The Defence of Duress in Canadian Refugee Law

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The majority of refugees come from destabilized states and conflict zones where threats and fear are endemic, and immediate escape is not always possible. These environments may necessitate that a person commit crimes to prevent harm to themselves or third parties before they cross borders and seek international protection. Under Canada's current refugee regime, such persons may be prevented from accessing refugee protection and status on the basis of criminality. Doctrinal complexities concerning available defences and procedural incoherencies complicate Canada's refugee decision making and have the potential to perpetuate grave injustices against refugee claimants.

The author argues that defences should be available in any refugee case where status is denied on the basis of criminality, and emphasizes the unique and enhanced role that defences should play in this context. Further, that current confusion about when and how defences ought to be applied by decision makers in Canada's refugee system must be resolved such that all exculpatory factors are fully and properly considered where criminality is alleged. Uncertainty over relevant sources of law underpins significant inconsistency in decision making and is problematic given important substantive differences between domestic and international criminal law. The article discusses the implications for the defence of duress in particular, given its relevance to many refugee claimants. The author identifies sources of law that must be considered by decision makers in refugee inadmissibility and exclusion cases, and specifies three aspects of the defence of duress that are critical in this context: temporal connection, implied threats and the modified objective standard.

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Introduction

There are nearly sixty million people who have been forcibly displaced as a result of war, persecution, generalized violence or other human rights violations in their home country.[1] The majority of these individuals come from weak, failed or fragile states, conflict zones or dictatorial regimes where both a proliferation of violence and governments who are unable or unwilling to offer protection to their own citizens are common.[2] Threats, fear and desperation are frequently endemic in these environments and immediate escape is not always possible. Sometimes the chaos and danger

1. See UNHCR, *UNHCR Global Trends 2014: World at War* (Geneva: UNHCR, 2014), online: <www.unhcr.org/556725e69.html> [UNHCR, *Global Trends 2014*].

2. Four of the top five refugee-producing countries in 2013 were also in the top seven list of fragile states: Afghanistan, Somalia, Sudan and the Democratic Republic of the Congo. See Nate Hacken et al, "Failed States Index 2013" (Washington: Fund for Peace, 2013), online: <library.fundforpeace.org/library/cfsir1306-failedstatesindex2013-06l.pdf>; UNHCR, *Global Trends 2014*, *supra* note 1 at 6. See also Stewart Patrick, "The Brutal Truth: Failed States are Mainly a Threat to their Own Inhabitants. We Should Help Them Anyway", *Foreign Policy* (20 June 2011), online: <www.foreignpolicy.com>; Stewart Patrick, "Weak States and Global Threats: Assessing Evidence of Spillovers" (January 2006) Centre for Global Development Working Paper No 73 at 9, online: <www.cgdev.org/publication/weak-states-and-global-threats-assessing-evidence-spillovers-working-paper-73>.

leads desperate people to do unthinkable things in their quest for survival. Denying refugee protection to these individuals is legally and morally complex, and it must be done on a basis that is principled and doctrinally sound.

In this article, I argue that the full circumstances surrounding alleged criminal acts must be considered before an asylum seeker is barred from refugee protection on the basis of criminality. In Canada, this requires that current confusion about when and how defences ought to be considered by decision makers in the refugee context be resolved such that potentially exculpatory factors are fully and properly considered in every case where criminality is alleged. Confusion over relevant sources of law is particularly troubling given critical differences between domestic and international law in this area, and a consistent, principled approach must be developed. Further, while inconsistencies permeate cases involving all types of defences, doctrinal uncertainty surrounding the defence of duress requires focused consideration. This is by far the most commonly claimed defence in the refugee context and it is critical that its contours be properly understood and applied.

My analysis proceeds in three parts. Part I provides an overview of the primary legal mechanisms Canada uses for denying refugee status on the basis of alleged criminal conduct. Part II argues that defences must be fully considered in any refugee case where protection is unavailable on the basis of criminality and emphasizes the unique and enhanced role that defences play in the refugee context. This Part also notes current confusion regarding defences amongst decision makers in the refugee system and discusses the implications for the defence of duress in particular. Finally, Part III identifies the doctrinal sources that need to be considered by refugee decision makers dealing with potential defences, and argues for an approach that ensures consistency with the remainder of the criminality assessment decision while also accomodating international treaty obligations and constitutional considerations. This Part concludes by discussing three specific aspects of the defence that are particularly important in the refugee context: temporal connection, implied threats and the modified objective standard.

I. Mechanisms for Denying Refugee Protection on the Basis of Alleged Criminality

An individual seeking refugee status in Canada may be denied protection on the basis of alleged criminality through one of two distinct processes: (1) it may be found that she is not entitled to even present her claim for refugee protection as a result of criminal inadmissibility;[3] or (2) the decision maker hearing her refugee claim may find that she is excluded from refugee protection because she is captured by Article 1(F) of the *Convention Relating to the Status of Refugees*[4] (*Refugee Convention*). Both of these mechanisms, and the relationship between them, are explained briefly below.[5]

3. See *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 34–37 [*IRPA*].

4. *Ibid*, s 98, citing *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Refugee Convention*]. The *Refugee Convention* states:

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

Ibid, art 1(F). Unless otherwise specified, the term *Refugee Convention* will be used to refer to the 1951 Convention as modified by the *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) [1967 Protocol], discussed *below*.

5. A refugee who has allegedly committed criminal acts in another country may also be subject to extradition but decisions to extradite are made outside of the immigration and refugee system and are independent of the decision to afford protection. See *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281. Note that this article does not offer any normative commentary on Canada's inadmissibility regime, which may completely deny a claimant access to a refugee status determination hearing in a way that is likely in contravention of Canada's obligations under the *Refugee Convention*, *supra* note 4. This dimension of the relationship between inadmissibility and Article 1(F) is the subject of an article currently under development.

All non-citizens[6] seeking to come to or stay in Canada may be screened to determine whether they are inadmissible on the basis of security concerns, involvement in human or international rights violations, criminality, serious criminality or organized criminality.[7] For the purposes of this article, these are collectively considered grounds for denying protection on the basis of alleged criminality.

Inadmissibility provisions dealing with these criminal allegations can be directly linked to two particular objectives of Canada's immigration and refugee policy: the aim to "protect public health and safety and to maintain the security of Canadian society" and the aim to "promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks".[8] Canada's inadmissibility provisions are routinely applied through visa offices abroad, at the port of entry, or as grounds for removing an individual who is already in the country.[9] In the case of refugee claimants, a finding of criminal inadmissibility results directly in a finding of ineligibility, meaning that the underlying refugee claim will not be assessed by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB).[10] Claimants who have been found to be ineligible may be able to apply for a Pre-Removal Risk Assessment (PRRA) before their removal from Canada, but the PRRA process is significantly truncated in comparison to the refugee determination process. A successful PRRA application would also lead, in most circumstances, to

6. Canada's criminal inadmissibility provisions apply to permanent residents and foreign nationals regardless of the reason for their presence in Canada. These terms are defined in the *IRPA*, *supra* note 3, ss 2, 46. Together, these classes include all non-citizens, including stateless persons. While this article focuses on the need for defences to be considered in the refugee context in particular, I do not mean to suggest that defences should be *unavailable* for other categories of persons to whom criminal inadmissibility applies. In my view, defences should be fully applied in all cases where criminality is being assessed.

7. See *ibid*, ss 34–37.

8. *Ibid*, ss 3(1)(h), 3(2)(i).

9. For a discussion of the procedural details attached to a criminal inadmissibility determination at each of these stages, see Lorne Waldman & Jacqueline Swaisland, *Inadmissible to Canada: The Legal Barriers to Canadian Immigration* (Toronto: LexisNexis Canada, 2012) at 1–8.

10. See *IRPA*, *supra* note 3, s 101(1)(f).

a mere stay of removal rather than the granting of refugee protection as it does in non-criminal cases.[11]

Even when an individual is allowed to present her claim for protection to the RPD, she may still be denied refugee status on the basis of alleged criminality through the second mechanism noted above. Article 1(F) of the *Refugee Convention* denies refugee protection to persons who would otherwise meet the refugee definition, but who may have been involved in serious crimes or other human rights violations and are therefore deemed unworthy of protection. Where "there are serious reasons for considering" that an asylum seeker has committed one of the acts enumerated under Article 1(F), the remainder of the *Refugee Convention* does not apply, and any protections to which the claimant would otherwise be entitled are consequently unavailable.[12] Article 1(F) aims to prevent the international asylum system from being brought into disrepute,[13] and it has been directly incorporated into the Canadian refugee system through section 98 of the *Immigration and Refugee Protection Act* (*IRPA*).[14] The provision is considered by Canada's RPD in every refugee hearing where criminality is alleged and a positive finding results in the claimant being excluded.[15]

In all cases where the IRB believes that criminal inadmissibility or exclusion may apply, the Minister must be notified and given an immediate opportunity to intervene in the claim (in the case of exclusion) or suspend the claim in order to commence inadmissibility proceedings (in the case of criminal inadmissibility).[16] There are serious consequences attached to findings of either criminal inadmissibility or exclusion: In

11. See *ibid*, ss 112(3), 114(1). See also *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 DLR (4th) 675.

12. *Supra* note 4.

13. See Jennifer Bond, "Principled Exclusions: A Revised Approach to Article 1(F)(a) of the Refugee Convention" (2013) 35:1 Mich J Intl L 15 at 17–18; James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge, UK: Cambridge University Press, 2014) at 565–66.

14. *Supra* note 3 ("[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", s 98).

15. The mandatory language in Article 1(F) requires that it be considered and protection denied where one of the criminal elements is listed. The mandatory nature of the provision was deliberate and ensures that the integrity of the system as a whole is not eroded as a result of leniency on the part of a particular state. See Bond, *supra* note 13 at 27–29.

16. *Refugee Protection Division Rules*, SOR/2012-256, s 26.

both cases, refugee protection usually becomes unavailable and a removal order is issued.[17]

It is important to note that Canada's inadmissibility and exclusion provisions deal with many identical forms of criminality, meaning that the same conduct may trigger either legal scheme. The similarities between the conduct captured by these two mechanisms become particularly evident when the broader inadmissibility provisions are mapped onto Article 1(F) of the *Refugee Convention*:

- Article 1(F)(a) excludes on the basis of involvement in crimes against peace, war crimes or crimes against humanity. Likewise, the inadmissibility scheme deals with involvement in offences listed in Canada's *Crimes Against Humanity and War Crimes Act* (*CAHWCA*), which in turn prohibits crimes against humanity and war crimes, amongst others.[18]
- Article 1(F)(b) excludes on the basis of involvement in serious non-political crimes outside the country of refuge. Likewise, the inadmissibility scheme deals with involvement in serious criminality either in Canada or in another country before arrival.[19]
- Article 1(F)(c) excludes on the basis of involvement in acts contrary to the purposes and principles of the United Nations. While the *IRPA* does not adopt this particular language, it does include inadmissibility provisions that deal with terrorism offences and subversion of a government by force, both of which may, in certain circumstances, be subsumed under Article 1(F)(c).[20]

Both international and Canadian criminal law feature prominently in both inadmissibility and exclusion regimes. For example, sections 36 and 37(1)(a) of the *IRPA*, which are concerned with serious and organized criminality, define the relevant acts according to whether they are an offence—or would be an offence if committed in Canada—"under

17 See *IRPA*, *supra* note 3, ss 44(2), 45(d).

18. *Ibid*, s 35. See also *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [*CAHWCA*].

19. *IRPA*, *supra* note 3, s 36.

20. *Ibid*, s 34. The United Kingdom Supreme Court gave particular consideration to Article 1(F)(c) in *Al-Sirri v Secretary of State for the Home Department; DD v Secretary of State*

an Act of Parliament".[21] As a result, Canadian criminal law underpins this determination. Similarly, the Supreme Court of Canada recently confirmed that an exclusion assessment for "serious non-political crimes" under Article 1(F)(b) of the *Refugee Convention* should define seriousness through direct reference to Canadian criminal law.[22]

The inadmissibility and exclusion schemes also rely directly on international criminal law. For example, the text of Article 1(F)(a) of the *Refugee Convention* mandates specifically that the crimes with which it is concerned are to be defined according to "international instruments".[23] Meanwhile, section 35 of the *IRPA* deals with the commission of crimes

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for the Home Department, [2012] UKSC 54 [*Al-Sirri*]. The Court endorsed the UNHCR's *Guidelines on Exclusion*:

> Article 1(F)(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.

Ibid at para 38, citing UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses, Article 1(F) of the 1951 Convention relating to the Status of Refugees*, UN Doc HCR/GIP/03/05, 4 September 2003 at para 17, online: UNHCR <www.unhcr.org/refworld/docid/3f5857684.html> [UNHCR, *Guidelines on Exclusion*]. The Court went on to hold that "inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to by the UNHCR". *Al-Sirri*, *supra* at para 39.

21. *IRPA*, *supra* note 3, ss 36, 37(1)(a).

22. *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 62, [2014] 3 SCR 431 [*Febles*]. It is beyond the scope of this article to assess the appropriateness of using domestic law to interpret an international convention, but I do note that this practice risks creating radically different approaches to Article 1(F) across jurisdictions. For the purposes of this article, I simply note that decision makers in Canada's refugee system who are applying *Febles* are required to use Canadian criminal law to determine whether the requisite degree of "seriousness" has been met.

23. *Refugee Convention*, *supra* note 4, art 1(F)(a). The 1967 Protocol removed temporal and geographical restrictions limiting the *Refugee Convention*'s applicability to the aftermath of World War II. Article 1(F)(a) of the *Refugee Convention* states:

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

contained in the *CAHWCA*,[24] a statute which defines the relevant criminal conduct "according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations".[25] More details on the complexities caused by the relationship amongst different sources of law are provided in Parts II and III, below.

The overlapping nature of the inadmissibility and exclusion provisions and the opaque relationship between refugee law and two different bodies of criminal law make this area doctrinally complex. Justice demands, however, that this complexity does not impede full and proper consideration of all relevant factors as part of the decision-making process. As will be discussed in Part II, defences must form an integral part of this analysis whenever criminality is alleged.

II. The Importance of Defences

The SCC has recently and explicitly recognized the need to consider defences, including duress, in the context of refugee exclusion cases.[26] The Court in *Ezokola v Canada (Citizenship and Immigration)* emphasized that Article 1(F)(a) will only apply to individuals whose conduct is voluntary and held that "[t]he voluntariness requirement captures the defence of duress which is well recognized in customary international criminal law,

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Ibid. See also *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at paras 42, 44, 46, [2013] 2 SCR 678 [*Ezokola*].

24. *IRPA*, *supra* note 3, s 35(1):

> A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for
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> (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*;
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> (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*.

See generally *CAHWCA*, *supra* note 18.

25. *Ibid*, ss 4(3).

26. See *Ezokola*, *supra* note 23 at para 100.

as well as in art. 31(1)(d) of the *Rome Statute*".[27] The Court also noted the applicability of the defence of duress when assessing a refugee claimant's membership in a criminal organization, stating:

> This requirement may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization. Similarly, an individual's involvement with an organization may not be voluntary if he or she did not have the opportunity to leave, especially after acquiring knowledge of its crime or criminal purpose.
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> . . .
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> A full contextual analysis would necessarily include any viable defences, including, but certainly not limited to, the defence of duress.[28]

Although the Court in *Ezokola* was considering only one specific aspect of the exclusion provision—Article 1(F)(a)—its conclusion that a full contextual analysis must underlie a finding of criminality is broadly applicable. In particular, the findings in *Ezokola* reinforce the fact that defences must be considered in every refugee case involving alleged criminality because doing so is required by core principles of justice, including the principle of voluntariness. Thus, since criminal law only establishes guilt when a prosecutor has proven both the mental and physical elements of the crime *and* an absence of defences,[29] all of these elements must also be considered in the refugee context—it is arbitrary and unjust for refugee law to rely on criminal concepts while ignoring certain aspects of the doctrine and key underlying principles, including the need for autonomous will.[30] A full consideration of defences is the only way to ensure that both inculpatory and exculpatory factors are properly considered, and as Hathaway and Foster argue, an individual has not actually *committed* a crime for the purposes of refugee law if a criminal law defence negates individual responsibility.[31]

27. *Ibid* at para 86 [citation omitted].

28. *Ibid* at paras 99–100.

29. See generally Kent Roach, *Criminal Law*, 6th ed (Toronto: Irwin Law, 2015); Antonio Cassese et al, eds, *Cassese's International Criminal Law*, 3rd ed (Oxford: Oxford University Press, 2013).

30. Expert commentators agree that defences need to be considered. See e.g. Hathaway & Foster, *supra* note 13 at 536–37.

31. See also *ibid* at 552–53.

In the Canadian context, the *Canadian Charter of Rights Freedoms*[32] is also relevant. Although the SCC has held that "[e]ven before the advent of the *Charter*, it [was] a basic concern of the criminal law that criminal responsibility be ascribed only to acts that resulted from the choice of a conscious mind and an autonomous will",[33] the *Charter* now specifically requires that defences be considered where individual responsibility for criminal conduct is being determined. In *R v Ruzic*, the Court held that "[i]t is a principle of fundamental justice that only voluntary conduct—behaviour that is the product of a free will and controlled body, unhindered by external constraints—should attract the penalty and stigma of criminal liability."[34] This same principle of fundamental justice must apply whenever an interest protected by section 7 of the *Charter* is engaged by a finding of criminality,[35] and it is therefore also applicable to exclusion and inadmissibility cases which, in my view, engage section 7 by virtue of being steps in a process that "may lead to removal . . . to a place where his life or freedom are threatened".[36] Although further administrative steps precede actual removal from Canada, criminal inadmissibility and exclusion findings—and their resulting deportation orders—carry the

32. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

33. *R v Ruzic*, 2001 SCC 24 at para 34, [2001] 1 SCR 687.

34. *Ibid* at para 47, aff'd in *R v Ryan*, 2013 SCC 3 at para 23, [2013] 1 SCR 14.

35. See *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 18, [2007] 1 SCR 350.

36. *Ibid* at paras 14. There have been a number of Federal Court cases finding that exclusion and criminal inadmissibility cases do not engage section 7 because they do not directly result in deportation, which occurs only after other administrative steps, including a PRRA. See e.g. *Barrera v Canada (Minister of Employment and Immigration)*, [1993] 2 FCR 3, 99 DLR (4th) 264 (CA); *Jekula v Canada (Minister of Citizenship and Immigration)* (2000), 193 FTR 111, [2001] 266 NR 355 (CA); *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 FCR 487 [*Poshteh*]; *JP v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 262, [2014] 4 FCR 371 [*JP*]. In my view, these cases are clearly wrong in law. In particular, they are inconsistent with the recent Supreme Court ruling in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 75–76, [2013] 3 SCR 1101 [*Bedford*]. This case established that a "sufficient causal connection" must exist between a state action and a deprivation of section 7 rights, a test that "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities". *Ibid* at para 76 [citation omitted]. A criminal inadmissibility finding, which automatically results in a deportation order and

required "sufficient causal connection" removal to engage section 7.[37] As a result, full and proper consideration of defences is required to ensure constitutional compliance.

It is also significant that key structural and remedial differences between criminal law and refugee law mean that defences play a unique and enhanced role in the latter context.[38] Specifically, a lack of prosecutorial discretion in the context of refugee exclusion cases means that compelling circumstances that may protect against the initiation of a criminal proceeding can provide no relief from scrutiny in this context.[39] This is because while both domestic and international prosecutors have a broad power to determine "whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for",[40] refugee decision makers considering Article 1(F) are required by virtue of the mandatory language in that section to deny protection to every individual who is in violation of the provision: Unlike criminal prosecutors, they have no discretion to consider compelling circumstances outside of the frameworks provided by *actus reus*, *mens rea* and defences.[41]

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begins the removal process, meets this test of "sufficient causal connection". Further, a deportation order issued as a consequence of a criminal inadmissibility finding must be carried out "as soon as possible". See *IRPA*, *supra* note 3, s 48(2). The PRRA in many criminal inadmissibility cases may take into account only the risk factors laid out in the *IRPA* (risk to life, risk of torture, and risk of cruel and unusual treatment or punishment) and not the risk of persecution that would be assessed in a refugee claim. *Ibid*, s 97. The insufficiency of pre-deportation safeguards to protect section 7 rights further demonstrates the clear link between the criminal inadmissibility finding and ultimate deportation.

37. See *Bedford*, *supra* note 36 at paras 75–76 (confirming the "sufficient causal connection" test).

38. For a discussion of the implications for exclusion determinations, see Bond, *supra* note 13.

39. The mandatory language of Article 1(F) removes any discretion in exclusion decisions by mandating that all individuals who are in violation of the provision "shall" be denied protection. *Refugee Convention*, *supra* note 4. However, *IRPA*, *supra* note 3, provides ministerial discretion for the application of the criminal inadmissibility provisions, but the discretion is rarely applied. *Ibid*, ss 42.1, 44.

40. See *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 47, [2002] 3 SCR 372 [emphasis in original] (regarding this power in the context of Canadian criminal law). For the analogous powers in international criminal law, see Bond, *supra* note 13.

41. Recall that Article 1(F) stipulates that the Convention "shall not apply" to persons for whom there are "serious reasons for considering" that one of the enumerated crimes was committed. See *Refugee Convention*, *supra* note 4.

Notably, some (but not all) inadmissibility provisions in the *IRPA* are accompanied by a provision that allows the Minister to exercise discretion to effectively override an apparent situation of criminal inadmissibility.[42] However, the Minister is only permitted to take into account "national security and public safety considerations" when exercising this discretion,[43] meaning that specific circumstances relevant to the commission of the underlying offence are unlikely to be considered. In addition, applications for ministerial relief in criminal inadmissibility cases are rarely successful (data produced in one Federal Court case showed that from 2009–2011, a total of three applications for ministerial relief from inadmissibility were granted),[44] demonstrating that this feature of the legislative scheme functions as a remedial provision for extraordinary cases rather than as a mechanism that routinely helps distinguish cases that should be pursued from those that should not. This power is therefore not analogous to the broad discretion available to prosecutors in criminal law. Further, the mandatory nature of Article 1(F) means that even where a claimant benefits from discretion during the inadmissibility process, she will not be granted any relief if the same issues trigger concerns during her refugee status determination hearing. The ultimate result is that many compelling circumstances that may prevent charges from even being laid in the criminal context will, in the refugee context, only ever be considered if there is a proper and full assessment of defences.

42. Sections 42.1(1) and 42.1(2) of the *IRPA*, *supra* note 3, limit the application of ministerial discretion to inadmissibility, as referred to in sections 34 (security grounds), 35(1)(b) (senior official in government engaged in serious international crimes), 35(1)(c) (person whose entry into Canada is restricted because of a decision of an international organization) and 37(1) (organized criminality and transnational crime). Forms of inadmissibility that are not eligible for application of ministerial discretion include sections 35(1)(a) (committing a war crime or crime against humanity) and 36 (criminality and serious criminality). See *ibid*. See also *ibid*, ss 37, 42.

43. See *ibid*, s 42.1(3). In *Agraira v Canada (Public Safety Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, the SCC specifically rejected a finding of the Federal Court of Appeal that the "national interest" should be limited to national security and public safety concerns. However, on June 19, 2013 (one day before the SCC ruling), the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 received assent, which amends the *IRPA* to specifically limit consideration of the "national interest" to national security and public safety concerns. *IRPA*, *supra* note 3, s 42.1(3).

44. See *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319 at para 22, 400 FTR 135.

It is also significant that criminality in the refugee context is established on a lower standard of proof than it is in criminal law, which requires that guilt be established beyond a reasonable doubt.[45] In exclusion cases, the standard of proof is "serious reasons for considering", while for criminal inadmissibility it is "reasonable grounds to believe".[46] In both instances, a claimant can be barred from refugee protection on the basis of far less certainty than is required for a criminal conviction, a feature which once again underscores the importance of properly considering all of the relevant circumstances surrounding the alleged criminality before preventing access to refugee protection on these grounds.

Finally, it is important to note that in criminal law, environmental or coercive factors falling short of a formal defence are frequently considered as mitigating factors during sentencing proceedings. For example, in *Prosecutor v Erdemovic*—the leading case on duress in international criminal law—the International Criminal Tribunal for the Former Yugoslavia found unanimously that where coercion is not available as a complete defence, it will still function as a significant mitigating factor that is applicable even where the most serious crimes have been committed.[47] Likewise, Canadian criminal courts routinely consider threats that are insufficient to ground a full defence on the basis that "the factual existence of a degree of compulsion falling short of duress is material to the

45. This well-established common law standard was recently explained by the SCC in *R v JMH*, 2011 SCC 45 at para 39, [2011] 3 SCR 197. The common law standard of having to prove guilt beyond a reasonable doubt has largely been adopted in international criminal law as well. See e.g. ICTY, *Rules of Procedure and Evidence*, UN Doc IT/32/Rev 50, 8 July 2015, Rule 87(A); ICTR, *Rules of Procedure and Evidence*, UN Doc ITR/3/REV 24, 13 May 2015, Rule 87(A); *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, art 66(3) (entered into force 1 July 2002) [*Rome Statute*]. See also William A Schabas, *An Introduction to the International Criminal Court*, 2nd ed (Cambridge, UK: Cambridge University Press, 2004) at 155.

46. See *IRPA*, *supra* note 3, s 33.

47. IT-96-22-*Tbis*, Sentencing Judgment (5 March 1998) at para 17 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org> [*Erdemovic*]. The accused in *Erdemovic* was found guilty of crimes against humanity due to his involvement in the deaths of dozens of civilians at the massacre in Srebrenica. He received a sentence of five years.

sentencing function".[48] Thus, in both domestic and international criminal law systems the presence of coercion will impact the actual outcome of criminal cases, even where the full defence of duress is not established.

No process equivalent to sentencing exists in refugee inadmissibility or exclusion cases, which are based on strictly binary decision-making models: Under Article 1(F), the claimant is either granted refugee protection or not, while in inadmissibility decisions, the claimant is either granted access to a refugee hearing or not—there is no second stage in the process where coercion may mitigate the consequences of these findings.[49] This critical difference between the systems heightens the importance of fully and properly considering all of the relevant circumstances surrounding the crime during the finding of individual responsibility. A failure to do so means that critical factors may not be considered at all.

As a result of these structural differences between criminal law and refugee law, important circumstances that in the criminal context may lead to: (a) a decision not to initiate a criminal prosecution; (b) a failure to meet the criminal standard of proof; or (c) a mitigated sentence may, in the refugee context, only be considered during the assessment of defences. A full and fair treatment of defences is therefore not only required in principle as part of *any* criminality assessment, but is also particularly critical in the refugee context for ensuring that all relevant factors have formed part of the overall determination of individual responsibility.

A. Confusion Regarding Application of Defences Amongst Decision Makers in the Refugee Context

In practice, defences are rarely raised in refugee criminal inadmissibility and exclusion cases before Canada's federal courts. They are also rarely successful. A review of refugee inadmissibility and exclusion cases before the Federal Court and Federal Court of Appeal from 2004–2014 reveals

48. See *R v Holder*, 21 CR (5th) 277 at para 30, 1998 CanLII 14962 (Ont Sup Ct) (cited with approval in *R v Basit*, 2014 BCSC 868 at para 31, [2014] BCWLD 4645). See also *R v Johnstone*, 2014 ABQB 647 at para 41, Alta LR (6th) 246; *R v Valentini* (1999), 43 OR (3d) 178 at para 107, 132 CCC (3d) 262 (CA); *R v Campbell*, 2010 ONSC 6973 at para 32, 91 WCB (2d) 736.

49. Although ministerial discretion in inadmissibility proceedings allows for the consideration of a range of circumstances, it does not allow for the application of a range of outcomes.

only twenty-three cases where defences were raised.[50] Of these, only one case referred to a defence that was successfully argued before the IRB and upheld by the Federal Court.[51] In an additional four cases, the Federal Court found that the original decision maker had failed to properly consider a potentially relevant defence or had erred in not recognizing a defence, and the cases were sent back for reconsideration on that issue.[52] In the remaining eighteen cases (seventy-eight percent), recourse to a defence was denied.

Duress was claimed in twenty out of the twenty-three cases where defences were raised (with some cases raising multiple defences). Out of the twenty duress claims, fourteen were rejected (seventy percent),[53] and four cases were sent back to the IRB for reconsideration due to

50. The review of refugee cases where defences were raised took place within the following parameters and methodological limitations: (1) only cases before the Federal Court and Federal Court of Appeal are reflected (claims before the Immigration and Refugee Board are not reflected); (2) only cases from 2004–2014 are reflected; and (3) only cases where defences were raised in criminal inadmissibility and exclusion cases are reflected.

51. See *Canada (Citizenship and Immigration) v Maan*, 2007 FC 583, [2007] FCJ No 790 (QL) [*Maan*].

52. *B006 v Canada (Citizenship and Immigration)*, 2013 FC 1033, 440 FTR 185 [*B006*]; *Ghaffari v Canada (Citizenship and Immigration)*, 2013 FC 674, 434 FTR 274 [*Ghaffari*]; *Guerra Diaz v Canada (Citizenship and Immigration)*, 2013 FC 88, 424 FTR 262 [*Diaz*]; *Lopez Gayton v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1075, [2012] FCJ No 1194 (QL) [*Gayton*]. This review also located several situations where duress could ostensibly have been argued based on the facts, but did not appear to have been raised. See e.g. *Thurairajah v Canada (Citzenship and Immigration)*, 2011 FC 891, [2011] FCJ No 1098 (QL) (in which an asylum seeker from Sri Lanka claimed that he had repeatedly refused to join the Liberation Tigers of Tamil Eelam until members of the group took him to their camp, beat him and threatened him with death). Notably, Joseph Rikhof's comprehensive review of exclusion decisions in nine jurisdictions revealed only six cases where a claim of duress was successful. See Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Dordrecht, Neth: Republic of Letters, 2012) at 278–87.

53. See *Betoukoumesou v Canada (Citizenship and Immigration)*, 2014 FC 591, [2014] FCJ No 645 (QL) [*Betoukoumesou*]; *Arokkiyanathan v Canada (Citizenship and Immigration)*, 2014 FC 289, [2014] FCJ No 305 (QL) [*Arokkiyanathan*]; *JP*, *supra* note 36; *TK v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 327, [2013] FCJ No 357 (QL) [*TK*]; *Jimenez v Canada (Citizenship and Immigration)*, 2012 FC 1231, [2012] FCJ No 1308 (QL) [*Jimenez*]; *Jalloh v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 317, [2012]

inadequate assessment of duress (twenty percent).[54] One successful claim was confirmed (five percent),[55] and one case was sent back to the IRB for reconsideration for unrelated reasons without consideration of the duress issue (five percent).[56] The primary reason for rejecting the defence of duress across these cases was a lack of clear or imminent danger.[57] Other less frequently cited reasons for rejecting the defence include the availability of a safe avenue of escape (such that the actor was not truly compelled to commit the criminal conduct)[58] and disproportionality between the harm caused and the harm avoided.[59]

Other defences that have been raised in the refugee context include superior orders (raised in four cases),[60] necessity (raised in three cases)[61] and protecting a child from imminent harm (raised in two cases).[62] No claims of superior orders, necessity or protecting a child were successful, nor were any sent back to the IRB for reconsideration.

There are currently substantial divergences in the jurisprudence regarding doctrinal approaches to defences for refugees in the context of exclusion and criminal inadmissibility. The leading authorities are the 1992

FCJ No 350 (QL) [*Jalloh*]; *Belalcazar v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1013, [2011] FCJ No 1332 (QL) [*Belalcazar*]; *Thiyagarajah v Canada (Citizenship and Immigration)*, 2011 FC 339, [2011] FCJ No 450 (QL) [*Thiyagarajah*]; *Rutayisire v Canada (Citizenship and Immigration)*, 2010 FC 1168, 379 FTR 44; *Valle Lopes v Canada (Citizenship and Immigration)*, 2010 FC 403, 367 FTR 41 [*Valle Lopes*]; *Mutumba v Canada (Citizenship and Immigration)*, 2009 FC 19, [2009] FCJ No 5 (QL) [*Mutumba*]; *Varela v Canada (Minister of Citizenship and Immigration)*, 2008 FC 436, [2009] 1 FCR 605 [*Varela*]; *Arica v Canada (Solicitor General)*, 2005 FC 907, 276 FTR 124 [*Arica*]; *Canada (Citizenship and Immigration) v El Chayeb*, 2005 FC 334, 293 FTR 315.

54. *B006*, *supra* note 52; *Ghaffari*, *supra* note 52; *Diaz*, *supra* note 52; *Gayton*, *supra* note 52.

55. *Maan*, *supra* note 51.

56. See *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146, 442 FTR 250 [*B074*].

57. See e.g. *Valle Lopes*, *supra* note 53; *Thiyagarajah*, *supra* note 53; *Arica*, *supra* note 53; *Varela*, *supra* note 53; *JP*, *supra* note 36; *Belalcazar*, *supra* note 53; *Arokkiyanathan*, *supra* note 53; *Jimenez*, *supra* note 53; *Mutumba*, *supra* note 53.

58. See *Valle Lopes*, *supra* note 53 at paras 107–08.

59. See *Arica*, *supra* note 53; *Varela*, *supra* note 53.

60. See e.g. *Betoukoumesou*, *supra* note 53; *Varela*, *supra* note 53; *Loayza v Canada (Minister of Citizenship and Immigration)*, 2006 FC 304, 288 FTR 250; *Arica*, *supra* note 53.

61. See *Arokkiyanathan*, *supra* note 53; *JP*, *supra* note 36; *B006*, *supra* note 52.

62. *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1473, [2006] 2 FCR 455; *Montoya v Canada (Citizenship and Immigration)*, 2005 FC 1674, 294 FTR 41.

Ramirez v Canada (Minister of Employment and Immigration)[63] case and, to a lesser extent, the 1994 *Equizabal v Canada (Minister of Employment and Immigration)*[64] case. In *Ramirez*, the Federal Court of Appeal relied heavily on academic sources interpreting international criminal law to define the doctrinal contours of the defence of duress,[65] while in *Equizabal* it relied on a combination of academic sources and the SCC's decision in *R v Finta* to define superior orders. *Finta* is a non-refugee case involving an alleged war criminal.[66] There, the SCC relied on a variety of sources to define the defence, including academic analysis, rulings from foreign jurisdictions, and the *Charter of the International Military Tribunal*.[67]

Many subsequent cases that have addressed the defence of duress in the refugee context have relied exclusively on *Ramirez* for the relevant doctrine.[68] Others have cited *Ramirez* in combination with other refugee law precedents,[69] in combination with the *Rome Statute of the International Criminal Court* (*Rome Statute*),[70] or in combination with other refugee cases and the *Rome Statute*.[71] A small number of cases defined the defence without citing *Ramirez* at all.[72]

Since 2012, an increasing number of Federal Court cases have also relied on Canadian criminal law precedents to determine the doctrinal approach to duress and necessity in the refugee context. Canadian

63. [1992] 2 FCR 306, 89 DLR (4th) 173 (CA) [*Ramirez* cited to FCR].

64. [1994] 3 FCR 514, 1994 CanLII 3498 (CA) [*Equizabal* cited to FCR].

65. *Ramirez*, *supra* note 63 at 327–28.

66. [1994] 1 SCR 701, 112 DLR (4th) 513 [cited to SCR].

67. *Ibid* at 828–39.

68. See e.g. *Varela*, *supra* note 53 at para 35; *Arica*, *supra* note 53 at para 24; *Canada (Minister of Citizenship and Immigration) v Asghedom*, 2001 FCT 972 at para 24, 210 FTR 294 [*Asghedom*]; *Thiyagarajah*, *supra* note 53 at para 11.

69. See e.g. *Oberlander v Canada (AG)*, 2009 FCA 330 at para 24, [2010] 4 FCR 395 [*Oberlander* 2009], citing *Ramirez*, *supra* note 63, and *Equizabal*, *supra* note 64; *Maan*, *supra* note 51 at para 18, citing *Ramirez*, *supra* note 63, and *Kathiravel v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 680, 2003 CarswellNat 1624 (WL Can) [*Kathiravel*].

70. *Ibid* at para 46.

71. *Belalcazar*, *supra* note 53 at para 19, citing *Ramirez*, *supra* note 63; *Oberlander* 2009, *supra* note 69; *Poshteh*, *supra* note 36; *Rome Statute*, *supra* note 45, art 31(1)(d).

72. See e.g. *Valle Lopes*, *supra* note 53 at para 105, citing *Asghedom*, *supra* note 68; *Jalloh*, *supra* note 53 at paras 18, 36, citing *Kathiravel*, *supra* note 69, and *Thiyagarajah*, *supra* note 53; *B074*, *supra* note 56 at para 24, citing *Oberlander* 2009, *supra* note 69; *TK*, *supra* note 53 at para 103 (where the Federal Court noted that the Board had cited *Jalloh*).

criminal law sources that have been cited for legal frameworks in refugee cases involving duress or necessity include *R v Hibbert*,[73] *Ruzic*[74] and *R v Ryan*;[75] a combination of *Hibbert*, *Ruzic*, *Ryan* and *Perka v R*;[76] and a combination of *Morgentaler v R*, *Perka* and *R v Latimer*.[77] Still further, cases have addressed the issue of duress without citing any authority in particular for the relevant doctrine.[78]

A recent case in the citizenship context (not included amongst the twenty refugee cases analyzed above) demonstrates the confusion in this area. In *Oberlander v Canada (AG)*, the Federal Court relied on the test for duress established in *Ramirez*, but also noted that Canadian criminal law aspects of duress should also be addressed "in so far as they were applicable to this case" or potentially "as an interpretive aid".[79]

The relevance of the inconsistencies explained in this Part are increased by doctrinal inconsistencies between the various sources of law. This is usefully illustrated through a closer look at duress, the most commonly claimed defence in the refugee context.

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73. See *Gayton*, *supra* note 52 at paras 15–16, citing *R v Hibbert*, [1995] 2 SCR 973, 184 NR 165 [cited to SCR].

74. See *Diaz*, *supra* note 52 at para 51, citing *R v Ruzic*, *supra* note 33.

75. See *Ghaffari*, *supra* note 52 at para 20, citing *R v Ryan*, *supra* note 34.

76. See *B006*, *supra* note 52 at paras 116–21, citing *R v Hibbert*, *supra* note 73; *R v Ruzic*, *supra* note 33; *R v Ryan*, *supra* note 34; *Perka v R*, [1984] 2 SCR 232, 13 DLR (4th) 1 [cited to SCR].

77. See *JP*, *supra* note 36 at para 127, citing *R v Latimer*, [2001] 1 SCR 3, 193 DLR (4th) 577 [cited to SCR], *Morgentaler v R*, [1976] 1 SCR 616, 53 DLR (3d) 161, and *Perka v R*, *supra* note 76.

78. See *Arokkiyanathan*, *supra* note 53 at para 42; *Jimenez*, *supra* note 53 at paras 18–21; *Mutumba*, *supra* note 53 at para 34.

79. 2015 FC 46 at paras 18, 229, 327 CRR (2d) 132 [*Oberlander* 2015]. Note that in this case, Russell J evaluates a government report that advises the governor in council to make decisions on duress based "on immigration law and policy considerations, but says that criminal law can serve as an interpretive aid, if applied with circumspection". *Ibid* at para 18 [citation omitted]. Canadian criminal law was specifically used to illuminate whether a "safe avenue of escape" and a temporal connection existed. *Ibid* at paras 20–21, citing *R v Ruzic*, *supra* note 33 at para 61. Justice Russell later concludes that "[g]enerally speaking, my review of the record leads me to conclude that the GIC [Governor in Council] applied the correct standard in assessing the issue of duress." *Oberlander* 2015, *supra* at para 206. See also *ibid* at para 225 (Justice Russel upheld the *Ramirez* test and the modified objective standard as set out in the Minister of Citizenship and Immigration's report to the Governor in Council).

B. The Contradictory Contours of the Defence of Duress Amongst Different Sources of Law

The defence of duress has deep roots in both civil and common law systems around the world.[80] According to a survey of relevant case law by Cassese, many legal systems have traditionally required four conditions for duress to be allowed as a full defence to criminal liability: (1) The act charged must be done under an immediate threat of severe and irreparable harm to life or limb; (2) there must be no adequate means of averting such evil; (3) the crime committed must not be disproportionate to the evil threatened; and (4) the situation leading to duress or necessity must not have been voluntarily brought about by the coerced actor.[81]

The defence of duress exists in Canadian criminal law in both codified and common law form,[82] and both require the fulfillment of six elements: (1) an explicit or implied threat of death or bodily harm directed at the accused or another individual; (2) a reasonable belief of the accused that the threat would be carried out; (3) no safe avenue of escape; (4) a close temporal connection between the threat and the harm threatened

80. Duress is deeply embedded in a large number of domestic criminal law systems even though the rationale underlying its availability differs across jurisdictions. See Massimo Scaliotti, "Defences Before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility—Part I" (2001) 2:1 Intl Crim L Rev 111 at 148. Its application is also controversial and even in countries where the defence of duress is well-established, debates about its availability continue to garner the attention of the highest courts. See e.g. *R v Ryan*, *supra* note 34; *R v Hasan*, [2005] UKHL 22. Joshua Dressler attributes the controversy that frequently surrounds claims of duress to the tendency to draw bright line distinctions between "victims and villains", and the fact that "it is unclear which appellation more fairly describes a person who accedes to an unlawful threat". See Joshua Dressler, "The Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits" (1989) 62:5 S Cal L Rev 1331 at 1332.

81. Cassese et al, *supra* note 29 at 215–16.

82. The codified defence of duress is found in the *Criminal Code*, RSC 1985, c C-46, s 17. For a summary of key similarities and differences between the common law and codified versions of duress, see *R v Ryan*, *supra* note 34 at paras 81–83. I note that one seminal (and controversial) difference is that the statutory offence is subject to an enumerated list of serious crimes to which it cannot apply. The common law defence does not contain such a list of exceptions. In addition, section 17 applies to principal actors, whereas the common law defence applies to parties to an offence. For the purposes of this article, my references to duress in Canadian criminal law are intended to capture both the codified and common law versions of the defence, except where explicitly stated otherwise.

(but does include threats of future harm); (5) proportionality between the harm threatened and the harm inflicted; and (6) that the accused did not voluntarily partake in a group or activities knowing that threats and coercion to commit an offence were a possible result of participation.[83] In Canada, the defence of duress has been impacted by important findings by the SCC. Drawing on well-established common law precedent from numerous jurisdictions,[84] the SCC has held that it is contrary to the principles of fundamental justice to hold an individual responsible for criminal conduct where he sees no alternative as a result of some pending harm and where he cannot "rely on the authorities for assistance".[85] Because an individual in these circumstances "is not behaving as an autonomous agent acting out of his own free will",[86] the actor may be excused from criminal liability despite having physically committed the prohibited conduct. These findings render some aspects of the defence of duress constitutionally protected.

The defence of duress has become well-established in international criminal law,[87] and it now has a prominent role in the international system.[88] Article 31(1)(d) of the influential *Rome Statute*[89] codifies the availability of a complete defence where the relevant crime was

83. See *R v Ryan*, *supra* note 34 at paras 55–80.

84. The SCC considered the defence of duress in the United Kingdom, Australia and the United States. See *R v Ruzic*, *supra* note 33 at paras 68–73, 74–80, 81–85.

85. *Ibid* at para 88.

86. *Ibid*.

87. For a brief discussion about why defences have developed more slowly in international criminal law, see Jennifer Bond & Meghan C Fougere, "Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law" (2014) 14:3 Intl Crim L R 471 at 481–82.

88. See Gerhard Werle, *Principles of International Criminal Law*, 2nd ed (The Hague: TMC Asser Press, 2009) at 205. The defence has been raised in a variety of fora, including the Nuremberg Tribunal, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Panels for Serious Crimes in East Timor. See Bond & Fougere, *supra* note 87 at 483–84.

89. The *Rome Statute* results from decades of work attempting to codify the key elements of international criminal law. Given the complex, multi-year, multi-party negotiation process, and the high number of state parties, it is widely seen as representing *opinio juris* on key issues and is a leading articulation of international criminal law standards. See generally *Rome Statute*, *supra* note 45.

caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and 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.[90]

The text also explicitly provides that the threat the actor faced may originate from either "other persons" or external "circumstances beyond [the actor's] control",[91] thus blurring the traditional common law distinction between the defence of duress (where the threat of harm emanates from a human threat) and the defence of necessity[92] (where the threat of harm emanates from an environmental threat). Further, Article 31(1)(d) of the *Rome Statute* does not distinguish between defences that justify criminal behaviour (either because it is sanctioned by law or is the lessor of two evils) and those that excuse it (because although the act remains wrongful, the circumstances surrounding its commission render the perpetrator non-blameworthy).[93] The blended formulations for both of these issues likely reflects an attempt to reconcile differing domestic approaches amongst negotiating parties, particularly between common law and civil law jurisdictions.

In contrast, the distinction between duress and necessity continues in Canadian criminal law, with the SCC recently confirming that "although both [defences are] categorized as excuses rooted in the notion of moral

90. *Ibid*, art 31(1)(d).

91. *Ibid*, art 31(1)(d)(ii).

92. My use of this term is as it is understood in most common law jurisdictions. Some civil law jurisdictions use this term to describe defences based on a "choice of evils", a concept the common law refers to as "justification". For more on the varying use of this terminology across jurisdictions, see Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012) at 242, 247–48.

93. Recognizing defences on the basis of both justification and excuse is consistent with the practice in most civil law countries, including Germany, France and the Netherlands. It is also the approach recommended in the American *Model Penal Code* and, although not explicit, is embedded in Anglo-American common law. See *ibid* at 216; *Model Penal Code*, Proposed Official Draft (American Law Institute Philadelphia, 1962), ss 2.09, 3.02 (exemplifies the distinction between defence based on choice of evils and defence based on duress as excuse). See also Paul H Robinson & Markus D Dubber, "The American Model Penal Code: A Brief Overview" (2007) 10:3 New Crim L Rev 319 at 337–40. For other recent examples of the distinction being insisted upon, see *R v Ryan*, *supra* note 34 at para 23 (Canada); *R v Hasan*, *supra* note 80 at para 18 (United Kingdom).

or normative involuntariness, [they] target different types of situations".[94] The Court went on to specifically endorse doctrinal differences between necessity and duress, thus implicitly rejecting the blended approach now found in international law.[95] Likewise, Canadian law also continues to uphold the distinction between defences that excuse an actor's conduct (including duress and necessity) and those that justify it (including self-defence).[96]

There are other differences between duress in Canadian criminal law and duress in international criminal law as well. For example, Canadian criminal law specifies that an accused cannot benefit from the defence of duress if she participated in a conspiracy or criminal association knowing that such participation "came with a risk of coercion and/or threats to compel [her] to commit an offence",[97] while Article 31(1)(d) does not contain a similar "voluntariness" requirement.[98] The *Rome Statute* does, however, introduce an element that considers whether the actor *intended* to cause more harm than she sought to avoid, a variant on the traditional proportionality analysis that emphasizes intent in a way that is unique from most formulations of duress, including the Canadian iteration. Article 31(1)(d) is also silent on the standard upon which the threat needs to be evaluated (despite evidence in the drafting history that there was discussion about whether an objective, subjective or combined standard

94. *R v Ryan*, *supra* note 34 at para 74.

95. The Court noted differences in both the temporal requirement and the standard on which proportionality is assessed. *Ibid*. In practice, different doctrinal approaches have developed, leading to a three-part test for necessity. See *R v Latimer*, *supra* note 77 at para 29–31. Meanwhile, a six-part test has developed for duress. See *R v Ryan*, *supra* note 34 at para 81.

96. See *ibid* at paras 23–24.

97. *R v Ryan*, *supra* note 34 at para 75, citing *R v Li* (2002), 162 CCC (3d) 360 at paras 20–33, 156 OAC 364; *R v Poon*, 2006 BCSC 1158 at para 7, [2006] BCJ No 1812 (QL); *R v MPD*, 2003 BCPC 97 at para 61, [2003] BCJ No 771 (QL).

98. Interestingly, numerous draft versions of Article 31(1)(d) suggested stipulating that the defence could not be relied on if the actor knowingly or recklessly exposed themselves to the threat. It was not until the end of the Rome Conference that this internal limit was removed. Delegates of the conference may have agreed to instead leave the issue to be dealt with in paragraph 2 of Article 31, which grants broad discretion to the Court to determine the availability of defences on a case-by-case basis. See UN, Preparatory Committee on the Establishment of an International Criminal Court, *Summary of the Proceedings of the Preparatory Committee During the Period 25 March–12 April 1996*, 1st Preparatory Committee, UN Doc A/AC 249/1, 7 May 1996 at para 89. See also Scaliotti, *supra* note 80 at 153.

should be used),[99] while the SCC has specifically explained that under Canadian law, a modified objective standard applies to assessment of both whether there was a safe avenue of escape and whether there was proportionality between the harm threatened and the harm inflicted by the accused.[100]

Further, and significantly, Article 31(1)(d) requires a threat of "*imminent* death or of continuing or imminent serious bodily harm",[101] reflecting a traditional focus on temporal proximity. In Canada, the SCC has held that requirements that the threat be immediately[102] executable by a person who is physically present are unconstitutional because they "exclude threats of future harm to the accused or to third parties"[103] and thus have the "potential of convicting persons who have not acted voluntarily".[104] These requirements were struck out of the Canadian formulation of the defence, and the focus is instead on the availability of a safe avenue of escape.[105]

Yet another variant of duress can be found in refugee law. There, the most frequently cited duress case sets out a simple, three-part test in a single paragraph. According to *Ramirez*, duress requires: (1) a grave and imminent peril; (2) that the peril is not the making of the person in peril; and (3) that the harm inflicted must not be in excess of the harm threatened.[106] In contrast, the leading case in Canadian criminal law sets out a sophisticated six-part test laid out over twenty-five paragraphs,[107] and, as was mentioned above, it explicitly rejects a strict temporal requirement that would preclude threats of future harm.[108] These differing approaches

99. See M Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994–1998*, vol 2 of the International and Comparative Law Series (Ardsley, NY: Transnational Publishers, 2005) at 229–36.

100. See *R v Ryan*, *supra* note 34 at paras 65, 70–74.

101. *Rome Statute*, *supra* note 45 [emphasis added].

102. *Criminal Code*, *supra* note 82, s 17 specifies that duress applies where there is a threat of "immediate death or bodily harm".

103. *R v Ruzic*, *supra* note 33 at para 90.

104. *Ibid*.

105. See *ibid* at para 61; *R v Hibbert*, *supra* note 73 at para 62; *R v Ryan*, *supra* note 34 at para 47. While the *Ryan* test includes a requirement of "close temporal connection", this does not preclude consideration of future harm. *Ibid* at para 67. The temporal requirement in both Canadian and international law is discussed later in this article.

106. *Supra* note 63 at para 327.

107. *R v Ryan*, *supra* note 34 at paras 55–80.

108. *Ibid* at para 41.

may be partially explained by the fact that the Federal Court in *Ramirez* relied on an academic source citing international law to define its test and that it did so prior to several critical evolutions in Canadian criminal law in this area.

In sum, there is a lack of doctrinal consistency amongst the various sources of law that are currently being used to define defences in the refugee context. This in turn leads to a lack of consistency surrounding how key elements of the defences are being defined and applied, including in the oft-claimed defence of duress. It is significant that there does not appear to be any correlation between the mechanism barring status on the basis of criminality (e.g., exclusion versus inadmissibility or different forms of inadmissibility) and the doctrine that is applied. The ultimate result is confusion amongst decision makers about when and how defences should be applied in the refugee context.

III. Applying the Defence of Duress in the Refugee Context

In this Part, I argue that in the context of criminal inadmissibility and exclusion cases, the doctrinal source for defining duress (and other potential defences) must be the same as the doctrinal source used to assess *actus reus* and *mens rea*. I also consider how to address situations in which the application of duress as defined in international criminal law could result in a finding of criminality against a person who did not act voluntarily. Finally, I identify three critical features of the defence of duress which must be emphasized and properly applied in the refugee context: temporal connection, implied threats and the modified objective standard.

A. Sources of Law for Decision Makers in the Refugee Context

While the general contours of the defence of duress are comparable in both Canadian criminal law and international criminal law, it is clear that there are a number of key differences in the relevant doctrines. These divergences create a significant challenge for refugee law, which relies on both systems to inform its criminal inadmissibility and exclusion schemes.

As discussed above, there is currently widespread confusion amongst Federal Court decision makers about how to navigate these complexities.

In considering how to resolve the current doctrinal confusion in this area, it is tempting to seek a solution in a single source of law—that is, to suggest that decision makers in the refugee context should draw exclusively on Canadian criminal law when attempting to delineate the contours of duress (and other defences). This has the benefit of simplicity and familiarity: Decision makers could, in every case involving criminality, rely solely on leading Canadian criminal law cases to identify and apply the relevant legal "test". Unfortunately, such an approach cannot be reconciled with the important role that international law plays in inadmissibility and exclusion provisions.

Drawing on international law to determine criminality without also considering international law defences would require an artificial division between the three essential elements of establishing individual responsibility—*actus reus*, *mens rea* and an absence of defences. The potential consequences are distortion of the doctrine and, worse, potential denial of a defence to which the claimant is legally entitled recourse. It is thus necessary to develop an approach to defences that is responsive to the fact that inadmissibility and exclusion decisions rely on a multiplicity of sources to determine criminality.

As a preliminary matter, it is notable that some provisions of the *IRPA* mandate decision makers in the refugee context to consider actual criminal convictions. For example, sections 36(1)(a) and 36(2)(a) of the *IRPA* establish inadmissibility for persons who have been convicted under Canadian criminal law. These provisions can be triggered by the nature of the conviction, the length of the sentence (available or imposed) or the number of convictions, but in every instance it is the claimant's actual criminal record that provides the basis for the decision.[109] In these circumstances, the decision maker in the refugee context is not required

109. *IRPA*, *supra* note 3. Types of Canadian criminal convictions that result in inadmissibility include: conviction of an offence with a maximum term of imprisonment of at least ten years (section 36(1)(a)); conviction of an offence where a term of imprisonment of more than six months has been imposed (section 36(1)(a)); conviction of an offence that may be punishable by way of indictment (section 36(2)(a)), even if, in the case of a hybrid offence, the offence was prosecuted summarily (section 36(3)(a)); and conviction of two offences under any Act of Parliament not arising out of a single occurrence (section 36(2)(a)). *Ibid*.

to consider defences because the relevant condition precedent to a finding of inadmissibility is the fact of the requisite conviction itself—individual responsibility for the underlying criminality (including relevant defences) has already been considered and adjudicated by the criminal system.[110] Significantly, the SCC has ruled that criminal judges may consider immigration consequences as a factor in sentencing on the basis that they constitute part of the offender's relevant personal circumstances. Once a criminal sentence is imposed, however, the decision maker considering the consequences of the conviction on a claim for protection is not mandated to reassess the underlying finding of individual responsibility.

A second category of criminal inadmissibility and exclusion provisions requires the decision maker to determine, in the absence of an actual Canadian conviction, whether an individual has committed acts for which she *would be* held individually responsible under Canadian criminal law. For example, sections 36(1)(b), 36(1)(c), 36(2)(b) and 36(2)(c) of the *IRPA* each explicitly require determination of what would have happened under Canadian law *if* the relevant criminal conduct had been "committed in Canada".[111] As a result of a recent SCC decision, a similar approach informs Article 1(F)(b) of the *Refugee Convention*, which excludes persons from refugee protection when there are serious reasons for considering that "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".[112] In *Febles*, the SCC linked the "seriousness" of the crime for the purposes of Article 1(F)(b) to the severity of the sentence that would have been imposed if the crime had been tried under Canadian criminal law: "[C]rimes attracting

110. Although the word "guilty" in Article 1(F)(c) may imply that a previous finding of criminal guilt must underlie exclusion under this provision, commentators have generally rejected this interpretation. See e.g. UNHCR, *Guidelines on Exclusion*, *supra* note 20 at para 35; Hathaway & Foster, *supra* note 13 at 536. Also note that while section 35(1)(c) is also based on a previous decision, it is not included in this analysis because the denial of status under this provision is not actually based on the criminality of the claimant.

111. *Supra* note 3. This form of inadmissibility applies to: conviction or commission of an offence outside of Canada that, if committed in Canada, would constitute an offence with a maximum term of imprisonment of at least ten years (sections 36(1)(b), 36(1)(c)); conviction or commission of an offence outside of Canada that, if committed in Canada, would constitute an indictable offence (sections 36(2)(b), 36(2)(c)); conviction of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament (section 36(2)(b)). *Ibid.*

112. *Supra* note 4.

a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion".[113] In these circumstances, it is incumbent on the decision maker in the refugee context to fully consider doctrine from Canadian criminal law to determine whether the actor's conduct meets the requirements for inadmissibility—an assessment which must involve consideration of *actus reus*, *mens rea and* defences in every case.

A more complicated situation arises where the decision maker is required to determine criminality in the absence of any direction from the *IRPA* regarding relevant sources of law. This challenge is particularly evident in the many inadmissibility and exclusion provisions that name the relevant criminal conduct without making any explicit reference to an underlying body of criminal law. Significantly, the critical terms contained in these provisions are also frequently undefined in the *IRPA* itself and, as a result, the decision maker is left to determine the precise meaning of a number of grounds of inadmissibility, including for example, "espionage",[114] "subversion",[115] "terrorism",[116] "transnational crime"[117] and "people smuggling",[118] without any explicit direction regarding which other bodies of law may be relevant in defining key terminology.[119]

It is also relevant that the SCC appears to have encouraged an approach to this ambiguity that allows a single term to be defined with reference

113. *Febles*, *supra* note 22 at para 62. The Court also noted that "the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner". *Ibid.*

114. *IRPA*, *supra* note 3, s 34(1)(a).

115. *Ibid*, s 34(1)(b)-(b.1).

116. *Ibid*, ss 34(1)(c), 35(1)(b).

117. *Ibid*, s 37(1)(b).

118. *Ibid*. For summaries of the leading immigration cases dealing with the meaning of these and other key terms, see Waldman & Swaisland, *supra* note 9.

119. In some instances, significant disagreement around what sources of law ought to inform the meaning of these terms in the inadmissibility context has led to contradictory decisions on key elements of the criminal conduct. For example, "people smuggling" is defined in both international and domestic law, including in a penal provision of the *IRPA* itself. Section 117(1) states: "No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act." *IRPA*, *supra* note 3. Violation carries a maximum penalty of $1,000,000 and life imprisonment where ten or more people are smuggled. *Ibid*, s 117(3). Lower maximum penalties apply where fewer people have

to both domestic and international sources. In *Suresh v Canada (Minister of Citizenship and Immigration)*,[120] the SCC considered an inadmissibility provision based on terrorism.[121] After noting that the term was not defined in the immigration context,[122] the Court went on to provide its own definition based on international law:

> In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act *includes* any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism".[123]

The word "includes" in this passage clearly indicates that this definition of terrorism is not exhaustive, and it is significant that the

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been smuggled. *Ibid*, s 117(2). In international law, the *Smuggling Protocol* also defines human smuggling at Article 3(a): "'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident". *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507, UN Doc A/55/383 (entered into force 28 January 2004). Significantly, whereas both definitions require the procurement of illegal entry of a person into a state in contravention of that state's laws, the requirement for material benefit is present only in international law. This definitional question is explored in the factum for *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, 390 DLR (4th) 385 [*B010*]. Further, whereas the *Smuggling Protocol* uses the term "procurement" to describe the mode of commission for human smuggling, the Canadian definition lists various modes of participation that would trigger culpability, including organizing, inducing, aiding and abetting. See *B010*, *supra* at para 65. The result is a broader Canadian definition that captures individuals whose actions are not subsumed by the international law definition. A series of contradictory decisions about what sources of law ought to define the term in the context of inadmissibility has led to a number of cases being granted leave to the SCC on this issue. See e.g. *B306 v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 262, [2014] 4 FCR 371, leave to appeal to SCC granted, 35685 (17 April 2014); *JP*, *supra* note 36, leave to appeal to SCC granted, 35688 (17 April 2014).

120. 2002 SCC 1 at para 94, [2002] 1 SCR 3 [*Suresh*].

121. *Ibid* at 93–98. This provision was contained in the *Immigration Act*, RSC 1985, c I-2, s 19, which was the statute that preceded the *IRPA*, *supra* note 3.

122. *Suresh*, *supra* note 120 at para 94.

123. *Ibid* at para 98 [emphasis added].

Court went on to explicitly note that its endorsement of this definition from international law did not preclude Parliament from adopting a "more detailed or different definitions of terrorism".[124] Subsequent to the decision in *Suresh*, the Canadian *Criminal Code* was indeed amended to include terrorism-related provisions and decision makers dealing with refugee inadmissibility on the basis of terrorism now routinely define the term with reference to both the international definition articulated in *Suresh* and the domestic definition from the *Criminal Code*.[125]

The fact that some key terms relevant to findings of criminality in the refugee context may be defined with reference to both international and domestic law appears on its face to be problematic for decision makers needing to determine which defence doctrine ought to be considered. It is, however, important to emphasize the critical difference between (a) referring to international law, broadly speaking, to assist in merely defining particular terms (international law defines and even condemns many issues that it does not itself "criminalize") and (b) hinging inadmissibility

124. *Ibid*.

125. See e.g. *Almrei (Re)*, 2009 FC 1263 at paras 70–71, [2011] 1 FCR 163; *Soe v Canada (Citizenship and Immigration)*, 2007 FC 671 at paras 22–24, 313 FTR 265; *Harkat (Re)*, 2010 FC 1241 at para 79, [2010] 3 FCR 169. While international law is used to aid in the interpretation of the definition of key offences in these cases, the full body of international criminal law doctrine is not incorporated in any way. It is also noteworthy that the *Criminal Code*, *supra* note 82, definition of terrorism itself references international law in two ways: First, it includes a number of subsections that create offences for acts that are defined in named international agreements. See e.g. *ibid*, s 83.01(a)(i)–(a)(x). These sections are in addition to a portion of the provision that explicitly defines terrorism without referential incorporation of other sources. See *ibid*, s 83.01(b)(i)–(b)(ii). This is a clear example of reliance on international law for definitional purposes only. The second reference to international law relates to an exception to liability for acts committed during armed conflict that are "in accordance with customary international law or conventional international law applicable to the conflict". *Ibid*, s 83.01(b)(ii). This represents incorporation of international humanitarian law, a body of international law that governs during conflicts and that is closely linked to international criminal law. Nonetheless, it is my view that this formulation is not meant to criminalize acts *under* international criminal law, which would require incorporation of international criminal law doctrine on such essential items as party liability. As a result, references to international law in both subsections of the *Criminal Code* definition of terrorism should be treated as definitional in nature—a characterization that is critical for the analysis I suggest in the following paragraph. For more on the terrorism provisions in the *Criminal Code*, see generally Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008).

or exclusion on a finding of criminality *under* international criminal law. In the second scenario, the relevant international criminal doctrine (which includes *actus reus*, *mens rea* and defences) supersedes the domestic one and needs to be holistically applied. In the first, where international sources are used to define a term but not as the basis for the finding of criminality, it is Canadian criminal law that prescribes how issues such as party liability and other aspects of *actus reus* and *mens rea* are assessed. Consequently, it is this body of law that ought also apply to defences.

To reiterate, a distinctly different situation arises where international criminal law is clearly invoked as the grounds for the inadmissibility or exclusion. For example, section 35 of the *IRPA* specifies that an individual will be found inadmissible if they have committed a crime referred to in sections 4–7 of the *CAHWCA*,[126] a statute that in turn defines a majority of the relevant criminal conduct with direct reference to international criminal law. For example, war crimes are defined by the *CAHWCA* as follows:

> [W]ar crime means an act or omission committed during an armed conflict that, at the time and in the place of its commission, *constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts*, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.[127]

Likewise, section 98 of the *IRPA* imports Article 1(F) of the *Refugee Convention* directly into Canadian refugee law, which means that an individual will be excluded where there are serious reasons for considering that she has committed a war crime, crime against peace or crime against humanity as defined in "the international instruments drawn up to make provision in respect of such crimes".[128] As I have written elsewhere, this "constitutes an explicit directive that international criminal law provides

126. *IRPA*, *supra* note 3, citing *CAHWCA*, *supra* note 18.

127. *Ibid*, ss 4(3), 6(3) [emphasis added]. Identical references to international criminal law are embedded in the definitions for crimes against humanity and genocide. *Ibid*, ss 4(3), 6(3). Several provisions dealing with temporal elements of the crimes also rely directly on international criminal law. See e.g. *ibid*, ss 4(4), 6(4), 6(5), 7(5) (provisions dealing with military commanders or superiors are deemed to apply even where the acts were committed before the coming into force of the *CAHWCA* where they were already criminalized in international criminal law).

128. *Refugee Convention*, *supra* note 4, art 1(F)(a).

the parameters for establishing individual responsibility for the crimes in Article 1(F)(a), and it is incumbent on decision makers in the refugee context to found their analysis on these principles".[129]

As a result, criminality under these provisions will only be established where the three requirements for showing individual responsibility—*actus reus*, *mens rea* and an absence of defences—are established according to international criminal law doctrine. Incorporating only *actus reus* and *mens rea* elements without also considering all of the defences that are provided for under this same system of law is both unprincipled and doctrinally incoherent given the close relationship between many defences and an "absence" of either *actus reus* or *mens rea*. It is simply not possible to consider the first two elements without also considering the third.

It is also important to note that while inadmissibility provisions are unique to Canadian refugee law,[130] Article 1(F) contains mandatory language that applies to all 148 state signatories to the *Refugee Convention*.[131] As a result, it is important that Canada's approach to the provision respects the well-established general principle that international treaties have an autonomous meaning that should not be undermined by unilateral state action. As noted by the United Kingdom House of Lords, "the Refugee Convention must be given an independent meaning . . . without taking colour from distinctive features of the legal system of any individual contracting state".[132]

129. Bond, *supra* note 13 at 30. See also Rikhof, *supra* note 52 at 272–74; Hathaway & Foster, *supra* note 13 at 572.

130. Inadmissibility provisions that deny protection in circumstances where it would otherwise be granted (because the claimant meets the definition of a legal refugee and is not excludable under Article 1(F) or any other provision) are likely in contravention of the *Refugee Convention*, *supra* note 4, which requires state parties to provide protection.

131. This figure reflects signatories to both the *Refugee Convention* and the *Smuggling Protocol*. See UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, online: <unhcr.org/3b73b0d63.html>.

132. *R v Secretary of State for the Home Department, ex parte Adan, ex parte Aitseguer* (2000), [2001] 2 AC 477 at 516 (HL Eng) (further describing the principle that "[i]t is necessary to determine the autonomous meaning of the relevant treaty provision . . . [as] part of the very alphabet of customary international law" at 515). See also *James Buchanan and Co v Babco Forwarding and Shipping (UK) Ltd* (1997), [1978] AC 141 at 152.

This principle was further affirmed by the SCC in *Ezokola*:

> Whether an individual is complicit in an international crime cannot be considered in light of only one of the world's legal systems. This flows not only from the explicit instruction in art. 1F(a) to apply international law, but also from the extraordinary nature of international crimes. They simply transcend domestic norms.[133]

In the context of Article 1(F)(a),[134] this principle requires that all state parties fully apply international criminal law paradigms, including consideration of any relevant defences. Finally, it is important to recall that some decision makers are currently relying primarily on precedent from within refugee law itself to define the parameters of duress and other defences—including *Ramirez* and other leading authorities. These precedents themselves draw on outside sources to define the relevant doctrine, and it is thus critical to consider which bodies of law underlie the leading refugee cases. Further, it is important that refugee law remains responsive to changes in the criminal systems upon which it relies, meaning that decision makers in the refugee context should refer directly to those outside bodies of law when considering criminality rather than relying exclusively on previous refugee cases. This is particularly important as refugee authorities become dated, thus increasing the likelihood that they will no longer reflect the current state of underlying bodies of criminal law.

To summarize, decision makers must assess any possible defences that emanate from the same body of law as is used to determine criminality. This means that where an inadmissibility or exclusion provision requires the decision maker to determine how particular conduct *would have* been treated under Canadian criminal law, Canadian defences, including duress, need to be considered. This principle extends to situations where international sources are used for the limited purpose of helping to define key terms and domestic doctrine around *actus reus*, *mens rea* and an absence of defences also needs to be applied in these circumstances.

133. *Supra* note 23 at para 44 [citations omitted].

134. As discussed *above*, Article 1(F)(a) clearly requires consideration of international criminal law. It is less clear what paradigms should inform Articles 1(F)(b) and 1(F)(c), although the SCC has recently found that a crime will generally be considered "serious" for the purposes of Article 1(F)(b) "where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada". *Febles*, *supra* note 22 at para 62. This represents a clear reliance on Canadian criminal law.

Correspondingly, when the decision around criminality is grounded in international criminal law that body of law needs to be considered in its entirety. This approach ensures that there is doctrinal consistency and that criminality is not found on a broader basis than what would be permissible in the criminal context.[135]

B. Reconciling International Criminal Law with Canadian Constitutional Requirements

While the above approach to identifying appropriate sources of law is essential for preserving doctrinal integrity and ensuring individuals are not denied a defence to which they are legally entitled, there is one additional complexity which needs to be considered: the fact that the contours of the defence of duress in international criminal law may allow for findings of criminality to be made on grounds that have been explicitly rejected in Canada as unprincipled and unconstitutional. Recall that the SCC has determined that an immediacy requirement in the defence of duress is inconsistent with the principles of fundamental justice (and thus in violation of the *Charter*),[136] and, relatedly, has also emphasized

135. *IRPA*, *supra* note 3, s 35(1)(b). This is an exceptional provision where criminality is currently determined on a strict liability basis. Under section 35(1)(b), claimants are found to be inadmissible if they are "prescribed senior officials" in the service of a government that engages in "terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity". *Ibid*. The Federal Court of Appeal has found that section 35(1)(b) should be viewed as an absolute liability offence where defences are not relevant. See *Lutfi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391, 52 Imm LR (3d) 99 (the court stating that "[t]he question is whether [the claimant] has the status of a prescribed senior official. If he does, any personal lack of blameworthiness is simply not relevant" at para 8). See also *Canada (Minister of Citizenship and Immigration) v Adam*, [2001] 2 FCR 337, 190 FTR 160; *Hussein v Canada (Citizenship and Immigration)*, 2009 FC 759, [2009] FCJ No 930 (QL). Section 35(1)(b) also runs contrary to recent developments in jurisprudence on the related issue of complicity in international crimes, where at common law, the SCC specifically rejected a "guilt by association" approach to complicity in international crimes and required that defences be considered, also finding that the claimant must have "voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose". See *Ezokola*, *supra* note 23 at para 84. Further, section 35(1)(b) is likely unconstitutional as it runs contrary to the SCC's finding that under section 7 of the *Charter* "it is a principle of fundamental justice that only voluntary conduct . . . should attract the penalty and stigma of criminal liability". *R v Ruzic*, *supra* note 33 at para 47.

136. See *R v Ruzic*, *supra* note 33; *R v Ryan*, *supra* note 34.

the importance of voluntariness, including in the specific context of international crimes allegedly committed by refugee claimants.[137] In contrast, the *Rome Statute* has recently codified a version of duress that contains an explicit imminence requirement.[138] The inclusion of this term in such a recent and authoritative codification suggests that international criminal law may insist on a temporal proximity that places limits on the voluntariness principle and has been rejected in Canadian criminal law.[139] This apparent divergence provides a tangible illustration of the fact that structural differences between these two versions of the defence cannot be ignored.

I have argued elsewhere that the imminence requirement in Article 31(1)(d) is problematic to the extent that it requires strict temporal proximity and thus ought to be read down:

> It is thus our conclusion that while the absence of an alternative course of action is an important criterion when determining whether the defence of duress should apply, the temporal proximity between threatened and actual harm is merely one possible indicator of the availability of such an alternative. As a result, it is critical that a temporal restriction be read out of the imminence requirement in Article 31(1)(d) and that the emphasis of this part of the inquiry instead focus on whether the actor had an honest and reasonable belief that the only way to avoid the threatened harm was to commit the criminal act.[140]

For reasons discussed more fully below, I have also emphasized the heightened importance of avoiding a temporal requirement in the defence of duress in the context of particularly coercive environments (including failed and fragile states) on the basis that there may be an increased prevalence of non-imminent, unavoidable harm.[141] However, despite my hope that international criminal law evolves in a way that minimizes any emphasis on temporal proximity in the defence of duress, recent codification of the imminence requirement cannot be ignored.

137. See *Ezokola*, *supra* note 23 at paras 8, 86.

138. *Supra* note 45, s 31(1)(d).

139. It is noteworthy that the temporal requirement that was rejected by Canadian criminal law was articulated as "immediacy", while the language used in international criminal law is "imminence". For a discussion on the relationship between these terms and their treatment in the context of duress decisions, see Bond & Fougere, *supra* note 87 at 507–10.

140. *Ibid* at 500 [footnote omitted].

141. *Ibid* at 500–10.

The consequence is that while decision makers in Canada are required to rely on international criminal law in the context of certain inadmissibility and exclusion provisions, reliance *only* on that system's version of duress could lead to findings of criminality against persons who have not acted voluntarily—a result that, according to the SCC, violates core principles now embodied in the *Charter*.

In my view, special consideration must be made to account for this possibility, and refugee claimants being barred from protection on the basis of international criminal law should thus be able to *also* benefit from any defence available to them under Canadian criminal law. I recognize that there are several conceptual weaknesses associated with allowing a refugee claimant access to two bodies of law when determining potential defences. First, such an approach cuts against the notion that defences are inseparable from *mens rea* and *actus reus*, and attempts to isolate one part of the criminal liability framework in a way that is, in my view, artificial and problematic. Second, I am conscious of the fact that this proposal would require decision makers in the refugee context to consider and apply two closely related—though not identical—versions of the same defence. From a pragmatic perspective, this may be cumbersome. Perhaps most significantly, this approach may be difficult to reconcile with an autonomous reading of the *Refugee Convention*'s clear directive that in certain circumstances refugee status must be denied where a crime has been committed under international criminal law. Article 1F(a) in particular leaves no room for discretionary application of domestic criminal law principles, including those with constitutional status in domestic regimes, and I will pay particular attention to this last issue in my analysis below.

Despite these legitimate concerns, I believe the benefits of considering both international and domestic defences in these limited circumstances outweigh the risks for a number of important reasons. First, where other requirements of the defence of duress are present, protection will not be denied on the basis of criminality to individuals who acted in an involuntary manner, thus ensuring that a key principle in both Canadian criminal law and Canadian constitutional law is respected. Second, this approach keeps both the international version of duress and the domestic version of duress whole, thus preserving the internal integrity of both defences in a way that would not be achieved if either were modified to account for the key differences between them. Third, the proposed

approach is consistent with closely related Canadian legislation: Like the *IRPA*, the *CAHWCA* relies on domestic law and international criminal law to define relevant criminal conduct. It is significant that section 11 of that Act explicitly offers criminally accused individuals the opportunity to rely on defences from both domestic and international criminal law: "In proceedings for an offence under any of sections 4 to 7, the accused may . . . rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings."[142] If Canada is prepared to afford persons accused under its war crimes legislation recourse to defences from two bodies of law it is, in my view, entirely appropriate that it also do so in the context of a claim for refugee protection.

One additional note on the technicalities of this step is necessary. Where a decision maker is applying international criminal law as part of an inadmissibility decision, she is applying strictly domestic legislation to determine whether the individual will even have access to a refugee status determination hearing. Application of a Canadian defence in this context would thus result in removing a domestically imposed bar to the refugee process and poses no challenge to the international asylum system itself. Consequently, a decision maker may simply consider both defences and grant the same remedy if either applies—a negative inadmissibility finding on the basis that the actor's conduct is legally excused.

A more complicated situation arises where international criminal law is being considered as part of an exclusion decision. There, international refugee law prevents affording protection if the conditions of Article 1(F) are met, meaning that status must be denied under Article 1(F)(a) where, for example, there are "serious reasons for considering" that certain crimes have been committed *under international criminal law*.[143] As mentioned above, the *Convention* itself thus precludes states from offering refugee protection on the basis of a domestic defence because it explicitly mandates that where there is a finding of individual responsibility according to international law, refugee protection must be denied.[144]

142. *CAHWCA*, *supra* note 18, s 11.

143. *Refugee Convention*, *supra* note 4.

144. This requirement manifests itself in Article 1(F) through the world "shall". See sources referred to in note 39.

This mandatory language appears to create an irreconcilable tension for the Canadian refugee system because constitutional requirements regarding voluntariness stipulate that non-temporal threats be considered in a way that deviates from international criminal law and thus from Article 1F(a) of the *Refugee Convention*. The ultimate result is that where an individual's criminal act is excused under domestic criminal law but not international criminal law, she is entitled to protection in Canada even where she is not entitled to protection under international refugee law. Although this result may appear anomalous, a similar situation exists with regard to individuals who face a risk of torture that is not linked to one of the five grounds enumerated in Article 1(A) of the *Refugee Convention*.[145] While these individuals cannot be refouled according to both the *Charter* and Canada's commitments under the *Convention Against Torture*,[146] they are not recognized as Convention refugees under international refugee law. Canada has responded to this apparent contradiction by offering a form of complementary protection for these individuals: Under Canadian law, "persons in need of protection" are individuals who, if removed, would face torture or a risk to their life, or cruel and unusual treatment or punishment, regardless of whether other requisite elements of being a legal refugee are present.[147] Persons in need of protection are entitled to the same rights in Canada as Convention refugees.

The existence of the persons in need of protection class in Canadian law is entirely consistent with the *Refugee Convention*, which requires signatories to recognize the rights of individuals meeting its definition but which does not prevent states from affording alternate forms of comparable protection to other persons. It is thus open to Canada to offer protection to individuals who are excluded under the *Refugee Convention* but whose criminal conduct is excused under domestic criminal law. In my view, the well-recognized, constitutionally-enshrined principle of voluntariness requires this step to be taken in the case of duress.

145. *Supra* note 4.

146. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85. See especially *ibid*, art 3.

147. *IRPA*, *supra* note 3, s 97. The definition of a Convention refugee is found in section 96 of the *IRPA*, and it is a direct incorporation of Article 1(A) of the *Refugee Convention*, *supra* note 4. The refugee definition encompasses both more forms of persecution than does section 97 and more restrictions on the circumstances in which that persecution will be the basis for protection.

C. Key Elements of the Defence of Duress that Must be Properly Applied in the Refugee Context

The potential for injustices to result from pervasive doctrinal inconsistencies in Canada's refugee system is exacerbated by the prevalence of threats in many refugee-producing countries. While some asylum seekers fear an individualized risk in otherwise peaceful circumstances, the vast majority of the world's refugee claimants come from places of great volatility, including failed and fragile states, conflict zones and dictatorial regimes. Breakdown of the rule of law in these states means that peaceful civilian life often gives way to constant fear and frequently men, women and children have to struggle for survival amidst societal chaos. Many individuals fleeing this volatility are able to establish a legal basis for refugee status because they face a significant risk of harm from which their home state cannot (or will not) offer them protection. Paradoxically, the same environmental realities that may ultimately ground the risk necessary to trigger international protection may, in some cases, also drive ordinary people to commit horrendous acts before they are able to escape. In this morally and legally complex context it is critical that the full circumstances surrounding the commission of a crime be fully considered, including a proper analysis of potential duress and any other relevant defences.[148]

As discussed above, jurisprudence from Canada's federal courts illuminates confusion about the defence of duress amongst decision makers in the refugee context. Leading criminal authorities from the appropriate source of law should be consulted to provide the relevant legal frameworks at the time criminality is being assessed, and it is beyond the scope of this article to offer detailed analyses of each doctrinal component. There are, however, three specific aspects of the defence of duress which are critical in the refugee context and which are currently being consistently

148. I do not mean to suggest that in every case the source and form of the persecution grounding a refugee claim will be identical to the source and form of a threat grounding a defence of duress. Nor am I arguing that the severity or nature of the threats relevant to each of these contexts are—or ought to be—assessed in the same way. Rather, I wish to emphasize that the prevalence of both serious criminal conduct and threats of harm for failing to contribute to this criminality increases in precisely the same volatile and chaotic environments that produce millions of refugees each year. Increased violence and a lack of state protection are key components of this dynamic.

misapplied. They are worth briefly noting in an attempt to emphasize their importance.

(i) A Strict Temporal Connection Must Not be Required

There appears to be a major divergence between Canadian criminal law and international criminal law on the issue of whether a temporal connection is needed in order to establish the defence of duress. This difference may render the international version of the defence inconsistent with the principle of voluntariness and thus contrary to the Canadian Constitution. As has been discussed, this factor militates in favour of an approach to defences in the refugee context that ensures that the Canadian version of duress is considered every time criminality is assessed—either as the sole source of the defence or where international criminal law provides the grounds for denying status—in addition to the international version.

It is important to emphasize the particular importance of considering non-imminent threats in the refugee context. The SCC's rejection of a strict temporal requirement is consistent with decisions in other common law jurisdictions,[149] and is predicated on the notion that in some cases non-immediate threats are nonetheless unavoidable.[150] The Court has referred to two situations to illustrate the problems with a misplaced emphasis on temporal proximity: battered women who are so "psychologically traumatized by the threatener that . . . [they] compl[y] with the threat, even though it was not immediate and to the objective observer, there was a legal way out",[151] and individuals who face a threat in circumstances where there is no "effective police protection".[152] Both psychological trauma vis-à-vis a brutal aggressor and a lack of state protection are

149. See *R v Ruzic*, *supra* note 33. The SCC canvassed approaches to duress in the United Kingdom and Australia, noting that

> although the common law is not unanimous in the United States, a substantial consensus has grown in Canada, England and Australia to the effect that the strict criterion of immediacy is no longer a generally accepted component of the defence. A requirement that the threat be "imminent" has been interpreted and applied in a more flexible manner.

Ibid at para 86.

150. *Ibid*.

151. *Ibid* at para 87.

152. *Ibid*.

systemic features in many refugee-producing states,[153] and the concerns the Court has identified are thus very relevant when assessing allegations of criminality against refugee claimants.

I have explored the relationship between imminence in the context of battered women and imminence in the context of refugee claimants with specific regard to defences under Article 1(F)(a) in particular.[154] There, I concluded that similar concerns animate both situations:

While the circumstances facing abused women who resort to violence against their partners are obviously entirely distinct from those facing asylum seekers who participate in international crimes, some of the principles underlying the former are directly applicable to the latter.[155] Feminist scholars have been arguing for decades that a temporal requirement in self-defense fails to recognize the unique realities of battered women and places an unjust restriction on application of the defense. Domestic violence, they argue, "cannot be understood as a series of isolated incidents detached from the overall pattern of power and control within which the violence is situated,"[156] and the difficulties women face in escaping their assailants and in receiving meaningful protection from the relevant authorities must be given appropriate consideration.[157] This latter point is particularly salient in the context of asylum seekers and is worth emphasizing:

> For the battered woman, escape from the abusive situation may not be a viable alternative. Frequently, [she will] have no access to money, alternate shelter, or means of transportation or support for herself or her children . . . Further, the idea that the battered woman's act of self-help is unjustified because the law will protect her may be similarly ill-formed. The failure of the current legal system to deal effectively with domestic violence cases is well-documented.[158]

In light of these complexities, calls have consistently been made for the law to give more robust assessment of what actions are "reasonable" for women facing the threat of ongoing violence, such that the "social context" and "structural realities" of their lives informs the

153. For a detailed example involving Syria, see Bond & Fougere, *supra* note 87 at 473–80.

154. Bond, *supra* note 13.

155. *Ibid* at 50.

156. *Ibid*, citing Rebecca Bradfield, "Understanding the Battered Woman Who Kills Her Violent Partner: The Admissibility of Expert Evidence of Domestic Violence in Australia" (2002) 9:2 Psychiatry, Psychology & L 177 at 178.

157. Bond, *supra* note 13 at 50–51, citing MJ Willoughby, "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defence When She Kills Her Sleeping Batterer?" (1989) 38:1 U Kan L Rev 169.

158. Bond, *supra* note 13 at 51, citing Willoughby, *supra* note 156 at 186–87.

assessment of whether there were alternatives to the harms they ultimately caused.[159] A strict temporal requirement is deemed to be at odds with this more contextual evaluation.[160]

The unique circumstances facing many asylum seekers render a similarly contextualized approach to duress particularly important in the context of exclusion decisions under Article 1(F)(a). The ongoing violence, extreme coercion, and lack of state assistance that is present in many refugee-producing states suggest that the assumption that a non-imminent threat can be easily avoided must be re-visited.[161]

The SCC's conclusion that an individual who "cannot rely on the authorities for assistance.. . . [Is] not behaving as an autonomous agent acting out of his own free will when he commits an offence under duress"[162] must similarly be taken seriously in the context of refugee claimants, many of whom have fled environments where the state cannot provide protection, or is the source of the threat. In these circumstances, it is crucial that a lack of involuntariness not be wrongly equated to the imminence of the harm.

The foregoing does not render temporal proximity irrelevant in the context of duress. As the SCC recently reiterated, it becomes increasingly difficult "to conclude that a reasonable person similarly situated had no option but to commit the offence"[163] as the time available for possible escape increases. As a result, a decision maker assessing duress should consider temporal proximity as an indicator of whether a safe avenue of escape existed, but not as a single, determinative factor. It is critical that the SCC's instruction that this requirement should "in no way preclude the availability of the defence for cases where the threat is of future harm"[164] be fully implemented in the refugee context.

159. Bond, *supra* note 13 at 51, citing Julie Stubbs & Julia Tolmie, "Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women" (2008) 41:1 Austl & NZ J Crim 138.

160. Bond, *supra* note 13 at 51.

161. *Ibid*.

162. *R v Ruzic*, *supra* note 33 at para 88.

163. *R v Ryan*, *supra* note 34 at para 68.

164. *Ibid* at para 67.

(ii) Implied Threats Must be Recognized

Although most claims of duress emanate from threats that are both explicit and directly issued ("if you do not do A, I will make B happen to X"), there are situations in which an individual may hold a genuine and reasonable belief that a threat of serious harm exists even where it has not been explicitly expressed. In such circumstances, the threat may be equally capable of overriding the actor's autonomy and rendering her involvement in criminal conduct involuntary. It is therefore significant that the SCC has recognized that claims of duress can be founded on either express or implied threats.[165] Allowing claims of duress on the basis of implied threats is consistent with both the *Rome Statute* and broader international criminal law.[166]

Recognizing the existence of implied threats is particularly important in the context of refugee claimants as a result of the prevalence of pervasive insecurity and systemic coercion in many refugee-producing states. Indeed, omnipresent threats—threats which are "present at all times"[167]—are a feature of many dictatorships, failed or fragile states and conflict zones, and it is critical that the entirety of these complex realities be considered during the assessment of criminality. This must include the impact of all threats on the actor's criminal involvement, and decision makers in the refugee context must consider implied threats as part of the duress assessment.

165. See *ibid* at paras 55, 57, citing *R v Ruzic*, *supra* note 33. See also *R v Mena*, 34 CCC (3d) 304 at 320, 1987 CanLII 2868 (Ont CA). For a more detailed discussion on implicit threats in the Canadian context, see David Paciocco, "No-One Wants to be Eaten: The Logic and Experience of the Law of Necessity and Duress" (2010) 56:3 Crim LQ 240 at 277–79.

166. For more on implied and indirect threats in the context of duress in international criminal law, see Bond & Fougere, *supra* note 87 at 491–500.

167. *Merriam-Webster's Collegiate Dictionary*, 11th ed, *sub verbo* "omnipresent". For more on the consequences of omnipresent threats in the context of duress in international criminal law, see Bond & Fougere, *supra* note 87 at 490–512.

(iii) A Modified Objective Standard Must be Used

Several critical elements of the Canadian defence of duress are evaluated on a modified objective standard, including the actor's reasonable belief that the threat will be carried out; the non-existence of a safe avenue of escape; and proportionality between the harm threatened and the harm caused.[168] The modified objective test was explained by the SCC in *Ruzic* in the context of assessing the availability of a safe avenue of escape:

> The test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse.[169]

More recently, the Court has described the standard as that of "a reasonable person in the same situation as the accused and with the same personal characteristics and experience".[170] Meanwhile, the *Rome Statute* is silent with respect to the question of whether the elements of the defence of duress should be tested on an objective, subjective or combined standard, despite evidence in the drafting history that this issue was discussed during negotiations.[171] I note that until clarification on this point is provided by international criminal law, it is entirely consistent with existing doctrine for refugee decision makers considering duress under international criminal law to also apply the modified objective standard.[172]

It is trite to note that the situations from which many refugee claimants have fled are extremely complex and very different from the stable, comprehensible environments that many Canadians take for granted. Indeed, the realities in many refugee-producing states are

168. See *R v Ryan*, *supra* note 34 at paras 64–65, 72.

169. See *R v Ruzic*, *supra* note 33 at para 61, aff'd in *R v Ryan*, *supra* note 34 at para 65.

170. *R v Ryan*, *supra* note 34 at para 65.

171. For the proposals relating to grounds for excluding criminal responsibility, see Bassiouni, *supra* note 99 at 229–36.

172. For arguments in favour of adaptation of this standard in international criminal law, see Bond & Fougere, *supra* note 87 at 493–500.

simply unimaginable for those of us who have not experienced the chaos and violence that accompanies civil war, a failing state or other similar catastrophes. In these circumstances, it is critical that decision makers in the refugee context apply the modified objective standard in a way that both fairly considers the impact of any threats on the actor's criminal involvement and protects against abuse of the defence by ensuring that the reasonableness of the actor's conclusions is always assessed with reference to someone similarly situated. It is incumbent on decision makers to ensure this standard is properly applied such that the unique circumstances facing many refugee claimants are fully included in the assessment.

Conclusion

In the context of Canadian criminal law, the SCC has held that "[t]he law is designed for the common man, not for a community of saints or heroes",[173] and that concessions must be made to "human frailty" in the context of "agonising choice".[174] Such concessions are particularly relevant in the context of refugee claimants, who have frequently fled environments filled with significant threats and who risk being denied basic human rights when protection regimes are made unavailable on the basis of criminality. In these circumstances, relevant defences must be fully considered and applied in a way that is consistent, predictable and doctrinally sound.

Currently, there is confusion amongst Canada's decision makers regarding defences to criminality in refugee inadmissibility and exclusion cases. This is evidenced by their inconsistent use of international and domestic sources of law to develop approaches to defences that vary in substantive ways. Ultimately, this inconsistency may lead to grave injustices.

In this article, I have argued that when decision makers consider duress and other defences in the refugee context, the doctrinal source of the defence must be the same as the doctrinal source for the remainder of

173. *R v Ruzic*, *supra* note 33 at para 40.

174. *R v Ryan*, *supra* note 34 at para 23, citing *R v Ruzic*, *supra* note 33 at para 40, and Don Stuart, *Canadian Criminal Law: A Treatise*, 6th ed (Scarborough, Ont: Thomson Reuters, 2011) at 490.

the criminality assessment, meaning it must be consistent with the *actus reus* and *mens rea*. I have also noted that an additional step is required where the appropriate source of law is international criminal law, since application of defences derived solely from that source may lead to findings of criminality that are unconstitutional and contrary to principles of fundamental justice, including the requirement of voluntariness. Consideration of defences emanating from both international and Canadian criminal law is consistent with the approach taken in other contexts and is appropriate in these limited circumstances. Finally, I have emphasized certain essential features of the defence of duress that must be properly applied in the refugee context.

Defences are a critical element of both domestic and international criminal law. It is essential that they also be properly considered in the refugee context, where the consequences of unprincipled and inconsistent decision making are more than merely theoretical.