Canada, Ramirez v. Canada

[**Source**: Ramirez v. Canada (*Minister of Employment and Immigration*) [1992] Federal Court of Appeal No 109, footnotes omitted; to facilitate comprehension, the order of paragraphs has been modified.]

Federal Court of Canada – Court of Appeal
Stone, MacGuigan and Linden JJ. [...]

1. This is an appeal [...] of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board [...], dated March 14, 1990, in which the Refugee Division determined that the appellant was not a Convention refugee. [...] Initially motivated by revenge for the murder of one sister and her husband by the guerrillas, and the rape of another [...], the appellant enlisted voluntarily in the Salvadoran Army for two years as of February 1, 1985, and was such an effective soldier that he was promoted to corporal and then to sub-sergeant. During this period he was involved in between 130 and 160 instances of combat [...]. Two months before his term was up he was wounded in an ambush in foot, leg, and head. During his recuperation he signed up for two more years of service so that his hospitalization and convalescence would be paid for and his salary would continue [...].
2. [...] [T]he Refugee Division found that the claimant had established that he had a well-founded fear of persecution by reason of his political opinion, but nevertheless excluded him from protection by virtue of section F of Article 1 of the United Nations Convention Relating to the Status of Refugees (the “Convention”) [...].

[**N.B.**: This provision reads as follows: “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” (The text of the Convention is available on http://www.unhcr.org [1])]

In the case at bar the crime in question is either a war crime or a crime against humanity. It is certainly not a crime against peace, and would normally be included in crimes against humanity [...]. However, since we are, on the facts under consideration, concerned with crimes committed in the course of what is either a civil war or a civil insurrection, and nothing hangs on whether one category or the other is the more relevant, I have chosen to employ the term “international crimes” to refer indifferently to both classes of crime. [...]

4. There is a dearth of authority with respect to the interpretation of the Convention. The introductory clause contains the ambiguous phrase “serious reasons for considering” [...].
5. The words “serious reasons for considering” also, I believe, must be taken, as was contended by the respondent, to establish a lower standard of proof than the balance of probabilities. [...]
7. Therefore, although the appellant relied on several international authorities which emphasize that the interpretation of the exclusion clause must be restrictive [...], it would nevertheless appear that, in the aftermath of Second World War atrocities, the signatory states to this 1951 Convention intended to preserve for themselves a wide power of exclusion from refugee status where perpetrators of international crimes are concerned. [...]
11. In the case at bar the most controversial legal issue has to do with the extent to which accomplices [...], as well as principal actors, in international crimes should be subject to exclusion, since the Refugee Division held in part that the appellant was guilty “in aiding and abetting in the commission of such crimes” [...], and it is on this finding that, as will become apparent, the respondent’s case must rest.

12. The Convention provision refers to “the international instruments drawn up to make provisions in respect of such crimes One of these instruments is the London Charter of the International Military Tribunal, Article 6 of which provides in part [...]:

“Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

I believe this evidence is decisive of the inclusion of accomplices as well as principal actors, but leaves to be answered the very large question as to the extent of participation required for inclusion as an “accomplice”. [...]

15. [...] From the premise that a mens rea interpretation is required, I find that the standard of “some personal activity involving persecution,” understood as implying a mental element or knowledge, is a useful specification of mens rea in this context. Clearly no one can “commit” international crimes without personal and knowing participation.

16. What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status. Indeed, this is in accord with the intention of the signatory states, as is apparent from the post-war International Military Tribunal already referred to. [...]

It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts.

17. Similarly, mere presence at the scene of an offence is not enough to qualify as personal and knowing participation [...], though, again, presence coupled with additional facts may well lead to a conclusion of such involvement. In my view, mere on-looking, such as occurs at public executions, where the on-lookers are simply by-standers with no intrinsic connection with the persecuting group, can never amount to

personal involvement, however humanly repugnant it might be. However, someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts.

18. At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law [...], and I believe is the best interpretation of international law. [...]

20. In my view, [a precedent referred to by the court] was correctly decided on its facts, but it relied in good part on the definition of parties to an offence contained in section 21 of the Canadian Criminal Code, [Article 21 of the Canadian Criminal Code provides: "(1) Every one is a party to an offence who: (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; (c) abets any person in committing it. (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."] an approach which is not sufficient in the case at bar where what has to be interpreted is an international document of essentially a non-criminal character. [...]

21. [...] In fact, in my view there is no liability on those who watch unless they can themselves be said to be knowing participants.

22. One must be particularly careful not to condemn automatically everyone engaged in conflict under conditions of war. Probably most combatants in most wars in human history have seen acts performed by their own side which they would normally find reprehensible but which they felt utterly powerless to stop, at least without serious risk to themselves. While the law may require a choice on the part of those ordered actually to perform international crimes, it does not demand the immediate benevolent intervention, at their own risk, of all those present at the site. Usually, law does not function at the level of heroism.

23. In my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should

be decided in relation to the particular facts. [...]

24. [...] This reservation as to his credibility in respect to the torture and killing of civilians is subsequently explained [by the Refugee Division] as follows [...]: “By his own admission, the claimant participated in what the panel would term “atrocities” against the civilian population. That such atrocities by the military against non-combatants occur is well documented throughout the exhibits filed in evidence in this matter. [...]”

25. [...] Throughout his testimony, the claimant described his personal participation in combat. In the first instance, claimant stated the following:

“Q: Okay now, tell us about your term of service.

A: Once I got there they started training me as a soldier. In the beginning I liked this. It was attractive to me. It sort of matured me from another lesson to man and I also knew that the army needed young people, [...] because otherwise they would lack soldiers, they would have no soldiers and who was going to fight for the fatherland [sic].

Then I started doing more and more training and progressing in the military ranks. That is how I was doing my service for almost two years. I fought, I did a lot of things that maybe people would think are bad things. I had to kill and the time went on, but these things went on too.

Q: Are you talking about ordinary combat?

A: Yes, I’m talking about ordinary combat. I’m also talking about getting people unarmed, torturing them and killing them. [...]“

26. The key phrase in this passage, the word which led the Refugee Division to disbelieve his subsequent denials of not being a principal actor in torture scenes, was obviously “I did a lot of things that maybe people would think are bad things”.

27. With the advantage of a better translation of the original Spanish, we now know that what the appellant actually said in this passage was not “I did,” but “I saw.” [...]

30. The first finding of the Refugee Division, relating to the appellant’s participation as a principal actor, cannot therefore be upheld, since there is no evidence that could sustain it.

31. Hence it is necessary to proceed to their second finding, relating to his participation as an accomplice [...].

32. From this passage it is unclear what legal test was applied by the Refugee Division in determining that the appellant was an accomplice. It has recourse to the common-law phrase “aiding and abetting,” which is a term of art in that tradition, and therefore an insufficient approach by itself to the interpretation of the international Convention. But the reference is so general and the standard actually applied so elusive, that I believe it must be said that the Refugee Division has erred in law, and its decision must be set aside and the matter remitted to it for redetermination unless, on the basis of the correct approach, no properly instructed tribunal could have come to a different conclusion [...].

33. The Refugee Division rested its finding on the appellant’s “being present and serving as a guard.” It would also have been open to it on the evidence to find that his activities in rounding up suspected guerillas constituted personal involvement in the commission of the offences against them which followed, but the Refugee Division must have accepted his explanation, that on the two occasions on which he admitted that his role in rounding up had led to mistreatment he had thought the prisoners were to be handed over to the Red Cross [...].

34. With respect to the appellant’s serving as a guard, I find it impossible to say that no properly instructed tribunal could fail to draw a conclusion as to personal participation. The appellant testified: [...]

> “We would just take watch, we’d make watch in the area or then we would just witness what was going on, but we never did the actual killing.”

The words “in the area” may merely imply a “making” or “taking watch” in the usual

military sense of serving as a guard for the encampment, without any particular reference to what was happening to the prisoners. The Refugee Division interpreted it as in the sense of guarding the prisoners or protecting the malefactors. Given the ambiguity, I cannot see this as the only interpretation possible for a properly instructed tribunal.

35. What remains is, therefore, the appellant's admitted presence at many instances of torture and killings committed by other soldiers, under orders from their common superiors. In speaking in a summary way of his experiences the appellant testified as to what he saw [...]:

    "Yes, I'm talking about ordinary combat. I'm also talking about getting people unarmed, torturing them and then killing them." [...]

36. 36. At that time he testified that his conscience was bothering him because of what he had been part of [...].
37. [...] I find it clear from these and other passages in the appellant's testimony, as well as from the documentary evidence, that the torture and killing of captives had become a military way of life in El Salvador. It is to the appellant's credit that his conscience was greatly troubled by this, so much so that during his second term of enlistment, after three times unsuccessfully requesting a discharge [...], he eventually deserted in November, 1987 [...], in considerable part at least because of his bad conscience. I have also to say, however, that I think it is not to his credit that he continued to participate in military operations leading to such results over such a lengthy period of time. He was an active part of the military forces committing such atrocities, he was fully aware of what was happening, and he could not succeed in disengaging himself merely by ensuring that he was never the one to inflict the pain or pull the trigger.
38. On a standard of "serious reasons for considering that [...] he has committed a crime against peace, a war crime, or a crime against humanity," I cannot see the appellant's case as even a borderline one. He was aware of a very large number of interrogations carried out by the military, on what may have been as much as a twice-weekly basis (following some 130-160 military engagements) during his 20 months of active service. He could never be classed as a simple on-looker, but was on all occasions a

participating and knowing member of a military force, one of whose common objectives was the torture of prisoners to extract information. This was one of the things his army did, regularly and repeatedly, as he admitted. He was a part of the operation, even if he personally was in no sense a "cheering section." In other words, his presence at this number of incidents of persecution, coupled with his sharing in the common purpose of the military forces, clearly constitutes complicity. We need not define, for purposes of this case, the moment at which complicity may be said to have been established, because this case is not to my mind near the borderline. The appellant was no innocent by-stander: he was an integral, albeit reluctant, part of the military enterprise that produced those terrible moments of collectively deliberate inhumanity.

39. To convict the appellant of criminal liability for his actions would, of course, require an entirely different level of proof, but on the basis of the lower-than-civil-law standard established by the nations of the world, and by Canadian law for the admission of refugees, where there is a question of international crimes, I have no doubt that no properly instructed tribunal could fail to come to the conclusion that the appellant had been personally and knowingly involved in persecutorial acts.

40. The appellant did not argue the defence of superior orders, and his arguments as to duress and remorse are insufficient for exoneration. [...]

I could find that the duress under which the appellant found himself might be sufficient to justify participation in lesser offences, but I would have to conclude that the harm to which he would have exposed himself by some form of dissent or non-participation was clearly less than the harm actually inflicted on the victims. The appellant himself testified as follows as to the punishment for desertion [...]:

> "A: Well, the punishment is starting with very, very hard training exercises and then after that they will throw you in jail for five to ten years."

This is admittedly harsh enough punishment, but much less than the torture and death facing the victims of the military forces to which he adhered.

41. 41. As for the remorse he no doubt now genuinely feels, it cannot undo his persistent and participatory presence.
42. The appeal must therefore be dismissed.

Discussion

1. a. Should the Court have determined the type of conflict prevailing in El Salvador? What effect would this determination have had on the decision rendered? Was the Court right not to specify the legal classification of the “crime in question”?
   b. How would you have characterized the situation in El Salvador? (GC I-IV, Art. 3(1); P II, Art. 1(1))
   c. Are the acts the appellant is charged with crimes against humanity, war crimes or both? Does the difference between these two categories of crime lie in the classification of the conflict? Can there be a war crime in a non-international armed conflict? (GC I-IV, Art. 3(1) and Arts 50/51/130/147 respectively; P II, Art. 4(2); ICC Statute, Arts 7 and 8; [See The International Criminal Court])
2. Did the Salvadoran armed forces violate IHL? (GC I-IV, Art. 3(1) [2]; P II, Art. 4(2)(a) [3]; CIHL, Rules 87 [4] and 90 [5])
3. Are there serious reasons to think that the appellant committed international crimes? Because of the simple fact that he belonged to the Salvadoran armed forces? The fact that he took prisoners who were subsequently tortured? What ought he to have done so as not to make himself criminally responsible? (ICC Statute, Art. 25(3)(d) [6])
4. a. For the appellant to be found criminally responsible for acts of torture and executions, would the prosecutor’s burden of proof concerning the said facts have been greater, or would it have been necessary to provide evidence of a major implication in the crimes? According to the Court? In your opinion?
   b. For what reasons was the appellant an accomplice in the offences of which the Salvadoran armed forces were accused? Was the fact that he knew about them and nevertheless remained a member of those forces sufficient to find him to be an accomplice? (ICC Statute, Arts 8(2)(c)(i) and 25(3)(d))
   c. How could mere membership in an armed force result in criminal responsibility for acts committed by the group? Is a soldier who commits hostile acts that are not violations of IHL, but who knows that his comrades are violating IHL,

criminally responsible for their illegal acts?

d. Is it appropriate to apply a provision such as Art. 21(2) of Canada's Criminal Code to members of armed forces?

5. Do you agree with the following statement of the Court: "no one can 'commit' international crimes without personal and knowing participation."? (P I, Art. 86(2) [7]; ICC Statute, Art. 28 [8]; CIHL, Rule 153 [9])
6. What grounds for excluding criminal responsibility did the appellant rely on? Why was he unsuccessful? (ICC Statute, Art. 31(1)(d) [10])
7. Should Canada have prosecuted the appellant rather than denying him refugee status? What grounds could justify not prosecuting but nevertheless denying refugee status? (GC I-IV, Arts 49 [11]/50 [12]/129 [13]/146 [14] respectively)
8. a. Does Canada have the right to deny the appellant refugee status on the grounds that he may have committed war crimes or crimes against humanity? Even if he risks persecution in El Salvador?

   b. Since the appellant committed war crimes or crimes against humanity, can he be sent back to El Salvador, even if he risks persecution there?

Links

[1] http://www.unhcr.org

[2] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BAA341028EBFF1E8C12563CD

[3] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F9CBD575D47CA6C8C12563CD

[4] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule87

[5] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90

[6] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9AB21264C13EEA4941256690

[7] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=043A5B6666FA92E6C12563CD

[8] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=EB381E75690E669F412566900

[9] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule153

[10]

https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=EAA4A44A5610D3F2412566900

[11]

https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=3F6C2B8B20272F58C12563CD0

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https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6F96EE4C7D1E72CAC12563CD