Federal Court		Cour fédérale

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Montréal, Quebec, June 17, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

RACHIDI EKANZA EZOKOLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made under sections 72 *et seq.* of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) by Rachidi Ekanza Ezokola (the applicant) concerning decision number MA8-00814 of the Refugee Protection Division of the Immigration and Refugee Board (the panel), dated September 25, 2009, but in which the reasons are dated September 23, 2009. The applicant, a former diplomat for the Democratic Republic of the Congo (the DRC) at the United Nations, was excluded by the panel from the

definition of “refugee” in Article 1F(a) of the United Nations Convention Relating to the Status of Refugees (Article 1F(a)).

[2] The panel’s decision is essentially based on the applicant’s complicity by association in the crimes committed by the security forces of various governments of the DRC, in view of the position he held in his country’s public service.

[3] The application for judicial review will be allowed for the following reasons.

[4] In short, merely being an employee of a state whose government commits crimes against humanity is not sufficient for exclusion under Article 1F(a), any more than mere knowledge of those crimes is sufficient. There must be a nexus between the claimant and the crimes alleged. That nexus may be established by presumption if the claimant held a senior position in the public service, where there are serious reasons for considering that the position in question made it possible for the refugee claimant to commit, incite or conceal the crimes, or to participate or collaborate in the crimes.

[5] Background

[6] The applicant was the economic adviser and second counsellor of embassy to the Permanent Mission of the DRC to the United Nations starting on December 1, 2004, and held that position until a few days before he arrived in Canada on January 17, 2008, to claim refugee protection, with his wife and eight children.

[7] The applicant was born in the DRC on May 26, 1966. Through his mother, he is a member of the Bangala ethnic group in Équateur province, while is father is from Bandundu. He completed all of his university education in the DRC and finished with a degree in economics from the University of Kinshasa in 1994.

[8] After a short time in the private sector, with intermittent periods of unemployment and underemployment, he was hired as a financial attaché at the Ministry of Finance and assigned to the Ministry of Labour, Employment and Social Welfare of the DRC in Kinshasa in January 1999, where he worked for several months. In July 1999 he was assigned to the Ministry of Human Rights, also in Kinshasa, first as a financial attaché and then as a financial adviser, until November 2000. The applicant was then transferred to the Ministry of Foreign Affairs and International Cooperation of the DRC as a financial adviser to the Minister's office.

[9] The Minister's office where he worked was eliminated in a ministerial reorganization. The applicant was then assigned to the foreign affairs administration, in June 2003, but he did not really hold a position as he was on sick leave. In July 2004 he was appointed as a member of the diplomatic mission of the DRC to the United Nations in New York. That is one of the DRC's most important diplomatic missions. The applicant then served as a delegate to various United Nations commissions. As well, he made a speech to the Security Council. He also took part in various diplomatic meetings in Ethiopia and Benin as a representative of the DRC.

[10] The applicant's rise in the Ministry of Foreign Affairs and International Cooperation of the DRC is explained by the fact that on June 30, 2003, a transitional government was created following the Inter-Congolese Dialogue held in Sun City, South Africa. The transitional government was composed of members of various opposing political parties, and was given the task of managing a three-year transition leading to elections. The President was Joseph Kabila, and four Vice-President positions were allocated among the leaders of the other parties.

[11] When ministerial positions were allocated, the Ministry of Foreign Affairs and International Cooperation was assigned to the Mouvement de libération du Congo (MLC) led by Jean-Pierre Bemba, who was one of the Vice-Presidents in the transitional government at the time. He appointed Antoine Ghonda as Minister for his party. The applicant states that he was the Minister who signed his transfer order for him to be a diplomat at the United Nations, after reviewing his file and satisfying himself as to his political convictions.

[12] The applicant submits that his problems at the Permanent Mission of the DRC to the United Nations began during the campaign for the election of the President of the DRC, following the Inter-Congolese Dialogue in Sun City. The ambassador of the mission had ties to the party of President Kabila, who was a candidate, while the applicant wanted a new President. We note that the opposition candidate in that election was Jean-Pierre Bemba.

[13] After the disputed electoral victory won by President Kabila in November 2006, Jean-Pierre Bemba was compelled to resign from the government. On March 22 and 23, 2007, in

Kinshasa, the presidential guard and certain elements in the armed forces confronted the people guarding former Vice-President Jean-Pierre Bemba, then a senator. The confrontations had a number of victims and led to the departure of a number of Bangalese and people from Équateur province from the government, and to the forced exile of Jean-Pierre Bemba. Mr. Bemba is currently facing international criminal prosecution; he is charged with taking part in crimes against humanity because of the abuses committed by his party's armed militia in the DRC.

[14] The applicant submits that in August 2007 an atmosphere of hostility set in against him in the DRC mission to the United Nations. His name was then left off the new Minister's mission list, he was given instructions implying that he should not speak on behalf of the DRC at the United Nations commission where he sat as a delegate, and he was denied access to internal meetings. His membership in the Bangala ethnic group in Équateur province, through his mother, made him suspect in the eyes of supporters of President Kabila, given the connection that ethnic group had with Jean-Pierre Bemba.

[15] In September 2007, the applicant was visited by two DRC intelligence agents who questioned him about Jean-Pierre Bemba's presence in New York. The agents suspected the applicant of having a relationship with Jean-Pierre Bemba. They threatened the applicant, stating: [TRANSLATION] "We will eliminate you, and the people who sent you here are no longer in power" (Applicant's Record, page 58). The applicant was then followed by the DRC intelligence agents.

[16] The applicant's situation at the mission became increasingly intolerable, and on January 4, 2008, it led to a heated discussion between him and the ambassador about the organization of the conference on peace, security and development in Nord-Kivu and Sud-Kivu provinces.

[17] The applicant ultimately decided to resign. He signed a letter of resignation dated January 11, 2008, but did not mail it until January 16, 2008. He then fled with his family by car to Canada. The applicant attributes his resignation to his refusal to serve the corrupt, anti-democratic and violent government of President Kabila. He alleges that his resignation is considered to be an act of treason. In view of the threats made against him and the methods used by the Congolese system, he is convinced that if he returned to the DRC he and his family would be arrested and subjected to inhuman and degrading treatment, tortured and killed.

Decision of the Panel

[18] The claim for refugee protection concerns the applicant, his wife and their eight children. The claims by the wife and children are largely dependent on the applicant's claim.

[19] After three days of hearing and lengthy deliberation, the panel concluded that the applicant's wife and their children (except one of the children, who was born in New York and is an American citizen) are Convention refugees by reason of their membership in the claimant's family. The panel therefore accepted their refugee protection claims.

[20] However, the applicant was excluded from the protection of the Convention, because the panel believed there were serious reasons for considering that he had been complicit by association in crimes against humanity and war crimes, and that he was therefore not entitled to the protection of Canada, under Article 1F(a).

[21] In its lengthy decision, the panel cited no evidence that the applicant had himself participated in crimes against humanity or war crimes, or that he had himself conspired to commit such crimes, or that he had himself ordered that such crimes be committed. The panel's decision essentially turns on the fact that the applicant was a public servant and diplomat in the service of the DRC, and that by virtue of that fact alone he was associated with the crimes against humanity and war crimes committed by the government of the DRC, even if he had committed no crimes of that nature himself. Note that the applicant was never a member of a political party and never did military service, nor was he a member of a police force or an intelligence service.

[22] The panel identified two questions to be decided: (a) whether the government of the DRC committed crimes against humanity; and (b) whether the applicant was complicit in the acts committed by the government of the DRC.

[23] The panel concluded, without hesitation, that the many abuses committed by the government of the DRC, both before and after the 2006 election, fall within the definition of crimes against humanity. The panel relied on the abundant documentary evidence in the record

in drawing that conclusion as regards all successive governments of the DRC in recent years, whether they be the government of Kabila Sr. or his son, or what was called the transitional government that preceded the 2006 election.

[24] The accounts and reports of massacres, murders and other killings, mutilations, rapes, abductions, kidnappings, torture, arbitrary arrests, extrajudicial executions, humiliation, looting, displacement of persons and other human rights violations by the various armed forces in the service of the DRC and by the various rebel forces operating are legion and are consistent for the entire period to which this case relates, and all come from reliable sources. In fact, reading those accounts and reports is a depressing exercise, and one that leaves the reader puzzled as to the true nature of the human spirit, when contemplating so much pointless and savage cruelty.

[25] Although the panel found that the government of the DRC is not an organization pursuing a limited, brutal purpose, it concluded that there was no doubt that the various successive governments committed serious crimes and inhumane acts against the civilian population, and that those acts were systematic and widespread.

[26] The second question, concerning the applicant’s complicity in the acts committed by those various governments, is more complex.

[27] The panel relied on various decisions of this Court and the Federal Court of Appeal in concluding that complicity is established by knowledge of the acts committed and failure to take

measures to prevent them or dissociate from them. The panel noted that knowledge may be inferred from the rank held within the organization.

[28] Applying those principles to the applicant's case, the panel concluded that the applicant's knowledge of wrongdoing by the various successive governments in the DRC was established by his brilliant career, which shows the confidence the government had in him, and by the very senior position he held as a diplomatic representative of the DRC at the United Nations.

[29] Although the applicant tried to minimize his role by portraying himself as a mere accountant and denied knowledge of the atrocities committed, the panel doubted his credibility on those points and was of the opinion that he was simply trying to establish wilful blindness in an attempt to justify his totally implausible ignorance of the systematic human rights violations that ravaged his country. The panel was of the opinion that it was not plausible that the applicant did not know what was happening in the DRC, since he was a representative of his country at the United Nations.

[30] At paragraph 67 of its decision, the panel added that "the principal male claimant's meteoric career and his strategic position at the DRC's Permanent Mission in New York, as well as the fact that his resignation was considered an act of treason, are evidence of a shared vision in accomplishing his government's objectives". The panel also relied on *Omar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 861, [2004] F.C.J. No. 1061 (QL) (*Omar*) in concluding that the ambassador of a country may be considered to be complicit by association in

crimes committed by the government of the country he or she represents, because of his or her close association with the government that appointed him or her to that position of trust.

[31] The panel therefore concluded as follows regarding the applicant's complicity, at paragraph 71 of its decision:

> Therefore, it is reasonable to conclude that the principal male claimant had a "personal and knowing awareness" in the Congolese government's actions, which is the "element required to establish complicity".

[32] On the element of dissociation, the panel concluded that the applicant would not have suffered any reprisals if he had resigned from his position before his personal problems began, at the time of the 2006 election. The panel criticized the applicant for not taking the opportunity offered to him, when he addressed the United Nations Security Council in June 2007, to denounce the abuses in the DRC. The panel noted that it was not until his personal safety was jeopardized that the applicant resigned. The panel therefore drew the following conclusion, at paragraph 75 of its decision:

> Consequently, the panel finds that there are "serious reasons for considering" that the principal male claimant personally and knowingly participated in the DRC government's crimes by making himself complicit by association with these serious crimes against humanity. Although the principal male claimant obviously did not personally commit acts of violence against civilians, assuming important duties and responsibilities allows the Congolese government to perpetuate itself, and he did nothing to dissociate himself from the government.

[33] The panel therefore excluded the applicant under Article 1F(a).

Position of the Applicant

[34] The applicant notes that at paragraph 43 of its decision the panel acknowledged that the government of the DRC is not an organization that has a limited, brutal purpose.

[35] After stating that conclusion, the panel cannot legally find that mere association or membership in the public service of the DRC in itself warrants exclusion under Article 1F(a) for complicity.

[36] Since the government of the DRC does not have a limited, brutal purpose, a systematic connection cannot be made between working in the public service of that government and the abuses committed by certain actors in that government. That is particularly true given that the government was not “banished” by international bodies.

[37] Accordingly, it cannot be inferred from the mere fact of working in the government’s diplomatic corps and assisting an ambassador to the United Nations that the applicant participated, by complicity or association, in the commission of crimes against humanity in the DRC.

[38] The panel therefore erred in law when it concluded that mere personal and knowing awareness of the acts of the government was sufficient to prove complicity in crimes against

peace, war crimes or crimes against humanity. Rather, the panel had to identify the shared common purpose within the government, and *mens rea* on the part of the applicant.

[39] However, the evidence is that the crimes committed were not the result of concerted government action; they were the acts of various autonomous and difficult-to-control elements acting in a confused and chaotic political and military situation, particularly given that the coalition government that came out of the Sun City accords included several divergent and opposing factions. It is absurd to draw the conclusion that there was a “shared common purpose” in a government of that nature.

[40] As well, the applicant publicly denounced the human rights violations committed during the armed conflicts, before both the United Nations Economic and Social Council and the Security Council. The panel did not take into account those speeches or the abundant documentary evidence showing the enormous confusion that prevailed in the DRC and the absence of a shared common purpose on the part of the various state actors in the DRC. That in itself warrants intervention by this Court.

[41] The panel established no nexus between the applicant and specific crimes. The panel did not identify the crimes in which the applicant was allegedly shown to have been complicit. The panel’s approach is contrary to the guidance given by this Court. In short, the applicant submits that he did not personally participate in any crime against humanity, and that it is unreasonable to

ascribe such participation to him on the sole ground that he held a position in his country's public service.

Position of the Respondent

[42] The respondent notes that the fact that the various governments of the DRC committed crimes against humanity is not disputed. This is therefore not an issue in this case. The question that arises in this case is whether the panel erred when it concluded that the applicant was complicit in those crimes.

[43] The case law indicates that persons are complicit in crimes against humanity if they have knowledge of the abuses, if they share a common purpose with the organization that commits the crimes, and if they do nothing to dissociate themselves from them.

[44] The respondent notes that the government of the DRC committed crimes against humanity, that the applicant voluntarily joined the public service of the DRC, that he held a high rank as a diplomat at the United Nations, that he could not have been unaware of the abuses committed by the government in the DRC, that the applicant worked for the DRC for nearly nine years, and that he never tried to leave that government voluntarily or to dissociate himself from it.

[45] Having regard to all those factors, the panel concluded that the applicant was associated with the government of the DRC in a shared common purpose, and that he was therefore complicit by association with that government.

[46] The respondent submits that the applicant's case bears similarity to the decision in *Omar*, above. In that decision, the Refugee Protection Division had concluded that Mr. Omar was complicit in crimes against humanity as a result of his duties at the Ministry of Foreign Affairs of the Republic of Djibouti, and in particular as Ambassador of Djibouti in France.

Legislative Framework

[47] The main statutory provision in issue is Article 1F of the United Nations Convention Relating to the Status of Refugees, which is reproduced in the schedule to the Act:

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;

(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.	*c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[48] That provision should be examined in light of section 96, subsection 97(1), section 98, subsection 112(1) and paragraph 112(3)(*c*) of the Act, reproduced below:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of	**97.** (1) A qualité de personne à

protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards; and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

...	...
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
...	...
(3) Refugee protection may not result from an application for protection if the person	(3) L'asile ne peut être conféré au demandeur dans les cas suivants :
...	...
(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; ...	*c*) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
	...

Relevant Questions

[49] Having regard to the applicable standard of review, discussed below, we need not question the panel’s findings of fact unless they are unreasonable.

[50] For the purposes of judicial review, I take as given the panel's findings that the various successive governments in the DRC were not organizations pursuing a limited, brutal purpose, but that they nonetheless all committed crimes against humanity; that the applicant had personal knowledge of the criminal acts committed by those governments; and that he did little to denounce those governments or dissociate himself from them as long as his personal situation was not jeopardized.

[51] In this case, the question that arises is whether holding a diplomatic post and having personal and knowing awareness of the acts committed by those Congolese governments are in themselves sufficient to establish that there was complicity by association with them and that there was personal and knowing participation in the crimes committed. That was the panel's conclusion, at paragraphs 71 and 75 of its decision.

[52] The panel confirmed that the applicant did not himself participate in crimes against humanity or war crimes, or conspire to commit crimes of that nature or order that they be committed. The panel's entire decision turns on the fact that the applicant served as a public servant and diplomat for the DRC and was therefore associated with the crimes against humanity and war crimes committed by the successive governments of the DRC, even though he committed no crimes of that nature himself, was never a member of a political party, never did military service, and was never a member of a police force or intelligence service.

[53] The fundamental question that therefore arises in this case is the scope of complicity by association in relation to crimes against humanity. That is a question of law. Once the legal framework that applies to complicity by association is established, that framework must be applied to the facts.

Standard of Review

[54] As the Supreme Court of Canada noted in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 54, 57 and 62, the first step in determining the applicable standard of review is to ascertain whether the jurisprudence has already determined in a satisfactory manner what standard is applicable to the issue.

[55] There are a number of decisions of the Federal Court of Appeal and this Court from which that standard can be ascertained. In *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, [2003] F.C.J. No. 108 (QL) (*Harb*), Justice Décary observed, at paragraph 14:

> In so far as these are findings of fact they can only be reviewed if they are erroneous and made in a perverse or capricious manner or without regard for the material before the Refugee Division (this standard of review is laid down in s. 18.1(4)(*d*) of the *Federal Court Act*, and is defined in other jurisdictions by the phrase "patently unreasonable"). These findings, in so far as they apply the law to the facts of the case, can only be reviewed if they are unreasonable. In so far as they interpret the meaning of the exclusion clause, the findings can be reviewed if they are erroneous. ...

[56] As well, in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (*Mugesera*), at paragraph 38, the Supreme Court of Canada unambiguously affirmed that the reviewing court must exhibit great deference to the findings of fact made by the panel.

[57] However, at paragraph 59 of the decision in *Mugesera*, the Supreme Court of Canada added that questions of law will be subject to the correctness standard, and this includes the elements of a crime against humanity. That approach applies not only to the applicable standard of review, but also to the application of the standard of proof. As the Supreme Court of Canada observed at paragraph 116 of *Mugesera*:

> When applying the "reasonable grounds to believe" standard, it is important to distinguish between proof of questions of fact and the determination of questions of law. The "reasonable grounds to believe" standard of proof applies only to questions of fact: *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.), p. 311. This means that in this appeal the standard applies to whether Mr. Mugesera gave the speech, to the message it conveyed in a factual sense and to the context in which it was delivered. On the other hand, whether these facts meet the requirements of a crime against humanity is a question of law. Determinations of questions of law are not subject to the "reasonable grounds to believe" standard, since the legal criteria for a crime against humanity will not be made out where there are merely reasonable grounds to believe that the speech *could* be classified as a crime against humanity. The facts as found on the "reasonable grounds to believe" standard must show that the speech *did* constitute a crime against humanity in law.

[58] Complicity for the purposes of Article 1F(a) is a legal concept that must be established and reviewed by applying the correctness standard. The panel may not misinterpret or modify the

concept of complicity as it is established by law: *Bouasla v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 930, [2008] F.C.J. No. 1160 (QL), at paragraph 132 (*Bouasla*); *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298, [1993] F.C.J. No. 912 (QL) (F.C.A.), at paragraph 27 (*Moreno*); and *Nagamany v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1554, [2005] F.C.J. No. 1930 (QL), at paragraph 20 (*Nagamany*).

[59] Accordingly, the requisite analysis must be carried out with these considerations in relation to the applicable standard of review in mind.

Analysis

Legal Framework

[60] There are two components in the concept of complicity in crimes against humanity in Canadian jurisprudence: complicity in the traditional sense of Canadian criminal law, and complicity by association. Here, only complicity by association is in issue. Is this truly a particular mode of complicity, and what elements must be present to establish complicity by association? These are the questions that must be addressed.

[61] The leading decisions on complicity by association in crimes against humanity are *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, [1992] F.C.J. No. 109 (QL) (F.C.A.) (*Ramirez*); *Moreno*, above; and *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, [1993] F.C.J. No. 1145 (QL) (F.C.A.) (*Sivakumar*).

[62] In *Ramirez*, Justice MacGuigan laid down the basic principle that a person cannot commit this type of crime by complicity "without personal and knowing participation" (at page 317). Justice MacGuigan then distinguished organizations directed to a limited, brutal purpose, where mere membership may suffice to establish personal and knowing participation.

[63] However, in *Ramirez*, Justice MacGuigan did not rule clearly as to the principles of complicity by association that are applicable to participation in an organization that does not meet the definition of limited, brutal purpose. Rather, Justice MacGuigan referred to concepts of complicity that are analogous to the criminal law concepts, which are to be determined based on the unique fact situation, keeping in mind that the criterion referred to above, personal and knowing participation in persecutorial acts (at page 320 of *Ramirez*), must not be exceeded. The concept of complicity by association in an organization that is not directed to a limited, brutal purpose is therefore not directly addressed in *Ramirez*.

[64] In *Moreno*, however, Justice Robertson directly addressed the question, stating at the outset that it is "well settled that mere membership in an organization involved in international offences is not sufficient basis on which to invoke the exclusion clause" (at page 321). Justice Robertson also confirmed the remarks in *Ramirez* to the effect that to find complicity, personal and knowing participation in persecutorial acts must be established, and this implies that *mens rea* is an essential element of a crime committed by complicity (at page 323).

Therefore, acts or omissions amounting to passive acquiescence are not a sufficient basis for invoking the exclusion clause; there must be personal participation in the acts alleged.

[65] In *Sivakumar*, the Federal Court of Appeal had to decide whether responsibility for crimes against humanity allegedly committed by the Liberation Tigers of Tamil Eelam extended by complicity to the applicant in that case, who held a leadership position in that organization but had not personally participated in the crimes. In deciding that the applicant was complicit in the crimes, Justice Linden addressed certain criteria in order to establish complicity by association in crimes against humanity (at pages 439 to 442):

> Another type of complicity, particularly relevant to this case is complicity through association. In other words, individuals may be rendered responsible for the acts of others because of their close association with the principal actors. This is not a case merely of being "known by the company one keeps." Nor is it a case of mere membership in an organization making one responsible for all the international crimes that organization commits (see *Ramirez*, at page 317). Neither of these by themselves is normally enough, unless the particular goal of the organization is the commission of international crimes. It should be noted, however, as MacGuigan J.A. observed: "someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts" (*Ramirez*, *supra*, at page 317).
>
> In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity.

> In *Crimes Against Humanity in International Criminal Law* (1992), M. Cherif Bassiouni states, at page 345:
>
> > Thus, the closer a person is involved in the decision-making process and the less he does to oppose or prevent the decision, or fails to dissociate himself from it, the more likely that person's criminal responsibility will be at stake.
>
> ...
>
> It should be noted that, in refugee law, if state authorities tolerate acts of persecution by the local population, those acts may be treated as acts of the state (see, for example, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, at page 17). Similarly, if the criminal acts of part of a paramilitary or revolutionary non-state organization are knowingly tolerated by the leaders, those leaders may be equally responsible for those acts. Complicity by reason of one's position of leadership within an organization responsible for international crimes is analogous to the theory of vicarious liability in torts, but the analogy is not altogether apt, since it is clear that, in the context of international crimes, the accused person must have knowledge of the acts constituting the international crimes.
>
> To sum up, association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a "limited, brutal purpose", is not enough (*Ramirez*, supra, at page 317). Moreover, the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes.

[66] In *Bazargan v. Canada (Minister of Citizenship and Immigration)*, No. A-400-95, September 18, 1996, 205 N.R. 282, [1996] F.C.J. No. 1209 (QL) (F.C.A.), Justice Décary stated that it is contributing to the activities of the group, rather than membership in the group, that establishes complicity by association:

> In our view, it goes without saying that "personal and knowing participation" can be direct or indirect and does not require formal membership in the organization that is ultimately engaged in the condemned activities. 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 from outside the organization. At p. 318, MacGuigan J.A. said that "[a]t bottom, complicity rests ... on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.

[67] In *Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 66, [2000] F.C.J. No. 10 (QL) (F.C.A.), Justice Létourneau clarified that evidence of complicity by association in crimes against humanity does not require evidence that an applicant is linked to specific crimes as the actual perpetrator (at paragraph 31). That clarification was also confirmed by Justice Décary in *Harb*, above, at paragraph 11:

> ... It is not the nature of the crimes with which the appellant was charged that led to his exclusion, but that of the crimes alleged against the organizations with which he was supposed to be associated. Once those organizations have committed crimes against humanity and the appellant meets the requirements for membership in the group, knowledge, participation or complicity imposed by precedent ..., the exclusion applies even if the specific acts committed by the appellant himself are not crimes against humanity as such. In short, if the organization persecutes the civilian population the fact that the appellant himself persecuted only the military population does not mean that he will escape the exclusion, if he is an accomplice by association as well.

[68] These principles have been applied on many occasions by this Court, in particular in the decisions in *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79,

[1993] F.C.J. No. 1292 (QL) (F.C.T.D.), and *Collins v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 732, [2005] F.C.J. No. 921 (QL).

[69] The question that therefore arises in this case is whether the fact that the applicant held a senior position in a government that commits crimes against humanity, together with the fact that the applicant had knowledge of those crimes and failed to denounce them, is sufficient to establish complicity by association where there is no evidence of direct or indirect participation by the refugee claimant in those crimes, or incitement or active support of the crimes, or of participation in enforcement agencies such as the police, army or intelligence services.

[70] In light of the decisions cited above and the additional reasons set out below, I am of the opinion that the exclusion clause in Article 1F(a) does not apply in those circumstances: there must be a personal nexus between the refugee claimant and the crimes alleged, and no such nexus was established in respect of the applicant.

[71] That was in fact the conclusion reached by Justice Gibson in *Aden v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 625, [1993] F.C.J. No. 1187 (QL) (F.C.T.D.) (*Aden*). In that case, the applicant had joined the Somali army and pursued a career in that army consisting entirely of administration. He rose to a high rank in the officer corps and was appointed as Director of Finance and senior financial consultant to the Minister of Defence. After war broke out between Somalia and Ethiopia in 1988, he became the spokesperson for the army and Ministry of Defence in relations with military attachés and diplomatic personnel in

Somalia. He was aware of atrocities and human rights violations being perpetrated by the army, but he continued to echo the government's line, which was to deny the abuses, knowing that this meant he was lying to the international community.

[72] In allowing the application for judicial review of the panel's decision excluding the applicant on the ground of complicity by association in crimes against humanity, Justice Gibson confirmed the importance of establishing personal involvement in the crimes alleged before concluding that the exclusion applies. He stated (*Aden*, at pages 633 and 634, paragraphs 18 to 20; emphasis added):

> I have quoted from the decision of the CRDD at some length because, with great respect, I have concluded that in deciding on the basis of the foregoing facts and analysis that the applicant falls within the four corners of the exclusion from the definition "Convention refugee" in that there are serious reasons for considering that he committed or knowingly participated in crimes against humanity or acts contrary to the purposes and principles of the United Nations, the CRDD erred in the application of the conclusion set out in *Ramirez* and in so doing erred in law.
>
> The question to be drawn from *Ramirez* is whether, on the facts of this case, there was personal and knowing participation in persecutorial acts by the applicant. In both his role as Director of Finance and senior financial consultant to the Minister of Finance and as Director of Foreign Relations and the Office of Military Cooperation, he was at all relevant times remote from the scene of persecutorial acts and, by his own testimony which was found by the CRDD to be credible, from the councils of war where decisions resulting in the persecutorial acts were taken. It would appear to be true that, without risk to himself or his family, he could have resigned his commission, left the military and government or fled the country other than for purposes of study. He could have spoken out publicly but the latter course might have involved significant personal risk. Mr. Justice MacGuigan counsels in *Ramirez* [at page 320] that "Usually, law does not function at the level of heroism."

> I have concluded that the applicant's actions as disclosed by a full reading of the transcript of his testimony before the CRDD, do not disclose, on his part, personal and knowing participation in the persecutorial acts of the Barre regime within Somalia. Thus, he is not a person with respect to whom there are serious reasons for concluding that he has committed a crime against humanity or has been guilty of acts contrary to the purposes and principles of the United Nations. Further, I conclude that it follows that it was unnecessary for the applicant to have resigned his commission, left the military and government, fled the country or spoken out publicly to insulate himself from complicity.

[73] This was also the conclusion reached by Justice Blanchard in *Sungu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1207, [2003] 3 F.C. 192, [2002] F.C.J. No. 1639 (QL) (*Sungu*). The applicants were citizens of the DRC who alleged that they had been persecuted under the regime of Kabila Sr., but who were denied refugee status by the panel on the ground that they were complicit in crimes against humanity, in view of their very close ties to the Mobutu regime which had been defeated. The issue was therefore complicity by association. Justice Blanchard laid down the analytical framework as follows, at paragraphs 34 to 39:

> In the case at bar, the Refugee Division determined that the male applicant could not be accorded refugee status pursuant to paragraph 1F(a) of the Convention. In its opinion, he had been an accomplice in crimes against humanity. It relied in particular on the conclusion that the applicant was sufficiently close to Mobutu, the former president, to make him an accomplice of Mobutu's regime.
>
> Before analyzing this aspect of the decision, it is important to make two observations. First, it is not disputed that the Mobutu regime practised torture and was responsible for “international crimes”. These acts of torture are covered by the definition of crimes against humanity as an “inhumane act or omission that is committed against any civilian population or any identifiable group” within the meaning of subsections 6(3) to 6(5) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

> ((Paragraph 35(1)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the Act).) I am satisfied, therefore, that the Refugee Division could reasonably reach this conclusion on the basis of the documentary evidence that was before it.
>
> Secondly, the organization in this case, the Mobutu regime, has not been characterized as an "organization pursuing a limited, brutal purpose". So it is inappropriate to apply the presumption that would exclude the applicant solely by virtue of his membership in such an organization. In the instant case, the characterization of the association was not made by the Refugee Division and in my opinion is not essential in the circumstances.
>
> In order to reach its conclusion of complicity through association, then, the Refugee Division had to be satisfied by the evidence that "the individual's participation must be personal and knowing". Complicity in an offence rests on a shared common purpose. (*Penate, supra*, at page 84.)
>
> In its reasons, the Refugee Division determined that [translation] "The claimant had personal and knowing awareness of these acts (international crimes); by his position, he could not have been ignorant or unconscious of the actions committed by the regime to which he belonged."
>
> The record clearly establishes that the male applicant was aware of the international crimes and atrocities of the Mobutu regime. ...

[74] Notwithstanding the evidence of knowledge of the crimes and proximity to the Mobutu regime, Justice Blanchard allowed the application for judicial review in *Sungu* for the following reasons (at paragraphs 51 and 52):

> From my reading of these reasons, it is my opinion that the applicant was excluded from the protection of the Convention because he was a so-called "close relation of Mobutu" and therefore guilty by association. Even if the record demonstrated (which it does not) that the applicant was "close" to Mobutu, this is definitely not a reason that might in itself justify the applicant's exclusion from the protection of the Convention (*Cardenas v. Canada (Minister of Employment and Immigration)* (1994), 74 F.T.R. 214 (F.C.T.D.)).

> It follows from this conclusion of the Refugee Division that it applied an inappropriate principle in order to determine his complicity, that is, of being "a man sufficiently close to Mobutu to make him an accomplice". In formulating its conclusion in this way, the Refugee Division committed a reviewable error.

[75] This was also the approach taken by Justice Lemieux in *Bouasla*, above. Mr. Bouasla was a member of the Direction générale de la Sûreté nationale of Algeria, and then became a re-education officer in the Algerian penitentiary system. The panel excluded him from protection in view of the numerous abuses committed by the Algerian government through its security forces, which corresponded to the definition of crimes against humanity. Mr. Bouasla himself had not participated as either the perpetrator or a direct accomplice in the commission of any crime. Participation through association was therefore ascribed to Mr. Bouasla by the panel because he was a member of the Algerian government's law enforcement agencies, he had knowledge of the abuses and he had not dissociated himself from them.

[76] Justice Lemieux allowed the application for judicial review in *Bouasla* on the ground that there had to be personal and knowing participation in order to conclude that there was participation through association in crimes against humanity. He concluded as follows, at paragraphs 138 to 140 of that decision (emphasis added):

> After reading the evidence presented during the hearings and applying that evidence to the principles established in the case law relating to complicity, I find that this application for judicial review must be allowed, first because the panel failed to apply the essential test for assessing Mr. Bouasla's complicity, namely personal and knowing participation in the crimes committed by the army, the national police and the penitentiary administration in

> Algeria, and second because the panel did not have regard to all the evidence before it when it applied the case law.
>
> The case law requires evidence of personal and knowing participation by Mr. Bouasla in the alleged crimes, essentially torture.
>
> As Justice Décary stated in *Bazargan*, to find complicity, the panel had to have evidence showing that the applicant was guilty of "knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization". The evidence had to show that Mr. Bouasla had "become involved in an operation" that was not his but that he knew would "probably lead to the commission of an international offence".

[77] That approach, which ascribes complicity by association where there is personal participation by the refugee claimant in the crimes alleged, is the one also advocated by the United Nations High Commissioner for Refugees in the *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (HCR/GIP/03/05, 4 September 2003), at paragraphs 51 to 58. Note, *inter alia*, the following comments by the High Commissioner:

> 51. In general, individual responsibility, and therefore the basis for exclusion, arises where the individual committed, or made a substantial contribution to, the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. Thus, the degree of involvement of the person concerned must be carefully analysed in each case. The fact that acts of an abhorrent and outrageous nature have taken place should not be allowed to cloud the issue. ...
>
> ...
>
> 53. "Aiding or abetting" requires the individual to have rendered a substantial contribution to the commission of a crime in the knowledge that this will assist or facilitate the commission of the offence. The contribution may be in the form of practical assistance,

> encouragement or moral support and must have a substantial (but not necessarily causal) effect on the perpetration of the crime. Aiding or abetting may consist of an act or omission and may take place before, during or after the commission of the crime, although the requirement of a substantial contribution must always be borne in mind, especially when failure to act is in question. ...
>
> 57. Given the principles set out above, the automatic exclusion of persons purely on the basis of their senior position in a government is not justified. "Guilt by association" judges a person on the basis of their title rather than their actual responsibilities or actions. Instead, an individual determination of responsibility is required for each official in order to ascertain whether the applicant knew of the acts committed or planned, tried to stop or oppose the acts, and/or deliberately removed him- or herself from the process. Moreover, consideration must be given as to whether the individual had a moral choice. Persons who are found to have performed, engaged in, participated in orchestrating, planning and/or implementing, or to have condoned or acquiesced in the carrying out of criminal acts by subordinates, should be excluded from refugee status.

[78] It is also the approach favoured by the United Kingdom Supreme Court in the very recent decision in *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department*, [2010] UKSC 15. Although that decision of the highest court in the United Kingdom is not binding on this Court, the reasoning laid out in it is persuasive. As well, given that Article 1F(a) is part of an international instrument, it is desirable to keep abreast of international developments and recent decisions of other foreign higher courts regarding this provision: *Nagamany*, above, at paragraph 64.

[79] The respondent in that case sought refugee status in the United Kingdom. He was a citizen of Sri Lanka. He was a member of the Liberation Tigers of Tamil Eelam (LTTE) for about 15 years. He joined the LTTE in 1992 at the age of 10. The following year, he joined the

LTTE's Intelligence Division. He held various posts over the years: he was team leader of a nine-man combat unit, and then the leader of a 45-man platoon; he led a mobile unit responsible for transporting military equipment and persons through jungles; he was second in command of the combat unit of the LTTE's Intelligence Division. Ultimately, in October 2006, he was sent to Colombo in plain clothes, but in December he learned that his presence had been reported and he left Sri Lanka.

[80] The respondent arrived in the United Kingdom in February 2007 and applied for asylum. His asylum application and his application for humanitarian protection were refused in September 2007 solely on the ground that he was excluded under Article 1F(a). The Secretary of State's decision was based on the fact that the respondent had voluntarily joined the LTTE, the length of his involvement, and the fact that he had gained promotions and had held a command position. The Secretary of State decided that voluntary membership in an extremist group created a presumption of personal and knowing participation, or acquiescence, amounting to complicity in the crimes committed. The respondent then sought judicial review of the decision and the Court of Appeal Civil Division quashed the decision of the Secretary of State, who then appealed to the Supreme Court of the United Kingdom. The appeal by the Secretary of State was dismissed by the Supreme Court of the United Kingdom.

[81] Lord Brown stated that there should no longer be a presumption of complicity by association if a group's primary purpose is terrorist activities. He further stated that there can be no responsibility without *mens rea*. Basing what he said on article 30 of the *Rome Statute*, he

held that if a person is aware that a circumstance exists or a consequence will occur in the ordinary course of events because of his or her actions, he or she will be considered to have acted with the requisite knowledge and intent. He therefore concluded that exclusion under Article 1F(a) will be justified only where there are serious reasons for considering that the applicant voluntarily contributed in a significant way to the group's ability to pursue its criminal activities, aware that his or her assistance would further that criminal purpose.

[82] Lord Kerr added the following, at paragraph 56 of the decision (emphasis added):

> The nature of the participation required has been described in various ways in the cases that Lord Brown has considered in his judgment. In an "Amicus Curiae Brief of Professor Antonio Cassese and members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine" (for Case File No 001/18-07-2007-ECCC-OCIJ) (2009) 20 CLF 289 it was suggested that the participation should be such as "allowed the institution to function" or that it allowed "the crimes to be perpetrated" or that it was "an indispensable cog". In *Prosecutor v Krajišnik* 17 March 2009 it was stated that "what matters in terms of law is that the accused lends a significant contribution to the crimes involved in the [joint common enterprise]" – (para 696). <u>Common to all these expositions is that there should be a participation that went beyond mere passivity or continued involvement in the organisation after acquiring knowledge of the war crimes or crimes against humanity.</u>

[83] That is also the approach taken in the *Rome Statute*, A/CONF. 183/9, 17 July 1998 (as amended), which establishes the International Criminal Court. The *Rome Statute* came into force on July 1, 2002. The provisions of the *Rome Statute* are important and carry some weight in the analysis required under Article 1F(a), particularly because the relevant provisions of the *Rome Statute* have been incorporated almost in their entirety in the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, and implemented in Canadian domestic law by that Act. As

Justice Décary stated in *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 F.C. 761, [2003] F.C.J. No. 565 (QL) at para. 151: "Article 1F(a) must now be interpreted in light of [the *Rome Statute*], *inter alia* … ."

[84] The *Rome Statute* provides for individual criminal responsibility, the responsibility of commanders and other superiors, and the mental elements of crimes against humanity. The relevant provisions of the *Rome Statute* on these points also set out much more clearly and in more detail the principles adopted earlier in article 7 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* (United Nations, Resolution 827 adopted 25 May 1993, as amended) and article 6 of the *Statute of the International Criminal Tribunal for Rwanda* (Security Council, Resolution 955, 1994).

[85] The relevant provisions of the *Rome Statute* are article 25, concerning individual criminal responsibility; article 28, concerning the responsibility of commanders and other superiors; and article 30, concerning the mental element. Those provisions are reproduced below:

> **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;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(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.

...

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> ...
>
> **Article 30**
> **Mental element**
>
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> > (a) In relation to conduct, that person means to engage in the conduct;
> >
> > (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

[86] Reading these provisions of the *Rome Statute*, we see that criminal responsibility for crimes against humanity requires personal participation in the crime alleged or personal control over the events leading to the crime alleged. That requirement must also be used to clarify the concept of participation through association.

[87] Accordingly, even in the case of commanders, they are not criminally responsible for crimes committed by their subordinates unless the subordinates were under their effective

authority and control and the commanders failed to exercise control properly over them. The same is true for other superiors.

[88] I also note that even in the case of vicarious liability, where the elements required are less stringent than in the case of criminal responsibility, the legal basis for that liability lies in the power to supervise and control other persons. As J.-L. Beaudoin observes in *La responsabilité civile*, 7th edition, 2007, Les Éditions Yvon Blais, at paragraph 1-670: [TRANSLATION] "[i]n each of the cases provided for by law [in cases of vicarious liability], the 'guarantor' has what amounts to a right of control over the person who commits the wrong, which is either over the activities of the other person (worker, agent) or over the person (child, insane person). That right of control includes a power of supervision or oversight, and thus a responsibility for harm caused to the third party where it is not exercised properly." This is the same basis as that from which vicarious liability in tort arises in common law: "The doctrine [vicarious liability] applies in circumstances where it would be fair to require the employer to stand behind the employee because, in most cases, that employer controlled the employee and benefited from that employee's conduct" (A. Linden and B. Feldthusen, *Canadian Tort Law*, 8th edition, 2006, LexisNexis, at page 553). It would be unusual to conclude that complicity by association for crimes against humanity imposes personal criminal responsibility in circumstances that are considerably less stringent than those required in relation to vicarious liability.

[89] Accordingly, the concepts of individual criminal responsibility and effective control over other persons and the mental element described in the *Rome Statute* may and must be used to

elucidate what the Canadian case law refers to as complicity by association for the purposes of Article 1F(a). This is required both by Article 1F(a), which expressly refers to “international instruments drawn up to make provision in respect of such crimes”, and by the principles advanced by the Supreme Court of Canada in similar cases: *Mugesera*, above, at paragraph 82.

[90] In light of this review of the Canadian and foreign cases and the provisions of the leading contemporary international instruments relating to crimes against humanity, complicity by association must be understood as being a presumption that is based on a set of facts from which it can be concluded that there are serious reasons for considering that the refugee claimant personally participated in the crimes alleged, personally conspired to commit them, or personally facilitated the commission of those crimes.

[91] Accordingly, the duties performed by a leader of an organization that is itself responsible for crimes against humanity may be such that there are serious reasons for considering that the leader in fact participated personally in the crimes alleged, by conspiring to commit them, by aiding in the commission of the crimes, or by facilitating them. However, that belief must itself be based on facts that support a finding of personal and knowing participation by the leader in question in the crimes alleged, or effective control by the leader over the people who committed the crimes. Accordingly, complicity by association is not an autonomous legal concept; rather, it is a presumption of direct complicity based on the hypothesis that a person who leads an organization that commits crimes against humanity probably participated in them personally.

[92] Merely working in the public service of a state whose government commits crimes against humanity is therefore not sufficient, nor is mere knowledge of those crimes. There must be a personal nexus between the refugee claimant and the crimes alleged. That personal nexus may be presumed where the refugee claimant holds such a position in the hierarchy of the organization that there are serious reasons for considering that he or she participated personally in the crimes alleged. However, in order for that presumption to be applied, a set of facts based on which it may be seriously considered that there was personal participation in the crimes must be established.

[93] For example, the head of a concentration camp where crimes against humanity were committed by subordinates will be presumed to have participated in those crimes where the facts in issue provide serious reasons for considering that the person effectively controlled the subordinates and could have intervened to prevent the commission of the crimes, even if there is no evidence of direct participation in the crimes.

[94] Conversely, the presumption of complicity by association cannot be applied against the head of a central bank of a country whose army has committed crimes against humanity notwithstanding the person’s senior position and knowledge of the abuses, unless there are serious reasons for considering that the person participated personally in the crimes alleged or exercised effective control over the people who participated in them. The presumption may not be applied merely because the office holder held high office in a part of the public service that

had no connection, or little connection, with the people who actually organized or committed the crimes.

[95] Obviously, everything must be assessed with regard to the facts of each case, and I would not wish to suggest that the presumption of complicity by association may in no case be applied against the head of a central bank if there are serous reasons for considering that the person participated in a crime against humanity.

[96] I also note that the approach advocated above is reflected as well in the provisions of the Act and Regulations.

[97] Paragraph 35(1)(*a*) of the Act provides that a person is inadmissible on grounds of violating human or international rights for committing an offence outside Canada referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*. The decisions of the Immigration and Refugee Board based on determinations that the person concerned has committed a war crime or a crime against humanity and is described in Article 1F(a) are conclusive findings of fact for the purpose of inadmissibility under paragraph 35(1)(*a*) of the Act, by operation of paragraph 15(*b*) of the Regulations. Such an individual is therefore excluded from the status of Convention refugee and is inadmissible to Canada. The individual may nonetheless, as an exception, obtain a stay of the removal order under paragraph 113(*d*) and subsection 114(1) of the Act if he or she meets the criteria in section 97 of the Act, but only if his or her application should not be refused because of

the nature and severity of acts committed by the applicant or the danger the applicant constitutes to the security of Canada.

[98] However, paragraph 35(1)(*b*) of the Act provides for separate inadmissibility for an individual who, being a senior officer in the service of a government that, in the opinion of the Minister, engages or has engaged in systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*. Under section 16 of the Regulations, individuals described in that provision are those who are or were able to exert significant influence on the exercise of government power or are or were able to benefit from their position, and include senior members of the public service, ambassadors and senior diplomatic officials, among others. An individual described in that provision is also inadmissible, but the inadmissibility may be lifted under subsection 35(2) of the Act if the individual satisfies the Minister that his or her presence in Canada would not be detrimental to the national interest.

[99] The Act therefore provides for different treatment for individuals described in Article 1F(a) and individuals who, although they have not necessarily committed a crime against humanity, have nonetheless participated in the exercise of government power or benefited from a government that violates human rights, or has committed genocide, a crime against humanity or a war crime.

[100] Accordingly, the legal mechanisms that are applicable and the legislative and regulatory procedures in issue are not the same for an individual described in Article 1F(a) who there are

serious reasons for considering has committed a crime against humanity, and an individual described in paragraph 35(1)(*b*) of the Act who has not necessarily committed a crime of that nature, but who may have influenced or benefited from a government that did.

Application of the Legal Framework to the Facts

[101] I note first that it is important to consider the applicable standard of proof under Article 1F(a) in establishing the facts. That standard is "serious reasons for considering", as reproduced in the text of Article 1F(a) itself and defined in *Ramirez*, above, at pages 311 to 314, as being considerably lower than the criminal law standard ("beyond a reasonable doubt") or the civil law standard ("balance of probabilities" or "preponderance of the evidence"). See also, on these points, *Moreno*, above.

[102] Should this lower standard of proof extend to the factual elements that must first be established in order for the presumption of complicity by association to be applied? In light of *Ramirez* and *Moreno*, I do not see why that standard of proof could not be applied to decide those facts, but it is still essential that the facts in issue be such that they provide sufficient evidence for there to be serious reasons for considering that the claimant participated personally in the crimes alleged.

[103] The crimes against humanity committed by the DRC security forces are truly heinous and scandalous. The applicant's assertions that he had no knowledge of those crimes are not credible

in view of the duties of his positions, and this makes the applicant an unsympathetic individual to the panel and this Court. However, the facts alone cannot lead to a conclusion of complicity in the crimes committed.

[104] In this case, the panel could not have ascribed personal responsibility to the applicant for the crimes alleged based on the facts found by the panel. There is no evidence that tends to show direct or indirect personal participation by the applicant in the crimes alleged, and there is no evidence of incitement or active support by the applicant for those crimes.

[105] The exclusion determination is instead based on the applicant's participation in his country's diplomatic corps. However, there is no evidence that the position the applicant held, second counsellor in a diplomatic mission, enabled the applicant to participate personally in the crimes against humanity committed by the security forces in the DRC or to facilitate those crimes personally. On this point, note that the panel itself found that "86 percent of human rights violations in the DRC are committed by the army and the police" (at paragraph 61 of the decision).

[106] The evidence accepted by the panel does not establish a nexus between the position held by the applicant and the army or police of the DRC. There is no evidence based on which it could be considered that the applicant exercised any control over the DRC security forces or over any component of those forces, or over any of their members.

[107] Applying the presumption of complicity by association in this kind of fact situation appears to me to be unreasonable, even having regard to the lower standard of proof that applies in this case, “serious reasons for considering”.

[108] In view of the foregoing, the application for judicial review will be allowed.

Inclusion

[109] Last, I note that in this case it would be desirable for the panel to make a determination as to inclusion of the applicant, since that issue had to be determined in any event for his wife and their children. The absence of a conclusion regarding inclusion of the applicant, however, is not a reviewable error, in view of the decision of the Federal Court of Appeal in *Gonzales v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646 (F.C.A.), at pages 655 to 657 (*Gonzales*).

[110] However, I note that in both *Moreno*, above, at pages 326 and 327 (paragraphs 58 to 61), and *Gonzales*, above, at page 657, the Federal Court of Appeal recommended that the panel rule on inclusion and all other elements of a claim. It would be desirable for those recommendations to be followed.

Question for Certification

[111] I will give each of the parties an opportunity, if either of them sees fit, to propose a question or questions within seven days of the date of this judgment for the purpose of

paragraph 74(*d*) of the Act, with the other party's reply to be served and filed within five days after any such proposal.

JUDGMENT

THE COURT ORDERS AND ADJUDGES:

1. The application for judicial review is allowed;

2. The decision of the panel is set aside as it relates to its conclusion that the applicant is excluded by operation of Article 1F(a);

3. The matter is referred back to the Immigration and Refugee Board to be heard by a different panel of the Refugee Protection Division, which will determine it *de novo* in accordance with the provisions of this judgment.

"Robert M. Mainville"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5174-09
STYLE OF CAUSE:	**RACHIDI EKANZA EZOKOLA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 5, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Mainville J.
DATED:	June 17, 2010

APPEARANCES:

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