


WORKING PAPER SERIES/DOCUMENTS DE TRAVAIL

Update on Exclusion and Inadmissibility Jurisprudence:
New Developments Since the Decisions of the
Supreme Court of Canada in *Ezokola* and *Febles*

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UPDATE ON EXCLUSION AND INADMISSIBILITY JURISPRUDENCE: NEW DEVELOPMENTS SINCE THE DECISIONS OF THE SUPREME COURT OF CANADA IN EZOKOLA AND FEBLES

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INTRODUCTION

As recent events have shown, Canada is a welcoming country for both refugees and immigrants. The vast majority of people in both categories will be accepted for (re)settlement in Canada as long as the basic requirement for such acceptance are met; namely, being subject to persecution or other inhumane or cruel treatment for asylum seekers in Canada¹ and general visa requirements for overseas applications for both asylum seekers² and immigration applicants.³

However, there are exceptions, which are expressed in the refugee context as exclusion and in the immigration context as inadmissibility, which can be related to both criminal and non-criminal matters.⁴

The context in which to place the *Ezokola* and *Febles* judgment is primarily the notion of criminal exclusion, which removes the entitlement of persons to obtain refugee status, which is contained in article 1F of the 1951 Refugee Convention and which reads as follows:

- a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Criminal inadmissibility pertains to the following broad categories of persons with involvement in security related activities (section 34 of *IRPA*); human rights violations (section 35); criminality (section 36); and organized criminality (section 37) with an overarching provision in section 33.

The details of these sections are as follows:

¹ See the Immigration and Refugee Protection Act (*IRPA*), sections 95-97.

² See the Immigration and Refugee Protection Regulations (*IRPP*), part 8.

³ See *IRPP*, parts 5-7 and 9 for permanent residents and parts 9-12 for temporary residents.

⁴ See articles 1C to 1E of the 1951 Refugee Convention for non-criminal exclusion and 1F for criminal exclusion, of which article 1D is reflected in section 108 of *IRPA* and articles 1E and F in section 98 of *IRPA*; with respect to inadmissibility, the criminal variant is regulated in sections 33-37 of *IRPA* while the non-criminal aspects can be found in sections 38-41.

Section 33: the facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

Section 34(1): a permanent resident or a foreign national is inadmissible on security grounds for

- (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
- (b) engaging in or instigating the subversion by force of any government;
- (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
- (c) engaging in terrorism;
- (d) being a danger to the security of Canada;
- (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
- (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

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

- (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;
- (b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity

within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

Section 36(1): a permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

(2) a foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Section 37(1): a permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

This working paper will examine the criminal type of exclusion and inadmissibility, specifically, in the context of two recent judgments by the Supreme Court of Canada; namely, the *Ezokola* decision of July 19, 2013⁵ and the *Febles* decision of October 30, 2014.⁶ Not only is it timely in terms of examining the Federal Court and

⁵ *Ezokola v. Canada*, 2013 SCC 40 (*Ezokola*).

⁶ *Febles v. Canada*, 2014 SCC 68 (*Febles*).

Federal Court of Appeal jurisprudence in this area in recent years, but, also because on February 7, 2017 it was exactly 25 years ago that the first and seminal case in exclusion, *Ramirez*,⁷ was decided by the Court of Appeal. The paper will first examine parameters of the *Ezokola* decision followed by an analysis of the subsequent jurisprudence following this judgment; then the same approach will be taken with respect to the *Febles* case. While the third part of the paper will discuss in some detail an issue relevant to the jurisprudence arising out of both cases, the issue of defenses in exclusion and inadmissibility. Lastly, the conclusion will provide an overview of the issues raised and the possible trends in this area of law.

While the two Supreme Court decisions were decided in the context of exclusion Articles 1F(a) and 1F(b),⁸ the dicta in the *Ezokola* decision also has application in respect to inadmissibility.⁹

THE *EZOKOLA* DECISION AND ITS SUBSEQUENT IMPACT

From the beginning, virtual all jurisprudence in Canada at all levels of the judiciary in respect to exclusion ground 1F(a) has been concerned with the meaning of the word ‘committed’ in that provision (and by implication section 35(1)(a) of IRPA, which uses the same term) and the parameters of the notion of complicity embedded within that word.¹⁰

⁷ *Ramirez v. Canada*, [1992] 2 F.C. 306 (*Ramirez*).

⁸ The Supreme Court has also interpreted the third exclusion ground, 1F(c) in the case of *Pushpanathan v. Canada*, [1998] 1 SCR 1222 (see Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*, 2012, pages 355-357) (hereafter Rikhof, *The Criminal Refugee*); Canada has been the only country where the highest courts have provided judgments for all three exclusion grounds with the exception of the United Kingdom, where 1F(a) was discussed in *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)*, [2010] UKSC 15; 1F(b) in *T. and Immigration Officer* [1996] AC 742; and 1F(c) in *Al-Sirri v Secretary of State for the Home Department*, [2012] UKSC 54.

⁹ While there is some overlap between the three exclusion clauses and the four inadmissibility provisions, this overlap is by no means complete in that the inadmissibility provisions tend to be broader than the exclusion clauses, especially in respect to sections 34(1)(f), 35(1)(b) and (c) as well as sections 36(2) and 37(1)(a); this is partially recognized in sections 101(1)(f) and 101(2) of IRPA. During the same time period that the Supreme Court rendered the three judgments in exclusion (1998-present), the same court issued the same number of decisions regarding the interpretation of the criminal inadmissibility provisions, *B010 v. Canada*, 2015 SCC 58 (re section 37(1)(b)); *Mugesera v. Canada*, 2005 SCC 40 (re section 35(1)(a)); and *Suresh v. Canada*, 2000 SCC 1 (re the notion of terrorism in section 34(1)(c)); the court has also denied leave in two cases involving criminal inadmissibility, *Kanagendren*, November 19, 2015, case no. 36508 (re the notion of engage in section 34) and *Najafi*, April 23, 2015, case no. 36241 (re section 34(1)(b)) while leave was granted in the *Tran* case, April 14, 2016, case no. 36784, which was heard on January 13, 2017 (re section 36(1)(a)). Lastly, while not directly dealing with the substantive aspects of criminality, the SCC has also decided on the issue of the exemptions contained in section 42.1 of IRPA in the case of *Agraira v. Canada*, 2013 SCC 36.

¹⁰ There have only been very few cases dealing with direct involvement, *Jayasinghe v. Canada*, 2007 FC 193; *Rivera Pena v. Canada*, 2008 FC 103; *Dhanday v. Canada*, 2011 FC 1166; *Sabadao v. Canada*, 2014 FC 815; and *Ghazala Asif Khan v. Canada*, 2017 FC 269 (out of 261 decisions since 1992).

It has been over three and half years since the Supreme Court of Canada rendered its *Ezokola* decision with respect to the parameters of complicity in exclusion.¹¹ Before the decision of the Supreme Court in 2013, the Federal Court and Federal Court of Appeal jurisprudence had developed the well-known test of “personal and knowing participation,” which had been used by tribunals and these courts since 1992, starting with the Federal Court of Appeal decision in *Ramirez*.¹² This test had a number of different manifestations, corresponding to four sub-categories of types of liability, namely: membership in an organization with a limited, brutal purpose; aiding and abetting (such as handing over persons, providing information or carrying out support functions); responsibility for persons with a high rank; and, having a shared criminal purpose. The latter three were applicable for organizations with no limited, brutal purpose.¹³ The last of the four above sub-categories, a shared criminal purpose, became the most popular in the courts after 2005 and was based on the application of seven factors to determine liability including the nature of the organization; the method of recruitment; position and rank obtained in an organization; the duration of association with the organization; age of the person; knowledge of atrocities committed by the organization; and the opportunity to disassociate from the organization.¹⁴

The *Ezokola* case concerned a person who began his career with the government of the Democratic Republic of Congo (DRC) in January 1999. He was hired as a financial attaché at the Ministry of Finance and was assigned to the Ministry of Labour, Employment and Social Welfare in Kinshasa. He later worked as a financial adviser to the Ministry of Human Rights and the Ministry of Foreign Affairs and International Cooperation. In 2004, he was assigned to the Permanent Mission of the DRC to the United Nations (“UN”) in New York. In his role as second counsellor of the Mission, he represented the DRC at international meetings and UN entities including the UN Economic and Social Council. He also acted as a liaison between the Permanent Mission of the DRC and UN development agencies. In 2007, the appellant served as acting *chargé*

¹¹ For more details regarding this decision, see James C. Simeon, “The Developing Jurisprudence on Exclusion Under Article 1F(a) of the 1951 Convention in Selected Western Industrialized States, *CARFMS Working Paper No. 2015/4*, October 2015, pages 16-18; Livio Zilli, ‘*Ezokola v. Canada: The Correct Place of International Criminal Law in International Refugee Law-making*’, 12 *Journal of International Criminal Justice* (2014), pages 1217-1231; and Joseph Rikhof, ‘International Criminal Law and Refugee Law: Lessons Learned?’ in Charles Jalloh and Alhagi Marong (eds.), *Promoting Accountability for Gross Human Rights Violations in Africa under International Law: Essays in Honour of Prosecutor Hassan Bubacar Jallow*, 2015, pages 572-576.

¹² Rikhof, *The Criminal Refugee*, pages 218-220.

¹³ *Idem* at 218-219.

¹⁴ *Idem* at 226-229.

d'affaires. In this capacity, he led the Permanent Mission of the DRC and spoke before the Security Council regarding natural resources and conflicts in the DRC. He worked at the Permanent Mission until January 2008 when he resigned and fled to Canada.¹⁵ He had been excluded as a result of his association with the government of the DRC, which during the time of his employment, had been complicit in crimes against humanity.

The Supreme Court made the following findings:

-guilt by association or mere membership in brutal, limited purpose organization is no longer an independent head of liability;¹⁶

-the overarching test for establishing complicity is no longer “personal and knowing participation” but, instead, whether a person made a “voluntary, knowing and significant contribution” to the crime or criminal purpose of a group carrying out international crimes;¹⁷

-guidance for determining this test can be found in assessing several factors, six of which are specifically set out by the Supreme Court:

- (i) the size and nature of the organization;
- (ii) the part of the organization with which the refugee claimant was most directly concerned;
- (iii) the refugee claimant’s duties and activities within the organization;
- (iv) the refugee claimant’s position or rank in the organization;
- (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group’s crime or criminal purpose; and

¹⁵ *Ezokola*, paragraphs 11-13.

¹⁶ *Ezokola*, paragraphs 81-83.

¹⁷ *Ezokola*, paragraphs 84-90; five of these factors can already be found in pre-*Ezokola* jurisprudence although the court added one crucial factor, namely the person’s duties and activities within an organization (paragraph 96).

(vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization;¹⁸

-others forms of liability, such as aiding and abetting and command responsibility fall within the overarching test.¹⁹

When comparing the test before and after *Ezokola*, it becomes clear that the Supreme Court only made, for the most part, incremental changes compared to the approach utilized before 2013. The most important changes were that membership as a form of liability is no longer applicable (although the notion of this type of organization can still play a role in factor i above) and a renewed emphasis on the nexus between a person and the organization involved in international crimes, as expressed in factor iii above. The reliance on a number of factors to assist in establishing the overarching test was for the most part inspired by previous jurisprudence, including the fact that the Supreme Court indicates that in factor ii a decision maker should “drill down” to the smallest unit carrying out 1F(a) activities.

There are three methods in determining the impact of the *Ezokola* judgment. Firstly, in respect to how the decision has been applied outside the exclusion 1F(a) context as well as quantitatively and qualitatively within the context of the parameters of the judgment. The impact of the judgment has been limited outside the area in refugee and immigration law dealing with human rights violations. As will be seen below, the Federal Court has had no hesitation in using the *Ezokola* decision when addressing the notion of complicity for section 35(1)(a), which is no surprise as the same word, ‘committed’ is used in both sections to delineate the boundaries of involvement in war crimes and crimes against humanity.²⁰ Second, the elimination of the notion of membership has only been found to be only applicable to section 35(1)(a) and not two other sections in IRPA dealing with serious criminality, namely: section 34(1)(f)²¹ for security inadmissibility and section 37(1)(a) for organized crime inadmissibility²²; as well, the judgment was also found not to apply to

¹⁸ *Idem*, paragraphs 91-100.

¹⁹ *Idem*, paragraphs 50 and 97.

²⁰ While section 35(1)(a) refers to another international crime, genocide and 1F(a) also includes the crime against peace, virtual all cases have been decided on the basis of involvement in crime against humanity with a few cases discussing war crimes.

²¹ *Kanagendren v. Canada*, 2015 FCA 86, leave to appeal to SCC dismissed, November 19, 2015, case no. 36508; see also *Moussa v. Canada*, 2015 FC 545; *NK v. Canada*, 2015 FC 1040; *Mirmahaleh v. Canada*, 2015 FC 1085; and *Shanmugarasa v. Canada*, 2016 FC 1374.

²² *Chung v. Canada*, 2014 FC 16; and *Bruzzese v. Canada*, 2014 FC 230.

section 35(1)(b).²³ Lastly, the question whether *Ezokola* applies to the other two exclusion clauses, 1F(b) and 1F(c), has been raised in the affirmative but not conclusively answered yet for 1F(b),²⁴ while it has been decided that it applies to 1F(c).²⁵

From the quantitative perspective, this approach can be utilized when comparing the number of Federal Court decisions in the ten years before the decision was handed down to what happened since July 2013. Two aspects can be explored in this context; namely, the absolute number of Federal Court decisions; and, within that number, the number of judgments overturning or upholding an administrative decision in the area of 1F(a) and 35(1)(a).

The following table sets out the number of decisions rendered by the Federal Court²⁶ from July 13, 2003 until the present, while also indicating a number of other relevant aspects in relation to those decisions.

²³ *Tareen v. Canada*, 2015 FC 1260; *Al-Ani v. Canada*, 2016 FC 30; *Sherzai v. Canada*, 2016 FC 166; and *Al-Naib v. Canada*, 2016 FC 723.

²⁴ *Villalobos v. Canada*, 2015 FC 60.

²⁵ *Alam v. Canada*, 2014 FC 556; 1F(c) is rarely used by administrative decision makers and then only in Quebec for human rights violations and as such is very similar to the notion of crimes against humanity in 1F(a).

²⁶ There has only been one Federal Court of Appeal decision in that time period, *Canada v. Ekanza Ezokola*, 2011 FCA 224, which is not reflected in the table.

TABLE 1: FEDERAL COURT JUDGMENT RE: EXCLUSION/INADMISSIBILITY 2003-2017

Year	Number of decisions	Section ²⁷	Tribunal ²⁸	Process ²⁹	Result-upheld (positive/negative) ³⁰	Result-overruled (positive/negative) ³¹
2003	2	1F(a)	RPD	N/A	1	1
2004	5	1F(a)	RPD	N/A	4	1
2005	29	1F(a) 1F(c) (1) 1F(a)/1F(c)(1) vacation (1) ³² 35(1)(a) (1)	RPD	visa (1)	14/1	13/1
2006	23	1F(a) 1F(c) (1) 35(1)(a) (2)	RPD	visa (2)	15	7/1
2007	19	1F(a) 35(1)(a) (2)	RPD ID (1)	visa (1)	11/1	5/2
2008	9	1F(a) 35(1)(a) (1)	RPD ID (1)	N/A	3/1	4/1
2009	11	1F(a) 1F(a)/1F(c)(1) 35(1)(a) (2)	RPD ID (2)	N/A	4/1	4/2
2010	8	1F(a) 1F(c) (1) 35(1)(a) (1)	RPD ID	N/A	6	2
2011	13	1F(a) 35(1)(a) (3)	RPD	visa (3)	8/1	4

²⁷ The indication without number in brackets refers to the majority category in that year while the numbers in brackets refer to the precise numbers of decisions in that same year.

²⁸ This indicates which division of the IRB issued the original decision, which was reviewed by the Federal Court.

²⁹ This indicates which IRPA process outside the IRB was utilized.

³⁰ The reference to positive refers to the fact that an exclusion or inadmissibility finding was upheld while negative refers that a non-exclusion or non-admissibility finding was upheld.

³¹ The reference to positive refers to the fact that an exclusion or inadmissibility finding was overturned while negative refers that a non-exclusion or non-admissibility finding was overturned.

³² Vacation is the RPD process contemplated in section 109 of IRPA.

Considering the first quantitative perspective, namely, the number of decisions rendered between July 19, 2003 and July 19, 2013, the Federal Court issued 134 decisions re 1F(a) and 35(1)(a) for an average of 13.4 a year. However, this average is a bit skewed as the Federal Court was uncommonly active between 2005 and 2007 with a total of 71 cases in those three years, which was more than ever before or after on an annual basis since 1992.³³ The numbers closer to the *Ezokola* decision, namely between 2008 and 2013 (with respectively 9, 11, 8, 14, 12 and 4 decisions per year) appear to more within the normal parameters with an average of 7.6 cases per year. Between January 1, 2014 and December 31, 2016 (as the one case after *Ezokola* in 2013 is likely artificially low and therefore not included while there have been only two cases in 2017 so far), the number of decisions was 25 for an average of 8.3 a year.

Interestingly in this context is the fact that the vast majority of the decisions before the SCC *Ezokola* judgment were related to the exclusion component (namely 120 as opposed 14 for inadmissibility) which became reversed in the post-*Ezokola* period, with 8 cases for exclusion and 17 dealing with inadmissibility.

With respect to a second quantitative aspect, the number of decisions overruled, in the 134 decisions by the Federal Court before *Ezokola*, in 51 instances the initial exclusion or inadmissibility decision was overruled for a percentage of 38%. This compares to 9 decisions overruled between July 2013 and December 31, 2016³⁴ for a ratio of 36%.

Looking at these statistics and looking at the picture immediately before and after the *Ezokola* judgment in terms of the approach by Federal Court, no major changes have occurred in either the number of decisions in the 2008-2013 period compared with the 2014-2016 period³⁵ or in decisions overruled. In both time frames the average number of cases decided was around 8 per year. Similarly, the ratio of decisions overruled by the Federal Court is in the same realm as well with respectively 38% and 36%. This would suggest that the incremental changes in the law pre- and post-*Ezokola* did not take the decision makers very much by surprise and that they had little difficulty adjusting to the relatively minor changes to the prior jurisprudence as

³³ There has been a total of 100 1F(a) cases between 1992 and 2013 at both the Federal Court and Federal Court of Appeal level.

³⁴ There was also one case of this nature in 2017, *Al Khayyat v. Canada*, 2017 FC 175.

³⁵ However, there was a decrease in the number of cases initiated by CBSA before the IRB between July 19, 2013 and March 31, 2015 (see *Canada's Program on Crimes Against Humanity and War Crimes - 2011-2015, 13th Report*, under the heading 'Immigration-Based Remedies'); the difference between this decrease and the stable level at the Federal Court could be explained by a higher number of leave applications granted in the first years after the *Ezokola* decision due to its novelty.

determined by the Supreme Court. This could also be due to the fact that the main change required by the court, membership in a brutal, limited purpose organization as an independent head of liability, had already become seriously circumscribed by the Federal Court immediately before the *Ezokola* decision.³⁶

With respect to the substantive application of the *Ezokola* test, of the 22 cases,³⁷ which applied this judgment since June 2014 (the first time that this decision was mentioned), the following occurred:

- five cases applied the aiding and abetting test;³⁸
- five cases used the new factor approach, while giving specific attention to the new factor of the person's duties and activities within an organization but also indicating that not all factors are of equal weight or necessary;³⁹
- four cases referred to the overarching test only;⁴⁰
- three cases used a combination of the overarching and factor approaches;⁴¹
- one case used all three approaches;⁴²
- in one case a decision was overruled for relying on the abandoned brutal, limited purpose form of liability;⁴³
- three cases were overruled for procedural reasons.⁴⁴

³⁶ Joseph Rikhof, 'Exclusion Law and International Law: Sui Generis or Overlap?', 20 *International Journal on Minority and Group Rights* (2013), pages 209-211 (hereafter Rikhof, *Sui Generis*).

³⁷ There were actually 23 cases in that time period but one case involved direct liability and not complicity as a result of which *Ezokola* does not apply; this is the case of *Sabadao v. Canada*, 2014 FC 815; on the other hand, the *Ghazala Asif Khan v. Canada* case, 2017 FC 269 is included because it discusses both direct and indirect liability.

³⁸ *Betoukoumesou v. Canada*, 2014 FC 591; *Moya v. Canada*, 2014 FC 996; *Parra v. Canada*, 2016 FC 364; *Concepcion v. Canada*, 2016 FC 544; *Shalabi v. Canada*, 2016 FC 961; while the decision maker utilized either the factor or overarching test, the facts on which this test was based disclose situations of aiding and abetting, unlike the other cases.

³⁹ *Khasria v. Canada*, 2016 FC 773 (this case also added a new factor, that the person had received medals for the work carried out); *Blazic v. Canada*, 2016 FC 901; *Bajraktari v. Canada*, 2016 FC 1136; *Al Khayyat v. Canada*, 2017 FC 175; *Ghazala Asif Khan v. Canada*, 2017 FC 269.

⁴⁰ *Hamida v. Canada*, 2014 FC 998; *Aazamyar v. Canada*, 2015 FC 99; *Katanda v. Canada*, IMM-8371-13; *Hadhiri v. Canada*, 2016 FC 1284

⁴¹ *Ndikumasabo v. Canada*, 2014 FC 955; *Mata Mazima v. Canada*, 2016 FC 531; *Canada v. Badriyah*, 2016 FC 1002

⁴² *Mekhachef v. Canada*, 2014 FC 142.

⁴³ *Valet v. Canada*, IMM-10707-12.

⁴⁴ *Johnson v. Canada*, 2014 FC 868; *Williams v. Canada*, 2015 FC 917; *Azimi v. Canada*, 2015 FC 1177.

Apart from the new overarching test, the reliance in most of the decisions on the factor of aiding and abetting approaches is not that different from the jurisprudence before *Ezokola*,⁴⁵ except that the new *Ezokola* factor did force decision makers to focus more on the exact nexus between a person and organizations involved in international crimes.

THE *FEBLES* DECISION AND ITS SUBSEQUENT IMPACT

While all aspects of the notion of serious, non-political crime committed outside Canada has been subject to judicial consideration⁴⁶ the parameters of what constitutes a serious crime has been the subject of the most jurisprudence, of which the *Jayasekara* case in 2008 by the Federal Court of Appeal has become the most important.⁴⁷

That case stands the following propositions in respect to the notion of ‘serious crime’:

- there is a strong presumption that any crime, the equivalent of which carries a maximum penalty of more than ten years in Canadian criminal law, is a serious crime, even though the actual sentence imposed abroad might be much less than the maximum penalty;
- factors such as the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction should be considered in that context and could rebut this presumption;
- economic crimes can also be 1F(b) crimes;
- the mitigating and aggravating factors should be balanced in a meaningful manner.⁴⁸

The issue in *Febles* case was whether Febles was ineligible for refugee protection because of crimes committed before he came to Canada; he had been admitted to the United States as a refugee from Cuba and

⁴⁵ See Rikhof, *The Criminal Refugee*, pages 218-229 and Rikhof, *Sui Generis*), pages 207-211.

⁴⁶ See Rikhof, *The Criminal Refugee*, pages 316-320 and Rikhof, *Sui Generis*, pages 218-220.

⁴⁷ *Jayasekara v. Canada*, 2008 FCA 404 (*Jayasekara*). Unlike in 1F(a) almost all 1F(b) cases involved personal involvement; only six cases have been decided in the latter context based on complicity, one after the *Febles* decision, *Gregorio v. Canada*, IMM-1447-98; *Zrig v. Canada*, 2003 FCA; *Jaouadi v. Canada*, 2005 FC 1256; *Rudyak v. Canada*, 2006 FC 1141; *Chong v. Canada*, 2001 FCT 1335; *Villalobos v. Canada*, 2015 FC 60.

⁴⁸ *Jayasekara*, paragraphs 40-46.

while living in the United States, he was convicted and served time in prison for two assaults with a deadly weapon, in the first case, he struck a roommate on the head with a hammer, and in the second, he threatened to kill a roommate's girlfriend at knifepoint; the U.S. revoked his refugee status and issued a removal warrant, which is still outstanding; after his refugee status in the U.S. was revoked, Febles fled to Canada, entering illegally.⁴⁹ Regarding the issue whether having served a sentence for a crime in another country or other forms of expiation, such as being rehabilitated or being no danger to the community, the court was of the view that this does not play a role in assessing criminality for purposes of 1F(b).⁵⁰

The Supreme Court of Canada confirmed the *Jayasekara* approach with respect to serious crimes very briefly as follows (even though the main purpose of the appeal had been whether expiation of a serious crime as a result of having served a sentence, of having been rehabilitated or no longer being a danger to the community, in regards to which the court was of the view that these are not circumstances to be taken into consideration for 1F(b):

The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian Criminal Code, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F (b) is designed to exclude only those whose crimes that are serious. ... However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of

⁴⁹ Febles, paragraphs 1-2

⁵⁰ *Idem*, paragraph 60.

ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.⁵¹

The new factor related to the sentencing range has been explored in Federal Court jurisprudence to the effect that potential Canadian sentences should be assessed in this context, for which actual foreign sentences imposed received can be an important consideration.

In determining the influence of the *Febles* decision in subsequent Federal Court case law, the statistical data are much easier to represent than was the case with respect to the *Ezokola* decision. In the ten years before October 30, 2014 (the date of the decision in *Febles*) there had been a total of 70 judgments,⁵² 66 at the Federal Court level and 4 at the Federal Court of Appeal level,⁵³ (all decisions rendered by the RPD), resulting in an average of 7 decisions per year. In the two years since the *Febles* decision (not counting the one case in 2014 after the SCC judgment) there have been 14 judgments, also resulting in 7 decisions per year.

While the number of decisions on an annual basis has been the same before and after *Febles*, this is certainly not the case in terms of results. Before October 2014 there had only been two Federal Court decisions overruling the RPD⁵⁴ while one non-exclusion case was upheld⁵⁵ but this changed dramatically after *Febles* when 9 of the 15 cases were overruled. The trajectory of these cases, which were sent back for redetermination, is interesting, as the majority of them (5) were the result of the application of the new SCC factor re serious crimes set out above,⁵⁶ although three other ones were as a result of the misapplication of the *Jayasekara* case⁵⁷ and one for other reasons.⁵⁸ It would appear that it took the RPD some time to come to grips with this new factor in 2015 but it seems to have rebounded in that regard in 2016⁵⁹ before sliding back in the last case decided by the Federal Court at the end of 2016. Equally interesting is the fact that the issue of

⁵¹ *Idem*, paragraph 62.

⁵² The breakdown is as follows: 2005: 10 plus one Federal Court of Appeal; 2006: 4; 2007: 7; 2008: 5 plus 1 Federal Court of Appeal; 2009: 3; 2010: 3; 2011: 8; 2012: 10 plus 2 Federal Court of Appeal; 2013: 12; 2014: 4 before *Febles* and one after; 2015: 9; 2016: 5.

⁵³ The Court of Appeal cases were the abovementioned *Jayasekara*, as well as *Hernandez Febles v. Canada*, 2012 FCA 324 and its companion case, *Feimi v. Canada*, 2012 FCA 325, both of which resulted in the SCC case of *Febles*; there was also the earlier case of *Sing v. Canada*, 2005 FCA 125, which discussed procedural and evidentiary issues applicable in 1F(b) and the notion of political crime.

⁵⁴ *Canada v. Pulido Diaz*, 2011 FC 738; *Mohamad Jawad v. Canada*, 2012 FC 232.

⁵⁵ *Canada v. Toktok*, 2013 FC 1150.

⁵⁶ *Profitt v. Canada* IMM-3193-83; *Jung v. Canada*, 2015 FC 464; *Tabagua v. Canada*, 2015 FC 709; *Mohamed*, 2015 FC 1006; *A. B., C. D. and E. F. v. Canada*, 2016 FC 1385.

⁵⁷ *Notario v. Canada*, 2014 FC 1159; *Narkaj v. Canada*, 2015 FC 26; *Hersy v. Canada*, 2016 FC 190.

⁵⁸ *Ching v. Canada*, 2015 FC 860; this case dealt with the issues of reasonable grounds and strength of foreign evidence.

⁵⁹ When the following cases were upheld: *Mustafa v. Canada*, 2016 FC 116; *Omar v. Canada*, 2016 FC 602, *Sajid v. Canada*, 2016 FC 981 (the last two cases were vacation cases).

expiation, which was the main dicta in *Febles*, was only discussed twice and in both cases the RPD decision was upheld on this point.⁶⁰ Lastly, two other cases were upheld, one of which refers to *Febles*⁶¹ in general terms while the other one applies to *Jayasekara*.⁶²

While exclusion 1F(b) has some resemblance to section 36(1) of IRPA, there has been, apart from passing reference to *Febles*,⁶³ no substantive discussion of the *Febles* case in that context. This is not surprising as the section 36(1) describes in detail what amounts to a serious crime, the area of most jurisprudence in this vague 1F(b) area.

THE ISSUE OF DEFENCES

In Canadian and international criminal law, defences are a device whereby a person who has committed a crime can still be acquitted or not held responsible if (s)he relied on a reason which provides a justification or excuse why this criminal act was carried out. The most common defences are a mental disease,⁶⁴ intoxication,⁶⁵ necessity,⁶⁶ self-defence,⁶⁷ duress,⁶⁸ mistake of fact,⁶⁹ mistake of law,⁷⁰ and in the specific context of international criminal law, superior orders.⁷¹ The most prevalent defence in exclusion/immigration law has been the defence of duress.

While the very first exclusion case, *Ramirez*, allowed for the use of defences⁷² and, specifically, provided the parameters of one defence, duress, this aspect of exclusion law has been underutilized.⁷³ Apart from 1F(a)

⁶⁰ *Skoro v. Canada*, 2015 FC 139; *Jung v. Canada*, 2015 FC 464 (although this portion was upheld the case as a whole was sent back as set out above).

⁶¹ *Villalobos v. Canada*, 2015 FC 60.

⁶² *Reyes v. Canada*, 2015 FC 1015.

⁶³ See for instance *Tran v. Canada*, 2014 FC 1040; *Tran v. Canada*, 2016 FC 1065.

⁶⁴ For Canadian law, see the Criminal Code, section 16; in international law, see the Rome Statute, article 31(1)(a).

⁶⁵ Criminal Code, section 33.1; Rome Statute, article 31(1)(b).

⁶⁶ Criminal Code, section 35; Rome Statute, article 31(1)(c).

⁶⁷ Criminal Code, section 34; Rome Statute, article 31(1)(d).

⁶⁸ Criminal Code, section 17; Rome Statute, article 31(1)(d).

⁶⁹ Criminal Code, section 8(3); Rome Statute, article 32.

⁷⁰ Criminal Code, section 19; Rome Statute, article 32.

⁷¹ Crimes against Humanity and War Crimes Act, section 14; Rome Statute, article 33.

⁷² For a discussion of defences, see *Rikhof, The Criminal Refugee*, page 275 (in international criminal law) and 279-280 (in Canadian exclusion law).

⁷³ See *Rikhof, The Criminal Refugee*, pages 279-280; Jennifer Bond, 'The Defence of Duress in Canadian Refugee Law', 41 *Queen's Law Journal* (2016) (hereafter Bond, *Duress in Canadian Refugee Law*).

and 35(1)(a),⁷⁴ this defence has been applied only very sparingly and then only recently in 1F(b)⁷⁵ and in the inadmissibility provisions.⁷⁶

One issue, which has not been addressed since the *Ezokola* decision are the parameters of the voluntariness and how to deal with situations of serious peril but short of the duress requirements.⁷⁷ This situation was raised in one of the most recent decision of *Al Khayyat*, where an imam in the United Arab Emirates provided information to the security organizations of that country under the threat that he and his family might be deported to Iraq, where their lives would be at risk.

The court questioned the Immigration Division's (ID) approach when rejecting this defence in the context of 35(1)(a) inadmissibility for relying on a Supreme Court judgment rendered in a criminal case⁷⁸ and wondered why no reliance had been placed on international criminal law.⁷⁹ This statement raises two issues: firstly, the relevance of the *Ryan* case in exclusion and admissibility; and, secondly, in how far either this Supreme Court case or international criminal law would be helpful for the situation discussed in *Al Khayyat*.

With respect to the first issue, it would appear that the *Ryan* case has become most recently the authority of choice by the Federal Court when discussing the defence of duress in the exclusion and immigration context.

The *Ryan* case dealt with the following situation. Nicole Ryan had been the victim of a violent, abusive and controlling husband. She believed that he would cause her and their daughter serious bodily harm or death as he had threatened to do many times. In 2007, she began to think about having her husband murdered.

⁷⁴ Before *Ezokola*, this defence was discussed in 15 cases while since that time only twice, in *Al Khayyat v. Canada*, 2017 FC 175 and *Betoukoumesou v. Canada*, 2014 FC 591; in the latter case both the defence of superior orders and duress were rejected on the facts before the court (for the difference between these two defences, see Rikhof, *The Criminal Refugee*, pages 276-277). This defence has also been discussed twice by the Federal Court of Appeal in the context of a citizenship revocation process, which indirectly used section 35(1)(a), in *Oberlander v. Canada*, 2009 FCA 330 and *Oberlander v. Canada*, 2016 FCA 52, leave to appeal to the SCC dismissed July 7, 2016, case no. 36949.

⁷⁵ Three times since 2013, *Jimenez v. Canada*, 2012 FC 1231; *Guerra Diaz v. Canada*, 2013 FC 88; *Villalobos v. Canada*, 2015 FC 60 but only successfully in the *Diaz* case.

⁷⁶ There has been a total of 12 decisions re duress in the inadmissibility context, 7 for section 34 and 5 for section 37; apart from one FCA decision in 2005, all the other judgments were issued since 2011; the following are the section 34 cases: *Poshteh v. Canada*, 2005 FCA 85; *Thiyagarajah v. Canada*, 2011 FC 339; *Belalcazar v. Canada*, 2011 FC 1013; *T.K. v. Canada*, 2013 FC 327; *Ghaffari v. Canada*, 2013 FC 674; *Mohamed v. Canada*, 2015 FC 622; *Gacho v. Canada*, 2016 FC 794 while these are the ones pertaining to section 37: *Lopez Gayton v. Canada*, 2012 FC 1075; *Castellon Viera v. Canada*, 2012 FC 1086; *B006 v. Canada*, 2013 FC 1033; *Canada v. J.P.*, 2013 FCA 262; *Arokkiyanathan v. Canada*, 2014 FC 289.

⁷⁷ Professor Jennifer Bond has advocated to incorporate these types of situations within an expanding reading of duress in 'Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law' 14 *International Criminal Law Review* (2014), pages 491-500; 'Excluding the Most Vulnerable: Application of Article 1F(a) of the Refugee Convention to Child Soldiers' 20 *International Journal of Human Rights* (2016), pages 579-580; Bond, *Duress in Canadian Refugee Law*, pages 14-15 and 40-44.

⁷⁸ *R. v. Ryan*, 2013 SCC 3 (*Ryan*).

⁷⁹ Paragraph 56,

Over the course of the next seven months, she spoke to at least three men whom she hoped would kill him. In 2008, she met with an individual and agreed to pay him to kill her husband. Shortly after, she was arrested and charged with counselling the commission of an offence. The only issue at trial was whether the respondent's otherwise criminal acts were excused because of duress.⁸⁰

The following table (explaining which precedent cases have been used to discuss the defence of duress in sections 34, 37 and 1F(b) but not 35(1)(a) since all these cases, except one,⁸¹ have relied directly or indirectly on the *Ramirez* decision) illustrates this point:

⁸⁰ *Ryan*, paragraphs 4-6.

⁸¹ This is the case of *Canada v. Maan*, 2001 FCT 972, which relied on the predecessor judgments of the *Ryan* case.

TABLE 2: THE USE OF THE DEFENCE OF DURESS IN REFUGEE/IMMIGRATION LAW

	No case mentioned but accepted as general proposition	SCC Perka (criminal) (1984) ⁸²	SCC Hibbert (criminal) (1995) ⁸³	SCC Ruzic (criminal) (2001) ⁸⁴	SCC Ryan (criminal) (2013)	Ramirez (FCA) (civil) (1984)	Oberlander (FCA) (civil) (2009)	Poshteh (FCA) (civil) (2009)	Other, no higher court authority	Rome Statute (ICL) (1998)
S. 34	Poshteh (FCA, 2005) (no analysis)									
S. 34						Thiyagarajah (FC, 2011)				
S. 34						Belalcazar (FC, 2011)	Belalcazar (FC, 2011)	Belalcazar (FC, 2011)		Belalcazar (FC, 2011)
S. 34									T.K. (FC, 2013); to 1F(a) case of Jalloh, FC, 2012 ⁸⁵	
S. 34					Ghaffari (FC, 2013)					
S. 34					Mohamed (FC, 2015)				Mohamed (FC, 2015); to Belalcazar and Ghaffari	
S. 34					Gacho (FC, 2016)					
S. 37			Lopez Gayton (FC, 2012)	Lopez Gayton (FC, 2012)						
S. 37						Castellon Viera (FC, 2012)	Castellon Viera (FC, 2012)			
S.37		B006 (FC, 2013)	B006 (FC, 2013)	B006 (FC, 2013)	B006 (FC, 2013)					
S. 37	J.P. (FCA, 2013) (no analysis)									
S. 37	Arokkiyanathan (FC, 2014) (no analysis)									
1F(b)	Jimenez (FC, 2014) (no analysis)									
1F(b)									Villalobos (FC, 2015); to Kéophokham, ⁸⁶ Quebec Superior court, 2003	
1F(b)				Guerra Diaz (FC, 2013)						

⁸² *Perka v. The Queen*, [1984] 2 SCR 232.⁸³ *R. v. Hibbert*, [1995] 2 SCR 973.⁸⁴ *R. v. Ruzic*, 2001 SCC 24.⁸⁵ *Jalloh v. Canada*, 2012-03-16.⁸⁶ *La Reine c Kéophokham*, [2003] JQ no 4651.

Of the 15 cases mentioned in the table, 6 had no analysis (4) or no reference to higher level jurisprudence (2, although one of those also referred to a criminal case but not at the SCC level); 5 mentioned SCC criminal jurisprudence, which was either the *Ryan* case or its predecessors; 3 cases referred to FCA authority; and one to both categories. All references to criminal cases are more recent than to the civil ones. In addition, and likely most authoritative, is the 2016 *Oberlander* revocation of citizenship war crimes case rendered the Federal Court of Appeal (and for which leave was denied by the SCC), which makes reference to the *Ramirez* case as well as the *Ryan* case.

With respect to the inquiry of the Federal Court judge to the use of international criminal law, there have only been three decisions with respect to duress in that context, two of which discuss the unusual situation of persons facing death threats while being asked to kill other persons and in both cases this defence was denied.⁸⁷ The more common situation of duress, where the threat and activity carried as a result of such a threat are of a different nature, was discussed by Pre-Trial Chamber of the International Criminal Court, when examining this defence for the first time last year and that in a fairly summary fashion.⁸⁸

As a result, based on the use of precedent cases, it would appear that there is nothing objectionable in using the *Ryan* test in the future.

In terms of the contents of the defence of duress if one were to compare the three main tests available for duress in the immigration and refugee context, namely *Ramirez* and *Ryan* (as mentioned in *Oberlander*) together with the *Ongwen* decision, a number of observations can be made.

The *Ryan* test uses the following requirement for duress:

- There must be an explicit or implicit threat of present or future death or bodily harm. This threat can be directed at the accused or a third party.
- The accused must reasonably believe that the threat will be carried out.

⁸⁷ See Rikhof, *The Criminal Refugee*, page 277.

⁸⁸ Decision on the confirmation of charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15), Pre-Trial Chamber II, 23 March 2016, paragraphs 150-156 (*Ongwen*)

- There is no safe avenue of escape. This element is evaluated on a modified objective standard.
- A close temporal connection between the threat and the harm threatened.
- Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be equal to or no greater than the harm threatened. This is also evaluated on a modified objective standard.
- The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.⁸⁹

The Federal Court of Appeal in *Ramirez* says this:

The appellant did not argue the defence of superior orders, and his arguments as to duress and remorse are insufficient for exoneration. On duress, Hathaway, *supra*, at page 218, states, summarizing the draft Code of Offences Against the Peace and Security of Mankind, in process by the International Law Commission since 1947:

Second, it is possible to invoke [as a defence] coercion, state of necessity, or force majeure. Essentially, this exception recognizes the absence of intent where an individual is motivated to perpetrate the act in question only in order to avoid grave and imminent peril. The danger must be such that "a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong". Moreover, the predicament must not be of the making or consistent with the will of the person seeking to invoke the exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion. [Footnotes omitted.]

⁸⁹ *Ryan*, paragraph 81.

If I were to accept this as the state of international law, as the appellant urged, I could find that the duress under which the appellant found himself might be sufficient to justify participation in lesser offences, but I would have to conclude that the harm to which he would have exposed himself by some form of dissent or non-participation was clearly less than the harm actually inflicted on the victims.⁹⁰

In *Ongwen* the test is described as follows:

For duress to exclude criminal responsibility it is required that: (i) the conduct of the person has been caused by duress resulting from a threat (whether made by other persons or constituted by circumstances beyond the person's control) of imminent death or of continuing or imminent serious bodily harm against that person or another person; and (ii) the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. The Chamber is of the view that neither requirement is met in the present case.⁹¹

As the *Ryan* test appears to be the most comprehensive test, the meaning of the words used in the *Ramirez* and *Ongwen* tests will be examined first. Paragraph 40 of the *Ramirez* decision uses for its authority for the test for duress (with the caveat "If I were to accept this as the state of international law") an excerpt from the 1991 version of James Hathaway's book, *The Law of Refugee Status*, page 218, but with footnotes omitted; the Hathaway book itself relies very heavily, as recognized by the Federal Court of Appeal, on the 1987 version of the *Draft Code of Offences Against the Peace and Security of Mankind* by the International Law Commission (ILC)⁹² but he does not reflect all the nuances or jurisprudence of the post-WWII war crimes tribunals as set out in the *Draft Code*.⁹³

⁹⁰ *Ramirez*, paragraph 40.

⁹¹ *Ongwen*, paragraph 152.

⁹² A later version was used by the in the SCC *Pushpanathan* decision, paragraphs 140 and 153.

⁹³ This version of the *Draft Code* can be found here: http://legal.un.org/ilc/publications/yearbooks/english/ilc_1987_v2_p1.pdf.

While the text as reproduced is an accurate reflection of the wording in the *Draft Code*, the following excerpts are not provided by Hathaway and consequently by the Federal Court of Appeal but were seen as essential elements of the defence of duress by the *ILC* at that time:

- To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril ...However, the application of this general principle is adjusted to the specific circumstances in each particular case. Account is taken of such elements as the extent to which the person invoking the exception is at fault and the proportionality between the interest sacrificed and the interest safeguarded;⁹⁴
- the means of defence based on the exceptions in question cannot be admitted where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.⁹⁵

In addition to the examination of the post-WWII jurisprudence by the *ILC* with the above results, there has also been more recent academic writing with respect to the same case law, which has extracted the following additional principles related to duress:

- actively participating in illegal acts bars the application of the defence;⁹⁶

⁹⁴ Draft Code, page 8, paragraph 9; for a discussion of the *Krupp* case mentioned in this paragraph, see also Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Second Edition, 2012 at 252, indicating that this case also looked at a subjective standard in this context; see also Kai Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part*, 2013 at 349; these two books have been cited with approval by the Appeals Chamber of the International Criminal Court with respect to the area of extended liability in Judgment, *Lubanga* (ICC-01/04-01/06 A5) Appeals Chamber, 1 December 2014, at paragraphs 462 (footnote 861/862), 465 (footnotes 866/867) and 469 (footnote 874), so it can be expected that they would have similar weight with respect to defences.

⁹⁵ Kai Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part*, 2013 at 349; see also Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Second Edition, 2012 at 251. This principle has been more recently expressed as follows by the Extraordinary Chamber in the Courts of Cambodia in Judgment, *Kaing Guek Eav alias Duch* (Case File 001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010 at paragraph 557: “duress cannot however be invoked when the perceived threat results from the implementation of a policy of terror in which he himself has willingly and actively participated”.

⁹⁶ Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Second Edition, 2012, page 251; according to this author this element is different than being the result of his own initiative but is captured by the wording in *Ramirez* of “consistent with the will of the person”.

- duress is not applicable in situations of mass killing.⁹⁷

As indicated above, in *Ongwen* the Pre-Trial Chamber, repeats the elements of the defence of duress as set out in the *Rome Statute*, article 31.1(d)⁹⁸ and is of the view that these elements are not made out by Mr. Ongwen without giving a further elaboration on those elements⁹⁹ (apart from indicating that they are equally applicable in situations of direct and indirect participation).¹⁰⁰

As a result, there is no further judicial clarification as to these elements but there is some academic discussion, which could be helpful as it reflects on the negotiations in 1998 in Rome, which resulted in this article. The following observations have been made:

- re imminent or continuing threat: since the word imminent is also used in article 31.1(c)¹⁰¹ related to self-defence, imminent should be read broader in the defence of duress than with respect to self-defence with as result that future threats are included in the duress defence as long they are not too far in the future;¹⁰²

⁹⁷ Idem at 252; see also Kai Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part*, 2013 (hereafter Ambos), page 349.

⁹⁸ Decision on the confirmation of charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15), Pre-Trial Chamber II, 23 March 2016, paragraph 152.

⁹⁹ Idem, paragraphs 153-156.

¹⁰⁰ Idem, paragraph 155.

¹⁰¹ This article reads as follows: "The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph."

¹⁰² Ambos, page 358; see also Robert Cryer, Hakan Friman, Darryl Robinson and Elisabeth Wilmhurst, *An Introduction to International Criminal Law and Procedure*, 3rd Edition, 2014 (hereafter Cryer), page 408 (three of these four authors were members of their national negotiating teams at the Rome conference in 1998); see also Jennifer Bond, *Duress in Canadian Refugee Law*, page 35 where she points in footnote 139 to the difference between imminent and immediate while at 38 and 40 she suggests a possible reconciliation of these requirements between Canadian and international criminal law. With respect to the latter point, it is interesting to note that the *Ryan* case never uses the term "imminent" in the context of the defence of duress but states that the concept of close temporal connection was used to replace the element of immediate threat against a person present in the statutory text in order to allow for future threats and threats from third parties (see paragraphs 41 and 58); the word "imminent" is only utilized in connection to the defence of necessity; however, the court introduces some confusion by referring to both "immediate" and "imminent" when discussing this defence (paragraphs 58 and 74) and giving rise to a possible argument that these two concepts are the same, which cannot be the case based on a purely textual analysis (although earlier jurisprudence of the Supreme Court with respect to the parameters of this defence are not particularly helpful either by saying, "the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril" in *Perka* at 259 or "there must be an urgent situation of 'clear and imminent peril'". In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur" in *Latimer* (*R. v. Latimer*, 2001 SCC 1), at paragraph 29.

- re imminent or continuing threat: there is no requirement that there is any particular relationship between the person threatened and the actor;¹⁰³
- beyond the person's control means that the defence is excluded where the person had joined a group notorious for its criminality;¹⁰⁴
- the term 'provided that' in article 31.1(d) incorporates a subjective standard.¹⁰⁵

Based on the above observations, the table below has set out the various requirements for the defence of duress as set out by the three judicial institutions, taking again the *Ryan* case as the starting point and changing its six requirements to seven by including the *mens rea* element (which is part of three requirements in *Ryan*, namely, the second, third and fifth below) as a separate heading. As well, with respect to the requirement of proportionality only the fact that this is an essential element is noted but not the possible contents of this requirement in the context of complicity.

TABLE 3: COMPARISON OF THE DURESS TESTS IN *RAMIREZ*, *RYAN* AND *ONGWEN*

	Ramirez (FCA)	Ryan (SCC)	Ongwen (ICC PTC)
an explicit or implicit threat of death or bodily harm against the accused or a third person	√	√	√
the accused reasonably believed that the threat would be carried out	√	√	√
the non-existence of a safe avenue of escape	√*	√	√*
a close temporal connection between the threat and the harm threatened	√*	√	√*
proportionality between the harm threatened and the harm inflicted by the accused	√	√	√
the accused is not a party to a conspiracy or association	√	√	√
<i>mens rea</i> of modified objective standard namely of a reasonable person similarly situated	√	√	√*

¹⁰³ Cryer, page 408; Ambos, page 357.

¹⁰⁴ Cryer, page 408; Ambos, page 357 (on page 358 he indicates that the delegates at the Rome Conference could not agree on a definition of this principle and left this to the court to determine; along the similar lines, see Bond, *Duress in Canadian Refugee Law*, page 23, footnote 98.

¹⁰⁵ Ambos, 360; for a slightly different view, see Bond, *Duress in Canadian Refugee Law*, pages 23 and 44-45.

From the above chart it can be seen that of the seven elements enunciated by *Ryan* there is little doubt that five of these requirements are also part of the international law *Ramirez* is referring to while the same can be said for four of these requirements in connection to the *Ongwen* case.

In regards to the three aspects about (indicated with an asterisk) which some doubt could be expressed, some clarification is useful:

- the element of non-existence of a safe avenue of escape is only mentioned specifically by *Ryan* but the international jurisprudence and background materials refers to this notion in an implicit manner by talking in general about not having a moral choice;¹⁰⁶

- with respect to the *mens rea* element, it is likely that a subjective part was included in the post-WW II jurisprudence and reflected in the *ILC* report; it is less clear in relation to the ICC Statute but the view of authors varies from stating that this type of *mens rea* is included to saying it should be included and as such it can at least be argued that subjectivity is part of the *mens rea* element;

- the issue of temporal connection is likely the subject of the most variation between the *Ryan* case, on one hand, and the *Ramirez* and *Ongwen* cases, on the other; while it could be argued that the term imminent is different from the notion of immediate and while both the law, to which *Ongwen* refers also includes continuing and future threats in addition to imminent ones, the fact remains that the underlying materials in *Ramirez* only refer to imminent and that the argument to mitigate the text of the Rome Statute is more of a suggestion based on common law jurisprudence than a firm direction in which the ICC might go.

One last aspect of clarification in respect to the *Ramirez* case is necessary, namely, how to approach the fact that the law as stated by the Federal Court of Appeal in that case was an imperfect reflection of international law at the time. One approach would be to take the test as is (as has been done in the past by the Federal Court) while the other approach would be that the two additional elements, which were part of international law but not referred to by the Federal Court of Appeal, should be read in. At a minimum, it needs to be

¹⁰⁶ The requirement of depriving the person of the freedom to choose the right and refrain from the wrong in *Ramirez* or as explained in Ambos, page 358 in the ICC context; this is also the underlying rationale in *Ryan* (at paragraphs 47-48).

recognized that international law had a particular content at that time whether or not the Federal Court of Appeal accurately reflected the state of that law or not.

Based on the above it would appear that the differences between the three tests are not as pronounced as originally thought but that at this point in time it is reasonably clear that one difference remains, how close of a temporal connection is required. The *Ryan* test is slightly narrower in the sense that it is easier to meet for the person raising the defence. To this can be added the fact that one of the arguments used by Ongwen's lawyers that his upbringing in a brutal atmosphere should have an impact on the defence of duress we rejected out of hand, confirming the strict approach taken at the international level in respect to duress at the moment.¹⁰⁷

As a result of the above, a decision maker charged with making a redetermination in the *Al Khayyat* case or any other case involving duress, should be careful in taking the comment made by the judge in that case at face value and examine both Canadian and international criminal law more carefully than was done originally. It might very well be the case that the *Ryan* approach is the preferable one.

However, having said so, the *Ryan* approach, while the most advantageous for a person raising the defence of duress, is unlikely at the moment to benefit a person in an *Al Khayyat* situation. But this does not mean that such a person is necessarily without recourse within the *Ezokola* framework. Rather than trying to fit a situation of approaching duress within the existing parameters of the defence, it would be possible to use an approach where the level of voluntariness is balanced against the other factors, especially the level of contribution; as indicated earlier this is the approach taken in 1F(b) exclusion¹⁰⁸ and there should be no reason why this cannot be extended to 1F(a), especially since virtually all situations falling within 1F(a) represent a lesser form of culpability than 1F(b) as they do not involved direct involvement but rather complicity.

¹⁰⁷ *Ongwen*, paragraph 150; this argument has also been made in academic circles, see for instance: Nadia Grant, 'Duress as a Defence for a Former Child Soldier; Dominic Ongwen and the International Criminal Court', International Crime Database (ICD) Brief 21, December 2016; Mark A. Drumbl, 'A former child soldier prosecuted at the International Criminal Court', Oxford University Press Blog, 26 September 2016.

¹⁰⁸ *Jayasekara*, paragraph 45.

CONCLUSION

The two recent decisions of the Supreme Court in *Ezokola* and *Febles* have, as expected, influenced the subsequent jurisprudence by exclusion and immigration decision makers, as reflected in the jurisprudence of the Federal Court between 2014 and 2017.

The level of influence has been different in that the *Febles* judgment has had a greater impact than the *Ezokola* case in that over half of the decisions in 1F(b) were overturned by the Federal Court compared to just over one third of the 1F(a) area.

When analyzing the subsequent 1F(b) case law it is surprising to see that the reasons why the Supreme Court in *Febles* had agreed to hear the case, the effect of expiation on the commission of a serious crime, was only addressed twice in the case law in 2015 and 2016 and, in both instances, the decision of the RPD were upheld on that point. The majority of the cases were overturned on an issue, which was only addressed by the Supreme Court in one paragraph, in which it agreed with the approach taken by the Federal Court of Appeal several years earlier, how to determine whether 1F(b) crime is serious by looking at both aggravating and mitigating circumstances related to the person concerned. The Supreme Court added a clarification to one of the aggravating circumstances, a sentence, which can be imposed in Canada for the crime in question, if the sentencing range is a broad one. This new factor wreaked some havoc with the RPD decision makers as they needed most of 2015 to incorporate this, as it turns out, novel approach but by 2016 they had made adjustments in their reasoning, resulting for the most part positive outcomes at the Federal Court.

In contrast, decisions makers in the 1F(a) area (which span a larger spectrum than the four divisions of the IRB and includes immigration decision makers in the visa, PRRA and H&C processes) saw most of their decisions upheld by the Federal Court. This is most likely as a result of the fact that the Supreme Court in *Ezokola* did not make an unexpected change as was done in *Febles*, but, instead adopted a more incremental approach, which not only borrowed from earlier jurisprudence at the Federal Court level but also kept intact most of these earlier approaches and only smoothed out the more rough edges in the area of complicity. While membership in a brutal, limited purpose organization was abandoned and more focus was placed on the nexus between the person concerned and the organization involved in international crimes, other parts of

previous jurisprudence remained the same, such as the ability to utilize the other factors as well as other forms of liability, like aiding and abetting. The *Ezokola* judgment made it clear that decision makers have now access to a complicity ‘tool kit’ to rely on three different types of analysis for complicity, which can be used independently or in conjunction with each other. These categories of analysis are the overarching approach of searching for a knowing, voluntary and significant contribution or an approach utilizing six different factors or using another form of prohibited involvement. This makes it possible for the decision makers to analyse a fact pattern in front of them and determine, which of these approaches works the best in that particular situation.

Incidentally, while it might look like the impact of *Ezokola* was slight but that of *Febles* more drastic, this is nothing compared with what happened after the Supreme Court issued its decision in *Pushpanathan* in regards to exclusion under 1F(c). While this exclusion ground was used fairly regularly before 1998,¹⁰⁹ this came to an almost complete stop as a result of the decision of the Supreme Court in *Pushpanathan* in that year. Since that judgment 1F(c) has been used only in Quebec, mostly in conjunction with 1F(a) to exclude persons involved in crimes against humanity while, as a separate heading, even more sparingly in relation to allegations of terrorism or human rights violations. At the Federal Court of Appeal level, 1F(c) issues have been addressed on two occasions but both in combination with another exclusion ground, either 1F(a)¹¹⁰ or 1F(b).¹¹¹ The Federal Court has used 1F(c) by itself only a few times, five times since 1998¹¹² while another four times together with 1F(a).¹¹³

Lastly, while the parameters of complicity for 1F(a) and expiation and serious crimes for 1F(b), as set out by Supreme Court have been largely implemented by the refugee and inadmissibility decision makers, the debate in respect to the issue of voluntariness and defences is only beginning. This debate in regards to the most utilized defence, duress, is twofold, specifically, which test for duress to apply and what the contents of that test should be. Regarding the test to be applied, three approaches have been utilized, the *Ramirez* test,

¹⁰⁹ See Rikhof, *The Criminal Refugee*, pages 353-355.

¹¹⁰ *Harb v. Canada*, 2003 FCA 39.

¹¹¹ *Zrig v. Canada*, 2003 FCA 178.

¹¹² *Szekely v. Canada*, IMM-6032-98; *El Hayek v. Canada*, 2005 FC 835; *Chowdhury v. Canada*, 2006 FC 139; *Islam v. Canada*, 2010 FC 71; *Alam v. Canada*, 2014 FC 556.

¹¹³ *Pushpanathan v. Canada*, 2002 FCT 867; *Canada v. Maan*, 2005 FC 1682; *Cadet v. Canada*, 2009 FC 723; *Valet v. Canada*, IMM-10707-12.

which found its origin in post-WWII international criminal law; the *Ryan* test with its origin in Canadian criminal law; and the test set out in the Rome Statute, as exemplified by the *Ongwen* case, which presents an updated approach in international criminal law.

From an efficiency and transparency perspective, one test, which would be applied across all exclusion and inadmissibility provisions, would be preferable and it would appear that most recently the *Ryan* test is becoming the best candidate for that purpose. This is also reinforced by the contents perspective, as the three tests are not that far apart in their requirements but where the *Ryan* case provides the most opportunity for persons raising this defence.

The final issue in respect to duress is how a widening of this defence is legally possible and desirable in a situation of near duress, for which the most recent case in exclusion and admissibility, *Al Khayyat*, provides a very good example. At the moment, it is debatable whether the law of duress, as it now stands in Canadian and international law, would allow such a situation to be included within its parameters. However, given the fact that both *Ezokola* and *Febles*, within its factor approach, allow a balancing of these factors, a near duress situation can be addressed, not as an absolute defence, but as a methodology to provide a relief for persons who have found themselves in this all too common predicament.