

The Supreme Court of Canada's Decision in *Ezokola* and the Harmonisation of Article 1f (A) of the Convention of the Status of Refugees and International Criminal Law

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Introduction

The Convention Relating to the Status of Refugees ("the Convention"), as amended by the Protocol Relating to the Status of Refugees ("the Protocol") with effect from 4 October 1967 [1], prohibits contracting parties from expelling ("refouling") a refugee, as defined by Article 1A(2) of the Convention, from its territory, except in very limited circumstances [2]. Article 1A (2) provides that a person is a "refugee" if:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Canada acceded to both the Convention and the Protocol on 4 June 1969 [3].

However, a person who falls within Article 1A(2) of the Convention can be excluded from refugee status and denied the protection of the Convention if he or she falls within any of Articles 1D, 1E or 1F. This paper is concerned with Article 1F (a), which provides as follows:

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.

Michael Kingsley Niyamah states that "Article 1F is underpinned by the idea that certain persons do not *deserve* protection as refugees by reason of serious transgressions committed, in principle, prior to seeking asylum" [4]. Kingsley argues that Article 1F is necessary to uphold the integrity of the Convention – for example, if perpetrators of serious crimes were to be accorded international protection along with their victims, "the image of the institution of asylum would be impugned" [5].

Canadian appellate courts have historically taken a very wide view of when there are "serious reasons to believe" that a person has committed the kinds of offences envisaged by Article 1F (a) of the Convention. In particular, they have taken the view that, in some cases at least, mere membership of a particular group is sufficient to exclude a person from protection under the Convention. However, in *Ezokola v Canada (Citizenship and Immigration)* [6] the Supreme Court has attempted to reconcile the requirements for responsibility for war crimes and crimes against humanity at international criminal law, and the requirements for exclusion under Article 1F(a). It will be argued that while exclusion from refugee status and conviction before

a criminal court are two very different procedures, this approach is a considerable advance in Canadian law.

This paper is in four parts. The first is concerned with the history and purpose of Article 1F (a) of the Convention. The second considers Canadian appellate-level authority on this provision prior to *Ezokola*, and the third discusses the *Ezokola* decision and how it attempts to reconcile international criminal law with the exclusion provisions of Article 1F(a). The fourth part concludes the article and draws some themes together.

Part 1 – History and Purpose of Article 1F (a)

Drafting intentions

Article 1F was clearly drafted with the events following the end of WWII in mind and the *travaux préparatoires* indicate that it was included in the Convention for two main reasons. First, refugee status had to be protected from abuse by preventing "undeserving" cases from receiving protection [7]. In other words, the drafters believed that because of the fundamentally humanitarian nature of asylum, it would undermine the credibility of the refugee system if individuals who actually caused some of the circumstances that led to refugee claims were able to benefit from the Convention. Secondly, the drafters were concerned that refugee status could lead to impunity for war crimes, and were particularly unwilling to give Nazi or Japanese war criminals the chance to escape prosecution [8]. This is illustrated by the fact that earlier drafts of the exclusion clauses contained explicit reference to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, generally known as the "London Charter" [9].

Sources considered in drafting article 1F

Atle Grahl-Madsen [10], writing in 1966, gave a detailed summary of the international documents that "fed in" to the drafting of Article 1F, some of which were prepared as early as August 1945. The biggest influence on the drafting of Article 1F, however, was London Charter. Grahl-Madsen first points to paragraph 7(d) of the Statute of the Office for the United Nations High Commissioner for Refugees (UNHCR),

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Received September 24, 2014; Accepted October 24, 2014; Published October 31, 2014

Citation: Freckelton A (2014) The Supreme Court of Canada's Decision in *Ezokola* and the Harmonisation of Article 1f (A) of the Convention of the Status of Refugees and International Criminal Law. J Civil Legal Sci 3: 133. doi:10.4172/2169-0170.1000133

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which provides that the UNHCR does have jurisdiction in relation to persons:

In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in Article VI of the London Charter of the International Military Tribunal, or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

Grahl-Madsen then explains as follows [11]:

Article 6 of the London Charter defines crimes against peace, war crimes, and crimes against humanity. Article 14(2) of the Universal Declaration of Human Rights speaks of “non-political crimes” and “acts contrary to the purposes and principles of the United Nations”. It will be seen, therefore, that Article 1F(a) of the Convention has been developed from the reference to Article 6 of the London Charter in Paragraph 7(d) of the UNHCR Statute.

Part 2 – Application of Article 1f (A) in Canada

Canadian legislation

The *Immigration and Refugee Protection Act* [12] (“the IRPA”) governs the admission of persons who are not Canadian citizens to Canada. Subsection 3(2) of the IRPA specifies a number of objectives of that Act with respect to refugees, including the following:

(b) To fulfill Canada’s international legal obligations with respect to refugees and affirm Canada’s commitment to international efforts to provide assistance to those in need of resettlement

(h) To promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals

The term “Convention refugee” is defined in s.96 of the IRPA as follows:

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) Is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) Not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

A person who has been accorded refugee status by the Refugee Protection Division (RPD) or Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB) is eligible for permanent resident status in Canada under s.12(3) of the IRPA.

It is immediately clear that s.96 of the IRPA closely follows the wording of Article 1A (2) of the Convention, as amended by the Protocol. Section 98 of the IRPA then provides that “a person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection”, and Articles 1E and 1F of the Convention are reproduced verbatim in the Schedule to that Act.

Other provisions of the IRPA that frequently arise in matters related to Article 1F exclusion are ss.34-37 and 115. Sections 34 to 37 deal with inadmissibility to Canada on the grounds of security, “violating human or international rights”, “serious criminality” and

“organised criminality” respectively. Article 1F(a) can therefore be relevant at the initial refugee processing stage, where a person applies for refugee status and is refused because they fall within Article 1F(a) of the Convention, or in later inadmissibility proceedings. If a person has already been found to be a refugee, and evidence of war crimes or crimes against humanity later comes to light, they can be subjected to an inadmissibility hearing [13]. A person who is found to fall within Article 1F(a) in such proceedings may be no longer recognised as a refugee as a result and may be found to be inadmissible to Canada under any of ss.34 – 37 of the IRPA. Alternatively, a person granted permanent residence on grounds other than refugee status may apply for or renew an application for refugee status if he or she is subjected to inadmissibility proceedings. That claim will then be considered, including an analysis of Article 1F(a).

Finally, s.115 of the IRPA provides that a “protected person” [14] is not to be removed from Canada solely because he or she falls within ss. 34 – 37 of the IRPA. Instead, the Minister must be satisfied that the person is a “danger to the public”, a “danger to security” or that the acts that they have committed are so serious that they should no longer be permitted to remain in Canada. Since Article 1F(a) deals with the worst kinds of crimes in existence, it is difficult to conceive of a situation where a person who is found to fall within that provision would not also fall within at least s.115(2)(b) of the IRPA.

Sections 4 – 7 of the *Crimes against Humanity and War Crimes Act* [15] are referred to in s.35 of the IRPA. The crimes of genocide, crimes against humanity and war crimes are defined in this Act by reference to both customary international law and international conventions.

International instruments considered in construction of the terms “War Crimes” and “Crimes against Humanity”

Article 1F(a) refers to “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 clearly indicates an intention on the part of the drafters that decision-makers with the task of deciding claims for refugee status should consider *international* law when deciding what constitutes a war crime or a crime against humanity, and not simply the receiving State’s domestic law.

Canadian cases have undertaken the task to examine sources of international law, but some have fallen back on considering domestic legislation as well. Appellate level cases that have embarked on a substantive consideration of the applicability of Article 1F(a) have considered the following international instruments:

- Charter of the United Nations – preamble, Articles 1 and 2 [16]
- Law No. 10 dated December 20, 1945, of the *Control Council for Germany* – paragraph II(1)(c) [17]
- London Charter – Article 6 [18]
- Charter of the International Military Tribunal for the Far East – Article 5 [19]
- Convention for the Prevention and Punishment of the Crime of Genocide, 9 December 1948 [20]
- Statute of the Office of the United Nations High Commissioner for Refugees, GA Res. 428 (V), UN GAOR, December 14, 1950 – Articles 2 and 7, Annex [21]
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – Article 3 [22]

- Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/46/405, 11 September 1991 – Article 25 [23]
- Statute of the International Criminal Tribunal for Rwanda – Article 3 [24]
- Statute of the International Criminal Tribunal for the Former Yugoslavia – Article 5 [25]
- Rome Statute of the International Criminal Court – Articles 6, 7, 25, 28 and 30 [26]

The London Charter was by far the most cited source of international law on the definition of “war crimes” and “crimes against humanity” at the Canadian appellate level until the Rome Statute commenced. However, the London Charter has not been referred to since the 2003 case of *Zrig v Canada (Minister of Citizenship and Immigration)* [27].

Of the other major international instruments, the statutes for the International Criminal Tribunals of Rwanda and Yugoslavia (ICTR and ICTY respectively) were not even considered as international instruments in *Harb v Canada (Minister of Immigration and Citizenship)* [28], without any explanation being given for such a finding. While *Harb* has never been expressly overturned, later cases did consider the ICTR and ICTY statutes, most prominently in the *Mugesera* cases [29], where the applicant was argued to have committed crimes against humanity in Rwanda. *Harb* is also authority for the proposition that “it is clear that Article 1F (a) should be interpreted so as to include international instruments concluded since it was adopted” [30], a finding that ensures that interpretation of this article can “move with the times”.

The decisions of the two ad hoc tribunals have been referred to fairly rarely, although in *Zazai v Canada (Minister of Citizenship and Immigration)* [31] the Federal Court of Appeal referred to three ICTY and three ICTR decisions [32]. This suggests that the appellate level Canadian courts regard international conventions as a somewhat more reliable source of international law than decisions of international criminal courts, which, it could be argued, are not truly “international instruments” at all, but simply judgements.

It is also notable that Canadian courts have on some occasions failed to refer directly to any international sources at all, and rely solely on Canadian legislation or case law. A literal reading of Article 1F(a) suggests that this could be an error of law. For example, in *Equizabal v Canada (Minister of Citizenship and Immigration)* [33] the Federal Court of Appeal relied solely on the then recent Supreme Court decision of *R v Finta* [34] to describe the term “crimes against humanity”. *Zazai* [35] may have fallen into the same trap, by not referring directly to any international instrument. Instead, as previously noted, it relied on three decisions of the ICTR and three of the ICTY, s.6 of the *Crimes Against Humanity and War Crimes Act*, s.19(1)(j) of the *Immigration Act 1985* [36] and s.35(1)(a) of the IRPA to define “crimes against humanity”.

Complicity in international crimes – Pre-*Ezokola* analysis

In *Ezokola* itself, the Supreme Court noted that “international criminal law, while built upon domestic principles, has adapted the concept of individual responsibility to this setting of collective and large-scale criminality, where crimes are often committed indirectly and at a distance” [37]. The Court also cited [38] Gerhard Werle as follows [39]:

When allocating individual responsibility within networks of collective action, it must be kept in mind that the degree of criminal

responsibility does not diminish as distance from the actual act increases; in fact, it often grows. Adolf Hitler, for example, sent millions of people to their deaths without ever laying a hand on a victim himself. And mass killer Adolf Eichmann organized the extermination of European Jews from his office in the Berlin headquarters of the “Reichssicherheitshauptamt” of the SS.

Compare this situation to that of “common crimes” where, with rare exceptions (such as in the case of large-scale organised crime networks), complicity for a crime tends to decrease with distance from the actual criminal act. The liability of leaders and commanders, who may be hundreds or thousands of kilometres from the “action”, in ordering and organising large-scale atrocities must be dealt with by both international criminal courts and by administrative decision-makers dealing with the applicability of Article 1F(a) of the Convention.

Ramirez: Prior to *Ezokola*, the test for complicity in war crimes or crimes against humanity in Canadian refugee law was set out in *Ramirez v Canada (Minister of Employment and Citizenship)* [40]. Despite this case now being 20 years old, its reasoning was explicitly endorsed as recently as 2011 by the Federal Court of Appeal in, ironically enough, *Canada (Citizenship and Immigration) v Ezokola* [41].

The facts in *Ramirez* were fairly straightforward. The applicant was a member of the armed forces of El Salvador. The Court described his activities in the army as follows:

The appellant enlisted voluntarily in the Salvadoran Army for two years as of February 1, 1985, and was such an effective soldier that he was promoted to corporal and then to sub-sergeant. During this period he was involved in between 130 and 160 instances of combat [42].

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

A: Torture people, kill people. Sometimes in combat the enemy would just spend all his ammunition and then we would capture them alive and there are some soldiers who are very, have a very strong character or they are very hard people, tough people and they just tortured these prisoners and finally they would kill them. The prisoners would be, before being killed, they would say the names of other people and then the soldiers would go to the houses where these people are and they would round them up [43].

I find it clear from these and other passages in the appellant’s testimony, as well as from the documentary evidence, that the torture and killing of captives had become a military way of life in El Salvador [44].

There was no evidence before the court or the Refugee Division that Ramirez had personally executed or tortured anyone, or that he had ordered anyone else to do so. Nevertheless, the Federal Court of Appeal found that there were serious reasons to believe that he had committed either war crimes or crimes against humanity. At paragraph 38 MacGuigan JA, with whom Linden and Stone JJA agreed, stated as follows:

I cannot see the appellant’s case as even a borderline one. He was aware of a very large number of interrogations carried out by the military, on what may have been as much as a twice-weekly basis (following some 130-160 military engagements) during his 20 months of active service. He could never be classed as a simple on-looker, but was on all occasions a participating and knowing member of a military force, one of whose common objectives was the torture of prisoners to

extract information. This was one of the things his army did, regularly and repeatedly, as he admitted. He was a part of the operation, even if he personally was in no sense a “cheering section”. In other words, his presence at this number of incidents of persecution, coupled with his sharing in the common purpose of the military forces, clearly constitutes complicity. We need not define, for purposes of this case, the moment at which complicity may be said to have been established, because this case is not to my mind near the borderline. The appellant was no innocent by-stander: he was an integral, albeit reluctant, part of the military enterprise that produced those terrible moments of collectively deliberate inhumanity.

Ramirez, therefore, was found to be “complicit” in the crimes against humanity committed by the El Salvadoran army because he knew that executions and torture were occurring but continued to serve with the military for nearly three years before his final desertion. He was also present at the scene of crimes committed by his subordinates, and did not prevent them from occurring.

MacGuigan JA also noted 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” [45]. That is, if the applicant is a member of such an organisation, he or she does not need to know about any specific actions of the group to be “complicit” in them; otherwise, he or she must have “personal and knowing participation” in war crimes or crimes against humanity to fall within the scope of Article 1F(a).

Moreno: A decision seemingly contrary to Ramirez was reached in *Moreno v Canada (Minister of Employment and Immigration)* [46]. In that case, the applicant had been found by the Immigration Appeals Board to have committed crimes against humanity by standing guard and not intervening while superior officers tortured a prisoner. At paragraph 48 Robertson JA noted as follows:

I am driven to the conclusion that the appellant's acts or omissions would not be sufficient to attract criminal liability as a matter of law. The appellant did not possess any prior knowledge of the acts of torture to be perpetrated. Nor can it be said that the appellant rendered any direct assistance or encouraged his superior officers in the commission of an international crime

Robertson JA conceded that “complicity of the appellant cannot be decided on the basis of criminal law provisions alone” [47], but went on to state as follows [48-50]:

Complicity rests on the existence of a shared common purpose as between “principal” and “accomplice”. In other words, mens rea remains an essential element of the crime. In my opinion, a person forcibly conscripted into the military, and who on one occasion witnessed the torture of a prisoner while on assigned guard duty, cannot be considered at law to have committed a crime against humanity [51].

On a superficial level, it could be maintained that the appellant knowingly assisted or otherwise participated in a persecutorial act. What is absent from that analysis is any evidence supporting the existence of a shared common purpose. However, the evidence does establish that the appellant disassociated himself from the actual perpetrators by deserting the army within a relatively short period after his forcible enlistment. In the circumstances, the appellant's presence at the scene of a crime is tantamount to an act of passive acquiescence. Accordingly, there is no legal basis on which to rest the application of the exclusion clause [52].

The real difference between Ramirez and Moreno seems to be that while Ramirez was a “sub-sergeant” who remained in the army for two years, Moreno was a mere foot soldier conscripted at the age of 16. His actions were therefore viewed as less culpable than those of a senior officer.

Groups with “Limited, Brutal” purposes: Canadian courts have found that mere membership of some kinds of groups can be sufficient “serious reasons to consider” that a person falls within Article 1F(a) of the Convention. In *Oberlander v Canada (Attorney-General)* [49], a case concerning deprivation of citizenship rather than Article 1F(a), the Federal Court of Appeal found that while there is no absolute liability on a member of an organisation with a “limited, brutal purpose”, it does create a rebuttable presumption that a member of such a group was complicit in the crimes committed by that group. In *Oberlander*, the Court found that the *Einsatzkommando 10a*, a German WWII paramilitary group tasked with executing political prisoners and other “undesirables” (such as Jews and communists), was an organisation with a limited, brutal purpose. In *Zazai v Canada (Minister of Citizenship and Immigration)* the same label was applied to the Afghan secret police (KHAD), which was described as having the limited, brutal purpose of “elimination of antigovernment activity and the commission of crimes which amount or can be characterized as crimes against humanity” [50]. In *Zrig v Canada (Minister of Citizenship and Immigration)* the Ennhada, described in the judgement as a terrorist group [51], was also found to be a body with a limited, brutal purpose [52]. However, the government of the Democratic Republic of the Congo was held not to have a limited, brutal purpose in *Canada (Citizenship and Immigration) v Ezokola* [53].

Knowledge or tolerance as complicity: *Sumaida v Canada (Minister of Citizenship and Immigration)* [54] also appears to equate mere knowledge of crimes against humanity with complicity. The applicant was alleged to have informed on members of suspected terrorist groups to the Iraqi police. This was found to be a crime against humanity on the basis that the Iraqi authorities did not merely arrest the suspected terrorists, but tortured and extrajudicially executed them and their families, something which was known to the applicant. The Federal Court of Appeal found that Sumaida was therefore complicit in the crimes against humanity committed by the Iraqi police [55].

Even more controversially, it was found pre-*Ezokola* that an applicant may be found to fall within Article 1F(a) if he or she simply “tolerated” war crimes or crimes against humanity committed by a group of which he or she is a member. In *Sivakumar v Canada (Minister of Employment and Immigration)* Linden JA, with whom Mahoney JA and Henry DJ agreed, stated as

It should be noted that, in refugee law, if state authorities tolerate acts of persecution by the local population, those acts may be treated as acts of the state (see, for example, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, at page 17). Similarly, if the criminal acts of part of a paramilitary or revolutionary non-state organization are knowingly tolerated by the leaders, those leaders may be equally responsible for those acts ...

To sum up, association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a “limited, brutal purpose”, is not enough (*Ramirez, supra*, at page 317). Moreover, the closer one is to a position of leadership or command within an organization, the easier it will be

to draw an inference of awareness of the crimes and participation in the plan to commit the crimes.

It appears that no appellate level Canadian court has actually *found* a person to fall within Article 1F(a) of the Convention solely because he “tolerated” war crimes or crimes against humanity committed by a group of which he was a member. However, the possibility had been raised.

Academic comment on the pre-Ezokola approach to complicity in Canada: Decisions such as *Ramirez* and *Sivakumar* have been criticised for imputing too much knowledge to members of particular groups. For example, Asha Kaushal and Catherine Dauvergne have pointed out that “there are now four ways to be complicit under Canadian refugee law: presence at an international crime if combined with authority; membership in a limited, brutal purpose organization; personal and knowing participation; and having a shared purpose” [56]. The term “shared purpose” appears to be synonymous with “common purpose”, referring to a situation where members of a group share a particular purpose to commit a crime [57]. The authors then state as follows [58]:

The cases show an increasing tendency to presume or impute the requisite knowledge or intention based on other factors. One such factor is the role of the individual in the organization. In fact, this notion of imputed knowledge is at the crux of the exception for organizations principally directed toward a limited, brutal purpose ... Members of such organizations are presumed to know of its “limited, brutal purpose”. Similarly, sometimes the abuses were of “such a multitude and magnitude that the claimant had to know” or “could not have been unaware”. This imputation holds even if the claimant held an administrative role, was posted to a rural area guarding a village or was a devout evangelical member of the army who did not read newspapers and lived off the army base. Knowledge will also be imputed where human rights organizations have published reports on abuses, making them “a matter of public record”.

Prior to *Ezokola*, Canadian courts appeared to have a wider view of what amounted to “complicity” than exists at international law. For example, the notion of command responsibility for crimes against humanity is well-established at international law, and the applicant in *Ramirez* for example could have been excluded from refugee status on the basis that he knew of crimes committed by his troops and took no action against the perpetrators [59]. This was not a *Yamashita* [60]-type case involving *imputation* of knowledge to a superior – Ramirez had first-hand knowledge of the crimes committed. However, MacGuigan JA excluded him from refugee status simply on the basis that he was present at the scene of crimes, and was in a position of authority [61]. There is no obvious reason in the judgement why the more usual notion of command responsibility was not applied. However, Jillian Sisskind has stated that *Ramirez* was decided “in accordance with international law” [62].

The “limited, brutal purpose” doctrine may also have some support in international law. Sisskind explains the *Dachau Concentration Camp Trial* [63] (“*Dachau*”) as follows [64]:

This approach of finding culpability with an individual’s mere membership began to be applied in the Nuremberg concentration camp cases. In those cases, it was presumed that all members of a concentration camp staff shared in the common criminal purpose and, as such, mere membership was sufficient for a finding of culpability [65]. As explained in the *Dachau Concentration Camp Trial* [66]:

The US Military Government Courts seem to have established a rule that membership of the staff of a concentration camp raises a presumption that the accused has committed a war crime. This presumption may *inter alia* be rebutted by showing that the accused’s membership was of such short duration or his position of such insignificance that he could not be said to have participated in the common design.

This kind of “rebuttable presumption” reasoning can be seen in *Oberlander* [67], and Sisskind has argued that the “limited, brutal purpose” organisation approach, when read in this way, is simply one way of demonstrating personal and knowing participation [68].

Other writers, however, are critical of the “limited, brutal purpose” reasoning. Pia Zambelli has argued as follows [69]:

The exclusion of members or supporters of non-inherently criminal organizations without connecting them to a particular crime, results in the carefully drawn distinction in *Ramirez* between ‘an organization principally directed to a limited and brutal purpose’ whose members by necessity commit crimes, and ‘an organization whose members from time to time commit international offences’ (such as an army) being considerably obscured. When the excludable behavior effectively becomes participation in an organization, the aider or abettor’s *mens rea* requirement of knowledge of the commission of a crime is diminished virtually to the point of non-existence and the analysis becomes essentially one of ‘guilt by association’.

It does appear that Canadian immigration cases, while referring to international sources (usually), applied their own understanding of what constitutes complicity in a crime against humanity. Sometimes this understanding was in accordance with general principles of international law and sometimes it is not. While one could hardly argue that a member of KHAD, a tightly controlled secret police organisation, would not know of the crimes committed by that group, a member of a much more decentralised or multi-purpose group such as the LTTE may genuinely not know – indeed, he or she may honestly believe that the attribution of criminal activities to the LTTE could be nothing more than government propaganda. In any event, should knowledge of crimes committed by an organisation, in the absence of any evidence of involvement or collusion in a particular act, result in exclusion from the protection of the Refugees Convention? This is the question that the Supreme Court had to answer in *Ezokola*.

“Serious reasons to consider”

It is notable that an asylum-seeker is excluded from refugee status under Article 1F if the decision-maker has “serious reasons to believe” that he or she falls within any of Articles 1F(a) – (c). In determining whether serious reasons exist, the decision-maker must first consider all the evidence relevant to the application, and then determine whether “serious reasons” for exclusion have been established.

Evidence in exclusion and inadmissibility hearings: It is fairly rare in cases involving Article 1F(a) to consider matters outside the applicant’s own evidence. For example, the applicant in *Ramirez* [70] more or less confessed to committing crimes against humanity and war crimes to the Refugee Division. In *Sumaida* [71], the applicant had published an autobiography in which he detailed how he provided the names of suspected terrorists to Iraqi police. In the *Pushpanathan* cases [72], which were primarily concerned with the application of Article 1F(c), the applicant’s criminal record was admitted into evidence. In only three cases – *Siad v Canada (Secretary of State)* [73] and the two *Mugesera* cases [74] – can it be said that the applicant was excluded

solely or even primarily on the basis of sources outside their own evidence. These cases will be considered in more detail shortly.

Two other common situations arise where an applicant changes their evidence at some stage of proceedings, or where an applicant admits to membership of a particular group but denies any knowledge of its violent or criminal activities. For example, in *Zazai v Canada (Minister of Citizenship and Immigration)* [75] the applicant had admitted to membership of the KHAD before the Convention Refugee Determination Division (CRDD), but denied it before an admissibility adjudicator. The adjudicator, by examination of the applicant's demeanour and consistency in his evidence, found that the initial evidence was more credible than the later evidence, and found the applicant inadmissible under s.35 of the IRPA. The Federal Court of Appeal chose not to disturb this finding [76].

In *Zrig v Canada (Minister of Citizenship and Immigration)* [77] the applicant admitted to membership of the Ennhada at all levels of proceedings, but claimed to be unaware of the group's violent activities. The Refugee Division simply disbelieved this claim, noting that Zrig was "part of the movement's clandestine command structure" and that the applicant "completely lacked sincerity and honesty" on this point [78]. It also found that even if the applicant was telling the truth, he was complicit in the crimes committed by Ennhada because it was an organisation with a "limited, brutal purpose" [79], and was excluded under Article 1F(b).

Siad v Canada (Secretary of State): In *Siad* [80] the applicant no less than the son of Siad Barre, the now deposed former leader of Somaila. The applicant was accused of serving as the governor of the Lanta Bur prison, and the Court stated that "it is not disputed that, during the Barre regime, Lanta Bur was a site for detention of political prisoners, nor is it disputed that torture, abuse and killing of prisoners were common there" [81]. Siad denied ever being the governor of Lanta Bur, and indeed claimed that he had been imprisoned there himself for a time. To rebut this evidence, the Minister produced two witnesses, both of whom had been granted refugee status, had previously been imprisoned at Lanta Bur, and who identified Siad as the man in charge at the prison. The Minister also sought to adduce affidavit evidence from a professor in African history at Rutgers University, whose research had also identified Siad as the governor of Lanta Bur.

Most of the case was actually procedural in nature – Siad claimed that he had been denied procedural fairness because CIC had refused him access to the witness' refugee application files, and did not make Professor Samatar available for cross-examination. The Trial Division had set the decision of the Refugee Division aside on this basis, but the Federal Court of Appeal reversed this decision on the basis that the Refugee Division was expressly not bound by rules of evidence. Siad was aware of the case that had been made against him, and therefore had been afforded procedural fairness [82].

The Mugesera litigation: As previously noted, the issue in the *Mugesera* cases was whether the applicant had committed a crime against humanity by making a speech apparently calling for genocide against Rwandan Tutsis. Mugesera initially denied ever making the speech, but the Immigration Appeal Division (IAD) had obtained a tape recording. The speech was made in the Kinyarwanda language and was translated into French for the purposes of Mr Mugesera's IAD hearing in Quebec. While objections to the quality of the translation were made, and the IAD adjudicator was presented with conflicting translations made by experts for the Minister and the applicant, Mr Mugesera ultimately accepted that the Minister's translation was

accurate [83]. From that point, the issue became simply whether the speech constituted a crime against humanity.

Standard of proof in article 1F cases: It has been made clear by both the Supreme Court and the Federal Court of Appeal that the "serious reasons to consider" standard is lower than either the criminal or civil standard of proof [84]. That is, a decision-maker does not need to find that it is more probable than not that an applicant for refugee status has committed any of the acts described in Article 1F to exclude them from refugee status – this sets the bar too high. Again, *Ramirez v Canada (Minister of Employment and Immigration)* [85] is the leading authority amongst Article 1F(a) cases.

MacGuigan JA considered the meaning of the phrase "serious reasons to believe" at paragraphs 6 and 7. Comparing Article 1F and the inadmissibility provisions in s.19 (1) (j) of the *Immigration Act 1985*, his Honour stated as follows:

While I see no great difference between the phrases "serious reasons for considering" and "reasonable grounds to believe" I find no necessity exactly to equate the one with the other, although I believe both require less than the balance of probabilities [6]. "Serious reasons for considering" is the Convention phrase and is intelligible on its own ...

Therefore, although the appellant relied on several international authorities which emphasize that the interpretation of the exclusion clause must be restrictive, it would nevertheless appear that, in the aftermath of Second World War atrocities, the signatory states to this 1951 Convention intended to preserve for themselves a wide power of exclusion from refugee status where perpetrators of international crimes are concerned [7].

In *Sivakumar v Canada (Minister of Citizenship and Immigration)*, Linden JA endorsed this approach as follows [86]:

The standard of proof in section F (a) of Article 1 of the Convention is whether the Crown has demonstrated that there are serious reasons for considering that the claimant has committed crimes against humanity. In *Ramirez*, MacGuigan JA stated that serious reasons for considering constitutes an intelligible standard on its own which need not be assimilated to the reasonable grounds standard in section 19 of the *Immigration Act* I agree that there is little, if any, difference of meaning between the two formulations of the standard. Both of these standards require something more than suspicion or conjecture, but something less than proof on a balance of probabilities. This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens. When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status.

It is not necessary to detail all of the elements of a crime before it can be relied on in an Article 1F determination. In *Zrig v Canada (Minister of Citizenship and Immigration)* Nadon JA stated that "in order to exclude persons covered by Article 1F(a) and (b), it will be necessary to show that there are 'serious reasons for considering' that the serious crimes identified were committed, but it will not be necessary to attribute any one specifically to the claimant" [87]. On the facts of that case, it was not necessary for the Refugee Division to have serious reasons to believe that each and every one of the terrorist attacks attributed to Ennhada during the applicant's period of membership occurred. It is sufficient that the decision-maker had serious reason to believe that such crimes did occur based on some kind of reliable empirical evidence (such as the reports of non-government organisations, for example). Similarly,

in *Sing*, a case primarily concerned with Article 1F (b), Malone JA stated as follows [88]:

The Article 1F (b) hearing process excludes a claimant when there are serious reasons for considering that a serious non-political criminal activity has taken place. Therefore, the Minister is not required to prove a particular criminal offence beyond a reasonable doubt. Accordingly, the Board is not required to set out and determine all of the specifics or elements of the crime committed.

The Supreme Court has found, however, that it is not sufficient for a decision-maker to find that there are "serious reasons to believe" that a particular action constituted an Article 1F (a) crime. In *Mugesera v Canada (Minister for Citizenship and Immigration)*, the majority stated as follows [89]:

The "reasonable grounds to believe" standard of proof applies only to questions of fact ... This means that in this appeal the standard applies to whether Mr Mugesera gave the speech, to the message it conveyed in a factual sense and to the context in which it was delivered. On the other hand, whether these facts meet the requirements of a crime against humanity is a question of law. Determinations of questions of law are not subject to the "reasonable grounds to believe" standard, since the legal criteria for a crime against humanity will not be made out where there are merely reasonable grounds to believe that the speech *could* be classified as a crime against humanity. The facts as found on the "reasonable grounds to believe" standard must show that the speech *did* constitute a crime against humanity in law.

That is, a decision-maker must conclude as a matter of law that a particular act constitutes a war crime or crime against humanity, and *then* decide whether there are serious reasons to believe that the applicant actually committed that crime [90].

It should also be noted that the inadmissibility provisions of the Act have changed from the *Immigration Act 1985* to the IRPA. The former s.19 (1) (j) of the *Immigration Act* provided that "persons who there are reasonable grounds **to believe** have committed an act or omission outside Canada that constituted a war crime or a crime against humanity" were inadmissible to Canada (my emphasis). As was seen in *Ramirez* [91], there is no real difference between "reasonable grounds to believe" and "serious reasons to consider". However, the current s.35 of the IRPA makes no mention of any standard of proof. It remains to be seen how courts will approach this distinction.

Academic comment on the "Serious Reasons" standard: There has been some academic criticism of the "serious reasons to believe" standard, or at least its application. Michael Bliss has argued that procedural safeguards in an Article 1F determination should be closer to a criminal than a civil standard [92]:

An important and distinguishing characteristic of an exclusion proceeding is its quasi-criminal nature. Although consideration of the exclusion clauses will generally occur as part of an administrative proceeding, a decision must be made as to the asylum seeker's involvement in criminal conduct. If the decision is made that the asylum seeker was involved in certain criminal conduct, a substantial "penalty" will usually be imposed – exclusion from the scheme of Convention protection and return to possible persecution. Therefore the proceeding, although formally administrative in nature, is in some respects "quasi-criminal". Accordingly, certain of the procedural safeguards which apply in domestic criminal proceedings and in the evolving field of international criminal law will be applicable in exclusion proceedings.

Bliss' argument that the consequences to an applicant of a failed claim for refugee status can be extremely serious is unassailable, and applicants accused of committing acts that fall within Article 1F of the Convention certainly cannot be left without procedural safeguards. However, it is clear from cases such as *Siad* [93] and the Charter-related cases of *Singh v Canada (Minister for Employment and Immigration)* [94] and *Charkaoui v Canada (Citizenship and Immigration)* [95] that applicants in refugee status or inadmissibility proceedings are not without procedural protections. Given that the intention of the drafters of Article 1F seems to have been to ensure wide powers to prevent serious criminals from obtaining refugee status, the "serious reasons to consider" ground would appear to be appropriate.

Note also that "serious reasons to consider" do not mean mere conjecture or surmise – *Sivakumar v Canada (Minister for Citizenship and Immigration)* [96]. That is, a decision-maker must be able to point to some clear evidence that a person has committed Article 1F crimes before they can be excluded from refugee status.

Part 3 – The Supreme Court's Decision in *Ezokola*

Facts

Rachidi Ekanza Ezokola began his career with the government of the Democratic Republic of Congo (DRC) with the Ministry of Finance in January 1999, and was assigned to the Ministry of Labour, Employment and Social Welfare in Kinshasa. He later worked as a financial adviser to the Ministry of Human Rights and the Ministry of Foreign Affairs and International Cooperation.

In 2004, Mr Ezokola was assigned to the Permanent Mission of the DRC to the United Nations in New York. In his role as second counsellor of embassy, the appellant represented the DRC at international meetings and UN entities including the UN Economic and Social Council. He also acted as a liaison between the Permanent Mission of the DRC and UN development agencies. In 2007, the appellant served as acting chargé d'affaires. In this capacity, he led the Permanent Mission of the DRC and spoke before the Security Council regarding natural resources and conflicts in the DRC.

Mr Ezokola worked at the Permanent Mission until January 2008 when he resigned and fled to Canada. He claimed that he ultimately resigned because he refused to serve the government of President Kabila which he considered to be corrupt, antidemocratic and violent, and that his resignation would be viewed as an act of treason by the DRC government. Mr Ezokola further alleged that the DRC's intelligence service harassed, intimidated, and threatened him because it suspected he had links to Jean-Pierre Bemba, President Kabila's opponent. He then sought refugee status for himself, his wife, and their eight children in Canada.

Immigration and refugee board and lower court decisions

Immigration and refugee board: The issue for the IRB in determining Mr Ezokola's application for refugee status was whether he should be excluded from Canada on the basis of s. 98 of the IRPA. The IRB found that he was so excluded, on the basis that, although the government of the DRC was not an organisation with a "limited, brutal purpose", it had committed crimes against humanity as defined by the Rome Statue and Canadian domestic law [97]. The IRB relied on various reports, including media, governmental, and non-governmental, to find international crimes were committed, on both sides of conflicts over several years [98].

The IRB concluded that "the evidence clearly shows that the

Congolese government represses human rights, carries out civilian massacres and engages in governmental corruption” [99]. Further, in the IRB’s view, the appellant was complicit in these crimes. Based on the appellant’s official rank, he had “personal and knowing awareness” of the crimes committed by his government [100]. The IRB emphasised the fact that the appellant had joined the government voluntarily and continued to act in his official capacity until he feared for his own safety. In the IRB’s view, the appellant’s functions and responsibilities helped to sustain the government of the DRC, and it therefore had serious reasons for considering that the appellant was complicit in the crimes committed by the government.

Federal court: On appeal to the Federal Court, Mainville J first noted that the construction of Article 1F of the Convention is a question of law that had to be reviewed on the correctness standard [101]. He found that an individual cannot be excluded under Article 1A “merely because he had been an employee of a state whose government commits international crimes” [102]. Mainville J instead examined the Rome Statute (in particular Articles 25, 28 and 30), and found that “criminal responsibility for crimes against humanity requires personal participation in the crime alleged or personal control over the events leading to the crime alleged” [103]. As there was no evidence that Mr Ezokola participated in, incited or actively supported the crimes of the regime, the decision of the IRB should be set aside. Mainville J stated as follows at below paragraphs:

The duties performed by a leader of an organization that is itself responsible for crimes against humanity may be such that there are serious reasons for considering that the leader in fact participated personally in the crimes alleged, by conspiring to commit them, by aiding in the commission of the crimes, or by facilitating them. However, that belief must itself be based on facts that support a finding of personal and knowing participation by the leader in question in the crimes alleged, or effective control by the leader over the people who committed the crimes. Accordingly, complicity by association is not an autonomous legal concept; rather, it is a presumption of direct complicity based on the hypothesis that a person who leads an organization that commits crimes against humanity probably participated in them personally [91].

Merely working in the public service of a state whose government commits crimes against humanity is therefore not sufficient, nor is mere knowledge of those crimes. There must be a personal nexus between the refugee claimant and the crimes alleged [92].

Federal court of appeal: Mainville J certified the following question [104]:

For the purposes of exclusion pursuant to paragraph 1F (a) of the United Nations Refugee Convention, is there complicity by association in crimes against humanity from the fact that the refugee claimant was a public servant in a government that committed such crimes, along with the fact that the refugee claimant was aware of these crimes and did not denounce them, when there is no proof of personal participation, whether direct or indirect, of the refugee claimant in these crimes?

The Federal Court of Appeal, constituted by Noel, Nadon and Petellier JJA, reformulated the question as follows [105]:

For the purposes of exclusion pursuant to paragraph 1F (a) of the United Nations Refugee Convention, can complicity by association in crimes against humanity be established by the fact that the refugee claimant was a senior public servant in a government that committed such crimes, along with the fact that the refugee claimant was aware of these crimes and remained in his position without denouncing them?

The Federal Court of Appeal then answered the question in the affirmative, overturning the decision of Mainville J. Noel JA, writing for the court, stated that “in my view, a senior official may, by remaining in his or her position without protest and continuing to defend the interests of his or her government while being aware of the crimes committed by this government demonstrate ‘personal and knowing participation’ in these crimes and be complicit with the government in their commission” [106]. However, Noel JA also found that the IRB had wrongly interpreted Article 1F(a) as requiring “knowing and personal awareness” of crimes committed by the government, as opposed to “personal and knowing participation” [107], and that the “personal and knowing knowledge” approach was based on a misunderstanding of Ramirez [108]. The IRB’s finding that personal knowledge of the crimes would suffice for the purposes of exclusion under Article 1F (a) was found to be incorrect and Noel JA remitted the matter to a new panel of the IRB for reconsideration [109]. Mr Ezokola then sought leave to appeal to the Supreme Court.

Supreme court decision

A new test for complicity in international crimes: In a rare 9-0 decision, the Supreme Court of Canada allowed Mr Ezokola’s appeal and remitted the matter to the Refugee Protection Division of the IRB. LeBel and Fish JJ, writing for the court, found that “to be complicit in crimes committed by the government, the official must be aware of the government’s crime or criminal purpose and aware that his or her conduct will assist in the furtherance of the crime or criminal purpose” [110]. In other words, mere membership of a group, even a group with a “limited, brutal purpose”, will longer in and of itself be sufficient for exclusion under Article 1F(a). Instead, it must be shown on an individual basis that a particular claimant was truly “complicit” in war crimes, crimes against peace or crimes against humanity.

Ezokola represents a deliberate attempt by the Supreme Court to harmonise the test for exclusion under Article 1F(a) of the Convention with international criminal law principles relating to complicity in international crimes. LeBel and Fish JJ were implicitly quite critical of the earlier Ramirez test, stating as follows at paragraphs 2 and 3 of the judgement:

2. Where exclusion from refugee status is the only “sanction”, it is not necessary to distinguish between principals, aiders and abettors, or other criminal participants. Individuals may be excluded from refugee protection for international crimes through a variety of modes of commission.

3. Guilt by association, however, is not one of them.

LeBel and Fish JJ summed up the task of the court at paragraph 4 as follows:

This appeal homes in on the line between association and complicity. It asks whether senior public officials can be excluded from the definition of “refugee” by performing official duties for a government that commits international crimes. It is the task of this Court to determine what degree of knowledge and participation in a criminal activity justifies excluding secondary actors from refugee protection. In other words, for the purposes of art 1F(a), when does mere association become culpable complicity?

The Court’s interpretation of Article 1F(a) is neatly summed up early in the judgement [111]:

[8] While individuals may be complicit in international crimes without a link to a particular crime, there must be a link between the

individuals and the *criminal purpose* of the group. In the application of art. 1F(a), this link is established where there are serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose.

[9] This contribution-based approach to complicity replaces the personal and knowing participation test developed by the Federal Court of Appeal in *Ramirez* [112]. In our view, the personal and knowing participation test has, in some cases, been overextended to capture individuals on the basis of complicity by association. A change to the test is therefore necessary to bring Canadian law in line with international criminal law, the humanitarian purposes of the *Refugee Convention*, and fundamental criminal law principles.

That is, in any given case considering the exclusion of a refugee applicant, an individual assessment must be made as to whether he or she has been complicit in war crimes, crimes against peace or crimes against humanity. Mere membership of a government or group that has been known to commit such crimes will not, in and of itself, be sufficient. LeBel and Fish JJ further elaborated on this test later in the judgement by stating that "an individual will be excluded from refugee protection under art. 1F(a) for complicity in international crimes if there are serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime" [113]. That is, the claimant for refugee status must not only have knowingly belonged to an organisation that committed international crimes, but must have knowingly *contributed* to the commission of those crimes. This is the case regardless of the person's rank within the organisation in question [114]. The obvious question is then "how does a person contribute to the commission of international crimes?" For example, would donating money to an organisation that exists solely to commit acts of terrorism result in exclusion under Article 1F(a)? What if the organisation carries out both charitable works and large-scale paramilitary assaults against the organisation's real or perceived enemies?

LeBel and Fish JJ themselves recognise the delicate balancing act that the Court was required to undertake in this case [115]:

[35] On the one hand then, if we approach art. 1F(a) too narrowly, we risk creating safe havens for perpetrators of international crimes — the very scenario the exclusion clause was designed to prevent. On the other hand, a strict reading of art. 1F(a) arguably best promotes the humanitarian aim of the *Refugee Convention*.

[36] The foregoing demonstrates the need for a carefully crafted test for complicity — one that promotes the broad humanitarian goals of the *Refugee Convention* but also protects the integrity of international refugee protection by ensuring that the authors of crimes against peace, war crimes, and crimes against humanity do not exploit the system to their own advantage. As we will explain, these two aims are properly balanced by a contribution-based test for complicity — one that requires a voluntary, knowing, and significant contribution to the crime or criminal purpose of a group.

Defining "International Crimes": The Court makes it clear that, in interpreting Article 1F (a), the IRB must have recourse to international criminal law, and not merely Canadian criminal law [116], citing *Harb* [117] in support. Recourse can and should also be had to "international jurisprudence" [118]. It is not possible to decide whether a person is complicit in an international crime solely by reference to "only one of the world's legal systems" [119], because of the "explicit instruction in art. 1F(a) to apply international law" [120], but also because such crimes "simply transcend domestic norms" [121]. In other words,

Canada cannot "go it alone" on deciding what an international crime is, and how one can be complicit in the commission of such a crime — because such crimes are held to be international in nature, domestic interpretation of such provisions must consider sources of law from right around the world.

LeBel and Fish JJ make it clear that the Rome Statute is the place to start in deciding whether a particular event amounts to an international crime, although they point out that "the *Rome Statute* cannot be considered as a complete codification of international criminal law" [122]. Other international instruments, such as the London Charter, as well as decisions of the ICC and the ad hoc international tribunals remain valid sources of law.

Complicity at international law: LeBel and Fish JJ then turned to the question of when a person is complicit in an international crime, as defined by international law. They state as follows at paragraph 52:

Exclusion from refugee protection applies when there are serious reasons for considering that an individual has committed an international crime, whatever the mode of commission happens to be. Our task then is to identify threshold criteria for the application of the exclusionary clause, art. 1F(a) of the *Refugee Convention*. Accordingly, the broadest modes of commission recognized under current international criminal law are most relevant to our complicity analysis, namely, common purpose liability under art. 25(3) (d) of the *Rome Statute* and joint criminal enterprise developed in the *ad hoc* jurisprudence.

Article 25(3) (d) of the Rome Statute provides as follows:

3. A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

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

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

(ii) Be made in the knowledge of the intention of the group to commit the crime.

LeBel and Fish JJ make it clear that there is a low threshold for liability under Article 25(3)(d). They state that "art. 25(3)(d) captures contributions to a crime where an individual did not have control over the crime and did not make an *essential* contribution as required for co-perpetration under art. 25(3)(a), did not incite, solicit or induce the crime under art. 25(3)(b), or did not intend to aid or abet a certain specific crime under art. 25(3)(c)" [123]. However, while the threshold is low, there is a "minimum contribution" that must be made. At paragraph 57 LeBel and Fish JJ cite the decision Pre-Trial Chamber I of the ICC in *Prosecutor v Callixte Mbarushimana* as stating that "without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability for their infinitesimal contribution to the crimes committed" [124]. The Pre-Trial Chamber went on to state that "it is only by examining a person's conduct in proper context that a determination can be made as to whether a given contribution has a larger or smaller effect on the crimes committed" [125], meaning that each case must be considered

on its facts, and it is not possible to prescribe a single formula for a minimum-level contribution that would apply in every case.

What is clear is that participation must always be intentional. Article 25(3)(d)(i) states that the contribution to the group must be made "with the aim of furthering the criminal activity or criminal purpose of the group". Again, *Mbarushimana* elaborates on the mens rea requirement [126]:

Differently from aiding and abetting under article 25(3)(c) of the Statute, for which intent is always required, knowledge is sufficient to incur liability for contributing to a group of persons acting with a common purpose, under article 25(3)(d) of the Statute. Since knowledge of the group's criminal intentions is sufficient for criminal responsibility, it is therefore not required for the contributor to have the intent to commit any specific crime and not necessary for him or her to satisfy the mental element of the crimes charged.

LeBel and Fish JJ point out that Article 25(3)(d) refers to *the* commission of an international crime, not a crime that *might* be committed. Therefore, "while the subjective element under art. 25(3)(d) can take the form of intent (accused intends to contribute to a group's criminal purpose) or knowledge (accused is aware of the group's intention to commit crimes), recklessness is likely insufficient" [127].

Joint criminal enterprise: LeBel and Fish JJ specify that Joint Criminal Enterprise (JCE) is actually a form of principal liability, but one that involves a number of agents acting in concert. They state as follows [128]:

Even though joint criminal enterprise is considered to be a form of principal liability, it is relevant to our task of setting threshold criteria for art. 1F(a) of the *Refugee Convention*. The line between principal and accessory is not necessarily drawn consistently across international and domestic criminal law. Joint criminal enterprise, like common purpose liability under art. 25(3)(d), captures "lesser" contributions to a crime than aiding and abetting. While aiding and abetting likely requires a substantial contribution to a certain specific crime, joint criminal enterprise and common purpose liability can arise from a significant contribution to a criminal purpose ... Joint criminal enterprise therefore captures individuals who could easily be considered as secondary actors complicit in the crimes of others.

The concept of JCE has had its detractors [129], particularly when trying to distinguish it from Article 25 of the Rome Statute. For example, Antonio Cassese has argued that Article 25(3)(d) regulates contributions to a common criminal endeavor by a member who stands *outside* the criminal group, while JCE regulates *internal* participation in a joint criminal plan [130]. A detailed discussion of the difference between JCE and Article 25 of the Rome Statute is beyond the scope of this paper, other than to note the comments of LeBel and Fish JJ in *Ezokola* [131]:

For our purposes, we simply note that joint criminal enterprise, even in its broadest form, does not capture individuals merely based on rank or association within an organization or an institution ... It requires that the accused have made, at a minimum, a significant contribution to the group's crime or criminal purpose, made with some form of subjective awareness (whether it be intent, knowledge, or recklessness) of the crime or criminal purpose. In other words, this form of liability, while broad, requires more than a nexus between the accused and the group that committed the crimes. There must be a link

between the accused's conduct and the criminal conduct of the group: *Brđjanin* [132], at paras. 427-28.

Overseas decisions: LeBel and Fish JJ then moved to discuss a number of similar cases in overseas jurisdictions. In particular, they pointed out at paragraph 70 of the judgement that the UK Supreme Court has found in *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [133] that mere membership of a group or organisation that has committed international crimes is not sufficient for a finding that a person is complicit in the crimes committed by that group. Instead, the culpability of an individual is to be assessed by reference to the following factors [134]:

(i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.

LeBel and Fish JJ point out that the factors identified in *JS* are very similar to the Canadian decision of *Ryivuze v Canada (Minister of Citizenship and Immigration)* [135]. Similarly, the US Supreme Court has found that "before [a claimant] may be held personally accountable for assisting in acts of persecution, there must be some evidence that he himself engaged in conduct that assisted in the persecution of another" [136].

LeBel and Fish JJ sum up the overseas jurisprudence as follows [137]:

The foregoing approaches to complicity all require a nexus between the individual and the group's crime or criminal purpose. An individual can be complicit without being present at the crime and without physically contributing to the crime. However ... to be excluded from the definition of refugee protection, there must be evidence that the individual knowingly made at least a significant contribution to the group's crime or criminal purpose.

LeBel and Fish summed up by stating that "the Federal Court's approach in this case brings appropriate restraint to the test for complicity that had, in some cases, inappropriately shifted its focus towards the criminal activities of the group and away from the individual's contribution to that criminal activity" [138], and that the Federal Court of Appeal's decision had "endorsed an overextended approach to complicity, one that captures complicity by association or passive acquiescence" [139]. If the Federal Court of Appeal's decision had been allowed to stand, "high-ranking officials might be forced to abandon their legitimate duties during times of conflict and national instability in order to maintain their ability to claim asylum" [140], including those in purely economic positions like Mr Ezokola. Finally, "unless an individual has control or responsibility over the individuals committing international crimes, he or she cannot be complicit by simply remaining in his or her position without protest" [141].

Test of complicity: LeBel and Fish JJ then went on to formulate a new test of complicity for international crimes for the purpose of exclusion under Article 1F(a). An individual will be complicit in these circumstances if he or she:

1. Makes a **voluntary contribution** to the crime or criminal purpose. This will require decision-makers to “consider the method of recruitment by the organization and any opportunity to leave the organisation” [142]. LeBel and Fish JJ also note that duress is a defence at customary international law and under Article 31(1)(d) of the Rome Statute [143].
2. Makes a **significant contribution** to the crime or criminal purpose. LeBel and Fish JJ do not attempt to define the word “significant” in minute detail, but note that the UK Supreme Court in *JS* found that the accused’s contribution does not have to be “directed to specific identifiable crimes” but can be directed to “wider concepts of common design, such as the accomplishment of an organisation’s purpose by whatever means are necessary including the commission of war crimes” [144]. This is still perhaps the weakest part of the judgement – is a contribution only “significant” if it was indispensable? Or is it sufficient that the crime or criminal purpose would have been somewhat more difficult or expensive to carry out without the individual’s contribution? This matter will have to be resolved by future courts.
3. Makes a **knowing contribution** to the crime or criminal purpose. This requirement seems to overlap somewhat with (1) above. To make a “knowing contribution”, “the official must be aware of the government’s crime or criminal purpose and aware that his or her *conduct* will assist in the furtherance of the crime or criminal purpose” [145] (original emphasis). LeBel and Fish JJ note that this requirement is consistent with Article 30 of the Rome Statute, which relevantly states that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge” [146].
3. The refugee claimant’s position or rank in the organisation. These requirements are obviously related to each other, and go to the exact role of the applicant in the organisation. On one hand, Mr Ezokola was a senior and high-ranking official, which would have tended to suggest that he had a knowing participation in the crimes of the government. On the other hand, his duties were solely economic and diplomatic, and not military.
4. The length of time the refugee claimant was in the organisation, particularly after acquiring knowledge of the group’s crime or criminal purpose. The longer a person is a member of a group that commits international crimes, the more likely it is that they made a knowing and significant contribution to those crimes.
5. The method by which the refugee claimant was recruited and the refugee claimant’s opportunity to leave the organisation. A person who was forced into a group, such as a child soldier, is less likely to have made a willing contribution to the group’s crimes than someone who voluntarily joined as an adult. This distinction can be seen in *Ramirez* [149] and *Moreno* [150] – the older, voluntary enlistee in an army committing crimes against humanity was excluded under Article 1F, but the 16-year-old conscript was not.

Applying the test: LeBel and Fish JJ emphasise that “whether there are serious reasons for considering that an individual has committed international crimes will depend on the facts of each case”. They then list the following factors as relevant to determining whether the applicant falls within the three elements of the complicity test outlined above [147].

1. The size and nature of the organisation. In short, LeBel and Fish JJ state that where a group is small and single-minded, it will be more likely that the applicant knew of and participated in the group’s activities. Where it is large and has both legitimate and illegitimate functions (like most governments), this link will not be as easy to establish. Of particular note is the comment by LeBel and Fish JJ that “where the group is identified as one with a limited and brutal purpose, the link between the contribution and the criminal purpose will be easier to establish” [148]. In other words, the “limited, brutal purpose” test may live on in a sense, but decision-makers will have to justify their finding that the person made a knowing and significant contribution to international crimes rather than simply stating that “X is an organisation with a limited, brutal purpose; Y was a member of that organisation; therefore Y is complicit in international crimes”.

The part of the organization with which the refugee claimant was most directly concerned. This would be particularly relevant in the case of large, multi-faceted organisations such as the Liberation Tigers of Tamil Eelam (LTTE), which had paramilitary divisions as well as charitable functions.

2. The refugee claimant’s duties and activities within the organisation.

Evidentiary requirements: Finally, LeBel and Fish JJ note that Article 1F(a) requires a decision-maker to “decide whether there are ‘serious reasons for considering’ that an individual has committed war crimes, crimes against humanity or crimes against peace” [151]. While they state that it may not be terribly useful to attempt to elaborate on the meaning of this phrase, they agree with the finding in *JS* that this term, should be interpreted as meaning something more like “belief” than mere “suspicion” [152]. LeBel and Fish JJ conclude by stating that this “unique evidentiary standard does not, however, justify a relaxed application of fundamental criminal law principles in order to make room for complicity by association”. The matter was remitted to the Refugee Protection Division of the IRB for reconsideration.

Reception of the judgement

There has been a generally enthusiastic response to the Supreme Court’s judgement by refugee groups. For example, the Canadian Civil Liberties Association, who acted as interveners in the case and provided a factum to the Supreme Court [153], stated as follows on their website [154]:

Today the Supreme Court of Canada released its judgment in *Ezokola v Canada* ... The decision is a victory for refugee protection and international criminal responsibility as well as for Canadian principles of asylum, criminal law, and fundamental justice. CCLA applauds the decision for correctly recognizing, as CCLA argued in its intervention, that any decision to exclude an individual from asylum must be based upon “serious reasons for considering” that the individual did commit the crimes which permit exclusion pursuant to Article 1F(a) of the Convention Relating to the Status of Refugees (“Refugee Convention”). It is not justifiable in Canadian law or in international law to exclude an individual merely because he or she was a member of a group guilty of war crimes — ‘guilt by association’ violates fundamental criminal law principles.

In a similar vein, the Canadian Council for Refugees (CCR) stated as follows [155]:

The *Ezokola* decision corrects Canadian jurisprudence that had overextended the interpretation of exclusion based on war crimes, resulting in innocent people being denied protection and wrongly labelled “war criminals”. It will mean that refugees will no longer be excluded from protection based on simple suspicion of crimes or based on the criminal acts of a group they belong to, without them personally being guilty of any crime.

Even the generally right-of-centre *Macleans* magazine took a positive view of the decision, quoting a number of academics and activists endorsing the decision in its report [156].

Part 4 – Conclusions

There is, of course, a limit to how far an administrative body can go in truly making a decision based on an individual's circumstances. Unless the applicant condemns themselves out of their own mouths (which has happened more frequently than one might expect), the Refugee Protection Division must make its assessment based on country reports, precedents and an individual's own (possibly self-serving) evidence. While the “limited, brutal purpose” test has, correctly in my view, been abolished as a strict rule, it will be very difficult for an applicant who really *did* voluntarily belong to such an organisation to show that he or she made no voluntary, significant and knowing contribution to the crimes committed by that group.

Some of the issues that the IRB and the courts are likely to have to face in the future include the following.

1. How does a decision-maker deal with the defence of duress? Is a threat of death to the individual sufficient? Should an individual be required to choose death to themselves over committing an international crime? What if the threat is wider, especially to family members?
2. How is “voluntariness” to be assessed? Is voluntariness equivalent to a lack of duress? What of the situation of a child soldier who later commits international crimes himself or herself – is their initial involuntary conscription and later “brainwashing” sufficient to find that their later criminal acts are involuntary?
3. Is a person who becomes aware that his or her organisation has committed international crimes required to disassociate themselves from that organisation as soon as possible? This again appears to be one of the differences between *Ramirez* [157] and *Moreno* [158] – the former applicant continued to serve for some time after war crimes were committed, but the latter deserted soon after he was required to stand guard while acts of torture were committed.
4. Is it really possible for an organisation that commits international crimes to “compartmentalise” itself so that association with some organs of that body lead to exclusion under Article 1F(a) while association with others does not? Governments are the obvious problem in this regard – it would be very difficult to classify any government, no matter how repressive, as having no function other than commission of international crimes – but large-scale organisations like the LTTE or many radical Islamic groups present similar problems. (It is well-known that Al Capone ran soup kitchens in Chicago as well.)

Should Mr Ezokola be ultimately excluded from refugee protection? On one hand, he was a senior official in a repressive government that

committed brutal crimes, and he made no attempt to dissociate himself from it until his own life was threatened. On the other, his duties were purely economic and diplomatic in nature, and he certainly had no power to order the commission of international crimes. Whichever way the IRB decision finally goes, it will make interesting reading.

All in all, however, the Supreme Court cannot be faulted for seeking to impose a more individual-based assessment of exclusion of Article 1F(a). All modern systems of criminal law despise guilt merely by association, as does the Rome Statute [159]. Unless a decision-maker can come to a conclusion that an *individual* has committed international crimes, whether directly or by complicity, it appears to be a misinterpretation of the Refugees Convention (as well as a breach of “fundamental justice” under s.7 of the Canadian Charter) to refuse them the benefit of protection under the Convention.

References

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3. <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>
4. Michael Kingsley Niyamah (2000) Exclusion Under Article 1F: Some Reflection on Context, Principles and Practice. 12th International Journal of Refugee Law.
5. *Ibid* at 297.
6. (2013) SCC 40.
7. (2003) Current Issues in the Application of the Exclusion Clauses. Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press).
8. *Ibid* at 428.
9. Musalo K (2002) Refugee Law and Policy: a Comparative and International Approach. Carolina Academic Press.
10. Atle Grahl-Madsen (1966) The Status of Refugees in International Law, Leyden.
11. *Ibid* at 272-3.
12. (2001) SC.
13. Provided for by s.45 of the IRPA.
14. Under s.95(2) of the IRPA, a “protected person” is a person who has been granted refugee status by Canada, or who has made an application for refugee status that has not yet been resolved.
15. SC 2000 c 24.
16. See for example *Pushpanathan v Canada* (Minister of Citizenship and Immigration) [1998] 1 SCR 982 at paragraph 120.
17. *Harb v Canada* (Minister of Citizenship and Immigration) (2003) FCA 39 at paragraph 5.
18. *Pushpanathan supra* n19 at paragraph 59; *Harb (supra)* at paragraphs 5 and 10; *Ramirez v Canada* (Minister of Citizenship and Immigration) [1992] 2 FC 306 at 315; *Sivakumar v Canada* (Minister of Employment and Immigration) [1994] 1 FC 433; *Sumaida v Canada* (Minister of Citizenship and Immigration) [2000] 3 FC 66 at paragraph 13; *Zrig v Canada* (Minister of Citizenship and Immigration) [2003] 3 FC 761 at paragraphs 133 and 149; *Gonzalez v Canada* (Minister of Employment and Immigration) [1994] 3 FC 646; *Nagalingam v Canada* (Minister of Citizenship and Immigration) [2008] FCA 153 at paragraph 55.
19. *Canada* (Minister of Citizenship and Immigration) v *Hajjalikhani* [1999] 1 FC 181 at paragraph 5.
20. *Mugesera v Canada* (Minister of Citizenship and Immigration) 2005 SCC 40 at paragraph 57.
21. *Pushpanathan supra* n19, headnotes.
22. *Pushpanathan supra* n19 at paragraph 155; *Said v Canada* (Minister of Citizenship and Immigration) [1999] 2 FC 592 at
23. *Pushpanathan supra* n19 at paragraph 140.

24. Harb supra n20 at paragraphs 5-7; Ezokola supra n7 at paragraph 51; Mugesera supra n23 at paragraphs 84 and 120; Zazai v Canada (Minister of Citizenship and Immigration) [2005] FCA 303 at paragraph 17.
25. Ezokola v Canada (Citizenship and Immigration) 2010 FC 662 at paragraph 84; Mugesera supra n23 at paragraph 120.
26. Ezokola supra n7 at paragraphs 50-68; Zrig supra n21 at paragraphs 146-154; Harb supra n20 at paragraphs 7-10; Zazai supra n27 at paragraph 2.
27. Supra n21.
28. Supra n20.
29. Mugesera supra n23 (Supreme Court) and Mugesera v Canada (Citizenship and Immigration) [2004] FCA 89 (Federal Court of Appeal).
30. Harb supra n20 at paragraph 8.
31. Supra n20.
32. Prosecutor v Tadic, IT-94-1, July 15, 1999; Prosecutor v Aleksovski, IT-95-14/1, June 25, 1999; Prosecutor v Kvočka et al, IT-98-30, November 2 2001; Prosecutor v Bagilishema, ICTR-95-1, June 7, 2001; Prosecutor v Musema, ICTR-96-13-1, January 27, 2000, November 16, 2001; Prosecutor v Rutaganda, ICTR-96-3, December 6, 1999.
33. [1994] 3 FC 514.
34. [1994] 1 SCR 701.
35. Supra n27.
36. RSC 1985, c I-2.
37. Supra n7 at paragraph 45.
38. Although note the criticisms of the concept of JCE as itself imposing a form of guilt by association – supra n134.
39. Gerhard Werle, "Individual Criminal Responsibility in Article 25 ICC Statute" (2007) 5 *Journal of International Criminal Justice* 953 at 954.
40. Supra n21.
41. [2011] FCA 224 at paragraphs 15, 20 and 43.
42. Ramirez supra n21 at paragraph 35.
43. Ibid at paragraph 36.
44. Ibid at paragraph 37.
45. Ibid at paragraph 17.
46. [1994] 1 FC 298.
47. Ibid at paragraph 49.
48. Ibid at paragraphs 51 and 52.
49. [2009] FCA 330.
50. [2005] FCA 303 at paragraph 26.
51. [2003] 3 FC 761 at paragraph 19. In this case, the Federal Court of Appeal excluded the applicant under Article 1F(b) rather than 1F(a), finding that Ennhada's acts were not sufficiently widespread or systematic to be classed as crimes against humanity – see paragraph 108.
52. Ibid at paragraph 24.
53. Supra n45 at paragraph 52.
54. [2000] 3 FC 66.
55. Ibid at paragraphs 32 and 33.
56. Supra n21.
57. Asha Kauval and Catherine Dauvergne, *The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions*, Centre of Excellence for Research on Immigration and Diversity Working Paper Series, no 11-06, June 2011 at 39.
58. Joseph Rikhoff notes that "in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose" – Rikhoff, "Complicity at International Law and Canadian Refugee Law", (2006) 4 *Journal of International Criminal Justice* 702 at 709, n33.
59. Kauval and Dauvergne, supra n61 at 41.
60. See for example Major James D Levine, "The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard?", (2007) 193 *Military Law Review* 52 at 53.
61. Application of Yamashita (1946) 327 US 1.
62. [1992] 2 FC 306 at paragraph 35.
63. Jillian Sisskind, "Complicity in Crimes Against Humanity: The Intersection of International Criminal and Canadian Refugee Law", (2004) 49 *Criminal Law Quarterly* 96 at 105.
64. Case No. 60, The Dachau Concentration Camp Trial: Trial of Martin Gottfried Weiss and Thirty-Nine Others (November 15, 1945 to December 13, 1945, General Military Government Court of the United States Zone, Dachau, Germany), from *Law-Reports of Trials of War Criminals*, The United Nations War Crimes Commission, vol. XI, London, HMSO, 1949.
65. Sisskind, supra n67 at 104.
66. It is notable that John Demjanjuk was convicted in Germany of being an accessory to murder at a WWII concentration camp (Sobibor) solely on the basis that it could be shown that he was stationed there. See for example <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007956>.
67. Dachau supra n68 at 15-16.
68. Supra n53.
69. Sisskind, supra n67 at 105.
70. Pia Zambelli, "Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law", (2011) 23 *International Journal of Refugee Law* 252 at 283-4.
71. Ramirez supra n21 at paragraphs 24 – 29.
72. Sumaida supra n58 at paragraph 7.
73. Pushpanathan (Supreme Court) supra n19 and Pushpanathan v Canada (Minister of Citizenship and Immigration) [1996] 2 FC 49 (Federal Court of Appeal).
74. [1997] 1 FC 608.
75. Mugesera (Supreme Court) supra n23 and Mugesera (Federal Court of Appeal) supra n33.
76. Supra n27.
77. Ibid at paragraph 5
78. Supra n21.
79. Ibid at paragraph 23
80. Ibid at paragraphs 24 and 25. This finding seems more like one of absolute liability than a mere rebuttable presumption.
81. Supra n78.
82. Ibid at paragraph 4.
83. Ibid at paragraph 23, referring to s.68(3) of the IRPA.
84. Supra n23 at paragraph 46.
85. See also James Simeon, "Exclusion under Article 1F(a) of the 1951 Convention in Canada", (2009) 21 *International Journal of Refugee Law* 193 at 197.
86. Supra n21.
87. Supra n50.
88. Ibid.
89. Sing v Canada (Minister of Citizenship and Immigration) [2005] FCA 125 at paragraph 56.
90. Supra n23 at paragraph 116.
91. See also Moreno supra n50 at paragraphs 26 and 27.
92. Supra n21.
93. Michael Bliss, "Serious Reasons for Considering: Minimum Standards of

- Procedural Fairness in the Application of the Article 1F Exclusion Clauses”, (2000) 12 *International Journal of Refugee Law* 92 at 99.
94. *Supra* n78.
95. [1985] 1 SCR 177.
96. [2007] 1 SCR 350.
97. [1994] 1 FC 433 at 445.
98. Paragraphs 31 and 43 of the IRB's decision.
99. For example, Human Rights Watch, *World Report 2006: Events of 2005* (2006), at pp. 90-92, reproduced in *Ezokola supra* n7 at paragraph 16.
100. Paragraph 43 of the IRB's decision.
101. *Ibid* at paragraph 71.
102. *Ezokola v Canada (Citizenship and Immigration)* [2010] FC 62 at paragraphs 57-58, citing in support *Mugesera (Supreme Court) supra* n23 at paragraph 116.
103. *Ezokola (Supreme Court)*, *supra* n7 at paragraph 20.
104. *Ezokola (Federal Court) supra* n106 at paragraph 86; *Ezokola (Supreme Court) supra* n7 at paragraph 21.
105. *Ezokola (Federal Court of Appeal) supra* n45 at paragraph 28.
106. *Ibid* at paragraph 44.
107. *Ibid* at paragraph 72.
108. *Ibid* at paragraphs 74-77.
109. *Supra* n21.
110. *Supra* n45 at paragraph 78-79.
111. *Supra* n7 at paragraph 89.
112. *Ibid* at paragraphs 8 and 9.
113. *Supra* n21.
114. *Supra* n7 at paragraph 29.
115. *Ibid* at paragraph 61.
116. *Ibid* at paragraphs 35 and 36.
117. *Ibid* at paragraph 42.
118. *Supra* n20.
119. *Supra* n7 at paragraph 42, citing *Mugersea supra* n23 in support.
120. *Supra* n7 at paragraph 44.
121. *Ibid*.
122. *Supra* n21.
123. *Ibid* at paragraph 51.
124. *Ibid* at paragraph 55, citing in support *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012 (ICC, Trial Chamber I), at paragraph 999; *Prosecutor v William Samoei Ruto*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges, 23 January 2012 (ICC, Pre-Trial Chamber II), at paragraph 354; *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-514, Judgment on the Prosecutor's Appeal against the Decision on the Confirmation of Charges, 30 May 2012 (ICC, Appeals Chamber), at paragraph 8, per Judge Silvia Fernández de Gurmendi, concurring; *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 29 January 2007 (ICC, Pre-Trial Chamber I), at paragraph 337.
125. ICC-01/04-01/10-514 at paragraph 277.
126. *Ibid* at paragraph 284.
127. *Ibid* at paragraph 289.
128. *Supra* n7 at paragraph 60.
129. *Ibid* at paragraph 63, citing in support *Prosecutor v Duško Tadic*, IT-94-1-A, Judgment, 15 July 1999 (ICTY, Appeals Chamber), at paragraph 229 and *Prosecutor v Radoslav Brdanin*, IT-99-36-A, Judgment, 3 April 2007 (ICTY, Appeals Chamber), at paragraphs 427-28 and 430.
130. JCE has itself been described as a form of guilt by association – see for example *Harmen van der Wilt*, “Guilty by Association – Joint Criminal Enterprise on Trial”, (2007) 5 *Journal of International Criminal Justice* 90. This is particularly interesting given the Supreme Court's condemnation of guilt by association in paragraph 3 of the *Ezokola* judgement (*supra* n7).
131. *Cassese A (2009) International Criminal Law (2d ed 2008)* at 213, discussed in *Jens David Ohlin*, *Joint Criminal Confusion*. 12 *New Criminal Law Review: An International and Interdisciplinary Journal* 406: 410.
132. *Supra* n7 at paragraph 67.
133. *Supra* n133.
134. [2010] UKSC 15.
135. *Ibid* at paragraph 30.
136. 2007 FC 134.
137. *Xu Sheng Gao v United States Attorney General (2007) 500 F.3d 93* at paragraphs 5-6, cited in *Zambelli*, *supra* n74 at pp 284-85. The Supreme Court could also have added that the same approach has been taken by the Full Federal Court of Australia in *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 308, where *Mansfield*, *Emmett* and *Bennett JJ* stated as follows at paragraph 30:
138. The Administrative Appeals Tribunal (AAT) did not find that merely being an officer of the KHAD constituted complicity in its acts. The finding was to the effect that the appellant, in his capacity as an officer, engaged in conduct knowing that that conduct was likely to lead to the commission of relevant acts.
139. (2004) The Full Court therefore affirmed the AAT decision, and the appellant's application for special leave to appeal to the High Court was refused – *SHCB v MIMIA*, HCATrans 294.
140. *Supra* n7 at paragraph 77.
141. *Ibid* at paragraph 79.
142. *Ibid*.
143. *Ibid* at paragraph 81.
144. *Ibid* at paragraph 82.
145. *Ibid* at paragraph 86.
146. *Ibid*.
147. *Ezokola supra* n7 at paragraph 87; *JS supra* n138 at paragraph 38.
148. *Ezokola supra* n7 at paragraph 89.
149. *Ibid* at paragraph 90.
150. *Ibid* at paragraph 91.
151. *Ibid* at paragraphs 94-99.
152. *Supra* n21.
153. *Supra* n50.
154. *Supra* n7 at paragraph 101.
155. *Ezokola*, *ibid*; *JS supra* n138 at paragraph 39.
156. <http://ccla.org/wordpress/wp-content/uploads/2013/01/Intervenors-Factum.pdf>
157. <http://ccla.org/2013/07/19/ccla-applauds-supreme-court-decision-in-ezokola>
158. <http://ccrweb.ca/en/bulletin/13/07/19>
159. <http://www2.macleans.ca/2013/07/19/supreme-court-grants-appeal-by-former-congo-diplomat-to-un-in-war-crimes-case/>

Citation: Freckelton A (2014) The Supreme Court of Canada's Decision in Ezokola and the Harmonisation of Article 1f (A) of the Convention of the Status of Refugees and International Criminal Law. *J Civil Legal Sci* 3: 133. doi:[10.4172/2169-0170.1000133](https://doi.org/10.4172/2169-0170.1000133)