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Punishment and Protection, Two Sides of the Same Sword: The Problem of International Criminal Law Under the Refugee Convention

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This Note problematizes the role and purposes of international criminal law under the international refugee regime. Article 1A of the 1951 Refugee Convention defines a refugee as a person who has left his or her country of nationality and is unwilling to return because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Article 1F of the Convention contains exceptions to Article 1A that exclude certain individuals from refugee status. Article 1F(a), the focus of this Note, denies refugee status if there are serious reasons for considering that the asylum applicant "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." The framework of the Convention, through the structure of Article 1, thus situates international crimes at the center of the refugee regime.

By striking a balance between protecting the world's most vulnerable people and denying safe haven to international criminals, the Convention's drafters contemplated a role for international criminal law, a body of statutes and jurisprudence that would develop significantly in the ensuing decades. The result is the adjudication of international criminal law doctrines in domestic immigration tribunals—unequivocally civil, not criminal, settings. Adjudicators in asylum hearings must grapple with evolving and sometimes inconsistent principles of international criminal law that have grown out of ad hoc tribunals and culminated in the International Criminal Court at the beginning of the Twenty-First Century.

The stakes of this assimilation of international criminal law into the refugee context are high: many more individuals allegedly implicated in international crimes pass through immigration tribunals than will set foot in international criminal courts. Immigration tribunals across the globe have become scattered echoes of international criminal courts, attempting to tailor international criminal law to a non-criminal context where the stakes of life and liberty are exceedingly high. There is a need for a coordinated global effort to develop clear and consistent principles from international criminal law that are suitable for exclusion proceedings. Until then, the Convention's guarantee of protection may be elusive even for those who need it most.

INTRODUCTION

The world is facing record numbers of displaced persons. As of 2017, over sixty-five million people had been forced from their homes, including over twenty-two million refugees and almost three million asylum-seekers.[1] Each

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1. U.N. High Comm'r for Refugees [UNHCR], GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, at 2 (June 19, 2017), http://www.unhcr.org/5943e8a34.pdf. This Note uses UNHCR terminology for "refugee" and "asylum-seeker." Refugees are people outside their country of origin because of feared

year, roughly a million asylum applications are filed by individuals seeking safety and protection in new places.[2]

When individuals apply for asylum, they must demonstrate that they meet the elements of the legal definition of refugee as codified in international law. To demonstrate their eligibility, they present testimony in writing, in the form of applications and affidavits, as well as orally before an adjudicator who ensures the criteria for refugee status are satisfied and assesses the applicant's credibility. These proceedings offer asylum-seekers the opportunity to tell their stories, bearing witness to the horror they have experienced.

The process of anticipating and participating in these hearings is painful for asylum-seekers, who relive their trauma in recounting their past.[3] They may be subject to intense questioning by the adjudicator and, in an adversarial proceeding, by a government representative. With asylum-seekers under the spotlight and scrutiny, these hearings that are a gateway to a new life and newfound liberty take on the weightiness of a trial. Indeed, if the adjudicator's attention turns to elements of the asylum-seeker's past that could serve to exclude the individual from asylum, the proceeding unofficially turns into a quasi-criminal trial. When the possibility of criminal liability determines the asylum-seeker's fate, criminal law becomes implicated in what is otherwise a civil administrative proceeding. This Note explores the role of international criminal law under the international refugee regime. The two bodies of law share historical origins and must interact under the Convention; however, without more careful coordination of the two legal regimes, international criminal law threatens to undermine the promise of refugee protection.

International refugee law originates in the humanitarian crisis of the Holocaust and World War II. In its aftermath, Member States of the United Nations drafted the 1951 Convention Relating to the Status of Refugees ("Convention") to ensure that persons facing persecution in their home countries could find refuge elsewhere.[4] The Convention establishes an international protection regime for the security, legal protection, and human dignity of individuals victimized by persecution.[5] In 1967, the Protocol Relating to the Status of Refugees ("Protocol") expanded the 1951 Convention's definition of a refugee and obliged States to comply with the substan-

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persecution, conflict, violence, or other circumstances that have seriously disturbed public order, and who, as a result, require international protection. An asylum-seeker is someone whose request for sanctuary has yet to be processed.

2. *Id.* at 2–3.

3. *See* Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J. L. REFORM 1001, 1034–36 (2015).

4. United Nations Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

5. *See* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 4–5 (2005); NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATIONS; A COMMENTARY 6–8 (1953).

tive provisions of the Convention.[6] Under Article 1A of the Convention, a refugee is defined to include a person who has left her country of nationality or residence and is unwilling to return to that country "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion[.]"[7]

The Convention does not apply to all persons who satisfy this definition, however. Article 1F provides a series of exclusions from refugee status for persons who have committed certain acts.[8] This Note focuses on Article 1F(a), which bars an asylum applicant from obtaining refugee status if there are "serious reasons for considering" that the applicant "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."[9] Article 1F(a) overlaps to a significant degree with Article 1F(c),[10] which bars an asylum applicant when there are "serious reasons for considering" that the applicant is "guilty of acts contrary to the purposes and principles of the United Nations."[11] Article 1F(b) concerns individuals who have "committed a serious non-political crime" before entering the country of refuge.[12] This Note highlights the centrality of international criminal law in the international refugee scheme, focusing on the implications for asylum-seekers and adjudicators.

The following Part I demonstrates that Article 1F(a) cannot be properly understood without situating it in its relationship to international criminal law. Although immigration proceedings are civil in nature, the origins of the Convention and the nature of exclusion under Article 1F(a) implicate international criminal law at the heart of the international refugee regime. Article 1 rests on two mutually reinforcing purposes of providing protection while ensuring that international criminals do not evade prosecution, what this Note calls the Convention's "refugee" and "criminal" purposes, respectively. Part I explores the theoretical implications of this finding by highlighting the structural incompatibilities of criminal and refugee law, in addition to their intersecting and divergent purposes. Victims seeking the protection of asylum lack many of the procedural due process guarantees accorded to criminal defendants. Further, criminal trials serve public, societal purposes that private, individual asylum proceedings do not. Yet, the ramifications of these two legal mechanisms are similarly consequential: a hearing to grant or deny an asylum application rivals a criminal trial in its grave implications for an individual's life and liberty. The stakes of this

6. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.
7. Refugee Convention, *supra* note 4, art. 1A(2).
8. *Id.* art. 1F.
9. *Id.* art. 1F(a).
10. *See* U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, ¶¶ 162–63 (1979, rev. 2011).
11. Refugee Convention, *supra* note 4, art. 1F(c).
12. *Id.* art. 1F(b).

assimilation of international criminal law into the refugee context are high, as many more alleged international criminals pass through immigration tribunals, potentially facing exclusion under Article 1F(a), than will set foot in international criminal courts.

Part II of this Note clarifies the nature and purpose of international criminal law in the international refugee regime by carefully analyzing jurisprudence from several states parties to the Convention.[13] The case law illustrates how immigration tribunals and national courts have had to grapple with international and domestic criminal law principles in the context of asylum proceedings. At the core of Article 1F(a), therefore, is the intersection of international and domestic law.

The first section of Part II examines Article 1F(a) jurisprudence of several states parties—Canada, Australia, and the United Kingdom—that have adopted the exact Article 1F(a) language of exclusion into domestic law. In civil immigration tribunals, adjudicators in these states parties have been forced to wade into international criminal law waters, confronting a multiplicity of principles and standards, sometimes inconsistent, from the relevant international instruments and tribunals that have grown over time. These tribunals become echoes of decentralized, ad hoc international criminal courts, extracting principles from international criminal law and adapting them to a non-criminal context. In applying international criminal law, these cases have themselves yielded a body of quasi-international criminal law doctrines specifically tailored for their application in exclusion decisions.

In contrast, the second subsection of Part II explores these kinds of cases in the United States, where domestic law on exclusion does not mirror verbatim the language of the Convention. As a result, the role and application of criminal law—international and domestic—in U.S. asylum adjudication are unclear and at odds with the practice of other states parties.

Part III concludes.

13. Part II focuses on the adjudication of refugee status in domestic fora as opposed to an international setting. There are two ways of being recognized as a refugee. Resettlement under the auspices of the United Nations High Commissioner for Refugees ("UNHCR") involves the selection and transfer of refugees from a country in which they have sought protection, to a host country that has agreed to admit them as refugees with residence status. These persons whom UNHCR recognizes as refugees and who are then resettled in a host country go through a different process than persons who apply for protection within the host country, either when they are seeking admission at a port of entry or after they have already entered the country in a different status or without status. Generally, when a person applies for refugee status within the host country, that state's government, not UNHCR, is responsible for making the determination. The Article 1F(a) jurisprudence discussed in Part I arises out of this latter process, although references are made to UNHCR guidance on the issue.

I. Article 1F(a) and International Criminal Law

A. Historical Origins: Coordinating the International Refugee and Criminal Law Regimes in the Aftermath of WWII

With Article 1F, the Convention's drafters sought to exclude from the protection regime criminally culpable individuals whose conduct could subject them to extradition or international criminal proceedings.[14] In the wake of the unprecedented atrocities of WWII, their supposed moral unworthiness would have weakened public support for a refugee regime where such individuals could receive protection.[15] The provisions of Article 1F were thus made mandatory, insofar as an adjudicator cannot exercise discretion to grant refugee status despite a determination that the asylum-seeker's conduct amounts to the activity proscribed under Article 1F.[16] In other words, the conduct that deprives an individual of refugee status under Articles 1F(a) cannot be balanced against the severity of persecution feared or suffered.[17] The imperative of Article 1F allowed the Convention's drafters to strike a fine balance to preserve the Convention's credibility and goals: under-exclusion would compromise the integrity of the institution of asylum by providing protection to those considered unworthy, while over-exclusion would have the grave consequence of denying protection to individuals in serious need.[18]

In contrast with the "non-political" crimes of Article 1F(b), the crimes enumerated in Article 1F(a)—crimes against peace, war crimes, and crimes against humanity—are specifically international in nature. Like the 1951 Refugee Convention, those crimes also originated in the aftermath of WWII. Although immigration proceedings are civil, not criminal, in nature, Article 1F(a) cannot be properly understood without recognizing its relationship with international criminal law.

Following the atrocities of WWII, military tribunals were tasked with determining who was guilty for the war's horrific crimes. In so doing, they defined and laid the foundation for the crimes contained in Article 1F(a) of the Convention. The Charter for the International Military Tribunal of 1945 ("London Charter"), which laid out the laws and procedures by which the Nuremberg Trials would be conducted, defined three categories of crimes to

14. *See* Geoff Gilbert, Current Issues in the Application of the Exclusion Clauses 427–29 (2002); James C. Hathaway, The Law of Refugee Status 567 (2014).

15. Hathaway, *supra* note 14, at 525.

16. Compare Article 1F with Convention Articles 32 and 33(2), which, respectively, deal with the expulsion of, and the withdrawal of protection from *refoulement* from, individuals who meet the refugee definition but who are deemed to pose a danger to the host state.

17. Guy Goodwin-Gill & Jane McAdam, The Refugee in International Law 180–84 (3d ed. 2007).

18. U.N. High Comm'r for Refugees [UNHCR], Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, ¶ 2, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) [hereinafter UNHCR, *Guidelines on International Protection*].

be tried by the International Military Tribunal ("IMT"): "crimes against peace," "war crimes," and "crimes against humanity."[19] After the commencement of the Nuremberg Trials, the Allied Control Council issued Law No. 10, which authorized every occupying power to have its own legal system to try individuals charged with the crimes defined by the Charter, and to conduct such trials independently of the IMT then sitting at Nuremberg.[20] At Nuremberg and elsewhere, Allied forces sought to hold individuals accountable for their actions by imposing liability for conduct that warranted moral condemnation.[21]

The drafters of the Refugee Convention understood that the principles enunciated by post-war military tribunals would apply to exclusion decisions under the Convention.[22] At the time of drafting, the language in Article 1F(a) regarding the "international instruments drawn up to make provision in respect of such crimes" would have been understood to refer to the foundational documents for the post-WWII trials of war criminals, including the London Charter.[23] The Convention's drafters would have also been contemplating the 1949 Geneva Conventions and the 1950 report of the International Law Commission as current sources of international criminal law.[24] By 1951, the Article 1F(a) crimes had developed content under international law; "crimes against humanity," for example, had come to include a register of certain crimes, including "murder, extermination, enslavement, deportation, and other inhuman acts done against a civilian population, or persecutions on political, racial, or religious grounds."[25]

International criminal law developed significantly at the end of the Twentieth Century, several decades following the Convention's drafting, starting with the creation of ad hoc criminal tribunals in the 1990s and culminating with the establishment of the International Criminal Court ("ICC") in 2002.[26] The United Nations High Commissioner for Refugees ("UNHCR"), recognizing that international criminal law has evolved since the post-WWII military tribunals, explains that international instruments

19. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; *see* Katherine Evans, *Drawing Lines Among the Persecuted*, 101 Minn. L. R. 453, 525 (2016).

20. Evans, *supra* note 19, at 525–26.

21. *Id.* at 526–28.

22. Goodwin-Gill & McAdam, *supra* note 17, at 163–68; Atle Grahl-Madsen, The Status of Refugees in International Law 273–77 (1966); Robinson, *supra* note 5, at 66–67.

23. Evans, *supra* note 19, at 525. An early draft of the 1951 Refugee Convention explicitly cited the Charter in its first exclusion from refugee status.

24. *Id.*

25. *See id.*; J. Spiropoulos, *Special Rapporteur, Second Report on a Draft Code of Offenses Against the Peace and Security of Mankind* [1951] 2 Y.B. Int'l L. Comm'n 59, U.N. Doc. A/CN.4/44. The phrase had evolved from its previous, more general reference to "any crime against peace or war crimes as defined by the Charter of the International Military Tribunals."

26. M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice*, *in* The Oxford Companion to International Criminal Justice 131, 137 (Antonio Cassese ed., 2009).

drafted since the 1951 Convention also "offer guidance" on the scope of international crimes.[27] These instruments include the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda ("ICTY" and "ICTR", respectively), and more recently the Rome Statute of the ICC.[28]

B. *A Fundamental Misalignment Between the Principles of International Criminal Law and the International Refugee Regime*

The Convention's reference to international crimes as mandatory grounds for denying refugee status yields a complex interaction between international criminal and refugee law. These two areas of law, while originating in the same historical moment, are rooted in fundamentally different purposes and principles. The importation of international criminal law into the determination of refugee status has critical implications for the personal rights of individuals seeking asylum. Further, international criminal law and protection under the international refugee regime serve fundamentally different societal purposes; utilizing the former in the service of the latter reveals structural incompatibilities between the two legal systems.

International criminal law tribunals sit in judgment of the perpetrators of wartime atrocities. They seek to administer retribution, incapacitate the perpetrators, hold them accountable for their actions, and deter similar conduct in the future.[29] These objectives constitute the essence of criminal law, domestic and international.[30] In contrast with domestic criminal courts, international criminal tribunals have often articulated additional, broader goals such as the desire to produce a reliable historical record of the context of international crimes, to provide a venue for giving voice to victims, to propagate human rights values, and to achieve objectives related to peace and security, such as by stopping an ongoing conflict.[31]

Criminal justice has the dual objective of satisfying both private and collective interests by bridging the victim's private desire for "an eye for an eye" retribution with the "public need to prevent and repress any serious breach of public order and community values."[32] International criminal law is an element in the "landscape" of conflict resolution and transitional jus-

27. UNHCR, *Guidelines on International Protection, supra* note 18, ¶ 10.

28. U.N. High Comm'r for Refugees [UNHCR], *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶¶ 23–25, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) [hereinafter UNHCR, *Background Note*].

29. *See* Mirjan R. Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 331 (2008).

30. *See generally* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1 (2003).

31. Damaska, *supra* note 29, at 331.

32. Antonio Cassese, *Reflections on International Criminal Justice*, 9 J. INT'L. CRIM. JUST. 271, 271 (2011).

tice, as societies emerge from a period of oppression and seek to reestablish stability, peace, and rule of law.[33]

While criminal justice systems deprive wrongdoers of life and liberty, refugee systems protect the life and liberty of victims when their home countries have failed to do so. Refugee law allows individuals to escape from oppression and find stability, peace, and rule of law elsewhere in the world. International refugee law, established by the Convention and Protocol, created the foundations for international and domestic administrative regimes that would offer refuge to victims of the aforementioned international crimes. The Convention enabled a system of international protection to ensure the security, legal protection, and human dignity of individuals suffering from persecution.

The Convention's exclusions coordinate the goals of these two legal regimes. Article 1F excludes from refugee status those considered to be undeserving of the protection that the status entails. As one Canadian judge explained, "those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees."[34] The provisions further ensure that serious criminals are not able to evade prosecution and punishment for their crimes by claiming asylum.[35] Article 1F thus preserves the political and ethical imperative to continue protecting refugees, as states parties cannot recognize as refugees persons in flight from legitimate domestic or international criminal prosecutions for serious crimes, or who were guilty of acts contrary to the purposes and principles of the United Nations.[36]

Aligning the refugee system with international criminal law thus strengthens its moral authority and political viability.[37] In so doing, Article 1F of the Convention brings the international criminal regime and refugee regime in service of one another. The existence of transnational accountability mechanisms for perpetrators of serious international crimes helps guarantee that these criminals will not take advantage of the protection offered by refugee law, while refugee law helps ensure that these criminals will not evade prosecution under those mechanisms. This symbiosis rests on an equilibrium between exclusion's dual purposes: to determine who is deserving of refugee protection (what this Note describes as the "refugee purpose") on one hand, and to ensure international criminals do not evade prosecution (what this Note describes as the "criminal purpose") on the other.

As a result of the Convention's criminal purpose, Article 1F inevitably subsumes findings of guilt for criminal acts into an administrative determi-

33. Patrick Keenan, *The Problem of Purpose in International Criminal Law*, 37 MICH. J. INT'L L. 421, 422 (2016) (examining the purposes of international criminal law in the second decade of the International Criminal Court).

34. Pushpanathan v. Canada, [1998] 1 S.C.R. 982, 984–85 (Can.).

35. HATHAWAY, *supra* note 14, at 525 n.10.

36. *Id.* at 526–27.

37. *Id.* at 529–30.

nation of refugee status, the fundamental goal of which is to provide or deny protection, not to establish moral responsibility for the purposes of accountability, retribution, incapacitation, or deterrence. Nevertheless, when the facts of an individual's case raise a potential Article 1F issue, a quasi-criminal investigation and judgment become a mandatory component of the administrative adjudication. A criminal trial returns findings of guilt and attributes moral responsibility in order to achieve retribution, incapacitation, rehabilitation, and deterrence.[38] A domestic immigration tribunal, however, does not make a finding of "guilt" beyond a reasonable doubt to attribute criminal responsibility for those several purposes. Instead, it finds "serious reasons for considering" an applicant may be guilty of Article 1F(a) crimes in order to deny an applicant refugee status and, accordingly, lawful presence in the country of refuge. However, the results—the deprivation of life and liberty—are arguably the same.[39]

This interaction between criminal and refugee law in determining an asylum seeker's fate is also noteworthy given the important structural differences between the two bodies of law that offer different degrees of protection to individuals on trial or seeking asylum. Procedurally, criminal and immigration proceedings contrast in significant ways. While the focus of a criminal trial is on the defendant, victims can participate in the proceedings by testifying as witnesses,[40] and the proceedings are generally open to the public. Asylum adjudications, on the other hand, are often confidential in order to protect the identity of the respondent.[41] A closed-door Article 1F(a) case has none of the pedagogical effects or purposes of public criminal trials.[42]

38. Damaska, *supra* note 29, at 331.

39. For an argument that asylum denial, or removal in general, should be considered a form of punishment, see Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2404–06 (2013). One author argues that deportation should be conceptualized as a phenomenon that is distinct and unique from punishment, though they share many similarities. Daniel Kanstroom, *Deportation as a Global Phenomenon: Reflections on the Draft Articles on the Expulsion of Aliens*, 30 HARV. HUM. R. J. 49, 51 (2017). Under U.S. law, deportation and asylum denial have not been considered forms of punishment such that individuals in such proceedings are not guaranteed due process rights. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime. It is not a banishment . . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property without due process of law; and the provisions of the [United States] Constitution, securing the right of trial by jury and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.").

40. In cases before the International Criminal Court, victims have a statutory right to participate in the proceedings. International Criminal Court Office of the Prosecutor, *Policy Paper on Victims' Participation*, 3, U.N. Doc. RC/ST/V/M.1 (Apr. 12, 2010).

41. While removal proceedings in U.S. Immigration Courts are open to the public, evidentiary hearings involving an application for asylum can be closed upon the respondent's express request. 8 C.F.R. § 1240.11(c)(3)(i) (2013). In Canada, admissibility hearing or detention review proceedings must be held in public unless they concern a claimant of refugee protection, in which case they must be held in private. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 166(c) (Can.).

42. In contrast to international criminal trials, however, the private nature of an Article 1F(a) proceeding means that it is less likely to be perceived as a politicized "show" trial, where the outcome of the

Moreover, when the asylum-seeker is "accused" of Article 1F(a) crimes, there is no opportunity for victims to testify against their alleged persecutor. As a consequence, there is little of the philosophical obligation that underlies international criminal proceedings to publicly acknowledge and memorialize the victims through the process of exacting retribution on their behalf.

It is also significant that criminal and civil proceedings make use of different standards of proof. While immigration courts and tribunals assume a quasi-criminal character in making Article 1F(a) determinations, the standard of proof for the purposes of exclusion is universally understood to be lower than that in criminal trials. The Convention establishes the standard of proof under Article 1F(a) is "serious reasons for considering." Not only are civil standards generally lower than the "beyond a reasonable doubt" standard in criminal law, but in some jurisdictions, proving the elements of exclusion under Article 1F(a) is even lower than the civil standard,[43] despite guidance by UNHCR urging a "restrictive" interpretation due to the serious consequences of exclusion.[44] Courts in the United States have equated the standard for exclusion with the low threshold set in probable cause hearings.[45] Canadian courts have interpreted "serious reasons for considering" to be lower than the civil standard of "balance of the probabilities."[46] One Canadian judge framed the standard for an Article 1F(a) finding as when "no properly instructed tribunal could fail to come to the conclusion that the appellant had been personally and knowingly involved in persecutorial acts."[47] The Supreme Court of Canada has explained that something less

case may be influenced by larger political and symbolic concerns or by a display of "victor's justice." Since immigration proceedings are classified, they generate fewer political considerations among States and the international community than international criminal tribunals. However, Article 1F(a) cases ultimately generate bodies of case law in which the host country passes judgment on the culpability of individuals seeking refuge. Often, the criminal activity at issue was a product of a State's or a regime's sponsored or organized violence. Indirectly, then, refugee determinations may amount to political judgments or statements by one sovereign state about another. For example, the U.S. has frequently denied asylum to applicants who, as nurses in China, directly or indirectly contributed to forced sterilizations or abortions, as these procedures are considered persecution under U.S. asylum law. *See infra* Part III.

43. Matthew Zagor, *Persecutor or Persecuted: Exclusion Under Article 1F(A) and (B) of the Refugees Convention*, 23 UNSW L. J. 164, 168 (2000). Zagor draws attention to the danger of cursory administrative decision-making given the seriousness of the consequences of a decision to exclude, and the low standard of proof set in most common law jurisdictions.

44. UNHCR, *Background Note*, *supra* note 28, ¶ 4 ("[A]s with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and should be used with great caution . . . . [S]uch an approach is particularly warranted in view of the serious possible consequences of exclusion for the individual.").

45. Zagor, *supra* note 43, at 168.

46. Moreno v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 298, 308 (Can. C.A.); Sivakumar v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 433, 445 (Can. C.A.); *see also Interpretation of the Convention Refugee Definition in the Case Law*, IMMIGR. & REFUGEE BD. CAN. (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef.aspx#table.

47. Ramirez v. Canada (Minister of Employment and Immigration), 1992 CarswellNat 94F (Can. C.A.) ("To convict the appellant of criminal liability for his actions would, of course, require an entirely different level of proof, but on the basis of the lower-than-civil-law standard established by the nations of

than a criminal burden of proof is appropriate in Article 1F(a) cases because immigration tribunals "do[ ] not make determinations of guilt."[48] That Court referred to "serious reasons for considering" as a "unique evidentiary standard" that, while lower than both the criminal and civil standards, "does not . . . justify a relaxed application of fundamental criminal law principles" to make room for theories of liability that would be at odds with basic tenets of criminal law.[49]

Courts in the UK have similarly grappled with the standard of proof in exclusion cases and determined that the language of the Convention "implied something less than proof on either a criminal standard of beyond reasonable doubt or a civil standard of balance of probabilities."[50] Rejecting a "rigid application" of the civil standard of proof, the Immigration Appeal Tribunal focuses on the "words of Art 1F, i.e. 'serious reasons for considering'" in order to account for "the possibility that doubtful events may have taken place" under a "more rounded approach."[51] At least one case from the UK Immigration Appeals Tribunal noted the oddity of applying a civil standard of proof to an essentially criminal finding. In parsing the standard for aiding and abetting liability under Article 1F, the Tribunal noted that "international criminal law and international humanitarian law . . . should be the principal sources of reference in dealing with such issues as complicity."[52] After citing several sources of international criminal law, the Tribunal cautioned that "such reference will need to bear in mind the lower standard of proof applicable in Exclusion Clause cases." It did not, however, explain how adjudicators should take into account the different standard of proof in reconciling the authority of international criminal law with the nature of refugee status determinations.

Exclusion proceedings thus apply substantive definitions of crimes, modes of commission, and defenses from international criminal law to a *de facto* determination of criminality using a lower standard of proof. Indeed, the ambiguity surrounding the standard of proof for essentially judicial determi-

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the world, and by Canadian law for the admission of refugees, where there is a question of international crimes, I have no doubt that no properly instructed tribunal could fail to come to the conclusion that the appellant had been personally and knowingly involved in persecutorial acts.").

48. Ezokola v. Canada (Minister of Citizenship and Immigration), 2013 SCC 40, [2013] 2 S.C.R. 678, paras. 10102 (Can.) ("[T]he Board does not make determinations of guilt. Its exclusion decisions are therefore not based on proof beyond a reasonable doubt nor on the general civil standard of the balance of probabilities. Rather, Article 1F(a) directs it to decide whether there are 'serious reasons for considering' that an individual has committed war crimes, crimes against humanity or crimes against peace . . . . In our view, this unique evidentiary standard is appropriate to the role of the Board and the realities of an exclusion decision addressed above. The unique evidentiary standard does not, however, justify a relaxed application of fundamental criminal law principles in order to make room for complicity by association."). For a detailed analysis of the *Ezokola* decision, including its interpretation and application of the relevant standard of proof, *see* Livio Zilli, *Ezokola v. Canada*: *The Correct Place of International Criminal Law in International Refugee Law-making*, 12 J. Int'l Crim. Just. 1217, 1229 (2014).

49. *Ezokola*, 2013 SCC 40, paras. 10102.

50. Gurung v. Secretary of State for the Home Department [2002] UKIAT 04870, [95].

51. *Id.*

52. *Id.* para. 109.

nations of guilt in a civil context made the Convention's drafters uneasy. They were troubled by the idea that administrative decision-makers applying Article 1F(a) would find themselves in the anomalous position of rendering essentially judicial judgments regarding the likelihood of criminal guilt.[53]

The opinion in *Ezokola v. Canada*, the leading Canadian case on Article 1F(a) interpretation, illustrates this latent tension between the administrative and criminal qualities of refugee adjudication and between the refugee and criminal purposes of exclusion.[54] The Canadian Supreme Court simultaneously distinguished the case from an international criminal proceeding while relying heavily on foundational principles of criminal law. The Court first treated the refugee and criminal analyses as distinct: "[U]nlike international criminal tribunals, the Refugee Protection Division does not determine guilt or innocence, but excludes, *ab initio*, those who are not *bona fide* refugees at the time of their claim for refugee status."[55]

However, the inquiry into an asylum seeker's complicity with Article 1F(a) crimes turned on a finding of a culpable mental state, leading the Court to rely on criminal law: "[A] concept of complicity that leaves any room for guilt by associate or passive acquiescence violates two fundamental criminal law principles: the principle that criminal liability does not attach to omissions unless an individual is under a duty to act, and the principle that individuals can only be liable for their own culpable conduct."[56] In *Ezokola*, the Court stated its intention to "bring Canadian law in line with international criminal law, the humanitarian purposes of the Refugee Convention, and fundamental criminal law principles" (italics omitted).[57] In so doing, the Court explicitly recognized their interconnectedness under Article 1F(a) and the centrality of criminal law in the Article 1F(a) analysis.

The foregoing analysis has outlined the differences between international criminal law and refugee protection as they relate to the individuals subject to those respective legal proceedings. Beyond the individual level, international criminal law and refugee protection serve different societal functions that further shape their structural incompatibilities.

Unlike international criminal trials, refugee cases do not seek to generate a historical record of past atrocities. Therefore, the nature of fact-finding and role of historical perspective differ between the two regimes. It is not the purpose of Article 1F(a) adjudication to encourage future generations to recognize and remember what happened in history.[58] While they may do so

53. Zagor, *supra* note 43, at 169. Lord MacDonald, the United Kingdom delegate at the drafters' convention, warned, "[I]t is dangerous to entrust such a power to the executive organs of a government." *Id.*

54. *See generally Ezokola*, 2013 SCC 40.

55. *Id.* para. 38.

56. *Id.*

57. *Id.*

58. *See* Cassese, *supra* note 32, at 6.

inadvertently, immigration tribunals do not see the documentation of history as a primary objective. They are also incapable of generating a factual record of nearly the same breadth, depth, and accuracy as that which would be put together before an international criminal court.[59] Asylum proceedings tend to take place while the conflict that gave rise to allegations of Article 1F(a) crimes is still ongoing, meaning that adjudicators cannot rely on historical perspective to contextualize the specific experiences of any particular individual. In contrast, international criminal trials administer justice at the end of an armed conflict and usually focus on the crimes perpetrated by those who have lost at the military or political level.[60] Whereas a historian may take the stand as an expert witness in an international criminal trial to contextualize the charges against individual defendants,[61] in an immigration hearing the parties may rely on current country conditions reports and expert witnesses to try to situate the petitioner's story against the larger, ongoing social, political, economic, and cultural forces at play.[62]

Both international criminal trials and individual refugee determinations grapple with large political crises by means of individual responsibility.[63] Like international criminal trials, Article 1F(a) adjudication is directed at the particular actions of individual human beings instead of the State or organization whose policies, laws, and administration gave rise to the international crimes at issue. Toward the end of or many years after a conflict, international criminal law seeks to establish individual responsibility in the context of the global community's collective assignation of guilt, such as to the whole State, political party, or military organization.[64] Refugee law, which establishes who is eligible for and deserving of protection, operates on a much smaller historical and political scale. While expert historians or country conditions experts can help attribute blame to a government regime or larger socio-political forces, the ultimate goal of each legal system is to

59. International criminal courts themselves have been criticized for being less conducive to administering justice than national criminal courts in part because the former do not normally sit in the country where the crimes falling under its jurisdiction were perpetrated and are thus significantly removed from the scene of the crimes. They may be located in neighboring countries, as was the case of the ICTR, or very far away, as was the case of the ICTY and as is the case of the ICC. While international criminal tribunals, unlike immigration courts, have the power to issue arrest warrants and subpoenas for the purpose of gathering evidence, they lack means of enforcing those orders. Thus, international criminal courts, like immigration courts, are at a relative disadvantage as compared with domestic criminal courts to make findings of guilt in such cases. *See generally* Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

60. Cassese, *supra* note 32, at 274.

61. RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 69–70 (2011).

62. For an overview on the role experts play in helping the judiciary understand the complexities of asylum cases, see ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY (Benjamin N. Lawrance & Galya Ruffer eds., 2015).

63. Marti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK UNITED NATIONS YB 1 (2002).

64. Antonio Cassese, *Reflections on International Criminal Justice*, 61 MODERN L. REV. 1, 6 (1998).

determine whether a particular individual deserves punishment or protection.

The international criminal legal regime has received significant criticism for what some see as an unrealistic, impossible goal of finding and conserving the "truth" of a "complex series of events involving the erratic action by major international players."[65] Criminal law, some have argued, may not be an adequate mechanism for comprehending large-scale international crimes, which take place against a background of "system criminality" where individual and collective responsibility is mixed.[66] If the search for individual responsibility is a challenge for *ad hoc* tribunals or permanent international criminal court, which are relatively more accustomed to dealing with the most complicated cases and have a relatively robust knowledge of a given conflict, then it is fair to say that immigration courts are less equipped to make similar determinations.

Nonetheless, Article 1F(a) mandates that immigration courts adjudicating refugee status assume the mantle of an international criminal court. Understanding Article 1F(a) thus necessitates a careful reconsideration of how international criminal law has been and should be imported into the asylum determination process. Where exclusion under Article 1F(a) may be implicated, immigration tribunals must turn to various sources of international criminal law, including statutes and jurisprudence from a range of courts and jurisdictions. As Part II illustrates, immigration judges arrive at Article 1F(a) determinations by appropriating legal principles that arose from a context whose purpose and nature differ fundamentally from those of refugee law. It is necessary, therefore, to examine how immigration judges and administrators draw on external sources of international criminal law in their decision-making. It remains unclear how the asylum-determination process should most effectively make use of sources and principles from international criminal law to fulfil the Convention's dual refugee and criminal purposes.

Many more alleged international criminals pass through immigration tribunals, raising Article 1F(a) issues, than set foot in international criminal courts. As of the end of 2015, approximately 65.3 million people have been forcibly displaced worldwide, including approximately 16 million refugees and 3.2 million asylum seekers.[67] In other words, millions of people a year

65. Koskenniemi, *supra* note 63, at 1; *see also* Damaska, *supra* note 29, at 332–33 ("[C]onsider the uneasy relationship between the objective of producing an accurate historical record and individualizing responsibility . . . . [W]hile individualization of responsibility may, in some circumstances, be politically desirable, it may also produce distortions of historical reality.").

66. André Nollkaemper, *Introduction* to System Criminality in International Law 1, 4 (André Nollkaemper & Harmen van der Wilt eds., Cambridge Univ. Press 2009).

67. U.N. High Comm'r for Refugees [UNHCR], Statistics: The World in Numbers, http://popstats.unhcr.org/en/overview (last visited May 11, 2017). In this database, refugees include individuals recognized under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, as well as people in a refugee-like situation. Asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined. Other classes of people com-

seek refugee or asylum determinations through UNHCR or the national governments of host countries. Even though a very small percentage of these cases raise exclusion issues under Article 1F(a), that figure would dwarf the number of international criminal prosecutions of similar types of crimes. Since its inception in 2002, the ICC has opened ten investigations,[68] opened preliminary examinations into ten other conflicts,[69] and publicly indicted forty people. The ICTY has indicted 161 people,[70] and the ICTR 93.[71] In comparison, in the United Kingdom it is estimated that the Special Cases Unit, which handles all cases that involve exclusion, receives about 150 to 200 potential Article 1F referrals every year, of which a quarter ultimately result in an exclusion decision.[72] The Federal Court of Canada, which reconsiders only a small number of petitions for judicial review, issued roughly 200 decisions in cases involving Article 1F(a) between 1992 and 2009.[73]

The immigration offices, tribunals, and courts making refugee determinations are thus more likely to be confronted with cases of Article 1F(a) crimes than the criminal tribunals tasked with defining the scope and elements of those crimes. The rest of this Note takes a closer look at how various national courts and domestic immigration tribunals have had to grapple with international criminal law for Article 1F(a) determinations.

II. Article 1F(a) Adjudication

The remainder of this Note, divided into two sections, explores how domestic immigration judges use international criminal law to decide whether an applicant is excluded from refugee status. The first section examines Article 1F(a) jurisprudence of several states parties to the Convention and Protocol that have adopted the exact Article 1F(a) language of exclusion into domestic law. These include common law countries such as Canada, the United Kingdom, and Australia. The subsequent section explores such jurisprudence in the United States, where international criminal law disappears from the analysis because U.S. domestic law on exclusion does not mirror the language of the Convention. This Note is not a comprehensive survey of

prising the 65.3 million figure include internally displaced persons (37.5 million), returned refugees (2.5 million), and stateless persons (3.7 million).

68. *Situations Under Investigation*, Int'l Crim. Ct., https://www.icc-cpi.int/pages/situations.aspx (last visited May 11, 2017).

69. *Preliminary Examinations*, Int'l Crim. Ct., https://www.icc-cpi.int/pages/situations.aspx (last visited May 11, 2017).

70. *Key Figures of the Cases*, U.N. Int'l Tribunal for the Former Yugoslavia, http://www.icty.org/en/cases/key-figures-cases (last visited May 11, 2017).

71. *The ICTR in Brief*, U.N. Mechanism for Int'l Crim. Tribunals, http://unictr.unmict.org/en/tribunal (last visited May 11, 2017).

72. Sarah Singer, Terrorism and Exclusion from Refugee Status in the UK 205 (2015).

73. Joseph Rikhof, *War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 Int'l J. Refugee L. 453, 457 (2009).

all or most exclusion decisions; instead it relies on a small subset of frequently cited cases that best illustrate the problems at issue.

Further, this Note does not purport to summarize the jurisprudence on crimes, complicity, and defenses arising out of these jurisdictions.[74] Rather, the analysis below sheds light on the paradoxes, challenges, and surprising consequences that result when criminal responsibility for war crimes or crimes against humanity becomes the central inquiry in determining refugee status. Domestic and international criminal tribunals have developed a whole register of theories of liability and defenses to align punishment with individual responsibility. Those standards may differ between domestic and international criminal law, and even across different sources of international criminal law. Moreover, because criminal law's approach to issues such as complicity and duress is necessarily correlated to criminal law's purposes, a criminal standard, be it domestic or international, is not necessarily suitable for refugee law. As the following analysis illustrates, adjudicators of refugee status apply criminal law standards, without first establishing whether they are appropriate, to determine whether a petitioner is deserving of the protection of refugee status.

A. Article 1F(a) in Canada, Australia, and the United Kingdom

Legislation in Canada, Australia, and the United Kingdom has imported Article 1F(a) of the Convention into domestic law. As the text of Article 1F(a) reflects the clause's origins in the international criminal law arising out of World War II, that language has become controlling on the application of refugee law in these states parties. Section 98 of Canada's Immigration and Refugee Protection Act (IRPA) incorporates by reference Article 1F(a) of the Convention. In Australia, Section 5H of the 1958 Migration Act recites the language of Article 1F(a). The Convention has not been directly incorporated into domestic law in the United Kingdom, but the country's immigration practices are required to align with the Convention, whose provisions necessarily influence the formulation of immigration rules.[75]

As the Convention's language specifically references "crimes" in "international instruments," those states parties must apply international criminal law principles in the determination of refugee status. It would follow, then, that a finding of exclusion under Article 1F(a) would require consideration of the elements of a crime: an *actus reus*, the requisite *mens rea*, voluntariness, a theory of liability, and relevant defenses. By itself, the Convention provides little guidance as to how each element should be interpreted and applied in the refugee context. There appears to be consensus across tribunals in Canada, Australia, and the United Kingdom that international instru-

74. For such a synthesis, see *id.*

75. Asylum and Immigration Appeals Act 1993, c. 23, § 2 (U.K.) ("Nothing in the immigration rules (within the meaning of the [Immigration Act of 1971]) shall lay down any practice which would be contrary to the Convention.").

ments, as repositories of international criminal law, are the appropriate starting point. However, the Convention refers broadly to "international instruments," leaving it up to the adjudicators to determine which are relevant. Moreover, there is significant confusion among tribunals regarding the uniform application of a body of international law that has developed substantially since the Convention and that is in some respects internally inconsistent.

1. *Domestic Adjudication in an "International Context"*[76]

In applying Article 1F(a), domestic immigration tribunals have repeatedly emphasized that the appropriate standards arise out of international, not domestic, criminal law. The UK Immigration Appeals Tribunal in *Gurung*, a 2002 denial of a Nepalese petitioner's asylum petition, underscored the importance of applying international law in the exclusion context: "Whilst the subject matter is serious criminality it is not assessed according to national law criteria: it is assessed according to an international law perspective which seeks to give autonomous meaning to the acts and crimes specified."[77] The High Court of Australia has similarly distinguished international from domestic law, focusing on the former as the appropriate authority: "[T]he relevant question for the decision maker is identified in an international treaty to which effect must be given in very different domestic administrative and judicial settings. There is no warrant for reading the text of the treaty as operating by reference to common law judicial or procedural precepts."[78] The High Court of Australia has warned lower courts interpreting the Convention not to "fall into the error of introducing into the elaboration of its meaning peculiarities of domestic law that have no place in an international context."[79]

Likewise, the Supreme Court of Canada explains the importance of relying on international, not domestic, legal standards as specifically tailored to the crimes that trigger exclusion under Article 1F(a):

> Whether an individual is complicit in an international crime cannot be considered in light of only one of the world's legal systems. This flows not only from the explicit instruction in Article 1F(a) to apply international law, but also from the extraordinary nature of international crimes. They simply transcend domestic norms . . . . International criminal law, while built upon domestic principles, has adapted the concept of individual responsibility to this

76. FTZK v. Minister for Immigration & Border Protection, [2014] HCA 26 (Austl.).
77. Gurung v. Secretary of State for the Home Dep't, [2002] UKIAT 04870, [32].
78. *FTZK*, [2014] HCA 26, at 13.
79. Minister for Immigration & Multicultural Affairs v. Singh, [2002] HCA 7 (Austl.).

> setting of collective and large-scale criminality, where crimes are often committed indirectly and at a distance.[80]

Domestic tribunals clearly recognize the place of international criminal law in Article 1F(a) adjudication. Canadian courts, including the Supreme Court of Canada, the Federal Court of Appeal, and the Federal Court Trial Division, originally looked to the London Charter of the IMT and later to the Statutes and jurisprudence of the ICTY and the ICTR.[81] In Australia, the earliest decisions at the Refugee Review Tribunal and the Administrative Appeal Tribunal mostly referred to the London Charter of the IMT, while later decisions examined the Statutes of the ICTY and the ICTR as well as, more recently, the Rome Statute of the ICC.[82] Likewise, in the United Kingdom, the Supreme Court and Court of Appeal have stressed the close link between international law sources, especially the Rome Statute of the ICC, and exclusion under Article 1F(a).[83] However, there is little recognition of the dissonance between principles adapted to a "setting of collective and large-scale criminality" and those arguably more appropriate to a single individual's plea for protection.

2. *Identifying and Interpreting the "International Instruments"*

While it may be widely accepted that the appropriate authority for determining exclusion under Article 1F(a) lies in international law, it remains unsettled how adjudicators of refugee status ought to make use of that sizeable body of law. Unlike an *ad hoc* or permanent international criminal court whose jurisdiction is governed by its foundational statute, the language of the Convention allows immigration tribunals to make use of the full array of "international instruments drawn up to make provision with respect to" crimes against humanity, war crimes, and crimes against peace. In 1950, when the Convention was drafted, the number of such international instruments was largely limited to those that arose in the aftermath of World War II. With a smaller body of principles and interpretations, one can imagine a greater harmonization in the application of international criminal law across the domestic refugee tribunals of the many states parties to the Convention. In the almost seventy years since, that universe has grown dramatically as

80. Ezokola v. Canada (Minister of Citizenship and Immigration), 2013 SCC 40, [2013] 2 S.C.R. 678, paras. 44–45 (Can.). For further analysis of the prosecution of genocide, crimes against humanity, and war crimes in Canadian criminal, civil, and administrative tribunals, see FANNIE LAFONTAINE, PROSECUTING GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES IN CANADIAN COURTS (2012).

81. Rikhof, *supra* note 73, at 458.

82. *Id.* at 470.

83. *See, e.g.*, CM (Article 1F(a) – superior orders) Zimbabwe [2012] UKUT 00236 (IAC) ("[W]hen considering whether an applicant is disqualified from asylum by virtue of Article 1F(a) the starting point should be the Rome Statute of the International Criminal Court."); *see also* MT (Article 1F(a) – aiding and abetting) Zimbabwe [2012] UKUT 00015 (IAC); SK (Zimbabwe) [2012] EWCA Civ 80; R (on the application of JS) (Sri Lanka) v. Sec'y of State for the Home Dep't [2010] UKSC 15 (appeal taken from Eng.).

international criminal law has developed into a robust body of public international law.[84] The proliferation of sources raises numerous challenges for adjudicators of refugee status. For example, statutes of international criminal tribunals define certain international crimes, theories of liability, and defenses in different ways.[85] Jurisprudence from various tribunals may accordingly be inconsistent. While "international criminal law" may imply a unified body of norms, it is not clear that such universal norms exist.[86]

The emergence of the ICC as a centralized authority on international criminal law has raised interpretive questions about which sources continue to constitute the relevant "international instruments" for the purposes of Article 1F(a) exclusion. Article 1F(a) refers to three crimes: crimes against peace, war crimes, and crimes against humanity. There are four crimes within the scope of the Rome Statute: war crimes (Article 8), crimes against humanity (Article 7), crimes of genocide, and crimes of aggression.[87] While decisions in Canada, the United Kingdom, and Australia place a strong emphasis on the Rome Statute as a leading source of authority on Article 1F(a) crimes, the tribunals continue to draw on other treaties, customary law, general principles of law, and judicial decisions in recognition that international criminal law comprises numerous different kinds of sources, many of which pre-date the ICC and have long guided Article 1F(a) adjudication.

In the early-2000s, when the ICC was in its early years of operation, immigration tribunals in Canada struggled with the retroactivity of the Rome Statute, negotiated in 1998 and came into force in 2002.[88] In *Harb v. Canada*,[89] the Federal Court of Appeals established that, with respect to crimes against humanity, the Rome Statute could be used for situations before its

84. Some argue that it was not until the 1990s, with the establishment of the ad hoc Tribunals for the former Yugoslavia and Rwanda, that it could be said that an international criminal law regime had fully evolved. *See* Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EURO. J. INT'L L. 331, 331 (2009) ("The emergence of international criminal law ranks as perhaps the signal achievement in public international law since 1990 and the end of the Cold War. The 'rise and rise' of not only a corpus of substantive criminal law but also tribunals, beginning with the Yugoslavia tribunal (ICTY) and culminating in the flagship tribunal, the International Criminal Court (ICC), is one of the most remarkable phenomena in international law and organizations in the past two decades.").

85. For example, the definition of aiding and abetting in the Rome Statute is slightly different from that used by the ICTY and the ICTR, and the Rome Statute's *mens rea* requirement ("purpose") is higher than that in the ICTY and ICTR statutes ("knowledge"). *Compare* Rome Statute of the International Criminal Court (as last amended 2010) art. 25, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] *with* S.C. Res. 827 (as amended on May 17, 2002), art. 7 (May 25, 1993); S.C. Res. 955 (as last amended on Oct. 13, 2006) (Nov. 8 1994).

86. Nancy Amoury Combs, *Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing*, 41 YALE J. INT'L L. 1, 2 (2016). There has been significant scholarly debate around the "fragmentation" or "pluralism" of international criminal law. *See, e.g.*, Elies van Sliedregt & Sergey Vasiliev, *Pluralism: A New Framework*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW 3, 10–11 (Elies van Sliedregt & Sergey Vasiliev eds., 2014).

87. Rome Statute, *supra* note 85, art. 5.

88. Rikhof, *supra* note 73, at 458.

89. Harb v. Canada (Minister of Citizenship and Immigration), 2003 F.C. 39 (Can. C.A.).

adoption as it reflects international law from before 1998.[90] Four years later, however, the Federal Court in *Ventocilla v. Canada*[91] held that the Rome Statute should not be referenced for its definition of war crimes if it was not part of international law at the time of the commission of the acts in question.[92] By 2012, Canada's acceptance of the Rome Statute "as authority on international criminal principles" had been established "beyond dispute."[93] At the same time, the Supreme Court rejected exclusive reliance on the Rome Statute as a "complete codification of international criminal law," recognizing the diversity of sources and the "growing body of jurisprudence" of international criminal courts.[94]

Similarly, the Australian Federal Court has held that while the Rome Statute is the most authoritative in the context of international crimes, courts may continue to refer to the IMT and other sources of international criminal law.[95] That Court in *SRYYY v. Minister for Immigration & Multicultural & Indigenous Affairs*,[96] observing that with the language of Article 1F(a) the Convention's drafters recognized international criminal law would develop over time, highlighted the need to draw upon "contemporary" instruments that reflect "international developments up to the date of the alleged crime, rather than to definitions in earlier instruments that may have become antiquated or are otherwise inappropriate."[97]

The issue before the Federal Court in *SRYYY* was whether conduct constituting a basis for exclusion under Article 1F(a) as war crimes or crimes against humanity should be evaluated in terms of the 1951 concepts of those crimes, or upon the interpretation of those crimes as understood in the light of the Rome Statute. *SRYYY* concerned a Sri Lankan national who between 1999 and 2000 had participated in actions against the Liberation Tigers of Tamil Elan ("LTTE"), including interrogating Tamil civilians suspected of having LTTE connections and engaging in violent acts to extract information.[98] The case thus problematized the Rome Statute's retroactivity to the petitioner's asylum claim, but the Court held that although the Rome Statute was not "in force" at that time, it had been "drawn up" and adopted by

90. *See id.* paras. 7–10.

91. Ventocilla v. Canada (Minister of Citizenship and Immigration), 2007 F.C. 575 (Can. C.A.).

92. *Id.*

93. Ezokola v. Canada (Minister of Citizenship and Immigration), 2013 SCC 40, [2013] 2 S.C.R. 678, para. 49 (Can.) ("Canada's acceptance of the *Rome Statute* as authority on international criminal principles is beyond dispute. Canada is not only party to the Rome Statute, Parliament has implemented the treaty into domestic law through the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.").

94. *Id.* ("[W]e may not rely exclusively on the approach of the International Criminal Court . . . to complicity. Despite its importance, the *Rome Statute* cannot be considered as a complete codification of international criminal law.").

95. Rikhof, *supra* note 73, at 471.

96. SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs, [2005] FCAFC 42 (Austl.).

97. *Id.* paras. 72–73.

98. *Id.* para. 2.

a substantial majority of states parties by 1998, predating the petitioner's conduct.[99] The Court noted that certain international legal instruments lend themselves more directly to certain Article 1F(a) inquiries: the London Charter would be appropriate for international crimes committed in Europe during World War II, while the ICTY and ICTR statutes would be appropriate instruments for international crimes committed under the jurisdictions of those statutes.[100] Nonetheless, the Court concluded, any international instrument drawn up to provide for, and which contains a definition of, a crime against peace, a war crime, or a crime against humanity is potentially relevant to an Art 1F(a) decision.[101] Moreover, the Court dismissed the suggestion that it should, before using the Rome Statute, evaluate whether it accurately reflected the state of customary international law at the date of the alleged crimes.[102]

The UK Supreme Court has stressed the need to consider first and foremost the Rome Statute as the "most comprehensive and authoritative statement of international thinking" on the fundamental principles of liability for grave international crimes that would justify the denial of asylum.[103] In *CM Zimbabwe*, the UK Upper Tribunal laid out the full text of numerous provisions of the Rome Statute, including Arts. 7(1) ("crimes against humanity"), 25 ("individual criminal responsibility"), 30 ("mental element"), 31 ("grounds for excluding criminal responsibility"), and 33 ("superior orders and prescription of law").[104] The Tribunal then applied each provision to the facts of the case of the asylum applicant, a former member of the people's militia in Zimbabwe who had been ordered to carry out two beatings and had fled Zimbabwe when ordered to kill his own uncle. By referring to other sources of international criminal law, the Tribunal implicitly recognized the need to supplement the Rome Statute with other international authority. With respect to the applicant's duress defense, the Tribunal in *CM Zimbabwe* noted that the recognition of duress as a defense to murder in Article 31 of the Rome Statute found support in other sources of international law, including cases from the Nuremberg IMT and the ICTY, which similarly recognized the defense.[105] However, in *MT Zimbabwe*, the Upper Tribunal noted that at least one other case from the ICTY did not fully

99. *Id.* para. 66.

100. *Id.* para. 73.

101. *Id.* para. 67.

102. *Id.* para. 74.

103. R (on the application of JS) (Sri Lanka) v. Sec'y of State for the Home Dep't [2010] UKSC 15, [9] (appeal taken from Eng.) ("It is convenient to go at once to the ICC Statute, ratified as it now is by more than a hundred States and standing as now surely it does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes (which alone could justify the denial of asylum to those otherwise in need of it).").

104. CM (Article 1F(a) – superior orders) Zimbabwe [2012] UKUT 00236 (IAC), [9]–[12].

105. *Id.* [27] (citing *U.S. v Freidrich Flick et al.*, Case 5 Vol VI (IMT); United States v Alfred Krupp et al., Case 10, Judgement (IMT 31 July 1948); Prosecutor v. Darko Mrda, Case IT-02-59-S, Sentencing Judgement (ICTY 31 Mar 2004)).

support the duress defense to murder as it is found in Rome Statute Article 31.[106]

Immigration tribunals and appeals courts in Canada, Australia, and the UK are civil, domestic institutions with a particular area of institutional competence. When they adjudicate individual asylum claims, they generally rely on the Convention and national immigration statutes as controlling sources of international and domestic law. When faced with a potential Article 1F(a) case, however, they must make use of a wide array of international statutes and jurisprudence, on which they have relatively little expertise. These international instruments are repositories of criminal, not civil, doctrines, which immigration adjudicators do not regularly apply. The institutions that oversee refugee law in these respective states parties—the Immigration Board of Canada, UK Visas and Immigration Home Office, and the Australian Migration and Refugee Division—provide limited guidance to immigration adjudicators regarding how to make sense of and apply this vast body of law.[107] The UNHCR, the international agency that oversees the Convention's mandate, provides some guidance to domestic adjudicators on the application of the exclusion clauses. However, it is long outdated, published only shortly after the ICC was formally established.[108] UNHCR encourages adjudicators to make use of the range of relevant international instruments but does not address possible inconsistencies among statutes or explain how they have been interpreted in the jurisprudence.[109]

While there is evident consensus around the primacy of the Rome Statute as the most recent authoritative statement on international criminal law, it is apparent that immigration tribunals lack a normative hierarchy for applying the provisions of the Rome Statute alongside other relevant international

106. MT (Article 1F(a) – aiding and abetting) Zimbabwe [2012] UKUT 00015 (IAC) (citing *Prosecutor v Endermovic*, Case No. IT-96-22 (ICTY 7 June 1997)).

107. *See* MIGRATION & REFUGEE DIV., ADMIN. APPEALS TRIBUNAL, GUIDE TO REFUGEE LAW ch. 7, 7-34–35 (Nov. 2016) (Austl.) ("Crimes falling under Article 1F(a) are defined in a wide variety of international instruments . . . . In view of the range of relevant international instruments, it is clear that there is no one accepted definition of the Article 1F(a) crimes and a difficult question may arise as to the definition to be applied where these instruments contain inconsistent definitions of the relevant crimes."); IMMIGR. & REFUGEE BD. OF CAN., INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION IN THE CASE LAW ch.11 (Dec. 31, 2010), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef11.aspx. ("The international instrument most frequently used to define these crimes is the Charter of the International Military Tribunal. Article 1F(a) must also be interpreted so as to include the international instruments concluded since its adoption. This would include the Statute of the International Tribunal for Rwanda and the Statute of the International Tribunal for the Former Yugoslavia as well as the Rome Statute of the International Criminal Court."); UK VISAS & IMMIGRATION, HOME OFFICE, EXCLUSION (ARTICLE 1F) AND ARTICLE 33(2) OF THE REFUGEE CONVENTION 23 (version 6.0 July 1, 2016) ("There is no one single set of definitions of what constitutes a war crime, crime against humanity or genocide for the purposes of the Refugee Convention, but detailed definitions of war crimes and crimes against humanity are contained in Articles 6, 7 and 8 of the International Criminal Court (Rome) Statute, incorporated into UK law . . . .").

108. The UNHCR's Guidelines and Background Note on exclusion under the Convention were published in September 2003, while the Rome Statute entered into force in July 2002. UNHCR, *Guidelines on International Protection*, *supra* note 27; UNHCR, *Background Note*, *supra* note 28.

109. UNHCR, *Background Note*, *supra* note 28.

statutes and jurisprudence. Domestic adjudicators must therefore struggle to make sense of a body of law with which they are relatively unfamiliar. The resulting unpredictability and lack of clear standards would be unacceptable in criminal law contexts that offer important due process guarantees for defendants. While asylum seekers lack many of these protections, Article 1F(a) inconsistency across and within jurisdictions may undermine the Convention's goal of a cohesive international refugee regime.

3. *Applying International Criminal Law Where Little Relevant Authority Exists: Complicity and Defenses*

When Article 1F(a) issues arise in the course of adjudication, immigration tribunals become ad hoc, decentralized international criminal courts in the context of administrative decision-making. While these adjudicators can make use of a variety of international criminal sources, the principles developed therein are often inadequate for refugee adjudication. The kinds of individuals who pass through immigration courts are different from those who find themselves before international tribunals. As a result, the nature of the liability and defenses at issue in exclusion cases differs accordingly.

Most of the cases holding individuals responsible for crimes against humanity and war crimes at the international level involve those who occupy positions of authority, such as military officers, government officials, or heads of state.[110] In international criminal law, the "paradigmatic offender" is often the person who orders, masterminds, or takes part in a plan at a high level.[111] In contrast, the asylum seekers whose cases potentially trigger Article 1F(a) are most likely low-level offenders, mere members in a criminal organization, or participants in indirect acts of support for others committing international crimes.[112] Principles of liability play a relatively larger role in international criminal law than in domestic criminal law, where the traditional image of the criminal defendant is of the primary perpetrator as opposed to the high-level criminal mastermind.[113] As in international criminal law, principles of liability also play a significant role in Article 1F(a) cases, but the focus is on low-level as opposed to high-level participants. Moreover, jurisprudence from the international criminal tribunals on defenses is sparse, partly as a result of the lack of sympathy for defendants in

110. Ronald C. Slye, *Refugee Jurisprudence, Crimes against Humanity and Customary International Law*, *in* Internally Displaced Persons and Migrants Workers, Essays in Memory of Joan FitzPatrick and Arthur Helton 249, 252 (Anne F. Bayevsky ed., 2006).

111. Robert Cryer et al., An Introduction to International Criminal Law and Procedure 353 (3d ed. 2014) (citing the Statute of the Special Court for Sierra Leone, which refers to such persons as "those bearing greatest responsibility" for international crimes, as well as the S.C. Res. 1534 (Mar. 26, 2004), which refers to "the most senior leaders suspected of being most responsible for" international crimes).

112. Slye, *supra* note 110, at 252.

113. William Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 Int'l Rev. Red Cross 439, 440 (2001). On the importance of principles of liability in international criminal, see generally *id.*

international criminal proceedings, partly because of the decision by prosecutors to pursue cases against defendants who do not have plausible claims of defenses.[114]

Consequently, while immigration courts and tribunals can look to international criminal statutes and jurisprudence, these sources have inherent limitations when it comes to defining the types of complicity and defenses that determine whether an individual's actions rise to the level of international crimes for the purposes of Article 1F(a). Immigration tribunals in Canada, Australia, and the UK have had to develop their own legal interpretations of international criminal issues such as low-level complicity, liability based on membership in an organization known to have committed international crimes, and exculpatory defenses like duress and superior orders.[115]

Since Nuremberg, where the IMT criminalized certain Nazi organizations and membership therein, international criminal tribunals have done little to elaborate on individual responsibility for crimes against humanity based on membership in an organization. Decision-makers in Article 1F(a) cases have had to devise criteria for establishing when membership in a criminal organization suffices to make an individual liable for an organization's crimes.[116] *Ramirez v. Canada*,[117] decided in 1992, served as Canada's seminal case on complicity in Article 1F(a) crimes until the Supreme Court devised a "significant contribution" test roughly twenty years later. In *Ramirez*, the petitioner admitted to having served as a guard and being present when other soldiers tortured and killed prisoners. While Ramirez had not personally committed atrocities, the Federal Court of Appeal relied on Article 6 of the London Charter as evidence that accomplices to international crimes, in addition to principle actors, should be subject to exclusion.[118] The London Charter, however, left open "the very large question as to the extent of participation required for inclusion as an 'accomplice.'"[119] The Court declined to consider the relevant provisions of the Canadian Criminal Code dealing with parties to an offense under the theory that an "international convention

114. CRYER ET AL., *supra* note 111, at 398.

115. Slye, *supra* note 110, at 253.

116. Pia Zambelli critiques a general trend in Canadian jurisprudence toward the gradual widening of Article 1F(a)'s scope to the point where the *mens rea* or *actus reus* requirements seem to have disappeared and the notion of "guilt by association" has become the norm. Pia Zambelli, *Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law*, 23 INT'L J. REFUGEE L. 252, 252 (2011). Zambelli argues that the situation is the result of confusion between, on one hand, the concept of personal and knowing participation in international crimes, and the concept of personal and knowing participation in a group whose members commit international crimes, on the other. Zambelli further explains that, in cases where the claimant is not the direct perpetrator of the crime, the form of complicity applicable is typically not clearly defined, with the Immigration Review Board rarely, if ever, explicitly indicating whether it considers the claimant to be an aider, abettor, instigator, or part of a joint criminal enterprise. When those various forms of complicity are identified, Zambelli argues that the IRB applies inconsistent definitions.

117. Ramirez v. Canada (Minister of Employment and Immigration), 1992 CarswellNat 94F, para. 31 (Can.) (WL).

118. *Id.* para. 12.

119. *Id.*

cannot be read in light of only one of the world's legal systems."[120] The Court later noted that reliance on the Canadian Criminal Code would not be "sufficient in the case at bar where what has to be interpreted is an international document of essentially a non-criminal character."[121]

The Court returned to the London Charter, determining that mere membership in an organization responsible for international crimes, without actual knowledge of those crimes, is insufficient to render an individual an accomplice or abettor.[122] Without resorting to domestic law *per se*, the subsequent steps of the Court's analysis nevertheless attempted to support controlling principles of international law, as understood by Judge MacGuigan, with domestic Canadian law:

> [M]ere presence at the scene of an offence is not enough to qualify as personal and knowing participation (nor would it amount to liability under s. 21 of the Canadian Criminal Code) . . . At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (e.g., s. 21(2) of the Criminal Code), and I believe is the best interpretation of international law.[123]

The Court's attempts in *Ramirez* to distinguish the Convention, a document of "non-criminal character," from criminal law seem at odds with the case's inquiry into accomplice liability and the decision's numerous references to Canadian criminal law. Concluding toward the end of the judgment, Judge MacGuigan points to the standard of proof as the differentiating factor between a judgment of criminal liability and one of exclusion from refugee status. The Court determined that Ramirez "had been personally and knowingly involved in persecutorial acts" on the "basis of the lower-than-civil-law standard established by the nations of the world," referring to the "serious reasons for considering" language of the Convention. "To convict the appellant of criminal liability for his actions would, of course, require an entirely different level of proof," the Court acknowledged. The *Ramirez* decision is thus the application of international criminal principles on accomplice liability, rendered compatible with Canadian criminal law, to an

120. *Id.* para. 13.

121. *Id.* para. 20.

122. *See id.* paras. 16–17. The principles of complicity in international crimes from the *Ramirez* decision, grounded in the court's analysis of the London Charter of the IMT, appeared frequently in subsequent decisions by the Supreme Court and the Federal Court of Appeal. *See, e.g.*, Penate v. Canada (Minister of Employment and Immigration), [1994] 2 F.C. 79 (Can. C.A.); Moreno v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 298 (Can. C.A.); Sivakumar v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 433 (Can. C.A.); Ruiz v. Canada (Minister of Citizenship and Immigration), 2003 F.C. 1177 (Can. C.A.); Thomas v. Canada (Minister of Citizenship and Immigration), 2007 F.C. 838 (Can. C.A.); Mutumba v. Canada (Minister of Citizenship and Immigration) 2009 F.C. 19 (Can. C.A.).

123. *Ramirez*, 1992 CarswellNat 94F, paras. 17–18.

administrative proceeding employing a standard of proof lower than criminal or civil law.

Twenty years later, in *Ezokola* the Canadian Supreme Court overruled *Ramirez*, finding that a "broad range of international authorities converge towards the adoption of a 'significant contribution test'" for complicity, requiring a "knowing, voluntary, and significant contribution to the crime or criminal purpose of a group."[124] *Ezokola* concerned a petitioner who had worked for the government of the Democratic Republic of Congo ("DRC"), including its Permanent Mission at the United Nations in New York. A year into his post, he resigned and fled to Canada, claiming he could no longer work for a government he considered corrupt, antidemocratic, and violent. He sought asylum in Canada, fearing his resignation would be viewed as an act of treason by the DRC government, and having been harassed, intimidated, and threatened by the DRC's intelligence service. The case came to the Supreme Court after an appeals court found that the petitioner, a senior official in a government, could have personal and knowing participation and be complicit in the crimes of the government by remaining in his position without protest and continuing to defend the interests of his government while being aware of the crimes committed by the government.

To arrive at its "significant contribution test," the Supreme Court recognized the "diversity of sources" from which international criminal law derives, including the Rome Statute as well as the "growing body of jurisprudence of international criminal courts" like the ICTY, ICTR, and ICC that did not exist when *Ramirez* was decided.[125] The Court noted at the outset that complicity may serve different purposes in criminal and refugee contexts: distinguishing between principal perpetrators and secondary actors may play a role in criminal sentencing but is irrelevant for exclusion purposes, which requires only a finding of complicity.[126] According to the Court, Article 1F(a) does distinguish aiding and abetting from guilt by mere association, to which international criminal law, not domestic criminal law, is best suited: "In international criminal law, the focus often switches to the collective and to the links between individuals and collective action."[127] Because of the differences between criminal trials and immigrations hearings, the Supreme Court felt compelled to devise its own test for determining when a government official may be held complicit in the crimes committed by his or her government, while nonetheless drawing on the doctrines enunciated in four ICC and three ICTY cases in addition to numerous commentaries and treatises on international criminal law.[128]

124. Ezokola v. Canada (Minister of Citizenship and Immigration), 2013 SCC 40, [2013] 2 S.C.R. 678, para. 92 (Can.).
125. *Id.* para. 51.
126. *Id.* paras. 2, 52.
127. *Id.* para. 5.
128. *Id.* paras. 41, 51.

The approach to complicity in the UK similarly developed in the decade following the Rome Statute's entry into force. In 2010, *JS (Sri Lanka)* overturned *Gurung*, which since 2002 had been a leading case on complicity under Article 1F(a), and rejected its holding that mere membership in an organization whose aims, methods, and activities are predominantly terrorist in character gives rise to a presumption of criminal complicity.[129] Like the Canadian Supreme Court in *Ezokola*, the UK Supreme Court in *JS (Sri Lanka)* devised a multifactorial test to arrive at a holistic determination as to whether an asylum applicant's participation in a terrorist organization rises to the level of complicity in international crimes.[130] The Court found the ICTY statute most helpful: "All these ways of attracting criminal liability are brought together in the ICTY Statute by according individual criminal responsibility . . . to anyone who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution' of the relevant crime."[131] Like its Canadian counterpart in *Ezokola*, the UK Supreme Court in *JS (Sri Lanka)* highlighted the differences between international and domestic criminal law with respect to complicity: "The language of all these provisions is notably wide, appreciably wider than any recognised basis for joint enterprise criminal liability under domestic law."[132] The tribunal proceeded to buttress its analysis of the requisite *mens rea* for complicity—personal knowledge of the crimes and intent to contribute to their commission—by drawing on the language of Article 30 of the Rome Statute as well as the standard enunciated in the *Tadić* case of the ICTY.[133]

Building on the complicity analysis in *JS (Sri Lanka)*, in *MT Zimbabwe* the UK Upper Tribunal further explored the *Tadic* case, from which it discerned three categories of joint liability: a "basic" form, a "systemic" form, and the "extended joint enterprise."[134] *MT Zimbabwe* concerned a former

129. *See* R (on the application of JS) (Sri Lanka) v. Sec'y of State for the Home Dep't [2010] UKSC 15, [29]–[32] (appeal taken from Eng.).

130. *See id.* para. 30 (describing the relevant factors for consideration as "(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").

131. *Id.* para. 34.

132. *Id.*

133. *Id.* para. 37; *see also* Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

134. MT (Article 1F(a) – aiding and abetting) Zimbabwe [2012] UKUT 00015 (IAC), [117] (describing the "basic form" as when the participants act on the basis of a common design or common enterprise and with a common intention, the "systemic form" as when crimes are committed by units on the basis of a common plan, and the "extended joint enterprise" as where one of the co-perpetrators actually engages in acts that go beyond the common plan but still constitute a natural and foreseeable consequence of the plan's realization).

police officer from Zimbabwe who had been pressured to participate in various acts against political opponents.[135] The Tribunal cited to almost a dozen other cases from the ICTY for the purposes of analyzing, among other issues, "co-perpetration" of crimes,[136] responsibility of co-perpetrators,[137] and what actions qualify as "substantial" contributions to crimes.[138] The Tribunal extensively cited ICTY jurisprudence to illustrate various forms of participation and level of involvement that an individual must have to be criminally responsible under each subparagraph in Article 25 of the Rome Statute.[139]

As with doctrines on complicity, refugee exclusion cases have led to a relatively developed body of jurisprudence on the defenses of duress and superior orders. As explained earlier in this section, these defenses are more likely to be raised in the cases of low-level actors and thus more frequently adjudicated in Article 1F(a) cases than in international criminal prosecutions.[140]

In *Ramirez*, the Federal Court of Canada rejected the petitioner's claim of duress by drawing on the U.N. International Law Commission's draft Code of Offences Against the Peace and Security of Mankind, assuming its standard for the duress defense "as the state of international law."[141] The International Law Commission ("ILC") was founded in the aftermath of WWII to promote and codify principles of international law.[142] The draft Code of Offenses, originally written in 1947, was a compilation of principles set out in the Charter and Judgment of the IMT and ultimately informed the exclusions in the Convention and Protocol.[143] Under the draft Code, a duress defense could be evoked by demonstrating a situation of grave and immi-

135. *Id.* para 1.

136. *Id.* para. 117. The Tribunal referred to the Appeals Chamber's distinguishing three categories of collective criminality in *Tadić.*

137. *Id.* para. 118. The Tribunal concluded that responsibility as a co-perpetrator requires being more than a mere accomplice and participation of an extremely significant nature at a leadership level by looking to three ICTY cases: Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Trial Chamber Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Chamber Judgement (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); and Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Chamber Judgement (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

138. *MT Zimbabwe*, [2012] UKUT 00236 (IAC), para. 119. The Tribunal referred to Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 11, 1999); Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Trial Chamber Judgement (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003); Prosecutor v. Brdanin, Case No. IT-99-36,-A, Appeals Chamber Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); and Prosecutor v. Perišić, Case No. IT-04-81-T (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011). The Tribunal also directly quoted Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgement, paras 199, 232, 273–74 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (explaining that "moral support and encouragement" that makes "a significant difference to the commission of the criminal act by the principal" can constitute a substantial contribution to the crime).

139. *MT Zimbabwe*, [2012] UKUT 00236 (IAC), paras. 118–19.

140. *See* Slye, *supra* note 110, at 260.

141. Ramirez v. Canada, 1992 Carswell 94F, para. 40 (Can. C.A.) (WL).

142. *Origin and Background*, Int'l L. Commission (July 31, 2017), http://legal.un.org/ilc/drafting.shtml (last visited Mar. 3, 2018).

143. Evans, *supra* note 19, at 533.

nent peril that was not created by the individual, and that the harm inflicted under duress was not in excess of the harm that the individual would have otherwise suffered.[144]

Since 2003, Canadian judges have considered Article 31 of the Rome Statute alongside the draft Code of Offenses as an authoritative starting point for defenses to crimes against humanity.[145] *Kathiravel v. Canada* concerned an applicant from Sri Lanka who, during an extended period of captivity and torture, was forced to identify innocent people in lineups.[146] The petitioner raised the defense of duress to crimes against humanity.[147] The Federal Court first cited the same language in *Ramirez* from the draft Code of Offences, which it found had been "reflected recently" in Art. 31(d) of the Rome Statute.[148] The Court in *Kathiravel* accordingly applied the two similar standards to the petitioner's case, finding that the acts the petitioner was compelled to take were "driven by a grave and imminent peril which is sought to be avoided," and that, under the second prong of proportionality, "the applicant's victims would suffer more than what was actually inflicted on him either as a result of not identifying people in the lineup or identifying them but recanting."[149]

In addition to analyzing the petitioner's complicity in crimes against humanity under international law, the UK Upper Tribunal in *MT Zimbabwe* outlined the various international legal standards that govern a duress defense. The Tribunal looked not only to the language of Article 31 of the Rome Statute but also to a draft ILC Article from 1987 on exceptions to the principle of responsibility in order to explicate the Rome Statute's principles.[150] Citing *Erdemovic*, the first ICTY case that dealt with duress, the Tribunal recognized that international law remains unsettled on whether duress can be a complete defense applying in all types of cases; in *Erdemovic*, duress did not absolve the defendant of guilt for crimes against humanity but was only a mitigating factor in his sentencing, a consideration inapplicable in Article 1F(a) refugee cases.[151] From the Rome Statute, ILC, and *Erdemovic*, the Tribunal in *MT Zimbabwe* deduced the duress defense to be "confined to situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice of counter activ-

144. *Ramirez*, 1992 Carswell 94F, para. 40.

145. Rikhof, *supra* note 73, at 458.

146. Kathiravel v. Canada (Minister of Citizenship and Immigration) 2003 FCT 680, paras. 8–10 (Can. C.A.).

147. *Id.* para. 8.

148. *Id.* para. 46.

149. *Id.* paras. 46, 49.

150. MT (Article 1F(a) – aiding and abetting) Zimbabwe [2012] UKUT 00015 (IAC). Draft Article 9 explains that for "coercion to be considered as an exception, the perpetrator of the incriminating act must be able to show that he would have placed himself in grave imminent and irremediable peril *if he had offered any resistance*" (emphasis added). The language on resisting coercion is not in Article 31 of the Rome Statute.

151. Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgement, para. 10 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 7, 1997).

ity available,"[152] and subsequently devised its own test for determining whether a duress defense is satisfied.[153]

In *CM Zimbabwe*, the UK Upper Tribunal again considered a duress defense by a citizen of Zimbabwe who had been recruited into the People's Militia and ordered to carry out two beatings.[154] The Tribunal relied on the analysis laid out in *MT Zimbabwe*, using its four-factor framework to evaluate and reject the petitioner's duress defense.[155] The Tribunal also noted, but did not parse or apply, several additional international law sources that had been submitted to the court at earlier stages of the case: the Nuremberg IMT cases of *United States v Freidrich Flick et al*. and *United States v Alfred Krupp Von Bohlen and Halbach*; the ICTY case of *Prosecutor v Darko Mrda*; and three secondary sources on international criminal law.[156] The *Flick* trial contributed to early jurisprudence on the duress defense by addressing how the requirement for a threat of imminent serious harm was applied, the *Krupp* case by discussing the proportionality requirement and the relevance of subjective evidence.[157]

Like duress, the defense of superior orders infrequently arises in the international criminal law context, where defendants usually issued the orders as opposed to simply executing them. The asylum applicant raised this defense in *SRYYY v. Minister for Immigration & Multicultural & Indigenous Affairs*, where the Federal Court of Australia considered the appropriate application of the Rome Statute, including the definitions of crimes against humanity and war crimes in Articles 7 and 8, respectively, and the defense of superior orders under Article 33.[158] The case illustrates a domestic court grappling to apply international criminal law standards from dozens of authoritative sources to an exclusion case. The Federal Court outlined the development of international criminal law, listing the relevant provisions of seventeen separate international instruments from the IMT through the Rome Statute as they related to the Court's task in identifying the elements of the crimes and defenses at issue in Article 1F(a).[159] Based on its "historical overview," the

152. *MT Zimbabwe*, [2012] UKUT 00236 (IAC), [106].

153. *Id.* (laying out a four-factor test wherein "the threat must be of imminent death or continuing or imminent serious bodily harm; the threat must result in duress causing the crime; a threat results in duress only if it is otherwise avoidable . . . , and the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect").

154. CM (Article 1F(a)–superior orders) Zimbabwe [2012] UKUT 00236 (IAC), [1].

155. *Id.* [26].

156. *Id.* [27].

157. Evans, *supra* note 19, at 529, 533. While *Flick* and *Krupp* were landmark Nuremberg decisions, *Darko Mrda* is a less cited ICTY decision whose implications for a duress analysis are unclear.

158. *See SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 42 (Austl.).

159. *See id.* paras. 19–45. The Court began its exposition of the context and development of the Convention's exclusions by stating, "The development of international criminal law following the Second World War provided an important part of the context in which Art 1F was to operate." *Id.* para. 19. The international instruments cited in the decision include: "the London Charter . . . *Control Council Law 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace* (signed in Berlin, 20 December 1945, published in (1946) 3 Official Gazette Control Council for Germany at 50-55) ('Control Council Law

Court held that the Rome Statute could be used to define the crimes and available defenses at issue even if the Rome Statute was not in place at the time the crimes were committed.[160]

Further, the Court addressed the difficulties that arise when international instruments falling within the scope of Article 1F(a) provide inconsistent definitions of the relevant crimes and their defenses, disparities that could have a determinative impact on the outcome depending on the nature of the case.[161] The Court looked to case law from other states parties to the Refugee Convention, such as Canada, finding reliance upon the Rome Statute without express consideration of "how inconsistent instruments are to be reconciled or which instrument should be preferred where an inconsistency exists."[162]

After conducting a survey of international instruments and commentaries on the defense of superior orders, the Court concluded that it could not discern a clear rule of customary international law with respect to the defense.[163] Problematically, in a departure from provisions made in previous instruments, Article 33 of the Rome Statute provides for the defense of superior orders in certain circumstances.[164] To the Court, this discrepancy between the Rome Statute and earlier treaties demonstrated that there is a contemporary international consensus with respect to the defense, but that this consensus is insufficient to determine whether the availability of the

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10')," "*Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (adopted by the International Law Commission at its second session, in 1950, and submitted to the UN General Assembly) ('ILC Principles')"; "*Convention on the Prevention and Punishment of the Crime of Genocide* (opened for signature 9 December 1948, New York, 78 UNTS 277, entered into force 12 January 1951) ('the Genocide Convention')"; "*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31 ('the First Convention')"; "*Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85 ('the Second Convention')"; "*Geneva Convention relative to the Treatment of Prisoners of War*, 75 UNTS 135 ('the Third Convention')"; "*Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 ('the Fourth Convention') (all *Geneva Conventions* were opened for signature on 12 August 1949 and entered into force on 21 October 1951)"; "Art. 14 of the *Universal Declaration of Human Rights* (UN Doc A/810 at 71, adopted by the UN General Assembly in Resolution 217A (III) on 10 December 1948)"; "*International Convention on the Suppression and Punishment of the Crime of Apartheid* (opened for signature 30 November 1973, New York, 1015 UNTS 243, entered into force on 18 July 1976) ('the Apartheid Convention')"; "*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3, ('Geneva Protocol I') and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non- International Armed Conflicts*, 1125 UNTS 609, ('Geneva Protocol II') (entered into force on 7 December 1978)"; "Statute establishing the International Criminal Tribunal for the Former Yugoslavia (Security Council Resolutions 808 and 827, 1993)"; "Statute establishing the International Criminal Tribunal for Rwanda (Security Council Resolution 995, 1994)"; the International Law Commission's "*Draft Code of Offenses Against the Peace and Security of Mankind* 1996"; the "*Rome Statute* of the International Criminal Court (adopted on 17 July 1998)"; the "Statute establishing the Special Court for Sierra Leone (Security Council Resolution 1315, 2000)."

160. *See SRYYY* [2005] FCAFC 42, paras. 64–66, 74–76; *see also* Rikhof, *supra* note 73, at 471.

161. *See SRYYY* [2005] FCAFC 42, paras. 46–51.

162. *Id.* para. 70.

163. *See id.* paras. 51–57.

164. *See id.* para. 56.

defense rose to the level of customary international law.[165] The Court stressed that states parties to the Rome Statute were divided on the appropriate approach to the defense, leading to a compromise on Article 33, and cited extensively to a secondary treatise discussing the status of the defense in international law at the time of the Rome Statute's drafting.[166]

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As the exposition of Article 1F(a) case law in Canada, Australia, and the UK make clear, states parties to the Convention have been forced to wade into international criminal law waters. These tribunals have become echoes of decentralized, ad hoc international criminal courts, extracting principles from international criminal law and adapting them to a non-criminal context. An Article 1F(a) analysis sits in a matrix of international and domestic law on one hand, civil and criminal law on the other. In adjudicating claims for refugee status under the Convention, tribunals in these jurisdictions have confronted a wide range of issues under international criminal law, from the relevant international instruments and standards to how to apply them in a domestic, administrative context. These Article 1F(a) cases have given rise to their own body of international criminal doctrines as applied to exclusion decisions.

The Convention thus entrusted domestic refugee adjudicators to make life-threatening decisions using international criminal law, an inordinately complex, heterogeneous body of public international law. They must grapple with statutes and jurisprudence that have over time arisen out of numerous courts, bound together in no clear hierarchy.[167] The result is unsettling: domestic adjudicators with little expertise in international criminal law wield a wide array of relevant instruments and their related jurisprudence, applying criminal doctrines in a non-criminal proceeding where asylum-seekers lack many of the procedural protections accorded criminal defendants.

B. The Persecutor Bar in the United States: Exclusion in the Absence of International Criminal Law

The preceding section of this Note explored the issues that arise when adjudicators in domestic immigration tribunals interpret and apply international criminal law principles to render individual determinations of refugee status. This section will explore what happens when exclusion under the Convention is determined without resort to international criminal law. The United States, unlike Canada, Australia, and the UK, has not adopted the precise language of Article 1F(a) in domestic legislation, and U.S. adjudicators do not refer to Article 1F(a) as controlling law on exclusion.

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165. *Id.* para. 77.
166. *Id.* paras. 56–57.
167. Sliedregt & Vasiliev, *supra* note 86, at 2.

The United States acceded to the Refugee Protocol in 1967, which it brought into domestic law in 1980 with the Refugee Act, an amendment to the Immigration and Nationality Act ("INA").[168] The Refugee Act adopted the Convention's definition of "refugee" from Article 1A, but it did not mirror the Convention's exclusions. While the exclusion provisions of Article 1F(b) and (c) of the Convention made their way into the INA, the language of international crimes is missing. Instead of adopting Article 1F(a) verbatim, Congress barred asylum-seekers from protection if "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[169] This provision, known as the "persecutor bar," essentially reverses the definition of refugee such that an individual cannot seek asylum in the United States if his or her actions could give rise to another's claim of asylum. As a result, the language of the persecutor bar mirrors three elements of the refugee definition: persecution, nexus,[170] and protected grounds.[171] Just as a refugee has suffered or fears persecution on account of her race, religion, nationality, political opinion, or membership in a particular social group, an applicant is barred from asylum if she ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, political opinion, or membership in a particular social group.

At the time of its enactment, congressional statements made clear that the Refugee Act was intended to conform U.S. law to its international treaty obligations. The House Judiciary Committee's report declared that the Refugee Act would "finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the [Convention and Protocol] . . . ."[172] The Committee also explained that the persecutor bar is "consistent with the U.N. Convention (which does not apply to those who, inter alia, 'committed a crime against peace, a war crime, or a crime against humanity')"[173] and further noted that the bar in the Refugee Act reflects the exception "provided in the Convention relating to aliens who have themselves participated in persecution . . . ."[174]

168. Deborah E. Anker, Law of Asylum in the United States § 1:1 (2016).

169. 8 U.S.C. § 1158(b)(2)(A)(i) (June 1, 2009).

170. The refugee definition requires that persecution or fear of persecution be "on account of" one of the iterated protected grounds. "Nexus" refers to the requirement of a link between the persecution suffered or feared and the particular ground of persecution. *See generally* Anker, *supra* note 168, § 5:1.

171. The persecution suffered or feared must be on account of one or more of the protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. *See generally id.* § 5:1.

172. H.R. Rep. No. 96-608, at 9 (1979), *cited in* Evans, *supra* note 19, at 168.

173. H.R. Rep. No. 96-608, at 10 (1979), *cited in* Evans, *supra* note 19, at 168.

174. *Id.* The persecutor bar is understood to correspond to the first and third exclusion in Article 1F, barring those who have committed a crime against peace, a war crime, a crime against humanity, or those guilty of acts contrary to the purposes and principles of the United Nations. *See* Anker, *supra* note 168, §§ 6:3–6:7; Goodwin-Gill & McAdam, *supra* note 22, at 184.

While the legislative history of the Refugee Act should in theory eliminate the apparent disconnect in scope of the exclusions, the textual differences between Article 1F(a) and the persecutor bar are significant. Replacing the specific treaty terms of "a crime against peace, a war crime, or a crime against humanity" with the more general concept of "persecution" detaches the exclusion analysis from international criminal norms, allowing U.S. exclusion jurisprudence to develop without reference to and guidance from international criminal instruments. The persecutor bar of the INA does not on its surface make clear what sources of law, criminal or otherwise, should be used to determine whether the applicant must be barred from asylum for having committed persecution.

One consequence is that U.S. statutory refugee law, and its interpretation by immigration and federal courts, contributes to the fragmentation of the international refugee system through inconsistent implementation of the Convention and Protocol.[175] Adjudicators from other states parties rely on international criminal law to guide the application of Article 1F(a) in ways that necessarily differ from the application of exclusion in the United States.[176] The United States is not a party to the Rome Statute, on which Canadian, Australian, and British adjudicators place significant interpretive weight.[177]

Whereas the Rome Statute and other international instruments define the crimes listed in Article 1F(a), neither the Convention nor the INA defines "persecution."[178] It is, therefore, not obvious what actions and mental states will trigger exclusion. Its definition depends on how immigration courts, the Board of Immigration Appeals ("BIA"), and federal appeals courts define the term for inclusion purposes, the more frequent inquiry, and then apply that standard to exclusion. The U.S. approach to defining persecution for the purposes of inclusion has been criticized as ad hoc and often inconsis-

175. Kate Jastram, *Left Out of Exclusion*, 12 J INT'L CRIM. JUST. 1183, 1184–85 (2014).

176. Rikhof, *supra* note 73, at 502. Glenna MacGregor and Jessica C. Morris demonstrate that reliance on analogous international criminal law principles in persecutor bar cases is infrequent. Glenna MacGregor & Jessica C. Morris, *Human Rights Enforcement in U.S. Immigration Law: A Missed Opportunity For Engagement With International Law?*, 5 J. MARSHALL L. J. 467, 493–494 (2012). The authors point to one exceptional case, Perkovic v. INS, 33 F.3d 615 (6th Cir. 1996), where the Sixth Circuit examined the Refugee Convention's exclusions of Article 1F, as opposed to the INA, and referred to the Universal Declaration of Human Rights to examine the asylum applicant's conduct under the framework of international human rights protections.

177. However, the Rome Statute should be relevant to U.S. exclusion decisions. The purpose behind the Refugee Act was to conform U.S. law to the obligations and exclusions of the Convention. *See* Evans, *supra* note 19, at 486–522. UNHCR makes clear that the Rome Statute should be a principal source for interpreting Article 1F(a). *See* UNHCR, *Background Note*, *supra* note 28, at para. 25. For a similar argument that decisions under the Persecutor Bar should be made in accordance with international law, *see* Brief for Scholars of International Refugee Law as Amici Curiae in Support of Petitioner, Negusie v. Holder, 555 U.S. 511 (2009) (No. 07-499).

178. *See* ANKER, *supra* note 168, § 4:2 ("The drafters of the Convention deliberately chose not to define persecution so that the term could be interpreted in a flexible and evolving manner.").

tent.[179] It is perhaps unsurprising that the persecutor bar has been raised in a wide range of circumstances of varying degrees of involvement and knowledge: when the asylum applicant has directly committed persecutory acts, voluntarily or not; when the applicant has committed acts peripheral but necessary to the persecution; and when the applicant has not personally committed any persecutory actions, but has knowledge that his or her actions will result in the persecution of others.[180] One federal appeals court succinctly summarized the complexities of the persecutor bar:

> The statute that bars persecutors has a smooth surface beneath which lie a series of rocks. Among the problems are the nature of the acts and motivations that comprise persecution, the role of scienter, whether and when inaction may suffice, and the kind of connection with persecution by others that constitutes 'assistance.' The more one ponders the variety of possible situations, the less confident one becomes of a useful, all-embracing answer.[181]

There is a certain appealing simplicity postulating inclusion and exclusion as symmetrically balanced,[182] but it is deceptive. Any enlargement of the definition of persecution on the inclusion side of the equation would in turn expand the persecutor bar's net to exclude more asylum applicants, running the serious risk of over-inclusivity.[183] While the language of inclusion and exclusion may be mirror images of each other, it is debatable whether their interpretation and application should likewise parallel one another, given the underlying purposes of the refugee regime and the goals of exclusion.

At the same time, some courts do not apply the same standards for persecution for purposes of inclusion and exclusion, thereby contributing further to over-exclusion. For example, suffering a minor act of persecution will be insufficient to establish a claim to refugee status, while committing a similar minor act of persecution may be enough to render one excludable.[184] Interpreting "persecution" for purposes of denying asylum under the bar as

179. *Id.* §§ 4:1, 4:3–4 ("U.S. jurisprudence . . . reveals inconsistent, result-oriented analysis that continues, in some cases, to confuse the development of a meaningful framework for analyzing persecution.").

180. For a comprehensive classification of how federal courts of appeals have approached cases where the persecutor bar is raised, see Martine Forneret, *Pulling the Trigger: An Analysis of Circuit Court Review of the "Persecutor Bar"*, 113 COLUM. L. REV. 1007, 1038 (2013).

181. Castaneda-Castillo v. Gonzales, 488 F.3d 17, 20 (1st Cir. 2007).

182. Jastram, *supra* note 175, at 1189.

183. Lori K. Walls, *The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern "Persecution" in the Case of Forced Abortion And Female Genital Cutting*, 16 PAC. RIM L. & POL'Y J. 227, 241–53 (2007) (arguing that the recognition of forced sterilization and female genital mutilation as forming the basis of asylum claims could lead to over inclusion with respect to the doctors and women who perform the practices).

184. Forneret, *supra* note 180, at 1030; *see also* Mei Fun Wong v. Holder, 633 F.3d 64, 65 (2d Cir. 2011) (holding that the forced insertion of an intrauterine device was not persecution without aggravat-

significantly more capacious than "persecution" for purposes of granting asylum appears to make the statute internally inconsistent.[185]

This asymmetry illuminates how the distinct purposes and analyses of criminal responsibility and refugee status clash in the persecutor bar in ways that differ from Article 1 of the Convention. For example, an applicant who is a victim of a forced abortion or sterilization would most likely be granted asylum, whereas an applicant who has suffered only the tangential precursors to a forced abortion, such as being driven to a facility, being held in a waiting room, or undergoing a medical exam, would most likely be denied asylum.[186] While the acts in question in the latter example would not rise to the level of persecution for the purposes of inclusion, individuals responsible for such preliminary events are subject to the persecutor bar and denied asylum.[187] To limit the breadth of the exclusion clause, courts could instead focus on the ultimate act of persecution itself, rather than precursor acts of tangential contribution.

However, that approach would ignore the criminal law principles underlying the exclusion clause. Depending on the level of contribution and the individual's knowledge about the consequences of her actions, the applicant who contributes directly or indirectly to the ultimate persecutory act may be responsible through complicity or under a theory of accomplice liability. Applying different standards for the victims and perpetrators of persecutory acts reflects the underlying purposes of the exclusion clauses. If an applicant's actions ultimately contribute to persecution but do not themselves rise to the level of persecution, granting refugee status could potentially allow the applicant to escape criminal liability. This approach would allow all individuals who knowingly contribute to persecution but do not commit the final persecutory act to receive protection under the U.S. asylum regime.

Just as U.S. adjudicators apply different standards as to whether the *actus reus* amounts to persecution, consideration of the persecutor's intent also differs for the purposes of inclusion and exclusion. For the purposes of inclusion, it is well established that a persecutor's subjective motives need not be considered in determining whether harm constitutes persecution.[188] Proof of punitive or malignant intent is not required for harm to constitute persecution. United States Citizenship and Immigration Services instructs asylum officers to determine whether the victim suffered or fears persecutory harm for reasons of a protected or perceived characteristic regardless of whether

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ing circumstances and remanding the case to the BIA to determine a test for what constitutes aggravating circumstances).

185. *See* Forneret, *supra* note 180, at 1030.

186. *See id.* (summarizing findings based on a survey of all forced abortion cases in the Second Circuit, which hears a majority of such cases).

187. *See id.*

188. ANKER, *supra* note 168, § 4:7.

the persecutor intends the victim to experience the harm as harm.[189] The BIA has similarly held that establishing the nexus element—that persecution was committed "on account of" a protected ground—does not require proving the persecutory agent's subjective intentions; such a requirement would amount to an impossible burden given the recognized difficulties of proof faced by refugees.[190] In determining whether an asylum applicant is a refugee, the adjudicator focuses entirely on the applicant and does not pass judgment on the persecutor.

In keeping with the underlying criminal law origins of exclusion under the Convention, an individual's knowledge, intent, and voluntariness with respect to the alleged persecutory acts should be at the center of the exclusion inquiry. Here, however, U.S. jurisprudence under the persecutor bar differs significantly from that of the aforementioned states parties to the Convention that apply the specific language of Article 1F(a). Until 2009, the BIA and several circuits focused on the objective effects of persecutory conduct, not the willfulness or culpability of the persecutor. In 1981, the Supreme Court in *Fedorenko v. United States*[191] interpreted a similar persecutor bar under the Displaced Persons Act ("DPA") of 1948.[192] The DPA, which granted quotas of visas to refugees from the occupied Allied territories following WWII, barred Nazi war criminals, those who "assisted the enemy in persecuting civil populations," from entry into the United States.[193] In *Fedorenko*, the Supreme Court held that even involuntary assistance to the enemy made an individual ineligible for a visa under the DPA.[194]

Fedorenko's holding was subsequently applied to individuals seeking asylum under the INA. As a result, in the almost three decades following *Fedorenko*, asylum-seekers who had allegedly committed persecutory acts could not avail themselves of a duress defense, finding themselves excluded under the persecutor bar regardless of individual culpability. This approach to the persecutor bar yielded a sharp dichotomy between the Convention, with Article 1F(a) arising out of international criminal law, and the U.S. persecutor bar. With no exception for involuntariness, the persecutor bar went beyond the scope of Article 1F(a) as it was intended by the Convention's drafters. It did more than exclude criminally culpable individuals whose conduct could subject them to international criminal proceedings, and it excluded more individuals than only those whose acts rendered them

189. Asylum Officer Basic Training Course, Asylum Eligibility Part III: Nexus and the Five Protected Characteristics 10–11 (Mar. 12, 2009); *see also* ANKER, *supra* note 168, § 4:7.

190. Matter of Fuentes, 19 I. & N. Dec. 658, 662, 1988 WL 235456 (B.I.A. 1988); *see also* ANKER, *supra* note 168, § 4:7.

191. Fedorenko v. United States, 449 U.S. 490 (1981).

192. *See id.* at 509–16.

193. Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009 (1948), amended by Immigration and Nationality Act, ch. 477, tit. IV, § 402(h), 66 Stat. 277 (1952).

194. *See Fedorenko*, 449 U.S. at 514.

morally unworthy. The persecutor bar lacked the dual protection and criminal purposes of Article 1F(a), as described in Part I of this Note.[195]

In 2009, the Supreme Court limited *Fedorenko*'s reach to the DPA and held in *Negusie v. Holder*[196] that the BIA had not determined whether coercion and involuntariness were relevant to the INA's persecutor bar.[197] The Court remanded the case to the BIA for consideration of the issue. In so doing, the Court distinguished the INA's history from that of the DPA and reiterated the purpose behind the Refugee Act of implementing the Convention and Protocol, suggesting that the BIA be guided by the principles underlying the international treaty.[198] It remains to be seen whether the BIA will align the INA with Article 1F(a), the balance struck under the Convention between the protection and criminal purposes of the refugee regime, by accepting a duress defense to the persecutor bar.[199]

Conclusion

As the numbers of asylum applicants continue to climb to unprecedentedly high figures, the imperative to confront the role of international criminal law in the determination of refugee status is incontrovertible. The UNHCR provides some direction to domestic adjudicators and practitioners on the application of the exclusion clauses, which are supplemented by guidance from authorities in domestic jurisdictions. However, there has been insufficient recognition of the inherent difficulties in applying international criminal law in the refugee context. International criminal law is not a unified, self-contained body of clear, coherent principles. The plurality of sources, jurisprudence, and doctrines that have developed in the decades

195. This approach marked a sharp departure from U.S. criminal law jurisprudence, where the centrality of intent for the purposes of attributing responsibility has long been a central tenet. As the Supreme Court stated in *Morisette v. United States*, 342 U.S. 246 (1952), "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.* at 250–51.

196. Negusie v. Holder, 555 U.S. 511 (2009).

197. *See id.* at 517.

198. *Id.* at 520. In a dissenting opinion, Justice Stevens drew attention to the relationship between the persecutor bar and the "crimes" referenced in Article 1F(a) of the Convention to support his contention that a duress defense is necessary to align the persecutor bar with the Convention's principle of *non-refoulement* as well as with other states parties' interpretations of the Convention. *Id.* at 536–37 (Stevens, J., dissenting) ("The language of the Convention's exception is critical: We do not normally convict individuals of crimes when their actions are coerced or otherwise involuntary. Indeed, the United Nations Handbook, to which the Court has looked for guidance in the past, states that all relevant factors, including 'mitigating circumstances,' must be considered in determining whether an alien's acts are of a 'criminal nature' as contemplated by Article 1(F) . . . . Other states parties to the Convention and Protocol likewise read the Convention's exception as limited to culpable conduct." (internal citations omitted)).

199. As of December 2017, the BIA has not published a decision in *Negusie*. In 2016 and 2017, the BIA conducted two rounds of briefing on whether there should be a duress exception to the persecutor bar. Oral arguments before the BIA took place on September 8, 2017.

since the Convention makes international criminal law a challenge to those who specialize in its practice. The interpretation and application of international criminal law is an even more daunting task for domestic immigration adjudicators, whose expertise lies in neither international nor criminal law. Further, international criminal law doctrines were shaped and have developed in order to fulfil the various purposes of international criminal law. Adjudicators must be cautious about importing them into the refugee context, which has fundamentally different goals.

Nonetheless, as the case law analyzed in this note demonstrates, adjudicators in Canada, Australia, and the UK have upheld the Convention's mandate, taking it upon themselves to search international legal instruments and jurisprudence for the criminal law principles relevant to Article 1F(a) cases. The inevitable result has been inconsistent outcomes within and across jurisdictions. Article 1F(a) cases find themselves in the interstices of international and domestic, criminal and civil law. They must strike a fine balance to achieve the goals of Article 1 of the Convention and preserve the integrity of the international refugee system: providing protection to *bona fide* refugees while excluding those responsible for persecution. Without greater attention to the correct use of international criminal law in this scheme, the Convention's delicate equilibrium risks being undermined.

To best fulfill the aim of the Convention to establish an effective refugee scheme, calibrated by the careful balance between protective and criminal purposes, states parties, working through inter-governmental organizations like the UNHCR and the ILC, should come together to establish a normative framework for the Twenty-First Century for the application of international criminal law in Article 1F(a) cases. These disparate national jurisdictions should decide on a guiding set of principles that accurately reflect the state of international criminal law today. It is necessary to establish a hierarchy of legal instruments and norms, from the standard of proof to requirements for complicity, to fulfil the dual criminal and protection purposes of the Convention: to ensure that the most serious international criminals do not evade prosecution but that victims in need of protection do not suffer the severe consequences of *refoulement*.

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