S.C.C. File No. 34470

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Between:

RACHIDI EKANZA EZOKOLA

Appellant
(Respondent)

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
(Appellant)

- and -

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
AMNESTY INTERNATIONAL
CANADIAN CENTRE FOR INTERNATIONAL JUSTICE AND INTERNATIONAL HUMAN RIGHTS PROGRAM AT THE UNIVERSITY OF TORONTO FACULTY OF LAW
CANADIAN COUNCIL OF REFUGEES
CANADIAN CIVIL LIBERTIES ASSOCIATION
CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Interveners

FACTUM OF THE INTERVENER THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The United Nations High Commissioner for Refugees ("UNHCR") is mandated by the United Nations General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees, pursuant to its 1950 Statute.[1] UNHCR's supervisory responsibility is also reflected, *inter alia,* in Article 35 of the 1951 Convention relating to the Status of Refugees[2] ("the 1951 Convention") and Article II of its 1967 Protocol.[3]

PART II – POINTS IN ISSUE

2. UNHCR's submissions in this appeal are strictly limited to questions of law and, in line with its supervisory responsibility, offered to ensure that the exclusion clause in Article 1F(a) of the 1951 Convention is applied in a manner consistent with international refugee law.

PART III – STATEMENT OF ARGUMENT

3. The central issue in this case is the proper determination, in the context of examining eligibility for international refugee protection, of an applicant's individual responsibility for crimes against peace, war crimes or crimes against humanity committed by another. UNHCR's position is that individual responsibility for crimes within the scope of Article 1F must be assessed in light of the relevant principles, standards and criteria in international law, within an overall approach to exclusion that is in line with the object and purpose of the 1951 Convention.[4]

A. The humanitarian and human rights purposes of the 1951 Convention determine the overall approach to exclusion

4. The 1951 Convention is to be interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention").[5] Pursuant to Article 31(1) of the Vienna Convention, the terms of Article 1F of the 1951 Convention must be interpreted in their context and in a manner that furthers its object and purpose. Article 31(2) of the Vienna Convention recognizes the preamble as part of the context for the purposes of the interpretation of a treaty. The Preamble to the 1951 Convention embeds the Convention within a broader

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[1] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Annex, paragraph 8(a), Book of Authorities (BOA) Tab 1, p. 6.
[2] United Nations, *1951 Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137, Appellants Book of Authorities.
[3] United Nations, *1967 Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 BOA Tab 2, p. 58.
[4] This applies not only with regard to Article 1F(a), but also Article 1F(b) and (c) of the 1951 Convention.
[5] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 BOA, Tab 3.

human rights framework.[6] This indicates the need to incorporate human rights considerations in the identification and treatment of refugees.[7] This was recognized in *Pushpanathan v Canada (MCI)*, where the Supreme Court of Canada examined the object and purpose of the 1951 Convention and, having found its human rights purpose to be established,[8] held:

> This overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place.[9]

5. Article 1 of the 1951 Convention establishes a normative framework which defines eligibility for international protection as a refugee. This includes the so-called "inclusion" criteria set out in the refugee definition in Article 1A(2), as well as certain provisions excluding the application of the 1951 Convention, among them Article 1F and more specifically Article 1F(a). The exclusion clauses of Article 1F of the 1951 Convention provide for the denial of international refugee protection to persons who would otherwise meet the criteria of the refugee definition, but who are considered undeserving of refugee status.[10]

6. Thus, while the exclusion clauses must be applied scrupulously to protect the integrity of the institution of asylum, they must be viewed in the context of the overriding humanitarian and human rights objectives of the 1951 Convention. As an exception to a fundamental right within an international treaty intended to provide protection, they should always be interpreted in a restrictive manner.[11] Given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case.[12] This position was adopted, for example, in the United Kingdom, where the Supreme Court in its recent decision in *Al-Sirri v. SSHD* expressed agreement with UNHCR's views that Article 1F must be interpreted restrictively and applied with caution.[13]

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[6] See preambular paragraphs 1 and 2 of the 1951 Convention, (Appellant's BOA).

[7] See, for example, UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (2001), at paras. 2-4, BOA Tab 4 p. 95.

[8] Supreme Court of Canada, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, at 51-57, BOA Tab 5, p. 99-101.

[9] *Ibid.*, at para. 57, BOA Tab 5, p. 101.

[10] See UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* ("*Guidelines on Exclusion*") HCR/GIP/03/05, 4 September 2003 BOA Tab 7, p. 104, and its accompanying *Background Note,* BOA Tab 8, p. 110. UNHCR issues "Guidelines on International Protection" pursuant to its mandate, as contained in its Statute (see above at footnote 1), in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, reissued December 2011. HCR/1P/4/ENG/REV. 3, BOA Tab 6, p. 119 and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

[11] See, for example, UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997, at 123, BOA, Tab 9, p. 165. See also UNHCR, *Background Note*, at para. 2, BOA, Tab 8, p. 121.

[12] See UNHCR, *Guidelines on Exclusion,* at para. 2, BOA Tab 7, p. 111, UNHCR, *Background Note*, at paras. 3-4, BOA Tab 8, p. 121

[13] United Kingdom Supreme Court, *Al-Sirri (Appellant) v Secretary of State for the Home Department (Respondent); DD (Afghanistan) (Appellant) v Secretary of State for the Home Department (Respondent)* [2012] UKSC 54, at para. 75, BOA Tab 10, p. 172.

Similarly, in *Pushpanathan v. Canada (MCI)*, the Supreme Court of Canada examined the interpretation of the exclusion provisions in Article 1F of the 1951 Convention in light of the human rights aims of the treaty and found:

> The *a priori* denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention [...] and can only be justified where the protection of those rights is furthered by the exclusion.[14]

7. In light of the overriding human rights purpose of the 1951 Convention, certain key principles are applicable in all cases where exclusion based on Article 1F is at issue. UNHCR submits that findings on individual responsibility must be made within this overall framework, which can be summarized as follows:

(i) Article 1F exhaustively enumerates the acts which may give rise to exclusion from international refugee protection.[15]

(ii) For exclusion based on Article 1F to operate, it must be established that the individual concerned committed the excludable acts, or that he or she participated in their commission in a manner that gives rise to individual responsibility for the acts in question.[16] An individualized assessment of the facts is required in all cases.[17]

(iii) The burden of proof to justify exclusion lies with the decision-making authority.[18] The application of Article 1F requires findings of fact to the standard of "serious reasons for considering" that an individual has committed or participated in acts covered by Article 1F in a manner which gives rise to individual responsibility. This requires clear and credible evidence.[19] A determination proving guilt in the sense of a criminal conviction is not required.[20] However, the standard must be sufficiently high to ensure that

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[14] Supreme Court of Canada, *Pushpanathan v. Canada (MCI)* (above footnote 8). at para. 74, BOA Tab 5, p. 101-103. It is also worth noting that in the course of its examination of Article 1F, the Supreme Court of Canada distinguished the purpose of exclusion from that of the exceptions to the principle of *non-refoulement*, noting that "[...] the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention." (at para. 58). On this issue, see also UNHCR, *Background Note*, at para. 10 BOA Tab 8, p. 123.

[15] See UNHCR, *Guidelines on Exclusion*, at para. 3, BOA Tab 7, p. 111; UNHCR, *Background Note*, at para. 7 BOA Tab 8, p. 121. For an overview of the international instruments which provide for the definition of acts which fall within the scope of Article 1F(a), see UNHCR, *Background Note*, at paras. 23-25, BOA Tab 8, p. 126-128.

[16] See UNHCR, *Background Note 2003*, at paras. 50–75, BOA Tab 8, p. 137-145.

[17] The standards and criteria to be applied in this regard are discussed further in Part B of this factum.

[18] See *Background Note*, at paras. 105-106. See also below at paragraphs 18–21, BOA Tab 8, p. 125-126, 156.

[19] UNHCR, *Guidelines on Exclusion*, at para. 35, BOA Tab 7, p. 118; UNHCR *Background Note,* at paras. 108-111, BOA Tab 8 at p. 125-126. See also Council of Europe, Recommendation (2005) 6 of the Committee of Ministers of the Council of Europe of 23 March 2005 on exclusion from refugee status in the context of Article 1F(b) of the Convention relating to the Status of Refugees of 28 July 1951, adopted by the Committee of Ministers on 23 March 2005 at the 920th meeting of the Ministers' Deputies, BOA Tab 11, p. 174-175.

[20] See, for example: United Kingdom, *Al-Sirri v. SSHD* (above footnote 13), at para. 75(4), BOA Tab 10, p. 173; in Germany: *Bundesverwaltungsgericht*, BVerwG 10 C 24.08, 24 November 2009, at para. 35, BOA Tab 12; in

refugees are not erroneously excluded. UNHCR considers that the "balance of probabilities" test is too low a threshold.[21] In *Al Sirri v. SSHD*, the UK Supreme Court examined relevant jurisprudence in several countries, including Canada.[22] The Court found, *inter alia,* that "serious reasons" is stronger than "reasonable grounds" and that:

> [...] if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. [...][23]

(iv) UNHCR submits that the exceptional nature and inherent complexity of exclusion requires that the applicability of Article 1F be examined within a regular refugee status determination procedure offering proper procedural safeguards, rather than in admissibility or accelerated procedures.[24] In UNHCR' view, a holistic approach to determining eligibility for international refugee protection, whereby both exclusion and inclusion issues are examined, is best suited to ensure a full assessment of the factual and legal issues arising in cases where the application of Article 1F is considered.[25]

(vi) UNHCR further submits that the proper application of Article 1F also requires a proportionality test, in which the seriousness of the applicant's criminal conduct is weighed against the consequences of exclusion. This allows consideration of any mitigating or aggravating circumstances as well as factors relevant to the effect of exclusion, such as the absence in some States of human rights guarantees as an accessible "safety valve" against *refoulement*. In UNHCR's view, the proportionality assessment is an important safeguard in the application of Article 1F and a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding human rights object and purpose of the 1951 Convention.[26]

Belgium: *Le Commissaire général aux réfugiés et aux apatrides c. XXX,* Arrêt no. 200.321, Belgium, Conseil d'Etat, 13 July 2012, at p.8, BOA Tab 13.

[21] UNHCR, *Background Note*, at para. 107, BOA Tab 8.

[22] United Kingdom Supreme Court, *Al-Sirri v. SSHD* (above footnote 13), at paras. 69-75, BOA Tab 10, p. 170-173.

[23] *Ibid.*, at para. 75, BOA Tab 10, p. 173.

[24] See UNHCR, *Guidelines on Exclusion*, at para. 31, BOA Tab 7, p. 117-118; UNHCR, *Background Note*, at paras. 98-99, BOA Tab 8, p. 154.

[25] See UNHCR, *Guidelines on Exclusion*, at para. 31, BOA Tab 7, p. 117-118; UNHCR, *Background Note*, at paras. 99-100, BOA Tab 8, p. 154-155.

[26] See UNHCR, *Guidelines on Exclusion*, at para. 24, BOA Tab 7, p. 116; UNHCR, *Background Note*, at paras. 76-78, BOA Tab 8, p. 145-147.

B. International law provides the principles, standards and criteria for determining individual responsibility for crimes within the scope of Article 1F(a)

8. Article 1F(a) of the 1951 Convention excludes from international refugee protection persons responsible for crimes defined at international law, which necessarily includes rules under international law related to criminal liability for these crimes. UNHCR submits that when establishing whether there are serious reasons for considering that an applicant has "committed" a crime against peace, a war crime or a crime against humanity, adjudicators should therefore be guided not only by the definitions of these crimes in international instruments but also the principles, standards and criteria for establishing individual responsibility as applicable under international law, bearing in mind the principle *nullum crimen sine lege*.[27]

9. In UNHCR's view, this approach is necessary to ensure a harmonized application of the exclusion criteria under Article 1F(a) by State Parties to the 1951 Convention. It is consistent with the rules of treaty interpretation as set out in Articles 31 and 32 of the Vienna Convention, and in particular, Article 31(3)(c), which provides that the sources for the interpretation of a treaty include any relevant rules of international law applicable between the parties.[28] In the context of determining the scope of Article 1F(a), these include the definitions and rules governing individual responsibility under customary international law, as reflected in the Statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY")[29] and the International Criminal Tribunal for Rwanda ("ICTR")[30] and elaborated in the jurisprudence of these tribunals,[31] as well as, in particular, the 1998 Rome Statute of the International Criminal

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[27] While the drafters of the 1951 Convention did not discuss the specific criteria for individual responsibility explicitly, the *travaux préparatoires* show that liability was mentioned during the discussions on exclusion in the Social Committee of the Economic and Social Council. Noting the difference between common crimes and crimes under international law, the representative of the United Nations Secretariat stated that "it was a fact that an individual could violate the provisions of the United Nations Charter. According to the terms of the Charter and judgments of the Nuremberg Tribunal, and by virtue of the provisions of the Convention on Genocide, an individual could nowadays be held liable under international law, and could be called upon to answer for such violations of international law." (UN Doc. E/AC.7/SR.166, 22 August 1950, at page 8), BOA Tab 14, p. 198.

[28] For a discussion of the application of the rules of treaty interpretation in relation to the 1951 Convention, including in particular the requirement that the terms of an international treaty be given an autonomous meaning which is independent from the national legislation and legal system of any contracting State and derivable from the sources listed in Articles 31 and 32 of the Vienna Convention, BOA Tab 3, p. 75-76; see *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, BOA Tab 15, p. 199. See also Supreme Court of Canada, *Pushpanathan v. Canada (MCI)* (above footnote 8), at paras. 52-57, BOA Tab 5, p. 99-101.

[29] United Nations Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as last amended on 17 May 2002), adopted by resolution 827 (1993) of 25 May 1993, Article 7(1), BOA Tab 16, p. 127.

[30] United Nations Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), adopted by resolution 955 (1994) of 8 November 1994, Article 6(1), BOA Tab 17, p. 215.

[31] The decisions of the *ad hoc* international tribunals can be found at www.icty.org and www.ictr.org, respectively. Another important source of customary international law governing individual responsibility for international crimes are the *Nuremberg Principles*, as affirmed by United Nations General Assembly resolution 95

Court ("ICC") ("the Rome Statute")[32] and the decisions issued by the ICC pursuant to its provisions.

10. There is increasing recognition of the significance of international criminal law and the jurisprudence of international bodies for the interpretation and application of Article 1F of the 1951 Convention. In Germany, for example, the *Bundesverwaltungsgericht*. held:

> The wording and genesis of [section 3(2)(1) of the German Asylum Procedure Act which replicates Article 1F(a) of the 1951 Convention] reveal a dynamic approach [...], in which the lawmakers assume that evolving international criminal law provides a sanction for violations of international humanitarian law. Therefore in the present instance, the determination of whether war crimes or crimes against humanity [...] have been committed must primarily be made in accordance with the defining elements of these offences formulated in the Rome Statute of the International Criminal Court [...], which articulates the current status of developments in international criminal law for cases of violations of international humanitarian law (*internal citations omitted)*.[33]

11. In *JS (Sri Lanka) v. SSHD* before the United Kingdom Supreme Court, Lord Brown noted that the Rome Statute of the ICC "should now be the starting point for considering whether an applicant is disqualified from asylum by virtue of Article 1F(a)" of the 1951 Convention,[34] and went on to state:

> It is convenient to go at once to the ICC Statute, ratified as it now is by more than a hundred States and standing as now surely it does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes [...].[35]

Discussing individual responsibility for crimes within the scope of Article 1F(a), Lord Brown then referred to Articles 25, 28 and 30 of the Rome Statute as well as Article 7(1) of the Statute of the ICTY and the jurisprudence of the ICTY Appeals Chamber on the notion of a joint criminal enterprise ("JCE").[36]

12. International sources like the recent jurisprudence of international criminal courts were also deemed "highly relevant" by the Supreme Court of Canada in *Mugesera v. Canada (MCI),*

(I) of 11 December 1946 and formulated by the International Law Commission (ILC) in its Report to the General Assembly in 1950 (Yearbook of the ILC, 1950, vol. II), BOA Tab 18, p. 231. See Antonio Cassese, *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, United Nations Audiovisual Library of International Law, 2009, available at: http://untreaty.un.org/cod/avl/ha/ga_95-i/ga_95-i.html, BOA Tab 19, p. 231.

[32] United Nations, *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90. See Articles 25-33 for the provisions on individual responsibility, defences and other circumstances negating individual responsibility BOA Tab 20, p. 246-250.

[33] See BVerwG 10 C 24.08, 24 November 2009 at para. 31 (unofficial translation provided by the *Bundesverwaltungsgericht*). In this decision, the *Bundesverwaltungsgericht* bases its examination of the law governing the application of Article 1F(a) on Articles 7 and 8 (concerning definitions of the crimes within its scope) and Articles 25(2) and (3), 27 and 28 (concerning individual responsibility). See also the decision of the Federal Court of Appeal in *Harb v. Canada (MCI),* 2003 FCA 39, at paras. 8-9, BOA Tab 21, p. 254-255.

[34] United Kingdom Supreme Court, *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC 184, at para. 8, BOA Tab 22, p. 260.

[35] *Ibid.*, at para. 9, BOA Tab 22, p. 260.

[36] *Ibid.*, at paras. 11-14 and 15-20, respectively, BOA Tab 22, p. 261-265.

in the context of interpreting domestic law "in a manner that accords with the principles of customary international law and with Canada's treaty obligations".[37] This decision *inter alia* considered jurisprudence of the ICTY and ICTR on issues related to individual responsibility.[38]

13. In light of the above, UNHCR submits that for exclusion based on Article 1F(a) to be consistent with the 1951 Convention, it must be established, based on findings of fact made to the "serious reasons for considering" standard, (i) that an act within the definition of a crime against peace, a war crime or a crime against humanity has occurred, and (ii) that the applicant has committed the crime – either individually or acting jointly with others as co-perpetrators – or incurred individual responsibility through one of the modes of participation in the commission of a crime recognized in international law.[39]

14. The criteria which must be met for individual responsibility to arise have been developed primarily by the ICTY and ICTR, although the ICC Pre-Trial Chambers and Trial Chamber have also issued decisions which set out the objective and subjective elements required under different modes of individual responsibility. The ICC jurisprudence to date indicates that the ICC does not consider the extended form of a JCE ("JCE III")[40] to be covered by the Rome Statute, thus adopting a more restrictive approach to accessory liability for common purpose crimes than the ICTY.[41] The ICC Trial Chamber also applies more stringent requirements with regard to the level of contribution required for co-perpetration.[42] In addition, the Pre-Trial Chambers' approach to examining situations in which co-perpetrators

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[37] Supreme Court of Canada, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91, 2005 SCC 39, at para. 82, BOA Tab 23, p. 277.

[38] *Ibid.*, at paras. 133-135, BOA Tab 23, p. 279-280.

[39] See Article 7(1) of the Statute of the ICTY (BOA Tab 16 p. 208) and Article 6(1) of the Statute of the ICTR (BOA Tab 17, p. 215), respectively, which provide for several of these modes of participation in identical terms. Although common purpose liability is not specifically mentioned in the Statutes, the ICTY developed the concept of JCE as one of the forms of incurring individual responsibility for international crimes recognized under customary international law. See also Articles 25 and 28 of the Rome Statute of the ICC, BOA Tab 20, p. 246, 249.

[40] Under this form of a JCE, first identified as a form of common purpose liability by the ICTY Appeals Chamber in *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1, ICTY, Appeals Chamber, 15 July 1999 at p. 80-108 (BOA Tab 24, p. 281-310), a person who had the intent to participate in a JCE will be held responsible not only for crimes covered by the common plan, but also acts outside the common plan and thus not covered by the shared intent, if these acts were a natural and foreseeable consequence of the realization of the JCE and the person willingly took that risk

[41] *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, ("*Lubanga* Decision"), at para. 1011 BOA, Tab 25, p. 313-314; and Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, at paras. 358-369, BOA Tab 26, p. 327-332, finding that Article 30 of the ICC Statute excludes *dolus eventualis*. Commentators have noted that the provisions of the Rome Statute encompass some but not all types of JCE identified by the ICTY. See, for example, Elies Van Sliedregt, *Individual Criminal Responsibility*, Oxford: Oxford University Press, 2012, p. 146, BOA Tab 27, p. 336.

[42] For the ICC, the contribution must be "essential" rather than "significant", as under the jurisprudence of the ICTY. See *Lubanga Decision*, at paras 989–1006 and footnote 2705, BOA Tab 25, p. 315-323, which cites a list of jurisprudence requiring an essential contribution for a finding of individual responsibility under Article 25(3)(a). See also, for example, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford: Oxford University Press, 2010, p. 428, BOA Tab 28, p. 350-351.

commit crimes through a structure or "apparatus" characterized by an almost automatic compliance with orders appears to take a narrower focus on common purpose crimes than the wide interpretation given to the notion of JCE by the ICTY.[43]

15. Thus, jurisprudence on individual responsibility for crimes within Article 1F(a) of the 1951 Convention continues to evolve. UNHCR submits that the proper application of this exclusion clause nevertheless requires adjudicators to assess the applicant's conduct and state of mind in relation to the excludable acts identified in light of the criteria for determining individual responsibility under international law. Where the ICC's approach differs from that of the ICTY or ICTR, adjudicators examining exclusion under Article 1F(a) should, in UNHCR's view, follow the jurisprudence of the ICC, given the universal scope of the Rome Statute and the permanent nature of the Court.[44]

16. In UNHCR's assessment, the correct approach to establishing individual responsibility for crimes within the scope of Article 1F(a) requires a clear distinction between the modes of participation recognized in international law, as the *actus reus* and *mens rea* requirements for each of them reflect different underlying concepts of guilt in relation to these crimes. This is particularly important when examining whether an applicant contributed to the commission of excludable crimes on the basis of aiding and abetting, through participation in a JCE, or by contributing "in any other way" to crimes committed by a group of persons acting with a common purpose, as provided for in Article 25(3)(d) of the Rome Statute.

17. An examination of individual responsibility in light of the relevant criteria in international law is also necessary where the applicant was a member of or otherwise associated with a group, organization or regime involved in the commission of crimes within the scope of Article 1F of the 1951 Convention.[45] Depending on the circumstances, such persons may incur individual responsibility for these crimes in any of the above-mentioned ways. The principle that exclusion may not be based solely on a person's membership in a particular group, organization or regime remains fundamental to the proper application of the exclusion clauses set forth in Article 1F of the 1951 Convention.

18. While mere membership in a group or organization, irrespective of its nature, is not as such sufficient basis to exclude, there may be cases where the available information about the

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[43] See, for example, Decision on the Confirmation of Charges, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,ICC-01/04-01/07, 30 September 2008, para. 517, BOA Tab 29, p. 355.

[44] UNHCR considers the Rome Statute of the ICC as a subsequent agreement and practice in relation to Article 1F of the 1951 Convention, in line with Article 31(3)(a) and (b) of the Vienna Convention.

[45] UNHCR, *Background Note*, at paras. 57-62, BOA Tab 8, p. 140-142; see also the Court of Justice of the European Union (CJEU), *B & D v. Germany, Joined Cases C-57/09 and C-101/09, 9 November 2010*, at paras. 88-97, BOA Tab 31, p. 362-363.

group or organization and the applicant's role, responsibilities and activities within it is specific enough to support a finding of individual responsibility for crimes within Article 1F.[46]

19. Where exclusion is considered with regard to an applicant who held a position within a State's administration without being directly involved in criminal activities of others acting on behalf or with the acquiescence of that State, or of some within the State, the exclusion examination should assess the person's conduct and state of mind in relation to any crimes within Article 1F. In UNHCR's view, reliance on JCE or common purpose liability to exclude persons exercising legitimate functions on behalf of that State, based on the fact that they continued to serve while being aware of crimes committed by other agents of the State but without evidence of a significant link between the applicant's conduct, an identified JCE and crimes committed pursuant to the common plan of the JCE, would not be justified under Article 1F of the 1951 Convention.

20. More specifically with regard to the notion of a JCE as the basis for a finding of individual responsibility in an exclusion context, UNHCR submits that a careful examination of relevant facts is required to establish the existence of all constituent elements of JCE liability. This means determining those who form the "plurality of persons" and identifying the common purpose at the core of the JCE in terms of both the criminal goal intended and its scope (for example its temporal and geographic limits, and the intended victims), as well as establishing that this criminal purpose is shared by all those acting together within a JCE.[47] Exclusion on this basis would be consistent with international refugee law only if the group or organization is properly characterized as a JCE, and if it is established that crimes within Article 1F were committed in furtherance of the common plan and the applicant made a significant contribution to these crimes, with the requisite *mens rea*.[48] In UNHCR's view, a determination of individual responsibility in accordance with Article 25(3)(d) of the Rome Statute would also need to be based on clear findings regarding the group acting with a common purpose, the scope and aims of that purpose, as well as the applicant's contribution and *mens rea*.

21. Recent jurisprudence which confirms the essential requirement, in all cases, of an individualized assessment of the nature and extent of the applicant's conduct and connection with the crime, or crimes, as well as his or her state of mind includes the decisions of the

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[46] See UNHCR, *Background Note*, at paras. 57-62, BOA Tab 8, p. 140-142.

[47] See the judgment of the ICTY Appeals Chamber in *Prosecutor v. Radoslav Brdanin*, IT-99-36-A, 3 April 2007, at paras. 428-431, BOA Tab 30, p. 359-360. In UNHCR's view, the Appeals Chamber's general comments on this mode of individual responsibility expressed in para. 428 ("The Appeals chamber emphasizes that JCE is not an open-ended concept that permits convictions based on guilt by association. [...]" fully apply also in the exclusion context.

[48] *Ibid.* at para. 365, BOA Tab 30, p. 357-358.

United Kingdom Supreme Court in *JS (Sri Lanka) v. SSHD*[49] and *Al Sirri v. SSHD,*[50] and the judgment of the Court of Justice of the European Union in *B & D.*[51] These decisions also note that findings concerning the nature of the group or organization of which the applicant was a member are not as such sufficient to establish individual responsibility for crimes committed by the group. The United Kingdom Supreme Court, in particular, has urged caution with regard to the application of a presumption of excludability on this basis[52] as well as reliance on a set list of factors which, while relevant, are neither exhaustive nor necessarily applicable in all cases.[53] In UNHCR's view, this is consistent with international refugee law, as denial of international refugee protection flowing from membership alone or otherwise based on criteria that are not in line with the requirements for establishing individual responsibility under international law would not be in keeping with the 1951 Convention.

PART IV – STATEMENT ON COSTS

22. UNHCR seeks no costs and respectfully ask that no costs are awarded against them.

PART V – ORDER SOUGHT

23. UNHCR seeks leave to present oral argument before the Court based on these submissions.

All of which is respectfully submitted this 15th day of December, 2012 at Toronto.

LORNE WALDMAN
Of counsel for the Proposed Intervener, United Nations High Commissioner for Refugees

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[49] United Kingdom Supreme Court, *R (JS(Sri Lanka) v. SSHD* (above footnote 34), in particular Lord Hope's discussion of the flaws of the complicity approach previously applied (at para.44) and his statement that even in the case of an extremist organization, "joining it will not be enough to suggest complicity or that little more is required for it to be presumed" (at para. 45), as well as Lord Kerr's emphasis on the need to conduct an examination of the applicant's actual involvement in the relevant criminal activity with a view to determining whether the requirements of Articles 25 and 30 of the Rome Statute are met (at para. 58), BOA Tab 22, p. 272, 275.

[50] United Kingdom, *Al-Sirri v. SSHD* (above footnote 13), in particular para. 15, BOA Tab 10, p. 169.

[51] CJEU, *B & D v. Germany* (above footnote 45), in particular paras. 93-96, BOA Tab 31, p. 363.

[52] See, in particular, Lord Hope's warning, in *R (JS (Sri Lanka) v. SSHD* (above footnote 34), that: "[…] the nature of the organisation itself is only one of the relevant factors in play and it is best to avoid looking for a "presumption" of individual liability, "rebuttable" or not. As the present case amply demonstrates, such an approach is all too liable to lead the decision-maker into error." (at para. 31), BOA Tab 22, p. 270.

[53] See, in particular, Lord Kerr's statements in *R (JS (Sri Lanka) v. SSHD* (above footnote 34), at paras. 54-55, BOA Tab 22, p. 273-274.

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