13 The appellant contended that, because the Rome Statute only entered into force on 1 July 2002 and only has effect from that date, the Rome Statute could not be relied upon by the AAT as defining the crimes against humanity and war crimes allegedly committed by the appellant prior to that date. The appellant also submitted that, even if the Rome Statute were the appropriate international instrument for the purposes of defining crimes against humanity or war crimes, the AAT had constructively failed to exercise its jurisdiction by not addressing the questions required to be addressed in determining whether there are serious reasons for considering whether the appellant had committed crimes against humanity or war crimes as defined in the Rome Statute. In particular, it was contended that the AAT did not address the following questions:

(1) whether the appellant's acts were committed as part of a widespread or systematic attack directed against the civilian population pursuant to or in furtherance of a State or organisational policy to commit such an attack;

(2) whether the appellant had knowledge that his acts were committed as part of a widespread or systematic attack committed against a civilian population pursuant to or in furtherance of a State or organisational policy to commit such an attack;

(3) whether the acts of the appellant were committed in the course of an armed conflict;

(4) whether the defence of superior orders, which is available under Art 33 of the Rome Statute in respect of a war crime, but which was not considered by the AAT or the primary Judge, was applicable and, if so, whether there were serious reasons for considering that the defence had been made out for the purposes of Art 1F(a) of the Refugees Convention in respect of the war crimes allegedly committed by the appellant.

14 The Minister contended that the Rome Statute was an appropriate instrument to draw upon for the definitions of a crime against humanity and a war crime because the Statute was drawn up, and in force, at the date upon which the decision under Art 1F(a) of the Refugees

Convention was made. The Minister also contended that, on a fair reading of the decision of the AAT, it had addressed and made findings in respect of the appellant's conduct in relation to each of the elements necessary to establish that there were serious reasons for considering that the appellant had committed crimes against humanity and war crimes. It was contended that, although the AAT did not express its findings in terms of each of the relevant criteria laid down in Arts 7 and 8 of the Rome Statute, it nonetheless addressed and made findings in respect of that criteria. The Minister also contended that in the AAT the appellant's legal representative accepted that the Rome Statute was the appropriate international instrument and it was now not open for the appellant to contend that the AAT had fallen into error in treating the Rome Statute as the applicable instrument.

15 The Minister accepted that the AAT did not address the superior orders defence in respect of a war crime, as set out in Art 33 of the Rome Statute, but contended that the AAT did not err in law in disregarding Art 33. It was contended that Art 1F(a) of the Refugees Convention is solely concerned with whether the crimes may have been committed and not with any defence to those crimes. In the alternative, the Minister contended that Art 33 of the Rome Statute was not available as a defence to crimes against humanity and, in so far as the article was available as a defence in respect of war crimes, the findings made by the AAT amounted to a rejection of that defence, whether cast in terms of Art 33 or in terms of any other relevant international instrument.

16 Finally, the Minister contended that, whatever be the applicable international instrument that contained definitions of crimes against humanity or war crimes, the findings made by the AAT were sufficient to amount to findings against the appellant for the purpose of Art 1F(a) of the Refugees Convention with the consequence that there was no jurisdictional error in the AAT's decision.

17 The contentions of the parties raise the following questions:

(1) Did the AAT fall into jurisdictional error by applying the definitions of crimes against humanity and war crimes in the Rome Statute?

(2) Did the AAT fall into jurisdictional error by failing to apply the defence of "superior orders" set out in Art 33 of the Rome Statute?

(3) Are there any discretionary factors relevant to the disposition of the appeal?

The background to Article 1F of the Refugees Convention

18 Article 1F(a) is to be interpreted in accordance with the rules of treaty interpretation under international law, principally those contained in the *Vienna Convention on the Law of Treaties* (opened for signature 23 May 1969, Vienna, 1155 UNTS 331, entered into force 27 January 1980) ("the Vienna Convention"): see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 ("*Applicant A*") at 251-256 per McHugh J and *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 ("*Ovcharuk*") at 178-179. Article 31(1) of the Vienna Convention provides that a treaty is to be interpreted in good faith, "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Articles 31(3) and 32 of the Vienna Convention permit recourse to matters external to the treaty, including "subsequent practice in the application of the treaty", "relevant rules of international law applicable in the relations between the parties" to the treaty and the *travaux preparatoires* of the treaty. Recourse may also be had to relevant decisions in other jurisdictions (see *Applicant A* per Kirby J at 296, and *Ovcharuk* per Branson J at 185) and the views of eminent academic commentators in the relevant field (see *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 307 and *Ovcharuk* at 185). Finally, publications of the UNHCR such as its *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("UNHCR Handbook") may also be of assistance in interpreting the meaning of the Refugees Convention (see *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294 per Allsop at [50]).

19 The development of international criminal law following the Second World War provided an important part of the context in which Art 1F was to operate. Although international law governing the conduct of armed conflicts was well established by the early part of the twentieth century, the law did not create individual criminal responsibility. Rather, it imposed obligations on belligerent states in respect of the conduct of hostilities leaving the state to be responsible for ensuring that its agents did not cause the state to violate its obligations. That responsibility was able to be met by the state creating offences under its laws the violation of which could lead to trial in its municipal courts or tribunals.

20 The concept of individual criminal responsibility under international law was not clearly established until the aftermath of the Second World War. By 1951, when the Refugees Convention was drafted, a number of instruments dealing with international crimes had come into existence. The *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, (82 UNTS 280, entered into force 8 August 1945) ("the London Charter"), drafted and entered into by the four victorious powers (although it was also acceded to by a number of other states, including Australia) provided for trial of war criminals by an "international military tribunal" ("the Nuremberg IMT") and in Art VI defined the offences to be tried:

> *"…The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:*
> *(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;*
> *(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*
> *(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated."*
> …

Article VIII of the London Charter provided:

> *"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."*

21 The Nuremberg IMT had as its purpose the trial of the highest level war criminals. Lower ranking persons were to be tried pursuant to *Control Council Law 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace* (signed in Berlin, 20 December 1945, published in (1946) 3 *Official Gazette Control Council for Germany* at 50-55) ("Control Council Law 10"), which provided similar, but not identical, definitions of crimes against peace, war crimes and crimes against humanity. Article II(4)(b) of the Control Council Law 10 contained a similar provision to Art VIII of the London Charter. Suspected Japanese war

criminals were tried by the International Military Tribunal for the Far East ("the Tokyo IMT"), which was required to apply definitions of crimes against peace, war crimes and crimes against humanity that were similar, but not identical, to the counterpart provisions in the London Charter.

22 On 11 December 1946 the General Assembly of the United Nations passed Resolution 95(I) affirming the principles of law recognised by the London Charter and the judgment of the Nuremberg IMT. In Resolution 177(II) of 21 November 1947 the General Assembly directed the newly created International Law Commission ("the ILC") to formulate the principles of international law recognised in the London Charter and the Nuremberg IMT judgment. At the same time the ILC was directed to "[p]repare a draft code of offences against the peace and security of mankind". The ILC completed the first of these tasks in 1950 with its *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (adopted by the Commission at its second session, in 1950, and submitted to the UN General Assembly) ("ILC Principles"). Principle VI provided definitions of war crimes and crimes against humanity similar to those in the London Charter. Principle IV stated:

> *"The fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."*

The ILC also commenced work on the proposed draft code of crimes against the peace and security of mankind, and it was envisaged at the time that this document would eventually represent an international criminal code.

23 Two other relevant developments preceded the drafting of the Refugees Convention. First, in 1948 the General Assembly adopted the *Convention on the Prevention and Punishment of the Crime of Genocide* (opened for signature 9 December 1948, New York, 78 UNTS 277, entered into force 12 January 1951) ("the Genocide Convention"). The Genocide Convention defined the crime of genocide, a particular species of crime against humanity.

24 Secondly, in 1949, under the auspices of the International Committee of the Red Cross, the four Geneva Conventions were adopted: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31 ("the First Convention"); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick*

and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 ("the Second Convention"); *Geneva Convention relative to the Treatment of Prisoners of War*, 75 UNTS 135 ("the Third Convention"); and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 ("the Fourth Convention") (all of which were opened for signature on 12 August 1949 and entered into force on 21 October 1951) ("the Geneva Conventions"). Each included (in Art 50 of the First Convention, Art 51 of the Second Convention, Art 130 of the Third Convention, and Art 147 of the Fourth Convention) definitions of a variety of war crimes, which are referred to as "grave breaches" of the Conventions. The definitions of war crimes, as well as those contained in all the instruments referred to above, were considered only to be applicable to an international armed conflict (see *Prosecutor v Tadic*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995 ("*Tadic*") at [71] and [81] – [84]). Common Article 3 of the Geneva Conventions set down standards of conduct applicable in armed conflicts not of an international character, however the standards relate only to state responsibility and do not create individual criminal responsibility.

25 Another part of the context for the interpretation of Art 1F is provided by Art 14 of the *Universal Declaration of Human Rights* (UN Doc A/810 at 71, adopted by the UN General Assembly in Resolution 217A (III) on 10 December 1948) ("the UDHR"). Article 14 provides:

> *"(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.*
>
> *(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."*

26 The article seeks to balance the need to provide refuge outside of the countries of those whose human rights are at risk of violation, against the need to hold individuals accountable for their own crimes or violations of the human rights of others.

27 In the course of drafting the Refugees Convention it was first proposed to make reference to Art 14(2) of the UDHR and to expressly exclude war criminals from the protection of the Convention. The draft that was recommended to the Conference of Plenipotentiaries (*Texts of The Draft Convention and The Draft Protocol to be Considered by The Conference: Note by the Secretary-General*, UN Doc A/CONF.2/1, 12 March 1951) read as follows:

> *"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime specified in article VI of the London Charter of the International Military Tribunal; or (b) he falls under the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights."*

In the course of negotiations it was proposed that the following text be substituted for (b): "that he has committed an act contrary to the purposes and principles of the United Nations" (*Draft Convention relating to the Status of Refugees: United Kingdom-Alternative amendments to Section E of Article l*, UN Doc A/CONF.2/74, 13 July 1951).

28 The final form of Art 1F(a) represented a rejection of the earlier approach of referring to specific international instruments that define the international crimes that would result in exclusion from the protection afforded by the Refugees Convention. Rather, the definition of such crimes was to be by reference to international instruments drawn up to make provision in respect of such crimes.

29 The clear purpose of Art 1F is to ensure that the protection obligations arising under the Refugees Convention are not extended to persons who were undeserving of the protection by reason of their past criminal misconduct and, if given protection, could escape prosecution for that conduct. In *Pushpanathan v Canada* (1998) 160 DLR (4th) 193 at 228 Bastarache J described the rationale of Art 1F as being that "those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees". However, it is also clear that the purpose of the resort in Art 1F(a) to the definition of a crime against peace, a war crime and a crime against humanity in international instruments was premised on an important feature of international law, namely the uncertain and imprecise content of that law at any particular time. As was stated by Cardozo J in *New Jersey v Delaware* (1934) 291 US 361 at 383:

> *"International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the* imprimatur *of a court attests its jural quality."*

30 However, the *imprimatur* of a court to a rule or doctrine of international law requires a determination that the rule or doctrine in question has attained the position of general acceptance by, or assent of, the community of nations "as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions": see *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 497

per Lord Macmillan.

31 Further, the rules of international law are dynamic and their content inevitably turns on the future evolution of international law: see, for example, *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 466 per Mason J. Thus, a precise definition of the crimes the subject of Art 1F(a) can be a vexed and difficult question. The drafters of the final form of the article avoided that difficulty by enabling the decision-maker to draw upon the definitions of such crimes by reference to unspecified international instruments drawn up to provide for the crimes in question, rather than by reference to any specific international instruments or to customary international law.

32 It is also significant that the criterion employed in Art 1F(a) is that the definition of the relevant international crimes is to be derived from "the international instruments drawn up to make provision in respect of such crimes". As was pointed out in *North Seas Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (1969) ICJ Reports 3 at [60] – [74], an international instrument such as a treaty may reflect or codify pre-existing customary law; it may "crystallise" a new rule of customary law; or subsequent state practice in accordance with the treaty may lead to the creation of a new rule of customary law after the adoption of the treaty provision.

International Instruments since 1959

33 Since 1959 a number of international instruments have been drawn up to make provision in respect of international crimes. First, though least significantly for the purposes of the present case, instruments have been created which deal with specific types of crimes. For example, Art I of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (opened for signature 30 November 1973, New York, 1015 UNTS 243, entered into force on 18 July 1976) ("the Apartheid Convention") declares that apartheid is a crime against humanity for which an individual may be criminally responsible, and Art II sets out a detailed definition of the crime of apartheid. In 1977 the Geneva Conventions were supplemented by two Protocols, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,* 1125 UNTS

3, ("Geneva Protocol I"), and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts,* 1125 UNTS 609, ("Geneva Protocol II"), both of which entered into force on 7 December 1978. The first of these, Geneva Protocol I sets out (in Art 85) further acts constituting the crimes of "grave breaches" of the Protocol. Geneva Protocol II specifically addressed issues arising in armed conflicts not of an international character, namely internal armed conflicts. However, the Protocol does not provide for the existence of any individual criminal responsibility arising from internal armed conflicts.

34 Subsequently, the United Nations Security Council established ad hoc criminal tribunals to try crimes occurring during the conflicts in the former Yugoslavia and Rwanda. In 1993, by Resolutions 808 and 827, the Security Council established the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). The Statute of the ICTY sets out the following definitions :

> *"Article 2: Grave breaches of the Geneva Conventions of 1949*
> *The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*
> *(a) wilful killing;*
> *(b) torture or inhuman treatment, including biological experiments;*
> *(c) wilfully causing great suffering or serious injury to body or health;*
> *(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*
> *(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;*
> *(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;*
> *(g) unlawful deportation or transfer or unlawful confinement of a civilian;*
> *(h) taking civilians as hostages.*
>
> *Article 3: Violations of the laws or customs of war*
> *The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:*
> *(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;*
> *(b) wanton destruction of cites, towns or villages, or devastation not justified by military necessity;*
> *(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;*
> *(d) seizure of, destruction or wilful damage done to institutions dedicated to*

religion, charity and education, the arts and sciences, historic monuments and words of art and science;
(e) plunder of public or private property.

Article 4: Genocide

1. *The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.*
2. *Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
   (a) killing members of the group;
   (b) causing serious bodily or mental harm to members of the group;
   (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   (d) imposing measures intended to prevent births within the group;
   (e) forcibly transferring children of the group to another group.
3. *The following acts shall be punishable:*
   (a) genocide;
   (b) conspiracy to commit genocide;
   (c) direct and public incitement to commit genocide;
   (d) attempt to commit genocide;
   (e) complicity in genocide.

Article 5: Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts."

The Statute also provides in Art 7(4) that:

"The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

35 In 1994, under Resolution 995, the Security Council established the International Criminal Tribunal for Rwanda ("the ICTR"). The Statute of the ICTR contains similar provisions to the Statute of the ICTY but, significantly, it also provides for individual criminal responsibility in respect of war crimes occurring in the context of the internal armed conflict

in Rwanda:

> *"Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II*
> *The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:*
> *(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;*
> *(b) Collective punishments;*
> *(c) Taking of hostages;*
> *(d) Acts of terrorism;*
> *(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;*
> *(f) Pillage;*
> *(g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;*
> *(h) Threats to commit any of the foregoing acts."*

36 The extension of individual criminal responsibility for war crimes to internal armed conflicts under international customary law, as well as under international conventional law, was recognised in 1995 by the decision of the ICTY Appeals Chamber in *Tadic*. The Chamber held (at [71]-[95]) that although grave breaches of the 1949 Geneva Conventions could occur only in the context of an international armed conflict, Art 3 of the ICTY Statute (violations of the laws and customs of war) incorporates customary international law, which includes a concept of individual criminal responsibility for war crimes even when committed in the context of an internal armed conflict (see [94]).

37 Alongside these developments in relation to the substantive content of international criminal law, as recorded in international instruments, attempts were once again made to establish a permanent international criminal court. In addition to the formulation of the ILC Principles, the ILC had the task of preparing a draft statute for an international criminal court, and a draft instrument codifying the content of the crimes existing under international law. Difficulties in establishing a satisfactory definition of the crime of aggression (referred to in the earlier instruments as "crimes against peace"), and political differences during the Cold War, prevented this process from reaching an outcome. However, drafts of the code of crimes were produced and developed by the ILC. The most recent draft prior to the Rome Statute,

titled the *Draft Code of Crimes Against the Peace and Security of Mankind 1996* ("Draft Code of Crimes"), included definitions of the crime of genocide, crimes against humanity and war crimes. The definition of war crimes in draft Art 20(f) extended to certain specified conduct engaged in in the course of "armed conflict not of an international character".

38 The Rome Statute was adopted on 17 July 1998 (with 120 votes in favour, 7 against and 21 abstentions). According to Professor Cassese in "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court" in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) vol 1 ("*The Rome Statute: A Commentary*") at 3-4:

> *"For all its imperfections, the Statute of the International Criminal Court, adopted on 17 July 1998 by the Rome Diplomatic Conference, was a major breakthrough in the effective enforcement of international criminal law. It marks the culmination of a process started at Nuremberg and Tokyo and further developed through the establishment of the* ad hoc *Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The Statute crystallizes the whole body of law that has gradually emerged over the past fifty years in the international community in this particularly problematic area. Insofar as it departs from existing trends and the practices of* ad hoc *criminal tribunals, the Rome Statute also breaks new ground and points to the path likely to be taken by international criminal justice in the current millennium."*

And at 18:

> *"With the establishment of the* ad hoc *International Criminal Tribunals for the former Yugoslavia and for Rwanda, the enforcement of international humanitarian law moved into a new and more effective phase. Nevertheless, it is the enactment of the ICC Statute which represents the pinnacle of the institutionalization and universalization of measures for the enforcement of international humanitarian law."*

39 The Preamble to the Rome Statute states, *inter alia*, that the States Parties to the Statute are:

> *"DETERMINED ... to establish an independent permanent International Criminal Court ... with jurisdiction over the most serious crimes of concern to the international community as a whole."*

40 Part 1 of the Rome Statute provides for the establishment of an International Criminal Court ("the ICC"). Part 2, *inter alia*, defines the crimes within the jurisdiction of the ICC being the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

41 Relevantly, for present purposes "crimes against humanity" are defined in Art 7:

"Article 7

1. *For the purposes of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

   …

   (f) Torture;

   …

   (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. *…*

   (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

   …

   (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;"

42 War crimes are, relevantly, defined in Art 8(2):

"Article 8

2. *For the purpose of this Statute, 'war crimes' means:*

   …

   (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed <u>hors de combat</u> by *sickness, wounds, detention or any other cause:*

   (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

   (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

   …

   (d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

43 Part 3, which was not referred to either by the AAT or the primary judge, sets out "General Principles of Criminal Law". It contains the following provisions:

"Article 22

1. *A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.*
2. *The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.*

…

Article 24

1. *No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.*

…

Article 30

1. *Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*
2. *For the purposes of this article, a person has intent where:*
   - *(a) In relation to conduct, that person means to engage in the conduct;*
   - *(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.*
3. *For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.*

…

Article 31

1. *In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:*

   …

   - *(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:*
     - *(i) Made by other persons; or*
     - *(ii) Constituted by other circumstances beyond that person's control.*

   …

…

Article 33

> 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."*

44 The Special Court for Sierra Leone was established by an agreement between the United Nations and Sierra Leone pursuant to Security Council Resolution 1315 of 14 August 2000. The Statute establishing the Special Court for Sierra Leone provides for the prosecution of crimes against humanity and war crimes, which were defined in a manner that closely resembled the definitions for the ICTR. The Statute also provided for other serious violations of international humanitarian law, which were defined as follows:

> *"Article 4: Other serious violations of international humanitarian law*
> *The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:*
> a. *Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;*
> b. *Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;*
> c. *Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.*"

45 Article 6(4) of the Statute provides:

> *"The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires."*

46 The development of international criminal law, as recorded in various international instruments made since the Second World War, demonstrates some of the difficulties involved in applying Art 1F(a) of the Refugees Convention. Identifying what constitutes a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes may not be a straightforward or simple task. A number of international instruments have defined war crimes and crimes against humanity and have also made specific provision for "superior orders". Although there is a substantial overlap in the various definitions there are disparities

which may, in some cases, have a determinative impact on the outcome of a particular case. In some instances the disparities may be explained by the fact that the statute in question has been drawn up to deal with the specific international crimes such as those committed in the former Yugoslavia, Rwanda and Sierra Leone.

47 Nonetheless, the various instruments to which we have referred were intended to reflect the development and evolution of the customary international criminal law that was applicable to the situation provided for by the instrument. With respect to crimes against humanity, the definition contained in the Art VI(c) of the London Charter and Art V(c) of the Charter of the Tokyo IMT defined crimes against humanity in a manner that required the existence of an armed conflict in the sense that the crime must have been committed "before and during the war". However, this requirement has not been included in many later instruments (see for example Control Council Law 10 Art II(1)(c), Apartheid Convention Art 2, Statute of the ICTR Art 3, Rome Statute Art 7, *Draft Code of Offences against the Peace and Security of Mankind 1954* ("Draft Code of Offences") Art 2(10), and Draft Code of Crimes Art 18). On the other hand, Art 2 of the Statute of the Special Court for Sierra Leone requires that the crime involve "a widespread and systematic attack against a civilian population". Also, notwithstanding the express inclusion of a nexus with an armed conflict in the definition of crimes against humanity contained in Art 5 of the ICTY Statute, the Appeals Chamber of the ICTY observed in *Tadic* (at [141]) that that definition is a departure from customary international law, which no longer requires a connection with an armed conflict for a crime against humanity.

48 Further, the conduct which may form the basis of a crime against humanity has been expanded beyond the conduct enumerated in the London Charter. For example, imprisonment, torture and rape were included in the Control Council Law 10, the Statutes of the ICTY and the ICTR, in Art 18 of the Draft Code of Crimes and in Art 7(1) of the Rome Statute, which also included forms of sexual violence and enforced disappearances. A number of other differences between the various instruments defining crimes against humanity are also apparent. These include, for example, a requirement in Art 3 of the Statute of the ICTR that the crime be committed "on national, political, ethnic, racial or religious grounds"; and the omission from Art 5 of the Statute of the ICTY of a requirement that the crimes be part of a widespread or systematic attack. The definition set out in Art 7 of the Rome Statute introduces further changes, including an expansion of the "persecution" form

of the crime to include persecution based on national, ethnic, cultural, or gender grounds or any other grounds that are universally recognised as impermissible under international law; an explicit reference to the *mens rea* requirement that the accused must have knowledge of the attack; and a requirement that the attack must be committed pursuant to or in furtherance of a State or organisational policy.

49 Perhaps the most significant change in terms of scope and content of individual criminal responsibility since the Second World War has been the recent acceptance that war crimes for which an individual may be criminally responsible may be committed in situations of internal armed conflict. As recently as 1994, the Commission of Experts established pursuant to Security Council Resolution 780 to report on questions relating to breaches of humanitarian law in the former Yugoslavia concluded that "there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes" and, consequently, "the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal are offences when committed in international, but not in internal armed conflicts" (Annexure to the *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674 at [52] and [54]). The situation under customary law was also reflected in the international instruments which dealt with war crimes up to and including the Statute of the ICTY. That changed in 1994 with the Statute of the ICTR and in 1995 with the ICTY's decision in *Tadic*. In *Tadic* the ICTY held at [94] that customary international law *did* contain an offence of war crimes committed during internal armed conflict, and imported such an offence into Art 3 of the ICTY Statute. However, war crimes are defined so as to include conduct occurring in an internal armed conflict under the Statutes of the ICTY and the ICTR, the Draft Code of Crimes and the Rome Statute, but were not so defined in the earlier instruments.

50 It is clear from the foregoing analysis that the choice of instrument against which the appellant's acts are to be assessed can have a significant impact on whether or not those acts constitute the commission of a crime against humanity and, more particularly, a "war crime". In respect of war crimes, under the earlier instruments such as the London Charter (favoured by counsel for the appellant) or even under the Geneva Conventions and Protocols, there may not be a "serious reason for considering" that the appellant had committed a war crime if the conflict in Sri Lanka was determined to be an internal armed conflict.

51 Finally, the choice of instrument will impact on the availability and content of the defence of superior orders that is sought to be relied upon by the appellant. The earlier international instruments that have touched upon the subject, such as Art VIII of the London Charter, stated that there is no defence of superior orders for crimes under international law, although superior orders may be relied upon in mitigation of the punishment. On that issue the Nuremberg IMT (in *International Military Tribunal (Nuremberg) Judgement and Sentences* (1947) 41 AJIL 172 at 221) observed that:

> *"The provisions of [Art VIII of the London Charter] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."*

52 The reference to a defence based on the absence of any possibility for a moral choice tied the factual question of obedience to an order to what might normally be referred to as raising a defence of duress. That approach was later reflected in Principle IV of the ILC Principles and in a slightly varied form in Art IV of the 1954 Draft Code of Offences (although the original London Charter formulation was readopted in the 1996 Draft Code of Crimes). It was also applied by the Supreme Court of Canada in *R v Finta* (1994) 112 DLR (4th) 513 ("*Finta*") and appears to have been adopted by the AAT in the present case. However, by providing in Art 33 that a defence of superior orders (as distinct from the defence of duress contained in Art 31(1)(d)) can relieve a person from criminal responsibility in certain circumstances, the Rome Statute diverged from the earlier international instruments on this point.

53 The question of the state of customary international law in relation to the defence of superior orders when the Rome Statute was adopted is a vexed one. By about 1998 two conflicting approaches were prevalent. The first was that the existence of superior orders can never constitute a defence relevant to liability although it can be relevant to mitigation and to a defence of duress or compulsion. This approach appears to be supported by provisions in numerous international instruments: see the London Charter Art VIII; Control Council Law 10 Art II(4)(b); Charter of the Tokyo IMT Art VI; Statute of the ICTY Art 7(4); Statute of the ICTR Art 6(4); and Draft Code of Crimes Art 5. Indeed, it has continued to be adopted in some international instruments since the Rome Statute: see Statute of the Special Court for

Sierra Leone Art 6(4) and s 21 of Regulation No 2000/15 (UNTAET/REG/2000/15, 6 June 2000) on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. However, in practice, tribunal decisions made in the context of some of those instruments have treated superior orders as relevant to a defence of duress or compulsion, which is a different question to whether superior orders *per se* can give rise to a defence: see *Prosecutor v Erdemovic* ICTY Appeals Chamber, IT-96-22, 7 October 1997 ("*Erdemovic*"), per Judge McDonald and Judge Vohrah at [34]; per Judge Cassese (dissenting) at [15]; see also the approach in *Finta* per La Forest J at 532.

54 The other approach was that superior orders can be a defence, but only where the orders were reasonably thought to be lawful. That approach, which is reflected in part in Art 33 of the Rome Statute, has also been the approach taken by courts in various jurisdictions: see *McCall v McDowell* (1867) 15 F.Cas. 1235 at 1240 (USA); *United States v Keenan* (1969) 18 USCMA 108 at 116-117; *United States v Calley* (1973) 22 USCMA 534 per Quinn and Duncan JJ; *United States of America v Yunis* (1991) 924 F2d 1086 at 1097; *Finta* per La Forest J (L'Heureux-Dubé and McLachlin JJ concurring) at 566-567 and per Cory J (Lamer CJC, Gonthier and Major JJ concurring) at 607-610 and 617; *In re List (Hostages Trial)* (1948) Annual Digest 632 (under Control Council Law 10); *Erdemovic*, per Judge Cassese (dissenting) at [15]. And by several eminent commentators, including ID Brownlee, "Superior Orders – Time for a New Realism?" (1989) *Criminal Law Review* 396.

55 There is disagreement among commentators as to whether customary law provides that superior orders can *never* constitute a defence in respect of responsibility: (LC Green "The Defence of Superior Orders in the Modern Law of Armed Conflict" (1993) 31 *Alberta Law Review* 320 at 333; P Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law" (1999) 10 EJIL 172 at 183-188; "*The Defence of Superior Orders*") or whether it allows an accused to rely on superior orders where the orders are not manifestly unlawful (A Zimmermann "Superior Orders" in *The Rome Statute: A Commentary*, at 957, 965-966; "*Superior Orders* in *The Rome Statute: A Commentary*"). States have also been unable to agree on that question. Proposed provisions dealing with superior orders were the subject of disagreement at the 1949 Conference that produced the Geneva Conventions and again at the 1977 Conference that produced the Protocols. The 1977 proposal would have permitted the defence under Protocol I, except where the accused knew or should have known that the order was

unlawful. Although the proposal secured majority support at the conference, it did not reach the two-thirds majority support required for inclusion in the Protocol.

56 The drafting of the Rome Statute raised the difficulty again, with the participants split as to the appropriate approach. Gaeta, in *The Defence of Superior Orders* at 188-189, refers to the question as "one of the major stumbling blocks in the negotiations on Part Three of the Rome Statute", although the ultimate compromise reached was in the form of Art 33.

57 It is therefore difficult to discern a clear rule of customary international law with regard to the defence of superior orders. The status of superior orders as a defence in international law was considered in *Superior Orders* in *The Rome Statute: A Commentary* by Professor Zimmermann at 965-966:

> *"It is not easy to ascertain the current status of customary law with regard to the relevance of superior orders as a defence in international criminal proceedings. In particular, the absolute liability standard, i.e. that the obedience to superior orders shall under no circumstances serve as a defence but might only be considered as a reason for mitigation of the sentence, as developed by the Nuremberg precedent, seems so far—apart from specific statutory provisions—not to have ripened into a generally applicable rule of customary international law. This is confirmed by the fact that the leading scholars in the field themselves cannot agree as to what the standard should be* de lege ferenda *and even less what it is* de lege lata.
>
> *As a very minimum, one might, however, be justified in asserting that where either the superior order was manifestly unlawful or where the subordinate was in a position to recognize the illegality of the order, the defence of superior order can no longer be relied upon. On the other hand, one might doubt whether there is currently an absolute barrier to superior order as a defence when the subordinate did not realize that the order was illegal and where the order was not blatantly unlawful. In that regard, it remains doubtful whether the necessary requirements for the formation of a rule of customary law are fulfilled, in particular whether there is both sufficient and uniform State practice and* opinio juris *supporting such a thesis. One should in that regard take into account the fact that even the Nuremberg Trials taking place under Control Council Law No. 10 did not under all circumstances rule out the possibility of relying on superior orders as a defence. Besides, it is quite telling that on two occasions, i.e. during the drafting of the four Geneva Conventions in 1949 and during the Diplomatic Conference leading to the adoption of Additional Protocol I, no consensus could be reached with regard to the different proposals of the ICRC which would have generally excluded an offender from pleading the defence of superior order.*
>
> *Thus, to summarize, one is tempted to argue that under current* customary *law, an offender might not be barred from claiming the defence of superior*

order unless he or she was aware of the illegality of the order or the order was manifestly illegal."

And at 972-973:

"The codification of the principle of superior order as now contained in Article 33 of the Statute has, as outlined above, significant shortcomings. In particular, one might have preferred a clear confirmation of the absolute liability principle as contained in the Nuremberg Charter and affirmed in the ICTY and ICTR Statutes, i.e. that superior order is no defence, but may be considered in mitigation of punishment if justice so requires. The ICC Statute could have thus paved the way towards a clear customary international standard. This is even more true since the United Nations Transitory Authority on Eastern Timor has now adopted Regulation No. 2000/15 of 6 June 2000 on the establishment of specific courts with exclusive jurisdiction over acts of genocide, crimes against humanity, and war crimes, largely reproducing the Rome Statute, but which in contrast to Article 33 of the Rome Statute provides, following the Nuremberg formula in its section 21, that indeed superior orders shall under no circumstances serve as a valid defence. The same is true with regard to Article 6, para. 4, of the Statute of the Special Court for Sierra Leone, set up by virtue of a treaty concluded between the UN and the government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000. In contrast thereto, Article 33 tries to find a delicate balance between the need to punish those committing terrible crimes on behalf of their governments or under order, on the one hand, and the need to protect persons who unknowingly commit war crimes, on the other. Notwithstanding this severe limitation, several merits of Article 33 should not be underestimated.

First, it is important to note that after the failures mentioned above, an agreement could finally be reached. It is to be estimated that, notwithstanding the entry into force of the Statute, this codification will by itself influence the future development of international customary law in the matter.

Secondly, Article 33 of the Statute confirms that, whatever the circumstances, a superior order can under no circumstances justify the commission of the most serious crimes under international law, i.e. an act of genocide or a crime against humanity.

Besides, the principle that superior orders cannot—as a rule—serve as a defence has been strengthened since any justification under Article 33 is now perceived as an exception to the general rule.

On the other hand, it has been argued that Article 33 has departed from pre-existing rules of customary international law in that it does not abide by the absolute liability principle. The analysis undertaken has proven, however, that the existence of such a rule was, to say the least doubtful. It seems, that when it comes to their own soldiers, many States tend to be more cautious than when they provide for a system under which only nationals of the

> *adversary are to be judged. Thus, one might say that Article 33 is just an expression of a rule of international law that is universally acceptable and which therefore, notwithstanding its imperfections, constitutes a step forward."*

58 It is in the above context that we now turn to consider the construction of Art 1F(a).

Construction of Art 1F(a) at the Refugees Convention

59 The primary issue in dispute between the parties is whether the AAT erred in relying upon the Statute of Rome for the definitions of crimes against humanity and war crimes. In order to resolve that dispute it is necessary first to resolve the dispute concerning the construction of Art 1F(a).

60 The Minister contended that Art 1F(a) permits recourse to any relevant definition found in an international instrument in existence at the time of the Art 1F(a) decision, even if it was not in existence at the time of the alleged criminal conduct. It was claimed that in order to give effect to the purpose of Art 1F(a) of preventing undeserving persons from gaining protection under the Refugees Convention, the question of exclusion of such persons is to be gauged by reference to the standards that apply at the date the decision is made, rather than the date of the conduct in question. It was argued that this approach does not impinge on the well established principle of *nullum crimen sine lege* (no crime without law making it so) because Art 1F(a) does not create, nor is it concerned with, criminal liability as such. Thus, so it was said, it is not a requirement that the conduct in question constitute an international crime when it is engaged in.

61 There is a textual difficulty with the Minister's construction. It is implicit in the phrase "there must be serious reasons for considering" that the person in question has "committed" a relevant international crime, that the conduct in question constituted a crime at the time that conduct was engaged in. In *Ovcharuk* Sackville J considered an analogous question concerning Art 1F(b) of the Refugees Convention. In considering the scope of that article his Honour held at the time the conduct was engaged in it must have constituted a crime under the local law where it occurred or under an Australian law having extraterritorial application to the place where it occurred. He stated (at 190-191):

> *"This conclusion is supported by the language of Art 1F(b). It refers to the person*

> *having 'committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. This is not language which suggests that a notional exercise is to be carried out; the language requires a crime to have been* committed*. Furthermore, unless the conduct relied on to invoke Art 1F(b) was criminal under the law of the country where it occurred, a person who acted quite lawfully under that law, and committed no offence under the law of the receiving country, could be found to have committed a 'crime', thereby excluding him or her from the protection of the Refugees Convention. ... It is hardly a beneficial construction of the Refugees Convention to exclude a person who has never engaged in conduct for which he or she is liable to prosecution on the ground that he or she has committed a serious crime."* (emphasis original)

62 Similar reasoning is applicable to Art 1F(a), save that the language of Art 1F(b) requires a relevant international crime to have been committed.

63 It does not follow, however, that an instrument defining the crime must be in existence at the time the crime is allegedly committed. As was observed by the Nuremberg IMT (in *International Military Tribunal (Nuremberg) Judgement and Sentences* (1947) 41 AJIL 172 at 219):

> *"The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."*

64 Furthermore, the circumstances of the drafting of Art 1F(a) suggest that it was not intended to impose a requirement that the instrument relied on must exist at the time of the conduct in question. The Conference debates make it clear that Art 1F(a) was intended to exclude persons involved in crimes under international law during the Second World War from the protection offered by the Refugees Convention, notwithstanding that the "international instrument" defining such crimes, namely the London Charter, was drawn up after the commission of the crimes in question.

65 As is evident from the historical overview set out above, an international instrument was drawn up after the crimes with which it is concerned not only in the case of the London Charter and the Charter of the Tokyo IMT, but more recently in the case of the Statutes of the ICTY, the ICTR and the Special Court for Sierra Leone, each of which was purportedly based upon the relevant and applicable rules of international criminal law existing at the time of the conflict in question. Thus, there is no reason in principle or practice for requiring the

relevant international instruments to be in existence when the crime in question is committed. Further, the criterion employed by Art 1F(a) for the relevant international instrument is not a temporal criterion. Rather, the criterion requires only that the international instrument defining the crimes in question has been "drawn up to make provision in respect of such crimes".

66 In any event, although the Rome Statute was not "in force" during late 1999 and early 2000 when the appellant was stationed at Jaffna, the Statute had been "drawn up" and adopted by a substantial majority in attendance at the UN Diplomatic Conference of Plenipotentiaries on 17 July 1998, which pre-dates the conduct in question. We consider that the reference in Art 1F(a) to "international instruments drawn up…" clearly embraces the Rome Statute. In the context of international law the term "instrument" is commonly used to refer to non-binding documents such as general assembly resolutions, draft instruments prepared by the International Law Commission, or non-binding declarations made by groups of states (such as the UDHR) and treaties not yet in force. Recourse to such non-binding instruments by international writers and courts in the context of public international law disputes is common and there is no reason to assume that Art 1F(a) intended to exclude such instruments. This approach is supported by guidelines published by the UNHCR, which have made reference to a number of non-binding instruments as being relevant to Art 1F(a) determinations, including: General Assembly Resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946, the Draft Code of Crimes, the ILC Principles, and the draft form of the Rome Statute prior to its adoption in 1998 (see UNHCR Handbook Annex VI; UNHCR Standing Committee, *Note on the Exclusion Clauses*, EC/47/SC/CRP.29 at [8] and [9]; and UNHCR, *The Exclusion Clauses: Guidelines on their Application*, December 1995, at [19]-[21] which refers at [20] to "non-binding but authoritative sources"). The writings of leading commentators in the area of refugee law take a similar approach: see for example JC Hathaway, *The Law of Refugee Status* (1991), at 217 ("*The Law of Refugee Status*"). Accordingly, we are satisfied that the fact that the Rome Statute was not in force when the crimes in question were allegedly committed did not preclude the AAT from having recourse to it.

67 The appellant contended that the words "such crimes" in Art 1F(a) indicates that the instrument is one that provides for the criminal conduct in question, rather than an instrument that provides generally for the category of crimes in question. Accordingly, so it was argued,

the Rome Statute was not a relevant instrument in the present case as it is not an international instrument drawn up to make provision in respect of international crimes of the kind allegedly committed by the appellant in Sri Lanka in 1999-2000 but, rather, was drawn up to provide for criminal responsibility for conduct after the date on which the Rome Statute came into force which, in the events that occurred, was 1 July 2002: see Art 24(1). An immediate difficulty confronting the appellant's argument is that Art 1F(a) does not purport to apply to persons who have committed a crime *under* or *pursuant to* an international instrument. Rather, the international instrument is merely the source of the definition according to which a person's exclusion from the Refugees Convention is to be tested. As we have explained, the source of the criminal responsibility may come from an international instrument, but it may also arise under customary international law. It is clear that the reference in Art 1F(a) to "such crimes" is a reference to the crimes earlier mentioned, namely "a crime against peace, a war crime, or a crime against humanity". Thus, the criterion in Art 1F(a) is that the definition of "such crimes" be in an international instrument drawn up to make provision for the crimes earlier mentioned, irrespective of whether the instrument was drawn up to make specific provision for the crimes allegedly committed by the person in question. It must follow that any international instrument drawn up to provide for, and which contains a definition of, "a crime against peace, a war crime, or a crime against humanity" is an instrument that is potentially relevant to an Art 1F(a) decision. Plainly, the Rome Statute is such an instrument.

68 The more difficult question raised by the contentions of the parties concerns the criterion to be applied where instruments that fall within the meaning of Art 1F(a) contain inconsistent definitions of the relevant crimes. The issue is of some importance as the UNHCR and many commentators commonly refer to a number of relevant instruments, without indicating how differences between them should be reconciled.

69 Previous decisions of the Court and the AAT do not appear to have specifically addressed this question. Reported AAT decisions have tended to refer primarily to the London Charter definitions without providing an indication of why that instrument is preferred over others (see *Re W97/164 and Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 432 at [49] and [51] ("*Re W97/164*"); *Re N96/1441 and Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 459 at [49], [51]-[52] ("*Re N96/144*"); *Re SRLLL and Minister for Immigration, Multicultural and Indigenous Affairs* (2002) 35 AAR 523 at [33]). In *SHCB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 229

the Court noted that the AAT had relied upon the Rome Statute, however the appropriateness of that reliance was not considered by the primary judge or the Full Court (see *SHCB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 308 ("*SHCB*")). See also *SBAR v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1502.

70 Decisions from other common law jurisdictions are of a similar nature. The Canadian courts have usually relied upon the London Charter (see eg *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 at 315 ("*Ramirez*"); and *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 at 441 and 442), but more recently have also relied upon the Rome Statute (see, for example, *M v Canada (Minister of Citizenship and Immigration)* 115 ACWS (3d) 1040), but without expressly considering how inconsistent instruments are to be reconciled or which instrument should be preferred where an inconsistency exists. In *The Minister of Citizenship and Immigration v Nagra* (unreported decision of the Federal Court of Canada, Ottawa, 27 October 1999) the applicant argued that the Immigration and Refugee Board had erred by *failing* to consider the Rome Statute, which the applicant described as "the most recent international instrument with respect to the definition of crimes against humanity" (at [9]-[10]). Rouleau J disposed of the application by reference to the facts and it was therefore not necessary for that question to be considered.

71 In the present case the crimes were allegedly committed against civilians (including children) on the command of a superior in the context of an internal armed conflict. In those circumstances the choice of instrument could have a significant bearing on the outcome.

72 The drafting history and ultimate form of Art 1F(a) recognises the fact that international criminal law will continue to develop over time. It is therefore consistent with the purpose of Art 1F(a) that resort be made to a definition in an instrument that is contemporary in the sense that it reflects international developments up to the date of the alleged crime, rather than to definitions in earlier instruments that may have become antiquated or are otherwise inappropriate.

73 Nonetheless, if the instrument in question satisfies the criterion in Art 1F(a) it will be open to a decision-maker to select the instrument that is appropriate to the circumstances of the case.

In some instances the selection may be obvious. For example, the London Charter would plainly be an appropriate instrument for international crimes committed in Europe during the Second World War. Also, the Statutes for the ICTY and ICTR would plainly be appropriate instruments for international crimes committed in the course of the conflicts the subject of those Statutes. However, as explained above, even if the crimes of the kind alleged (for example, international crimes in the internal armed conflict in Sri Lanka) have not been the subject of a specific instrument the general criterion in Art 1F(a) can nonetheless apply.

74 The question for the AAT was whether the Rome Statute is an international instrument drawn up to make provision in respect of crimes of the kind alleged to have been committed to the appellant. In determining that question it is not for the Court or the decision-maker to enquire whether the Rome Statute accurately reflects the state of customary international law at the date of the alleged crime. As has been explained that is a vexed question upon which views will differ. Moreover, to engage in such an enquiry is to defeat one purpose of Art 1F(a) which, as has also been explained, was to avoid the making of such an enquiry. Of course, the relevant rules of international customary law at the time the relevant international crimes were allegedly committed can be relevant to the question whether the instrument has been drawn up to make provision in respect of "such crimes". But they are not relevant to the quite different question whether the definitions accurately reflect international law at the relevant time.

75 In our view the Rome Statute was drawn up to provide for the crimes it defined and purported to define those crimes as crimes that had crystallised into crimes in international law as at the date of the Statute, notwithstanding that the Statute was to come into force, and the ICC was to be established, at a later date.

76 For the above reasons we are of the view that the definitions of crimes against humanity and war crimes contained in Arts 7 and 8(2)(c) of the Rome Statute respectively were appropriate definitions for the AAT to apply and that the AAT did not err in law in applying those definitions. It is therefore unnecessary to consider whether, by his conduct in relying on the definitions in the Rome Statute before the AAT, the appellant was precluded in any event from asserting that the AAT had fallen into jurisdictional error when applying those definitions.

77 Article 33 of the Rome Statute dealing with the defence of superior orders stands in a similar position. In providing for that defence in certain circumstances, albeit not for genocide or crimes against humanity, the article departs from the provisions made in previous instruments. While it may be an open question whether Art 33 accurately reflects customary international law, what is indisputable is that it reflects an international consensus in an international instrument that there is to be such a defence.

Jurisdictional error

78 Having held that the AAT did not err in accepting that the Rome Statute was an "international instrument" that satisfied the criterion set out in Art 1F(a), the next question is whether the AAT failed correctly to apply the definitions in the Rome Statute of "crimes against humanity", as set out in Art 7, and "war crimes", as set out in Art 8.

79 In order to understand the way in which the appellant's case is now put, it is necessary to set out the AAT's findings in more detail. The AAT first dealt with the meaning of the expression in Art 1F(a), "serious reasons for considering that …". It accepted, in our view correctly, that there was no requirement that the appellant be formally charged with, or convicted, of war crimes or crimes against humanity. Nor was there any requirement that it be satisfied that the appellant had committed any offence "beyond reasonable doubt", or "on the balance of probabilities". The AAT appeared to accept that the relevant criterion was that it be satisfied that there was clear and convincing evidence that the appellant had committed such crimes.

80 In dealing with the issue in that way the AAT's approach was consistent with the approach taken in such cases as *Ramirez*; *Cardenas v Canada ("Minister of Employment and Immigration)* (1994) 23 Imm LR (2d) 244 at 252; *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 at 563 per French J; *Arquita v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 465 at 478 per Weinberg J; and *WAKN v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 211 ALR 398 at 410 at [51] and [52] per French J. That approach accords with the views of leading commentators, including Hathaway in *The Law of Refugee Status* at 215 where the learned author quotes

from N Robinson, *Convention relating to the Status of Refugees* (1953) at 67 that "it is enough that the determination authority, have 'sufficient proof warranting the assumption of [the claimant's] guilt of such a crime'". See also GS Goodwin-Gill in *The Refugee in International Law* 2nd ed (1996, Clarendon Press, Oxford) at 97.

81 With regard to "crimes against humanity" the AAT regarded the definition in Art 7 of the Rome Statute as the "most recent authoritative statement" on the subject. Nevertheless it also had regard to other definitions of such crimes. For example, it noted the definition in the London Charter adopted by the Nuremberg IMT. It also considered the observations of Deane J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ("*Polyukhovich")* at 596, where his Honour said:

> *"The phrase 'crime against humanity' has, in the last half-century, also become a commonly used one in international treaties and the writing of publicists. There is little real difficulty about its meaning. It is a convenient general phrase for referring to heinous conduct in the course of a persecution of civilian groups of a kind which is now outlawed by international law but which may not involve a war crime in the strict sense by reason of lack of connexion with actual hostilities."*

82 Next, the AAT considered the decision of the Supreme Court of Canada in *Finta*. In that case, the accused was charged under the Canadian Criminal Code with various offences, including unlawful confinement, robbery, kidnapping and manslaughter as a result of his activities in Hungary during the Second World War. He was tried in Canada for these offences under a provision of the Code, which conferred jurisdiction in relation to acts or omissions committed outside Canada if the conduct in question constituted a war crime, or a crime against humanity. The Code defined "crime against humanity" as meaning "murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population …".

83 Cory J, with whom Lamer CJC, Gonthier and Major JJ agreed, observed that the stigma attaching to crimes against humanity or war crimes was overwhelming and, before a person could be convicted of such crimes, elements in addition to the underlying offence had to be proved. With respect to crimes against humanity, the relevant additional element was that the inhumane acts were based on discrimination against, or the persecution of, an identifiable group of people. The test was subjective. The accused had to be aware of the conditions which rendered his actions more blameworthy than the domestic offence. While it was not

necessary to prove that he knew that his actions were inhumane, it was essential to prove that he was aware of the facts or circumstances that would bring his acts within the definition of a crime against humanity.

84 Importantly, Cory J recognised (at 602) that an accused charged with crimes against humanity could avail himself of all defences and excuses under domestic and international law. These were stated to include the defence of obedience to superior orders. However, that defence was stated (at 617) not to be available where the orders in question were "manifestly unlawful", unless the accused "had no moral choice as to whether to follow the order". A person might have no moral choice as to whether to follow an order if he was coerced into doing so. In such a case, his Lordship stated (at 611-612) that the threat would have to be so "imminent, real and inevitable" as to deprive the person of any real moral choice. Cory J also observed (at 609) that an order from a superior was "manifestly unlawful" if it offended the conscience of any reasonable, right-thinking person that is, it was an order that was obviously and flagrantly wrong.

85 The AAT acknowledged that *Finta* was concerned with the interpretation of the Canadian Criminal Code, and not directly with the elements of a war crime, or a crime against humanity, under international law. It also recognised that *Finta* predated the Rome Statute. Nonetheless, it regarded the analysis in the case as helpful.

86 Finally, the AAT referred to two decisions of Matthews J, in each of which her Honour relied heavily upon *Finta*. The decisions were *Re W97/164* and *Re N96/1441*. Once again, both cases predated the Rome Statute.

87 Having discussed the elements of "crimes against humanity" in the light of these authorities, the AAT concluded that according to the High Court in *Polyukhovich*, crimes against humanity involved "the most grave and cruel criminal acts committed in the course of the persecution of any civilian group" and that, according to Matthews J in *Re N96/1441*, the deliberate infliction of torture on detainees as described by the applicant in that case was "barbarous".

88 The AAT noted that the delegate had found that the appellant's treatment of children and young persons amounted to "torture" and that the delegate had concluded that the appellant

had engaged in conduct that was part of a "systematic pattern of persecution" by the Sri Lankan army aimed at members of the Tamil civilian population. The AAT also noted that the delegate had considered whether the appellant might be able to rely upon the defences of "superior orders" and "compulsion". The AAT observed that although those defences were not expressly referred to in either Art 7, or Art 8 of the Rome Statute, the relevant provisions suggested "that there should be an element of intention or wilfulness in the conduct".

89 The AAT then considered whether the appellant's acts fell within the definition of "crimes against humanity" in Art 7. It noted that he had served as an ordinary soldier in the Sri Lankan army from May 1997 until March 2000 and that, for approximately the last six months of that period, he had served at an army camp at Jaffna. There he was responsible for interrogating detainees who were thought to have information about members of the LTTE.

90 The AAT stated:

> *"There is no dispute that the Sri Lankan Army was involved in a protracted civil war against the LTTE, also known as the Tamil Tigers."*

91 The AAT found that the appellant was one of a group of five soldiers who were part of an interrogation unit. It stated:

> *"56. If a detainee was thought to be lying or to have relevant information, but was not co-operating in providing this information, members of the unit were instructed to* ***slap the faces*** *of the suspects, and* ***to kick them*** *and* ***beat them with wooden batons of about 18 inches in length****. The [appellant] said he protested against this but was told to 'just do it'. He also asked for a transfer but was told that he had joined the Army and had to do such work.*
>
> *57. The [appellant] said* ***most of the beating was on the legs as part of a process of intimidating detainees so that they would provide information****. The [appellant] could not recall having caused any permanent injuries. However, during the interview on 14 May 2001, his answers to questions suggested more serious assaults involving* ***dislocation of bones*** *..."* (emphasis added)

92 The AAT also found that the appellant had been required to interrogate children who were brought to the camp. It noted that he had told the delegate that, on occasion, he had questioned children aged between 12 and 14. He said that his aim had been to coerce them into providing information.

93 The AAT then set out the following extract from the transcript of the appellant's interview

with the delegate:

> *"WATSON: ... Now in your statement you mentioned the* ***torture of children****. Can you explain what you meant by this?*
>
> *INTERPRETER: The suspects of my age or similar age are assaulted but at times* ***even the children are made frightened and made excited****.* ***Sometimes we'd threaten the children*** *– sorry, that* ***if you do not come with the truth we will kill you****.* ***Sometimes small children when we threaten even they urinate in fear. These children age 14 or 13 or 12****.*
>
> *WATSON: So was this the extent of torture of children?*
>
> *INTERPRETER: The children are assaulted by* ***slapping in their face****. That was the main way of assaulting the children but* ***teenagers of 16 or 17 are assaulted and also kicked****.*
>
> *WATSON: Can you describe what you, you said that you assault with you, you were ordered to assault with batons. What were these batons like?*
>
> *INTERPRETER: That's a wooden baton.*
>
> *WATSON: And how long would it be?*
>
> *INTERPRETER: About one and a half to two feet."* (emphasis added)

94 The AAT observed that during the hearing the appellant had resiled somewhat from what he had told the delegate. He now claimed that he had only ever questioned children aged below 16 during his first two days at the camp. He said that he had protested about this, and thereafter only questioned older children. He acknowledged that he had, on occasion, threatened and assaulted these older children. He said that this was because they were sometimes "keen members of the LTTE".

95 On the basis of this evidence, the AAT found that there were "serious reasons for considering that" the appellant had committed acts which could be characterised as "lower level torture", or "cruel and inhuman treatment involving the intentional infliction of both physical and mental pain and suffering". It observed that even if the physical pain was not always severe, the threats and violence could have led to more severe mental suffering, especially in the case of children.

96 This is how the AAT expressed its conclusion:

> *"61. The Tribunal accepts the [appellant's] evidence that,* ***as an ordinary soldier, he was acting in accordance with the orders of his superior officer*** *and that he protested at the interrogation techniques he was told to use. However, the Tribunal is not satisfied that the level of compulsion on the [appellant] was great. On his evidence, when he protested he was told to 'just do it' because this was expected of him in the Army, and it was too soon to transfer him elsewhere.* ***There does not appear to be any evidence of specific threats made to him if he did not comply****. The [appellant] also, presumably, had the option of asking to be transferred to a frontline unit. Even though he might not have liked this, he had served in such units in both Trincomalee and Elephant Pass.*
>
> *62. The Tribunal has referred to various reports on the situation in Sri Lanka contained in the Tribunal documents. These attest* ***to policemen and soldiers 'who flagrantly violate the rights of innocent civilians'*** *(T p200). Clearly,* ***Tamil civilians were targeted*** *(T pp227, 232). It should also be noted that the LTTE have been guilty of gross violations of human rights and 'reportedly used torture on a regular basis' (T p267). The LTTE was fighting to establish a separate state in the north and east of Sri Lanka for the Tamil minority (T p287), and engaged in assassinations, hostage-takings, hi-jackings and bombing of civilian targets (T p302).*
>
> *63. Nevertheless, the Tribunal is satisfied that* ***the Sri Lankan Army was involved in systematic persecution of a civilian group****, namely the Tamil population. The Tribunal therefore finds that there are* ***serious reasons for considering that the [appellant] was involved in committing war crimes namely of torture or inhuman treatment against Tamil civilians.***
>
> *64. In conclusion, the Tribunal finds that there are serious reasons for considering that the* ***[appellant]*** *committed crimes against humanity and war crimes. Pursuant to Article 1F(a) of the Refugees Convention, he is not therefore a person to whom Australia has protection obligations under the Convention. The decision under review is affirmed."* (emphasis added)

97 The appellant submitted that the definition of "crimes against humanity" in Art 7 of the Rome Statute required the AAT to conclude that any particular act on his part was "committed as part of a widespread or systematic attack directed against any civilian population"; and was done with "knowledge of the attack". He submitted that the AAT had failed to make either of these findings. The closest that it had come to doing so was at [62] of its reasons where it noted that various reports showed that policemen and soldiers had flagrantly violated the rights of innocent Tamil civilians and targeted them. The appellant complained that the AAT did not specify the passages in support of that conclusion. He submitted that the bulk of the country information upon which the AAT relied pre-dated his period of service at the Jaffna camp.

98 This submission has its difficulties. In [63] of its reasons the AAT noted that the Sri Lankan Army had been "… involved in **systematic persecution of a civilian group**, namely the Tamil population" (emphasis added). On one view, this conclusion represents a close approximation of a finding that the appellant's acts were committed "as part of a widespread or systematic attack directed against any civilian population", in accordance with the requirements of Art 7. The appellant sought to overcome this difficulty by noting that the conclusion that immediately followed this finding was that there were serious reasons for considering that the appellant had committed "war crimes", and not that such reasons existed for considering that he had committed "crimes against humanity". It was submitted that this demonstrated that the AAT must have been confused about the elements of "crimes against humanity".

99 The appellant then submitted that even if the AAT had made the requisite finding of "widespread or systematic attack directed against [a] civilian population", there was no evidence to support that finding. He referred to the definition of "attack directed against any civilian population" in Art 7(2)(a), and submitted that his conduct could not be regarded as involving the multiple commission of acts against a civilian population "pursuant to or in furtherance of a State or organizational policy to commit such [an] attack". On that analysis, his actions might conceivably amount to "war crimes", but could not, on any view, constitute "crimes against humanity". Moreover, the appellant submitted that members of the LTTE, and those who aided and abetted them, could not properly be regarded as members of a "civilian population".

100 The appellant then submitted that, even if the AAT had considered whether his acts were part of a "widespread or systematic attack directed against [a] civilian population", and even if there was evidence to support that conclusion, the AAT had made no finding that the appellant had "knowledge" of such an attack, and there was no evidence to support any such finding. It was submitted that the "knowledge" limb of Art 7 required evidence that the appellant was aware of the facts and circumstances that brought the Army's actions within the ambit of "a State or organizational policy to commit such [an] attack".

101 The appellant relied upon his unchallenged evidence that the Army's practice was to release any person who had been detained for questioning, and who appeared to be innocent. It was only those suspected of involvement with the LTTE, or of having information about its

members, who were subjected to mistreatment while being interrogated. He submitted that even if the Army were responsible for the various atrocities described in the reports upon which the AAT relied, and even if that conduct could be described as "widespread or systematic" persecution of Tamils, there was no evidence that he had **knowingly** engaged in that enterprise. He was simply a lowly soldier given the task, which he had carried out reluctantly, of interrogating terrorist suspects.

102 On the other hand, the Minister submitted that the AAT must implicitly have found that the appellant's acts in threatening young children, and assaulting older ones, amounted to "torture", within the meaning of Art 7(2)(e) of the Rome Statute. It will be recalled that "torture" is defined in that paragraph as including "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody … of the accused".

103 Similarly, the Minister submitted that the AAT must implicitly have concluded that the appellant's actions amounted to "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" within the meaning of Art 7(1)(k). The Minister submitted that there was ample evidence to support that finding.

104 The Minister relied primarily upon paras 62 and 63 of the AAT's reasons in support of these contentions. The Minister submitted that the findings contained in those paragraphs were unassailable. The Minister claimed that the appellant had acknowledged that by the time he was posted to the camp at Jaffna: "… he had a good knowledge of the war and knew that it was largely innocent civilians … who were being harmed".

105 It was submitted that when there was added to this the appellant's particular knowledge or suspicion that those whom he had interrogated were being additionally mistreated elsewhere in the camp, the only inference that could be drawn was that he had "knowledge" of the "widespread [and] systematic attack directed against [a] civilian population" that was taking place.

106 In our opinion, the appellant's submissions regarding this issue should be accepted. In order to carry out its statutory obligation in determining whether Art 1F(a) precluded the appellant from claiming protection, the AAT was required to give specific and careful consideration to

each of the elements of "crimes against humanity" set out in Art 7. It is clear that it failed to do so.

107 The AAT did not consider whether *the appellant's conduct* took place "as part of a widespread or systematic attack directed against any civilian population". Its finding that "the Sri Lankan Army was involved in systematic persecution of a civilian group" was made as a prelude to its conclusion that there were serious reasons for considering that the appellant was involved in committing "war crimes". Yet, the definition of a war crime in Art 8 contains no requirement that there be evidence of a "widespread or systematic attack", whether directed against a civilian population, or otherwise. Manifestly, this is a critical and distinguishing feature of "crimes against humanity", as defined in Art 7.

108 It is possible that the AAT's reference to "systematic persecution of a civilian group" in [63] of its reasons was intended merely as a shorthand method of stating that it rejected any suggestion that what was happening in Sri Lanka may have been nothing more than a series of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". Articles 8(2)(d) and 8(2)(f) of the Rome Statute both employ that language in endeavouring to identify those acts of violence that occur in the course of armed conflicts not of an international character that are incapable, of themselves, of amounting to war crimes. These provisions, however, have nothing whatsoever to do with crimes against humanity.

109 The AAT appears not to have appreciated that there is a fundamental difference between the requisite elements of these two offences. *Finta* made that difference clear, but it has existed for far longer than that. These matters cannot be treated in a loose manner. When considering whether there is evidence which suggests that a person has committed a particular offence, it is essential that the elements of that offence are correctly identified and that each of them is properly addressed. Plainly, a serious issue was raised by the evidence as to whether the appellant's conduct in relation to interrogating civilian detainees, in order to obtain information they had about LTTE members, was conduct that was "part of a widespread and systematic attack directed against any civilian population". In our view that issue was required to be, but was not, addressed by the AAT.

110 We are not persuaded that the AAT's analysis of this critical issue should be accommodated

by the principles stated in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. It is one thing to say that the reasons of an administrative decision-maker are meant to inform and are not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which reasons are expressed. It is altogether another thing to ignore a complete failure on the part of an administrative decision-maker to turn his or her mind to an essential aspect of the question that must be determined.

111 In addition, we consider that the AAT failed to address the question whether the appellant had "knowledge" of the existence of any such widespread or systematic attack. The fact that there is evidence from which such knowledge might be inferred does not overcome this failure.

112 It follows that the AAT erred in its analysis of whether the appellant's acts might constitute a "crime against humanity" because it failed to address the essential elements of that offence. It thereby applied the wrong legal test. Its decision was vitiated by jurisdictional error and, in the normal course, would be set aside.

113 However, the fact that the AAT's decision was flawed in relation to its consideration of "crimes against humanity" will be of no avail to the appellant unless he can demonstrate that its decision in relation to "war crimes" was also flawed. That is because a finding that there were serious reasons for considering that the appellant had committed war crimes would, on its own, be sufficient to exclude him from any claim to protection. It is necessary therefore to consider the AAT's treatment of the aspect of Art 1F(a) that concerns "war crimes".

114 The appellant next submitted that the AAT had apparently relied upon the definition of "war crimes" in Art 8(2)(a) ("grave breaches of the Geneva Conventions of 12 August 1949 …") including "torture or inhuman treatment …" (8(2)(a)(ii)) and "wilfully causing great suffering, or serious injury to body or health" (8(2)(a)(iii)). It had apparently also relied upon Art 8(2)(c) ("in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 … include "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" (8(2)(c)(i)) and "committing outrages upon personal dignity, in particular humiliating and degrading treatment" (8(2)(c)(ii)).

115 The appellant next submitted that there was no evidence that his acts amounted to war crimes within the meaning of any of these provisions. He submitted that the unchallenged evidence was that once it became clear that any person who had been detained was innocent of terrorist involvement, or was not suspected of having information about LTTE members, that person was immediately released. If, on the other hand, that person was suspected of lying, the appellant was under orders to adopt the interrogation techniques that he employed in order to obtain information that might prevent further terrorist acts.

116 The appellant submitted that the AAT had failed to consider whether, in accordance with Art 8(2)(d), the "armed conflict" that was taking place in Sri Lanka at the time was essentially a situation of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". If so, his acts could not amount to "war crimes".

117 The appellant also submitted that the AAT had failed to consider whether he was "relieved" of criminal responsibility for conduct that might otherwise amount to a war crime by Art 33 of the Rome Statute.

118 Neither the AAT nor the primary judge referred to Art 33. The fact that the Rome Statute provided for the defence of superior orders to a charge of war crimes appears to have been overlooked, most likely because no party referred to it. It is true that the AAT, in its reasons for decision, referred to a "defence" that might possibly be available to the appellant if "he acted **in obedience to superior orders and under compulsion**". However, that was not a reference to the defence under Art 33. It arose solely in the context of the discussion about *Finta* where Cory J had linked the defences of "superior orders" and "duress" when considering their availability in answer to a charge of crimes against humanity, or war crimes.

119 As previously indicated, the AAT rejected the defence of superior orders because there was no evidence that the appellant had been subjected to significant compulsion. In approaching the matter in that way, it may have acted in accordance with the principles articulated in *Finta*. However, the appellant submitted that that was not its task. Rather, so it was argued, once the AAT had determined to apply the Rome Statute as the international instrument upon which it intended to rely for the purposes of Art 1F(a) it was not open to it to disregard Art 33.

120 In *SHCB* the Full Court considered the operation of Art 1F(a) in relation to a claim that the appellant had acted under duress. The appellant had been a high-ranking officer in a military unit in Afghanistan that was responsible for acts of torture and attacks against the civilian population. The AAT had concluded that there was strong evidence that the appellant had aided or abetted the commission of war crimes, or crimes against humanity. In arriving at that conclusion, it adopted the definitions of those crimes contained in the Rome Statute. It recognised that in order to be criminally responsible for an act under the terms of that instrument, "the person must act intentionally" and "must have knowledge of the intention of the group to commit the crime". That interpretation of the Rome Statute was endorsed by the Full Court (at [13]).

121 One of the grounds upon which the appellant challenged the AAT's finding was that it had failed to consider the danger that he and his family would have faced if he had left his military unit. The Full Court characterised this as a claim of duress, but rejected that ground of appeal upon the basis that no such claim had been advanced before the AAT. Nonetheless, the Full Court stated at [31]:

> *"The defence of obedience to higher orders will normally apply only where there are imminent real and inevitable threats to a subordinate's life. There is an element of moral choice in relation to the defence: see* Re W97/164 and Minister for Immigration and Multicultural Affairs *(1998) 51 ALD 432 at 449 [80]-[83]. As the primary judge observed (at [15]), the question ultimately was whether the appellant had been in a position to make the relevant moral choice. ..."*

122 The Full Court did not refer to Art 33. The case upon which it relied in formulating the test for superior orders in the passage set out above predated the Rome Statute. Moreover, whatever may have been the position at the time *Finta* was decided, the effect of Art 33(2) is that superior orders cannot constitute a defence to a charge of committing crimes against humanity. That accords with the position taken by the Nuremberg IMT, and implicitly also by the Israeli Supreme Court in the case of *Attorney-General of Israel v Eichmann* (1968) 36 ILR 277, though it must be said that the primary basis upon which the Court rejected that defence was that it had not been made out on the facts. In the words of the Court (at 339), Eichmann "did not receive orders 'from above' at all; he was the high and mighty one, the commander of all that pertained to Jewish affairs". It was *Finta* that appeared to extend the scope of the defence to include crimes against humanity but, not surprisingly, imposed additional limitations upon it. Matthews J simply followed *Finta*. The Full Court in *SHCB*

(at [31]) relied upon the decision of Matthews J in *Re W97/164*, although apparently without considering either the structure of the Rome Statute or the text of Art 33.

123 The Rome Statute makes express provision for a defence of duress that is both separate and distinct from the defence of superior orders. Article 31(1)(d) provides that a person shall not be criminally responsible if, at the time of that person's conduct, that conduct is caused "by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person". An additional requirement is that the person act "necessarily and reasonably" to avoid the threat, and that the person "not intend to cause a greater harm than the one sought to be avoided".

124 Under the Rome Statute a defence of superior orders can be maintained in answer to a charge of war crimes under Art 8 without any evidence of duress. The conditions under which such a defence can relieve a person of criminal responsibility are those set out in Art 33(1), namely that the person was under a legal obligation to obey orders of the superior, that that person did not know that the particular order was unlawful, and that the order was not "manifestly unlawful".

125 Normally, the failure of the AAT to even consider the possibility that Art 33 might relieve the appellant of criminal responsibility for any war crimes would be seen as giving rise to jurisdictional error. Yet, the Minister submitted that the AAT's failure to consider Art 33 did not vitiate its decision. That argument was put in two ways. First, it was submitted that when determining whether the appellant fell within the ambit of Art 1F(a) any possible defences that he might have in relation to his involvement in war crimes were to be ignored. Alternatively, it was submitted that the appellant's conduct, even on his own version of what he had done, was "manifestly unlawful". It could not therefore give rise to a successful defence under Art 33.

126 In support of the first argument the Minister submitted that Art 1F(a) looked to international instruments for definitions of war crimes and crimes against humanity. It did not, in terms, require any finding of guilt, or any liability to criminal sanction, under those instruments. That suggested that possible defences were to be ignored when considering whether there were serious reasons for thinking that the appellant had committed any of those crimes.

127 The submission should be rejected. Article 1F(a) refers to serious reasons for considering that the relevant person "has committed a crime". We are unable to accept the proposition that a person may be said to have committed a crime when that person has a defence which, if upheld, will absolve or relieve that person from criminal responsibility. Professor Cassese, in "Justifications and Excuses in International Criminal Law" in *The Rome Statute: A Commentary* at 951 discusses the distinction between defences described as justifications and those described as excuses in most national law systems, and observes (at 954) that it is indisputable that "until now no practical distinction has been made between the two classes of defences" in respect of criminal responsibility for the acts in question. The learned author then refers specifically to the Rome Statute and explains (at 954-955) why the defences in Articles 31-33 exclude criminal responsibility. We do not accept that it is open to a decision-maker when considering whether there are "serious reasons" for thinking that a person has committed a particular crime under the Rome Statute to ignore the availability of a defence under that Statute if it is relied upon by that person. Contrary to the respondent's submission, Art 8 cannot be read in isolation. There are many provisions in the Rome Statute that bear directly upon whether a person's conduct amounts to the commission of a war crime. For example, Art 30 defines the requisite mental elements for all offences unless otherwise provided. It would be antithetical to the purpose of Art 1F(a), and contrary to principle, to attempt to answer the question posed by Art 1F(a) without having regard to Art 30. This view accords entirely with the approach taken by the Full Court in *SHCB* at [13].

128 The same is obviously true of other defences that might be available, including those set out in Art 31. That provision contains a series of grounds for excluding criminal responsibility. It can hardly be said of a person whose criminal responsibility has been "excluded" that he or she has nonetheless "committed" an offence: see generally *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318. A similar observation applies in relation to Art 32, which excludes criminal responsibility where there is a mistake of fact or mistake of law. The same can be said of Art 33, notwithstanding the fact that it speaks of "relieving" a person of criminal responsibility rather than "excluding" criminal responsibility. That may be no more than a reflection of the distinction referred to above between justifying and excusing conditions.

129 Another reason for rejecting the respondent's first submission is that any offence can be defined equally as well by including within its elements a negation of relevant defences as by

leaving those defences to be considered separately. The point is well illustrated by a passage from a celebrated article written by Professor Julius Stone, "Burden of Proof and the Judicial Process" (1944) 60 LQR 262. The learned author observed at 279:

> *"The doctrinal basis of the rules as to the burden of proof here involved is a supposed distinction between, on the one hand, a rule defined so as to exclude a given situation, and on the other hand, a rule defined without reference to that situation which is then made subject to an exception for that situation. It is the distinction between a rule containing its qualification within itself, and a rule the qualification upon which proceeds from a proposition outside the rule."*

Professor Stone went on to say at 280:

> *"The difficulties in which this distinction has caused the Courts to labour suggests that a preliminary consultation with the logicians may be appropriate. What is the difference in logic between a quality of a class as contained in the definition of the class, and a quality of a class as contained in an exception to the class? The answer appears to be – none at all. Every qualification of a class can equally be stated without any change of meaning as an exception to a class not so qualified. Thus the proposition 'All animals have four legs except gorillas', and the proposition 'All animals which are not gorillas have four legs', are, so far as their meanings are concerned, identical."* (footnotes omitted)

130 Similar difficulties are encountered when one considers the definition of certain common law offences including, in particular, murder. In *The Third Part of the Institutes of the Laws of England*, Sir Edward Coke described murder (at 47) as:

> *"when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature* in rerum natura *under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same."*

Later institutional writers adopted this description, and it is still widely accepted in common law jurisdictions.

131 It is obvious that almost any offence can equally well be defined by including within its elements a negation of relevant defences, achieved in the case of murder by the use of the term "unlawful", as by providing for separate and externally defined defences. In our view, there is no reason in principle for ignoring the possible availability of a defence of obedience to superior orders when determining whether there are serious reasons for believing that the person seeking refugee status has committed war crimes.

132 That takes us to the final question. The respondent submitted that it would be futile to remit this matter to the AAT because the only possible conclusion that it could reach, on the evidence, would be that the appellant's acts, even if in response to superior orders, were "manifestly unlawful".

133 The first point to note is that under Art 33 it is not the appellant's acts that must be "manifestly unlawful", but rather the superior order. To describe an order from a superior as "manifestly unlawful" requires the conclusion that it is obviously so. For example, it has been said in cases where it is contended that a sentence is "manifestly excessive" that this proposition does not admit of much argument. Either the sentence is obviously excessive, or it is not.

134 A major difficulty in the present case is that the AAT simply did not address this issue and made no finding whatsoever concerning the illegality of the orders of the appellant's superiors. In those circumstances it is inappropriate for the Court to stand in the shoes of the AAT and make its own findings on that matter, which can involve mixed questions of fact and law.

135 Accordingly, we are unable to accept the Minister's contention that it would be futile to remit this matter to the AAT because it would be bound to find that the orders that the appellant carried out were "manifestly unlawful". It might do so. On the other hand, it might not.

136 It must be remembered that the AAT is required to consider whether there are serious reasons for considering that the appellant committed war crimes. Relevantly, war crimes include, as Art 8(2)(c) of the Rome Statute states, the "serious violations" of Common Art 3 of the 1949 Geneva Conventions identified in Art 8(2)(c)(i) and (ii). Before any conclusion could be reached that the orders to engage in conduct constituting the serious violations were "manifestly unlawful", there would have to be a clear definition of the conduct constituting the war crime and consideration of the terms of the "superior orders" and the circumstances under which they were given. The AAT failed to apply itself to the real questions to be decided in relation to the latter two matters.

Conclusion

137 In the result jurisdictional error has been established. The AAT "constructively failed to exercise jurisdiction" because it "applied a wrong test, misconceived its duty, and failed to apply itself to the real question or questions to be decided": *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 per Gaudron J at 339 and per McHugh, Gummow and Hayne JJ at 351-352. The relevant principles are again clearly stated in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 per Gummow and Callinan JJ at 394-395, per Kirby J at 406-407 and per Hayne J at 408. It follows that the decision of the AAT was not a "privative clause decision" as defined in s 474(2) of the Act and that the appeal is not incompetent by reason of s 483 of the Act, which provides that s 44 of the AAT Act does not apply to a privative clause decision.

138 The appeal must be allowed, the orders made by the primary judge and the decision of the AAT must be set aside and the matter must be remitted to the AAT to determine the appellant's application for review of the decision of the delegate of the Minister according to law.

139 A question might arise as to whether any orders for costs in respect of the appeal should be made, including an order under O 80 r 9(2) of the *Federal Court Rules*. If a costs order is sought by the appellant he should file and serve a short outline of submissions within

10 days and the Minister should file a short outline of submissions in response within 10 days of receiving the appellant's submissions.

I certify that the preceding one hundred and thirty-nine (139) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Merkel, Finkelstein and Weinberg.

Associate:

Dated: 17 March 2005

Counsel for the Appellant: Ms M Allars appeared as pro bono counsel for the appellant

Counsel for the Respondent: NG Williams SC and GR Kennett

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 15 September 2004

Date of Judgment: 17 March 2005