# Complicity and Exclusion from Asylum – Rethinking the Rationale of Undeserving of Protection

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Principles developed in the criminal law context figure prominently in exclusion assessments under art. 1F of the 1951 Refugee Convention. This is appropriate because the entire evaluation is based on determining whether the claimant has committed a crime; this makes him/her undeserving of protection. There is however a problem with the connection between refugee law and international criminal law in art. 1F(a). It enables the import of broad concepts of liability; to the extent that it undermines the Convention's purpose of protection.

Article 1F(a) deals with persons who (allegedly) committed war crimes, crimes against humanity and crimes against peace. The reference to "international instruments" makes that decision makers rely on international concepts of liability. A controversial concept, going back to the Nuremberg trials, is the 'personal and knowing participation-test',[1] where membership of a Nazi organization was sufficient for criminal responsibility, irrespective of whether the accused person was drafted into that organization. The Netherlands relies heavily on this concept to exclude asylum seekers under subparagraph 1F(a). Officers in Afghan security organizations (KhAD, WAD), senior officials of the Iraqi Baath party and senior leaders of the RUF in Sierra-Leone, all are confronted with this Nuremberg-concept that entails a rebuttable presumption of complicity. The membership concept was actually never applied in Nuremberg. It was controversial because it created a presumption of guilt.[2]

In recent years, the Supreme Courts of the UK, New Zealand and Canada held that the 'personal and knowing participation' concept but also a controversial concept such as joint criminal enterprise (JCE), are too broad and that exclusion requires the stricter test of a "voluntary, knowing and significant contribution" to a crime.[3] The Canadian Supreme Court in the case of *Ezokola* ([2013] SCC 40) found that 20 years of Canadian jurisprudence on exclusion had been overly expansive and that "[i]t is...necessary to rearticulate the Canadian approach to bring it in line with the purpose of the Refugee Convention and art. 1F(a)".

This is a welcome development. It is opportune to rethink the rationale of *undeserving* of refugee protection. This calls for research on what it means to be *deserving* of punishment; on where to draw the line between criminal complicity and mere association with criminal conduct. The Refugee Convention was drawn up in the specific historical and political context of the WWII and the Nuremberg era; a time where the line between victors and vanquished, between war criminals and 'genuine' refugees, was easier to draw. Modern day refugee exclusion takes place in a different context, of civil war and terrorism. Also, it concerns a more differentiated group of claimants, most of them occupying positions in the lower echelons of political or military organizations.[4] In my paper, I aim to draw the outer limits of criminal conduct

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[1] See *Ramirez v, Canada (Minister of Citizenship and Immigration*) [1992] 2 F.C 19.
[2] E. van Sliedregt, Individual Criminal Responsibility in International Law, (Oxford: OUP 2012), 60-61.
[3] *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department* (appellant), [2010] UKSC 15; The Attorney-General (minister of Immigration) v Tamil X and the RSAA, [2010] NZSC 107; *Ezokola v. Canada (Minister of Citizenship and Immigration*) [2013] SCC 40.
[4] S.S. Juss, 'The Notion of Complicity in UK Refugee Law', *Journal of International Criminal Justice*, 2014,

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that triggers exclusion. To that end, I analyse international and national case law on complicity, focusing on those on the fringes of an organization or in lower positions; i.e. on those who did not commit crimes *con amore*.

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