Date: 20041001

Docket: IMM-377-02

Citation: 2004 FC 1356

BETWEEN:

NASRULLAH ZAZAI,

Applicant,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

REASONS FOR ORDER

LAYDEN-STEVENSON J.

[1] Since November 17, 1993, Mr. Zazai has lived in Canada. A deportation order was issued against him on January 17, 2002. He claims that the order should not have been made.

PROCEDURAL AND FACTUAL BACKGROUND

[2] A citizen of Afghanistan, Mr. Zazai came to Canada as a stowaway. He made a refugee claim after he arrived at Montreal Harbour. His personal information form (PIF) was completed on February 11, 1994 and his hearing before the Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD) took place on October 11, 1994 and March 22, 1995. On August 10, 1995, the CRDD determined that Mr. Zazai was excluded from the definition of Convention refugee - under subsection 2(1) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the Act) - because of section F(a) of Article 1 of the United Nations Convention Relating to the Status of Refugees (the Convention). The board found that there were serious reasons for considering that he had committed crimes against humanity. Mr. Zazai's application for leave with respect to the CRDD decision was denied on January 5, 1996.

[3] On October 10, 1996, he submitted an application for landing as a post-determination refugee claimant in Canada. A report under section 27(2) of the Act was prepared and a section 27(3) direction for inquiry was issued on December 8, 2000. The inquiry was held before an adjudicator on June 26, 2001, October 26, 2001 and January 16, 2002. The adjudicator was satisfied that the allegation - that Mr. Zazai was a person described in paragraph 27(2)(a) coupled with paragraph 19(1)(j) of the Act - had been established. As a result, the adjudicator determined that he was

subject to a deportation order under subsection 32(6) of the Act. The deportation order was signed on January 17, 2002.

[4] Mr. Zazai successfully sought leave to apply for judicial review of the adjudicator's decision. His application for judicial review was heard on May 7, 2003 and by order dated May 21, 2003, the Federal Court Trial Division, as it was then constituted, allowed the application (*Zazai v. Canada (Minister of Citizenship and Immigration*) 2003 FCT 639). The Minister appealed. The appeal was heard on March 2, 2004 and by judgment dated March 4, 2004, the Federal Court of Appeal allowed the appeal, set aside the order of the applications judge and remitted the matter to the Federal Court for redetermination (*Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.)).

[5] Mr. Justice Pelletier, writing for a unanimous court, provided a concise recitation of the pertinent facts at paragraphs 3 and 4 of the Court of Appeal judgment:

> Before the CRDD, [Mr. Zazai] testified that he had served as a member of the 5th Directorate of KHAD which, according to the documents before the CRDD, was a "secret intelligence organization with the purpose of eliminating anti-government activity, and which engaged in crimes, which could be characterized as crimes against humanity". On the basis of [Mr. Zazai's] own testimony, the CRDD found that he fell within the exclusion in article 1F(a) of the Convention. When the matter came before the adjudicator for a determination as to whether [Mr. Zazai] should be removed from Canada due to his inadmissibility under paragraph 19(1)(j) of the Act, [Mr. Zazai] led evidence from two witnesses to show that he was not, in fact, a member of KHAD. While [Mr. Zazai] testified briefly before the adjudicator as to his status in Canada, he was not asked about his membership in KHAD by the Minister's representative or by his own. The evidence of the two witnesses was essentially to the effect that they had known the respondent as a basketball [sic] player at the University of Kabul and that they had not known him to be a member of KHAD.
>
> The adjudicator considered the evidence of the two witnesses, the documentary evidence as well as the evidence given by _[Mr. Zazai] before the CRDD. After carefully analyzing the evidence, she concluded:
>
> > Over all, I am satisfied that the evidence that was given at the CRDD hearing in 1994 and 1995, and in your application for landing made in 1996, is more credible then (sic) that evidence which has been presented here at this inquiry with respect to your involvement in the organization known as KHAD. Therefore, and especially in light of the courts' comments in Figueroa, I conclude that the evidence does indeed establish that you were complicit in crimes against humanity in Afghanistan as part of the organization known as KHAD.

[6] There are two arguments advanced on behalf of Mr. Zazai. The first is that the adjudicator erred in arriving at her credibility determinations. The second is that the notion of complicity in crimes against humanity by reason of membership in

an organization with a limited brutal purpose, which has its genesis in refugee law, has no application in relation to the admissibility provisions of the Act.

[7] I should note, for clarity, that the adjudicator's decision was made before the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) came into force on June 28, 2002. By virtue of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the IRP Regulations), passed pursuant to IRPA, specifically subsection 348(6), this judicial review is to be determined in accordance with the provisions of the former Act.

[8] This leads to a rather anomalous result with respect to the alleged errors regarding credibility. If Mr. Zazai were to be successful on this application and the matter were to be remitted for redetermination, section 190 of IRPA mandates that the matter would be governed by IRPA. Section 15 of the IRP Regulations provides that, in determining inadmissibility under IRPA, the findings of fact in a rendered decision or determination - based on findings [in this case those of the CRDD] that the foreign national has committed a war crime or crime against humanity and is a person referred to in section F of Article 1 of the Convention – shall be considered as conclusive findings of fact.

[9] Thus, it appears that if Mr. Zazai were to be successful on this application, redetermination under IRPA would require, with respect to the issue of Mr. Zazai's membership in KHAD, that the findings of the CRDD would prevail and the adjudicator's determination would be restricted to the question of whether or not there are reasonable grounds to believe that Mr. Zazai had committed an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 (the War Crimes Act), within the meaning of paragraph 35(1)(a) of IRPA [paragraph 19(1)(j) of the Act].

[10] I raised this point with counsel at the outset of the hearing. After some discussion, during which Mr. Zazai's counsel indicated that the application of section 15 of the IRP Regulations would or could be challenged, I determined that any argument in relation to the impact of section 15 was best left to circumstances where the provision was being applied. Accordingly, and in the face of the express direction of subsection 348(6) of the IRP Regulations, this application was argued and will be decided without regard to IRPA or the IRP Regulations. Given my conclusions regarding Mr. Zazai's credibility argument, in the circumstances of this matter nothing turns on the point in any event.

CREDIBILITY

[11] The witnesses testified that Mr. Zazai, at the relevant time, was a student at the University of Kabul and a member of its volleyball team. Mr. Nawami testified that he [Nawami] was the sports director at the university and the trainer of the volleyball team. Mr. Malikzai stated that he [Malikzai] and Mr. Zazai were teammates on the university volleyball team during one of the years when Mr. Zazai attended the university. Both witnesses said that they did not believe that Mr Zazai was a member of KHAD.

[12] The submission is that the adjudicator improperly relied on purported inconsistencies in the evidence to justify her credibility findings. Specifically, she found inconsistencies in the evidence of the witnesses as well as internal inconsistencies in relation to the evidence of each of them. Mr. Zazai maintains that the witnesses were called to refute the evidence of his membership in KHAD. The adjudicator was therefore obliged to weigh and assess this evidence and reach a determination on its credibility. Mr. Zazai contends that a review of the evidence indicates that the witnesses were not inconsistent. They were consistent in terms of their timing and there was no inconsistency between the evidence of one or the other as to Mr. Zazai's participation, Mr. Malikzai's participation, and their participation together on the university volleyball team. Both testified that Mr. Zazai and Mr. Malikzai played together in 1990 and 1991.

[13] The written argument alleges that both witnesses testified that Mr. Zazai was also a member of the national volleyball team. That allegation was not pursued at the hearing nor can it be sustained on a review of the transcript.

[14] Findings of fact, including those of credibility, are best left to the trier of fact: *Chen v. Canada (Minister of Citizenship and Immigration)* (1999), 240 N.R. 376 (F.C.A). The applicable standard of review regarding findings of fact and credibility is one of patent unreasonableness: *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. However, intervention is warranted in circumstances where the decision-maker arrives at a finding of fact having misconstrued or ignored relevant evidence and then relies on those findings when making an adverse determination as to credibility: *Lai v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 906 (F.C.A.)

[15] The adjudicator summarized the evidence of both witnesses as well as Mr. Zazai's evidence (including his PIF, CRDD hearing testimony, application for landing, and affidavit denying KHAD membership). She then stated:

> The evidence you have given with respect to your involvement in this organization has been consistently presented from 1992 (sic) when you first arrived in Canada through the hearing process which took place in 1994 and 1995 before the CRDD, before the Federal Court in the form of your application for leave, and continuing on through at a minimum your application for landing in Canada, even after your exclusion by the CRDD at their hearing. The repudiation of all of that information only comes recently, and it is not in my estimation credible over all.

[16] The adjudicator then enumerated a number of inconsistencies in the evidence. That evidence included not only the oral testimony of Messrs. Nawami and Malikzai, but all of the evidence that she had previously summarized.

[17] Mr. Zazai does not take issue with all of the noted inconsistencies but he does take exception to the comment that the evidence of the witnesses was internally inconsistent. In fairness, the adjudicator specified that this comment was of particular significance in relation to Mr. Malikzai. Although Mr. Nawami's evidence was, for the most part, internally consistent, there was vacillation in relation to when Mr. Zazai

allegedly played on the volleyball team. Mr. Zazai maintains that all were agreed that it was 1990-1991. However, Mr. Nawami did state that he [Nawami] left Kabul in 1991 and that Mr. Zazai had left before him. Although he does not specifically refer to a time frame between Mr. Zazai's departure and his departure, his comments imply that the length of time between their respective departures was not insignificant. He also stated, more than once, that Mr Zazai played on the team in 1990.

[18] In the case of Mr. Malikzai, repeatedly reciting that he and Mr. Zazai played together on the University of Kabul volleyball team in 1990-1991 does not make it so, particularly when regard is had to his evidence as a whole. Having reviewed Mr. Malikzai's affidavit and the transcript several times, I am still uncertain as to when Mr. Malikzai actually attended the University of Kabul, if at all. In my view, it was open to the adjudicator to make the observations and the determinations that she made and there is no prospect of them being regarded as unreasonable.

[19] With respect to the evidence regarding KHAD, each of the witnesses stated that he did not believe that Mr. Zazai was a member. Mr. Nawami stated that he would have known had that been the case although he was unable to provide any convincing explanation as to why. The adjudicator reasonably found that their evidence constituted no more than opinions. She also considered that the organization was "a secret one" and that it was unlikely that its members "would have been known to the general populace". This latter observation is supported by Mr. Zazai's evidence before the CRDD when he stated that "nobody knew" that he was working in KHAD because it "was a confidential organization".

[20] Mr. Zazai also contends that the adjudicator applied the wrong test when she stated:

> Neither [of the] gentlemen in their evidence could point to any specific evidence or facts in their possession that conclusively proved you were not part of this organization known as KHAD during the time in question.

[21] I regard the adjudicator's choice of words as unfortunate. I do not regard them as a statement of a standard of proof. When read in the context of the decision as a whole, the comments simply mean that the witnesses could not point to any evidence, other than their own testimony, that demonstrated that Mr. Zazai was not a member of KHAD as he had repeatedly professed to be.

[22] In short, the adjudicator did not accept the evidence provided in Mr. Zazai's most recent affidavit and she did not accept the evidence of the witnesses. She also provided her reasons for rejecting that evidence. I am not persuaded that the adjudicator made any error that would warrant my intervention in relation to her findings in this regard. Even if I had found that the adjudicator erred in her findings regarding some internal inconsistencies in the evidence presented by Messrs. Nawami and Malikzai, her findings on the central and determinative issue are, in my view, unassailable. She simply did not believe Mr. Zazai's later story over the one that had been advanced from the time of his initial refugee claim through to the time just before his admissibility hearing.

[23] I turn now to Mr. Zazai's second argument. An understanding and appreciation of his submissions requires reference to various statutory provisions and to the jurisprudence concerned with the concept of complicity in the commission of international crimes in the context of refugee law.

THE RELEVANT STATUTORY PROVISIONS

[24] The relevant statutory provisions and international law references are attached to these reasons as Schedule "A". For ease of reference, the pertinent extracts of sections 2, 19 and 27 of the Act as well as section F(a) of Article 1 of the Convention are reproduced here.

2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi. ...
"Convention refugee" ...	"réfugié au sens de la Convention" ...
... does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;	... Sont exclues de la présente définition les personnes soustraites à l'application de la Convention par les sections E ou F de l'article premier de celle-ci dont le texte est reproduit à l'annexe de la présente loi.
19. (1) No person shall be granted admission who is a member of any of the following classes: ...	19. (1) Les personnes suivantes appartiennent à une catégorie non admissible: ...
(j) persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;	j) celles dont on peut penser, pour des motifs raisonnables, qu'elles ont commis une infraction visée à l'un des articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;
27. (2) An immigration officer or a peace officer shall, unless the person has been arrested pursuant to subsection 103(2), forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a person in Canada, other than a Canadian citizen or	27. (2) L'agent d'immigration ou l'agent de la paix doit, sauf si la personne en cause a été arrêtée en vertu du paragraphe 103(2), faire un rapport écrit et circonstancié au sous-ministre de renseignements concernant une personne se trouvant au Canada autrement qu'à titre

permanent resident, is a person who(a) is a member of an inadmissible class, other than an inadmissible class described in paragraph 19(1)(h) or 19(2)(c); ...	de citoyen canadien ou de résident permanent et indiquant que celle-ci, selon le cas:
	a) appartient à une catégorie non admissible, autre que celles visées aux alinéas 19(1)h) ou 19(2)c);
ARTICLE 1 OF THE UNITED	
NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES	ARTICLE PREMIER DE LA
	CONVENTION DES NATIONS UNIES RELATIVE AU STATUT DES RÉFUGIÉS
F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:
(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; ...	a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes; ...

THE JURISPRUDENCE

[25] The jurisprudence of this court with respect to complicity in war crimes and crimes against humanity - for convenience referred to as international crimes throughout these reasons - includes, but is not limited to: *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.) *(Ramirez)*; *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646 (C.A.) *(Gonzalez)*; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.) *(Moreno)*;*Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.) *(Sivakumar)*; *Bazargan v. Canada (Minister of Citizenship and Immigration)* (1996), 205 N.R. 282 (F.C.A.) *(Bazargan)*; *Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 66 (C.A.) (*Sumaida*) and *Harb v. Canada (Minister of Citizenship and Immigration)* (2003), 302 N.R. 178 (F.C.A.) (*Harb*). The trilogy of *Ramirez, Moreno* and *Sivakumar* provided the basis from which the principles summarized in the paragraphs below evolved.

[26] The burden of establishing that international offences have been committed is on the Minister and, with respect to exclusion from refugee status, it must be shown that there are serious reasons for considering that a claimant committed international crimes: *Ramirez*. The standard applies to factual determinations. Whether the acts or omissions in question constitute international crimes is a question of law: *Moreno*.

[27] Accomplices as well as principal actors may be found to have committed international crimes (although, for present purposes, I am not concerned with principal actors**)**. The court accepted the notion of complicity defined as a personal and knowing participation in *Ramirez* and complicity through association whereby individuals may be rendered responsible for the acts of others because of their close association with the principal actors in *Sivakumar*. Complicity rests on the existence of a shared common purpose and the knowledge that all of the parties may have of it: *Ramirez*; *Moreno*.

[28] Madam Justice Reed in *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (T.D.) synthesized the trilogy principles at pages 84 and 85:

> The Ramirez, Moreno, and Sivakumar cases all deal with the degree or type of participation which will constitute complicity. Those cases have established that mere membership in an organization which from time to time commits international offences is not normally sufficient to bring one into the category of an accomplice. At the same time, if the organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may indeed meet the requirements of personal and knowing participation. The cases also establish that mere presence at the scene of an offence, for example, as a bystander with no intrinsic connection with the persecuting group will not amount to personal involvement. Physical presence together with other factors may however qualify as a personal and knowing participation.
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> As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them from occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation.

[29] In *Bazargan*, it was determined that personal and knowing participation can be direct or indirect and membership in an organization that is engaged in the condemned activities is not required. It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or outside the organization.

[30] These principles have been reiterated and confirmed in subsequent jurisprudence of the Federal Court of Appeal, most recently in *Sumaida* and *Harb.*

THE CONCEPT OF COMPLICITY IN RELATION TO INADMISSIBILITY

[31] Mr. Zazai submits that the above-noted jurisprudence, developed in the context of refugee exclusion, does not apply to the inadmissibility provision found at paragraph 19(1)(j) of the Act. He argues that by amending the Act (the amendment has been carried forward into IRPA) and by relating the determination of admissibility on grounds of violating human rights directly to the *Criminal Code* R.S.C. 1985, c. C-46 as amended, it is clear that "the test for admissibility is the same as that under section 36 of the Act (sic)[s. 19(1)(c.1)] dealing with serious criminality". The issue is whether he has committed a crime under sections 4 to 7 of the War Crimes Act.

[32] The rationale underlying Mr. Zazai's argument is that a person is guilty of an indictable offence if the person commited, either inside or outside of Canada, an international crime. The War Crimes Act makes it an offence to counsel one to commit international crimes or to be an accessory after the fact. Thus, according to Mr. Zazai, in an admissibility hearing, a determination of inadmissibility under the provisions of paragraph 19(1)(j) [now 35(1)(a) of IRPA] requires application of the rules that have evolved in the context of criminal admissibility and these rules demand an equivalency analysis. He maintains that this process is entrenched in the jurisprudence.

[33] He refers to the War Crimes Act and says that there is nothing in it that makes it a crime to be complicit in a crime so as to make a "person's being 'complicit' sufficient to produce a finding of guilt in a Canadian court of law". He asserts that complicity under refugee law has been broadly defined and nothing in the provisions of sections 4 to 7 of the War Crimes Act permits such an interpretation. By opting to define inadmissibility by reference to a statute that has provided for culpability based on specific provisions, he claims that Parliament has determined that inadmissibility to Canada will be judged on the basis of the equivalent criminal statutes.

[34] Mr. Zazai contends that the current provisions constitute a clear departure from the past when inadmissibility, due to the commission of international crimes, was related to the broadly defined terms set out in section F(a) of Article 1 of the Convention without reference to any definition in any Canadian statute. The wording in the exclusion and inadmissibility provisions is not equivalent. Moreover, he argues, the purposes of the two provisions are completely different. In an admissibility hearing, the question is whether he has committed a crime that would render him inadmissible. In a refugee context, the question is whether he is entitled to international protection. This, he says, was made clear by the Supreme Court in *Pushpanathan* where the court explicitly recognized the different roles of section 19 and the exclusion clause.

[35] The adjudicator erred, in Mr. Zazai's opinion, by failing to make express findings in relation to his culpability for specific crimes as required by law. Absent an express finding that he had in fact committed a crime described in sections 4 to 7 of the War Crimes Act, the decision is not sustainable. It was incumbent on the adjudicator to "engage in an equivalency analysis similar to that undertaken under

section 36 (sic) [s. 19(1)(c.1)], a determination as to whether there exists (sic) reasonable grounds for concluding that he had committed an offence that was equivalent to a specific offence or crime under sections 4 to 7 of the [War Crimes] Act". In this regard, mere membership in the KHAD was not enough.

[36] If Mr. Zazai is correct that the concept of complicity, as enunciated in the jurisprudence summarized earlier, does not apply to paragraph 19(1)(j) of the Act, then the adjudicator's decision must be set aside. Her determination was based on his complicity (not direct participation) in international crimes. In addressing Mr. Zazai's submissions, it is useful to begin with the common ground. For convenience, I may refer to section F(a) of Article 1 of the Convention as the "exclusion provision" and to paragraph 19(1)(j) of the Act as the "inadmissibility provision".

[37] There is no dispute that Mr. Zazai has not been charged with committing international crimes. Nor is there any suggestion that the applicability of the inadmissibility provision is in any way dependant upon him being charged with or convicted of any such offences. There is no disagreement as to the standard of proof applicable to the factual findings. It is settled law that there is no substantive distinction between the terms "serious reasons for considering" (the standard for the exclusion clause) and "reasonable grounds to believe" (the standard for the inadmissibility provision): *Ramirez*;*Moreno*. The phrases have the same meaning: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C. 3 (C.A.) (*Mugesera*). In the context of the inadmissibility provisions of the Act, the standard has been defined as one that, while falling short of a balance of probabilities, nonetheless connotes a *bona fide* belief in a serious possibility based on credible evidence: *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.)(*Chiau)*; *Qu v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 3 (C.A.)(*Qu*); *Andeel v. Canada (Minister of Citizenship and Immigration)* (2003), 240 F.T.R. 1 (F.C.) (*Andeel)*; *Gariev v. Canada (Minister of Citizenship and Immigration)* 2004 FC 531 (*Gariev*).

[38] Additionally, Mr. Zazai does not suggest that the fifth directorate of KHAD is anything other than the type of organization that the documentary evidence described and the CRDD determined it to be - a "secret intelligence organization with the purpose of eliminating antigovernment activity and which engaged in crimes, which would be characterized as crimes against humanity".

[39] With respect to Mr. Zazai's submissions, I am not persuaded that the jurisprudence of this court, developed in the context of the exclusion provision, is not relevant or applicable to the inadmissibility provision. The Federal Court of Appeal has consistently recognized and noted that the exclusion clause is analogous to paragraph 19(1)(j): *Ramirez*; *Moreno*; *Sivakumar*; *Mugasera*. In *Sivakumar*, Mr. Justice Linden, when discussing the standard of proof for both provisions, stated at paragraph 18 that "[t]his shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens".

[40] I appreciate Mr. Zazai's position that the purposes of the two provisions are different and I accept that in *Pushpanathan*, the Supreme Court stated that the purpose of Article 1 is "to define who is a refugee". Article 1F establishes categories

of persons who are specifically excluded from that definition. Mr. Justice Bastarache explained that "[t]he general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees...[r]ather, it is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status".

[41] The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 (*Chiarelli*). Mr. Justice Sopinka, writing for a unanimous court referred to the comments of Mr. Justice LaForest in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, and confirmed the government's right and duty to keep out and to expel aliens where it considers it advisable to do so. Otherwise, Canada could become a haven for criminals and others whom we legitimately do not wish to have among us. That pronouncement has been cited in *Chiau, Qu, Yuen v. Canada (Minister of Citizenship and Immigration)* (2000), 267 N.R. 87 (F.C.A.) and a plethora of other cases. That said, the statutory scheme under which immigration control is administered does not leave admission decisions to the untrammelled discretion of the Minister or her officials: *Chiau*.

[42] The objectives of the immigration policy are set out in section 3 of the Act. The overarching objective is to promote the domestic and international interests of Canada recognizing the need, among other things, to maintain and protect the health, safety and good order of Canadian society (subsection (i)). The purpose of paragraph 19(1)(j) must be read in the context of that objective and in the context of the other provisions of the Act. The statutory interpretation presumption of coherence requires that there not be internal conflict within the legislation. It is to be presumed that the legislation does not contain contradictions or inconsistencies and that each provision is capable of operating without coming into conflict with any other. Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Butterworths, 2002) at page 169 states:

> The presumption of coherence is strong and virtually impossible to rebut. It is unthinkable that the legislature would impose contradictory rules on its citizens. When inconsistency occurs, either the drafter has made a mistake which the court must correct or the law must be interpreted in a way that solves the dispute in a definitive fashion. Contradiction or inconsistency cannot be tolerated; some method of reconciliation must be found.

[43] In my view, it is inconceivable that Parliament intended to exclude an individual who - but for the existence of serious grounds for considering that the individual had committed international crimes - may otherwise be entitled to Convention refugee status and, in the same breath, permit that individual to apply for and be granted permanent resident status - notwithstanding the inadmissibility provision - on the basis that the jurisprudence in relation to the exclusion provision does not apply to the inadmissibility provision. Despite their different purposes, it defies logic that one provision could collide so incongruously with the other.

[44] It is important to recall the distinction between complicity in traditional criminal law and complicity in international law. The differences are discussed by Mr. Justice Décary in *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2003] 3

F.C. 761 (C.A.) where he explains that complicity is one method of committing a crime. The concept of complicity by association has been developed in international law in connection with international crimes or acts of the type covered in Article 1, section F(a) and section F(c) of the Convention. The concept of a "party to an offence" has been developed in traditional Anglo-Saxon criminal law. At paragraphs 131-133 (citations omitted) Justice Décary states:

> Article 1F(a) and (c) deals with extraordinary activities, that is international crimes in the case of Article 1F(a), or acts contrary to international standards in the case of Article 1F(c) (which explains the presence of the word "committed" in Article 1F(a), which deals with crimes, and the fact that it is not present in Article 1F(c) which deals with acts that are not necessarily crimes). These are activities which I characterize as extraordinary because, if I might so phrase it, they have been criminalized by the international community collectively for exceptional reasons, and their nature is described in international instruments...One feature of some of these activities is that they affect communities and are conducted through persons who do not necessarily participate directly in them. In order for the persons who are responsible to be held to account, the international community wished responsibility to attach to persons, for example, on whose orders the activities were carried out or who, aware of their existence deliberately closed their eyes to the fact that they were taking place. It is in these circumstances that the concept of complicity by association developed, making it possible to reach the persons responsible who would probably not have been responsible under traditional criminal law. Fundamentally, this concept is one of international criminal law.
>
> Accordingly in Ramirez, MacGuigan J.A., at page 315, agreed in a case involving the application of Article 1F(a) of the Convention, that the Court could not "interpret the 'liability' of accomplices under this Convention exclusively in the light of section 21 of the Canadian [page 825] Criminal Code..., which deals with parties to an offence". MacGuigan J.A. went on, "that provision stems from the traditional common law approach to 'aiding' and 'abetting'. An international convention cannot be read in the light of only one of the world's legal systems"...
>
> Similarly, in Sivakumar, another case of exclusion based on the perpetration of international crimes, Linden, J.A., explained at page 437 et seq. the introduction of the concept of complicity by association by its presence in international instruments dealing with international crimes. In particular, he said at page 441:
>
> This view of leadership within an organization constituting a possible basis for complicity in international crimes committed by the organization is supported by Article 6 of the Charter of the International Military Tribunal [Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 82 U.N.T.S. 279] which defines crimes against peace, war crimes and crimes against humanity...

[45] As noted earlier, Mr. Zazai contends that the enactment of the War Crimes Act changed the law regarding the inadmissibility provision. He claims, and I agree, that paragraph 19(1)(j) mandates reference to sections 4 to 7 of the War Crimes Act (it is section 6 that is specific to Mr. Zazai). He relies heavily on the fact that there is no reference to aiding and abetting anywhere in section 6. This is in contrast to the former provision of the Act that required reference to the *Criminal Code*. Subsection 7(3.77) of the *Criminal Code* specifically included aiding and abetting. Mr. Zazai argues that it is to be presumed - by not including a reference to aiding and abetting in the War Crimes Act - that Parliament intended to exclude it. Absent that reference, it must be shown that he committed an act outside Canada that would be an offence if committed in Canada, as in paragraph 19(1)(c.1) [now section 36 of IRPA]. Since only those acts specifically delineated in subsections 6(1) or 6(1.1) of the War Crimes Act are applicable and since he does not fall within any of the offences provided for in subsection 6(1.1), Mr. Zazai says that it follows that the question must be approached by applying the "equivalency test".

[46] Insofar as viewing paragraph 19(1)(j) in the context of the Act is concerned, Mr. Zazai's position is that regard must be had only to the contents of section 6 of the War Crimes Act and if he does not come within it, as it is written, that is the end of the matter. It strikes me that this is not the approach enunciated by the Supreme Court in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 where Mr. Justice Iacobucci stressed that a contextual and purposive approach to statutory interpretation is essential. While it is not the function of the court to rewrite what Parliament intended and ought to have said (but did not say), the task, as I see it, is to identify the interpretation of paragraph 19(1)(j) that best furthers the goals of the Act.

[47] The frailty in Mr. Zazai's argument is section 34 of the *Interpretation Act*, R.S.C., 1985,c. I-21. That section provides that where an enactment creates an offence, all the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by the enactment. Thus, the partyship provisions that appear in the *Criminal Code* - including the aiding and abetting provisions in section 21 - apply to the War Crimes Act. When the *Criminal Code* amendments in subsection 7(3.71) to 7(3.77) were adopted in 1987, the wording of subsection 7(3.77), as stated, was "for greater certainty". Given that Canada was extending its territorial reach to acts committed beyond its borders, it was prudent for Parliament to provide for that greater certainty.

[48] The War Crimes Act came into force on October 23, 2000. It implemented Canada's obligations under the Rome Statute of the International Criminal Code (ICC) by creating new offences of genocide, crimes against humanity, war crimes, and breach of responsibility by military commanders and civilian superiors: Registration SI/2000-95, Explanatory Note, Canada Gazette Part II, Vol. 134, No. 23 at 2418. Subsection 6(4) of the War Crimes Act specifically incorporates Articles 6, 7, and paragraph 2 of Article 8 of the Rome Statute, which set out and expand the types of acts that constitute international crimes. Because section 34 of the *Interpretation Act* makes the partyship provisions of the *Criminal Code* applicable to the War Crimes Act, it is inaccurate to say that "accomplices" other than those specified in subsection 6(1.1) do not fall within its provisions. The specification of the particular offences in subsection 6(1.1) is included because they describe new crimes in relation to this kind of conduct, i.e., acts that could be characterized as international offences.

[49] The question then becomes whether the "accomplice" provisions are to be interpreted in accordance with domestic criminal law or in accordance with international law. The definition of "crime against humanity", in subsection 6(3) of the War Crimes Act, expressly requires that it be "a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission". Thus, in my view, the jurisprudence of this court that defines complicity, albeit determined in the context of the exclusion clause, applies equally to the inadmissibility provision. In this respect I note that, in the trilogy, the notion of complicity was arrived at through statutory interpretation of the London Charter of the International Military Tribunal Article 6. Although it arose in circumstances involving the exclusion clause, the resultant interpretation did not turn on the fact that it was a refugee matter. The International Military Tribunal Charter was referred to, in the context of inadmissibility, in *Rudolph v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 653 (C.A.). Principle VII of the Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission of the United Nations, 1950, also states that complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law.

[50] In short, the jurisprudence of this court that deals with the concept of complicity was developed in accordance with the principles of international law. The fact that it was developed primarily in matters that related to an exclusion clause under the Convention is of no consequence. I find support for this position in the reasons of my colleague, Mr. Justice Lemieux, in *Murillo v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 287 (T.D.). While acknowledging that the point was not specifically argued, Justice Lemieux, in dealing with a matter under paragraph 19(1)(j), expressed the opinion that the concept of complicity as defined by the jurisprudence of this court is valid for the application of section 6 of the War Crimes Act. Additionally, I note that in *Yuen, supra,* the Federal Court of Appeal, although dealing with paragraph 19(1)(c.2), that admittedly is distinguishable from paragraph 19(1)(j), displayed no reservation in applying the *Sivakumar* reasoning to the meaning of the word "member".

[51] In relation to the equivalency analysis that Mr. Zazai proposes, I agree that there is an equivalency analysis required, but not the one that he suggests. He consistently refers to the process that is applied in relation to paragraph 19(1)(c.1). That process is also sometimes referred to as the "double criminality requirement" and that is what the provision mandates. The jurisprudence of the court has responded in kind. However, that is not the situation in relation to paragraph 19(1)(j) where the equivalency analysis consists of, first, having regard to and examining the acts that are alleged to have occurred outside Canada and, second, determining whether those acts come within the meaning of section 6 of the War Crimes Act. In this case, the adjudicator decided that they did.

[52] To conclude this portion of my analysis, as I have stated, the jurisprudence regarding complicity in the commission of international offences, developed in the context of the Article 1F(a) exclusion, applies to the paragraph 19(1)(j)

inadmissibility provision of the Act. This is consistent with the earlier-noted objectives of the Act as well as the objective of the particular provision: to enable Canada to close its borders to those whom it regards as undesirable because of the existence of a *bona fide* belief that those individuals have committed international crimes, whether or not they have been prosecuted for or convicted of those crimes. It is also compatible with the analogous exclusion provision contained elsewhere in the Act.

[53] It bears repeating that it is not necessary for the Minister to establish Mr. Zazai's guilt. She need only show that there are reasonable grounds to believe that he has committed the acts. Criminal liability would require demonstration of the commission of the acts at an entirely different level of proof and the panoply of procedures and protections associated with criminal prosecutions would presumably apply.

[54] This disposes of Mr. Zazai's arguments. He conceded, at the hearing, that he could not argue that the adjudicator's decision was based only on adherence to the reasoning in *Figueroa v. Canada (Minister of Citizenship and Immigration)* (2000), 181 F.T.R. 242 (T.D.). His concession is based on the comments of the Federal Court of Appeal in *Zazai* at paragraph 8:

> Presumably, the adjudicator's reference to Figueroa led the applications judge to conclude that the adjudicator simply adopted the CRDD's conclusion as to the respondent's exclusion under article 1F(a) of the Convention and applied it to the current version of paragraph 19(1)(j) which resulted in her finding of complicity. But it is apparent that if the adjudicator had considered herself bound by the CRDD's decision, she would simply have referred to the CRDD's conclusion as to the application of article 1F(a) of the Convention, and applied Ramirez and Figueroa to conclude that there were serious grounds to believe that the respondent was complicit in the commission of an offence described in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act. Instead, the adjudicator took care to come to her own conclusion on the issue of whether the respondent was a member of KHAD and, on the basis of that conclusion, decided that the respondent was complicit in crimes against humanity. The important point here is that the basis of the adjudicator's conclusion was her finding that the respondent was a member of KHAD, and not the CRDD's finding that the respondent was excluded under article 1F(a) of the Convention.

[55] Nor did Mr. Zazai argue (credibility arguments aside) - assuming the jurisprudence with respect to complicity in the context of the exclusion provision applies to the inadmissibility provision - that the adjudicator erred. I note in this respect that the adjudicator referred to Mr. Zazai's evidence that he was a member of KHAD, specifically the Ministry of State Security, Fifth Division, from 1987 until 1992; he secured the position through the assistance of his brother Miagul (a high-ranking official in the government of Dr. Najibullah) to avoid military service; the organization was a confidential one; he entered as a first lieutenant and rose to the rank of captain; and he served until the fall of the government of Dr. Najibullah.

[56] The adjudicator also referred to an Amnesty International document covering the period during which Mr. Zazai was involved with KHAD that provided additional evidence to that which was before the CRDD as to the nature of KHAD and its activities, including torture. She described the Fifth Directorate of KHAD as a "notorious subdivision existing for the purpose of eliminating anti-government activity and which engaged in crimes which would be characterized as crimes against humanity".

[57] She noted the CRDD determination that Mr. Zazai was complicit despite his testimony denying participation in any specific crimes against humanity. She referred repeatedly to the "evidence that was before the CRDD". That evidence included Mr. Zazai's testimony that he considered himself as part of the secret police; the objective of the Fifth Division was "to eliminate people who are against the government"; those considered a threat were arrested and imprisoned (PIF); he attended training sessions; he wrote reports to the head of the office; and he provided the names of those who did not co-operate.

[58] The adjudicator also referred to the negative credibility finding of the CRDD regarding Mr. Zazai's naiveté with respect to the nature of the organization and its activities. She determined that acts within the definition of crimes against humanity were committed by KHAD during the relevant time period and that Mr. Zazai, as seen in the evidence before the CRDD, was complicit in those crimes.

[59] The application for judicial review will be dismissed and an order will go accordingly. Counsel, jointly, proposed that the previously certified question be certified again. Subject to one caveat, I agree that a serious question of general importance that would be dispositive of an appeal arises in this matter. Regarding the caveat, the previously certified question referred to the definition of "crimes against humanity" found at subsection 4(3) of the *Crimes Against Humanity and War Crimes Act*. Section 4, in its entirety, deals with crimes committed in Canada. It is beyond dispute that the acts alleged in relation to Mr. Zazai were committed outside of Canada. Offences outside of Canada come within section 6 rather than section 4. Therefore, I will certify the following question:

Does the definition of "crime against humanity" found at subsection 6(3) of the *Crimes Against Humanity and War Crimes Act* include complicity therein?

« Carolyn A. Layden-Stevenson »

Judge

Ottawa, Ontario

October 1, 2004

FEDERAL COURT

Names of Counsel and Solicitors of Record

DOCKET: IMM-377-02

STYLE OF CAUSE: NASRULLAH ZAZAI

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 12, 2004

REASONS FOR ORDER AND ORDER BY: The Honourable Madam Justice Layden-Stevenson

DATED: October 1, 2004

APPEARANCES BY: Mr. Lorne Waldman

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SCHEDULE A

RELEVANT STATUTORY PROVISIONS

Immigration Act, R.S.C., 1985, c. I-2

2. (1) . . .

"Convention refugee" means any person who

(*a*) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(*b*) has not ceased to be a Convention refugee by virtue of subsection (2),

but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

. . .

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

. . .

(i) to maintain and protect the health, safety and good order of Canadian society;

. . .

19. (1) No person shall be granted admission who is a member of any of the following classes:

. . .

(*c*) persons who have been convicted in Canada of an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more;

(*c*.1) persons who there are reasonable grounds to believe

(i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or

(ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

(*c*.2) persons who there are reasonable grounds to believe are or were members of an organization that there are reasonable grounds to believe is or was engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence under the *Criminal Code* or *Controlled Drugs and Substances Act* that may be punishable by way of indictment or in the commission outside Canada of an act or omission that, if committed in Canada, would constitute such an offence, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;

. . .

(*j*) persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

. . .

27. . . .

(2) An immigration officer or a peace officer shall, unless the person has been arrested pursuant to subsection 103(2), forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a person in Canada, other than a Canadian citizen or permanent resident, is a person who

(*a*) is a member of an inadmissible class, other than an inadmissible class described in paragraph 19(1)(*h*) or 19(2)(*c*);

. . .

32. . . .

(6) Where an adjudicator decides that a person who is the subject of an inquiry is a person described in subsection 27(2), the adjudicator shall, subject to subsections (7) and 32.1(5), make a deportation order against that person.

Immigration and Refugee Protection Act, S.C. 2001, c. 27

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

. . .

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

(2) A foreign national is inadmissible on grounds of criminality for

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(*d*) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

(3) The following provisions govern subsections (1) and (2):

(*a*) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(*b*) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

(*c*) the matters referred to in paragraphs (1)(*b*) and (*c*) and (2)(*b*) and (*c*) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(*d*) a determination of whether a permanent resident has committed an act described in paragraph (1)(*c*) must be based on a balance of probabilities; and

(*e*) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada

(*a*) genocide,

(*b*) a crime against humanity, or

(*c*) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

(1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

(2) Every person who commits an offence under subsection (1) or (1.1)

(*a*) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and

(*b*) is liable to imprisonment for life, in any other case.

(3) The definitions in this subsection apply in this section.

"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized

by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

(4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

(5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:

(*a*) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and

(*b*) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998)

Article 7

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(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.

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;

(b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(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;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(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;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Charter of the International Military Tribunal, Annex of the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, August 8, 1945, 82 U.N.T.S. 279

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Adopted by the International Law Commission of the United Nations, 1950, UN Doc. A/1316 /82 (1950)

Principe VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December, 1984, [1987] Can. T.S. No. 36

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Criminal Code, R.S.C., 1985, c. C-46.

7. . . .

(3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

(*a*) at the time of the act or omission,

(i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or

(*b*) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada.

(3.72) Any proceedings with respect to an act or omission referred to in subsection (3.71) shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

(3.73) In any proceedings with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.

(3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

(3.75) Notwithstanding any other provision of this Act, no proceedings may be commenced with respect to an act or omission referred to in subsection (3.71) without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and such proceedings may only be conducted by the Attorney General of Canada or counsel acting on his behalf .

(3.76) For the purposes of this section,

"conventional international law" means

(*a*) any convention, treaty or other international agreement that is in force and to which Canada is a party, or

(*b*) any convention, treaty or other international agreement that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved;

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

(3.77) In the definitions "crime against humanity" and "war crime" in subsection (3.76), "act or omission" includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.

Interpretation Act, R.S.C., 1985, c. I-21

34. (1) Where an enactment creates an offence,

(*a*) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;

(*b*) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and

(*c*) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.

(2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.