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A Quest for Jurisdiction and an Appropriate Definition of Crime

Mpambara before the Dutch Courts

Larissa van den Herik*

Abstract

On 23 March 2009, Joseph Mpambara was convicted by the district court of The Hague for criminal acts committed in Rwanda in 1994. Interestingly, for lack of jurisdiction, Mpambara was not tried for genocide, which features as the central charge in most judgments of the Rwanda Tribunal. Moreover, Mpambara was acquitted of war crimes because of a lack of sufficient nexus between the crimes he had committed and the armed conflict. Eventually, Mpambara was convicted for a crime that does not figure as an independent crime in the Statute of the Rwanda Tribunal, namely torture. In this note, the interrelationship between this case and the unsuccessfully referred case of Bagaragaza is analysed against the backdrop of the Dutch legal quest for jurisdiction and an appropriate crime definition. On the basis of the expressive function of international criminal law, it is submitted that a contemporary interpretation of the protective principle could have resulted in a more appropriate qualification of the criminal acts for which Mpambara was convicted, namely as genocide. From the same perspective, it is argued that the interpretation of the nexus requirement in the specific case of Rwanda goes to the heart of the qualification of the 1994 events and, in particular, the interrelatedness of the armed conflict and the genocide. In addressing the question concerning the nexus requirement, the district court paid careful attention to relevant international case law and as such the judgment presents a positive example of transjudicial communication between international and national criminal courts.

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1. Introduction

On 7 August 2006, Joseph Mpambara was arrested in the Netherlands on the suspicion that he had committed crimes in Rwanda during the genocide of 1994. At the time of his arrest, Mpambara had been in the Netherlands for some eight years. Upon the arrest of Mpambara, the Dutch Prosecutions Office notified the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR) that it held Mpambara in custody. The ICTR Prosecutor in turn informed the Dutch Prosecutions Office that he did not plan on trying Mpambara before the ICTR and the ICTR would thus not exercise its primacy rights.¹ The completion strategy that was drafted in response to the Security Council's wish that the ICTR come to closure made no specific mention of Mpambara. Extradition to Rwanda was not an option for lack of an extradition treaty between the Netherlands and Rwanda.² It was thus decided to prosecute Mpambara in the Netherlands.³

Mpambara is the brother of Obed Ruzindana, who was one of the first persons to be convicted by the ICTR in 1999.⁴ The brothers belonged to a wealthy and influential family in Rwanda at the time. The family members were scattered over various countries when most of them fled Rwanda in July 1994. After some wandering, Mpambara came to the Netherlands. Subsequent to almost three years of intricate legal proceedings following his arrest, Mpambara was convicted by the district court of The Hague on 23 March 2009.⁵ Interestingly, for lack of jurisdiction Mpambara was not tried for

- 1 Pursuant to Art. 8(2) ICTRSt., the ICTR enjoys primacy over the national courts of all states, and it may ask national courts to defer to it. Deferral requests were mainly made in the first years of the ICTR's functioning. Deferral to the ICTR is to be distinguished from the notion of referral, which concerns the transfer of cases by the ICTR to national courts as part of the completion strategy. Originally, the plan was to refer approximately 40 cases to national courts. See *Completion Strategy for the International Criminal Tribunal for Rwanda*, UN Doc. S/2003/946, 6 October 2003, §§ 23–24. This plan has not been realized so far given the reluctance of ICTR Trial Chambers and the Appeals Chamber to refer cases to Rwanda; see e.g. Decision on the Prosecutor's Appeal Against the Decision on Referral under Rule 11bis, *Hategekimana* (ICTR-00-55B-R11bis), Appeals Chamber, 4 December 2008. However, in 2005, the Prosecutor did transfer case files in respect of 15 suspects to Rwanda. This transfer was not governed by Rule 11bis and could be undertaken without judicial approval, see UN Doc. S/2005/336, 23 May 2005, § 37. In view of the current judicial refusal at the ICTR to refer to Rwanda out of fair trial concerns, the question may well be raised how opportune these case file transfers were.
- 2 Furthermore, even if an extradition treaty had existed, a potential extradition request by Rwanda might well have been refused on the ground that there was a real risk that Mpambara's human rights would be violated in Rwanda. For comparable decisions emanating from other European jurisdictions, see *infra* note 51.
- 3 For more information on the Dutch practice of prosecuting extraterritorial crimes, see L.J. van den Herik, 'The Difficulties of Exercising Extraterritorial Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia', 9 *International Criminal Law Review* (2009) 211–226, at 213–215.
- 4 Judgment, *Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber II, 21 May 1999, upheld on appeal, Judgment, *Kayishema and Ruzindana* (ICTR-95-1-A), Appeals Chamber, 1 June 2001.
- 5 *Rechtbank* (District Court), The Hague, judgment of 23 March 2009, LJ number: BI2444 (in Dutch). Judgments of Dutch courts can be found at <http://www.rechtspraak.nl>.

genocide, which features as the central count in most ICTR judgments. Moreover, Mpambara was acquitted of war crimes because of a lack of sufficient nexus between the crimes he had committed and the armed conflict. Eventually, Mpambara was convicted for a crime that does not figure as independent crime in the Statute of the ICTR, namely torture. In this note, the Dutch legal quest for jurisdiction and an appropriate crime definition is analysed.

2. The Lack of Jurisdiction to Try Mpambara for Genocide

The alleged acts committed by Mpambara leading to his arrest were carried out in the midst of and as part of the Rwandan genocide of 1994. Yet, in the first indictment against Mpambara, genocide charges were absent given that the Dutch Act of 1964 implementing the Genocide Convention had not vested Dutch courts with universal jurisdiction. After consultation with the ICTR Prosecutor, who indicated that he did not wish to try the case against Mpambara himself and who referred the case to the Netherlands, the Dutch Prosecution Office decided to add genocide charges. It was not certain though that Dutch courts indeed had jurisdiction to try cases of genocide committed in Rwanda in 1994. This question was relevant not only for the case of Mpambara but also for the case of Bagaragaza who had been officially referred to the Netherlands by the ICTR as well.⁶ The difference between the case against Mpambara on the one hand and Bagaragaza on the other hand was that Bagaragaza had been indicted by the ICTR and, therefore, his referral to the Netherlands was based on rule 11*bis*, whereas the case against Mpambara concerned a referral of a so-called 'unindicted' case.⁷ Nevertheless, given the interlinkage between the two referred cases, the single question on jurisdiction over genocide was decided in interlocutory proceedings before the district court of The Hague,⁸ the Court of Appeal⁹ and, finally, by the Supreme Court.¹⁰

In the interlocutory proceedings, the courts first observed that the Dutch Act Implementing the Genocide Convention accepted the active nationality principle in addition to the territoriality principle as a ground for jurisdiction over genocide.¹¹ In addition, the Dutch Criminal Law in Wartime Act provides

6 Decision on the Prosecutor's request for referral of the indictment to the Kingdom of the Netherlands, *Bagaragaza* (ICTR-2005-86-11*bis*), Trial Chamber III, 13 April 2007.

7 The main difference between the transfer of indicted cases versus unindicted cases is that the unindicted cases can be transferred without judicial review as they are not subject to the regime of Rule 11*bis*.

8 *Rechtbank* (District Court), The Hague, Judgment of 24 July 2007, LJ Number: BB0494, LJ Number of English translation: BB8462.

9 *Gerechtshof* (Court of Appeal), The Hague, Judgment of 17 December 2007, LJ Number: BC0287, LJ Number of English translation: BC1757.

10 *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands), The Hague, Judgment of 21 October 2008, LJ Number: BD6568.

11 Art. 5, Dutch Act Implementing the Genocide Convention, *Staatsblad (Stb.)* 1964, 243. Entry into force: 24 October 1970, *Stb.* 1970, 481.

for two additional jurisdiction grounds for genocide committed in situations of war ('in geval van oorlog'),¹² namely the passive personality principle and the protective principle. The new International Crimes Act which implements the International Criminal Court Statute and which revokes the two previously mentioned acts,¹³ creates universal jurisdiction for genocide within the Dutch legal order, but this act only entered into force on 1 October 2003 and does not have retroactive effect.¹⁴ According to the courts, customary international law could not offer an independent basis for the exercise of universal jurisdiction for genocide either. Even though the Netherlands has a monist approach in its reception of international law, the Dutch Supreme Court held in a previous case — the *Bouterse* case¹⁵ — that it would violate the legality principle as included in the Dutch Constitution to ground a prosecution for torture on universal jurisdiction solely in customary international law.¹⁶ In situations of conflict between customary international law and Dutch legal provisions, the domestic provisions prevail over customary international law. Customary international law can only be applied by the Dutch judge to the extent that it does not contravene national provisions.¹⁷ In the case at hand, the question was whether a customary international rule generating universal jurisdiction for genocide, provided that such a rule existed in 1994, could *complement* the existing domestic jurisdiction principles for genocide rather than setting these aside.

12 Art. 3 (old) jo. Art. 1 (old), Dutch Criminal Law in Wartime Act, *Stb.* 1952, 408. Entry into force: 5 August 1952. Later amended on several occasions, inter alia in 1964 at the occasion of the implementation of the Genocide Convention. In a recent judgment in cassation in the case against Frans van Anraat, the Supreme Court held that it is not required that the Netherlands is involved in the war. *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands), The Hague, Judgment of 30 June 2009, LJ Number: BG4822, § 4.

13 That is, the Dutch Act Implementing the Genocide Convention and the Dutch Criminal Law in Wartime Act.

14 International Crimes Act, *Stb.* 2003, 270. Entry into force: 1 October 2003, *Stb.* 2003, 340.

15 This case concerned Desi Bouterse, former President and junta leader in Surinam, who was charged in the Netherlands for his involvement in the so-called 'Decembermoorden' committed in 1982. For more, see L. Zegveld, 'The Bouterse Case', XXXII *Netherlands Yearbook on International Law* (2001) 97–118.

16 *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands), The Hague, Judgment of 18 September 2001, LJ Number: AB1471, §§ 4.1–4.6.

17 Only certain treaty provisions can have the effect of setting aside contradictory domestic provisions, cf. Arts 93 and 94 of the Dutch Constitution. See for the Dutch system on reception of international law more generally, W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: T.M.C. Asser Press, 2006), at 66–69. On 8 July 2009, a Commission of State has been installed to advise the Government on the need to amend the Dutch Constitution on a number of issues, including the influence of the international legal order on the Dutch legal order, *Stert.* 10354, 9 July 2009. The perceived need to reflect on the adequacy of the current Dutch legal framework on the acceptance of international law has arisen in the context of UN-targeted sanctions and problems of de-listing, the so called 'Kadi-problematique'. See for more, L.J. van den Herik and N.J. Schrijver, 'Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the cases of Kadi and Al Barakaat', 5 *International Organizations Law Review* (2009) 329–338. Potential future amendments of the Constitution as regards the effect of international law in the Dutch legal order might also bear consequences for international criminal law.

The district court answered this question in the negative and this was not reversed by the Court of Appeal nor by the Supreme Court. The district court held that in light of the Dutch legality principle, the Dutch system of jurisdiction had to be understood as being exhaustive, a 'closed system'. Accepting universal jurisdiction on the basis of customary international law would infringe on this system and on the legislator's decision prior to 2003 only to accept a certain number of jurisdiction grounds for genocide, not including universal jurisdiction. The court held that accepting universal jurisdiction for genocide based on customary international law would not be in the interest of legal certainty. It referred to the Conclusion of Advocate-General Nico Keijzer in the *Bouterse* case, that the Dutch legality principle governs jurisdiction principles in the same way as it governs substantive criminal law.¹⁸

The public prosecutor did not base his case on direct universal jurisdiction, but argued instead that the Netherlands had indirect or conferred jurisdiction pursuant to the ICTR referral of Mpambara for genocide to the Netherlands. The basis for such conferred jurisdiction would be Article 4a of the Dutch Criminal Code. This provision reads as follows:

The criminal law of the Netherlands is applicable to anyone against whom proceedings have been transferred to the Netherlands from a foreign state pursuant to a treaty conferring jurisdiction to the prosecutor in the Netherlands.

In the attempt to make this provision applicable to the ICTR referral, two questions had to be answered, namely (i) whether the ICTR could be equated with a foreign state and (ii) whether a treaty conferring jurisdiction to the Netherlands existed. The Dutch government had taken a clear position in relation to these questions in the context of the referral proceedings before the ICTR in the case against Bagaragaza. First of all, it favoured an interpretation of the concept of 'foreign state' that included the ICTR as this would be in line with the importance it attached on facilitating cooperation with the ICTR. Second, the Dutch government presented the view that the Genocide Convention could be regarded as a treaty conferring jurisdiction.¹⁹ The courts did not accept this interpretation. The district court held that a reasonable explanation of the law would provide an affirmative answer to the first question, but it answered the second question negatively. Neither the Genocide Convention nor the UN Charter taken together with the ICTR Statute, the completion strategy and rule 11*bis* could be regarded as a treaty conferring jurisdiction in the sense of Article 4a. The Court of Appeal and the Supreme Court answered both questions negatively. As a result of the finding that Dutch courts had no jurisdiction over crimes of genocide committed in Rwanda in

18 *Rechtbank* (District Court), The Hague, *supra* note 5, §§ 39–40.

19 It referred in this context to Decision of the International Court of Justice in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, judgment of 11 July 1996, at 31: 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention'. Decision, *Bagaragaza* (ICTR-2005-86-11*bis*), Trial Chamber III, 13 April 2007, § 19.

1994, the referral of Bagaragaza was revoked by the ICTR²⁰ whereas the case against Mpambara continued with charges on war crimes and torture.

3. The Lack of a Nexus Required to Convict for War Crimes

In relation to the charge of war crimes committed in a non-international armed conflict, the question of jurisdiction did not present a problem. The Supreme Court had already confirmed in earlier case law that the Dutch Criminal Law in Wartime Act provided universal jurisdiction for war crimes in internal armed conflict.²¹

Article 8 of the Dutch Criminal Law in Wartime Act is a broadly phrased provision that criminalizes ‘the violation of the laws and customs of war’.²² In the application of this provision, the district court adhered to the ICTY case law in *Tadić* that only serious violations of international humanitarian law can attract individual responsibility.²³ The specific rules of international humanitarian law that were relevant in the context of the case against Mpambara concerned

20 In the reports of the ICTR, it is said that the case was revoked because Dutch courts had no jurisdiction. This does not seem to be entirely accurate. Dutch courts did not have jurisdiction over genocide in 1994, but they could exercise universal jurisdiction over war crimes. In fact, the indictment against Bagaragaza was specifically amended to include war crimes charges. However, as ICTR jurisprudence and in fact also the *Mpambara* case have shown, it may not be easy to secure a conviction on war crimes in light of the nexus requirement. It may also be that the case against Bagaragaza was revoked, because it was felt that the charge of war crimes even if resulting in a conviction would not adequately describe Bagaragaza’s criminal behaviour. In relation to the presence requirement, which is a prerequisite for the exercise of universal jurisdiction in the Netherlands, the Dutch government had argued before the ICTR that the requirement would be fulfilled once Bagaragaza’s case was referred by the ICTR to the Dutch authorities. Notably, Bagaragaza had been present in UN Detention Unit in the Netherlands as of 18 August 2005. Cf. Submission by the Kingdom of the Netherlands pursuant to the Order of the Trial Chamber for Further Submissions Concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands of 31 January 2007, *Bagaragaza* (ICTR-2005-86-11bis), 7 March 2007, § 4.3.

21 *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands), The Hague, Judgment of 11 November 1997 (*Knezević* case) NJ 1998/463, and *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands), The Hague, Judgment of 8 July 2008, LJ Number: BC7418, § 6.3.

22 Recently, the Supreme Court of the Netherlands reaffirmed in cassation in the case against Van Anraat that this formulation did not violate the legality principle, *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands), The Hague, Judgment of 30 June 2009, LJ Number: BG4822, § 5.

23 Judgment, *Tadić* (IT-94-1), Appeals Chamber I, 2 October 1998, § 94, as cited in *Rechtbank* (District Court), The Hague, *supra* note 5, § 16. In *Tadić*, the Appeals Chamber formulated the following requirements for a violation of international humanitarian law to be qualified as a war crime: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, certain conditions must be met; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

the violation of personal dignity as prohibited in common Article 3(1)(c) of the Geneva Conventions of 1949 and Article 4(2)(e) of Additional Protocol II of 1977, and threats to commit violence as prohibited in Article 4(2)(h) of Additional Protocol II. In relation to threats to commit violence, the court observed that this behaviour is not prohibited by common Article 3 and as it appeared from the International Committee of the Red Cross Study nor by customary international law. However, the court referred to Article 4(2)(h) of Additional Protocol II for the primary prohibition. In principle, Article 8 of the Dutch Criminal Law in Wartime Act provides the penalization of that primary norm and Dutch case law does not expressly require that the norm is criminalized under international law. However, international criminalization would seem necessary to justify the exercise of universal jurisdiction. In the process of demonstrating such international criminalization, and, in particular, in relation to the *Tadić*-requirement that individual criminal responsibility should exist, the court referred to Article 4(h) of the ICTR Statute in which threats to commit violence had been criminalized.²⁴ However, in theory, the ICTR Statute is only declaratory of existing customary international law, and in line with the *Tadić*-requirements it should thus be shown that the primary prohibition of threats to commit violence as included in Article 4(2)(h) had been criminalized under customary international law in 1994. The court's earlier reference that the primary rule of threats to commit violence was not a rule of customary international law sits somewhat uneasy with this *Tadić*-requirement. If a primary rule, the prohibition, does not belong to customary international law, it seems impossible to construe that the secondary rule, the criminalization, does. The sole reference to the ICTR Statute is not sufficient to prove that a given rule has been criminalized given the nature of this document and the powers of the organ that adopted it.²⁵ In sum, it may well be argued that the war crime of threats to commit violence exists (as the district court eventually did), but this can only be sustained with proper reference to customary international law.

Another unfortunate aspect in the legal reasoning of the court concerns the sequence of the court's findings. In relation to the war crimes charge, the court first held that the crimes committed by the defendant were serious violations of international humanitarian law resulting in individual criminal responsibility. As a second independent step it enquired whether this could lead to a conviction for war crimes. As part of this second step, the court

24 *Rechtbank* (District Court), The Hague, *supra* note 5, § 22. It may be observed that the ICC Statute does not include a similar provision in Art. 8 of its Statute. This does not necessarily mean that the war crime of threat to commit violence does not exist in customary international law, as Art. 10 of the ICC Statute reaffirms. As the non-threshold of the chapeau of Art. 8 of the ICC Statute illustrates, the Court is only meant to deal with the gravest war crimes, and threats to commit crimes may be deemed not to be among those.

25 As noted by an ICTY Trial Chamber: 'the United Nations cannot 'criminalize' any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal': Judgment, *Delalić et al.* (IT-96-21), Trial Chamber, 16 November 1998, § 310.

formulated certain requirements, such as whether an armed conflict existed. However, this seems to be the reverse order. The requirements formulated are pertinent to the first question, and to the question whether international humanitarian law applies at all. Therefore, it would have been logical to address those requirements prior to a decision that international humanitarian law had been violated rather than as an afterthought.

Apart from these legal incongruities, the court's case law on a germane question in relation to the war crimes charges, namely the nexus requirement, can be appraised more positively. The nexus requirement ensures that only crimes that are perpetrated in connection with the armed conflict are qualified as war crimes. The function of the nexus requirement is to distinguish a common crime committed during an armed conflict from a war crime committed as part of or in close connection with the armed conflict. In the first cases adjudicated by the ICTR, accused were convicted for genocide but acquitted of war crimes, precisely because the nexus requirement was not fulfilled.²⁶ In this context, the nexus requirement seemed to play a novel function, namely to distinguish between war crimes and genocide. In some later ICTR cases, the nexus requirement was interpreted more broadly leading to a confused picture on the appropriate interpretation of the nexus requirement in the context of Rwanda. In addition, some national courts have also tried and convicted Rwandan nationals on the basis of war crimes charges.²⁷ In the midst of this rather diffuse picture, the Dutch district court came to a negative finding on the nexus requirement in the case against Mpambara, which led to acquittal of the war crimes charges.

In its reasoning, the district court was most receptive of international case law. It characterized international case law as guiding and referred to the specific instruction of the legislator in the context of the International Crimes Act that Dutch courts had to refer to international case law for legal guidance.²⁸ Accordingly, the district court referred to relevant appeal judgments

26 See for an analysis of this case law, L. van den Herik and E. van Sliedregt, 'Ten Years Later: The Rwanda Tribunal Still Faces Legal Complexities. Some Comments on the Vagueness of the Indictment, Complicity in Genocide and the Nexus Requirement for War Crimes', 17 *Leiden Journal of International Law* (2004) 537–557 and L. van den Herik, 'Commentary on Rutaganda Appeal Judgment', in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals; The International Criminal Tribunal for Rwanda*, Vol. XII (Antwerp: Intersentia, 2007) 1020–1030.

27 *Public Prosecutor v. Niyonteze*, Tribunal Militaire d'Appel, 26 May 2000 and Tribunal Militaire de Cassation, Switzerland, ILDC 349 (CH 2001), judgment of 27 April 2001; *The case against Ntezimana, Mukangango, Mukabutera and Higaniro*, Cour d'assises de l'Arrondissement Administratif de Bruxelles-Capitale, judgment of 8 June 2001; *The case against Nzabonimana and Ndashyikirwa*, Cour d'assises de l'Arrondissement Administratif de Bruxelles-Capitale, judgment of 29 June 2005; and *The case against Ntuyahaga*, Cour d'assises de l'Arrondissement Administratif de Bruxelles-Capitale, judgment of 5 July 2007, R. C. Munyaneza, Cour Supérieure du Québec, chambre criminelle (Superior Court of Québec, criminal chamber), 2009 QCCS 2201, 22 May 2009.

28 *Rechtbank* (District Court), *supra* note 5, § 30. Even though the International Crimes Act is not applicable to this case, the legislator's instruction is indicative of a more general vision on the extent of the Dutch monist approach.

on the nexus requirement, and, in particular, to the *Kunarac* appeal judgment from the ICTY, which explained how a common crime could be distinguished from a war crime. The *Kunarac* appeal judgment mentioned some factors that could be relevant to the determination whether a given act was sufficiently related to the conflict.²⁹ In addition, relevant parts of the *Akayesu* and *Rutaganda* appeal judgment were cited at some length. As opposed to what the public prosecutor had argued, the district court held that the *Kunarac* appeal judgment did not provide a binding legal framework.³⁰ Rather, the district court identified a casuistic approach by the international tribunals in their determination of whether a nexus existed in specific cases. Instead of being based on clear and fixed criteria that can apply equally in all kinds of different situations, the court put forward that this determination was rather dependent on an evaluation of the relevant facts and circumstances of each specific case and situation.³¹ In this context, the court cited Michael Cottier who had set forth that in contemporary non-international or mixed armed conflicts, with a whole range of different actors and less clear-cut front lines, the existence of a nexus would often be less easy to identify.³²

In the specific context of Rwanda, there is much to say in favour of such a strict case-specific interpretation of the nexus requirement. In fact, the interpretation of the nexus requirement goes to the heart of the qualification of what happened in Rwanda in 1994 and how the genocide and the armed conflict are interrelated. The district court followed the initial ICTR evaluation that the genocidal policy and the armed conflict were parallel and interwoven but distinct events. Pursuant to early ICTR findings, the court held that the two events were fundamentally different from each other in terms of policy and objectives.³³ The objective of the genocide was to destroy all Tutsi because of their ethnicity and not because of suspected ties with the Rwandan Patriotic Force (RPF). The objective of the war was to prevent the RPF from taking over power. The mere fact that the war against the RPF was used as a pretext to destroy all Tutsi in Rwanda was in the eyes of the court not sufficient to satisfy the nexus requirement as such a broad interpretation would mean that all Rwandan acts of genocide could be qualified as war crimes. From later case law, it appears as if the ICTR has embarked on a reappraisal of the relationship between the genocide and the armed conflict. Most notably, in *Military I*, a Trial Chamber held that the core of the charges concerned

29 Judgment, *Kunarac and others* (IT-96-23-A), Appeals Chamber, 12 June 2002, §§ 57–59.

30 On the basis of § 58 of the *Kunarac* appeal judgment, the Dutch public prosecutor argued a crime can be qualified as a war crime if the armed conflict substantially influences the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.

31 *Rechtbank* (District Court), The Hague, *supra* note 5, § 47.

32 M. Cottier, 'Comment on Art. 8', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (2nd edn., Ch.H. Beck/Hart/Nomos, 2008), at 293, note 51.

33 *Rechtbank* (District Court), The Hague, *supra* note 5, §§ 58–59.

'organised military operations ordered at the highest levels' and³⁴ the defendants were convicted for genocidal massacres both under the label of genocide as well as war crimes.³⁵ The Trial Chamber held that the facts that the Tutsi ethnic minority in Rwanda was equated with the RPF and that all Tutsi were targeted under the pretext of identifying RPF collaborators were sufficient to fulfil the nexus requirement.³⁶ Following this line of thinking, the nexus was even deemed fulfilled in situations where an accused contributed to the killing of civilian Tutsi's in a given area under the pretext of identifying RPF collaborators, while he knew that the RPF was not present in that area.³⁷ It remains to be seen whether the ICTR will definitely pursue this line of reasoning which emphasizes the pretext of the perpetrators over their actual knowledge and intentions.

The two approaches — the initial ICTR case law and the findings in the *Mpambara* case versus the *Military I* jurisprudence — are markedly different. Ultimately, the choice between a strict and a lenient interpretation of the nexus requirement is a policy decision. Often, expansive interpretations are favoured in substantive international criminal law with a view to enlarging the coverage of the penalization. This has led to considerable overlap between the three core crimes resulting in numerous cumulative convictions. One is left wondering whether this is such a welcome development in light of the educational purposes of international criminal law. Conversely, stricter interpretation of characterizing elements of the core crimes would assist in offering a more unambiguous legal articulation of the criminal acts, as it will more often result in single convictions using the crime definition that most accurately depicts the underlying criminal behaviour. In the concrete case of *Mpambara* where no jurisdiction over genocide could be exercised, a lenient interpretation on war crimes resulting in a conviction for that crime could possibly even distort the narrative that law aims to provide. Uncomfortably, it risks painting the same picture as the discourse of genocide denial, which — still present in some communities in the diaspora — refers to the genocide as the Great War.³⁸ Clearly, the relationship between the genocide and the armed conflict is much more intricate than perceiving the genocide as an inherent part of or collateral event to the armed conflict. In sum, a single qualification of war crimes is problematic to the extent that it does not provide a proper account of the most pertinent characteristics of the crimes committed (i.e. the genocidal intent to destroy all Tutsi), but rather emphasizes the pretext used by the perpetrators (i.e. war against the RPF and all collaborators).

Obviously, a full acquittal as a result of lack of jurisdiction and lack of a fitting crime definition, in the face of proven genocidal acts is also highly undesirable and from that perspective the conviction on torture may be welcomed.

34 Judgment, *Baqosora et al.* (ICTR-98-41-T), Trial Chamber I, 18 December 2008, § 1996.

35 *Ibid.*, chapter IV of the Judgment, in particular §§ 2228 and 2257.

36 *Ibid.*, §§ 2231–2236.

37 *Ibid.*, §§ 1824 and 2235.

38 Denial of genocide was also one of the defence arguments in Judgment, *Niyitegeka* (ICTR-96-14-T14), Trial Chamber I, 16 May 2003, §§ 376–396.

However, one may also be tempted to revisit the question on jurisdiction over genocide.

4. The Question of Jurisdiction for Genocide in Hindsight

The lack of universal jurisdiction to try genocide committed prior to 2003 has in this case resulted in a conviction that does not capture the facts of the case adequately as it does not refer to the broader genocidal context in which the crimes took place. Starting from the premise that fair labelling is important in light of the educative purpose of international criminal law,³⁹ the question arises as to how this can be remedied. First of all, the slightly inopportune legal qualification may lead to a re-evaluation of the decision not to grant retroactive effect to the International Crimes Act. The Supreme Court alluded to this possibility when it observed no legal provision would have opposed this in light of the second para of Article 7 of the European Convention on Human Rights.⁴⁰ In an annotation to the judgment, former Advocate-General Nico Keijzer cautioned not to embark on a too flexible approach to the legality principle. He indicated that the International Crimes Act also criminalizes new crimes, such as the use of anti-personnel mines, which were not covered by Article 7, para 2 of the European Convention on Human Rights. In relation to crimes against humanity, it may further be observed that the contours of the definition of this crime have only recently been carved out with more precision. For long the requirement that crimes against humanity be committed in the context of an international armed conflict was considered to be part of the law.⁴¹ To remove this requirement with retroactive effect in addition to granting universal jurisdiction for this and all other crimes of the International Crimes Act does pose some problems from the perspective of the legality principle. It may be for that reason that most states parties to the Rome Statute have given their implementing legislation forthlooking temporal scope. Canada provides a different example and allows prosecution of crimes committed before the entry into force provided that the conduct was criminal

39 See for an analysis of the scope and justification of the criminal law principle of 'fair labelling', J. Chalmers and E. Leverick, 'Fair Labelling in Criminal Law', 71 *The Modern Law Review* (2008) 217–246.

40 *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands), The Hague, *supra* note 10, § 6.2.

41 In the context of a discussion on the applicability of crimes against humanity to Cambodian crimes committed in the mid- to late-1970s, it has been argued that the armed conflict requirement disappeared from the international customary law definition of crimes against humanity between 1968 and 1984 and that there is insufficient state practice to provide a more specific date; S. Ford, 'Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?', 24 *UCLA Pacific Basin Law Journal* (2007) 125.

pursuant to Canadian or international law. As such, the Canadian law is not retroactive, but retrospective.⁴² Even though this precise distinction was rejected by the Supreme Court in the *Bouterse* case, the Court may accept such distinction if there is a proper and explicit domestic legislative act that supports it. Granting the International Crimes Act retrospective effect would not infringe on the Dutch legality principle to the same extent as granting the Act retroactive effect would. In this scenario, universal jurisdiction over genocide committed in 1994 could be justifiably exercised.

With the academic privilege of reflecting on the complete case in hindsight, it may be observed that in the alternative to granting the entire International Crimes Act retrospective effect, another option could have been to interpret the jurisdiction provisions on genocide somewhat more leniently. Even though Dutch law does not provide for universal jurisdiction for genocide, it does vest jurisdiction based on the protective principle in the Criminal Law in Wartime Act.⁴³ The protective principle grants jurisdiction over conduct that damages national security or other central state interests.⁴⁴ The question is how this principle should be interpreted in relation to the crime of genocide. Which are the protected interests of the Netherlands in relation to genocidal acts committed abroad? The district court indicated that the parliamentary history did not provide any clarification. By lack of guidance, the court held that the Dutch interests could be harmed by the crime but not by the lack of a possibility to prosecute. From that it concluded that no Dutch interest had been violated.⁴⁵ On appeal, the Advocate-General argued that the importance of maintaining the international legal order should be considered a Dutch interest and also pointed to the special role of the Netherlands as a host for international courts and tribunals. The court of appeal accurately observed that such an interpretation in fact equated the protective principle with the universality principle and held that such a broad interpretation could not have been the

42 R. Hage, 'Implementing the Rome Statute: Canada's Experience, in States Responding to Issues arising from the ICC Statute; Constitutional, Sovereignty, Judicial Cooperation and Criminal Law', in R. Lee (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Ardsley, NY: Transnational Publishers, 2005) 47–55, at 52. Also see W.A. Schabas, 'Canadian Implementing Legislation for the Rome Statute: Jurisdiction and Defences', in M. Neuner (ed.), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (Berlin: Berliner Wissenschafts-Verlag, 2003) 35–43, at 37.

43 This form of jurisdiction only exists for genocide committed in situation of war. Building on ICTY jurisprudence on crimes against humanity, it can be argued that the requirement of the existence of an armed conflict in the context of jurisdiction can be interpreted differently than the nexus requirement for war crimes as a substantive element of crime. See e.g. Judgment, *Tadić* (IT-94-1), Appeals Chamber, 15 July 1999, § 251: 'A nexus between the accused's acts and the armed conflict is not required, as is instead suggested by the Judgment. The armed conflict requirement is satisfied by proof that there was an armed conflict'.

44 I. Cameron, 'International criminal jurisdiction, protective principle', *Max Planck Encyclopedia of Public International Law* (online edition at <http://www.mpepil.com>), § 1.

45 *Rechtbank* (District Court), The Hague, *supra* note 5, § 25.

intention of the legislator.⁴⁶ This may well be true to the extent that the Dutch Criminal Law in Wartime Act did vest universal jurisdiction for others crimes, and thus made the explicit choice not to do so for genocide. However, the current reasoning of the Dutch courts mischaracterizes the nature of genocide as an international crime and in effect renders the protective principle for genocide almost meaningless. This cannot have been the intention of the legislator either. It is well agreed that international crimes are crimes *erga omnes*. The protected interests of international criminal law are broadly defined as 'peace, security and the well-being of the world'.⁴⁷ From this perspective, any core international crime directly impairs the interests of the international community and thus of each state being a part of that community. Thus, the crime of genocide by its nature damages Dutch interests. If we do not embark on such a 'contemporary' interpretation of the protective principle that in fact equals it with the universality principle, which other reasonable interpretation of the protective principle in relation to genocide can there be? One might conceive of a situation in which a state wishes to 'protect' a minority group in another state with which it has ethnic links. However, that scenario is not easily applicable to the Netherlands. Cryer has also argued that apart from the crime of aggression and the unique case against Adolf Eichmann, all imaginable uses of the protective principle in relation to international crimes overlap with other heads of jurisdiction.⁴⁸ Moreover, Cassese has argued in relation to the passive nationality principle that resort to this principle in the case of international crimes is incongruous, as these crime injure humanity regardless of the nationality of the victims.⁴⁹ The same reasoning could well apply to the protective principle. It is telling that Cassese does not include this principle in his list of accepted heads of jurisdiction.

5. Some Concluding Observations

The *Mpambara* case can be seen as part of a 'common judicial enterprise'⁵⁰ involving national as well as international criminal courts with the ultimate aim of combating impunity in accordance with the rule of law. The emanating interaction between international and national criminal courts presents a relatively new chapter in transjudicial communication, which is worth investigating. In the specific context of Rwandan crimes, transjudicial communication is taking place on various themes, such as (i) trying Rwandese genocide

46 *Ibid.*, § 11.

47 ICCSt., Preamble (3), as cited by G. Werle, *Principle of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), at 27.

48 R. Cryer et al., *International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), at 43.

49 A. Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2008), at 337–338.

50 Those words are borrowed from A. Slaughter, 'A Typology of Transjudicial Communication', 29 *University of Richmond Law Review* (1994–1995) 99–137, at 122.

suspects on the basis of universal jurisdiction, (ii) the question of transmitting genocide suspects to Rwanda for trial⁵¹ and (iii) the trial of alleged RPF atrocities in 1994 as well as the attack on the Presidential plane which triggered the genocide.⁵² The *Mpambara* judgment belongs to the first category and presents a positive example of transjudicial communication, mainly with the ad hoc Tribunals. As a result of the open Dutch legal culture and the express instruction of the legislator to seek guidance from international criminal courts, the district court paid careful attention to relevant international case law. In the typology of Anne-Marie Slaughter who distinguished between types of transjudicial communication, inter alia according to their degree of reciprocal engagement,⁵³ this communication can be classified either as a monologue by the ICTR or as an intermediated dialogue, depending on whether the ICTR was a self-conscious participant in the conversation. Given that the Security Council Resolution establishing the ICTR made express reference to the ‘need for international cooperation to strengthen the courts and judicial system of Rwanda’,⁵⁴ it may be argued that national courts, at least Rwandan national courts, were supposed to be within the audience of the ICTR. Moreover, the completion strategy enhances the ICTR’s dependence on national courts, even those other than Rwandan courts, which also creates an increased need for the ICTR to ensure dissemination of its ideas and legal reasoning. Therefore, the classification of intermediated dialogue between the ICTR and the Dutch courts seems appropriate. From the point of view of the Dutch district court, the function of the communication may be to find inspiration for a legal problem on the one hand as well as to bolster its decision with authority and legitimacy on the other hand. This functional account could also apply for national courts in more dualist systems and as such the *Mpambara* judgment presents an exemplary articulation in an ongoing conversation.

In this conversation, the *Mpambara* judgment also exhibits problems that national courts will be confronted with when prosecuting international crimes. These problems relate to evidence. A pressing question relating to

51 The UK High Court refused the extradition of *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, and Celestin Ugirashebuja, Appellants v. The Government of Rwanda, The Secretary of State for the Home Department*, The High Court of Justice Divisional Court on Appeal from the City of Westminster Magistrates Court, NCN: [2009] EWHC 770 (Admin), Judgment of 8 April 2009. Similarly, France also refused in the cases against Isaac Kamali, Cour d’Appel de Paris (Court of Appeal of Paris), Judgment of 20 February 2008; Pascal Simbikangwa, le Tribunal Supérieur d’Appel de Mamoudzou de Mayotte (Court of Appeal of Mamoudzou de Mayotte), Judgment of 28 October 2008, and Marcel Bivugabagabo, Cour d’Appel de Toulouse (Court of Appeal Toulouse), Judgment of 9 October 2008. Germany equally refused to extradite Onesphore Rwabukombe and Callixte Mbarushimana, Court of Appeal of Frankfurt, Judgment of 3 November 2008. The first court to allow extradition was a Swedish Supreme Court in the case against Sylvere Ahorugeze, Swedish Supreme Court, Stockholm, Ö 1082–09, Judgment of 26 May 2009.

52 See e.g. L. Sadat, ‘Transjudicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity’, 22 *Leiden Journal of International Law* (2009) 543–562.

53 Slaughter, *supra* note 50, at 112–114.

54 *Security Council Resolution on the Establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal*, UN Doc. S/RES/955, 8 November 1994, Preamble.

evidence concerns the reliability of witnesses. In *Mpambara*, the district court provides a comprehensive overview of relevant factors for the determination of reliability of witnesses, which may well be inspirational for other domestic courts exercising extraterritorial jurisdiction. Even though questions of evidence lie at the core of domestic criminal law systems and precise rules will differ from one system to the other,⁵⁵ national and international courts will be confronted with similar problems. Some form of 'collective judicial deliberation'⁵⁶ on these common problems would underscore the idea of an emerging international criminal law *system*. The *Mpambara* judgment presents one more step towards a fairly coherent system.

6. Postscript

In early October 2009, after the completion of this article, the Dutch Minister of Justice announced a proposal to amend Article 4a of the Dutch Criminal Code, the International Crimes Act and the Act on Extradition for International Crimes. The proposed amendments aim to provide the legal basis for the transfer of cases from international courts to Dutch courts and vest Dutch courts with universal jurisdiction over genocide for crimes committed on or after 18 September 1966, the date on which the Genocide Convention entered into force in the Netherlands.

55 The following example of divergent rules of evidence may be given: the Dutch court partially acquitted *Mpambara* as a direct result of the Dutch rule that one witness is not enough. This rule is encapsulated in Art. 342(2) of the Dutch Code of Criminal Procedure. As the lawyer representing victims in this case pointed out in a presentation, the rules of evidence of the ad hoc Tribunals are more relaxed on this point, as is the case in many other civil law systems. L. Zegveld, 'Domestic prosecution of sexual violence; experience in Dutch court rooms', presentation given in the context of a conference on *Sexual violence as international crime — interdisciplinary approaches to evidence*, Center on Law and Globalization of the University of Illinois College of Law and American Bar Foundation in cooperation with The Grotius Centre for International Legal Studies, Leiden University/Campus The Hague and Intervict, Tilburg University, 16–18 June 2009, The Hague.

56 Slaughter, *supra* note 50, at 119.