

The Notion of ‘Complicity’ in UK Refugee Law

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Abstract

In recent years, United Kingdom case-law has analysed the arrival of new terms in refugee law, that determine a person’s complicity in a crime such that the Exclusion Clauses of the Refugee Convention apply. These terms have included concepts of “individual responsibility”, “individually responsible for the crime”, and “otherwise participate in the commission of crimes” drawn from International Criminal Law (“ICL”). This essay traces the use of these terms in the modern law relating to the exclusion of refugee status and suggests that a simple standard of identifying ‘a sufficient level of participation on the part of the individual to fix him with the relevant liability’ should be adopted in all cases of complicity.

Introduction

It is trite that those who are unworthy of refugee status are described in what are known as the ‘exclusion clauses’, namely, in Article 1F of the Geneva Convention Relating to the Status of Refugees 1951 and the New York Protocol 1967 (hereafter ‘the Refugee Convention’) which provides that:-

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

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

The UK courts have recently identified two broad purposes behind the ‘exclusion clauses’.² First,

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² Blake J. in *AH (Article 1F(b) – ‘serious’) Algeria [2013] UKUT 00382 (IAC)*.

to allow States to prosecute serious offenders, who may try to avoid extradition, by claiming asylum elsewhere.³ Second, to exclude from protection those who are not worthy of it.⁴ Article 1F(a) and (c) demonstrate the level of seriousness required to engage article 1F(b), so the three limbs of Article 1F have a symmetry to them. This important principle comes directly from the Refugee Convention itself. The genus of seriousness has to be at a common level throughout, so that those who commit war crimes, crimes against humanity, serious crimes, and act against the principles and purposes of the United Nations, are those who are unworthy of protection,⁵ provided only that a sufficiently high level of 'seriousness' can be shown, as confirmed by the UNHCR to the decision of the Court of Justice in Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v. B und D*⁶ which established that all article 1F cases involving criminal acts must reach "a high degree of seriousness."⁷ The purpose of this essay is to consider how that standard applies⁸ with respect to those who are complicit in the criminal

³ Although Blake J. said this did not apply where the offence has been prosecuted and the offender has served his punishment.

⁴ *Ibid.*, at para 85

⁵ *Ibid.*, at para 39

⁶ Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v. B und D* [2010] ECR I-000. Here the principal question referred by the German Federal Administrative Court (**Bundesverwaltungsgericht**) was whether mere membership of or support of an organization listed in the Annex to the Council Common Position of 17 June 2002 on the application of specific measures to combat terrorism constituted a serious non-political crime within article 12 (2)(b) or an act contrary to the purposes and principles of the United Nations within article 12(2)(c) of the Qualification Directive. The Court considered the authorities and said (at para 94) that, "It follows from all those considerations that the exclusion from refugee status of a person who has been a member of an organization which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organization, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of Article 12(3) of Directive 2004/83." Available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/EUECJ/2010/C5709.html&query=Joined+and+Cases+and+Bundesrepublik+and+Deutschland+and+B+and+und+and+D&method=boolean> . Also see, *Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D* [2011] Imm AR 190

⁷ "All the types of criminal acts leading to exclusion under Article 1F of the 1951 Convention *involve a high degree of seriousness*. This is obvious regarding Article 1F(a) and (c), which address acts of the most egregious nature such as "war crimes" or "crimes against humanity" or "acts contrary to the purposes and principles of the United Nations." In light of its context and the object and purpose of the Convention, the nature of an allegedly excludable act, *the context in which it occurred and all relevant circumstances of the case* should be taken into account *to assess whether the act is serious enough to warrant exclusion* within the meaning of Article 1F(b) and 1F(c)." (emphases added). Quoted from Blake J. in *AH (Article 1F(b) – 'serious') Algeria* [2013] UKUT 00382 (IAC), who cites the UNHCR view (at para 2.2.1) at para 36 of his judgment.

⁸ For previous considerations of this issue by the author, see Satvinder Singh Juss, "Terrorism and the Exclusion of Refugee Status in the UK", *Journal of Conflict & Security Law* (OUP, 2012, vol. 17) at pp. 1-38. Also see, Satvinder Singh Juss, "Complicity, Exclusion, and the 'Unworthy' in Refugee Law" *Refugee Survey Quarterly*, (OUP, vol. 31, No. 3,) pp. 1-39.

acts of others and to suggest that recent case-law under articles 1F(a) and 1F(c) implies that a simple standard of identifying 'a sufficient level of participation on the part of the individual to fix him with the relevant liability' should be adopted in all cases of complicity. The discussion is confined to UK case-law.

'Complicity' and the use of ICL and IRL in exclusion decisions

The seminal case in the UK is *JS (Sri Lanka)*.⁹ It concerned the question whether an asylum seeker who had been a member of the Liberation Tigers of Tamil Eelam ("Tamil Tigers") should be disqualified by reason of the Article 1F exceptions. The asylum applicant, who had equally been a relatively senior commander in the Tamil Tigers, had participated in military combat against the Sri Lankan Government forces. Eventually, he was sent *incognito* under an assumed name in Colombo to await further instructions. However, he escaped immediately upon learning that his identity had been compromised, whereupon he arrived in the United Kingdom to claim asylum. The Government rejected his claim, as falling outside the Refugee Convention. This was because his acts involved operating within the LTTE and even gaining promotions during a six-year period until he left the intelligence wing of the Liberation Tigers of Tamil Eelam. He had therefore been a voluntary member of the LTTE.¹⁰ According to the Government, the claimant's *actus reus* involved his having had "voluntary membership and command responsibility within an organisation that has been responsible for widespread and systemic war crimes and crimes against humanity." His *mens rea* was such that it was considered "that there are serious reasons for considering that you were aware of and fully understood the methods employed by the LTTE."¹¹

Lord Brown had regard to three sources of international criminal law, namely, the ICC Statute, the corresponding provisions of the Statute of the International Criminal Tribunal for former Yugoslavia, as well as the well-known judgment of the ICTY Appeal Chamber in *Tadic*.¹² In an erudite judgment, he then explained how it was possible for refugee law to draw from ICL in that, "[a]ll these ways of attracting criminal liability are brought together in the ICTY Statute by according individual criminal responsibility under article 7(1) to anyone who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution' of the relevant crime." This was despite the fact that, "[t]he language of all these provisions is notably wide, appreciably wider than any recognised basis for joint enterprise criminal liability under domestic law." But the German Federal Administrative Court (*Bundesverwaltungsgericht*) had put it well in its 2008

⁹ *JS (Sri Lanka)* [2010] UKSC 15

¹⁰ Para 34 of the Refusal Letter.

¹¹ Para 35 of the Refusal Letter.

¹² *Prosecutor v. Tadic* (1999) 9 IHRR 1051.

judgment¹³ that, when it comes to *actus reus* of a criminal act, exclusion under these ICL provisions now, "covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities."¹⁴ Therefore, in the words of Lord Brown "Article 1F disqualifies those who make 'a substantial contribution to' the crime, knowing that their acts or omissions will facilitate it." The UNHCR Representative was also right in stating that "that article 1F responsibility will attach to anyone 'in control of the funds' of an organisation known to be 'dedicated to achieving its aims through such violent crimes', and anyone contributing to the commission of such crimes 'by substantially assisting the organisation to continue to function effectively in pursuance of its aims'."¹⁵ That left the question of *mens rea* and Lord Brown was equally emphatic here that, "as Article 30 of the ICC Statute makes plain, if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent. ..."¹⁶

Moreover, and "consistently with this, the ICTY Chamber in *Tadic* defines *mens rea* in a way which recognises that, when the accused is participating in (in the sense of assisting in or contributing to) a common plan or purpose, not necessarily to commit any specific or identifiable crime but to further the organisation's aims by committing Article 1F crimes generally, no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission."¹⁷ It was not enough, as reinforced in the concurring judgment of Lord Kerr, "that voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity" because this would mean that, "the Secretary of State was being invited to decide as a matter of automatic consequence that membership of the Intelligence Division of LTTE equated to complicity." That would be wrong because it "implicitly (at least) suggested that no consideration of the personal responsibility of the respondent was required and indeed that it was not appropriate to inquire into it beyond acknowledging that the respondent was a member of the Intelligence Division."¹⁸ For his part, Lord Hope had said in relation to Lord Brown's test: "... [t]he words 'serious reasons for considering' are, of course, taken from article 1F itself. The words 'in a significant way' and 'will in fact

¹³ See, German Federal Administrative Court judgment in *BVerwG* 10C 48.07, judgment dated 14 October 2008 (at para 21).

¹⁴ Lord Brown at para 34

¹⁵ Lord Brown at para 35.

¹⁶ Lord Brown at para 37.

¹⁷ Lord Brown at para 38. With this Lord Brown over-ruled paragraph 119 of the judgment of the Court of Appeal below as it "does seem to me too narrowly drawn, appearing to confine Article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law." See Lord Brown at para 39.

¹⁸ Lord Kerr at para 59.

further that purpose' provide the key to the exercise. Those are the essential elements that must be satisfied to fix the applicant with personal responsibility. The words 'made a substantial contribution' were used by the German Federal Administrative Court, and they are to the same effect. The focus is on the facts of each case and not on any presumption that may be invited by mere membership."¹⁹

In *JS (Sri Lanka)*²⁰ Lord Brown had referred to the ICC Statute²¹ as "the starting point" describing it as "the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes."²² The Supreme Court's judgment is a leading example of how the requirements of both *actus reus* and *mens rea* were drawn from the ICL provisions of the ICC. For *actus reus*, article 25 sets out the circumstances in which an individual may be "criminally responsible" for a crime against humanity falling within article 7, "whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible" and this is broadly defined, for example, to include situations where that person "Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted". For *mens rea*, Article 30 imposes a standard of "mental element" that is defined as "intent and knowledge." Through these provisions the ICC Statute catches those who are 'complicit' in the crimes of others, even if they have not committed them themselves. But Lord Brown had also referred, in the context of the facts before him, to article 28 of the ICC Statute which deals with the "Responsibility of commanders and other superiors", so that they become personally responsible for crimes committed by their forces, or by their subordinates under their effective authority and control on the basis that they are complicit on them.²³

To conclude, the enduring importance of the provisions of the ICC Statute is such that it is supported by other international instruments, such as the *Qualification Directive (2004/83/EC)* provides a common standard for the application of the Refugee Convention's requirements across the 28²⁴ Member States of the EU.²⁵ Article 12(2)(a)

¹⁹ Lord Hope at para 49.

²⁰ *JS (Sri Lanka)* [2010] UKSC 15

²¹ Available at http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm

²² *JS (Sri Lanka)* [2010] UKSC 15 per Lord Brown at para 9.

²³ Article 28 (which was also referred to by Lord Brown at para 13 of *JS (Sri Lanka)*) is notable with respect to 'Responsibility of commanders and other superiors' in that it covers the negligence of commanders when it states, "that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes" and also that "the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission....".

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

²⁴ The latest accession to the EU being that of Croatia on 1 July 2013.

²⁵ It states at the outset (at para 1) that, "A common policy on asylum, including a Common

precisely mirrors article 1F(a).²⁶ Article 12(3), however, then provides in addition that article 12(2) "applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."²⁷ What does it mean to 'otherwise participate' in the commission of a crime against humanity?²⁸ Lord Brown acknowledged in *JS (Sri Lanka)*, that the language here is wider than joint enterprise liability under domestic law but attempted to limit its breadth by explaining that "Article 12(3) does not, of course, enlarge the application of article 1F; it merely gives expression to what is already well understood in international law." In this way, "criminal responsibility is engaged by persons other than the person actually committing the crime (by pulling the trigger, planting the bomb or whatever)."²⁹

Understanding 'Complicity'

The question is how we understand 'complicity' or extended liability in general. The word 'complicity' only appears in two places in ICL documents. It appears in identical terms in both articles 4.3(e) of the *Statute of the International Criminal Tribunal for the former Yugoslavia* ('ICTY')³² and the *Statute of the International*

European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. Available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=4157e75e4>

²⁶ Article 12(2) states that: "A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: (a) he or she 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."

²⁷ The full citation of this provision (which was also referred to Lord Brown in para 14 in *JS (Sri Lanka)*) is that: "Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."

²⁸ The *Bundesverwaltungsgericht* considered Article 12 (3) in *BVerwG* 10C 48.07, judgment dated 14 October 2008:

"21. In the case of the activities of terrorist organisations in particular, the question additionally arises as to attribution. Under Article 12(3) of Directive 2004/83EC, the reasons for exclusion also apply to persons who instigate or otherwise participate in the mentioned crimes or acts. Thus the person seeking protection need not have committed the serious non-political crime himself, but he must be personally responsible for it. This must in general be assumed if a person has committed the crime personally, or made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct (see Paragraph 18 of the UNHCR Guidelines). Thus this principle covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities. . .

22. In this Court's opinion, all three prerequisites of fact are met in the case of a person who actively supported the armed struggle of a terrorist organisation. . ." (cited in *JS (Sri Lanka)* [2010] UKSC 15 by Lord Brown at para 14).

²⁹ *JS (Sri Lanka)* [2010] UKSC 15 per Lord Brown at para 33

³² Available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

Criminal Tribunal for Rwanda ('ICTR')³³ where it describes how the international Tribunals "have the power to prosecute persons committing genocide" including "complicity in genocide". But the context here, being genocide, is different and it is significant that it does not appear in the ICC. So, what is it that is really required generally for extended liability, which is set in more general terms in the ICTY, ICTR and ICC Statutes? Is there not a risk here that someone with a cursory or borderline involvement with a prohibited criminal act will be caught by the possibly wide language of ICL provisions? We have seen how in *JS (Sri Lanka)* Lord Brown stated³⁴ that, under the ICC Statute, to establish 'complicity' in a crime covered by article 7, and falling under article 25, would require proof of the necessary mental element under article 30 of the ICC statute, namely, intent and knowledge, when the case concerned "crimes against humanity" under article 7. But of course, the same applies equally to "war crimes" under article and indirectly to article 6, which deals with "genocide."

Extended liability in crimes may occur therefore as much in cases of one as of another of these specific crimes. The matter has been much discussed recently in "*The Criminal Refugee*" by Dr. Joseph Rikhoff.³⁵ Carefully defining the uses of language is accordingly a matter of some considerable importance in refugee law. This is because governments will often place reliance upon general acts of a banned organization to support the allegation of an individual's 'complicity' in those nefarious acts. Three questions are commonplace. First, where an individual is member of a proscribed group, what degree of specificity about his actions or incidents does there have to be before he is subject to the exclusion clauses? Very often precise details are missing or otherwise difficult to obtain. So, is guilt by association enough? Does close association make an individual complicit in the actions of his movement? Second, where an individual is charged with a crime against humanity on the grounds that he has been a member of a body which has committed such crimes, is it a defence for him to say that his are purely personal crimes having no connection with his organisation's widespread or systematic attack on a civilian population? In particular, is such a defence open to him if there is no link established between his own acts and the attack by the body of which he is a member? Third, what if the individual has had no choice, as an aider and abettor in a crime? Is the defence of duress or of obedience to superior orders open to him? In a series of recent cases since the Supreme Court judgment in *JS (Sri Lanka)*, the Upper Tribunal, an administrative tribunal in the UK, has provided noteworthy guidance on all three questions. Let us first consider the degree of specificity required for actions or incidents subject to exclusion clauses.

³³ Available at <http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf>

³⁴ *JS (Sri Lanka)* [2010] UKSC 15 at para 36

³⁵ Dr. Joseph Rikhoff, *The Criminal Refugee: the Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Dordrecht, The Netherlands: Republic of Letters Publishing, 2012)

*AN*³⁶ involved a commander from the rebel Islamist group, *Hisbi-i-Islami*, in Afghanistan, who had given his men rocket launchers. They had bombarded Kabul. It was alleged he was complicit in their war crimes under article 1F(a). When Judge Aziz concluded³⁷ that he was “most likely aware of the human rights abuses and war crimes being committed on the front line by Hizb-e-Islami troops,” such that, “he was complicit in such atrocities,” his lawyer appealed contending that this “must be read as a finding based on the reasonable possibility or degree of likelihood” rather than as a substantial contribution to the crime as required by *JS (Sri Lanka)*.

The Upper Tribunal disagreed holding that “a proper reading is that Judge Aziz found that it was ‘most likely’ that the appellant was complicit in war crimes as he knew that his activities behind the lines were intended to enable the frontline artillery units in their indiscriminate shelling of civilians.”³⁸ This is because “the evidence in this case was a combination of the background data of war crimes being committed by HI (and others) in the battle for Kabul from 1992 to 1996 and the appellant’s account of his role as a commander of 500 troops of HI during this time, securing the areas behind front line troops in order for them to act unhindered and an account that admittedly included some visits to the front line by either appellant or his troops.”³⁹ The conclusion is unsurprising. The claimant had given his men rocket launchers as the commander of the Hizb-I-Islam. He was at least indirectly responsible in the bombardment of Kabul. Can the same, however, be said of a case where one cannot actually point to a specific act or incident?

This issue was clarified after the UK Supreme Court remitted the claimant’s appeal to the Upper Tribunal in the case of *Al Sirri* and *DD*.⁴⁰ The Tribunal had to properly determine whether there were serious reasons for considering that the appellant “has been guilty of acts contrary to the purposes and principles of the United Nations” under article 1F(c) after making a finding of an error or law. In *DD*⁴¹ the claimant’s brother was a Jamiat-e-Islami commander in Afghanistan. He had formed a number of strategic alliances. One was with the Taliban. The claimant had acted as his brother’s deputy commanding between 50 and 300 men at one time. The question was whether the claimant fell to be excluded from the Refugee Convention by virtue of his

³⁶ *AN v. Secretary of State* (AA/06251/2008) (24 Sept. 2013) (available at <http://www.bailii.org/uk/cases/UKAITUR/2013/AA062512008.pdf>)

³⁷ At para 55 (referring to para 80 of Judge Aziz’s determination).

³⁸ At para 57

³⁹ at para 58.

⁴⁰ *Al Sirri v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department* [2012] UKSC 54.

⁴¹ *DD* (AA/05707/2007) (9th September 2013);

complicity in the activities of his brother.⁴² The Upper Tribunal emphasised the holistic nature of the task before them.

It adopted *inter alia*⁴³ the following relevant tests: (i) *Nature of the "acts"*: had the appellant involvement in acts which fall within Article 1F(c)? (as this was a principal issue addressed by the Supreme Court in Al-Sirri and DD). The Tribunal noted that "it is more likely than not (and in our view much more likely) that the appellant in 2004 to 2006 engaged in combat against ISAF forces, both in a defensive and an offensive capacity."⁴⁴ (ii) *Seniority/role*: did the appellant have a sufficient seniority/role in connection with those acts? Interestingly, the Tribunal here observed that, "the issue of exclusion is not *necessarily* answered by reference to seniority or a person's place within a military command structure. The key questions are, rather: what did the person concerned do and why did he do it? Everything depends on the facts."⁴⁵ This is because "even if a person has been a mere "foot soldier", not commanding any other combatant and having no other significant role in a military organisation fighting ISAF forces, he would not for that reason escape exclusion under article 1F(c). For example, such a foot soldier may have willingly and frequently planted and/or detonated IEDs, resulting in ISAF fatalities; or may have acted as a sniper, targeting ISAF personnel. In either case it would frankly be subversive of the 1951 Geneva Convention for that person to enjoy refugee status."⁴⁶ But, in any event, in this case the claimant "had a senior, significant and well-recognised position within Hizb-e-Islami in 2004-2006,"⁴⁷ and the evidence

⁴² The Upper Tribunal had regard to the CJEU judgment in *Bundesrepublik Deutschland v B and D* [2011] Imm AR 190, where the *Bundesverwaltungsgericht* had asked the CJEU whether it constituted a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of the Qualification Directive if the person seeking asylum was a member of an organisation which, because of its involvement in terrorist acts, was on the list of entities annexed to the Common Position 2001/931 and that person actively supported the organisation's armed struggle or occupied a prominent position within that organization. The Upper Tribunal stated that it was here potentially concerned only with this question, and observed (at para 15) that, "The CJEU held that exclusion from refugee status of a person who had been a member of an organisation which used terrorist methods was conditional on an individual assessment of the specific facts, and that before a finding could be made, it must be possible to attribute to the person concerned a share of the responsibility for the acts committed by the organisation of which he or she was a member. Individual responsibility had to be assessed in the light of objective and subjective criteria, and an assessment had to be made of the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; 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."

⁴³ The Tribunal also added (iv) Probability: Is the respondent's case made out to a sufficient degree of probability? (as required by Al-Sirri and DD).

⁴⁴ At para 69 of *DD*.

⁴⁵ *ibid.*, at para 75

⁴⁶ *ibid.*, at para 74

⁴⁷ *ibid.*, at para 79

showed him to be “a seasoned military leader, used to the command of several hundred men in the field,....”⁴⁸ (iii) *Specificity*: were the allegations against the appellant of sufficient specificity to satisfy the Supreme Court’s approach in *JS (Sri Lanka)*? Although, the claimant’s lawyer argued how the judge below in her determination had recorded that, “neither at interview or in cross-examination was there elicited any specificity about his actions or incidents,”⁴⁹ the Tribunal concluded that there “is nothing in the relevant case law or the UNHCR Note that requires the acts upon which an article 1F(c) exclusion case is based to be pleaded with the degree of particularity that one might find, say, in an indictment in the Crown Court,” but , of course, “[t]his is not to say that vague assertions or generalised inferences will do.”⁵⁰

In coming to these conclusions, the Upper Tribunal was clearly influenced by the, “appellant’s obviously detailed knowledge of weaponry,” even when the claimant had suggested this was not unusual because, “every child in Afghanistan has such a knowledge, given the chronic nature of conflict in that region.” The Tribunal unsurprisingly rejected this explanation on grounds that, “it remains a striking fact that the Home Office interviewer had to stop the appellant from naming every single part of an AK47 and that the appellant knew precisely how to clear a jam in that weapon.”⁵¹

Let us next consider the second question we set out above, namely, whether an individual’s commission of purely personal crimes, can be separated from his organisation’s widespread or systematic attack on a civilian population, as one that has no connection with it? The issue arose in *Akbar Azmi-Rad*,⁵² where the claimant, a member of the Basij (*Nirouye Moqavemate Basij*), a volunteer paramilitary force in Iran founded in 1979 by Ayatollah Khomeini,⁵³ asserted that his Basij activities were unconnected from the acts of others that amounted to crimes against humanity within article 7 of the ICC Statute. He was “a committed and respected member of the Basij of some local rank” who was “the commander in his village” and had even “received a ‘Basij of the year’ award.” Yet, the fact remained that he “had not personally been involved in acts of violence against Iranian civilians” but “had witnessed such acts of violence when he and his men were seconded to patrol or man checkpoints in the nearby town of Miyaneh.” Significantly, “[t]here , however, he was not in command of

⁴⁸ *ibid.*, at para 58

⁴⁹ *ibid.*, at para 80

⁵⁰ *ibid.*, at para 81.

⁵¹ *ibid.*, at para 63

⁵² *Azimi-Rad (Art.1F(a) - complicity - Arts 7 and 25 ICC Statute) Iran [2011] UKUT 339 (IAC)*

⁵³ Its mission is to maintain law and order and to enforce ideological and Islamic values in Iran.

his Basij colleagues.”⁵⁴ These facts led him to argue the UK Government had not shown the acts were “part of” those crimes, as a “widespread or systematic attack directed against any civilian population.” However, the UK government relied heavily upon a 33-page report and analysis prepared in respect of the appellant by the Home Office War Crimes Unit dated March 2009 which the judge below had described as “cogent, detailed and well-resourced.”⁵⁵ Importantly, his own evidence was that he “had to hand people over who would be beaten. I told my men I didn’t beat people but my men did in my village – some of them.”⁵⁶ When asked he had explained that, “I haven’t seen anyone die but seen many unconscious after beatings and torture – some people not many”.⁵⁷ Not having committed the violence himself, the claimant relied on the Canadian case of *Mugesera*⁵⁸ to suggest that his own acts were distinct and discrete acts not related to the acts of the Basij.

However, the Upper Tribunal in the UK referred to the wider complicity liability arising from article 25 in relation to article 7 of the ICC Statute. It held that a person’s acts did not have to form “part of” a crime against humanity committed by others. In *JS (Sri Lanka)* Lord Brown had held that the scope of Art 25(3) could not be restricted to only those who would be criminally liable (whether as perpetrators or accessories) under domestic criminal law,⁶⁴ but to “wider concepts of common design, such as the accomplishment of an organisation’s purpose by whatever means are necessary including the commission of war crimes.”⁶⁵ But even more significantly, Lord Kerr in *JS (Sri Lanka)* had indicated that, “The evaluation of his role in the organisation has as its purpose either the identification of a sufficient level of participation on the part of the individual to fix him with the relevant liability or a determination that this is not present.”⁶⁶ The claimant in this case was handing people over to be tortured. It is hardly surprising that the Upper Tribunal concluded that his were not “purely personal crimes.” He was aiding and abetting in the commission of crimes which fell within the scope of crimes against humanity. It is not hard to conclude they were ‘part of’ those crimes. Lord Kerr’s focus in *JS (Sri Lanka)* on a ‘sufficient level of participation’ on the part of the individual is clearly no less important as this case shows as the requirement

⁵⁴ *Azimi-Rad* at para 3

⁵⁵ *Azimi-Rad* at para 41 (referring to the judge’s determination at para 9.3).

⁵⁶ *Azimi-Rad* at para 48 (which referred to question 44 of his interview at B14-15)

⁵⁷ *Azimi-Rad* at para 48 (which referred to question 47 of his interview at B14-15)

⁵⁸ *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] SCC 40, which was cited by the Tribunal at para 57.

⁶⁴ *Azimi-Rad* at para at para 28

⁶⁵ Lord Brown at para 38 of *JS (Sri Lanka)*

⁶⁶ Lord Kerr at para 55 of *JS (Sri Lanka)*

by Lord Brown of a 'substantial contribution' to the crime. Yet, it has hitherto received less attention than is deserving. It needs to be better known and more widely used. Put even more simply: Is the person concerned a knowing participant or accomplice in the war crimes or against crimes against humanity?

It may be noted here in this context that recently the *Bundesverwaltungsgericht*⁶⁷ has also considered how aiding and abetting impacts on the distinction between mere membership of an organisation and active involvement in its activities, as first highlighted in *JS (Sri Lanka)*. In that case, the claimant, of Kurdish ethnicity, had joined the militant arm of the PKK, and then headed its art and culture school, appearing as an artist broadcasting his concerts on Kurdish television station, and being responsible for PKK propaganda. When the lower court held⁶⁸ that, because of the great importance of music, dance and custom as an expression of cultural identity in Kurdish life, the claimant had participated in acts by the PKK, which were in violation of the aims and principles of the United Nations, he appealed.⁶⁹ But the *Bundesverwaltungsgericht* held that there is no requirement of a 'spatial-organisational proximity' and the correct context was the United Nations Anti-Terrorism measures, specifically United Nations Security Council Resolutions 1373 and 1377. Nevertheless, the need for a link⁷⁵ or *nexus* to the individual events during the claimant's activity for the PKK⁷⁶ was also evident although it was not enough that the organisation of which the individual was a member was on what is known as the 'EU – Terror List'⁷⁷ namely, the EU's list of entities, groups and persons involved in terrorist acts.

⁶⁷ *BVerwG 10 C 26.12.* (OVG 3L 218/08). This is Germany's supreme administrative court, and was on this occasion presided over by Prof. Dr. Dorig, Prof. Dr. Kraft, Fricke, and Dr. Maidowski.

⁶⁸ *Ibid.*, at para 17

⁶⁹ The claimant argued on appeal to the Federal Administrative Court (i) that there had been inadequate findings of fact; (ii) that if exclusion from refugee status was to be founded solely on ideological support for the PKK's armed conflict, then the content of this support must be directed to the use of violent means, and (iii) that this must be situated in both temporal and spatial-organisational proximity to armed conflict; (iv) that on this basis (iv) he had never incited criminal acts of terrorism; and (v) that if the Government wanted to argue that propaganda support for violent actions by terrorist organisations can also lead to exclusion from refugee status, then the court below should have clarified his specific actions for the PKK: see, at para 3

⁷⁵ *BVerwG 10 C 26.12.* (OVG 3L 218/08) at para 13

⁷⁶ From this, the Court of Justice of the European Union has concluded that this reason for exclusion can also be applied to persons who, in the course of their membership of an organisation which is on the list forming the Annex to Common Position 2001/931, have been involved in terrorist acts with an international dimension: See order of 10 October 2013 – *BVerwG 10 B 19.13* – juris at para. 5.

⁷⁷ *BVerwG 10 C 26.12.* (OVG 3L 218/08) at para 15. This arose from Council Common Position [2001/931/CFSP](#) of 27 December 2001 on the application of specific measures to combat terrorism. It read as follows:

SUMMARY

Finally, let us look at the third and final question above, namely, his liability if the individual has had no choice, as an aider and abettor in a crime. Is the defence of duress or of obedience to superior orders open to him or her? Will it save him or her from the charge of complicity? The *Bundesverwaltungsgericht* has recently held that⁸² “to have the possibility of actually influencing the committing of terrorist acts, or publicly approved of or incited such acts” is not a requirement for exclusion to operate, “otherwise, those who are purely desk perpetrators and propagandists would enjoy protection as refugees.....” This is not inconsistent with Lord Kerr’s emphasis that, “What must be shown is that the person concerned was a knowing participant or accomplice in the commission of war crimes etc. , “ rather than a list of relevant factors to be taken into account, which he cautioned against, lest that it become an “invariable and infallible prescription” to be followed in all cases.”⁸³ Two cases are noteworthy. The first concerned duress. The second concerned obedience to superior orders. In the

The extraordinary European Council of 21 September 2001 defined terrorism as one of the main challenges facing the world and identified the fight against terrorism as one of the European Union’s (EU) priority objectives. The purpose of this common position is to apply further measures to combat terrorism, in addition to the United Nations Security Council Resolution 1373 (2001). Specifically, it establishes a list of individuals, groups and entities involved in terrorism whose funds and other financial assets are to be frozen as part of the fight against the financing of terrorism.

Definitions

"Persons, groups and entities involved in terrorist acts" means individuals, groups and entities on whom there is accurate information proving that they have committed, are attempting to commit or are facilitating the commission of terrorist acts.

"Terrorist acts" are defined as intentional acts that may seriously damage a country or an international organisation by intimidating a population, exerting undue compulsion of various types or by destabilising or destroying its fundamental political, constitutional, economic or social structures. The list of terrorist acts includes:

- attacks on a person’s life or physical integrity;
- kidnapping or hostage-taking;
- causing extensive destruction to a public or private facility, including information systems;
- seizure of means of public transport, such as aircrafts and ships;
- manufacture, possession, acquisition, transport or use of weapons, explosives, or nuclear, biological or chemical weapons;
- release of dangerous substances or causing fires, explosions or floods;
- interfering with or disrupting the supply of water, power or any other fundamental natural resource;
- directing or participating in the activities of a terrorist group, including by funding its activities or supplying material resources.

Merely threatening to commit any of these criminal acts is also to be treated as a terrorist offence.

The common position also defines "terrorist groups" as structured groups of persons, acting in concert to commit terrorist acts, regardless of their composition or the level of development of their structure. See, http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/133208_en.htm

⁸² *BVerwG 10 C 26.12.* (OVG 3L 218/08) at para 16

⁸³ Lord Kerr at para 55 of *JS (Sri Lanka)*

first, *MT*⁸⁴ the claimant had been a police officer stationed at Bulawayo in Zimbabwe. She came under pressure from her superiors to attend opposition MDC rallies where police beat MDC supporters with batons. Two incidents of torture were highlighted, in one of which she had been ordered to go to a village near Plumtree, where 30 people had been killed the night before by government ZANU PF supporters, and bury the bodies in shallow graves.⁸⁵ Her defence was that she had minor or incidental involvement. She had not inflicted any significant suffering. There was neither *actus reus* nor *mens rea* for any torture. The offence of aiding and abetting needed specific intent and that was lacking. She had not intended to carry out torture or “cover up” evidence of murder. At Plumtree she arrived at the last minute and only carried out orders. She had done all she could to minimise her own involvement.⁸⁶

The Upper Tribunal, in considering her liability to aiding and abetting⁸⁸, held that the claimant, in “serving in the Zimbabwe police at the country’s second largest police station” would have known that “there had been a significant number of incidents in which police encounters with political opponents of ZANU-PF had involved a notable use of force.”⁸⁹ Even if she thought that the police used “a legitimate use of force in the course of public order enforcement”, it was not credible “that she was unaware that such violence had been inflicted by the police.”⁹⁰ It was not plausible “that she felt disquiet” because “she continued to go to work normally and in the next month to take part in police dispersal of the MDC during a rally.”⁹¹ In fact, by her own evidence “she worked at the city’s largest police station (the second largest in Zimbabwe) and that she worked in the charge office, regularly having responsibility for dealing with arrested suspects when they were brought into the station or also when they were charged.”⁹² This evidence was relevant “for the issues of participation and complicity”.⁹³

But the claimant pleaded duress and said, “that the context in which she operated constituted a threat of at least serious bodily harm against her, she being a mother with a daughter to think about; that in this context she acted proportionately (failing to beat people at demonstrations, slapping rather than beating a detainee, recording events rather than taking a more active role).”⁹⁴ The Upper Tribunal rejected this defence on grounds that, “for coercion to be considered as an exception, the perpetrator of the incriminating act must be able to show that he would have placed

⁸⁴ *MT* (Article 1F (a) – aiding and abetting) Zimbabwe [2012] UKUT 00015(IAC)

⁸⁵ at para 1.

⁸⁶ At para 68.

⁸⁸ At para 101

⁸⁹ at para 86

⁹⁰ at para 87.

⁹¹ At para 88

⁹² at para 89

⁹³ at para 90.

⁹⁴ At para 105.

himself in grave imminent and irremediable peril if he had offered any resistance.”⁹⁵ It was concluded that “at no point was the appellant in a situation of duress” because “at no point was she faced with a threat of imminent death or of continuing or imminent serious bodily harm”⁹⁶ and she was unable to establish that had she “taken any kind of avoidance action during the torture” then “she would immediately have faced a threat of imminent harm.”⁹⁷

The second case of *CM*⁹⁸ involves obedience to a superior order. The claimant, who had been a full-time soldier and a reservist in the Zimbabwe army had been involved in beatings on orders from his superiors, but maintained that he dissociated himself from such activities as soon as he could, and that he had carried out orders to beat people in order to save his own life.⁹⁹ It was well known that at the relevant time, the Mugabe regime in Zimbabwe was committing criminal acts as part of a widespread or systematic attack directed against the civilian population with knowledge of those attacks.¹⁰⁰ However, his interview suggested that: (i) he had been ordered to beat people and had proceeded to carry out beatings; (ii) the beatings were carried out by sticks and whips, and the inflicted violence caused tears to the skin and bleeding; (iii) that these beatings would take five hours, shared between him and others present; and (iv) that he had ordered other beatings. The Upper Tribunal had little difficulty in concluding that on the basis of this evidence the claimant had engaged in acts which amounted to torture or inhumane acts. As well, the claimant, said the Upper Tribunal was an aider and abettor¹⁰² because he “held the rank of sergeant and was a principal facilitating actor in the beatings in which he participated. He described himself in the asylum interview as being the officer in charge on the relevant occasion(s).”

The Upper Tribunal rejected the defence of acting in obedience to superior orders because “the effect of Article 33(1) of the Rome Statute is that whilst obedience to superior orders can be a defence if each of its three requirements – as set out at (a), (b) and (c) – are met, by virtue of Article 33(2) the Article 33(1)(c) requirement can never be met in cases where the order was to commit genocide or a crime against humanity. Such cases are always “manifestly unlawful”. When the claimant claimed duress, this was also rejected for four reasons, namely, he had been complicit in beatings ordered by his

⁹⁵ At para 106. The Tribunal continued: “Whether it is a complete defence and whether it can apply in all types of cases remains unsettled: see the Trial Chamber discussions in *Prosecutor v Endermovic* (IT-96-22) 7 June 1997” (a case decided by the International Criminal Tribunal for the Former Yugoslavia or ICTFY).

⁹⁶ At para 107.

⁹⁷ At para 108.

⁹⁸ *CM (Article 1F(a) - superior orders) Zimbabwe [2012] UKUT 00236(IAC)*

⁹⁹ at para 1

¹⁰⁰ at para 14.

¹⁰² At para 22. The Tribunal relied on *MT* which said of aiding and abetting: “Aiding and abetting differs from joint criminal responsibility (jce) in that whilst the former generally only requires the knowledge that the assistance contributes to the main crime, participation in jce requires both a common purpose and an intentional contribution of the participant (Triffterer, pp. 756-758) to a group crime. Aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime.”

superiors for some period of time,¹⁰⁴ he produced no evidence to support the claim that if he had not obeyed he would have been at risk of imminent harm from his superiors for disobedience,¹⁰⁵ that the claimant did not give a credible account of obeying orders to carry out beatings out of fear of reprisal actions against his family members,¹⁰⁶ and his conduct was not consistent with someone taking immediate and effective steps to avoid having to carry out the orders.¹⁰⁷

Conclusion

In *JS (Sri Lanka)*¹⁰⁸ Lord Kerr in the UK Supreme Court judgments had emphasised, “the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.”¹⁰⁹ This is arguably a better test than that of Lord Brown who had looked to the person “to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.”¹¹⁰ The Supreme Court approved the dicta of the *Bundesverwaltungsgericht*¹¹¹ that exclusion “covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities.”¹¹² In *MT*¹¹³ the Upper Tribunal later helpfully explained that with respect to aiding and abetting, international criminal law jurisprudence¹¹⁴ encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime, i.e. the contribution should facilitate the commission of a crime in some significant way. A minority view, which has not been widely adopted, is as Lord Kerr has observed, the “... notable exception to this theme” which “is to be found in the *obiter* statements in paragraph 16 of the judgment in *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173 where it is suggested

¹⁰⁴ At para 29

¹⁰⁵ at para 30.

¹⁰⁶ At para 31.

¹⁰⁷ At para 34.

¹⁰⁸ *JS (Sri Lanka)* [2010] UKSC 15.

¹⁰⁹ *JS (Sri Lanka)* [2010] UKSC 15 at para 55.

¹¹⁰ *JS (Sri Lanka)* [2010] UKSC 15 at para 38

¹¹¹ *BVerwG* 10C 48.07, judgment dated 14 October 2008 (at para 21)

¹¹² *JS (Sri Lanka)* [2010] UKSC 15 at para 34.

¹¹³ *MT* (Article 1F (a) – aiding and abetting) Zimbabwe [2012] UKUT 00015(IAC)

¹¹⁴ As enjoined by *R (JS) (Sri Lanka) v SSHD* [2010] UKSC 15

that voluntary knowing participation can be assumed from membership of a brutal organisation.”¹¹⁵

Yet, lest it be forgotten, Lord Brown’s statement in the Supreme Court that, “Article 1F disqualifies those who make ‘a substantial contribution to’ the crime, knowing that their acts or omissions will facilitate it,” was designed to reject the approach of the Tribunal in *Gurung*¹¹⁶ that organisations could be divided into those that were, in effect, terrorist in nature, and those which were not, in determining an individual’s criminal responsibility for his involvement in the particular organization. It is for this reason that the Supreme Court was unanimous that “mere membership” of an organisation would not be sufficient to bring an individual within the exclusion provisions.¹¹⁷ This is why Lord Brown set out the relevant factors¹¹⁸ to enable a decision-maker to properly assess whether an individual’s membership and activities within an organisation resulted in his criminal responsibility on account of his complicity in those committed crimes against humanity.¹¹⁹

The cases discussed above suggest, however, that a simple test of identifying ‘a sufficient level of participation on the part of the individual to fix him with the relevant liability’ should be adopted in all cases of complicity. It would be easier to operate. It is more in line with the latest decision of the *Bundesverwaltungsgericht* that “even purely logistical acts of support ... if they are of sufficient importance” may be enough for individual responsibility” and that “the same applies to serious ideological and propagandistic activities in favour of a terrorist organisation.”¹²⁰

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<sup>115</sup> Lord Kerr in *JS (Sri Lanka)* at para 57.

<sup>116</sup> *Gurung v SSHD [2003] Imm AR 115*

<sup>117</sup> *JS (Sri Lanka)* paras 1 and 2.

<sup>118</sup> *Ibid.*, at para 30

<sup>119</sup> *ibid.*, at para 29.

<sup>120</sup> *BVerwG 10 C 26.12. (OVG 3L 218/08)* at para 13