# CASE NOTES

## SRYYY v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS*

## WAR CRIMES AND THE *REFUGEE CONVENTION*

CONTENTS


I Introduction
II The Facts
III The Issues on Appeal
IV The Full Court's Approach to the Interpretation of Article 1F of the *Refugee Convention*
  A International Instruments since 1951
  B The Significance of the Rome Statute in Defining Individual Criminal Responsibility
V The Relationship between Article 1F of the *Refugee Convention* and the *Rome Statute*
VI The AAT's Application of the Definitions of Crimes against Humanity and War Crimes
VII The Sequel
VIII Critique of the Full Court's Decision and Conclusions


### I INTRODUCTION

In *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* ('*SRYYY*'),[1] the Full Court of the Federal Court of Australia addressed questions concerning the application of international humanitarian law to Australian domestic law. In relation to refugees' claims for protection, the Court explored issues concerning the contemporary understanding of the notions of 'crimes against humanity' and 'war crimes', as they affect the domestic application of the *Convention relating to the Status of Refugees* ('*Refugee Convention*').[2] The meaning of these concepts is also relevant to other

* (2005) 147 FCR 1.

1 Ibid.

2 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954). The *Refugee Convention* was complemented by the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). The relationship between exclusion and protection entailed in applying art 1F of the *Refugee Convention* is discussed by Matthew Zagor, 'Persecutor or Persecuted: Exclusion under Article 1F(A) and (B) of the *Refugees Convention*' (2000) 23(3) *University of New South Wales Law Journal* 164, 168–70.

Commonwealth statutes involving international humanitarian law.[3] In a thoroughly researched judgment, the Court canvassed developments in conventional and customary international humanitarian law and international criminal law relevant to these topics. In so doing, the Court drew on comparative jurisprudence and scholarly writings to a degree that is perhaps unusual in a curial opinion. The Court also addressed the vexed question of the current status in customary international law of the 'defence' of acting under superior orders in response to allegations of individual criminal responsibility.

The primary question posed by *SRYYY* is as follows: in assessing whether persons should be denied refugee protection on the basis that they have allegedly committed war crimes or crimes against humanity, should their conduct be evaluated in terms of the 1951 concepts of those crimes, or upon the interpretation of those crimes as understood in the light of the *Rome Statute of the International Criminal Court* ('*Rome Statute*')?[4] The Court explored this issue in deciding whether the Administrative Appeals Tribunal ('AAT'), a domestic tribunal charged with determining claims to protection, erred in performing *its* statutory function.[5] The case thus entails issues of both international and administrative law.

*SRYYY* is not an isolated instance of claims to refugee status raising issues of the claimant's possible ineligibility due to their involvement in war crimes or crimes against humanity. Similar issues have arisen in other decisions of the AAT[6] and the Federal Court.[7] The fact that there are several similar cases stresses that these are issues of concern to the general Australian public. If there are, in Australia, more than a few claimants seeking refugee status who attract allegations of possible complicity in serious offences known to international criminal law, is there an obligation on the Australian Government to go beyond

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[3] See *International Criminal Court Act 2002* (Cth) sch 1; *Criminal Code Act 1995* (Cth) ss 268.1–101 (establishing offences against humanity and related offences as crimes under Australian law), s 268.116 (defence of superior orders); *International War Crimes Tribunals Act 1995* (Cth) schs 2, 4 (establishing crimes that are able to be tried by the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR')); *Geneva Conventions Act 1957* (Cth) sch 5; *War Crimes Act 1945* (Cth) s 17 (establishing the defence based on laws, customs and usages of war).

[4] Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002). Regarding its adoption by Australia, see Gillian Triggs, 'Implementation of the *Rome Statute for the International Criminal Court*: A Quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507, 529.

[5] *SRYYY* (2005) 147 FCR 1, 6.

[6] See, eg, *SRNN v Department of Immigration and Multicultural Affairs* [2000] AATA 983; *AXOIB v Minister for Immigration and Multicultural Affairs* [2002] AATA 365; *SRDDDD v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] AATA 150; *SRHHH v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 1020; *SROOOO v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] AATA 91; *WBR v Minister for Immigration and Multicultural Affairs* [2006] AATA 754.

[7] See, eg, *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 561; *WAKN v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 579; *VWYJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 658 (Unreported, Sundberg J, 18 April 2005); aff'd [2006] FCAFC 1 (Unreported, Gray, Kiefel and Lander JJ, 16 March 2006); *SZCWP v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 9 (Unreported, Wilcox, Gyles and Downes JJ, 20 February 2006). Justice McHugh in the High Court has also noted the role of art 1F of the *Refugee Convention* in barring claims to protection status: *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, 24.

merely rejecting their claims? Should the Australian Government go further and actually institute prosecutions for war crimes or crimes against humanity in such instances? These questions underscore the significance and contemporary relevance of cases like *SRYYY*.[8]

This case note explores some of the ramifications of the Court's decision, particularly with respect to the growth of customary international criminal law, and comments on the implications for domestic decision-making regarding refugee applications.

## II THE FACTS

The appellant, a Sri Lankan national, applied for a protection visa under the *Migration Act 1958* (Cth) ('*Migration Act*') 'on the basis that he was a person to whom Australia owed protection obligations under the *Convention Relating to the Status of Refugees 1951*'.[9] Under art 1A(2) of the *Refugee 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 he or she were to return to their country of nationality.

The applicant claimed that while serving in the Sri Lankan army in Jaffna in late 1999 and early 2000, he had participated in actions against the Liberation Tigers of Tamil Elan ('LTTE'), and that he feared he would be killed if he returned to Sri Lanka.[10] He disclosed that during his service he was required to interrogate Tamil civilians suspected of having links with the LTTE and had engaged in violent acts to extract information from them.[11]

The irony in the circumstances was that the appellant's predicament arose from his own disclosure to the Minister's delegate that he had been engaged in the interrogation of LTTE suspects, which in turn gave rise to his fear of returning to Sri Lanka. That interrogation potentially involved torture or the mistreatment of prisoners that was relevantly criminal. That disclosure contained the seeds of his dilemma. It implicitly set in motion a most attenuated factual, and legally complex, inquiry.

The Minister's delegate refused the appellant's application for a protection visa on the grounds that the *Refugee Convention* did not apply.[12] This was

8 The public interest in these issues is expressed in a newspaper comment by Debra Jopson and Lisa Pryor, 'Saddam Bodyguard Free in Adelaide', *The Age* (Melbourne, Australia) 5 December 2005, 2. Jopson and Pryor report that as many as 30 possible war criminals have been denied refugee status because of reasons to consider that they may have committed serious breaches of international criminal law. While some of them may not be subject to prosecution under more recent Commonwealth legislation dealing with war crimes and crimes against humanity (see above n 3) because their conduct occurred before that legislation was enacted, many may be subject to prosecution under the *Crimes (Torture) Act 1988* (Cth). Of course, the standard of proof to sustain a conviction in such cases would be more stringent than that applicable in proceedings concerning the denial of refugee status. The topic of possible prosecutions goes beyond the scope of this case note and is not considered further.

9 *SRYYY* (2005) 147 FCR 1, 3.

10 Ibid 4.

11 Ibid.

12 Ibid. Under s 503(1)(c) of the *Migration Act 1958* (Cth), a person is not entitled to enter or remain in Australia if they are refused a protection visa under art 1F of the *Refugee Convention*.

because the delegate determined that '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'[13] and therefore fell within the exclusionary provision of art 1F(a) of the *Refugee Convention*, which reads:

> F. 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 …

The AAT reviewed the delegate's decision pursuant to s 500 of the *Migration Act*, but '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*'.[14] Accordingly, the AAT affirmed the delegate's decision.[15] On appeal to the Federal Court, on the ground that the AAT had erred in law, the Court held that the AAT was entitled to conclude that by reason of art 1F(a), the provisions of the *Refugee Convention* did not apply to the appellant.[16] The appellant then appealed to the Full Court of the Federal Court.[17]

## III The Issues on Appeal

The appellant contended that the AAT could not rely on the definitions of 'crimes against humanity' and 'war crimes' in the *Rome Statute* because the statute only entered into force on 1 July 2002.[18] The *Rome Statute* therefore could not apply in respect of any acts committed by the appellant prior to that date. The appellant also contended that the AAT had further erred, in particular, by not addressing whether:

- His acts were 'committed as part of a widespread or systematic attack directed against the civilian population pursuant to or in furtherance of' the policy of a state;[19]
- His acts were 'committed in the course of an armed conflict';[20] and
- The defence of superior orders under art 33 of the *Rome Statute* (which had not been considered by the AAT) was applicable.[21]

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13 *SRYYY* (2005) 147 FCR 1, 4.

14 Ibid 5.

15 *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] AATA 927, [64].

16 *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1588 (Unreported, Lindgren J, 19 December 2003) [36]–[41].

17 *SRYYY* (2005) 147 FCR 1, 2.

18 Ibid 6.

19 Ibid.

20 Ibid.

21 Ibid. If there were serious reasons for considering that the defence of superior orders had been made out, art 1F(a) of the *Refugee Convention* would not apply in respect of relevant crimes allegedly committed by the appellant: see, eg, *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 ('*Dhayakpa*'); *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173.

The appellant maintained that by reason of these failures, the AAT had fallen into jurisdictional error by failing to perform the review function statutorily conferred upon it.[22] The Full Court was therefore required to address whether the AAT had erred by:

- Misapplying the definitions of crimes against humanity and war crimes in the *Rome Statute*;[23] or
- Failing to apply the defence of superior orders set out in art 33 of the *Rome Statute*.[24]

## IV THE FULL COURT'S APPROACH TO THE INTERPRETATION OF ARTICLE 1F OF THE *REFUGEE CONVENTION*

The Court interpreted art 1F(a) in accordance with the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*').[25] In interpreting art 1F(a), regard could therefore be had to the ordinary meaning of the terms of the *Refugee Convention* 'in their context and in the light of its object and purpose'.[26] In particular, the Court considered the development of international criminal law following the Second World War to be an important contextual element of the operation of art 1F.[27] While prior to that time international law governing the conduct of armed conflicts had not provided for individual criminal responsibility, by the time that the *Refugee Convention* was drafted in 1951, 'a number of instruments dealing with international crimes had come into existence'.[28] These included, importantly, the *Charter of the International Military Tribunal* ('*London Charter*'),[29] annexed to the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European*

[22] *SRYYY* (2005) 147 FCR 1, 7.

[23] Ibid.

[24] Ibid.

[25] Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). The Full Court cited *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 251–6 (McHugh J) as authority for this: *SRYYY* (2005) 147 FCR 1, 7. 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'. This permits the terms of a treaty to be read primarily textually, but also contextually and teleologically: see Gillian Triggs, *International Law: Contemporary Principles and Practices* (2006) 526. However, some argue that in the end all three approaches tend to merge and overlap: see, eg, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 291–9.

[26] *Vienna Convention*, above n 25, art 31(1).

[27] *SRYYY* (2005) 147 FCR 1, 8.

[28] Ibid.

[29] *Charter of the International Military Tribunal*, annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945).

*Axis*.[30] These instruments provided for the trial of war criminals by the Nuremberg International Military Tribunal ('IMT'). The offences to be tried by the IMT were crimes against peace, war crimes and crimes against humanity.[31] Similar, though not identical, definitions of those kinds of crimes were applicable in relation to the trials of lesser Axis war criminals[32] and also to the trials of Japanese war criminals by the International Military Tribunal for the Far East.[33]

Regarding pleas of obedience to superior orders, art 8 of the *London Charter* provides that acting pursuant to an order of his or her government or of a superior should not free a defendant from responsibility, but could be considered in mitigation of punishment. To similar effect, in 1950, the International Law Commission published its *Principles of International Law Recognized in the Charter and the Judgment of the Nürnberg Tribunal*, principle IV of which states:

> 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.[34]

Also forming part of the context surrounding the drafting of the *Refugee Convention* was the *Convention on the Prevention and Punishment of the Crime of Genocide*,[35] which defined the crime of genocide, and the four *Geneva Conventions* adopted by the UN in 1949.[36] Each of the *Geneva Conventions*

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30 *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945).

31 *London Charter*, above n 29, art 6.

32 *Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, enacted 20 December 1945, art II(a)(b), 3 *Official Gazette Control Council for Germany* (1946), 50–5 ('*Control Council Law 10*'), cited in M Cherif Bassiouni (ed), *International Criminal* Law (2nd ed, 1999) vol 3, 69.

33 *Charter of the International Military Tribunal for the Far East*, TIAS 1589, arts 5(a), 5(b), 5(c) (19 January 1946) ('*Tokyo IMT Charter*').

34 'Formulation of Nürnberg Principles' [1950] *Yearbook of the International Law Commission*, vol II, UN Doc A/CN.4/22, 191. The General Assembly directed the International Law Commission to formulate the principles of international law recognised in the *London Charter* and the Nuremberg IMT judgment. See *Formulation of the Principles Recognized in the* Charter of the Nürnberg Tribunal *and in the Judgment of the Tribunal*, GA Res 177 (II), UN GAOR, 2nd sess, 123rd plen mtg, UN Doc A/RES/177 (II) (21 November 1947).

35 Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

36 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*').

defined various war crimes, referred to broadly as 'grave breaches'.[37]

The Court also considered that art 1F of the *Refugee Convention* should be interpreted in light of art 14 of the *Universal Declaration of Human Rights* ('*UDHR*'),[38] which reads:

> 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.

When the *Refugee Convention* itself was under negotiation, a proposal was made to refer to art 14(2) of the *UDHR* with a view to expressly excluding war criminals from the protection of the *Refugee Convention*.[39] The final form of art 1F(a) did not, however, refer to *specific* international instruments defining the international crimes that would attract exclusion from the protection afforded by the *Refugee Convention*. Rather, as the Court saw it, 'the definition of such crimes was intended to be by reference to international instruments drawn up to make provision in respect of such crimes'.[40] As such, the Court concluded that the primary purpose of art 1F was to ensure that the protection conferred by the *Refugee Convention* was not to extend to persons who should not be protected because of past criminal misconduct.[41]

Significantly however, the Court also found that the reference in art 1F(a) to crimes against peace, war crimes and crimes 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'.[42] The Court recognised that the rules of international law are dynamic and capable of future evolution.[43] The drafters of art 1F allowed for the discretion of the decision-maker to draw upon definitions of such crimes in unspecified instruments.[44] This would encompass situations where a future international instrument either reflected pre-existing customary international law or crystallised or created a new rule of customary international law.[45]

### A *International Instruments since 1951*

Having accepted that the relevant crimes in art 1F(a) should be given an ambulatory content, the Court also had regard to a number of international

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37 *Geneva Convention I*, above n 36, art 50; *Geneva Convention II*, above n 36, art 51; *Geneva Convention III*, above n 36, art 130; *Geneva Convention IV*, above n 36, art 147.

38 GA Res 217A (III), UN GAOR, 3rd sess, 183th plen mtg, UN Doc A/RES/217A (III) (10 December 1948). See *SRYYY* (2005) 147 FCR 1, 10.

39 Conference of the Plenipotentiaries, *Texts of the Draft Convention and the Draft Protocol to Be Considered by the Conference*, UN Doc A/CONF.2/1 (12 March 1951) art 1E.

40 *SRYYY* (2005) 147 FCR 1, 10.

41 Ibid, citing *Pushpanathan v Canada* [1998] 1 SCR 982, 1028 (Bastarache J).

42 *SRYYY* (2005) 147 FCR 1, 11.

43 Ibid.

44 Ibid.

45 Ibid, citing *New South Wales v the Commonwealth* (1975) 135 CLR 337, 466 (Mason J); *North Sea Continental Shelf (Germany v Denmark; Germany v the Netherlands) (Judgment)* [1969] ICJ Rep 3, 37–43.

instruments that prescribed international crimes subsequent to the *Refugee Convention*.[46] These included the *International Convention on the Suppression and Punishment of the Crime of Apartheid* ('*Apartheid Convention*')[47] and the two *Protocols Additional to the Geneva Conventions*.[48] *Protocol I* enumerates further acts constituting 'grave breaches' of the protocol, while *Protocol II* specifically addresses conduct occurring in armed conflicts of a non-international character, that is, internal armed conflicts.[49]

Of particular relevance to the evolution of individual criminal responsibility, the Court pointed to the establishment of ad hoc criminal tribunals to try crimes committed during the conflicts in the former Yugoslavia[50] and Rwanda[51] in 1993 and 1994 respectively.[52] The Court noted that art 2 of the *Statute to the International Criminal Tribunal for the Former Yugoslavia* ('*ICTY Statute*')[53] explicitly defines 'grave breaches' of the *Geneva Conventions* to include acts such as wilful killing or causing great suffering or serious injury, while art 3 specifies kinds of conduct constituting violations of the laws or customs of war.[54] Further, art 4 deals with offences amounting to genocide, while art 5 addresses crimes against humanity. Article 5 authorises the ICTY to prosecute persons responsible for, among other acts, the following crimes when committed in armed conflict (whether international or internal in character) and directed against any civilian population: murder;[55] torture;[56] rape;[57] and other inhumane acts.[58]

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46 *SRYYY* (2005) 147 FCR 1, 11–12.

47 Opened for signature 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976). Article 1 declares that 'apartheid is a crime against humanity'.

48 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

49 See *SRYYY* (2005) 147 FCR 1, 12.

50 SC Res 808, UN SCOR, 48th sess, 3175th mtg, UN Doc S/RES/808 (22 February 1993); SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993). These resolutions established the ICTY.

51 SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994). This resolution established the ICTR. Note that the surrender of putative offenders to both the ICTY and ICTR by Australia is governed by the *International War Crimes Tribunals Act 1995* (Cth) schs 2, 4.

52 See also *SRYYY* (2005) 147 FCR 1, 17. There, the Full Federal Court noted that '[t]he statute establishing the Special Court for Sierra Leone' defined crimes against humanity and war crimes 'in a manner that closely resembled the definitions for the ICTR'. The Special Court for Sierra Leone was established pursuant to SC Res 1315, UN SCOR, 55th sess, 4186th mtg, UN Doc S/RES/1315 (14 August 2000).

53 Annexed to *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) art 2.

54 *SRYYY* (2005) 147 FCR 1, 12.

55 *ICTY Statute*, above n 53, art 5(a).

56 Ibid art 5(f).

57 Ibid art 5(g).

58 Ibid art 5(i).

In regard to individual responsibility, art 7(4) of the *ICTY Statute* provides 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.

This appears to reflect the contemporary view as at 1994 that obedience to superior orders was still not accepted as excusing individual criminal responsibility.

### B *The Significance of the* Rome Statute *in Defining Individual Criminal Responsibility*

After noting that prior to 1998, there had been some divergence of opinion in international instruments concerning the definitions of the crime of genocide, crimes against humanity and war crimes, the Court accepted that the adoption of the *Rome Statute* on 17 July 1998 marked, in the words of Professor Cassese,

> 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.[59]

The Court referred specifically to the definition of crimes against humanity in art 7 of the *Rome Statute*, which includes torture.[60] Reference was also made to the art 8(2) definition of war crimes, which includes 'serious violations of article 3 common to the four *Geneva Conventions*' committed in armed conflict not of an international character. Violations of art 3 common to the *Geneva Conventions* include acts committed against persons taking no active part in the hostilities, such as:

- 'Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture';[61] and
- 'Committing outrages upon personal dignity, in particular humiliating and degrading treatment'.[62]

Having regard to the development of international criminal law since the Second World War, the Court conceded that identifying what constitutes a crime against peace, a war crime, or a crime against humanity, as defined in the

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[59] Antonio Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The* Rome Statute of the International Criminal Court*: A Commentary* (2002) vol 1, 3–4. See *SRYYY* (2005) 147 FCR 1, 14.

[60] *SRYYY* (2005) 147 FCR 1, 15.

[61] *Geneva Convention I*, above n 36, art 3(1)(a); *Geneva Convention II*, above n 36, art 3(1)(a); *Geneva Convention III*, above n 36, art 3(1)(a); *Geneva Convention IV*, above n 36, art 3(1)(a).

[62] *Geneva Convention I*, above n 36, art 3(1)(c); *Geneva Convention II*, above n 36, art 3(1)(c); *Geneva Convention III*, above n 36, art 3(1)(c); *Geneva Convention IV*, above n 36, art 3(1)(c).

international instruments, was not a straightforward or simple task.[63] The Court held that '[a]lthough there is a substantial overlap in the various definitions there are disparities that may, in some cases, have a determinative impact on the outcome of a particular case'.[64] Importantly, however, the Court noted that those instruments 'reflect the development and evolution of customary international criminal law'.[65] In particular, conduct that amounts to a crime against humanity has been 'expanded beyond the conduct enumerated in the *London Charter*'.[66] With respect to the content of individual criminal responsibility, the Court noted that the most significant expansion has been the recent acceptance that individuals may be criminally responsible for war crimes committed in situations of domestic conflict.[67]

The extension of individual criminal responsibility under customary international law for war crimes committed in situations of internal armed conflicts was recognised in 1995 by the decision of the ICTY Appeals Chamber in *Prosecutor v Tadic*.[68] In *Tadic*, the ICTY held that customary international law 'contain[ed] an offence of war crimes committed *during internal armed conflict*, and imported such an offence into Art 3 of the *ICTY Statute*'.[69] In that respect, conduct that would not have been a war crime under the *London Charter* could be so regarded under contemporary notions evident in relevant instruments drafted after 1994.

Equally, the definition of the relevant crime as recognised in customary international law has changed over time, although some conduct has been recognised from an early stage as attracting international criminal responsibility.[70] Thus conduct which may not have satisfied the elements of an international crime at a particular point in time *would* constitute a crime at a later date when the elements of the crime have changed. This was recognised by the Court, which observed that the various instruments referred to thus far 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'.[71] The Court referred to the example of crimes against humanity,

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63 *SRYYY* (2005) 147 FCR 1, 17.

64 Ibid 18.

65 Ibid.

66 Ibid.

67 Ibid. For a discussion of the more embracing approach, see generally Deidre Willmott, 'Removing the Distinction between International and Non-International Armed Conflict in the *Rome Statute of the International Criminal Court*' (2004) 5 *Melbourne Journal of International Law* 196.

68 *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)* Case No IT–94–1–AR72 (2 October 1995) ('*Tadic*'). Professor Cassese regards the Appeals Chamber's treatment in *Tadic* as a more accurate notion of war crimes than previous models insofar as it encompasses serious infringements occurring in internal conflict. That treatment is now reflected in art 8 of the *Rome Statute*: Antonio Cassese, *International Law* (2nd ed, 2005) 437.

69 *SRYYY* (2005) 147 FCR 1, 19 (emphasis added). The Court noted that a similar coverage of acts committed in internal armed conflict was evident in the *Statute to the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (1994) ('*ICTR Statute*') and the *Rome Statute*, above n 4.

70 *SRYYY* (2005) 147 FCR 1, 18.

71 Ibid.

which were required — as defined in the *London Charter* and the *Tokyo IMT Charter* — to have been committed before or during an armed conflict; a requirement that was not retained in many later instruments.[72]

Similarly, the Court observed that the choice of instrument in assessing the appellant's conduct would impact on whether the defence of superior orders was available to him.[73] The Court noted that the AAT had not directed itself to art 33 of the *Rome Statute* which is concerned with the defence of superior orders.[74] So far as is relevant the *Rome Statute* reads:

> 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.[75]

By way of comparison, art 31 of the *Rome Statute* was also cited by the Court.[76] The relevant section reads:

> 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.[77]

Whereas earlier international instruments such as art 8 of the *London Charter* ruled out recourse to the defence of acting under superior orders for crimes under international law, later instruments conceded that it could be applicable in limited circumstances.[78] In this context, the *Rome Statute* diverged from the earlier international instruments on this point, by providing that in certain

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[72] Ibid. These later instruments include: *ICTY Statute*, above n 53, art 3; *Rome Statute*, above n 4, art 7; *Apartheid Convention*, above n 47, art 2.

[73] *SRYYY* (2005) 147 FCR 1, 19.

[74] Ibid 5.

[75] *Rome Statute*, above n 4, art 33.

[76] *SRYYY* (2005) 147 FCR 1, 16–17.

[77] *Rome Statute*, above n 4, art 31 (emphasis added).

[78] *SRYYY* (2005) 147 FCR 1, 19–20. The Court also acknowledged that superior orders could be raised in the context of a defence of duress: at 19. The Court noted that a variant of this argument had been accepted by the Canadian Supreme Court in *R v Finta* [1994] 1 SCR 701 ('*Finta*'). *Finta* is more extensively discussed in the Court's judgment: *SRYYY* (2005) 147 FCR 1, 27–8.

circumstances, a defence of superior orders can relieve a person's criminal responsibility.[79]

The Court acknowledged that the state of customary international law in relation to the defence of superior orders posed a vexed question. As the Court put it:

> 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 …
>
> 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 … [a]nd by several eminent commentators …[80]

This led the Court to conclude that it is 'difficult to discern a clear rule of customary international law with regard to the defence of superior orders'.[81] Although art 33 of the *Rome Statute* does not establish a general rule that superior orders could justify the commission of serious international law crimes, it provides a measure of protection concerning the punishment of persons who unknowingly commit war crimes.[82]

While the Court did not explicitly draw the distinction, two interrelated factors may be seen to be in tension in the Court's treatment of the issue, and therefore require differentiation. The first is the application of art 33 as a defence to matters arising under the *Rome Statute* itself, namely, prosecutions pursued under it. In that context, art 33 provides scope for pleading superior orders as a defence, separate from that of duress, in certain exceptional circumstances such as where the unlawfulness of the conduct is not manifestly evident to the perpetrator. Even in those limited circumstances, it does not constitute a general relief from criminal responsibility. The second aspect is the wider relevance of art 33 in the context of the development of general customary principles of international criminal liability. In that respect it appears to be premature to make a judgement that art 33 is either declaratory of, or constitutes, a fully crystallised and posited customary principle. The Court appears to have accepted this conclusion.

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79 *SRYYY* (2005) 147 FCR 1, 19–20.

80 Ibid 20. Regarding the international instruments in support of the first approach, the Court cited the *London Charter*, above n 29, art 8; *Control Council Law 10*, above n 32, art II(4)(b); *Tokyo IMT Charter*, above n 33, art 6; *ICTY Statute*, above n 53, art 7(4). Regarding the eminent authors who employ the second approach, the Court referred to Ian Brownlee, 'Superior Orders — Time for a New Realism?' [1989] *Criminal Law Review* 396.

81 *SRYYY* (2005) 147 FCR 1, 21.

82 Ibid, citing Andreas Zimmermann, 'Superior Orders' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The* Rome Statute of the International Criminal Court*: A Commentary* (2002) 957, 965–6.

## V THE RELATIONSHIP BETWEEN ARTICLE 1F OF THE *REFUGEE CONVENTION* AND THE *ROME STATUTE*

Having regard to the evolution of the notion of war crimes and crimes against humanity, the Court concluded that 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'.[83] Further, the criterion used by art 1F(a) of the *Refugee Convention* 'requires only that the international instrument defining the crimes in question has been "drawn up to make provision in respect of such crimes"'.[84] It does not need to be in existence at the time of the relevant conflict or conduct, however, it is necessary that the relevant conduct was actually a crime at the relevant time.[85] The Minister, however, submitted that it was not necessary for the purposes of art 1F that the conduct constituted a crime at the relevant time.[86] Such a result would have been surprising given the clear inconsistency with the principle *nullem crimen sine lege*.[87] In fact, the Court held that such an interpretation would be inconsistent with the terms of art 1F and in particular the requirement that '"there must be serious reasons for considering" that the person in question has "committed" a relevant international crime, [which indicates] that the conduct in question constituted a crime at the time that conduct was engaged in'.[88]

In the case of the *Rome Statute*, although not 'in force' in late 1999 and early 2000 when the appellant was alleged to have committed disqualifying crimes, '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'.[89] This was, according to the Court, sufficient to satisfy the reference in art 1F(a) to 'international instruments drawn up'.[90] Accordingly, the *Rome Statute* was an instrument to which the AAT could have recourse. More specifically, the definitions of crimes against humanity and war crimes contained in arts 7 and 8(2)(c) of the *Rome Statute* respectively, 'had crystallised into crimes in international law as at the date of the statute, notwithstanding that the statute was to come into force … at a later date'.[91] The Court therefore held that the AAT did not err in law in applying those definitions.[92]

## VI THE AAT'S APPLICATION OF THE DEFINITIONS OF CRIMES AGAINST HUMANITY AND WAR CRIMES

The critical issue then became whether the AAT failed to correctly *apply* the relevant definitions in arts 7 and 8 of the *Rome Statute* to the appellant's circumstances, resulting in jurisdictional error.

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83 *SRYYY* (2005) 147 FCR 1, 24.
84 Ibid.
85 Ibid 23–4.
86 Ibid 22.
87 There is no crime except in accordance with law.
88 Ibid 23.
89 Ibid 24. While the approach of the Court on this point might be described as 'technical' it is nevertheless supportable in light of the careful historical analysis.
90 Ibid 24.
91 Ibid 26.
92 Ibid.

The Court accepted that the AAT had adopted the correct approach by considering whether there was clear and convincing evidence that the appellant had committed crimes of the requisite character, as opposed to being satisfied 'beyond reasonable doubt'.[93] However, while the AAT had rightly seen the issue as being whether the appellant's alleged acts fell within the relevant definitions of the *Rome Statue*, the question then became whether the AAT correctly *applied the right criteria* in determining that issue.

In the Court's opinion, the AAT had failed in determining whether art 1F(a) precluded the appellant from claiming protection.[94] This was because the AAT, in evaluating the evidence before it, had not given 'specific and careful consideration to each of the elements of "crimes against humanity" set out in Art 7'.[95] More particularly, 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"'.[96] According to the Court, this is 'a critical and distinguishing feature of "crimes against humanity", as defined in Art 7'.[97] Moreover, the AAT did not seem to recognise that there is a fundamental difference between the elements of a crime against humanity and a war crime.[98] In addition, the Court held that the AAT 'failed to address the question whether the appellant had "knowledge" of the existence of any such widespread or systematic attack'.[99] While this question could have been inferentially answered on the basis of the evidence presented to the AAT, it was not considered by the Court to 'overcome this failure'.[100] The Court held that in failing to address essential elements of the offence, the AAT had 'erred in its analysis of whether the appellant's acts might constitute a "crime against humanity"'.[101] Having applied the wrong legal tests, the AAT's decision was vitiated by jurisdictional error.

However, this finding did not conclude the matter. While the AAT's decision might have been flawed by reason of its approach to crimes against humanity, the Court held that that error did not warrant setting the AAT's decision aside unless the appellant could also show that the AAT's consideration of whether he had engaged in war crimes was also in error. This is because a finding that the appellant had engaged in war crimes would still leave the decision-maker open to exclude the appellant from the protection of the *Refugee Convention*.[102] In that respect, the appellant also submitted that 'the AAT had failed to consider

93 Ibid 27. This was consistent with the approach taken in *Dhayakpa* (1995) 62 FCR 556, 563 (French J); *Arquita v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 465, 478; *WAKN v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 579, 592. See also James C Hathaway, *The Law of Refugee Status* (1991) 215; Guy Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996) 97.

94 *SRYYY* (2005) 147 FCR 1, 32.

95 Ibid.

96 Ibid (emphasis in original).

97 Ibid.

98 Ibid.

99 Ibid 33.

100 Ibid.

101 Ibid.

102 Ibid.

whether he was "relieved" of criminal responsibility for conduct that might otherwise amount to a war crime by Art 33 of the *Rome Statute*'.[103]

Noting that neither the AAT nor the Federal Court at first instance had referred to art 33, the Full Court scrutinised the AAT's decision, deducing that it had not effectively considered matters relevant to sustaining the defence of superior orders in relation to possible war crimes.[104] These matters concerned the appellant's alleged ill-treatment and torture of LTTE suspects. While the AAT had considered whether the appellant had acted under some form of 'compulsion', this was consistent with the AAT considering a defence based on duress and not necessarily obedience to superior orders.[105] As the Court observed, however, the *Rome Statute* makes express provision in art 31(1)(d) for 'a defence of duress that is both separate and distinct from the defence of superior orders'.[106] The AAT was therefore required to give separate consideration to whether the latter defence was available.[107] After rejecting the Minister's submission that the AAT's reasons could be read as substantially negating any possible recourse to the defence of superior orders, the Full Court held that the AAT had not directly addressed the relevance of art 33 and had 'made no finding whatsoever concerning the illegality of the orders of the appellant's superiors'.[108] It had failed, therefore, to consider the real questions it had to decide.[109]

Since the AAT's decision was marred by jurisdictional error in several respects, the Court ordered that the matter be remitted to the AAT for reconsideration.[110]

## VII THE SEQUEL

Consistent with the Full Court's orders, the matter was remitted to the AAT for further consideration. In the remitted case, *SRYYY v Minister for Immigration and Multicultural Affairs* ('*SRYYY No 2*'),[111] Deputy President Walker noted that the Full Court had held that the relevant definitions in arts 7 and 8 of the *Rome Statute* were 'appropriate definitions for the AAT to apply'.[112] He also accepted that the AAT could take into account the *Elements of Crimes*,[113] adopted by the Assembly of State Parties to the *Rome Statute* in 2002, in accordance with art 9

[103] Ibid 34.
[104] Ibid.
[105] Ibid 34.
[106] Ibid 35.
[107] Ibid 35. The Court cited *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 561, which had considered the exculpatory element of duress in relation to conduct by an applicant for refugee protection that had occurred before the *Rome Statute* had been 'drawn up': at 34.
[108] *SRYYY* (2005) 147 FCR 1, 37.
[109] Ibid 37–8.
[110] Ibid 38.
[111] [2006] AATA 320.
[112] Ibid [66].
[113] Assembly of States Parties to the *Rome Statute of the International Criminal Court*, *Report of the Assembly of States Parties to the* Rome Statute of the International Criminal Court *First Session*, UN Doc ICC–ASP/1/3 (3–10 September 2002) 119.

of the *Rome Statute*.[114] In establishing whether a crime against humanity involving torture had been committed within the meaning of art 7(1)(f) of the *Rome Statute*, the *Elements of Crimes* indicated that such an offence would occur if:

> 1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
> 2. Such person or persons were in the custody or under the control of the perpetrator.
> 3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
> 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[115]

Having regard to the evidence before him, Deputy President Walker found that each element was satisfied in the applicant's case and that there were serious reasons to conclude that the applicant had committed crimes against humanity by engaging in torture within the definition of art 7 of the *Rome Statute*.[116] That finding alone attracted art 1F of the *Refugee Convention*, so it was unnecessary to make a separate finding about whether the applicant had also committed a war crime.[117] Since the applicant could only invoke the partial defence of superior orders under art 33 of the *Rome Statute* in relation to a war crime and not a crime against humanity, the AAT did not need to consider the superior orders defence.[118] The AAT thus affirmed the decision to deny protection to the applicant.[119]

The applicant then applied to the Federal Court for a constitutional writ to quash the AAT's decision.[120] The first ground of the application contended that the AAT made errors of law in interpreting and applying the *Rome Statute*.[121]

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114 *SRYYY No 2* [2006] AATA 320, [66]. The *Elements of Crimes* were adopted into domestic law by s 3 of the *International Criminal Court Act 2002* (Cth). The Tribunal also noted that Wilcox J had regard to that document when identifying the elements of crimes under the *Rome Statute* in *SZCWP v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 9 (Unreported, Wilcox, Gyles and Downes JJ, 20 February 2006).

115 *Elements of Crimes*, above n 113, 119.

116 *SRYYY No 2* [2006] AATA 320, [131].

117 Ibid [133].

118 Ibid [132]. Since the applicant had not relied on the defence of duress under art 31 of the *Rome Statute*, it also was irrelevant.

119 Ibid [134].

120 *SZITR v Minister for Immigration and Multicultural Affairs* [2006] FCA 1759 (Unreported, Moore J, 15 December 2006) ('*SZITR*').

121 Ibid [20].

The second ground of the application was that:

> The AAT made jurisdictional error by failing to have regard to a defence of superior orders which was available to the Applicant prior to the coming into force of the *Rome Statute* of 1 July 2002 and the acts of the Applicant relied upon secured in 1999 and early 2000.[122]

The application was dismissed in *SZITR v Minister for Immigration and Multicultural Affairs* ('*SZITR*').[123]

In relation to the first ground, Moore J considered the way in which the AAT analysed and applied the relevant provisions of the *Rome Statute*, concluding that the AAT had not erred in applying those provisions, and thus upheld the AAT's decision.[124]

In relation to the second ground, the applicant contended that since the *Rome Statute* was not in force at the time he was alleged to have committed the relevant crimes, and given that there was doubt as to whether art 33 of the statute accurately reflected customary international law, the *Rome Statute* should not be given retrospective effect to the extent that it excludes the defence of superior orders in relation to crimes against humanity.[125] The applicant argued that the Canadian Supreme Court decision of *Finta*[126] was authority for the proposition that the superior orders defence predated the *Rome Statute* and was available under customary international law.[127]

Ultimately, this interesting question was not considered by Moore J on the basis that the applicant had not raised before the AAT the argument that a customary international law defence of superior orders should have been available.[128] In the circumstances, the AAT had no duty to anticipate that argument. The applicant's failure to raise the submission before the AAT 'means that the alleged failure of the Tribunal to have regard to a defence of superior orders arising under customary international law cannot give rise to jurisdictional error'.[129] It was therefore unnecessary to consider whether the various legal propositions contended by the applicant were correct.

## VIII CRITIQUE OF THE FULL COURT'S DECISION AND CONCLUSIONS

Several points may be made about the Full Court's decision and particularly its treatment of the relevant international law concepts.

First, it is evident that the Court conducted a thorough and sophisticated analysis of the way in which art 1F of the *Refugee Convention* should be interpreted. The Court determined that the article should be construed to have an ambulatory operation, as manifested from time to time in particular international instruments.[130] Accordingly, the concepts of 'crimes against humanity' and 'war crimes' should be applied in light of their evolution in customary international

122 Ibid.
123 Ibid [53].
124 Ibid [43]–[46].
125 Ibid [32].
126 [1994] 1 SCR 701.
127 *SZITR* [2006] FCA 1759 (Unreported, Moore J, 15 December 2006) [32]–[33].
128 Ibid [52].
129 Ibid.
130 *SRYYY* (2005) 147 FCR 1, 18.

law. In that regard, it is significant that the Court concluded that the *Rome Statute* reflected contemporary developments in the status of defences based on duress and obedience to superior orders. The Court's approach to these related issues may be supported, with respect, as being consistent with orthodox canons of interpretation of international instruments.[131]

Second, the Court's detailed analysis of the relevant definitions of international crimes and defences exposed several jurisdictional failures on the part of the AAT. Accordingly, the Court overturned the AAT's decision to affirm the Minister's denial of the appellant's refugee status under the *Migration Act*.[132] This, however, entails a certain irony. The appellant had not expressly raised the potential application of art 33 of the *Rome Statute* at either the first AAT hearing or, for that matter, before the primary judge in the Federal Court proceedings.[133]

The most contentious issue addressed by the Court concerns the status in customary international law (to the extent that it was not settled by the *Rome Statute*) of the defence of superior orders. The Court recognised that the nature of the defence and the circumstances in which it can be invoked are still indeterminate.[134] It is submitted that this leaves the precise significance of the putative defence uncertain, in a way which was highlighted by the proposed ground of review raised by the applicant in *SZITR*. The nature, extent and availability of that defence is yet to be determined in contemporary international criminal law.

While art 8 of the *London Charter* originally recognised that superior orders could only be raised in mitigation, not as a defence, the situation now, as conceded by the Court, is somewhat ambiguous.[135] Article 33 of the *Rome Statute*, for the reasons suggested above, departs from that absolute position and permits recourse to a plea of superior orders in some cases. But it is debatable whether that recourse is, at present, solely confined to cases under the *Rome Statute* itself, or represents the emergence of a wider customary principle. It is submitted that the contemporary customary principle will be relevant to determinations of refugee status under the *Migration Act*.

The problem for decision-makers under the *Migration Act*, including the AAT, may be posed as follows: what obligation is imposed on decision-makers to satisfy themselves that there is scope for considering the application of such a defence when determining cases involving art 1F of the *Refugee Convention*? In particular, should the AAT be expected to engage in the same detailed analysis of the complex international law matrix as the Court did? The short answer appears to be that in cases entailing possible war crimes, where art 1F arises for consideration, the decision-maker should consider whether there is evidentiary material that suggests that the applicant may have been acting on superior orders. If so, the relevant tribunal is bound to consider whether, at the time of commission, superior orders could have exonerated the applicant from liability. It is inevitable then, that the complexities of the conventional and customary

[131] This is also consistent with the principles of interpretation laid down in the *Vienna Convention*, to which the Court had regard: see above n 25.

[132] *SRYYY* (2005) 147 FCR 1, 38.

[133] *SZITR* [2006] FCA 1759 (Unreported, Moore J, 15 December 2006) [49]–[50].

[134] *SRYYY* (2005) 147 FCR 1, 20–2.

[135] Ibid 21.

status of the defence, must, over time be faced. In that event, it is submitted that if the alleged crimes occurred after 1998, the most practical course in light of the Full Court's decision is for the decision-maker to apply art 33 of the *Rome Statute* and leave the final resolution for judicial determination. If the alleged crimes occurred prior to 1998, the matter is open to debate. Indeed, as demonstrated in *SZITR*, if they occurred at any time before the *Rome Statute* entered into force on 1 July 2002, there may be scope to argue as to the availability of a customary international law defence.[136]

In remitting the matter to the AAT in order to make findings as to whether the appellant could be relieved of criminal responsibility under art 33 of the *Rome Statute*, the Full Court rendered the AAT's duties difficult. This was because of the relatively inconclusive customary status of the defence of superior orders. While the Court was undoubtedly correct in not evaluating the factual aspects of the appellant's alleged conduct itself, it could have been of greater assistance to the AAT by articulating a more definitive finding in respect of the availability of any customary international law defence. Article 1F(a) of the *Refugee Convention* is clear in referring to *crimes* 'as defined in the international instruments'. However, it is less clear, particularly in light of the long established principles of *nullem crimen sine lege*, that an article of the *Rome Statute* not yet in force at the relevant time could preclude reliance on a customary international law defence, if in fact the defence of superior orders was available at customary law at the relevant time. Despite the Full Court's caution against decision-makers attempting to determine the content of customary international law, the case of *SZITR* indicates that it may not be long before the AAT is placed in the position of being required to undertake such an analysis — or to decide, more controversially, that even if a customary international law defence existed at the relevant time, it cannot be relied upon if not expressed in a conventional instrument.

A further related difficulty for decision-makers may arise from the interaction between the Court's recognition that art 1F of the *Refugee Convention* only applies to conduct which was criminal at the relevant time,[137] and its clear statement that it is inappropriate for the decision-maker to assess whether a particular instrument accurately reflects the state of customary international law. The Court observed in that respect:

> 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 by the appellant. In determining that question it is not appropriate for the Court or the decision-maker to enquire whether the *Rome Statute* accurately reflects the state of customary law at the date of the alleged crime … 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 which … was to avoid the making of such an enquiry.[138]

Given the very real complexities involved in determining the state of customary international law at any given time, which can vex even international

[136] *SZITR* [2006] FCA 1759 (Unreported, Moore J, 15 December 2006) [47]–[52].
[137] *SRYYY* (2005) 147 FCR 1, 23.
[138] Ibid 26.

tribunals, this is an entirely understandable position to take. However, in cases where the conduct in question falls between two instruments that define crimes, or defences to them, differently, or where a crime is included in one instrument but not another, it is hard to see how such an assessment can be avoided, if the decision-maker is to ensure that the conduct was in fact criminal at the relevant time. Taking, for example, conduct which took place in 1965 in the context of an internal armed conflict, a decision will need to be made as to which of the *London Charter* (or other Second World War instruments), or later instruments such as the UN ad hoc tribunal statutes adopted in the 1990s, should be applied. In some cases, such as crimes committed during an internal armed conflict, the conduct was only recognised as criminal by customary international law at some time between the earlier instruments and the UN tribunal statutes which came nearly 50 years later. If the AAT is not to engage in an assessment of when the conduct was in fact recognised as criminal, before determining which is the appropriate instrument to apply, it is faced with a serious dilemma. It is submitted that the appropriate course of action in cases where it is unclear whether the conduct was a crime under customary international law at the relevant time is to apply the instrument which was actually in existence. That may have the undesirable consequence of failing to recognise conduct which was in fact criminal by reference to customary international law, but it is consistent with the beneficial objectives of the *Refugee Convention*.

Finally, in *SRYYY*, the Federal Court has again demonstrated the increasing importance of international law to domestic legal issues. The case of *SRYYY* is another reminder that international law principles are no longer the sole concern of ministers, diplomats and government officers; they are now clearly part of the landscape and province of the judiciary and legal practitioners.

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