

Ignoring Complex Identities: Canada's Continuing Post-Ezokola Overzealous Application of Article 1F(a) of the Refugee Convention

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International criminal law (ICL) and refugee law both struggle with the reality that victims of international crimes are often individuals who have themselves participated to some degree in atrocity violence. Pursuant to Article 1F(a) of the Refugee Convention, a claimant is disqualified from obtaining refugee status if found to have participated in the commission of an international crime. This provision draws a bright line, distinguishing refugees from atrocity participants. However, this distinction is routinely far from clear-cut, as amidst the chaos of atrocity violence, numerous individuals may span the victim-perpetrator divide, or otherwise have their agency deeply constrained. They may participate in atrocities in ways that place them at the margins, or possibly outside the purview of ICL liability, if they were to be viewed as potential prosecutorial targets. This article explores how the complex identities of such individuals are addressed at the intersection of refugee law and ICL in the Canadian context. It argues that Article 1F(a) continues to be overused in Canada to deny refugee status to claimants with complex identities and calls for greater restraint in excluding such claimants.

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Le droit pénal international et le droit des réfugiés sont tous deux confrontés au fait que les victimes de crimes internationaux sont souvent des personnes ayant elles-mêmes participé, dans une certaine mesure, à des atrocités. Selon la disposition 1F(a) de la Convention relative au statut de réfugié, un demandeur d'asile ne peut obtenir le statut de réfugié s'il a commis un crime contre l'humanité. Cette disposition établit donc une distinction claire entre les réfugiés et les personnes ayant commis des atrocités. Toutefois, cette distinction est souvent loin d'être nette, car dans le chaos des atrocités, de nombreuses personnes peuvent s'être retrouvées à la fois dans la catégorie des victimes et dans celle des auteurs de violence, ou sinon voir leur faculté d'agir fortement restreinte. Elles peuvent également participer aux atrocités d'une manière qui les place en marge, voire en dehors du champ d'application du droit pénal international si on devait les considérer comme des cibles potentielles de poursuites. Cet article explore la manière dont les identités complexes de ces personnes sont traitées à l'intersection du droit des réfugiés et du droit pénal international dans le contexte canadien. Il soutient que la disposition 1F(a) continue d'être surutilisée au Canada pour refuser le statut de réfugié à des demandeurs aux identités complexes et appelle à une plus grande retenue dans la procédure de demande d'exclusion de ces personnes.

I. Introduction: The Second Life of International Criminal Law in Refugee Exclusion

Many common critiques of international criminal law (“ICL”) can be traced back, at least partially, to selectivity and under-enforcement. While extraordinary in many ways, the commission of “atrocities crimes” (genocide, crimes against humanity and war crimes) remains a rather common occurrence.¹ Each instance of atrocity also tends to entail mass criminality, involving many potentially criminally culpable individuals, often numbering well into the hundreds or thousands.² Consequently, each year many thousands of individuals could theoretically be criminally prosecuted for participating in atrocity crimes. In reality, only a tiny fraction of such individuals are ever investigated, let alone tried.

The exceptional nature of ICL prosecutions, along with their extreme politicization, has led some to view ICL as a niche, relatively unimportant legal regime. After all, for all the ink spilled on the International Criminal Court (“ICC”), the institution has, to date, successfully prosecuted only a handful of mid-level African rebel commanders in situations involving the cooperation of relevant states. Yet, ICL extends its reach far beyond the realm of criminal prosecutions. It shapes narratives of conflict, culpability and victimhood, influences how we think about human rights and transitional justice and has ancillary repercussions in a variety of other social and legal settings.

One of ICL’s most important secondary applications is in refugee law. Pursuant to Article 1, subsection F(a) of the 1951 Refugee Convention, “any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity,” is to be disqualified from attaining refugee status.³ This

¹ Throughout this article the term “atrocities crimes” is used to refer generally to genocide, crimes against humanity and war crimes. The term atrocity has no freestanding legal relevance, but it is used often and repeatedly to generally refer to conduct amounting to the commission of one or more international crimes under prevailing ICL doctrine. See e.g., *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, preamble (entered into force July 2002) (Rome Statute). Apparent international crimes have been recently or are currently being committed in, *inter alia*, Ukraine, Syria, Afghanistan, Iraq, North Korea, the Democratic Republic of Congo, Zimbabwe, Mali, Myanmar, Palestine/Gaza, Somalia, Yemen, Ukraine and Colombia, to name only a handful of prominent potential example situations.

² Mark Drumbl refers to this aspect of atrocity commission as a “complicity cascade.” Mark A Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007) at 8.

³ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 at art 1F(a) (entered into force 22 April 1954) [Refugee Convention].

exclusionary provision was drafted at a time when the experiences of World War II loomed large and many former Nazis and other war criminals had fled to far-flung countries in an effort to hide their criminal pasts, including by availing themselves of refugee protections. The logic behind this provision is two-fold. First, those who participate in atrocity crimes are considered “undeserving” of the protections of refugee status.⁴ Second, the goal of anti-impunity, depriving individuals involved in international crimes of refugee protection, may help “ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.”⁵ While clearly, former Nazi party members who hid their past in this way may be legitimately considered “fundamentally unworthy” of refugee status,⁶ such “unworthiness” is mandatory and extends to *all* claimants who may have had some role in the commission of an enumerated crime.⁷

While the increasing invocation of Article 1F(a) by states eager to exclude a maximum number of refugee claimants amidst the ongoing global migration crisis has been criticized, the general notion that anyone who might theoretically be prosecutable under ICL *should* be excluded remains an “axiomatic” aspect of the international refugee law regime.⁸ Like other signatories to the Refugee Convention, Canada applies Article 1F(a) to exclude refugees from its borders. Also like many other nations, Canada interprets and applies the provision expansively by interpreting the term “committed” to encompass any individual who might theoretically be prosecutable for their alleged participation in one or more international crimes.

⁴ UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, UN doc HCR/GIP/03/05 at para 2.

⁵ *Ibid* (along these lines, “impunity” in this context is often associated with a lack of criminal accountability specifically, however, in this context, the term is used to refer to a more general lack of accountability or consequences including, but not limited to, criminal prosecutions).

⁶ Jennifer Bond, “Principled Exclusions: A Revised Approach to Article 1(F)(A) of the Refugee Convention” (2013) 35:15 *Mich J Intl L* 15 at 77 (“Article 1(F)(a) plays an important role in protecting the integrity of this system by ensuring that individuals who are fundamentally unworthy of protection are not admitted as refugees.”).

⁷ For a discussion of the mandatory nature of Article 1F(a) and the complications this creates for former child soldiers seeking refugee status, see Jennifer Bond & Michele Krech, “Excluding the Most Vulnerable: Application of Article 1F(a) of the Refugee Convention to Child Soldiers” (2016) 20 *Intl JHR* 567 at 571–72.

⁸ James C Simeon, “The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have Committed War Crimes and/or Crimes Against Humanity in Canada” (2015) 27 *Intl J Refugee L* 75 at 79.

The rigidity and potential expansiveness of Article 1F(a) has been critiqued in various ways. Asha Kaushal and Catherine Dauvergne argue that overuse of all exclusionary provisions in Article 1F has led to an “exclusion creep” problem in Canadian refugee decision-making.⁹ They attribute this overuse to the Canadian government “aggressively pursu[ing] exclusion by intervening in [Immigration and Refugee Board] cases [and] employ[ing] ‘creative’ arguments at all levels of adjudication.”¹⁰ Several scholars have also critiqued the lack of uniformity in interpreting and applying Article 1F(a) at the domestic level.¹¹ Other scholars have expressed concern in relation to certain domestic applications of Article 1F(a) over the lack of adherence to components of ICL itself, such as its specialized modes of liability, defenses, and burdens of proof.¹² Others have identified tensions between the mandatory nature of the Article and other provisions of international law dealing with topics such as child soldiers or protections against refoulement.¹³ Problems may also arise when refugee claimants feel the need to embellish their own experiences of violence to strengthen their claims of persecution. Brian Moore and Joris van Wijk point out that some refugee applicants may unwittingly exaggerate or altogether fabricate connections to “atrocious violence” in an effort to otherwise strengthen their claims, thereby placing themselves at risk of exclusion pursuant to Article

⁹ Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” 23 *Intl J Refugee L* 54 at 65.

¹⁰ *Ibid.*

¹¹ E.g. Bond, *supra* note 6; Jenny Poon, “Non-Refoulement Obligations under Article 1F(a) of the Refugee Convention” (2018) 41 *Hous J Intl L* 1.

¹² See e.g. Joseph Rikhof, “Complicity in International Criminal Law and Canadian Refugee Law: A Comparison” (2006) 4 *Journal of International Criminal Justice* 702; Sarah Creedon, “‘The Exclusion Clause’ and the Intersection of International Criminal Law and the Refugee Convention” (2015) 18 *Trinity College Law Review* 84; Alison Duxbury, “Excluding the Undesirable: Interpreting Article 1F(a) of the Refugee Convention in Australia” in David A Blumenthal & Timothy LH McCormack, eds, *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden, Brill, 2008) 259; Mathias Holvoet, “Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law” (2014) 12 *Journal of International Criminal Justice* 1039; Poon, *supra* note 11; Pia Zambelli, “Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law” (2011) 23:2 *Intl J Refugee L* 252.

¹³ E.g. Matthew Happold, “Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention” (2002) 17:6 *Am U Intl L Rev* 1131; Magali Maystre, “The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers” (2014) 12 *Journal of International Criminal Justice* 975; Bond & Krech, *supra* note 7; Geoff Gilbert, “Undesirable but Unreturnable: Extradition and Other Forms of Rendition” (2017) 15 *Journal of International Criminal Justice* 55.

1F(a), despite having never actually, meaningfully, contributed to any international crime.¹⁴

Similar allegations of overbreadth and overreach have been made in relation to other subsections of Article 1F.¹⁵ These particularized concerns regarding Article 1F, including subsection (a), are compounded by more generalized problems plaguing refugee and immigration law, as well as ICL. Both areas of law suffer from pervasive undercurrents of racism, xenophobia and gender bias.¹⁶ Refugee claimants also can be harmed by misguided expectations regarding how applicants will narrate their experiences of oppression that fail to account for the distorting effects of trauma and differing cultural traditions of narration and storytelling.¹⁷ The net result is an extreme difficulty in arriving at anything resembling just outcomes in the application of Article 1F(a), even in the wake of paradigmatic atrocity events, such as the Rwandan Genocide.¹⁸ These challenges are all the more important given the ongoing global migration crisis, which shows no signs of dissipating any time soon.¹⁹

The 2013 *Ezokola v Canada* decision of the Supreme Court of Canada was responsive to many critiques of the over-expansiveness of Article 1F(a) in

¹⁴ Brian Moore & Joris Van Wijk, "Asylum-Seekers Falsely Implicating Themselves in International Crimes: Should they be Informed of the Existence of Article 1F of the Refugee Convention?" (2015) 12 Migration Letters 91.

¹⁵ See Bond, *supra* note 6; Jennifer Bond, Nathan Benson, and Jared Porter, "Guilt by Association: Ezokola's Unfinished Business in Canadian Refugee Law," (2020) 39 Refugee Survey Quarterly 1; Ned Djordjevic, "Exclusion under Article 1F(b) of the Refugee Convention: The Uncertain Concept of Internationally Serious Common Crimes" (2014) 12 Journal of International Criminal Justice 1057; Amar Khoday, "Tough on Terror, Short on Nuance: Identifying the Use of Force as a Basis for Excluding Resisters Seeking Refugee Status" (2015) 4:2 Can J Hum Rts 179; Camille Lefebvre & Fannie Lafontaine, "The Exclusion Cause in Canada: Prioritizing Practical Expediency," (2021) 33:3 Intl J Refugee L 405.

¹⁶ E. Tendayi Achiume, "Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees" (2014) 45:2 Geo J Intl L 323; Valerie Oosterveld, "Gender at the Intersection of International Refugee Law and International Criminal Law" (2014) 12 Journal of International Criminal Justice 953.

¹⁷ See e.g. Amy Shuman & Carol Bohmer, "Representing Trauma: Political Asylum Narrative" (2004) Journal of American Folklore 394 at 410 (identifying an "enormous gap between the requirements of the [US asylum process] and the applicants' cultural forms of representation [which] is itself a source of suffering and trauma for asylum petitioners"); Anthea Vogl, "Telling Stories from Start to Finish: Exploring the Demand for Narrative in Refugee Testimony" (2013) 22 Griffith L Rev 63 at 83 (arguing that expectations of linear narratives in refugee claims are misplaced because of the nature of memory and trauma and noting that "testimony may be deemed to be less plausible or implausible when it does not conform to a decision-maker's multiple, deeply embedded and implicit narrative-based understandings of the world.").

¹⁸ See Philippe Larochelle & Sébastien Chartrand, "Balancing the Rights of Migrants and International Criminal Law: The Case of Alleged Rwandan War Criminals Under Canada's Immigration Laws" (2015) 93:2 Can B Rev 409 (noting that even in the case of Rwandan genocide refugees, risks of over-inclusivity in exclusion abound, which merits proceeding with caution and affording significant procedural safeguards to applicants considered to be potentially excludable via Article 1F(a)).

¹⁹ See generally Simeon, *supra* note 8.

the Canadian context. As discussed in Part II of this article, the decision reined in some of the extreme excesses evident in prior Canadian Article 1F(a) decision-making processes.²⁰ More recent scholarship identifying areas of overreach within Canada's application of exclusionary policies has largely framed such overreach as attributable to gaps left by the *Ezokola* limitation to Article 1F(a).²¹

This article argues that while *Ezokola* did improve the law, the Canadian government continues to attempt, sometimes successfully, to overstretch the boundaries of Article 1F(a) in an exclusionary manner. More specifically, it argues that despite the general improvement in the law *Ezokola* represents, the Canadian government continues to aggressively seek an overly expansive interpretation of Article 1F(a), one conceptually moored in a common, yet flawed and overly simplistic understanding of international crimes as simplistic dramas of good and evil, wherein devious perpetrators torment one-dimensional victims. Consequently, the Canadian approach, though slightly reined in by the *Ezokola* decision, continues to presume criminal culpability of marginal actors in atrocity processes absent rigorous factual investigations or legal certainty. The over-application of Article 1F(a) by government decision-makers, highlights their tendency to presume refugee applicants are complicit in atrocity crimes, where the facts are more complicated or there is only marginal culpability. In the chaos of violent atrocities, individuals often traverse the line between perpetrator and victim, sometimes repeatedly. Moreover, while prior victimization does not necessarily excuse, let alone exculpate a low-level participant in atrocity violence, the pressures at play in many atrocity situations are often of a more extreme nature than those faced by "ordinary" criminals, like victim-perpetrators at the domestic level. A person who has been severely tortured, or a young person whose family members have been brutally murdered and who are forcibly recruited into a violent organization, do not magically recover from their trauma at some identifiable point in time, such as upon reaching adulthood. When such persons participate in atrocity violence, their culpability may be difficult, if not impossible, to truly assess. Similarly,

²⁰ For discussions of such excesses, both in Canada and more generally, see e.g. Bond, *supra* note 6; Kaushal & Dauvergne, *supra* note 10; Rikhof, *supra* note 12; Zambelli, *supra* note 12.

²¹ See e.g. Bond, Benson & Porter, *supra* note 15; Lefebvre & Lafontaine, *supra* note 15 at 435 (arguing that Article 1F remains generally overused in Canada, and "as some provisions are exempt from the *Ezokola* test, this regime permits a broader use of membership by association, despite a contrary ruling by the Supreme Court of Canada.").

people living amidst atrocity violence, who may contribute to such violence, often face extreme pressures not present in more stable social settings.

This generalized complexity in the culpability of low-level victim-perpetrators of atrocity violence has been an issue that has bedeviled ICL theorists and practitioners alike. However, the basic conceptual mooring of liberal criminal law to a simplified, binary notion of good/evil and guilt/innocence is especially problematic when it is applied in the context of refugee law for several reasons. First, admissibility decisions are, in some instances, far more grave than criminal convictions for refugee claimants. Several years of incarceration, or even significantly more, may pale in terms of seriousness when compared to the prospect of being returned to a state that one has fled out of fear of violence, persecution, or even death. Some claimants would surely opt for a stay in prison rather than return to the state they fled, if given the choice. Second, first instance refugee status determinations are made (1) by lay administrative decisionmakers; (2) without due process guarantees or robust factfinding; and (3) on the basis of a “serious reasons for considering” burden of proof, short of the near-universal reasonable doubt standard applied in criminal cases, including within ICL. These decisions, which may outstrip a criminal conviction in terms of gravity of risk, may rest on thin evidentiary foundations, inviting not only good-faith mistakes, but the insidious creep of explicit or implicit biases individual decisionmakers may hold. Claimants who could never be successfully prosecuted may still be excluded. Yet, despite these clear shortcomings, it remains difficult to critique Article 1F(a), be it outright or in terms of how it is adopted and applied by individual nations, due to the social stigma surrounding genocide, crimes against humanity and war crimes. This is especially true given the rarity of prosecutions of excluded individuals, as it is typically socially and politically unpalatable to allow a person implicated in any way in an atrocity crime to move through the refugee claims process.

Given these complex realities and what is at stake for refugee claimants facing exclusion who otherwise have strong cases for asylum, this article argues that the difficulty, costs and/or practical challenges impeding prosecutions should not be used to excuse a process that essentially finds a claimant responsible, indeed *quasi-criminally liable*, for participating in an atrocity crime in situations involving marginal alleged contributions or other factors complicating the culpability of the claimant involved. Rather, the appropriate remedy for such marginal cases lies not in the continued

broad application of Article 1F(a), but rather in improving other accountability processes such as domestic prosecutions of international crime. Anything less risks implicating Canada's immigration system in the perpetuation of oversimplified stereotypes of atrocities, victims and perpetrators of international crimes.

To make this argument, this article proceeds in five parts. Part II provides a brief overview of Article 1F(a) of the Refugee Convention and explains how expansive interpretations of this provision have been adopted as components of exclusionary national immigration and asylum policies. Part III explains how Article 1F(a) has been incorporated and interpreted within Canadian law and refugee assessment processes, with a particular emphasis on the effects of the *Ezokola* decision. This part demonstrates how even after overly broad applications of 1F(a) were narrowed in *Ezokola*, the decision failed to grapple with deeper, more difficult questions of identity and culpability that are commonplace in atrocity situations. Part IV offers an alternative to the rigid categorical binaries of victim/perpetrator and bystander/perpetrator. It does so by drawing inspiration from Mark Drumbl's argument that, within the realm of ICL, the complexity and murkiness of the culpability of some "victims who victimize" renders such persons beyond legal categorization and thus, unsuited to criminal prosecution. Part IV contends that the culture of restraint proposed by Drumbl in the realm of ICL should be adopted in the interpretation and application of Article 1F(a) in Canada and elsewhere, supplanting existing cultures of maximum exclusion. Part V demonstrates that such a properly nuanced, restrained approach to pursuing exclusion and interpreting the outer boundaries of Article 1F(a)'s reach has not been adopted in post-*Ezokola* Canada. Rather, the government has continued to espouse an expansive conception of who qualifies as "undeserving" of the protections of refugee law. This part does so through an analysis of post-*Ezokola* legal decisions involving Article 1F(a) exclusion determinations. In particular, three cases – those of refugee applicants Weiss Saherzoy, Zobon Johnson, and Boutros Massroua – are highlighted as examples of situations meriting restraint in the interpretation of *Ezokola's* test for complicity in atrocity. In each case, the complex identities and unclear culpabilities of the claimants arguably warranted restraint in the application of Article 1F(a). Nonetheless, the Canadian government sought to apply the provision in the broadest conceivable manner. Part VI offers some concluding thoughts on how complicated cases involving individuals such as Saherzoy, Johnson, and

Massroua could be more appropriately addressed within the context of refugee law and the exclusionary mandates of Article 1F(a). It does so by advocating for a more nuanced view of what counts as a voluntary, knowing and significant contribution to atrocity violence when it comes to individuals operating under extreme pressure approaching duress, or those who defy unitary categorization as victim, perpetrator or bystander.

II. Article 1F(a) and Individuals “Undeserving” of Refugee Protection

The notion that anyone who has participated in the commission of an international crime should be unequivocally barred from being granted refugee status is normatively tied to the idea that such individuals are fundamentally undeserving of the legal protections afforded to refugees and that grants of refugee status could permit some criminally culpable individuals to benefit from impunity. According to the United Nations Office of the High Commissioner for Refugees (UNHCR):

The rationale behind the [Article 1F(a)] exclusion clauses is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. While these underlying purposes must be borne in mind in interpreting the exclusion clauses, they must be viewed in the context of the overriding humanitarian objective of the 1951 Convention.²²

These considerations are commonly referenced in scholarly literature on Article 1F(a),²³ as is the notion that to allow individuals implicated in international crimes to obtain refugee status would have a negative effect on the integrity and reputation of the refugee system itself.²⁴ Article 1F(a) is also widely viewed as a provision that ensures that “perpetrators of the worst international crimes do not subsequently benefit from the robust international protections available to refugees.”²⁵ Thus, Article 1F(a) operates as a sort of secondary anti-impunity mechanism, one that ensures

²² UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* 4 September 2003, <www.refworld.org/docid/3f5857d24.html> accessed 29 April 2020 at para 3.

²³ E.g. Bond, *supra* note 6 at 28; Kaushal & Dauvergne, *supra* note 10 at 57; Simeon, *supra* note 8 at 80–81.

²⁴ Bond, *supra* note 6 at 18, 78. Bond argues that reform of usages of Article 1F(a) is “desperately needed.”

²⁵ For example, in the words of Jennifer Bond, allowing perpetrators of international crimes to avail themselves of refugee status would “bring the asylum system into disrepute.” Bond, *supra* note 6 at 18.

perpetrators of international crimes, even if not criminally prosecuted, are at least stripped of certain legal rights they otherwise may be entitled to.

On the surface, the thinking behind Article 1F(a) makes a great deal of sense. After all, the commission of atrocity crimes is one of the driving factors in producing refugees, evidenced by the numerous links between various recent atrocities and the ongoing global refugee crisis. When Article 1F(a) is applied to those who were the driving force behind, or key perpetrators of, atrocity crimes, this logic of Article 1F(a) as a safeguard against abusers benefitting from a system designed to help their victims holds, as it would seem perverse to allow powerful actors who produced refugees by bringing about or carrying out atrocities, to then benefit from refugee status themselves. The central figures in atrocity crimes, however, tend to be well-known, even notorious individuals, who are not the kinds of people regularly making refugee claims. But, for the most part Article 1F(a) seems to be used to exclude relatively low-level or fringe atrocity participants: guards, foot soldiers, police officers and functionaries, as opposed to torturers, policy-makers and high-ranking military officials. More high-ranking figures meanwhile, are more apt to be prosecutorial targets, be it in ICL, or domestic criminal proceedings.

Marginal actors are often swept up in what Drumbl describes as the “complicity cascade” of atrocity; they may not have physically participated in the perpetration of international crime, but they may have facilitated such perpetration in one way or another.²⁶ These individuals occupy moral and legal grey zones, in terms of their culpability for relevant atrocity crimes, having spent considerable time negotiating dangerous environments rife with violence and insecurity. Escaping atrocity situations without serious moral compromises may be near impossible. Except in exceedingly rare circumstances, authorities engaged in the criminal prosecution of individuals for international crimes are spared the difficult task, both morally and legally, of assessing the culpability of marginal figures. Rare as they are, actual ICL prosecutions have overwhelmingly focused on individuals directly implicated in the crimes they have been charged with. Given the abundance of clearly appropriate prosecutorial targets, there is no need for prosecutors to go after marginal actors in most instances.

Yet, this is not the case when it comes to the application of Article 1F(a), which is routinely applied to individuals accused of having made tangential

²⁶ Drumbl, *supra* note 2 at 8.

contributions to atrocity crimes. Canada regularly excludes individuals who it is highly doubtful could, or would, ever be criminally prosecuted for their alleged participation in atrocity crimes. The tendency toward the overuse of Article 1F(a) is especially problematic given that numerous governments, including Canada, are increasingly utilizing Article 1F(a) as an inexpensive, largely uncontroversial method of excluding as many refugee claimants as possible, especially claimants failing to conform to the stereotype of the passive, grateful refugee defined wholly by their victimhood.²⁷ Thus, Article 1F(a) is an especially attractive method of limiting a country's intake of refugees, as it can be used to exclude a subset of relatively unsympathetic refugee claimants²⁸ with relative ease and expediency.²⁹

III. Article 1F(a) Refugee Exclusion in Canada

In Canada, Article 1F(a) and relevant domestic legislation operate to both render certain individuals ineligible to make a claim for refugee status and as grounds for deporting otherwise legal resident non-citizens of Canada by deeming them "inadmissible."³⁰ In assessing any refugee claim, immigration officers are mandated to "determine whether the claim is eligible to be referred to the Refugee Protection Division" so that the merits of the claim may be assessed.³¹ A finding that there exists serious reasons to consider that a claimant participated in the commission of genocide, crimes against humanity and/or war crimes, is one of the grounds for a finding of ineligibility and hence, triggers a duty to report the situation to the Refugee Protection Division.³² Similarly, if a claimant is found to have served as "a prescribed senior official in the service of a government" that committed an

²⁷ Kaushal & Dauvergne, *supra* note 10. On the figure of the "grateful refugee," see Vinh Nguyen, "Refugeetude: When Does a Refugee Stop Being a Refugee" (2019) 37:2 Social Text 109.

²⁸ In this vein, see generally, Christine Schwöbel-Patel, "Spectacle in International Criminal Law: The Fundraising Image of Victimhood" (2016) 4:2 London Review of International Law 247; Sara Kendall & Sarah Nouwen, "Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood" (2013) 76:3&4 Law & Contemporary Problems 235. On the figure of the "grateful refugee" in the Canadian context, see Vinh Nguyen, "Refugee Gratitude: Narrating Success and Intersubjectivity in Kim Thúy's *Ru*" (2013) 219 Canadian Literature 17; Nguyen, "Refugeetude," *supra* note 27.

²⁹ See Lefebvre & Lafontaine, *supra* note 15 at 405 (arguing that in the Canadian context, the government's "continuing prioritization of security trumps humanitarian aims by an overly broad application of article 1F of the Refugee Convention.").

³⁰ There are various reasons a claimant may be deemed legally inadmissible to Canada, some of them overlapping with Article 1F(a). See Bond, Benson & Porter, *supra* note 15 at 3. This article focuses exclusively on Article 1F(a) exclusion.

³¹ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 100(1).

³² *Ibid.*, ss 101(1)(f), 101(2)(b).

international crime, the claimant may also be found inadmissible and face deportation.³³ If a hearing officer identifies the existence of a potential Article 1F(a) exclusion issue, an exclusion hearing is scheduled.³⁴ According to James Simeon, typically such hearings result in “[m]inisterial intervention and the presence of the Minister’s Representative at the hearing[, which is] conducted as an adversarial proceeding, with the onus on the Minister to establish that the refugee applicant ought to be excluded from international protection.”³⁵

An adverse finding at the exclusion hearing prevents the claimant from moving forward with the substance of their refugee claim as, pursuant to Canadian law and in accordance with Article 1F(a), such a person is automatically excluded from the definition of who may qualify as a refugee.³⁶ No exceptions are made under humanitarian and compassionate grounds, or to balance the severity of harm the claimant may face if deported with the nature or gravity of their alleged criminal behavior.³⁷ Thus, in Canada, the implementation of Article 1F(a) creates a strict and unyielding barrier to refugee status claimants found to have participated in any international crime.

Claimants denied refugee status pursuant to Article 1F(a) may face risks if returned to their country of origin – such as persecution, torture or even death – far graver than imprisonment. Many such individuals would presumably prefer being prosecuted and even imprisoned in Canada or elsewhere, over being deported back to their home countries.³⁸ Individuals who are the driving force behind an atrocity crime at worst face a term of imprisonment in the Hague, Canada or other locations mostly clustered in

³³ *Ibid*, s 35(1)(b).

³⁴ Simeon, *supra* note 8 at 77.

³⁵ *Ibid*.

³⁶ *Immigration and Refugee Protection Act*, *supra* note 31, s 98: “A person referred to in section E or F of Article 1 of the *Refugee Convention* is not a *Convention refugee* or a *person in need of protection*.” (emphasis added).

³⁷ *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paras 26-27. It should be noted that refugee applicants excluded pursuant to Article 1F(a) are generally permitted to apply for a Pre-Removal Risk Assessment prior to their actual removal. However, this safeguard is minimal at best as excluded individuals “may be removed despite a risk of persecution, including in certain circumstances even a risk of death, torture, or cruel and unusual treatment or punishment.” Bond, Benson & Porter, *supra* note 15 at 8.

³⁸ This is not to suggest that some individuals may not survive, even thrive, following deportation to their home country. Nonetheless, deportation creates a *risk* that persecution will occur and it is this acknowledged risk that refugees are protected from. There is no requirement that an individual must face *certain* persecution or violence if returned to their country of origin in order to qualify for refugee protections. I would like to thank Mark Kersten for pointing out this issue to me during our discussion of this article.

the Global North if prosecuted under ICL. Meanwhile, individuals who played minor roles in the same or similar atrocity processes, may be exposed to much graver consequences if denied refugee status. This is especially true in the Canadian context, where there are no requirements that decisionmakers balance the nature of the Article 1F(a) crime with the degree of persecution reasonably feared. In fact, doing so is explicitly forbidden, amounting to a reversible error.³⁹

Excluded refugee claimants may also face such consequences based on thin evidence and without rigorous procedural protections. Relevant decisionmakers need not have any expertise in ICL; refugee status hearings are based on extremely limited factfinding and exclusion decisions are based solely on a finding of “serious reasons for considering” that the claimant participated in atrocity crimes.⁴⁰ Empirical research demonstrates that in Canada, even in less factually and legally complex refugee claims, the success or failure of the claim depends on the luck of the draw in terms of who is assigned as decisionmaker, moreso than the overall merit of one’s claim.⁴¹ Mistakes in fact-finding, assessments of credibility and the nature and severity of risks faced by claimants necessarily occur with some regularity.⁴² Too often, errors in fact-finding prejudice, rather than benefit, claimants with extralegal considerations appearing to influence how decisionmakers resolve uncertainty in the Canadian context.⁴³ Moreover, as Moore and Van Wijk point out, asylum seekers may unwittingly and falsely

³⁹ See e.g. *Gonzalez v Canada (Minister of Employment and Immigration)*, [1994] 3 FC 646, 115 DLR (4th) 403 (“nothing ... permit[s] the Refugee Division to weigh the severity of potential persecution against the gravity of the conduct which has led it to conclude that what was done was an Article 1F(a) crime. [...] Whatever merit there might otherwise be to the claim, if the exclusion applies, the claimant simply cannot be a Convention refugee) (appeal allowed on other grounds). Canada is not alone in this interpretation, which flows directly from the language of the Refugee Convention. For example, Australia’s application of Article 1F(a) also creates an absolute bar. See Duxbury, *supra* note 12 at 281-82.

⁴⁰ See generally Bond, *supra* note 6; Kaushal & Dauvergne, *supra* note 10; Simeon, *supra* note 8. In light of these shortcomings Lefebvre and Lafontaine advocate for a “higher threshold of proof” beyond Canada’s “serious reasons to believe” standard in Article 1F exclusion cases. Lefebvre & Lafontaine, *supra* note 15 at 414.

⁴¹ Sean Rehaag, “Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations” (2011) 23:2 Can J Women & L 627 at 628; Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38 Queen’s LJ 1 at 49-50. Utilizing a “comprehensive dataset of over 23 000 cases from 2005 to 2010” Rehaag concludes that “outcomes in applications for judicial review in the refugee law context all too often hinge on who decides the case.”

⁴² See e.g. Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (New York: Cambridge University Press, 2018).

⁴³ Hilary Evans Cameron, “The Battle for the Wrong Mistake: Risk Salience in Canadian Refugee Status Decision-making” (2019) 42 Dalhousie LJ 1.

implicate themselves in international crimes in an effort to “convince immigration officials that they risk persecution upon return” if deported.⁴⁴

Many commentators have criticized both the increasing use of Article 1F(a) by governments such as Canada and overly broad interpretations of the Article’s scope in terms of how complicity in international crime is assessed.⁴⁵ In the Canadian context, the bounds of Article 1F(a) were partially reined in by the *Ezokola* decision, where the Court held that in order to bring Canada’s interpretation of Article 1F(a) into accord with ICL, to be excluded, a refugee claimant must be found to have made a “voluntary, significant, and knowing contribution” to the commission of an international crime.⁴⁶ *Ezokola* specifically directs refugee decisionmakers to assess six factors in determining whether a specific refugee claimant made a significant, knowing and voluntary contribution to an international crime committed by an organization they were in some way associated with:

- (i) the size and nature of the organization;
- (ii) the part of the organization with which the [person] was most directly concerned;
- (iii) the [person’s] duties and activities within the organization;
- (iv) the [person’s] position or rank in the organization;
- (v) the length of time the [person] was in the organization, particularly after acquiring knowledge of the group’s crime or criminal purpose; and
- (vi) the method by which the [person] was recruited and the [person’s] opportunity to leave the organization.⁴⁷

Ezokola, and subsequent refugee status determination decisions citing it, demonstrate the continuing difficulty of assessing the line dividing “voluntary, knowing, and significant” contributions to atrocity crimes from those that may be involuntary, carried out without full knowledge and/or

⁴⁴ Moore & Van Wijk, *supra* note 14 at 92. Moore and Van Wijk provide examples of “fabricate[d] stories” where a claimant was actively involved in a “certain rebel movement or government institution.” Statements were made by claimants in order to make their claims of persecution more convincing, unaware that they could be exposing themselves to expulsion via Article 1F(a).

⁴⁵ See e.g. Bond, *supra* note 6; Kaushal & Dauvergne, *supra* note 10; Lefebvre & Lafontaine, *supra* note 15.

⁴⁶ *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]. For a discussion of the “personal and knowing participation” test replaced by the *Ezokola* test, see Bond, Benson & Porter, *supra* note 15 at 4–6.

⁴⁷ *Ezokola*, *supra* note 46 at para 91. These factors are now quoted verbatim as the definitive test for complicity in Canadian Article 1F(a) assessments.

which may be insignificant in relation to broader causal dynamics involved. The *Ezokola* decision also did little in terms of providing appropriate tools for acknowledging and reckoning with the reality that individuals fleeing atrocities cannot always be neatly divided into mutually exclusive binary categories of victim and perpetrator. Canada's approach to Article 1F(a) continues to perpetuate a false victim-perpetrator dichotomy. While some degree of oversimplification and construction of rough categorial binaries are built into the structure of law generally, and Article 1F(a) specifically, there are spaces wherein false binaries of identity can be resisted within the Canadian refugee system. Many such spaces exist within areas of discretion afforded by the policies and practices of the Canadian government in relation to immigration, where greater restraint in applying the still quite malleable *Ezokola* standard is warranted. Similar to Drumb's observations in the context of certain ICL prosecutions, a culture of restraint is currently lacking in Canada, in the pursuit of exclusion via Article 1F(a), as government actors continue to seek the exclusion or deportation of the maximum number of refugee claimants possible, including those whose identities are complex, whose criminal culpability is highly questionable and who may span the artificial victim-perpetrator divide.⁴⁸

This status quo of maximum exclusion is neither inevitable nor unavoidable. Other options exist. In cases where sufficient evidence is available, Canadian authorities may prosecute individuals barred by Article 1F(a) from making refugee claims for their alleged participation in international crimes. The government could also extradite individuals to third countries who are more willing or better situated to conduct such prosecutions. In certain extenuating situations, where a refugee claimant operated within an extremely constrained environment falling just short of duress, was a minor or made a relatively tangential, yet perhaps legally "significant" contribution to the commission of an international crime, the government could simply view the situation as outside the scope of *Ezokola's* malleable standard, in order to acknowledge the limits of both ICL and refugee law in their ability to address the complex realities attendant to atrocity situations. Yet, as the remainder of this article demonstrates, these avenues are rarely pursued. Instead, Canada's current culture of maximum exclusion undermines the country's claim to be a nation committed to international justice, human rights and the protection of refugees by

⁴⁸ For a variation of the argument that the Canadian government unduly prioritizes exclusion via Article 1F, see generally Lefebvre & Lafontaine, *supra* note 15.

exposing a subset of non-ideal refugee claimants to the potentially grave risk of exclusion in situations involving marginal or unclear culpability. As is made clear in the remainder of this article, this culture seems to persist despite the reining in of the legal bounds of complicity for the purposes of Article 1F(a) exclusion by the Supreme Court in *Ezokola*.

A. *Ezokola v Canada*: Reining in the Boundaries of Complicity in International Crime

Rachidi Ezokola is a complex individual who does not fit neatly within the stereotypical mold of the hapless atrocity victim turned refugee. The father of eight children, Ezokola is a long-time supporter of Jean-Pierre Bemba, a man tried, and initially convicted in 2016 by the ICC of various war crimes and crimes against humanity, before eventually being acquitted by the Appeals Chamber.⁴⁹ As a known Bemba supporter, Ezokola was viewed as opposing Joseph Kabila, who held power in the Democratic Republic of Congo (DRC) from 2001–2019.⁵⁰ Despite his opposition to President Kabila, as part of a complex political compromise, Ezokola worked for the DRC government in various capacities for many years. His last government position was as second counsellor of the Permanent Mission of the DRC to the United Nations in New York City. Ezokola resigned from this position in 2008 and, fearing for his safety after coming to believe that DRC security officers were surveilling him, fled with his wife and children to Montréal, Canada, where he applied for refugee status, claiming that he feared being targeted by the DRC government if forced to return to the country because his resignation would be interpreted as an act of treason.⁵¹

In 2010, the Immigration and Refugee Board of Canada found that Ezokola was, in a legal sense, undeserving of consideration for refugee status pursuant to Article 1F(a) of the Refugee Convention based on a finding he was complicit in crimes against humanity committed by the DRC

⁴⁹ *Prosecutor v Bemba*, Case No. ICC-01/05-01/08-A, Judgment (8 June 2018) (ICC Appeals Chamber). Bemba was initially sentenced to an eighteen-year prison term. *Prosecutor v Bemba*, Case No. ICC-01/05-01/08, Decision on Sentence pursuant to Article 76 of the Statute (21 June 2016) at para 94 (Trial Chamber III). The reasons underlying Bemba's acquittal are outside the scope of the present analysis. For an overview of analyses of the acquittal and links thereto, see Fritz Streiff, "The Bemba Acquittal: Checks and Balances at the International Criminal Court" (18 July 2018), online: *International Justice Monitor* <www.ijmonitor.org/2018/07/the-bemba-acquittal-checks-and-balances-at-the-international-criminal-court/> [perma.cc/HC7J-PCJC].

⁵⁰ *Ezokola*, *supra* note 46 at paras 11–14.

⁵¹ *Ibid* at para 14.

government.⁵² An elite with some financial means, Ezokola retained counsel and appealed the Refugee Board's determination. His case ultimately wound up at the Supreme Court of Canada in 2013. The central question before the Court concerned the proper bounds of individual liability for international crimes committed by large groups, a question that has been a source of enduring controversy and continual debate within ICL itself. In the words of the Court, the case concerned the question of when "general participation in a group's criminal activity [...] becomes a culpable contribution."⁵³

Various refugee advocacy groups intervened in *Ezokola*.⁵⁴ These organizations argued that the test being used in Canada for Article 1F(a) determinations was overly broad, resulting in the exclusion of refugee applicants who could not be prosecuted for their alleged role in the commission of international crimes under even the broadest modes of liability available under ICL. This argument was a strong one as the test for complicity, utilized for the purposes of Article 1F(a) decisions in Canada prior to the Supreme Court's holding in *Ezokola*, was overbroad to the point of verging into the forbidden realm of guilt by association.⁵⁵

Ultimately, the Court largely agreed with Ezokola and the various interveners, holding that a refugee claimant could only be excluded pursuant to Article 1F(a) if the relevant decisionmaker finds that there exists "serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the [relevant international] crime."⁵⁶ The Court declined to make such a determination in Ezokola's specific case, instead remanding it back to the Refugee Board for a new determination of Article 1F(a)'s applicability to Ezokola in light of the refined complicity test. Ezokola and his family celebrated the outcome.⁵⁷ While the ultimate

⁵² *Ibid* at paras 15–19.

⁵³ *Ibid* at para 41.

⁵⁴ These organizations included the United Nations High Commissioner for Refugees, Amnesty International, Canadian Centre for International Justice, the International Human Rights Program at the University of Toronto Faculty of Law, the Canadian Council for Refugees, the Canadian Civil Liberties Association and the Canadian Association of Refugee Lawyers.

⁵⁵ *Ezokola*, *supra* note 46 at paras 2–3, 9. For a critique of pre-*Ezokola* standards, see e.g. Zambelli, *supra* note 12.

⁵⁶ *Ezokola*, *supra* note 46 at para 29.

⁵⁷ See Vidya Kauri, "Supreme Court Allows High-Level Congo Diplomat to Appeal Refugee Application" (19 July 2013), online: *The Globe and Mail* <www.theglobeandmail.com/news/national/supreme-court-to-rule-on-refugee-diplomat-with-suspected-war-crimes-ties/article13317076/> [perma.cc/NM8Q-YS9H].

outcome of Ezokola's specific status determination remains unclear, given that the Supreme Court of Canada cited the largely agreed-upon facts of Ezokola's situation as an example of the overly broad reach of the old Article 1F(a) complicity test used in Canada, in all likelihood, Ezokola is now living in Canada as a status refugee.

Regardless of one's view of Ezokola, his general politics, his support for Bemba, his previous actions or the merits of his underlying asylum claim, the basic contours of his story are emblematic of the experiences of refugee claimants located at the margins of atrocity commission. While he may or may not be viewed as "deserving" of the protections associated with refugee status by outside observers in a moral or ethical sense, the Supreme Court of Canada essentially found that Rachidi Ezokola is eligible to be considered for refugee status and the protections that come with it. As a refugee claimant whom the Canadian government sought to exclude pursuant to Article 1F(a), Ezokola is far from alone. His experience is emblematic of a growing second life of ICL being used by governments, including Canada, as a tool to exclude unwanted refugee claimants. Within the context of the ongoing global refugee crisis and the relative scarcity of actual ICL prosecutions, at the ICC or elsewhere, this second life within Article 1F(a) is perhaps the most important function ICL currently plays in terms of tangibly affecting individual lives. For example, while comprehensive data is not available concerning the total number of claimants excluded pursuant to Article 1F(a) in Canada, due to the lack of a full public database on refugee status decisions, between 1998 and 2008 nearly half of the 757 excluded refugee claimants were excluded pursuant to Article 1F(a).⁵⁸ Many such individuals would invariably have preferred being criminally tried or even summarily imprisoned, to being excluded and deported, since incarceration in a Canadian prison is, in many cases, preferable to being returned to one's home country to face a serious risk of being persecuted, tortured or even killed.

Despite the massive differences in terms of culpability of individuals who play some role in atrocity commission and the moral (and often legal) grey areas occupied by such individuals, the fiction that individuals entangled in atrocity can be neatly divided into binary categories of wholly

⁵⁸ Kaushal & Dauvergne, *supra* note 10 at 59–61. This estimate is based on Kaushal and Dauvergne's finding that from 1998 to 2008, based on available data, 757 total claimants were excluded. 269 were excluded solely on Article 1F(a) grounds, with an additional 95 claimants excluded based on a combination of Article 1F(a) along with Article 1F(b) or (c).

innocent victims and wholly condemnable perpetrators persists, not only in the popular imagination, but also in both ICL and refugee law.⁵⁹ This tendency toward binary categorizations evacuates nuance from legal determinations concerning the actions of individuals caught up in the maelstrom of atrocity. While the *Ezokola* holding was a positive development for refugee rights and protections in Canada, even in dealing with the nuances of *Ezokola*'s actions the Supreme Court of Canada continued to unquestioningly treat the world of atrocity as one populated solely by victims and the villains who torment them. This simplistic understanding of atrocity actors permeates the various decisions in the *Ezokola* litigation. It is evident in the Court's unquestioning repetition of Article 1F(a) that its purpose "is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status."⁶⁰ This statement assumes much about who *does* qualify as a *bona fide* refugee. Such individuals must not be the kinds of deeply flawed, perhaps unsympathetic people, who made deep moral compromises in negotiating the violence they found themselves in before fleeing to Canada. Accordingly, the world of international crime is populated by "persecutors" whose nefarious actions "create refugees"⁶¹ and the mass of largely anonymous, agency-devoid victims who they persecute.⁶² According to this assumption, those who may have participated in atrocity crimes before making a refugee claim necessarily "exploit the system to their own advantage."⁶³

This rather simplistic binary approach to categorizing individuals affected by atrocity can be traced back to the Refugee Convention itself. When the Convention was drafted and subsequently entered into force in 1951, individuals implicated in the commission of international crimes were explicitly excluded from availing themselves of its protections, based on a pre-existing "consensus that asylum should not be available to those who

⁵⁹ This tendency is evident at times even in commentary that is generally critical of the over-application of Article 1F(a). See e.g. Poon, *supra* note 11 at 5 (Framing the relevant inquiry as one of assessing "whether the threshold established by Article 1F(a) is too low and the interpretation too wide, leading to the exclusion of otherwise legitimate asylum claimants ... [versus the risk of adopting an] interpretation of Article 1F(a) that is too narrow [that] will create a 'safe haven' for perpetrators.").

⁶⁰ *Ezokola*, *supra* note 46 at para 38 quoting *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 58, SCJ No 46.

⁶¹ *Ezokola*, *supra* note 46 at para 34 quoting *Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433 at 445, FCJ No 1145.

⁶² On the tendency of ICL to frame victims of atrocity as agency-devoid actors, see Schwöbel-Patel, *supra* note 28.

⁶³ *Ezokola*, *supra* note 46 at para 36.

have committed serious international crimes.”⁶⁴ While many critiques have been lodged against Article 1F(a) in terms of its interpretation, the foundational notion that any individual who has knowingly contributed in any way to any atrocity crime should be denied refugee status remains rarely questioned.⁶⁵

IV. Defying Binaries: Individuals at the Margins of ICL

The sharp divide between atrocity perpetrators/persecutors on the one hand, and victims/refugees on the other, that continues to persist in post-*Ezokola* Canada, is rarely as clear-cut as it is commonly assumed to be. Most atrocities are complex, large-scale processes of violence that engulf affected societies as they unfold over time and space.⁶⁶ Atrocities also tend to be cyclical, with groups victimized by mass violence often subsequently committing atrocities of their own. Amidst the chaos of atrocity, victims routinely become perpetrators, while perpetrators themselves are often victimized.⁶⁷

ICL struggles to address the significant moral and legal grey areas created by atrocities and overlaps between victim and perpetrator populations.⁶⁸ Drafting the proper legal boundaries of individualized liability for those who participate in, but are not the driving force behind, atrocity crimes represents a difficult project of legal construction that remains a work in progress. Predictably, ICL’s specialized modes of liability – the tools crafted to establish the outer boundaries of individual criminal liability for participation in atrocity commission – have been fraught with

⁶⁴ Bond, *supra* note 6 at 27.

⁶⁵ For example, even in critiquing the application of article 1F(a) in the US and Canada, Jennifer Bond asserts that “Article 1(F)(a) plays an important role in protecting the integrity of this system by ensuring that individuals who are fundamentally unworthy of protection are not admitted as refugees.” Bond, *supra* note 6 at 77.

⁶⁶ On the “processorial” nature of atrocity commission, see Sheri P Rosenberg, “Genocide Is a Process, Not an Event” (2012) 7 *Genocide Studies & Prevention* 16.

⁶⁷ Tendencies of post-atrocity nations to deny or minimize their legacies of mass violence and oppression only make things worse, as the harms of unaddressed violence continue to resonate through time and space until properly reckoned with. See Kerry Whigham, *Resonant Violence: Affect, Memory, and Activism in Post-Genocide Societies* (New Brunswick: Rutgers University Press, 2022).

⁶⁸ Mark A Drumbl, “Victims who Victimise” (2016) 4:2 *London Review of International Law* 217.

controversy.⁶⁹ The availability of certain traditional defenses, such as that of duress, within ICL have been similarly controversial.⁷⁰

Drumbl explores ICL's struggle to address the complex identity of individuals who span the victim-perpetrator divide in relation to participation in atrocity violence.⁷¹ Comparing the oversimplification of identity inherent in attempts to prosecute concentration camp *kapos* (prisoners who worked in the camps in various capacities) in Israeli courts and former child soldier Dominic Ongwen at the ICC, Drumbl highlights the inherent limitations of ICL. He observes that although many individuals caught up in atrocities blur the artificial line dividing victim from perpetrators:

Criminal law [...] spurns any such blurring. The representational iconography, and the symbolic economy, of the criminal law is one of finality, disjuncture and category: guilty or not-guilty, persecuted or persecutor, abused or abuser, right or wrong, powerful or powerless. Judicial accounts tend to be austere. Victims are to be pure and ideal; perpetrators are to be unadulterated and ugly. International criminal law hinges upon these antipodes which, in turn, come to fuel its existence. Contrived as they are, these binaries nonetheless undermine international criminal law's ability to speak in other than a crude register, in particular when it comes to the collective nature of mass atrocity.⁷²

While law, especially criminal law, may struggle to avoid the reductionism of creating mutually exclusive binaries of identity, Drumbl notes that other narrative formats, such as literature, unlike ICL, do not "oblige them to pardon or punish."⁷³ Rather, such formats provide the "freedom to address the reality that, in times of atrocity, the divide between victimisers and victims blurs."⁷⁴

In order to avoid complex discussions of victimization and culpability being reduced to the "crude register" of criminal law, Drumbl ultimately advocates for restraint in the prosecution of certain individuals who span

⁶⁹ Allison Marston Danner & Jenny S Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93 Calif L Rev 75; Jens David Ohlin, "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise" (2007) 5 Journal of International Criminal Justice 69; James G Stewart, "The End of 'Modes of Liability' for International Crimes" (2012) 25 LJIL 165; Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Portland: Hart Publishing, 2014).

⁷⁰ Sarah J Heim, "The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians" (2013) 46 Cornell Intl LJ 165; Windell Nortje & Noëlle Quéniwet, *Child Soldiers and the Defence of Duress under International Criminal Law* (Cham: Springer, 2019).

⁷¹ Drumbl, "Victims who Victimise," *supra* note 68.

⁷² *Ibid* at 218.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

the victim-perpetrator divide.⁷⁵ He defends such restraint as supported by a needed commitment to “aetiological expressivism” within ICL practice, arguing that ICL lacks the tools necessary to meaningfully delve into the moral complexities such individuals embody and thus, “[p]erhaps it is best for certain actors, survivors and perpetrators simply to lie beyond criminal law’s remit and, in turn, be non-justiciable.”⁷⁶

These concerns, regarding the clumsiness of ICL in addressing complex perpetrators, are also applicable to refugee law within the context of Article 1F(a). Most notable in this regard have been arguments that Article 1F(a) should not be invoked to exclude claimants whose alleged criminal acts were committed when they were child soldiers,⁷⁷ despite the fact that prevailing interpretations of the Refugee Convention permit the exclusion of child soldiers.⁷⁸ By definition, child soldiers span the artificial victim-perpetrator divide, yet countries, including Canada, continue to ignore this reality through the continued application of Article 1F(a) to exclude claimants based on alleged contributions to international crimes committed as children.

Given the close parallels between ICL and refugee law in terms of their tendency to oversimplify the complex realities of atrocity commission, the remainder of this article considers Drumbl’s argument for restraint within the context of Article 1F(a) exclusion practices. I argue that the need for restraint is equally, if not more so, applicable to the utilization of Article 1F(a). Such restraint is so needed because unlike the actual practice of ICL, Article 1F(a) is routinely applied to individuals who not only span the victim-perpetrator divide, but whose contributions to the commission of atrocities are relatively small in comparison to the kinds of individuals typically prosecuted for international crimes. Moreover, the alleged contributions of refugee claimants to international crimes are assessed without the benefit of a full-scale criminal investigation or anywhere near the same level of procedural protections afforded to criminal defendants, heightening the risk of mistaken conclusions leading to exclusions and deportations.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at 245.

⁷⁷ See e.g. Poon, *supra* note 11 at 12-14 (citing the exclusion of child soldiers as an example of an overly wide interpretation of Article 1F(a)); Bond & Krech, *supra* note 7 (also discussing the challenges raised by child soldiers in the Article 1F(a) context).

⁷⁸ See generally Happold, *supra* note 13 at 1135-36.

Given that the stakes are, in many cases, much higher for refugee claimants facing exclusion than even individuals facing prosecution for extremely serious alleged international crimes, countries such as Canada should do more than continue to reform their relevant legal provisions. Relevant government ministries should also practice greater restraint in considering their policies in terms of who they view as subject to Article 1F(a) exclusion. Instead, the government continues to adopt expansive interpretations that push the outer limits of the *Ezokola* test in accordance with a maximum exclusion orientation.

V. Continuing to Oversimplify: Post-*Ezokola* Article 1F(a) Exclusion in Canada

The Supreme Court's decision in *Ezokola* undoubtedly improved the state of Canadian refugee law by bringing the law more in line with the letter and spirit of both ICL and refugee law. As the Supreme Court recognized, prior to *Ezokola*, refugee claimants in Canada could be excluded pursuant to Article 1F(a) based on being found complicit via guilt by association or passive acquiescence to the commission of international crimes; forms of complicity far exceeding the bounds of liability in ICL.⁷⁹ The Court reined in the boundaries of complicity for the purposes of Article 1F(a) by requiring that a claimant only be excluded based on a finding (of serious reasons for considering) that they made a "voluntary, significant, and knowing" contribution to an international crime.⁸⁰

The *Ezokola* decision has, as of July 2021, been cited 360 times in decisions publicly available via the Canadian Legal Information Institute (CanLII) website.⁸¹ Most decisions are appeals from decisions made by members of Canada's Immigration and Refugee Board concerning the application and scope of Article 1F(a) for the purposes of exclusion or findings of admissibility.⁸² These cases – necessarily a small subset of the total number of instances where Article 1F(a) has been invoked by members of the board – demonstrate that despite the reining in of ICL complicity in *Ezokola*, the Canadian government continues to regularly rely on Article 1F(a) in an

⁷⁹ *Ezokola*, *supra* note 46 at paras 53, 68, 79–83.

⁸⁰ *Ibid* at paras 84–90.

⁸¹ Canadian Legal Information Institute (CanLII) (accessed 1 May 2023), <www.canlii.org/en/ca/scc/doc/2013/2013scc40/2013scc40.html?autocompleteStr=ezokola&autocompletePos=1#citing> [perma.cc/CTF9-6BGK].

⁸² This number is based on the citation count according to CanLII as of May 1, 2023. This site serves as a public repository of public legal documents and decisions in Canada.

effort to exclude refugee claimants. Given that, to date, the federal government has only deemed it appropriate to prosecute two refugee claimants for allegedly committing international crimes, Article 1F(a) determinations arguably represent Canada's most significant efforts to interpret and apply elements of ICL domestically. This complex body of law has consequently been applied by government decisionmakers who may not have a law degree, let alone any specialized training in ICL.

As is demonstrated in the foregoing analysis, often such decisions are, by their nature based on questionable evidentiary foundations, given the limited fact-finding ability of refugee officers. Unlike criminal prosecutions, which tend to focus on key actors in relevant atrocity situations, Article 1F(a) continues to be invoked by the Canadian government seeking to exclude individuals who (1) made rather tangential contributions to relevant crimes, (2) operated in situations approaching duress, (3) were children at the time, and/or (4) were themselves victims of serious atrocity crimes. In such situations the government could decline to pursue exclusion, based on a policy decision that in such instances relevant individuals fall outside the purview of the *Ezokola* test. Yet, the government continues to pursue a policy of maximum exclusion, seeking to push the boundaries of the *Ezokola* test to its outer limits.

To highlight practices of governmental overreach in pursuing Article 1F(a) exclusion, three cases are discussed in some detail; those concerning the refugee status claims of Waiss Saherzoy, Zobon Johnson and Boutros Massroua. In each case, despite the fact that the relevant claimant's alleged participation in atrocities occurred largely while they were minors and/or involved complex and difficult moral and ethical questions related to complicity, the Canadian government persisted in seeking exclusion pursuant to Article 1F(a). While the results of these cases are mixed, their outcomes are not why they are selected. The three cases are highlighted as particularly troubling examples of situations where the Canadian government aggressively pursued the exclusion of claimants with complex identities in terms of their alleged roles in relevant atrocity crimes.⁸³ In

⁸³ These cases are not intended to be representative of all cases involving Article 1F(a) exclusion issues and indeed, were specifically selected due to the especially complicated culpability issues presented by them. Nonetheless, these cases underscore issues of complicated identity and culpability appearing regularly in the cases surveyed. Many such cases involve individuals who the Canadian government is seeking to exclude via Article 1F(a) for allegedly "contributing" to atrocity crimes committed by large organizations through carrying out their regular duties as a member of such organizations. Examples

seeking to exclude these three individuals, the Canadian government sought to collapse these complex identities by casting the claimants exclusively in the role of a willing participant in atrocity violence, thereby preserving the false binaries of victim/perpetrator within ICL and persecutor/persecuted in refugee law.

A. Waiss Saherzoy: Child Informant to the Afghan Intelligence Service

In *Saherzoy*, the Canadian Minister of Public Safety sought a deportation order against refugee claimant Waiss Saherzoy, predicated on his alleged participation in crimes against humanity committed by the Afghani intelligence services (Khadamat-E-Aetla'At-E Dawlati or "KhAD").⁸⁴ Saherzoy was ultimately unsuccessful on the merits, partially because of the requirements of the *Ezokola* test for complicity. The Minister sought to have Saherzoy deported. This choice was made despite the fact that during the time period Saherzoy was alleged to have contributed to crimes against humanity committed by the KhAD, by "gather[ing] information on students and their families, as well as on the enemies of the regime," Saherzoy was between the ages of fourteen and seventeen years old.⁸⁵ Given that he was recruited as an informant to KhAD as a fourteen year-old child, one could easily characterize Saherzoy himself as a victim and question the degree to which he was morally and legally responsible for his actions. Nonetheless, the Minister found it appropriate to seek Saherzoy's deportation.

The Minister deemed it appropriate to appeal a 2015 decision finding Saherzoy had not made the requisite contribution to the crimes committed by members of KhAD pursuant to the standard set forth in *Ezokola*. On appeal, the Minister argued that in its 2015 decision, the Immigration Division "had failed to give a reasonable assessment of the evidence submitted by the Minister [...] and [...] had made errors in the application of the *Ezokola* test for complicity with respect to [the] conclusion that Mr. Saherzoy did not make a significant, knowing and voluntary contribution to

include police and military officers employed by repressive governments engaged in the commission of international crimes physically perpetrated by members of the police and/or military. Thus, the specter of automatic guilt by association remains in this category of cases, as otherwise ordinary, banal contributions to police or military forces may be found to be "significant" in some instances. For examples of such cases, see *infra* note 140.

⁸⁴ *Saherzoy v Canada (Public Safety and Emergency Preparedness)*, 2015 CarswellNat 9050, 2015 CanLII 93732 (CA IRB).

⁸⁵ *Ibid* at para 3.

the crimes committed by KhAD.”⁸⁶ This argument was wholly based on the existing record, as no new evidence was filed and no new witnesses called.⁸⁷

On appeal, the Immigration Appeals Division summarized the Minister’s position, regarding Saherzoy’s alleged contribution to crimes committed by KhAD as follows:

With respect to the duties and activities of Mr. Saherzoy, in support of “KhAD”, the only concrete evidence is the acknowledgement by Mr. Saherzoy that on two occasions he informed his teacher about two boys who appeared to be of military age who were thereafter sent to do their military service, and that he singled out a house that might have had suspicious activity linked to the Mujahideen; otherwise, he declared that he only pretended to provide information because he did not wish to cause harm to anyone.⁸⁸

According to the Immigration Appeals Division, the Minister’s counsel contended that these acts, on their own “would constitute making a significant contribution to the ‘KhAD’s criminal purposes.”⁸⁹ The Minister’s other arguments are similarly tenuous. The Minister argued that Saherzoy, who claimed he joined KhAD’s youth organization in order to avoid being conscripted into the military and potentially sent to the front lines of Afghanistan’s ongoing civil war at the time, could have simply claimed to be a student of religion in order to avail himself of an alternative means of avoiding dangerous military service.⁹⁰

The Appeals Division points out that Saherzoy could not have done so because he already attended a secular school. The mere fact that the Minister would argue that a teenager, living in a country embroiled in a civil war and facing the prospect of being drafted into the military, must behave in such a savvy manner, identifying the most innocent way to avoid extremely dangerous military service, while incurring clear additional risks in doing so, by outright lying to KhAD itself, is deeply troubling. While the *Ezokola* test appears to have operated as designed by preventing the exclusion of a bona fide refugee claimant who only marginally contributed to the efforts of a group that committed international crimes, the question remains why Saherzoy’s age at the time of his alleged contribution to KhAD’s crimes was

⁸⁶ *Saherzoy v Canada (Public Safety and Emergency Preparedness)*, [2017] IADD No 2732017, CanLII 23091 (CA IRB) (Immigration Appeal Division) at para 5.

⁸⁷ *Ibid.*

⁸⁸ *Ibid* at para 13.

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at para 14.

not viewed by the Minister (and the Refugee Board, for that matter) as sufficient in and of itself to preclude the application of Article 1F(a).

B. Zobon Johnson: Forcibly Conscripted Child Soldier for Charles Taylor Regime

The facts in the *Johnson* case are more troubling. In this case, refugee claimant Zobon Johnson appealed the finding of an immigration officer who held Johnson was inadmissible pursuant to Article 1F(a) for having participated in crimes against humanity committed by the Charles Taylor regime in Liberia.⁹¹ According to the basic, agreed-upon facts, Johnson himself clearly qualified as a victim of international crimes. The Board made the following pertinent findings:

Johnson's father worked for the Special Security Services of then-President Doe. When Charles Taylor and his National Patriotic Front of Liberia (NPFL) invaded Liberia in 1990, Mr. Johnson's family attempted to flee the country. Before they could do so, however, Mr. Johnson's father was captured and beheaded.

Mr. Johnson, who was 13 at the time, was then forcibly recruited into, and compelled to fight for the Small Boys Unit ("SBU") of the NPFL. He was promoted to Commander of the SBU in 1992, remaining in that position until the organization dissolved in 1995. After that, Mr. Johnson began working as a guard at Charles Taylor's residence. By 1997, Charles Taylor had become President of Liberia, and Mr. Johnson joined the President's Special Security Services ("SSS") where he continued to work until 2000.⁹²

Johnson was exposed to horrific violence as a young teenager and forcibly recruited into a military unit made up of child soldiers, run by the same organization that had beheaded his father. While the Board accepted these facts, they did not play a role in the Board's assessment of Johnson's admissibility to remain in Canada. Instead, the Board focused exclusively on Johnson's role in the SSS and his potential complicity for the various war crimes and crimes against humanity committed by the organization.⁹³ On appeal, the Federal Court found that the Board failed to engage in a sufficient analysis concerning Johnson's complicity in the crimes of the SSS, as the Board had merely concluded that Johnson was complicit. The Federal Court remitted the question of Johnson's admissibility to a different immigration officer for a re-determination in line with the *Ezokola* complicity

⁹¹ *Johnson v Canada (Citizenship and Immigration)*, 2014 FC 868 [*Johnson*].

⁹² *Ibid* at paras 4-5.

⁹³ *Ibid* at paras 7-11.

test.⁹⁴ While the ultimate outcome of Johnson's claim remains unclear,⁹⁵ the mere fact that the government would seek his exclusion without considering Johnson's childhood victimization and associated trauma is deeply troubling.

C. Boutros Massroua: Lebanese Mechanic Caught between ISIS and Hezbollah

Unlike *Saherzoy* and *Johnson*, *Massroua* involved a claimant who was an adult for the duration of his alleged participation in atrocities. The Canadian government sought to exclude Massroua, an experienced mechanic, pursuant to Article 1F(a) based on the assistance he allegedly provided to ISIS/Da'esh by fixing vehicles for pay.⁹⁶ Like *Saherzoy* and *Johnson*, the facts in *Massroua* were not subject to any fundamental disagreement.

On appeal, Judge Ahmed of the Federal Court summarized the facts as follows: Massroua, a Christian and a "specialist in difficult [vehicle] repairs" was approached by a person named Abu Mohamad at the repair shop where Massroua worked.⁹⁷ After performing repairs on several vehicles Mohamad brought to the shop over the course of several weeks, Mohamad offered to hire Massroua at a higher rate of pay to perform additional work on vehicles during non-working hours.⁹⁸ Massroua agreed and began repairing vehicles and overseeing mechanic work at a site 30-40 minutes away from his usual work location for Mohamad.⁹⁹ Over time, Massroua's work for Mohamad expanded and Mohamad referred Massroua to another man, Abu Arafat, who paid Massroua to work on vehicles in a large "hanger."¹⁰⁰ At this point, Massroua began to realize that he was likely working for a militant group. He observed that Abu Arafat and the other men working at the hanger had long beards and spoke with non-Lebanese accents. He noticed trucks being reinforced with heavy metal plates that could only serve a military purpose and saw bullet holes in some of the vehicles.¹⁰¹ Despite these warning signs, Massroua worked at the hanger several more times, as he was paid well.¹⁰²

⁹⁴ *Ibid* at para 38.

⁹⁵ No publicly available decision related to Johnson's refugee claim has been published at the time of writing.

⁹⁶ *Massroua v Canada (Citizenship and Immigration)*, 2019 FC 1542 [*Massroua*].

⁹⁷ *Ibid* at para 8.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* at para 9.

¹⁰¹ *Ibid*.

¹⁰² *Ibid* at para 10.

Each time he entered the hanger he was patted down and his cross and cellphone were taken from him.¹⁰³

Massroua began to understand the seriousness of his predicament the third time he was taken to the hanger, when he touched “wet blood” inside a vehicle he was repairing.¹⁰⁴ Despite his growing fears, Massroua continued to perform repairs at the hanger when called upon, as the men who picked him up were armed.¹⁰⁵ Despite trying to make “excuses” to not return to the hanger, Massroua became further entangled with the men he met through Mohamad and Arafat. In March of 2015, three people came to Massroua’s house, took his passport, put a Chinese visa in it and told him that he may have to go to China to “buy something for them.”¹⁰⁶ Massroua was also taken across the border into Syria to areas where he could see shelling in the distance, to repair vehicles on three occasions in early 2015.¹⁰⁷ It was at this point that Massroua claims he became “convinced” that the group he had been doing repairs for were part of ISIS.¹⁰⁸ To complicate matters further, around this time Massroua was visited by a representative from Hezbollah, who accused him of working with ISIS and directed him to stop doing so.¹⁰⁹ Unable to reach Mohamad to try and end his work arrangement, Massroua set about arranging for he and his wife to visit his wife’s sister in Canada.¹¹⁰ While Massroua was waiting to receive visas to travel to Canada, he was again visited by members of ISIS, who “pressured him” to return to the hanger for an “important job,” involving the repair of a vehicle.¹¹¹

About a week after fixing the vehicle, Massroua was again visited by Hezbollah representatives, who accused Massroua of lying to them, dismissed Massroua’s claims of being “forced” to do the repairs, and threatened him.¹¹² Eventually, Hezbollah representatives told Massroua they wanted him to spy for them the next time he was brought to Syria by members of ISIS to do mechanic work, offering to pay Massroua “\$1,000 per night” to do so.¹¹³ Shortly thereafter, ISIS members again attended

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* at para 11.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* at para 12.

¹⁰⁷ *Ibid* at para 13.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* at para 14.

¹¹² *Ibid.*

¹¹³ *Ibid* at para 16.

Massroua's house and took him to the hanger, where he offered to go to Syria to do work for more money. He was taken to Syria that night to repair an SUV, but learned little he could share with Hezbollah during the trip.¹¹⁴

As pressure mounted on Massroua from his interactions with ISIS and Hezbollah members, he was notified that the visas he and his wife had applied for to travel to Canada were approved in early May of 2015.¹¹⁵ Five days after the visas were approved, Arafat called Massroua and told him to go to a new location. Massroua complied and was met by men carrying machine guns in an SUV.¹¹⁶ The men brought Massroua to Syria to complete repairs and told him "he should be ready to travel to China."¹¹⁷ The next day Hezbollah representatives demanded that Massroua wear a recording device to spy on ISIS for them, threatening to kill Massroua and his wife if he refused.¹¹⁸ A few days later, on May 15, 2015, Massroua was notified that he and his wife's Canadian visas were ready.¹¹⁹ Massroua and his wife travelled to his in-law's house in Beirut and stayed there until their visas were finalized and issued on May 22.¹²⁰ They flew to Canada the next day.¹²¹

Massroua and his wife submitted refugee claims to the Canadian government in September of 2015.¹²² Massroua received a positive first instance decision by Immigration Division hearing officer Laura Ko, who found Massroua was admissible to Canada because his intermittent work repairing vehicles for ISIS did not render him a member of ISIS, nor amount to a sufficient contribution to the organization's crimes, necessary to exclude him.¹²³ The Refugee Protection Division disagreed, finding "serious reasons for considering [Massroua] complicit in crimes against humanity because he voluntarily made a significant and knowing contribution to ISIS by repairing vehicles".¹²⁴ In 2018, the Refugee Appeal Division upheld this holding, finding "that the RPD did not err in finding [that Massroua] voluntarily

¹¹⁴ *Ibid* at para 17.

¹¹⁵ *Ibid* at para 18.

¹¹⁶ *Ibid* at para 19.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* at para 20.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid* at para 21.

¹²³ Douglas Quan, "'Fear from two sides': B.C. Refugee Claimant who Helped Repair Vehicles for ISIL says he was under Duress" (20 August 2019), online: *National Post* <nationalpost.com/news/canada/fear-from-two-sides-b-c-refugee-claimant-who-helped-repair-vehicles-for-isil-says-he-was-under-duress> [perma.cc/CXK2-4SYM]; *Massroua*, *supra* note 96 at paras 22, 39.

¹²⁴ *Massroua*, *supra* note 96 at para 23.

made a knowing and significant contribution to ISIS/Da'esh and was thus excluded from refugee protection."¹²⁵ Massroua brought an application for judicial review of this Refugee Appeal Division decision to the Federal Court where, as noted above, he failed yet again. Having exhausted all legal avenues, Massroua faces extradition to Lebanon and an uncertain future.¹²⁶

The tone adopted, at various points, by judges and decisionmakers in Massroua's refugee claim is telling in terms of the continuing tendency to frame individuals as falling within the mutually exclusive categories of victim or perpetrator. According to the National Post, Refugee Protection Division adjudicator Michael Fox disagreed with Ko's more generous interpretation of Massroua's behavior. Fox held that Massroua must have known he was assisting ISIS, or at least some "criminal" or "clandestine" operation the very first time Massroua was taken to the hanger to fix vehicles at the behest of Arafat.¹²⁷ Fox concluded that Massroua was aware that he was assisting ISIS from the outset and that his mechanic work represented a "significant contribution to the entire war effort of ISIS."¹²⁸ Thus, Fox afforded Massroua no leeway or equivocation. Either Massroua was aligned with ISIS, or he was wholly ignorant of the fact he was working for ISIS, which Fox found implausible.

A similar approach appears to have been adopted by Patricia O'Connor of the Refugee Appeal Division, who reviewed Fox's decision finding Massroua ineligible for refugee status pursuant to Article 1F(a). In considering Massroua's duress claim, O'Connor said that Massroua had a "safe avenue of escape" available to him and thus his otherwise significant contribution to ISIS was not only knowing, but voluntary.¹²⁹ While Massroua argued that he did not suspect the group he was working for was criminal until his third trip to the hanger to repair vehicles, neither Fox nor O'Connor viewed this as plausible for various reasons, including that Massroua saw "15-20 jeeps or 4x4 vehicles being repaired which are the types of vehicles used by ISIS," these vehicles had no license plates, had metal reinforcements installed that could only be for "military conflict" and Massroua was paid a

¹²⁵ *Ibid* at para 24.

¹²⁶ Michelle Ghoussoub, "Mechanic knew he was fixing vehicles for ISIS, judge says in rejecting asylum appeal", (10 December 2019), online: CBC <www.cbc.ca/news/canada/british-columbia/isis-hezbollah-mechanic-asylum-refugee-federal-court-canada-1.5390306> [perma.cc/N2PW-XRF6] ("Massroua's lawyer Amanda Aziz said her client now faces deportation to Lebanon, as he has no other appeals and is not eligible for any other immigration status in Canada").

¹²⁷ Quan, *supra* note 123.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*; See also Massroua, *supra* note 96 at paras 29-51.

large sum in cash.¹³⁰ On appeal, Justice Ahmed characterized Massroua as having been at the least “willfully ignorant” regarding the fact that he was working for ISIS following his first visit to the hanger.¹³¹ According to Justice Ahmed, Massroua placed himself in the predicament he did because of his “wilful ignorance and greed.”¹³² Despite the “short” period Massroua assisted in fixing vehicles, Justice Ahmed held this “does not lessen his significant contribution to the criminal purpose of [ISIS].”¹³³ Justice Ahmed sums up his view of Massroua’s culpability as follows:

At a minimum, the Applicant was reckless for the purposes of economic gain by fattening his pockets. Whether it be recklessness or wilful blindness, the totality of the evidence points to the Applicant having obtained knowledge of ISIS’ identity very early in his interaction with them. Perhaps the Applicant wished to turn a blind eye and quietly tuck away his suspicions on who this organization may be. However, ignorance bred out of greed is no excuse for the participation in a terrorist organization that commits crimes against humanity.¹³⁴

This finding of Massroua’s near-immediate complicity in the crimes committed by ISIS undermined his attempted duress defense. Implicated so early, Massroua got little sympathy from Justice Ahmed, who emphasized that Massroua was “never physically harmed or subject to threats from ISIS” and that he only seemed to truly take steps to flee by traveling to Canada once Hezbollah became involved and began to try and force Massroua to spy on ISIS under threat of killing him and his family.¹³⁵ Noting that Massroua had family members in both Beirut and Tripoli, Judge Ahmed found it “difficult to accept that someone who had the immediate resources to leave his town would stay put while being ‘coerced’ to work for a terrorist organization such as ISIS/Da’esh,” opining that “[d]esperate times call for desperate measures, but the Applicant did not act on anything because there was nothing desperate about his situation – he was fixing vehicles for ISIS and earning more money. He simply stayed put in the comforts of his own home.”¹³⁶

The three key decisionmakers, Fox, O’Connor, and Justice Ahmed, who found Massroua complicit in crimes against humanity committed by ISIS all

¹³⁰ *Massroua*, *supra* note 96 at para 32.

¹³¹ *Ibid* at para 37.

¹³² *Ibid*.

¹³³ *Ibid*.

¹³⁴ *Ibid* at para 38.

¹³⁵ *Ibid* at para 45.

¹³⁶ *Ibid* at para 46.

seemed to expect Massroua to take significant risks and forego significant amounts of income, to extricate himself from ISIS and later Hezbollah. These adjudicators brushed aside Massroua's argument that it was a relatively normal occurrence to be patted down and have one's phone and religious emblems removed in Lebanon, in the context of ongoing "armed religious conflict."¹³⁷ They did not seem to accept that Massroua may have been threatened with serious harm from the moment he was transported to the hanger the first time. They also seemed to view the "desperate measures" of fleeing from his home, presumably to Beirut or Tripoli, as a "safe avenue of escape," at least until Hezbollah became involved.¹³⁸

In sum, Massroua was viewed as a greedy man, one who profited from the misery of others by repairing vehicles for ISIS for large sums of money and who only sought to cease doing so once it became dangerous for him personally. On the surface, this may very well be true. Nonetheless, Massroua's greed and ethics were not on trial. Yet, accusations of greed seem to seep into the decision. What the three adjudicators all seem to have required of Massroua is that he either avoid all potentially illegal extra work in the first place or after becoming aware that he was fixing vehicles for ISIS (or any group engaged in the commission of international crimes), find a way to immediately extricate himself from the situation.

These expectations require a person like Massroua to take quite significant risks to maintain their eligibility to even have their refugee claim heard. Even if Massroua immediately realized that he was being hired by ISIS when he walked into the hanger, his reasonably safe options to avoid or end his relationship with ISIS had already evaporated. One could reasonably believe that full, unquestioning and continued cooperation was the only (itself imperfect) way to avoid extreme forms of violence once Massroua realized he had been hired by ISIS. Massroua could only have preserved his refugee eligibility by fleeing before being called to the hanger for a second job or making the dangerous decision to decline an offer of continued employment *after* being taken to an ISIS vehicle depot.

¹³⁷ *Ibid* at para 31.

¹³⁸ *Ibid* at paras 46, 50.

D. Saherzoy, Johnson, Massroua and the Continued Pursuit of Maximum Exclusion

It appears Saherzoy and Johnson have been able to remain in Canada, while Massroua faces deportation. But for the present analysis, more important than the ultimate outcome of these claims is the fact that the Canadian government continues to take the position that refugee claimants should be excluded pursuant to Article 1F(a). In *Johnson*, despite the fact that Johnson was violently and forcibly recruited by the Taylor regime as a young teenager, the Minister argued that, even if the case was remitted for re-determination, “the outcome would inevitably be the same given the Board’s factual findings with respect to Mr. Johnson’s leadership role within the SBU, and his involvement with the NPFL and the SSS.”¹³⁹ More than anything else, these three cases are examples of the Canadian government taking an expansive approach to Article 1F(a), applying the provision to its fullest possible extent and seeking to stretch the boundaries of the *Ezokola* test.

In doing so, the government seeks to exclude individuals who were pressured, or outright forcibly conscripted into criminal organizations, including as children, or who inadvertently became entangled with an organization involved in international crimes. Each of these three refugee claimants may have simply made poor choices, or truly participated in horrific acts of violence, but they nonetheless continue to defy the binary categorization of victim or perpetrator preferred by ICL and refugee law. Johnson was a child when he joined the Taylor regime and was himself a victim of serious international crimes, including being forcibly conscripted into a military organization as a child. Saherzoy was a young person living in an environment of general insecurity and violence trying to avoid potentially fatal military service. Massroua was a skilled mechanic who pursued lucrative supplemental employment fixing vehicles for a person who turned out to be a member of ISIS.

While Saherzoy ultimately successfully avoided deportation and Johnson’s status remains unclear, Massroua faces deportation. Other complicated individuals alleged to have participated at the margins of atrocity have been denied refugee status altogether in other post-*Ezokola*

¹³⁹ *Johnson*, *supra* note 91 at para 31.

cases.¹⁴⁰ Amongst those most commonly excluded via Article 1F(a) are claimants who served in militaries, police forces or otherwise worked for governments accused of committing international crimes. Many such claimants occupied low to mid-level positions and carried out administrative tasks or other activities that were not manifestly criminal in nature. However, a significant number of these claimants were nonetheless disqualified from seeking refugee status because of alleged contributions to criminal organizations, despite the limitations placed on complicity in *Ezokola*, including its explicit denunciation of guilt by association. The upshot of this broad view of Article 1F(a) and the *Ezokola* test is that in many cases where atrocity crimes have been committed, those situated near, at or perhaps in some cases beyond the outer boundaries of ICL's theoretical reach, continue to face potential ramifications far more severe than those any of the individuals directly involved in atrocity crimes are likely to ever face. The smallest fish are caught up in the largest net.

VI. Conclusion: Complex Identities, Legal Categories, and Resisting Binaries

As the preceding analysis demonstrates, while *Ezokola* reined in some of the most egregious excesses of Article 1F(a) to exclude unwanted refugee claimants, current Canadian law and government practices continue to exclude individuals who contributed at the outer fringes of atrocity and/or were both victims of and contributors to atrocity crimes. While this culture of maximum exclusion has many contributing factors, the complicated identities of many refugee claimants is one of the most significant factors. Both ICL and refugee law tend toward binary, mutually exclusive categorizations of identity. In ICL, this approach divides individuals affected by atrocity violence into the (seemingly) mutually exclusive categories of victim and perpetrator. In refugee law, individuals are divided

¹⁴⁰ See e.g. *X (Re)*, 2017 CanLII 98894 (CA IRB); aff'd *Sarwary v Canada (Minister of Citizenship and Immigration)*, 2018 FC 437 (excluded claimant who worked for the Afghan National Police for twenty-four years in an administrative capacity within the Afghan prison system where torture and other crimes against humanity were committed); *Nsika v Minister of Public Safety and Emergency Preparedness*, 2015 CanLII 97782 (CA IRB) (excluded claimant based on membership in Congolese military for six years during which time the military committed crimes against humanity, despite no finding that claimant's job functions involved no engagement in any criminal activity); *Singh v Minister of Public Safety and Emergency Preparedness*, 2014 CanLII 99210 (CA IRB) (excluded claimant who worked as a driver for the Indian Army, including transporting terrorist suspects to be questioned, during which torture was regularly committed).

into the (artificially) mutually exclusive categories of those fleeing persecution and those implicated in persecutory acts. These categories represent crude oversimplifications of the complexity of persecutory practices themselves, as well as the identities of those affected. Individuals such as Rachidi Ezokola, Zobon Johnson, and Waiss Saherzoy defy these essentializing classifications. These individuals may be alternately described as somewhat sympathetic atrocity participants or unsympathetic, even unlikeable victims. They trouble existing molds of identity, shaped by ICL and refugee law alike. They are neither all good, nor all bad, but are, as is typical with humans, complex beings with multiple, overlapping, even seemingly contradictory identities.

Just as criminal law struggles to capture the full complexity of the culpability of such individuals, so too does refugee law. This struggle, however, goes beyond the mere structural limitations of law. It is also deeply embedded in individual and social understandings of identity and the core purposes of the refugee system and its division of human beings into those who are either “deserving” or “undeserving” of protection. A prevailing tendency toward a reductionist, binary approach to understanding complex identities manifests itself in other areas of refugee status determination processes. For example, biases in favor of binary identity assessments help explain the fact that bisexual refugee claimants are statistically less successful than claimants fitting into the binary-conforming category of gay or lesbian in the context of persecution claims based on sexual identity within Canada.¹⁴¹

¹⁴¹ See Sean Rehaag, “Bisexuals Need not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia” (2009) 13:2-3 Intl JHR 415 at 429 (Concluding that “bisexuals outside their countries of origin who have a well-founded fear of persecution on grounds of their sexual orientation in principle meet the refugee definition. However, it has also shown that, at least in Canada, the United States, and Australia, bisexual refugee claimants are much less likely to succeed in securing refugee status than are other groups of sexual minorities.”). Rehaag hypothesizes “that such research would reveal that among the reasons for the low grant rates include (1) the invisibility of bisexuality and (2) the disparaging views of some refugee claims adjudicators on bisexuality and their willingness to grant refugee status to bisexuals only to such extent as their cases appear to match adjudicators’ perceptions of homosexual or lesbian sexual identities.” For a Canada-specific analysis of relative success rates, see Sean Rehaag, “Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada” (2008) 53 McGill LJ 59 at 59, 102. (Concluding that “the success rates for sexual-minority refugee claims are similar to the success rates for traditional refugee claims. However, one subset of sexual-minority refugee claimants, those alleging a fear of persecution on account of bisexuality, is far less successful.” Consequently, “sexual-minority refugee claimants [in Canada may be exposed] to the indignity of having their sexual identity measured against a standard that flows from the very same compulsory heterosexuality that led them to Canada in the first place.”).

Although it may be the simplest approach to conceptualizing and categorizing individual identities, the tendency toward reducing identities into a series of mutually exclusive binary assessments (victim *or* perpetrator, refugee *or* criminal, deserving *or* undeserving of refuge, etc...) needs to be resisted. While the text of Article 1F(a) and relevant Canadian immigration law narrow the availability of spaces for such resistance by commanding that individuals implicated in the commission of international crimes “shall” be excluded from refugee protections, there does exist some space at the margins to better account for complex identities. The six considerations mandated in *Ezokola* leave considerable space for restraint in application. The quite malleable *Ezokola* factors could be interpreted by the government and decisionmakers strictly in favor of the claimant in situations where the claimant is a minor, acting under conditions approaching duress or otherwise has their agency constrained in one way or another when allegedly participating in atrocity crimes. Decisionmakers could also err on the side of caution, finding an applicant’s potential contribution to an international crime was not “significant” in marginal cases.

It is also within the discretion of the Canadian government to criminally prosecute claimants potentially excluded pursuant to Article 1F(a), as Canada’s *Criminal Code* provides for the prosecution of any individual within Canada implicated in the commission of genocide, crimes against humanity or war crimes, regardless of where the crimes took place.¹⁴² The cases of *R c Munyaneza* and *R c Mungwarere* demonstrate that such prosecutions remain possible, if difficult and expensive.¹⁴³ While the difficulty and expense of prosecuting these cases may have discouraged the government from encouraging additional cases, or prosecutors from bringing them, such practical challenges should not excuse the use of Article 1F(a) as a cheaper and more expedient alternative, if the cost in doing so is the return of potentially legitimate refugee claimants to a country where they may be persecuted or killed. Of course, situations are bound to arise where claimants, especially those whose alleged contributions to atrocity crimes were marginal, may be acquitted, yet excluded pursuant to Article 1F(a), due to the lower evidentiary standards and burdens of proof within

¹⁴² *Crimes Against Humanity and War Crimes Act*, SC 2000 c 24, ss 6, 8(b).

¹⁴³ Munyaneza was convicted of genocide and crimes against humanity for participating in the Rwandan genocide. *R c Munyaneza*, 2009 QCCS 2201, confirmed by *Munyaneza c R*, 2014 QCCA 906, application for leave to appeal dismissed by the Supreme Court of Canada, *R v Munyaneza*, [2014] SCCA No 313. Mungwarere, alleged to have been complicit in the same crimes as Munyaneza, was acquitted at trial on evidentiary grounds. *R c Mungwarere*, 2013 ONSC 4594.

refugee law in comparison to criminal law.¹⁴⁴ Yet this, again, is no reason to simply expel refugee claimants whose identities are complex and whose plight may be somewhat unsympathetic. Other remedies, such as civil lawsuits, exist, which could allow victims to pursue redress in a hearing on a civil standard of proof. Forcing a potential perpetrator out of Canada to face an uncertain future is no justice.

There are bound to be difficult cases where decisions must be made by government officials concerning who they will seek to exclude and deport. Although the presence within Canada of certain individuals suspected of participating in atrocity crimes may cause tensions, especially within diasporic communities directly affected, and such individuals may be unsympathetic, the complexity of their relationship to atrocity, victimhood and perpetration, may nonetheless place them outside the reasonable reach of both ICL *and* refugee law. They may have contributed to an atrocity crime, yet their contribution may be properly characterized as insignificant when properly contextualized. Both international and Canadian law are clearly lacking in their ability to satisfactorily deal with the complex identities and related questions of responsibility such flawed refugee claimants raise. Simply expelling such discomfiting refugee claimants from Canada amounts to a national shirking of the country's self-celebrated dedication to human rights, especially when such dedication is most important in instances where vulnerable refugee claimants are not especially sympathetic or likable. Broadly speaking, Canada's current overreliance on Article 1F(a) exclusions reinforces ICL's and refugee law's troubling tendencies toward perpetuating overly simplistic notions of identity, culpability and victimhood in relation to persecution and atrocity.

In the long run, a more fundamental reappraisal of the appropriateness of Article 1F(a) in light of what we now know about the complexities of atrocity perpetration may be warranted, especially considering the exigencies of the ongoing and now longstanding global refugee crisis. Until such a reappraisal occurs, modesty and restraint are warranted in terms of how and against whom exclusion and deportation, pursuant to Article 1F(a), is sought in Canada. Thus, as Drumbl argues within the realm of ICL prosecutorial decision-making, perhaps it is best that certain complex

¹⁴⁴ See e.g. *Mungwarere*, *supra* note 143 (judgment of acquittal in criminal proceedings). See also, *Mungwarere v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 708 (raising the possibility of exclusion pursuant to 1F(a) despite acquittal at trial).

individuals remain “non-justiciable” in both ICL and refugee law.¹⁴⁵ While such an outcome may not be particularly satisfying, it may be necessary in order to seek more appropriate, less drastic measures for addressing refugee claimants situated at the margins of complicity, who participated in relevant crimes as minors, or who span the victim-perpetrator divide.

¹⁴⁵ Drumbl, “Victims who Victimise” *supra* note 68 at 245.