

FEDERAL COURT OF AUSTRALIA

SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs

[2006] FCAFC 9

CORRIGENDUM

**SZCWP v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND
INDIGENOUS AFFAIRS
NSD 1321 of 2004**

**WILCOX, GYLES and DOWNES JJ
20 FEBRUARY 2006 (CORRIGENDUM 7 MARCH 2006)
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

**GENERAL DISTRIBUTION
NSD 1321 of 2004**

**BETWEEN: SZCWP
 APPLICANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AND INDIGENOUS AFFAIRS
 RESPONDENT**

JUDGES: WILCOX, GYLES, DOWNES JJ

DATE OF ORDER: 20 FEBRUARY 2006

WHERE MADE: SYDNEY

CORRIGENDUM

In the aforementioned matter, the following amendments should be made to the judgment of his Honour Justice Downes:

1. On page 59, paragraph 120, reference to 'paragraph 17 above' should in fact be reference to 'paragraph 114 above';
2. On page 59, paragraph 121, reference to 'paragraph 17 above' should in fact be reference to 'paragraph 114 above'.

I certify that the preceding two (2) paragraphs
are a true copy of the Corrigendum to
the reasons for judgment of his Honour
Justice Downes

Associate: Z Justice

Dated: 7 March 2006

FEDERAL COURT OF AUSTRALIA

SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs

[2006] FCAFC 9

IMMIGRATION – Refugees – Application for protection visa – Applicant Nepalese citizen who was associated with Maoist insurgents – Applicant held to be excluded from application of Refugees Convention on the basis of serious reasons for considering he had committed war crimes and crimes against humanity – Whether Administrative Appeals Tribunal erred in law in determining that question – Tribunal’s application of definitions in Rome Statute of the International Criminal Court – Whether Tribunal failed to have regard to particular requirements of definitions.

Migration Act 1958 (Cth), s 36(2)

1951 Convention relating to the Status of Refugees, Article 1F

Rome Statute of the International Criminal Court, Articles 7(1), 8(2), 9

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JUDGES: WILCOX, GYLES, DOWNES JJ

DATE OF ORDER: 20 FEBRUARY 2006

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THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the costs of the respondent.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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NSD 1321 of 2004

**BETWEEN: SZCWP
APPLICANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AND INDIGENOUS AFFAIRS
RESPONDENT**

JUDGES: WILCOX, GYLES, DOWNES JJ

DATE: 20 FEBRUARY 2006

PLACE: SYDNEY

REASONS FOR JUDGMENT

WILCOX J:

1 This is an appeal, pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('the AAT Act'), from a decision of a Deputy President of the Administrative Appeals Tribunal ('the AAT').

Background

2 The learned Deputy President affirmed a decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister') refusing to grant to the applicant a Protection (Class XA) visa. The delegate's refusal was based upon findings that the applicant:

- (a) *is excluded from protection under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees, ("the Refugees' Convention"), there being strong reasons to consider that he has been complicit in and has committed war crimes and crimes against humanity within the meaning of article (1) F of the Refugees' Convention whilst an active member of the Nepalese Maoists; and*
- (b) *is not a person to whom Australia has protection obligations under the Refugees' Convention and does not meet the prescribed criterion in subclause 866.221 for the grant of a subclass 866 (Protection) Visa.'*

3 This finding was relevant because s 36(2) of the *Migration Act 1958* (Cth) makes it a
criterion for a protection visa that the applicant is a non-citizen to whom the Minister is
satisfied Australia has protection obligations under the Refugees' Convention.

4 As the Deputy President explained, on 15 March 2000 the then Minister (or his
delegate) decided the applicant was not a 'refugee' within the meaning of the Refugees'
Convention. That decision was reviewed by the Refugee Review Tribunal ('the RRT'). The
RRT decided the applicant satisfied Article 1A(2) of the Refugees' Convention. However,
the RRT did not grant the applicant a protection visa; instead, it remitted the application to
the Minister to consider whether the applicant was excluded from protection under the
Refugees' Convention by Article IF thereof.

5 On 29 July 2003, a delegate of the Minister determined that matter adversely to the
applicant. The AAT affirmed that determination on 13 February 2004. Its decision to affirm
gives rise to the present appeal.

6 Article IF of the Refugees' Convention provides:

*'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.'*

The facts

(i) General information

7 At the AAT hearing, the applicant and the Minister were each represented by counsel.
No oral evidence was adduced. The evidence was entirely documentary. It was received and
considered against the background of some undisputed facts.

8 It was common ground before the AAT that the applicant is a Nepalese citizen,
having been born to a family in what he described as 'the privileged class'. The applicant
attended university, graduating with a degree in commerce. While at university, the applicant
joined a Maoist group. At [12]-[13], the Deputy President described what then happened:

'Following his graduation in 1998 he became more active in the Maoist movement and by 1999 began to move around with them from district to district becoming intimately involved in their insurgency activities. He was, he said, a part "of the second line of defence".

It was as a consequence of the Applicant being in fear of arrest (a warrant had been issued against him for terrorist activities), that following the Maoist attack on the village Mahaghat he left Nepal in 1999, escaped into India and entered Australia in October of that year on a false passport.'

9 The Deputy President went on, at [15], to quote passages in the delegate's decision, which he apparently adopted as background facts.

'Nepal is a nascent democracy, having been ruled as a kingdom until about 1992. The country then became a democracy. The applicant belongs to the privileged, educated class, but at university he was exposed to the Maoist ideas. He became concerned by the corruption and exploitation of the poor, especially by wealthy rural landowners.

When the applicant joined the Maoist group he was an undergraduate university student. At that time the Maoists group was a single group espousing general Maoist communist philosophy. The applicant participated in distributing information and attended talks and meetings. After a couple of years the group split into two factions. One faction supported change through the ballot box, and the other felt that the corruption in the country was such that no election could be fair and open, and this faction supported a change of government by force.

Initially the applicant believed that change through the voting system was possible, however, he became disillusioned by the corruption and following an election in 1995 he then sided with the "hardline" group which advocated change using force and the bullet.

The Maoist who supported change through elections achieved electoral success in various areas. In the areas where there was overwhelming support for the Maoists, the government bureaucracy chose to live outside the area. The government maintained a presence in these Maoist areas in the form of police stations.

Upon completing university the applicant went "underground" to serve the group. His main activities involved talking to people to try to convince them of the ideology of the group.

The applicant stated at interview that the landowners were often dishonest. In a kind of mortgage system, landowners and wealthy people would lend money to the poor in exchange for their land held as security. The poor were illiterate, and these contractual relationships were frequently misrepresented in the deeds. Commonly this was done by misrepresenting amounts owed to the lender by adding zeros to the amounts owed when documents were being signed. (The signatures consisted of a thumbprint due to the illiteracy of the poor.) Due to their illiteracy the borrowers did not know that the documents

that they signed misrepresented the actual debts, and would often later find that a small debt was actually recorded as a massive debt that they could not possibly repay in their whole lifetime...making them slaves to the wealthy for their entire lives.

The applicant was involved in various activities, including two projects in which landowners were asked to meet with the Maoists to present all of their debt documents. The landowners involved complied with the request. The applicant believes they knew that they would be forced by the Maoists to comply if they refused, however no threats were made during the incidents in which he was involved. The Maoists publicly burned all of the debt documents, thereby releasing the poor from the onerous debts.

Often the Maoists would force a landowner who held unused land to allow the poor to work the land and to take a share of the produce in order to survive (proportional to the number of hours that they worked the land). The landowner would maintain the ownership of the land and would be given the balance of the income from this unused land.

In other circumstances the Maoists would educate the poor about their rights then place them on unused land, and armed with knowledge of their rights, the poor would then stand up to the landowners by themselves.

The applicant claims that he was involved in a fight with a landlord, and used his knife against someone who ran away.

He was also involved in an incident that involved violence in a village in Rukum district before fled Nepal. This incident occurred in September 1999. The applicant claims that it was a battle that lasted for about three hours from 9 pm.

This incident was arranged by the central command. One way in which the Maoists worked was to have members collect information about particular districts. Such information involved an assessment of the local support for the Maoists, the nature and size of the government presence in the district, the security situation and other information that may be useful for trying to take control of a region. For instance, if there were 5 policemen with five rifles and five bullets each, an assessment would be made that more than 25 Maoists would be needed to be successful in a campaign against them. Thus 25 Maoists killed would use all of the bullets and there would still be Maoists advancing. This information would be sent to central command which would relay orders about the timing and type of attacks.

The applicant was involved in this information gathering strategy for the group. He entered the village and moved around the village representing himself as a local. It was a village of about 30,000 people, so it was possible for the applicant to pretend to be a local. He assessed the level of support for the Maoists...and as it was an area in which 75% of the population had voted for a parliamentary Maoist representative, the support was high. No bureaucrats lived within the village, and he found that only a police station represented the government.

The applicant therefore gathered information about the police station and the local area, and in the evenings went to the Maoist camps that had been set up in the surrounding jungle. For about five days the Maoists observed the area

from the camps and used the applicant's information to decide what action to take.

The applicant understood that his information would be used to launch an attack operation to make the police and government officials flee the area, so that the Maoists could take control. A warning was sent by mail telling the government people and police to leave the area, but the police stayed.

About three hundred Maoists were involved in the operation on the police station during the evening of 22nd September 1999. During the attack the applicant stayed in the camp in the jungle to provide defence against any attacks by government forces from outside the village, and to provide reinforcements if needed for those fighters going ahead. The fighters approached the police station with loudspeakers in an attempt to make the police give themselves up. The applicant believes that had the police given themselves up the Maoists would have captured them and would then have used these captives to negotiate with the government to release the Maoists who were in prison.

However the police did not surrender, and the police started the shooting. The fighting continued for three hours from about 9 o'clock at night. The Central District Officer ...surrendered. The applicant understands that after being kept captive for a month and a half the [Central District Officer] was released after negotiations with the government.

After three hours of fighting the Maoists received news that a large contingent of government soldiers was on its way to the area, and the Maoists were not in a situation to defend themselves against such a large group. So they fled. The applicant fled to India because he believed his identity would be known to all of the villagers with whom he had spoken while gathering information. Many Maoists had been killed in this battle.'

10 At [16], the Deputy President set out some observations by the delegate concerning the applicant's role:

'The applicant joined the Maoists before they engaged in violence and before they advocated violence. However he later followed the faction that advocated violence as a method to achieve the goals of the group (when he felt that the election system could not work due to entrenched corruption).

The applicant had been involved in some violence, however he has never killed a person that he knows of. The applicant was not involved directly in the fighting during the attack on the police station. He stayed in reserve in case he was needed to fight in the village and to provide rear defence.

The applicant gathered information which enabled the attack on the police station in the village in which a number of police and Maoists were killed.

The applicant knew that after a warning to leave the area, followed by an opportunity to surrender peacefully, violence against the police was likely, and that his information would be used to design the strategy.

...

The applicant supported the use of violent means to overthrow the government and to install a Maoist government. He was aware of the killing of civilian landowners, wealthy people and politicians by the Maoist group and supported such activities when necessary as a means of forcing change.'

11 The Deputy President also quoted from country material available to him. That material included these excerpts from *Jane's Intelligence Review* ('Jane's) of 1 December 2002:

'Controlling structures

The insurgents' military arm grew rapidly from a small nucleus in the Tamang communities around Harbung in West Nepal in the early 1990s. In its expanded form, the military wing is now organised into five elements that control their overseas linkages, the Kathmandu valley cadres and the three military regions - central, east and west that comprise the remainder of the Nepalese countryside and the regional centres. Each military region is further subdivided into three sub-regions and then again into three districts. The 30 or so military districts that result from this subdivision do not correspond to the official jillas or administrative districts of Nepal.

The strengths, energy, limitations and ruthlessness of the movement are manifest at the operational level of the military wing. In concept the smallest brick in the field organisation on which the Maoist structure rests is the local guerilla group. This is tactically reinforced from the district or region level for a specific action.

...

At a local level Maoist social regulations ban gambling, alcohol, corruption, ostentatious religious ceremonies and caste and gender discrimination. The local Maoists act in place of the government, monitoring and controlling movement through their area, commandeering privately owned weapons and keeping accurate records of individual wealth and surplus food. Because most of Nepal's rural areas are occupied by such groups, the Maoists collectively exercise an overwhelming resistance to the Nepalese government's efforts to re-assert itself over its territory in the form of elections, development infrastructure and the party political efforts to educate and mobilise a more informed electorate.

Military tactics

When the Maoists attack a military target their local organisation is significantly enlarged by the arrival of a uniformed battalion group. Whereas the resident guerillas are primarily an instrument of control, the uniformed battalion group is an attack force. Its permanent cadre is subdivided into four functional groups: uniformed fighters; logistics porters; the intelligence group, and commissars. The regular battalion is augmented by a locally conscripted element known as the 'martyrs'.

The uniformed fighters are a full-time military force with an established

vertical control structure and badges of rank. Individual fighters are variously armed with captured arms and seem to adapt themselves to new weapons with great versatility.

...

A Maoist operation against a company position is usually executed with precision and determination. The target will be carefully selected for its value and vulnerability. Its security will be penetrated by the intelligence group that has shown itself capable of making shrewd assessments concerning the laxity of a garrison and the weakness of its defensive positions. The most successful Maoist operations have managed to overcome the defensive perimeter using surprise but where this has failed waves of martyrs will assault the position until the defending fire is exhausted.

The final thrust is made by the uniformed fighters, who enter and clear the installation, rounding up prisoners, gathering weapons and looting useful articles. Meanwhile the commissars sift through records and papers, identifying the prisoners and deciding who will be executed and how. In some cases executions are carried out visibly and brutally to send a signal to corrupt government officials and police officers in other areas.'

12

Other quoted excerpts from *Jane's* were as follows:

'This situation is confirmed by Professor Kapil Shrestha, a member of the government-appointed National Human Rights Commission. "In the Maoist-affected areas, human rights abuses are committed on a horrendous scale." The commission says that 10,000 families have been displaced by Maoist activities, with 1,011 people killed, of whom 487 were killed by Maoists. The state stands accused of the disappearance of around 100 persons; the Maoists of 70.' (February 2001 records)

...

'The revolutionary international movement (RIM), an international communist umbrella organisation, has supported the Maoist cause and is thought to have provided training, weapons and money...

Aims and Strategy

*The stated aim of the Maoists is to bring about an agricultural revolution, attain power and declare **Nepal** a communist state. To capture power, the primary aim of the Maoists is to widen class conflict. By launching guerilla activities in their strongholds in remote districts, the Maoists hope to create terror and insecurity and expand their power base. This will be accomplished through increasing the strength of its 'Red Army Troops'.*

To enhance its military power, Maoist plans call for the capture of weapons from police units and local people, and the collection of funds to equip armed units. This is combined with a political strategy that includes identifying and looting rich people and burning their legal documents, and building sympathy among the rural population by assisting them in their households.

...

Targets and tactics

Specific Maoist targets include ‘the rich’, which as a class is identified as the enemy and has been singled out for maiming or killing. They also seek to disrupt legitimate government administration by attacking public targets, such as police stations, local government offices and banks. The staff and property of non-governmental organisations (NGOs) and foreign-funded development projects have also been designated a [sic] legitimate targets, as have tourist facilities - all part of a plan to discredit and destabilise the present Nepalese state.

In spite of their stated aim of attacking the bourgeoisie and the aristocracy, the Maoists have also targeted the poor, including labourers, farmers and school teachers. Several school teachers have been murdered, probably for expressing opposition to the Maoist campaign.

Up until 2 March 1999, a total of 1,440 incidents have been reported to the police including 367 cases of looting, 184 physical assaults, 143 explosions, 80 arson attacks, 63 attacks on police units and 563 police encounters. In this period, Maoists killed 38 police personnel and 121 civilians (mostly members of other political parties), and maimed or seriously wounded 242 police personnel and 297 civilians. Of 63 government and NGO properties attacked, 14 were telecommunications repeater stations.

...

The campaign

The first stage of the Maoist campaign was directed at gaining political control of villages. Maoists targeted unarmed civilians, most members of other political parties, and looted their property, especially food (mostly grain) and hunting weapons. They also raided government stores and stole explosives intended for use in road construction and development projects.

During the phase, the Maoists gained notoriety for placing bombs in public places which killed a number of children. ...

In the latest stage of the campaign, the Maoists have targeted foreign-funded project offices, international NGOs and tourist resorts as well as government officials and offices engaged in the developmental work, such as road construction, irrigation, drinking water, health and education projects. Up to 2 March 1999, Maoists have attacked and burnt 13 foreign-aided project offices.’ (October 2001 review)

(ii) Evidence concerning the applicant’s actions

13 In addressing the question whether the applicant was a person who fell within Article 1F of the Refugees’ Convention, it is necessary and appropriate to read his evidence against the background of news reports and ‘country information’ concerning occurrences in Nepal and, in particular, the activities of the Maoist group. However, Article 1F requires a

judgment about the applicant himself; that is, whether there are serious reasons for considering that he himself has done particular things. It would be a serious error to determine the question adversely to the applicant by reference only to the conduct of the group as a whole or other members of it. For this reason, it is necessary to set out, and to carefully analyse, such evidence as there is concerning the actions of the applicant himself.

14 The only evidence before the AAT as to the applicant's role in the Maoist group's activities was that contained in records of interviews with him. The Deputy President set out sections of the records of interviews.

15 One interview was conducted by a case officer employed by the Department of Immigration and Multicultural and Indigenous Affairs ('DIMIA') on 18 January 2000. It included the following:

Case Officer: What are the policies of the party you were a member of?

Interpreter: The belief of the party is to have a government where there is no democracy.

...

Case Officer: Is there anything else you can tell me about their policies?

Interpreter: And redistribution of wealth between those that have and those that do not have, reduce the poverty. And to eradicate corruption and then to eliminate those that have. Eliminate the wealthy ones.

Case Officer: How would you eliminate them?

Interpreter: Kill them.

...

Case Officer: OK I'll ask you the question in another way. What is the role of the CPN Maoist?

Interpreter: The role of CPN is to eliminate the wealthy ones, similar to what he was saying before

Case Officer: Before you said "eradicate those that have". What do you mean? Who are those that have?

Interpreter: He said that if they can't be eliminated through the ballot, by the voting system, they'll be eliminated through bullet.

...

Case Officer: Now for the 7 and 8 months that you had left university, what sort of activity did you do?

Interpreter: Go to the meetings, and then organise rallies and find the

wealthy people then they warn them or capture them.

Case Officer: What did you do after you captured them?

Interpreter: They used to threaten them and try to get them to agree with their ideas, and if they didn't then they would kill them.

Case Officer: Have you ever killed anyone?

Interpreter: He hasn't killed anybody directly.

...

Interpreter: Business people who may have robbed poor people of their wealth, by drafting of false papers or whatever, they would go and get the business people to return the confiscated property back to the people.

...

Case Officer: And what would happen then?

Interpreter: If they didn't return it they would do it forcefully.

Case Officer: How would you do it forcefully?

Interpreter: He said they would go and surround the house. First they went in and took the key from the businessman, and gain admission.

...

Interpreter: Remember that he said that they would confiscate the stolen property of the landlords? They would go to the landlords and they would try to come to some sort of agreement. If no agreement exist then they would have a clash with the landlord. They might beat the landlord break his property and so on.

And the politicians, in order to protect the landlord, would send the police. That's how the clashes would start.

Case Officer: And what would happen at these clashes?

Interpreter: Sometimes (indistinct) clashes fighting with stones with the police, sometimes even firing guns (indistinct).

...

Interpreter: When they used to travel at night they used to carry weapons.

Case Officer: What sort of weapons were they?

Interpreter: Things like khukura knives.

Case Officer: Any other weapons?

Interpreter: And muskets.

...

Case Officer: Well people have been killed. I consider that violent.

Interpreter: He says no one who is innocent has been killed.

Case Officer: So what people have been killed?

Interpreter: People that have been killed are landlords, government, police and those in the government itself.

Case Officer: And what's your view on that?

Interpreter: He said that for the landlord to die out is OK.

...

Case officer: Is there anything else you can tell me about their policies?

Interpreter: And redistribution of wealth between those that have and those that do not have, reduce the poverty. And to eradicate corruption and then to eliminate those that have. Eliminate the wealthy ones.

Case Officer: How would you eliminate them?

Interpreter: Kill them

...

Case Officer: I understand that, but what you said before, the interpretation was "eradicate those that have". Who are the people that have? Can you describe those people?

Interpreter: He says his definition of "people who have" are first of all the politicians, secondly the business people and the king.

Case Officer: What did you do after you captured them?

Interpreter: They used to threaten them and try to get them to agree with their ideas, and if they didn't then they would kill them.

...

Case Officer: Now you said on 8 to 10 times you were involved with group fighting. What do you mean by that?

Interpreter: By fighting he meant...(indistinct)... small scale in the villages we may have to fight with a landlord and things like that...

Case Officer: How many times have you clashed with police?

Interpreter: For himself he was involved about 6 times.

...

Case Officer: Have you ever used a weapon in any of these fightings?

Interpreter: Yes he's fired a rifle in the air and he ha[s] also used the khukura knives and things like that.

Case Officer: Have you ever struck anyone with a khukura

knife?

Interpreter: Yes

Case Officer: How many times have you done that?

Interpreter: About once or twice.

...

Case Officer: What do you think of this sort of violence?

Interpreter: He says that (indistinct.) he does not condone violence.

Case Officer: Why did you get involved in these activities?

Interpreter: He said his main purpose in entering into these activities is to eradicate the gap in the distribution of wealth.

Case Officer: Yes but you told me you don't condone violence but you're gong [sic] around in groups where violence is occurring. Can you explain how that comes about?

Interpreter: He says it is depends on the places...some places are tolerant...depends on the place of the country...if the country is in a situation like that then what they are doing is right.

...

Case Officer: Now you said you don't condone violence, but the group that you're a member of, the UPF, is notoriously violent.

Interpreter: He doesn't consider them to be extremely violent.'

16 At the May 2000 hearing before the RRT, the applicant gave the following evidence:

'Interpreter: In 1995 it divided...then it became hardliner and softliner. Because of all the corruption and things that were going on I supported the hardliners.

RRT member: What was the difference between the hardline and softline?

...

Interpreter: The softliner believed that they had to take power after the elections, through the elections. And the hardliners believed that it's not by ballot, by voting, but by bullets, that was their belief. And I supported them underground, I gave them my underground support...

RRT member: What do you mean when you say you became very active. What did you do?

Interpreter: He said I left my family, my house, everything and went

underground and got involved with all activities. Though I don't think I can tell you all the details of what we did.

RRT member: Well I need to know what you did.

Interpreter: Like some things I can tell you but not all the things.

RRT member: Why not?

Interpreter: Like betraying the party, ...(indistinct)...the party's authority. I was an active member of the party (indistinct).

RRT member: Well were you a part of the armed insurgency?

Interpreter: Went to the villages and all later and we took active part but actually I wasn't involved in any of the killings of the people.

RRT member: Were you armed at any point, sorry, were you armed at any point between May '98 and September '99?

Interpreter: Carried it but didn't actually kill anybody.

RRT member: What kind of weapon did you carry?

Interpreter: For my own safety Khukuri, that is a Nepalese dagger. And to make a sort of handgun sort of thing with a cycle device.

RRT member: Sorry, a handgun with a what?

Interpreter: Made out of the pump, a rod of the cycle, pump of the cycle.

RRT member: Were you wearing a uniform?

Interpreter: That time no.

RRT member: When, were you uniformed at any time?

Interpreter: No just for fighting. I was never at the front...

RRT member: ...can you just tell me, what were you doing in those districts? What were you doing? Your daily, your daily work, what were you doing? You'd get up in the morning and what would you do?

Interpreter: We'd sometimes go the jungle and spend the night there, sometimes in the villages and there was a big police station there, from government police. And until we had removed all the government officers from there, all the police force from there, it was useless to declare (indistinct) kingdom.

RRT member: So your intention was to remove the presence of the government and the authorities from these areas. Is that right? That's what you were there for?

Applicant: Yes

RRT member: And how did you do that?

Interpreter: We had to remove all the force of the government.

RRT member: So you had to get rid of the police and the armed forces or whoever is there. How did you do that?

Interpreter: By capturing them.

RRT member: Were you involved in capturing these people?

Interpreter: Yes I have to say yes.

RRT member: Alright, and what did you do with them when you captured them?

Interpreter: I didn't actually capture them but because I was there with them I suppose I have to say yes I captured them.

RRT member: And then what did you do with them once they were captured?

Interpreter: Well I didn't capture them but after my colleagues captured them they put them in a safe place.

RRT member: What do you mean by that?

Interpreter: They put them in a place and then they put their demands forward to the government.

RRT member: You mean they kidnapped them and then held them ransom?

Interpreter: Yes sort of you can call that.

RRT member: And were any of these people killed by your colleagues, by yourself?

Interpreter: Not me but by some people in the front.

RRT member: Who were the people in the front? What's the difference between you and the people in the front?

Interpreter: Front people were the fighters group.

...

RRT member: So you're fighting?

Applicant: Yes

RRT member: But you're the second line?

Applicant: Yes

RRT member: And in fighting you must have been engaged in killing people. Is that right or not? I mean isn't that the intention of fighting?

Applicant: Yes that's the intention of fighting.

RRT member: Do you know whether anyone was killed through your fighting?

Interpreter: No I never know.'

17 In October 2002, the applicant was again interviewed by a DIMIA officer. The record of that interview included the following:

'Case officer So how, what was proposed when you said "eliminate the wealthy people. How did you propose to eliminate the

wealthy people?

Interpreter: As much as possible by talking, negotiating talk and then - not to charge to [sic] much excessive interest and to give the money back to them and when they wouldn't listen at all then we threaten them.

Case officer: And if they resisted handing over the papers what would happen?

Interpreter: Forcefully we would take it off them.

Case officer: What sort of force would you use?

Interpreter: Like going in the houses, raiding and getting those papers.

Case officer: Had you gone on any raids at all before you left Nepal?

Interpreter: Yes in one or two small incidents I was involved.

Interpreter: We asked them and when we asked them for the papers they gave us the papers. When they gave it we called all the people, called the villagers, gave it the villagers and so in front of them we just burned down all those papers.

Case officer: OK so they willingly gave you the papers?

Interpreter: Can't say willingly or happily but I suppose they must have got scared and they gave us.

Case officer: Why would they have been scared?

Interpreter: Because other serious incidents were taking place too, like some places when people wouldn't give people would go and forcibly take it off them. Maybe some lives were lost too.

...

Applicant: Lots of people support the hardliner. It is not possible to change the Constitution, change the system by ballot. So lots of people believe in the bullet - so I believe on [sic] them too.

Case officer: So what methods were they proposing using?

Interpreter: Topple down the kingdom, the king and the powers, the rights that were just held by the people in high positions. Should be everybody. Everybody should have those rights. And the big companies and foreign should be given to Nepalese. And the natural resources should not be sold to the foreigners and they should be used and utilised within the country like (indistinct). And the education system should be directed from there within the country - not imported education system.

Case officer: And what methods were they going to use to achieve that if they weren't going to use the ballot and the parliamentary system?

- Interpreter:* *Change the whole Constitution to make a new Constitution - make a new system level Communist ideology. And wealth should be distributed to all people equally. Things like that. Not haves and have nots. Class system shouldn't be there.*
- Case officer:* *That's their goal - where they want to get to. How were they going to achieve that if they didn't want to participate in the parliamentary system?*
- Interpreter:* *Through bullet.*
- Applicant:* *Through the bullet.'*

18 Finally, the Deputy President set out a lengthy extract from a November 2002 interview with a DIMIA officer:

- 'Case officer:* *Can you tell me the type of activities you were involved in[?]*
- Interpreter:* *Once we had to go underground, that time was underground speeches and all, to get the instructions from the leaders and pass that instruction to the workers. And go to the areas where they were influenced by us...*
- Case officer:* *What sort of instructions from leaders would you pass to the workers?*
- Interpreter:* *About the weakness of the government, about the corruption of the government.*
- ...
- Case officer:* *And so who would decide which landowners or wealthy people had to be asked to cooperate?*
- Interpreter:* *When the party workers actually estimate, they are the ones who go and first estimate who has been suppressing people and how much land has been taken forcibly by some of the poor people they estimated ... After this estimation and calculations then from the district and central levels we receive to the district level and then we get the instructions.*
- Case officer:* *How detailed are the instructions?*
- Interpreter:* *I think on the main from the central level...They said, from the reports are made sometimes from the lower levels also but people they sent the workers, officers from the central level and the higher levels to estimate do the calculations who has got how much land and what they are doing, how they have obtained that land things like that then see how many poor people have been suffering how many of their lands have been taken and debt to them because they count it off and all them they seize their land from those*

landowners that they think they should be seizing from, and that will after the seizing of the land then it will be proportionately divided into those poor people who think their land has been taken...

...

Interpreter: ...some people have no land...so at least of the poor people get that land they will make do produce and cultivate that land and have enough to eat at least...

Interpreter: The main force there was the police station, that was the government's main force in Rukum. Plus we get the instructions, give them instructions...if the police leave from there then our commandos will take their place. And then we can run our administration totally in that area... and in present...

...

Case officer: OK so you were working in Mahaghat village when you were staying there?

Interpreter: Yes party work.

Case officer: What sort of party work was it then?

Interpreter: To observe how strong are the forces there. Keep something if need be from which are the places from where you could attack or from the places you can run out of lets[?] for escaping. And how much people that you feel are independent thinking people, how much of that can you obtain the support from, things like that to study, observe and get information.

Case officer: OK so you were discovering information. Did you do a lot of gathering of sort of strategic information like that?

Interpreter: I was there in that village I was openly moving around because I could mix around with the general public easily with them. Because people there will help you and support you for that...because later on they might face problems from the authorities from the police so how the process goes on is the people from that area who are helping us will send information to the high command and from assessing all that and observing and studying all that information sent by those levels, we are given instructions to do things accordingly and how many of us are needed and then we are sent there and to assess other people who have different opinions sort of things and to see how much support we can gain from them.

...

Case officer: And so, for how long were you observing the Mahaghat village?

Interpreter: I have reached there maybe four or five days I think about five days before that incident...

The day that we had to attack that place, many of the supporters from the houses, from the houses in the village evacuated the place and went to the bushes and jungles and then these people went to attack.

Of course there were warnings and all the biggest force comes later there are warnings, we gave them warnings.

...

Case officer: Was this to everyone who lived there?

Interpreter: People belonging to the government...bureaucrats of that place. Some of them the bureaucrats they don't live there in the village, they live in Nepalgange, another place. The police force which is the main force of the government for protection and that force is always in the village and most necessary was to topple that force.

...

Case Officer: So when you were assessing the situation you were mostly assessing...

Interpreter: Mainly the main force there, the government force.

Case officer: Which is the police. So what sort of observation did you make of the police?

Interpreter: Like inside the police camp, about the weapons and all. We just have approximation, an estimate that they are this strong, they are this much strength, and this is how the attack should be done then. Just to see the circumstances there, and see how much possibility we have then that's all nothing much.

...

Case officer: So what was your assessment of Mahaghat to the people who were surrounding the village?

Interpreter: It's like we can't actually say it's this much because we don't have the modern arms and ammunitions like the police force has with them. We don't have all that. Our weapons are most of the time like stones, bricks, sticks and things like that, like domestic weapons knives and things, sugar cane knives, things like that we have, so we have to fight with that and estimate like that, and estimate the soldiers...

...so we have to say five policemen have five rifles and each one will have five bullets so that means 25 bullets, and for that 25 bullets we will have to fight those 25 bullets we will estimate that we will need at least 40 of our people because they don't have those types of guns and bullets and all. So

at least 25 die and 15 will survive.

...

Case officer: And so can you tell me what happened then after you gave your warning?

Interpreter: That time we had the instructions that on the 22nd, not just in Rukum that the instructions from the high command, but also in Saliyand district, because those are the areas influenced by us mostly, that is why big incidents took place in those. But in the other places in Nepal also, small minor incidences did take place but mainly in those two places because they were influenced mostly by us.

Like when the attack was to be on the 20th the operation was to take place on the 22nd so 21st we all (indistinct) we went to those other people in the jungle. We left the village and the commandos were already there, and we go behind the commandos as defence force. It was about 9 o'clock at night we started the attack. Police fired and all and there were friends also threw stones and other things their own domestic weapons. And that's the main force of the police there, of the government, the main force is only that particular one because to get other forces it takes time it's a very remote area. The war lasted about 3 hours between the police and my people, it was about 12 o'clock then.

And then we got information that there was a possibility for the government sending a really big force there. And it was already 3 hours and in that 3 hours time was enough for them to send a new force through helicopters. And many friends were injured, some died. So we estimated the time that maybe the force would arrive, we just escaped from there ran away from there...

Case officer: You've been involved in other operations haven't you, in Nepal?

Interpreter: Not like this, only to convince people, make speeches and all. Just estimate the forces and inspire the people, just make them conscious of their rights...

Case officer: When you were gathering information within Mahaghat, what did you think the commandos were going to do with that information?

Interpreter: We thought that if we, I thought that if we capture that if we get there that the police will run away from there and we will capture that place and that means that we are taking all the bureaucrats there if we take over that particular police post there...

Case officer: When you approached with your microphones, what would have happened if the police had just come out of the police station?

- Interpreter:* We would capture them and put forward our demands.
- Case officer:* And what would those demands have been?
- Interpreter:* Like many of our workers are in the police stations to release them. Do such things to force the government, to force the government just to make the government feel weak.
- ...
- Case officer:* What weapons did you have with you?
- Interpreter:* Like musket, sort of home made gun then the Nepalese cookery dagger that in any case culturally men put for our protection and we usually carry that with us as we go.
- Case officer:* And did you use those?
- Interpreter:* No in Mahaghat I didn't get the opportunity to use them.
- Case officer:* Why not?
- Interpreter:* I wasn't in the fighting, I was in the back force.
- Case officer:* Where were you?
- Interpreter:* In the second force, that is the defence force.
- Case officer:* So where was the second force located?
- Interpreter:* The second force went through the jungle to the village. Behind the fighter force the defence force remains in the jungle. When the fighter force is sent as I said it was estimated we estimated then sent them like so many of them will attack, so many will be needed so many, so many of them. After those estimations they go so they attack accordingly, and in case they the [sic] need help and they need support then we go and attack.
- ...
- Case officer:* Were any civilians killed during the attack on Mahaghat?
- Interpreter:* Well, if you say that all our friends were civilians. The revolution has to be brought forward by bloodshed.'

19

A September 1999 news report about the attack on Mahaghat read as follows:

'Kathmandu, September 24: Seven policeman including a sub-inspector of police were killed in a pitched battle with Maoist guerillas in Mahatgaun of Rukum district and Jagadipur of Jajarlot district, about 450 kilometer west of Kathmandu, Thursday.

Police said one deputy superintendent of police Thule Rai has also been missing. However, he is also feared killed by communist guerillas.

...

Police said, a fierce battle between the police and guerillas took place when a group of about 300-armed insurgents surrounded the police post in Mahaghat

and indiscriminately fired and hurled petrol bomb at the police post from all sides. The battle lasted for about three hours.

Seventeen other policemen were also injured in the battle. The injured have been taken to Nepalgunj Hospital for treatment. The guerillas totally destroyed the police post and took away some arms and ammunition, according to police.

...

Similarly, the communist guerillas also killed chairman of Mahatgaun VDC...'

20 The learned Deputy President did not summarise the effect of the evidence he set out. As it is necessary, for the purpose of this application, to evaluate the evidence about the applicant's activities against the provisions of Article 1F of the Refugees' Convention, I summarise the applicant's admissions as follows:

- (i) over a period of about four years, he was a member of a Nepalese Maoist group that advocated the use of force to effect social change;
- (ii) the Maoist group was inspired by a Communist, anti-democratic ideology; in particular, the group was concerned to assist the rural poor against perceived oppression by wealthy landlords;
- (iii) the Maoist group was prepared to kill people who stood in the way of achievement of their objectives, including landlords who rejected their demands and government representatives such as police;
- (iv) the applicant advocated to others the position of this group;
- (v) during a period of some months, between the time he left university and his departure from Nepal, the applicant engaged in non-violent activities on behalf of the group, including representing it in discussions (no doubt intimidatory discussions) with landlords;
- (vi) although the activities mentioned in (iv) and (v) did not themselves involve the use of violence, the applicant undertook them with knowledge of the group's readiness to use violence (including murder), if that was needed to achieve its goals;
- (vii) on about six occasions, after he left university, the applicant participated in small-scale group clashes with landlords and police. Although he used a khukura knife once or twice, and has fired a rifle in the air, he did not kill anyone in any of these clashes; the applicant was never uniformed or a frontline soldier.

(viii) immediately prior to his departure from Nepal, the applicant was involved in an attack by the Maoist group on the police station in the village of Mahaghat in the Rukum district. He did not participate in the fighting but he carried out reconnaissance in preparation for the attack and was a member of a second force that was held in the jungle in reserve, against the possibility of being needed to supplement the 300 strong 'first force' that had been sent into the village to capture the police station.

Four uncontroversial propositions.

21 It is convenient immediately to mention four propositions that are not in contest between the parties.

22 First, the chapeau to Article 1F of the Refugees' Convention refers to there being 'serious reasons for considering' that one or more of paras (a), (b), and (c) of the Article applies to a person. The adopted standard, 'serious reasons for considering', does not require proof, even on a balance of probabilities. It is sufficient if there is 'strong evidence of the commission of one or another of the relevant crimes or acts': see *Dhayakapa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCA 556 at 563 (French J). See also *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 at 179 and *Arquita v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 465 at 476.

23 Second, in the present case, it was necessary for the AAT to evaluate the applicant's admissions about primary facts against the criteria stated in Article 1F of the Refugees' Convention, the question being whether those admissions provided strong evidence that the applicant had committed one or more war crimes or crimes against humanity.

24 Third, the evaluation required in respect of para (a) of Article 1F of the Refugees' Convention must be made by reference to the most appropriate international instrument dealing with the relevant category of offences. The impugned conduct must have constituted a crime under the local law when committed, but it is immaterial that the international instrument was not in force at that time: see *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 42 ('SRYYY') at [60] – [65]. In the present case, it was appropriate for the AAT to evaluate whether the applicant's conduct constituted 'a war crime' or a 'crime against humanity', within the meaning of para (a) of

Article 1F, by reference to the *Rome Statute of the International Criminal Court* ('the Rome Statute'), notwithstanding that this instrument came into force only on 1 July 2002, after the applicant's impugned conduct.

25 Fourth, the AAT was correct in confining its attention to only three of the matters specified in paras (a), (b) and (c) of the Article 1F of the Refugees' Convention: 'war crimes', 'crimes against humanity' and 'serious non-political crimes'.

The AAT's conclusions

26 The AAT concluded there were serious reasons for considering that the applicant did commit and was, within the meaning of the Rome Statute, criminally responsible for committing crimes against humanity and war crimes.

27 The AAT also concluded that the applicant's motives for committing the crimes were significantly political in character. Consequently, para (b) of Article 1F concerning 'serious non-political crimes' did not apply to him. No challenge is made to this finding. The only issue in this application is whether the AAT erred in law in concluding adversely to the applicant in relation to 'war crimes' and 'crimes against humanity'.

28 In argument before us, Mr D Burwood, counsel for the applicant, contended that the AAT erred in its conclusions in relation to both war crimes and crimes against humanity. He said that, as a matter of law, the admitted conduct of the applicant is not capable of being regarded as falling within either of these categories of conduct, as they are defined in the Rome Statute.

29 In its reasons for decision, the AAT dealt first with crimes against humanity and then with war crimes. I will follow the same course.

Crimes against humanity

(i) The Rome Statute definition

30 Article 7.1 of the Rome Statute defines the term 'crime against humanity' as being any one of eight acts 'when committed as part of a widespread or systematic attack directed

against any civilian population, with knowledge of the attack'. The eight acts are as follows:

- (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, or 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.'*

31 Article 7.2(a) defines the term 'attack directed against any civilian population' as meaning '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'. The word 'organizational' is not defined.

32 Article 9 of the Rome Statute provides for the adoption, by a two-thirds majority in the Assembly of State Parties, of a document called 'Elements of Crimes'. The document may be amended from time to time and is to be consistent with the Rome Statute.

33 An Elements of Crimes document ('the EoC') was adopted by the Assembly of State Parties at a meeting in New York in September 2002. It is useful immediately to note the introductory paragraphs to that document's discussion of Article 7 of the Rome Statute:

‘1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted 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. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. “Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.’ (footnote omitted)

34 In her submissions to us, Ms R M Henderson, counsel for the Minister, did not indicate which of the eleven paragraphs ((a) to (k)) in Article 7.1 of the Rome Statute were relevant to the conduct admitted by the applicant. It seems to me that none of paras (b), (c), (d), (e), (f), (g), (i), (j) and (k) could possibly apply to that conduct. This leaves paras (a) and (h).

35 The term ‘Murder’, used in Article 7.1(a), is not defined in the Rome Statute. However, guidance as to its meaning is provided by the EoC. The EoC identifies three elements of the crime against humanity of murder:

‘1. The perpetrator killed one or more persons.

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian

population.' (footnote omitted)

36 The word 'persecution', used in Article 7.1(h), is defined by Article 7.2(g) as meaning 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.

(ii) The AAT's reasoning

37 The AAT accepted that the meaning to be ascribed to the words 'crime against humanity' is to be derived from the Rome Statute. The AAT went on:

'Such meaning will be applied to the circumstances as they exist in this application. It is necessary to consider whether there is evidence of a "widespread and systematic attack directed against any civilian population" and the Applicant bearing "individual criminal responsibility" within the meaning of the Rome Statute for the commission of the crime or crimes.'

38 Two comments may be made about that passage in the AAT's reasons. First, as Ms Henderson pointed out, the chapeau to Article 7.1 refers to 'widespread **or** systematic attack', not 'widespread **and** systematic attack'. The sub-Article uses the disjunctive, not conjunctive, thereby embracing a wider range of attacks on civilian populations than if both adjectives had to apply. Second, Article 7.1 makes no reference to individual criminal responsibility. The Deputy President apparently took these words from Article 25 of the Rome Statute, which is concerned with the jurisdiction of the International Criminal Court. It is not apparent that the words apply to the definition of crime against humanity. However, that does not matter. The reason for this is that Article 1F excludes the application of the Convention only against a person with respect to whom there are serious reasons for considering that '**he** has committed ... a crime against humanity'; so it is necessary there be serious reasons to consider that the particular person was involved in a crime against humanity.

39 At [41], the Deputy President explained his finding in respect of crimes against humanity in this way:

'It was submitted on behalf of the Applicant that the police in Nepal cannot be considered as part of the civilian population by reason of the role the force was playing in maintaining order in face of the Maoist disturbance. I do not agree with this submission when consideration is given to the context in which the words "civilian population" appear in the Rome Statute. The evidence tendered in this application clearly indicates that the role of the police was to

maintain civil order and not engage in counter attacks upon the Maoist forces. This is borne out in that following the attack on the Mahaghat village it was the impending presence of the army, not the police, that caused the Maoists to withdraw. Their attack had been on the civilian police station ...

The Applicant was involved in a series of acts designed to undermine the Nepalese government by the use of force and intimidation involving widespread and systematic violence and attacks against landowners, bureaucrats and police. There was murder and severe deprivation of liberty and there was conduct involving the multiple commission of these acts against the civilian population in furtherance of the Maoist policy to commit such attacks.

Apart from the Applicant's knowledge, awareness and preparedness to participate in the overall conduct of the Maoists, this by reason of his membership and devotion to its objectives, the Applicant engaged in the specific acts earlier detailed with reference to his involvement. As was submitted on behalf of the Respondent they included:

- *fighting against police during the course of which police were killed and capturing police and holding them to negotiate satisfaction of the Maoist demands of the government;*
- *fighting against landlords and other civilian non-combatants during which the Applicant used his khukura knife and guns and during which civil non-combatants were killed;*
- *capturing wealthy people and landowners who were civilian non-combatants and holding them for ransom as a consequence of which some of these people were killed, but not directly by the Applicant; and*
- *gathering information to facilitate the attack on Mahaghat village, an attack on civilians.'*

(iii) Counsel's submissions

40 Neither counsel directed attention to the paragraphs in Article 7.1 of the Rome Statute identifying the eleven types of action that may constitute a crime against humanity. Both counsel were content to limit themselves to submissions about the proper interpretation of certain terms in the chapeau to Article 7.1, drawing for that purpose on decisions of the International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Tribunal for the former Yugoslavia ('ICTY'). Yet Article 7.1 clearly limits the concept of 'crime against humanity' to one or more of the particular acts listed in paras (a) to (k) of the sub-Article.

(iv) My view

41 I find it unnecessary to deal with counsel's submissions concerning the chapeau to Article 7(1). It seems clear that the applicant's admitted conduct does not involve any of the acts listed in paras (a) to (k).

42 As I have indicated, all but paras (a) and (h) may immediately be dismissed from consideration. The EoC makes clear that, for conduct to constitute the crime against humanity of murder, the relevant person must have killed one or more persons. In decisions given before the date upon which the Assembly of Parties adopted the EoC, the ICTR and ICTY each accepted that the relevant killing may be carried out by the accused person through a subordinate: see *The Prosecutor v Jean Paul Akayesu* (ICTR-96-4-T, judgment 2 September 1998) and *The Prosecutor v Dario Kordic and Mario Cerkez* (IT-95-14/2-T, judgment 26 February 2001). But there is no authority that suggests it would be enough to satisfy Article 7.1(a) that the person is an associate or accomplice of persons who have carried out killings.

43 There is no evidence that the present applicant ever killed anybody; the only evidence on the point is his denial that he did so. Neither is there any basis for a suggestion that he caused a subordinate to carry out a killing on his behalf, supposing this to be sufficient to satisfy Article 7.1(a), having regard to the EoC. Accordingly, it is not necessary to determine whether the killings at Mahaghat – the only killings with which he was associated – constituted 'a widespread or systematic attack directed against a civilian population'.

44 In expressing the above view, I do not overlook the terms of Article 25 of the Rome Statute. As mentioned at para 38 above, that Article is concerned with the International Criminal Court's jurisdiction over individuals. It defines the circumstances in which a 'person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court'. Those circumstances include commission of the crime (Article 25.3(a)), ordering, soliciting or inducing the crime (Article 25.3(b)), facilitating the commission of the crime, in the sense of aiding and abetting or assisting with the commission or attempted commission of the crime (Article 25.3(c)) and in any other way contributing to the commission or attempted commission of the crime by a group of persons acting with a common purpose (Article 25.3(d)).

45 Because of the jurisdictional function of Article 25, it is debatable whether it operates to extend the range of the definition of crime against humanity contained in Article 7(1). However, even if it does, the evidence in the present case would not support a finding that the applicant facilitated or contributed to the crime of murder. The only evidence concerning the applicant's intention, or knowledge of other people's intentions, in relation to the attack on Mahaghat was that the group intended to take control of the village so 'we can run our administration in that area'. The applicant was aware that the invading force would be armed, and there may be violence and deaths, but that was not the purpose of the attack; on the contrary, everyone, including police, were warned to leave the village in advance of any attack: see the record of interview of November 2002, para 18 above. The applicant may have adverted to the possibility that the police would not leave the village, and would therefore be put at risk of suffering violence, even death. Even then, and assuming the police are properly to be categorised as civilians, it could not be said that the attack on the village was 'committed as part of a widespread or systematic attack directed against any civilian population', within the meaning of the chapeau to Article 7.1. The attack on Mahaghat was not an attempted massacre of the civilian population, or even the local police. It was an attack designed to wrest control of the village from the government, in which the police might suffer casualties.

46 In relation to para (h) of article 7.1 of the Rome Statute, I have already mentioned the definition of 'persecution' contained within Article 7.2(g); 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. The EoC further explains the content of article 7.1(h) by setting out these elements:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

2. 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.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

4. 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.

5. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*

6. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population,' (footnotes omitted)*

47 When these elements are compared with the summary of the applicant's admissions set out at para 20 above, it will readily be seen that his admitted conduct does not fall within Article 7.1(h). The only activities of the applicant that involved violence are those referred to in items (vii) and (viii) of the summary. Item (vii) refers to clashes with landlords and police in which the applicant used a khukura knife once or twice and fired a rifle in the air. That does not involve deprivation of fundamental rights. Similarly, in relation to the applicant's role in the Mahaghat attack.

48 It is not necessary to determine whether other elements of the crime against humanity of persecution are satisfied.

49 In relation to the question whether there are serious reasons for considering whether the applicant has committed a crime against humanity, the Deputy President failed to take into account the entire wording of Article 7.1 of the Rome Statute. In particular, he overlooked the necessity to consider whether the applicant's disclosed conduct provided a serious reason to believe he had committed one or more of acts listed in paras (a) to (k) of that sub-Article. As a result of this error, the Deputy President evaluated the issue of crimes against humanity by reference to his personal view about the acceptability of the actions of the Maoist group, and the applicant as a member of it, rather than by reference to the meaning of the term in the Rome Statute. That was an error of law. Had the Deputy President correctly directed himself in relation to this issue, he would have seen that the evidence did not provide a basis for concluding it could be said there were serious reasons for considering that the applicant has committed a crime against humanity.

War crimes

(i) The Rome Statute definition

50 Article 8.2 of the Rome Statute divides 'war crimes' into four categories. The first

two categories, set out in paras (a) and (b) of the sub-Article, are as follows:

- ‘(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely any of [eight described acts];*
- (b) Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely’ any of 26 described acts.’*

51 The Geneva Conventions created individual criminal responsibility in relation to international conflict: see SRYYY at [24]. Article 8.2(b) expressly refers to international armed conflict. However, the conflict in which the applicant was involved was not of an international nature. Accordingly, as is common ground, neither para (a) nor para (b) applied directly to this case.

52 The third category in the Rome Statute definition of ‘war crimes’ reads as follows:

- ‘(c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:*
 - (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;*
 - (iii) Taking of hostages;*
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.’*

53 It is also relevant to note para (d) of Article 8.2:

- ‘(d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.’*

54 The final category in the Article 8.2 definition is that contained in para (e):

- ‘(e) Other serious violations of the laws and customs applicable in armed*

conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;*
- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;*
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.*
- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;*
- (v) Pillaging a town or place, even when taken by assault;*
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;*
- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;*
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;*
- (ix) Killing or wounding treacherously a combatant adversary;*
- (x) Declaring that no quarter will be given;*
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;*
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.'*

(f) *Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.'*

(ii) The AAT's reasoning

56 At [44], the AAT accepted that the meaning to be ascribed to 'war crimes' is that given in the Rome Statute. At [45] – [46], the Deputy President said:

'There was and is clearly a protracted armed conflict in Nepal between the Maoists, the King and his government authorities during which relevant acts were and are committed against persons taking no active part in the hostilities, viz landowners, bureaucrats and civilian police. The acts so committed included violence to life and person, murder, cruel treatment and the taking of hostages. There were intentional attacks against the civilian population and against individual citizens not participating in the hostilities. Detainees were held consequent upon the insurgency and civilians were affected by the fighting.'

As with the "crimes against humanity" so with the "war crimes", the Applicant engaged in the acts earlier detailed with reference to his involvement. These included conduct the like of that referred to under the above heading "crimes against humanity" but falling within the definition contained in the Rome Statute.'

57 Later in his reasons, at [58], the Deputy President stated his satisfaction that 'the Applicant did commit, and was within the meaning of the *Rome Statute* criminally responsible for, committing ... war crimes'. Nowhere, however, did the Deputy President identify the particular provision or provisions of the Rome Statute on which he relied for that conclusion.

(iii) Counsel's submissions

58 In his written submissions, Mr Burwood speculated that the Deputy President relied on Article 8.2(c) and/or Article 8.2(e) of the Rome Statute. In contrast to the earlier paragraphs in the sub-Article, these paragraphs are concerned with 'armed conflict not of an international character'. This was, of course, the situation in relation to the Maoist conflict in Nepal. However, Mr Burwood pointed out, the Deputy President failed to consider, as required by Article 8.2 (d) and (f) respectively, whether the relevant situation was one of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or

other acts of a similar nature’.

59 Ms Henderson referred to the finding of the AAT, quoted at para 56 above, that ‘(t)here was and is clearly a protracted armed conflict in Nepal between the Maoists, the King and his government authorities’. She argued this finding was sufficient to make applicable paras (c) and (e) of Article 8.2 of the Rome Statute; the finding ‘disposes of the possibility that the applicant’s activities might have occurred in the context of “internal disturbances and tensions”’. Ms Henderson also argued the AAT’s findings about acts committed during the course of the conflict was enough to support its conclusion that there were serious reasons for considering that the applicant had committed a war crime. Ms Henderson did not identify any action of the applicant, himself, that would constitute a war crime.

(iii) My view

60 The reasons of the Deputy President do not identify the basis of his finding that there was and is ‘a protracted armed conflict in Nepal between Maoists, the King and his government authorities’. Presumably, the finding was based on the Jane’s material. The applicant’s records of interview are concerned mainly with his personal circumstances and activities; they do not deal with more general questions.

61 It may be accepted that the Jane’s material was sufficient to support the Deputy President’s description of the nature of the conflict. However, it was not enough for the Deputy President simply to characterise the conflict and consider whether it involved actions falling within para (c) or para (e) of Article 8.2; it was necessary for him to tie responsibility for at least one of those actions to the applicant. The Deputy President did not do this.

62 As it seems to me, the evidence before the AAT did not provide a basis upon which it could have found there were serious reasons for considering that the applicant had committed a war crime as defined by reference to any of the provisions of paras (c) and (e) of Article 8.2. I will analyse them briefly, referring as necessary to the relevant parts of the EoC.

63 Of the four types of action listed in para (c) of Article 8.2, the only one that could conceivably be applicable to this case is item (i) – ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’. However, the EoC makes it clear, in respect of murder, mutilation, cruel treatment and torture, that the relevant person must have done the act; it is not enough that the person may have associated with others who

so acted. Although these four categories are not an exhaustive statement of what constitutes 'violence to life and person', it seems reasonable to apply the same requirement of individual responsibility to any violence that falls outside the stated four categories. Although the applicant admitted having acted in a threatening way towards landlords, the evidence does not establish that he did anything that could be described as 'violence to life and person', treating that phrase as covering actions of the same type as murder, mutilation, cruel treatment and torture.

64 Even if it is correct to read Article 25 as creating accessorial liability for violence to life and person, there is still a difficulty in finding that the applicant fell within Article 8.2(c)(i) by reason of the attack on Mahaghat. That attack was not 'committed against persons taking no active part in the hostilities'. The police suffered casualties in the attack precisely because they failed to accede to the Maoist group's demand that they leave the village and, instead, actively resisted the attack. Article 8.2(c)(i) is not concerned with violence towards belligerents but with violence towards those who never were, or who have ceased to be, active belligerents.

65 In relation to para (e) of Article 8.2 of the Rome Statute, the only arguable issue is whether there is evidence of the applicant 'intentionally directing attacks against the civilian population': see item (i). The evidence does not suggest that the applicant did anything that might conceivably fall within items (ii) to (xii) inclusive.

66 As the EoC makes clear, item (i) applies only where the relevant person directed an attack. The only attack with which the applicant was associated, on the evidence, was the attack on Mahaghat. The applicant said he carried out reconnaissance work in regard to Mahaghat, apparently extending over four or five days. However, there is no evidence that he directed the attack on the village. Apparently, the attack was ordered by the 'high command' of the group, whose writ extended beyond Rukum, in which Mahaghat is situated, and embraced the whole of the Suliyard district: see the interview of October 2002, para 18 above.

67 Items (i), (ii), (iii) and (iv) are concerned with the person or persons who made the decision to attack a particular target. There is no evidence that the applicant had any say in the decision to attack Mahaghat; he seems to have been a junior member of the group with no

decision-making role.

68 As in the case of crimes against humanity, the Deputy President fell into the error of dealing with the question whether there were serious reasons for considering that the applicant had committed war crimes by reference to generalities and his personal disapproval of the activities of the Maoist group, rather than by reference to the full terms of the Rome Statute. This was an error of law.

Disposition

69 The applicant has a right to appeal to this Court only upon a question of law. If my only difference with the Deputy President related to the proper factual conclusion arising out of the records of interview, that difference would not concern a question of law. However, the proper interpretation of Articles 7 and 8 of the Rome Statute is a matter of law; as, also, is the question whether there was evidence capable of giving rise to a conclusion that the applicant fell within Article 1F of the Refugees' Convention.

70 In my view, in relation to both crimes against humanity and war crimes, the AAT erred in law in both these respects. The errors were jurisdictional errors, critical to the AAT's decision, which must therefore be set aside.

71 Ordinarily, when an AAT decision is set aside, the matter is remitted to the AAT for further hearing and determination according to law. However, in some cases, the material before the AAT may admit of only one answer in law. In such a case, there is no point in the Court ordering a rehearing. The Court can, and should, make whatever orders are appropriate finally to resolve the controversy between the parties.

72 This is such a case. No facts remain to be found. All the evidentiary material is documentary. The critical evidence is contained in records of interview. On the proper interpretation of that material, there is no basis for a finding that there are serious reasons for considering that the applicant has committed a war crime or crime against humanity.

73 Of course, the applicant may have done more than he has admitted; but the AAT would not be justified in finding serious doubts on the basis of speculation that the applicant has not been fully frank as to the extent of his activities. The AAT can only act on the evidence and, on that evidence and having regard to the terms of the Rome Statute (as elucidated by the

EoC), there is no basis upon which the AAT could find that Article 1F of the Refugees' Convention applies to the applicant. That being so, the Court should set aside the decisions of both the AAT and the Minister's delegate, and remit the applicant's application for a protection visa to the Minister for determination according to law, and on the basis that Article 1F of the Refugees' Convention has no application to the applicant.

74 The Minister should pay the applicant's costs of the proceeding in this Court.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 20 February 2006

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 1321 OF 2005

**BETWEEN: SZCWP
APPLICANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AND INDIGENOUS AFFAIRS
RESPONDENT**

JUDGES: WILCOX, GYLES AND DOWNES JJ

DATE: 20 FEBRUARY 2006

PLACE: SYDNEY

REASONS FOR JUDGMENT

GYLES J

75 I have had the advantage of reading the reasons of each of Wilcox J and Downes J in draft. I agree with the opinion of Downes J that the application should be dismissed. In view of the split on the Court I will add reasons of my own. I do not need to repeat all of the background.

76 The only issue of law that might be thrown up by the facts of this case is the position of an active participant in an organisation that carries on a long and deliberate campaign involving many atrocities against non-military personnel that, on any view, are crimes against humanity and war crimes. As will be seen, the Administrative Appeals Tribunal (AAT) correctly directed itself as to the principles to be applied. The application of those principles to the facts of the case was for the AAT, not for this Court which exercises no general appellate supervision of decisions of the AAT.

77 The applicant's application for a protection visa in 1999 was accompanied by a statement prepared by an immigration agent on his behalf, which included the following:

'He also states that he got a chance to participate in politics through student unions where he became a member of Communist hard-liner in student Union in the campus and started working for Maoist in various activity.

...

After the dawn of democracy in 1990, the applicant's party United Peoples Front (SJM) did not agree to join the unified Nepal Communist Party, United Marxist and Leninist. However, in 1995 the SJM split into two branches, 'hard-line and 'soft-line'. The applicant supported 'hard-line' which initiated 'people's war' in February 1996 started 'people's war' against parliamentary democracy established 7 years ago.'

Reference was made in that statement to a Nepal Country Report on Human Rights for 1998 which referred to the People's War as a self-declared Maoist insurgency.

78 There was a plethora of material before the AAT describing the People's War which had been declared in 1996 and was in full swing when the applicant left Nepal in 1999. By 1999 there was material indicating that the insurgency had led to violence in 27 of 75 districts of the country and had been waged through torture, killings and bombings involving civilians and public officials. The Refugee Review Tribunal (RRT) was satisfied that the applicant satisfied Article 1A(2) of the Convention relating to the Status of Refugees (22 April 1954) (the Refugee Convention):

79 The RRT summarised the claims of the applicant as follows:

'In essence, the applicant claims that he has been politically involved with the revolutionary wing of the Samyukta Jana Morcha for many years while a student, even before it became Maoist. He claims that since the party split, he supported the hard line Maoists and that since about early 1999 he was involved in the armed insurgency and in particular in an incident in the Rukum district in September 1999.'

The RRT found the following:

*'The independent evidence before the Tribunal is that there have been grave human rights violations by police including extrajudicial executions, disappearances and torture in the context of the "people's war" declared by the Communist Party of Nepal (CPN) (Maoists) in 1996. **There were widespread abuses by members of the CPN (Maoist) including deliberate killings, hostage-taking and torture** (Amnesty International Report 2001 – Nepal – web.amnesty.org/web/ar2001.nsf/webasacountries/NEPAL).'*
[emphasis added]

When the matter was remitted to the Minister to consider the application of Article 1F of the Refugee Convention, immigration agents on behalf of the applicant provided a copy of an opinion of counsel dated 10 April 2003 concerning that question. The opinion referred to the applicant admitting to participating in violent activities whilst a member of the Maoist party in Nepal in the period 1996–1999 culminating in the storming of a police station when seven police officers were murdered and 17 officers injured. Counsel also referred to the US State Department Country Reports on Human Rights Practices 1996 which stated:

'In February 1996 leaders of the United People's Front launched a 'People's War' in central Nepal which has been waged through killings and bombings involving both soldiers and civilians The insurgents were responsible for numerous human rights abuses ... the 'People's War' is a self declared Maoist insurgency. Guerrillas ... attacked landowners, government officials, and government facilities in a number of districts.'

The opinion included the following:

'It is submitted that the applicant's criminal activities have taken place in the context of his membership of the hardline Maoists and the insurgency waged by them against the Government of Nepal. The applicant had previously been politically involved with the revolutionary wing of the Samyukta Jana Morcha even before it became Maoist [p.15 RRT findings and reasons]. The Tribunal accepted that the applicant had been politically active 'for a long time' [p.16 RRT].

The evidence the applicant gave in November 2002 has all the hallmarks of a person actively engaged in insurrection – an attempt to change the government by force. The evidence is that the applicant was a member of a political party whose objectives included armed struggle with the central government through co-ordinated and planned attacks on manifestations of its power including the police. The applicant operated as a member of a 'cell' which acted 'underground' and which communicated to and received instructions from a central committee.

...

It is submitted that the crimes with which the applicant was associated e.g. riot, affray, arson, assaults and murders – were political. The evidence is that the attack on the police station at Rukum was planned in advance by the Maoist leadership and aimed solely at the police station and the police officers within.

There is no evidence of civilian injury or death. There is no evidence of atrocities. There is no evidence of criminal activity that takes the attack on the police station outside of the proposition that this was an act of insurrection planned and executed by the Maoist Party in furtherance of its stated and reported aim of overturning the Nepalese Government.

The attack was a deliberate assault on the authority of the Government in line with the Maoist's aim of establishing a republican state. The independent literature in describing the Maoists uses the terms 'insurgent' and 'rebel'. Insurgent is defined in the 2nd Revised Edition Macquarie dictionary as 1. one who rises in forcible opposition to lawful authority; one who engages in armed resistance to a government or to the execution of laws, 2. rising in revolt; rebellious. Rebel is defined as 1. one who refuses allegiance to, resists, or rises in arms against the established government or ruler etc.

The attack took three hours, involved 300 Maoists and left seven police officers dead and seventeen injured. This was not a spontaneous or random event. The applicant stated in his interview with the delegate that the police station was attacked with the intention of introducing the laws of the party.

It is submitted that the nature of the attack – an attack focused on an arm of government – was an act of insurgency or rebellion that was not remote from the stated objects of the party which included abolishing the monarchy and establishing a republic.

On the evidence the applicant was a member of a political party furthering its objectives through acts of rebellion and insurgency including the targeting of police. The crimes perpetrated were political.'

81 Other material relating to the Maoist insurgency is set out in the decision of the AAT establishing the targeting of civilians, particularly land owners, and public officials, including police. The various interviews with the applicant contained ample material to demonstrate his knowledge of, and active participation in, the People's War generally, and, in particular, incidents involving landowners and police. Some parts of those interviews are set out in the reasons of the AAT.

82 The learned Deputy President of the AAT identified the precise international instruments he considered relevant and then systematically considered the application of the facts to those instruments in a reasoned manner. The learned Deputy President directed himself as to complicity of the applicant as follows (at [28]–[29]):

'Consistent with my acceptance of the definitions of "war crime" and "crimes against humanity" as set forth in the Rome Statute as being those appropriate for consideration in the present application, so also is the test of criminal responsibility of a member of an organisation as set forth in article 25 of the Rome Statute. As was stated in SHCB v MIMIA [2003] FCA 229 at para 10:

"Of course, mere membership of ... is not sufficient to ascribe the applicant with these crimes. The Tribunal acknowledged this:

"In order to bear criminal responsibility for an act under the Rome Statute, a person need not have directly committed that act him or herself. He or she must, however, have aided,

abetted or otherwise assisted in its commission or attempted commission or have contributed to its commission or attempted commission by persons acting with a common purpose. The person must act intentionally and must have knowledge of the intention of the group to commit the crime.”

Both parties before me accepted this as a correct statement of the test for the “complicity” of a member of an organisation involved in systematic crimes. It is consistent with the detailed reasoning and analysis of Matthews J in W98/45 and Minister for Immigration and Multicultural Affairs [1998] AATA 948 and W97/164 and Minister for Immigration and Multicultural Affairs [1998] AATA 618.”

In determining whether the Applicant was relevantly complicit in the acts of the Maoists it is necessary to look to the available evidence but not necessarily to identify a specific or particular war crime or crime against humanity in which the Applicant was complicit, although this may be so. The task is also to ascertain the extent to which the Applicant participated in the common purpose of the Maoists.’

83 The decision of Selway J in *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 229 was affirmed by the Full Court in *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 561 and there was no criticism of the test applied by Selway J. The Full Court said (at [23]):

‘It is not necessary, for a finding that the appellant committed a war crime or a crime against humanity, that there be a finding with respect to a specific incident, if there are findings of many such incidents and a finding that the appellant took steps as an officer of KHAD knowing that such acts would be the consequence of his steps. It was open to the AAT, on the material before it, to conclude that the appellant aided, abetted or otherwise assisted the commission or attempted commission of such acts. The AAT made findings that KHAD was involved in crimes against humanity and war crimes at a time when the appellant, in the course of his duties as a reasonably high ranking officer, passed on information that was likely to lead to the commission of such acts.’

84 The conclusion of the AAT as to crimes against humanity was as follows (at [42]–[43]):

‘The Applicant was involved in a series of acts designed to undermine the Nepalese government by the use of force and intimidation involving widespread and systematic violence and attacks against landowners, bureaucrats and police. There was murder and severe deprivation of liberty and there was conduct involving the multiple commission of these acts against the civilian population in furtherance of the Maoist policy to commit such attacks.

Apart from the Applicant's knowledge, awareness and preparedness to participate in the overall conduct of the Maoists, this by reason of his membership and devotion to its objectives, the Applicant engaged in the specific acts earlier detailed with reference to his involvement. As was submitted on behalf of the Respondent they included:

- *fighting against police during the course of which police were killed and capturing police and holding them to negotiate satisfaction of the Maoist demands of the government;*
- *fighting against landlords and other civilian non-combatants during which the Applicant used his khukura knife and guns and during which civil non-combatants were killed;*
- *capturing wealthy people and landowners who were civilian non-combatants and holding them for ransom as a consequence of which some of these people were killed, but not directly by the Applicant; and*
- *gathering information to facilitate the attack on Mahaghat village, an attack on civilians.'*

85 The conclusion of the AAT as to war crimes was as follows (at [45]–[46]):

'There was and is clearly a protracted armed conflict in Nepal between the Maoists, the King and his government authorities during which relevant acts were and are committed against persons taking no active part in the hostilities, viz landowners, bureaucrats and civilian police. The acts so committed included violence to life and person, murder, cruel treatment and the taking of hostages. There were intentional attacks against the civilian population and against individual citizens not participating in the hostilities. Detainees were held consequent upon the insurgency and civilians were affected by the fighting.

As with the "crimes against humanity" so with the "war crimes", the Applicant engaged in the acts earlier detailed with reference to his involvement. These included conduct the like of that referred to under the above heading "crimes against humanity" but falling within the definition contained in the Rome Statute.'

86 The learned Deputy President correctly directed himself as to the test to be applied. Each conclusion was a factual finding well open on the material before the AAT.

87 Counsel, who had provided the opinion submitted to the Minister and who had appeared before the AAT, indicated in his written submissions on this 'appeal' that he did not intend to pursue any ground of appeal based upon the findings as to the applicant's participation in crimes against humanity and war crimes but, in the first instance, relied upon two points. The first was that the AAT did not consider whether the applicant would have a

defence pursuant to the Statute of Rome. It was later accepted that that issue had never been raised before the AAT and that, in any event, there was no material to support it. The second was an argument described as being 'the balance test' which again had not been canvassed before the AAT. That was the only ground pressed when hearing of the appeal commenced.

88 Shortly after the commencement of the hearing the following exchange took place:

‘WILCOX J: Mr Burwood, you accept, do you, that on the evidence given by the applicant that what he did constituted war crimes?’

MR BURWOOD: I would have to concede that, your Honour.

WILCOX J: Why would you concede that?

MR BURWOOD: I would consider making that concession, your Honour, because of the evidence that he himself has given.

WILCOX J: Yes, I know, but what it comes down to, he was involved in an insurgency and no doubt a long and bitter one involving quite a lot of bloodshed. Does that make it a war crime or a crime against humanity?

MR BURWOOD: It is argued by the respondent, your Honour, that because those activities involved activities, crimes, against civilians - - -

After some further remarks from Wilcox J:

MR BURWOOD: Well, your Honour, I am prepared based on your Honour's remarks to withdraw the concession based on what the court has said.

Towards the conclusion of argument, the presiding Judge then said:

‘What about if we do this, Miss Henderson? If we simply adjourn the hearing of the appeal and ask Mr Burwood to put in written submissions within some defined time, dealing firstly with the question whether he should be allowed to rely on the arguments. We want him to actually say exactly what his submission is and why he should be able to rely on them, and deal with the question whether there was any prejudice to the minister. Whether there would be prejudice in reliance on them, including whether the Minister might have called evidence before the Tribunal. Then in the one document, set out his comprehensive submissions on both the question of crimes against humanity and war crimes. Then you deal in reply with each of those matters, again within some specified time. At the end of that time we can consider what is the appropriate course to take.’

Counsel for the respondent reserved the position of the respondent and no ruling was made by the Court.

89 During oral argument brief reference was made to the nature of the proceeding, in particular to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the *AAT Act*) and whether the decision in question was a privative clause decision – an indirect reference to s 483 of the *Migration Act 1958* (Cth) as it then stood.

90 The applicant's further written submissions provided after the hearing abandoned the so-called 'balance' point. Counsel for the applicant sought to rely on the following questions of law which had not been pressed hitherto:

- (a) *Whether the Tribunal correctly applied the test for complicity in finding that there were serious reasons for considering that the activities of the Applicant in Nepal fell within the relevant definitions of crimes under the Rome Statute of the International Criminal Court (Rome 17 July 1998) (the Rome Statute).*
- (b) *Whether the Tribunal correctly applied Article 1F in concluding that the Refugee Convention did not apply to the Applicant.'*

The grounds said to be relied upon were as follows:

'The decision of the Tribunal should be set aside on the ground that it failed to apply the correct current principles to the test of whether there were serious reasons for considering that the Applicant had been complicit in crimes under the Rome Statute whilst he was a member of the Nepalese Maoists in the Kingdom of Nepal in the years 1996–1999.

The acts committed by the applicant were not sufficiently serious to constitute a war crime or a crime against humanity. The Tribunal did not apply the correct test to the applicant's evidence of his own activities in Nepal during the Maoist insurgency. The applicant's activities were not 'so grave that they shock the conscience of all right thinking people'.

The Tribunal erred in concluding there were serious reasons for considering the applicant was within the meaning of the Rome Statute criminally responsible for committing crimes against humanity and war crimes. There was no or insufficient evidence to support the Tribunal's conclusion that the applicant fulfilled the criteria required under the Statute.

The decision of the Tribunal should be set aside on the grounds it misapplied Article 1F of the Refugee Convention to the facts and admissions made by the applicant and reached a wrong conclusion that the applicant was excluded from the Convention.'

91 Following a set of submissions covering some 43 paragraphs, the conclusion was said to be as follows:

- ‘44. *The AAT constructively failed to exercise jurisdiction because it applied the wrong tests, it misconceived its duty and failed to apply itself to the real question or questions to be decided per Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at 339 and 351–352.*
45. *The decision of the AAT is not a privative clause decision pursuant to s.474(2) of the Act and the appeal is not incompetent by reason of s.483 of the Act which provides that s.44 of the AAT Act does not apply to a privative clause decision.*
46. *The appeal should be allowed, the decision of the AAT should be set aside and the matter remitted to the AAT to determine the appellant’s application for review of the decision of the delegate of the Minister according to law.’*

No argument was presented as to why the applicant should be permitted to change his ground. Furthermore, the only reference to the nature of the proceedings was that in paragraph 45 of the applicant’s further submissions.

92 The additional submissions in response for the respondent do not deal with the question as to whether the applicant should be given leave to raise the new arguments. After 46 paragraphs of submissions, the following conclusion was put:

‘The assertions made by the applicant in paragraph 44 of his further submissions are baseless. To succeed before the Court, it would be necessary for him to establish that the Tribunal’s findings in respect of both crimes against humanity and war crimes were affected by jurisdictional error. He has failed to identify any jurisdictional error in either of these aspects of the Tribunal’s decision. The application should be dismissed, and the applicant should be ordered to pay the respondent’s costs.’

A general submission was put that it was not open to the applicant to challenge the Tribunal for not having adequately addressed matters which were not put in issue before it.

93 In my opinion, the position which has been arrived at is unsatisfactory. Firstly, the proceeding in form and in substance purports to be an ‘appeal’ pursuant to s 44 of the *AAT Act*. It is on that basis that this Full Court was constituted by the Chief Justice. On the face of it, s 483 of the *Migration Act* would be a bar to such a proceeding, absent jurisdictional error. There has been no proper examination as to whether that section applies. The question of whether there has been jurisdictional error is not to be determined upon a purported appeal pursuant to s 44 of the *AAT Act*. That provision assumes the validity of the proceeding. The throw away references to jurisdictional error in the written submissions cannot change the

nature of the proceeding. In any event, in my view, no jurisdictional error has been exposed in the arguments for the applicant. The learned Deputy President identified the provisions of the Act and the international instruments which were accepted as correct and which accord with subsequent Full Court authority (*SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 42), found relevant facts which were well open to be found and applied those facts to the instruments concerned. The correct questions were asked. Even if there were an error or errors in the answers, that would not establish jurisdictional error. Secondly, the form of the alleged questions of law and the grounds identified are more appropriate to appellate review than to questions of law pursuant to s 44 of the *AAT Act*. The latest written submissions for the applicant certainly seem to proceed upon that basis. Thirdly, it has not been demonstrated that the precise questions of law upon which it is said that the learned Deputy President erred were ever squarely put to him, or that the necessary factual issues were properly isolated.

94 I would not have been inclined to permit the applicant to make another change of stance. The applicant persuaded the RRT that he had personal participation in a serious, organised and violent insurgency targeting civilians and public officials involving torture and killing of non-military persons and so satisfied Article 1A. Having done so, it appears to have been considered that a way of escaping the consequence that Article 1F would be engaged was to argue that the political nature of the crimes in which the applicant was implicated avoided the provisions of the Article. That endeavour was correctly held by the AAT to be misconceived. I would not be inclined to permit the applicant to now seek to diminish the seriousness of the conduct which he has claimed from the time of the application for a protection visa onwards. In my opinion, the explanation given during oral argument by counsel for his concession aptly sums up the situation.

95 There is no need to come to a final view about that as I agree with the judgment of Downes J that the identified questions of law and grounds in the amended application would not lead to success if permitted. The first alleged question of law does not put in issue the test for complicity but, rather, challenges the application of it. That was a question of fact for the AAT. There is no suggestion that there was or is any challenge to the relevance of Article 25 of the Rome Statute before the AAT or on this appeal. The approach to fact finding by the AAT as to the complicity of the applicant is quite consistent with the decisions at first instance and in the Full Court in *SHCB v Minister for Immigration and Multicultural*

and Indigenous Affairs. The first alleged ground takes the matter no further. The second alleged question of law is plainly not a question of law in the relevant sense. The second ground appears to be again directed to complicity. The words '*so grave that they shock the conscience of all right thinking people*' are not found in the operative parts of the relevant instruments. In any event, it would be open to find that the actions of the Maoists answered that description. The third ground raises only a question of fact as there was plainly some evidence. The fourth ground is also only a question of fact.

96 The last point to be made is that some of the arguments for the applicant overlook the difference between proof that a particular crime has been committed on the one hand and the existence of 'serious reasons for considering' on the other. Again, the learned Deputy President correctly directed himself as to that matter by reference to the relevant authorities.

97 The appeal should be dismissed with costs.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 20 February 2006

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 1321 of 2004

**BETWEEN: SZCWP
APPLICANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AND INDIGENOUS AFFAIRS
RESPONDENT**

JUDGES: WILCOX, GYLES, DOWNES JJ

DATE: 20 FEBRUARY 2006

PLACE: SYDNEY

REASONS FOR JUDGMENT

DOWNES J:

98 The applicant is Nepalese. He was born and educated in Nepal. While at university he joined a Maoist group whose objective was to achieve a change in the government of Nepal. The group broke into two factions. One faction advocated a change of government by force and engaged in activities to this end. In about 1995 the applicant joined this group. He travelled around Nepal supporting the activities of the group. The applicant fled Nepal in 1999. He arrived in Australia on a false passport and applied for a protection visa as a refugee.

99 The Refugee Review Tribunal upheld the applicant's primary claim to refugee status. It remitted the matter to the Minister for Immigration and Multicultural and Indigenous Affairs for consideration as to whether the applicant was excluded from protection under the *Convention relating to the Status of Refugees* because there were serious reasons for considering that he had committed war crimes or crimes against humanity or serious non-political crimes. The Minister's delegate decided that the applicant was excluded for war crimes and crimes against humanity.

100 The applicant appealed to the Administrative Appeals Tribunal. Deputy President RNJ Purvis QC affirmed the decision. The applicant appealed to the Federal Court pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth). Pursuant to subs 44(3) the Chief

Justice directed that the appeal be heard by a Full Court.

101 Decisions of the Administrative Appeals Tribunal concerning applications under the Refugee Convention are privative clause decisions under s 474 of the *Migration Act 1958* (Cth). Section 44 of the Administrative Appeals Tribunal Act does not apply (s 483 of the Migration Act). However, these provisions only apply to a decision that is made within jurisdiction. The question in this appeal is whether the decision of the Administrative Appeals Tribunal is subject to jurisdictional error. In my opinion there was no error of law and no jurisdictional error.

102 Deputy President Purvis made the following findings of fact:

“42. The Applicant was involved in a series of acts designed to undermine the Nepalese government by the use of force and intimidation involving widespread and systematic violence and attacks against landowners, bureaucrats and police. There was murder and severe deprivation of liberty and there was conduct involving the multiple commission of these acts against the civilian population in furtherance of the Maoist policy to commit such attacks.

43. Apart from the Applicant’s knowledge, awareness and preparedness to participate in the overall conduct of the Maoists, this by reason of his membership and devotion to its objectives, the Applicant engaged in the specific acts earlier detailed with reference to his involvement. As was submitted on behalf of the Respondent they included:

- fighting against police during the course of which police were killed and capturing police and holding them to negotiate satisfaction of the Maoist demands of the government;*
- fighting against landlords and other civilian non-combatants during which the Applicant used his khukura knife and guns and during which civil non-combatants were killed;*
- capturing wealthy people and landowners who were civilian non-combatants and holding them for ransom as a consequence of which some of these people were killed, but not directly by the Applicant; and*
- gathering information to facilitate the attack on Mahaghat village, an attack on civilians.”*

103 The applicant gave a number of recorded interviews to representatives of the Department of Immigration and Multicultural Affairs. In one interview the following appears:

Case Officer: What are the policies of the party you were a member of?
Interpreter: The belief of the party is to have a government where there is no democracy.
Case Officer: No democracy, yes. Anything else?
Interpreter: And to eradicate culture, and to have a country labourisation.
Case Officer: Is there anything else you can tell me about these policies?
Interpreter: And redistribution of wealth between those that have and those that do not have, reduce the poverty. And to eradicate corruption and then to eliminate those that have. Eliminate the wealthy ones.
Case Officer: How would you eliminate them?
Interpreter: Kill them.

...

Case Officer: Now for the 7 or 8 months that you had left university, what sort of activity did you do?
Interpreter: Go to the meetings, and then organise rallies and find the wealthy people then they warn them or capture them.
Case Officer: What did you do after you captured them?
Interpreter: They used to threaten them and try to get them to agree with their ideas, and if they didn't then they would kill them.
Case Officer: Have you ever killed anyone?
Interpreter: He hasn't killed anybody directly."

104 The applicant agreed that he had engaged in fighting "with a landlord and things like that". He had clashed with police about six times. He carried weapons including khukura knives and rifles. He also carried a home made hand gun. He had struck someone with a khukura "about once or twice" and fired a rifle in the air. He admitted he had been involved in capturing people. He was involved in incidents in which landlords handed over papers for destruction. He said they did not do this willingly but "I suppose they must have got scared". This was "[b]ecause other serious incidents were taking place too ... maybe some lives were lost too."

105 The applicant was involved with an attack on the police station in the town of Mahaghat. Before the attack he infiltrated the town to collect intelligence. The attack on the police lasted some three hours before the Maoists withdrew. Police were killed. There were about 300 Maoists involved in the actual attack. The applicant was not in the front line. He

remained in a jungle camp to assist in resisting any government forces arriving from outside and to provide reinforcements if necessary. The applicant thinks that the Central District Officer of the police was captured and held for about a month. He was released after negotiation with the Government. It was after the incident at Mahaghat that the applicant fled to India and ultimately arrived in Australia.

106 Article 1F of the Refugee Convention provides that the 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.”*

107 In *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 ALR 394, a Full Court of the Federal Court held that it was appropriate to refer to Articles 7 and 8 of the *Rome Statute of the International Criminal Court* for definitions of “Crimes against humanity” and “War crimes”.

108 The definitions, relevantly, are as follows:

“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;

...

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

...

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or 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;

...

(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;*

...

Article 8 - War crimes

1. *The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*

2. *For the purpose of this Statute, “war crimes” means:*

...

(c) *In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:*

(i) *Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*

(ii) *Committing outrages upon personal dignity, in particular humiliating and degrading treatment;*

(iii) *Taking of hostages;*

...

(d) *Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.*

(e) *Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:*

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities;

...

(v) Pillaging a town or place, even when taken by assault;

...

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

...

(f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

109

Article 25 is also relevant:

“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;*

...

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose."

110 Deputy President Purvis addressed the above provisions and applying the facts as he had found them concluded that there were serious reasons for considering that the Applicant has committed war crimes and crimes against humanity and that Article 1F of the Refugee Convention accordingly prohibited him from protection under that Convention. His conclusion was framed as follows:

"CONCLUSION AND DECISION

57. *The criminal conduct in which the Applicant was engaged, whether perpetrated directly by himself or in connection with which he was aider and/or abettor, entailed the murder of members of the police and other members of the civilian population and the multiple commission of acts against a civilian population pursuant to an organisational policy to commit such attacks. The attack at Mahaghat was systematic. The treatment afforded to landlords, when they did not comply with Maoist demands, constitutes a crime against humanity. It was organised and it was systematic. The role of the police was to maintain civil order and ensure the compliance of citizens of Nepal with the law as it then was. It was not the police who could change the law. That was the task of the government. It was with the government with whom the Maoists were engaged in hostilities, not the civilian population. The Maoists were seeking to take the law into their own hands and inflict violence to life and person. They were intentionally directing attacks against the civilian population as such and against individual citizens who were not taking a direct part in the hostilities between the Maoists and the government of Nepal.*

58. *The Tribunal is satisfied that there are serious reasons for considering that the Applicant did commit, and was within the meaning of the Rome Statute criminally responsible for, committing crimes against humanity and war crimes. The evidence against the Applicant in this regard is strong."*

111 To understand the issues as they finally emerged in the appeal it is necessary to trace their history. On the assumption that there was jurisdictional error, the appeal under s 44 of the Administrative Appeals Tribunal Act is confined to questions of law. Three questions of

law were originally raised:

a) *“Whether the Tribunal correctly applied the test for complicity in finding that there were serious reasons for considering that the activities of the Applicant in Nepal fell within the relevant definitions of crimes under the Rome Statute of the International Criminal Court...”*

b) *“Whether the Tribunal correctly applied Article 1F ...”*

c) *“Whether it was open to the Tribunal, having made the findings it did in regard to the Applicant’s crimes in Nepal, to consider the balance between the nature of those crimes, the Applicant’s exclusion from the Refugee Convention under Article 1F and the prospect of his persecution for a Convention reason on his return to Nepal.”*

112 At the commencement of the hearing and in its original written submissions the applicant did not rely on the first two grounds and acknowledged that the third ground, the sole ground relied upon, was not argued before the Administrative Appeals Tribunal and depended upon the Court either overruling or distinguishing the line of authority including the decision of French J in *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556.

113 During the hearing the Court granted leave to the applicant to furnish written submissions relating to matters which had arisen during the hearing. When those submissions were filed they abandoned the third ground and raised again grounds one and two which had previously been abandoned.

114 Reduced to its essence the first matter which the Tribunal was required to address by a combination of Article 1F of the Refugee Convention and Article 8 of the Rome Statute was whether there were “serious reasons for considering that [the applicant] has committed”:

“a war crime” (Art 1F) namely:

“(c) In the case of an armed conflict not of an international character... any of the following acts committed against persons taking no active part in the hostilities...:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

...

- (e) *Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:*
 - (i) *Intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities;*
 - ...
 - (v) *Pillaging a town or place, even when taken by assault;*
 - ...
 - (viii) *Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;*” (Article 8 of the Rome Statute)

Internal disturbances and tensions are excluded. There must be an armed conflict although it need not be of an international character. Criminal responsibility attaches to aiding, abetting and assisting or in any other way contributing to the commission or attempted commission of such a crime where there is a group acting with a common purpose and the contribution is intentional and with at least knowledge of the intention to commit the crime. (See paragraph 2(f) of Article 8 and Article 25 of the Rome Statute).

115 The Tribunal was also required to address the question of whether there were “serious reasons for considering that [the applicant] has committed”:

“*a crime against humanity*” (Art 1F) namely:

“... *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;*
- ...
- (e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) *Torture;*
- ...
- (h) *Persecution against any identifiable group or collectivity on political,*

racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or 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;*

....

(k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” (Article 7 of the Rome Statute)*

116 Where issues arise under Article 1F of the Refugee Convention, the Parliament has committed the relevant final exercise of executive power, namely, the making of a decision whether or not to grant a protection visa, to the Administrative Appeals Tribunal. Even if the privative clause does not apply, the only appeal to this Court is an appeal on a question of law. This Court has no power to grant a visa and no power to make findings of fact which might be the basis for the grant of a visa. Recent amendments to s 44 of the Administrative Appeals Tribunal Act did, by subs 44(7), give the Federal Court limited power to find facts but only where they “ ... are not inconsistent with findings of fact made by the Tribunal...”. For the purposes of this case the amendment only reaffirmed the inability of the Court to make findings of fact.

117 The appeal, as it is now argued, concentrates on three matters. First, it is said that there was no evidence to support some findings. Secondly, it is said that the Tribunal misdirected itself as to some provisions of the Convention. Thirdly, it is said that the Tribunal did not give sufficient specific and careful consideration to some of the elements required by the Convention.

118 The first asserted error recognises that the question is not whether we agree with the Tribunal’s findings of fact but whether there is evidence to support them. In my opinion there is evidence to support the Tribunal’s findings of fact and particularly those in paragraphs 42, 43, 57 and 58 set out above. It is said that there is no evidence that there were widespread or systematic attacks. I do not agree. It is said that there is no evidence that the applicant had knowledge of such attacks. I do not agree.

119 Turning to the argument that the Tribunal misdirected itself, it is not said that it made any positive error of legal reasoning. Rather, it is said that the misdirection is to be inferred. For example, it is said that the Tribunal did not address the question of knowledge on the part of the applicant or the evidence of any widespread or systematic attacks. I do not agree. The whole thrust of the statements of the applicant was recognition that he had knowledge of attacks and their nature. This was what the Tribunal found. The applicant also submits that “it is arguable that during the time of the applicant’s activities the police would not come within the definition of ‘civilian population’”. I do not agree. The police are not part of the armed forces. The fact that they sought to repel an attack by the Maoists did not change this.

120 Finally, it was said that the Tribunal failed to give specific consideration to each of the elements required by the Rome Statute. Particular reference was made to Article 8. Deputy President Purvis set out Article 8. The elements are isolated in paragraph 17 above. In my opinion the Deputy President’s reasons do address each element even though individual sentences in his reasons are not assigned to particular elements of Articles 7 and 8. It is also said that the Deputy President did not apply the correct test for complicity or common purpose and that he did not consider the *mens rea* of the applicant in context. I do not agree. As the Deputy President found, the applicant was fully involved in, fully understood and supported what the Maoists were doing.

121 The reasons of the Deputy President should not be technically construed. He is a very experienced lawyer and a former Judge of the Family Court of Australia. I would not conclude that merely because he did not slavishly repeat all the elements he had already isolated from the Convention when he made his findings, that he departed from his duty to have regard to each of them. Inote, for example, that although I have attempted, for convenience, to summarise the relevant elements in paragraph 17, such summaries can be criticised for omitting relevant parts. However, I have accordingly had regard to the whole of the provisions in arriving at my conclusions. Returning to Deputy President Purvis’ reasons, in my opinion sufficient elements of the provisions of the Convention are referred to in his findings.

122 The appeal should be dismissed with costs.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Downes.

Associate:

Dated: 20 February 2006

Counsel for the Applicant:	Mr D Burwood
Counsel for the Respondent:	Ms R Henderson
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	9 May 2005
Date of Final Submissions:	8 July 2005
Date of Judgment:	20 February 2006