ENF 18 War crimes and crimes against humanity

Updates to chapter

Listing by date:

Date: **2016-12-01**

Changes were made to ENF 18 to reflect the contribution test for complicity
Substantive and minor changes as well as clarifications have been provided throughout the chapter

Date: **2005-12-15**

Changes were made to ENF 18 to reflect the IRCC and CBSA policy and service delivery roles.

Appendix E has been removed and a web site address has been given to direct the reader to the list of designated regimes online. Appendix F was renamed accordingly.

Date: **2004-01-23**

A bullet was added to Appendix E of chapter ENF 18 and now reads as follows:

designated November 21, 2003, the government of Ethiopia under Mengistu Haile Mariam for the period of September 12, 1974 to May 21, 1991.

ENF 18 War crimes and crimes against humanity

1 What this chapter is about

This Chapter describes the Canada's War Crimes Program, and the CBSA's role in the Program. It further describes how to determine if persons are inadmissible to Canada for alleged involvement in war crimes, crimes against humanity and/or genocide.

2 Canada's War Crimes Program objectives

The goal of Canada's War Crimes Program is to deny safe haven in Canada to war criminals and persons believed to have committed or been complicit in in these crimes.

The program is delivered as a partnership between the Canada Border Services Agency (CBSA), Immigration, Refugees and Citizenship Canada (IRCC), Department of Justice (Justice) and the Royal Canadian Mounted Police (RCMP).

The CBSA administers and enforces the *Immigration and Refugee Protection Act* (IRPA) and the Immigration and Refugee Protection Regulations (IRPR) in identifying inadmissible persons access to Canada at ports of entry, excluding claimants from refugee protection, and removing inadmissible and excluded persons from Canada.

IRCC applies the IRPA and IRPR when determining the admissibility of temporary and permanent residents to Canada. IRCC also conducts the initial screening as part of the visa assessment process to determine if there are reasonable grounds to believe that the applicant has committed or was complicit in the commission of war crimes, crimes against humanity and/or genocide. IRCC, in coordination with Justice are responsible for citizenship revocation of individuals who have committed or were complicit in war crimes, crimes against humanity and/or genocide.

Under the *Extradition Act* legislation, Justice leads on cases involving extradition to foreign states or surrender to international tribunals. Justice also works with the Public Prosecution Service of Canada (PPSC) in criminal proceedings led by the PPSC. Criminal proceedings are, in turn, based on investigations conducted by the RCMP under the *Crimes Against Humanity and War Crimes Act* .

2.1 Remedies

Canada's War Crimes Program has several remedies available to deal with alleged war criminals and individuals suspected of involvement in crimes against humanity and/or genocide:

- designation of governments and regimes considered to have engaged in gross human rights violations under A35(1)(b) of the *Immigration and Refugee Protection Act*;
- denial of visas to persons outside of Canada under the *Immigration and Refugee Protection Act;*;
- exclusion from refugee protection of the 1951 *United Nations Convention Relating to the Status of Refugees;*
- admissibility hearing and removal from Canada under the *Immigration and Refugee Protection Act*;
- prosecution in Canada under the *Crimes Against Humanity and War Crimes Act;*
- revocation of citizenship under the *Citizenship Act;*
- extradition upon request of a foreign government under Canada's *Extradition Act*; and,

- surrender to an international tribunal (upon request) under Canada's *Extradition Act*.

These remedies are available to the Government of Canada through its various bodies and not specifically the CBSA. Each department or agency is mandated under different legislation further described below.

3 Related Legislation

The following is the list of applicable legislation and government of Canada departments mandated with the enforcement against individuals who have committed or were complicit in the commission of war crimes, crimes against humanity and/or genocide. A description of the relevant provisions is also included.

3.1 *The Crimes Against Humanity and War Crimes Act*

Mandate: Justice and the RCMP

This Act:

provides for the prosecution of any individual present in Canada for any offence stated in the Act regardless of where the offence occurred;

- organizes offences of genocide, crimes against humanity, war crimes, and breach of responsibility by military commanders and civilian superiors;
- creates offences to protect the administration of justice at the International Criminal Court (ICC) including the safety of judges and witnesses;
- recognizes the need to provide restitution to victims of offences; and
- provides a mechanism to do so.

3.2 The *Extradition Act*

Mandate: Justice and the RCMP

This Act:

- provides Canada with the legal basis on which to extradite persons located in Canada, who are sought for extradition by one of Canada's "extradition partners".

Extradition partners are:

- countries with which Canada has an extradition agreement (bilateral treaties or multilateral conventions);
- countries with which Canada has entered into a case-specific agreement; or
- countries or international courts whose names appear in the schedule to the *Extradition Act*.

Justice handles all of the extradition cases under their mandate. The extradition process is provided for reference only; this is not an avenue for the CBSA to pursue.

3.3 The *Immigration and Refugee Protection Act*

Mandate: CBSA and IRCC

This Act:

- provides for refusal of visas and Temporary and Permanent Resident visas of persons found inadmissible abroad, including those inadmissible for war crimes, crimes against humanity and/or genocide;
- provides for the legal authority to investigate an allegation, review and report the allegation and issue a removal order when the allegation is founded against individuals seeking entry or already in Canada. Provides the opportunity for the Minister to grant relief for those found inadmissible under A35(1)(b);
- provides for the exclusion from the refugee determination process of persons involved in war crimes, crimes against humanity and/or genocide;
- provides for the designation of regimes considered to have engaged in gross human rights violations, war crimes or crimes against humanity and/or genocide; and,
- limits appeal rights of persons involved in war crimes, crimes against humanity and/or genocide.
- allows for the removal of A35 inadmissible persons to countries, even when there is a temporary stay of removal (TSR) and allows Canada to remove to a third country willing to take the individual even when it is not their former country of permanent residence/citizenship or a country from which the entered Canada.

Exclusion from the Principle of Non-refoulement (A115(2)b))

In most cases Convention refugees in Canada are protected from removal pursuant to 115(2)(a) of the IRPA. An exception may, however, be made when a Convention refugee has been found inadmissible to Canada for the commission of human rights violations and a Minister's Delegate at IRCC is of the opinion that either the danger the person presents to the security of Canada or the nature and severity of their actions is greater than the risk they would face upon removal.

If an officer identifies a case where they feel it may be appropriate to seek an opinion under A115(2)(b), they should consult the manual ENF-28 and contact the CBSA's Danger Assessment Section at: CBSA-ASFC_Danger_Assessments-Evaluations_De_Danger_Assessments-Evaluations_De_Danger@cbsa-asfc.gc.ca

3.4 The *Citizenship Act*

Mandate: IRCC and the RCMP

This Act:

- provides for the not granting of citizenship for security or criminality cases and also allows for the revocation of citizenship obtained by fraud or misrepresentation for a number of reasons including misrepresentation concerning war crimes, crimes against humanity and/or genocide.

- provides that citizenship shall not be granted while the person is under investigation by the Minister of Justice, the RCMP or the Canadian Security Intelligence Service (CSIS) for, or is charged with, on trial for, subject to or a party to an appeal relating to, an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

4 Forms

Nil.

5 Instruments and delegations

A35(1)(b) of the IRPA stipulates that the Minister (Public Safety) may designate a regime. This authority is not delegated to any other official.

6 Definitions

As defined in the Crimes Against Humanity and War Crimes Act:

War Crime	An act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.
Crimes against humanity	means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.
Genocide	means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

6.1 Differences between genocide and a crime against humanity

Genocide	Crime against humanity
An act committed to destroy a group.	An act committed as part of a widespread or systematic attack.
The perpertrator intended to destroy a group.	The perpertrator was aware of the widespread or sytematic attack and intended to commit the criminal conduct.
The circle of victims, as defined by the Rome Statute, is relatively small and includes the following groups defined by: nationality, ethnicity, race and religion. In addition, the following distinction was added in Canada: any other identifiable group.	The circle of victims, as defined by the Rome Statute, is relatively small and includes the following groups defined by: nationality, ethnicity, race and religion. In addition, the following distinction was added in Canada: any other identifiable group.
Genocide always falls within the broader category of crimes against humanity.	

6.2 Differences between a war crime and a crime against humanity

War Crime	Crime against humanity
Can be limited to a single criminal act.	A single criminal act can only be considered a crime against humanity if it is shown that this one act was the result of the implementation of a widespread or systematic policy (*Rome Statute of the International Criminal Court art. 7*).
Can only occur when a certain threshold of intensity is reached between parties in the conflict (*Rome Statute of the International Criminal Court art. 8, 2(d*)). For example, police officers conducting themselves in a violent manner during riots would not necessarily constitue a war	Can occur in any setting: during international war, civil war, and in times of peace. For example, a particular atrocity such as the killing of a civilian during a civil war can

crime, but could be a crime against humanity.	be both a war crime and a crime against humanity.
Can be a crime against property.	

6.3 Differences between a crime against humanity, war crime and a terrorist act:

A terrorist act generally has a wider application than a war crime, a crime against humanity and/or genocide because:

- Is different than a crime against humanity in that it can be committed against both persons and property;
- it can be an isolated incident — it does not have to be committed in a widespread or systematic manner;
- it can be committed both in times of war and peace;

Criminal conduct pertaining to terrorist acts tends to be limited to very serious acts against persons and property (see section 83.01(1)(b)(ii) of the Criminal Code *Criminal Code*). Terrorist acts also have been committed to achieve a particular purpose and with a specific intention (see section 83.01(1)(b)(i) and 83.01(1)(b)(ii) of the *Criminal Code of Canada*).

This wider application is also reflected in section 34 of IRPA, which makes any person who is or was a member of a terrorist organization inadmissible.

An officer may have an applicant who fits the description of all three crimes. An example scenario would be:

- that a person was found to be a member of a group;
- that the group the person belonged to conducted a bombing campaign;
- that the incident occurred during a civil war..

In this scenario it would be preferable to find such a person described in A34(1)(f) rather than in A35(1)(a). The concept of membership to apply A35(1)(a) would not be sufficient as a result of the Ezokola decision by the Supreme Court of Canada (i.e. it would need to be proven that the person made a knowing and significant contribution) further described in Section 8 of this chapter..

Note: Refer to Appendix C which lists articles 6, 7 and 8 of the *Rome Statute of the International Criminal Court*. These articles provide further clarification and examples of what constitutes war crimes, crimes against humanity and/or genocide.

7 Program Objectives – CBSA

Persons who have committed or including those who are complicit in the commission of a war crime, a crime against humanity, genocide or any other reprehensible act, regardless of when or where these crimes occurred, are not welcome in Canada.

A four-pronged approach is taken when dealing with modern-day war criminals:

- refusing their overseas applications as permanent residents, refugees, or temporary residents;
- denying their entry to Canada at ports of entry;
- excluding them from the refugee determination process in Canada; and,
- finding them inadmissible and removing them from Canada

8 Procedure: Establishing inadmissibility under A35(1)(a) of the *Immigration and Refugee Protection Act* or exclusion under 1F(a) of the United Nations Refugee Agency's Convention and Protocol relating to the status of refugees.

A35(1)(a) under the Immigration and Refugee Protection Act reads as follows:

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

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

Article 1F(a) of the United Nations Refugee Agency's Convention and Protocol relating to the status of refugees reads as follows:

1F 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

This includes the following:

- individuals who personally commit an offence;
- individuals who attempt to commit an offence;
- individuals who aid and abet, encourage, or are involved in the planning of an offence;
- individuals who occupy a position of command or superior responsibility with regards to those who committed the offense;
- individuals who are complicit when an offence is committed.

8.1 Establishing complicity

The Supreme Court of Canada (SCC) decision in the matter of *Rachidi Ekanza Ezokola v Minister of Citizenship and Immigration* (2013) changed how complicity in war crimes, crimes against humanity and/or genocide is to be assessed. The court introduced the contribution-based test as the applicable legal test to be applied by the Immigration Refugee Board (IRB) or immigration officers in-Canada or overseas. Eliminated components of the *United Nations Refugee Agency's Convention and Protocol relating to the status of refugees* 1F(a) jurisprudence, which are also applicable to IRPA A35(1)(a) analysis, are:

- the elimination of complicity by mere association; and,

- the elimination of the presumption that mere membership in an organization with a limited brutal purpose is sufficient for an individual to be excluded from refugee protection or found inadmissible under A35(1)(a).

8.2 The contribution-based test

The key components of the contribution-based test jurisprudence are:

- **Voluntary** contribution to the group's crime or criminal purpose:

Decision makers are to consider the method of recruitment by the organization and any safe and early opportunity the person has had to dissassociate from the organization. The voluntariness requirement captures the defense of duress. The contribution to the crime or criminal purpose must be voluntarily made; it cannot be made under duress.

- **Significant** contribution to the group's crime or criminal purpose:

The mere association factor has now been replaced with a culpable complicity factor when a person makes a significant contribution to the crime or criminal purpose of a group. The degree of contribution must be carefully assessed to prevent an unreasonable extension of criminal participation in international criminal law.

- **Knowing** contribution to the group's crime or criminal purpose:

The person must be aware of the group's crime or criminal purpose and aware that his or her conduct will assist in the furtherance of the crime or criminal purpose.

8.3 6 Factors – Contribution-based test for establishing complicity:

To determine whether a person's conduct meets the test for complicity, the following 6 factors should be considered in the decision maker's analysis:

- The size and nature of the organization, including whether the organization was one with a brutal, limited purpose;

- The part of the organization with which the person was most directly concerned:

Decision makers should be aware that persons may not have been affiliated with all parts of the organization and could have been excluded from affiliating with the part that was involved in the crime or criminal purpose. The decision maker should drill down as far as possible in the organization so as to more properly define the group to which the person is said to belong, especially with organizations that are hybrid or multi-faceted.

- The person's duties and activities within the organization:

This factor is significant because it goes to the heart of a person's day-to-day participation. The decision maker should look at the person's day-to-day participation in regards to the duties and activities and consider the link between these and the crimes and criminal purpose of the organization.

- The person's position or rank in the organization;

- The length of time the person was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and,

- The method by which the personwas recruited and the person's opportunity to leave the organization,

These factors are not exhaustive and are not given the same weight in all cases. The focus must remain on the person's contribution to the crime or criminal purpose and the analysis. The weight of each factor will depend on the facts and context of each case.

8.4 Establishing complicity—brutal (limited purpose) organizations

In the decision of *Rachidi Ekanza Ezokola v Minister of Citizenship and Immigration* (2013) SCC40, the Supreme Court of Canada has stated that when looking at establishing complicity, the contribution-based test should be applied.

A first step is to look at the size and nature of the organization. If the main purpose of the organization is the involvement in war crimes, crimes against humanity and/or genocide, the factor with respect to such an organization may weigh more heavily than some of the other factors set out above. A characterization of an organization as brutal only has an effect in relation to the other factors in the contribution-based test but by itself can never lead to complicity. The Supreme Court stated in the decision of *Rachidi Ekanza Ezokola v Minister of Citizenship and Immigration* (2013) SCC40 that "In contrast, where the group is identified as one with a limited and brutal purpose it will be easier to establish complicity. In such circumstances, a decision maker may more readily infer that the accused had knowledge of the group's criminal purpose and that his conduct contributed to that purpose."

8.5 Other forms of complicity

While the new contribution-based test for complicity set out in Ezokola replaces the former "personal and knowing participation test", it also allows for the continued and direct application of international criminal law including modes of partial liability for the commission of international crimes, such as aiding and abetting based on article 25 of the Rome Statute, and also command or superior responsibility based on article 28 of the Rome Statute.

The Canadian courts have determined that the following activities constitute aiding and abetting (as 1 form of complicity):

- handing over people to organizations (brutal or non-brutal) with the knowledge that these people would come to harm;
- providing information to organizations on individuals which result in harm to these individuals;
- providing support functions, such an being an intelligence officer, a driver or a bodyguard to members of the organization;
- assisting in increasing the effectiveness of a limited brutal purpose organization, for example, by being a policeman in charge of political prisoners at a military hospital or being in charge of legal training with a police force.

If the above examples of aiding and abetting do not fit the situation at hand, international criminal law can be helpful in this regard. The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. (*Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999 at para. 229.)

While the concepts of command responsibility and superior responsibility have been introduced into Canadian criminal law and are now part of the Crimes Against Humanity and War Crimes Act (which is in turn based on article 28 of the Rome Statute) there has been no jurisprudence in Canada as of yet. Command responsibility applies to military hierarchies and superior responsibility applies to civilian organizations.

However, international criminal law has been instrumental in providing clarifications for its various elements. For example, a superior will be subject to individual criminal liability if the following elements can be demonstrated: a superior-subordinate relationship; the superior knew or had reason to know that a criminal act was about to be, was being or had been committed (the requisite mens rea); and a failure to take necessary and reasonable measures to prevent or punish the conduct in question.

8.6 Defences

The burden of proof with respect to defences lies with the person concerned, i.e. it has to be raised and proven by that person. Two common defences in immigration/refugee law are superior orders and duress.

Superior Orders:

A common defence of a person who committed a war crime, genocide, or a crime against humanity is based on the concept of superior orders; i.e., the position held required the individual to follow orders from the government or a superior officer. Although this defence may be used in arguing for a lighter sentence in a criminal prosecution, it is not relevant for the purposes of the IRPA and cannot overcome inadmissibility under A35(1)(a) or 1F(a) exclusion, except if the person concerned can show that the order followed was not manifestly unlawful; a difficult test to meet.

Duress:

In the Supreme Court of Canada decision in *R v Ryan, 2013 SCC 3* (criminal law), the Court concluded the following elements that comprise duress:

- an explicit or implicit threat of death or bodily harm proffered against the accused or a third person.

The threat may be of future harm. Although, traditionally, the degree of bodily harm was characterized as “grievous”, the issue of severity is better dealt with at the proportionality stage, which acts as the threshold for the appropriate degree of bodily harm;

- the accused reasonably believed that the threat would be carried out;
- the non-existence of a safe avenue of escape, evaluated on a modified objective standard;
- a close temporal connection between the threat and the harm threatened;
- proportionality between the harm threatened and the harm inflicted by the accused. This is also evaluated on a modified objective standard;
- the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

A Federal Court decision in *Mohamed v. Canada (Citizenship and Immigration) 2015 FC 622* recognized the above SCC definition of duress as the persuasive authority that should be followed as the IRPA does not contain any provision which defines duress in a different way.

8.7 Cases involving prior exclusion by the Refugee Protection Division (RPD)

Section R15(b) of the *Immigration and Refugee Protection Regulations* (IRPR) has established that the findings of fact pursuant to section F of Article 1 of the United Nations Refugee Agency's Convention and Protocol relating to the status of refugees [1F(a)] are conclusive during an IRPA A35(1)(a) assessment.

An example would be where the person has previously been in Canada and the officer has evidence that the Refugee Protection Division has excluded the person from refugee determination under 1F(a). In most instances there would be no need to conduct any further investigation to establish further facts under A35(1)(a), as long as the decision maker can demonstrate that these facts would stand up using the new contribution-based test. In most cases, RPD decisions made before the Ezokola decisions can be utilized without having to apply the new complicity test.

There will be situations where the person provides the officer with additional information that was not available at the time of the Refugee Protection Division exclusion. The decision maker must take into account any new and credible evidence regarding the inadmissibility. Any such additional information must be accepted and has to be assessed to demonstrate the contribution-based test.

Both submissions by the applicant as well as the CBSA can be found to be new evidence, provided that they were not before the Refugee Protection Division. Where relevant and credible evidence is brought forward that requires consultation with CBSA NHQ, officers may contact the Case Review Unit at:

case-management@cbsa.gc.ca

R15 also considers a decision by any international criminal tribunals established by resolution of the Security Council of the United Nations or by the ICC as a conclusive finding of fact for the purposes of inadmissibility under A35(1)(a), as well as a decision by a Canadian court pursuant to the *Criminal Code of Canada* or the *Crimes against Humanity and War Crimes Act.*

For case law on complicity, refer to ENF24 Appendix H.

9 Procedure: Establishing inadmissibility under A35(1)(b)

9.1 Designation of regimes

A person cannot be described in A35(1)(b) unless the government concerned has been designated by the Minister of Public Safety as a regime that has been involved in terrorism, systematic or gross human rights violations, a war crime, crime against humanity or genocide within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act.*

9.2 Designated regimes pursuant to Section A35(1)(b)

Designated June 16, 1993, extended on August 15, 1997: the Bosnian Serb regime between March 27, 1992 and October 10, 1996.

Designated October 12, 1993: the Siad Barré regime in Somalia between 1969 and 1991.

Designated April 8, 1994: the former military governments in Haiti between 1971 and 1986, and between 1991 and 1994, except the period August to December 1993.

Designated October 21, 1994: the former Marxist regimes of Afghanistan between 1978 and 1992.

Designated September 3, 1996, amended September 9, 2004: the governments of Ahmed Hassan Al–Bakr and Saddam Hussein in power in Iraq between 1968 and May 22, 2003.

Designated April 27, 1998: the Government of Rwanda under President Habyarimana between October 1990 and April 1994, as well as the interim government in power between April 1994 and July 1994.

Designated June 30, 1999, amended March 14, 2001: the governments of the Federal Republic of Yugoslavia and the Republic of Serbia (Milosevic) between February 28,1998, and October 7, 2000.

Designated March 14, 2001, amended September 9, 2004: the Taliban regime in Afghanistan between September 27, 1996 and December 22, 2001.

Designated November 21, 2003: the Government of Ethiopia under Mengistu Haile Mariam between September 12, 1974 and May 21, 1991.

The Intelligence Operations and Analysis Division of the CBSA NHQ, has the responsibility for researching the human rights records of regimes. The Enforcement and Intelligence Program Directorate, in consultation with Citizenship and Immigration's International Region and the Department of Foreign Affairs, Trade and Development, provides a recommendation to the Ministers that a particular government should be designated. The following are among the factors that will be considered in deciding whether a regime should be designated:

- condemnation by other countries and organizations;
- the overall position of the Canadian government, including whether accepting a refugee claim by a senior member of the government would undermine Canada's strong position on human rights;
- the nature of the human rights violations; and
- immigration concerns such as the number of persons coming from that specific country and whether there might be a concern for the protection of Canadian society.

Where visa offices have information that would support the designation of a particular regime based on the above requirements, they may consult Citizenship and Immigration's NHQ Operational Case Management.

9.3 Requirements to establish inadmissibility

Persons who are described in A35(1)(b) may be broken down into three categories, each with its own evidentiary requirements, as set out in the following table:

Category	Evidence required	Notes
1. Persons described in R16(a), R16(b), R16(f) (ambassadors only), and R16(g)	Designation of regime Proof of position	A person in this group is presumed to be or to have been able to exert significant influence on the exercise of that government's power. This is a non-rebuttable presumption which has been upheld by the Federal Court of Appeal. In other words, the fact that a person is or was an official in this category is determinative of the allegation. Aside from the designation and proof that the person holds or held such a position, no further evidence is required to establish inadmissibility.

2. Persons described in R16(c), R16(d), R16(e), and R16(f) (senior diplomatic officials only)	Designation of regime Proof of position held Proof that position is senior (see the note following this table)	In addition to the evidence required, it must be established that the position the person holds or held is a senior one. In order to establish that the person's position was senior, the position should be related to the hierarchy in which the functionary operates. Copies of organization charts can be located from the *Europa World Year Book*, *Encyclopedia of the Third World*, *Country Reports on Human Rights Practices* (U.S. Department of State). If it can be demonstrated that the position is in the top half of the organization, the position can be considered senior. This can be further established by evidence of the responsibilities attached to the position and the type of work actually done or the types of decisions made (if not by the applicant then by holders of similar positions).
3. Persons not described in R16	Designation of regime Proof that the person could exercise significant influence or was able to benefit from the position	In addition to the designation of the regime, it must be established that the person, although not holding a formal position, is or was able to exercise significant influence on the actions or policies of the regime or was able to benefit from the position. A person who assists in either promoting or sustaining a government designated by the Minister can be characterized as having significant influence over its policies or actions. The concept of significant influence is not limited to persons who made final decisions on behalf of the regime; it also applies to persons who assisted in the formulation of these policies, e.g., by providing advice, as well as persons responsible for carrying them out, as long as the influence or benefit occurred at a high level and not an average situation applicable to large categories of people. If a person conducts activities which directly or indirectly allow the regime to implement its policies, the test for significant influence is met. The phrase "government power" in R16 is not limited to powers exercised by central agencies or departments but can also refer to entities that exercise power at the local level. Once it is established that the person exerted significant influence or benefited, the extent or degree of this influence or benefit is not relevant to the finding of inadmissibility; however, they are factors that could be considered by the Minister when deciding whether authorizing the person to enter Canada would not be detrimental to the national interest.

There is no definition of "senior official" in the IRPA but the Federal Court has held on a number of occasions that ‘senior’ applies to the top 50% of an organization.

9.4 Opportunity for person to be heard

If an officer is reporting the person for an allegation under A35(1)(b), the applicant must be given an opportunity to demonstrate that their position is not senior as described in R16 (category 2) or that they did not or could not exert significant influence on their government's actions, decisions, or policies (category 3). This can be done by mail or by personal interview. In either case, the officer should provide the applicant with copies of all unclassified documents that will be considered in assessing admissibility.

9.5 Consultation with CBSA NHQ

Officers should be aware of the sensitive nature of A35(1)(b) and the need for careful and thorough consideration of all relevant information. It is not intended that officers should cast the net so widely that all employees of a designated regime are considered inadmissible.

- Before considering the refusal of an applicant whose position is not listed in R16 or writing an A44 for an allegation of inadmissibility, officers are requested to consult with:

case-management@cbsa.gc.ca

10 Procedure: How to assess A35 or 1F(a) cases

10.1 Determining the general profile

When reviewing an application for entry into Canada or investigating an allegation of inadmissibility for persons in Canada, applicants who are from countries where there is/was war, internal turmoil, genocide, or where human rights abuses are/were widespread and who are one of the following qualify for more in-depth investigation:

- senior government officials, diplomats or employees of the government;
- current and former military, para-military, security, intelligence and police personnel or individuals employed in technical or scientific backgrounds related to chemical or biological weapons;
- close family relatives of heads of government/state;
- persons suspected of being members of an organization that is involved in terrorism or crimes against humanity; or
- members of guerrilla groups.

10.2 Security vetting of Temporary and Permanent Resident visa applicants

IRCC visa officers processing temporary and permanent resident visa applications should be aware that an Immigration Control (IC) manual outlines procedures for security screening. These manuals are classified, however an Immigration Program Manager will have a copy of the manual.

11 Procedure: Resources and support available

11.1 General program assistance

There will be situations where officers require assistance in researching or obtaining information, policy, legal advice or assistance in dealing with problematic or high profile cases. In such instances, officers may contact:

NSSD at: NSSD-DFSN@cbsa-asfc.gc.ca
(For temporary and permanent resident cases abroad)

CBSA NHQ's Case Review Unit at: case-management@cbsa.gc.ca
(For Port of Entry and in-Canada cases)

12 Roles and responsibilities

12.1 National Security Screening Division (NSSD)

The NSSD is located within the International Region, Operations Branch and is comprised of three geographic desks and one support section, namely: Asia and Oceania; Europe, Africa, Americas and Iran; Middle East, North Africa and India; and Security Screening Support.

The geographic desks are responsible for screening temporary and permanent resident applicants as well as refugee claimants for involvement in organized crime, crimes against humanity, genocide, terrorism, espionage and subversion. They also provide guidance to Immigration, Refugees and Citizenship Canada offices (both domestically and internationally) and Canada Border Services Agency enforcement offices by developing assessments and recommendations on security screening referrals.

12.2 Intelligence Operations and Analysis Division (IOAD)

The Intelligence Operations and Analysis Division of the Operations Branch at CBSA collects, analyses and disseminates actionable intelligence on individuals, organizations and events of security concern. The division conducts trend analyses and produces threat assessments and screening aids on current issues and/or groups including those related to foreign interference, espionage, war crimes, crimes against humanity and genocide.

12.3 Hearings and Investigations Unit

The Hearings and Investigations Unit, located within the Inland Enforcement Program Management Division of the Programs Branch at the National Headquarters of the CBSA specifically as it related to the War Crimes Program is responsible for:

- coordination of the CBSA program input into Canada's War Crimes Program administration documents and agreements including the annual reports, performance measurements, evaluations, etc.

- shared responsibility for governance of the program by representing the CBSA at the Program Coordination Operations Committee (PCOC) along with the CBSA's Case Review section. The unit represents the CBSA and works closely with program partners in Justice, the RCMP and IRCC in policy development and program administration, setting of program priorities, and accountability for

program performance including annual reporting, implementation of performance measurements and evaluations..

- updates of the ENF18 manual relating to War Crimes, Crimes against Humanity.
- provides functional direction and program policy development related to Canada's War Crimes Program.

12.4 Case Review Unit (CRU)

The Case Review Unit is located within the Inland Enforcement Operations and Case Management Division of the Operations Branch at CBSA and is responsible for providing advice to the regions concerning case specific enforcement options. The unit is also responsible for managing, tracking and reporting on high profile cases in consultation with program areas, IRCC and the regions. It works closely with IRCC to resolve inadmissibility issues and responds to information requests on immigration cases from senior management, the Minister's Office, IRCC and stakeholders. The CBSA's Case Review Unit is responsible for producing case chronologies; a weekly report on high-profile immigration cases; and management of the "Wanted by the CBSA" program.

Appendix A - War crimes amendments to the *Immigration Act* and Regulations

April 10, 1978 – The *Immigration Act* 1976 came into force. The Act marked a significant shift in Canadian immigration policy in limiting the wide discretionary powers of the Minister of Manpower and Immigration.

October 30, 1987 - Bill C-71 created 19(1)(j), a new ground of inadmissibility pertaining specifically to war crimes and crimes against humanity.

January 1, 1989 - Bill C-55 added to the *Immigration Act* the exclusionary clauses of the 1951 Convention Relating to the Status of Refugees. Article 1F(a) of the Convention excludes protection under the Convention to persons who have committed or are complicit in war crimes or crimes against humanity.

February 1, 1993 - Bill C-86 created 19(1)(l), a new ground of inadmissibility pertaining to individuals who are or were senior members of regimes designated by the Minister as having committed gross human rights violations or war crimes.

July 10, 1995 - Bill C-44 enabled senior immigration officers to render ineligible decisions at any stage of the refugee determination process. This included the authority to declare a positive refugee decision null and void if it was determined that the original decision on eligibility was based on misrepresentation.

May 1, 1997 - Amendments to the Post Determination Refugee Claimants in Canada Class (PDRCC) and Deferred Removal Orders Class (DROC) Regulations restricted persons excluded under Article 1F(a) of the Convention from accessing these reviews.

June 17, 1999 - Bill C-40 introduced changes to the *Immigration Act* concurrent with the proclamation of the new *Extradition Act*. These included three new provisions 69.1(12), (14), and (15) designed to harmonize the extradition and refugee determination processes.

October 23, 2000 - Bill C-19 modified the description of 19(1)(j) and (l) concurrent with the proclamation of the *Crimes Against Humanity and War Crimes Act*. The grounds of inadmissibility are now based on the definitions of war crimes, crimes against humanity, and genocide contained in the new Act.

June 28, 2002 - *Immigration and Refugee Protection Act* came into force. The Act provides two specific grounds of inadmissibility for persons involved in war crimes, crimes against humanity and/or genocide, reporting of those inadmissible and issuance of removal orders. It also provides for the exclusion from the refugee determination process of persons involved in war crimes, crimes against humanity and/or genocide; and it limits appeal rights of persons involved in war crimes, crimes against humanity and/or genocide.

Appendix B – *Crimes Against Humanity an War Crimes Act*

The Crimes Against Humanity and War Crimes Act is a statute of the Parliament of Canada. The Act implements Canada's obligations under the Rome Statute of the International Criminal Court and incorporates several grounds of jurisdiction:

Ensures Canada holds jurisdiction over crimes committed on Canadian territory and by Canadians anywhere in the world;
Gives Canada jurisdiction over crimes committed against Canadian nationals; and,
Allows Canada to prosecute any individual present in Canada for crimes listed in the Crimes Against Humanity War Crimes Act, regardless of that individual's nationality or where the crimes were committed.

Section 4 of the *Crimes Against Humanity and War Crimes Act*

4 (1) Every person is guilty of an indictable offence who commits
(a) genocide;
(b) a crime against humanity; or
(c) a war crime.

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

(2) Every person who commits an offence under subsection (1) or (1.1)
(a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and
(b) is liable to imprisonment for life, in any other case.

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

"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

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

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

(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the *Rome Statute of the International Criminal Court* are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

Appendix C - *Rome Statute of the International Criminal Court*

https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

The Rome Statute of the International Criminal Court is the treaty that established the International Criminal Court (ICC). It was adopted as a diplomatic conference in Rome on July 17, 1998 and it entered into force on July 1, 2002. As of 2015, 123 countries are party to the statute. The Rome Statute established 4 core international crimes: genocide, crimes against humanity, war crimes and crimes of aggression.

Articles 6, 7 and 8 pertain to definitions and scenarios of genocide (article 6), crimes against humanity (article 7) and war crimes (article 8)

Articles 6, 7 and 8

(a) Article 6—Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

(b) Article 7—Crimes against humanity

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 of 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.

(c) Article 8—War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefined and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva

Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii)Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiii) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xiv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi)Pillaging a town or place, even when taken by assault;

(xv) Employing poison or poisoned weapons;

(xvi) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) intentionally directing attacks against buildings, material, medical units and transport, and

personnel using the distinctive emblems of Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given objects under the law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a

serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

(f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.