REASONS FOR JUDGMENT

MacGUIGAN J.:-- This is an appeal under s. 82.3 of the Immigration Act, R.S.C. 1985, c. I-2 ("the Act"), of a decision of the Refugee Division of the Immigration and Refugee Board ("Refugee Division"), dated March 14, 1990, in which the Refugee Division determined that the appellant was not a Convention refugee.

This case is unusual in that the 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 I of the United Nations Convention Relating to the Status of Refugees ("the Convention"). The definition of "Convention refugee" in s. 2(1) of the Act states that it does not include any person to whom the Convention does not apply pursuant to section E or F of Article I thereof, which sections are set out in the schedule to this Act...

The relevant part of section F of Article I of the Convention, as set out in the Schedule to the Act is as follows:

F. 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;

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 [Footnote: Professor James C. Hathaway, The Law of Refugee Status, 1991, at 217, includes "genocide, slavery, torture, and apartheid" as crimes within this category. Guy S. Goodwin-Gill, The Refugee in International Law, 1983, at 59-60, writes that "The notion of crimes against humanity inspired directly the 1948 Genocide Convention, Article II of which defines the 'crime under international law' □"]. 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.

Applying this provision to the activities of the appellant, the Refugee Division concluded as follows (Appeal Book, II at 402):

The claimant is not a major war criminal. We do not have the benefit of times, places and description of activities. We do not have witnesses. However we do have the claimant's own testimony which we believe meets the "serious reasons for considering" standard of proof which is set out in section F.

As a result, the Refugee Division determines that although the claimant has demonstrated that he has a well-founded fear of persecution on the basis of his political opinion, his activities, while serving with Salvadoran armed forces, fall clearly within the confines of the exclusion clause, section F(a) of Article I of the Convention.

I

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" referred to by the Refugee Division. On this A. Grahl-Madsen, The Status of Refugees in International Law., 1966, at 289-90, has this to say:

The words 'serious reasons for considering' make it clear that it is not a condition for the application of Article I F (b) that the person concerned has been convicted or formally charged

or indicted of a crime. The person's own confession, the testimonies of other persons, or other trustworthy information may suffice. On the other hand the wording of the paragraph suggests that a person may be allowed to refute the accusations levelled against him, even if he has been convicted by a final judgment. If a person is able to establish his innocence, there is clearly no reason why he should be denied status as refugee.

In the case at bar, the appellant has never been formally charged with a crime, and it was his own evidence which the Refugee Division used against him to exclude him, an approach in conformity with the Convention.

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. The respondent indeed argued that "serious reasons for considering" should have the same meaning as the phrase "reasonable grounds to believe," which is used again and again in s. 19 of the Act with respect to inadmissible classes of persons. The most closely related class is that described in par. 19(1)(j), which applies generally to all immigration claimants:

19 (1) No person shall be granted admission who is a member of any of the following classes:

(j) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity....

The same result is provided for by par. 27(1)(g) and (h) for persons who are already permanent residents, and by subpar. 46.01(1)(d)(i) for persons who claim to be convention refugees: both of these latter provisions merely refer to persons described in par. 19(1)(j), and so incorporate the notion of "reasonable grounds to believe."

While I see no great difference between the phrases "serious reasons for considering" and "reasonable grounds to believe," I find no necessity exactly to equate the one with the other, although I believe both require less than the balance of probabilities. "Serious reasons for considering" is the Convention phrase and is intelligible on its own. Nevertheless, the comparison with par. 19(1)(j), shows that Parliament was prepared to contemplate a standard lower than the usual civil standard in this kind of case. Moreover, it also leads me to think that it would be extremely awkward to place one standard at the ordinary civil level, and another, for what is essentially the same thing, at a lower level.

Therefore, although the appellant relied on several international authorities which emphasize that the interpretation of the exclusion clause must be restrictive, [Footnote: The Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, 1988, par. 149 at 35, states: "Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive." Goodwill-Gill, supra at 62, writes: "A person with a well-founded fear of very severe persecution, such as would endanger life or freedom, should only be excluded for the most serious reasons."], 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.

The U.N.H.C.R. Handbook, supra at 35, states:

147. The pre-war international instruments that defined various categories of refugees contained no provisions for the exclusion of criminals. It was immediately after the Second World War that for the first time special provisions were drawn up to exclude from the large group of then assisted refugees certain persons who were deemed unworthy of international protection.

148. At the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected. There was also a desire on the part of States to deny

admission to their territories of criminals who would present a danger to security and public order.

149. The competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his refugee status.

Hathaway, supra at 215-16, provides more vivid detail as to the intention of the drafters:

While the drafters of the Convention were unanimously of the view that war criminals should not be entitled to claim refugee status, there was disagreements on two points. First, the United States argued that countries should be allowed to treat war criminals as refugees, although they should not be compelled to do so. Most representatives, however, were strongly of the view that discretion of this kind could undermine the integrity of refugee status....

The compromise which emerged consisted of the mandatory exclusion of an undefined category of persons who had committed "a crime against peace" This satisfied the majority of delegates who wanted a strong stand against the sheltering of war criminals; the United States was content that the definition was sufficiently vague to allow for the injection of domestic discretion.... [Footnotes omitted]

I do not view a less-than-civil-law onus, however, as amounting to "domestic discretion," because I believe it is in accord with the international standard, and assigns roughly equal weight to the terms "serious" and "considering" within that standard.

There was no issue between the parties as to which party bore the onus. Both agreed that the burden of establishing serious reasons for considering that international offenses had been committed rested on the party asserting the existence of such reasons, i.e., the respondent. Aside from avoiding the proving of a negation by a claimant, this also squares with the onus under par. 19(1)(j), of the Act, according to which it is the Government that must establish that it has reasonable grounds for excluding claimants. For all of these reasons, the Canadian approach requires that the burden of proof be on the Government, as well as being on a basis of less than the balance of probabilities.

In the case at bar the most controversial legal issue has to do with the extent to which accomplices, [Footnote appended to judgment] 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" (Appeal Book at 401), and it is on this finding that, as will become apparent, the respondent's case must rest.

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 (reproduced by Grahl Madsen at 274):

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".

It was common ground to both parties during argument that it is not open to this Court to interpret the "liability" of accomplices under this Convention exclusively in the light of s. 21 of the Canadian Criminal Code, which deals with parties to an offence, since that provision stems from the traditional common law approach to "aiding" and "abetting." [Footnote: Admittedly, the respondent appeared to come to this conclusion primarily by reason of the difference between

the burdens of proof in the Criminal Code and here.] An international convention cannot be read in the light of only one of the world's legal systems.

Hathaway, supra at 218, refers to a "mens rea requirement," implying a "knowing" state of mind. He states (at 220):

The last question to be addressed is the degree of involvement required to justify criminal liability. While mere presence at the scenes of a crime may not be actionable, 198 exclusion is warranted "when the evidence establishes that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution...."199

198 Fedorenko v. United States, 449 U.S. 490 (U.S.S.C. 1981).

199 Laipenieks v. I.N.S., 750 F. 2d 1427, at 1431 (U.S.C.A. 9th Cir. 1985).

The two U.S. deportation decisions cited by Hathaway, although interpreting related domestic legislation, are helpful with respect to the appropriate degree of participation. Thus, in Laipenieks the Ninth Circuit Court of Appeals reviewed the U.S. law as follows (at 1431):

Fedorenko stated that the proper analysis under the statute was whether the acts of the individual amounted to assisting in the persecution of civilians:

[A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

In Osidach, 513 F. Supp. at 70, the court read the above language as requiring that in order to establish "participation" or "assistance", the act of participation must involve "some personal activity involving persecution".

This interpretation is mandated first by the Plain language of Section 1251(a)(19). The statutory provision clearly states that deportability is established when the "alien" has been found to have ordered, incited, assisted or otherwise participated in persecutorial acts. Mere acquiescence or membership in an organization is insufficient to trigger the deportability provision of Section 125(a)(19).

Second, the intent of the legislation demonstrates that active personal involvement in persecutorial acts needs to be demonstrated before deportability may be established.

I am not unmindful of the dangers of reading an international convention in the light of the interpretation of domestic American law by American Courts, and I do not propose to do so. Nevertheless, the American case law represents a helpful starting point as to the meaning of the word "committed" in the Convention. 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.

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 offenses 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. Grahl-Madsen, supra at 277, states:

It is important to note that the International Military Tribunal excluded from the collective responsibility 'persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations' [International Military Tribunal, i. 256].

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.

Similarly, mere presence at the scene of an offence is not enough to qualify as personal and knowing participation (nor would it amount to liability under s. 21 of the Canadian Criminal Code), 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, by 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.

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 (e.g., s. 21(2) of the Criminal Code), and I believe is the best interpretation of international law.

The one Canadian authority in this area, Naredo v. Minister of Employment and Immigration (1990), 11 Imm. L.R. (2d) 92 (F.C.T.D.), [Footnote: Hathaway cites the Immigration Appeal Board version of this case, T 80-9159, C.L.I.C. Notes 27. 13, November 20, 1980, per D. Davey, immediately following his citation of the U.S. cases Fedorenko and Laipenieks. There are in fact Immigration Appeal Board decisions affirming either side of this issue.], did not deal with the Convention as such. In that case Muldoon J. refused certiorari, prohibition, and mandamus to a husband and wife who had been members of the intelligence service of the Chilean police and who were facing an order of deportation from Canada. The evidence showed that the applicants belonged to a team of four persons which tortured prisoners, frequently to death, but that they did not themselves apply force to any of the detainees, merely acting as guards or as witnesses to the statements extracted from them. On these facts the Court refused the extraordinary remedies requested, on the ground that the applicants had aided or abetted the crimes committed.

In my view, Naredo was correctly decided on its facts, but it relied in good part on the definition of parties to an offence contained in s. 21 of the Canadian Criminal Code, 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.

Moreover, in my opinion the Court there cast its net too broadly in stating (at 112):

Just watching is equally culpable with just torturing. All humans in distress just naturally look for help to other humans, a truth which has been accorded judicial notice. In 1921, in the U.S. case of Wagner v. International Railroad, 133 N.E. 147. 19 A.L.R. 1 (N.Y.), the late Mr. Justice Cardozo, albeit in a different context, expressed that which might be a consistent human verity:

"Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences.... The risk of rescue, if only it be not wanton is born of the occasion."

Thus, it is so perverse and reprehensible just to watch the torture of a fellow human, no matter with what posture or expression, be it glee or just indifference, without making any gesture to rescue the victim, that the watchers are just as immorally criminal as the wielders of the

electrodes, pliers, cigarette butts or instruments of suffocation. To be purposely inflicted with agonizing pain in the presence of other humans who will not come to one's help, is to be doubly tortured, for it creates utter despair. The "mere" watcher is just as culpable a torturer as the actual physical torturer [Footnote: To the contrary is the fact that the duty to rescue is not generally recognized in our law, and only in specialized circumstances is such a duty found to exist: see A.M. Linden, Canadian Tort Law, 4th ed., 1988, at 263ff.].

No doubt in the circumstances of that case, where four members of a police force who had freely chosen their occupation, were isolated in a room with a victim with no other purpose than collectively to apply torture to the victim, guards, witnesses and watchers were all equally guilty of personal and knowing involvement in persecutorial acts. But, as I see it, that is a determination that can be made only in a particular factual context, and cannot establish a general rule that those who look on are always as guilty as those who act. In fact, in my view there is no liability on those who watch unless they can themselves be said to be knowing participants.

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.

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.

II

In the case at bar the Refugee Division found the appellant to be for the most part credible, with one significant exception (Appeal Book, II at 398):

With the exception of his testimony concerning his participating in the torture and killing of civilians, the panel found the claimant's testimony to be credible and trustworthy.

This reservation as to his credibility in respect to the torture and killing of civilians is subsequently explained as follows (Appeal Book, II at 400):

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. Previously in these reasons we have outlined the evolution of his testimony. The first admission he made, although lacking in detail, appears to hit right at the heart of the matter. The panel does not believe that his statement is simple machismo.

The Refugee Division refers to this admission as the "first admission he made," which can refer only to the statement they set out several pages earlier (Appeal Book, II at 397):

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 solider. 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, people like me, but all 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.

On a second occasion, the claimant described.... [Emphasis added]

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" [Emphasis added].

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."

The appellant introduced an affidavit to this effect by one Rafael Lopez Moreno (Appeal Book, App. I), a permanent resident of Canada fluent in both the English and Spanish languages, with the original Spanish text and his translation of it attached as exhibits. The respondent accepted that the tape from which the Spanish text was taken and the Spanish itself were before the Refugee Division, so that no question arises of this Court's considering the case on any different basis than did the Refugee Division. The respondent also acknowledged that "I saw" and not "I did" is the correct interpretation. Thus the Refugee Division, through no fault of its own, has been deprived of the entire basis for its finding that the appellant was himself a principal in the commission of international crimes.

The respondent did attempt to argue that several other passages, including the latter part of the passage quoted immediately above, could lead to the same conclusion. However, not only did the Refugee Division not rely on any other admission, but, given the initial ''I saw," none of the other passages can reasonably be given a contrary interpretation. On every occasion on which he was asked directly about his participation, the appellant answered squarely, as below (Appeal Book, I at 158-160):

Q: Did you ever receive and follow such orders?

A: No, because one knows what is coming up and one tries to get away from the place where the action is going on.

Q: Did you commit what you would, even if you felt you weren't responsible for it, did you commit what you would consider to be an abusive act on someone else's orders?

A: No, I wouldn't.

Q: No, I wouldn't. My question was, did he. Not would he, but did he.

INTERPRETER: Oh, your question was did he?

Q: Did he.

INTERPRETER: Oh, okay.

A: No, I never did that.

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.

Hence it is necessary to proceed to their second finding, relating to his participation as an accomplice (Appeal Book, II at 400-2):

The first admission he made, although lacking in detail, appears to hit right at the heart of the matter. The panel does not believe that his statement is simple machismo. But even this were to

be the case, he has admitted, as well, being present and serving as a guard, while these activities took place.

Even if the claimant were involved only in aiding and abetting in the commission of such crimes, as was his second assertion, in the panel's opinion, he would be no less guilty.

The claimant defended his actions by stating:

I don't feel responsible because I did not issue the orders. I only follow what it was order to me as any ordinary soldier. (sic)

The panel recognizes that the claimant joined the Salvadoran army at a impressionable age and that he wag motivated to do so by vengeance arising from the murder of one sister and the rape of another. The panel also acknowledges that the claimant was ordered by his superiors to participate in brutal actions against non-combatants whom they believed were aiding the guerrillas. This defense, however, is not acceptable.

There does appear to be some remorse on the claimant's part for his conduct; according to the claimant, this remorse was first manifested when he lay badly wounded in a military hospital. That this kind of physical trauma could induce a change of heart is not questioned. However, although this change of heart and the claimant's religious beliefs may have had some bearing on his decision to desert the army, the panel is more inclined to believe that it was his physical inability to function as a combat soldier and the resulting curtailment of his potential for career development in the military which carried more weight in the making of this decision.

The claimant is not a major war criminal. We do not have the benefit of times, places and description of activities. We do not have witnesses. However we do have the claimant's own testimony which we believe meets the "serious reasons for considering" standard of proof which is set out in section F.

As a result, the Refugee Division determines that although the claimant has demonstrated that he has a well-founded fear of persecution on the basis of his political opinion, his activities, while serving with Salvadoran armed forces, fall clearly within the confines of the exclusion clause, section F(a) of Article I of the Convention.

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 or the correct approach, no properly instructed tribunal could have come to a different conclusion [Footnote: This standard has from time to time been applied by this Court: see, e.g., Grewal v. Minister of Employment and Immigration Canada, decided February 23, 1983 (A-972-82), per Pratte J.A. It is clear from the majority in Schaaf v. M.E.I., [1984] 2 F.C. 334 that not every error of law will vitiate an-administrative decision.].

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 offenses 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 (Appeal Book, I at 103-4).

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 (Appeal Book, I at 97):

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.

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 (Appeal Book, I at 20):

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

Initially motivated by revenge for the murder of one sister and her husband by the guerrillas, and the rape of another (Appeal Book, I at 20-27), 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 (Appeal Book, I at 31). 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 (Appeal Book, I at 35-38).

At that time he testified that his conscience was bothering him because of what he had been part of (Appeal Book, I at 35-6):

Q: Were there other reasons for you to renew your contract?

A: No, there were no other reasons. I didn't want to stay in the army any longer because of the things that were going on there. I only wanted to get better from my injuries and then just to ask for, ask them to dismiss me and just get away from it all.

Q: What things are you talking about that, things you were seeing, as a result of things you were seeing you wanted to get a discharge. What things are you talking about?

A: Torture people, kill people. Sometimes in combat the enemy would just spent all his ammunition and then we would capture them alive and there are some soldiers who are very, have a very strong character or they are very hard people, tough people and they just tortured these prisoners and finally they would kill them. The prisoners would be, before being killed, they would say the names of other people and then the soldiers would go to the houses where these people are and they would round them up.

Q: Okay, but go ahead please.

A: They would bring these people unarmed and they would torture them and then they would kill them.

Q: You didn't think this was justifiable?

A: Yes, I thought that it wasn't correct at all because as me as much as anybody else, we all have a right to life.

To similar effect he stated (Appeal Book, I at 37):

Q: Well, just a minute. I think I'm getting off on a track here. My question here is, you obviously, you renewed, you said you renewed, but it seems you didn't really want to and so I'm talking about you, your mental frame at the end of your first term of service.

A: I thought that the things that I saw were not the correct things. So, I wanted to start a new life. I wanted to change my lifestyle. I wanted to have a future, at least to have a home and to do my

own life because I didn't have any trade at that point and I didn't know how to go on with a civilian life. At that point I knew that I was wounded and I could no longer progress in the ranks and that is why I thought that maybe it would be better for me just to leave the army.

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 (Appeal Book, I at 41), he eventually deserted in November, 1987 (Appeal Book, I at 47), 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.

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.

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.

The appellant did not argue the defence of superior orders, and his arguments as to duress and remorse are insufficient for exoneration. On duress, Hathaway, supra at 218, states, summarizing the draft Code of Offences Against the Peace and Security of Mankind, in process by the International Law Commission since 1947:

Second, it is possible to invoke [as a defence] coercion, state of necessity, or force majeure. Essentially, this exception recognizes the absence of intent where an individual is motivated to perpetrate the act in question only in order to avoid grave and imminent peril. The danger must be such that "a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong". Moreover, the predicament must not be of the making or consistent with the will of the person seeking to invoke the exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion. [Footnotes omitted]

The appellant urged, 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 (Appeal Book, I at 49):

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.

As for the remorse he no doubt now genuinely feels, it cannot undo his persistent and participatory presence.

The appeal must therefore be dismissed.