Federal Court  Cour fédérale

Date: 20101203

Docket: IMM-6485-09

Citation: 2010 FC 1168

Ottawa, Ontario, this 3rd day of December 2010

Before: **The Honourable Mr. Justice Pinard**

BETWEEN:

FAUSTIN RUTAYISIRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of a decision of the Immigration Division of the Immigration and Refugee Board (the "Board"). The Board determined that the applicant was inadmissible to Canada by virtue of paragraph 35(1)(*a*) of the Act as a person who committed offences outside Canada listed in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24. For the reasons that follow, this application must be dismissed.

[2] In my opinion, the Butare prefecture in Rwanda, of which the applicant was sub-prefect, was not a limited, brutal purpose organization. However, the applicant was nonetheless complicit in crimes against humanity through his position and is accordingly inadmissible to Canada.

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[3] The applicant, Faustin Rutayisire, is a 54-year-old citizen of Rwanda of Hutu background. Prior to the genocide in Rwanda, he worked as a math teacher and was a founding member of the Parti social démocrate ("PSD"), an opposition party to the dominant Mouvement républicain national pour la démocratie et le développement.

[4] On April 6, 1994, the plane carrying Rwandan President Juvénal Habyarimana was shot down, igniting a genocide perpetrated by Rwanda's majority Hutus against the minority Tutsis. The genocide lasted approximately 100 days, ending when the Hutu regime was toppled by the Tutsi-led Rwandan Patriotic Front ("RPF") in July 1994. The RPF had been invading from the North during the genocide. The applicant lived in the southernmost province, Butare.

[5] In early May 1994, the applicant was appointed sub-prefect of Butare. He learned of his appointment from a news broadcast on the radio. He claims that he accepted the position against his will because he was frightened that refusing could endanger his safety. The former prefect of Butare, Jean-Baptiste Habyalimana, a Tutsi, had been murdered along with his family. The applicant knew of this murder, having seen the bodies of the former prefect's wife and daughters; he

also knew about the widespread massacres of Tutsis in Butare, as he had seen corpses at a university and seen murders taking place in the hills.

[6] His duties as sub-prefect did not include actively participating in the genocide. He was in charge of technical and economic affairs, and describes his duties as being of a purely administrative nature. He says the sub-prefects continued to perform their regular duties despite the ongoing violence. In his affidavit and oral testimony, the applicant provided the following details about his duties:

- he was named as a signing officer on the Civil Defense bank account by the prefect, and could not refuse this signing authority without risk; he says that to his knowledge the account never functioned after money was deposited and that he never signed a cheque to the account;
- the prefecture worked to ensure medical care and education continued to be available;
- he was responsible for a number of agricultural development projects;
- the sub-prefects worked to keep the economy running by encouraging people to return to work, re-opening the public markets, ensuring that banks were still operating, and helping a factory stay open;
- he was responsible for rationing and redistributing items such as gasoline and food;
- he was responsible for providing travel passes and military escorts;
- the prefecture collected goods left behind by people who fled or were killed, allegedly to avoid pillaging;
- the prefecture provided social services to tens of thousands of displaced people; and
- the prefecture ensured communications services, electricity, and water continued to function during the violence.

[7] The applicant fled Rwanda on July 3, 1994, and eventually made his way to South Africa, where he made a claim for refugee protection at the Canadian High Commission in 2002. On his application he indicated that he had been sub-prefect; there is accordingly no issue of misrepresentation here. On November 13, 2003 the applicant became a permanent resident of

Canada. On January 21, 2005, a report was prepared under subsection 44(1) of the Act alleging the applicant was inadmissible to Canada as a person who committed offences outside Canada listed in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act* or as a prescribed senior officer in the service of a government that has engaged in genocide or crimes against humanity.

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[8] Subsection 35(1) of the Act provides the relevant inadmissibility provisions:

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

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

(*b*) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or

[. . .]

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

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

b) occuper un poste de rang supérieur – au sens du règlement – au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

[. . .]

[9] Subsection 6(1) of the *Crimes Against Humanity and War Crimes Act* provides that the relevant offences are genocide, a crime against humanity, or a war crime, which are defined in

subsection 6(3). The fact that genocide and crimes against humanity occurred is not at issue in this case.

[10] Two pieces of case law are also central to the disposition of this application for judicial review. In *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), Justice Mark MacGuigan wrote for the Federal Court of Appeal, at page 317:

> . . . where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts.

[11] In *Ali v. Minister of Citizenship and Immigration*, 2005 FC 1306, Justice Michel Shore noted, at paragraph 10, six factors which should be considered by the Court in determining whether an individual is complicit in crimes against humanity:

(1) the nature of the organization;
(2) the method of recruitment;
(3) position/rank in the organization;
(4) knowledge of the organization's atrocities;
(5) the length of time in the organization; and,
(6) the opportunity to leave the organization.

* * * * * * * *

[12] The decision of the Board was issued on December 4, 2009, after 11 days of hearings. The Board reviewed the applicable law on crimes against humanity as well as the jurisprudence with respect to complicity. The Board then proceeded to conduct an analysis based on the six factors articulated in *Ali, supra*.

[13] The Board's analysis of the six factors can be summarized as follows.

1. *The nature of the organization / limited, brutal purpose organization*

[14] The Board found that after the assassination of President Habyarimana, a small group of leaders took control of the government and over the next 100 days undertook a campaign of genocide against the country's Tutsi population.

[15] The Board considered the administrative framework which facilitated the genocide, specifically noting that the prefects, sub-prefects, and burgomasters served as the link between the army and the civilian population. According to the evidence, these different levels of government collaborated to control the movement of Tutsis and others, access to food and water, patrols, distribution of vehicles and gasoline, the redistribution of goods taken from those who had been displaced or murdered, and the cleaning up of evidence of the massacres. While these politicians and bureaucrats were not necessarily those holding the machetes, the Board cites evidence that "[l]a différence entre la vie ou la mort tenait parfois, pour les Tutsis, à une simple decision bureaucratique".

[16] The Board also considered the fact that the Minister of Citizenship and Immigration has designated the regime in power between April and July of 1994 as a regime that committed genocide. The Board specifically cited the case of *Imeri v. The Minister of Citizenship and Immigration*, 2009 FC 542, where Justice Luc Martineau overturned the decision of the Board that the National Liberation Army, a pro-Albanian group operating in Macedonia, was not a limited, brutal purpose organization.

[17] Ultimately, the Board concluded that because the seizure of power by a small group of leaders was primarily motivated by the eradication of Tutsis, the interim government of Rwanda, including the Butare prefecture, was a limited brutal purpose organization.

2. *The method of recruitment*

[18] The Board considered that the appointment of Sylvain Nsabimana as prefect of Butare was a strategic choice by the central government and the *Interahamwe* militia because as a member of the PSD, the dominant political party in Butare, he would be in a position to facilitate the genocide in that province. The Board found that the applicant's appointment to the position of sub-prefect was also a strategic decision to facilitate the genocide in Butare, given the need to garner popular support in Butare and the applicant's status as a founding member of the PSD. The Board found that the interim government did not want to appoint a moderate Hutu as sub-prefect, but rather sought someone who would follow orders from the central government: the applicant.

[19] The Board considered the applicant's testimony that he had no choice but to accept his appointment because of the danger inherent in refusing. The Board found that the applicant had not established duress to the degree required by the jurisprudence: "imminent physical peril in a situation not brought about voluntarily and that the harm caused was not greater than the harm to which the individual was subjected" (*Oberlander v. The Attorney General of Canada*, 2009 FCA 330, at paragraph 25). The Board noted that many people, including a former sub-prefect, had fled across the border to Burundi. The Board found that the applicant made no effort to refuse the position, and in so doing chose to associate with the Hutu extremists who perpetrated the genocide.

3. *Position/rank in the organization*

[20] The Board concluded that the sub-prefect held a high-ranking position at the local level and that the mandate given to him was important. The Board reviewed his responsibilities, detailed above, and found that contrary to the applicant's statements, there was good reason to believe that the applicant was a part of the "Conseil de sécurité de la préfecture", given the appearance of the applicant's name on various pertinent documents.

[21] The Board also concluded that the administrative tasks performed by the prefecture facilitated the implementation of the central government's plan to exterminate the Tutsis and had a direct link with the genocide perpetrated in Butare.

4. *Knowledge of the organization's atrocities*

[22] The Board found that the applicant knew that massacres had occurred when he was appointed as sub-prefect. Indeed, he had witnessed massacres as well as seen corpses on a number of occasions. He knew that refugees seeking protection at the prefecture were disappearing at night.

5. *The length of time in the organization*

[23] The Board noted that the time the applicant served as sub-prefect, from May to July of 1994, was within the 100 days during which the genocide took place.

6. *The opportunity to leave the organization*

[24] The Board noted that the applicant only left Butare when the RPF had taken control of the country, and accordingly the Board was not satisfied that he had tried to dissociate himself from the

government or looked for ways to flee, even though his nephew and other family members had left in June, at the same time as others.

[25] Thus, on the basis of this analysis, the Board concluded that given his close association with his government and his knowledge of the atrocities, the applicant was complicit by association with the government, and the requisite *mens rea* existed. The Board also found, based on an evaluation of the first of the six factors (the nature of the organization) that the applicant was complicit based on his membership in an organization with a limited brutal purpose. Accordingly, the Board determined that the applicant was inadmissible by virtue of paragraph 35(1)(*a*) of the Act.

[26] However, with respect to paragraph 35(1)(*b*) of the Act, the Board concluded that the applicant was not a prescribed senior official.

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[27] The issues in this matter may be formulated as follows:

1. Did the Board err in finding that the interim government of Rwanda, and accordingly the Butare prefecture, was a limited brutal purpose organization?

2. Did the tribunal err in finding that the applicant was complicit in the genocide and crimes against humanity?

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1. ***Did the Board err in finding that the interim government of Rwanda, and accordingly the Butare prefecture, was a limited, brutal purpose organization?***

[28] The applicant submits that the prefecture of Butare was not a limited, brutal purpose organization. According to the applicant, only if an organization is one that has no objective other than the commission of crimes against humanity is it properly characterized as a limited brutal purpose organization.

[29] The applicant submits that in this case, the prefecture of Butare was engaged in multiple functions, and that the applicant's duties involved a range of activities. The applicant argues that it was the military and not civil authorities that had control over the genocide, and that although some of the activities he worked on could be linked to the genocide, these tasks were necessary to keep the prefecture functioning. The applicant submits that the primary goal of the prefecture was not to commit war crimes or crimes against humanity, but that the prefecture was a "complex organization involved in a variety of functions and purposes," many of which were distinct from the functions of the central government.

[30] For his part, the respondent argues that the determinative factor is whether the main purpose of the organization is achieved by crimes against humanity. According to the respondent, the single limited brutal purpose of the interim government of Rwanda was the massacre of Tutsis and moderate Hutus. The respondent says that the evidence demonstrates that the interim government used the instruments and authority of the Rwandan state to achieve its purpose of killing Tutsis, and that the fact that the Butare prefecture continued to offer services to the population is not relevant and does not alter the genocidal purpose of the organization. Accordingly, the interim government,

including the Butare prefecture, was “an organization whose very existence was premised on achieving the eradication of the Tutsis and of Hutu moderates by any means necessary.”

[31] A preliminary issue in considering whether the applicant was a member of a limited brutal purpose organization is whether the focus of the inquiry should be on the national interim government or on the Butare prefecture. The applicant’s submissions focus on the Butare prefecture, while the respondent focuses on the interim government as a whole. In my view the focus must be on the Butare prefecture. This is the organization with which the applicant was associated. There is no evidence that he had any links with the senior leaders in the national interim government.

[32] The Butare prefecture does not fit neatly into the existing jurisprudence regarding limited brutal purpose organizations. Cases that have considered this status have typically concerned specific and discrete groups, not entire governments and bureaucracies. Examples include militias (*Balta v. Canada (M.C.I.)*, [1995] F.C.J. No. 146 (T.D.) (QL)), police forces (*Loordu v. Canada (M.C.I.)*, [2001] F.C.J. No. 141 (T.D.) (QL)), death squads (*Oberlander*, *supra*), armies (*Antonio v. Solicitor General*, 2005 FC 1700), and terrorist or rebel groups (*Rai v. Canada (M.C.I.)*, [2001] F.C.J. No. 1163 (T.D.) (QL)); *Mendez-Leyva v. The Minister of Citizenship and Immigration*, 2001 FCT 523). Although in *Thomas v. Minister of Citizenship and Immigration*, 2007 FC 838, Justice Richard Mosley found that the Armed Forces Revolutionary Council, the military group which formed the government of Sierra Leone, was a limited brutal purpose organization, he did not go so far as to say that all subordinate levels of government would also be assigned this status.

[33] Furthermore, the language used in the jurisprudence appears to anticipate a much narrower focus, not one that would encompass entire bureaucracies. In the seminal *Ramirez* decision, Justice MacGuigan's understanding of "limited" purpose seemed to be more strict than the interpretation the respondent proposes:

> It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, *such as a secret police activity*, mere membership may by necessity involve personal and knowing participation in persecutorial acts. (Emphasis added.)

[34] More recently, in *Minister of Citizenship and Immigration v. Seifert*, 2007 FC 1165, Justice James O'Reilly, at paragraph 20, offered a death squad as an example of a limited brutal purpose organization. In the context of Rwanda it has been held that the Rwandan military during the genocide was a limited brutal purpose organization: *Seyoboka v. Canada (Minister of Citizenship and Immigration)*, [2010] 2 F.C.R. 3 (F.C.).

[35] The interpretation proposed by the respondent is tantamount to asking this Court to accept that an entire state may be classified as a limited brutal purpose organization. I do not think the jurisprudence goes this far. The Board found, reasonably in my view, that the leaders who seized power after the President's assassination usurped the power of the state and used it to accomplish genocide. In so doing, they employed the administrative powers of the state, including the prefecture of Butare, to facilitate crimes against humanity. Many bureaucrats, administrators, and local civic leaders either actively participated or acquiesced to the violence and performed compartmentalized duties which contributed to the genocide. For this reason they are complicit in genocide and must be held accountable. However, the avenue for accountability should be through a

finding of complicity on the facts of their participation, not a presumption based on their membership in an institution as varied and multipurpose as a government.

[36] The respondent's submission that the Butare prefecture was "an organization whose very existence was premised on achieving the eradication of the Tutsis and of Hutu moderates by any means necessary" is not logical. The Butare prefecture existed before the genocide and continued to exist after the genocide. It evidently had purposes other than crimes against humanity before April 1994, purposes which included the promotion of health, education, agriculture and commerce. During the genocide these purposes continued to exist. The Board found and the respondent suggests that the performance of the prefecture's duties from April to July of 1994 became encompassed within a broader genocidal purpose. It is clear on the facts that a number of the ostensibly administrative activities of the prefecture supported the genocide, for example those functions related to travel and finance. However, it is also clear that other activities did not support the genocide, for example saving cows or promoting the coffee trade. The purposes of the prefecture were manifold, not limited.

2. ***Did the tribunal err in finding that the applicant was complicit in the genocide and crimes against humanity?***

[37] The applicant notes that absent direct involvement in crimes against humanity, a close association with an organization responsible for such crimes may constitute complicity only if there is "personal and knowing" participation in the crime. The applicant submits that the Board's assessment of the six complicity factors was unreasonable and that the Board ignored evidence from

the applicant's testimony that showed that he had no personal and knowing participation in the genocide.

[38] The applicant submits that in the case law, "personal and knowing" participation has been found in cases where associations with organizations perpetrating crimes against humanity were longstanding and voluntary, and that this is not the case here. The applicant relies on *Bazargan v. Canada (M.C.I.)*, [1996] F.C.J. No. 1209 (C.A.) (QL), *Ryivuze v. Minister of Citizenship and Immigration*, 2007 FC 134, and *Loayza v. Minister of Citizenship and Immigration*, 2006 FC 304. The applicant submits that he feared his life would be in danger if he refused the appointment, that he left the organization when he felt it was safe to do so, and that his entire association with the organization lasted less than two months.

[39] The applicant also submits that mere knowledge of crimes committed by the organization is insufficient to ground a finding of complicity absent other evidence that the applicant was involved in the offence. Likewise, the applicant says mere membership does not indicate complicity unless it is a limited brutal purpose organization.

[40] After reviewing the Board's analysis of each of the six factors used to determine whether the applicant was complicit in crimes against humanity, the respondent, for his part, submits that none of the Board's findings in that regard were unreasonable. I agree. In my view, the Board's findings regarding the applicant's complicity fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[41] At paragraph 11 of *Bazargan*, *supra*, the Federal Court of Appeal, relying on Justice MacGuigan's decision in *Ramirez,* found as follows:

> . . . At p. 318, MacGuigan J.A. said that "[a]t bottom, complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.

[42] While as noted above the Butare prefecture was not a limited brutal purpose organization, once the control of the prefecture had been overtaken by the directing minds of the genocide, the prefecture and its agents had a shared common purpose with the interim government. The applicant had knowledge of the genocide and that it was taking place within the prefecture, and accordingly his participation was "personal and knowing."

[43] Although the applicant states that he feared for his life if he were to refuse the appointment, he failed to demonstrate that he was at risk of "imminent physical peril in a situation not brought about voluntarily and that the harm caused was not greater than the harm to which the individual was subjected" (*Oberlander, supra*, at paragraph 25). While he stated that opponents of the government were at risk, he did not present evidence that this risk was imminent.

[44] The applicant suggests the Board ignored his statement that his decision to sign travel passes for Tutsis to be taken to the refugee camp was based on a desire to protect them. However, the Board never found that the applicant knew the Tutsis would be killed at the refugee camp; the

Board's finding was that the accomplishment of various administrative tasks, including but not limiting to enabling travel, facilitated the genocide.

[45] The Board did not ignore the fact that the applicant attempted to protest the crimes; rather, the Board found that his intervention was insufficient. Nor did the Board conflate general knowledge with specific knowledge; the Board considered that the applicant knew that massacres were occurring and that he had witnessed murders and seen dead bodies.

[46] The applicant's submission that the Board erred when it found that the applicant could have fled because it did not consider that a Tutsi-led military government was in power in Burundi is also unconvincing. The reasonableness of the Board's finding is confirmed by the applicant's own affidavit, in which he writes, at paragraph 18, that "[t]ens of thousands of Hutus were attempting to flee to Burundi . . .".

[47] The applicant's argument that the jurisprudence surrounding "personal and knowing" participation requires longstanding and voluntary involvement does not assist the applicant here. Considerations of the length of involvement are unhelpful on the facts of this case because of the short duration of the interim regime. Moreover, the applicant remained in his position until the very end of the regime when the RPF invaded. The question of voluntariness was addressed by the Board when it provided a reasonable analysis of the alleged existence of compulsion and duress.

[48] The applicant's submission that mere knowledge of crimes against humanity is insufficient to ground a finding of complicity absent other evidence the applicant was involved does not assist

the applicant, because here there was other evidence that the applicant was involved in the offence. The Board found that the applicant, as sub-prefect, facilitated the genocide through both his specific duties and delegations as well as more generally by ensuring the continuing functioning of the prefecture, the apparatus of which was used to perpetrate genocide. This latter finding reflects one of the most frightening aspects of genocide: the compartmentalization of responsibility into discrete tasks such that each of the perpetrators is able to say that they themselves were not guilty. The Board, at page 11 of its decision, cited Alison Des Forges' description of this disturbing tendency (*Expert Report by Alison Des Forges Prepared for the Butare Case ICTR-98-42-T, 1 June 2001*, at page 77):

> . . . By the regular and supposedly respectable exercise of their public functions, they condemned Tutsi to death for the mere fact of being Tutsi. Silent before the daily horror, they sought to hide behind the bureaucratic routine that divided the genocide into a series of discrete tasks, each ordinary in itself. But in the end, the semblance of administration as usual failed to disguise the ultimate objective of extermination.

[49] The Board itself wrote at paragraph 81 of its decision:

> Un dernier mot sur la situation à Butare par rapport aux activités de M. Rutayissire comme fonctionnaire exécutant. L'administration locale à Butare fonctionnait remarquablement bien en dépit des massacres. Or, selon la preuve documentaire, l'accomplissement de tâches administratives par la préfecture facilitait la mise en place du plan national pour exterminer les Tutsis. […] Cependant, le tribunal ne peut que constater que la plupart des tâches que M. Rutuyisire accomplissaient avait un lien direct avec les effets du génocide qui faisaient rage à Butare pendant son mandat à titre de sous-préfet.

[50] Any realistic approach to state-sanctioned crimes against humanity and genocide must acknowledge that the circle of complicity is much broader than simply those directly ordering or

carrying out violent acts. It should properly encompass those who, with knowledge of the crimes being perpetrated, acted or acquiesced in administrative positions that facilitated violence and normalized brutality. This is the approach the Board took. It reached a reasonable conclusion on the applicant's complicity based on a comprehensive and reasoned balancing of the evidence before it, including the applicant's own testimony.

[51] At the hearing, learned counsel for the applicant argued that after finding that the prefecture was a limited brutal purpose regime, the Board proceeded to consider the question of complicity in the context of rebutting a presumption of complicity, rather than engaging in an independent analysis of whether the relevant factors demonstrated complicity. Thus, the applicant contends, given that the Board was mistaken in its determination that the prefecture was a limited brutal purpose organization, the entire decision must fail because this unreasonable determination coloured the Board's analysis of the complicity factors.

[52] A careful reading of the Board's reasons reveals that this is not the case. Although the Board considered the question of whether the Butare prefecture was a limited brutal purpose regime under the heading of the first of the six complicity factors, the nature of the organization, it is clear that the Board's finding in this respect did not taint its broader analysis of complicity, which remained a conceptually and practically distinct exercise throughout the Board's reasons. For example, at the beginning of the Board's analysis on complicity, at paragraph 59 of its reasons, the Board clearly demonstrates its understanding of the two distinct routes for arriving at a finding of complicity:

> . . . Selon la jurisprudence, il y a deux façons qu'une personne puisse être considérée « complice »: soit par une association étroite et volontaire avec les acteurs principaux qui ont commis les actes de

> persécution, soit par simple appartenance à une organisation qui vise principalement des fins limitées et brutales.

[53] The Board went on to cite from a number of cases, including *Ali, supra*. *Ali* addressed the six complicity factors and, by my reading, does not relate to rebutting any presumption of complicity arising from membership in a limited, brutal purpose organization. Likewise, in *Teganya v. The Minister of Citizenship and Immigration,* 2006 FC 590, Justice Pierre Blais provided guidance as to determining complicity but did not address the limited, brutal purpose issue. In my view, the Board's reference to these cases on complicity is further evidence that the Board did not conflate the limited, brutal purpose presumption with an analysis of complicity based on the six relevant factors.

[54] Paragraph 64 of the Board's decision further demonstrates that the issue of whether the prefecture was a limited, brutal purpose regime was considered on its own merit, although within the Board's analysis of the first complicity factor, the nature of the organization:

> Les critères soutirés de la jurisprudence se résument surtout en six facteurs à appliquer. Cependant, étant donné que le conseil du ministre allègue que le gouvernement intérimaire au Rwanda entre les mois d'avril et juillet 1994 constitue une organisation ayant principalement des fins limitées et brutales, nous allons aussi traiter de cette prétention dans le cadre du premier facteur.

[55] The distinction also appears from the heading of the analysis of the first factor, just before paragraph 65 of the Board's reasons:

> 1. <u>La nature de l'organisation / organisation ayant des fins limitées et brutales</u>

[56] This organizational choice does not disrupt the integrity of the Board's analysis regarding complicity. The Board made it clear, at paragraph 87 of its reasons, that its analysis of the six complicity findings led it to a finding that the applicant was complicit in crimes against humanity:

> Après avoir analysé les faits en fonction des six critères précités, le tribunal conclut que M. Rutayisire est complice en raison de son association avec les auteurs principaux qui ont commis des crimes contre l'humanité, à savoir, le gouvernement intérimaire du Rwanda, perpétrés entre les mois de mai et juillet 1994. . . .

[57] This conclusion was not one based on any presumption. It derived from the Board's conclusions regarding complicity, which were based on its analysis of the evidence before it. In the paragraphs that follow, the Board summarizes the common knowledge and intention that the applicant shared with the perpetrators of the genocide. The Board then proceeds, at paragraph 91, to come to an independent determination of complicity based on the applicant's membership in a limited, brutal purpose organization:

> *De plus*, le tribunal arrive à la conclusion que M. Rutayisire est complice par son appartenance à une organisation visant principalement des fins limitées et brutales, à savoir son gouvernement. (Emphasis added.)

[58] In my view, the Board's choice of the words "de plus" is a clear indication of the discrete nature of its finding.

[59] The applicant referred to *Yogo v. The Minister of Citizenship and Immigration*, 2001 FCT 390, a decision where Justice Dolores Hansen, at paragraph 21, found that the complicity factors must be considered within the context of the first factor, the nature of the organization. Here, it is

clear that the Board considered the five other complicity factors within the context of the nature of the organization, which was determined to be a limited brutal purpose organization. However, I do not think that in this case the Board's analysis should be disrupted based on its finding that the Butare prefecture was a limited brutal purpose organization given that the Board clearly stated that the applicant was guilty of complicity "en raison de son association avec les auteurs principaux qui ont commis des crimes contre l'humanité". In *Yogo*, this clear language did not exist, and indeed Justice Hansen found, at paragraph 22, that having reviewed the Board's reasons:

> . . . it *remains unclear* whether the applicant's complicity was based on the operation of the presumption and his failure to rebut the presumption because his evidence was disbelieved or whether the personal and knowing participation was inferred from its analysis of the [complicity] factors . . . (Emphasis added.)

[60] *Yogo* can also be distinguished on the basis that in that case, the Board had erred in its finding that the applicant voluntarily joined and continued his association with an organization that committed crimes against humanity. The Court in *Yogo* was unable to determine whether, in the absence of that error, the Board would have reached the same conclusion. The same is not true here. The Board did not err in finding that the interim government and the Butare prefecture committed crimes against humanity, and it did not err in its analysis of the applicant's complicity with the prefecture, which it supported with its findings regarding his recruitment, lack of attempt to disassociate himself, and knowledge of the crimes against humanity being committed. The Board then, "de plus," found that the applicant was complicit based on his membership in a limited brutal purpose organization.

[61] Here, unlike in *Yogo*, there is no mystery as to what the Board would have concluded absent its finding that the prefecture was a limited brutal purpose regime. The Board, in reliance on the applicant's direct association and common intention with his government and knowledge of the atrocities committed, found that the applicant was complicit. It is clear that this determination was not based on any presumption given that the Board specifically found the applicant to have the requisite *mens rea* (paragraph 90). The Board then proceeded to the independent conclusion that he was complicit based on his membership in a limited brutal purpose organization.

[62] For the above-mentioned reasons, the application for judicial review is dismissed.

[63] The applicant proposes the following question for certification:

> Is the proper test for characterization of an organization as one with a limited brutal purpose whether all the activities of the organization are directed towards the commission of crimes against humanity and are thus so intertwined with the commission of crimes as to be inseparable from such a purpose?

[64] In view of my above finding that the applicant was complicit in genocide, crimes against humanity and war crimes and inadmissible under paragraph 35(1)(*a*) of the Act regardless of the issue of whether the organization he belonged to had a limited brutal purpose, the proposed question is not determinative of the application for judicial review and is, therefore, not certified (see *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4 (F.C.A.)).

JUDGMENT

The application for judicial review of the decision rendered on December 4, 2009 by the Immigration Division of the Immigration and Refugee Board of Canada is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-6485-09
STYLE OF CAUSE:	Faustin RUTAYISIRE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	December 3, 2010

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