

Federal Court



Cour fédérale

Date: 20190911

Docket: IMM-2933-18

Citation: 2019 FC 1156

Ottawa, Ontario, September 11, 2019

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

SASA VELIMIROVIC

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background and Summary

[1] Sasa Velimirovic [Mr. Velimirovic] is a citizen of Bosnia and Herzegovina. He was born on September 4, 1972 in Germany. He is married to a Canadian citizen, Svetlana Mitrovic Velimirovic, with whom he has one Canadian son, Luka, born January 5, 2016. In July 2015, Mr. Velimirovic was sponsored by his wife to enter Canada as a permanent resident in the spousal class. Immigration, Refugees and Citizenship Canada [IRCC] satisfied itself as to the

genuineness of their marriage, confirmed that he had passed his medical examination and that his criminal record check from countries in which he has resided was clear.

[2] Problems with Canadian authorities arose for Mr. Velimirovic, his spouse and their young child when he responded to IRCC's request for further information regarding his military service. Those records confirmed that as a teenager, Mr. Velimirovic had been conscripted into the Army of the Bosnian Serb Republic (Vojska Republika Srpska) [VRS] where he trained from October 1991 to September 1992. He was then assigned, under threat of penal sanction, to participate in the Bosnian War spanning periods between 1992 and 1996. It is that military service which led a Migration Officer [Officer] to conclude Mr. Velimirovic was inadmissible to Canada by reason of his participation in war crimes or crimes against humanity as contemplated by paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], which reads as follows:

Human or international rights violations

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

Atteinte aux droits humains ou internationaux

35 (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

[3] Mr. Velimirovic brings the within application for judicial review, pursuant to subsection 72(1) of the *Act*. He requests that the Officer's decision be quashed and remitted for re-determination. For the reasons set out below, I grant the application for judicial review and remit the matter for re-determination. The results of the re-determination must be communicated to Mr. Velimirovic within 90 days of the filing of these reasons in the Registry. I remain seized of this matter in order to deal with any request for remedies arising from a failure to communicate the results of the re-determination within the time ordered.

II. Relevant Facts and Decision Under Review

[4] In or about July 2015, Ms. Mitrovic Velimirovic submitted an overseas family class spousal sponsorship application for her husband, Mr. Velimirovic. The IRCC confirmed the genuineness of the marriage and approved the sponsorship. On January 5, 2016, the Applicant's spouse gave birth to their son, Luka. On March 15, 2016, the Applicant passed his criminal background check. On March 24, 2016, the IRCC forwarded to Mr. Velimirovic documents to authorize a Humanitarian and International Rights Violation check. Nearly one (1) year later, on March 6, 2017, a procedural fairness letter was sent to Mr. Velimirovic.

[5] The procedural fairness letter stated that Mr. Velimirovic may be inadmissible for a permanent resident visa by application of paragraph 35(1)(a) of the *Act* because of his service in the VRS during the Bosnian War. The Officer noted that there is a wide variety of open source documents that indicate that war crimes and crimes against humanity were committed by the VRS soldiers stationed in Ilidza and Lukavica, where Mr. Velimirovic had been stationed. Furthermore, the Officer stated that soldiers in those locations prevented international

humanitarian aid from landing at the airport. The Officer then concluded there were reasonable grounds to believe Mr. Velimirovic had either committed or, at least, aided and abetted the commission of war crimes and crimes against humanity.

[6] In his response to the procedural fairness letter, Mr. Velimirovic relied extensively on the Supreme Court of Canada's decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*]. That case sets out six (6) "non-exhaustive" factors at paragraph 91 which serve as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose. They are the following: (i) the size and nature of the organization; (ii) the part of the organization with which the individual was most directly concerned; (iii) the individual's duties and activities within the organization; (iv) the individual's position or rank in the organization; (v) the length of time the individual was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and (vi) the method by which the individual was recruited and the individual's opportunity to leave the organization.

[7] Mr. Velimirovic contended that mere membership in a government that had committed international crimes or knowledge of those crimes is insufficient to establish complicity. He also contended that the test under section 34 of the *Act* is distinct from that under section 35. He asserted that the former requires that the individual must simply be shown to have been a member of an organization and aware of the crimes. He cited *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 21, [2016] 1 FCR 428. In contrast, the latter requires the commission of an offence. Proof on a balance of probabilities that an

individual held a position within an organization is insufficient grounds upon which to make a finding of complicity for crimes against humanity referred to in paragraph 35(1)(a). In applying the six (6) non-exhaustive factors established in *Ezokola*, Mr. Velimirovic asserted, among others, that he was a low-ranking soldier; he was assigned a defensive position as a guard; he benefited from a less dangerous posting due to the death of his elder brother in combat in 1993; and he did not volunteer for military service, rather, he was conscripted. He produced country condition documents showing that the penalty for evasion or desertion ranged from imprisonment to the death penalty. Mr. Velimirovic also submitted statements from former members of the military with whom he served in the VRS to support his contention that he was in a defensive position, functioning largely as a guard during the relevant periods.

[8] In rejecting the spousal visa application, the Officer relied upon numerous publicly available documents regarding the Bosnian conflict. The Officer opined that the VRS had impeded humanitarian aid from landing at the Sarajevo Airport. The Officer noted that public documents showed that prisoners of war were employed to dig trenches on the front lines before Mr. Velimirovic's arrival to the front. In the absence of any evidence of personal knowledge by Mr. Velimirovic, the Officer concluded that he should have known about the use of prisoners of war in those circumstances and that those tactics would continue. The Officer also referred to attacks on civilians and the shelling of Muslim civilian populations in the region of old Sarajevo. Again, the Officer concluded, in the absence of any direct evidence, that Mr. Velimirovic should have been aware of those attacks on civilians. While there was no direct evidence of war crimes or crimes against humanity having been committed by Mr. Velimirovic, the Officer concluded:

I am satisfied that the applicant had to have known that his actions as a front-line soldier were helping the members of his brigade to

carry out their criminal acts, even if the applicant did not share the same criminal purpose.

[9] The Officer concluded that *Ezokola* was irrelevant to the analysis. The Officer candidly acknowledged that the decision was based on principles of “aiding and abetting” to avoid applying the *Ezokola* factors.

[10] Upon receiving the Certified Tribunal Record [CTR], Mr. Velimirovic learned, for the first time, that the Officer had referred his case to the National Security Screening Division [NSSD] of the Canada Border Services Agency [CBSA]. The NSSD provided the Officer with a report dated November 25, 2016. The NSSD report contains approximately nine (9) pages. The June 11, 2018 decision contains approximately nine (9) pages plus the Officer’s notes to file. The NSSD report contains numerous references to the evidence and expresses opinions concerning the credibility of Mr. Velimirovic. Most importantly, the concluding paragraphs under the title ***Recommendation*** read as follows:

(B) The NSSD recommends that there are reasonable grounds to believe that the applicant is inadmissible pursuant to paragraph 35(1)(a) of the IRPA at this time. The decision of whether the subject is inadmissible rests solely with the decision-maker.

(B) Should your office seek to initiate a contrary outcome process, Temporary Resident Permit, or Public Policy Temporary Resident Visa, it is incumbent on the decision-maker to contact the NSSD.

(U) Please do not hesitate to contact us should you require further clarification

(U) National Security Screening Division (NSSD): NSSD—
DFSN@cbsa-asfc.gc.ca

(B) NSSD C5: CBSA-NSSDZASFC—DESN@cjinternationalgoca

III. Relevant Provisions

[11] For the purposes of this judicial review, the relevant provision of the *Act* is paragraph 35(1)(a). Also relevant are sections 4 to 7 of *the Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. All provisions are set out in the Schedule attached hereto.

IV. Issues Arising from the Within Application for Judicial Review

[12] Mr. Velimirovic raises the following issues:

1. A breach of procedural fairness with respect to the non-disclosure of the NSSD report, and its treatment of the issue of Mr. Velimirovic's credibility;
2. The failure to apply the *Ezokola* factors; and
3. The Officer's erroneous application of the law with respect to aiding and abetting.

V. Analysis

A. *Standard of Review*

[13] The standard applicable to the determination of whether a decision-maker complied with the duty of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). The Court owes no deference on such procedural fairness issues and must instead undertake its own analysis of the question (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190 [*Dunsmuir*]). Questions of procedural fairness require the Court to determine whether the procedure followed by the decision-maker satisfied the level of procedural fairness required in the circumstances (*Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 21, [2017] FCJ No 129 (QL/Lexis); *Suresh v Canada (Minister of Citizenship and*

Immigration), 2002 SCC 1 at para 115, [2002] 1 SCR 3; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-22, 174 DLR (4th) 193).

[14] The issues relating to the *Ezokola* principles and aiding and abetting could be characterized in one of two ways. First, if the Court is called upon to determine whether the decision-maker formulated and applied the correct legal test, the standard of correctness normally applies, in which case no deference is owed to the decision-maker (*Kunabalasingnam v Canada (Minister of Citizenship and Immigration)*, 2017 FC 704 at para 17, [2017] FCJ No 751 (QL/Lexis); *Sapkota v Canada (Minister of Citizenship and Immigration)*, 2013 FC 790 at para 40, [2013] FCJ No 835 (QL/Lexis); *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at para 9, 62 Imm LR (3d) 5). In contrast, if the decision-maker's choice of legal test is not in issue, but the Court is called upon to review the decision-maker's application of that test to the facts, therein lay a question of mixed fact and law. In such a case, the reasonableness standard applies and deference is owed (*Dunsmuir* at paras 51-56; *Mirza v Canada (Minister of Citizenship and Immigration)*, 2016 FC 510 at para 26, 40 Imm LR (4th) 241). However, it is irrelevant to my analysis whether the correctness or the reasonableness standard applies to the latter two issues since I am of the view the Officer was both incorrect and unreasonable in his analysis and conclusions on those issues.

B. *Did the Officer Breach the Duty of Procedural Fairness by failing to Disclose the NSSD Report?*

[15] Mr. Velimirovic contends that the failure to disclose the NSSD report and provide him an opportunity to respond to it constitutes a breach of procedural fairness. Mr. Velimirovic also contends that the report contains multiple inconsistencies, such as incorrectly describing the

mens rea required for aiding and abetting, incorrectly limiting the applicability of *Ezokola*, incorrectly applying international law concepts to Canadian domestic law, fettering the discretion of the Officer and usurping the role of the Officer as it relates to credibility findings. Absent an opportunity to know of these errors, weaknesses and misstatements of the law in the NSSD report, Mr. Velimirovic contends he was denied a fair hearing.

[16] A review of the Officer's decision reveals that it followed the NSSD's legal analysis, which I find in many respects to be erroneous, that it deferred to the NSSD's opinion on the credibility of Mr. Velimirovic and, without any direct evidence, that it accepted the NSSD's suppositions and conjectures as to the role of Mr. Velimirovic in the Bosnian war.

[17] The Respondent contends that there was no breach of procedural fairness as it is well established that there is no duty to disclose the actual report relied upon by an immigration officer when there is a disclosure of the substance of the allegations contained therein. The Respondent cites *Gebremedhin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 380 at para 9, 431 FTR 42 [*Gebremedhin*] in support of its contention that the "relevant question is not whether the document was provided but whether the information was disclosed to the Applicant" [emphasis in original]. The Respondent contends the procedural fairness letter was adequate notice of the deficiencies in Mr. Velimirovic's application. This, according to the Respondent, permitted Mr. Velimirovic to know the substance of the allegations against him.

[18] It is trite law that a party must be given the opportunity to fully participate in the decision-making process. A party is also entitled to be informed of the allegations against him or

her and the evidence to be relied upon to support those allegations. Only through knowledge of the allegations can a party fully respond (*Hosseini v Canada (Minister of Immigration, Refugees and Citizenship)*, 2018 FC 171 at para 25, 57 Imm LR (4th) 211 [*Hosseini*]; *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 407, 2000 CanLII 17143 (FCA)).

[19] The facts in the present case differ significantly from those which confronted the Court in *Gebremedhin*. In the present case, in contrast to *Gebremedhin*, the undisclosed report contains very strong recommendations on factual findings the Officer should make, very strong recommendations on credibility the Officer is encouraged to follow, erroneous statements of the law with respect to the domestic law surrounding aiding and abetting, and controversial statements regarding the application of *Ezokola*. Finally, I note that the report instructs the Officer that he or she is to inform the NSSD if the advice to reject the application is not followed.

[20] I am of the view the violation of Mr. Velimirovic's right to procedural fairness was egregious. The decision-maker incorporated a significant amount of the NSSD's recommendations without permitting Mr. Velimirovic a meaningful opportunity to reply. The two-page fairness letter did not adequately capture the content of the nine-page NSSD report. Had more detailed information about the report been provided to Mr. Velimirovic, he could have presented very relevant information on the credibility issues raised and the proper application of the *Ezokola* factors. Had Mr. Velimirovic had the opportunity to reply in a meaningful way to the strong language of the NSSD report, the decision-maker may not have erroneously defaulted to the NSSD's findings and recommendations.

C. *Did the Officer Err by Failing to Apply Ezokola to Assist in the Determination of Mr. Velimirovic's Degree of Participation in any War Crimes or Crimes Against Humanity?*

[21] This Court has already concluded that the test for complicity set out in *Ezokola* applies to a paragraph 35(1)(a) analysis (*Talpur v Canada (Minister of Citizenship and Immigration)*, 2016 FC 822 at para 20, [2016] FCJ No 915 (QL/Lexis); *Al Khayyat v Canada (Minister of Citizenship and Immigration)*, 2017 FC 175 at paras 23-27, [2017] FCJ No 150 (QL/Lexis); *Blazic v Canada (Minister of Citizenship and Immigration)*, 2016 FC 901 at paras 15-21, 44 Imm LR (4th) 39; also see *Jelaca v Canada (Minister of Citizenship and Immigration)*, 2018 FC 887, [2018] FCJ No 919 (QL/Lexis) [*Jelaca*]). The *Ezokola* factors were developed by the Supreme Court to ensure individuals seeking to come to Canada or remain in Canada are not subjected to guilt by association.

[22] It is important to note that the *Ezokola* factors are not exhaustive. Other relevant factors may arise in any given circumstance. In my view, the *Ezokola* factors are also not determinative. Factors not contemplated in *Ezokola* could lead a decision-maker to conclude favourably or unfavourably toward an applicant. The factors are simply designed to assist decision-makers and reviewing courts in their analysis.

[23] In my view, the *Ezokola* factors are significant in all cases where there is no direct evidence of complicity in war crimes, which is clearly the case here. While counsel for Mr. Velimirovic urges this Court to define the *Ezokola* factors as a floor or minimum threshold, I decline to do so in those terms. Obviously, they cannot be a floor or minimum threshold when faced with direct evidence of a crime. Similarly, if they are “non-exhaustive” they cannot

constitute a floor or minimum threshold. Regardless, in my view, a consideration of the *Ezokola* factors is essential in a case such as the present one. I am satisfied the Officer was both incorrect and unreasonable by failing to consider them in the circumstances, particularly given the existing jurisprudence.

D. *Did the Officer apply an Incorrect or Unreasonable Approach to the Analysis of Aiding and Abetting?*

[24] It is trite law that the burden is on the Minister to establish, on a balance of probabilities, that a rejected applicant has committed the acts which lead to his or her inadmissibility under section 35 of the *Act* (*Jelaca* at para 18). In this case, the Officer is very clear: the decision is not based upon complicity but rather aiding and abetting. The Officer candidly admits that pronouncement is to avoid a consideration of the *Ezokola* factors. However, by making that distinction, the Officer demonstrates a lack of understanding of the law as it relates to aiding and abetting. I am of the view that aiding and abetting always results in complicity; however, one might be complicit without necessarily aiding and abetting. There are many ways one might be said to be complicit in a crime that does not necessarily meet the threshold of aiding and abetting.

[25] I now turn to the Officer's understanding of aiding and abetting. The Officer states the following:

As recommended in the CBSA message of November 2016, I applied the mode of partial liability for the commission of international crimes based on aiding and abetting. Operational Bulletin 551-A states that there is a distinction between these different modes of application of A35(1)(a). According to the training I received on A35(1)(a), there are four types of situations where a person may be inadmissible under A35(1)(a): direct

commission, indirect or partial commission as per the contribution-based test (Ezokola), aiding and abetting, or by ordering, commanding or superior responsibility. Although the three indirect modes (contribution, aiding and abetting, and ordering or superior responsibility) can all be defined as complicity, I deliberately chose not to use the terms “complicit” or “complicity” in my procedural fairness letter to avoid giving the impression that I was applying the contribution-based test.

[26] The Officer correctly states that the “aider and abettor” is always an accessory to a crime perpetrated by another person, the “principal”, and that “the principal may not even know about the accomplice’s contribution”. The Officer contrasts these statements with the concept of common purpose or common design wherein the parties all are involved in the criminal objective. This can also be considered a correct or reasonable analytical approach. However, a careful reading of the decision as a whole, in French and in English, leads me to conclude that the Officer believed conduct which contributes to the crime(s) constitutes aiding and abetting even in circumstances where the purported aider and abettor does not know of the criminal purpose. That is, the Officer seems to believe that if someone passes a firearm to another person and that person uses it to commit a crime, unbeknownst to the putative aider and abettor, the passing of the weapon makes one an aider and abettor. This seems a reasonable interpretation of the concluding paragraph in which the Officer states:

I am satisfied that the applicant had to have known that his actions as a front-line soldier were helping the members of his brigade to carry out their criminal acts, even if the applicant did not share the same criminal purpose.

[27] In my view, if an individual does not share the same criminal purpose as the principal they cannot aid and abet the crime. Purpose is comprised of intent and knowledge. An individual must have knowledge of the principal’s intention to commit a crime, and then act with the

intention of assisting the principal in carrying it out. Therefore, one cannot aid and abet a murder if they do not intend to assist the principal in committing that murder. One cannot aid and abet a robbery if they do not intend to assist the principal in carrying out that robbery. Similarly, one cannot aid and abet a war crime or crime against humanity if one does not intend to assist in the accomplishment of just that. I accept that one can aid and abet without the principal knowing. For example, if a person learns someone else is planning a murder and, unbeknownst to the principal, that person leaves the light on and posts a sign in the hallway saying where the intended victim is located, that person becomes an aider and abettor, without the knowledge of the principal. That person clearly “shares the criminal purpose” as they possess knowledge of the crime to be committed by the principal, and intend to assist in its commission. The person does not, however, share a criminal purpose if, having no knowledge of the planned murder, they leave the light on and post a sign to distinguish one room from another, without intending to assist the principal’s criminal purpose. In my view, to be an aider and abettor one must always “share the same criminal purpose” even if the principal does not know they share it (R v Briscoe, 2010 SCC 13 at paras 15-18, [2010] 1 SCR 411).

[28] In view of the foregoing, I also find that the Officer took an incorrect and unreasonable approach to the analysis of aiding and abetting.

VI. Conclusion

[29] In my view, the application of the NSSD report, particularly its observations regarding Mr. Velimirovic’s credibility, combined with the failure to disclose that information constituted a clear violation of Mr. Velimirovic’s right to procedural fairness. Furthermore, although the

Officer chose to apply aiding and abetting to the facts before him, he should have placed that mode of commission under the lens of *Ezokola*, rather than attempting to by-pass it. Finally, it is simply incorrect to say that an aider and abettor need not share the criminal purpose of the principal. While the principal may not know of the aider and abettor's assistance, a person is not an aider and abettor unless he or she knows of the criminal purpose, or, in other words, "shares" the criminal purpose.

[30] For the foregoing reasons, I grant the application for judicial review and order the matter be remitted to another Migration Officer for re-determination consistent with these reasons. In addition, I am ordering that the redetermination be completed and communicated to Mr. Velimirovic within 90 days of the date of the filing of this decision in the Registry. I am limiting the time available for re-determination given that this application for family reunification has been ongoing for more than 4 (four) years, at considerable cost to the family from a personal, financial and emotional perspective.

[31] I also note that the Respondent posed the following questions for certification:

1. Does an IRCC decision-maker fetter his or her discretion by consulting a CBSA National Security Screening Division ("NSSD") assessment providing expert analysis and advice when deciding a visa case raising inadmissibility under s. 35 of the IRPA?
2. What does the duty of fairness require to be disclosed when an IRCC decision-maker consults an NSSD assessment in deciding a visa case raising inadmissibility under s. 35 of the IRPA?

[32] The Federal Court of Appeal has revisited the criteria for certification in two recent cases: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36, 23 Admin LR (6th) 185 and *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 44-47, 419 DLR (4th) 566). First, the question to be certified must be a serious one that is dispositive of the appeal. In this case, neither of the Respondent's proposed questions would result in an answer that is determinative of the within application for judicial review. The failure to consider the *Ezokola* factors, for example, is not raised in either proposed question but is one motive for granting the within application. See also *Hosseini* at para 59.

[33] Second, the question must transcend the interests of the parties and raise an issue of broad significance or general importance. I have found that procedural fairness was not afforded to Mr. Velimirovic. This was based, however, on the facts of this particular NSSD report and the timing of its disclosure. Nothing in my conclusions would lead to a question of general importance that would transcend the interests of the parties.

[34] Finally, a question whose answer turns on the unique facts of the case or that is in the nature of a reference cannot be properly certified. In the case of the first question, the answer would turn on the facts. It may be possible that consulting a balanced, objective report would not constitute an improper fettering of discretion. However, consulting a report that makes findings of facts and attacks credibility, as in this case, leads to a different conclusion. The second question is much too broad to be certified. As was the case in *Mudrak v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 at para 35, 43 Imm LR (4th) 199, the question is "somewhat theoretical" and "more in the nature of a reference, which is prohibited".

[35] In the result, I decline to certify either of the proposed questions for certification.

JUDGMENT in IMM-2933-18

THIS COURT'S JUDGMENT IS THAT:

1. The Application for Judicial Review is granted and the matter is remitted to another Migration Officer for re-determination consistent with these reasons.
2. The results of the re-determination are to be communicated to Mr. Velimirovic within 90 days of the filing of these reasons in the Registry.
3. I remain seized of this matter should the re-determination not be communicated within 90 days of the filing of these reasons as ordered. In the event the 90 day limit is not respected either party may request that I reconvene for purposes of revisiting the appropriate remedy.

“B. Richard Bell”

Judge

SCHEDULE

<p><i>Immigration and Refugee Protection Act</i>, SC 2001, c 27</p>	<p><i>Loi sur l'immigration et la protection des réfugiés</i>, LC 2001, ch 27</p>
<p>Human or international rights violations</p>	<p>Atteinte aux droits humains ou internationaux</p>
<p>35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for</p> <p style="padding-left: 40px;">(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the <i>Crimes Against Humanity and War Crimes Act</i>;</p>	<p>35 (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :</p> <p style="padding-left: 40px;">a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la <i>Loi sur les crimes contre l'humanité et les crimes de guerre</i>;</p>
<p><i>Crimes Against Humanity and War Crimes Act</i>, SC 2000, c 24</p>	<p><i>Loi sur les crimes contre l'humanité et les crimes de guerre</i>, SC 2000, ch 24</p>
<p>Genocide, etc., committed in Canada</p>	<p>Génocide, crime contre l'humanité, etc., commis au Canada</p>
<p>4 (1) Every person is guilty of an indictable offence who commits</p> <p style="padding-left: 40px;">(a) genocide;</p> <p style="padding-left: 40px;">(b) a crime against humanity; or</p> <p style="padding-left: 40px;">(c) a war crime.</p>	<p>4 (1) Quiconque commet une des infractions ci-après est coupable d'un acte criminel :</p> <p style="padding-left: 40px;">a) génocide;</p> <p style="padding-left: 40px;">b) crime contre l'humanité;</p> <p style="padding-left: 40px;">c) crime de guerre.</p>
<p>Conspiracy, attempt, etc.</p>	<p>Punition de la tentative, de la complicité, etc.</p>
<p>(1.1) Every person who conspires or attempts to commit, is an accessory after</p>	<p>(1.1) Est coupable d'un acte criminel quiconque complotte ou tente de commettre une des</p>

the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

infractions visées au paragraphe (1), est complice après le fait à son égard ou conseille de la commettre.

Punishment

(2) Every person who commits an offence under subsection (1) or (1.1)

(a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and

(b) is liable to imprisonment for life, in any other case.

Peines

(2) Quiconque commet une infraction visée aux paragraphes (1) ou (1.1)

a) est condamné à l'emprisonnement à perpétuité, si le meurtre intentionnel est à l'origine de l'infraction;

b) est passible de l'emprisonnement à perpétuité, dans les autres cas.

Definitions

(3) The definitions in this subsection apply in this section.

crime against humanity means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law

Définitions

(3) Les définitions qui suivent s'appliquent au présent article.

crime contre l'humanité Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après

recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (*crime contre l'humanité*)

genocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (*génocide*)

war crime means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (*crime de guerre*)

Interpretation — customary international law

(4) For greater certainty, crimes described in Articles 6

les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (*crime against humanity*)

génocide Fait — acte ou omission — commis dans l'intention de détruire, en tout ou en partie, un groupe identifiable de personnes et constituant, au moment et au lieu de la perpétration, un génocide selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (*genocide*)

crime de guerre Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (*war crime*)

Interprétation : droit international coutumier

(4) Il est entendu que, pour l'application du présent article,

and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

les crimes visés aux articles 6 et 7 et au paragraphe 2 de l'article 8 du Statut de Rome sont, au 17 juillet 1998, des crimes selon le droit international coutumier sans que soit limitée ou entravée de quelque manière que ce soit l'application des règles de droit international existantes ou en formation.

Breach of responsibility by military commander

***5 (1)** A military commander commits an indictable offence if

(a) the military commander

(i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or

(ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;

Manquement à la responsabilité : chef militaire

***5 (1)** Tout chef militaire est coupable d'un acte criminel si les conditions suivantes sont réunies :

a) selon le cas :

(i) il n'exerce pas le contrôle qui convient sur une personne placée sous son commandement et son contrôle effectifs ou sous son autorité et son contrôle effectifs et, en conséquence, la personne commet l'infraction visée à l'article 4,

(ii) il n'exerce pas, après l'entrée en vigueur du présent article, le contrôle qui convient sur une personne placée sous son commandement et son contrôle effectifs ou sous son autorité et son contrôle effectifs et, en conséquence, la personne commet l'infraction visée à l'article 6;

(b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and

b) il sait que la personne est sur le point ou en train de commettre l'infraction ou il se rend coupable de négligence criminelle du fait qu'il ignore qu'elle est sur le point ou en train de commettre l'infraction;

(c) the military commander subsequently

c) en conséquence, il ne prend pas, dès que possible, toutes les mesures nécessaires et raisonnables en son pouvoir pour :

(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or

(i) soit empêcher ou réprimer la perpétration de l'infraction ou empêcher la perpétration d'autres infractions visées aux articles 4 ou 6,

(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

(ii) soit en référer aux autorités compétentes aux fins d'enquête et de poursuite.

*[Note: Section 5 in force October 23, 2000, see SI/2000-95.]

*[Note : Article 5 en vigueur le 23 octobre 2000, voir TR/2000-95.]

Breach of responsibility by a superior

Manquement à la responsabilité : autres supérieurs

(2) A superior commits an indictable offence if

(2) Tout supérieur est coupable d'un acte criminel si les conditions suivantes sont

réunies :

- | | |
|--|---|
| <p>(a) the superior</p> <p style="padding-left: 20px;">(i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or</p> <p style="padding-left: 20px;">(ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6;</p> | <p>a) selon le cas :</p> <p style="padding-left: 20px;">(i) il n'exerce pas le contrôle qui convient sur une personne placée sous son autorité et son contrôle effectifs et, en conséquence, la personne commet l'infraction visée à l'article 4,</p> <p style="padding-left: 20px;">(ii) il n'exerce pas, après l'entrée en vigueur du présent article, le contrôle qui convient sur une personne placée sous son autorité et son contrôle effectifs et, en conséquence, la personne commet l'infraction visée à l'article 6;</p> |
| <p>(b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;</p> | <p>b) il sait que la personne est sur le point ou en train de commettre l'infraction ou il néglige délibérément de tenir compte de renseignements qui indiquent clairement qu'elle est sur le point ou en train de commettre l'infraction;</p> |
| <p>(c) the offence relates to activities for which the superior has effective authority and control; and</p> | <p>c) l'infraction est liée à des activités relevant de son autorité et de son contrôle effectifs;</p> |
| <p>(d) the superior subsequently</p> | <p>d) en conséquence, il ne prend pas, dès que possible, toutes les mesures nécessaires et raisonnables en son pouvoir pour :</p> |

(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or

(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

*[Note: Section 5 in force October 23, 2000, see SI/2000-95.]

Conspiracy, attempt, etc.

(2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

Punishment

(3) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

Definitions

(i) soit empêcher ou réprimer la perpétration de l'infraction ou empêcher la perpétration d'autres infractions visées aux articles 4 ou 6,

(ii) soit en référer aux autorités compétentes aux fins d'enquête et de poursuite.

*[Note : Article 5 en vigueur le 23 octobre 2000, voir TR/2000-95.]

Punition de la tentative, de la complicité, etc.

(2.1) Est coupable d'un acte criminel quiconque complotte ou tente de commettre une des infractions visées aux paragraphes (1) ou (2), est complice après le fait à son égard ou conseille de la commettre.

Peines

(3) Quiconque commet une infraction visée aux paragraphes (1), (2) ou (2.1) est passible de l'emprisonnement à perpétuité.

Définitions

(4) The definitions in this subsection apply in this section.

military commander includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander. (*chef militaire*)

superior means a person in authority, other than a military commander. (*supérieur*)

Genocide, etc., committed outside Canada

6 (1) Every person who, either before or after the coming into force of this section, commits outside Canada

- (a) genocide,
- (b) a crime against humanity, or
- (c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

Conspiracy, attempt, etc.

(1.1) Every person who

(4) Les définitions qui suivent s'appliquent au présent article.

chef militaire S'entend notamment de toute personne faisant effectivement fonction de chef militaire et de toute personne commandant un corps de police avec un degré d'autorité et de contrôle similaire à un chef militaire. (*military commander*)

supérieur Personne investie d'une autorité, autre qu'un chef militaire. (*superior*)

Génocide, crime contre l'humanité, etc., commis à l'étranger

6 (1) Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8 :

- a) génocide;
- b) crime contre l'humanité;
- c) crime de guerre.

Punition de la tentative, de la complicité, etc.

(1.1) Est coupable d'un acte

conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

criminel quiconque complotte ou tente de commettre une des infractions visées au paragraphe (1), est complice après le fait à son égard ou conseille de la commettre.

Punishment

Peines

(2) Every person who commits an offence under subsection (1) or (1.1)

(2) Quiconque commet une infraction visée aux paragraphes (1) ou (1.1) :

(a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and

a) est condamné à l'emprisonnement à perpétuité, si le meurtre intentionnel est à l'origine de l'infraction;

(b) is liable to imprisonment for life, in any other case.

b) est passible de l'emprisonnement à perpétuité, dans les autres cas.

Definitions

Définitions

(3) The definitions in this subsection apply in this section.

(3) Les définitions qui suivent s'appliquent au présent article.

crime against humanity means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being

crime contre l'humanité Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international

criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (*crime contre l'humanité*)

genocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (*génocide*)

war crime means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (*crime de guerre*)

Interpretation – customary international law

conventionnel ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (*crime against humanity*)

génocide Fait — acte ou omission — commis dans l'intention de détruire, en tout ou en partie, un groupe identifiable de personnes et constituant, au moment et au lieu de la perpétration, un génocide selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (*genocide*)

crime de guerre Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (*war crime*)

Interprétation : droit international coutumier

(4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

Interpretation – crimes against humanity

(5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:

(a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and

(b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

Breach of responsibility by military commander

7 (1) A military commander commits an indictable offence

(4) Il est entendu que, pour l'application du présent article, les crimes visés aux articles 6 et 7 et au paragraphe 2 de l'article 8 du Statut de Rome sont, au 17 juillet 1998, des crimes selon le droit international coutumier, et qu'ils peuvent l'être avant cette date, sans que soit limitée ou entravée de quelque manière que ce soit l'application des règles de droit international existantes ou en formation

Interprétation : crimes contre l'humanité

(5) Il est entendu qu'un crime contre l'humanité transgressait le droit international coutumier ou avait un caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations avant l'entrée en vigueur des documents suivants :

a) l'Accord concernant la poursuite et le châtement des grands criminels de guerre des Puissances européennes de l'Axe, signé à Londres le 8 août 1945;

b) la Proclamation du Commandant suprême des Forces alliées datée du 19 janvier 1946.

Manquement à la responsabilité : chef militaire

7 (1) Tout chef militaire est coupable d'un acte criminel si les conditions suivantes sont

if	réunies :
(a) the military commander, outside Canada,	a) selon le cas, à l'étranger :
(i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or	(i) il n'exerce pas le contrôle qui convient sur une personne placée sous son commandement et son contrôle effectifs ou sous son autorité et son contrôle effectifs et, en conséquence, la personne commet l'infraction visée à l'article 4,
(ii) fails, before or after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;	(ii) il n'exerce pas, avant ou après l'entrée en vigueur du présent article, le contrôle qui convient sur une personne placée sous son commandement et son contrôle effectifs ou son autorité et son contrôle effectifs et, en conséquence, la personne commet l'infraction visée à l'article 6;
(b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and	b) il sait que la personne est sur le point ou en train de commettre l'infraction ou il se rend coupable de négligence criminelle du fait qu'il ignore qu'elle est sur le point ou en train de commettre l'infraction;
(c) the military commander subsequently	c) en conséquence, il ne prend pas, dès que possible, toutes les mesures nécessaires et raisonnables en son pouvoir pour :

(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or

(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

(i) soit empêcher ou réprimer la perpétration de l'infraction ou empêcher la perpétration d'autres infractions visées aux articles 4 ou 6,

(ii) soit en référer aux autorités compétentes aux fins d'enquête et de poursuite.

Breach of responsibility by a superior

Manquement à la responsabilité : autres supérieurs

(2) A superior commits an indictable offence if

(2) Tout supérieur est coupable d'un acte criminel si les conditions suivantes sont réunies :

(a) the superior, outside Canada,

a) selon le cas, à l'étranger :

(i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or

(i) il n'exerce pas le contrôle qui convient sur une personne placée sous son autorité et son contrôle effectifs et, en conséquence, la personne commet l'infraction visée à l'article 4,

(ii) fails, before or after the coming into force of this section, to exercise control properly over a

(ii) il n'exerce pas, avant ou après l'entrée en vigueur du présent article, le contrôle qui

person under their effective authority and control, and as a result the person commits an offence under section 6;

convient sur une personne placée sous son autorité et son contrôle effectifs et, en conséquence, la personne commet l'infraction visée à l'article 6;

(b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;

b) il sait que la personne est sur le point ou en train de commettre l'infraction ou il néglige délibérément de tenir compte de renseignements qui indiquent clairement qu'elle est sur le point ou en train de commettre l'infraction;

(c) the offence relates to activities for which the superior has effective authority and control; and

c) l'infraction est liée à des activités relevant de son autorité et de son contrôle effectifs;

(d) the superior subsequently

d) en conséquence, il ne prend pas, dès que possible, toutes les mesures nécessaires et raisonnables en son pouvoir pour :

(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or

(i) soit empêcher ou réprimer la perpétration de l'infraction ou empêcher la perpétration d'autres infractions visées aux articles 4 ou 6,

(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the

(ii) soit en référer aux autorités compétentes aux fins d'enquête et de poursuite.

matter to the competent authorities for investigation and prosecution.

Conspiracy, attempt, etc.

(2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

Jurisdiction

(3) A person who is alleged to have committed an offence under subsection (1), (2) or (2.1) may be prosecuted for that offence in accordance with section 8.

Punishment

(4) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

Application before coming into force

* **(5)** Where an act or omission constituting an offence under this section occurred before the coming into force of this section, subparagraphs (1)(a)(ii) and (2)(a)(ii) apply to the extent that, at the time and in the place of the act or omission, the act or omission constituted a contravention of customary international law or

Punition de la tentative, de la complicité, etc.

(2.1) Est coupable d'un acte criminel quiconque complotte ou tente de commettre une des infractions visées aux paragraphes (1) ou (2), est complice après le fait à son égard ou conseille de la commettre.

Compétence

(3) La personne accusée d'avoir commis une infraction visée aux paragraphes (1), (2) ou (2.1) peut être poursuivie pour cette infraction aux termes de l'article 8.

Peines

(4) Quiconque commet une infraction visée aux paragraphes (1), (2) ou (2.1) est passible de l'emprisonnement à perpétuité.

Application avant l'entrée en vigueur

* **(5)** Lorsqu'un fait — acte ou omission — constituant une infraction visée au présent article est commis avant l'entrée en vigueur de celui-ci, les sous-alinéas (1)a)(ii) et (2)a)(ii) s'appliquent dans la mesure où, au moment et au lieu de la perpétration, l'acte ou l'omission constituait une transgression du droit

conventional international law or was criminal according to the general principles of law recognized by the community of nations, whether or not it constituted a contravention of the law in force at the time and in the place of its commission.

*[Note: Section 7 in force October 23, 2000, see SI/2000-95.]

Definitions

(6) The definitions in this subsection apply in this section.

military commander includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander. (*chef militaire*)

superior means a person in authority, other than a military commander. (*supérieur*)

international coutumier ou du droit international conventionnel, ou avait un caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il ait ou non constitué une transgression du droit en vigueur à ce moment et dans ce lieu.

*[Note : Article 7 en vigueur le 23 octobre 2000, voir TR/2000-95.]

Définitions

(6) Les définitions qui suivent s'appliquent au présent article.

chef militaire S'entend notamment de toute personne faisant effectivement fonction de chef militaire et de toute personne commandant un corps de police avec un degré d'autorité et de contrôle similaire à un chef militaire. (*military commander*)

supérieur Personne en position d'autorité, autre qu'un chef militaire. (*superior*)

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SOLICITORS OF RECORD

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