CANADA[1]

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Government Action — Denial of Immigration and Asylum on Basis of War Crimes and Other Atrocities

☛ Canada Border Services Agency, *Canada's Program on Crimes Against Humanity and War Crimes 2008–2011* (12th Report, 2011)
<http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2011-eng.html>

A person who has been involved in war crimes or crimes against humanity can be refused a visa if they apply, either as a permanent resident or as a visitor, to come to Canada from overseas. If they have managed to enter Canada, officers in Canada may take action against that person whether they are in the refugee stream, the immigration process or the citizenship process or if they have already been granted Canadian citizenship but hid their war crimes activities when they originally immigrated to Canada.

During the fiscal years of 2008–11, visa officials prevented a total of 912 persons from coming to Canada because of allegations of war crimes or crimes against humanity. This includes those refused specifically for possible involvement in war crimes or crimes against humanity, those who withdrew when asked for more information and those who were investigated for allegations of war crimes but were refused for other reasons. Canadian missions abroad investigated a total of 9019 potential war crimes cases, resulting in the refusal of more than 10 per cent.[2]

Visa officers identify potential war crimes cases through security screening and refer many of them to the Canadian Border Services Agency's (CBSA) Modern War Crimes Unit. Analysts with geographic expertise provide analysis and recommendations on immigrant cases. Visa officers abroad concluded the review of 784 permanent immigrant applicants for possible involvement in war crimes or crimes against humanity. As a result, 311 persons considered to have been involved in war crimes or atrocities were refused visas to immigrate

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[2] This number includes: visa applications that were denied because of reasonable grounds to believe that the applicant committed or was complicit in war crimes, crimes against humanity, or genocide; applicants who withdrew their visa applications when asked for more information during the screening process; and visa applications that were denied for other reasons, even though there were reasonable grounds to believe that the applicant committed or was complicit in war crimes, crimes against humanity, or genocide.

to Canada. During the same years, 8234 applications for temporary resident visas were assessed for possible war crimes of which 601 were refused a visa.[3]

If a potential war criminal manages to enter Canada or is identified as already living in Canada, CBSA officials take appropriate enforcement action. These cases include persons in the refugee claims process, the immigration process, the citizenship process or Canadian citizens who hid their past activities when they immigrated to Canada.

Persons claiming refugee protection must first complete a Personal Information Form (PIF). During 2008–11, a total of 2023 refugee claimant cases were reviewed for possible war crimes or crimes against humanity based on these PIFs. During these fiscal years, CBSA hearings officers filed 287 interventions before the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) based on allegations of war crimes or crimes against humanity as set out in exclusion ground 1F(a) of the 1951 *Convention relating to the Status of Refugees*. During the same period, CBSA received a total of 270 decisions from the RPD in cases where CBSA had intervened to seek exclusion based on war crimes concerns. These included: exclusions of 74 refugee claimants for war crimes; 70 decisions to refuse refugee status, although the persons were not excluded for war crimes; rulings that 57 individuals had withdrawn or abandoned their claims where there was an allegation of involvement in war crimes or crimes against humanity; and finally, granting of refugee status to 69 persons.[4]

When allegations about the commission of or complicity in war crimes, crimes against humanity, or genocide are made against persons in Canada, these cases are referred by the CBSA to admissibility hearings based on Section 35(1)(a) of the *Immigration and Refugee Protection Act* (IRPA) before the Immigration Division of the IRB. If the person is a refugee claimant, the refugee claim can be suspended pending the outcome of the admissibility hearing.

In 2008–11, 34 admissibility hearings were opened for non-refugee claimants and 56 for refugee claimants. In respect of nine non-refugee claimants and 30 refugee claimants, there were reasonable grounds to believe that they had committed or were complicit in war crimes, crimes against humanity or genocide and they were therefore ordered to be deported. Of the cases brought before the Immigration Division, 28 persons' claims were found to be admissible (six non-refugee cases and 22 refugee cases), while 158 cases were still under investigation at the end of fiscal year 2011 (28 non-refugee cases and 132 refugee files).

Sixty-one persons who had been considered to be war criminals were removed from Canada during the period 2008–11. As of 31 March 2011, there was an inventory of 199 enforceable removal orders of which 118 could not be carried out because of various impediments, such as problems obtaining a travel document, or a moratorium on removals to certain countries because of war or serious civil unrest.[5]

If a person who is subject to a deportation order cannot be found in Canada, a warrant for the person's arrest can be issued. At the end of the fiscal year there were 177 outstanding warrants for war crimes related cases. The government launched a new initiative in 2011 to

[3] Canada Border Services Agency, *Canada's Program on Crimes Against Humanity and War Crimes 2008–2011* (12th Report, 2011) <http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2011-eng.html>.
[4] Ibid.
[5] Ibid.

facilitate the execution of such outstanding warrants whereby CBSA asked the public to identify and report any information about persons named in the 'Wanted by the CBSA' list.[6]

Cases — Federal Court Jurisprudence regarding War Crimes and Crimes against Humanity

☛ Application of Article 1(F)(a) of the *Convention relating to the Status of Refugees* and Section 35(1)(a) of the *Immigration and Refugee Protection Act*

The Federal Court issued 6 judgments in 2010 and 12 judgments in 2011 concerning war crimes and crimes against humanity in the context of immigration and refugee claims, while the Federal Court of Appeal examined only one case.[7] These cases spanned the spectrum of possible outcomes: 10 persons were found 'excluded' while three were not; one non-exclusion finding by the RPD was upheld by the Federal Court; three inadmissibility findings by another branch of the IRB, the Immigration Division (ID), were upheld while two were found wanting. In 10 of the 13 cases in which individuals were considered to be involved in crimes against humanity (there were no cases analyzing war crimes), the findings were based on the six factor approach. Membership in a brutal organization,[8] aiding and abetting[9] and direct participation[10] each counted for one incidence of liability. Unlike in earlier years, the Federal Court and the Federal Court of Appeal placed a greater reliance on international criminal law.[11] Similarly, these Courts examined the recent jurisprudence of the highest courts in the United Kingdom and New Zealand, which have given a great deal of attention to the notion of extended liability.[12] The jurisprudence discussed situations[13] in Burundi,[14] Bangladesh,[15]

[6] See Canada Border Services Agency, *Wanted by the CBSA* (2012) <http://www.cbsa-asfc.gc.ca/wc-cg/menu-eng.html>.

[7] *Canada (Citizenship and Immigration) v Ekanza Ezokola* [2011] FCA 224 (15 July 2011), which involved an economic attaché of the Democratic Republic of the Congo at the United Nations in New York.

[8] *Thurairajah v Canada (Citizenship and Immigration)* [2011] FC 891 (15 July 2011) with respect to a member of the LTTE in Sri Lanka.

[9] *Uriol Castro v Canada (Citizenship and Immigration)* [2011] FC 1190 (27 October 2011), regarding an intelligence officer of the Air Force Intelligence Division in Peru.

[10] *Dhanday v Canada (Citizenship and Immigration)* [2011] FC 1166 (14 October, 2011), discussing a member of the Punjabi Police Force in India who had carried out torture during interrogations.

[11] *Ezokola v Canada (Citoyenneté et Immigration)* [2010] FC 66 (17 June 2010), referring to the Statutes of the ICTY, the ICTR and especially the ICC regarding extended liability; *Ishaku v Canada (Citizenship and Immigration)* [2011] FC 44 (14 January 2011), relying on the *Rome Statute* for the contours of the concept of crimes against humanity; *Pourjamaliaghdam v Canada (Citizenship and Immigration)* [2011] FC 666 (9 June 2011), referring to Article 25 of the *Rome Statute* regarding extended liability; *Hagos v Kirkoyan* [2011] FC 1214 (24 October 2011), engaging in an analysis of the crimes against humanity of deportation and inhumane acts, relying on the *Rome Statute* and the ICTY case *Prosecutor v Popović*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010.

[12] *Ezokola v Canada (Citoyenneté et Immigration)* [2010] FC 66 (17 June 2010); *Pourjamaliaghdam v Canada (Citizenship and Immigration)* [2011] FC 666 (9 June 2011).

[13] In one case, the exclusion of a member of an unidentified group in an unidentified African country was overruled because the established principles of complicity were not applied properly by the RPD. See *JMS v Canada (Citizenship and Immigration)* [2011] FC 208 (22 February 2011).

[14] *Ndabambarire v Canada (Citizenship and Immigration)* [2010] FC 1 (18 January 2010), exclusion of a member and then the head of a neighbourhood self-defence organization/security committee upheld; *Mukasi v Canada (Citizenship and Immigration)* [2010] FC 463 (28 April 2010), exclusion of a high level official of opposition party, UPRONA, upheld; *Bugegene v Canada (Citizenship and Immigration)* [2011] FC 475 (27 April 2011), exclusion of a member of the Burundian army between 1973 and 1993 during which time this organization carried out a number of crimes against humanity against the Hutu population upheld.

Honduras,[16] the Democratic Republic of the Congo,[17] Rwanda,[18] Iran,[19] Haiti,[20] Sri Lanka,[21] Afghanistan,[22] India,[23] El Salvador,[24] Eritrea[25] and Peru.[26]

Of the judgments issued during these two years, five cases warrant further discussion. The Federal Court of Appeal,[27] in its first decision in the area since 2003, took the opportunity to canvass all its previous jurisprudence and came to the conclusion that the term 'complicity by association' is misleading and that the word 'complicity' is sufficient to connote extended liability. The Court also referred briefly to Articles 25, 28 and 30 of the *Rome Statute* and the *JS* case of the Supreme Court of the UK,[28] but only to confirm its view that the personal and knowing participation test as set out originally in the *Ramirez* case in 1992 is still a valid approach in respect to complicity. Moreover, the references to these Articles also makes it clear that the notions of aiding and abetting, common purpose and command responsibility are all part of the larger concept of personal and knowing participation. The Court also confirmed the view that membership in a brutal organization 'establishes a presumption of participation in the crimes of that organization'. In respect of the interplay between Sections 35(1)(a) and 35(1)(b) [29] of the IRPA, the Court was of the view that a 'function', as set out in Section 35(1)(b), is not sufficient to attract liability for 1F(a):

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[15] *Islam v Canada (Citizenship and Immigration)* [2010] FC 71 (22 January 2010), exclusion of a local leader of the Awami League upheld.

[16] *Valle Lopes v Canada (Citizenship and Immigration)* [2010] FC 403 (14 April 2010), inadmissibility of a person who had joined the Directorate of Special National Investigations for Honduras (DIN, also referred to as Battalion 3-16) upheld.

[17] *Ezokola v Canada (Citoyenneté et Immigration)* [2010] FC 66 (17 June 2010), exclusion overuled; *Canada (Citizenship and Immigration) v Ekanza Ezokola* [2011] FCA 224 (15 July 2011), exclusion restored; *Ishaku v Canada (Citizenship and Immigration)* [2011] FC 44 (14 January 2011), exclusion of a member of the Mouvement pour la Libération du Congo (MLC) upheld.

[18] *Rutayisire v Canada (Citizenship and Immigration)* [2010] FC 1168 (3 December 2010), exclusion of a prefect during the 1994 genocide upheld.

[19] *Pourjamaliaghdam v Canada (Citizenship and Immigration)* [2011] FC 666 (9 June 2011), exclusion of a person working for SAVAK overruled.

[20] *Eugene v Canada (Citizenship and Immigration)* [2011] FC 671 (17 June 2011), inadmissibility finding against a person who belonged to the Haitian National Police and the CIMO, a special unit that provided crowd control during demonstrations, overruled.

[21] *Thurairajah v Canada (Citizenship and Immigration)* [2011] FC 891 (15 July 2011), exclusion of a member of the LTTE in Sri Lanka upheld; *Kathiripillai v Canada (Citizenship and Immigration)* [2011] FC 1172 (19 October 2011), inadmissibility of a person who served for 26 years with the Sri Lankan police during a time when this organization was routinely involved in torturing detainees upheld.

[22] *Canada (Citizenship and Immigration) v Khan* [2011] FC 982 (9 August 2011), non-exclusion of a driver for KhAD upheld.

[23] *Dhanday v Canada (Citizenship and Immigration)* [2011] FC 1166 (14 October 2011).

[24] *Hernandez v Canada (Citizenship and Immigration)* [2011] FC 1170 (18 October 2011), exclusion of a person who served in the military of El Salvador for two years from 1988–90 and who was assigned to an elite battalion, the Recondo-Battalion Atonal (the Atonal Battalion), upheld.

[25] *Hagos v Kirkoyan* [2011] FC 1214 (24 October 2011), inadmissibility of person who was a member of the EPLF in Eritrea, overruled.

[26] *Uriol Castro v Canada (Citizenship and Immigration)* [2011] FC 1190 (27 October 2011), exclusion upheld of an intelligence officer for the Peruvian Air Force Intelligence Division in which capacity he participated in various reconnaissance missions between 1998 and 2008 while also collecting information which was ultimately transferred to the National Intelligence Service (NIS), a brutal organization.

[27] *Canada (Citizenship and Immigration) v Ekanza Ezokola* [2011] FCA 224 (15 July 2011).

[28] *R (JS) (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15.

[29] Section 35(1)(b) of IRPA states the following:

> paragraph 35(1)(b) merely extends the inadmissibility to senior officials in the service of the government that has committed the crimes, without it being necessary to prove their direct or indirect participation in them. Depending on the circumstances, noting prevents a senior official, who remains in office despite the crimes committed by his or her government, from becoming an accomplice to these crimes and subject to paragraph 35(1)(*a*).

The court also indicated that the personal and knowing awareness test as used by the RPD is an incorrect iteration of the personal and knowing participation test because in addition to knowledge, participation is also required to impute liability. While the Court reaffirmed that the personal and knowing participation test is the proper approach with respect to extended liability, it appeared to extend this concept beyond its existing jurisprudence (although in the past it has used the notion of toleration of crimes as being part of complicity):

> a senior official may, by remaining in his or her position without protest and continuing to defend the interests of his or her government while being aware of the crimes committed by this government demonstrate 'personal and knowing participation' in these crimes and be complicit with the government in their commission.

Despite this finding, the final outcome will always depend on the facts particular to each case.

Three Federal Court decisions addressed the issue of membership in a brutal organization. However, individual judges were inconsistent in their approaches to the issues. In the first case, *Pourjamaliaghdam v Canada*,[30] the Court overruled the exclusion of a woman who had worked in an Iranian military hospital and between 1976 and 1979 had recorded telephone conversations critical of the Shah and passed them onto SAVAK. In deciding this case, the Court was asked to declare that the head of liability based on membership of a brutal organization had been overtaken by recent judicial developments, specifically the 2010 decision by the Supreme Court in the UK and a 2011 decision in New Zealand[31] as well as the *Rome Statute*. Examining these sources as well as the most pertinent Canadian jurisprudence, the Court came to the conclusion that for the most part the Canadian jurisprudence was consistent with foreign case law as well as Article 25 of the *Rome Statute*. Furthermore, where there might be slight differences between Canadian and foreign jurisprudence, for example in relation to the issue of membership, there is no reason to abandon the long standing tradition in Canadian courts and bring the Canadian jurisprudence in 'perfect alignment' with foreign decisions. However, the court does provide caution in using the notion of membership on a number of levels, namely in terms of the fact that it should be an unusual occurrence, that membership is a rebuttable presumption (meaning that 'the presumption can be rebutted by evidence of a lack of knowledge of the organization's purpose or an absence of direct or indirect involvement in the group's activities), that the standard of proof for this type of liability is much higher than for other forms of liability, namely that the characterization as a brutal organization has to be free from doubt, that in most cases it would be better to use the

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> A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for (*b*) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*.

[30] *Pourjamaliaghdam v Canada (Citizenship and Immigration)* [2011] FC 666 (9 June 2011).
[31] *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107.

normal type of complicity analysis unless it is 'fairly clear that the presumption applies based on the evidence of the nature of the group' and that the decision maker must take into account the remainder of the evidence and apply the six factor approach to see if complicity results. The last aspect appears to be an extension of the approach set out in the *Thomas* case,[32] although in that case it was framed in the alternative rather than an aspect of the complete approach and as such, the decision might have gone too far. The Court also provided a reiteration of two key elements of the notion of membership from the *Harb* decision,[33] namely the existence of an institutional link between the organization and the person, accompanied by a more-than-nominal commitment to the organization's activities and the notion of civilian population. The RPD decision was overruled as the board had not made any specific finding on the issue of membership.

In the second case, *Thurairaja*,[34] the subject was a Sri Lankan of Tamil ethnicity who worked with the Liberation Tigers Tamil Ealam (LTTE) from December 1992 – October 1995. During the first year, he worked at the Archive Desk in the Tinnevelly camp. He was subsequently promoted and worked in the Finance Department in the Chankanai camp where he was in charge of collecting taxes which financed the service of LTTE fighters. The RPD found that throughout this period, the LTTE committed crimes against humanity and was an organization with limited and brutal purpose. It also found that the subject was complicit in the crimes against humanity committed by the LTTE given that he was aware of the crimes committed, that his position as a tax collector within the LTTE could not be qualified as a negligible or passive role, and that he did not demonstrate he had been coerced to work for the LTTE. The subject challenged his exclusion on the basis that the RPD erred in finding him complicit of crimes against humanity and erred in fact when assessing the situation in Sri Lanka after 1995. The Federal Court found that the conclusion of the RPD to exclude the subject was reasonable given the facts and the jurisprudence based on the fact that membership in a brutal organization is sufficient to establish a finding of complicity and therefore exclusion. While the Court found the RPD had erred by stating that the Jaffna region (where the subject was living) was not under control of the government army in 1995, it also found the error was immaterial given that the exclusion was based on the activities of the subject between 1992 and 1995.

In the third case regarding membership in a brutal organization, *Khan*,[35] the non-exclusion of a driver for KhAD was upheld by the Court based on the fact that the individual had fulfilled the requirements of the rebuttable presumption for membership in a brutal organization, namely the lack of knowledge of the purposes of KhAD (which did not go beyond common or 'street' knowledge). This presumption was especially relevant for a large organization like the KhAD where lower level operatives in one particular section might not be aware of crimes against humanity committed in another section or department.

Again, the Court's decision shows confusion between the notions of membership and forms of complicity for non-brutal organization by tying the rebuttal of the presumption to the elements of complicity of the latter forms of extended liability. The Court said:

[32] *Thomas v Canada (Citizenship and Immigration)* [2007] FC 838 (13 August 2007).
[33] *Harb v Canada (Minister of Citizenship and Immigration)* [2003] FCA 39 (27 January 2003).
[34] *Thurairajah v Canada (Citizenship and Immigration)* [2011] FC 891 (15 July 2011).
[35] *Canada (Citizenship and Immigration) v Khan* [2011] FC 982 (9 August 2011).

> the RPD is obliged to consider the nature of the membership at issue and determine whether it gives rise to a sharing of the organization's common purpose of achieving its goals through brutality and violence against civilians ... [and] where the organization is one directed to a limited brutal purpose, one's position in such an organization is a significant factor.

These decisions suggest there is a divergence developing in the case law of the Federal Court on the issue of brutal organizations. The correct approach should be the one set out in the *Thomas* case where the notion of membership and complicity in non-brutal organizations were considered separately but evidence adduced for the latter could be used for the former. Under *Thomas*, two approaches to rebut the membership issue, namely the six factor approach and the approach of examining a shared or common purpose, would be excessive since a rebuttable presumption only operates to negate the essential elements of the issue in question, which in the case of membership is the connection with more-than-nominal involvement and knowledge[36] but nothing more.

One decision in the Federal Court addressed the defence of duress. In the case of *Valle Lopes*,[37] the IRB had found the subject inadmissible under Section 35(1)(a) of the IRPA based on the facts that he was a member of the Directorate of Special National Investigations for Honduras (DIN, also referred to as Battalion 3-16) from 1980–84 and that during this period, he participated in acts of kidnapping and torture against a civilian population based on three distinct headings of liability, namely on membership in a brutal organization, personal involvement and on the six factor approach. The issue of duress was raised in the following context:

> The applicant finally challenges the Board's conclusion that the defence of duress was not made out. That defence is embodied in the consideration 'opportunity to leave the organization' in a complicity analysis. The Board acknowledged that if the applicant had attempted to leave he would likely have been killed, but subsequently concluded that 'the possibility of the applicant's own death does not justify a defence of duress given the greater harm that was inflicted on a number of people.' The applicant argues that it was improper for the Board to implicitly find that a singular death was unequal to multiple deaths.

The Court dismissed the appeal:

> The applicant appears to argue that the possibility of death for desertion is a *carte blanche* excuse for participation in the commission of atrocities. I know of no authority in support of this principle. The Board is free to weigh the evidence before it and come to its own conclusion on whether an individual ought to have attempted to leave. The Board surmised that while leaving the organization may have put the applicant in grave danger when weighed against the atrocities they were committing, it was the only acceptable course of action. The Board accepted that Battalion 3-16 would likely attempt to hunt down and kill deserters, but it felt that the applicant was not in imminent harm when he was participating in crimes against humanity. He was not under constant watch and a carefully planned desertion could have been executed much earlier. The Board also considered that when the applicant found himself in danger of imminent harm, he was able to escape. It was not unreasonable for the Board to consider these factors.

[36] See *Harb v Canada (Minister of Citizenship and Immigration)* [2003] FCA 39 (27 January 2003).
[37] *Valle Lopes v Canada (Citizenship and Immigration)* [2010] FC 403 (14 April 2010).

Cases — Revocation of Citizenship

☛ *Canada (Citizenship and Immigration) v Rogan* [2011] FC 1007 (18 August 2011)

The *Rogan* case was the first case using the remedy of the revocation of citizenship of a person misrepresenting his involvement in war crimes and crimes against humanity taking place after the Second World War.

Branko Rogan was born in the Municipality of Bileća, in what was then Yugoslavia (now, Bosnia-Herzegovina (BiH)) in February 1962. In January 1994, Rogan submitted an application for permanent residence to the Canadian Embassy in Belgrade. Following an interview with Canadian immigration officials, he was granted entry to Canada as a refugee and arrived in Vancouver with his wife and three sons in March 1994. He obtained Canadian citizenship in November 1997.

The Federal Court found that Rogan had been employed as a reserve police officer and worked as a guard at detention facilities in Bileća, Bosnia-Herzegovina, in June and July of 1992. During this time, Muslim males were arrested and detained in inhumane conditions while being subjected to physical abuse on the basis of their Muslim faith. According to the Court, Rogan had been aware of these facts and had participated directly and indirectly in the mistreatment and torture of prisoners held at the facilities:[38]

> Mr. Rogan was also aware that prisoners in the detention facilities were being beaten and, in at least one instance, killed. Mr. Rogan facilitated and was complicit in the beating of prisoners. Mr. Rogan was himself directly responsible for striking Sreco Kljunak in the face, for the beating of Asim Catovic, and for the intentional infliction of severe psychological pain on Mr. Catovic's son.[39]

Furthermore, the Court concluded that he had knowingly concealed this information from Canadian immigration officials in the course of his application for permanent residence and obtained, as consequence, his Canadian citizenship by false representation or fraud or by knowingly concealing material information.[40]

With respect to whether the activities committed by Rogan amounted to crimes against humanity, the judge canvassed the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the definition of crime against humanity in Canada's *Criminal Code* at the relevant time. She then looked to Canadian jurisprudence to help inform her of the four essential elements of crimes against humanity. Finally, she turned her attention to determining whether Rogan's actions constituted a crime against humanity. Based on these findings of fact, the judge was of the view that the actions constituted the crimes against humanity of persecution and other inhumane acts.[41]

Cases — Court Martial Proceedings

☛ *R v Semrau* [2010] CM 4010

[38] *Canada (Citizenship and Immigration) v Rogan* [2011] FC 1007 (18 August 2011), paras. 6–7, 418–421.
[39] Ibid., paras. 386–387.
[40] Ibid., paras. 8, 430–431.
[41] Ibid., paras. 390–391.

Captain Robert Semrau was deployed to Afghanistan in 2008 as part of the Operational Mentor Liaison Team assigned to mentor the Afghan National Army (ANA). This team was composed of four members divided into two fire teams. During the month of October 2008, Semrau was involved in a clearing operation with the ANA in Helmand province while mentoring the commander of an Afghan infantry company. On 19 October 2008, the lead element of that company encountered an enemy position. Attack helicopters were called in to suppress the enemy position. Semrau was positioned at the rear of the company when he came upon an insurgent who was lying wounded on a path by a cornfield. After a brief examination of the insurgent, the ANA company commander moved to the position of another, deceased insurgent in the next cornfield. Semrau also went to the location of the second insurgent and then returned to the location of the first insurgent so that the fire team partner could photograph the insurgent for intelligence purposes. Once the photographs had been taken, he shot the insurgent who had been wounded but was still alive at this point.

Semrau had been charged with various offences, namely second-degree murder, attempt to commit murder using a firearm, negligent performance of a military duty and having behaved in a disgraceful manner. He was found guilty of the last offence only and on 5 October 2010, was sentenced to dismissal from military service and a reduction in rank to the rank of second lieutenant.[42]

In arriving at this sentence, the judge considered both aggravating and mitigating circumstances. With respect to the first consideration, the judge stated:

> Subjectively, this is also a serious offence. One must examine the conduct of the accused as well as the reasons why this behaviour is deemed disgraceful. The act of unlawfully shooting a wounded and unarmed person is serious. In the military context, you committed a grave breach of discipline because you decided to set aside your orders, training and fundamental principles. As I stated previously, this conduct is deemed disgraceful because it is so fundamentally contrary to our values and training that it is shockingly unacceptable. The profession of arms is synonymous with the management of violence. Officers are ultimately entrusted to lead soldiers and to use weapon systems to put into effect the will of our government. Our discipline and respect for the rule of law ensures that we remain an effective and efficient armed force that reflects Canadian values and makes Canadians proud of its military force's achievements around the world. You personally failed to abide by one of our most important responsibilities: that of only using force in accordance with lawful orders.[43]

Mitigating circumstances were found in the fact that Semrau had no previous convictions, that he pleaded guilty, that the behaviour had been out of character and that he was considered a leader who cared for his subordinates and displayed battlefield qualities that inspired confidence and trust.[44] By contrast, the fact that Semrau had indicated that he wanted to help the insurgent because of his grave condition was dismissed in the following fashion:

> Your actions might have been motivated by an honest belief you were doing the right thing; nonetheless, you committed a serious breach of discipline. You failed in your role as a leader because you chose to put aside your training and orders. Thus you put your subordinates in one of the most precarious situations imaginable: that of knowing their leader had committed a serious breach of discipline. Now, what were they supposed to

[42] *R v Semrau* [2010] CM 4010, para. 53.
[43] Ibid., para. 45.
[44] Ibid., paras. 24–25.

> do? Report you, as it was their duty, or support their leader, knowing that what he did was unlawful and that their silence was also wrong? Each member of your team has had to make decisions since that incident and has had to live with the consequences that flowed from these decisions. You might have been torn between your personal moral values and your duties as a Canadian soldier when you made your choice; but did you consider the dilemma you were inflicting upon your subordinates? How can we expect our soldiers to follow the laws of war if their officers do not? How can we expect the ANA to follow the laws of war if the Canadian officers mentoring them do not? Captain Semrau, I do not know if you have taken any time to reflect upon these questions in the last year; if you have not, do so, and also consider the effects of your actions on the members of your team.[45]

Cases — Repatriation of Guantánamo Inmate to Canada

☛ *Canada (Prime Minister) v Khadr* [2010] 1 S.C.R. 44

Mr. Khadr, the appellant and a Canadian citizen, was apprehended by the American military in July 2002. He continues to be detained at the US Naval Station, Guantánamo Bay, Cuba. In November 2005, the appellant was charged with conspiracy to commit offences triable by Military Commission, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy. As of 2 February 2007, the charges against him read: murder in violation of the law of war; attempted murder in violation of the law of war; conspiracy; providing material support for terrorism; and spying. The charges relate to events which are alleged to have occurred in Afghanistan and elsewhere when the appellant was 15 years of age and younger. They carry a maximum penalty of life imprisonment. The prosecution was not seeking the imposition of the death penalty.

Prior to the laying of charges, Canadian officials from the Canadian Security Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT), with the consent of US authorities, attended Guantánamo Bay and interviewed the appellant in the absence of his counsel. These visits were allegedly not welfare visits or covert consular visits but were purely information gathering visits with a focus on intelligence/law enforcement. The topics discussed with the appellant included matters which were the subject of the charges. Canadian agents took a primary role in these interviews, were acting independently and were not under the instruction of US authorities.

In 2009, both the Federal Court and the Federal Court of Appeal were of the view that these actions by the Canadian government constituted violations of international human rights norms and the Canadian *Charter of Rights and Freedoms* and that Canada was obliged to protect Khadr by taking appropriate steps to ensure that his treatment was in accordance with these norms. According to these courts, the appropriate remedy for these *Charter* violations was to ask the US to repatriate Khadr to Canada.[46]

On 29 January 2010, the Supreme Court of Canada ruled on this issue. The starting point of the Court's analysis was the observation that:

> as a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*.

[45] Ibid., paras. 37–38. The Court also examined two US cases involving the shooting of wonded and unarmed enemy insurgents and found them somewhat helpful for the situation at hand. At paras. 39–42.
[46] See 12 *YIHL* (2009) pp. 518–519.

> International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada. … The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms.[47]

The Court was of the view that the statements taken by Canadian officials contributed to the continued detention of Khadr, thereby impacting on his liberty and security interests protected by the *Charter*. The Court also found that the 'interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects,' and violates the *Charter*.[48]

However, unlike the lower courts, the Supreme Court found it did not have the power to order the executive to seek Khadr's repatriation to Canada. Instead, it issued declaratory relief, namely it stated that Canada participated in a process contrary to Canada's international human rights obligations, thereby contributing to Khadr's ongoing detention and depriving him of the right to liberty and security as guaranteed by the *Charter*.[49]

☛ *Khadr v Canada* [2010] FC 715 (5 July 2010)

On 16 February 2010, in response to the Supreme Court's decision, Canada sent a diplomatic note to the US government requesting it not to use the information provided by Canada in its prosecution of Mr. Khadr. This action was challenged by Khadr's counsel on the grounds that it had not been given any opportunity to present informed submissions in advance of the response provided by the government.

The Court indicated that the response by the government was subject to judicial review by the Federal Court and that Khadr was entitled to some degree of procedural fairness and natural justice during the process by which the government decided to implement the decision of the Supreme Court, which included a duty to inform Khadr of the action it would be taking and to give him an opportunity to make written submissions as to which actions would be appropriate.[50] As a result, the Court ordered the government to advise Khadr within 7 days of the judgment of all untried remedies it considered available to cure the breach of his *Charter* rights and provide Khadr with an opportunity to provide submissions on the government's anticipated solution.[51]

☛ *Canada (Prime Minister) v Khadr* [2010] FCA 199 (22 July 2010)

The government applied for an injunction to stay the enforcement of the Federal Court's judgment until the appeal against the decision had been heard, which was granted 17 days after the original order had been issued.

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[47] *Canada (Prime Minister) v Khadr* [2010] 1 S.C.R. 44, para. 14.
[48] Ibid., paras 25–26.
[49] Ibid., paras. 38, 48.
[50] *Khadr v Canada* [2010] FC 715 (5 July 2010), paras. 62, 71, 75.
[51] Ibid., para. 96.

☛ *Canada v Khadr* [2011] FCA 92 (9 March 2011)

The appeal of the decision of the Federal Court was dismissed as moot in the following terms: 'as a result of the prison sentence imposed on the respondent following the guilty plea which he registered before the U.S. Military Commission, he is no longer detained by reason of the breach of his *Charter* rights which forms the basis of the judgment under appeal.'

Cases — State Immunity Act and Torture

☛ *Kazemi (Estate of) c. Islamic Republic of Iran* [2011] QCCS 196 (25 January 2011)

In 2003, photojournalist Zahra (Ziba) Kazemi, an Iranian by birth but a naturalized Canadian citizen, was tortured to death in Iran. She had obtained a permit allowing her to photograph the daily lives of Iranians but government officials arrested her while she was taking pictures of protesters near a prison in Tehran. During her detention, Iranian prison authorities severely tortured her, breaking several bones and sexually abusing her. Kazemi was eventually taken to a hospital with internal bleeding and a brain injury. While she was in a coma at the hospital, Iranian officials initially failed to contact Canadian consular officials and refused to allow her family access to her.

In 2006, Kazemi's son, Stephan Hashemi, filed a civil lawsuit in Montreal against the Government of Iran and three individual Iranian officials: Ayatollah Ali Khamenei, Iran's Supreme Leader; Tehran's Chief Public Prosecutor, Saeed Mortazavi, who is alleged to have ordered Kazemi's arrest; and Mohammad Bakhshi, the former Deputy Chief of Intelligence for Evin Prison where it is alleged he interrogated, physically assaulted and tortured Kazemi. The Government of Iran has argued that the case should be dismissed because each of the three accused are immune from suit under Canada's *State Immunity Act*.[52] That law provides immunity to foreign governments from civil lawsuits except in certain circumstances. A previous case against Iran for alleged torture, the *Bouzari* case,[53] had been dismissed when the courts found that the *State Immunity Act* applied even to such serious charges.

On 25 January 2011, the Quebec Superior Court rendered a decision on the immunity issue. The Court followed the *Bouzari* case with respect to the general principles enshrined in the *State Immunity Act* and then applied the principles to the specific individuals named in the lawsuit. With respect to Ayatollah Ali Khamenei the Court dismissed liability:

> in the present instance, the allegations made against the Ayatollah Ali Khamenei are not in the nature of private personal acts but more in the nature of tolerance of a state policy vis-à-vis foreign journalists. He would, according to the Plaintiffs, have known or ought to have known that Ms Kazemi, once arrested, would be illegally detained, interrogated, tortured and eventually murdered. These acts, relate to a state policy rather than to a personal involvement on the part of the Head of State. Furthermore, the liability of the Head of State is based only upon his knowledge or vicarious liability for the acts of others under his control. Nowhere is it alleged that the Head of State has directly and/or actively participated to the brutal acts committed upon Ms. Kazemi. In other words, the allegations against the Head of State of Iran are in the nature of acts done in a public capacity, *qua* Head of State, and assuming the constitutional validity of the SIA, this Court holds that the allegations made against the Ayatollah Ali Khamenei presuppose that

[52] *State Immunity Act*, RSC 1985, c. S-18.
[53] See 6 *YIHL* (2003) p. 470; 7 *YIHL* (2004) p. 477.

> the head of the State of Iran was there and then acting in his official capacity. Therefore, the said Defendant is immune from jurisdiction.[54]

With respect to the two other individuals sued, Mortazavi and Bakhshi, the Court came to the conclusion that the *State Immunity Act* would also apply to them as they had been acting in their official capacity as employees of Iran. The fact that the acts committed could be illegal or malicious did not move them outside the scope of their official duties.[55] Lastly, the Court indicated that the *State Immunity Act* was not unconstitutional.[56]

Kazemi has appealed the judgment to the Quebec Court of Appeal.

Cases — Lawsuit against Corporations: Aiding and Abetting in Alleged War Crimes

☛ *Yassin c. Green Park International Inc.*[2010] QCCA 1455

In July 2008, the village council of Bil'in (located in the Occupied Palestinian Territory of the West Bank) and the head of the village council filed a lawsuit in Montreal against two Canadian companies, Green Park International and Green Mount International. The plaintiffs claimed that Green Park and Green Mount constructed buildings in Bil'in as part of an illegal Israeli settlement that violates the *Geneva Conventions*. The lawsuit alleged that Green Park and Green Mount are therefore liable for conspiring with and aiding and abetting Israel in committing war crimes.

On 18 September 2009, the lawsuit was dismissed under the doctrine of *forum non conveniens*. Although the judge found that a defendant's participation in war crimes could potentially lead to civil liability in a Quebec court, he ruled that Israel was a more proper forum for the lawsuit. Bil'in had argued that the Israeli courts would not consider a case on the legality of settlements in the West Bank (because the Courts would rule the case non-justiciable) and so it was forced to pursue the lawsuit in Canada. The judge considered various Israeli cases submitted to him and found that those judgments did not completely close the Israeli courts to Bil'in. He ruled that the Israeli courts might consider Bil'in's claim that the construction of the specific settlement violates the *Geneva Conventions*, and because the case has a much closer connection to Israel than Canada, the lawsuit was dismissed.[57]

The appeal of this case was decided on 11 August 2010. The Quebec Court of Appeal agreed with the Superior Court that Israeli courts are better placed to hear this type of case, even though the Israeli government could invoke the doctrine of State immunity, especially since Israeli courts have already heard cases of a similar nature.[58] With respect to the issue of justiciability, the Court of Appeal was of the view that the trial judge had come to the correct conclusion based on the facts before it and that the claimants had failed to establish that Israeli courts would not be inclined to hear cases of this nature.[59]

The Supreme Court of Canada refused leave to appeal on 3 March 2011.[60]

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[54] *Kazemi (Estate of) c. Islamic Republic of Iran* [2011] QCCS 196 (25 January 2011), paras. 100–102.
[55] Ibid., paras 150–153. The Court considered other Canadian jurisprudence as well as case law from the UK, US and the European Court of Human Rights. At paras. 115–150.
[56] Ibid., paras. 159–210.
[57] See 12 *YIHL* (2009) p. 522.
[58] *Yassin c. Green Park International Inc.*[2010] QCCA 1455, paras. 56–58, 68–71.
[59] Ibid., paras. 72, 76–80.
[60] *Bil'in (Village Council) v Green Park International Inc.* [2011] CanLII 10843 (SCC).

☛ *Association canadienne contre l'impunité (ACCI) c. Anvil Mining Ltd.* [2011] QCCS 1966

On 13 October 2004, a small group of armed individuals claiming to act in the name of the Mouvement révolutionnaire pour la liberation du Katanga (MRLK) entered the town of Kilwa and proclaimed the independence of Katanga. The Government of the Democratic Republic of the Congo deployed its army to regain control of the village, which resulted in the massacre and summary executions of 70–80 civilians and pillage. According to the claimants, Anvil had provided logistical support during the events in Kilwa which included the transportation of military troops to Kilwa, which is about 55 kilometres from a mine operated by Anvil. Anvil also allegedly made trucks and drivers available to the armed forces and provided food rations and fuel.

On 28 June 2007, the Military Court in Katanga acquitted 12 defendants, both military and civilian, in a trial arising out of the 2004 events. The civilians implicated in this case had been three employees of Anvil, one Canadian and two South Africans.[61] On 21 December 2007, the Military Court of Appeal in Lubumbashi refused to allow an appeal of the acquittals.[62]

Also in 2007, a class action was launched in Australia on behalf of the victims of the events in Kilwa but the original law firm involved in the case withdrew from the case and no other lawyers have taken up the case so far.[63]

The judge in the case before Quebec's Superior Court came to the conclusion that Quebec courts had jurisdiction to hear the case and the exception of *forum non conveniens* as invoked by Anvil would not apply to this case because Anvil was not able to indicate why other States, namely the Democratic Republic of the Congo or Australia, would be better placed to hear the case. This decision was based on the fact that although proceedings had taken place in both countries, victims had experienced considerable difficulties in pursuing their causes of actions as a result of the possibility of lack of a fair trial in the DRC and the unwillingness of lawyers in Australia to take on the case.[64]

Anvil has appealed the decision.

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[61] See *Kilwa Trial: A Denial of Justice: A Chronology: October 2004 – July 2007* (Joint Report by Action contre l'impunité pour les droits humains (ACIDH), Association Africaine de Défense des Droits de l'Homme/Katanga (ASADHO/Katanga) Global Witness and Rights and Accountability in Development (RAID), 17 July 2007) <http://www.globalwitness.org/library/victims-kilwa-massacre-denied-justice-congolese-military-court>; UN, 'High Commissioner for Human Rights concerned at Kilwa Military Trial in the Democratic Republic of the Congo' (Press Release, 4 July 2007).

[62] See Global Witness and Rights and Accountability in Development (RAID), 'Military Court of Appeal Succumbs to Political Interference in Kilwa Trial' (21 December 2007) <http://www.raid-uk.org/docs/Kilwa_Trial/kilwa_appeal-21dec07-pdf.pdf>.

[63] For some of the reasons, see *Pierre v Anvil Mining Management NL* [2008] SCWA 30.

[64] *Id.*, paras 37-40.