Upper Tribunal
(Immigration and Asylum Chamber)

MT (Article 1F (a) – aiding and abetting) Zimbabwe [2012] UKUT 00015(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 October 2011	
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Before

UPPER TRIBUNAL JUDGE STOREY
UPER TRIBUNAL JUDGE P R LANE
Between

MT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

In the context of exclusion under Article 1F(a) of the 1951 Refugee Convention (Article 12(2)(a) of 2004/83/EC (the Refugee Qualification Directive)):

i) The requirement set out at Article 7(1) of the International Criminal Court Statute (ICC Statute) that acts be "…committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack" (the "chapeau requirement") is an essential element in the definition of a crime against humanity.

ii) In principle the question of whether acts are '…committed as part of a widespread or systematic attacks directed against any civilian population' is a matter that could be dealt with in future country

guidance cases; although the question of whether there exist acts with such a nexus must ultimately be decided on a case-by-case basis.

iii) Commission of a crime against humanity or other excludable act can take the form of commission as an aider and abettor, as a subsidiary (or non-principal) form of participation. Drawing on international criminal law jurisprudence (as enjoined by R (JS) (Sri Lanka) v SSHD [2010] UKSC 15), aiding and abetting in this context encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime, i.e. the contribution should facilitate the commission of a crime in some significant way.

iv) The fact that the Article 7(1)(a)-(g)list of acts capable of being crimes against humanity does not include the "cover-up" of murders, whilst a surprising lacuna, should not be filled by judicial interpretation.

v) Duress is a defence to international criminal responsibility (see Article 31(1)(d) of the ICC Statute). Again, drawing on international criminal law jurisprudence, such a defence is confined to situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice of counter activity available. It has four components: the threat must be of imminent death or continuing or imminent serious bodily harm; the threat must result in duress causing the crime; a threat results in duress only if it is otherwise avoidable (i.e. if a reasonable person in comparable circumstances would have submitted and would have been driven to the relevant criminal conduct); and the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect.

Representation:

For the Appellant: Mr M Symes, Counsel, instructed by Birnberg Peirce & Partners
For the Respondent: Mr S Ouseley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Zimbabwe. She arrived in the UK on 13 August 2007 and claimed asylum on 25 March 2009. The basis of her claim was that in Zimbabwe she had been a police officer stationed at Bulawayo between 2000 – 2007. In 2007 she found herself under pressure from her superiors to participate in various acts against political opponents of ZANU PF, including attendance at MDC rallies where police beat MDC supporters

with batons, two incidents in which torture was used (the "Stephen Mhlanga incident" in February 2007 and the "Gibson Sibanda incident" in April 2007) and in March 2007 she had also been ordered to go to a village near Plumtree, where 30 people had been killed the night before by ZANU PF supporters, and bury the bodies in shallow graves (the "Plumtree incident"). Despite the risks she had been able in mid-July 2007 to desert and travel to Sudan, returning for a brief period in the second half of September in order to try, unsuccessfully, to get a passport for her daughter. She had then travelled, via South Africa, to the UK.

2. On 18 January 2010 the respondent decided to remove her as an illegal entrant having refused to grant her asylum. At the same time the respondent certified her claim under s.55 of the Immigration, Asylum and Nationality Act 2006 because it was considered that Article 1F(a) and (c) of the Refugee Convention operated so as to exclude her from the protection of the Refugee Convention because there were serious reasons for considering she had committed crimes against humanity. Article 1F of the Refugee Convention is as follows:

> "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;
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

3. In R(JS) (Sri Lanka) v SSHD [2010] UKSC 15 Lord Brown said that when considering whether an applicant is disqualified from asylum by virtue of Article 1F(a) the starting point should be the Rome Statute of the International Criminal Court ("the ICC Statute"). Article 7(1) of the Statute defines crimes against humanity as follows:

> "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:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, on other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

The first sentence of Art 7(1) comprises what is known as the "chapeau" requirement. ("Chapeau", we would observe, is used in this context to mean "hat"/"covering" or text that prefaces particular provisions.)

4. The respondent also considered that her claim to be a police deserter was not credible and that she would face risk of being persecuted on return. Her appeal against this decision was heard by the First-tier Tribunal (FTT) (Judge Pirotta) who in a determination notified on 7 April 2010 upheld the certificate and dismissed the appeal. Judge Pirotta considered that the respondent had shown that the appellant had committed crimes against humanity and so fell to be excluded under Article 1F(a) of the Refugee Convention and that in any event she had not established that she was a police deserter or that the Zimbabwe authorities would view her adversely. The appellant was successful in obtaining a grant of permission to appeal to the Upper Tribunal. In a response dated 30 March 2011 the respondent said she agreed with the contention in the grounds of appeal that the FTT judge had materially erred in law by failing to consider the issue of whether the appellant was entitled to rely upon the defence of duress in respect of the s.55(1)(a) certificate. In a decision made on 19 April 2011, the Upper Tribunal (UTJ Storey) decided that the FIT had made a material error of law as just described and set aside its decision. The appeal now comes before this panel for us to re-make the decision. In a case in which a certificate has been made in relation to an asylum appeal, as here, the Upper Tribunal "must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate" and, if in agreement with the certificate, must dismiss the asylum dimensions of the appeal without considering any of its other aspects (s.12(2)(b) of the Tribunals, Courts and Enforcement Act 2007; s.55(5A) and s.55(4) of the 2006 Act).

5. In the decision finding a material error of law there was a clear ruling as to the material scope of the appellant's appeal. It was noted that the respondent had not sought to dispute before the FTT judge the appellant's evidence that she was a member of the police force in Zimbabwe between 2000 and

September 2007 and that accordingly the present hearing would proceed to treat this much of her evidence as established.

6. Before proceeding further we should record our thanks to both parties for their assiduous preparation and helpful skeleton arguments and submissions. With the agreement of both parties we made an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 whose contents included an order that all references to certain specified witnesses should be anonymised.

7. At the hearing we heard from a witness, W1, and from the appellant. W1 is a person whom the Tribunal has accepted previously as an expert witness on country conditions in Zimbabwe. It is convenient if we set out a summary of W1's evidence when dealing with the expert evidence below.

The appellant

8. In her evidence to us the appellant confirmed that her ethnicity was Shona and her religion was Christian (Roman Catholic). She had been a police officer in Bulawayo in the duty uniform branch. She had not voted in any elections before joining the police, and police in Zimbabwe were not allowed to vote (she added later that no one in her family was involved in politics).

9. In cross-examination the appellant was asked why, if she was now saying she was just a uniformed duty officer, she had said in her screening interview that she was a police detective and submitted a January 2007 payslip describing her as being in criminal investigations. She said she had only been assigned to criminal investigations for three months, being trained during that time in fingerprint techniques and scene of the crime work. (Later she added that during this time she had also attended courts to present the police cases). She said she had joined the police because she had been inspired by their crime-prevention role. Until 2007 she had not come to understand that the police force had a record of brutality against political opponents and others. She had not seen anything else herself to suggest that this was the case before then, except when it came to the Riot Squad.

10. Asked if she was not aware that the police had used violence in the 2002 elections, she said she knew about that to some extent but she and her colleagues always believed the MDC were making up claims about police brutality. She and her colleagues did not discuss political matters. Asked if she had ever witnessed ZANU-PF youth militia being "attached" to her police station, she said she had not although she had seen the Riot Squad being involved in dealing with riots and demonstrations. Her work in the charge office meant she saw persons when they were brought in to the police station for questioning and also afterwards when, and if, they were charged/released. She had seen MDC activists brought in to the police

station and being arrested and charged for public order offences, but she had never seen any of them being ill-treated. The questioning of such people was done by the CID. If someone who had been in a cell complained that they had been beaten, she and her colleagues told them to fill in a form and raise the matter in court. In her time as a police officer, only one or two people had done that. In the course of a year probably no more than 4% of suspects had injuries when brought into custody. Such injuries could be for pub fights and the like. She had never seen someone injured after having been put in the cells. She described her police station as a ground floor building having 8 rooms comprising a main office, a charge office, an administration office, a CID room, a briefing room and a general kitchen. At the back there were four cells. She estimated that on average her station dealt with three detainees a day, 60-80 per month.

11. Asked if she had heard about police officers being sacked or disciplined for political reasons in 2005-2006, she said this had not happened in her station but she had heard about it in 2006 over the police radio and through police circulars. She was also aware of a Police Commissioner's Directive giving instructions about the transfer of political suspects. She did not think that to be a police officer she had to support ZANU-PF; she had been neutral; she did not support any party. She had heard however that a police commissioner had said all police should be ZANU-PF.

12. Asked if she had ever arrested any ZANU-PF supporters she said she never had. When she first became aware of police mistreatment of MDC supporters in February 2007 she never thought to question her orders as this would have caused her superiors to think she supported the MDC. She did not know the political affiliation of her immediate superior. There had only been two occasions when she had been asked to arrest MDC supporters. On a third occasion she had feigned illness. She was never suspended.

<u>The Stephen Mhlanga incident, February 2007</u>

13. The appellant then described the first incident in which she was involved in such an arrest, in mid-February 2007, involving Stephen Mhlanga. She was with five other police who raided his house, arrested him and, en route back to the police station, took him to a bushy area by a river, where he was questioned for about two hours about his MDC connections. She was the most junior officer there and her role was just taking notes. Some of the officers there were verbally aggressive and poked him and threatened to throw him in the river. He was very scared. He gave them the information they wanted. After they had taken him to the police station he was put in the cells. She did not inquire if they had ill-treated him there, although she knew he was released the next day. She did not protest to her superiors about his ill-treatment as they would, she said, have labelled her as an MDC sympathiser.

The Gibson Sibanda incident April 2007

14. The next MDC arrest incident in which she was involved was at the end of April 2007, involving Gibson Sibanda. She was one of seven police officers present on a raid on his house. Others had hit him with batons, but she had only slapped him. She did not think he had been offered or received any medical treatment for his injuries. After the interrogation, conduct of his case was left to the detectives. She saw him the next day. She did not notice any new injuries.

15. She said that in 2007 she had been involved in policing eleven MDC rallies/demonstrations. She and her colleagues had been deployed as a second line behind the Riot Squad, helping chase and disperse the demonstrators. Excessive force had only been used on some of these occasions. The Riot Squad used tear gas and batons; they needed to use force against the MDC mob. She did not participate in any beatings-up; she used her baton just as a form of prodding to encourage people to disperse. Very few ZANU-PF supporters turned up or became confrontational towards the police.

The Plumtree incident, March 2007

16. The appellant was asked about the Plumtree incident which she said had happened in March 2007 (i.e. after the Stephen Mhlanga incident but before the Gibson Sibanda incident). ZANU-PF supporters had gone to a village near Plumtree in the evening and set fire to houses of MDC supporters. Some 30 were killed, including children. When she got there it was the next morning and the village was deserted. No one knew where the perpetrators had gone. The CID officers present told her and others to bury the bodies in shallow graves. She was traumatised and shocked. She did not try and quit the police straight afterwards because she was scared.

17. The appellant was then asked why, having travelled to Sudan on 13 July 2007, she had returned to Zimbabwe on 16 September. Her main reason, she said was to try and get a passport for her daughter, and also to see her mother. She knew she was taking a risk but from what she had heard from police colleagues that she had met by chance in Sudan, she counted on her employers not yet realising she had in fact deserted. She had not told her employers she was going to leave. She travelled on a passport issued in Zimbabwe.

18. Asked why, after arrival in the UK in October 2007 (and even before she had claimed asylum on 25 March 2009) she had gone to the Zimbabwe Embassy in London to renew her passport, she said she had done so because that was the only way of getting ID. She believed it was safe to do so because

she was in the UK. She was also asked why she had not gone to UKBA to claim asylum earlier. Initially she did not reply but went on to say it was because she thought her visa was still valid. She agreed she had lied to the supermarket company, Asda, when she had applied for a job from them as in fact she knew her passport was not (as she had told Asda), with the Home Office. She had not claimed asylum until she had been arrested while working. She had been told in Zimbabwe not to claim asylum as the CIO back in Zimbabwe would learn about that.

19. In reply to questions from the panel the appellant said that during the arrest of Gibson Sibanda she was one of two present who had not been issued with a baton. It was in 2007 when she had first seen circulars giving details of officers alleged to be MDC supporters. Even before seeing them she knew that it would be risky for any police officer to question a beating-up of a suspect by the police. Further, "a bell" had started "to ring" with her about the true nature of police mistreatment of MDC supporters in early 2007 when she began feigning illness. Once she had used the sickness excuse one or two times, she thought she should not use it again.

20. Asked further about the Plumtree incident in March 2007 she said that the police had tried to carry out an investigation into who had been responsible for the killings. Her clear information when she went there was that it was ZANU-PF supporters who were responsible. She and others had been told to go there to investigate but they were not given the opportunity (she asked about taking photos, but was told there was not much point). She agreed that burying bodies was a way of assisting a "cover-up". She knew she was "covering up" serious crimes.

21. She said that when she had left for Sudan in July 2007, she believed the ban on police resignations was still in place.

22. We heard oral submissions from the parties which are summarised below at paras 58-73. At the end of the hearing we directed that the parties had permission to submit further case law and submissions dealing with the possible crimes against humanity dimension of the appellant's role in the Plumtree incident in March 2007. We duly received further submissions from both parties.

Background Evidence

23. It is not intended that we summarise each and every item of background material; these are listed in Appendix C. It will assist, however, if we summarise key parts of this evidence relating to police activities and conduct in Zimbabwe in general and in Bulawayo in particular. These furnish a useful prologue to our summary of the expert evidence, which follow them.

The Republic of Zimbabwe Police (ZRP)

24. In its November 2005 report the Zimbabwe Human Rights NGO Forum described the police as being divided into specialised units, namely the Duty Uniform Branch (DUB), the Police Protection Unit (PPU); the Support Unit (a paramilitary branch), Criminal Investigation Department (CID), the Staff Branch and the Technicians Branch. It describes the police force as dominated by a "culture of impunity". The March 2003 report by Zimbabwe Human Rights NGO Forum on Torture by State Agents in Zimbabwe, June 2001-April 2002 noted that in 2002 the percentage of police perpetrators identified by victims was 12% (ZANU-PF supporters accounted for 46%). Numerous reports highlight the fact that during Operation Murambatsvina (Restore Order or Clean up Filth) in May 2005, which according to UN estimates left 700,000 people without homes or livelihoods, most of the widespread demolition of urban markets and homes had been carried out by the police, with help from the army and National Youth Service. The Human Rights Watch report of May 2007 ("Bashing dissent") stated that the police routinely used unnecessary force to disrupt peaceful protests and subject activists to severe beating and other mistreatment in police custody. The culture of impunity within the police is also the main theme of the September 2009 Amnesty International document: "Zimbabwe: the toll of impunity".

Bulawayo

25. According to the US State Department Report for 2002, in November 2001 hundreds of war veterans and ZANU-PF supporters attacked shoppers, schoolchildren and other persons in Bulawayo, causing numerous injuries. No arrests were made. A Human Rights Watch Report for 2009 ("Video and Shadow") notes that in 2002 the presence of youth militia increased, particularly in Harare and Bulawayo. A "Zimbabwe: Post-Presidential Election Report" of May 2002 by Physicians for Human Rights, Denmark, documents an incident that year in Bulawayo in which youth militia beat nine people. Initially uniformed police from the Support Unit watched on and did not intervene although they did later move in to rescue the nine.

26. Physicians for Human Rights Denmark in a 17 April 2003 report entitled "Peaceful Protest and Police Torture in the city of Bulawayo 24 February – 25 March 2003" chronicle the detention of civilians at Queen's Club Sports Ground during the above dates when Zimbabwe played overseas teams in the World Cup cricket competition. It is stated that "the current authors are aware of 15 detainees in relation to the first match in Bulawayo, of 42 detainees in relation to the second and of 23 detainees in relation to the third. All those detained have reported torture or serious ill-treatment". The report went on to note that all the interviewees reported that their abuse took place at least in part at Bulawayo Central Police Station. The interrogators were said to be from the Law and Order section of the police and those inflicting beatings being the CID.

27. A US State Department Report February 2005 says that at this match 80 persons were arrested. This report also describes four women's account of ill-treatment by police at Central Police Station, Bulawayo on 8 March 2003 following 21 arrests at an international women's rally demonstration. There were similar reports of police ill-treatment at several other stations in Bulawayo, including the Nkulumare Police Station which concerned the detention of seven civilians on 18-19 February 2003. This report also notes that, in order to put pressure on the church not to criticise Mugabe, the government had charged the Catholic diocese of Hwnge and the Catholic Mater Dei Hospital in Bulawayo for allegedly handling foreign exchange illegally.

28. The 2006 Freedom House Report noted that Operation Murambatsvira began on 19 May 2005 in Harare and soon spread to almost every urban area including Killney and Ngozi Mine (both suburbs of Bulawayo). The Zimbabwe Human Rights NGO Forum Political Violence Report 2005 records that in September 2005 thirteen members of Women of Zimbabwe Arise (WOZA) were arrested at a demonstration and spent the night in the cells.

29. The US State Department report of February 2007 records that on 16 May 2006 in Bulawayo three church leaders from the Christian Alliance were briefly held accused of planning nationwide demonstrations in commemoration of the first anniversary of Operation Murambatsvina. On 29 November 2006, also in Bulawayo, 57 WOZA demonstrators were arrested for holding an illegal demonstration and it was reported some were assaulted whilst in detention.

30. The Zimbabwean Human Rights NGO Forum Political Violence report for July 2006 notes demonstrations by students in March and by students and the Bulawayo Residents Association in June 2006. The Zimbabwe Human Rights Forum report of December 2006 "Who Guards the Guards?", which documents reports of police human rights violations in that period, noted that the majority were from Harare and that there were "very few cases from Bulawayo" (although press reports for Bulawayo were nearly 10% of the total). A table in this report lists five names of police perpetrators from Bulawayo (the highest was from Harare: 27).

31. The Human Rights Watch report for May 2007 ("Bashing dissent") documents mass arrests following an aborted prayer meeting in March, including in Bulawayo. The Zimbabwe Human Rights NGO Forum in a December 2007 political violence report notes that in April 2007 82 members of WOZA were arrested for protesting against incessant government cuts in 2007. In the course of the same series of incidents 6 members of WOZA in Bulawayo were allegedly taken by force from their various homes by the police in vehicles bearing South African number plates to a secluded area 40

km away from Bulawayo. They were questioned about the whereabouts of the WOZA leaders. They were not released until the next day. Also in 2007, on 19 April two National University of Science and Technology (NUST) students were reportedly abducted and tortured by suspected CIO operating in Bulawayo. In May police dispersed students at NUST in Bulawayo. In August at NUST a student representative was arrested and tortured at Bulawayo Central Police Station. In October of the same year police arrested 158 members of WOZA in Bulawayo for protesting.

Expert Witnesses

32. The appellant's representatives produced written reports from two witnesses, W1 and W2. In view of the anonymity order it is inappropriate to give any further particulars about them save to say that both parties accepted they had relevant expertise based in part on their own contacts within Zimbabwe with a wide range of actors.

W1: written reports

33. There were three reports from W1, the most relevant being that dated 14 April 2011, which set out his understanding of the events since 2007 and the latest political situation in Zimbabwe. Given that W1 in his oral evidence and Mr Symes in his submissions did not seek to argue that this evidence disclosed a greater degree of risk to failed asylum-seekers on return than identified in current Tribunal country guidance, it is unnecessary to say anything more about those parts of this report addressing this aspect.

34. As to the earlier political history of Zimbabwe, W1 states in his April 2011 report that in the last nine years an estimated 25,000 people have been the victims of human rights abuses, including: endemic torture, beatings, murders and disappearances An estimated 200,000 became displaced persons. Operation Murambatsvina in May 2005 saw widespread demolition of urban markets and homes, most of them carried out by the police with help from the army and National Youth Service, and, according to UN estimates, left 700,000 people without homes or livelihoods. MDC members were the prime targets. The state-sponsored violence was compounded by total impunity for state forces and their non-state surrogates. A key feature of the ZANU style is the demand for overt loyalty.

35. As regards the police, from early 2000 there was evidence of police refusal to enforce the law when it came to on-the-ground operations conducted by the youth militia. One of W1's sources (cited at para 8.82) said that the general public and low-level police were only mildly aware of police 'misdemeanours' prior to 2000, during the time when the police had a reasonably professional image. But since 2000 all senior police officers have made plain their allegiance to ZANU-PF on a number of occasions.

36. In 2007 there had been attacks on police stations and a passenger train which the regime blamed on the MDC.

37. W1 cites one of his sources (his report para 84) stating that it would be very unusual for someone working in the ZRP in the years after 2000 to have access to any media other than pro-ZANU-PF sources. If a normal police officer had no social networks (church, family or other) or no direct personal experiences of police misbehaviour, it was highly unlikely he or she would have reason not to believe the propaganda supplied. Further, political tension was less in Matebeleland (of which Bulawayo was a part) and there was a more limited ZANU-PF presence, with the result that much policing activity was devoted to dealing with ordinary criminality. Being a serving police officer would mean that fellow churchgoers critical of ZANU-PF were likely not to raise political matters with you.

38. A recent estimate was that since 2000 some 20,000 former police and army staff from all levels have left Zimbabwe having quit government service. Many more may have left the services without being able to leave Zimbabwe. Overall, current staffing levels of the police are about 30,000 and the army about 35,000. Thus at least a third of relatively professional staff have left and been replaced by graduates from the National Youth Service.

39. According to one of W1's sources (his report, para 88) there were a number of periods when police resignations were banned: 2001, 2002 and following the 2005 election. In 2002-2004 the problem of deserters had led to the creation of a "Commissioner's pool" to retain, but quarantine, senior officers suspected of insufficient loyalty.

40. The appellant's account of the AWOL procedures applied in her case was found by one of W1's sources to be plausible. It was plausible also that in 2007 someone with sufficient funds would have been able to sort out a passport for a minor Zimbabwe national. The legal requirement was that – assuming the parents were both in Zimbabwe – at least one should attend at the passport office when applying or otherwise someone with a power of attorney to act on their behalf. Should an internal police procedure for an officer being AWOL be carried out, this would not necessarily interfere with the Registrar General's procedure in issuing a passport, but since the passport office would be one of the first agencies to be told of someone being AWOL, it would be advisable to avoid it.

41. In 2007, writes W1, Zimbabwe's border with Botswana was porous.

<u>W1: emails etc.</u>

42. W1 also produced copies of a number of emails and a "Note" from one of his principal sources dated 7 October 2011 which described: 'youth militia'

presence at police stations in Zimbabwe as being 'commonplace'; during the 2005 elections violence being more limited in Bulawayo; and during 2006-2009 there being a significant shakeup of the police resulting in a new round of witch-hunting by the police for opposition supporters. A 10 October 2011 note from the same source stated that bringing a case of desertion from the police to court might result in imprisonment of not more than two years. "However, other measures, non-judicial, are possible, such as harassment about housing, or debts real or alleged".

W1: oral evidence

43. W1 reminded the Tribunal that his report produced for this hearing dated 10 March 2011 had been written before the Tribunal had reported its country guidance case EM and others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) on 14 March 2011; but he did not consider that for the purposes of this appeal anything turned on any differences between the views expressed in his report and the assessment made in EM.

44. Asked about developments in Zimbabwe post-EM, WI said that ZANU-PF had sought to make political capital out of the events of the Arab Spring by organising a petition against UN sanctions imposed on the Gadhafi regime: these sanctions were portrayed as a "western plot" and Mugabe continued to voice support for Gadhafi. ZANU-PF were continuing to press for presidential elections this year rather than in 2012 and had been behind increased incidents of violence, particularly in Harare.

45. W1 said that from the very beginning of Zimbabwe as an independent state the police force has been aligned with ZANU-PF. Its ranks were drawn heavily from former liberation fighters but its politicisation had been a gradual process. From 2000 the police had become more involved in direct violence against the MDC and had developed closer links with ZANU-PF youth militia. Youth training had started in 2003 and induction of youth militia into the police sped up in 2005. At the same time there had been an ongoing struggle between those in the police who saw their role as a professional body devoted to upholding law and order and those who wanted it to be a political tool of ZANU-PF. The picture nationally was mixed, with the police in some areas being able to maintain a professional ethos. Attempts by some NGOs to provide human rights training to the police had ceased in 1998/99. The process of politicisation went through different phases: very pronounced in 2002 around the elections that year; marked by less violence during the 2005 elections; in full swing during 2007. The high point was 2008 when there were increased numbers of ZANU-PF youth militia who became police.

46. Mr Ouseley asked W1 about mention in his report that there were various periods when the government banned police resignations. W1 said that the

ban on resignations was accompanied by a procedure for putting officers whose loyalty was suspect on watch; the numbers involved had been as many as several thousand. He confirmed that given the high levels of bureaucratic inefficiency, it was quite possible that the Zimbabwe authorities could take over 90 days to identify certain persons in the police as deserters to the border and airport authorities.

47. Asked about levels of political violence in Bulawayo since 2000, W1 said that although in 2000-2002 there had been incidents of violence in that town, the fact that it was used as a commercial site by white farmers and had been more sympathetic to the MDC position on most issues meant that ZANU-PF had accepted it would not win political control of this area. He did not accept that levels of police violence in Bulawayo had been as high as in other areas. He agreed that Zimbabwe-wide the great majority of those in the police force and other areas of the security sector would be pro-ZANU-PF supporters. He accepted that nevertheless police in Bulawayo would generally act under orders from the higher echelons of the ZRP. It was likely that all serving police would have been aware of statements from some senior government officials that all police should support ZANU-PF, but statements from other senior officials had not been on the same lines. It was also important to bear in mind that there were differences in approach from different parts of the police, e.g. between those responsible for riot control and law and order on the one hand and those doing ordinary criminal investigation or traffic control work on the other.

48. W1 said he accepted that police officers in Bulawayo would have been aware that there were police abuses against MDC members and supporters, especially during the policing of MDC rallies; but sometimes, especially when it came to whites, they preferred to leave it to the youth militias to do the beating up. Police virtually never arrested ZANU-PF members or, if they did, the latter were released very quickly without follow-up. After the 2008 elections there were general amnesties for known ZANU-PF supporters. From 2006 onwards there had been an increasing incidence of ZANU-PF militia being "attached" to police stations to help them in policing MDC rallies etc. Serving police officers working in police stations would have been told about this.

49. In reply to questions from the panel, W1 said that up until 2007 the media in Bulawayo was very much monopolised by ZANU-PF papers and radio/tv stations. In 2007 there was a well-known incident involving a Catholic Archbishop speaking out against the Mugabe regime and youth militia were deployed to try and obstruct his dissemination of pastoral messages.

W2

50. In a report dated 25 March 2010 W2 described the ZRP as comprising various departments including the uniformed police, Criminal Investigation

Department (CID); Traffic police; and specialised units such as Police Internal Security and Intelligence Unit (PISI) and the Riot Police.

51. The ZRP has a "dual tradition of following professional police procedure in some instances and abandoning this and following political directions in others". W2 described 2000-2002 as a transitional period which saw the most experienced policemen leaving and being replaced in many instances by former members of the youth brigades, resulting in increased levels of violence against criminals and political suspects by the police, and a return to the utility of 1980s-style state-sponsored violence as a political tool.

52. W2 said he was aware that in 2006 there was a ZRP directive banning resignations. W2 said that for a member of the ZRP to refuse to take part in an interrogation if called upon to do so would be treated as insubordination, - the penalties for which would range generally speaking from a verbal or written warning, to a forcible transfer or dismissal; there can also be harder penalties, including a fine, and arrest/imprisonment. "If the person continued to refuse to participate in interrogation they would presumably be suspected of having a political agenda and supporting the opposition. This could result in the "defaulters" being arrested and imprisoned/tortured themselves".

53. W2 said that mass desertions and resignations of army and police during the last decade had led to the authorities clamping down on those trying to leave legally. "If MT had tried to resign, it is likely that her resignation would have been blocked/rejected and she would have been questioned as to why she wanted to resign. Her political loyalties would have been questioned, and she would have had to 'prove' her political allegiance by participating in more political interrogations/violence against opposition activists".

54. W2 assessed that in 2000 and 2002 the levels of police violence associated with the elections was just as high in Bulawayo as compared with other areas. Around the 2005 elections however, Bulawayo had much less violence than the rest of the country.

55. W2 did not find it implausible that MT had only been asked in 2007 to get involved in violence against MDC activists.

56. For police who went absent without leave (AWOL), W2 said his understanding was that there would first be a letter sent by the individual's branch/depot. If that received no response, there might then be a follow-up letter from a senior commanding officer, copied to all the main police depots in Zimbabwe advising them that the subject is AWOL. The family of the subject would also be notified. In some instances, a warrant of arrest may be issued for desertion of duty.

57. W2 also dealt with risks the appellant was likely to face on the basis she was a deserter.

Submissions

58. Mr Ouseley addressed us first on the issue of credibility. He asked us to find that whilst it was accepted the appellant had been a member of the ZRP from 2000-2007, she had not been able to give a credible account of her role whilst serving there. She had only claimed asylum after having been arrested for illegally working. She had given inconsistent evidence about whether she was a duty officer (constable) or a detective and whether she had seen any MDC supporters transferred from her police station as political suspects. Her account of having no awareness of the close interconnection between the police and ZANU-PF until early 2007 was simply not plausible. To the extent that she had admitted to involvement in certain incidents involving mistreatment of MDC supporters, she had clearly sought to minimise her own level of participation and complicity beyond what was credible. Only under questioning had she admitted that her role in the Plumtree incident was essentially to help "cover up" a mass murder. On the strength of W1's evidence, it was not plausible she could have been as unaware as she claimed of the long-standing political policy of the ZRP to harass MDC supporters and of the significant number of incidents in which police used unacceptable levels of violence against MDC supporters. W1's report had described an increasing politicisation of the Zimbabwean police since 2000. The police force had been staffed from its creation with war veterans and the police had acquired a reputation early on as undisciplined, violent and corrupt. Even those who tried to be neutral professionals would have known they had many colleagues who were not.

59.As to the letters the appellant had produced from the Zimbabwe police saying that she was being treated as a deserter, Mr Ouseley asked us to find that they were not genuine and had been produced to help provide the appellant with a cover story. For a genuine deserter to have gone back to Zimbabwe within a few weeks of deserting would have been bizarre and highly risky. On her own evidence she had no "Plan B" or story ready to tell the Zimbabwe authorities if they had stopped her at the point of return or subsequently – that was something which, if her account were true, she must have worried might happen. Her attempt to explain why she had felt it safe to go to the Zimbabwe Embassy in London to renew her passport, when she was saying the authorities of that country would have classified her as a deserter, did not ring true; especially as she would plainly have known that some Zimbabwean CIO were active in the UK.

60. According to W2, Bulawayo had witnessed its share of violence used by the police and ZANU-PF against MDC supporters in 2000-2002 and, at a

reduced level, in 2005. On the appellant's evidence most of the cases of arrests of MDC supporters in Bulawayo must have passed through her police station, yet she said she had seen nothing wrong except in two cases. The truth was far more likely to be that she was a front-line pro-ZANU-PF police officer in an MDC stronghold. The picture she sought to present, that neither she nor her colleagues ever talked about politics and the conflict between ZANU-PF and the MDC, was far-fetched.

61. As regards the appellant's attempts to say she had tried to desert as soon as she reasonably could, she would in truth have known well before 2007 that she was working in a force that routinely ill-treated MDC members and from early 2007 would have had plenty of opportunity to desert earlier than she said she did. Regarding the first incident involving maltreatment of Stephen Mhlanga, even if it were accepted she was just a note taker, that was not a minimal role and her presence there lent support to the torture used. Similarly, even if during the Gibson Sibanda incident she only slapped him, that was still behaviour that must have put, or helped keep, that gentleman in a state of fear. She was a team player. She was complicit. She was there, voluntarily, participating in breaches of basic human rights.

62. As regards whether the appellant's crimes amounted to crimes against humanity, Mr Ouseley asked us to regard the police as part of the repressive apparatus of Mugabe's essentially one-party state which from an early time had been used as a political tool to punish dissent from ZANU-PF policies. There had been a targeting of many in the civilian population on a country-wide scale since 1988 and the level of impunity within the police and other security services was widespread and systematic. The background evidence clearly established that the crimes committed against the civilian population included murder, rape, enslavement, forcible transfer of population and torture.

63. Turning to the issue of whether the appellant had a defence of duress, Mr Ouseley accepted that this was a defence provided by the ICC Statute to exclusion under Article 1F(a).

64. As regards *mens rea*, it was clear from R(JS) (Sri Lanka) and other cases that mere membership of an organisation – in this case the Bulawayo branch of the ZRP - was not enough. But the appellant's involvement with police abuses in Bulawayo went well beyond that. To have been called to attend at two torture scenes, 11 demonstrations and the Plumtree crime scene, shows she must have been trusted to be loyal. She voluntarily joined a brutal police force, she had personal involvement in the "cover-up" of a mass murder and in two incidents of torture. The test of duress is a high one requiring a person to show that not to follow an order put them in grave and imminent peril. Yet even after these incidents she did not leave immediately.

65. With respect to the Tribunal's request to know the respondent's position on Article 1F(b), Mr Ouseley said that clearly the crimes she had been involved in were serious and the context was non-political. As regards Article 1F(c), Mr Ouseley relied on the respondent's Reasons for Refusal letter.

66. The thrust of Mr Symes' submissions was as follows. We should find the appellant a credible witness. She had afforded viable explanations of difficult points in her evidence. The expert evidence of W1 and W2 bore out that in Bulawayo even in 2002 and 2005 the number of violent incidents directed against MDC or other opposition to ZANU-PF were on a much lower level than in Harare. Despite Mr Ouseley's attempts to re-characterise it, W1's evidence was that the politicisation of the Zimbabwean police was a gradual process, and the struggle between professional elements and the more ZANU-PF- minded officers varied in nature and balance from area to area. In Bulawayo the police could very well have been predominantly a body performing a public service. W1 had said it was entirely plausible that it might take several months for the bureaucracy-prone police to notify border posts about suspected or known deserters and the appellant had a strong family motivation: to see her mother for possibly the last time and to try and help her daughter. When assessing her credibility, it had to be borne in mind that her asylum interview had failed to follow proper procedures for suspected exclusion cases. She had not been given the opportunity to detail relevant incidents and the surrounding circumstances.

67. As regards risk on return, it was entirely credible that she would face persecution for having deserted, being liable not just to criminal punishment under the Zimbabwean Police Act but also adverse treatment for having been disloyal. Given the evidence that there was a blanket ban on resignations from the police force when she left Zimbabwe in 2007, it was inevitable she would be classified as a deserter. She would face second-stage interrogation on return and would thus experience ill-treatment at the airport: see AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061 and HS (Returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094. She could not be expected to lie. By analogy with Article 9(2)(a) of 2004/83/EC (the Qualification Directive), she was someone who had refused for legitimate reasons of conscience to perform acts contrary to international law. If W1's figures were right, there had been a significant number of police who had left the force by resigning or deserting when they could, and so this would be a sensitive point with the Zimbabwe authorities, who would want to be seen to be cracking down.

68. Turning to exclusion and first of all Article 1F(a), Mr Symes first submitted that the evidence clearly did not establish that the appellant had been a (co-)principal in commission of any of the crimes listed in Article 7 of the Rome Statute (for full text see Appendix A). She was effectively a bystander or

someone with only minor or incidental involvement. She had not inflicted any significant suffering. There was neither *actus reus* nor *mens rea* for any torture. The offence of aiding and abetting needed specific intent and that was lacking. She had not intended to carry out torture or "cover up" evidence of murder. At Plumtree she arrived at the last minute and only carried out orders. She was not reckless; she had done all she could to minimise her own involvement. By contrast with the appellant in SK (Article 1F(a) exclusion) Zimbabwe [2010] UKUT 327 (IAC), who had a high level of involvement in the attacks against white farmers, the appellant in this case was in a very lowly position with limited knowledge of wider patterns of police abuses and limited involvement in any wrongdoings.

69. Clearly, following the guidance given by the Supreme Court in R(JS) (Sri Lanka) the respondent could not deduce her complicity as a non-principal from the mere fact she was a serving police officer. So far as concerns whether she was involved in a joint criminal enterprise, the legal test was that she had contributed in a significant way. That was not the case here. As regards aiding and abetting, Mr Symes added, it was even clearer that the legal test here required a "substantial contribution". Again that was not the case here. Her involvement was low-level and involved no command responsibility. She had decent motives for joining the police force and serving in it. In the context of events that arose from early 2007 she did her best to minimise her role. She was unable safely to extricate herself earlier than she did especially given that to have spoken out at any stage would have risked making herself the target of ill-treatment as a traitor. She had explained that after the Plumtree incident it had taken her some time to track down the details of her cousin, so she could arrange exit to Sudan.

70. Also relevant were background factors such as the dominance in Zimbabwe media of ZANU-PF versions of events portraying MDC supporters as thugs or persons who falsely alleged police violence; and the evidence showing that Bulawayo was relatively quiet in 2005 and until 2007. It was wrong to overlook that the vast majority of human rights abuses committed by the Zimbabwe regime were committed by the Riot Police and ZANU-PF youth militia, not the ordinary uniformed police.

71. The Court of Justice ruling in Cases C-101/09 and 57/09 known as B and D v Germany (Area of Freedom, Security and Justice) [2010] EUECJ C-101/09 (09 November 2010) disclosed that there was no high test of duress; para 97 suggested a lighter test. In any event under the ICC Statute she met the test. She suffered from ongoing threats.

72. Concerning Article 1F(c), it was clear from the Court of Appeal judgment in Al-Sirri [2009] EWCA Civ 222 that for this sub-paragraph to be engaged there had to be an international element; that was entirely lacking here.

73. As regards Article 1F(b), it was clearly perceived both under the 1951 Convention and under Article 12 of the QD, that only very serious crimes were covered. Regarding the exemption in the latter for "particularly cruel actions", it could not be said that any of the appellant's actions fell into that category, which envisaged malice and personal desire to harm. Arguably when 1F(b) was involved the decision-maker had to take into account a wider range of factors than under 1F(a). Under the latter a crime had to be a listed crime. Further and in any event, the case law made clear that when state actors were involved in a political struggle with other organised groups, their actions were covered by the "political" proviso: see Lord Mustill in T [1996] 2 All ER 443. Significantly the Rome Statute only dealt with politically motivated crime as a crime of persecution.

Our Assessment

Credibility

74. In examining the appellant's account we have looked at the evidence in the round including the expert and background evidence, and applied the requisite standard of proof, bearing in mind that the burden on the appellant to prove entitlement to international protection but that the respondent bears the burden of showing that the relevant exclusionary provisions apply. In addition to that which she gave before us, the appellant's evidence is contained in an undated, unsigned initial statement, her screening interview record of 28 March 2009, her asylum interview of 21 July 2009, her witness statement of 20 August 2009, her witness statement of 10 March 2010; and the record of the evidence she gave before Judge Pirotta in the same month (on 23 March 2010). We bear in mind that the record of her asylum interview does not show that she was given as full an opportunity as is envisaged in Asylum Policy Instructions to answer questions relating to her possible involvement in crimes against humanity. At the same time, she was offered a break and took one (see Q84) and the interview was plainly not rushed, taking a little over two hours. We also bear in mind that in a case in which an appellant gives oral and written evidence on different occasions stretching over a period of a year or so, one cannot expect total consistency of recall. In this regard it is fair to say that in significant (but not all) parts of her evidence the appellant has been broadly consistent in the story she has given, and, in relation to the bare fact that she had been a serving police officer in Bulawayo between 2000-2007, we consider that her description of the layout of rooms and cells and similar details was given unhesitatingly and with significant grasp of detail.

75. Notwithstanding such considerations, we are not satisfied that the appellant has given us a wholly credible account.

76. Central to the appellant's account at interview, in her latest witness statement and before the FTT judge, was that during her period as a police

officer at Bulawayo Central Station she was just a police constable. That is not, however, how she described herself at her screening interview in March 2009 when she stated that she was a police detective serving in Bulawayo and Harare. A police detective, we are informed, is at least two ranks above a police constable. Nor is it the impression given by the ZRP pay advice slip dated January 2007 which refers to her as being in "Criminal Investigation". When Mr Ouseley asked her about this the appellant said, for the first time, that she had been "attached"/(seconded) to Criminal Investigations Department (CID) but only for three months. She was unable to explain to our satisfaction why she had not mentioned this in her asylum interview or her March 2010 witness statement or in her evidence before the FTT judge, on each occasion when she had said without any qualification that she was a police constable.

77. We found particularly unsatisfactory her evidence regarding the circumstances of her July 2007 trip and her return to Zimbabwe in September 2007. She said in her March 2009 statement that whilst she was in Sudan the ZRP had written to her mother enquiring about her absence, but that she did not know they had done so until she arrived back at her mother's house. (In her 2010 statement she said the ZRP letter was dated 9 August and had been received in the second week of August). However, she also said that immediately before she left Sudan she had asked her mother by phone whether the police had come looking for her and her mother had said 'no' (paras 12-13). If that were correct, she is asking us to believe that her mother neglected to tell her that there was in fact a letter addressed to her as the appellant's next-of-kin from the police, despite the appellant having specifically asked her mother a question about police interest.

78. One of the points of evidence on which the appellant has sought to rely in explanation of why she felt it was sufficiently safe to return to Zimbabwe from the Sudan was that she had been told by police officer colleagues she had by chance met there that it would take quite a while before they classified her as a deserter and notified the Zimbabwe border authorities of the same. Indeed in her statement of 25 March 2010 and in her evidence before the FTT judge she sought to suggest that these colleagues did not even tell her flatly that she was being suspected as a deserter ("…[the fellow officer] said he hoped she was not a deserter as many had come to Sudan"). She said she understood him to be hinting that he knew she was being sought. She placed this chance encounter during the period when she first arrived in Sudan (para 49). Yet in her witness statement earlier that month she described this chance encounter as taking place in October 2007, i.e. *after* she had returned from Zimbabwe to the Sudan (para 10). Not only is there an inconsistency in the timing of this chance encounter, but what the appellant said about it in 2010 is markedly different from what she said in 2009. In her asylum interview in 2009 she was quite definite that this colleague had "highlighted to me he knew I was wanted as I had deserted Zimbabwe" (Q82) and, asked what her

response was, she replied "I panicked and I knew I was no longer safe in Sudan because I did not know who was going to tell the authorities they had seen me in Sudan" (Q88). When asked whether she did not therefore feel at risk when she decided nevertheless to return to Zimbabwe, she said she had considered the matter "but I know that the system is very slow to inform border posts and airport to publish my name as a deserter so I just took advantage of that". We fail to see how, if she truly thought the authorities would learn from her colleagues in July, August or early September 2007 that she had actually left Zimbabwe and would straightaway take steps to pursue her in the Sudan, she could have genuinely believed they would not at the same time take immediate action to notify all relevant authorities in Zimbabwe.

79. In addition, there is also the chronology of this aspect of her account to consider. She had left Zimbabwe for Sudan on the first occasion on 13 July 2007, returning on 16 September 2007. That is over 8 weeks. In most of her evidence the appellant has said that she counted on the Zimbabwe authorities being likely to take up to 3 months to alert border controls of her desertion. She described the police procedure being to classify an officer as AWOL after an initial 21 days of absence, with further procedures taking another 90 days. However, on the appellant's own account her own station had already put her on watch after she had submitted five sick notes early in 2007 in order to avoid carrying out police duties involving harassment of MDC supporters and so her station was likely therefore to see her AWOL status as immediately confirming their suspicions that she was pro-MDC. On her own account they did not in any event wait 90 days (or 111 days if one counts 90 days plus 21). When she went back in mid-September, i.e. around 56 days later, she said in her asylum interview that she did not go to the passport office because the police were looking for her.

80. We would also observe that if in fact the appellant knew she had been classified as a deserter but was simply counting on the tardiness of the Zimbabwe authorities in notifying border controls of this, we do not think she would have sought to give the additional explanation she advanced earlier in her screening interview. After saying in Q2 that she had been led to believe colleagues in the police force in Zimbabwe had come to know that she was in Sudan and so she felt she could not stay there, she was then asked why she had returned to Zimbabwe on 16 September. She replied: "I just went there to check on my daughter. I thought maybe the situation may have settled. However, it was still there so I went back to Sudan on 27 September 2007". If as she claimed, the clock was running down before police procedures resulted in her name being given to border posts and immigration controls as a deserter, then it is difficult to understand how she could have believed the situation may have been "settled".

81. There are also difficulties about what the appellant said she did on return to Zimbabwe. On her own account her principal reason for going back was to check on her daughter and sort out a passport for her. Why she did not take steps to sort out her daughter's passport before she had left Zimbabwe the first time (she said she had decided to leave immediately after the Plumptree incident in March 2007) or why she did not consider trying to sort out such problems whilst in the Sudan, using trusted family as intermediaries, is unexplained. The evidence given to W1 by a trusted source was that a power of attorney could be used in such circumstances. Moreover in her initial evidence she was adamant that when back in Zimbabwe she had not sought to hide. At Q95 of her asylum interview she said she had stayed for about 10 days and during this time she was able to go out. That is difficult to square with her evidence later on in the interview where she said she had not felt able to go to the passport office to sort out a passport for her daughter "after I heard that police were looking for me". She had said she had learnt the police were looking for her the day she arrived back.

82. In her second statement the appellant's evidence was different again. She said she had not gone out except when taking the trip to Botswana to get food for the family. In addition she said that from 19 to 26 September 2007 (i.e. 3 days after her return) she had gone to a friend's house in Marondera (para 8). In her earlier evidence by contrast she said nothing to suggest that during her 10 days back she stayed anywhere in Zimbabwe except at her mother's house.

83. As to the trip to Botswana in September 2007, we also find her evidence wanting. On her own account the Zimbabwean authorities (at least in Bulawayo) knew by then that she was a deserter and she would have known that by leaving Zimbabwe and returning again she would have to pass through border controls for a second time within a few weeks. This prompts the question as to why in such circumstances, even assuming there was an urgent need to buy food (to help the family cope with the food crisis), she would not have tried to get someone else to go. In her March 2010 statement the reason she gave for going herself was because her mother was too old and did not drive, but on her own evidence she had a sister and other close family and we find it surprising that she has never suggested that consideration had been given to finding someone else. Mr Symes has sought to highlight evidence that the Botswana border was 'porous'; that may be so but it was not suggested by the appellant that she knew or counted on that.

84. A further dimension of difficulty is that her account of the extent of her involvement in police mistreatment of MDC supporters has not been consistent; over time she had sought to qualify and minimise it significantly. In her asylum interview in July 2009 she was asked a number of questions that arose out of her screening interview statement that she was "asked to go and beat people and torture people which I did not agree with". At Q49 she was asked whether she had been involved in beating anyone. She replied,

"Yes we used to beat up people". At Q50 she was asked whether she could remember any specific incidents of this and gave as an example in reply the White City rally in February 2007 she had mentioned earlier. Asked if she had beaten up any known MDC activists, she said that at rallies people were mixed "so you didn't know who you are beating". When asked about whether she had been involved in torturing anyone she gave as an example the incident in February 2007 [involving Stephen Mhlanga] stating that she had been involved in torturing as part of a group. She then described Mhlanga being blindfolded and tortured. Whilst it is perfectly true that in these answers the appellant does not expressly confirm that she personally had done the blindfolding and torturing, she said nothing to suggest she had not been involved in doing so and gave these examples in reply to specific questions about whether she personally had beaten people and tortured them. In subsequent accounts, by contrast, she was adamant, in relation to the White City rally that "I did not beat anyone" (para 7, 25 March 2010 statement). Similarly, in relation to the Stephen Mhlanga incident her subsequent accounts portray her role as being confined to taking notes and saying a few bad words to him. In her evidence before the FTT judge she said she did ask Mhlanga a few aggressive questions but her body language was not threatening (para 49). Leaving aside that it is not immediately clear how, if this man was blindfolded, her body language would be known to him, we consider that this revised account, if true, was one she could and should have given earlier in her asylum interview or August 2009 witness statement.

85. The appellant's consistent evidence as to the state of her knowledge about Zimbabwe police mistreating political opponents was that it was not until 2007 that she realised this. In her March 2010 statement she said that up until that date she perceived the police to be generally an impartial law-enforcement body. In submissions on behalf of the appellant Mr Symes sought to argue that this account was credible and supported by the background country evidence. In particular he sought to highlight the fact that in Bulawayo the evidence indicated that the police there until 2007 were relatively well-disciplined and relatively professional. He highlighted her evidence that even though she knew that there had been a significant number of violent incidents (stating that she knew the 2005 elections "had been very violent"), she believed that insofar as any of these were alleged to involve police brutality, "the MDC were making incidents up" and she just accepted the government's version. She also said that she and her police colleagues did not discuss the violence between themselves, nor did she hear talk about it at church or other community events (paras 2-5, statement of 10 March 2010).

86. We have several reactions to that submission. First, the appellant's evidence has been for the most part that her understanding of the police role pre-2007 related to their role in Zimbabwe generally, not only or specifically in Bulawayo; and in relation to the national picture, we cannot accept that anyone serving in the Zimbabwe police at the country's second largest police

station would not have known that pre-2007 there had been a significant number of incidents in which police encounters with political opponents of ZANU-PF had involved a notable use of force.

87. Second, whilst we can accept that she may have thought the police violence was a legitimate use of force in the course of public order enforcement, we cannot accept that she was unaware that such violence had been inflicted by the police.

88. We are also unable to accept her claim that her awareness both of police abuse and her own level of disagreement with it was a gradual process of disassociation which did not crystallise sufficiently for her to decide to desert until mid-2007 (eg para 15 of her statement of 20 August 2009). On her own account, even before the Stephen Mhlanga incident in mid-February 2007, her own unhappiness at being asked to take part in operations involving violence towards MDC supporters, had led her to feign illness on five occasions and to have been told by someone that as a result she had been placed under scrutiny. That is to say, even before she became involved in the Mhlanga, Sibanda and Plumtree incidents, her evidence was that she felt disquiet: in her own words to us (even at that stage) a "bell" had "rung". Further, on her own account, despite perceiving the most serious incident of all to be the Plumtree incident in March 2007 (in her witness statement for March 2010 she said this was "the most traumatising and disturbing experience I have had in the police force – digging graves for unknown bodies and burying them all in the name of trying to cover up for ZANU-PF acts" (para 10), she continued to go to work normally and in the next month to take part in police dispersal of the MDC during a rally.

89. Part of our concerns about this aspect of her evidence relates to her own account of what she witnessed during her period of duty in Bulawayo. In the course of her evidence she confirmed that she worked at the city's largest police station (the second largest in Zimbabwe) and that she worked in the charge office, regularly having responsibility for dealing with arrested suspects when they were brought into the station or also when they were charged. She also said in her witness statement of August 2009 that she had been instructed to take Mhlanga to the cells, leaving further interrogation to the CID. Yet at the same time she was insistent in her evidence before us that in her 7 years as a police officer at this station (leaving aside the Stephen Mhlanga and Gibson Sibanda cases) she had only received a complaint from a suspect on one or two occasions that they had been ill-treated whilst in police custody or detention and she did not suggest these were MDC-related. This covered the time in 2007 when the police had attacked MDC supporters at the White City rally. Even allowing for the fact that the two country experts who have written reports for her case were not wholly *ad idem* about the level of police mistreatment of MDC supporters in Bulawayo, we note that both they and other background sources (for the latter see paras 25-31 above) are clear

that over this period of time there were significant incidents in which police used violence against MDC supporters and we do not find it credible she knew of none.

90. We shall need to consider below the implications for our above assessment of her evidence for the issues of participation and complicity; but our concern here is simply to make clear that her own account of gradual realisation and gradual dissociation crystallising in mid-2007 is not borne out by her own narrative: in particular by the time of the Plumtree incident in March she could scarcely have had a higher level of knowledge of the extent of police abuses or of repugnance to it, yet after that she remained serving in the police and at the end of April went on to participate in the Sibanda torture incident (albeit, she said, reluctantly).

91. A further shortcoming in her evidence concerns the explanation she gave for why she felt able shortly after arrival in the UK to go to the Zimbabwe Embassy in London to renew her passport. On her own evidence her understanding at that time was that the Zimbabwe CIO was active in the UK, indeed she had said she had avoided claiming asylum because she had heard there were Zimbabwe CIO patrolling UK airports. She further accepted that in order to complete particulars to obtain a passport renewal, the Zimbabwean authorities needed to, and did, send a form to her sister in Zimbabwe (FTT determination, para 52). We doubt she would have involved her sister if she genuinely believed that the Zimbabwe authorities had classified her as a deserter. By this time it had been several months since she had deserted.

92. A further concern we have relates to her explanation for why she had not claimed asylum on arrival in September 2007. On her own evidence she was clearly aware when she came that MDC members from Zimbabwe had claimed asylum in the UK. She said her reason for not claiming was not ignorance but fear – fear that the Zimbabwean CIO kept a close watch on UK immigration controls and so would learn about her desertion. If she felt confident enough to visit the Zimbabwe Embassy in person we cannot see that she could genuinely have feared that contacting the UK authorities would put her at risk. The appellant clearly had time to plan her departure from Zimbabwe and particularly given her claimed realisation by early to mid-2007 that MDC supporters were being persecuted, we do not accept she would have lacked confidence that claiming asylum in the UK was a confidential process. Furthermore, we are quite satisfied she would have known that her UK visa had expired on 3 March 2008 and that in order to avoid becoming an overstayer, she would need to make an application of some kind to secure stay.

93. In considering the appellant's account in the light of the evidence as a whole (and applying Tanveer Ahmed principles) we are not able to accept

that the letters she produced from the Bulawayo police – one dated 9 August 2007 addressed to the appellant's mother and signed by "N Nsingo, Chief Inspector, Bulawayo Central Police Station", the other dated 10 October 2007 addressed to the appellant and signed by "T Gunguwo, Inspector, Administration, Bulawayo Central Police Station" - are reliable. We bear in mind that false documents can be obtained in Zimbabwe relatively easily and that in any event the appellant is likely to have colleagues in her local police station prepared to assist with such documentation. We are prepared to accept, however, that the January 2007 pay advice slip is genuine and indeed neither party sought to persuade us otherwise.

94. For all the above reasons (1) we consider that her account of her precise role as a serving police officer between 2000-2007 lacks credibility; and (2) we are fully satisfied that she was a detective and that her involvement in police mistreatment of MDC supporters was greater than she claimed. The matter of the timing and extent of her greater involvement is one to which we shall turn, when considering the implications of our findings of fact for her legal position under the 1951 Convention, the Directive 2004/83/EC (the Refugee Qualification Directive) and Article 3 ECHR.

Application of the exclusion clauses

95. Our principal task is to decide whether there are "serious reasons for considering" that the appellant has committed an act contrary to Article 1F: see Yasser Al_Sirri [2009] EWCA Civ 222 and R(JS) (Sri Lanka) para 39. In the 13 January 2010 Reasons for Refusal letter the respondent stated that there were serious reasons for considering that the appellant was complicit in the crimes against humanity committed by the ZRP during her period of service and she thereby stood to be excluded from the Refugee Convention under: (i) Article 1F(a) of the 1951 Convention as she had committed crimes against humanity as part of a joint criminal enterprise and as an aider and abettor; and (ii) Article 1F(c) because she had been guilty of acts contrary to the purposes and principles of the United Nations. The thrust of the appellant's appeal is that neither Article 1F(a) nor Article 1F(c) apply to her, and that she is a refugee under Article 1A(2).

Article 1F(b)

96. At the outset of the hearing we raised with the parties the issue of whether the appellant fell (additionally or otherwise) within the exclusionary scope of Article 1F(b): we had previously issued directions to ensure the parties made submissions as to the implications of the Court of Justice ruling in B and D v Germany (Area of Freedom, Security and Justice) [2010] EUECJ C-101/09 (9 November 2010), which concerned Article 1F(b) and the equivalent provision of the Qualification Directive, Article 12(2)(b). In response, both parties made submissions, Mr Symes arguing that we should find that the appellant was

not caught by Article 1F(b) (we have already noted his submissions on this at para 73) and Mr Ouseley arguing we should find the opposite.

97. Neither party sought to submit that it was impermissible for us to extend our inquiry to embrace Article 1F(b). We are conscious, however, that in MH (Syria) DS (Afghanistan) [2009] EWCA Civ 226 the Court of Appeal was faced with a case in which the Secretary of State had sought to rely as a ground of appeal in the case of DS on the contention that the Tribunal had erred in failing to consider categories of exclusion under Article 1F other than crimes against humanity. Richards LJ dealt with this ground as follows:

> "74. Despite the position taken by the Home Office Presenting Officer before the senior immigration judge, Mr Sheldon pursued the point before us. He submitted that the immigration judge was under a duty to consider, in the light of her findings, whether the case fell within Article 1F(b) or (c). Where Article 1F issues are obvious in the *Robinson* sense they must be taken by the tribunal even if not raised by the parties: see *Gurung* paras 38, 47 and 92; *Secretary of State for the Home Department v A (Iraq)* [2005] EWCA Civ 1438, paras 27-30; and *GH (Afghanistan) v Secretary of State for the Home Department* [2005] EWCA Civ 1603, para 16. What made the existence of an issue under Article 1F(b) or (c) obvious in this case was that DS was a member of an organisation engaged in large-scale torture and that he was found to have known about the abuses. The immigration judge was under an obligation to consider the issue even though the Secretary of State's case had been limited to Article 1F(a) and therefore, on the immigration judge's findings, pitched too high. Had she considered it, she must have concluded that the exclusion under Article 1F(c), at least, was engaged. Her failure to take the point of her own motion was an error of law, and the senior immigration judge was wrong to find otherwise.
>
> 75. I readily accept that the Secretary of State might have had a case against DS under Article 1F(b) or (c) had the evidence and argument been presented in that way. But that was not the case advanced. The case was put squarely on participation in crimes against humanity, within Article 1F(a). That was the basis of the Secretary of State's original decision and of her case before the immigration judge. That was the issue to which the evidence and submissions on behalf of DS were addressed. In order to pursue a case under Article 1F(b) or (c), the Secretary of State would have had to give notice of the precise way in which the case was put, and DS would have had to be given an opportunity to obtain additional expert evidence and make further submissions. That was not done. The issues arising under article 1F are potentially complex and the immigration judge could not sensibly reach a view on the application of Article 1F(b) or (c) simply on the basis of evidence and submissions directed to Article 1F(a). If, despite the way in which the Secretary of State's case was put, the immigration judge considered that Article 1F(b) or (c) ought to be considered, it would have been open to her to invite the parties to deal with the issues, granting an appropriate adjournment for the purpose.

> But it cannot be said that she was required to go down that line, let alone that she was required to determine the case under Article 1F(b) or (c) on the basis of the existing material. Even if the Secretary of State is entitled to rely on the *Robinson* principle in relation to an issue such as this, which it is unnecessary to decide, the applicability of Article 1F(b) and (c) was not an obvious point (one with a strong prospect of success) such as to engage the principle and to require the immigration judge to take the point for herself.
>
> 76. Accordingly, the immigration judge did not fall into legal error by failing to take the point."

98. We are left in some doubt as to how this analysis applies to the case in hand. Whilst Richards LJ states that in order to pursue a case under one or more of the exclusion subcategories, the respondent "would have to give notice of the precise way in which the case was put", he went on to accept that it would have been open to the tribunal judge in any event to invite the parties to deal with the issue, albeit "it cannot be said she was required to go down that line…" His Lordship added that even if the respondent was entitled to rely on the Robinson principle in relation to such an issue, the applicability of the two further subcategories the respondent sought to raise in the DS case was not obvious because there was no strong prospect of success. In the appellant's case by contrast, we invited the parties to deal with the issue and both were given adequate time to address it. Further, the Article 1F(b) point in her case was one which we viewed potentially as having strong prospects of success. In the event, because of the conclusion we go on to reach in relation to Article 1F(a) it is not necessary to reach a definitive decision on this issue; although we will address the appellant's position under 1F(b) on an obiter basis. We would, however, observe that subject to issues of procedural fairness and of real prospects of success, we doubt that a judge tasked with deciding whether mandatory exclusion clauses apply can fail to reach a decision on each of them, particularly in a case in which the only reason for finding that an appellant was not caught by Article 1F(a) was because he or she failed to meet the chapeau requirements of the latter (viz. the requirement that acts falling with Article 7(1)(a)-(k) be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"). An alternative approach would run the risk of exempting from exclusion even a person who had committed a crime that was patently a serious non-political crime, e.g. murder, torture, rape. On this issue we regard Gurung, paras 38, 47, 92 and Secretary of State for the Home Department v A (Iraq) [2005] EWCA Civ 1438, paras 27-30 as being still good law.

Article 1F(c)

99. It is convenient next to dispose of the other exclusion subcategory involved in this case – Article 1F(c). As already noted, this was one of two

Article 1F subcategories expressly applied by the respondent in the reasons for refusal decision. In relation to cases falling under Article 1F(c) the principal UK authority is Al-Sirri [2009] EWCA Civ 307. Sedley LJ, whilst rejecting the appellant's contention that this subcategory was confined to persons deploying state power, also considered that in order to give effect to the "purposes and principles" requirement the case would need to have an international dimension: see paras 32, 51. In the absence of further argument from the parties we incline to the same view. (We observe that very recently in SS (Libya) v Secretary of State for the Home Department [2011] Civ 1547 Carnwath LJ noted that on the issue of whether Article 1F(c) imports an international dimension requirement, Sedley LJ in Al Sirri "did not need to express a definitive view for the purpose of the case before him"; but the same is true of Carnwath LJ's own expressed doubts in SS (Libya) about there being such a requirement; and, we further observe, submissions before his court on the issue centred chiefly on the discrete matter of whether such a requirement was a necessary part of the definition of terrorism: see paras 16, 27.) There has been no suggestion that in Zimbabwe cases there is the requisite international dimension. Accordingly we conclude that Article 1F(c) has no application to this appellant.

100. Subject to what we have said above regarding Article 1F(b) this case turns, therefore, on Article 1F(a).

Specific observations on legal framework and case law

101. With limited exceptions, we do not propose to set out in the body of the decision either the relevant legislative materials or the most salient principles identified in case law; although purely for the convenience of the reader we include these in Appendices. We take the view that when dealing with exclusion cases tribunal judges should take these materials and that guidance as an essential starting point. After a lengthy period following the reporting of Gurung (IG (Exclusion, Risk, Maoists) Nepal [2002] UKIAT 04870) on 14 October 2002, the Supreme Court in R(JS) (Sri Lanka) has now settled most of the issues about which there was uncertainty and it is unnecessary to set out their guidance in the main body of the determination. As already noted, this guidance clearly directs that we should treat the source of applicable norms when applying Article 1F(a) of the 1951 Convention as being those set out in the ICC Statute: in R(JS) (Sri Lanka), the Supreme Court regarded Art 12(3) of the Qualification Directive as offering no more than a shortened version of the provisions found in Art 25(3) of the ICC Statute: see e.g. Lord Brown at para 33. In what follows we need only deal with the more specific legal issues arising in this case (which as we shall see turn mainly on criminal responsibility in the form of aiding and abetting and not, as in R(JS)(Sri Lanka) on joint criminal enterprise). In that regard we should mention that we made clear to the parties at the end of the hearing that to assist us in evaluating their submissions (which in Mr Symes' case included extensive

citation of the case law of the various international criminal tribunals), we would have regard to academic authority; and in what follows we refer in several places (without identifying the authors of particular chapters and sections), to the leading textbook by Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court, 2nd ed, 2008. There is first of all, however, one general matter concerning the guidance given in R(JS) (Sri Lanka) that needs emphasising.

B and D v Germany

102. In the Appendices we include extracts from the judgment of the Court of Justice in B and D v Germany. Although that considered two Article 1F(b) (Article 12(2)(b)) cases it sought to give guidance relating to key elements of the international crimes encompassed by Article 1F as a whole. Unlike a judgment of the European Court of Human Rights, judgments of the Court of Justice are binding on us and so, if there were any significant differences between the guidance given in R(JS) (Sri Lanka) and B and D, we would have to follow the latter.

103. Further, as Sedley LJ acknowledged in Al-Sirri and Lord Brown acknowledged in R(JS) (Sri Lanka), as a result of the coming into force of the Qualification Directive, the legal rules we must apply are those set out in Article 12 of the Qualification Directive (Article 11 where exclusion from subsidiary protection is concerned). The Supreme Court in R(JS) (Sri Lanka) formulated their reasons without the benefit of the Court of Justice ruling now to hand. Now we have that ruling it is essential that we apply it and the simplest way to do that is to draw directly upon its formulation of the relevant legal tests, although we would note that we see no significant difference between its guidance and that given in R(JS) (Sri Lanka). We turn therefore to consider the principal legal issues that we need to address in this case.

Duress

104. The basis of the appellant's appeal is two-limbed. Mr Symes submits that she did not participate in crimes against humanity so as to meet the requirements of criminal liability within the meaning of the ICC Statute, but that even if she did, she had a ground for excluding her criminal responsibility, namely a defence of duress. It is convenient to address the duress issue first and in this context we shall set out the relevant statutory provisions in the main body of the determination. Article 31 of the ICC Statute in its relevant parts provides:

> "*Article 31*
> *Grounds for excluding criminal responsibility*

(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. Such a threat may either be:

(i) made by other persons; or
(ii) constituted by other circumstances beyond that person's control.

(2) The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

(3) At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence."

105. As regards duress, the appellant accepted that she could not rely on the "only following orders" defence under Article 33 of the ICC Statute, as orders to commit genocide and crimes against humanity are by reason of their subject matter deemed "manifestly unlawful". Rather, her case was that the context in which she operated constituted a threat of at least serious bodily harm against her, she being a mother with a daughter to think about; that in this context she acted proportionately (failing to beat people at demonstrations, slapping rather than beating a detainee, recording events rather than taking a more active role) and that the consequences were not greater than the risk avoidance for her (she would have been branded as a traitor and be at risk of ill-treatment herself).

106. We believe we can dispose of the duress claim relatively briefly. Article 31(1)(d) of the ICC Statute makes clear that duress can be a defence to international criminal responsibility.. In draft Article 9 (dealing with 'Exceptions to the principle of responsibility') the International Law Commission (ILC) UN GAOR Supp.No.10: UN doc. A/42/10/ (1987) at 18 noted that for 'coercion to be considered as an exception, the perpetrator of the incriminating act must be able to show that he would have placed himself in grave imminent and irremediable peril if he had offered any resistance'. Whether it is a complete defence and whether it can apply in all types of cases remains unsettled: see the Trial Chamber discussions in Prosecutor v Endermovic (IT-96-22) 7 June 1997 (a case, like all the other overseas cases to

which we refer elsewhere in this decision -unless otherwise specified- decided by the International Criminal Tribunal for the Former Yugoslavia or ICTFY). It appears uncontroversial, however, that such a defence is confined to situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice of counter activity available; and that it has four components: the threat must be of imminent death or continuing or imminent serious bodily harm; the threat must result in duress causing the crime; a threat results in duress only if it is otherwise avoidable (i.e. if a reasonable person in comparable circumstances would have submitted and would have been driven to the relevant criminal conduct); and the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect.

107. Assuming for the moment that the appellant did participate in the crimes against humanity alleged by the respondent, we consider the evidence to demonstrate that at no point was the appellant in a situation of duress. First of all, we find that at no point was she faced with a threat of imminent death or of continuing or imminent serious bodily harm. The background evidence does not show that police officers who resigned or deserted – and there were very significant numbers of them – ordinarily met with threats of ill-treatment and, even assuming that a small number were, that such threats faced by them were imminent. Both experts described the likely reaction by the authorities to desertions as likely to vary from judicial (prosecution and imprisonment) to other non-judicial measures such as quarantining and harassment about housing and/or debts. Both experts also described the police procedure in relation to those who went AWOL as allowing 21 days before any step was taken, then a further period of 90 days to complete other steps. Whilst neither ruled out that possible reactions to desertion could include ill-treatment, neither suggested that the evidence demonstrated that was a real risk for the generality of police deserters or that even if ill-treatment would be carried out, it would be immediate. Nor did the appellant herself suggest that she was aware that police deserters had faced imminent repercussions.

108. Secondly, and in any event, for the appellant's account to have established duress it would have been necessary to postulate that if she had taken any kind of avoidance action during the torture of Mhlanga or Sibanda (or at Plumtree) (e.g. feigning sick, pointing out that the Zimbabwean Police Act proscribed such conduct, saying she felt unable to participate), that she would immediately have faced a threat of imminent harm. Far more likely is that she would have been suspended or threatened with disciplinary action and at some later stage difficulties may have worsened. The evidence simply does not support the idea that the immediate or short-term reaction would have been imminent harm.

109. As we have already emphasised when assessing the appellant's credibility, we are not able to accept that there was a significant period of time during 2007 when the appellant was unaware that she was taking part in police actions that were abusive and that it was only in mid-July that she was in a position to make a moral choice not to participate any further. In our judgment she must have known from early 2007 (if not before) that she was engaged in abusive conduct and had had available to her for some time means for avoiding such conduct. On our findings, the plain fact of the matter is that she never turned her mind to possible avoidance of participation in abusive conduct.

Crimes against humanity: the chapeau requirement

110. In the Reasons for Refusal letter and submissions the respondent identified background country evidence that supported her view that in Zimbabwe during the period relevant to the appellant's case (2000-2007) the state authorities, including the police, were engaged in acts as defined in Article 7(1)(a)-(k) of the Rome Statute "…committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack". Indeed Mr Ouseley maintained that such a pattern of attacks had been occurring since Mugabe came to power in 1980 and he pointed to the violent action taken by the Zimbabwean military against the Ndebele ethnic group in Matabeleland between 1983-1987 resulting in the deaths of between 10,000-20,000 civilians. He also cited the Tribunal case of SK (Article 1F(a) exclusion) Zimbabwe [2010] UKUT 327, in which Ouseley J followed Mitting J (and the latter's order for reconsideration) in regarding it as "beyond doubt" that the Mugabe regime's attacks on white farmers and their workers constituted an attack directed against the civilian population so as to meet the Article 7(1) "chapeau" requirement (paras 4, 12, 35-39). Given that the respondent identified a considerable body of background country evidence in support of its position and that Mr Symes expressly eschewed arguing that the chapeau requirement was not met in this case, we do not consider there is any need in this case to conduct any further examination of this issue. Two general observations are, however, in order.

111. First, the chapeau requirement is an essential element in the definition of a crime against humanity and if not met the acts specified in Article 7(1)(a)-(k) do not constitute such a crime, no matter how reprehensible they may be. As stated in Triffterer, p.168, the chapeau of paragraph 1 establishes the jurisdictional threshold of the Court over crimes against humanity under the Statute. Article 7(1) has to be read together with the Elements of Crimes document which the ICC adopted in September 2002 and which under Article 21 of the Statute is part of the first rank of legal sources to which that court shall have regard.

112. Second, in the nature of such a requirement, background country evidence will play a critical part in deciding whether it is met. It is clear from decisions of the International Criminal Court - see e.g. the decision on post-election violence in Kenya (Situation in the Repubic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (ICC-01/09; 31 March 2010)) - and other international tribunals dealing with international criminal liability that the fact-finder will need to make specific findings not only on intention and knowledge but also on the temporal and geographical scope of such crimes and (in relation to their material scope) identify why in particular it is considered that: (i) there is an attack on the civilian population (or part of it); (ii) that the attack consists in a course of conduct involving the multiple commission of crimes against humanity; (iii) there is a plan or policy of the State or organisation involved; (iv) that the state has actively promoted or encouraged such an attack; (v) that there is a widespread or systematic attack where the perpetrators knew this, or intended the conduct to be part of such an attack. These are not considerations to be taken lightly: the international community through treaties such as the ICC Statute has not seen it as appropriate to designate discrete acts such as torture and rape as "crimes against humanity" *per se*. It has reserved this designation for "macro-crimes" in which the actors concerned possess resources on a large scale and use them to humanity's detriment. At the same time, case law has established that crimes against humanity can occur even in the absence of an armed conflict and it is not required that each act listed in Article 7(1) occurring within the attack be widespread or systematic, providing that the acts form part of an attack, with these characteristics. Additionally, the commission of a single act, e.g. murder or torture, in the context of a broader campaign against the civilian population, can constitute a crime against humanity (Tadic Trial Chamber, IT-94-T, 7 May 1997, para 649). In view of what we go on to say below at paras 123- 125, it is important to emphasise as well that for a crime against humanity to arise under the ICC Statute there must also be an act within the listed acts specified in Article 7(1)(a)-(f).

113. In several cases that have already come before UK courts and tribunals, there has been an issue of whether the chapeau requirement was met, see e.g. in MH (Syria) [2009] EWCA Civ 226 the Court of Appeal found that there was a sufficient evidential basis to justify an Immigration Judge in finding it had been met in relation to the role of KhaD in Afghanistan, particularly during the 1980s. In Azimi-Rad (Art.1F(a) – complicity – Arts 7 and 25 ICC Statute) Iran [2011] UKUT 339 (IAC) the Upper Tribunal was satisfied that it was reasonably open to the immigration judge on the background evidence before her to conclude that the Basij in Iran had in the relevant period committed multiple crimes against humanity. However, in such cases the challenge was confined to an error of law challenge and the issue was not whether the tribunal would have reached the same conclusion had they been themselves the fact-finder. By contrast, a tribunal judge who has a fact-finding role will

need to apply anxious scrutiny to assess for himself whether the background country evidence establishes the chapeau requirement, even if the parties agree between themselves that it is established.

114. Third, in principle the question of whether acts are '…committed as part of a widespread or systematic attacks directed against any civilian population' (the Article 7(1) chapeau requirement) is a matter that could be dealt with in future country guidance cases; although the question of whether there exist acts with such a nexus must always be decided on a case-by-case basis. (Although not a decisive consideration, we would also note that because assessing Article 1F(a) criminal responsibility necessarily involves assessment of evidence of past events, there is not the added difficulty often confronted in country guidance cases of assessing risk of such events happening in the future.)

International criminal responsibility

115. In the appellant's case the three issues relating to her potential liability for a crime or crimes against humanity under Article 7(1) of the ICC Statute are threefold:

(i) Has she committed any excludable acts as a (co-) principal?

(ii) If not excludable as a (co-) principal, has she committed any excludable acts as a non-principal (as an aider or abettor)?

(iii) In any event, does she have a defence of duress?

116. We have already dealt with (iii).

117. In relation to (i), it is important to bear in mind that Article 25, which encapsulates the basic concepts of individual criminal responsibility, refers to three forms of perpetration: on one's own, as a co-perpetrator or through another person (perpetration by means): see R(JS) (Sri Lanka), paras 16-19. Plainly in the appellant's case we are only concerned with co-perpetration. So far as co-perpetration is concerned, the Tadic Appeals Chamber in Prosecutor v Tadic, 15 July 1999, (1999) 9 IHRR 1051 distinguished three categories of collective criminality: the basic form (where the participants act on the basis of a common design or common enterprise and with a common intention); the systemic form (where crimes are committed by units on the basis of a common plan - viz. the so-called concentration camp cases) and the extended joint enterprise (where one of the co-perpetrators actually engages in acts going beyond the common plan but still constituting a natural and foreseeable consequence of the realisation of the plan). Again, on the facts of the appellant's case we are only concerned with the basic form of co-perpetration.

118. R(JS) (Sri Lanka) is, of course, primarily a case about the basic form, known as "joint criminal enterprise" (jce), which Lord Brown at para 34 noted is wider in scope than any recognised basis for joint enterprise criminal liability under domestic law. For there to be jce there must be a plurality of persons who act on an explicit or implicit common plan or purpose, and the accused must take part in this plan, at least by supporting or aiding its realisation. There must be a shared intent on the part of the co-perpetrators. On the basis of leading cases, in particular Prosecutor v Kordic and Cerkez Trial Chamber (IT-95-14/2), Prosecutor v Krnojelac Trial Chamber (IT-97-25-A, 15 March 2002) and the Prosecutor v Krstic Trial Chamber (IT-98-33) cases, responsibility as a co-perpetrator requires being more than a mere accomplice and requires participation of an extremely significant nature and at a leadership level.

119. Art 12(3) of the Qualification Directive provides that, inter alia, Article 1F(a) applies not only to those who personally commit crimes against humanity but also those "who instigate or otherwise participate in the commission of [crimes against humanity]". This is consistent with the approach adopted in the ICC Statute. Art 25(3)(a)-(d) of this Statute lay down, in effect, in descending order the level of involvement that an individual must have to be criminally responsible. Article 25(3)(b) sets out the different forms of participation and Article 25(3)(c) establishes individual criminal responsibility if a person "aids, abets or otherwise assists…" as a subsidiary form of participation. (It is not necessary in the context of this case to seek to address the meaning of "or otherwise assists" as a form of participation.). Aiding and abetting differs from joint criminal responsibility (jce) in that whilst the former generally only requires the knowledge that the assistance contributes to the main crime, participation in jce requires both a common purpose and an intentional contribution of the participant (Triffterer, pp. 756-758) to a group crime. Aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime. Article 2 para 3(d) of the 1996 Draft Code requires that aiding and abetting should be "direct and substantial", i.e. the contribution should facilitate the commission of a crime in "some significant way". The Trial Chamber in Tadic II, the Trial Chamber in the Prosecutor v Naletilic and Martinovic (IT-98-34) cases and the Appeal Chamber in Prosecutor v Akeyesu (Case No. IT-95-14/1-T), paras 484, 706) interpreted "substantial" to mean that the contribution has an effect on the commission, that is have a causal relationship with the result and it included within the concept "all acts of assistance by words or acts that lend encouragement or support". In Prosecutor v Furundzija (IT-95-17/1-T, 10 December 1998), paras 199, 232, 273-4, the Trial Chamber said that assistance need not be tangible: "moral support and encouragement" can suffice, albeit it must "make a significant difference to the commission of the criminal act by the principal": see also Prosecutor v Brdanin (IT-99-36-A, Appeal Chamber, 3 April 2007) and Prosecutor v Perisic (IT-04-81-T, 6 September 2011). The requisite knowledge

may be inferred from all relevant circumstances, i.e. it may be proven by circumstantial evidence (Prosecutor v Tadic, para 689; Prosecutor v Akeyesu para 498). With these essential elements in mind we turn to consider what is said in this case as to whether the appellant was a co-perpetrator in a jce and/or as an aider or abettor.

Joint criminal enterprise (jce) and aiding and abetting

120. It is not wholly clear whether the respondent seeks to argue in this case that the appellant can be excluded on the basis of any acts committed by her as an aider and abettor only or also as a co-principal. In para 69 of the Reasons for Refusal letter the respondent does allege that the appellant has committed crimes against humanity "as part of a Joint Criminal Enterprise", but the reasoning leading up to this allegation is equally consistent with the appellant being merely an aider and abettor. Paragraphs 66-69 state:

> "66. You did not specify what role you held when you were involved in torturing people as a group, however you have portrayed yourself as a willing individual. It is considered that you were at the very least acquiescing to the international crimes committed during this period by the Zimbabwean Republic Police, and that you aided and abetted in the commission of such crimes by arresting people and being involved in their torture, as well as raiding people's homes on the basis of their political views. Furthermore, it is considered that you took part in such activities without much difficulty in terms of your conscience as you stated that following torturing an individual *'we taken them back to the cells and knock off duty and continue what you are doing'* (AIR Q60).
>
> 67. Your admittance [sic] that you took part in the beating and intimidation of MDC supporters and disrupted anything to do with MDC (AIR Q25) relates to your role as a police officer in the ZRP between February 2000 and June 2007. You describe being directly involved in physical attacks against opposition supporters and have been involved in torture as part of a group (AIR Q53). You have admitted your involvement in disrupting MDC rallies using batons (AIR Q32). You also coherently and consistently described being told to beat up MDC supporters, raid their houses and disrupt their rallies.
>
> 68. It is considered that you were complicit because you had been a participating and knowing member of the Zimbabwean Republic Police. You participated in a number of police raids, beating and incidents of torture. It is noted that, despite claiming that you did not approve of participating in such activities, it took you seven years to disassociate yourself from such activities. On the basis of your own evidence and the available objective evidence, there are serious reasons for considering that between February 2000 and June 2007, you were individually criminally responsible for the crimes against humanity of torture and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health in accordance with Article 25 of the International Criminal Court Statute.

69. Accordingly, there are serious reasons for considering that you were complicit in the crimes against humanity committed by the Zimbabwe Republic Police during your period of service and in turn it is considered that you warrant exclusion from the Refugee Convention under Article 1F(a) of the 1951 United Nations Convention and there are serious reasons for considering that you have committed crimes against humanity as part of a Joint Criminal Enterprise."

121. Whilst Mr Ouseley did not resile as such from the same position during the proceedings before the Upper Tribunal, the main burden of his submissions was that the appellant was guilty of an Article 1F(a) crime as an aider and abettor, not as a participant in a jce. Bearing in mind the emphasis in leading cases on the need for co-principals to have some level of leadership role, we have reached the conclusion that in relation to the appellant the allegation of co-perpetration cannot be made out as it is common ground that, even if she was in fact a detective rather than a constable, she could not be said to have held any significant leadership role and her own accounts, even keeping in mind that in our judgement she has sought to downplay her own role, do not suggest that in any of the incidents in which she was involved that potentially qualify as acts under Article 7(1)(a)-(k), she played a leading role. Accordingly we shall proceed on the basis that Article 1F(a) can only be applied against the appellant if it is shown that she was an aider and abettor. As already noted, for a person to be an aider and abettor it is not necessary to establish a common purpose.

Excludable acts

122. It was common ground between the parties that there were three possible types of acts capable of constituting a crime against humanity engaged by the facts of the appellant's case: Article 7(1)(f) (torture); Article 7(1)(b) (persecution) and Article 7(1)(k) (other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health).

123. We would only note here that in seeking to identify the possible events in which it could be said the appellant may have committed such acts as principal or aider and abettor, Mr Symes' skeleton argument list enumerated beatings, torture, violent disruption of around 11 MDC rallies; arrest and ill-treatment of Stephen Mhlanga and Gibson Sibanda; and general actions of the police. There was no mention of her involvement in the Plumtree incident, notwithstanding that she herself described it as the worst incident she had experienced. It was partly with a view to ensuring that our inquiry extended to consider the possible status of this incident as a crime against humanity that we sought further submissions from the appellant's representatives (with provision for a respondent's reply) regarding relevant case law/academic authority on "cover ups" of mass murder. In response Mr Symes referred us to case law, in particular the case of Prosecutor v Blagojovic (IT-02-60-T, 17

January 2005), which he submitted established that it was not possible to categorise the appellant's participation in the Plumtree incident as a crime against humanity, as the only relevant act was murder; whereas it was not possible for there to be "ex post facto" aiding and abetting of murder. He pointed out, correctly, that the respondent had never alleged that the appellant was party to the plan formed by the group of persons, whom she understood to be ZANU-PF members, who murdered the villagers near Plumtree. Her wrongdoing could only consist in her involvement in the "cover-up" of those murders. Mr Ouseley did not add any observations on this matter.

124. We are bound to say, leaving aside for the moment the issue of whether the appellant possessed some form of criminal responsibility for her actions at Plumtree, that we are somewhat bemused to find that the enumerated list of excludable acts in Article 7(1)(a)-(k) does not include any crimes that have any obvious relationship to the "covering up" of a murder (e.g. conspiracy to pervert the course of justice, destruction of evidence, suppression of evidence, unlawful handling of bodies). We did not find much assistance from any of the case law so far as we could learn of it from standard textbooks such as Triffterer. To our mind there are only two alternatives: either acts relating to "cover-up" of a murder are to be seen as falling within the definition of "persecution" or "other inhumane acts" or they are not included. Our reason for considering there to be such a dichotomy is based primarily on Article 22(2) of the ICC Statute, which enjoins that criminal law provisions may not be interpreted to the detriment of an accused and extended by analogy and on the fact that, according to Triffterer, p.536: "Theoretically, the development of changes in humanitarian law, for instance defining crimes against humanity – not yet falling within the jurisdiction of the Court, cannot be blocked by the Statute. However, from the practical point of view, it can be expected that on subject matters the Statute deals with in a comprehensive way, such a progressive development outside the possibilities provided for by review or an amendment of the Statute appears improbable". As glaring a lacuna as the "cover-up" of mass murder appears to us to be, we cannot contemplate seeking to extend the list of crimes by judicial interpretation.

125. Turning to the former possibility, regarding "cover-up" of mass murder as either persecution or an ("other) inhumane acts…", we do not consider the respondent has furnished enough evidence for us to be satisfied that the role played by the appellant and the other police called to the scene amounted to persecution within the Article 7(1)(b) definition. So far as the subjects of harm are concerned, the persons murdered were self-evidently already dead and it is not clear that burying them could easily be described as cruel infliction of harm or suffering. We have no doubt that such actions, even if not witnessed, must have been acutely distressing for the victim's loved ones, but the act of burial in itself may even be said to have a humane element, in ensuring bodies are not left to flies and carrion. In the absence of either fuller evidence

and/or clearer submissions from the respondent responding to Mr Symes' further submissions on this matter, we are not persuaded that we should categorise the appellant's involvement in the Plumtree incident as being in itself a crime against humanity. The mass murder which took place there plainly was, but not the appellant's involvement in it. The fact that it took place and the appellant participated in it in the way she described remains relevant to our assessment of the general nature of her participation in various incidents between February and July 2007. It is also a matter we shall return to when dealing with Article 1F(b) on an *obiter* basis. However, it cannot in itself constitute a crime against humanity. Given this finding, we would only reiterate our surprise that the ICC Statute's list of excludable acts that are necessary (but not sufficient) to constitute crimes against humanity should not include ones expressly dealing with the "cover-up" of mass murder. Indeed, more generally we know only too well from history that repressive regimes will sometime go to great lengths to destroy, suppress or otherwise "cover up" evidence of their perpetration of evil acts.

Aiding and abetting

126. Mr Symes sought to persuade us that the appellant's participation in the two incidents of torture (the Stephen Mhlanga and Gibson Sibanda incidents) and in 11 rallies in Bulawayo in the first half of 2007 was only ever at a level of participation falling short of aiding and abetting. In our judgment, however, the evidence firmly establishes that she was an aider and abettor.

127. In general terms we are first of all satisfied that (so far as concerns her level of involvement) in 2007 the appellant held the rank of detective rather than constable. That was the way she described her rank when she filled in the SEF form and her pay advice slip she herself submitted corroborated that. We make no finding on for how long, by the beginning of 2007, she had held this rank, but we reject her claim that she held this post only on a temporary basis for three months. We are also satisfied that throughout 2007 the appellant in fact knew full well that the ZRP of which she was a part played an active part in abusive conduct towards the MDC and other opponents of ZANU PF and the Mugabe leadership. We do not accept that the appellant did not become aware of this in her early years as a police officer (she joined in 2000). In particular we do not accept that the sizeable degree of state control over the media would have meant she was unaware that the ZRP was involved in a significant number of incidents in various parts of Zimbabwe in which the police played an oppressive role. We do not, for example, consider that she would have been unaware of the background supporting role played by the police during Operation Murambatsvina in 2005. We note that she herself had said in the course of her different accounts that the 2005 elections were violent and we do not find it credible that she believed the MDC were, routinely, falsely portraying the police as being responsible for the violence.

128. We also reject the appellant's claim that by virtue of being a serving police officer in Bulawayo she understood her role, and the role of her fellow police officers in that city more generally, to be merely one of impartial law-enforcement. We do not doubt that much of her function between 2000-2007 was routine police work involving protection of the local population against crime etc. However, we do not accept that her role did not also involve participation in police harassment and the use of violence against MDC and other political opponents of Mugabe and ZANU PF. As noted earlier, it is clear that although the number of incidents was less in Bulawayo than in Harare, it remains that during the period prior to 2007 there were a number of recorded incidents in which the police took an active part in arresting and detaining opposition supporters, including the very high-profile World Cup cricket incidents which took place in late February/early March 2003 at Queen's Club Sports ground in Bulawayo when police made arrests of a very significant number of demonstrators, significant numbers of whom were detained and ill-treated whilst in police detention. We remind ourselves of the evidence recorded at para 26 above in the form of the Physicians for Human Rights Denmark 17 April 2003 report entitled "Peaceful Protest and Police Torture in the city of Bulawayo 24 February – 25 March 2003" whose findings on these arrests specified that all the detainees interviewed by them reported being ill-treated and all said that their abuse took place at least in part at Bulawayo Central Police Station. In this regard we note that throughout this period she was stationed at the main police station in Bulawayo and on her own account worked for much of that time in the charge office; so that in our judgement she would have known of the comings and goings of a great many of the persons arrested and detained.

129. Moving to the events of 2007, bearing in mind our earlier findings on the appellant's credibility, we are quite satisfied in relation to the Stephen Mhlanga incident which occurred in mid-February 2007 that she was herself present at the scene and was someone along with her fellow-officers in a position of authority and that, whether or not her principal job during this incident was taking notes, she was fully aware that her colleagues were inflicting ill treatment on this man: she herself made threats to him whilst he was blindfolded and her threats, along with those made by her colleagues, put him in fear that he was going to be thrown into the river to drown if he did not co-operate with them in giving certain information. In this regard we attach significant weight to the fact that in her asylum interview she did not seek to distance herself from the ill-treatment inflicted on this man and at no point sought to say that the collective "we" did not include herself: e.g. at Q49. In our judgement her conduct during this incident amounted to facilitation of the commission of the crime of torture in a significant way. We are further satisfied that her involvement in this incident was with specific intent to contribute substantially to it and that her role assisted the common purpose of putting this man in fear of his life.

130. For reasons given earlier we leave aside in this context the appellant's involvement in the Plumtree incident.

131. As regards the Gibson Sibanda incident, which took place at the end of April 2007, we do not accept the appellant's claim that she did not carry a baton at the time or that her role in this incident was merely slapping. Once again we attach significant weight to the fact that in her asylum interview she did not seek to qualify her reference to her being part of a number of police officers who beat this man. On her own account she was present at the incident, was one of a number of police officers there in a position of authority and was fully aware that what was being visited on this man by the officers present, including herself, amounted to serious harm. In our judgement it is incontrovertible that her actions during this incident had a substantial effect on the commission of the crime of torture which took place. We are entirely satisfied that her participation in this incident amounted to the aiding and abetting of a crime against humanity.

132. Bearing in mind Mr Symes' citation in the course of his response to our request for further submissions (see above para 123) of two recent cases dealing with aiding and abetting, Prosecutor v Perisic and Prosecutor v Brdanin, , we should also record that we are entirely satisfied that our finding that during both the Stephen Mhlanga and Gibson Sibanda incidents the appellant aided and abetted the commission of a crime against humanity, is entirely consistent with these and other cases referred to earlier.

133. In light of the above it is unnecessary for us to decide whether the appellant's involvement in an estimated 11 rallies in Bulawayo during the course of the first half of 2007 also amounted to aiding and abetting of a crime (or crimes) against humanity. We would record, however, that here we find once again that the account she gave at her asylum interview gives a more accurate portrayal than her later versions (in which she sought to say that she was merely prodding demonstrators to move them on). We note that at more than one of these rallies the evidence indicates that the police used a significant amount of violence against demonstrators. On her own account in her asylum interview the police role in the White City rally in February 2007 involved beating people (Q50). We do not accept the appellant's later accounts that the police violence used was committed only by the Riot Squad: on her own account she came into direct contact with demonstrators and was not simply in lines behind the Riot Squad.

Article 1F(b)

134. Although it is unnecessary for us to decide, we may say that we are also satisfied on that the above acts, taken together with the appellant's involvement in the Plumtree incident, amounted to serious non-political crimes falling within Article 1F(b) of the 1951 Convention. We agree with Mr Symes' submission that in assessing what constitutes a '… *non-political* crime'

we must apply (albeit in this context only) a principle of proportionality, but we cannot accept his analysis of what that concept entails in the present case. In particular we do not accept his contention that we should regard the appellant's excludable acts as political crimes. Even if he is right in asserting that as state actors the ZRP should be seen as playing a political role in relation to those they harmed in the ways specified (see above para 73), we note that the acts concerned involved, inter alia, participation in acts of torture and ill treatment. Such acts are contrary to peremptory norms of international law and in our judgement they cannot for that reason be regarded as proportionate, non-political, enforcement of the law.

135. In this regard we have taken account of Mr Symes' submission that the appellant's acts should not be regarded as non-political because they did not fall within the description given in Article 12(2)(b) of the Qualification Directive, namely "particularly cruel actions". It seems to us that the latter reference is essentially a gloss on the meaning of "serious" and we have no doubt that torture falls into that category; but in any event we do not understand Article 12(2)(b) to contain an exhaustive definition of non-political crimes. The essence of any definition of the "non-political" category must have regard to whether any purportedly political act is proportionate. In our judgement the appellant's involvement in two incidents of torture does not meet the proportionality standard.

Decision on the certificate

136. For the above reasons we agree the statement in the respondent's certificate that the appellant committed excludable acts falling with Article IF(a). There are serious reasons for considering she did so as an aider and abettor. Accordingly we must dismiss the asylum dimensions of the appeal without considering any other aspect of the case (s.12(2)(b) of the Tribunals, Courts and Enforcement Act 2007; s.55(5A) and s.55(4) of the 2006 Act).

137. Even had we found that the appellant did not fall within any of the exclusion clauses and had accordingly not agreed the s. 55 certificate, we do not find that she faced a real risk of persecution. Likewise we do not find that the appellant faces a real risk of serious harm (under Article 15 of 2004/83/EC, the Refugee Qualification Directive) or of treatment proscribed by Article 3 of the ECHR. On the basis of our findings of fact she is a person who was a serving police officer in Zimbabwe and she has failed to show that she left that service in adverse circumstances either by deserting or otherwise showing disloyalty to the regime. We consider her subsequent conduct, returning to Bulawayo, Zimbabwe from adjoining countries on two occasions and then, once in the UK going personally to the Zimbabwe Embassy in London to renew her passport, confirms us in that opinion. It also follows from our assessment that even if she was required to prove loyalty to ZANU PF and the Mugabe regime, she would have no difficulty in doing so.

Applying the guidance given in EM (Zimbabwe), we find that she would not be at risk on return. There is nothing to indicate that her involvement in crimes against humanity will result in any action being taken against her in Zimbabwe in the future.

138. The evidence relating to the appellant's personal circumstances do not disclose that her removal would breach her Article 8 right to respect for family or private life.

139. For the above reasons:

The First-tier Tribunal materially erred in law and its decision is set aside.

The decision we re-make is to agree the Secretary of State's s.55 certificate.

The appellant's appeal is dismissed on asylum, humanitarian protection and human rights grounds.

Signed Date

Upper Tribunal Judge Storey

Appendices

Appendix A. Legal provisions

Refugee Convention

The Refugee Convention sets out:

> "**Article 1**
> …
> **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;
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

Domestic Regulations

The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 provides:

> "**Exclusion**
> **7.—**
> (1) A person is not a refugee, if he falls within the scope of Article 1 D, 1E or 1F of the Geneva Convention.
> (2) In the construction and application of Article 1F(b) of the Geneva Convention:
> (a) the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective;
> (b) the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued.
> (3) Article 1F(a) and (b) of the Geneva Convention shall apply to a person who instigates or otherwise participates in the commission of the crimes or acts specified in those provisions."

Qualification Directive

The Qualification Directive (Directive 2004/83) sets out at Article 12:

> "**Article 12**
>
> …
>
> 2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> (a) he or she 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;
>
> (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
>
> (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
>
> 3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."

ICC Statute

Relevant provisions from the ICC Statute and the Elements of Crime document adopted in 2002 include the following:

> "**Article 21**
> **Applicable law**
>
> 1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over

the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

…

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

"Crimes against humanity" (Art 7)

Article 7 of the ICC Statute defines a "crime against humanity" in the following terms:

"**Article 7**

Crimes against humanity

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:

   (a) Murder;
   (b) Extermination;
   (c) Enslavement;
   (d) Deportation or forcible transfer of population;
   (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   (f) Torture
   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
   (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, on other grounds that are universally recognized as impermissible under international law, in

connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 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; ...

(e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; ...

(g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity ..."

Elements of Crime document

The ICC adopted its *Elements of Crime* document in September 2002 (which under Article 21 of the Rome Statute is part of the first rank of legal sources to which that Court shall have regard). It sets out:

(a) The provisions are to be strictly construed (7.1);

(b) The requirement of knowledge of an attack on the civilian population should not be taken as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization (7.2);

(c) Throughout the "Elements" provided, that the conduct be committed as part of a widespread or systematic attack directed against a civilian population where the perpetrator knew this, or intended the conduct to be part of such an attack;

(d) As to intent, the "mental element is satisfied if the perpetrator intended to further such an attack." (7.3);

(e) 'Attack directed against a civilian population' in this context means a course of conduct involving the multiple commission of crimes against humanity against any civilian population, where the State actively promoted or encouraged such an attack;

(f) As to the crime of torture**:**

- Persons were "in the custody or under the control of the perpetrator": 7(1)(f);

- Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions: 7(1)(f)."

(g) As to the crime of persecution**:**

- The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights: 7(1)(h);

- The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such: 7(1)(h);

- Such targeting was based on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law: 7(1)(h);

- The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court: 7(1)(h).

(h) As to the crime of other inhumane acts:

- The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act: 7(1)(k);

- Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute: 7(1)(k);

- The perpetrator was aware of the factual circumstances that established the character of the act: 7(1)(h).

"Criminal responsibility" (Art 25)

Article 25 sets out the circumstances in which an individual may be "criminally responsible" for a crime against humanity falling within Art 7. It provides as follows:

> **Article 25**
>
> **Individual criminal responsibility**
>
> 1. The Court shall have jurisdiction over natural persons pursuant to this Statute:
>
> 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> (ii) Be made in the knowledge of the intention of the group to commit the crime ..."

Mental element

Article 30 deals with the mental element:

> **Mental element**
>
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

Grounds for excluding criminal responsibility (including duress)

Article 31 of the ICC Statute provides:

> "**Article 31**
> **Grounds for excluding criminal responsibility**
> 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. Such a threat may either be:
> (i) Made by other persons; or
> (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence."

Appendix B: Relevant Case Law

R(JS) (Sri Lanka) [2010] UKSC 15 (17 March 2010)

In R(JS) (Sri Lanka) Lord Brown stated:

32. *(3) The correct approach to article 1F*

33. There can be no doubt, as indeed article 12(3) of the Qualification Directive provides, that article 1F disqualifies not merely those who personally commit war crimes but also those "who instigate or otherwise participate in the commission of [such] crimes". Article 12(3) does not, of course, enlarge the application of article 1F; it merely gives expression to what is already well understood in international law. This is true too of paragraphs (b), (c) and (d) of article 25(3) of the ICC Statute, each of which recognises that criminal responsibility is engaged by persons other than the person actually committing the crime (by pulling the trigger, planting the bomb or whatever) who himself, of course, falls within article 25(3)(a). Paragraph (b) encompasses those who order, solicit or induce (in the language of article 12(3) of the Directive, "instigate") the commission of the crime; paragraph (c) those who aid, abet, or otherwise assist in its commission (including providing the means for this); paragraph (d) those who in any other way intentionally contribute to its commission (paras (c) and (d) together equating, in the language of article 12(3) of the Directive, to "otherwise participat[ing]" in the commission of the crime).

34. All these ways of attracting criminal liability are brought together in the ICTY Statute [see para 129 of JS] by according individual criminal responsibility under article 7(1) to anyone who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of the relevant crime. The language of all these provisions is notably wide, appreciably wider than any recognised basis for joint enterprise criminal liability under domestic law. That, it seems to me, is what the German court was saying, at para 21 of the *BverwG* judgment (cited at para 14 above) when holding that the exclusion "covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities."

35. It must surely be correct to say, as was also said in that paragraph, that article 1F disqualifies those who make "a substantial contribution to" the crime, knowing that their acts or omissions will facilitate it. It seems to me, moreover, that Mr Schilling, the UNHCR Representative, was similarly correct to say in his recent letter that article 1F responsibility will attach to anyone "in control of the funds" of an organisation known to be "dedicated to achieving its aims through such violent crimes", and anyone contributing to the commission of such crimes "by substantially assisting the organisation to continue to function effectively in pursuance of its aims". This approach chimes precisely with that taken by the Ninth Circuit in *McMullen* (see para 106 of *Gurung* cited above): "[Article 1F] encompasses those who provide [the gunmen etc] with the physical, logistical support that enable modern, terrorist groups to operate."

36. Of course, criminal responsibility would only attach to those with the necessary *mens rea* (mental element). But, as article 30 of the ICC Statute makes plain, if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent. (I would for this reason reject the respondent's criticism of the omission from paragraph 21 of the German court's judgment of any separate reference to intent; that ingredient of criminal responsibility is already encompassed within the Court's existing formulation).

37. Similarly, and I think consistently with this, the ICTY Chamber in *Tadic* defines *mens rea* in a way which recognises that, when the accused is participating in (in the sense of assisting in or contributing to) a common plan or purpose, not necessarily to commit any specific or identifiable crime but to further the organisation's aims by committing article 1F crimes generally, no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission.

38. Returning to the judgment below with these considerations in mind, I have to say that paragraph 119 does seem to me too narrowly drawn, appearing to confine article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. Certainly para 119 is all too easily read as being directed to specific identifiable crimes rather than, as to my mind it should be, wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes. Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.

39. It would not, I think, be helpful to expatiate upon article 1F's reference to there being "serious reasons for considering" the asylum-seeker to have committed a war crime. Clearly the Tribunal in *Gurung* (at the end of para

109) was right to highlight "the lower standard of proof applicable in exclusion clause cases" - lower than that applicable in actual war crimes trials. That said, "serious reasons for considering" obviously imports a higher test for exclusion than would, say, an expression like "reasonable grounds for suspecting". "Considering" approximates rather to "believing" than to "suspecting". I am inclined to agree with what Sedley LJ said in *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, para 33: "[the phrase used] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says."

40. In the result I would dismiss this appeal but vary the order below to provide that in re-determining the respondent's asylum application, the Secretary of State should direct himself in accordance with this Court's judgments, not those of the Court of Appeal."

B and D v Germany

The Court of Justice of the European Union has considered exclusion on a single occasion, in B and D v Germany (C-57/09 and C-101/09; 9 November 2010). It found that:

(a) International terrorist acts are generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations;

(b) Exclusion cannot occur until an individual assessment of the specific facts of each case has taken place;

(c) The mere fact of membership of an organisation which features on a Common Position or a Framework Decision unconnected to Directive 2004/83 cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions;

(d) Inclusion in a Common Position indicates that a group has committed acts falling within the scope of the exclusion provisions;

(e) For exclusion to operate, it must be possible to attribute a share of the responsibility for the acts committed by the organisation to the individual whilst they were a member [95];

(f) Relevant factors are the true role played by the person concerned in the perpetration of the acts in question, his position within the organisation, the extent of knowledge he had, or was deemed to have, of its activities, any pressure to

which he was exposed, and other factors likely to have influenced his conduct [97];

(g) Article 12(b) and (c) of Directive 2004/83 are intended as a penalty for acts committed in the past;

(h) Exclusion from refugee status is not conditional on an existence of a present danger to the host State;

(i) Exclusion from refugee status is not conditional on an assessment of proportionality in relation to the particular case."

Appendix C: LIST OF DOCUMENTATION CONSIDERED

Item	Document	Date
1	Amnesty International, "Zimbabwe: Fear for safety of farming communities and opposition political activists in rural areas"	20 April 2000
2	Amnesty International, "Zimbabwe: Terror tactics in the run-up to parliamentary elections, June 2000"	8 June 2000
3	Zimbabwe Human Rights NGO Forum, "Report on political violence in Bulawayo, Harare, Manicaland, Mashonaland West, Masvingo, Matabeleland North, Matabeleland South and Midlands"	29 July 2000
4	Amnesty International, "Amnesty International Report 2001: Zimbabwe"	2001
5	US Department of State, "Country Reports on Human Rights Practices: Zimbabwe"	4 March 2002
6	Physicians for Human Rights, Denmark, "Zimbabwe: Post Presidential Election March to May 2002: "We'll make them run""	21 May 2002
7	Amnesty International, "Zimbabwe: The toll of impunity"	25 June 2002
8	Mashonaland Programme of the AMANI Trust, "Beating your opposition. Torture during the 2002 Presidential campaign in Zimbabwe"	25 June 2002
9	Zimbabwe Human Rights NGO Forum, "Organised Violence and Torture (OVT)" Human Rights Monitor No. 27	June 2002
10	Zimbabwe Human Rights NGO Forum, "Torture by State Agents in Zimbabwe: January 2001 to August 2002"	March 2003
11	The Solidarity Peace Trust, "Peaceful protest and police torture in the City of Bulawayo: 24 February to 25 March 2003"	17 April 2003
12	America.gov / US Department of State, "U.S. Sternly Rebukes Zimbabwe's Brutality Toward Protesting Citizens"	5 June 2003
13	Human Rights Watch, "Under a Shadow: Civil and Political Rights in Zimbabwe"	6 June 2003
14	The Zimbabwe Situation, "Annan voices concern about reports of possible violence in Zimbabwe (UN News Centre)" "Mugabe crushes protest marches (Telegraph)" "Zimbabwe situation catastrophic: Downer (ABC News Australia)" "Zimbabwe opposition vows to push	June 2003

Item	Document	Date
	on with protests (Reuters)" "Mugabe's forces fire on student protesters (The Times)"	
15	Amnesty International, "Zimbabwe: Southern African leaders must forcefully condemn human rights abuses"	21 August 2003
16	Amnesty International, "Zimbabwe: Unfair trial of Roy Bennet, MP"	24 December 2004
17	US Department of State, "Country Reports on Human Rights Practices: Zimbabwe "	28 February 2005
18	The Redress Trust / AMANI Trust, "Torture in Zimbabwe, Past and Present: Prevention, Punishment, Reparation?"	June 2005
19	The Guardian, "Monster of the moment"	1 July 2005
20	Zimbabwe Human Rights NGO Forum, "Political Violence Report – September 2005"	14 November 2005
21	Human Rights Watch, "Zimbabwe: Evicted and Forsaken"	30 November 2005
22	Zimbabwe Human Rights NGO Forum, "Zimbabwe: Facts and Fictions: An Audit of the Recommendations of the Fact-Finding Mission of the African Commission on Human and People's Rights"	November 2005
23	Immigration and Refugee Board of Canada, "Zimbabwe: The National Youth Service (NYS) training program; the type of training involved; age of participants; whether the training program is mandatory; whether there are exemptions; and the penalty for refusing to serve or for desertion (2001-2006)"	22 June 2006
24	Zimbabwe Human Rights NGO Forum, "Political Violence Report – May 2006"	14 July 2006
25	Zimbabwe Human Rights NGO Forum, "Political Violence Report – July 2006"	11 September 2006
26	Human Rights Watch, ""You Will Be Thoroughly Beaten" – The Brutal Suppression of Dissent in Zimbabwe"	November 2006
27	Mail & Guardian, "Report slams Zimbabwe police torture"	14 December 2006
28	Zimbabwe Human Rights NGO Forum, "Who guards the guards? – Violations by Law Enforcement Agencies in Zimbabwe, 2000 to 2006"	December 2006
29	Freedom House, "Zimbabwe"	2006
30	Zimbabwe Human Rights NGO Forum, "Political Violence Report – November 2006"	23 January 2007

Item	Document	Date
31	The Zimbabwean, "CIO flood Jozi to spy on deserters"	15 February 2007
32	Human Rights Watch, "Zimbabwe: Security Forces Extend Crackdown to Public"	28 March 2007
33	Amnesty International, "Zimbabwe: Fear of torture"	5 April 2007
34	GlobalResearch.ca, "The Battle over Zimbabwe's Future"	13 April 2007
35	Human Rights Watch, "Bashing Dissent – Escalating Violence and State Repression in Zimbabwe"	May 2007
36	Zimbabwe Human Rights NGO Forum, "At Best a Falsehood, at Worst a Lie"	August 2007
37	Reuters, "Zimbabwe police torture women activists"	10 October 2007
38	Mail & Guardian, "Zim dismisses MDC violence claims as 'hearsay'"	25 October 2007
39	Zimbabwe Human Rights NGO Forum, "Political Violence Report – December 2007"	13 February 2008
40	Maravi blog, "(Herald) UN publicly fingers MDC-T for violence"	1 May 2008
41	Thaindian News, "Zimbabway's ruling party says presidential run-off vote necessary"	1 May 2008
42	Institute for War and Peace Reporting (UK), "ZANU-PF Sees Police as Captive Vote"	13 May 2008
43	The Telegraph, "Mugabe regime to rig parliament with arrests"	9 June 2008
44	Gowans blog, "Violence in Zimbabwe and the MDC and its Social Imperialist Supporters"	25 June 2008
45	Maravi blog, "(Herald) MDC-T violence claims dismissed"	9 July 2008
46	War Resisters' International (UK), "Zimbabwe army starts recruitment drive among rural youths after one-third of soldiers deserted"	2 March 2009
47	Hatnews, "MDC official detained over violence"	16 March 2009
47	Jane's Sentinel, "Security Assessment – Southern Africa"	22 April 2009
48	NewZimbabwe.com, "CIO grills Mandaza over Murambatsvina"	11 December 2009
49	NewZimbabwe.com, "MDC accused of lying over cause of Tsvangirai aide's death"	11 December 2009
50	Zimbabwe Broadcasting Corporation, "MDC-T violence threats a fantasy: ZRP"	3 February 2011
51	The Zimbabwe Mail, "Zanu PF: MDC started violence"	9 February 2011
52	The Herald, "MDC's election manifesto synonymous with violence"	10 February 2011

Item	Document	Date
53	AllAfrica.com / The Herald, "Zimbabwe: MDC-T Accused of Peddling Falsehoods Over Political Violence"	15 February 2011
54	Email to W1	15 April 2011
55	Foreign and Commonwealth Office, "Human Rights in Countries of Concern: Quarterly Update on Zimbabwe, June 2011"	30 June 2011
56	Email to W1	10 October 2011
57	Email to W1	10 October 2011
58	African Commission on Human and Peoples Rights, "Executive Summary of the Report of the Fact-finding Mission to Zimbabwe 24th to 28th June 2002"	Undated
59	United Nations, "Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlement Issues in Zimbabwe, Mrs Anna Kajumulo Tibaijuka""	Undated
60	Zimbabwe Human Rights NGO Forum, "Political Violence Report – 1-31 March 2003"	Undated
61	Zimbabwe Human Rights NGO Forum, "Political Violence Report – 1-30 April 2003"	Undated