Federal Court Cour fédérale

Date: 20210528

Docket: IMM-2232-20

Citation: 2021 FC 507

Ottawa, Ontario, May 28, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

IURII VERBANOV

Respondent

JUDGMENT AND REASONS

[1] One element of the definition of crimes against humanity is that they must be committed as part of a "widespread or systematic attack." The fundamental issue in this case is whether this phrase encompasses a "policy requirement," that is, that the attack must have been committed pursuant to a "State or organizational policy." The issue arises in the context of inadmissibility proceedings against Mr. Verbanov, a former officer of the Moldovan police force, under the

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA], which refers to the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [*Crimes Against Humanity Act*].

[2] The gist of the Minister's case is that the Moldovan police routinely tortures detainees and, given the widespread nature of the practice, this constitutes a crime against humanity. Mr. Verbanov's work as a police officer would amount to a knowing and significant contribution to these crimes, making him inadmissible to Canada pursuant to paragraph 35(1)(a) of IRPA. Mr. Verbanov, on his part, claims that the acts of torture committed by the Moldovan police do not constitute crimes against humanity, as they were not committed pursuant to a State or organizational policy. In its decision, the Immigration Appeal Division [IAD] sided with Mr. Verbanov.

[3] The Minister now seeks judicial review of this decision. His main argument is that the IAD unreasonably disregarded the framework set by the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 [*Mugesera*]. In that case, the Supreme Court stated that a crime could constitute a crime against humanity even though it is not committed pursuant to a policy.

[4] I am dismissing the Minister's application. The facts of *Mugesera* took place before the coming into force of the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS I-3854 [Rome Statute], and the *Crimes Against Humanity Act*, which explicitly refers to the Rome Statute for the definition of crimes against humanity. Article 7(2)(a) of the Rome Statute now establishes a policy requirement. The IAD could therefore reasonably decide that

Mugesera, insofar as it denies the existence of such a requirement, is no longer good law. Further, the IAD's decision does not disregard any precedent set by this Court, nor does it misconstrue the requirements set by article 7(2)(a) of the Rome Statute.

I. Crimes Against Humanity: The Legal Framework

[5] It is difficult to understand the various decisions made in Mr. Verbanov's case without a certain degree of knowledge of the legal framework for the prosecution of crimes against humanity in Canada. Therefore, contrary to the usual practice, I will begin these reasons with a detailed review of this framework, before I turn to the facts and the proceedings. As the changes brought by the Rome Statute with respect to the policy element of the definition of crimes against humanity are a critical aspect of the case, I will provide an overview of the state of the law both before and after the coming into force of this international treaty.

A. *Before the Rome Statute*

(1) International Law

[6] Not all crimes are of international concern. In most cases, punishing crimes is a domestic matter. Nonetheless, some crimes threaten the security and well-being of the global community and their repression rightly belongs to the realm of international law. Crimes against humanity constitute one category of international crimes.

[7] Defining international crimes such as crimes against humanity is a complex endeavour drawing upon the multiple sources of international law—treaties, custom, general principles,

jurisprudence and academic commentary. For our purposes, it is not necessary to engage in a detailed review of the subtle interplay between these sources. It is enough to acknowledge the important role played by custom, especially before the Statute of Rome came into force. For a thorough discussion, see Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011).

[8] To distinguish crimes against humanity from domestic crimes not deserving of international attention, their definition includes an additional element aimed at fully capturing their scale and gravity, over and above the elements of underlying offences such as murder or torture. Defining this distinguishing element has proved challenging.

[9] The first international prosecution of crimes against humanity was in response to the tragedy of the Holocaust and the horrendous crimes of the Nazi regime. The distinguishing element of crimes against humanity was then defined in terms of the relationship of the crime with armed conflict, or what became known as the "war nexus:" *Charter of the International Military Tribunal*, annexed to the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, August 8, 1945, 82 UNTS 279, also known as the *Nuremberg Charter*.

[10] In the 1990s, the commission of mass-scale atrocities in several countries led to the creation of *ad hoc* tribunals with the limited jurisdiction to prosecute international crimes in relation to those events. Most influential amongst them were the International Criminal Tribunal for the former Yugoslavia [ICTY] and the International Criminal Tribunal for Rwanda [ICTR].

As a “war nexus” was not readily established with respect to the events unfolding in Rwanda, the distinguishing element of crimes against humanity was reformulated as a “systematic or widespread attack against any civilian population […]” in the ICTR Statute. On its part, the ICTY Statute retained the “war nexus” in its Statute, but the ICTY interpreted it as a jurisdictional requirement, not an essential element of the crime: *Prosecutor v Tadić (Judgement),* IT-94-1-A, ICTY, 15 July 1999, at paragraphs 248 to 251 [*Tadić*]. Thus, in practice, the “war nexus” was set aside.

[11] Nonetheless, in *Tadić*, the ICTY adopted the concept of “widespread or systematic attack” as the necessary threshold to distinguish between ordinary crimes and crimes against humanity, even though it was not explicitly mentioned, let alone defined, in its own statute. It emphasized the “special nature” and “greater degree of moral turpitude” at the core of these crimes: *Tadić*, at paragraph 271. From that point onward, this requirement had clearly become an essential part of the definition of crimes against humanity.

[12] Yet, the requirement of a “widespread or systematic attack” gave rise to interpretive difficulties. While everyone agreed that random and isolated attacks should not be a matter of international concern and that the concept of “widespread and systematic attack” implied a certain degree of coordination, the articulation of this standard remained controversial. One manner of expressing this degree of coordination was the policy requirement, that is, that the underlying offences must have been committed pursuant to a policy or ideology or to achieve a collective goal; see, for example, William A Schabas, “State Policy as an Element of International Crimes” (2008) 98 J Crim L & Criminology 953, at 970. Another issue was

whether crimes against humanity could only be committed by States or also by other organizations such as guerilla groups. In this regard, the two issues intersected, as the policy requirement was sometimes considered as an impediment to the accountability of non-State groups.

[13] As we will see in the next section, the Rome Statute laid these issues to rest with respect to acts committed after its coming into force in countries that ratified it. The debate remained alive, however, with respect to conduct that took place earlier. Thus, in *Prosecutor v Kunarac, Kovač and Vuković*, Case Nos. IT-96-23-A & IT-96-23/1-A, 12 June 2002, at paragraph 98 [*Kunarac*], the ICTY found that, while useful in determining the existence of a systematic attack, the policy element was not an underlying element of the term "attack" under customary international law. When reading *Kunarac*, however, one must bear in mind the absence in the ICTY Statute of any explicit policy requirement, and indeed the absence of a requirement that the underlying crimes be committed in the context of a systematic or widespread attack. The ICTY, of course, was not applying the Rome Statute, as the facts took place in 1992 and 1993.

(2) Canadian Law

[14] In 1987, Parliament amended the *Criminal Code*, RSC 1985, c C-46, to make crimes against humanity a distinct offence under Canadian law. Section 7(3.76) of the Code defined these crimes by reference to customary or conventional international law. Moreover, Parliament amended the former *Immigration Act*, RSC 1985, c I-2, to render inadmissible to Canada "persons who there are reasonable grounds to believe have committed … a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*". For a history of these

provisions, see Fannie Lafontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012) [Lafontaine, *Prosecuting Genocide*]. This regime remained in force until the adoption of the *Crimes Against Humanity Act* and was considered by the Supreme Court in *Mugesera*.

[15] *Mugesera* dealt with the admissibility of a Rwandan national alleged to have incited murder, genocide and hatred in a speech made in Rwanda in 1992. In its decision, at paragraph 119, the Court distilled four criteria from its analysis of customary international law:

> 1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
>
> 2. The act was committed as part of a widespread or systematic attack;
>
> 3. The attack was directed against any civilian population or any identifiable group of persons; and
>
> 4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

[16] The Court also discussed whether an attack needed to be carried according to a government policy or plan, which was a matter of controversy in international law at the time: *Mugesera*, at paragraphs 157-158. The Court acknowledged the debate, but, relying mainly on *Kunarac*, found that customary international law did not establish such a requirement. The Court, however, was alive to the possibility that this requirement could become an essential element of the definition of crimes against humanity: *Mugesera*, at paragraph 158. It specifically noted that article 7(2)(a) of the Rome Statute, which was already in force but not applicable to

the facts of the case, could effect a change in this regard. This brings me to the review of the new framework created by the Rome Statute and the *Crimes Against Humanity Act*.

B. *After the Rome Statute*

(1) International Law

[17] The work undertaken by the *ad hoc* tribunals evidenced the need for a permanent international court with jurisdiction to prosecute international crimes beyond specific situations. In July 2002, the Rome Statute came into force and established the International Criminal Court [ICC]. It shifted the nature of State response to crimes against humanity from a retroactive, situation-driven and localized approach to a proactive, global and collaborative mindset. It provided a comprehensive definition for all crimes under the ICC's jurisdiction, including crimes against humanity.

[18] The negotiations surrounding the drafting of the Statute reveal that member States intended to reflect customary international law as it existed at the time, not to create new principles: see Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 AJIL 43 at 48-50; Leila N Sadat, "Crimes Against Humanity in the Modern Age" (2013) 107:2 AJIL 335 at 351. As such, they relied on the interpretative foundation laid by the *ad hoc* tribunals and the International Law Commission to define crimes against humanity. The resulting provisions were overall reflective of customary law, while settling certain issues that had given rise to debate: Leena Grover, "A Call to Arms: Fundamental Dilemmas Confronting

the Interpretation of Crimes in the Rome Statute of the International Criminal Court" (2010) 21:3 EJIL 543 at 569.

[19] In particular, the Rome statute settled the debate regarding the policy element and adopted it as a necessary ingredient of crimes against humanity:

7(1) For the purpose of this Statute, "crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:	7(1) Aux fins du présent Statut, on entend par crime contre l'humanité l'un quelconque des actes ci-après lorsqu'il est commis dans le cadre d'une attaque généralisée ou systématique lancée contre toute population civile et en connaissance de cette attaque :
[…]	[…]
(f) torture;	f) torture;
[…]	[…]
(2) For the purpose of paragraph 1:	(2) Aux fins du paragraphe 1 :
(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;	a) Par « attaque lancée contre une population civile », on entend le comportement qui consiste en la commission multiple d'actes visés au paragraphe 1 à l'encontre d'une population civile quelconque, en application ou dans la poursuite de la politique d'un État ou d'une organisation ayant pour but une telle attaque;

[20] The meaning of policy was further defined through the following provision of the *Elements of Crimes*, a set of guidelines adopted by the Assembly of State Parties pursuant to article 9 of the Rome Statute:

> 3. […] It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population.[6]
>
> [6] A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

[21] The ICC has applied the policy requirement in its decisions. Most recently, in *Situation in the Republic of Kenya*, ICC-01/09, 31 March 2010 [*Republic of Kenya*], it summarized its previous comments on the interpretation of the policy requirement:

> 84. The Chamber notes that the Statute does not provide definitions of the terms "policy" or "State or organizational". However, both this Chamber and Pre-Trial Chamber I have addressed the policy requirement in previous decisions. In the case against Katanga and Ngudjolo Chui, Pre-Trial Chamber I found that this requirement:
>
> > [...] ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised - as opposed to

> spontaneous or isolated acts of violence - will satisfy this criterion.

(2) Canadian Law

[22] Parliament enacted the *Crimes Against Humanity Act* to fulfil Canada's obligations under the Rome Statute. While the new legislation retains certain aspects of the former provisions of the *Criminal Code*, for example the definition of crimes against humanity by reference to international conventional and customary law, this is done in a manner that recognizes that the Rome Statute is the result of a significant codification effort and now occupies a pre-eminent place among the sources of international criminal law, given that it attracts the broad consensus of the international community.

[23] Sections 4-7 of the *Crimes Against Humanity Act* explicitly refer to the definition of international crimes listed in the Rome Statute. With respect to crimes committed outside Canada, this is accomplished through the interaction of subsections 6(3) and 6(4). Subsection 6(3) defines crimes against humanity by enumerating a number of underlying crimes and requiring that they constitute crimes under international conventional law, international customary law or the general principles of international law. Subsection 6(4) sets forth a presumption that descriptions of crimes found in the Rome Statute are reflective of customary norms. The relevant portions of these provisions read as follows:

6. (3) The definitions in this subsection apply in this section.	**6. (3)** Les définitions qui suivent s'appliquent au présent article.
crime against humanity means murder, extermination, enslavement, deportation,	**crime contre l'humanité** Meurtre, extermination, réduction en esclavage,

imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.
[…]	[…]
(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.	**(4)** Il est entendu que, pour l'application du présent article, les crimes visés aux articles 6 et 7 et au paragraphe 2 de l'article 8 du Statut de Rome sont, au 17 juillet 1998, des crimes selon le droit international coutumier sans que soit limitée ou entravée de quelque manière que ce soit l'application des règles de droit international existantes ou en formation.

[24] As a result, the Rome Statute becomes the main reference with respect to the definition of international crimes, including crimes against humanity. Not only does it have force as conventional law between countries that ratified it, it is also presumed to reflect international custom as of the date of its signature. The presumption established by Parliament reflects the

intention of the State Parties to the Rome Statute to codify custom and to settle certain debates regarding the definition of international crimes: see, among others, *Tadić*, at paragraph 223.

[25] These requirements are further incorporated by reference in the sections on inadmissibility proceedings: paragraph 35(1)(a) of the *IRPA*. When deciding on the admissibility of a foreign national, the IAD is thus bound to consider the *Crimes Against Humanity Act* and, by extension, the Rome Statute.

[26] It is worth noting that the *Crimes against Humanity Act* does not invalidate the four-prong test that was set out in *Mugesera*, insofar as it complies with current international law. This is evidenced by the test still being used in recent decisions on inadmissibility pursuant to 35(1)(a) of IRPA: see, e.g., *Niyungeko v Canada (Citizenship and Immigration)*, 2019 FC 820; *Varela v Canada (Minister of Citizenship and Immigration)*, 2008 FC 436, [2009] 1 FCR 605. Yet, with respect to conduct taking place after 1998, any discrepancies between prior customary law and the Rome Statute must be resolved in favour of the latter.

II. The Inadmissibility Proceedings in Respect of Mr. Verbanov

[27] The foregoing description of the evolving framework for crimes against humanity in international and Canadian law provides the backdrop for the Minister's attempts to have Mr. Verbanov declared inadmissible to Canada and the decisions rendered by the Immigration and Refugee Board and this Court, to which I now turn.

A. *Facts and Judicial History*

[28] This is the third time this Court is seized with an application for judicial review of a decision regarding the inadmissibility of Mr. Verbanov in relation to alleged crimes against humanity committed by the Moldovan police while he was a junior officer. As this application does not turn on any factual component of the case, I will only briefly summarize the relevant facts and the procedural history of the matter.

[29] Mr. Verbanov was born in Moldova. Between 2007 and 2011, he was a field officer for the Moldovan police service in Chișinău, the capital city. He was assigned to the section tasked with arresting pickpockets in public transit. Due to the undercover nature of his role in apprehending thieves, Mr. Verbanov worked in plain clothes and did not carry weapons or handcuffs. During his time as a police officer, he went to the general police station about three times a week, either to attend a unit meeting or to write an incident report after an arrest. He claims he was never aware of torture or ill treatment of detainees by officers in other divisions. In 2011, he obtained permanent residence in Canada as part of his wife's skilled worker application.

[30] In December 2013, the Canada Border Services Agency issued two inadmissibility reports pursuant to section 44 of IRPA, alleging that Mr. Verbanov was inadmissible on grounds of serious criminality under paragraph 36(1)(c) of IRPA, and of crimes against humanity under paragraph 35(1)(a) of IRPA. The grounds of serious criminality related to charges laid against

Mr. Verbanov in Moldova, which were later dismissed by the Buiuicani Court of the Municipality of Chișinău.

[31] In April 2015, the Immigration Division [ID] determined that Mr. Verbanov was not inadmissible. It found that the testimony of Mr. Verbanov was credible, and that neither he nor officers in his unit had committed acts of violence or torture which could constitute crimes against humanity. On the issue of serious criminality, the ID took into consideration the fact that the criminal complaint against Mr. Verbanov had been dismissed by a competent foreign court. The Minister appealed the ID's conclusions.

[32] In April 2017, the IAD dismissed the appeal. The IAD found that Moldovan police officers committed crimes in a sufficiently systematic manner to qualify as crimes against humanity, but that the Minister had failed to demonstrate that Mr. Verbanov or members of his unit were amongst the perpetrators. The IAD commented that declaring Mr. Verbanov inadmissible on such a basis would effectively render inadmissible all police officers from countries where corruption and abuse are rampant. It confirmed the ID's conclusion that neither Mr. Verbanov nor officers from his unit had engaged in the commission of such crimes. Mr. Verbanov was found not inadmissible on either grounds of serious criminality or crimes against humanity.

[33] The Minister sought judicial review of this decision, on the basis that the IAD had erred in its analysis of inadmissibility pursuant to paragraph 35(1)(a) of IRPA. The IAD's findings on the grounds of serious criminality were not disputed. In *Canada (Citizenship and Immigration) v*

Verbanov, 2017 FC 1015, my colleague Justice Michel Shore allowed the application for judicial review on the basis that the IAD had failed to conduct a proper examination of Mr. Verbanov's complicity in the commission of crimes against humanity, in conformity with the test laid out by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*].

[34] The matter was remitted to the IAD. In May 2018, it concluded that torture was widespread within the Moldovan police force and amounted to a crime against humanity. From this conclusion, the IAD then inferred that Mr. Verbanov must have known crimes were being committed, and, as such, had made a "significant contribution".

[35] Mr. Verbanov applied for judicial review of this decision. In *Verbanov v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 324, at paragraph 38, my colleague Justice Martine St-Louis found that the IAD had erred by applying a standard of complicity that amounted to "guilt by association". While Mr. Verbanov also argued that a State policy is an essential ingredient of crimes against humanity and that the evidence did not establish any such policy, she did not find it necessary to analyze the issue. She allowed the application, and remitted the matter for a third assessment by the IAD.

[36] The IAD's third decision is the subject of this application for judicial review.

B. *The IAD's Decision Under Review*

[37] On February 4, 2020, the IAD found that the Minister had not discharged its onus of demonstrating that the actions of the Moldovan police amounted to crimes against humanity.

[38] Its analysis was structured according to the test set by the Supreme Court in *Mugesera*, quoted above. On the first element, the IAD found that there were reasonable grounds to believe that Moldovan police officers had committed acts of torture, based on the documentary evidence adduced by the Minister.

[39] The IAD then examined whether the prescribed act – torture – had been committed as part of a widespread or systematic attack. In doing so, it considered the definition of an attack in *Mugesera*. The IAD noted that the Supreme Court had solely applied case law from the ICTR and ICTY, whose Statutes did not contain any reference to a policy element. It also referred to paragraphs 157 and 158 from *Mugesera*:

> A contentious issue raised by the "widespread or systematic attack" requirement is whether the attack must be carried out pursuant to a government policy or plan. […]
>
> […] It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement (see, e.g., art. 7(2)(a) of the *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998).

[40] The IAD considered the legislative backdrop against which *Mugesera* was decided and found that, fifteen years later, the situation had indeed evolved. The IAD concluded that the

existence of a policy was now a mandatory element of the concept of "widespread or systematic attack" under international criminal law due in part to the incorporation of the Rome Statute within domestic law by way of the *Crimes Against Humanity Act*. At paragraph 37 of its decision, the IAD stated:

> For us to even speak of the existence of an attack, I believe that there must be evidence that the acts committed or the prohibited acts are committed by perpetrators with a certain intention in mind to conform to a policy, a plan, a scheme or an ideology emanating from the state or the organization itself.

[41] In support of its finding, the IAD cited case law from the ICC: *Republic of Kenya*, at paragraphs 83-84; *The Prosecutor v Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, 15 June 2009, at paragraphs 79-80 [*Bemba Gombo*]. The quoted paragraphs from *Republic of Kenya* included a reference to the excerpt from the *Elements of Crimes* reproduced above at paragraph [20].

[42] Consequently, the IAD concluded that the evidence presented by the Minister was insufficient to support the existence of an attack. It found that a policy could simply not be deduced from the repetition of prescribed acts; the Minister needed to provide evidence of a unifying backdrop against which the acts were committed. The IAD was unable to find that the Moldovan police officers committing torture did so with the belief that they were acting pursuant to a policy or an ideology. It found that torture, however unacceptable, was likely the result of individual motives, stating:

> whether it was to be rewarded, avoid reprimand, obtain a promotion or have a hope of improving their financial situation through bribery, the evidence supports the premise that the police officers acted that way because the system permitted it. They most

> likely abused the system for personal purposes without the risk of any real consequences.

[43] Further, the IAD considered that Moldova was a country "struggling to eradicate the remnants of the former USSR" and that it had committed to combat torture through initiatives and policies. The impunity resulting from a deficient judicial system was, in its view, insufficient to support the existence of a policy, a plan, a scheme or an ideology underlining the attack.

[44] The IAD then reviewed this Court's decisions in *Hadhiri v Canada (Citizenship and Immigration)*, 2016 FC 1284, and *Bedi v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1550, dealing with former police officers who were found to have made a knowing and significant contribution to crimes against humanity committed by their organizations.

[45] The IAD distinguished those decisions from Mr. Verbanov's situation. It found that the parties in those cases had proceeded on the assumption that the alleged human rights violations amounted to crimes against humanity. Moreover, even without a full analysis, the factual and political context underlying both cases suggested that police officers had acted pursuant to a state policy. The IAD held that those cases supported rather than weakened its reasoning.

[46] Thus, the IAD concluded that the acts of torture committed by members of the Moldovan police did not amount to crimes against humanity, as they were not carried out according to a policy. Due to this determinative conclusion, the IAD found it was not required to examine the issue of complicity as defined in *Ezokola*.

[47] The Minister now seeks judicial review of this decision.

III. Analysis

A. *Standard of Review*

[48] The parties agree that the IAD's decision is to be reviewed on a standard of reasonableness: *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Certain aspects of reasonableness review must be emphasized before going any further.

[49] Administrative decision-makers must take into account their own governing statute and any relevant source of law applicable to their decisions, including international law: *Vavilov*, at paragraphs 108-114. The interpretative value of international law is especially relevant where a statute is explicitly enacted for the purpose of implementing international obligations, as is the case with both IRPA and the *Crimes Against Humanity Act*: *Ezokola*, at paragraph 49; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paragraphs 47-49, [2015] 2 SCR 704 [*B010*]; *R v Hape*, 2007 SCC 26 at paragraphs 53-54, [2007] 2 SCR 292; *Vavilov*, at paragraphs 114, 182; *Elve v Canada (Citizenship and Immigration)*, 2020 FC 454, at paragraphs 78-79. In this context, a decision-maker is not only encouraged to look towards international criminal law for guidance; it is required to do so: *B010*, at paragraph 48. Indeed, with respect to crimes against humanity, the Supreme Court underscored the importance of harmonizing Canadian law with international law: *Mugesera*, at paragraphs 126, 143 and 178.

[50] Judicial precedent also constitutes a legal constraint bearing on administrative decision-makers: *Vavilov*, at paragraph 112; *Tan v Canada (Attorney General)*, 2018 FCA 186 at paragraph 22, [2019] 2 FCR 648; *Bank of Montreal v Li*, 2020 FCA 22 at paragraph 37. Nonetheless, administrative decision-makers are entitled to distinguish a precedent for reasons recognized by the doctrine of *stare decisis*. Thus, a decision may not be binding where there have been "significant developments in the law" after it was rendered: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paragraph 42, [2013] 3 SCR 1101; *Carter v Canada (Attorney General)*, 2015 SCC 5 at paragraph 46, [2015] 1 SCR 331. In particular, where Parliament amends legislation, cases interpreting the former version of the statute may no longer be binding: *Perron-Malenfant v Malenfant (Trustee of)*, [1999] 3 SCR 375 at paragraph 25; *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17 at paragraph 53, [2003] 1 SCR 178; *R v Gibson*, 2008 SCC 16 at paragraph 16, [2008] 1 SCR 397. Professor André Émond puts it succinctly in *Introduction au droit canadien*, Montreal, Wilson & Lafleur, 2012 at 255: [TRANSLATION] "Of course, if Parliament changes the wording of the rule interpreted, the value of a precedent decreases."

[51] Where an administrative decision-maker distinguishes a judicial precedent, the Court will intervene only if the grounds for distinguishing the precedent are unreasonable: *Céré v Canada (Attorney General)*, 2019 FC 221 [*Céré*]. For example, if the decision-maker disregards a precedent interpreting legislation that was subsequently amended, the Court will not intervene if the decision-maker provided a defensible explanation of the differences between the former and latter versions of the legislation. The Court, however, will not impose its own view of the scope of these differences.

B. *The Policy Requirement*

[52] The Minister's main challenge to the IAD's decision is that there is no policy requirement in the definition of crimes against humanity in Canadian law. I disagree with the Minister. The IAD's decision is entirely consistent with the framework described above, given that the alleged conduct took place after the Statute of Rome and the *Crimes Against Humanity Act* came into force. I also reject the Minister's alternative submissions that the IAD misconstrued the ICC's jurisprudence regarding the policy requirement or that there was enough evidence in this case to satisfy the requirement.

(1) Failure to Follow *Mugesera*

[53] The Minister essentially argues that the IAD's decision is unreasonable because it fails to follow binding precedent. According to the Minister, *Mugesera* stands for the proposition that a policy is not an essential element of the definition of crimes against humanity. It was not open to the IAD, an administrative tribunal, to disregard or distinguish a decision of the Supreme Court of Canada, the highest court in the land.

[54] With respect, the Minister's argument turns the hierarchy of sources of law on its head. Legislation is paramount over law emanating from judicial decisions. As I indicated above, when the courts interpret legislation, any binding authority that attaches to their decisions is subject to subsequent changes in legislation. If the legislation changes, its interpretation must change too.

[55] The facts of *Mugesera* took place in 1992. Thus, the Supreme Court of Canada had to apply the legal framework that pre-dated the Rome Statute and the *Crimes Against Humanity Act*. Yet, writing in 2005, it was aware that this framework was no longer in force. Referring to the *Crimes Against Humanity Act*, it wrote that "those sections define crimes against humanity in a manner which differs slightly from the definition in the sections of the *Criminal Code* relevant to this appeal": *Mugesera*, at paragraph 118. The Quebec Court of Appeal too adverted to the slight differences between the Rome Statute and pre-existing international law: *Munyaneza v R*, 2014 QCCA 906 at paragraphs 152-153.

[56] One of these slight differences is at the forefront of the present case. It did not go unnoticed in *Mugesera*. The Court was fully aware of the change that the Rome Statute brought about with respect to the policy requirement, which I reviewed above. It stated its conclusions in cautious terms, at paragraph 158, which I reproduce again for ease of reference:

> It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement (see, e.g., art. 7(2)(*a*) of the *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998).

[57] Thus, the IAD did not act unreasonably in finding that this aspect of *Mugesera* was displaced by the subsequent evolution of international law, most importantly the Rome Statute. Far from establishing a legal constraint binding on the IAD, the Court's remarks regarding the policy requirement opened the door to a different conclusion in a case governed by the framework established by the Rome Statute.

[58] The IAD is not alone in considering that *Mugesera*'s finding regarding the policy element has been displaced by the Rome Statute and the *Crimes Against Humanity Act*. Professor Lafontaine, a noted authority on the international criminal law, described the consequences of the adoption of the new framework as follows, in *Prosecuting Genocide*, at 169:

> The Canadian legislator chose, implicitly through its declaration in the *Act* that the [*Rome*] *Statute* constitutes customary international law, to impose a requirement that a policy underlie the attack. The Supreme Court's decision [in *Mugesera*] was taken on the basis of the former provisions of the *Criminal Code*, although the *Act* had already been adopted. The Court specifically mentioned that the differences in the manner that crimes against humanity are defined in the *Act* were "not material" to its discussion of the issue. However, the interpretation it gave to the "attack" element of the *actus reus* departs not insignificantly from the legislative choice reflected in the *Act*.
>
> […] future prosecutions regarding crimes committed after that date [1998] would have to ignore both *Mugesera* and *Munyaneza* and come to a different conclusion regarding the policy element, regardless of whether the *Rome Statute* effectively reflects customary international law on the issue.

[59] The Minister argued that an administrative tribunal like the IAD cannot legitimately engage in an analysis that results in a decision of the Supreme Court being no longer applicable, perhaps suggesting that only a higher court has the authority to do so. Administrative tribunals, however, are not so constrained. Deciding whether the statutory context that gave rise to a precedent is sufficiently similar to that of the case at hand is an integral component of the doctrine of *stare decisis*: *Céré*, at paragraphs 38-40. In reality, administrative tribunals have a duty to perform this analysis to ensure the proper understanding of the legal constraints bearing upon their decision.

[60] The Minister further asserts the *Mugesera* framework is reflected in fifteen years of this Court's case law, including *Khachatryan v Canada (Citizenship and Immigration)*, 2020 FC 167; *Sarwary v Canada (Citizenship and Immigration)*, 2018 FC 437; *Vaezzadeh v Canada (Citizenship and Immigration)*, 2017 FC 845; *Hadhiri*; *Talpur v Canada (Citizenship and Immigration)*, 2016 FC 822. These cases all stand for the proposition that civilian detainees are part of an identifiable group for the purpose of crimes against humanity. They do not, however, discuss the meaning of "attack" in international law nor the existence of a policy requirement. At the hearing, the Minister acknowledged that this Court has never engaged with these issues. Consequently, the lack of case law on the topic does not support the Minister's position. As counsel for Mr. Verbanov stated, one cannot draw a precedent from a case in which the issue is neither raised nor argued. These cases do not establish any legal constraint preventing the IAD from ruling as it did.

[61] The Minister did not point to any other legal constraint that the IAD would have disregarded. Therefore, the IAD's decision regarding the policy requirement is reasonable.

(2) Misreading of ICC Case Law

[62] The Minister also claims that the IAD misread the ICC case law it quoted regarding the policy requirement. If I understand the argument correctly, the IAD would have failed to consider passages where the ICC stated that crimes against humanity could be committed by a non-State organization.

[63] This, however, is beside the point. Even though the issue has given rise to academic debate, nothing in the IAD's decision turns on what an organization's nature must be in order to be able to carry an attack in accordance with the requirements of article 7(2)(a) of the Rome Statute. In the present case, there is no question that the police is part of the State apparatus. Had the alleged acts of torture been carried out pursuant to a policy, there is little doubt that there would have been "a State or organizational policy" within the meaning of article 7(2)(a). I do not understand the IAD to have suggested otherwise.

[64] I acknowledge that in *Bemba Gombo*, at paragraph 81, the ICC stated that a policy may be made "by any organization with the capability to commit a widespread or systematic attack". The Court made similar comments in *Republic of Kenya*, at paragraphs 90-92. In making these remarks, the Court meant that organizations other than the State could adopt a policy within the meaning of article 7(2)(a), not that proving the organization's capability was a substitute to the policy requirement. Indeed, the latter proposition would make little sense. Thus, it does not assist the Minister to argue that the Moldovan police would possess such a capability. Again, I do not understand the IAD to have reached the opposite conclusion; and the issue is irrelevant, as the IAD found that there was no policy to torture detainees in the first place.

(3) Evidence of a Policy Underlying the Moldovan Police's Acts of Torture

[65] Lastly, the Minister argues that, irrespective of whether a policy element is required or not, the evidence clearly shows that Moldovan police officers acted according to a policy, whether implemented by the State or the police. It seems that the Minister did not make this argument before the IAD.

[66] In any event, the IAD's finding that Moldovan police officers who tortured detainees did not act according to a policy is reasonable. The IAD has not "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at paragraph 126. In this regard, the IAD found that the motivation of the Moldovan police officers in torturing detainees was purely individual and resulted from a flawed justice system. The acts of torture, however frequent, lacked the direction necessary to support the conclusion that they were the product of a concerted endeavor. As we have seen, crimes against humanity do not purport to apply to "spontaneous or isolated acts": *Republic of Kenya,* at paragraphs 84-85. The evidence was insufficient to reveal a common scheme amongst police officers. The IAD noted that Moldova took initiatives against the use of torture by police officers. The fact that these initiatives failed to reach their goal is not, of course, evidence of a policy to use torture.

[67] The Minister sought to impugn the IAD's factual findings by pointing to various reports about the use of torture by the Moldovan police. In particular, the Minister relies on decisions of the European Court of Human Rights [ECHR] condemning Moldova for the ill-treatment of detainees by the police. These decisions establish that there are cases of torture or ill-treatment by the Moldovan police, a fact acknowledged by the IAD. What the decisions of the ECHR do not establish is whether these acts of torture or ill-treatment were committed pursuant to a "State or organizational policy." In fact, the ECHR does not have a criminal jurisdiction and does not make findings regarding the constitutive elements of crimes against humanity. In *Taraburca v Moldova*, ECHR no 18919/10, 6 December 2011, the Court noted that its previous judgments pertained to individual cases, and that the group of cases regarding the repression of the April 2009 demonstrations were exceptional in this regard. This supports, rather than detracts from, the

IAD's finding that the Moldovan police did not act according to a policy when torturing detainees.

IV. Costs

[68] Mr. Verbanov seeks an order for costs pursuant to rule 22 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22. Pursuant to rule 22, no costs are ordered in immigration and refugee cases, unless there are "special reasons" for doing so. Thus, costs awards are exceptional and usually based on the blameworthy conduct of one party. In this case, it is unfortunate that Mr. Verbanov went through no less than seven hearings before a final decision is being made regarding his inadmissibility. This is not, however, the result of any misconduct on the part of the Minister. In particular, Mr. Verbanov did not initially raise the argument on which he is successful today. Therefore, the usual rule will apply and no costs will be ordered.

V. Certified Question

[69] The Minister proposes the following question for certification:

> Does a widespread or systematic attack directed against any civilian population or any identifiable group need to be committed pursuant to or in furtherance of a State or organizational policy to satisfy the elements of the offence of crimes against humanity such that it would render a person inadmissible on grounds of violating human or international rights pursuant to paragraph 35(1)(a) of the Immigration and Refugee Protection Act?

[70] Pursuant to section 74(d) of IRPA, this Court may certify a "serious question of general importance," which allows the matter to be considered by the Federal Court of Appeal. That

Court stated that, to be certified, a question "must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance": *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paragraph 46, [2018] 3 FCR 674 [*Lunyamila*].

[71] This Court has declined to certify a question where the result is dictated by unambiguous statutory provisions, as the question would not qualify as "serious," even if it is apparently raised for the first time: *Duri v Canada (Citizenship and Immigration)*, 2010 FC 125 at paragraph 19; *Es-Sayyid v Canada (Citizenship and Immigration)*, 2011 FC 1415 at paragraph 61. Here, Parliament's referential incorporation of the Statute of Rome, which explicitly states that a crime against humanity can only be committed pursuant to a "State or organizational policy," leaves little room for arguing that no such requirement exists.

[72] Moreover, it is unclear that the question would be dispositive of the matter. If the Minister succeeds in persuading the Federal Court of Appeal that the proposed question should be answered in the negative, that would of course dispose of the application for judicial review, but not of Mr. Verbanov's case. The matter would have to be remitted to the IAD, which would need to consider whether Mr. Verbanov made a knowing and significant contribution to the crimes committed by the Moldovan police. In this regard, Justice St-Louis found that the second IAD decision, which reached such a conclusion, was unreasonable and amounted to guilt by association. Thus, even if the Minister were successful with respect to the proposed certified question, the ultimate result for Mr. Verbanov might very well be the same. From Mr. Verbanov's perspective, the process would only have lengthened what can already be described

as “an endless merry-go-round of judicial reviews and subsequent reconsiderations”: *Vavilov*, at paragraph 142.

[73] If, however, the question arises again and gives rise to inconsistent answers, the Minister will have other opportunities to apply for a certified question.

[74] Therefore, I decline to certify the proposed question.

VI. Conclusion

[75] For the foregoing reasons, the application for judicial review will be dismissed without costs, and no question will be certified.

[76] In closing, I wish to emphasize that this judgment should not be understood as shielding police officers from the accountability warranted by the commission of heinous crimes. Whether the torture of detainees is conducted pursuant to a State or organizational policy is an issue that must be decided on a case-by-case basis, according to the evidence. Moreover, a police officer who personally participates in torture would obviously be inadmissible to Canada pursuant to other provisions of IRPA.

JUDGMENT in file IMM-2232-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2232-20
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v IURII VERBANOV
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 1, 2021
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	MAY 28, 2021

APPEARANCES:

Daniel Latulippe	FOR THE APPLICANT
Lorne Waldman Charles Steven Althea Song	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Montreal, Quebec	FOR THE APPLICANT
Lorne Waldman Waldman & Associates Toronto, Ontario	FOR THE RESPONDENT