Nuetral Citation: [2022] UKUT 00125 (IAC)

KM (exclusion; Article 1F(a); Article 1F(b)) Democratic Republic of Congo

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

On 20 and 21 July 2021
Promulgated on 9 March 2022

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

K M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. We find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant: Mr R. Khubber, instructed by J D Spicer Zeb Solicitors
For the respondent: Ms J. Anderson & Mr S.C. Milnes, instructed by GLD

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Exclusion under Article 1F(a)

(i) Decision-makers considering protection claims are not required to conduct an assessment akin to a criminal trial, but given the grave nature of an allegation that a person has committed an international crime, and the potentially serious consequences of exclusion, a decision to exclude a person from the protection of the Refugee Convention should be sufficiently particularised to show why there are serious reasons for considering that the main elements of crime are engaged.

(ii) Whether there are serious reasons for considering that a person has committed a crime against peace, a war crime, or a crime against humanity for the purpose of exclusion under Article 1F(a) of the Refugee Convention should be interpreted with reference to the autonomous meaning of those terms in international law.

(iii) In relation to acts committed before 01 July 2002 (the date when the jurisdiction of the International Criminal Court came into force) the autonomous meaning of war crimes or crimes against humanity may need to be drawn from earlier sources of customary international law. Those sources might include the Geneva Conventions, the London Charter, the Tokyo Charter, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Statute of the International Criminal Tribunal for Rwanda (ICTR), the Statute of the Special Court for Sierra Leone (SCSL), and any relevant case law arising from those courts and tribunals.

(iv) In relation to acts committed on or after 01 July 2002, the Supreme Court has made clear that the Rome Statute of the International Criminal Court should be the starting point when considering whether a person is excluded with reference to Article 1F(a): see JS (Sri Lanka) v SSHD [2010] UKSC 15; [2011] AC 184.

(v) The chapeau of Article 7(1) of the Rome Statute sets out the contextual elements of crimes against humanity and should be read with Article 7(2)(a) and the Elements of Crime. It is an essential part of the definition. The crimes listed in Article 7(1)(a)-(k), although serious, do not constitute crimes against humanity if they are not 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. An 'attack' meaning 'a course of conduct involving the multiple commission of acts... pursuant to or in furtherance of a State or organizational policy.'

(vi) At [32] of this decision the Upper Tribunal summarises the main principles drawn from the terms of the Rome Statute, the Elements of Crime, and relevant International Criminal Court case law when assessing whether there are serious reasons for considering that the contextual elements of the chapeau of Article 7 of the Rome Statute are engaged.

(vii) Domestic decisions that have considered the issue of individual criminal responsibility under customary international law should now be read in the context of the developing case law of the International Criminal Court.

Exclusion under Article 1F(b)

(viii) Nothing in the wording of the Refugee Convention excludes the possibility of a former state agent arguing that a serious crime comes within the political exception. However, the majority view in T v Immigration Officer [1996] UKHL 9; [1996] AC 742, that the political exception is likely to apply to

offences committed with the 'object of overthrowing or subverting or changing the government of a state or inducing it to change its policy', sits more comfortably with the intended purpose of the Convention. The Convention was not intended to protect those who had committed serious crimes on behalf of an oppressive state, even if committed with a stated political purpose.

DECISION AND REASONS

1. This decision considers whether the appellant should be excluded from the protection of the 1951 Convention Relating to the Status of Refugees ('the Convention') because there are serious reasons for considering that he committed crimes against humanity (Article 1F(a)) or in the alternative a serious non-political crime (Article 1F(b)) during his service in the Police d'Intervention Rapide (PIR) in the Democratic Republic of Congo (DRC).

LEGAL FRAMEWORK

The Refugee Convention

2. The Convention rose from the ashes of a world war in which widespread and systematic atrocities were committed, including war crimes, deliberate policies of extermination, and targeting of civilian populations.

3. The Convention was designed with the highest humanitarian principles in mind. As such, 'a large and liberal spirit' is called for when a court is asked to interpret its provisions. The Convention is a treaty between states which must be interpreted in good faith according to the ordinary meaning of the terms read in their proper context, and in the light of the object and purpose of the treaty: see *Hoxha & Anor v SSHD* [2005] UKHL 19; [2005] 1WLR 1063.

4. At the heart of the Convention is the principle of non-discrimination. The House of Lords in *SSHD v K* [2006] UKHL 46; [2007] AC 412 emphasised this basic principle as follows [10]:

> 'It is well-established that the Convention must be interpreted in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms.'

5. The purpose of the Convention and subsequent Protocol is to provide an international legal framework whereby signatory states agree to provide surrogate protection to those who are outside their country of nationality due to a well-founded fear of persecution for one of the five reasons identified, and are unable, or owing to such fear, are unwilling to avail themselves of the protection of their country of nationality or former habitual residence. A grant of status under the Convention is a declaratory act. A person is a refugee if they meet the relevant criteria contained in Article 1A(2). When a signatory state such as the United Kingdom grants leave to remain as a refugee it recognises an existing status under international law and undertakes to respect the rights and benefits associated with that status.

6. The Qualification Directive (2004/83/EC) reaffirmed the Convention and Protocol as the cornerstone of the international legal regime for the protection of refugees. The recitals went on to confirm that the Directive sought to ensure full respect for human dignity and the right to asylum for applicants and their accompanying family members. Core elements of the Directive were transposed into domestic law by The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ('the Qualification Regulations 2006'). By operation of section 2(1) of the European Union Withdrawal Act 2018, 'EU-derived

domestic legislation', which had effect in domestic law immediately before the Implementation Period (IP) Completion Day (31 December 2020), continues to have effect after IP Completion Day. The Qualification Regulations 2006 are saved 'EU-derived domestic legislation' which, at the date of this decision, and until such time as they are revoked, continue to have effect in domestic law.

7. If a person has not been recognised as a refugee by a signatory state, their status comes to an end as soon as they no longer meet the criteria of Article 1A(2). If a person has been formally recognised as a refugee, the Convention ceases to apply in one of the specified circumstances set out in Article 1C of the Convention ('the Cessation Clauses'): see *Hoxha*.

The distinction between exclusion and expulsion

8. The treaty also makes provision for certain categories of people to be excluded from the protection of the Convention ('the Exclusion Clauses'). In the case of Article 1D this is because the person had the surrogate protection of UNHCR[1] or in the case of Article 1E is not considered to need surrogate protection because the person is recognised by the host country as having the equivalent rights and obligations which are attached to the possession of the nationality of that country.

9. Article 1F is the only provision which considers certain categories of people undeserving of the protection of the Convention. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (February 2019) states that the pre-war international instruments that defined various categories of refugees contained no provisions for the exclusion of criminals. It was only after the Second World War, when the memory of the trials of major war criminals was still alive, that provisions were drawn up to exclude certain people who were deemed unworthy of international protection. In The Law of Refugee Status (Cambridge University Press, 2014, 2nd ed.) Hathaway and Foster cite concerns among the drafters that serious criminals should not be able to avoid prosecution by claiming asylum. They say that the drafters were persuaded that if state parties were expected to admit serious criminals as refugees that they would not be willing to be bound by the Convention.

10. In this way the humanitarian objectives of the Convention are balanced by the exclusion of those whose actions may have been the underlying cause of others having to seek international protection. In most cases the assessment under Article 1F will consider whether the past actions of a person outside the country of refuge justify exclusion from the protection of the Convention, and the rights and freedoms associated with refugee status, because they pose a risk to the integrity of the system of international protection.

11. Article 33(1) sets out the fundamental principle of non-refoulement. No contracting state shall expel or return a refugee (whether recognised or not) in any manner to the frontiers of territories where their life or freedom would be threatened for any of the five Convention reasons. There is general acceptance that the principle applies to applications made at the frontier of the receiving

[1] The intention of the drafters was for Article 1D to apply to the specific situation of Palestinians under the protection of the UN following the end of the Second World War, but the exact application has been the subject of varying legal decisions and is not within the scope of this decision: see *El-Ali* [2002] UKUT 00159, *El-Ali v SSHD* [2003] 1 WLR 95 and *Said (Article 1D meaning)* [2012] UKUT 413.

state or from within it: see *R (European Roma Rights Centre & Ors) v Immigration Officer at Prague Airport & Anor* [2004] UKHL 55; [2005] 2 AC 1.

12. Article 33(2) provides an exception to this fundamental principle in cases where there are reasonable grounds for regarding the person as a danger to the security of the host country, or who, having been convicted of a particularly serious crime, constitutes a danger to the community of the host country. Article 33(2) is not an exclusion clause within the meaning of the Convention. Article 33(2) is more accurately described as an exception to the principle of non-refoulement. Because of the serious consequences of expelling a person who has a well-founded fear of persecution, the Convention only permits refoulement if the refugee poses a sufficiently serious danger to the community of the host country.

13. Section 72(1) of the Nationality, Immigration and Asylum Act 2002 describes Article 33(2) as 'exclusion from protection'. Article 14(4) of the Qualification Directive provides a procedural mechanism for 'revocation' of refugee status granted under the Directive in the same circumstances as those outlined in Article 33(2) of the Convention. In *M & Others (revocation of refugee status)* (C-391/16) [2019] 3 CMLR 30 the Court of Justice of the European Union (CJEU) made clear that Article 14(4), which contains the same wording in the recast Directive, is not an exclusion clause. The Court distinguished between 'being a refugee' for the purpose of Article 1A of the Convention and the grant of 'refugee status' under the Directive. Article 14(6) makes clear that those whose 'refugee status' is revoked under Article 14(4) or not granted under Article 14(5) of the Directive are still entitled to the rights and benefits set out in the Refugee Convention, which the court described as a 'light-refugee' status in view of the broader rights and benefits associated with status granted under the Directive.

14. In *EN (Serbia) v SSHD* [2010] 1 QB 633 the Court of Appeal found that the phrase 'particularly serious crime' was clear, and drastically restricts the offences to which the article applies. So far as 'danger to the community' is concerned, the danger must be real. If a person is convicted of a particularly serious crime, and there is a real risk of its repetition, they are likely to constitute a danger to the community. The Court observed that not every crime giving rise to a sentence of at least two years' imprisonment is particularly serious. For section 72 to be construed to be compatible with the Convention the presumptions relating to the seriousness of the crime and whether a person poses a danger to the community must both be rebuttable.

15. In contrast to Article 1F, which primarily is backward looking and focused on whether a person's actions pose a systemic risk, Article 33(2) focuses on the current risk that a refugee might pose to the host country. In contrast to Article 1F, which excludes a person from protection and the rights and benefits associated with refugee status, a removable refugee should continue to be entitled to the rights and benefits associated with refugee status under the Convention until the act of removal (although in practice they may be protected from removal by human rights law): see *Essa (Revocation of protection status appeals)* [2018] UKUT 00244 (IAC) and *M & Others*.

16. Article 1F of the Convention states:

> '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;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.'

17. The interpretation of Article 1F should be drawn from an autonomous meaning found in international law. Because of the serious consequences of exclusion Article 1F must be interpreted restrictively and used cautiously: see *JS (Sri Lanka) v SSHD* [2010] UKSC 15; [2011] AC 184 and *Al-Sirri v SSHD* [2012] UKSC 54; [2013] 1 AC 745.

18. The burden is upon the state seeking to deny protection to show that there are 'serious reasons for considering' that one or more of the exclusion clauses applies. 'Serious reasons' is stronger than 'reasonable grounds'. The evidence from which those reasons are derived must be 'clear and credible' or 'strong'. The word 'considering' is stronger than 'suspecting'. It is not necessary for the decision maker to be satisfied beyond reasonable doubt. In *Al-Sirri* the Supreme Court found that it was unhelpful to import domestic standards of proof into the question, but the reality is that there are unlikely to be sufficiently serious reasons for considering that a person engages the exclusion clauses unless a decision-maker can be satisfied, at least on the balance of probabilities, that the person has committed sufficiently serious acts.

Exclusion under Article 1F(a) – international criminal law

19. Whether there are serious reasons for considering that a person has committed a crime against peace, a war crime, or a crime against humanity, should also be interpreted with reference to the autonomous meaning of those terms in international law.

20. In relation to acts committed before 01 July 2002 (the date when the jurisdiction of the International Criminal Court came into force) the autonomous meaning of war crimes or crimes against humanity may need to be drawn from earlier sources of customary international law. Those sources might include the Geneva Conventions, the London Charter, the Tokyo Charter, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Statute of the International Criminal Tribunal for Rwanda (ICTR), the Statute of the Special Court for Sierra Leone (SCSL), and any relevant case law arising from those courts and tribunals.

21. In relation to acts committed on or after 01 July 2002, the Supreme Court has made clear that the Rome Statute of the International Criminal Court (ICC) should be the starting point when considering whether a person should be excluded under Article 1F(a): see *JS (Sri Lanka)*.

22. The first principle to note is that proceedings in the ICC are reserved only for the most grave and serious crimes of concern to the international community. The preamble to the Rome Statute is mindful that during the 20th century millions of people were 'victims of unimaginable atrocities that deeply shock the conscience of humanity' and recognises that 'such grave crimes threaten the peace, security and well-being of the world'. The preamble goes on to affirm that 'the most

serious crimes of concern to the international community as a whole must not go unpunished'.

23. This emphasis is repeated in Article 5, which makes clear that the jurisdiction of the Court shall be 'limited to the most serious crimes of concern', including the crime of genocide, crimes against humanity, and war crimes. The Kampala Amendments to the Rome Statute, which included the crime of aggression, were activated on 17 July 2018. The UK has not ratified the amendments.

24. The principle of complementarity is reflected in Article 17, which governs the admissibility of cases to the ICC and reaffirms the focus on the most serious crimes. Article 17(1)(a) recognises that the initial responsibility for investigating and prosecuting crimes will lie with the state which has jurisdiction, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution of such serious crimes. Hence the international criminal jurisdiction is complementary to state jurisdiction. To further emphasise that the international criminal jurisdiction only deals with the most serious of crimes, Article 17(1)(d) makes clear that a case may not be admissible if it 'is not of sufficient gravity to justify further action by the Court'.

25. The body of the Rome Statute sets out the applicable law relating to the core crimes within the jurisdiction of the ICC and general principles of international criminal law. Article 9 confirms that the Elements of Crime shall assist the Court in the interpretation and application of Article 6 (genocide), Article 7 (crimes against humanity), and Article 8 (war crimes).

26. In interpreting the meaning of war crimes or crimes against humanity for the purpose of Article 1F(a) of the Convention a court or tribunal should have regard to the meaning given to those terms in international criminal law, which is now governed by the Rome Statute and the Elements of Crime. The case law of the ICC and other relevant international tribunals is not binding but should be considered an authoritative aid to interpretation. In the context of domestic criminal law, section 50(5) of the International Criminal Court Act 2001 states that in interpreting and applying the provisions of Articles 6, 7 and 8 for the purpose of criminal proceedings a court shall take into account any relevant judgment or decision of the ICC and account may also be taken of any other relevant international jurisprudence.

27. The respondent asserts that there are serious reasons for considering that the appellant committed crimes against humanity in the course of his duties as a police officer in the PIR. The acts must fall within the definition of the relevant crime (Article 7- crimes against humanity), the person must be individually responsible (Article 25 - individual criminal responsibility), and have the required knowledge and intent (Article 30 - mental element).

Crimes against humanity

28. Article 7 of the Rome Statute defines crimes against humanity as follows:

> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;

(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court.
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
(b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
(c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
(d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
(f) “Forced Pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
(h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

29. The 'chapeau' of Article 7(1) sets out the contextual elements of crimes against humanity and should be read with Article 7(2)(a) and the Elements of Crime. It is an essential part of the definition. The crimes listed in Article 7(1)(a)-(k), although serious, do not constitute crimes against humanity if they are not 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. An 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such an attack.

30. The Elements of Crime state that the provisions of Article 7 must be strictly construed taking into account the fact that crimes against humanity are among the most serious crimes of concern to the international community (7.1). The last two elements of each crime describe the context in which the conduct must take place and clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, it should not be interpreted as requiring proof that the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organisation. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack (7.2). An 'attack directed against a civilian population' in furtherance of a State or organisational policy to commit such an attack need not constitute a military attack. A 'policy to commit such attack' requires that the State or organisation 'actively promote or encourage' such an attack against a civilian population (7.3).

31. The legal elements of the relevant international crime are not disputed. The parties accept that the Rome Statute is the starting point. The case law of the ICC illuminates those elements in more detail. Trial judgments of the ICC have given broadly consistent guidance on the meaning of the contextual elements of the chapeau of Article 7 in a series of cases including *Katanga* (Judgment)(ICC-01/04-01/07)(07 March 2014), *Bemba Gombo* (Judgment)(ICC-01/05-01/08)(21 March 2016) (acquitted on appeal), *Gbagbo* (Reasons for Oral Decision)(ICC-02/11-01/15)(16 July 2019), *Ntaganda* (Judgment)(ICC-01/04-02/06)(18 July 2019), and *Ongwen* (Judgment)(ICC-02/04-01/15)(04 February 2021).

32. In *Katanga* the court outlined a three-stage process of analysis of the contextual elements of crimes against humanity. The following principles can be drawn from the terms of the Rome Statute, the Elements of Crime, and relevant ICC case law when assessing whether the contextual elements of the chapeau of Article 7 of the Rome Statute are satisfied.

(1) <u>Existence of an attack</u>

(i) *Course of conduct involving the multiple commission of acts referred to in Article 7(1)*
The definition of an 'attack' denotes a campaign, an operation or a series of actions directed against the civilian population, not an isolated single act. Once a course of conduct involving multiple commission of acts

referred to in Article 7(1) is established, a single event might constitute an attack within the meaning of Article 7(2)(a) provided that the other elements are met. The attack need not be military in nature.

(ii) *Directed against a civilian population*
The expression 'civilian population' denotes all persons who are civilians as opposed to members of armed forces and other legitimate combatants. The nationality of members of such a population, their ethnic group or any other distinguishing feature is immaterial to the protection that attaches to 'civilian' character. The presence within the civilian population of individuals who do not come within the definition does not deprive the population of its civilian character. Where an attack is carried out in an area containing both civilians and non-civilians, factors relevant to determining whether an attack was directed against a civilian population include the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the form of resistance to the assailants at the time of the attack, and the extent to which the attacking force complied with precautionary requirements of the laws of war.

The requirement that the attack be 'directed against' means that the civilian population must be the primary target of the attack and not an incidental victim of it. There is no requirement to show that the entire population of a geographic area was targeted, but civilians must be targeted in sufficient numbers or in such a manner that the attack could be said to be directed against the civilian population, as opposed to a limited number of specific individuals. If the attack is directed against a civilian population, there is no requirement that individual victims must be civilians.

(iii) *Pursuant to or in furtherance of a State or organisational policy*
The requirement presupposes the existence of a 'state' or 'organisation'. An 'organisation' is understood as 'an association, whether or not governed by institutions, that sets itself specific objectives'. This general definition may not allow for the contours of an organisation to be clearly circumscribed. As such, the term should be put in context. It suffices that the organisation has a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population.

The existence of a 'policy' must be established. It need not be formalised and may be inferred from a variety of factors which, taken together, establish that a policy existed. Such factors may include (i) that the attack was planned, directed or organised; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the state or organisational forces in the commission of crimes; (v) statements, instructions or documentation attributable to the state or the organisation condoning or encouraging the commission of crimes; (vi) an underlying motivation; and (vii) the existence of preparations or collective mobilisation orchestrated and coordinated by the state or organisation. In principle, a state or organisation committing a systematic attack against a civilian population will satisfy the policy requirement.

The requirement to show that the attack is 'pursuant to or in furtherance of' a state or organisational policy requires a link between the operation or course of conduct and the policy. This ensures that acts perpetrated by isolated and uncoordinated individuals acting randomly on their own are excluded. There is no requirement that the perpetrators are members of the state or organisation if the conduct was carried out in furtherance of the policy and with the requisite knowledge.

(2) Characterisation of the attack

(i) *'Widespread' or 'Systematic'*
The term 'widespread' reflects the large-scale nature of the attack and the large number of targeted persons. The assessment of whether the attack is widespread is neither exclusively quantitative nor geographical but must be based on all the relevant facts of the case.

The term 'systematic' reflects the organised nature of the acts of violence and the improbability of their random occurrence. It also refers to the existence of 'patterns of crimes' evidenced by non-accidental repetition of similar criminal conduct on a regular basis.

(3) Nexus and knowledge

(i) *Nexus between the attack and acts within the ambit of Article 7(1)*
The individual act must be committed as part of a widespread or systematic attack directed against a civilian population. Due regard must be given to the nature of the act, the aims it pursues, and its consequences, in assessing whether the act forms part of a widespread or systematic attack, when considered as a whole. Isolated acts that differ in their nature, aims and consequences from other acts that form part of an attack fall outside Article 7(1) of the Statute.

(ii) *Knowledge*
The perpetrator must know that the act in question is part of a widespread or systematic attack against the civilian population but does not need to have knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organisation.

Individual Criminal Responsibility

33. Article 25 of the Rome Statute sets out the requirements for individual criminal responsibility. The relevant provisions for the purpose of this appeal are:

> 1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
>
> 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made with the knowledge of the intention of the group to commit the crime;

.....

34. The Rome Statute is an amalgam of principles drawn from different legal systems and elements of customary international law. The context of the Rome Statute, with its emphasis on 'macro-crimes' committed as part of larger situations involving serious and widespread violations, is different to that of domestic criminal cases. However, individual criminal responsibility is still an essential element to be proved on the facts of each case.

35. Article 25 sets out a series of different modes of individual criminal responsibility, which as with many areas of international criminal law is still subject to interpretation and debate. It is beyond the scope of this decision to go into the principles in any detail but it may be useful to highlight a few basic aspects.

36. In broad terms, Article 25 differentiates between those who are principal perpetrators of a crime and those who are accessories to a crime. Principal liability might arise from (i) direct commission of the material elements of a crime (direct perpetrator); (ii) joint commission of a crime with another (co-perpetrator); or (iii) indirect commission of a crime through another person (indirect perpetrator or co-perpetrator). Accessorial liability relates to those whose conduct is connected to the commission of a crime by another person or group of persons.

37. In certain areas the ICC has departed from previous approaches of the *ad hoc* tribunals in the assessment of individual criminal responsibility. The principles formulated in the Rome Statute have been interpreted by the Court with reference to the theory of 'control over the crime', drawn from German legal doctrine, to distinguish between principal and accessorial liability: see *Lubanga* (Trial and Appeal Judgments)(ICC-01/04-01/06-2842)(05 April 2012 & 01 December 2014) and *Katanga*. In early decisions, some judges of the ICC expressed concerns about the use of this principle, especially in relation to the novel concept of indirect co-perpetration. These included Judge Fulford's partially dissenting opinion in *Lubanga* and Judge Wyngaert's concurring opinion in *Chui* (Judgment)(ICC-01/04-02/12)(18 December 2012). Nevertheless, it appears that

the Court has continued to apply the theory of ‘control over the crime’ in later judgments.

38. It may be useful to highlight that the ICC does not apply the customary international law principle of joint criminal enterprise liability in the same way as the *ad hoc* tribunals. The ICC is governed by a different statutory framework. The wording of Article 25 provides for more than one form of joint criminal liability. We note that domestic authorities relating to exclusion under the Refugee Convention that have touched on the principle of joint criminal liability applied by the *ad hoc* tribunals, such as *JS (Sri Lanka)*, were decided before any ICC trial judgments were issued. Domestic decisions that have considered the issue of individual criminal liability should now be read in the context of the developing case law of the ICC when considering whether there are serious reasons for considering that a person has committed war crimes or crimes against humanity and should be excluded from the protection of the Refugee Convention.

Mental Element

39. Article 30 of the Rome Statute defines the mental element required to establish criminal responsibility.

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purpose of this article, a person has intent where :
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purpose of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

40. The General Introduction to the Elements of Crime states that, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct the relevant mental element in Article 30 applies, subject to exceptions contained in the Statute. The General Introduction goes on to state that the existence of intent and knowledge can be inferred from relevant facts and circumstances. With respect to mental elements involving value judgement, such as those using the terms ‘inhuman’ or ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.

Exclusion under Article 1F(b) – serious non-political crime

41. The wording of the Convention is deceptively simple:

> ‘F. The provisions of this Convention shall not apply to any person in respect to whom there are serious reasons for considering that:
> …..

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;'

42. From the French text it is clear that the drafters of the Convention intended Article 1F(b) to apply to serious common crimes:

'F. Les dispositions de cette Convention ne seront pas applicable au personnes dont on aura des raison sérieuses de penser :
.....
(b) qu'elles ont commis *un crime grave de droit commun* en dehors du pays d'accueil avant d'y être admises comme réfugiés;' [emphasis added]

43. Article 12(2)(b) of the Qualification Directive expanded the definition for exclusion from that contained in Article 1F(b) of the Convention:

'2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
.....
(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; *which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes*;
.....
3. *Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein'* [emphasis added]

44. Article 12(2)(b) was transposed into paragraph 7 of the Qualification Regulations 2006, with somewhat less clarity and is, for the moment, saved in domestic law:

'7(1) A person is not a refugee, if he falls within the scope of Article 1D, 1E or 1F of the Geneva Convention.
(2) In the construction and application of Article 1F(b) of the Geneva Convention:
(a) the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective;
(b) the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued.
(3) Article 1F(a) and (b) of the Geneva Convention shall apply to a person who instigates or otherwise participates in the commission of crimes or acts specified in those provisions.'

45. In *T v Immigration Officer* [1996] UKHL 9; [1996] AC 742 the House of Lords considered whether an Algerian national who was a member of an armed opposition group committed a non-political crime as a result of his involvement in a bomb attack on an airport which killed 10 people and a separate attack on an army barracks. The House of Lords conducted a review of the law underpinning the common law exception to extradition in cases involving political offences. Lord Lloyd noted that the framers of the Convention clearly had extradition principles in mind, albeit he recognised that the exclusion clause had a different purpose. Lord Lloyd described a political purpose as an action 'with the object of

overthrowing or subverting or changing the government of a state or inducing it to change its policy'. However, Lord Slynn did not consider that the act must be directed against the government saying that 'it is in a democratic society no less an attack on the state if the attacker seeks to destroy or to pressurise the opposition party.' It is not clear from this comment whether 'the attacker' he was referring to might be a non-state agent or a state agent. In the context of a case in which he was considering whether a terrorist act might constitute a political crime it seems more likely that he may have been referring to the former.

46. Lord Lloyd gave the judgment with which the majority agreed. The main reasoning of the decision is contained in the following conclusion at [786H-787C]:

> 'Taking these various sources of law into account one can arrive at the following definition. A crime is a political crime for the purposes of Article 1F(b) of the Geneva Convention if, and only if (1) it is committed, for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.
>
> Although I have referred to the above statement as a definition, I bear in mind Lord Radcliffe's warning in *Reg v Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, 589 that a question which was first posed judicially more than 100 years ago in *In re Castioni* [1891] 1 Q.B. 149 is unlikely now to receive a definitive answer. The most that can be attempted is a description of an idea. But to fall short of a description would, in Lord Radcliffe's words, be to abdicate a necessary responsibility, if the idea of a political crime is to continue to form part of the apparatus of judicial decision-making.'

47. In the context of domestic law, the jurisdiction to decline to extradite a person because they are accused of or have been convicted of a political offence was formalised by the statutory scheme contained in the Extradition Act 2003 ('the 2003 Act'). It is easy to identify echoes of Refugee Convention principles in the 2003 Act, which states that extradition is barred by reason of extraneous considerations if it is in fact sought 'for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions'. The 2003 Act also provides that a person must not be extradited before an asylum claim is finally determined.

48. In *SSHD v A (Iraq)* [2005] EWCA Civ 1438; [2006] Imm AR 114 the Court of Appeal considered the case of a 'self-confessed torturer under Saddam Hussein's regime in Iraq' in which the Secretary of State belatedly raised the issue of exclusion under Article 1F(b) after the hearing and argued that it was an obvious point that the Tribunal should have considered. The Court noted that it did not form part of the claimant's case to support the Immigration Appeal Tribunal's suggestion that the crimes could be characterised as 'political'. Lord Justice Carnwarth commented, in parenthesis, that there did not seem to be a basis for that suggestion in light of *T*. The question of whether a state official committing serious crimes in the course of their duties was non-political or political in nature was not argued before the court nor considered in any detail.

49. In *B and D v Germany* [2010] EUECJ C-101/09 the Grand Chamber of the CJEU considered the application of Article 12(2)(b) (serious non-political crime) and Article 12(2)(c) (acts contrary to the purposes and principles of the United Nations) of the Qualification Directive in the context of another case involving acts that were terrorist in nature. The CJEU concluded that mere fact that a person has supported an organisation involved in armed struggle does not automatically constitute a serious reason for considering that a person has committed acts that justify exclusion. The specific facts of an individual case must be assessed. Exclusion under Article 12(2)(b) or (c) is not conditional on the person concerned representing a present danger to the host Member State or on an assessment of proportionality.

50. In *AH (Article 1F(b) – 'serious') Algeria* [2013] UKUT 00382 (IAC) the Upper Tribunal concluded that the term 'serious' must reflect the level of gravity of crime required to exclude a person from the Convention. In the subsequent appeal, the Court of Appeal concluded that the term was sufficiently clear and did not need to be qualified as 'particularly' serious: *AH (Algeria) v SSHD* [2015] EWCA Civ 1003; [2016] 1 WLR 2071. The court went on to find that Article 1F(b) was not confined to fugitives from justice. Nor did rehabilitiation or expiation after having served a sentence for a serious non-political crime render the exclusion clause inapplicable.

51. For the purpose of exclusion, the Convention distinguishes between macro-crimes covered by Article 1F(a) that fall within the realm of international criminal law and common crimes covered by Article 1F(b) that fall primarily within the realm of domestic criminal law (albeit interpreted in the context of an autonomous meaning under international law). The political offence exception contains partial roots in extradition law. One of the intended purposes of Article 1F(b) is to prevent applicants from using asylum as a means of avoiding extradition and prosecution for serious crimes committed outside the host country. Another intention is to exclude those who have committed serious common crimes because they pose a risk to the integrity of the system of international protection as well as to mitigate the potential risk to the host state. Like Article 1F(a), because of the potentially serious consequences of exclusion, the clause should be interpreted restrictively and used cautiously. The crime must be of a sufficiently serious nature to justify exclusion.

52. In *T* Lord Slynn expressed a differing view as to what might constitute a political offence, but it is not clear whether he was referring to the actions of non-state or state agents. Nothing in the wording of the Convention excludes the possibility, but the parties before us have been unable to find any case law in which a state agent has been found to come within the political offence exception. As always, a fact sensitive assessment will need to be carried out in each case.

53. In our assessment the attempt by the majority in *T* to define a 'political offence' as one committed with the 'object of overthrowing or subverting or changing the government of a state or inducing it to change its policy' sits more comfortably with the intended purpose of the Convention. The Convention came into being at a time when many people had fled or were fleeing oppressive regimes where political offences might have been committed with the object of overthrowing or changing the policy of a regime and prosecution for 'political' offences might itself be used as a tool of oppression. Haunted by the ghosts of the Second World War, the Convention was intended to provide protection to those fleeing oppression. The Convention was not intended to protect those who had

committed serious crimes on behalf of an oppressive state, even if committed with a stated political purpose.

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

54. Whether there are serious reasons for considering that crimes against humanity were committed in the period that the appellant served in the PIR must be assessed with reference to the evidence relating to the situation in the DRC at the relevant time.

55. The modern history of the DRC, know as Zaïre until 1997, began with harsh colonial exploitation, which gave way to political turmoil following independence in 1960, and subsequent interference by Cold War powers vying for influence over the resource rich country. The civilian population and the national infrastructure have remained desperately poor despite great mineral wealth in the region, which has been an ongoing source of conflict.

56. In 1965 Joseph-Désiré Mobutu seized power in a coup. The background evidence shows that he established a long-standing authoritarian regime characterised by widespread human rights abuses, violent suppression of any opposition, and the plunder of the country's resources for the personal benefit of the President and his associates. The end of the Cold War led to a marked change in attitude by the United States towards the Mobutu regime. In the early 1990s the President was forced to establish a transitional coalition government, with a view to holding elections, but retained significant powers.

57. The shockwave caused by the 1994 Rwandan genocide has had a devastating and long-lasting effect on the region. Large numbers of Rwandan Hutu, including génocidaires, fled into eastern Zaïre following the advance of the Tutsi led Front Patriotique Rwandaise (FPR). Refugee camps along the border with Rwanda became populated with Hutu militias which used the camps as a base to launch attacks against ethnic Tutsi in Zaïre's eastern region of South Kivu and across the border into Rwanda.

58. In response to the threat posed by the Interahamwe and other Hutu armed groups based in Zaïre the Rwandan government supported the creation of the Alliance des Forces Démocratiques pour la Libération du Congo (AFDL) led by Laurent-Désiré Kabila. Years of dictatorship and corruption had led to disastrous economic decline. Many areas of the state were close to collapse and growing insecurity in the east left parts of Zaïre barely under government control. By now Mobutu was suffering from a terminal illness and was struggling to control various opposing factions. The crumbling armed forces were unable to stop the anti-Mobutu advance that began in the south-east in 1996. The First Congo War was swift but destructive as other regional powers quickly became embroiled, resulting in thousands of deaths. The AFDL took control of large swathes of the country. In May 1997 Mobutu fled into exile. Laurent Kabila captured Kinshasa with little resistance and installed himself as President.

59. The country was renamed the Democratic Republic of Congo, but it soon became clear that any hope of progress towards more democratic and accountable governance would be dashed as the regime of Laurent Kabila continued in a similar mould to his predecessor. His relationship with former allies in Rwanda and Uganda deteriorated because he failed to tackle the Hutu militias and turned on ethnic Tutsis. His former allies supported new armed groups to achieve their

aims. By August 1998 the situation had mushroomed into a major geopolitical conflict involving a proliferation of armed groups supported by various regional powers.

60. The Second Congo War was even more devastating and was complicated by increased fighting over access to the DRC's natural resources. A ceasefire agreement brokered in Lusaka in 1999 failed. The complex conflict raged on, involving massive human rights abuses against the civilian population of eastern DRC. Laurent Kabila was assassinated in 2001 and was succeeded by his son, Joseph Kabila. International peacekeeping forces deployed to the area were ineffective in stopping serious and widespread abuses. A ceasefire agreement was signed in 2002, but eastern DRC has continued to suffer conflict at a lower level until the present day.

61. The DRC ratified the Rome Statute in April 2002. The government referred the situation to the ICC prosecutor to investigate crimes committed since its jurisdiction began on 01 July 2002. Reports of a pattern of rape, torture, forced displacement, and the illegal use of child soldiers were investigated by the prosecutor leading to charges of war crimes and crimes against humanity being brought against several members of non-state armed groups that had been active in the region. By the time the ICC began its investigation in 2004, international bodies estimated that nearly four million people had died due to violence, malnutrition or lack of medical care arising from the conflict (this figure continued to increase). It was reported to be the biggest loss of life in any conflict since the Second World War. The stated purpose of the Rome Statute was to ensure that such serious and widespread crimes would not go unpunished.

62. Although we must consider the legal framework relating to international criminal law, we are not conducting a criminal trial. Our assessment is placed firmly in the context of the Refugee Convention and the legal framework relating to exclusion set out above. Nevertheless, it is important not to dilute the particularly grave nature of war crimes and crimes against humanity when considering whether a person should be excluded from the protection of the Convention. A person's past actions might be considered deeply objectionable, or even criminal, but Article 1F(a) is only engaged in cases involving situations of sufficient gravity. Our summary of the recent history of the conflict in eastern DRC is intended to provide an indication of the necessary scale and gravity of war crimes and crimes against humanity. We bear this in mind as we begin to look at the evidence relating to the actions of the PIR in more detail.

63. The respondent's bundle of background evidence contains copies of US State Department reports (USSD), UN reports, and reports from organisations such as Human Rights Watch and Amnesty International, which cover the period the appellant served in the PIR. Given the scale of abuses, many of the reports focus on the serious human rights situation in eastern DRC. The appellant only claims to have served with the PIR in Kinshasa save for a period of time, on a date that he claimed not to remember, when his unit was dispatched to the border with Cabinda. As such, we have concentrated our assessment on the evidence relating to the actions of the authorities in government held areas during the relevant period and on any evidence relating to the actions of the PIR in Kinshasa.

64. A partial and undated copy of a document from the US Library of Congress cites the USSD report from 1991, which said that human rights in Zaïre were seriously restricted. The key source of the problem was the authoritarian nature of the

Mobutu regime, the size of the security apparatus, and pervasive and widespread corruption. The instruments of law and order were also the chief abusers of human rights. Another important factor was that, although the armed forces received general authority from central government, they were often not within its firm control, especially at local level.

65. A report of the UN Special Rapporteur on Human Rights dated January 1998 states that he was refused permission to visit the DRC but received information from a range of organisations within the country. The Rapporteur described the chaotic demise of the Mobutu regime and outlined developments since Kabila took power. He noted that there had been changes in the structure of the military and the police, which included the creation of the PIR and the Détection Militaire des Activités Anti-Patrie (DEMIAP) (military intelligence). At first the PIR was thought to have improved the security situation but the Rapporteur noted that initial impression was beginning to fade. DEMIAP was reported to be 'actively suppressing dissidents'. President Kabila also set up his own presidential protection corps. The armed forces were reported to have no precise structure and no identifiable ranks or responsibilities. Like the Mobutu regime, all political activity was banned. This was thought to be with the same aim of 'outlawing all dissent, preventing the emergence of opposition leaders and obstructing, through repression, any attempt at organization.' The Rapporteur went on to consider abuses carried out during the conflict in North Kivu in eastern DRC and stated that there was no doubt in his mind that 'all parties to the conflict were responsible for flagrant and extremely serious violations of the norms of international humanitarian law.'

66. The Rapporteur went on to document a number of credible reports of political murders as part of a 'settling of scores' during the transition. Under the heading 'Arbitrary deprivation of life through excessive use of force in repressing crime or dissidence' he also documented human rights violations committed by public officials in the exercise of their duties 'in suppressing dissent or ordinary crime'. The examples included the killing of people attending demonstrations, but also included the killing of people imprisoned for witchcraft, accused of corruption or relatively minor criminal activity. The Rapporteur also documented serious and substantiated reports of torture throughout the country, which he described as being 'systematic and widespread'. Again, the victims were a mix of people. Some were detained for political reasons, but others for witchcraft or on suspicion of ordinary criminal activity. Having reviewed the evidence, the Rapporteur went on to conclude that abuses did not reach the levels of the previous period. Such incidents were often unrelated to the performance of professional duties and were reminiscent of the looting and extortion carried out by the former Forces Armées Zaïroises (FAZ).

67. The Rapporteur learned of many cases of arrest on political, religious, cultural and trade union grounds. A ban on demonstrations had been in place since 19 May 1997 and was extended to demonstrations held in private venues. Examples were given of incidents of violent suppression of peaceful demonstrations. The Rapporteur went on to make the following observation:

> '189. The violence with which demonstrations are suppressed cannot be blamed on excesses on the part of middle-ranking members of the AFDL police. It was President Kabila himself who, in referring to demonstrations in Bukavu and Maniema in June, warned that if such demonstrations continued, he would have participants shot, adding: "I'm going to impose a bit of discipline."'

68. The USSD for 1999 reported that the state continued to be highly centralised although in practice the dilapidated transportation and communications infrastructure impaired government control. Kabila continued to rule by decree and political activity was banned. The Kabila government's human rights record remained poor. Security forces were responsible for numerous extrajudicial killings, disappearances, torture, beatings, rape, and other abuses. In general, security forces committed abuses with impunity. The government was said to used excessive force and committed violations of international law in the war in eastern DRC. The government severely restricted freedom of assembly and association.

69. The report went on to state that, despite legal provisions governing arrest and detention procedures, the security forces were responsible for numerous cases of arbitrary arrest and detention. Under the law, serious offences punishable by more than six months' imprisonment did not require an arrest warrant. Only a law enforcement officer with 'judicial police officer' status was empowered to authorise an arrest. This status was also vested in senior officers of the security services. In practice these provisions were violated systematically. Security forces, especially those carrying out the orders of any official who could claim authority, used arbitrary arrest to intimidate outspoken opponents and journalists. Charges rarely were filed and the political motivation for such detentions often was obscure.

70. The USSD stated that security forces and prison officials used torture and often beat prisoners in the process of arresting or interrogating them. Members of the security forces also raped, robbed, and extorted money from civilians. Some abusers were prosecuted. Incidents of physical abuse by security forces occurred during the arrest or detention of political opponents, journalists, and businessmen. The cases cited in the report primarily related to people perceived as political opponents. Harsh prison conditions and abuse led to an undetermined number of deaths in prisons.

71. During the year covered by the USSD report, human rights organisations reported an increase in the number of security agencies arresting and detaining persons. There were many secret and unofficial detention centres in Kinshasa. The report went on to give examples of arbitrary arrests and detentions in Kinshasa and elsewhere in the country. Many of the reported arrests were by agents of the Agence Nationale de Renseignements *(*ANR*)* (national intelligence agency). Other arrests were reported to be carried out by the police. There is a reference to the 'rapid intervention police' arresting the president of an NGO (Bill Clinton Foundation) and charging him with illegally operating an NGO and conspiracy against the security of the state. In another incident the PIR was reported to have arrested three union leaders while dispersing striking civil services workers who were protesting about low pay and non-payment of salaries.

72. An Amnesty International report dated 10 January 2000 entitled 'Government terrorises critics' stated that any gains achieved since 1990 were 'systematically eroded' in the two and a half years since Kabila took power. Dozens of leaders and supporters of opposition political parties were routinely detained for days or months. Those accused of political offences were subjected to beatings at the time of their arrest and in custody. There were reports of torture and rape of detainees. The report stated that the most prevalent violations in government held territory related to political repression. The government used the war

against the armed opposition to 'subject the Congolese to unwarranted repression'. Most of the victims appeared to be critical of the government or its policies and practices that violated human rights. Political activists, journalists, human rights defenders, and trade unionists all worked under the threat of intimidation, harassment, arrest or torture. The authorities used a variety of security forces to clamp down on the right to freedom of expression and association. The report went on to note a range of security forces involved in such abuses and outlined examples of specific incidents. It said the following about the PIR:

> 'A paramilitary police force known as the Police d'intervention rapide (PIR), Rapid Intervention Police, is also often used to arrest dissidents. These security forces have no known powers under Congolese or any other law to carry out arrests or detentions. In cases of arrest, members of these security forces usually neither reveal their identity nor the place where they are taking their victims, leaving relatives unsure who is responsible for the arrests or where the arrested persons are to be detained. These security forces are not answerable to the judiciary and are only responsible to the Presidency, whose powers are unquestionable under the DRC's current transitional constitution.'

73. The report acknowledged that the protection of human rights was difficult against the background of an armed conflict, but went on to say:

> 'The information contained in this report shows that a large number of human rights violations by government forces take place in areas far away from the armed conflict zones. Whereas the authorities have often claimed that they were not aware of specific violations, it is clear that many of the violations were ordered or condoned by government and security officials. Thus, members of the security forces believe that they will continue to enjoy impunity because the human rights violations they commit are no different, in nature or scope, from those ordered by the authorities. This is especially the case with regard to human rights violations against human rights defenders, journalists and members of opposition political parties. Moreover, these violations, particularly of the right to freedom of expression and association, started long before the armed conflict broke out in August 1998. Armed conflict may have exacerbated the situation, but it is most often used as a pretext to justify an unacceptably widespread scale of human rights violations.'

74. A paper prepared by the Research Directorate of the Immigration and Refugee Board of Canada (IRBC) dated February 2005 covers the period from June 2003 to November 2005. This was a period after a peace accord was agreed in April 2003 (The Sun City Agreement). Joseph Kabila remained as President but was surrounded by four Vice-Presidents from various parties including leaders of former armed groups and oppositionists. One of these included Jean-Pierre Bemba Gombo, leader of the Mouvement de Libération du Congo (MLC), who was later brought to trial in the ICC for crimes committed by the MLC in the Central African Republic, but was acquitted on appeal.

75. The IRBC paper stated that after one year in power the Government of National Transition (GNT) had been unable to establish authority nationwide. It was 'weak or absent' in many areas of the country, particularly in the east, where armed groups continued to exercise influence. The justice system was reported to be ineffective, corrupt, and lacked independence. In some regions, particularly in eastern DRC, many people were subject to arbitrary arrest. A number of security forces were still reported to be in operation. The police had a total of 70,000 to 90,000 officers including the PIR. There were an additional 800 officers with the

Police Judiciaire de Parquets (PJP) ('judiciary prosecution police') who operated under the Ministry of Justice and had the specific mandate to 'record offences, gather evidence, apprehend perpetrators and bring them to trial'. The PJP was only reported to be present in those parts of the country under the control of the former administration.

76. The research paper went on to cite evidence stating that the integration of the various police forces was vital to ensure public security, the GNT had only appointed the police high command. According to the United Nations, approximately 6,000 police officers were being trained in preparation for integration. France and the United Kingdom agreed to participate in the training, reorganisation, and integration of police officers. However, the police were still reported to perpetrate human rights abuses in certain areas including Kinshasa and the provinces of Équateur and Katanga.

77. In April 2004 concerns were expressed about the behaviour of 'certain PIR members who used extreme violence to disperse a student demonstration at the National Pedagogical Institute in Kinshasa'. The same report suggested that many students were raped and tortured by police officers. Abuses continued in areas of eastern DRC. Whilst noting that a legal framework was put in place for the operation of political parties following the peace accord, in practice, political leaders often were arrested. Political events were raided by security forces on the pretext that their party was not registered or had not obtained the relevant authorisation. 'Police crackdowns' specifically targeted the Union pour la démocratie et le progrès social (UDPS). Only Joseph Kabila's party seemed to have the right to hold meetings with its supporters.

78. UN reports of the General Assembly (A/57/437) (26 September 2002) and the Security Council (S/2003/566)(27 May 2003) both mention the 'rapid intervention police'. The first, in the context of an arrest in eastern DRC where a person was arrested with a view to extortion. The incident did not appear to have any apparent political element. The second, reported the deployment of 700 rapid intervention police to Bunia, Ituri province, in April 2003. Lack of equipment, communications, unclear command arrangements, and lack of clarity surrounding the precise role the force played with the Ituri interim administration, led to the force disintegrating as a unit when faced with violent clashes.

79. The USSD report for 2003 continued to outline a serious human rights situation in the DRC. There were no reports of political killings in areas under government control. However, NGOs reported 69 deaths at Makala prison in Kinshasa during the year, including 'some who had been beaten severely in the custody of the Provincial Inspection of Kinshasa (IPK) and the Rapid Intervention Police (PIR), who were responsible for transferring them'. The use of excessive force by security forces while dispersing demonstrations resulted in at least one death. Although torture and ill-treatment during arrest and detention was still reported to be common, and political opponents continued to be arrested and detained, in our assessment, the picture relating to the overall human rights situation in areas under government control was slightly improved from 2000-2001.

80. The USSD report for 2004 stated that Joseph Kabila continued to have extensive powers as head of the transitional government. Elections were due to be held as part of the transition process. Although the DRC was nominally a centralised state, in practice, the government struggled to maintain effective lines of control:

> ‘Civilian authorities did not maintain effective control of the security forces, and there were frequent instances in which elements of the security forces acted independently of government authority. In addition, different individuals of the same security service effectively had different chains of command and often responded to orders from different individuals, including former commanders and political leaders whom they had followed before the Government was established. Members of the security forces were poorly trained, poorly paid, and undisciplined, and they committed numerous serious human rights abuses with impunity.’

81. The overall human rights situation was similar to the previous year. Members of the PIR were reported to have severely beaten a man in Orientale province during an arrest in connection with a marital dispute. Police continued to arbitrarily arrest and detain people. The national police force was only partially integrated into the national command structure by the end of the year. The PIR was ‘generally responsible for crowd control’. The report went on to say that the government had worked with the international community to train police, but police forces generally remained corrupt and inefficient. During the year, members of the police, military, and security forces attacked, detained, robbed, and extorted money from civilians.

82. The USSD for 2005 reported a marginal improvement in the human rights situation during the year as the DRC took steps towards democratic elections and the security situation in eastern provinces improved. Unlike previous years, there were no reports of politically motivated killings in areas under government control or of any persons dying of torture. The PIR was said to be under the control of the Ministry of Interior and there had been continued progress towards the integration of the police. There was an improvement in the level of training of the PIR.

> ‘By years end the national police force was increasingly integrated. On November 8, the government – with financial support from foreign governments – opened a $1.3 million police facility in Kinshasa to bring the country's disparate police units under central command and control. In addition during the year the government worked with MONUC and members of the international community to train police. There was some police improvement, specifically among the rapid police force, following the training by a foreign country of three thousand officers for riot control and emergencies. These officers were properly armed with tear gas and rubber bullets to handle volatile situations and significantly reduce human rights violations. At year's end the international community was training and professionalizing traffic police.
>
> Although the overall level of professionalism increased during the year, police forces generally remained ineffective and corrupt. During the year members of the police, military, and security forces attacked, detained, robbed, and extorted money from civilians. The government prosecuted and disciplined some abusers; however, the vast majority acted with impunity. Although there were mechanisms available to investigate human rights violations by police, they were used sporadically.’

83. The respondent’s Special Cases Unit research and analysis report, which was prepared in relation to this case in September 2013, cites information from an International Crisis Group (ICG) report entitled ‘Security Sector Reform in the Congo’ dated 13 February 2006. The report noted that the French government assisted police training programmes and the British government had provided bi-lateral support to security sector reform in the DRC. Other EU funding supported the provision of training and equipment. It reported that police reform had

modest success. The police 'made a generally positive showing' during demonstrations in June 2005, when they put down and dispersed the crowd. Around 2,500 rapid intervention police and 1,000 integrated police personnel were deployed in the operation. President Kabila was said to have limited trust in the force and had stationed 600 Angolan trained police in Kinshasa as a precaution. The report went on to note that the success of police reform depended on continued support of the trained units because 'even well trained and equipped units can disintegrate or turn against the local population if not regularly paid and kept under a responsible and apolitical command.' The same section went on to outline inconsistencies in pay scales according to different ranks and units. Police reform had mainly focused on Kinshasa, but more work was needed in rural areas.

84. An Amnesty International report dated January 2007 entitled 'Disarmament, Demobilization and Reintegration (DDR) and Reform of the Army' focussed primarily on the aftermath of the conflict in eastern DRC. Much of the report is not relevant to this case. However, the report noted the need for training in human rights. It stated that the army had in the past usurped police powers, making arrests or carried out public order operations despite not having the necessary authority or training to carry out those functions. An example was given of the army suppressing a street demonstration in Kinshasa in June 2004 by firing into the crowd, killing more than 30 people, and injuring over 50 others. The behaviour of the army 'contrasted sharply' with that of the PIR which was also deployed that day.

85. The USSD reports for 2006 and 2007 appear to be missing. The USSD report for 2008 stated that the elections held in 2006 were generally judged to be credible. Civilian control of the security forces remained weak. The government's human rights record remained poor. Abuses continued to be committed by the security forces. Security forces generally remained ineffective, lacked training, received little pay, and suffered from widespread corruption. Some reported incidents appeared to have political links while others related to general abuse. The USSD report also noted abuses committed during operations to restore state authority in Bas Congo province, which borders Angola, where members of the Bundu Dia Kongo (BDK), a political-religious group seeking greater provincial autonomy, had effectively taken over state functions in several villages and towns.

86. A Human Rights Watch report entitled 'We Will Crush You' dated November 2008 also outlined abuses in Kinshasa and Bas Congo in the two years following the election as Joseph Kabila consolidated his power and repressed political opposition.

> 'According to many military and intelligence officials and others close to Kabila who were interviewed by Human Rights Watch, Kabila set the tone and direction of the repression. In giving orders, he spoke of "crushing" or "neutralizing" the "enemies of democracy," "terrorists," and "savages," implying it was acceptable to use unlawful force against them. Possibly due to a lack of capacity in the military and law enforcement services, Kabila's attempts to monopolize power were sometimes disorganized, though his intention to rid himself of perceived opponents was clear. As one disillusioned member of Kabila's inner circle remarked to Human Rights Watch, Kabila pursued an approach of "winner take all," leaving no room for other strong political opponents.'

87. The report outlined how military operations were launched in Kinshasa against Kabila's electoral rival Jean-Pierre Bemba. Soldiers and Republican Guards interviewed by Human Rights Watch said that they had received and interpreted their orders in March 2007 as needing to 'eliminate Bemba'. The use of heavy weaponry in central Kinshasa left hundreds of civilians dead and left many others injured. In Bas Congo in February 2007 and March 2008 state agents acting under Kabila's authority used excessive force against the BDK, which had allied itself with Bemba during the runoff vote for president. The report went on:

> 'During and after the military operations in Kinshasa and Bas Congo, soldiers, police officers, and intelligence agents loyal to President Kabila deliberately killed, injured, arbitrarily arrested, and tortured hundreds of persons. They acted at the direction of Kabila or his advisors and with the objective of reinforcing Kabila's control. These subordinates worked through both formal and informal channels, relying on first one and then another of several state security forces – including the paramilitary Republican Guards, a "secret commission", the special Simba battalion of the police, and the intelligence services – as circumstances dictated – to tighten control over perceived opponents.'

88. The report provided a glossary of military, police, and security services. The PIR was described as a special police unit for security and crowd control that played an important role in providing security during the elections. Several PIR units received training funded by international donors. PIR officers were allegedly involved in arbitrary arrests and detention in Kinshasa in March 2007 and in Bas Congo in March 2008. The report went on to outline some of the details of abuses committed by security forces, including members of the PIR, in Kinshasa and Bas Congo at the relevant times. In February 2008, 600 officers from the PIR, Integrated Police Unit, and the Simba Battalion were dispatched from Kinshasa to Bas Congo. The report outlines paramilitary operations against unarmed civilians in the area. Human Rights Watch considered that these actions amounted to breaches of international law. The United Nations MONUC mission conducted an investigation, which was summarised in the Human Rights Watch report as follows:

> 'MONUC human rights investigators received little cooperation from government officials in their efforts to ascertain the facts about and responsibilities for the Bas Congo violence. They nonetheless produced a report on June 13, 2008, concluding that the aim of the operation appeared to have been to cripple the BDK. The investigators criticized the use of the Simba battalion, a special force of police troops with more military than police training, as "at best misguided, or at worst a deliberate decision to conduct a military-style operation aimed at punishing the BDK and severely reducing its capacity as a group. The weapons and tactics used during the operation further reinforces the conclusion that there may have been "a premeditated plan to use lethal force against the BDK.'

89. The USSD reports for 2009-2012 outlined a pattern of human rights abuses by security forces arising from political suppression, but also from lack of training, discipline, corruption, inefficiency, and impunity. There do not appear to be any reports of specific abuses by members of the PIR during that period. Further elections were held in November 2011 which many local and international observers judged lacked credibility and were seriously flawed.

90. We were not referred to any direct evidence relating to the incidents described by the appellant on 05 September 2011 or 20 January 2012. The closest is a BBC online news report from 01 September 2011 entitled 'DR Congo police fire tear gas at opposition protestors', which stated that hundreds of protestors were

stopped as they approached the electoral commission in Kinshasa. Two demonstrators were reportedly arrested and two police officers were injured.

INDIVIDUAL ASSESSMENT

91. The appellant is a citizen of the Democratic Republic of the Congo who says that he entered the UK illegally on 16 February 2012. He made a protection claim on 17 February 2012. An initial screening interview was conducted the same day. At this early stage, the appellant confirmed that he had served in the PIR for over 10 years. Some of this period pre-dated the coming into force of ICC jurisdiction, but most of it post-dated 01 July 2002.

92. The appellant signed a brief initial witness statement on 28 February 2012. He said that he had been a police officer. The mission of the police was to safeguard and protect people's belongings and security. The 'superior authority changed this normal duty of a policeman to trying to use us against the population.' He said that he was a conscientious objector. In relation to his personal safety, he said 'I was pointed out by my superior as a trouble maker policeman as I was trying to defend our rights, i.e. we are not paid on a regular basis. To be paid we have to accept not normal mission against human rights just to get our salary or wages.'

93. On 29 February 2012 the respondent interviewed the appellant about his reasons for claiming asylum. The appellant said that he joined the police in the late 1990s. Apart from an initial three-month training placement in the Special Service, he served in the PIR. He reached the rank of 'Brigadier Principal'. The appellant said that he started as a driver in the logistics office but then worked in a battalion. He became the head of a unit commanding 12 police officers. The appellant said that he was issued with an AK47 and a gun for firing teargas. Tear gas was his speciality. He said that the role of the battalion was to 'look after people and their things and to maintain peace among the people'. They would carry out regular patrols and 'if a situation arose we may be called to help our colleagues'. When asked for an example of such a situation, he said that if people were throwing stones at the police they might be called upon to disperse them. He told the interviewing officer that it was not their role to arrest or detain people, but if they were called upon to deal with trouble and people 'were not responding we would hand them over to our chiefs who would put them in detention'. The appellant said that his battalion was first stationed in Limete but was later transferred to Camp Mobutu (renamed Camp Kabila) in Lemba.

94. When asked if he dealt with any political demonstrations the appellant confirmed: 'we did that and if they were causing trouble and there were a lot of them we would be called'. The appellant was asked whether he or his officers were involved in beating or torturing anyone. He did not answer the question but said: 'refusing to do that was what caused me the problems from my chiefs and the authorities of my country'. Next, he was asked whether he had ever been involved in shooting demonstrators, to which he said: 'I saw it'. When pressed, he said: 'No. Refusal to do that is what caused the problems.'

95. The appellant went on to explain that the authorities stopped giving them their monthly salary. He said: 'In order to receive your pay you had to agree to do these bad things.' After having described some of the command structure and his place in it, the interviewer asked the appellant about the events that caused him to leave the DRC. He told the interviewer that he had training on human rights,

but the authorities ‘wanted us to do things that were bad’. He went on to say: ‘we had the choice, you go and do these bad things or bad things will happen to you.’

96. The results of the elections held in late 2011 were disputed. The appellant said that he was sent to a demonstration outside the house of Étienne Tshisekedi, the leader of the UDPS, on 20 January 2012. The appellant claimed that his superiors wanted him to use a different type of canister containing Iperit (mustard gas). He confirmed that he went to the demonstration at the university near Tshisekedi’s house. He said that he was ordered to fire the tear gas first and then the mustard gas. When asked who gave the order he gave the name of a colonel in the PIR and then mentioned another colonel from the Presidential Guard. The appellant said that he fired the tear gas but refused to fire the mustard gas. The interviewer asked him what happened after he refused the order, to which he said: ‘They told us to go back up and they sent other officers in to fire guns.’

97. The appellant said that he and five others were arrested by the colonel from the Presidential Guard and were taken to DEMIAP. He was accused of sympathising with Tshisekedi because he was from the same tribe. He said he was questioned about his salary demands. The appellant went on to describe being beaten and other forms of severe ill-treatment. The interviewer noted that he became upset during this part of the interview. The appellant said that he was held until 28 January 2012. He developed a high fever and was taken to the police hospital. Another officer helped him to escape a few days later. The appellant went on to describe how he was able to leave the DRC.

98. When asked about any other incidents before January 2012, the appellant said that he complained about pay and conditions on three occasions in 2011. On 08 July 2011 they were sent to disperse people in the run up to the elections and were given a bonus. He asked whether this was the only way to get paid and was told that ‘I was being dangerous asking for our rights.’ The appellant also described an incident in early September 2011 when a colleague was injured, but did not receive adequate treatment. He said that many people had not been paid on a regular basis since 2010.

99. The respondent interviewed the appellant for a second time on 23 May 2012. Much of the interview covered similar ground, but we will summarise those aspects that we consider relevant to our assessment. The appellant explained that the PIR was a special police unit. When asked to give an example of special missions that the ordinary police could not do, he said that the PIR protected the frontier between Cabinda and Congo from ‘bandits’. When asked what made the PIR different from other police and security forces he was recorded as saying: ‘They were bodyguards of authorities [and] they prevented all things against the [government].’

100. When asked about the techniques used by the PIR at demonstrations the appellant said that there were ‘appropriate techniques [and] materials according to human rights.’ He described using barriers, shields, and batons. If those techniques did not work, and the people did not ‘obey’, they would use tear gas and water cannon. He was asked whether he had ever opened fire on demonstrators to which he replied: ‘No. Other people did, but not us. That was not an appropriate technique.’ When asked to clarify what units had opened fire on demonstrators the appellant denied that the PIR had done so and said that they were from the Presidential Guard. He said that he had seen demonstrators fired upon ‘many times’. He was then asked a series of questions to ascertain

whether the PIR had ever opened fire on people. In response he said: ‘We used plastic bullets not real ones.’ When asked whether he fired plastic bullets he gave the following indirect answer: ‘Yes, we use it.’ He was then asked whether he ever ordered his men to open fire using plastic bullets, to which he answered: ‘Me, I take orders, but I don’t give them.’

101. The appellant went on to answer a series of questions about the command structure of the PIR. The interviewer returned to questions about the techniques used to quell demonstrations, during which the appellant accepted that he had used tear gas ‘many times.’ He was the only person in his unit who used tear gas if the crowd became violent.

102. The appellant was asked what would happen to those demonstrators who were left. He said: ‘I couldn’t arrest them so another member of my team arrested them [and] gave them to the authorities.’ He went on to describe the procedure whereby the person would be taken to the Office of Police Judiciary (OPJ) who would ‘hear their cases’. The law stated that they could only be held for 48 hours. He said that sometimes people were held longer than that but acknowledged that it was illegal. He said that this was done by other people. When asked how the demonstrators were treated after being arrested he said: ‘Not very well.’ He went on to say: ‘Those people who judge other people, they say that if you are a demonstrator, they beat them as they are against the power in place.’ When asked what injuries people sustained he said: ‘They were beaten with batons stamped on [and] hit with the butt of the weapon.’ He had heard that demonstrators had died in custody ‘on the part of OPJ but not on our side.’ He said: ‘We heard, but did not see.’

103. The interviewer went on to ask questions about the appellant’s progress through the ranks of the PIR. He said that he did six months’ basic training in the late 1990s and then worked as a police driver. He was placed in the PIR in 2001 and promoted to Brigadier Principal in 2006. A further discussion took place about the techniques used by the PIR during demonstrations, which was consistent with the answers given in the earlier interview. When asked if he personally handed people over to the authorities following a demonstration the appellant said: ‘I was not able to while I had the tear gas.’ He was asked whether he ordered his men to do so, to which he replied: ‘No. My orders are to give discipline to my team.’ Yet in response to the next question about how many people his men handed over to the authorities he answered: ‘many.’

104. The appellant explained that demonstrators were taken to PIR Victoire, CIRCO, Camp Lufungula, and Camp Kabila. It was a matter for ‘Bureau 2 [and] OPJ’ once people were placed in detention. The appellant explained that the conditions in detention were bad and admitted that he had heard that some people had died in detention. The appellant was then asked whether he knew this was how people would be treated once they were passed to his superiors. He answered: ‘No. We didn’t know how they would treat them.’ The appellant denied ever having opened fire on people or having directed his men to do so in the time that he served in the PIR. He went on to describe two occasions, on 05 September 2011 and 20 February 2012, when he was told to open fire on opposition demonstrators. He refused, but others opened fire. The appellant accepted that he had heard about crimes being committed by the security forces during Joseph Kabila’s reign. He said that he heard this mostly from Presidential Guards and from seminars conducted by human rights organisations. He denied being aware of any crimes committed by the PIR during his period of service.

105. After a four year delay, the respondent refused the protection and human rights claim in a decision dated 27 July 2016. She issued a certificate under section 55 of the Immigration, Asylum and Nationality Act 2006 ('IANA 2006') stating that the appellant was not entitled to the protection of the Refugee Convention because there were serious reasons for considering that he had committed a crime against peace, a war crime or a crime against humanity and that Article 1F(a) applied. Although the decision letter also included the wording of Article 1F(c) (serious reasons for considering guilty of acts contrary to the purposes and principles of the United Nations) the body of the decision only gave reasons for exclusion with reference to Article 1F(a) of the Refugee Convention. In light of subsequent events, it is notable that the first decision letter did not make any reference to Article 1F(b). The main reasons given for concluding that he should be excluded under Article 1F(a) were:

> '76. Despite the credibility issues and contradictions surrounding your claimed knowledge and involvement in arrests and detentions at demonstrations, because of the amount of evidence proving that it clearly occurred, there are serious reasons for considering that due to your senior position, the length of time you spent in the PIR and the purpose and activities of your battalion of men, you and your men were responsible for arresting demonstrators during and after demonstrations and handing them over to the authorities. As you had responsibility for your men, you would have also been responsible for ordering them to arrest those deemed suitable during demonstrations. Therefore, there are serious reasons for considering that you made a significant contribution to the attacks, arbitrary arrest and detention of civilians.
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> 77. The research evidence strongly supports the view that you would have been aware that it was likely some or all of the individuals your men detained would have been ill-treated. Therefore, there are serious reasons for considering that you were aware that the individuals you handed over were illegally detained and likely tortured. Despite this you continued to serve for a number of years.
>
> 78. You gave practical assistance to the commission of Crimes against Humanity by personally passing individuals you had arrested or detained, onto (sic) the relevant authorities. At least some of the people that you and your team handed over to the authorities were interrogated, tortured or put to death. Supporting evidence confirms that security forces from the DRC, including the PIR, committed human rights abuses during the period that you were active and involved with them.'
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> .....
>
> 80. You were part of a joint criminal enterprise as you were a voluntary member of the PIR (in a period when the Mobutu and Kiabila regimes and their security and police fores were carrying out international crimes on a widespread and systematic basis), using international crimes as part of a policy to maintain power in the DRC. You continued to assist the PIR even though you were aware of their activities. At no point in your evidence did you state that you had spoken out about these activities or try to remove yourself from the role and situation. Despite the crimes perpetrated by the PIR and other security forces on behalf of the Mobutu and Kabila regimes, you remained a loyal member…'

106. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 07 February 2018 the First-tier Tribunal judge allowed the appeal on protection and human rights grounds. The judge heard evidence from the appellant. He noted

that it was not disputed that the appellant had been a member of the PIR. The judge rejected the credibility of some elements of his account. However, having considered the medical evidence, he accepted that the appellant was a middle ranking officer in the PIR, that he had been detained in early 2012, and was severely ill-treated for refusing to follow orders. In light of the documentary evidence he also accepted that the appellant was likely to be wanted for desertion. The judge concluded that the appellant did not have individual criminal responsibility for acts that would exclude him under Article 1F(a).

107. The respondent applied and was granted permission to appeal to the Upper Tribunal. An Upper Tribunal judge found that the First-tier Tribunal's findings relating to exclusion involved the making of an error on a point of law because the juge failed to give adequate reasons for his finding that the appellant did not have individual criminal responsibility. The findings relating to risk on return under Article 3 were upheld. The case was listed for a resumed hearing in the Upper Tribunal on 11 March 2019. Nothing in the decision suggests that the appellant was called to give evidence or that any application was made by the respondent to question him. The Upper Tribunal judge considered the terms of Article 1F of the Refugee Convention and Article 25 of the Rome Statute. He concluded that the appellant fell within Article 1F(a) and should be excluded from the protection of the Refugee Convention.

108. The appellant applied and was granted permission to appeal to the Court of Appeal. The grounds of appeal only challenged the Upper Tribunal's findings relating to the exclusion clause and did not challenge the earlier findings relating to errors of law in the First-tier Tribunal decision. The appeal was settled by consent and remitted to the Upper Tribunal for remaking.

109. Following the start of the Covid 19 pandemic the Upper Tribunal reviewed the file and made a series of case management directions. It was agreed that the legal issues involved in the case were sufficiently complex to justify a face to face hearing. The parties were asked to provide up to date position statements and to agree what facts or legal issues were still in dispute. Despite a prolonged process of case management the parties were unable to come to any clear agreement save for (i) the First-tier Tribunal's findings relating to risk on return with reference to Article 3 were preserved; and (ii) in light of those findings the only issue to be determined was whether the appellant should be exluded under Article 1F of the Refugee Convention.

110. The case was listed for hearing on 27 January 2021, but due to high levels of Covid 19 cases at the time all cases listed for face to face hearings were converted to remote case management hearings. At this point both parties appeared to be ready to proceed. However, shortly after the hearing the Upper Tribunal was notified that the respondent had instructed the Government Legal Department. An application was made for an extension of time to comply with a direction to file and serve an agreed statement of facts and issues. The parties were unable to agree the issues. The respondent changed approach. She applied to call the appellant to give evidence. She also applied to expand the scope of the appeal to include exclusion under Article 1F(b). This application came nine years after the appellant claimed asylum, five years after the asylum application was refused, and after two substantive hearings at which the issue had not been raised.

111. Given the fairness issues raised by such a late submission, the respondent was directed to produce a supplementary decision letter and a series of directions were made to allow the appellant to respond. The respondent's addendum letter was dated 07 April 2021. It contained the same background information about the PIR as the first decision letter. The summary of his background in the PIR was also similar. The respondent gave substantially the same reasons for exclusion under Article 1F(b) as she did in the first decision letter (see [105] above). As to whether the crimes were non-political, the second decision letter said:

> '35. The ill treatment of groups, individuals and civilians in the DRC, in the context of the crimes you have been associated with are not considered to have been political acts or indeed to have been motivated by political ideology. The general approach of brutality and corruption was not limited by political considerations. Moreover, participation in serious crimes including participation in handing over individuals to the authorities or colleagues who were subsequently interrogated, tortured and/or put to death is not suggested to be convention political activity nor would it be accepted as such. It is considered that the crimes you have been involved in are serious, non-political and were committed prior to entering the UK.'

112. Although the appellant's representatives objected to the respondent's belated legal argument on fairness grounds, by the time the case was relisted for a hearing on 20 July 2021 we were satisfied that the appellant had been given sufficient time to respond to the new issue. Although fairness issues were included in Mr Khubber's skeleton argument, he did not pursue the argument in his oral submissions.

113. We proceeded with the hearing on the basis that it was agreed that the First-tier Tribunal's finding that the appellant would be at risk of Article 3 ill-treatment if returned to the DRC was preserved. In view of the fact that the parties could not agree any other factual findings, we have conducted a holistic assessment of the evidence relating to the outstanding issues for determination in this appeal: see *AB (preserved FtT findings; Wisniewski principles) Iraq* [2020] UKUT 00268 (IAC).

114. The appellant's initial appeal statement signed on 09 January 2017, which seems to have been re-signed on 05 November 2017, commented on the original decision letter. He said that his salary was paid to him on a regular basis when he first started working for the police. Later on his salary was not paid 'if I did not undertake a task that had been given to me.' The PIR initially made the country situation better. He spent the first 3-4 years as a driver. He did not agree that he was a 'specialist' in the use of tear gas or that he always carrying a gun to fire tear gas. He was required to carry it at times of riot or when there were demonstrations which were likely to become disorderly. He clarified: 'I would put people in handcuff[s] and take them to the Office – this is where my job and authority would end. The Office would then decide further about whether they were guilty or not.' He said that he would give orders to his unit 'if I agreed with the orders', but there were some orders he did not agree with. He denied being personally involved in the ill-treatment of people in detention. He did not have authority to detain people. However, he accepted that he had heard stories that some people who were detained were killed by the authorities. He went on to say: 'as a result of the rumours/stories I have heard, I felt terrible for handing people over to the authorities, however, I did not have a choice but to do this.'

115. The appellant made a further statement on 19 April 2021 responding to the second decision letter. He said that if you are a good police officer you can be

promoted without having to commit any crimes. He denied having committed crimes in order to be promoted. He said that he did not give orders but simply 'passed on' orders given to him by his superiors. He repeated some of the points made in his earlier statement. He said that if he did not attend demonstrations when orders had been given to do so he would have been arrested. He denied ever having witnessed abuses by members of the PIR, and if he had done, he would have reported it. The appellant said that it was normal for police officers to arrest people, but he did not have the authority to detain people. He did not take people to the office with the intention that they should be abused. He disagreed that he was part of a joint criminal enterprise. Again, he denied that he was aware that those he handed over would be illegally detained or tortured.

116. In a further statement dated 09 July 2021 (amended 19 July 2021) the appellant maintained his earlier position. He said that if he was asked to do a task that would cause serious harm or endanger life, he refused to do it. He gave further information about his service in the police force. He said that he joined with a genuine intention to 'promote law and order, maintain peace and protect the people from abuse by the authorities.' He claimed not to be aware of abuses by the police when he joined. He now said that he joined the PIR in 2001. The appellant described the PIR as 'the authorities' bodyguards'. He described the duties of the PIR during demonstrations. He said that the equipment used by the PIR during demonstrations included 'protective clothing, batons, fire extinguishers, sand, tear gas (we knew this as "Cougar" tear gas), masks and a gun; a Russian AK47 with live rounds and plastic bullets.' His battalion was authorised to use tear gas when necessary. He was one of the people who was responsible for deploying tear gas. The appellant went on to describe a staged approach to dispersal of demonstrations beginning with negotiation, and if necessary, leading to the use of tear gas. He said that he 'did have to use tear gas a number of times.' Those protestors that still refused to disperse would be arrested 'by other members of my team and then handed over to the relevant authorites'.

117. The appellant went on to claim that his unit did not take those who were arrested during demonstrations to places of detention. He now claimed that they were taken by the OPJ in vans or trucks. He claimed that he did not accompany those arrested when they were taken to places of detention. Although he accepted that he had 'heard rumours' that some people may have been subsequently ill-treated or died in detention he could not do anything to stop the abuse. He could not leave the PIR because it was his only source of income and it would have been difficult to find another job. The appellant said that he had heard that the DRC security forces had committed international crimes while Joseph Kabila was in power. He heard this from members of the Presidential Guard and in seminars conducted by human rights organisations. The appellant continued to deny that he had been involved in any actions that might justify his exclusion from the Refugee Convention.

DECISION AND REASONS

118. We had the opportunity to assess the appellant during his oral evidence. The detail of his evidence is known to the parties and is a matter of record. In his submissions, Mr Milnes made a series of points about the credibility of the appellant's evidence, which were not rebutted by Mr Khubber. In view of this, it is not necessary to set out anything more than a summary of the points.

119. In our assessment the appellant is an articulate and intelligent man who fully understood the context in which he was giving evidence. Although he made a show of answering questions in an open way, when his evidence is analysed, he repeatedly failed to provide direct answers to questions put to him during the hearing. As can be discerned from his earlier evidence in interview, he avoided answering questions about his individual actions by answering questions in the first person plural, by referring to the actions of the PIR in general, or avoiding direct answers altogether. His evidence was characterised by what he was at pains not to say rather than what he did say. The overall impression left by his evidence was that he was careful to distance himself even further from the description of his duties given in earlier interviews.

120. It is not disputed that the appellant was a police officer in the PIR for a period of over 10 years. He has produced evidence including ID cards and photographs of him in police uniform, including riot uniform, and carrying an AK47. However, there were several areas of his evidence that were submitted to be incredible or inconsistent with his earlier evidence or the background evidence.

121. First, the appellant obfuscated about the equipment used by the PIR, claiming for the first time at the hearing that the force used blank cartridges to ‘scare’ people. This contradicted his evidence in the statement he prepared shortly before the hearing, in which he listed the equipment issued to the PIR, which included live and plastic bullets. The information he gave in that statement was consistent with the background evidence relating to the equipment used by the DRC security forces. There is no evidence to indicate that the PIR or any other security forces in the DRC are issued with blank cartridges. As Mr Milnes pointed out, the appellant would have no cause to refuse orders to fire on demonstrators if he was armed only with blank cartridges. We note that there would be no purpose in a police force being armed at all if only blank cartridges were issued. It would offer no protection to officers if a demonstration did escalate into violence. The background evidence indicates that the PIR, in particular, was trained and equipped by foreign donors. We find that it is reasonable to take judicial notice of the fact that many police forces around the world are equipped with live and plastic ammunition and that riot officers also use tear gas. Nothing in his original description was inconsistent with the equipment often used by riot police in many countries. For these reasons we reject his assertion that he only used blank cartridges.

122. Second, we accept that the background evidence shows a process of reform of the DRC police, security services, and army following the peace accord. The evidence also shows that those services were poorly trained, equipped, and rather chaotic, often without clear lines of command. We also accept that the evidence indicates that as a Brigadier Principal in charge of a unit of 12 men the appellant was a fairly low ranking officer when his rank is considered in the context of the evidence which shows that the PIR comprised of at least 2,500-3,000 officers. However, the appellant’s repeated denial that he even gave orders to the members of his small unit and his attempts to minimise his actions by saying that he was simply ‘passing on’ orders given to him is not credible when that is precisely the way in which a system of command works. It is another example of the way in which he sought to minimise his role as a police officer in the PIR.

123. Third, the appellant’s evidence as to whether he was ever ordered to or witnessed civilians being fired upon has been inconsistent. In interview he

admitted that he had seen it ‘many times’, but by the time he gave evidence at the hearing he denied ever having witnessed it at all.

124. Fourth, the appellant’s evidence as to whether he ever arrested anyone or took them to the OPJ office or any other place where they might be detained has also been inconsistent, with a view to minimising his role by the time he gave evidence at the hearing. In interview the appellant stated that those who were arrested would be taken to PIR Headquarters in Victoire, CIRCO, Camp Kabila, and Camp Lufungula. In the statement prepared shortly before the hearing, and during his evidence at the hearing, the appellant sought to resile on his earlier evidence by suggesting that the OPJ would pick people up and take them away and claimed that there were no detention facilities in Camp Kabila where he was stationed.

125. Fifth, the evidence shows that serious ill-treatment and poor conditions in detention are widespread and that it is a long standing and ongoing problem. In light of this evidence it is likely that even ordinary citizens of the DRC would be aware of this fact. Although we accept that the evidence shows that the PIR was a specialist force trained to deal with crowd control, and was likely to be a largely mobile force as the appellant claims, it is not plausible that he would have been unaware of the conditions that people who were arrested were likely to face in detention. Even if he was not required to carry out duties within the camp or relating to detention, it is not plausible that a long standing police officer of the PIR would not have direct knowledge of the conditions that a person would face in detention. In interview he described specific forms of ill-treatment, but again, by the time of the hearing he sought to minimise his level of knowledge to only hearing ‘rumours’ of ill-treatment. The fact that the appellant said that he ‘felt terrible’ about handing people to the authorities also indicates that he was fully aware of the risk of serious ill-treatment when a person was detained.

126. Sixth, we reject the appellant’s claim that he was ordered to use mustard gas during the course of the demonstration on 20 January 2012. Although the appellant believes that he saw news reports indicating that mustard gas was used in Goma in 2004, neither party has been able to point to any evidence to show that, despite the horrific nature of the war in the east, chemical weapons of that kind have ever been used in the DRC. It is not plausible that if the authorities of the DRC intended to use mustard gas against civilians that the appellant was the only officer to have been asked to fire it. If it was a weapon used by the authorities it is highly likely that there would be reports of its use, but there are none.

127. We conclude that the more likely reason for the appellant’s arrest and detention in 2012 was his history of complaints about pay and conditions during 2011. The authorities’ view of the appellant may have been compounded by a febrile atmosphere during the post-election period in early 2012 when officers who did not follow orders to fire on demonstrators, or whose ethnic origin was from the same region as Tshisekedi, may have been perceived as sympathetic to the opposition. The appellant gave a detailed account of ill-treatment in detention. He says that he was accused of being from the same region and of receiving money from the Tshisekedi camp. The Republican Guards who interrogated him also noted that he had complained about pay and conditions, including medical care.

128. We accept that the evidence shows that the appellant was a long standing member of the PIR who reached the rank of Brigadier Principal. The appellant has been consistent in stating that he joined the police in the late 1990s, but there is less clarity as to when he joined the PIR. In the screening interview records the full range of his dates of service and indicated that he was a member of the PIR throughout. In the first interview he stated that he joined the PIR in the late 1990s, and save for a three month placement in another service, the record indicated that he served in the PIR. Later he claimed that he did not join the PIR until 2001. It is notable that the background evidence shows a high level of abuses under the Laurent Kabila regime before his death in 2001. In light of the pattern of minimisation in his evidence, it is possible that the appellant has sought to obscure his length of service in the PIR to avoid the suggestion that he was a member during the worst abuses of the Laurent Kabila regime. Nevertheless, we note that even if he was a member of the PIR from his first enrolment in the police force, his evidence has been fairly consistent in saying that his early period of service was as a driver. The description of his role in the early years of his service is broadly plausible and is at least consistent with the kind of work a junior officer might be given.

129. The appellant has made few formal admissions about his personal actions while serving in the PIR. What early admissions he did make he sought to resile from by the date of the hearing. For the reasons already given, we do not accept his sanitised version of events. We have summarised his evidence in some detail to illustrate the extent of his earlier evidence. In light of that evidence we find that there are serious reasons for considering that:

    (i) the appellant was a long standing voluntary member of the PIR;

    (ii) the appellant was aware of the role of the PIR as ‘the bodyguards of the authorities’;

    (iii) that ‘many times’ he witnessed incidents when the authorities fired upon demonstrators;

    (iv) while he asserts that other units such as the Presidential Guard opened fire, which is supported by the background evidence, he appeared to accept in interview that the PIR used plastic bullets on occasion, although he denied using live ammunition;

    (v) that he used tear gas ‘many times’;

    (vi) that the appellant or other members of his unit under his command arrested ‘many’ demonstrators and handed them to the OPJ;

    (vii) the appellant ‘felt terrible for handing people over to the authorities’ and therefore knew that in the ordinary course of events a person who is detained following an arrest would be at risk of torture, inhuman, or degrading treatment;

    (viii) that the problems with pay only began in or around 2010 and in order to receive pay ‘you had to agree to do…bad things’;

    (ix) that the appellant took part in a special mission of the PIR on the border with Cabinda to protect the border from ‘bandits’. We take judicial notice

of the fact that the only province of the DRC that borders with Cabinda is Bas Congo;

(x) that he was aware of allegations that the DRC security forces had committed international crimes.

Article 1F(a) – crimes against humanity

130. We turn to consider whether the respondent has shown that there are serious reasons for considering that the appellant committed crimes against humanity that might justify exclusion under Article 1F(a) of the Convention. Article 1F must be interpreted restrictively and used cautiously. We also bear in mind that the Elements of Crime make clear that the provisions of Article 7 must also be strictly construed because crimes against humanity are among the most serious crimes of concern to the international community. In short, it is important to remember that an allegation that a person has committed a crime against humanity is of the gravest nature and that exclusion from the protection of the Convention could have the gravest consequences.

131. We have set out the legal elements of crimes against humanity in some detail to illustrate the importance of specific elements of the definition, such as the chapeau. The chapeau is the crucial element which puts the criminal acts contained in Article 7(1)(a)-(k) into the macro-context.

132. The importance of satisfying the contextual elements of the chapeau of Article 7 is illustrated by the trial of the former President of Côte D'Ivoire, Laurent Gbagbo. He was brought to trial in the ICC but was found to have no case to answer. He was acquitted of charges of crimes against humanity allegedly committed during post-election violence in 2010 and 2011 on the ground that the prosecution had failed to produce sufficient evidence to satisfy the contextual elements of the chapeau of Article 7. The acquittal was upheld by the appeal chamber in early 2021.

133. We have also considered the background evidence relating to the situation in the DRC in detail because of the need to assess whether the reported human rights violations by the authorities, and the PIR in particular, during the appellant's period of service engage the main elements of crime required to show that there are serious reasons for considering that crimes against humanity took place.

134. In *MT (Article 1F(a) – aiding and abetting) Zimbabwe* [2012] UKUT 00015 (IAC) the Upper Tribunal suggested that the question of whether the chapeau of Article 7 is engaged might be suitable for country guidance. We are not aware of any cases that have been decided on this basis in the intervening period. As the Upper Tribunal acknowledged, each case must be decided on its facts, which might make it difficult to tailor country guidance that is applicable to other cases. What is clear is that cases of this kind require careful consideration of the evidence to assess whether there are serious reasons for considering that the chapeau to Article 7 is engaged for the purpose of exclusion.

135. The burden of proof is on the respondent to show that there are serious reasons for considering that the appellant committed crimes against humanity. Given the serious nature of an allegation that a person has committed a crime against humanity, the respondent's case in relation to Article 1F(a) is generalised. The decision letter dated 27 July 2016 summarised background evidence relating to

the DRC and the actions of the PIR. In assessing the legal framework, much of the letter focussed on the customary international law principles relating to joint criminal liability. The respondent concluded that there were serious reasons for considering that the appellant 'made a significant contribution to the attacks, arbitrary arrest and detention of civilians.' The closest the decision letter came to identifying any issues that might be relevant to the contextual elements of Article 7 was a general assertion that the Mobutu and Kabila regimes 'were carrying out international crimes on a widespread and systematic basis' and that those crimes were used 'as part of a policy to maintain power in the DRC.'

136. The report prepared by the repondent's Special Cases Unit (SCU) as long ago as December 2013 set out background evidence relating to human rights violations carried out by the security forces generally and any reports that mentioned the PIR in particular. The SCU report noted the wording of the chapeau but merely stated that 'the widespread and systematic nature of the crimes shows that there are serious reasons for considering that during the subject's involvement with the RIP this unit and the wider security sector were responsible for… crimes against humanity.'

137. In written and oral arguments at the hearing, Mr Milnes made the general submission that PIR units 'were involved in widespread and systematic human rights abuses serious enough to be considered as international crimes' and that the PIR 'was used by the Kabila government as a weapon of political repression and intimidation.' He asked us to reject the appellant's later evidence and to find that he was knowingly involved in the suppression of opponents as a member of the PIR. He did not particularise a clear case beyond the vague admissions made by the appellant in earlier interviews. No evidence was identified that suggested the appellant had direct involvement in any particular incidents where conduct might have gone beyond those of reasonable and lawful policing techniques. The highest that he appeared to put the case was that the appellant aided and abetted the furtherance of a state policy to repress political opposition by handing civilians to the authorities in the knowledge that, in the ordinary course of events, they were likely to suffer serious ill-treatment in detention.

138. Having considered the background evidence and the legal framework in more detail after the hearing the parties were invited on 11 November 2021 to make further written submissions on (i) the contextual elements of the chapeau with reference to the background evidence; and (ii) the application of Article 1F(b) in relation to state agents. Following an extension of time, the Upper Tribunal had received further submissions from both parties by early January 2022. It is notable that the respondent's written submission in relation to the chapeau was confined to a legal submission. The respondent did not take issue with the interpretation of the statute in various ICC decisions and did not particularise a positive case with reference to the background evidence.

139. It is clear that the background evidence relating to the DRC shows a pattern of serious human rights violations in Kinshasa during the period in which the appellant served in the PIR. We have not considered the evidence relating to potential state violations during the war in eastern DRC because there is no evidence to indicate that the appellant served there. In any event, there is little evidence to indicate that the PIR was involved in violations in that region. The evidence indicates that it is likely that international crimes were committed by the DRC authorities during the conflict in eastern DRC, but to suggest that the appellant should be excluded because of his role as a police officer in Kinshasa

would be to rely on his mere membership of an organisation and would fail to demonstrate sufficient proximity between those violations and the required element of individual criminal responsibility.

140. It is also clear that in the early years of the PIR, like many other sections of the security forces in the DRC, human rights violations were committed in Kinshasa. However, in our assessment, the evidence relating discloses a complex picture that cannot be reduced to a simplified assertion that human rights violations formed part of an 'attack against the civilian population' of the kind required to engage the contextual elements of the chapeau of Article 7 based on an generalised assertion that the DRC government sought to repress political opposition to stay in power.

141. The background evidence indicates a rather chaotic situation after the fall of Mobutu where there was a multiplicity of security forces including the police, army, and various special forces. The evidence shows that those forces were poorly trained and equipped. It also shows that there were weak and chaotic lines of command. The evidence shows that the security forces were used to oppress those who expressed opposition to both Kabila regimes. There were numerous reports of human rights violations against political opponents in Kinshasa.

142. Although the evidence shows that human rights violations were widespread, when analysed, it also shows that many violations had nothing to do with the suppression of political dissent. Many of the reported violations were rooted in poor training, lack of effective command, corruption, and resulted from widspread impunity. Many of those who suffered human rights violations were ordinary citizens from whom members of the security forces sought to extort money or who were the subject of disproportionate force during arrest on suspicion of common crimes. It is possible to describe those violations as widespread and systematic, but a necessary element of the contextual elements of the chapeau of Article 7 is to link the operation or course of conduct to an 'attack against the civilian population' which is 'pursuant to or in furtherance of a State or organizational policy to commit such an attack'.

143. In contrast to regimes with a level of well organised doctrinal oppression of the whole civilian population, the Iranian state being a possible example, the evidence relating to the DRC does not provide a sufficiently clear link between the series of actions by members of the security forces and the stated plan identified by the respondent. The reports of arrests and detentions of political opponents in Kinshasa, whilst serious and concerning, do not indicate a multiple commission of acts at the level and number required to show that the actions were directed at the civilian population rather than a limited number of specific individuals. Whilst the evidence shows that human rights violations generally could be said to be widespread and systematic, in our assessment it does not provide a sufficiently strong link between the conduct of state agencies and a state or organisational policy to suppress political opposition given that several other causes were identified for the violations.

144. The problems arising from the lack of professionalism of the police and security forces was recognised when Joseph Kabila took power, leading to a process of training and reform supported by sections of the international community. By 2005, the respondent's own evidence is that the PIR was one of the better trained and equipped sections of the police and that it performed with more professionalism that other sections of the security forces. Aside from the

exceptions identified below, the evidence shows fewer incidents involving abuses by members of the PIR in the period after 2005.

145. The only area of the evidence that indicates a sufficiently widespread and systematic series of actions targeted at sections of the civilian population, which might engage the contextual elements of the chapeau, are the reports relating to the specific period of repression in Kinshasa and Bas Congo after the 2006 election. The evidence shows a clearer link between Joseph Kabila's stated motive to crush opposition supporters and the deliberate, disproportionate, widespread, and systematic actions of the security forces, which led to a large number of deaths. The PIR was reported to be involved in the suppression of dissent in Kinshasa and in Bas Congo. In Kinshasa, heavy weaponry was used against the civilian population leading to hundreds of deaths. Human Rights Watch considered that the violence against civilians in Bas Congo was sufficiently serious to amount to breaches of international law.

146. In our assessment there are serious reasons for considering that those specific incidents are capable of engaging the contextual elements of Article 7 of the Rome Statute. However, the respondent has not questioned the appellant to explore whether he might have been involved in those incidents, neither in the two asylum interviews, nor in the three substantive appeal hearings that have taken place since. Despite the fact that the appellant mentioned having conducted operations on the border with Cabinda i.e. in Bas Congo, there has been no meaningful exploration of his conduct there. Nor was any of the evidence relating to the widespread killing of civilians by the security forces in Kinshasa in or around 2007 put to the appellant.

147. We conclude that the generalised case put forward by the respondent is insufficient to show serious reasons for considering that the contextual elements of Article 7 are satisfied based on the background evidence relating to the DRC. The evidence shows widespread human rights violations, but without a sufficiently clear link to an organised state plan or policy. The evidence shows that, as a member of the PIR, there may be good reason to suspect that the appellant's involvement in human rights violations might be greater than he admits, but the respondent's case is based on little more than his mere membership of the PIR. We bear in mind that the evidence must be 'clear and credible' or 'strong' and that 'suspecting' is not the same as 'considering'. In respect of those elements of the evidence that indicate that crimes against humanity might have been committed in Kinshasa and Bas Congo in 2007 and 2008, we conclude that there is insufficient evidence to make the necessary link with the appellant's actions to show that there are serious reasons for considering that he might have individual criminal responsibility for crimes against humanity.

148. This is a difficult area of the law to navigate. It involves considering elements of international criminal law within the different context and standard of proof relating to exclusion under the Refugee Convention. Decision-makers considering protection claims are not required to conduct an assessment akin to a criminal trial. We agree with Mr Milnes' submission that the assessment under the Convention should avoid descending into recondite areas of international criminal law, but given the grave nature of an allegation that a person has committed an international crime, and the potentially serious consequences of exclusion, a decision to exclude a person from the protection of the Refugee Convention

should be sufficiently particularised to show why there are serious reasons for considering that the main elements of crime are engaged.

Article 1F(b) – serious non-political crime

149. In contrast to the inherently political nature of the definition for crimes against humanity contained in the contextual elements of Article 7 of the Rome Statute, which requires the underpinning of a state or organisational policy, the respondent's late volte-face was to argue that the same evidence showed that there were serious reasons for considering that the appellant committed a serious non-political crime.

150. In this respect the respondent was unable to point to any specific alleged crime. Instead, we were asked to draw an inference that there were serious reasons for considering that the appellant must have committed serious human rights violations during the course of his long-standing service in the PIR in light of the background evidence relating to the conduct of the DRC security forces.

151. The appellant's evidence is that he began his service in the PIR as a driver. While he admits to having fired tear gas on civilians, no case has been particularised to suggest that this is a serious criminal act given that it is a common non-lethal technique for riot control in many countries. The PIR is armed with live and plastic ammunition, but no case has been particularised to show that the appellant himself fired live ammunition on civilians, which he denies. The highest Mr Milnes could put his submission was that we should infer that the appellant fired on demonstrators during an incident in September 2011, but there is no evidence relating to the demonstration or to indicate whether live or plastic rounds were used let alone that there are serious reasons for considering that the appellant himself used unjustified force that would amount to a serious non-political crime.

152. The background evidence shows that, aside from the specific incidents that we have identified, the PIR was generally better trained and more restrained than other sections of the security forces after 2005. We have already found that there is insufficient evidence to show that there are serious reasons for considering that the appellant was involved in the more serious incidents reported in 2007 and 2008.

153. The pinnacle of the evidence is the appellant's admission that he surrendered 'many' people arrested during demonstrations to the OPJ and that people were detained in various places in Kinshasa including the camp where he was based. The background evidence shows that torture and inhuman treatment was widespread in detention during the relevant time. We have rejected the appellant's later attempt to gloss over his earlier admissions. The role of the PIR was to control demonstrations. If it was deemed necessary to arrest demonstrators, that would have been the role of the appellant and his unit. We have also found that the appellant was likely to be aware that a person who is detained following an arrest would be at risk of torture, inhuman or degrading treatment.

154. In response to our invitation to make further submissions relating to the political exception under Article 1F(b), Mr Khubber did not depart from Mr Milnes' analysis of *T* in any significant way save to submit that the wording of the Convention did not preclude a state agent relying on the political exception. He was right to point out that the issue was not considered by the House of Lords. Mr Khubber's case

was that the respondent has failed to identify any particular criminal act that the appellant is said to have committed or to establish the necessary elements to show that there are serious reasons for considering that he committed a serious non-political crime. At the hearing Mr Khubber acknowledged that the appellant had admitted handing over demonstrators, but argued that there was a break in criminal responsibility given that it was not his decision whether they would then be detained. There was no direct evidence to show that he used unjustified force on demonstrators. There was no direct evidence to show that he detained or tortured anyone.

155. Because of the potentially serious consequences of exclusion, the specific facts and evidence must be evaluated carefully in each case. This is a finely balanced decision. The burden of proof is on the respondent who has put forward a generalised case based on the background evidence relating to the actions of the DRC police and security forces and the appellant's long standing service in the PIR. We agree that no specific incident has been identified beyond the appellant's admission that he handed 'many' people over to the authorities during the course of his service in the PIR, that he 'felt terrible' for doing so, but had no choice because he needed the job. The high point of the respondent's case is the assertion in the supplementary decision letter that the appellant aided and abetted in the torture of suspects.

156. We agree that there is insufficient evidence before us to show that there are serious reasons for considering that the appellant was a principal offender in the serious ill-treatment of suspects. Although there is some evidence to suggest that the PIR did occasionally detain people who were then ill-treated, we accept that it was primarily a mobile paramilitary force deployed to control demonstrations. However, it is also clear that members of the PIR did not carry out ordinary policing duties relating to common crime. The evidence shows that it was a specialist force, which the appellant described as 'the bodyguards of the authorities'. The nature of its work in quelling demonstrations against the government was likely to generate numerous arrests. Given the number of years that the appellant served in the PIR we conclude that there are serious reasons for considering that the appellant and those under his command arrested 'many' people who were then surrendered to the authorities.

157. It is argued on behalf of the appellant that there is a break in criminal responsibility between the handing over of suspects to the OPJ and any subsequent decision to detain them with the attendant ill-treatment that was likely to occur. This argument has some initial attraction, but when we step back to consider the evidence as a whole we conclude that it does not assist him. The appellant was not an innocent bystander. He was a voluntary and long serving member of a paramilitary force that was used to quell political opposition on behalf of the government. Although he says that he refused to do 'bad things' in order to receive his pay, on his own evidence, the issues with non-payment of salaries did not begin until around 2010. It was only after he began to complain about pay and conditions that the appellant ran into problems. Before that, it is reasonable to infer that he carried out all the duties that were required of him as a member of the PIR.

158. Although the argument about the break in the chain of criminal responsibility is superficially attractive, the appellant's actions cannot be divorced from the fact that he played an integral role in the system of suppressing dissent. The arrest of suspects during the course of demonstrations and their transfer to the OPJ was

an essential element in a course of action that would lead to many of those suspects being detained. We cannot discount the possibility that some suspects might not have been charged and detained by the OPJ. However, during the course of such a long period of service, we find that there are at least serious reasons for considering that 'many' people arrested by the appellant and those under his command would have been detained.

159. The background evidence makes clear that there has been a long standing risk of torture, inhuman or degrading treatment in detention in the DRC. We are also satisfied that there are serious reasons for considering that the appellant had the requisite knowledge of what would happen to the people he surrendered to the OPJ. We conclude that the reason why he 'felt terrible' about handing them over was because he knew full well that suspects would be at risk of serious ill-treatment. For these reasons we conclude that there are serious reasons for considering that the appellant knowingly aided and abetted in the torture of suspects during the course of his long service in the PIR.

160. Even though it did not feature in the arguments before us, we have considered whether accessorial liability is sufficient for the purpose of exclusion. We do not discount the possibility that some forms of accessorial liability, especially in relation to ordinary common crimes, might render a crime insufficiently serious for the purpose of exclusion under Article 1F(b). However, torture is a particularly serious crime that would attract a high sentence. In that context, we find that knowingly aiding and abetting torture, especially in the context of an official role such as a police officer, could not be described as anything other than a serious crime.

161. Mr Khubber did not seek to argue that a serious crime of this kind committed by a state official would come within the political exception. His arguments rested firmly on the lack of particularisation of the respondent's case. We have set out the legal framework relating to the interpretation of Article 1F(b) and explained why it is highly unlikely that the political exception would apply in a case where there are serious reasons for considering that a state official acted unlawfully by committing a serious crime during the course of their duties. The intention of the drafters of the Convention was to provide a system of surrogate international protection for those fleeing oppression and ill-treatment. The humanitarian objective of the Convention is balanced with provision for exclusion of those who are deemed undeserving of protection because there are serious reasons for considering that they have committed serious non-political crimes.

162. We remind ourselves that this is not a criminal trial. We have considered this case firmly within the context of the relevant legal framework relating to exclusion under the Refugee Convention. Although much of the respondent's case was rather generalised, for the reasons given above, we conclude that there is sufficient evidence to show that that there are serious reasons for considering that the appellant committed a serious non-political crime outside the country of refuge. We conclude that Article 1F(b) applies in this case.

Conclusion

163. The respondent has failed to particularise a sufficiently strong case to show that there are serious reasons for considering that the appellant committed crimes against humanity during his service in the PIR. We conclude that there is

insufficient evidence to show that the appellant should be excluded from protection with reference to Article 1F(a) of the Convention.

164. The respondent has also failed to produce sufficient evidence to demonstrate that there are serious reasons for considering that the appellant might have been among those members of the DRC security forces who used excessive and unlawful force during the course of their duties. Nevetheless, we conclude that there is sufficient evidence to show that there are serious reasons for considering that the appellant aided and abetted in the torture of suspects during his long period of service in the PIR. For the reasons given above, there is sufficient evidence to show that there are serious reasons for considering that the appellant committed a serious non-political crime for the purpose of exclusion under Article 1F(b) of the Convention.

165. In relation to the outstanding ground of appeal, we conclude that the removal of the appellant would not breach the United Kingdom's obligations under the Refugee Convention. In practice, the appellant will not be removed because there is a preserved finding that his removal would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The appeal is DISMISSED on Refugee Convention grounds

The appeal is ALLOWED on Human Rights grounds

Signed M. Canavan Date 07 March 2022
Upper Tribunal Judge Canavan