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Docket: IMM-2795-08

Citation: 2009 FC 881

Ottawa, Ontario, September 9, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MAURICIO CERVERA BONILLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated May 28, 2008, wherein the Board found the applicant was excluded from refugee protection by reason of Article 1F of the United

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

[2] The applicant requested that the decision be set aside and the matter referred back to a newly constituted panel of the Board for redetermination.

Background

[3] Mauricio Cervera Bonilla (the applicant), was born in 1966 and made a claim for refugee protection in Canada with his wife and three children. They are citizens of Colombia. The Board found the applicant's wife and children to be Convention refugees and therefore in need of refugee protection. The applicant was excluded from refugee protection, as stated above. During the determination of his refugee claim, the Minister intervened seeking a determination that the applicant was a person to be excluded by reason of Article 1F(a) of the Convention. The Minister participated in the claim based on the allegation that the applicant was complicit in crimes against humanity during his service with the Colombian Army.

[4] In 1984 when the applicant was 17 years old, he joined the Colombian army to study civil engineering and gain financial stability. He resigned from the military nine years later after marrying his present wife.

[5] While in the Colombian army, the applicant initially received two years of initial training and attained the rank of 2nd Lieutenant.

[6] In January 1987, the applicant was assigned to the 3rd Battalion of engineers within the 3rd Brigade in the areas of Palmira, Valle in the Uraba region as the leader of a platoon. The applicant testified that although this was not officially classified as a red zone, it was nevertheless considered to be a red zone because of the presence of M 19, a Colombian guerrilla movement. The applicant testified that his role included administration, delivering instructions, coordinating the technical section, keeping track of the weaponry of each soldier and performing guard service once a week at military detention facilities. According to the applicant, his platoon was not involved in military conflicts but in providing support to the military by way of setting up bridges to support military operations.

[7] In December 1988, the applicant testified that he was transferred to the 13th Brigade of the 4th Division, is a counter-guerrilla battalion. The role of this battalion was to take part in military operations, maintain peace and military control and make contact with subversive groups and to reduce their number. The applicant was again commander of this platoon which had 32 infantry men. Initially the applicant spent one and a half months training and then his company was transferred back to the Uraba region in Antioquia. The applicant testified that this region was under control of General Guzman and that guerrilla groups, including the Fuerzas Armadas Revolucionaries de Colombia (FARC) had been very active there. It was considered a red zone as many military and police had been killed. The battalion was sent there to cover for troops that had

been mobilized elsewhere in the region. In the year before the applicant arrived there, there is alleged to have been mass killings of banana workers and peasant farmers by paramilitary groups backed by military officers.

[8] In the applicant's Personal Information Form (PIF), the applicant states that in March of 1989 he was involved in an operation for which he was later accused of participating in the torture of a union member and a peasant at a farm house. The applicant testified in the hearing that he was not involved in questioning these individuals in the house, rather he was securing a perimeter outside of the house where the men were being held before they were ultimately detained elsewhere. The applicant claimed that he did not have a view of the house and had no knowledge of what took place in the house during the time the individuals were held. The applicant testified that his superior, Captain Velandia, was suspicious that the men were hiding weapons. The two individuals were apparently freed after several hours and the direct intervention by the Attorney General.

[9] The applicant remained in Uraba for nine months following this incident during which time the People's Liberation Army (EPL) was active and attacking military units. The applicant acted in Captain Velandia's position for six months while the captain recovered from combat injuries but claimed that his platoon never had any direct contact with any subversive elements during that period.

[10] Between January and March 1990, the applicant testified that his platoon took part in two search and seizures of narco-producer's properties which resulted in seizing millions of dollars and rifles, munitions and explosives.

[11] The applicant stated that his name and Captain Velandia's names were given to the Attorney General of Colombia as being in charge of the operation at the farm house. However, the applicant states that he was unaware that he was being accused of torturing the two detainees until May 1993 when he was contacted by a military officer who informed him that his name had appeared in a book published in Germany called, "Terrorisme de estado en Columbia" which indicated that he had been involved in the torture of two people in the Uraba region.

[12] The applicant was reassigned away from this region in June 1990 when he was appointed as a platoon commander of a cadet battalion. He taught courses to cadets as well as fulfilled courses necessary to become captain himself.

[13] In 1993, the applicant resigned from the army and became involved in security management positions for private companies.

[14] The claim for refugee protection was based on the threats the applicant received after working for two different companies: Cemex Colombia and Carulla Vivera. During his work for Cemex Colombia he became aware that he was on an assassination list of the FARC guerrillas. Carulla Vivera is a large department store chain in Colombia. During his work as a security

manager, the applicant received repeated communications from FARC guerrillas asking for payment of vacuna (war tax). In 2000, the negotiations failed and the guerrillas obtained the name of the applicant who up until this point had been negotiating anonymously. The FARC informed the applicant that he was considered a military target. As a result, the applicant resigned his position and fled with his family from Colombia.

Board's Decision

[15] The Board issued a lengthy decision outlining the reasons for the exclusion of the applicant and the inclusion of the applicant's wife and children as Convention refugees. The decision to exclude the applicant from refugee protection is the only portion of the Board's decision subject to review.

[16] At the outset, the Board set out the legal basis for exclusion. Section 98 of the Act states that a person referred to in sections E or F of Article 1 of the Convention is not a Convention refugee or person in need of protection. The purpose of Article 1F is to exclude from the benefit of refugee protection, persons who have breached international norms of acceptable behaviour. The burden of proof rests on the Minister and this burden was defined in the Federal Court of Appeal decision in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 as "serious reasons for considering" or "reasonable grounds to believe" and as in *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297.

[17] The Board noted that crimes against humanity as defined in Article 7 of the *Rome Statute of the International Criminal Court* (the Rome Statute) consists of:

> …imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, other inhumane acts of a similar character internationally causing great suffering, or serious injury to body or to mental or physical health.

[18] The Board cited *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 43 as an authority for accepting the definition of "torture" found in Article 1 of the *Convention Against Torture*. That definition is also incorporated by reference in paragraph 97(1)(a) of the Act.

[19] Within this framework the Board sought to determine "whether the claimant is legally responsible as an accomplice for the crimes against humanity perpetuated by the Colombian military during his years of service with that organization".

[20] The Board then addressed how claimants can be liable by way of their role as accomplices in such crimes as crimes against humanity. This attachment of responsibility is supported by Article 6 of the Charter of the International Military Tribunal (UNHCR Handbook, Jan./88, Annex V, p. 88) (Article 6), and is referred to in Article 1(F)(a) of the Convention.

[21] Article 6 states:

> Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [including crimes against humanity] are

> responsible for all acts performed by any persons in execution of such plan.

[22] The jurisprudence followed by the Board in establishing the "principle of complicity of an accomplice" includes *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, 27 Imm. L.R. (3d) 1, *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 and *Sivakumar* above.

[23] The following outlines the most important parts of the cases cited by the Board. In *Ramirez* above, "personal and knowing participation" and a "shared common purpose" were established as essential elements of complicity. In *Harb* above, it was held that "complicity by association" does not require personal commission of such crimes. As well, in *Harb* above, denial, even if credible, is held to be not sufficient to negate the presence of a common purpose of committing crimes against humanity. In other words, "[a] plaintiff's actions can be more revealing than his testimony and the circumstances may be such that it can be inferred that a person shares objectives of those with whom he is collaborating". *Penate* above, defines shared common purpose as:

> …As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with the safety of himself) but who lends his active support to the group will be considered an accomplice…

[24] In conclusion, the Board stated that an analysis of the following six factors enumerated by the Federal Court will determine whether or not an applicant is complicit in crimes against humanity:

1. Nature of the organization;
2. Method of recruitment;
3. Position/rank in organization;
4. Knowledge of the organization's atrocities;
5. Length of time in the organization; and
6. Opportunity to leave the organization.

[25] At this point in the decision, the facts in this case were examined by the Board under each of the six factors stated above.

[26] First, the Board examined the nature of the organization in question: the Colombian army. The most important elements brought forward included: evidence that it acted with impunity in cases of human rights cases violations; the nature and culture towards the treatment of civilians; evidence of torture committed by the Colombian army; evidence of killings and enforced disappearances; paramilitaries that committed crimes against humanity and were known to collaborate with the Colombian army; and the tactics used by the Colombian army during the campaign known as the "war on drugs". The Board found documentary evidence in regard to each element that suggests that the Colombian army committed crimes against humanity including torture, killings, and disappearances of Colombian civilians.

[27] The Board then turned to some more specific facets of the crimes against humanity committed by the Colombian army where the applicant was alleged to be complicit.

[28] Substantial documentary evidence supported the conclusion that paramilitary groups backed by military officers carried out torture and mass killings in a systematic and widespread manner in the region of Uraba at the time the applicant was assigned to that region. The massacres "received nation wide and international attention and ended in impunity for the members of the military".

[29] Second, the Board examined the method of recruitment of the applicant and noted that the applicant testified that he voluntarily joined the army in January of 1984 when he was 17 years old for the purposes of studying civil engineering and gaining financial stability.

[30] Third, the Board examined the position and rank the applicant had in the army. The Board concluded that the applicant was a middle-ranking officer and that he was able to advance in his rank because he was ". . . a faithful employee, and because he upheld and followed the Colombian army's principles and mandates, . . .". The time that the applicant spent in the Uraba region as a commander of a platoon and as an acting captain was noted by the Board as it related to the connection that *Sivakumar* above at paragraph 10, makes between rank and complicity:

> In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared an organization's purpose in committing that crime. Thus, remaining in an organization in a

> leadership position with the knowledge that the organization was responsible for crimes against humanity may constitute complicity.

[31] Fourth, the Board explored the extent of knowledge the applicant had of the Colombian army's atrocities. Taken as a whole, the Board did not find it plausible that the applicant as a mid-ranking officer did not have knowledge of the atrocities committed by the Colombian military in the nine years of his career. The Board found that the applicant "turned a blind eye" to the atrocities to the extent of being "wilful[ly] blind" and cited *Sivakumar* above, and *Cortez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 470, for the proposition that wilful blindness implies a culpability beyond possessing knowledge of the atrocities.

[32] The Board rejected the applicant's arguments that he was unaware of the atrocities because of the regions where he served and the positions he held. The Board also noted that one did not have to be in these positions to know of the atrocities committed by the Colombian army. The President of Colombia, Cesar Gavira, publicly spoke of the reputation of the army in this regard and torture was an issue of public discussion in Colombia.

[33] Also related to the applicant's knowledge of the army's atrocities were the allegations that he was involved directly in torture in the Uraba region in March of 1989. As supported by the documentary evidence, the Board stated that the applicant's claim that he was not aware of an investigation of him related to these events is consistent with a common pattern in Colombia. The Board also stated that there is no persuasive evidence to suggest that a book written in Germany alleging the applicant was involved in torture at the farmhouse was written to discredit him and his

captain. The Board rejected the applicant's testimony that the union fabricated the allegations in order to discredit the military. The Board stated that this is implausible given that civilian and union members were commonly perceived to be guerrilla sympathisers and the same union members had already been attacked the year before by the military and many were massacred and had much to fear in making any report of torture by the army.

[34] According to the Board, the applicant had to have known what was going on in the farmhouse even if he was located outside when the men were held. The applicant was the second highest ranking officer in that operation and led a platoon of professional soldiers. In conclusion, the Board found that the applicant's lack of knowledge was not possible given that he had a lengthy career in the army, that torture was so widely discussed in Colombian society and that he was specifically accused in a book of torturing while he was stationed in the Uraba region. The argument by the applicant that allegations against the army were never proven goes more to the inadequacies of the Colombian justice system, said the Board, than the suggestion that the atrocities did not take place.

[35] Fifth, the Board found that the long tenure of service in the Colombian army suggests that the applicant "shared a common purpose" with that of the organization and as such, had complicity in human rights abuses committed by the army during that time.

[36] Sixth, under the heading “Opportunity to Leave”, the Board noted that the applicant remained in the military for several years after his posting to the Uraba region and only left the military when he was married and did not want to make his wife a widow.

[37] The Board stated that although they do believe that the applicant was involved in torture in March 1989, the applicant was complicit in crimes against humanity notwithstanding that event. The Board believes that he had knowledge of the massacres of farmers in the Uraba region the year before he was stationed there but did not resign. Nor did he resign after the incident in March 1989 or the confrontation with guerillas involving his superior, Captain Velandia. And, he did not resign after he was moved to Bogota in June 1990, in the aftermath of his time in the Uraba region. In fact, the Board states that his reason for resigning from the army were related to his new marriage and the inherent risks in serving in the military rather than any concern over the atrocities in terms of serious human rights abuses being committed by the Colombian army.

[38] In conclusion, the Board found that the applicant was a “knowing participant of the crimes perpetuated on a widespread and systemic basis against civilians by the Colombian army” as a middle ranking officer for about seven years of the nine he served, including time as an acting captain.

[39] The Board found that the applicant had full knowledge of the widespread and systemic crimes being perpetrated by the army against civilians and turned a blind eye to the atrocities and as such, falls within the parameters of Article 1F(a) of the Convention. The serious reasons for

considering that the applicant was an accomplice in crimes against humanity during his service with the Colombian army excludes him from refugee protection under paragraphs 97(1)(a) and 97(1)(b), based on section 98 of the Act.

Applicant's Written Submissions

[40] The standard of review, according to the applicant is reasonableness for the Board's findings of fact and correctness for the Board's interpretation of what constitutes complicity in crimes according to law.

[41] The applicant brings forward preliminary issues in the analysis of the facts by the Board.

[42] The applicant suggests that the Board was in error when it did not identify any particular unit or brigade within the Colombian army that would implicate the applicant in crimes against humanity. Instead, the applicant submits the Board uses documentary evidence that "speaks broadly" about the Colombian military, army, security forces and various other agencies.

[43] The applicant suggests that the Board reverses the onus to the applicant by expecting the applicant to prove that he was not involved in the March 1989 torture event.

[44] The applicant also suggests that the Board's finding of knowledge of atrocities of the Colombian army and the applicant's wilful blindness is illogical given that they did not question the applicant's credibility.

[45] The applicant also submits that the Board was wrong to conclude that the applicant was involved in an incident in January 1990 without any evidence to support that conclusion. The applicant submits that he was seizing drugs during that period and was not fighting guerrilla forces.

[46] The main role of the applicant was not in military conflicts but in doing work unrelated to military operations such as setting up portable "baily" bridges for the civilian population rather than the military as stated by the Board.

[47] The applicant takes issue with the characterization of the applicant's rank in the military as middle rank or higher in the last six years. He states that he held the rank of 2nd Lieutenant, which was the second lowest listed rank of officers.

[48] The applicant submits that the definitions of crime against humanity post-date the applicant's alleged involvement. The applicant also questions whether crimes against humanity can be committed when Colombia was fighting an internal conflict.

[49] Next, the applicant submits that the Minister failed to meet the burden of proof that there were "serious reasons for considering" that the applicant had committed crimes against humanity.

While the applicant concurs with the Board that “serious reasons for considering” and “reasonable grounds to believe” are basically an equivalent standard set by the Federal Court in *Sivakumar* above, the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] S.C.J. No. 3 at paragraph 114 stated that reasonable grounds to believe requires “more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities” and that the evidence should create an objective belief “based on compelling and credible information”.

[50] The applicant submits that the Board failed to refer to all of the elements that elevate a crime to an international crime against humanity as enumerated as follows in *Mugesera* above, at paragraph 119:

> 1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
>
> 2. The act was committed as part of a widespread of systemic attack;
>
> 3. The attack was directed against any civilian population or any identifiable group of persons; and
>
> 4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her comprised a part of that attack.

[51] The applicant is also critical of the Board’s reasoning given the principles set out in *Ardila v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1518, [2005] F.C.J. No. 1876 at paragraph 9. One of the principles highlighted is where consequences of exclusion are potentially so

"dire", as in this instance, the expectation that reasons are given in unmistakable terms with a thorough consideration of the facts and issues is greater.

[52] The other principle from *Ardila* above, emphasized by the applicant is that mere membership in an organization is insufficient for exclusion, except where the organization has a limited brutal purpose. The Board must focus on the specific acts of the person and determine whether the person and the organization shared a common purpose.

[53] Since the Board did not properly identify the part of the organization in which he was complicit, the applicant takes issue with the Board using the words "army" and "military" interchangeably and that security forces should be lumped in with these groups. He states that this does not provide the specificity required as in *Corrales Murcia v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 287, [2006] F.C.J. No. 364 where the Federal Court of Appeal stated that when an organization's purpose goes beyond a bare brutal one, it is imperative to identify the proximity to the part of the organization the applicant was involved with. This broad brush of indicting all facets of the Colombian army is also evident in the Board's evaluation of the impunity of the army in atrocities. In *Ardila* above, at paragraph 19, a broad analysis was found to be in error where "mere membership in a 270,000 army would exclude everyone".

[54] The applicant states that he cannot in law be complicit in all acts committed by the Colombian army, air force and navy as well as the National Police, the Administrative Department of Security (DAS) and the Prosecutor's General's Corps of Technical Investigators (CTI).

[55] In the case of *Bedoya v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1092, this Court stated that the applicant could not be said to have "personal knowledge and knowing participation" and "a shared common purpose" with the entire Colombian army. In that case, members of the Colombian army served from March of 1985 until May 1994 and participated in active operations against FARC during the same time period as the applicant here. The Court held that the "unit/brigade" to which the applicant was assigned must be implicated.

[56] In another case, *Bonilla Vasquez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1302, a major in the Colombian army from 1989 to 2004 was found to be excluded for being aware of crimes against humanity or wilfully blind to them. The Court held that it was necessary to determine what "operations" were committing these crimes.

[57] The applicant addresses the issue of the March 1989 allegations of torture and states that *Bedoya* above, is relevant when considering the "probative value" of the evidence. *Bedoya* above, states that evidence of newspaper clippings and documentary reports are not the best evidence and may not meet the "less than balance of probabilities" test required for exclusion. In *la Hoz v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 762, the Federal Court stated that the Board reversed the onus and incorrectly applied the test for complicity. At paragraph 21, the Court states, "...the Board seems to have concluded that the male applicant should be excluded because he did not provide convincing evidence that he did not commit these acts".

[58] The applicant submits that he testified at length regarding his time in the Uraba region and included it in his PIF in detail. The applicant denies he was ever involved in a case of torture in March of 1989 in the Uraba region and it was not until four years after the alleged torture took place that the applicant became aware of any allegations against him.

[59] The applicant's evidence is that he arrived at a banana plantation where weapons were believed to be hidden and searched the house. He left his captain in the house with seven people from the house and secured a perimeter around the house returning five hours later. When the applicant arrived back at the army base with the two prisoners, the Procuraduria (the Attorney General's office in Colombia) took possession of them. Two of the persons in the house were banana union workers. The applicant states that the banana union immediately went to the Procuraduria to have them intervene on the union workers' behalf. At that time, the applicant and the commanding officer were questioned and the applicant alleges that he was never contacted further about the incident or as aware of any further investigations.

[60] For the remaining time in the Uraba region, the applicant contends that he acted in a captain's position for six of the nine months but never had any direct contact with any subversive elements. Instead, the applicant was tasked with searching for and seizing weapons belonging to narco-producers and traffickers.

[61] However, instead of the Board focusing on whether the Minister met the burden of showing "serious reasons for considering" that the applicant was complicit in war crimes, the Board focused

on the evidence that the Attorney General intervened but never launched an investigation or found proof of torture. In *La Hoz* above, the Federal Court stated that '[t]he Minister cannot meet its burden through inferences...".

[62] In summary, the applicant states that of nine years in the army, only three were spent in the field in a low ranking officer position. Given this evidence, he states that "he knew of no systemic violations of human rights abuses or an army policy to employ systemic human rights violations". He also submits that "he had no first-hand knowledge of torture" and "was unaware that the Colombian army had a reputation for perpetrating crimes against humanity, including killings, torture and enforced disappearances during the time he was in the army".

[63] The last matter that the applicant addresses involves the interpretation of the law governing exclusion. There are two main issues in this regard. The first issue is whether the applicant can be excluded based on definitions of crimes against humanity that come from statutes that did not exist at the time of the alleged incidents. Can these laws be applied retroactively? (see *Ventocilla v. Canada (Minister of Citizenship and Immigration),* 2007 FC 575). The second issue is whether civilian casualties are crimes against humanity when a country is involved in an internal conflict. This has two dimensions. One, the perspective that civilians are not necessarily civilians in the sense of the word as it was regarded for the Conventions and international statutes against torture and crimes against humanity when a country is in a conflict of the nature of the one in Colombia. Two, some international laws such as the *Rome Statute* have been found not to encompass war crimes when they are committed in the context of an armed conflict as was the finding by the Federal Court

in *Ventocilla* above, regarding the armed conflict in Peru between 1985 to 1992. In the *Rome Statute*, which contains a retroactivity clause, a reading of the *Crimes against Humanity and War Crimes Act* must be an international crime "at the time and in the place of its commission".

[64] The applicant submits that the Board erred in law, evaluated on a standard of correctness, when it used the *Rome Statute* retroactively to attribute crimes committed by the Colombian army to the applicant. The Board's lack of reference to the four elements set out in *Mugesera* above, and the Board's assumption that crimes against humanity can occur in internal conflict were reviewable errors.

Respondent's Submissions

[65] The respondent submits that the Board was not unreasonable when it determined that the applicant should be excluded from refugee protection because of his complicity in torture as stated in a foreign news report and because he was an accomplice by way of his involvement in the Colombian army who was committing crimes against humanity. They state that the sole issue is the reasonability of the Board's determination that there were serious reasons to believe that the applicant had been an accomplice in crimes against humanity.

[66] The respondent's arguments regarding the standard of review centre around the "move towards a single reasonableness standard" (see *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9) and the renewed emphasis on employing an attitude of deference and respect. For the respondent,

Dunsmuir above, mandates a very robust standard of deference when dealing with expert tribunals such as immigration boards. The respondent also notes that there is a statutory basis for review in the *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 18.1(4) that should take precedence over common law standards of review. The statute mandates review on matters of fact only when a court finds "erroneous finding of fact made in a perverse or capricious manner or without regard to the evidence".

[67] The respondent submits that the Court should be even more reluctant to intervene when the assessment of fact and credibility was made after an oral hearing as in this case (see *Diazgranados v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 617).

[68] Although the applicant has submitted that the standard of review to be applied is correctness when reviewing the legal term of "crimes against humanity", the respondent argues that despite being an issue of law, it is also one that involves applying legal principles to facts. *Dunsmuir* above, addressed legal and factual issues that are intertwined and cannot be readily separated. The Supreme Court concluded that questions such as these are ones requiring deference.

[69] In regards to the analysis of the facts, the respondent states that they were reasonably considered as they were presented to the Board. The applicant was found to have significant areas of his testimony that were implausible or not credible. This testimony covered the activities and reputation of the army as a whole, along with specific allegations against the applicant.

[70] The respondent states that it was implausible that the applicant did not know of the reputation of the army due to the widespread public discussion of it, his positions of practical responsibility for anti-guerrilla platoons in the combat area, his rank as an officer, his being stationed in the same area where massacres had occurred a few months earlier, his service training other soldiers, and his grooming for promotion before he resigned at a military academy that was considered to be an elite unit of the army. The idea that FARC sympathizers wanted to discredit the applicant in a book written alleging torture of the two men in the farmhouse in March of 1989 was also not persuasive.

[71] The Board determined that on a balance of probabilities the applicant, as second in command of the combined two combat platoons, would have known what was occurring in the farmhouse. The applicant could have resigned from the military because he objected to what the army had done or what he was forced to do. Instead, the applicant only left after becoming married and for advancement of his civil engineering career. All of these findings, the respondent asserts, were reasonable given the evidence and there is no basis for overturning the decision on this ground.

[72] The respondent disagrees that the Board did not follow the legal test for complicity as they provided conclusions on each factor relevant to this case.

[73] The respondent argues that *Bedoya* above, does not suggest an error of the Board. The applicant was not found to be complicit on the proposition that he belonged to the Colombian army,

rather, the applicant was considered complicit in the specific circumstances of his service in the Uraba region and in particular, the torture allegations from the farmhouse.

[74] The respondent disagrees that the Board was illogical in its analysis of credibility. On the facts regarding exclusion, the Board found the applicant made statements that were implausible and not credible. It is true that the Board accepted his well-founded fear of the FARC in relation to the facts surrounding his claim for refugee protection, but these are not the issues at play in the exclusion of the applicant.

[75] The respondent submits that the applicant has not raised a reviewable error in regard to the legal definition of crimes against humanity. The Federal Court judge in *Carrasco Varela* above, while certifying the questions about the application of the *Rome Statute*, found that the *Rome Statute* applied to crimes committed in the 1980s notwithstanding. The earlier *Ventocilla* above, case has not been followed in other cases.

[76] The respondent states that the sections of the *Crimes against Humanity and War Crimes Act* (CAHWCA) that the applicant referred to are pertinent only to crimes committed in Canada, rather than the more applicable sections 6 to 8. As the Board noted, the CAHWCA incorporated the *Rome Statute* definitions of crimes against humanity as well as having its own definition. The definition in the CAHWCA explicitly applies to actions before the CAHWCA came into force. The CAHWCA also specifically references the *London Charter (1945)* and the *Allied Control Council Law No. 10 (1946)* which included the similar definitions of crimes against humanity.

[77] *Harb* above, articulated the Federal Court of Appeal's view that the *Rome Statute* consolidated certain crimes against humanity and many other decisions unequivocally accepted that inhumane treatment or torture of prisoners in the 1980's constituted a crime against humanity (see *Figueroa c. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 112, *Ramirez* above, *Sivakumar* above, and *Morena v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.)). Severe mistreatment of prisoners including psychological torture was also included in this category (see *Alza v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 430, *Quinonez v. Canada (Minister of Citizenship and Immigration)* (1999), 162 F.T.R. 37, and *Osagie v. Canada (Minister of Citizenship and Immigration)* (2000), 186 F.T.R. 143). Complicity was also found in handing people over to organizations known to commit crimes against humanity in the 1980s (see *Sulemana v. Canada (Minister of Citizenship and Immigration)* (1995), 91 F.T.R. 53, *Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1494 and *Ponce Vivar v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 286).

[78] The respondent also submits that the Board was not in error when it referred to the 1998 *Rome Statute* because it is a "reflection of customary or conventional international law having regard to the inclusion of inhumane acts, murder and torture of civilians in the definition of crimes against humanity". At the time of their commission, the applicant's actions were offences in international law.

Issues

[79] The applicant submitted the following issues for consideration:

1. What is the appropriate standard of review?

2. Did the Board err in law when it concluded that the applicant was complicit in crimes against humanity perpetrated by the "Colombian army" or the "Colombian military"?

3. Did the Board make an error on the face of the record that was significant to its conclusion regarding the applicant's complicity in crimes against humanity committed by the Colombian army?

4. Did the Board err in law by applying definitions of crimes against humanity from the *Rome Statute* retroactively and by finding that crimes against humanity could be committed in the context of an internal armed conflict?

[80] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board commit a reviewable error on the facts related to the applicant's complicity in crimes against humanity committed by the Colombian army?

3. Did the Board commit a reviewable error when it concluded that the applicant was complicit in crimes against humanity perpetrated by the "Colombian army" or the "Colombian military"?

4. Did the Board err in law by applying definitions of crimes against humanity from the *Rome Statute* retroactively?

5. Did the Board err in law by finding that crimes against humanity could be committed in the context of an internal armed conflict?

Analysis and Decision

[81] **Issue 1**

What is the appropriate standard of review?

In *Dunsmuir* above, the Supreme Court of Canada stated at paragraph 62 that:

> ... the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[82] Of the issues raised in this review, the last two issues require the least amount of deference by this Court. On the other hand, the second and third issues require a review of the Board's analysis of the factual circumstances as it relates to the law. It is well established that questions of law and fact are to be reasonable. Reasonableness is described in *Dunsmuir* above as being:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency

> and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[83] As I stated in *Zeng v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 956, the Board's finding of exclusion based on the evidence before it required consideration where the legal issues cannot easily be separated from the factual ones. In *Dunsmuir* above, the Court explained that deference usually applies automatically in this case unless there are constitutional questions involved. The Board was also tasked with evaluating the factual evidence presented in an oral hearing. It would be inappropriate for me to second guess the Board's findings as I did not have the evidence directly before me. Although the applicant argued that correctness should apply in the case of such difficult international legal issues, I find that *Dunsmuir* above, and subsequent jurisprudence has not gone in that direction.

[84] The final issues, however, warrant less deference. The question of whether the *Rome Statute* can apply retroactively and whether crimes against humanity can be committed within internal conflicts are bare legal questions separate from the facts. I find that in this domain, the standard of review should be one of correctness.

[85] **Issue 2**

Did the Board commit a reviewable error on the facts related to the applicant's complicity in crimes against humanity committed by the Colombian army?

There are many aspects of this issue that the applicant raised and they will be addressed on a reasonableness standard.

[86] I agree with the applicant that the onus is on the Minister to establish that a person is excluded as in *Ramirez* above. The applicant's position is that the Board put the onus on him to prove that he did not commit the international crimes he was accused of.

[87] I find, however, that the Board was not unreasonable in how it conducted the analysis. The Minister tendered evidence to the Board that it said supported its position that the applicant should be excluded because of complicity in crimes against humanity. The Board was investigating the allegations made by the Minister and whether it found the applicant's responses compelling enough to disprove the Minister's position.

[88] As I mentioned above, this Court is not tasked with reevaluating the facts in this case beyond requiring a decision to have "intelligibility" being "within a range of possible outcomes" (see *Dunsmuir* above). In this regard, I find that the applicant is suggesting that the Court do just that. In his arguments, the applicant reiterates the evidence and explanations he provided to the Board rather than suggesting why the Board's inferences drawn from the Minister's evidence, the documentary evidence and the applicant's testimony were so unreasonable.

[89] As the Board stated, the standard of proof for the Minister has been called "serious reasons for considering", "reasonable grounds to believe" and both standards "require more than suspicion

or conjecture, but something less than a balance of probabilities" (see *Sivakumar* above). These standards inform to what degree the Board's inferences and findings were reasonable.

[90] The applicant submitted that inferences being drawn from given facts were not enough for a finding of exclusion. I am satisfied, however, that the Board member went beyond finding superficial inferences. For each finding, the Board member explained why an inference was made as it related to documentary evidence and testimony.

[91] The Board's findings of complicity in crimes against humanity lay squarely on the time period the applicant spent in the Uraba region. During the applicant's time there, he is alleged to have committed torture. He also is alleged to have been in charge of a platoon of professional soldiers and in an acting Captain position for part of that time.

[92] I agree with the Board's assessment that it is implausible that the applicant was not aware of the allegations of torture and other crimes against humanity being levelled at Colombia's military during this period. It was well known in Colombia. I also accept that the Board's finding that it was implausible that the applicant was not aware of the events happening at the farmhouse in March 1989. He was in charge of the group that went to the farmhouse and it is reasonable to conclude that in that role he would have had knowledge of the events that transpired there.

[93] I have not been satisfied that the Board's inferences were unreasonable or were lacking transparency, justification, and intelligibility as outlined in *Dunsmuir* above. I have considered the

applicant's submission that the consequences are "so dire" as stated in *Ardila* above, "that the reasons [must be] given in unmistakeable terms and with a thorough consideration of the facts and issues" and I am satisfied that they were.

[94] The applicant also argues, however, that ultimately these findings are illogical or "unintelligible" because the Board never directly accused the applicant of lying. I disagree.

[95] I concur with the respondent that the Board did question the applicant's credibility in relation to the incidents and time the applicant spent as a platoon leader in the Uraba region, even though they did not formally question his credibility. The Board found the testimony implausible as it related to these events, in other words, they found the applicant's testimony unbelievable. I would not allow the judicial review on this ground.

[96] **Issue 3**

Did the Board commit a reviewable error when it concluded that the applicant was complicit in crimes against humanity perpetrated by the "Colombian army" or the "Colombian military"?

The applicant states that the Board did not identify any particular unit or brigade within the Colombian army. In the end, the applicant says it is not clear to which group he was accused of being complicit with in crimes against humanity and the idea that he was implicated because he belonged to a group of such wide-ranching functions as the "army" or "military" suggested that the finding of complicity in crimes against humanity was too far reaching. In *Ardila* above, the

applicant argues, this type of broad analysis was said to be in error where membership in an army with thousands would exclude everyone from refugee protection.

[97] This is an important aspect of the Article 1F(a) analysis. As stated in *Mugesera* above, "[c]rimes against humanity, like all crimes, consist of two elements: (1) a criminal act; and (2) a guilty mind." It is important to characterize the organization or group that is implicated in crimes against humanity (see *Mugesera* above). If the purpose of the organization is not limited to its brutality, then the applicant must be found to be a "knowing and willing participant in specific crimes against humanity". If a person has held senior leadership positions in the organization, it is more likely that they were complicit in such crimes (*Sivakumar* above). If the person did not hold senior leadership positions, then there must be a nexus between the crime committed and the person implicated. Finally, a person's role in an organization, the length of time he or she participated in the organization and his/her awareness of the crimes is essential (*Sivakumar* above).

[98] This Court, the Federal Court of Appeal and the Supreme Court of Canada have all grappled with the questions above in the context of individuals that were members of military organizations associated with the government including *Ramirez* above, and *Moreno* above, amongst others.

[99] I agree that finding the applicant complicit in crimes against humanity for mere membership in the Colombian army would unduly simplify what is a complex and multi-faceted organization made up of thousands of persons and erroneously implicate the applicant as having a criminal

intent. Without a close nexus between the unit he belonged to and the army's systemic attacks against civilian populations, a finding of exclusion would be in error (see *Mugesera* above).

[100] As the applicant stated, the objectives of serving in the army were personal and professional for him. There is no suggestion that the applicant was invested in the greater objectives and policies in the organization. In this case, the applicant wanted to gain an education and financial stability. These are common objectives of individuals that serve in armies the world over. At what point then, do our international standards require the applicant to take responsibility for the wider objectives of an organization? When in this case did the applicant become responsible for resigning his membership in an organization thereby avoiding complicity in atrocities?

[101] In *Sivakumar* above, the Court addresses when a crime is elevated to the sphere of an international crime:

> This requirement does not mean that a crime against humanity cannot be committed against one person, but in order to elevate a domestic crime such as murder or assault to the realm of international law an additional element will have to be found. This element is that the person who has been victimized is a member of a group which has been targeted systematically and in a widespread manner for one of the crimes mentioned.

[102] I note that the Board found it implausible that the applicant served in the Uraba region for three years without knowledge of crimes against humanity perpetrated by the army or even without direct involvement in those crimes. The reason it is implausible, according to the Board, is that the applicant eventually became platoon leader of a group that was made up of professional soldiers.

This was different than the groups that the applicant had been a part of in the past, namely groups associated with fulfilling supportive roles of military operations such as maintaining bridges.

[103] From the documentary evidence, the Board concluded that the activities of the army, and by extension, it is inferred, the applicant's platoon group in that region, involved a systemic targeting of civilians. The Amnesty International Procurator General's Report on the human rights situation in 1992, states:

> The state security and defence agencies are trained to persecute a collective enemy and generally consider that victim's form a part of that enemy….they establish a direct link between , for example, trade unions or peasant organisations, with the guerrilla forces and when they carry out counter-insurgency operations these passive subjects are not identified as "independent" victims, but as part of the enemy.

[104] The most significant issue, in my mind, that arises in this analysis is whether the Board found that there was a nexus to the systemic targeting of populations and the applicant's service in the Uraba region. The inference is made that the applicant participated in activities targeting civilians but was this reasonable? I find that it was reasonable and I would not allow the judicial review on this ground.

[105] **Issue 4**

Did the Board err in law by applying definitions of crimes against humanity from the *Rome Statute* retroactively?

First, I wish to state some of the national and international laws and instruments that define crimes against humanity.

[106] The CAHWCA reads in part as follows:

> OFFENCES OUTSIDE CANADA
>
> Genocide, etc., committed outside Canada
>
> 6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada
>
> (*a*) genocide,
>
> (*b*) a crime against humanity, or
>
> (*c*) a war crime,
>
> is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.
>
> Definitions
>
> (3) The definitions in this subsection apply in this section.
>
> "crime against humanity"
> «*crime contre l'humanité* »
>
> "crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

[107] The applicant's submission that section 4 of CAHWCA precludes the application of the *Rome Statute* because it had not come into force requires an analysis of that section.

> Interpretation — customary international law
>
> 4.(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the *Rome Statute* are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

[108] I note the respondent's submission that this section is under the heading "OFFENCES WITHIN CANADA" and as such, does not apply to these circumstances.

[109] I also note that the wording of the section suggests that Parliament, by enacting the statute, did not want to open the door for the kind of arguments put forward by the applicant. The second sentence states that the coming into force date does not mean that "existing or developing rules of international law" should be limited or prejudiced by the introduction of this legislation.

[110] Canadian courts have also incorporated international conventions on torture. As the Board noted, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 43 approved the definition of "torture" in Article 1 of the *Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment* ratified by Canada in 1987.

[111] Secondly, the analysis required here involves interpreting international and national laws regarding crimes against humanity.

[112] As stated by Lorne Waldman in *Immigration Law and Practice* "Convention Refugees and Persons in Need of Protection", (2006) 1 LexisNexus Canada 8.519 at 8.540:

> . . . the acts constituting crimes against humanity are no longer limited to those contained in the definition of Art. 6 of the IMT Charter. The international community has since labeled genocide and apartheid as crimes against humanity. In addition, acts such as torture and piracy have been declared, in effect, to be international crimes.

[113] The Supreme Court of Canada in *Mugesera* above, stated that "a crime against humanity" consists of the commission of one of the enumerated proscribed acts which contravenes customary or conventional international law or is criminal according to the general principles of law recognized in the community of nations". Clearly, the Supreme Court recognizes that it would be wrong to get bogged down in the technical aspects of many different laws, established for differing purposes, enacted at different times.

[114] There is no doubt that there is consensus in our courts and in the world that the elimination of crimes against humanity such as torture has been the focus of international instruments since the aftermath of World War II (see *Ramirez* above). There has been no arbitrary date imposed on finding culpability in torture. For these reasons, I am not satisfied that the Board made an error in law and I would not allow the judicial review on this ground.

[115] **Issue 5**

Did the Board err in law by finding that crimes against humanity could be committed in the context of an internal armed conflict?

The applicant argued that his actions in the army were related to stopping the narco-producers and drug traffickers in Colombia. In his testimony, he stated that the incident in March 1989 was in response to suspicion that farm and union workers knew of weapons stashed in the area. In 1990, the applicant states that his platoon was seizing drugs and weapons rather than fighting guerilla forces.

[116] The bare issues at play in relation to the law are many. Was the applicant fighting an internal war? Were civilians implicitly involved in this war on many levels? In other words, were the actions of the army in the time that the applicant served in the Uraba region more complex than just an army gone awry morally and criminally?

[117] It can be inferred that the applicant feels he did not have the *mens rea* in the commission of international crimes as he felt that his service was related to the entrenched “war on drugs” in Colombia.

[118] International law on armed conflict within borders is instructive. Article 3 of *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949 is applicable to non-international armed conflict within the borders of a contracting state and reads in part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause,

> shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> . . .

[119] It may be the case that the Colombian army was fighting a complex conflict with many different facets. However, as international law dictates, this does not absolve individuals from accountability in cases where they are found to be complicit in crimes that go beyond the necessities of war. The Supreme Court, however, has said that for crimes to be elevated to crimes against humanity, the crimes must be directed against a civilian population as the "primary object of an attack", not collateral to it (see *Mugesera* above, at paragraph 161).

[120] I am satisfied that the civilian population was targeted in Colombia during the time that the applicant served in a manner that is against international law. I would not allow the judicial review on this ground.

[121] The application for judicial review is therefore dismissed.

[122] The applicant submitted the following proposed serious question of general importance for my consideration for certification:

> Is it an error of law to apply the definition of "crimes against humanity" as set out in the Rome Statute to alleged acts committed prior to July 1, 2002? In other words, can the definition of "crimes against humanity" apply retroactively given the requirement of *mens rea* for an international crime?

[123] The respondent opposed the certification of this question on the basis that the question would not be determinative of the issues in the case and because the question has already been considered by the Court of Appeal.

[124] The issue of torture of civilians has been part of the definition of crimes against humanity since 1945. I agree with the respondent's statement:

> The reasons for decision show that the tribunal referred to the Rome statute as well as the CAHWCA definitions of crimes against humanity, but the this [sic] was not an application of the Rome statute, rather it was a consolidation of the traditional definition which was in existence at least since 1945. The applicable definition is in the CAHWCA, which explicitly applies to past events which were considered to be crimes against humanity at international law. Torture of civilians has been in the definition of crimes against humanity at least since 1945.
>
> The question would not affect the case because torture of civilians has been in the definition of crimes against humanity at least since 1945, and so it is not a retroactive application of a new definition.

[125] In addition, I am bound by the decision of the Federal Court of Appeal in *Harb* above (see paragraphs 5 to 10). The question has already been considered by the Federal Court of Appeal.

[126] Consequently, I cannot certify the question proposed by the applicant.

JUDGMENT

[127] **IT IS ORDERED that:**

1. The application for judicial review is dismissed.

2. The question put forward by the applicant for certification will not be certified as a serious question of general importance.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

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

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;	a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.	c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

96. A Convention refugee is a person who, by reason of a well-founded fear of	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant

persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

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

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

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

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

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

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

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

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

protection of that country,	
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Crimes Against Humanity and War Crimes Act, 2000, c. 24:

4.(3) The definitions in this subsection apply in this section.	4.(3) Les définitions qui suivent s'appliquent au présent article.
"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at	« crime contre l'humanité » Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe

the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.
. . .	. . .
(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.	(4) Il est entendu que, pour l'application du présent article, les crimes visés aux articles 6 et 7 et au paragraphe 2 de l'article 8 du Statut de Rome sont, au 17 juillet 1998, des crimes selon le droit international coutumier sans que soit limitée ou entravée de quelque manière que ce soit l'application des règles de droit international existantes ou en formation.

Schedule (Subsection 2(1)) – Provisions of *Rome Statute*, Article 6:

PROVISIONS OF ROME STATUTE ARTICLE 6	ANNEXE (paragraphe 2(1)) DISPOSITIONS DU STATUT DE ROME ARTICLE 6
Genocide	Crime de génocide
For the purpose of this Statute, "genocide" means any of the	Aux fins du présent Statut, on entend par « crime de

following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

génocide » l'un quelconque des actes ci-après commis dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel :

(a) killing members of the group;

a) meurtre de membres du groupe;

(b) causing serious bodily or mental harm to members of the group;

b) atteinte grave à l'intégrité physique ou mentale de membres du groupe;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

c) soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle;

(d) imposing measures intended to prevent births within the group;

d) mesures visant à entraver les naissances au sein du groupe;

(e) forcibly transferring children of the group to another group.

e) transfert forcé d'enfants du groupe à un autre groupe.

ARTICLE 7

ARTICLE 7

Crimes against humanity

Crimes contre l'humanité

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

1. Aux fins du présent Statut, on entend par « crime contre l'humanité » l'un quelconque des actes ci-après lorsqu'il est commis dans le cadre d'une attaque généralisée ou systématique lancée contre toute population civile et en connaissance de cette attaque :

(a) murder;

a) meurtre;

(b) extermination;	b) extermination;
(c) enslavement;	c) réduction en esclavage;
(d) deportation or forcible transfer of population;	d) déportation ou transfert forcé de population;
(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;	e) emprisonnement ou autre forme de privation grave de liberté physique en violation des dispositions fondamentales du droit international;
(f) torture;	f) torture;
(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;	g) viol, esclavage sexuel, prostitution forcée, grossesse forcée, stérilisation forcée ou toute autre forme de violence sexuelle de gravité comparable;
(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;	h) persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste au sens du paragraphe 3, ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international, en corrélation avec tout acte visé dans le présent paragraphe ou tout crime relevant de la compétence de la Cour;
(i) enforced disappearance of persons;	i) disparitions forcées de personnes;
(j) the crime of apartheid;	j) crime d'apartheid;
(k) other inhumane acts of a	k) autres actes inhumains de

similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

caractère analogue causant intentionnellement de grandes souffrances ou des atteintes graves à l'intégrité physique ou à la santé physique ou mentale.

2. For the purpose of paragraph 1:

2. Aux fins du paragraphe 1 :

(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

a) par « attaque lancée contre une population civile », on entend le comportement qui consiste en la commission multiple d'actes visés au paragraphe 1 à l'encontre d'une population civile quelconque, en application ou dans la poursuite de la politique d'un État ou d'une organisation ayant pour but une telle attaque;

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

b) par « extermination », on entend notamment le fait d'imposer intentionnellement des conditions de vie, telles que la privation d'accès à la nourriture et aux médicaments, calculées pour entraîner la destruction d'une partie de la population;

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

c) par « réduction en esclavage », on entend le fait d'exercer sur une personne l'un quelconque ou l'ensemble des pouvoirs liés au droit de propriété, y compris dans le cadre de la traite des êtres humains, en particulier des femmes et des enfants;

(d) "deportation or forcible transfer of population" means forced displacement of the

d) par « déportation ou transfert forcé de population », on entend le fait de déplacer de force des

persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

personnes, en les expulsant ou par d'autres moyens coercitifs, de la région où elles se trouvent légalement, sans motifs admis en droit international;

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

e) par « torture », on entend le fait d'infliger intentionnellement une douleur ou des souffrances aiguës, physiques ou mentales, à une personne se trouvant sous sa garde ou sous son contrôle; l'acception de ce terme ne s'étend pas à la douleur ou aux souffrances résultant uniquement de sanctions légales, inhérentes à ces sanctions ou occasionnées par elles;

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

f) par « grossesse forcée », on entend la détention illégale d'une femme mise enceinte de force, dans l'intention de modifier la composition ethnique d'une population ou de commettre d'autres violations graves du droit international. Cette définition ne peut en aucune manière s'interpréter comme ayant une incidence sur les lois nationales relatives à la grossesse;

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

g) par « persécution », on entend le déni intentionnel et grave de droits fondamentaux en violation du droit international, pour des motifs liés à l'identité du groupe ou de la collectivité qui en fait l'objet;

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

h) par « crime d’apartheid », on entend des actes inhumains analogues à ceux que vise le paragraphe 1, commis dans le cadre d’un régime institutionnalisé d’oppression systématique et de domination d’un groupe racial sur tout autre groupe racial ou tous autres groupes raciaux et dans l’intention de maintenir ce régime;

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

i) par « disparitions forcées de personnes », on entend les cas où des personnes sont arrêtées, détenues ou enlevées par un État ou une organisation politique ou avec l’autorisation, l’appui ou l’assentiment de cet État ou de cette organisation, qui refuse ensuite d’admettre que ces personnes sont privées de liberté ou de révéler le sort qui leur est réservé ou l’endroit où elles se trouvent, dans l’intention de les soustraire à la protection de la loi pendant une période prolongée.

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

3. Aux fins du présent Statut, le terme « sexe » s’entend de l’un et l’autre sexes, masculin et féminin, suivant le contexte de la société. Il n’implique aucun autre sens.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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