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The influence of international criminal law on refugee law

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This article will discuss the relationship between International Criminal Law (ICL) and refugee law. The emphasis will be on the interplay between concepts developed in ICL with respect to war crimes and crimes against humanity, as well as the notion of extended liability on one hand and the exclusion provision in the 1951 Refugee Convention (Refugee Convention) on the other.

KEYWORDS

international criminal law, refugee law, exclusion clause, complicity, common law, civil law

1. Introduction

This article will discuss the relationship between International Criminal Law (ICL) and refugee law. The emphasis will be on the interplay between concepts developed in ICL with respect to war crimes and crimes against humanity, as well as the notion of extended liability on one hand and the exclusion provision in the 1951 *Refugee Convention* (*Refugee Convention*) on the other. While a person seeking asylum is entitled to protection under the convention if he or she has "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,"[1] article 1F of the *Refugee Convention* sets an exception to this rule by excluding a person if:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

2. International crimes and refugee law

The interpretation of the parameters of international crimes by national courts and tribunals in giving meaning to exclusion 1F(a) has been influenced a great deal by ICL, both by the statutes of the relevant international institutions as well as their jurisprudence (Currie and Rikhof, 2020, 108–109). The analysis will show that the interaction between exclusion law and ICL has followed a different course in the area of crimes compared to that of extended liability and that this unlikely to change in the future.

2.1. War crimes

While national courts in refugee determination decisions initially relied on decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International

1 Article 1A(2).

Criminal Tribunal for Rwanda (ICTR) to determine the parameters of both the overarching element of war crimes, namely the existence of an armed conflict, either international or non-international, as well as the underlying crimes, more recently, the more prevalent source of international criminal law has been the *Rome Statute* and its jurisprudence.[2]

The discussion with respect to war crimes has taken place primarily in the context of non-international conflicts where ICTY jurisprudence was used to decide that war crimes could not be committed in such conflicts before 1990 (Canada[3] and New Zealand[4]) although in Belgium[5] and the Netherlands,[6] based primarily on international humanitarian (IHL) instruments, it was found to apply to situations in the late eighties. Although the *Tadić* decision by the ICTY Appeals Chamber[7] was factually related to an armed conflict situation in 1991, its more general reasoning and its reliance on customary international law, where some reference was made to national criminal decisions with findings of war crimes in non-international armed conflicts before that time, makes it difficult to point to a precise date for the expansion for individual criminal liability from international armed conflicts to its non-international counterparts. As such, the Belgian and Dutch decisions cannot be said in error when putting them in the ICL context.

There have been two decisions by a Dutch court, which examined the issue of war crimes in an international armed conflict. The first situation dealt with an oil tanker sailing in 1986 under the Liberian flag for and from Iran during the Iran-Iraq, which war was attacked by a rocket launched from a helicopter on which the person concerned had been a navigation officer. The District Court was of the view that such an attack did not amount to a violation of IHL pursuant to articles 67 and 85 of *Protocol I* nor a war crime pursuant to article 147 of the Fourth *Geneva Convention* or article 8 of the *Rome Statute* as the ship was not a civilian object. This was based on the consideration of the court that, while the crew of the ship was civilian, which was attacked without specific warning (which could lead in general to a possible conclusion of war crimes) in this specific situation the ship was in the exclusive service as part of an oil-export system for the Iranian government, one of the parties to an international armed conflict. As well, Iraq had announced an exclusion zone in the waters where the ship was traveling amounting to a more general warning to the crew of the ship, which had been subject to attacks on the same ship before, resulting in the conclusion that it had some warning of Iraq's intention.[8] It would appear that this appreciation of what constitutes a non-civilian object might have been construed too narrowly as IHL[9] as well as the ICTY jurisprudence require in that context that military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[10]

Secondly, the armed conflict between Israel and Hezbollah on the territory of Lebanon during the time period of July and August 2006 was considered by twice by a Dutch district court to be an international armed conflict although it relied on a conclusion in a 2006 report of the United Nations Human Rights Council for this determination rather than doing its own analysis.[11]

With respect to non-international armed conflicts, it is necessary according to the Dutch courts, that, in order to establish that such conflict exists, the factors set out in article 1 of *Protocol II* regarding the organization of the parties to the conflict and the ability to control territory have to be present. As well, it is possible, pursuant to Common Article 3 of the *Geneva Conventions* in conjunction with article 4 of *Geneva Convention IV*, which deals with the protection of civilians during occupation, that an occupation can occur in a non-international armed conflict setting. However, in the case before it, the Council of State held that the requirements for occupation were not fulfilled in the situation of armed clashes between the PKK and the Turkish government in

2 See for instance, in Australia, the cases of SHCB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 229; SZCWP v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 9; SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 42; SZITR v Minister for Immigration and Multicultural Affairs [2006] FCA 1759 and more recently, GZCK and Minister for Home Affairs (Migration) [2019] AATA 656, which also referred to *ICC Elements of Crime* document; Canada, Harb v. Canada (Minister of Citizenship and Immigration) 2003 FCA 39; France, CNDA, 5 July 2019, 17040984, M.A.; Germany, Bundesverwaltungsgericht (Federal Administrative Court, Germany), 10 C 24.08, 24 November 2009; the Netherlands, AbRS 18 April 2005, nr. 200408765/1 and Rb, The Hague, 10/42733, 26 January 2012; New Zealand, The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107; the *UK*, Gurung and the Secretary of State for the Home Department, [2002] UKIAT 04870.

3 By the Federal Court in the cases of Bermudez v. Canada (Minister of Citizenship and Immigration) 2005 FC 286 for the situation in Honduras in 1989 and Ventocilla v. Canada (Citizenship and Immigration) 2007 FC 575 for a situation in Peru between 1985 and 1992 while in passing in Howbott v. Canada (Citizenship and Immigration) 2007 FC 911 for Liberia between 1995 and 2003 and Bonilla v. Canada (Citizenship and Immigration) 2009 FC 881 for Colombia between 1984 and 1993.

4 X v. Refugee Status Appeals Authority, [2009] NZCA 488 at paragraphs 210-223 and 228-234.

5 CPRR No. 99-1280/W7769, 6 August 2002, at paragraph 4.2.3 for Somalia between 1969 and 1991.

6 AbRS 9 July 2004, nr. 200401181/1; AbRS 7 October 2010, nr. 201006259/1/V1; AbRS, 14 December 2010, nr. 200909884/1/V3 for Iraq between 1986 and 1989; Dutch courts, including the Supreme Court of the Netherlands are of the view that under Dutch law crimes committed during non-international armed conflicts between 1979 and 1989 are punishable as war crimes in a criminal context as well, see the decision of the Supreme Court of the Netherlands of July 8, 2008, case number LJN BC7418.

7 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, paras 128-134.

8 Rb, Den Bosch, Awb 10/32882, 14 November 2011.

9 *Geneva Convention IV*, article 52(2), as well as the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, article 67.

10 Judgment, *Blaškić* (IT-95-14), Trial Chamber, 3 March 2000, para 180; Judgment, *Strugar* (IT- IT-01-42T), Trial Chamber, 31 January 2005, para 282.

11 Rb, The Hague, Awb 16/12591, 18 August 2016 and Rb, The Hague, NL18.10336, 7 November 2018.

South-East Turkey between 1995 and 1998 but they should still be characterized as acts of war.[12]

Following this reasoning the Anfal campaign by the Iraqi government of Saddam Hussein against the Kurdish population in northern Iraq between 1986 and 1989 was also considered to be an internal armed conflict during which war crimes were committed.[13] Similarly, the conflict between Maoists groups and the government in Nepal in 1998 was considered to be such a conflict, in which the maltreatment of a village head by members of the Maoist groups was a war crime because he was a civilian. The fact that, according to the claimant, this village head was a representative of the exploitative government against which armed attacks were directed was not relevant to the status as non-combatant of the victim nor was the argument that village heads were not unarmed as they could invoke the assistance of the Nepalese army.[14]

In the UK, the notion of internal armed conflict was discussed in three cases in 2008 and 2009,[15] namely HH and others (Mogadishu: armed conflict: risk) Somalia v Secretary of State for the Home Department[16]; KH (Article 15(c) Qualification Directive) Iraq v Secretary of State for the Home Department[17] and AM and AM (Armed Conflict: Risk Categories) Somalia v Secretary of State for the Home Department.[18] The first decision sets out in great detail the history of the provisions in international law dealing with both international and internal armed conflicts, while it also canvasses academic literature and the jurisprudence of the International Court of Justice and the ICTY, especially the *Tadić* case from the latter institution.[19] Applying the jurisprudence of the ICTY it distills two main propositions with respect to the notion of internal armed conflict, namely it must amount to protracted armed violence between two parties, governmental or non-governmental and that the conflict is limited both in duration and location to only when and where two parties are engaged in such violence. Based on these two premises it came to the conclusion that there was such a conflict in Somalia in the early nineties but only around Mogadishu.[20]

The second case builds on the two general premises of the first one and after an in-depth examination of the ICTY caselaw and some jurisprudence of the SLSC and the ICC,[21] comes to the conclusion that the essential elements for a determination of an internal armed conflict are twofold, namely some degree in the organization of the parties to the conflict and an intensity of the conflict which goes beyond situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. The second element of intensity can be further analyzed under four sub-heads, namely the length or protracted nature of the conflict; the seriousness and increase in armed clashes; the spread of clashes over the territory; and the increase in number of forces.[22] Based on these parameters it comes to the conclusion that there was an internal armed conflict in the whole of Iraq.[23] The third case examines again the situation in Somalia and applying the same jurisprudence in the previous cases and being of the view that there is no information available about the country conditions in Somalia comes the conclusion that there is an internal armed conflict in central and southern Somalia and not just Mogadishu.[24]

In Australia, a tribunal was of the view without the analysis conducted in the UK that a "concerted lengthy and coordinated campaign led by the Oodua Peoples Congress (OPC) from at least 1996 to 2003 and beyond that time, albeit to a lesser extent, involved an ongoing sequence of large-scale rallies and protests and the sophisticated monitoring of the army and the Nigerian police force, often involving violence" amounted to a non-international armed conflict as it did not fall within situation of internal disturbances and tension, which are the exceptions to non-international armed conflicts in articles 8.2(d) and (f) of the *Rome Statute* but was in the nature of protracted armed conflict between governmental authorities and organized armed groups as set out in articles 8.2(c) and (e) of the same *Statute*.[25]

2.2. Crimes against humanity

Crimes against humanity have received a great deal of treatment in all common law countries, except the US, as well as in Belgium, Germany and the Netherlands. The courts in these countries adopted the main overarching elements of this concept, namely a systematic or widespread attack against a civilian population with knowledge of the attack.[26] According to a Dutch

12 AbRS 23 July 2004, nr. 200402639/1 and 200402651/1.

13 AbRS 9 July 2004, nr. 200401181/1; AbRS 7 October 2010, nr. 201006259/1/V1; AbRS 14 December 2010, nr. 200909884/1/V3. Dutch courts, including the Supreme Court of the Netherlands are of the view that under Dutch law crimes committed during non-international armed conflicts between 1979 and 1989 are punishable as war crimes.

14 Rb, Awb 02/93493, 28 October 2004.

15 While in a fourth decision it was conceded by the government that the whole of amounted to such a conflict in the case of GS (Existence of Internal Armed Conflict) v. Secretary of State for the Home Department, [2009] UKAIT 00010.

16 [2008] AIT 00022.

17 [2008] AIT 00023.

18 [2008] AIT 00091.

19 Paras 255-270.

20 Paras 318-331.

21 Paras 71-80.

22 Paras 81-82.

23 Paras 147-157.

24 Paras 128-149.

25 Adekoya and Minister for Immigration and Border Protection (Migration) [2017] AATA 2028 at para 66.

26 In Australia, see SHCB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 229; SZCWP v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 9; SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 42; SZITR v Minister for Immigration and Multicultural Affairs [2006] FCA 1759; in Belgium, see CE No. 184.647, 24 June 2008, CE No. 186.913, 8 October 2008; CCE No. 49.298, 10 October 2010; in Canada, see Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40; in Germany, see Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 2.10, 31 March 2011; in the Netherlands, see AbRS 31 Augustus 2005, nr. 200502650/1; Rb, The Hague, Awb 09/40819, 9 April 2010; Rb, The Hague, Awb, 10/42733, 26 January 2012; in New Zealand, see Sequeiros Garate v.

court, crimes against humanity can also be committed by non-governmental entities, which operate in an organized fashion as set out by the *Rome Statute*, article 7.2(d).[27] These general aspects of crimes against humanity are consistent with international criminal law, for the most part because the national courts in setting out these requirements relied directly on international instruments and jurisprudence.

In Australia, the Federal Court of Australia, Full Court, has provided more detail about one aspect of the definition by saying that police officers who are victimized are part of a civilian population,[28] the same conclusion reached later by the Special Court for Sierra Leone (SCSL)[29] while in Canada the same was said about people incarcerated in civilian prisons.[30] In Belgium, one case provided guidance with respect to the issue of civilian population as part of crimes against humanity in the context of Gaza. The case was concerned with a person involved in the training of several security forces belonging to the Fatah organization in Gaza, which were involved in a power struggle with groups belonging to Hamas. The evidence showed that these security organizations were involved in a systematic manner in the torture of killing of persons who had no connection with Hamas and as such could be considered civilians as set out in the *Rome Statute*.[31]

2.3. Crimes against peace

With respect to the last international crime, aggression or crimes against peace, this is mentioned in general in both a UK[32] and Dutch immigration manual (the latter with a prescient reference to *United Nations General Assembly Resolution 3314*, the parameters of which has now become part of the crime of aggression in the *Rome Statute*).[33] In Belgium the crime of aggression was applied to a person who was one of five members of the Politburo of the ruling party in Somalia during the Barre government between 1969 and 1991. As such, he was involved in all important policy decisions of this regime. One of these decisions was the aggression against Ethiopia over the control of the Ogaden region in 1982, in which this person was involved while also being responsible specifically for the purchase of military material in preparation of this armed conflict. The tribunal relied on the judgment of the International Military Tribunal in Nuremberg of 1949 in deciding that the prohibition against aggression had entered the realm of customary international law. As to the factual underpinnings of the decision, the tribunal referred to the international condemnation of Somalia for initiating the war against Ethiopia.[34]

While none of these manuals nor the national decision makers made reference to the *Rome Statute* as their decisions preceded the Kampala Review Conference in 2010, where aggression was added,[35] it is remarkable that all the parameters for this crime were not only in accordance with international law at the time of the decisions but also with later understandings of the contours of this crime in international criminal law.

2.4. Underlying crimes

In regard to specific or underlying crimes, which are part of war crimes and crimes against humanity, in most cases such crimes were not discussed as it was clear that the organizations under discussion had been involved in at least murder or torture.[36] However, the Federal Court of Australia, Full Court, discussed what type of control is required for the underlying crime of torture, as defined by the *Rome Statute* and came to the conclusion that it has only to be factual, as opposed to legal, control and as such represents a useful contribution to international criminal law which has not made any finding yet on this specific point.[37]

2.4.1. War crimes

In the Netherlands, the Council of State was prescient in finding that causing terror could amount to a war crime[38] without having the benefit of the ICTY jurisprudence[39] although its reasoning could have been improved upon by explaining why an international

Refugee Status Appeals Authority, M826/97, High Court, 9 October 1997; The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107; in the UK, see SK (Article 1F(a) – exclusion) Zimbabwe [2010] UKUT 327 (IAC).

27 Rb, Awb 00/7608, 1 March 2004.

28 SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 9.

29 Judgment, *Sesay, Kallon and Gbao ('RUF')*, (SCSL-04-15-T), Trial Chamber, 25 February 2009, paras 87-88.

30 Carrasco v. Canada (Minister of Citizenship and Immigration), 2008 FC 436; Liqokeli v. Canada (Citizenship and Immigration) 2009 FC 530; Khachatryan v. Canada (Citizenship and Immigration), 2020 FC 167.

31 CCE No. 80 570, 2 May 2012.

32 *Exclusion (Article 1F) and Article 33(2) of the Refugee Convention*, 25, which also states that "a crime against peace has been defined as including planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances."

33 *Vreemdelingencirculaire* 2000 (C), article C4/3.11.3.2 (this document has been updated since 2000 and while there is still a reference to crimes against peace in article C2/7.10.2.1, it more limited than set out here).

34 CPRR No. 99-1280/W7769, 6 August 2002.

35 *UN Doc Resolution RC/Res.6*, Annex I, "Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression."

36 In Canada, recently a court determined that torture is a crime against humanity as set out in the *Rome Statute* and that this concept can be applied before the Rome Statute became part of Canadian law as torture as such a crime had already been recognized in international law long before the Rome Statute, see Elve v Canada (Citizenship and Immigration), 2020 FC 454; this has already been determined in the Netherlands in 2011 in Rb, The Hague, Awb 10/28846, 23 June 2011.

37 SZITR v Minister for Immigration and Multicultural Affairs [2006] FCA 1759.

38 AbRS 2 August 2004, nr. 200401637/1.

39 The case of Judgment, *Galić* (IT-98-29-T), Trial Chamber, 5 December 2003, paras 133-138 had set out the basis of this crime in customary international law and its elements almost eight months before the decision of the Council of State.

humanitarian law norm could be transformed into a crime with individual responsibility.

In Germany the war crime of treacherous killing or wounding was addressed in detail again without assistance of international jurisprudence, as there was none. The situation involved a person who "had shot to death two people in Chechnya and taken a Russian officer prisoner to obtain through an exchange the release of his brother, who had been taken captive in a "cleanup" operation."[40] After a finding that the situation in Chechnya amounted to an internal armed conflict along the lines of the *Rome Statute*, the court then relied on ICTY and ICTR jurisprudence to opine that both civilians and combatants can commit war crimes.[41] In order to hold a person liable a for war crimes a nexus need to be shown between the acts and the armed conflict, or, according to the court, "the existence of an armed conflict must be of material significance to the actor's ability to commit the crime, his decision to commit the act, the manner in which it was committed, or the purpose of the act." This was found to exist in the present case.[42] The court then proceeded with a detailed examination of the contours of the war crime of killing or wounding treacherously,[43] which is contained in the *Rome Statute* but has not received judicial consideration by the ICC as of yet, and indicated that in general "not every misleading of an adversary is prohibited, but rather only the exploitation of a confidence obtained under false pretenses through specific acts contrary to international law".[44] Even in internal armed conflicts, where there is no obligation to wear a uniform, "combatants do not violate the prohibition on perfidy if they carry their arms openly during each military engagement, including during the preparation of attacks."[45] It comes to the conclusion that this crime might have been committed since:

> Carrying a concealed weapon might have deceived the Russian soldiers that they need expect no attack from the resistance fighter and the Complainant working with him, and that therefore they were not allowed to attack the two of them. The fact that the soldiers extended confidence to the Complainant and his companion could possibly be deduced from the fact that according to the Complainant, the soldiers had turned their backs as they were struck by the shots.[46]

As this finding and its underlying reasoning represents a good understanding of international humanitarian and criminal law, other decision makers, both at the national and international level when dealing with this specific crime might very well benefit from using this judgment in developing their own understanding of this war crime. As a matter of fact, this reasoning was persuasive enough that the Prosecutor of the ICC used this judgment in one report when assessing the parameters of this particular war crime.[47]

Another example where a national court was called upon to determine the parameters of war crime without any international guidance was the decision of a Dutch district court to consider the use of chemical weapons in Syria in 2012-14 during a non-international conflict; without resort to international instruments or an analysis of the nature of the conflict (as this was agreed upon between the parties and the only issue of discussion was whether the person in question had been complicit), it came to the conclusion that the use of such weapons was a war crime because it had resulted in wilful killing, wilfully causing great suffering, or serious injury to body or health and intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.[48] While the judgment is a bit inconsistent by using the text of the *Rome Statute* for the underlying crimes as it relates to both international and non-international armed conflict while it determined that the conflict was non international,[49] it should be commended for calling attention to the use of such weapons and their consequences in non-international armed conflicts at a time that this had not been interpreted internationally.[50]

Along the same lines, Dutch courts also stipulated that the use of human shields amounted to a war crime in the armed conflict between Israel and Hezbollah on the territory of Lebanon during the time period of July and August 2006 without any further discussion.[51] This war crime cannot be found in the *Rome Statute* but has been seen as an example of the war crime of inhumane treatment[52] or was included in the war crime of child recruitment.[53] Lastly, again without any reference to international criminal law, another Dutch court found the director of a water supply company in Syria, who withheld water from the population of cities under siege by the Syrian army, complicit in war crimes and crimes against humanity as the lack of supply of water was part of a policy of starvation, which was an international crime.[54]

40 Bundesverwaltungsgericht (Federal Administrative Court), BverwG 10 C 7.09, 10 February 2010 at paragraph 2.

41 Ibidem at paragraph 26-31.

42 Ibidem at paragraph 32-33.

43 Ibidem at paragraph 37-41.

44 Ibidem at paragraph 39.

45 Ibidem at paragraph 40.

46 Ibidem at paragraph 41.

47 *Situation in the Republic of Korea, Article 5 Report*, ICC OTP, June 2014, paragraph 50.

48 Rb, The Hague, Awb 15/15728, 21 September 2015, upheld on appeal in AbRS, 24 June 2016, nr. 201507522/1.

49 Specifically, the reference to great suffering and serious injury comes from article 8(2)(a)(iii).

50 While the *Rome Statute* had the use of chemical weapons for international armed conflicts already since its inception in 1998 in articles 8(2)(b)(xvii) and (xix), they were only added for non-international armed conflicts in 2010 as a result *of UN Doc. Resolution RC/Res.5*, Annex I, "Amendments to article 8 of the Rome Statute", adding articles 8(2)(e)(xiii) and (xiv).

51 Rb, The Hague, Awb 16/12591, 18 August 2016 and Rb, The Hague, NL18.10336, 7 November 2018.

52 Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, para 155; Judgment, *Prlić et al.* (IT-04-74), Trial Chamber, 29 May 2013, paras 117-118.

53 Judgment, *Brima, Kamara and Kanu ('AFRC')* (SCSL-2004-16-T), Trial Chamber, 20 June 2007, para 737.

54 Rb, The Hague, Awb 16/22445, 6 February 2017; starvation is mentioned as a war crime in international armed conflicts in the Rome Statute in

In Belgium, the notion of war crimes was introduced for an internal armed conflict between the government of Somalia and rebel groups in northern Somalia between 1988 and 1990; the tribunal makes it clear that while the reasons and justification for the armed conflict are obscure and while IHL allows certain types of violence, the bombardment of refugees trying to flee the conflict zones, the killing of non-combatants, such as women, children and old men and the destruction of water reservoirs are all war crimes.[55] Along the same lines, while being member of commando unit in Afghani army and involved in daily raids, not distinguishing civilians from Taliban fighters during those raids amounted to a war crime, namely the violation of articles 8(2)(e)(i) and (xii) of the *Rome Statute*.[56]

With respect to the above-mentioned crime of child recruitment, this has been used as a basis to find persons involved in war crimes on five occasions, three with respect to Sri Lanka,[57] one in Chad[58] in one in the Democratic Republic of the Congo,[59] all but one with references to the *Rome Statute*.[60]

2.4.2. Crimes against humanity

With respect to crimes against humanity, in Australia, the actions by the Saddam Hussein regime against the Kurds during the Anfal Campaign in Northern Iraq between 1986 and 1989 resulting in massive killing of the population as well as the draining if the marshes and driving out the Marsh Arabs in Southern Iraq between 1991 and 1993, in oppressing the uprising by the Shi'a Moslems after the 1991 Gulf were considered such crime. In respect to the latter event, it was said that the Iraqi Army was engaged in the drainage of the marshes and, in doing so, forced the inhabitants of the marshes to lose their homeland and to flee.[61]

Underlying crimes as part of crimes against humanity were also discussed in the UK with respect to a situation in Zimbabwe where a person had been involved in the violent invasions of land owned by white farmers and in the violent expulsion of their black farm workers from their houses and jobs on those farms. The Court of Appeal provided parameters for the underlying crimes against humanity of inhumane acts and persecution.[62] The court relied on academic commentary[63] regarding the meaning of these crimes and especially gave great weight to the jurisprudence of the ICTY, the ICTR[64] and the ICC[65] to come to the conclusion that with respect to inhumane acts "The critical feature of the requirement of 'similar character' is that 'other inhumane acts' should be, by their nature and the gravity of their consequences, of comparable ("similar") character to the other enumerated crimes"[66] while "there is likely to be a strong affinity between the crimes of 'other inhumane acts' and 'persecution"'.[67] Applying these legal test and some of the examples used in the international jurisprudence the court was of the view that

> In sum, where the conduct in question is admitted by SK, involves direct participation in severe beatings and joint enterprise responsibility in the two farm invasions as a whole, where those farm invasions are described by the Upper Tribunal as brutal and terrifying, designed to force farmers and farm workers off the land on which they live by the use of violence and terror and the burning of their homes and the destruction of their livelihoods, and where this is done as part of a widespread and systematic attack on such farms for political and discriminatory aims such as can fairly be described as persecutory and as involving the forcible transfer of populations (whether or not amounting to those separate crimes), where the Upper Tribunal has found established to their satisfaction all the ingredients of "other inhumane acts" including the consequences of great suffering or serious injury, and the test is not the establishment of criminal guilt but the lower standard of "serious reasons for considering," in my judgment it has not been possible by the use of legal materials to show that the Upper Tribunal's findings and conclusions are not open in law or ought to be rejected as insufficiently or improperly grounded.[68]

In a case dealing with a female detective of the Zimbabwean police force who had been involved in a number of activities

article 8(2)(b)(xxv) while for non-international armed conflicts it is mentioned (since 6 December 2019 by virtue of *UN Doc. Resolution ICC-ASP/18/Res.5*, "Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court", Annex I) in article 8(2)(e)(xix). Incidentally, the deprivation of water has been seen as inhumane treatment, which can be both a war crime and a crime against humanity in Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, para 155.

55 CPRR No. 99-1280/W7769, 6 August 2002.

56 CCE, No. 228 260, 30 October 2019.

57 In France, CNDA, 29 April 2013, 12018386 M.G., while also referring to *Additional Protocol II*, article 4(3)(c), as well as CNDA, 28 July 2016, 16011229 while in Belgium, CCE No. 150 989, 18 August 2015.

58 In France, CNDA, 1 February 2017, 16027532, M.T.

59 In Canada, Kamanzi v. Canada (Citizenship and Immigration), 2013 FC 1261; this decision provides slightly more detail by saying in paragraph 24: "The *actus reus* of the particular war crime in question is that of participating in conscripting child soldiers to participate in hostilities. It does not require the use of intimidation or force to conscript the children, merely the act of participating in a voluntary conscription program meets the requirements to be a war crime."

60 Both the French decisions refer in general to article 8 but given the fact that in both countries the conflict was non-international, the reference must be to article 8(2)(e)(vii), which states "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."

61 SAH and Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 263.

62 SK (Zimbabwe) v. Secretary of State for the Home Department [2012] EWCA Civ 807.

63 Idem 49-50 for inhumane acts and 66 for persecution.

64 Idem 51-53, 56-57 and 59-60 for inhumane acts and 67-69 for persecution.

65 Idem 53-55 and 58 for inhumane acts.

66 Idem 61.

67 Idem 69.

68 Idem 86.

amounting to police abuses such as attendance at two torture scenes, being part of the violent disruption of almost a dozen demonstrations and a cover-up of a mass murder by burying bodies of persons killed by the police, an exclusion finding was upheld.[69] A UK tribunal had no difficulty coming to the conclusion that the police conduct in Zimbabwe during the time period of her involvement fit the criteria of the overarching element of crime against humanity of since it had been carried out in a systematic or widespread manner. With respect to the underlying crimes, torture and inhumane acts were found to be the most relevant.[70] In the context of discussing these underlying crimes, the tribunal comes to the puzzling conclusion that it is somewhat bemused to find that the enumerated list of excludable acts in Article 7(1)(a) - (k) does not include any crimes that have any obvious relationship to the "covering up" of a murder (e.g., conspiracy to pervert the course of justice, destruction of evidence, suppression of evidence, unlawful handling of bodies).[71] This conclusion is puzzling for two reasons, namely first the assumption that this type of behavior is seen as a substantive crime rather than a type of extended liability, namely, accessory after the fact, and, secondly, the observation that there is no international jurisprudence which has addressed this issue, which is incorrect.[72]

Lastly, in France human trafficking was also seen as an excludable offense,[73] which mirrors the fact that this crime was recognized as a crime against humanity by the drafters of the *Rome Statute*.[74]

2.5. Observations

It can be concluded from the observations made above in regards to the relationship between international and national jurisprudence that the exclusion jurisprudence has not strayed very much at all from the international jurisprudence and as such has taken the reference to international instruments in exclusion 1F(a) seriously and accurately. At the domestic level the use of international instruments is common with some attention also being given to the most important jurisprudence coming out of the ICTY and ICTR. Where there has not been such jurisprudence, the domestic courts have applied their own reasoning to the characterization of underlying crimes in a manner that cannot be faulted. However, since a trend can be detected in the national jurisprudence where attention is being given to the less obvious specific crimes than murder, torture or rape, it will become necessary to go beyond the intuitive reasoning employed so far and utilize the international case-law, which have defined and circumscribed these crimes in great detail. Not only would the reasoning of the exclusion decision-makers become more persuasive it would also allow for a more consistent development of the over-all national jurisprudence.

3. Extended liability

3.1. Introduction

While the connection between ICL and refugee law in defining the international crimes has been a persistent and an in-depth one, this situation with respect to extended liability is quite different (Currie and Rikhof, 2020, 705–752; Einarsen and Rikhof, 2018, 425–592; Rikhof, 2020). Although national decision makers were called upon to determine the circle of responsible perpetrators as early as when examining the crimes themselves, the parameters of accountability were often decided in a more autonomous fashion. This changed in 2010 in common law countries when the highest courts in New Zealand and the UK canvassed in detail ICL concepts of liability in order to come to a workable definition of the term "committed" in exclusion 1F(a) (Rikhof, 2023, 306–394). The Supreme Court of Canada followed this approach in 2013, followed by Australia while the US followed a more independent course. In civil law countries in Europe (specifically Belgium, France, Germany and the Netherlands with the most exclusion jurisprudence) there was less of an interdependent approach in this area even though the CJEU has had some harmonizing effect in some aspects.

3.2. The conceptual framework

3.2.1. Common law countries

3.2.1.1. The UK[75]

The Supreme Court issued its unanimous judgment on March 17, 2010.[76] It was of the view that the main issue in this case was the notion of extended liability and canvassed a wide range of sources in this area including the Rome Statute, the ICTY jurisprudence, especially in regards to joint criminal

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

70 Idem paras 115–121 where substantial reliance is place on the ICTY jurisprudence in this area even though the tribunal is incorrect in stating in para. 121 that JCE requires a leadership role; for the application of the legal parameters to the facts in the case see paras 127–131.

71 Idem para 122.

72 Idem para 124.

73 CNDA, 30 August 2019, M.A., 18052314 for a situation in Nigeria.

74 See the *Elements of Crimes document* connected to the *Rome Statute*, page 8, under the Crime against humanity of sexual slavery, which states "It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."

75 Sections 1 and 2 of the *Asylum and Immigration Appeals Act of 1993* makes reference to the *Refugee Convention*. Section 55(1)(a) of the *Immigration, Asylum and Nationality Act 2006* allows the Secretary of State to issue a certificate during an appeal procedure to the effect that a person is not entitled to protection because 1F applies to this person.

76 R (on the application of JS) (Sri Lanka) (Respondent) *v* Secretary of State for the Home Department (Appellant), [2010] UKSC 15; for a commentary see Juss (2014).

enterprise, foreign jurisprudence (including Canadian, American and German) and the views of the UNHCR to determine the desirable parameters of this concept.[77] Like the Court of Appeal before it, it was of the view that the starting point for assessing extended liability should be the *Rome Statute*.[78]

The court says in *obiter* that membership in a brutal organization by itself is not sufficient to result in complicity,[79] but that the essential test for extended liability is "if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organization's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose," while this overarching test can be accomplished by having regard to a number of factors or in the words of the court:

> Rather, however, than be deflected into first attempting some such sub-categorization of the organization, it is surely preferable to focus from the outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organization and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organization was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organization and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organization, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organization including particularly whatever contribution he made toward the commission of war crimes.[80]

In the final analysis the Supreme Court was of the view that an approach utilizing membership as a head of liability was too broad for recognizing it as a type of complicity[81] while the path taken by the Court of Appeal was too narrow by using domestic notions of liability in requiring participation in international crimes.[82]

3.2.1.2. New Zealand[83]

The decision, X and Y v. Refugee Status Appeals Authority,[84] involved the exclusion of a person who was the chief engineer of a ship, which was owned by the LTTE and which was sunk during a confrontation with the Indian Navy in January 1993. At the time, it was carrying several LTTE members and substantial quantities of arms and explosives and it has been found by the refugee tribunal that the LTTE had committed crimes against humanity. The notion of complicity was summarized by a lower court as participating, assisting or contributing to the furtherance of a systematic and widespread attack against civilians knowing that the acts will comprise part of it or takes the risk that it will do so without the need for a specific event to be linked to the accomplice's own acts.[85]

The Supreme Court of New Zealand issued a decision on August 27, 2010 in which it might several relevant findings.[86] In terms of sources of extended liability, the *Rome Statute* was found to be the most authoritative instrument to provide the various modes of liability in international criminal law,[87] one of which is Joint Criminal Enterprise (JCE), which was also the most appropriate one in the situation at hand.[88] After canvassing in detail the concept of JCE and the Canadian and UK jurisprudence[89] in the area of extended liability, the court came to the following conclusion:

> Refugee status decision-makers should adopt the same approach to the application of joint enterprise liability principles when ascertaining if there are serious reasons to consider that a claimant seeking recognition of refugee status has committed a crime or an act within art 1F through being complicit in such crimes or acts perpetrated by others. That approach fully reflects the principle that those who contribute significantly to the commission of an international crime with the stipulated intention, although not direct perpetrators of it, are personally responsible for the crime. This principle is now expressed in arts 25 and 30 of the Rome Statute and was earlier well established in customary international law. Its application recognizes the importance of domestic courts endeavoring to develop and maintain a common approach to the meaning of the language of an international instrument which is given effect as domestic law in numerous jurisdictions of state parties.[90]

Based on the facts of the case, the court came to the conclusion that the claimant should not be excluded. While it was clear that he supported the LTTE in general and had done so in the past, the past activities did not reach the threshold of complicity while the activities underlying the case in question could not support an exclusionary finding, as the

77 Paras 9-24 (Lord Brown) and 42-43 (Lord Hope).

78 Para 47 (Lord Hope).

79 Para 2 (Lord Brown), indicating this was a common ground among the parties while in paragraph 57 Lord Kerr says it was wise for the Secretary of State not to rely on this aspect of the Canadian jurisprudence; see also para 49 (Lord Hope).

81 Para 44-46 (Lord Hope).

82 Paras 26, 38 (Lord Brown) and 48 (Lord Hope); this seemed to be based on the analysis of joint criminal enterprise I of low-level participants (Lord Brown in paragraphs 19-20, as well as 37).

83 Section 137(2) of the *Immigration Act 2009* sets out the exclusion provisions.

84 X & Y v. Refugee Status Appeals Authority, CIV-2006-404-4213, High Court, 17 December 2007.

85 Para 81.

86 The Attorney-General (Minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107 (Watt, 2012).

87 Paras 51-53.

88 Paras 56 and 71, referring to joint criminal enterprise III.

89 Paras 51-69; the court indicates in paragraphs 58-61 that the notion of shared purpose as used in the Canadian jurisprudence is in effect a reference to joint criminal enterprise while in paragraphs 66-69 the court discusses and agrees with the JS decision of the UK Supreme Court, which has been discussed above.

90 Para 70.

weapons on the ship never reached the LTTE for a possible criminal purpose.

3.2.1.3. Canada[91]

In Canada, the Supreme Court made some adjustments to the well-known test of personal and knowing participation, which had been used by national tribunals and courts since 1992 (Rikhof, 2023, 306–377). This overall test had a number of different manifestations, corresponding to four sub-categories of types of liability, namely membership in an organization with a limited, brutal purpose; aiding and abetting; responsibility for persons with a high rank; and shared criminal purpose (Rikhof, 2023, 320–323), the latter sub-category became the most popular after 2005 in the courts and was based on the application of seven factors to determine liability; these factors were the nature of the organization; the method of recruitment; position and rank obtained in an organization; the duration of association with the organization; age of the person; knowledge of atrocities committed by the organization; and the opportunity to disassociate from the organization (Rikhof, 2023, 336–340).

The case before the Supreme Court[92]concerned a person who began his career with the government of the Democratic Republic of Congo (DRC) in January 1999. He was hired as a financial attaché at the Ministry of Finance and was assigned to the Ministry of Labor, Employment and Social Welfare in Kinshasa. He later worked as a financial adviser to the Ministry of Human Rights and the Ministry of Foreign Affairs and International Cooperation. In 2004, he was assigned to the Permanent Mission of the DRC to the United Nations ("UN") in New York. In his role as second counselor of embassy, he represented the DRC at international meetings and UN entities including the UN Economic and Social Council. He also acted as a liaison between the Permanent Mission of the DRC and UN development agencies. In 2007, the appellant served as acting chargé d'affaires. In this capacity, he led the Permanent Mission of the DRC and spoke before the Security Council regarding natural resources and conflicts in the DRC. He worked at the Permanent Mission until January 2008 when he resigned and fled to Canada.[93]He had been excluded as a result of his association with the government of the DRC, which during the time of his employment had been involved in crimes against humanity.

The analysis of the Supreme Court is very much based on ICL in the sense that the court makes an inquiry as to which are the broadest forms of extended liability both under the ICTY/ICTR statutes and the *Rome Statute* on the understanding that Canadian exclusion law should not go beyond these forms of liability in international law.[94] As a result the court examines the concepts of JCE[95] and common purpose[96] and comes to the conclusion that, based on these forms of liability, a new overarching test of voluntary, significant and knowing contribution to the organization's crime or criminal purpose[97] should replace the previous personal and knowing participation test as the latter had gone too far by also allowing to capture individuals based on mere association or passive acquiescence.[98]

Applying these overarching test recourse can be had to a number of factors, for which the court found inspiration in the JS decision of the UK Supreme Court,[99] as well as the previous Canadian jurisprudence,[100] which would guard against "against a complicity analysis that would exclude individuals from refugee protection on the basis of mere membership or failure to dissociate from a multifaceted organization which is committing war crimes."[101] In so far that this factor test would make exclusion possibly easier than a criminal conviction, this is justified as a result of the fact that refugee exclusion proceedings are of a different nature than criminal trials.[102] The court also made it clear that this overarching test represent the outer limits of extended liability but that other forms of liability, such as aiding and abetting and command responsibility can still play a role in an exclusion determination.[103]

The factors, which can play a role, are slightly less stringent that the ones set out in the JS case by deleting the factor of the person's own personal involvement and role in the organization but by instead building on the seven-factor approach of the previous Canadian jurisprudence and adding one new, crucial, factor, namely the person's duties and activities within the organization. The complete list of factors is the following:

(i) the size and nature of the organization;
(ii) the part of the organization with which the refugee claimant was most directly concerned;
(iii) the refugee claimant's duties and activities within the organization;
(iv) the refugee claimant's position or rank in the organization;

91 Section 98 of the *Immigration and Refugee Protection Act* refers to article 1F of the *Refugee Convention*.

92 Ezokola v. Canada (Citizenship and Immigration), 2013 SCC 40 [for commentaries, see Zilli (2014), Weisman (2018)].

93 Ezokola v. Canada (Citizenship and Immigration), 2013 SCC 40, paras 11-13.

94 Ezokola v. Canada (Citizenship and Immigration), 2013 SCC 40, paras 42-46.

95 Idem paras 62-67, specifically utilizing the Decision of the Confirmation of Charges, *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, 16 December 2011.

96 Idem at paragraphs 54-61.

97 Ezokola v. Canada (Citizenship and Immigration), 2013 SCC 40, para 84.

98 Idem para 85.

99 Idem para 70-72.

100 Idem para 73.

101 Idem para 74.

102 Idem paras 37-40.

103 Idem paras 41, 50 and 97; these are specific examples; given the reasoning by the Supreme Court that other forms of participation which are narrower than JCE or common purpose, such as the preparatory acts such as planning, instigating [article 7(1) of the *ICTY Statute*], ordering, soliciting, counseling and inducing (article 25(3)(b) of the *Rome Statute* would be included as well. For a discussion of these forms of participation, see Currie and Rikhof, above note 46, 714-717.

(v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
(vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.[104]

While the court has made it clear the membership in a brutal organization is no longer a form of liability for exclusion, the notion of brutal, limited purpose organization has not been abandoned completely; it now is part of the first factor[105] in that it would appear that belonging to such an organization could affect the importance and possibly the relevance of the other factors. The mens rea requirement is met if a person is aware of the crime or criminal purpose and is aware that his conduct will assist in the furtherance of the crime or criminal purpose.[106]

The three judgments of the highest courts in Canada, New Zealand and the UK represent an incremental approach to the notion of extended liability in which the Ezokola decision appears the most sophisticated as it incorporates the reasoning of the other two courts and strengthens the linkage with ICL. The three courts utilized ICL in two distinct manners. First they set out what the essence of the broadest notion of complicity in ICL, typically JCE as derived from the ICTY jurisprudence and common purpose from the ICC caselaw and made it clear that domestic concepts of complicity cannot go beyond the international approaches for extended liability. Secondly, they use the same ICL jurisprudence to extract the essential features of these two broad notions and then adopt them (especially the UK and Canadian courts) for domestic usage by giving guidance to the overall test to be used in subsequent cases as well a more practical approach based on a number of factors.

3.2.1.4. Australia[107]

The just mentioned observation is supported by the fact that in Australia the most recent expression at the highest level related to extended liability also relied on the Ezokola judgment. The original seminal case involved a person from Afghanistan who reported individuals to the security service, the KhAD, in the knowledge that these individuals could become victims of war crimes or crimes against humanity. The Federal Court of Australia upheld the tribunal decision to exclude this person based on complicity by indicating that the international crimes can be committed as accessories but that mere membership in the KhAD was not sufficient. Accessory liability, according to the court, requires evidence of acting intentionally and with the knowledge of the group's intention to commit the crime. The court found in addition to this factor the applicant's rank in the KhAD and his role in providing information sufficient to establish the element of joint purpose.[108] On Appeal, the Federal Court of Australia, Full Court agreed with all aspects of the earlier decision, especially the finding that it is not necessary that the appellant personally committed a war crime or a crime against humanity or that there be a finding with respect to a specific incident. In its view, what is required is evidence of many such incidents and a conclusion that the appellant took steps as an officer of KhAD knowing that such acts would be the consequence of his steps.[109]

In 2018, the Federal Court of Australia was called upon to assess the involvement of a person belonging to the Jandarma and the Jandarma Istihbarat ve Terorle Mucadele (JITEM), the Turkish gendarmerie and the intelligence agency of the gendarmerie respectively, both of which were heavily involved in the Turkish-PKK conflict in the nineties and both which had been involved in human rights abuses and crimes against humanity.[110] The court started out by setting the overarching proposition complicity as originally determined in the SHCB, Full Court decision by saying "in order to bear criminal responsibility for an act under the Rome Statute, a person need not have directly committed that act him or herself. He or she must, however, have aided, abetted or otherwise assisted in its commission or attempted commission or have contributed to its commission or attempted commission by persons acting with a common purpose. The person must act intentionally and must have knowledge of the intention of the group to commit the crime."[111]

Then it repeated the essential elements of such liability in the following manner:

- The applicant need not actually have directly committed the act in question;
- There must be awareness of the act of participation and a conscious decision to participate in aiding, abetting or otherwise assisting in the commission of the crime. This includes planning, instigating, ordering or committing;
- There does not necessarily need to be a finding with respect to a specific incident. If there are many such incidents and the applicant took steps knowing that those actions would result in criminal activity that would suffice;
- There must be the "requisite intent" to assist in the act; mere knowledge is not sufficient;
- Presence alone at the scene of a crime is not sufficient, but if presence is coupled with other circumstantial or other evidence then it may be used;
- Membership of an organization is usually insufficient by itself to establish complicity, depending on the principal aims of the organization and the closeness of the applicant to the organization's decision-making process; and

104 Ezokola v. Canada (Citizenship and Immigration), 2013 SCC 40, para 94; the details of each factor are described in paras 94-99.

105 Idem para 95. While the second factor appears to be new as well, in actuality, this "drilling down" approach had already been used by the Federal Court since 2006, see Rikhof, above note 136, 227-228.

106 Idem, para 89.

107 Section 36(2C)(a) of the *Migration Act 1958* repeats the wording of article 1F of the *Refugee Convention*.

108 SHCB v Minister for Immigration & Multicultural and Indigenous Affairs [2003] FCA 229.

109 SHCB v Minister for Immigration & Multicultural and Indigenous Affairs [2003] FCAFC 308, para 23.

110 MRWF v Minister for Immigration & Border Protection, [2018] FCA 504.

111 Idem para 59.

- Rank may be an important factor. A high ranking officer may be held responsible as they are closer to the decision-making process.[112]

Lastly, it made reference to the Ezokola decision by repeating its crucial finding that "the requirement of a significant contribution is critical to prevent an unreasonable extension of the notion of criminal participation in international criminal law."[113]

Since the Australian court relied primarily on the two previous UK and Canadian cases while only paying lip service to the Rome Statute, it did not see a need to do its own detailed analysis of ICL jurisprudence, thereby reducing the link to that body of law somewhat without loosing sight of that fact that ICL had played an important role in those decisions and therefore was an influential factor in the approach taken in its own judgment.

3.2.2. Civil law countries in the European Union

3.2.2.1. Introduction

While the Court of the European Union has provided guidance to the member states of the European Union on exclusion 1F, it has only pronounced itself on exclusion grounds (b) and (c) although its judgments also has had an effect on exclusion ground (a) in that it was of the view that membership by itself cannot lead to exclusion; this is how the court expressed this sentiment:

> As a consequence, first, even if the acts committed by an organization on the list forming the Annex to Common Position 2001/931 of the European Union because of its involvement in terrorist acts fall within each of the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83, the mere fact that the person concerned was a member of such an organization cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions.[114]

In the same judgment, it is recognized that a number of factors can play a role in establishing complicity by saying:

> To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organization; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.[115]

3.2.2.2. Belgium

The general principles with respect to indirect involvement,[116] based on the legislative text, which refers to article 1F of the *Refugee Convention*[117] have remained constant in Belgium although the wording to describe these principles have fluctuated somewhat over the years.

The Council of State stated in 2001 that to commit international crimes, it is sufficient that a person participates in the preparation or execution of acts, which amount to article 1F(a) activities.[118] In 2006, the same court said that the requirement was more akin to knowing participation and personal participation,[119] while in 2008 the court adjusted this language saying that an individual could be responsible for the commission of crimes, in addition to personally committing them, by making a substantial contribution with knowledge of the crime.[120] A later refinement was that it had to be a substantial personal contribution with knowledge and no defense.[121] The Council has also indicated that in situations with a large number of killings and acts of torture there is no need to precisely describe to which acts a person has made the contribution.[122] At the tribunal level, the substantial contribution requirement set out by the Council of State has been repeated but with the addition of the notion of an immediate effect.[123]

3.2.2.3. France

The *Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA)* follows the same approach as in Belgium by referring to article 1F of the Refugee Convention and then adding the wording of article 12(3) of the *Qualification Directive*.[124] Membership in a political or government organization associated with international crimes is not a concept, which has been applied in France.[125]

112 Idem paras 58.

113 Idem paras 63-64; incidentally, one of the paragraphs of the Ezokola judgment quoted refers in turn to the UK JS case.

114 Bundesrepublik Deutschland v. B und D, C-57/09 and C-101/09, 9 November 2010, para 88.

115 Idem, para 97.

116 There have been a number of cases where persons were excluded for direct involvement in the crimes against humanity of torture (CCE No. 13.733, 4 July 2008 for a member of a security service during the Saddam Hussein regime in Iraq; CCE No. 16991, 8 October 2008 in regards to a soldier of the Charles Taylor regime in Liberia; CCE No. 18.233, 31 October 2008 involving a soldier in charge of a rebel group in Ivory Coast in 2001-2005 and CCE No. 24.924, 24 March 2009 for a soldier of a border unit during the Saddam Hussein regime in Iraq).

117 *Aliens Act*, section 55/2, which adds the reference to instigation and other participation from article 12(3) of the *Qualification Directive*.

118 CE No. 94.321, 27 March 2001, at paragraph 2.4.2.

119 CE No. 165.722, 8 December 2006, at paragraph 1.2; while the judgment is in Dutch, these words are in English, which mirrors the language used in Canadian and Dutch jurisprudence.

120 CE No. 184.647, 24 June 2008, at paragraph 3.1.1 with reference to the ICC Statute.

121 CE No. 186.913, 8 October 2008, at paragraph 2.4 also with reference to the ICC Statute; this approach was also used in the case of CCE 14.567, 29 July 2008.

122 CE No. 165.722, 8 December 2006, at paragraph 1.2.

123 CCE No. 11.020, 8 May 2008 and CEE No. 25.649, 3 April 2009 (which refers to article 25 of the *Rome Statute*).

124 Article L511-6, which came into force on May 1, 2021; before it was article L711-4.

125 CE, 25 March 1998, 170172, Mahboub.

3.2.2.4. Germany

The *Asylum Procedure Act* repeats the wording of articles 12(2) and (3) of the *Qualification Directive*,[126] which has not been further expanded on in the jurisprudence in a conceptual manner.

3.2.2.5. The Netherlands

The main parameters of indirect liability are set out in the *Aliens Manual*,[127]

According to the Manual knowing participation present when:

a) the alien was employed in an organ or organization which according to influential reporting has committed in a systematic or widespread manner crimes set out in article 1F during the time period of his employment unless the alien can show that there was a significant exception in his individual case;
b) the alien was employed in an organization of which the Minister has determined that certain categories of persons belonging to that organization will be considered to fall within article 1F unless the alien can show that there was a significant exception in his individual case;
c) an alien has participated in activities, which he knew or should have known, were activities set out in article 1F, without being associated with an organ or organization as set out above.

Personal participation is present when:

a) the alien has personally committed a crime as set out in article 1F of the Refugee Convention;
b) the alien ordered or under his responsibility a crime as set out in article 1F of the Refugee Convention has been committed;
c) the alien has facilitated a crime as set out in article 1F of the Refugee Convention;
d) the alien belongs to a category of persons within an organization, of which the Minister has designated as a group that is generally opposed by Article 1F of the Refugee Convention.

The category under (c) is further clarified by indicating that a substantial contribution means a contribution, which had a factual effect on the commission of the crime and which would likely not have taken place if nobody had fulfilled the role of the person concerned or if the person concerned had taken the opportunity to prevent the crime.[128]

The Council of State has approved this approach.[129] While there is no particular sequence, which has to be followed in assessing personal and knowing participation,[130] both aspects of this test have to be addressed by the decision maker[131]. There is no need to provide concrete examples of the results of the personal and knowing participation of the asylum seeker, as long it can be shown that he or she was involved in acts, which increased the risk of death or torture of the victim and the asylum seeker was aware of that risk.[132]

The Minister responsible for refugee matters has designated a number of categories within organizations where membership results in the rebuttable presumption set out above under (d), namely non-commissioned officers and officers in the KhAD and WAD, security organizations in Afghanistan between 1978 and 1992[133]; senior and general officers of the police (Sarandoy)[134] and certain specific categories of persons belonging to the Hezb-i-Wahdat (or Islamic Unity Party of Afghanistan) of the same regime in Afghanistan[135]; certain senior officials in Iraq during the Baath party regime of Saddam Hussei[136]; and corporals and non-civilian leaders in the RUF during its terror campaigns between 1998 and 2001 in Sierra Leone.[137]

126 Section 3(2).

127 The *Vreemdelingencirculaire* 2000 (C), article C2/7.10.2.4 (article 29(1)(a) of the *Aliens Act* refers in general to *Refugee Convention*) while the Manual is in Dutch the words "knowing participation" and "personal participation" are set out in English, a parlance, which is used in other official documents and the jurisprudence. This terminology stems originally from the Canadian caselaw, which is clear from the fact that the seminal Canadian case, Ramirez, is mentioned in this context in the Dutch case of Rb, The Hague, Awb 02/12057, 19 December 2002; see also Rb, The Hague, 04/51818, 28 June 2006; Letter from the State Secretary of Justice to the House of Commons, 1997-1998 Session, 19 637, nr. 295, 28 November 1997 7-8; and Adviescommissie voor Vreemdelingenzaken "Artikel 1F Vluchtelingenverdrag in het Nederlands vreemdelingenbeleid" (The Hague, Adviescommissie voor Vreemdelingenzaken, 2008) 15.

128 Vreemdelingencirculaire 2000 (C), article C4/3.11.3.3.

129 AbRS 27 October 2003, nr. 200305116/1 and AbRS 13 April 2005, nr. 200408522/1.

130 Rb, The Hague, Awb 04/51818, 28 June 2006.

131 Rb, Roermond, Awb, 01/48721, 4 February 2003.

132 AbRS 13 August 2004, nr. 200402430/1, AbRS 2 August 2005, nr. 200401637/1 and AbRS 31 August 2005, nr. 200502650.

133 Letter from the State Secretary of Justice to the House of Commons, 1999–2000 Session, 19 637, nr. 520, 3 April 2000, at paragraph 3.1. This decision was based on an extensive official report (Ambtsbericht) by the Minister of Foreign Affairs earlier in the year regarding the security services in Afghanistan and their close connection to the human rights abuses carried out in Afghanistan during that time period as well as the role played by the officer corps in those abuses. This organization was called the KhAD from 1978 until 1987 after which it was called the WAD.

134 Letter from the Minister of Immigration and Integration to the House of Commons, 2002–2003 Session, 19 637, nr. 695, 7 November 2002. The letter specifies in more detail which parts of the police services are covered for purposes of article 1F; three specific sections of the police are mentioned. The designation was again based on an official report by the Minister of Foreign Affairs.

135 Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag at 12.

136 Namely officers in the Special Security Services and the heads of the General Security Services, the Military Intelligence Services and the General Intelligence Service. Letter from the Minister of Immigration and Integration to the House of Commons, 2003–2004 Session, 19 637, nr. 811, 8 April 2004; the designation was again based on an official report by the Minister of Foreign Affairs.

137 Letter from the Minister of Immigration and Integration to the House of Commons, 2003–2004 Session, 19 637, nr. 829, 23 June 2004, again based on a report from the Ministry of Foreign Affairs. For jurisprudence regarding these designations, see Rikhof, above note 1, 350-354.

The conceptual approach in civil law countries is different than in common law in two aspects. The first one is that there much less reliance on ICL while secondly (and likely related to this first one), the principles, which have been enunciated are more fragmentary and less detailed than in their common law counterparts.

3.3. The application of the conceptual framework

3.3.1. Introduction

All national jurisdictions in their refugee exclusion judgments have applied the conceptual framework to a number of general categories, typically seen as forms of aiding and abetting or extended liability, namely,

- Handing over persons who have been arrested during roadblocks, police or military raids or during routine criminal investigations to other persons or other organizations, which then committed criminal acts amounting to international crimes, usually torture, while the person doing the handing over knew or was wilfully blind to the fact that such persons would be subjected to such crimes;
- Providing information about persons, through surveillance, being an informer or as part of an intelligence operation or organization, which resulted that those persons would be found or arrested and then again becoming victims of international crimes;
- Being present at the scene where international crimes occurred either to encourage the actual perpetrators or because of having inherent authority;
- Having a position in an organization with sufficient seniority to influence others to commit international crimes; in most cases such a determination is made on the basis of one of the factors articulated in the JS and Ezokola cases rather than using the more complex reasoning of command or superior responsibility as set out in article 28 of the *Rome Statute*;
- If no direct link between a person and the commission of international crimes can be found by relying on the above activities, recourse can be had by utilizing the approach advocated by the Canadian and British Supreme Courts, the factor approach, whereby a number of factors are assessed to bring a person within the parameters of complicity in a more indirect fashion (Rikhof, 2023, 399–400).

The jurisprudence with respect to the above categories will be discussed below in more detail as of early 2013 while an examination will also be made of cases where complicity was in the outer periphery of this concept as well cases where complicity was found not be present usually because of a lack of nexus to the international crimes or because the contribution was too minimal. These aspects of complicity can also provide important information about where to draw the line between culpable involvement and non-complicity.[138] The connection between ICL and the finding of liability in these above situations has been tenuous. The observation was already made that for persons with senior position in an organization their liability was not based on the command/superior responsibility as set out in the Rome Statute. The same can be said for the other four forms of extended liability in that very little of the national jurisprudence used or relied upon ICL to conclude that persons should or should not be excluded. This is not surprising for two reasons. First, there is very little caselaw at the international level, which addresses aiding and abetting as ICL tends to examine situations of people which occupy the upper echelon of power for which other forms of extended liability are more suited than aiding and abetting. This results in a situations where national refugee decision makers are often faced with facts which have not been addressed at the international level. Secondly, the highest courts in common law countries and in Europe have provided general guidance, as seen earlier in the chapter, which are more suited for the myriad of factual circumstances before national refugee decision makers.

3.3.2. Handing over of persons as a form of complicity

In Canada, two cases discussed this category. In one case, a member of the Algerian police who had belonged for 27 years to an anti-terrorism unit, in which capacity he participated in numerous actions including arresting suspected terrorist who he then handed over to specialized unit in the knowledge that they would tortured, the exclusion finding upheld.[139] The other case involved a sergeant in the Palestinian National Security Service (NSF) whose duties involved manning checkpoints in Gaza and the West Bank; he would stop suspicious cars for an inspection while at other times the checkpoints were given information about specific vehicles or individuals to watch out for; if suspected individuals were found at a checkpoint, it was the responsibility of the applicant and the other staff at the checkpoint to arrest that person until one of the other branches of the General Security Service could take custody of the detainee, resulting in torture.[140]

In the UK, one case dealt with the complicity of a person who was a member of the Basij in Iran whose mission it was to maintain law and order and to enforce ideological and Islamic learnings; the person was complicit not because of his membership in this organization but as a result of the fact that he handed individuals

138 There have also been a number of cases where complicity was not discussed as the person had been directly involved in international crimes, see in *Australia*, Adekoya and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 768 for Nigeria; in *Canada*, Sabadao v. Canada (Citizenship and Immigration), 2014 FC 815 for a member of the armed forces in the Philippines and Nathaniel v. Canada (Public Safety and Emergency Preparedness), 2020 FC 32 for a police officer in Nigeria; in the *UK*, AA040782014 [2015] UKAITUR AA040782014 for a platoon commander in the armed forces of Eritrea; in the *US*, Tas v. Holder, 530 Fed. Appx. 31 (2nd Circuit, 2013) for a soldier in the Turkish army.

139 Mekhachef v. Canada (Citizenship and Immigration), 2014 FC 142.

140 Shalabi v. Canada (Public Safety and Emergency Preparedness), 2016 FC 961.

over to other units of the Basij knowing that they would be seriously ill-treated.[141]

In Belgium this type of complicity was used against a soldier in Eritrea involved in arresting civilians,[142] a police officer doing the same in Iraq,[143] a member of Spetsnaz in Chechnya who was also involved in arresting people[144] and a person in Ivory Coast arresting people at road blocks during a civil war.[145] The same fate befell a person who joined the National Directorate of Security in Afghanistan, in which capacity he belonged to an unit which arrested Taliban fighters and possible suicide terrorists who were transferred to other units where they were tortured.[146]

In France a member of the religious police of the Taliban in Afghanistan was involved in the arrest of civilians[147] while in the Netherlands a number of judgments addressed this situation, once by the Council of State (applying exclusion to a policeman in Northern Iraq tasked with arresting persons involved in bombings of shops)[148] and the other times by a district court, namely one with respect to a police officer as well as a sergeant in Turkey,[149] both of which handed over people after arrest; a soldier in Nigeria, who arrested persons and then handed them over to his superior[150]; one with respect of a member of the Republican Guard in Syria who carried out inspections and arrests at road blocks[151]; two with respect to persons in Syria assisting in police raids and in that capacity arresting and handing over other persons[152]; one with respect to a police officer in Iraq,[153] and one in regards to a police officer in Algeria.[154]

3.3.3. Providing information

In Australia, an informant operating against the PKK for the Turkish police was excluded[155] as was the case in two instances in Canada, namely a soldier in the Colombian army whose was task it was to survey members of the FARC and paramilitaries by listening to, taping or intercepting communications[156] and a policeman in Colombia involved in intelligence gathering.[157]

In Belgium an informer for ISIS in Syria,[158] a member of the military in Iraq during the Saddam Hussein's regime informing on other military personnel[159] and persons writing reports for Palestinian intelligence service resulting in arrests and then torture[160] were all found to be complicit as was denouncing people in Ivory Coast[161] and being involved in surveillance as a soldier in Syria[162] by French tribunals.

In the Netherlands, a number of decisions resulted in exclusion due to providing information leading to genocide, crimes against humanity or war crimes. Regarding war crimes, a member of the Eritrean Liberation Front (ELF) in Eritrea who between 1963 and 1975 during a time that this organization was engaged in a non-international armed conflict with Ethiopian government gathered information about fellow citizens was excluded.[163] With respect to genocide, a person making lists of Tutsis to be killed and then passing them on to the Interhamwe during the 1994 genocide while also provding information on other occasions was also found to be complicit.[164]

Most cases involved crimes against humanity, such as the person of the Baath party in Iraq who reported people for not showing up at party meetings[165]; an informant for the intelligence service of the South Lebanese Army, an Israeli proxy in Lebanon[166]; an informant for the intelligence service in Gambia[167]; a spy for the LTTE in Sri Lanka[168]; informants in Syria[169] and Guinea[170]; a guide and guard of the PKK providing information about opponents of this group[171]; an employee in Northern Iraq who collected information about criminals and terrorists, put that information in reports, which he then passed on to his superiors who in turn directed arrest teams to apprehend the persons mentioned in those reports.[172] As well, a soldier in the Eritrean army who was a trainer and guard in a military camp and who reported other soldiers to superiors was found to be complicit.[173]

Interestingly, Dutch courts have also excluded persons who occupied a senior position in their organization and in that capacity

141 AA (Art 1F(a) – complicity – Arts 7 and 25 ICC Statute) Iran [2011] UKUT 00339 (IAC); this decision was upheld on appeal in AA-R (Iran) v Secretary of State for the Home Department [2013] EWCA Civ 835.

142 CCE, no 218412, 18 March 2019.

143 CCE, no 226560, 24 September 2019.

144 CCE, no 160633, 22 January 2016.

145 CCE, no 108962, 3 September 2013.

146 CCE, no 213664, 10 December 2018.

147 CNDA, 25 March 2014, 12023208, M.A.

148 AbRS, 18 April 2013, nr. 201109876/1.

149 Rb, Roermond, Awb 13/13175, 3 December 2013 and Rb, The Hague, Awb 14/3475, 3 March 2015, upheld on appeal in AbRS, 16 September 2015, nr. 201502212/1.

150 Rb, The Hague, Awb 16/5323, 19 May 2016.

151 Rb, The Hague, Awb 15/12382, 14 June 2016.

152 Rb, The Hague, Awb 13/13175, 26 April 2016 and Rb, The Hague, NL19.10728, 17 December 2019; involvement in raids lead to the same result for soldiers in Eritrea, see Rb, The Hague, Awb 14/18073, 29 April 2015 and AbRS, 201506938/1, 25 November 2015.

153 Rb, The Hague, Awb 16/6954, 7 March 2017.

154 Rb, The Hague, NL16.28, 12 January 2017.

155 MRWF v Minister for Immigration & Border Protection, [2018] FCA 504.

156 Parra v. Canada (Citizenship and Immigration), 2016 FC 364.

157 Durango v. Canada (Citizenship and Immigration), 2018 FC 146.

158 CCE, no 239574, 11 August 2020.

159 CCE, no 103188, 22 May 2013.

160 CCE, no 213943, 13 December 2018 and CCE, no. 220460, 29 April 2019.

161 CNDA, 27 October 2014, 14016605, M.E.

162 CNDA, 14 December 2016, 16010759, M.A.

163 Rb, The Hague, Awb 10/28846, 23 June 2011.

164 Rb, The Hague, Awb 13/29482 and 13/29483, 25 March 2014.

165 AbRS, 28 March 2013, nr. 201107951/1.

166 AbRS, 3 December 2013, nr. 201211236/1.

167 Rb, The Hague, Awb, 16/27787, 20 June 2017.

168 RB, The Hague, Awb 12/39207, 8 November 2019.

169 AbRS, 7 January 2016, 201505169/1.

170 Rb, The Hague, Awb 14/12940, 23 January 2015.

171 Rb Den Bosch, Awb 11/19645, 31 March 2014.

172 Rb, Middelburg, Awb 12/11771, 31 July 2014.

173 Rb, The Hague, Awb, 15/9196, 29 March 2016; see also Rb, The Hague, Awb 15/7085, 1 October 2015.

either themselves directly or through the work of their underlings provided information or intelligence to other organizations; this was the case for majors in the Armenian National Security Service,[174] a major in Savak, the intelligence service of the Shah of Iran,[175] senior officers in the Iraqi intelligence service[176] and the Basij in Iran.[177]

Lastly, while virtually all cases re complicity deal with activities in the country of origin, there is one Dutch case where gathering information about a person living in a country of refuge was seen as objectionabe, namely carrying out such activities about Syrians in Germany on behalf of the Syrian intelligence service.[178]

3.3.4. High officials

In Canada, a number of high officials were found to be involved in international crimes usually based on the factor approach set out in Ezokola where the function of the person was given prominence. This happened in countries as diverse as Ethiopia (a senior official in the Relief and Rehabiliation Commission in the Mengistu regime during a time that this regime carried out a policy of starvation of the inhabitants of Eritra),[179] Nepal (an inspector in the police department),[180] Pakistan (an assistant sub-inspector of police in the city of Hyderabad[181] and a lieutenant colonel and a member of the joint Pakistani military and the police Field Interrogation Team in Karachi),[182] Albania (a high functionary in the interior department of the communist regime in Albania between 1961 and 1993),[183] Tunisia (a high functionary in the police between 1988 and 2013),[184] India (a senior member of the Punjabi police force)[185] and Rwanda (a lieutenant and acting battalion commander in the Rwanda Army between 1985 and 1994).[186]

In the UK, a person with a senior leadership role within an organization called Hizb-i-Islami in Afghanistan in the 1990's, which was a group involved in the civil war in Afghanistan between 1992 and 1996 was also found to be complicit.[187]

While in common law countries the liability of high officials was determined by reference to the jurisprudence of their superior courts rather than direct references to the principles of command or superior responsibility as developed by the international tribunals and the ICC,[188] on two occasions a Dutch court sought a more direct connection to these principles and on both occasions the person was originally held not responsible. In the first case, a district court came to this conclusion as the only evidence was that the person had a high position during the genocide in Rwanda and it was not clear whether the requirements that the person had influence and the ability to punish the persons involved were fulfilled.[189] In the second case, the Council of State overruled a lower court decision, which had found that a person who had been a platoon commander in Syria was not responsible because the crimes were committed by his soldiers after he had handed them over to another commander because according to the Council of State this person had not taken any measures to prevent these crimes from occurring by encouraging his soldiers from leaving although he knew they would commit international crimes.[190]

In other cases, some aspects of the concepts of command/superior responsibility were mentioned without reference to international jurisprudence as was the case of a senior official in the Basij in Iran where people under his command mistreated civilians and he did not used measures within his power to prevent or mitigate such mistreatment.[191] This was also the case in a situation in Eritrea where a person had command over others who were involved in torture and he did nothing to prevent it.[192]

In most cases in the Netherlands, complicity for high officials was arrived at in a more general fashion rather than examining the specifics of command/superior responsibility. In three parallel cases leaders of three different militia groups in the Ituri region of the Democratic Republic of the Congo who decided to co-operate with each other and together attack civilians in that region were found complicit because of their leadership and their influence on the soldiers of these groups who had been involved in massive international crimes.[193] In another case, the leadership role was much more direct, such as where a person during the Rwandan genocide ordered militia to set up roadblocks, was being kept informed of the progress of the genocide while at the same time also playing an important role with the RTML radio station and the newspaper Kangura, both of which had been vehicles of hate

174 Rb, Assen, Awb 10/42733, 17 January 2012 and Rb, The Hague, Awb 10/42733 and 10/43122, 26 January 2012.

175 AbRS, 3 February 2016, nr. 201503747/1.

176 Rb, Haarlem, Awb 12/26943 and 12/26950, 7 May 2013.

177 Rb, Zwolle, Awb 12/38326, 8 April 2014.

178 Rb, The Hague, NL19.6344, 26 August 2019.

179 Gebremedhin v. Canada (Citizenship and Immigration), 2013 FC 380.

180 Sapkota v. Canada (Citizenship and Immigration), 2013 FC 790.

181 Talpur v. Canada (Citizenship and Immigration), 2016 FC 822.

182 Ghazala Asif Khan v. Canada (Citizenship and Immigration), 2017 FC 269.

183 Bajraktari v. Canada (Public Safety and Emergency Preparedness), 2016 FC 1136.

184 Hadhiri v. Canada (Citizenship and Immigration), 2016 FC 1284.

185 Bedi v. Canada (Public Safety and Emergency Preparedness), 2019 FC 1550.

186 Musabyimana v. Canada (Public Safety and Emergency Preparedness), 2018 FC 50.

187 AN (Afghanistan) v Secretary of State for the Home Department [2015] EWCA Civ 684.

188 The *Rome Statute* contains a detailed description of these two concepts in article 28, which in turn was inspired by the caselaw of the ICTY and ICTR.

189 Rb, The Hague, SGR_14-9106, 9 July 2015, relying on ICTR jurisprudence.

190 AbRS, 25 May 2015, nr. 201506251/1, relying on ICTY and ICC jurisprudence.

191 Rb, Middelburg, Awb 12/20698, 1 August 2013.

192 AbRS, 6 November 2019, nr. 201808972/1; interestingly, reference is made to the Ezokola case of the Supreme Court of Canada.

193 AbRS, 23 June 2014, nr. 201300768/1; AbRS 27 June 2014, nr. 201310225/1 and AbRS, 27 June 2014, nr. 201310217/1; the reasoning in these cases is similar and resembles somewhat the analyis of co-perpetration mentioned in article 25(3)(a) of the *Rome Statute*, which also requires a leadership component according to ICC jurisprudence, see Currie and Rikhof, above note 4, 730-736.

propaganda in 1994[194] as well as in the case of a senior official in a paramilitary unit in the Central African Republic.[195] Lastly, there are the cases where a person in a leadership position was responsible for the co-ordination and logistics of the use of so-called "hell canons" in Aleppo in Syria[196] and the head of the logistics department in charge of providing large amounts of weapons and munition in Afghanistan[197] while a brigadier general in Afghanistan in his function as the head of political affairs of various units in the army facilitated the security forces in carrying out their nefarious activities.[198] At a lower level there was the case where a person had a co-ordinating role in ensuring safety in a neighborhood in Bagdad.[199]

In Belgium, persons with senior positions, such as a high official in the Baath party[200] a unit head in the Mukhabarat, a security organization during the regime of Saddam Hussein,[201] as well as an officer in the Eritrean army imposing harsh penalties on the soldiers for which he was responsible,[202] were found complicit. An interesting case, again out of Iraq, involved a senior member of Iraqi intelligence service who was found involved in crimes against humanity partially because of an attempt to murder prominent Kurdish opposition members as part of an ambush of a convoy, which was not successful,[203] while attempt is a form of liability in ICL,[204] it has never been used in that context.[205]

In France there have been three cases involving senior officials, twice involving the head of a battalion during the Rwandan genocide[206] and once with respect to a high-level member of the PKK in charge of logistics.[207]

3.3.5. Factor approach

In common law countries the factor approach was used in both Canada and the UK. In Canada it was applied to exclude a person who had been a recruiter for the Council for the Defense of Democracy/Forces for the Defense of Democracy in Burundi between 1998 and 2003 (while also reiterating that it was not necessary to identify specific crimes committed by organizations involved in crimes against humanity).[208] As well, a person who had worked for Afghani National Police in its prison system between 1980 and 1992 as well as from 2001 to 2013 was found to be complicit based on his role of transferring prisoners as well as his administrative work, which contributed to the efficiency of a system engaged in crimes against humanity, namely the torture of those prisoners.[209]

In the UK, an appeal tribunal was of the view that the possible involvement of a member of the Ba'ath Party in 2001 to 2003 in Iraq who had not been excluded by the first level tribunal, should have been based not only the final rank and position he had occupied in those years but also his role in possible war crimes in the early nineties.[210]

In civil law countries, the factor approach was applied both in France and the Netherlands. In France, it was used against a commander of the presidential guard of the head of state of the Central African Republic because he belonged to an organization known for numerous human rights violations, he had knowledge of these violations and he did not disassociate himself from this organization.[211] The same factors were in play for a colonel and head of medical services in a hospital in Syria, in which capacity he visited a couple of times a week prisons where torture occurred; his length of service, no disassociation, knowledge as well the fact that being present provided encouragement to the torturers were sufficient.[212] In another case out of the Central African Republic, a person who trained child soldiers for a militia who were involved in human rights violations was found complicit because of his importance in the military hierarchy, which was the result of his role of trainer, his nationality and his family ties with one of the leaders of the militia.[213]

In the Netherlands a person who had been a member of the gendarmerie in the Ivory Coast, which had been loyal to the ex-president Laurent Gbagbo in a military camp in Abidjan during the 2010–2011 election crisis and who was also involved in the preparation and execution of attacks against civilians and UN peacekeepers, was considered complicit.[214]

3.3.6. Cases in the periphery

In Australia complicity was found in a situation of facilitating the travel of Black Tiger missions of the LTTE in Sri Lanka into enemy controlled areas in the knowledge that the LTTE intended to bomb civilian targets.[215]

In Canada a number of activities amounted to complicity, such as providing acid by a chemistry student to the Shining Path organization in Peru, which used the acid to make bombs to carry

194 Rb, Oost-Brabant, SHE 18/2181, 14 February 2020.

195 Rb, The Hague, Awb 15/15956, 9 March 2016.

196 AbRS, 29 August 2018, nr. 201803118/1.

197 AbRS, 10 December 2014, nr. 201404725/1.

198 Rb, The Hague, NL16.838, 6 October 2016.

199 AbRS, 11 March 2014, nr. 201210609/1.

200 CCE, no 94846, 10 January 2013.

201 CCE, no 138035, 6 February 2015.

202 CCE, no 210729, 9 October 2018.

203 CCE, no 210830, 11 October 2018; it should be pointed out that the reference to attempt is a bit confusing as it is discussed at first instance as part of 1F(b) but at the same time relying on article 25(3) of the *Rome Statute*.

204 For the most recent iteration, see the *Rome Statute*, article 25(3)(f).

205 See Currie and Rikhof, above note 4, 742-743.

206 CNDA, 15 May 2018, 11013546, M.N. and CNDA, 20 February 2019, 14033102, M.G.

207 CNDA, 23 June 2016, 12025076, M.K.

208 MR. MJS v. Canada (Citizenship and Immigration), 2013 FC 293.

209 Sarwary v. Canada (Citizenship and Immigration), 2018 FC 437.

210 [2015] UKAITUR AA071322015.

211 CNDA, 7 October 2014, 13003572, M.B.G.; see also for a person associated with the LTTE, CE, 3 December 2020, 433161, M.S. and for a member of Gaddafi's female bodyguard in Libya, CNDA, 2 June 2020, 18031988, Mme M. for similar factors.

212 CNDA, 30 October 2015, 15000096, M.A.

213 CNDA, 9 November 2018, 17009037, M.I.

214 AbRS, 28 December 2014, nr. 201302334/1.

215 GZCK and Minister for Home Affairs (Migration) [2019] AATA 656.

out attacks against civilians[216]; standing guard on a pedestrian bridge in Sarajevo during the war between Serbia and Croatia[217]; repairing vehicles belonging to ISIS in Syria[218]; collecting and reporting intelligence on foreign journalists, for purposes that may have included intimidation, threats and violence in Venezuela.[219]

In Belgium a judge in Afghanistan under the Najibullah regime, who was involved in sham proceedings with a dearth of evidence and confessions obtained under torture while also imposing disproportionally heavy sentences, including the death penalty was found to be complicit.[220]

In France, four cases leading to complicity were the result of fundraising efforts in France for the LTTE, one of which had been convicted for this activity in a criminal court[221]; the latter situation, exclusion after a criminal conviction for fundraising also occurred in a case where this was done on behalf of the ACSAP, a terrorist organization in Turkey.[222]

In the Netherlands, being involved in the weapons-for-diamond trade between RUF rebels in Sierra Leone and the Taylor government in Liberia[223]; transporting persons on suicide missions in Sri Lanka[224]; involvement in demonstrations in Syria, either by driving demonstrators toward security services[225] or by using violence to prevent people from escaping[226]; being an interpreter for the Syrian security services[227]; being in charge of the budget for the division of the Center d'Etudes et de Recherches Scientifiques (CERS) in Syria, which was responsible for the production and storage of chemical weapons;[228] being a soldier in Syria who participated in attack on Hama in 1982 as part of a tank battalion, which had a crucial role in this attack[229]; being a member of the MDR in Rwanda during the genocide, in which capacity he carried out propaganda and information activities[230]; being an employee at a communication and operation center in a Syrian security service, in which capacity he transmitted orders to field units[231]; being a radar operator for the Syrian air force at a time that it was involved in attacking civilians[232]; and creating communication codes for and providing Hezbollah fighters in Palestine with food as well as participating in armed patrols[233] all lead to a conclusion of complicity.

3.3.7. Cases where no complicity was found

In Canada a number of cases complicity was not found as no link between the person's activities and the commission of crimes against humanity was found as in the situation of a person who was only present at the university of Butare during the Rwandan genocide[234]; being a guard at a barrack in Prijedor in Bosnia during an episode of ethnic cleansing[235]; serving in a different department of the Egyptian National Police then where human rights abuses were carried out.[236] In other cases, it was held that the person was not complicit because he had no knowledge of the commission of international crimes as with a soldier in Bosnia between 1991 and 1996[237] and a sergeant in the Directorate of Security of the National Army of Afghanistan in 2009.[238] Lastly, at times, the contribution was deemed not significant enough to fulfill the requirement for complicity as was the case of a public relations officer in the Nigerian army[239] or when managing information holdings and protecting information concerning political opponents in the Democratic Republic of the Congo.[240]

In the UK it was held that a doctor involved in assisting torturers by treating victims of torture was found eventually not to be complicit due to the lack of knowledge, which persons he treated would be subject to this treatment.[241]

As with common law jurisprudence, civil law countries have also declined to find a person complicit for two distinct reasons, namely that there was no nexus between the person and the international crimes committed by others or the level of contribution was too low or too minimal to meet the significant or substantive threshold required in the conceptual approach.

With respect to the lack of nexus, this was applied in Belgium in the situation of a member of a secret policy organization in Iraq during the Saddam Hussein regime[242] and, again in Iraq, where an Iraqi member of the special operations forces who worked with the American army, were found not to have a connection with the detention/interrogation centers where torture occurred.[243] A lack of nexus was also found in France where it was established that a person was gathering information on political opponents for the police in the Democratic Republic of the Congo but as there was

216 Moya v. Canada (Citizenship and Immigration), 2014 FC 996.

217 Jelaca v. Canada (Citizenship and Immigration), 2018 FC 887.

218 Massroua v. Canada (Citizenship and Immigration), 2019 FC 1542.

219 Villegas v. Canada (Citizenship and Immigration), 2020 FC 736.

220 CCE, no 216093, 30 January 2019.

221 CNDA, 15 July 2014, 11016153, M.S.; CNDA 4 July 2018, 16040253, M.J.; CNDA, 14 December 2018, 17034992, M.R.; CNDA, 14 December 2018, 17030884, M.M..; the first case mentioned here is the one with the conviction, which was confirmed on appeal in CE, 13 March 2020, 423579, B.; see also CE, 19 June 2020, 427471/419803, M.M.

222 CNDA, 11 October 2018, 17014478. M.B.

223 AbRS, 28 May 2014, nr. 201303363/1.

224 Rb, Amsterdam, Awb 12/16421, 19 July 2013.

225 AbRS, 17 October 2018, nr. 201802357/1.

226 Rb, The Hague, Awb 18/5312, 1 October 2019.

227 AbRS, 26 October 2016, nr. 201509493/1.

228 AbRS, 29 June 2016, nr. 201507522/1.

229 Rb, The Hague, NL18.14281, 10 May 2019.

230 Rb, The Hague, Awb 13/29202, 13 March 2015.

231 Rb, The Hague, Awb 14/2126, 9 December 2015.

232 RB, The Hague, Awb, 15/11496, 8 December 2015.

233 Rb, The Hague, NL18.10336, 7 November 2018.

234 Nikuze v. Canada (Citizenship and Immigration), 2013 FC 33.

235 Blazic v. Canada (Citizenship and Immigration), 2016 FC 901.

236 Gerges v. Canada (Citizenship and Immigration), 2018 FC 106.

237 Velimirovic v. Canada (Citizenship and Immigration), 2019 FC 1156.

238 Sailab v. Canada (Public Safety and Emergency Preparedness), 2020 FC 773.

239 Canada (Citizenship and Immigration) v. Hammed, 2020 FC 130.

240 Canada (Citizenship and Immigration) v. Katanda, IMM-8371-13, 28 January 2015.

241 MAB (Iraq) v The Secretary of State for the Home Department | [2019] EWCA Civ 1253, followed by AB (preserved FtT findings; Wisniewski principles) Iraq [2020] UKUT 268 (IAC).

242 CCE, no 104074, 31 May 2013.

243 CCE, no 128506, 2 September 2014.

no consequences for other people as it only amounted to contra espionage no exclusion followed.[244] Lastly, being a soldier in Syria in a conflict zone without evidence that unit he belonged to had been involved in crimes against humanity had the same result.[245]

In the Netherlands, a person in Sri Lanka who assisted in the transport of satellite phones and medication to the LTTE was also absolved from involvement due to a lack of connection between this activity and possible crimes by the LTTE.[246] As well, an aircraft mechanic who serviced airplanes in the Sudanese air force was found not to be complicit as the planes he was assigned to were training planes and not the fighter planes, which were used to carry out bombardments of the civilian population,[247] which was also the case for an internet administrator in Syria as the internet can be used for both beneficial and nefarious purposes even in a country rife with human rights abuses.[248] Also a person who had worked for organizations who in turn carried out activities for the CIA in Afghanistan, which might have been involved in international crimes, was found not to be complicit as the organizations he worked for also conducted activities for other American entities.[249] The same was said about a trader in oil in Jordan during the international oil embargo against Iraq and the Oil for Food Program who did not pass his profits on to Iraq while Iraqi people lacked in food and medication as there was no causal connection.[250]

With respect to the insufficient level of contribution, the operating of liquor stores on behalf of the LTTE[251]; being a driver in the Syrian army during raids against the Muslim brotherhood[252] and a being soldier in the Syrian army[253] were found to fall into this category in Belgium. In the Netherlands, for a soldier in Syria who participated in an attack on Hama in 1982 by conducting house searches, it was determined that his exact involvement was not clear[254]. While these cases were rather clear cut, one other case in Belgium could be seen as a bit more controversial in that a tribunal was of the view that a bodyguard of the police chief in Latakia in Syria, who had been involved twice in the arrests of smugglers and drug dealers, part of which involved some violence, such as hitting persons with an electric baton and a gun as well as on one occasion taking part in pouring hot water over an arrested person, was not complicit as his actions did not amount to a substantial contribution[255].

244 CNDA, 10 October 2013, 6014596, M.B.

245 CE, 27 November 2020, 428703, M.A; see also CE, 19 June 2020, 431731, OFPRA c. M.A.

246 Rb, The Hague, Awb 17/4891, 22 February 2018.

247 Rb, The Hague, Awb 15/19296, 10 May 2016.

248 Rb, The Hague, Awb 14/26349, 18 September 2015.

249 Rb, The Hague, NL17.10150 VK, 26 February 2018.

250 Rb, Overijssel, Awb 15/2845, 17 July 2015.

251 CCE, no 120077, 4 March 2014.

252 CCE, no 121274, 21 March 2014; see also CCE, no 145401, 12 May 2015.

253 CCE, no 122130, 4 April 2014.

254 Rb, The Hague, Awb 17/4891, 22 February 2018.

255 CCE, no 122 812, 22 April 2014.

4. Conclusion

The interaction between exclusion law and ICL has followed a different course in the area of crimes compared to that of extended liability and it is unlikely that this will change in the future.

As indicated above the national exclusion decision makers have followed ICL quite closely when setting out the chapeau elements for war crimes and crimes against humanity, namely the existence of an armed conflict or the commission of crimes in a systematic or widespread manner. This connection was originally based on the language of the various statutes of the international tribunals and court, primarily the ICTY, the ICTR and the ICC, followed by a more sophisticated reliance on the jurisprudence of these institutions, especially that of the ICTY.

The use of these international instruments and jurisprudence present an alternative picture in terms of the underlying crimes, where originally exclusion was in most cases based on allegations of murder or torture. As the national decision makers became more familiar with ICL, they started to pay attention to other international crimes as well and were quite willing to rely on international precedents but, if not available, were equally willing to develop their own parameters of these crimes based on the extrapolation of other precedents in international law, such as IHL.

The area of extended liability has had yet another approach. Forms of liability where initially based on a combination of post Second World War precedents, domestic criminal law as well foreign refugee jurisprudence, which then developed into a *sui generis* approach, based in most countries on the unique personal and knowing participation test. Only in the last few years has ICL become a source of inspiration to give the notion of accountability an international flavor as exhibited by judgments at the highest level in the UK, New Zealand and Canada. Relying on international jurisprudence, the courts in the UK and Canada developed the new test of voluntary, personal and significant contribution, accompanied by a factor approach. Lower-level decision makers in these countries as well as Australia and New Zealand have applied the overarching test in most cases while also at times using or the factor approach by utilizing this new *sui generis* approach without delving further into international jurisprudence in this area. Civil law countries who had already developed such a unique test for extended liability continued to do so without very little reference to international criminal law with the exception sometimes for the doctrine of command/superior responsibility.

Author's note

A more detailed examination of the subject matter of this article can be found in Rikhof (2023).

Data availability statement

The raw data supporting the conclusions of this article will be made available by the authors, without undue reservation.

Author contributions

The author confirms being the sole contributor of this work and has approved it for publication.

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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