Introd ction

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

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

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

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

e provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as de ned in the international instruments drawn up to make provision in respect of such crimes.

Michael Kingsley Niyanah states that "Article 1F is underpinned by the idea that certain persons do not *deserve* protection as refugees by reason of serious transgressions committed, in

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

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

Of the other major international instruments, the statutes for the

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

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

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

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

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

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

> is approach of nding culpability with an individual's mere membership began to be applied in the Nuremburg concentration camp cases. In those cases, it was presumed that all members of a concentration camp sta shared in the common criminal purpose and, as such, mere membership was su cient for a nding of culpability [65]. As explained in the *Dachau Concentration Camp Trial [66]*:
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> e US Military Government Courts seem to have established a rule that membership of the sta of a concentration camp raises a presumption that the accused has committed a war crime. is presumption may *inter alia* be rebutted by showing that the accused's membership was of such short duration or his position of such insigni cance that he could not be said to have participated in the common design.

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

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

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

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

Serio s reasons to consider

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

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

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

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

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

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individuals and the *criminal purpose* of the group In the application of art. 1F(a), this link is established where there are serious reasons for considering that an individual has voluntarily made a signi cant and knowing contribution to a group's crime or criminal purpose.AipTj0.1td w developherbyn11 Fet al L1 Tf0.232owing coanada'Appel L an1 Tf(crimina

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

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

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

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

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

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

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

For our purposes, we simply note that joint criminal enterprise, even in its broadest form, does not capture individuals merely based on rank or association within an organization or an institution ... It requires that the accused have made, at a minimum, a signi cant contribution to the group's crime or criminal purpose, made with some form of subjective awareness (whether it be intent, knowledge, or recklessness) of the crime or criminal purpose. In other words, this form of liability, while broad, requires more than a nexus between the accused and the group that committed the crimes. ere must be a link between the accused's conduct and the criminal conduct of the group: *Brđjanin* [132], at paras. 427-28.

Overseas decisions: LeBel and Fish JJ then moved to discuss a number of similar cases in overseas jurisdictions. In particular, they pointed out at paragraph 70 of the judgement that the UK Supreme

Makes a **vol ntar contrib tion** to the crime or criminal purpose. is will require decision-makers to "consider the method of recruitment by the organization and any opportunity to leave the organisation" [142]. LeBel and Fish JJ also note that duress is a defence at customary international law and under Article 31(1)(d) of the Rome Statute [143].

Makes a **signi cant contrib tion** to the crime or criminal purpose. LeBel and Fish JJ do not attempt to de ne the word "signi cant" in minute detail, purpose.31(17ltail, 17l(fouand taeraeraac cueda's contributio. dkes(not pose.3079 Tw 0 -1.2 TDheave o beo duirct purpost bywtaeevder
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