Hate Speech and International Criminal Law

The *Mugesera* Decision by the Supreme Court of Canada

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Abstract

On 28 June 2005, the Supreme Court of Canada rendered a decision in Mugesera, *bringing to an end the decade-long legal saga involving a speech made by Leon Mugesera in November 1992 in Rwanda. While the decision of the Supreme Court was handed down in the context of an immigration case, its impact will be mostly felt in the realm of criminal law, as the court embraced international jurisprudence for the international elements of crimes against humanity. In addition, the decision is important for three reasons: it (i) clarified the interrelationship between international and domestic criminal law; (ii) examined the notion of hate crime; and (iii) analysed the concept of inchoate crimes.*

1. Background

In November 1992, Leon Mugesera, a well educated and well connected man, holding teaching and public service positions in Rwanda, and 'an active member of the MRND, the hard-line Hutu party which opposed the Arusha [peace] process', made a speech at a meeting of the party at Kabaya.[1] This occurred during a time of increasing instability. The Rwandan People's Front (RPF) had invaded northern Rwanda on 1 October 1990. Mass arrests

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1 Decision of Supreme Court of Canada, 2005 SCC 40, § 8, available online at: http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2005scc040.wpd.html (visited 6 September 2005). The Supreme Court issued another decision in which it dismissed a motion by Mugesera to stay

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and the detention of alleged RPF accomplices, 90 per cent of whom were Tutsi, followed. The Minister of Justice considered all Tutsi intellectuals to be RPF accomplices, and several massacres were perpetrated by the Rwandan army. Between October 1990 and January 1993, approximately 2,000 Tutsi were massacred. In May 1992, the RPF occupied a small part of northern Rwanda, forcing the Rwandan government to negotiate with it. Three agreements between the government and the RPF were concluded in Arusha: a cease-fire agreement on 12 July, a rule of law protocol on 18 August, and the initial power-sharing agreement on 30 October. The day after the signing of the protocol, there were massacres of Tutsi and moderate Hutu. Months of escalating violence followed, with reports of massacres of Tutsi and political opponents. It was in this context of internal political and ethnic conflict that Mr Mugesera made his speech.

He spoke to about 1,000 people at a political meeting at Kabaya in Gisenyi prefecture, just a few days after the speech in which President Habyarimana had described the Arusha agreements as a scrap of paper.[2] The speech in question was not long but contained the following passages:

> You know there are 'Inyenzis' (cockroaches) in the country who have taken the opportunity of sending their children to the front, to go and help the 'Inkotanyis'. . . . Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? . . . If justice therefore is no longer serving the people, as written in our Constitution which we voted for ourselves, this means that at that point we who also make up the population whom it is supposed to serve, we must do something ourselves to exterminate this rabble. . . . I asked if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! I told him 'So don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly'. . . . Another important point is that we must all rise, we must rise as one man . . . if anyone touches one of ours, he must find nowhere to go.[3]

The content of the speech led the Rwandan authorities to issue the equivalent of an arrest warrant against Mugesera, who fled the country shortly thereafter. He found temporary refuge in Spain. On 31 March 1993, he applied for permanent residence in Canada for himself, his wife and their five children. After the application was approved, the Mugesera family landed in Canada

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the proceedings before it on the basis that 'an extensive Jewish conspiracy was hatched to ensure that the Minister's appeal would succeed and that the respondent Mugesera and his family would be deported' (2005 SCC 39, § 9); this decision by the court was couched in unusually strong language in saying (in § 17) 'Regretfully, we must also mention that the motion and the documents filed in support of it include anti Semitic sentiments and views that most might have thought had disappeared from Canadian society, and even more so from legal debate in Canada'.

2 *Ibid.*, §§ 17–24. See also Judgment, *Akayesu* (ICTR-96–4-T), Trial Chamber, 2 September 1998, §§ 100, 149 and footnote 54.

3 SCC decision, Appendix III.

in August 1993. In 1995, the Minister of Citizenship and Immigration became aware of Mugesera's background and commenced proceedings[4] under the Immigration Act.[5] The allegations against Mugesera were fivefold, namely counselling to commit murder, advocating or promoting genocide, public incitement of hatred,[6] committing a crime against humanity, and misrepresenting his background when applying for permanent residence.[7]

The litigation was lengthy and convoluted. The hearing before the immigration adjudicator, the first-level quasi-judicial tribunal, took 29 days, resulting in a finding against Mugesera on all five counts on 11 July 1996.[8] The appeal of this decision before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, the second-level administrative tribunal, took 24 days and affirmed the original decision on 6 November 1998.[9] The IAD decision was judicially reviewed by the Federal Court, Trial Division, which rendered its decision after a 14-day hearing on 10 May 2001 in which it agreed with the IAD that Mugesera was inadmissible on the allegations involving incitement to commit murder, advocating or promoting genocide and public incitement

4 *Ibid.*, §§ 3–4.

5 The Immigration Act was replaced on 28 June 2002 by the Immigration and Refugee Protection Act (IRPA); both acts contain provisions dealing with the commission of war crimes and crimes against humanity by using for the contents of such offences the Criminal Code of Canada until October 2000 and the Crimes against Humanity and War Crimes Act (which also includes the crime of genocide) after that date. For a description of the latter, see W.A. Schabas, 'Canadian Implementing Legislation for the Rome Statute', 2 *Yearbook of International Humanitarian Law* (1999) 337–346; W.A. Schabas, 'Canadian Implementing Legislation for the Rome Statute: Jurisdiction and Defences' and D. Robinson, 'Implementing International Crimes in National Law: The Canadian Approach', in M. Neuner (ed.), *National Codes on International Crimes: National Approaches to the Implementation of International Criminal Law in Domestic Law* (Berlin, BWV — Berliner Wissenschaft Verlag, 2003); T. Gut/M. Wolpert on Canada in A. Eser, U. Sieber and H. Kreicker (eds), *National Prosecution of International Crimes — Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 5 (Berlin: Duncker and Humblot, 2005), at 19–88; and W. Burchards, *Die Verfolgung von Völkerrechtsverbrechen durch Drittstaaten, Das kanadischen Beispiel* (Berlin: BWV — Berliner Wissenschaft Verlag, 2005) 338–377.

6 While in Canadian criminal law, only a limited number of instances give rise to extraterritorial jurisdiction, Canadian immigration law provides authority to refuse applicants who wish to come to Canada if they have committed any offence outside Canada known under foreign law as long as that offence is an indictable one and has its equivalent in Canadian criminal law at the time of commission; the three offences in question were all known in Rwandan criminal law in 1992.

7 *Mugesera v. Canada* (Minister of Citizenship and Immigration), Federal Court, Trial Division, IMM-5946–98, 10 May 2001, § 7, available online at: http://decisions.fct-cf.gc.ca/fct/2001/2001fct460.shtml (visited 6 September 2005).

8 *Ibid.*, §§ 3 and 5; see also the decision of Supreme Court of Canada, 2005 SCC 40, §§ 25–27 and Appendix I.

9 *Ibid.*, §§ 2 and 5; see also decision of Supreme Court of Canada, 2005 SCC 40, § 27. For a commentary, see W.A. Schabas, 'Mugesera v. Minister of Citizenship and Immigration, Canadian Immigration and Refugee Board appellate decision on expulsion of alien for inciting genocide in Rwanda', 93 *American Journal of International Law* (AJIL) (1999) 529–533. Appeals to the IAD for persons found to have been involved in serious crimes was abolished in 2002 with the advent of IRPA.

of hatred, but that its conclusions regarding crimes against humanity and misrepresentation were made in error.[10]

All aspects of this decision, with the exception of the determination re misrepresentation, were heard by the Federal Court of Appeal, which ruled in favour of Mugesera on all counts on 8 September 2003.[11] This decision was based on a wide interpretation of freedom of expression in which context Mugesera's speech, according to the court, would not have resulted in a criminal conviction if made in Canada.[12] The court concluded that:

> The speaker spoke fluently, used clear and colourful language, sometimes even brutal language. This speaker was a fervent support of democracy, patriotic pride and resistance to invading foreign forces. The themes of his speeches were elections, courage and love . . . . Even though it is true some of his statements were misplaced or unfortunate, there is nothing in the evidence to indicate that Mr. Mugesera under the cover of anecdotes or other imagery, deliberately incited to murder, hatred or genocide.[13]

The Supreme Court of Canada heard the appeal of the Federal Court of Appeal case on 8 December 2004 and issued a unanimous decision six-and-a-half months later, overturning the decision of the Federal Court of Appeal and restoring the IAD decision.

2. The Decision of the Supreme Court

A. The Domestic Offences of Incitement to Murder, Hate and Genocide[14]

The allegation of incitement to murder was framed originally both as the party offence and the inchoate offence of counselling. In Canadian law, counselling to commit an offence can be a form of complicity if the counselling subsequently results in the commission of that offence[15] while, if the offence

10 *Mugesera v. Canada* (Minister of Citizenship and Immigration), Federal Court, Trial Division, IMM-5946–98, 10 May 2001, §§ 34–44 and 54–58; see also the decision of the Supreme Court of Canada, 2005 SCC 40, § 29. Also W.A. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes"', 1 *Journal of International Criminal Justice* (JICJ) (2002) 49–51.

11 *Mugesera v. Canada* (Minister of Citizenship and Immigration), Federal Court of Appeal, A-316-01, 8 September 2003, available online at: http://decisions.fca-caf.gc.ca/fca/2003/2003fca325.shtml (visited 6 September 2005); see decision of Supreme Court of Canada, 2005 SCC 40, §§ 30–31.

12 *Ibid.*, § 208.

13 *Ibid.*, § 240.

14 While not in the nature of a legal finding, the court alludes to the notion of judicial notice in § 8 of its decision by saying: 'There is no doubt that genocide and crimes against humanity were committed in Rwanda between April 7 and mid-July 1994.' Regarding this concept, see J. Stewart, 'Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent', 3 *International Criminal Law Review* (2003) 245–274.

15 Section 22 of the Canadian Criminal Code, available online at: http://laws.justice.gc.ca/en/C-46/index.html (visited 6 September 2005).

has not occurred, the counselling itself can also be charged as an independent offence.[16] Since, in this case, the connection between Mugesera's speech and subsequent killings could not be proven, the only type of counselling examined by the Supreme Court was the inchoate type of counselling.

The court indicated that *counselling* includes procuring, soliciting or inciting while to incite means to urge, stir up or stimulate. The offence of counselling requires that the statements, viewed objectively, actively promote, advocate or encourage the commission of the offence described in them. The criminal act will be made out where the statements are likely to incite — and are made with a view to inciting — the commission of the offence. An intention to bring about the criminal result, that the counsellor intended the commission of the offence counselled, will satisfy the requisite mental element for the offence of counselling.[17]

The offences of advocating or promoting genocide[18] or inciting or promoting hatred[19] are specific inchoate offences in that neither requires the commission of a subsequent criminal activity.[20]

16 Section 464(a) of the Criminal Code; there are four types of general inchoate offences in Canadian criminal law, namely conspiracy, counselling, attempt and accessory after the fact, which are regulated in ss. 463–465 in conjunction with ss. 22–24 of the Criminal Code. The same inchoate offences can also be committed in respect to genocide, war crimes and crimes against humanity by virtue of ss. 4(1.1) (for offences committed in Canada) and 6(1.1) (for offences committed outside Canada) of the Crimes against Humanity and War Crimes Act, available online at: http://laws.justice.gc.ca/en/C-45.9/index.html (visited 6 September 2005); see Federal Court of Appeal in *Zazai*, A-539-04, 20 September 2005. In international criminal law, these have received different treatments depending on the type of substantive offence. Accessory after the fact does not exist at all, while conspiracy, incitement and attempt can only occur in relation to the crime of genocide according to the ICTY (Art. 4.3(b), (c) and (d)) and ICTR (Art. 2.3(b), (c) and (d)) Statutes, while the ICC Statute (Art. 25) extends the notion of attempt to all three crimes, retains incitement for genocide only, and does not mention conspiracy. For an explanation, see C. de Than and E. Shorts, *International Criminal Law and Human Rights* (London: Thomson; Sweet and Maxwell, 2003), at 8–9, which says: 'These are offences designed to cover situations when a full criminal offence has not yet been committed but was suggested (incitement), agreed to (conspiracy) or begun but not completed (attempt).'

17 §§ 63–64; the same court clarified the elements of the inchoate offence of counselling a month after the *Mugesera* decision in the *Hamilton* case (2005 SCC 47, 29 July 2005) by saying in § 29: 'In short, the *actus reus* for counselling is the *deliberate encouragement or active inducement of the commission of a criminal offence*. And the *mens rea* consists in nothing less than an accompanying *intent* or *conscious disregard of the substantial and unjustified risk inherent in the counselling*: that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct.'

18 Section 318 of the Criminal Code.

19 Section 319 of the Criminal Code; there are actually two different offences in this section, namely communicating statements in any public place where such incitement is likely to lead to a breach of the peace (319(1)) and communicating statements, other than in a private communication, wilfully promoting hatred (319(2)).

20 See SCC decision, §§ 84–85 (re the connection to genocide, relying on both *Akayesu* and Judgment, *Nahimana, Barayagwiza and Ngeze* (ICTR-99–52-T-I) ('*Media* case'), 3 December 2003) and 102 (re the connection to hatred, again relying on the *Media* case).

For *advocating or promoting genocide*, the incitement needs to be public and direct. Direct incitement assumes a direct form and specifically provokes another to engage in a criminal act: more than mere vague or indirect suggestion is needed. The direct element of incitement should be viewed in the light of its cultural and linguistic content. Depending on the audience, a particular speech may be perceived as direct in one country, and not so in another. The determination of whether acts of incitement can be viewed as direct necessarily focuses mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.[21] The *mens rea* of this offence is intent to directly prompt or provoke another to commit genocide. The person who incites must also have the specific intent to commit genocide: an intent to destroy in whole or in part any identifiable group, namely any section of the public distinguished by colour, race, religion or ethnic origin.[22]

With respect to *promoting hatred*, the court indicates that to promote means to actively support or instigate, while more than mere encouragement is required. Hatred connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. Only the most intense forms of dislike fall within the ambit of this offence.[23] Similarly to inciting genocide, the analysis must focus on the speech's audience and on its social and historical context, while the *mens rea* is less than intention but has as a conscious purpose the promotion of hatred against the identifiable group, or if the accused foresaw that the promotion of hatred against that group was certain to result but nevertheless communicated the statements.[24]

The Supreme Court came to the conclusion that the IAD had been correct in all three instances to find that the speech caused incitement to murder, hate and genocide and that the decision of the Federal Court of Appeal failed to take into consideration the context and time during which the speech had been made.[25]

B. The International Offence of Crimes against Humanity

If the Supreme Court relied sporadically on international jurisprudence in the interpretation of domestic offences which have their genesis in international law, it wholeheartedly embraced the case law developed at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) with respect to crimes against humanity. It was even willing to depart from its own earlier

21 SCC decision, § 87, directly quoting *Akayesu*.
22 SCC decision, §§ 88–89, again relying on the *Akayesu* and *Media* cases.
23 SCC decision, § 101.
24 *Ibid.*, §§ 104–105.
25 *Ibid.*, §§ 77–80, 95–98 and 109–111.

judgment in this area — the *Finta* decision[26] — where the latter decision was not in accordance with its international counterparts.[27]

The court followed closely the international jurisprudence by indicating that crimes against humanity consist of these four essential elements: (1) one of the enumerated proscribed acts is committed; (2) the act occurs as part of a widespread or systematic attack; (3) the attack is directed against any civilian population or any identifiable group; and (4) the accused must have knowledge of the attack and must know that his or her acts comprise part of it, or take the risk that his or her acts will comprise part of it.[28] The Court similarly followed international case law when providing further details of these requirements. By saying that an attack is a course of conduct involving the commission of acts of violence, the court used the same language as that used by the ICTY and ICTR.[29]

Thus, the international elements for crimes against humanity in Canadian criminal law are now very similar to the ones in international criminal law.[30] A widespread attack is a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. A systematic attack is one that is thoroughly organized and follows a regular pattern on the basis of a common policy involving substantial public or private resources and is carried out pursuant to a policy or plan, although the policy need not be an official state policy and the number of victims affected is not determinative. It also signifies the organized nature of the acts of violence and the improbability of their random occurrence, or the non-accidental repetition of similar criminal conduct on a regular basis. Only the attack needs to be widespread or systematic — not the act of the accused. Even a single act may constitute a crime against humanity as long as the attack or part of it is widespread or systematic.[31]

26 [1994] 1 SCR 701.

27 SCC decision, §§ 126, 143–144 and 172 by indicating that the requirement of discrimination for crimes against humanity is not according to customary international law as expressed by the ICTY/ICTR jurisprudence; the SCC decision also overruled the *Finta* case indirectly in §§ 121 and 123 by saying that the decisions of the IAD and the Federal Court, Trial Division, were incorrect by adding the element of cruelty to the *actus reus* of crimes against humanity as demanded in *Finta*. The *Finta* decision had been criticized for these reasons in J. Rikhof, 'Exclusion Clauses: The First Hundred Cases in the Federal Court', 34 *Immigration Law Reporter (2nd)* (1995) 29, at 44–46 and I. Cotler, 'War Crimes and the *Finta* Case', 6 *Supreme Court Law Review* (1995) 577 and 'International Decision' in 90 AJIL (1996) 460. The *Finta* case has been referred to in the ICTY case law in Judgment, *Tadić* (IT-94–1), Appeals Chamber, 15 July 1999, §§ 265–267 re the *mens rea* for crimes against humanity. Canadian law has also been used in Judgment, *Furundžija* (IT-97–17/1), Appeals Chamber, 10 December 1998, § 185 re bias of judges; and Decision, *Kordić* (IT-95–14/2), Trial Chamber, 6 April 2000, § 20 re test for motion for acquittal.

28 SCC decision, §§ 128 and 173.

29 *Ibid.*, § 153.

30 With the possible exception of the requirement of a policy for the systematic portion of crimes against humanity according to Art. 7(2)(a) of the Rome Statute as noted by the court itself in § 158.

31 SCC decision, §§ 154–158.

Furthermore, the attack must also be directed against a civilian population. This means that the civilian population must be the primary object of the attack, and not merely a collateral victim of it, and that the attack is directed against a relatively large group of people who share distinctive features which identify them as targets of the attack.[32]

The acts of the accused need to be objectively part of the attack in that they, by their nature or consequences, are liable to have the effect of furthering the attack. The fact that an act is part of a pattern of abuse, or must objectively further the attack, does not mean that no personal motive for the underlying act can exist.[33]

With respect to possible underlying offences of crimes against humanity, the *Mugesera* decision examines only two, namely murder and persecution; again, international jurisprudence is followed very closely. The Court is of the view that counselling the crime against humanity of murder is akin to the international mode of liability of instigation, which in the ICTY/ICTR case law requires a causal link with the eventual crimes committed. Since no such connection existed in the case at hand, Mugesera could not have committed this type of crime against humanity.[34] Persecution as a crime against humanity is the gross or blatant denial of a fundamental right of equal gravity as the other underlying offences of crimes against humanity carried out on discriminatory grounds with the discriminatory intent to deny the right.[35] While contrasting two trends regarding hate speech as persecution in the ICTY and ICTR jurisprudence, the Court is of the view that hate speech can fall within the parameters of this crime if the speech openly advocates extreme or egregious violence (such as murder or extermination) against the target group, but it may not be limited to such instances.[36]

The Court is of the view that in applying the legal principles regarding crimes against humanity, Mugesera's speech had targeted Tutsi and moderate Hutu who had been the victims of the systematic attack taking place in Rwanda at the time. A persecutory speech which encourages hatred and violence against a targeted group furthers an attack against that group. Also considered relevant by the Court was geographical proximity, in that many of the massacres perpetrated in Rwanda between 1990 and 1993 had occurred in and around Gisenyi prefecture, where the speech was given, while at the same time local officials had participated in and encouraged the targeting of Tutsi and moderate Hutu. Mugesera's speech therefore not only objectively

32 *Ibid.*, §§ 161–162.
33 *Ibid.*, § 164–167.
34 *Ibid.*, §§ 132–136 and 150.
35 *Ibid.*, §§ 139–145.
36 *Ibid*, §§ 146–147 and 150; the court examined the ICTR jurisprudence as developed in the *Media* case and Judgment, *Ruggiu* (ICTR-97–32), Trial Chamber, 1 June 2000, and compared those decisions with the ICTY Judgment, *Kordić* (IT-95–14/2), Trial Chamber, 14 January 2000, § 209 and footnote 272.

furthered the attack, but also fitted into a pattern of abuse prevailing at that time and was therefore a part of a systematic attack directed against a civilian population that was occurring in Rwanda at the time; Mugesera also had knowledge of such an attack.[37]

3. Analysis of the Supreme Court Decision

A. The Interrelationship between International and Domestic Criminal Law

The Canadian Crimes against Humanity and War Crimes Act (CAHWA) deems the following acts to be crimes against humanity: murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act.[38] While some do not have an equivalent in Canadian criminal law, the crimes of murder, imprisonment, torture and sexual violence are regulated in the Criminal Code. It was not clear whether the elements of these crimes would be derived from their domestic context or whether they should be considered a different genus of crimes altogether. This question goes beyond Canadian interest, since a great number of states have now incorporated crimes against humanity in their domestic legislation as a result of ratifying the Statute of the International Criminal Court (ICC Statute)[39] but few have initiated a prosecution on this basis as of yet.[40]

The decision of the Supreme Court appears to have taken the international route by defining the crime against humanity of murder more in line with the international jurisprudence than the domestic definition of murder by saying:

> For instance, where the accused is charged with murder as a crime against humanity, the accused must (1) have caused the death of another person, and (2) have intended to cause the person's death or to inflict grievous bodily harm that he or she knew was likely to result in death.[41]

37 SCC decision, §§ 169 and 177.

38 Sections 4(3) and 6(3).

39 For an overview, see the website of Coalition for the International Criminal Court, http://www.iccnow.org/countryinfo.html (visited 6 September 2005) and the National Prosecution of International Crimes Project of the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany, available online at: http://www.iuscrim.mpg.de/forsch/straf/projekte/nationalstrafverfolgung2_e.html (visited 6 September 2005).

40 See in general http://www.trial-ch.org/trialwatch/home/en (visited 6 September 2005); see also R. Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia', 3 JICJ (2005) 381–399 and D. Vandermeersch, 'Prosecuting International Crimes in Belgium', 3 JICJ (2005) 400–421.

41 § 130.

The Court did not refer to either the Criminal Code or international jurisprudence but the most recent statement by the ICTY is remarkably similar to the Supreme Court, namely:

> The death was the result of an act or omission of the accused . . .; the intent of the accused . . . was a) to kill the victim or b) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[42]

This deference to international jurisprudence by the Supreme Court means that international criminal law has come of age in its ability to develop its own independent interpretation of the underlying offences for crimes against humanity as opposed to engaging in a comparative analysis of domestic provisions,[43] as was the case in the early years of the ICTY/ICTR jurisprudence. This jurisprudence should in turn be accepted by domestic courts when charges of crimes against humanity are laid, including for such offences known in domestic law.[44]

B. Hate Speech

The Supreme Court continues the international jurisprudence in criminalizing hate speech[45] by using this case law to circumscribe the elements of the Canadian domestic crime of incitement to commit genocide and to include hate speech into the crime against humanity of persecution. It also makes the same distinction between incitement and hate speech as

42 Judgement, *Kvočka* (IT-98–30/1-A), Appeals Chamber, 28 February 2005, § 261.

43 For the development of the underlying crime of murder, see Judgment, *Delalić* (IT-96–21), Trial Chamber, 16 November 1998, §§ 422 and 431–439, where it compared domestic legislation (including Canadian law in footnotes 435 and 450); this definition of murder was used in subsequent jurisprudence without further domestic references. The same approach was used for the crime of rape where *Akayesu* referred briefly to domestic law in § 596, and Judgement, *Kunarac* (IT-96–23), Trial Chamber, 22 February 2001, §§ 439–460 (including Canadian law in § 453) and Appeals Chamber, 12 June 2002, §§ 126–133 after which their definition was followed by other ICTY/ICTR cases. For other crimes against humanity, the ICTY/ICTR jurisprudence referred to other international law areas such as human rights or humanitarian law.

44 For this approach, see *General Prosecutor v. Damiao DaCosta* (no. 1/2003), 10 December 2003, at 14–15 of the Special Panel for Serious Crimes of the Dili District Court of East Timor, available online at: http://www.jsmp.minihub.org/courtmonitoring/spsccaseinformation2003.htm (visited 6 Sptember 2005).

45 See *supra* note 36, specifically the *Media* case. For commentaries, see G.S. Gordon, 'A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech', 45 *Virginia Journal of International Law* (2005), 140–179, and W.K. Timmermann, 'The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend, in International Law Towards Criminalization of Hate Propaganda', 18 *Leiden Journal of International Law* (2005) 257–282.

the ICTR, in that hate speech can be broader than incitement, which is expressed as follows:

> . . . hate speech lies not only in the injury to the self-dignity of target group members but also in the credence that may be given to the speech, which may promote discrimination and even violence.[46]

In addition, the Court contributes to this developing trend. First, it expands the notion of hate crime as persecution by making it clear that in order for such a crime to be committed in certain circumstances, only *one* act or event can be sufficient for both genocide and a crime against humanity. While this has been acknowledged as a general proposition, this is the first time that this principle has been applied to a specific factual situation. This would also mean that concerns regarding jurisdiction when incitement or hate speech straddle the temporal mandate of a tribunal or court can be avoided.[47]

Secondly, it provides some guidance to the nature of hate speech by setting the threshold for hate speech to enter the realm of criminal law, namely if a speech as a minimum openly advocates extreme violence.[48] It also indicates, while relying on Canadian law,[49] that hatred connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation and that only the most intense forms of dislike fall within the ambit of this offence.[50]

C. Inchoate Offences

Canadian criminal law employs a wider variety of inchoate offences than international criminal law, namely conspiracy, attempt, counselling and accessory after the fact.[51] The reason that inchoate behaviour is made criminal has been explained by the Supreme Court:

> If the primary act (for example, killing), is harmful, society will want people not to do it. Equally, it will not want them even to try to do it, or to counsel or incite others to do it. For while the act itself causes actual harm, attempting to do it, or counselling, inciting or procuring someone else to do it, are sources of potential harm — they increase the likelihood of that particular harm's occurrence. Accordingly, society is justified in taking

46 § 147; see the *Media* case, § 1078; see also Timmermann, at 270 and 278–282.

47 See Gordon, *supra* note 45, at 195–197.

48 *Ibid.*

49 The *Media* case alludes to domestic regulation of hate speech in § 1075 but does not discuss any jurisprudence.

50 § 101.

51 See *supra* note 16; however, counselling can both be a party offence if the counselled crime is committed and an inchoate offence if the counselled crime is not committed (see the SCC decision, §§ 60–61); the former type of counselling is akin to the notion of instigation in the ICTY and ICTR Statutes, Arts 7.1 and 6.1, respectively, and to the concepts of soliciting and inducing in the ICC Statute, Art. 25(3)(b).

> certain measures in respect of them: outlawing them with sanctions, and authorizing intervention to prevent the harm from materializing.[52]

The term 'counselling' in Canadian law means inciting (as well as procuring and soliciting) and was specifically included in the CAHWA as an inchoate offence as of October 2000 and, as such, was not applicable to the *Mugesera* case.[53] While it might not have been possible to charge the crime against humanity of murder before that time if no murder had resulted from the incitement, this has changed with the coming in force of the CAHWA. As a result, a Canadian prosecutor has now more choices when contemplating a charge of an international offence.[54]

Apart from general inchoate offences where any offence in Canadian criminal law can be charged even if the offence in question has not been carried out, the Criminal Code also knows a number of specific inchoate offences where particular preparatory activities leading up to a criminal offence are made criminal even if that offence does not occur. Incitement to commit genocide and hate propaganda are two such offences discussed by the Supreme Court, but there are a number of similar offences as well.[55]

In *Mugesera*, the Supreme Court, following international jurisprudence, has elevated hate crime to a specific inchoate offence by including it within the crime against humanity of persecution.[56] This approach holds a number of advantages. The first one is that concepts such as instigation/soliciting, which, as a party offence, requires that a subsequent offence has been committed, or incitement, which does not require a subsequent offence but only applies to genocide, have now a much wider reach; an entire range of objectionable inchoate behaviour can be the subject of a criminal charge. Secondly, by including inchoate behaviour within an already existing offence,

52 The SCC in the *Hamilton* case, see *supra* note 17, § 25; see also Timmermann, at 268.

53 See SCC decision, § 118.

54 For that reason, it is likely that the SCC approach in §§ 134–135 for which it relied on international jurisprudence re the term 'instigate' is too narrow at the moment. It has been argued that the inchoate offence of conspiracy can be read into Art. 25(3)(d) of the Rome Statute (see K. Kittichaisare, *International Criminal Law*, Oxford: Oxford University Press, 2001, at 235 and 250) but since that article deals with the concept of common purpose, it is likely that the agreement alluded to is an element of that particular party offence rather than an inchoate offence.

55 Especially offences against the public order such as inciting mutiny, assisting a deserter, causing a riot or assisting in an escape of a prisoner of war.

56 While the residual character of this crime against humanity has provided the ICTY and ICTR with an opportunity to include a great number of criminal acts within its parameters (see G. Mettraux, *International Crimes and International Tribunals* (Oxford: Oxford University Press, 2005), 184–185 as well as Judgment, *Brdjanin* (IT-99–36), 1 September 2004, §§ 992–1050; Judgment, *Kordić* (IT-95–14/2), Appeals Chamber, 17 December 2004, §§ 101–109, Judgment, *Blagojević* (IT-02–60), Trial Chamber, 17 January 2005, §§ 578–602 and Judgment, *Kvočka* (IT-98–30/1), Appeals Chamber, 28 February 2005, §§ 313–339), hate speech has been the only inchoate type of activity so far.

the complication of determining in what circumstances double inchoate offences (such as a conspiracy to counsel or an attempt to incite) can be allowed[57] has been avoided; all available inchoates in both Canadian and international criminal law can be used in combination with each other. Lastly, it opens the door conceptually to include other inchoate offences within the crime of persecution.

4. Conclusion

The decision of the Supreme Court has adopted, and contributed to, domestic and international criminal law to the benefit of both and, in doing so, is true to its own epithet:

> In the face of certain unspeakable tragedies, the community of nations must provide a unified response. Crimes against humanity fall within this category. The interpretation and application of Canadian provisions regarding crimes against humanity must therefore accord with international law. Our nation's deeply held commitment to individual human dignity, freedom and fundamental rights requires nothing less.[58]

57 For Canadian law, see D. Stuart, *Canadian Criminal Law, A Treatise* (4th ed., Toronto: Carswell, 2001), at 704–705.

58 § 178.