

## Canada, Sivakumar v. Canada

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Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** *Sivakumar v. Canada (Minister of Employment and Immigration)* (C.A.), [1994] 1 F.C. 433, 1993-11-0; available on <http://www.canlii.org/ca/cas/fca/1993/1993fca10048.html> <sup>[2]</sup>; the order of the paragraphs has been modified to facilitate understanding of the case.]

[...] The appellant, Thalayasingam Sivakumar, is a Tamil and a citizen of Sri Lanka. Even though he was found by the Refugee Division to have had a well-founded fear of persecution at the hands of the Sri Lankan government on the basis of his political opinion, the Refugee Division decided to exclude him on the basis of section F(a) of Article 1 of the

United Nations Convention Relating to the Status of Refugees [See Canada, Ramirez v. Canada <sup>[3]</sup>] as someone who had committed crimes against humanity [...]. The issue on this appeal is whether the appellant was properly held responsible for crimes against humanity alleged to have been committed by the Liberation Tigers of Tamil Eelam (LTTE) even though he was not personally involved in the actual commission of the criminal acts. [...]

The standard of proof in section F(a) of Article 1 of the Convention is whether the Crown has demonstrated that there are serious reasons for considering that the claimant has committed crimes against humanity. [...] This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens. When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status. [...]

He [the appellant] became involved with the LTTE in 1978, shortly after the LTTE was banned by the Sri Lankan government. While he was at university, the appellant used his office as a student leader to promote the LTTE. [...]

The appellant testified that between 1983 and 1985, he was made aware that the LTTE was naming people working against the LTTE as traitors and killing those people as punishment [...]. The leader of the LTTE, Prabaharan [*sic*], discussed these killings with the appellant, who testified that, while he never had any direct connection with these killings, he “accepted” what the leader of the LTTE told him. [...]

The appellant remained in India until 1985 when he returned to Sri Lanka. In the intervening years, the appellant had been approached by the LTTE leader. As a result, the appellant rejoined the LTTE as military advisor. He established a Military Research and Study Centre in Madras where he lectured LTTE recruits on guerrilla warfare. The

appellant testified that he instructed recruits on proper relations with the civilian population in order to gain popular support and that the recruits were told to observe the Geneva Convention.

In 1985, the appellant took part in negotiations (organized by the Indian government) between the Sri Lankan government and the five main rebel groups. These talks broke down when 40 Tamil civilians were killed by Sri Lankan forces.

In 1986, the appellant returned to Sri Lanka to visit his family. He resigned his position at the LTTE's military training college as a result of a dispute over military strategy with another member of the LTTE, and turned his attention to developing an anti-tank weapon. In 1987, he went back to India to mass-produce this weapon.

The appellant then returned once more to Sri Lanka with instructions to develop a military and intelligence division for the LTTE to gather information, prepare military maps and recruit new members. At that time, he was appointed to the rank of major within the LTTE.

Hostilities between the Sri Lankan and LTTE forces broke out in early 1987, but these were brought to an end by a peace accord signed in July of 1987. This accord allowed the Tamils to form a Tamil police force in the northern and eastern provinces, and the appellant was instructed to convert the military and intelligence centre into a police academy. However, the accord broke down and the police academy was never established.

The appellant testified that, in 1987, one commander of the LTTE, Aruna, went to a prison under their control and shot about forty unarmed members of other rival Tamil groups with a machine gun, after an assassination attempt by another Tamil group on a high-ranking officer of the LTTE. The appellant testified that, when he learned about the killing, he went to Prabaharan to demand public punishment, which he said he would do. However, little

was done to Aruna, except that he lost his rank and was detained for a while. The appellant complained again, but nothing further was done. Aruna was later killed in action. Despite this, the appellant remained in the LTTE.

When a military commander in Jaffna died, the appellant was ordered to take charge of the defence of Jaffna Town. The appellant held the town for 15 days before he and his soldiers were driven into the jungle where they carried on guerrilla attacks. Subsequently, the appellant was ordered to return to India because of a dispute between him and the LTTE's second-in-command. The appellant testified that this dispute arose from his strong conviction that negotiations with Sri Lanka should proceed without pre-condition. Although the appellant participated in peace talks with the Sri Lankan government, the talks were doomed to failure because of the leader of the LTTE's intractable position and confrontational style.

Eventually, the appellant voiced his frustrations with the inability of the LTTE to conduct itself properly in peace talks, and was consequently expelled from the LTTE in December of 1988. The claimant remained underground in India until January of 1989 when he travelled to Canada on a false Malaysian passport via Singapore and the United States.

The evidence clearly shows that the appellant held positions of importance within the LTTE. In particular, the appellant was at various times responsible for the military training of LTTE recruits, for internationally organized peace talks between the LTTE and the Sri Lankan government, for the military command of an LTTE military base, for developing weapons, and, perhaps most importantly, for the intelligence division of the LTTE. It cannot be said that the appellant was a mere member of the LTTE. In fact, he occupied several positions of leadership within the LTTE including acting as the head of the LTTE's intelligence service. Given the nature of the appellant's important role within the LTTE, an inference can be drawn that he knew of crimes committed by the LTTE and shared the

organization's purpose in committing those crimes. [...]

It is incontrovertible that the appellant knew about the crimes against humanity committed by the LTTE. The appellant testified before the Refugee Division that he knew that the LTTE was interrogating and killing people deemed to be traitors to the LTTE. [...]

The appellant's testimony must also be placed against the back-drop of the voluminous documentary evidence submitted to the Refugee Division. The various newspaper articles indicate that Tamil militant groups are responsible for wide-spread bloodshed amongst civilians and members of rival groups. In many of these articles, the LTTE are blamed for the violence by spokespeople for the Sri Lankan government. The Amnesty International Reports indicate that various Tamil groups are responsible for violence against civilians, but are not specific about incidents involving the LTTE. [...]

It is clear that if someone personally commits physical acts that amount to a war crime or a crime against humanity, that person is responsible. However, it is also possible to be liable for such crimes "to "commit" them" as an accomplice, even though one has not personally done the acts amounting to the crime [...] the starting point for complicity in an international crime was "personal and knowing participation."

This is essentially a factual question that can be answered only on a case-by-case basis, but certain general principles are accepted. It is evident that mere by-standers or on-lookers are not accomplices. [...]

However, a person who aids in or encourages the commission of a crime, or a person who willingly stands guard while it is being committed, is usually responsible. Again, this will depend on the facts in each case. [...]

Moreover, those involved in planning or conspiring to commit a crime, even though not personally present at the scene, might also be accomplices, depending on the facts of the case. Additionally, a commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them. [...]

Another type of complicity, particularly relevant to this case is complicity through association. In other words, individuals may be rendered responsible for the acts of others because of their close association with the principal actors. This is not a case merely of being “known by the company one keeps.” Nor is it a case of mere membership in an organization making one responsible for all the international crimes that organization commits. Neither of these by themselves is normally enough, unless the particular goal of the organization is the commission of international crimes. It should be noted, however, as MacGuigan J.A. observed: “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”. [...]

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

In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organization. [...]

Of course, as Mr. Justice MacGuigan has written, “law does not function at the level of heroism” [...]. Thus, people cannot be required, in order to avoid a charge of complicity by reason of association with the principal actors, to encounter grave risk to life or personal security in order to extricate themselves from a situation or organization. But neither can they act as amoral robots.

This view of leadership within an organization constituting a possible basis for complicity in international crimes committed by the organization is supported by Article 6 of the Charter of the International Military Tribunal. [...]

This principle was applied to those in positions of leadership in Nazi Germany during the Nuremberg Trials, as long as they had some knowledge of the crimes being committed by others within the organization. [...]

It should be noted that, in refugee law, if state authorities tolerate acts of persecution by the local population, those acts may be treated as acts of the state [...]. Similarly, if the criminal acts of part of a paramilitary or revolutionary non-state organization are knowingly tolerated by the leaders, those leaders may be equally responsible for those acts. [...]

To sum up, association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a “limited, brutal purpose”, is not enough [...]. Moreover, the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes. [...]

As one Canadian commentator, Joseph Rikhof, [*War Crimes, Crimes Against Humanity and Immigration Law*

” (1993), 19 Imm.L.R. (2d) 18], at page 30 has noted:

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

Another historic requirement of a crime against humanity has been that it be committed against a country’s own nationals. This is a feature that helped to distinguish a crime against humanity from a war crime in the past. [...] While I have some doubt about the continuing advisability of this requirement in the light of the changing conditions of international conflict, writers still voice the view that they “are still generally accepted as essential thresholds to consider a crime worthy of attention by international law” [...].

There appears to be some dispute among academics and judges as to whether or not state action or policy is a required element of crimes against humanity in order to transform ordinary crimes into international crimes. The cases decided in Canada to date on the issue of crimes against humanity all involved members of the state, in that each of the individuals was a member of a military organization associated with the government [...]. One author, Bassiouni, [*Crimes against Humanity in International Criminal Law*, Dordrecht: M. Nijhoff, 1992], states that the required international element of crimes against humanity is state action or policy [...]. Similarly, the Justice Trial [...], was quite clear in interpreting Control Council Law No. 10 (basically identical in terms to Article 6 of the Charter of the International Military Tribunal) to mean that there must be a governmental element to crimes against humanity [...].

Other commentators and courts take a different approach [...]. Based on these latter

authorities, therefore, it can no longer be said that individuals without any connection to the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach of international criminal law. On the contrary, they are now governed by it. [...]

As for the requirement of complicity by way of a shared common purpose, I have already found that the appellant held several positions of importance within the LTTE (including head of the LTTE's intelligence service) from which it can be inferred that he tolerated the killings as a necessary, though perhaps unpleasant, aspect of reaching the LTTE's goal of Tamil liberation. Although the appellant complained about these deaths and spoke out when they occurred, he did not leave the LTTE even though he had several chances to do so. No evidence was presented that the appellant would have suffered any risk to himself had he chosen to withdraw from the LTTE. The panel's finding that there was no serious possibility that the appellant would be persecuted by the LTTE supports the conclusion that the appellant could have withdrawn from the LTTE and failed to do so. I conclude that the evidence discloses that the appellant failed to withdraw from the LTTE, when he could have easily done so, and instead remained in the organization in his various positions of leadership with the knowledge that the LTTE was killing civilians and members of other Tamil groups. No tribunal could have concluded on this evidence that there were no serious reasons for considering that the appellant was, therefore, a knowing participant and, hence, an accomplice in these killings.

Finally, did these killings constitute crimes against humanity? That is, were the killings part of a systematic attack on a particular group and (subject to my reservations expressed above) were they committed against Sri Lankan nationals? Clearly, no other conclusion is possible other than that the civilians killed by the LTTE were members of groups being systematically attacked by the LTTE in the course of the LTTE's fight for control of the northern portion of Sri Lanka. These groups included both Tamils unsympathetic to the

LTTE and the Sinhalese population. It is also obvious that these groups are all nationals of Sri Lanka, if that is still a requirement.

## DECISION

I conclude that, given the appellant's own testimony as to his knowledge of the crimes against humanity committed by the LTTE, coupled with the appellant's position of importance within the LTTE and his failure to withdraw from the LTTE when he had ample opportunities to do so, there are serious reasons for considering that the appellant was an accomplice in crimes against humanity committed by the LTTE. The evidence, both the appellant's testimony and the documentary evidence, is such that no properly instructed tribunal could reach a different conclusion. Accordingly, I would dismiss the appeal.

## Discussion

1. Is the appellant accused of having committed crimes against humanity, war crimes or both? Does the distinction between these two crimes lie in the nationality of the victims? (GC I-IV, Art. 3(1) <sup>[4]</sup>; GC I-IV, Arts 50 <sup>[5]</sup>/51 <sup>[6]</sup>/130 <sup>[7]</sup>/147 <sup>[8]</sup> respectively; P II, Art. 4(2) <sup>[9]</sup>; ICC Statute, Arts 7 <sup>[10]</sup> and 8 <sup>[11]</sup> [See The International Criminal Court <sup>[12]</sup>])
2. In order to commit a crime against humanity, must the perpetrator be acting on behalf of a State? In order to commit a grave breach of international humanitarian law (IHL)? A war crime? (GC I-IV, Arts 50 <sup>[5]</sup>/51 <sup>[6]</sup>/130 <sup>[7]</sup>/147 <sup>[8]</sup> respectively; P II, Art. 4(2) <sup>[13]</sup>; ICC Statute, Arts 7 <sup>[10]</sup> and 8 <sup>[11]</sup>.)
3. Which "Geneva Convention" should the appellant have been teaching the LTTE recruits to respect?
4. What obligations did the appellant and Mr Prabakaran have with regard to Mr Aruna's acts? Did they fulfil them? (P I, Art. 86(2) <sup>[14]</sup>; ICC Statute, Art. 28 <sup>[15]</sup>)
5. When the LTTE executes its members accused of treason, is it violating the rules of IHL applicable to non-international armed conflicts? Does that act constitute a crime against humanity? What elements are necessary for this to be the case? (GC I-IV, Art. 3(1)(a) <sup>[4]</sup>; P II, Art. 4(2) <sup>[13]</sup>; ICC Statute, Art 7 <sup>[10]</sup>)

6.
    - a. Why is the appellant an accomplice to the crimes committed by the LTTE? Is the fact that he knew they were being committed and nevertheless remained in a position of leadership sufficient for him to be held as an accomplice? Even if the crimes were not committed by his subordinates? (P I <sup>[16]</sup>, Art. 86(2) <sup>[17]</sup>; ICC Statute <sup>[12]</sup>, Arts 25(3)(d) <sup>[18]</sup> and 28 <sup>[19]</sup>)
    - b. Should the court's requirements be the same if the appellant were a high-ranking officer in the Sri Lankan armed forces?
    - c. Is a member of an armed force who knows that it commits war crimes but does not leave it - despite having the possibility to do so – an accomplice to its crimes?
    - d. In which case may mere membership of an armed force lead to criminal responsibility for all acts committed by the group? ( ICC Statute <sup>[12]</sup>, Arts 25 <sup>[18]</sup>)
    - e. According to IHL and your country's criminal law, is the individual who stands guard while others commit war crimes responsible for those crimes?
  7. Should Canada have prosecuted the appellant instead of refusing him refugee status? How may it be justified in not prosecuting him while refusing him refugee status? ( GC I-IV, Arts 49 <sup>[20]</sup>/50 <sup>[21]</sup>/129 <sup>[22]</sup>/146 <sup>[23]</sup> respectively)
    - a. Does Canada have the right to refuse him refugee status on the basis that he might have committed war crimes or crimes against humanity? Even if he might be persecuted in Sri Lanka?
    - b. Since the appellant committed war crimes or crimes against humanity, may he be forcibly returned to Sri Lanka, even if he risks persecution there?
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[4]

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