

Institution: UNIVERSITY OF BIRMINGHAM
Unit of Assessment: C20 Law
Title of case study: Underpinning change and influencing policy in international refugee law and guidance
<p>1. Summary of the impact (indicative maximum 100 words)</p> <p>Professor Cryer's research on International Criminal Law has changed how the human rights of refugees are protected under International Law. First, it has significantly influenced Canadian jurisprudence in this field. Prior to the July 2013 decision of the Supreme Court of Canada in <i>Ezkola v Canada</i>, refugee claimants had been excluded from Canada on the basis of their association with others, rather than because they were individually responsible for the commission of international crimes. The Supreme Court of Canada relied directly on Cryer's research to develop a new test to determine eligibility for refugee status. Secondly, Cryer's research has helped to shape the revised 2003 UNHCR guidelines on the application of exclusion clauses, which will be published in 2014. Beneficiaries of the research include the UNHCR and all States which implement the UNHCR's guidelines on refugee status, and individuals who would previously have been denied refugee status.</p>
<p>2. Underpinning research (indicative maximum 500 words)</p> <p>The underpinning research was conducted by Robert Cryer, Professor of International and Criminal Law at Birmingham Law School since 2007, in the period 2008-2010. Cryer co-authored (with Wilmshurst, Friman and Robinson) the leading text: <i>An Introduction to International Criminal Law and Procedure</i> (see output R1 below). It is a comprehensive treatise on all aspects of international criminal law. Cryer is the sole author of Chapter 15, the chapter on general principles of liability which examines:</p> <ul style="list-style-type: none"> • The nature of international criminal law and the definitions of crimes, principles of liability and defences. • The interpretation and application of international criminal law and the law of armed conflict in contemporary conflicts and circumstances. <p>The arguments that underpin the chapter and the impact relate to the general principles of liability in international criminal law. In this regard Cryer argues for the necessity to balance the dynamics of the group nature of international crimes with individual responsibility:</p> <p><i>"A person can be convicted of specific intent crimes such as genocide even if that person did not have the relevant mens rea for that offence, but the crimes were a natural and foreseen incident of the enterprise he or she was involved in on the basis of joint criminal enterprise. This has led to criticisms of joint criminal enterprise, as allowing the prosecution to circumvent the proper mens rea requirements for such serious crimes."</i> (p. 373).</p> <p>As Cryer notes, principles of liability play a more significant role in international (as compared to domestic) criminal law - reasoning which was to underpin the decision of the Canadian Supreme Court in <i>Ezokola v Canada [2013] SCC 40</i>. More specifically, he stresses the importance of the nature of joint criminal enterprise liability. He argues that joint criminal enterprise requires that the accused, at a minimum, made a significant contribution to the group's crime or criminal purpose, and did so with some form of subjective awareness of the crime or criminal purpose:</p> <p><i>"membership in the group per se is not enough to ground liability on this basis. There has to be some form of action by the defendant to contribute to the implementation of the plan...it needs to be significant"</i> (pp.369-70).</p> <p>As evidenced below, Cryer's research on the nature of international criminal law and the definitions of crimes, principles of liability and defences, and determination of refugee status has played a significant role in developments both in Canadian jurisprudence and more broadly in the</p>

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formulation of UN policy in this field.

3. References to the research (indicative maximum of six references)

R1) R. Cryer, E. Wilmshurst, H. Friman and D. Robinson. (2010). *An Introduction to International Criminal Law and Procedure* (pp618 + lxvi, 2nd edn 2010, Cambridge University Press) **[available from HEI on request]**.

Evidence of research quality:

Leading commentators have acclaimed the first edition as “the best general text on international criminal law so far [...]” (O’ Keefe, R., (2009) *International and Comparative Law Quarterly* 485-486), and “splendid... highly recommended” (Bowring, B., (2008) *Times Higher Education Supplement*. The work was also cited by the International Criminal Court in *Prosecutor v al Bashir*, Decision on Prosecutor’s Request for Warrant of Arrest, 4 March 2009, ICC-02/05-01/09, pp.42,43,44,46 (majority), p.8 (dissent of judge Ušacka). and the Special Court of Sierra Leone Appeals Chamber in *Prosecutor v Sesay et al*, Judgment, SCSL-04-15-A, 26 October 2009, para 578 (see sources 6 and 7 below).

4. Details of the impact (indicative maximum 750 words)

The law and practice of the **Supreme Court of Canada** and **United Nations High Commission for Refugees** has been significantly influenced by Cryer’s research on definitions of crimes, principles of liability and defences in international criminal law, specifically as they impact on refugees.

Impact on Canadian Refugee Jurisprudence:

In July 2013, Cryer’s book chapter (in R1 above) was **cited by the Supreme Court of Canada** in its landmark decision, *Ezokola v Canada [2013] SCC 40* (see source 1 below). Cryer’s argument influenced the Court’s new test to determine eligibility for refugee status. In *Ezokola*, the Court had to interpret Article 1F(a) of the *1951 Convention Relating to the Status of Refugees*, under which claimants are denied refugee status if they are determined to have committed a crime against peace, a war crime or a crime against humanity. Prior to this case, Canadian jurisprudence on Article 1F(a) had been unclear and contradictory. Refugee applicants were being excluded on the basis of their membership of groups accused of such crimes, rather than their individual responsibility for the commission of crimes. The Federal Court of Appeal in Canada had previously held that those in authority could be considered complicit in an international crime by remaining in their position without protest and protecting their group/government’s interests while being conscious of the offences being committed in the name of their group. This permitted guilt by association and through passive acquiescence. The Supreme Court of Canada was required to bring consistency and coherence to this area of law. The Court recognised that liability by virtue of complicity plays a key role in the commission of international crimes, owing to the large number of people who tend to be involved in them. When deciding where the line should be drawn between association and complicity, the Court laid down a new ‘significant contribution’ test for determining the criminal liability of refugees.

In creating this new test, the Supreme Court of Canada **relied upon Cryer’s book chapter** to rule that there must be a voluntary, significant and knowing contribution on behalf of the individual for the criminal purposes of the group. Cryer’s underpinning arguments, utilised by the Supreme Court, stress:

- The importance of the nature of joint criminal enterprise liability.

The Supreme Court found that joint criminal enterprise requires that “the accused have made, at a minimum, a significant contribution to the group’s crime or criminal purpose, made with some form of subjective awareness of the crime or criminal purpose” (para 67).

- The fact that to satisfy the actus reus requirement, membership in the group per se is not sufficient to ground liability. The defendant must perform an action that contributes to the implementation of the plan. There is no requirement that the contribution made by the

defendant is a 'necessary or substantial one', but...it needs to be 'significant' (pp.369-70).

The Supreme Court held that "guilt by association is not a means to exclude" and found that there must be a link between the accused's conduct and the criminal conduct of the group (para 67). This helps to align Canadian jurisprudence with international law and limits the overextended use of Article 1F(a) of the 1951 Refugee Convention. **The change significantly impacts individuals who would previously have been denied State protection**, while continuing to deny refugee status to those individuals who were involved in serious international crimes. The Senior Counsel, Crimes against Humanity and War Crimes Section, Government of Canada, confirmed that his office "uses [Cryer's] book regularly, most of the time when our office provides legal advice to the Royal Canadian Mounted Police and the Canadian Border Service Agency... the latter when dealing with overseas visa applications or inland asylum or deportation processes. Especially when the question pertains to defences, either as a stand alone question or in the context of child soldiers, the book is one of the first sources we rely on, either directly or as a guide for further research ... The advice provided by our office... usually will find its way into facta filed with either the civil or criminal courts. Examples of the legal advice utilized in this fashion in the civil context is foremost the factum of the government as well as several facta of intervenors in the recent case of Ezokola before the Supreme Court of Canada, which itself referred to the book in its decision" (see source 2 below).

Influencing UNHCR Guidelines:

In January 2013, Cryer participated as an invited expert to the UNHCR in roundtable discussions held in Colchester, UK, designed to revise and update the UNHCR's 2003 Guidelines on International Protection: Application of the Exclusion Clauses issued under Article 1F 1951 *Refugee Convention Relating to the Status of Refugees (Refugee Convention)*. The aim of the roundtable was to ensure that the guidance was aligned with advances in International Criminal Law, International Humanitarian Law, International Human Rights Law and Refugee Law. Owing to his expertise on International Criminal Law, and how crimes, principles of liability and defences are defined, Cryer was invited to provide expert advice on the expansion of general principles of liability in the determination of refugee status (the key issue to be considered in the revision of these Guidelines) (source 3). The discussion focused on the challenges that modern developments in the law on general principles of liability pose for refugee law, and the fact that the guidelines must reflect existing law rather than creating new law. A central concern was whether a person should be denied asylum on the basis of what s/he has done. Cryer proposed that the new guidelines should reflect the controversy associated with the mental element in group participation. Drawing on the arguments in his book he advocated the need to balance the dynamics of the group nature of international crimes with individual responsibility, and emphasised flaws in the 2003 guidance which contained little substance on the general principles of the criminal law, because it was not considered so important when this guidance was drawn up (source 4).

Consequently the arguments in Chapter 15, where Cryer identified the practical implications of *mens rea* with regard to the doctrine of joint criminal enterprise and criminal liability, underpin proposals to reform the guidance on exclusion of refugees. Cryer's contribution to the roundtable has therefore **influenced the UNHCR** in applying the general principles of liability and defining the eligibility of refugee applicants, thus benefitting both the States which implement the UNHCR guidelines and those individuals seeking refuge within their borders. The revised guidance containing these changes, which will offer stronger legal protection to refugees, will be published by the UN in 2014. UNHCR guidelines are widely used by States in their determination of refugee status, and by lawyers acting for putative refugees. They are intended to offer interpretative legal guidance for governments, legal practitioners, decision-makers, the judiciary, and UNHCR staff carrying out refugee status determination in the field. In many cases, the UNHCR actually determines eligibility which States then follow. To give a sense of scale of this problem, in 2010, UNHCR conducted refugee status determinations in 67 countries, making about 100,000 determinations. That amounts to 11% of global asylum applications (source 5, p.42.)

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Summary

Cryer's research has thus **shaped developments both in international jurisprudence and at the level of UN guidance**, by facilitating access to justice for refugee applicants in Canada and contributing to improvements in the provision of guidelines for the determination of refugees within UN Member States. It thereby directly benefits governments, legal practitioners, decision makers and the judiciary implementing UNHCR guidelines, as well as the individuals seeking refuge within their borders.

5. Sources to corroborate the impact (indicative maximum of 10 references)

- [1] *Ezkola v Canada* [2013] SCC 40 (19 July 2013) paragraphs 5, 62, 63, 67.
- [2] Factual statement provided by Senior Counsel, Crimes against Humanity and War Crimes Section, Government of Canada.
- [3] Factual statement provided by Convener of the UNHCR Experts' Roundtable.
- [4] Transcript of UNHCR the UNHCR Experts' Roundtable, 2013 (available on request).
- [5] UNHCR Statistical Yearbook, 2010, p.42.
- [6] *Prosecutor v al Bashir*, Decision on Prosecutor's Request for Warrant of Arrest, 4 March 2009, ICC-02/05-01/09, pp.42,43,44,46 (majority), p.8 (dissent of judge Ušacka).
- [7] Special Court of Sierra Leone Appeals Chamber, *Prosecutor v Sesay et al*, Judgment, SCSL-04-15-A, 26 October 2009, para 578.