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# Excluding Women

Catherine Dauvergne\* and Hannah Lindy†

## ABSTRACT

This article reviews 16 years of Canadian case law applying the Refugee Convention's exclusion provisions to women. Despite a quarter of a century of strong scholarly and policy-making work asserting the need for attention to gender in refugee law, this dataset shows that, in questions of exclusion, gendered analysis is almost entirely absent. By contrast, in seeking explanations for the factual basis of exclusion in these cases, gender is almost always an explanatory factor. This stark observation leads us to conclude that significant additional work – both scholarly and policy-focused – is required. The article also considers whether a more robust application of existing Supreme Court jurisprudence can address the problems we have identified and reaches a mixed conclusion. Overall, the article points out an important gap in current understandings of gender in refugee law, and maps a way forward for future work in the area.

## 1. INTRODUCTION

This article looks at Canadian case law excluding women from refugee protection. Its empirical core is a group of cases from the past two decades where the argument was raised, often successfully, that a woman ought not to be considered a refugee because of a criminal or otherwise heinous act. Our objective in this analysis is to bring together insights about the place of gender in refugee law with recent work on the jurisprudence of exclusion. The results are nothing short of bizarre.

In the contemporary political context, the rules surrounding refugee exclusions have become a focus of intense interest. The idea that some people simply do not *deserve* refugee protection has slipped into popular discourse, repeated regularly in news broadcasts concerning the flood of humanity making its way to Europe's southern shores and the array of national leaders erecting walls in one form or another. The political importance of refugee exclusions began even before the Arab Spring, which altered the landscape of global refugee movements in the second decade of this century. Indeed, following the 9/11 attacks in the United States (US) in 2001, the idea that refugee populations were a likely camouflage for terrorists quickly became alarmingly popular. The uptick in refugee flows since 2014 has elevated this concern to a level approaching hysteria. Tracking this shift in popular consciousness, many prosperous Western States

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have also seen an increase in the number of people excluded from refugee protection over the past two decades, a trend that has outstripped any rise in the number of asylum claims.<sup>1</sup>

People can be excluded from refugee status for one of three reasons: serious criminal acts; war crimes or crimes against humanity; or acts contrary to the purposes and principles of the United Nations (UN).<sup>2</sup> The case law surrounding refugee exclusions conforms to a number of predictable expectations; most important for our work here is that the overwhelming majority of those excluded are men.

This masculine framing is, in many ways, a truism of refugee law. The post-Second World War definition of a refugee is built on a masculine paradigm, a fact that has been scrutinized by feminist analysts over the past several decades. Much scholarly, judicial, and policy development work has been done to ensure a place for female experiences within refugee law,<sup>3</sup> but there has been little interest in ensuring 'equal access' to exclusion. The stereotype of women as victims has yielded some putative 'benefits' to women in refugee jurisprudence, and this same stereotype might be expected to protect women from exclusion.<sup>4</sup> However, the exclusion case law reveals a different picture. The cases excluding women – at least those in Canada – show alarmingly gendered patterns which this article outlines and analyses. We conclude that considerations of gender and gendered power imbalance, which have attracted considerable attention in

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- <sup>1</sup> Since 2000, the number of asylum claims around the globe has hovered around 1 million annually. In 2015, there was a sharp uptick to 3.2 million. Comprehensive data about the number of exclusions is not available from UNHCR; however, examples from around the world provide some insight. For example, in Canada between 1998 and 2008, exclusions accounted for approximately 0.3% of total refugee claims. In the United Kingdom (UK), the number of exclusion cases in 2013 amounted to 0.9% of total refugee claimants and in 2012 only 0.13% of refugee claimants were excluded. Asha Kaushal and Catherine Dauvergne, 'The Growing Culture of Exclusions: Trends in Canadian Refugee Exclusions' (2011) 23 *International Journal of Refugee Law* 54.
- <sup>2</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention), as amended by the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art 1F. See also arts 1D–1E.
- <sup>3</sup> A few leading examples from a very large body of literature include: DE Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133, 154; Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 *Human Rights Quarterly* 213, 277; Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate 2000); Susan Kneebone, 'Women within the Refugee Construct: "Exclusionary Inclusion" in Policy and Practice – the Australian Experience' (2005) 17 *International Journal of Refugee Law* 7, 42; Efrat Arbel, 'The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases' (2013) 58 *McGill Law Journal* 1; Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014).
- <sup>4</sup> Catherine Dauvergne, Leonora C Angeles, and Agnes Huang, *Gendering Canada's Refugee Process* (Status of Women Canada 2006).

feminist work on refugee law, have not yet reached the question of exclusion, and that such attention is urgently needed.

The starting point of this work is to situate the exclusion provisions of the Refugee Convention. Following this brief overview, we present the dataset of Canadian cases over the past 16 years and examine how gender shapes the exclusion jurisprudence. This analysis reveals a number of very serious concerns with how Canadian decision makers have been approaching exclusion. In the final section of the article we consider whether the leading Supreme Court of Canada cases on exclusion, properly interpreted, have the potential to remedy our concerns and to effect a principled course correction for the exclusion of women.

As this is, to the best of our knowledge, the first analysis to focus systematically on exclusion jurisprudence involving women in any jurisdiction, there are a number of important questions that are beyond the scope of this research. We are looking only at Canadian data, and we are examining how exclusion is applied to women. Our central question at all times is whether gender makes a difference in this setting. Key starting points to build on this work would be comparisons with other jurisdictions, and equally systematic approaches focusing solely on cases involving men (which are similarly absent in existing scholarship). Our data is further shaped by the idiosyncrasies of Canadian law, which we outline in the first section. Finally, given the groundbreaking nature of this exposition, it raises at least as many questions as it answers. We review some of those questions in the concluding section and invite readers to uncover more.

Despite these limitations, Canada has done more than any other jurisdiction to build sustained attention to its guidelines on gender-related persecution into first-instance decision making, and Canadian first-instance decision making is more visible and accessible than that of any other jurisdiction in the world.<sup>5</sup> These two factors go a considerable way to making Canadian data a logical starting point for analysis of how refugee exclusion is applied to women.

### 1.1 Starting points for exclusion

Article 1F of the Refugee Convention originated as a political compromise. Hathaway and Foster summarize the drafting history of this article by stating, ‘most fundamentally, the drafters were persuaded that if state parties were expected to admit serious criminals as refugees, they would simply not be willing to be bound by the Convention.’<sup>6</sup> If anything, this perspective on excluding from protection even those individuals who face a serious risk of being persecuted has hardened in the years since 1951. In 2002, the Supreme Court of Canada referred to those captured by the exclusion clauses as ‘persons who by their conduct have put themselves “beyond the pale”’;<sup>7</sup> and the Court of Justice of the European Union has recently

<sup>5</sup> Arbel, Dauvergne, and Millbank (n 3). See also Shauna Labman and Catherine Dauvergne, ‘Evaluating Canada’s Approach to Gender-Related Persecution’ in Arbel, Dauvergne, and Millbank (n 3) 264.

<sup>6</sup> James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 525.

<sup>7</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 1 SCR 3, para 102.

characterized the purpose of article 1F as maintaining the ‘credibility’ of the refugee protection system.<sup>8</sup>

A key feature of article 1F is the moral opprobrium it expresses. It reads in full:

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

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as 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.<sup>9</sup>

The objective of exclusion is to protect the refugee system as a whole, rather than to protect a host State from any specific risk posed by an individual refugee. The separate questions of expelling a person who poses a threat to national security or to public order in the host State are dealt with in article 32.<sup>10</sup> Closely linked to this is the article 33(2) commitment to allow the *refoulement* of convicted criminals who are determined to be dangerous to the host community.<sup>11</sup> Exclusion *ab initio* as provided for in article 1F is not primarily a matter of safety or security; it is a matter of system integrity. Article 1F is to be applied mandatorily, even to individuals whom a State would choose to admit. Outside the framework of refugee law, States may, of course, admit whomsoever they choose, but individuals captured by the exclusion provision may not be granted refugee status and the rights that accompany it.

<sup>8</sup> Joined Cases C-57/09 and C-101/09 *Federal Republic of Germany v B and D* [2010] ECR I-10979, para 115.

<sup>9</sup> Refugee Convention (n 2) art 1F.

<sup>10</sup> *ibid* art 32: ‘1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.’

<sup>11</sup> Art 33 reads in full: ‘1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’

Given the categorical and absolute character of article 1F, it is interpreted narrowly. This follows from general principles of interpretation of human rights instruments: exception provisions are to be read narrowly. This principle is especially important in the case of refugee law, which provides surrogate human rights protections for individuals at risk of very serious harm whose home States will not protect them. It follows that to be excluded from refugee protection is a very stark exclusion indeed. Beyond refugee protection, there is almost literally nowhere else to turn.<sup>12</sup> It follows, then, that the exclusion provisions are generally thought to be applied to as few people as possible, and that those who are indeed excluded are truly undeserving, and that their acts conform to the moral opprobrium the provision expresses.<sup>13</sup>

The bottom line is that exclusion is not aimed at garden-variety criminals. While the number of individuals excluded in Canada has increased steadily since the beginning of the 21st century, the number remains low, and leading jurisprudence around the world continues to reinforce the imperative for a narrow interpretation.

Despite this commitment, the evidentiary standard for exclusion is low. The opening clause of article 1F states that there must be ‘serious reasons for considering’ that an individual is captured by one of the three subparagraphs. There is no requirement for an actual conviction,<sup>14</sup> nor even a criminal charge, much less the common law criminal threshold of proof of ‘beyond a reasonable doubt’. The Supreme Court of Canada has agreed with its United Kingdom (UK) counterpart that it is ‘a mistake to paraphrase the straightforward language of the Convention’ and that article 1F contains a ‘unique evidentiary standard’.<sup>15</sup>

In Canada, there are a few additional procedural matters that shape our dataset. First-instance decisions about applications for refugee protection are made by the

<sup>12</sup> The one protection that remains is that provided by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, which provides that a State may not return an individual to a place where there are substantial grounds for believing that he or she would be in danger of being subjected to torture (see art 3(1)).

<sup>13</sup> As summarized in: UN High Commissioner for Refugees (UNHCR), ‘Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’, UN doc HCR/GIP/03/05 (4 September 2003) para 2: ‘The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied “scrupulously” to protect the integrity of the institution of asylum, as is recognised by UNHCR’s Executive Committee in Conclusion No 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.’

<sup>14</sup> Ambiguously and unhelpfully, art 1F(c) requires ‘guilt’.

<sup>15</sup> *Ezokola v Canada (Citizenship and Immigration)* 2013 SCC 40, [2013] 2 SCR 678, paras 101–02; *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222.

Refugee Protection Division (RPD) of Canada's Immigration and Refugee Board (IRB). Individuals have a hearing before a notionally non-adversarial single-member panel tribunal. In addition, the Minister of Immigration, Refugees and Citizenship Canada (the Minister) has a right to participate in RPD hearings, and almost invariably does so when an exclusion issue arises. Furthermore, some individuals who seek to make a refugee claim in Canada are excluded under an 'eligibility' determination process prior to even reaching the first-instance decision-making stage. Eligibility criteria include criminality considerations that overlap considerably with exclusion under the Refugee Convention, but the decisions are made quickly and with few procedural protections.<sup>16</sup> Finally, when first-instance decisions are made public, they are anonymized, and thus details are sometimes missing, which leads to some gaps in analysis.

Beyond these framing pieces regarding exclusion and procedure, there is also the difficulty of appropriately 'gendering' refugee jurisprudence, which has had significant attention over a sustained period. Many States, and the UN High Commissioner for Refugees (UNHCR) itself, have developed guidelines for interpreting the refugee definition to include gender considerations.<sup>17</sup> None of the gender guidelines address the intersection of gender and exclusion.<sup>18</sup>

The Canadian gender guidelines have a particular focus on gender-related *persecution*, rather than the Refugee Convention as a whole. Given this, it follows that article 1F is not part of the analysis. The UNHCR gender guidelines have a broad focus, but still do not mention article 1F. The breadth of these guidelines results primarily from their engagement with UNHCR's operational role, considering particular risks to women during flight, in camp situations, and during repatriation. Ironically, one of the risks noted in these guidelines is that of forced recruitment into armed groups.<sup>19</sup>

<sup>16</sup> Immigration and Refugee Protection Act SC 2001, c 27 (IRPA) ss 100–02. See also Kaushal and Dauvergne (n 1) 60, re numbers found ineligible annually (which are very small in comparison to those who have been excluded under art 1F).

<sup>17</sup> See UNHCR: 'Guidelines on the Protection of Refugee Women' (1991); 'Sexual Violence against Refugees: Guidelines on Prevention and Response' (1995); 'Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', UN doc HCR/GIP/12/09 (23 October 2012). For a detailed overview of how gender guidelines are incorporated into legislation around the world, see Centre for Gender and Refugee Studies, 'Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for US Attorneys' (University of California Hastings College of the Law, 2014) <[https://cgrs.uchastings.edu//sites/default/files/Review\\_Foreign\\_Gender\\_Guidelines\\_Caselaw\\_0.pdf](https://cgrs.uchastings.edu//sites/default/files/Review_Foreign_Gender_Guidelines_Caselaw_0.pdf)> accessed 4 August 2017.

<sup>18</sup> The only guidelines with a gender focus that make any mention of exclusion are: UNHCR, 'Sexual Violence against Refugees' (n 17) s 4.3(b), which make mention of exclusion in their discussion of perpetrators of sexual violence.

<sup>19</sup> UNHCR, 'Information Note on UNHCR's Guidelines on the Protection of Refugee Women' (1991) 39. Refugee camps, in a number of locations, house the civilian families of members of the armed forces. The camps frequently serve as rest and recuperation sites. The men often bring weapons with them into the camps. Proliferation of weapons can compound the protection problems facing refugee women. Forced recruitment of women and adolescent girls into the

Involvement of this nature with armed groups exposes people to exclusion questions, and sometimes to actual exclusion, which is not mentioned in the guidelines. One factor that may explain the absence of exclusion considerations in these guidelines is that the most influential gender guidelines were issued in the 1990s, when the exclusion provisions were much less frequently in use.

UNHCR has also issued guidelines on exclusion, which were published considerably later, in 2003.<sup>20</sup> Despite widespread attention to gendering refugee jurisprudence by the time these guidelines were issued, the guidelines do not make a single comment about women or gender-related considerations.

While UNHCR recommends that questions of inclusion be determined prior to questions of exclusion, this instruction has not been adopted into Canadian refugee law. The approach of the RPD is, rather, to consider any potential issues that may arise, whether related to inclusion or exclusion. No particular issue order is mandated, but issues are often tackled in order of perceived importance by the decision maker. As a result, it is impossible to conclude that the women in the dataset would have been granted refugee status but for the application of the article 1F provisions.

It is against this backdrop, and in particular in consideration of the yawning gap between analysis of gender and analysis of exclusion that we now turn to our dataset of Canadian cases about women and exclusion.

## 1.2 The data

In 2015, the RPD finalized 13,459 claims and the Refugee Appeal Division (RAD) finalized 2,781 appeals. In 2016, the RPD finalized 15,761 claims and the RAD finalized 2,967 appeals.<sup>21</sup> Only a small selection of decisions are publicly available. As an example of how small the selection is, consider that only 2,543 decisions are available from the IRB for 2015, which includes decisions from all four divisions of the Board.<sup>22</sup> There is no public data on the number of female claimants who have been excluded under article 1F in Canada other than a small number of IRB decisions that have been made public. Our research examines the 51 decisions available from the RPD and the RAD for the years 2000–17 that involve female claimants where the issue of exclusion was raised under article 1F.<sup>23</sup> When reading and drawing conclusions from these cases, it is vital to remember that they represent an incredibly small part of the greater whole.

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armed forces of resistance groups is a further problem in some countries. In some cases, they are recruited as actual soldiers. In other cases, women and children are required to carry ammunition and other supplies, or even to clear mines.

<sup>20</sup> UNHCR, 'Guidelines on International Protection No 5' (n 13).

<sup>21</sup> Immigration and Refugee Board of Canada (IRB), 'Refugee Claims – Statistics, Trends and Projections' (2017) <<https://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/RefClaDemStat.aspx>> accessed 19 November 2017; IRB, 'Refugee Appeals – Statistics, Trends and Projections' (2017) <<https://www.irb-cisr.gc.ca/Eng/RefApp/Pages/RefAppStat.aspx>> accessed 19 November 2017.

<sup>22</sup> In addition to the RPD and the RAD, the IRB includes the Immigration Division and the Immigration Appeal Division.

<sup>23</sup> There are 51 decisions and 50 claimants, since one claimant was the subject of two decisions: *X(Re)* 2011 CanLII 100325 and *X(Re)* 2013 CanLII 99195.

We gathered decisions from two publicly available datasets. The IRB makes some of its decisions available on the open access CanLII site, and some further decisions are available on Quicklaw and Westlaw.<sup>24</sup> Given the constraints of the CanLII search platform in terms of narrowing a search down to cases involving women and article 1F exclusions, the best way to find these cases was to search for ‘Article 1F’ within the text. This returned 640 results between 2000 and 2015.<sup>25</sup> The next step was to read each decision and find those where the claimant was female. In total, there were 51 such decisions (including the three decisions from 2016 and 2017). Of this set of 51 decisions, 37 led to the claimant being excluded,<sup>26</sup> five resulted in the claimant being accepted, and in nine the exclusion issue was raised but the outcome was less straightforward (‘other’).<sup>27</sup> To protect the identity of claimants, most of the decisions made public are anonymized by removing names and other key identifying details,<sup>28</sup> and this process can make it difficult to fully understand the claimant’s story and the conduct that is the subject of the 1F allegation. Furthermore, anonymization means that some cases cannot be traced through the process of subsequent judicial review in the Federal Court.

A dataset of 51 cases is enough to be interesting, but not enough to draw any kind of quantitative conclusion, and few enough that even qualitative analysis must tread cautiously. It is, of course, possible that some women would have been excluded without a textual mention of article 1F but, given the very small number of cases publicly available, there is no significant loss of data integrity by not separately searching for these potential needles in the haystack.<sup>29</sup>

<sup>24</sup> The IRB website links users directly to the CanLII site.

<sup>25</sup> There were inevitably a few cases in this group that had nothing to do with article 1F but that nevertheless matched the search criteria. For comparison, Westlaw was also used to view the number of cases mentioning ‘Article 1F’ and the result was similar, totalling over 600. Ultimately CanLII provided a better platform for narrowing the search, so it was used as the primary research tool. An additional search of the years 2016 and 2017 was conducted to update the dataset prior to final submission for publication. Based on the original findings, CanLII was used in this final phase and added three additional cases to the dataset.

<sup>26</sup> This number includes one decision where the claimant’s protection was vacated on the basis that the claimant had misrepresented conduct that would fall within art 1F.

<sup>27</sup> In eight cases the outcome was not as easy to categorize as ‘accepted’ or ‘excluded’. In two cases the exclusion issue was raised against the claimant, but the Minister subsequently withdrew its intervention (*X(Re)* 2003 CanLII 55249; *X(Re)* 2004 CanLII 55670); in one case the Minister withdrew its intervention but the panel still proceeded with an exclusion analysis (*X(Re)* 2000 CanLII 21312); in four cases the claimant was not excluded but was denied protection (*X v Canada (IRB)* 2001 CanLII 26864; *X(Re)* 2010 CanLII 59590; *X(Re)* 2013 CanLII 100927; *X(Re)* 2015 CanLII 61919); and in one case the RAD referred the matter back to the RPD to consider the 1F issue (*X(Re)* 2015 CanLII 80981).

<sup>28</sup> IRB, ‘Decisions’ (2017) <<https://www.irb-cisr.gc.ca/Eng/BoaCom/decisions/Pages/index.aspx>> accessed 29 July 2017.

<sup>29</sup> A search of this type was attempted but the results were very difficult to assess. On the ‘unknowability’ of research in this area, see Efrat Arbel, Catherine Dauvergne, and Jenni Millbank, ‘Introduction’ in Arbel, Dauvergne, and Millbank (eds) (n 3).

The women who were the subjects of the 51 decisions came from 30 countries.<sup>30</sup> Of these, 20 applied as solo claimants and 31 applied with others (friends, children, spouses, and other family members). The majority of the cases – 39 decisions – concerned exclusion under article 1F(b), three concerned article 1F(a) only, and nine discussed two or more article 1F grounds.<sup>31</sup> Despite the relatively small number of decisions, they are incredibly diverse – beyond what might be suggested by these preliminary groupings. We have organized the cases thematically, according to the type of conduct alleged against the claimants. This approach makes it easier to see what is going on in the cases as compared to grouping them by the article 1F subsections. As our focus is on understanding how exclusion applies to women, separating the cases according to the paragraphs of article 1F adds little to the analysis. Our dataset confirms that most exclusions are under article 1F(b) and that Canadian decision makers are both imprecise and vague about which paragraph they are applying.<sup>32</sup> We identified six groups: child abduction, use of false or forged documents or identity theft, economic offences, drug-related offences, crimes against humanity, and a final ‘other crimes’ group.<sup>33</sup>

## 2. CASES BY CATEGORY

### 2.1 Child abduction

The group of cases where the conduct triggering an exclusion analysis is labelled ‘child abduction’ is one of the larger groups in the dataset (11 decisions out of 51). This is unsurprising given the common denominator in these cases is gender – women are more likely to be primary caregivers than are men, and are more likely to be forced to flee abusive relationships (with their children) than are men. Compared with the other case categories, the child abduction decisions were the most inconsistent in terms of outcome: five claimants were excluded, one was accepted, and five resulted in ‘other’ outcomes. There was a strong nexus between the reason the women sought protection and the reason exclusion was raised – often it was one and the same. With the exception of two cases, the women in these cases claimed to be fleeing domestic violence against themselves and their children, and it was that same conduct that was then used to argue for their exclusion from the protection framework.<sup>34</sup> This puts the claimants in an impossible situation, where they cannot access protection precisely because they are seeking it with their children.

<sup>30</sup> There were 11 countries of origin with more than one claimant: Colombia, Mexico, the US, Hungary, China, Haiti, Iran, Guyana, Jamaica, Nigeria, and El Salvador.

<sup>31</sup> Earlier research by Kaushal and Dauvergne demonstrated that IRB decisions are often imprecise about which art 1F ground is being applied by the decision maker: (n 1) fns 43–44.

<sup>32</sup> This confirms the finding of Kaushal and Dauvergne (n 1). See also Molly Joeck, ‘Refugee Protection at the Edges: Exclusion for Criminality in Canada since *Febles*’ (LLM thesis, University of British Columbia 2018).

<sup>33</sup> The breakdown of cases by category is as follows: child abduction: 11; use of false or forged documents or identity theft: 8; economic offences: 10; drug-related offences: 6; crimes against humanity/war crimes: 11; and, other: 5.

<sup>34</sup> In *X(Re)* 2013 CanLII 100827, the claimant was also seeking to protect her daughter from her husband as he wanted to have her circumcised.

In the first of the exceptional (that is, non-domestic violence) cases, the claimant came from Iran to Canada with her husband and their son and *de facto* daughter, of whom she had full legal guardianship (but had not adopted).<sup>35</sup> While working as a nurse in Iran, the claimant had begun taking care of a baby whose birth mother had died in childbirth and whose father was a drug addict who had run away. She was eventually granted legal guardianship of the girl, who became an integral part of the claimant's family and believed the claimant to be her mother. When the child was eight or nine years old, her biological father sought her return. Fleeing both the Iranian legal system, which would give the father's biological rights precedence over her guardianship rights, and the father and his family, whose living environment was described as lacking access to education and surrounded by drugs and prostitution, the claimant came to Canada. The Canadian government eventually withdrew its intervention, but the RPD still considered the issue of exclusion and found the female claimant was not excluded because she had full guardianship rights when she left Iran, and the biological father had not yet reasserted his extinguished rights. The RPD found the claimant and her family to be Convention refugees on religious grounds – they had converted to Christianity and apostates face discrimination and even death in Iran.

The claimant in the second exceptional case left China with her minor son and daughter. After violating the one-child policy in that country, the female claimant and her husband had refused to undergo forced sterilization, and faced the repercussions of this refusal.<sup>36</sup> The claimant found a smuggler to get them to Canada and left her husband behind in hiding. The RPD did not consider child abduction or the issue of exclusion in its decision, and the Canadian government appealed the decision, partly on the basis that the RPD should have done so. On appeal, the government argued that proof of the father's permission to remove the children from China was required, and the RAD referred the case back to the RPD for redetermination on the grounds that the issue of exclusion should have been considered.

Overall in these cases, there is no real consideration given either to the claimants' gender or to the reality that, despite the measures a State may have in place to address domestic violence, victims often cannot or will not seek State intervention for fear of reprisal. In one decision, the RPD speculated quite inventively about an internal flight alternative and, in essence, implied that the claimant should have simply run away from her abusive husband.<sup>37</sup> Although the RPD often includes a perfunctory note about having considered the Gender Guidelines in its decisions, there was little space devoted to a gendered analysis of these protection claims. It is of course difficult to know how much consideration the Gender Guidelines were given when this is not explicitly articulated in the written decisions.

The five excluded claimants were all excluded because the RPD considered that there were serious reasons to suspect that the women had abducted their children, an act deemed a serious non-political crime. In one decision, the RPD wrote, 'Non-political criminals and persons engaged in reprehensible conduct in violation of international norms of acceptable behaviour should not be entitled to protection

<sup>35</sup> X(Re) 2000 CanLII 21312.

<sup>36</sup> X(Re) 2015 CanLII 80981.

<sup>37</sup> X(Re) 2015 CanLII 35403.

in a third country'.<sup>38</sup> If the claimants' allegations are credible, it is hard to conceive of their actions as 'reprehensible'. Furthermore, none of these cases engages in the kind of scrutiny of the alleged criminal offence that is required by international standards or by Supreme Court of Canada jurisprudence.<sup>39</sup> Arguably, no crimes have been committed at all.<sup>40</sup> In one decision excluding a woman and her mother from protection for child abduction, the decision maker adopted the government's argument that, had the claimants been able to produce credible evidence that they were removing the children from imminent harm, that would have negated the illegality of removal.<sup>41</sup> Again, this requires claimants to produce evidence of abuse or domestic violence from States where this violence was not reported for fear of the State's response.

The one decision in this category where the claimant was *not* excluded and was found to be a Convention refugee is somewhat of an outlier – not only because the claim was accepted despite the claimant's removal of her children from France against their father's protests and in the face of a court order – but because of the strong body of evidence she presented to the RPD.<sup>42</sup> In its decision, the RPD even remarked on the sheer amount and comprehensiveness of the evidence tendered. Faced with this particular decision, one has to conclude that fewer female claimants would be excluded if they were fleeing States where domestic violence was strongly condemned by the courts and the judicial system, and if they were socially and economically privileged enough to gather comprehensive documentation. Ironically, of course, many women would not be considered to be at risk of being persecuted precisely because of their access to the kind of judicial system that generates this evidence. A nuanced approach to considerations of gender in this set of cases would begin with attention to gender in childcare norms, in domestic and sexual violence patterns and protections, and in custody law provisions in the countries of origin of these claimants.

## 2.2 Use of false or forged documents or identity theft

There were eight decisions that involved identity theft or use of fake or forged documents and all had negative outcomes – in six decisions the claimants were excluded, and in two the claimants were not excluded but were ultimately denied protection.<sup>43</sup> There are similarities between this group of cases and the child abduction cases – in the

<sup>38</sup> *ibid* para 18.

<sup>39</sup> *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68, [2014] 3 SCR 431, para 62; UNHCR, 'Guidelines on International Protection No 5' (n 13); Hathaway and Foster (n 6) 534–37.

<sup>40</sup> This question is discussed below (conclusions, pt 4).

<sup>41</sup> *X(Re)* 2002 CanLII 52666, para 48.

<sup>42</sup> *X v Canada (IRB)* 2001 CanLII 26855. The claimant and her children were dual nationals of France and Syria.

<sup>43</sup> *X(Re)* 2010 CanLII 59590; *X(Re)* 2011 CanLII 97802; *X(Re)* 2011 CanLII 100325; *X(Re)* 2013 CanLII 99195; *X(Re)* 2013 CanLII 92087; *X(Re)* 2013 CanLII 97643; *X(Re)* 2015 CanLII 61919; *X(Re)* 2016 CanLII 106186.

majority of these cases the claimant used false identity or forged travel documents to flee, and it is this conduct that precluded them from seeking protection.<sup>44</sup> In both this group and the child abduction group, the female claimants often did something illegal to protect themselves or their children, and were then adversely affected by that choice when applying for protection in Canada.

It should be said at the outset that use of forged documents would not fall within the interpretation of a ‘serious non-political’ crime as suggested by UNHCR, or by leading commentators Hathaway and Foster or Goodwin-Gill and McAdam.<sup>45</sup> The more problematic standard set by the Supreme Court of Canada will be discussed later.

Some of the decisions in this group did consider the fact that, in order to escape their home countries or to survive elsewhere, refugee claimants are often forced to use fake documents or identities, with varied outcomes. This possibility is explicitly recognized in article 31 of the Refugee Convention.<sup>46</sup> There are, however, a number of cases where the illegal activity did not occur in the context of border crossings. In one case, a claimant from Haiti had committed identity and social services fraud in the US.<sup>47</sup> The Canadian government intervened on the exclusion issue, and the panel found that the claimant ‘must not be excluded’ from protection because she was not motivated by personal financial gain but by the need to work and receive social services such as food stamps despite not having immigration status. The panel doubted the claimant would have committed the offences if she had had legal status and, even though the claimant had served time for the offences, breached her probation, and been deported, the panel did not find her excludable, writing that it:

must not be forgotten that the spirit governing exclusions is to deny refugee protection to people who, by their actions, allegedly committed serious acts, to such an extent that they would be *undeserving* of Canada’s protection; but, in this case, the claimant acted only to meet her needs and those of her children, not to injure or to gain advantage through those documents. She used the documents in order

<sup>44</sup> In *X (Re)* 2016 CanLII 106186, the analysis is somewhat more complicated: the claimant used forged documents to enter the US, but returned to her home country of Nigeria in confusing circumstances prior to travelling to Canada and seeking protection.

<sup>45</sup> UNHCR defines ‘serious non-political crime’ as a capital crime or a very grave punishable act. Minor offences, punishable by moderate sentences, are not grounds for exclusion under art 1F(b), even if technically referred to as ‘crimes’ in the penal law of the country concerned. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN doc HCR/1P/4/ENG/REV. 3 (1979, reissued 2011) para 155. For further definitions of serious non-political crimes, see Hathaway and Foster (n 6) 567; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 179–80.

<sup>46</sup> Refugee Convention (n 2) art 31(1): ‘The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’

<sup>47</sup> *X(Re)* 2010 CanLII 59590.

to work and support her family. Furthermore, the amount of money involved is fairly small.<sup>48</sup>

Despite not excluding her, the RPD determined that she was neither a refugee nor a person in need of protection under the slightly broader provisions of Canadian law.<sup>49</sup>

In the second case with a mixed outcome, the RAD considered the RPD's decision to exclude the claimant, a woman from Nigeria accompanied by her minor son.<sup>50</sup> Before coming to Canada, the claimant had used another person's travel documents to make a return trip from Nigeria to the US, where she initially went to escape her abusive husband. She then travelled to Canada with a different set of fake documents and applied for protection. The government intervened on the ground that her use of false documents to reach the US constituted a serious non-political crime that excluded her from protection. The claimant argued that section 133 of the Immigration and Refugee Protection Act<sup>51</sup> (which may exempt claimants from a charge of using false documents if used to travel to Canada) was applicable but, since she used the documents in question to enter the US, the RPD excluded her. Interestingly, the RAD concurred with the RPD's determination that the claimant had committed a serious non-political crime but overturned the exclusion. It applied the Supreme Court of Canada's ruling in *Febles*, which held that the harshness of the effect of exclusion must be balanced against the seriousness of the criminal conduct.<sup>52</sup> Ultimately, however, the RAD dismissed the claimant's appeal for lack of credibility, finding she was not a Convention refugee nor a person in need of protection. This conclusion makes the application of a balancing approach somewhat inexplicable, despite the helpful insight that the 'seriousness' threshold was not reached. Balancing 'seriousness' against the consequences of exclusion is regarded by a number of leading courts and commentators as an unacceptable approach to article 1F(b).<sup>53</sup>

This group of cases lends support to the idea that, when faced with an exclusion case, the tribunal has constructed an idea of the 'good claimant', ideally a woman who is hard-working and honest. In two of the decisions where the claimant was excluded, the reasons specifically call the claimant a 'thief, and a con-woman'<sup>54</sup> and a 'habitual criminal', even going so far as to say that individuals like the claimant do not 'deserve' protection.<sup>55</sup> These decisions take the original logic of article 1F and stretch it far beyond its intent and, indeed, beyond the idea that a small number of individuals commit acts so heinous that admitting them would bring the refugee system as a whole into disrepute. Furthermore, half of the claimants in this group of cases (three of six) alleged they were

<sup>48</sup> *ibid* para 70 (emphasis added).

<sup>49</sup> IRPA (n 16) ss 96–97.

<sup>50</sup> *X(Re)* 2015 CanLII 61919 (RAD).

<sup>51</sup> IRPA (n 16).

<sup>52</sup> *X(Re)* 2015 CanLII 61919 (RAD), para 67; *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68, [2014] 3 SCR 431.

<sup>53</sup> Hathaway and Foster (n 6) take this view.

<sup>54</sup> *X(Re)* 2013 CanLII 99195, para 49.

<sup>55</sup> *X(Re)* 2011 CanLII 97802, paras 22–30.

fleeing domestic violence.<sup>56</sup> This factor alone suggests that focusing on gender could shed significant light on these cases, even though the crime of identity theft is not especially gendered on its face.

### 2.3 Economic offences

The group of cases involving economic offences is one of the larger groups in the dataset, together with child abduction and crimes against humanity. The decisions in this group tend to be more straightforward than the preceding two groups in that – generalizing very broadly – there is no real consideration given to gender in the written reasons, and in each case the claimant was excluded on the basis of having committed one or more economic offences.<sup>57</sup> The offences in this group include fraud, embezzlement, receiving material benefit from trafficking in persons, misappropriating public funds, smuggling, tax evasion, and bribery. In one case, the claimant was wanted for fraud in Romania and she claimed that much of the harassment she had been subjected to in Romania was due to her gender, but the RPD did not find this to be a reasonable argument.<sup>58</sup> In another case, a claimant from Colombia had served time for accepting bribes in her capacity as a prosecutor. She claimed her boss had brought the charges against her after sexually harassing her and trying to transfer her to a dangerous area of the country. This too did not attract attention in the RPD’s reasons and she was excluded for committing a serious non-political crime.<sup>59</sup>

The one decision that gave more than passing consideration to the claimant’s gender involved a woman from Korea who was subject to an arrest warrant for defrauding over 50 investors of US\$19 million.<sup>60</sup> She claimed that her husband had perpetrated the fraud and had physically abused her during their marriage. The panel dedicated part of its analysis to the allegations of domestic violence but did not find the claimant credible because she had not reported the abuse to the authorities and had married her husband knowing that he was a criminal, and despite her father’s opposition. Despite the RPD stating it had paid ‘serious attention’ to the Gender Guidelines, this aspect of the decision is quite troubling in its victim blaming (credibility issues aside). In a fraught analysis, the panel concluded that ‘the argument made by counsel concerning the claimant’s fear of her husband is not sufficient to mitigate the seriousness of this alleged criminal activity.’<sup>61</sup> The question of mitigation ought never to arise at this stage of the analysis.

As with the false documents cases, leading cases and commentary outside Canada suggest that an economic offence would very rarely (or never) be considered a ‘serious non-political crime’ under article 1F(b).<sup>62</sup> As we do not have a comparable group

<sup>56</sup> *X(Re)* 2011 CanLII 100325; *X(Re)* 2013 CanLII 99195; *X(Re)* 2014 CanLII 97643; *X(Re)* 2015 CanLII 61919.

<sup>57</sup> *Sing (Re)* 2002 CanLII 53174; *X(Re)* 2003 CanLII 55286; *X(Re)* 2008 CanLII 76235; *X(Re)* 2008 CanLII 88060; *X(Re)* 2009 CanLII 90091; *X(Re)* 2009 CanLII 90241; *X(Re)* 2010 CanLII 96103; *X(Re)* 2010 CanLII 98108; *X(Re)* 2013 CanLII 100007; *X(Re)* 2015 CanLII 66234.

<sup>58</sup> *X(Re)* 2010 CanLII 98108.

<sup>59</sup> *X(Re)* 2010 CanLII 96103.

<sup>60</sup> *X(Re)* 2009 CanLII 90241.

<sup>61</sup> *ibid* para 24.

<sup>62</sup> See *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68, [2014] 3 SCR 431 and IRPA (n 16).

of men excluded for economic crimes, it is impossible to be certain what attention to gender might add in these cases, beyond that of the Korean claimant discussed above. We can conclude, however, that the cases do not attempt to address this question, which the Canadian guidelines mandate, at least at a general level.

## 2.4 Drug-related offences

The group of six decisions that considered the claimant's excludability based on drug-related crimes under article 1F(b) tend to take a harsh stance: five of the six claimants were excluded.<sup>63</sup> The one successful claimant was a transgender woman from Mexico who had pleaded guilty to possession for the purpose of trafficking in the US. The RPD made it clear that the only reason the claimant was accepted was because of the very particular circumstances of her case, which included discriminatory treatment by the police (see part 3.2). Another case in this group involved a lesbian claimant from Jamaica (see part 3.1) who, despite the finding that she had a well-founded fear of persecution if she were to return to Jamaica, was excluded for drug-related offences committed prior to arriving in Canada.<sup>64</sup> Four of the five excluded claimants were considered to have committed serious drug-related crimes in the US, and the fifth was found to have been involved in international drug trafficking based in Vietnam.<sup>65</sup>

One case involved a claimant from the Dominican Republic, whose protection was vacated five years after it was granted on the basis of drug charges in the US that had come to light.<sup>66</sup> The claimant had been charged with delivery of and conspiracy to traffic in cocaine and had failed to appear for her trial in the US. The Canadian government argued that had this been known at the time of her original claim, she would have been excluded. The RPD found that the government had discharged its duty to establish that the original decision granting protection was made on the basis of a misrepresentation or the withholding of material facts relating to a relevant matter, and vacated the claimant's status. Although counsel argued that the incident for which the claimant was arrested was one transaction valued at \$20 and, therefore, not deserving of the 'serious' descriptor, the panel found there were 'serious reasons to believe that the respondent's involvement in drug trafficking went deeper than just this single transaction.'<sup>67</sup> While it is the RPD's role to consider all conduct, not only arrests or convictions, this seems particularly harsh considering the charge was 22 years earlier and little additional evidence was discussed in the decision.

There are more obvious discussions of gender in this group of cases than in the two groups above. For example, in a 2004 case, the principal claimant, who was from

<sup>63</sup> Excluded: *X(Re)* 2004 CanLII 56810; *X(Re)* 2010 CanLII 96659; *X(Re)* 2010 CanLII 98924; *X(Re)* 2012 CanLII 100170; *X(Re)* 2013 CanLII 96342. Accepted: *X(Re)* 2011 CanLII 97655.

<sup>64</sup> *X(Re)* 2012 CanLII 100170.

<sup>65</sup> In Canada, decision makers often compare the seriousness of the offence in the country where it was committed to its seriousness in Canada. This methodology flows directly from Canadian immigration jurisprudence and is not a widely accepted trajectory of analysis around the world. For this reason, the 'war on drugs' in the US may have influenced the outcomes in this group more than would be the case had the claims not been made in Canada.

<sup>66</sup> *X(Re)* 2013 CanLII 96342. The issue of 'vacating' protection arises under IRPA (n 16) s 109.

<sup>67</sup> *X(Re)* 2013 CanLII 96342, para 47.

Vietnam, was excluded on the basis that the Vietnamese government had issued a warrant for her arrest for involvement in an international drug smuggling operation.<sup>68</sup> The claimant's application for refugee protection was joined with that of her female friend, who had hidden the principal claimant for several years at her house in Vietnam before they escaped to Canada together. The claimants alleged that, during that time, the associate claimant's husband had physically abused both women and raped the principal claimant. The associate claimant's daughter, who was 19 years old at the time of the hearing, also lived in the same house.

After finding there was insufficient reason to exclude the associate claimant, the panel conducted an inclusion analysis in order to determine whether she had a well-founded fear of persecution. The panel used the fact that the associate claimant had not brought her daughter to Canada with her as proof that she was not credible: 'Is it reasonable that she would leave her vulnerable young daughter in the care of this violent, murderous, sexual assaulting predator?' She replied that she had hoped her father or brother would keep her daughter safe, although she admitted that she had made no provision for this.<sup>69</sup> While this particular issue was not central to the decision or to the exclusion of the principal claimant, the language and tone of the commentary imply that if the associate claimant were to be believed, then she must be a bad mother for leaving her daughter behind when fleeing persecution.

There are other examples of female claimants being judged in this way, where their actions are deemed to reflect their qualities as a woman, wife, or mother, and thus their 'goodness' is called into question. More systematic attention to gender in these cases would highlight how this stereotyping may frame conclusions, as well as how gender-based coercion may undermine the traditional analysis of criminal responsibility.

## 2.5 Crimes against humanity and war crimes

Like the economic offences group, the crimes against humanity group of decisions seems fairly atypical of exclusion cases generally. In this group, nine of 11 claimants were excluded for complicity in committing crimes against humanity.<sup>70</sup> In the two cases where the claimants were not excluded, they were also not afforded protection.<sup>71</sup> Article 1F(a), which mentions war crimes as well as crimes against humanity, was used as the sole basis for exclusion analysis in three of these cases, while the rest referred to both article 1F(a) and article 1F(c). The distinctions between the two provisions (including 'guilt' vs 'having committed', and 'acts' vs 'crimes') were not explored in any of the cases; rather, it seems that the two provisions were applied jointly because of the assumption that crimes against humanity are, categorically, acts contrary to the purposes and principles of the UN. There is a gendered analysis in a few of these decisions, but in most cases the panel's analysis does not mention gender other than to identify the claimant.

<sup>68</sup> *X(Re)* 2004 CanLII 56810.

<sup>69</sup> *ibid* para 118.

<sup>70</sup> *X(Re)* 2001 CanLII 26924; *X(Re)* 2004 CanLII 56805; *X(Re)* 2006 CanLII 61620; *X(Re)* 2007 CanLII 80289; *X(Re)* 2007 CanLII 80292; *X(Re)* 2009 CanLII 60485; *X(Re)* 2010 CanLII 96821; *X(Re)* 2012 CanLII 95544; *X(Re)* 2012 CanLII 98923.

<sup>71</sup> *X v Canada* 2001 CanLII 26864, and *X(Re)* 2016 CanLII 106186.

The majority of claimants excluded in this group were members of organizations allegedly involved in crimes against humanity: the government of the Democratic Republic of Congo, Rwandan genocidaires, the SAVAK in Iran, the Farabundo Marti Liberation National Front in El Salvador, the LTTE in Sri Lanka, the Haitian national police force, the family planning office of a Chinese company, and the KZF in India. Perhaps unsurprisingly, the claimants in these cases were not found to have personally committed crimes against humanity but were considered complicit through their membership or involvement in the organization that perpetrated the crimes. Given the fairly wide net that the complicity doctrine casts, it is extremely difficult for claimants to rebut an exclusion allegation once it is made out that they were members of an organization known to have committed such crimes. All but one of these cases predate the Supreme Court of Canada's ruling in *Ezokola*, which we turn to in the final section.<sup>72</sup> In the pre-*Ezokola* case where the claimant was not excluded, she had worked for the Peruvian government and had been a member of the Peruvian National Police, during which time she was enlisted to assist staff in the aftermath of a riot at a high-security prison that typically housed terrorists.<sup>73</sup> While providing medical assistance to an inmate, the police officer assigned to be her bodyguard shot and killed the inmate she was helping. During an inquiry into the riot, the claimant testified that the officer had threatened to accuse her of collaborating with the terrorist inmates if she told anyone about the incident. In its exclusion analysis, the RPD considered whether the Peruvian National Police Force was an organization with a limited and brutal purpose, and whether the claimant's assistance to inmates who might have been tortured made her an accomplice in crimes against humanity. It determined that she had provided assistance to the inmates in good faith, not to prolong their lives so that they might be tortured further. The post-*Ezokola* case that did not lead to exclusion involved a married couple who had been members of the Afrikaner Resistance Movement in South Africa. The RPD decision maker carefully applied the *Ezokola* ruling and concluded that exclusion was not warranted.<sup>74</sup>

In the majority of these decisions, the term 'gender' is not used. The two exceptions are a case where the claimant, who worked for the Democratic Government of Congo, made a claim based on gender-related persecution,<sup>75</sup> and a case involving a claimant from Rwanda, whom the panel found complicit in crimes against humanity.<sup>76</sup> The Rwandan claimant described a number of instances when she was sexually assaulted in Rwanda, both before and after the genocide. Before undertaking its analysis of the complainant's credibility, the panel explicitly acknowledged that it was conscious of gender in assessing the claim:

I carefully read the IRB Chairperson's guidelines concerning women refugee claimants fearing gender-related persecution and certain decisions of the Federal Court of Canada in which this subject was directly addressed. In light of these readings,

<sup>72</sup> *Ezokola v Canada (Citizenship and Immigration)* 2013 SCC 40, [2013] 2 SCR 678.

<sup>73</sup> *X v Canada (IRB)* 2001 CanLII 26864.

<sup>74</sup> *X (Re)* 2016 CanLII 106186.

<sup>75</sup> *X (Re)* 2012 CanLII 98923, para 2.

<sup>76</sup> *X (Re)* 2012 CanLII 95544.

[I] know that it is important to be extremely careful when assessing the actions of women subjected to violence, and that to assess these actions, it is essential to apply special knowledge in order to reach a fair and correct judgment, and that in order to acquire this special knowledge, it is necessary [*sic*] rid oneself of the myths and stereotypes about abused women. I also understand that when I make findings about the credibility of a woman who alleged that she is a victim of violence, I must be sensitive to, and know and understand the reality of women who find themselves in this situation; I must employ a standard of reasonableness that incorporates the experiences of women who have been subjected to violence.<sup>77</sup>

This is one of the most explicit statements regarding considerations relevant to female refugee claimants in the 51 cases and it hints at some of the difficulties in assessing claims from women who allege they are victims of violence and sexual assault. In this particular case, the panel found the claimant was not credible and excluded her from protection. This is an example of how much latitude decision makers have to shift their negative conclusions to an adjacent aspect of the refugee definition. A more systematic approach to gender in these cases would help develop an understanding of how gendered power imbalances intersect with the facts and jurisprudence of complicity.

One 2004 case stands out from the rest in this group. It involved a claimant from China who had worked for the family planning office at a large company.<sup>78</sup> The RPD determined that she had forced other women to have abortions and that this constituted a crime against humanity. This case will be discussed in more detail in part 3.

## 2.6 Other crimes

There are five decisions where the conduct giving rise to potential exclusion does not fall under the above categories: sexual interference,<sup>79</sup> robbery,<sup>80</sup> manslaughter,<sup>81</sup> aggravated assault,<sup>82</sup> and a variety of offences including resisting arrest, assaulting an officer, and possession of firearms.<sup>83</sup> Perhaps because of the unique facts of these cases, we see a higher proportion of accepted claims: three of the five claimants were accepted (sexual interference, robbery, and manslaughter) and two were excluded (miscellaneous offences and aggravated assault). Accordingly, this group contains three of the five accepted claimants in the entire dataset.

Of the three claimants accepted in this group, there is little similarity in the cases other than the ultimate dispositions. In one of these cases, which was eventually confirmed by the Federal Court of Canada on judicial review, the claimant left the US after being sentenced to 30 years imprisonment for ‘unlawful sexual activity with a minor’ (a 16-year-old).<sup>84</sup> The government declined the RPD’s invitation to

<sup>77</sup> *ibid* para 30.

<sup>78</sup> *X(Re)* 2004 CanLII 56805.

<sup>79</sup> *X(Re)* 2012 CanLII 95148.

<sup>80</sup> *X(Re)* 2010 CanLII 97305.

<sup>81</sup> *X(Re)* 2011 CanLII 97799.

<sup>82</sup> *X(Re)* 2014 CanLII 48294.

<sup>83</sup> *X(Re)* 2007 CanLII 47399.

<sup>84</sup> *X(Re)* 2012 CanLII 95148; *Canada (Citizenship and Immigration) v Harvey* 2013 FC 717.

intervene on article 1F grounds and the panel ultimately found that, because the act would not have been an offence if committed in Canada, the claimant could not be excluded under article 1F(b). In its inclusion analysis, it found that despite the presumption of State protection in the US, the sentence was 'so excessive as to outrage the standards of decency and surpass all rational bounds of punishment. The panel finds that it is cruel and unusual punishment imposed in disregard of accepted international standards.'<sup>85</sup>

While this decision did not explicitly consider gender in its exclusion analysis, the other two cases where the claimant was granted protection did. In a 2011 case, an Albanian claimant and her husband were living in the US as permanent residents, having been granted refugee status there.<sup>86</sup> A family acquaintance sexually assaulted the claimant at home while her young children were present and, after temporarily fending him off, she shot and killed him. She was found guilty of manslaughter and spent three years in prison. A removal order was issued against her as a result of the conviction, which is why she came to Canada. The panel's exclusion analysis focused on the seriousness of the crime and found that, in shooting her attacker to prevent herself from being further assaulted, she had not committed a serious non-political crime. In its analysis of both the claimant's credibility and the mitigating factors,<sup>87</sup> the panel referred to the Gender Guidelines and was conscious of the issues relating to sexual assault and self-defence. At the end of a fairly nuanced analysis the panel wrote, 'Ms XXXX is not the type of criminal against which the exclusion clause aims to protect the citizens of the host country.'<sup>88</sup>

The third accepted claimant was from Colombia. She had fled the Revolutionary Armed Forces of Colombia (FARC) after being beaten and gang raped as a teenager by FARC members because she and her mother had refused to give them money.<sup>89</sup> After she was attacked the claimant moved around, even living in the US for a time, but members of the FARC were able to track her down in each place and continued to threaten her and her family. The Minister raised exclusion under article 1F(b) because of the claimant's criminal record in the US, which included a number of offences, the most serious of which was robbery. In finding that the claimant had not committed a serious non-political crime, the panel referred to her age at the time the offences were committed, the context of the prosecutions for those offences, the penalties imposed, and, perhaps most emphatically, her circumstances in the aftermath of being attacked and raped. The panel found that if the claimant returned to Colombia she would be persecuted by the FARC due to her gender and perceived political opinion, because she had refused to give them money. In its decision, the panel specifically referred to the Gender Guidelines and documentary evidence that 'clearly indicates that women are particularly affected and are in danger of being persecuted by members of the various

<sup>85</sup> *Canada (Citizenship and Immigration) v Harvey* 2013 FC 717, para 65.

<sup>86</sup> *X(Re)* 2011 CanLII 97799.

<sup>87</sup> *ibid.* The mitigating factors here were: 'the claimant's fear of being further sexually assaulted, her fear for her children, her lack of a criminal history, the period of the time since the offence, and the fact that the offence was an isolated event': para 29.

<sup>88</sup> *ibid* para 59.

<sup>89</sup> *X(Re)* 2010 CanLII 97305.

guerrilla forces in Colombia.<sup>90</sup> While these gender considerations were raised in the decision's inclusion analysis, they also inform the exclusion analysis, where the panel contextualized the offences committed by the claimant.

Of the two cases in which the claimant was excluded, the first involved aggravated assault. The RAD reviewed the initial exclusion of the claimant, who had arrived in Canada from Guinea. The original decision maker had excluded the claimant under article 1F(b) for assisting her mother in carrying out female genital mutilation for a number of years.<sup>91</sup> The Appeal Division affirmed that decision, dismissing the argument that the RPD should have weighed her risk of return against the seriousness of the offence.<sup>92</sup> As with the decision regarding the claimant from China who was found to have engaged in forced abortion (part 2.5), this case raises questions about how to address violence and oppression inflicted on women by women. In a setting where attention to gender is framed primarily as attention to forms of victimization, this analysis appears especially confronting for decision makers.

This group of cases is remarkable in three ways. First, it includes a number of crimes that are *prima facie* 'serious' in any statute book. Second, the group includes three of only five cases in our dataset where exclusion was raised but the claimant was granted refugee protection; it is the only group of cases where more claimants are included than excluded. And third, gender is salient in every decision, possibly suggesting that bringing gender into the analysis increases the likelihood that the exclusion argument will be rejected.

### 3. MAKING GENDER MATTER

As we have suggested by presenting the cases thematically, there are very few decisions in the dataset where gender matters in the sense that the claimant is more than *incidentally* female in the text of the decision. It is useful, therefore, to step back and look at the dataset as a whole to ask whether and how gender shapes it overall.

A first observation is that the largest group of cases involves allegations of child abduction. In all of these cases, the woman fled with her own children, or with a child for whom she had parental responsibility. This is a truly notable finding. The emergence of the international offence of child abduction is recent and it has been developed in the context of disputing parents leaving a national jurisdiction with their children after a marital breakdown. This offence is inherently gendered as it is most often men who

<sup>90</sup> *ibid* para 21.

<sup>91</sup> Although the exact conduct is redacted, and a number of details in the case sanitized prior to publication, the decision cites s 268 of the Criminal Code. Given the claimant's background information, and that subsection 268(3) criminalizes female genital mutilation, this appears to be the offence involved. Criminal Code, RSC 1985, c C-46.

<sup>92</sup> In a number of these cases, the claimant argued that this balancing should be done, in the hope that the risk of persecution she faced on return would outweigh the serious non-political offence. The panel usually declined to do this, citing the prohibition in *Xie v Canada (Minister of Citizenship and Immigration)* 2004 FCA 250, [2005] 1 FCR 304: 'in the application of the exclusion, the Refugee Protection Division is neither required nor allowed to balance the claimant's crimes (real or alleged) against the risk of torture upon her return to her country of origin.'

have the resources for this type of flight, and feminist advocates were instrumental in advancing the treaty.<sup>93</sup> In the refugee context, however, the gender imbalance that lies behind this act is generally ignored. Furthermore, decision makers often move quickly to an assumption of a criminal act based on evidence of flight alone, ignoring the detailed analysis which would be required in a criminal law context. The treaty (which addresses civil aspects only) has a principal goal of preserving existing custody arrangements, a point absent in these cases. Furthermore, this set of cases conflates ‘refusing to abandon one’s children while seeking basic protection’ with ‘kidnapping’ in the space of a sentence or two. The complicated ways in which considerations of gender and gendered power imbalance undergird the entire legal framework are beyond the analyses in these decisions.

The cases grouped into the other categories are less starkly revealing, but still notable. We find here a number of trends that fit with general patterns of women and criminal activity. Prominent among these is the near absence of crimes of violence. The only cases involving crimes of violence are found in the ‘miscellaneous’ group and in the ‘crimes against humanity’ group, where the issue is complicity rather than direct involvement in violent acts. The ‘false document’, ‘economic crimes’, and ‘drug offences’ groups concern non-violent offences. This closely maps onto general data about women and crime, where the offences for which women are jailed are statistically much more likely to be non-violent than those of men, and frequently economic offences. Indeed, the violent crimes that do appear in the dataset are most often those perpetrated against the claimants: 23 cases – almost half – involved allegations of sexual violence, domestic assault, or both. The only sexual offence alleged to have been committed by a claimant involved consensual sex not criminalized under Canadian law.<sup>94</sup> In total, only two of the 45 excluded women in the dataset were excluded because of direct involvement in a violent act.

The crimes against humanity group requires special attention. Every one of these cases involved a woman who was allegedly complicit in a crime, rather than a woman whose criminal liability would be established by direct links to a criminal act. Nine of the 10 cases established complicity on the basis of membership of an organization. While it is possible to argue that this pattern shares the gendered marker of women being less likely to be involved in violent crime than men, in Canadian article 1F jurisprudence, complicity via membership has been widely applied to both men and women.<sup>95</sup> Ironically, the crimes against humanity group is remarkably *ungendered*. It is

<sup>93</sup> Convention on the Civil Aspects of International Child Abduction (1980) TIAS No 11,670, 1343 UNTS 89 (Child Abduction Convention). The Convention has two objectives: (1) to ensure that children who are wrongfully removed to or retained in a country other than their place of habitual residence are returned promptly; and (2) to enable contact with or access to children across international borders. The Convention applies to children under the age of 16. It promotes a quick court process in which the left-behind parent applies for the child’s return. The application is heard and decided in the country where the child was taken. The court in that country applies the Convention but does not decide which parent should have custody or guardianship of the child. That issue is left to be decided by the courts of the child’s habitual residence, if the child is ordered to be returned.

<sup>94</sup> *X(Re)* 2012 CanLII 95148; *Canada (Citizenship and Immigration) v Harvey* 2013 FC 717.

<sup>95</sup> *Kaushal and Dauvergne* (n 1).

also important that these cases are likely to have been corrected going forward by the *Ezokola* ruling of the Supreme Court of Canada. Indeed, the one case that occurred late enough to apply the *Ezokola* ruling did not result in exclusion (although the married claimants were not found to be refugees).

Another way to approach the question of whether and how gender matters is to pay particular attention to cases where gender is central to the analysis, and where there is an important conclusion to be drawn by paying closer attention. Three cases in the dataset provide compelling examples.

### 3.1 *X(Re)* 2012 CanLII 100170

In this case, the panel acknowledged that the claimant had a well-founded fear of being persecuted while simultaneously excluding her from protection. The claimant was a lesbian from Jamaica who applied for protection on the basis that she feared persecution on account of her sexuality. The panel first concluded that the claimant was in need of protection because ‘Jamaica is an exceptionally dangerous place for gay men and women,’<sup>96</sup> but then determined that the claimant was excluded due to serious criminality under article 1F(b). Both the Gender Guidelines and the UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity informed the panel’s analysis. The documentary evidence consulted paints a bleak picture of life as a gay person in Jamaica:

Jamaica is a deeply homophobic society that still enforces anti-homosexual legislation, and ... has very serious levels of ongoing anti-homosexual violence and brutality ... Jamaican gay men and gay women probably cannot access adequate state protection due to the formal illegality of their sexual orientation and because of levels of homophobia within the Jamaican police which match the homophobia within Jamaican society as a whole.<sup>97</sup>

This case belongs to the drug-related offence group. Although the exact nature of the offence was redacted from the decision, the context seems to indicate it was a trafficking offence. The claimant was convicted in the US and sentenced to 33 months in prison with three years probation on release. In terms of mitigating factors, counsel argued that low esteem stemming from prior sexual orientation abuse was partly to blame for her poor decision making in committing the offence. What is particularly striking about the decision is the careful attention paid to gender and sexuality in the inclusion analysis, which is then completely absent once the question of exclusion arises. In many ways, this approach to gender is an exemplar of its invisibility in the dataset generally. The case is also a problematic example of an approach to article 1F(b) that does not consider expiation as a relevant factor.<sup>98</sup> In conclusion, the tribunal stated:

<sup>96</sup> *X(Re)* 2012 CanLII 100170, para 10.

<sup>97</sup> *ibid.*

<sup>98</sup> The role of expiation in art 1F(b) analyses was the central issue in the Supreme Court of Canada’s ruling in *Febles v Canada (Citizenship and Immigration)* [2014] 3 SCR 431; see discussion below (conclusions, pt 4).

If it were permissible for me to weigh the claimant's inclusion case herein as a mitigating factor, I would have, and I would have found it so heavy as to be entirely sufficient in itself to rebut the serious crime presumption herein, and probably several times over. However, my doing that would be 'balancing' and, as Minister's counsel has reminded me, I am not legally allowed to do that because exclusion under Article 1F(b) is not, as a legal matter, tantamount to removal. I therefore have not weighed the strength of the claimant's inclusion case, which is very strong indeed, in arriving at my exclusion conclusion.<sup>99</sup>

### 3.2 *X(Re)* 2011 CanLII 67655

The claimant in this case was a transgender person<sup>100</sup> from Mexico who feared persecution on the basis of her sexual identity. She had pleaded guilty to what appears to have been a drug trafficking offence in the US but, 'given the very particular circumstances of this case',<sup>101</sup> the RPD determined that she should not be excluded. While living in the US, the claimant's boyfriend asked her to hold onto a toiletry bag for him until the next day. In her rush to get to an exam, the claimant forgot the bag in her school's reception area, where it was discovered to contain drugs. Police officers arrested her and acted with courtesy until she told them that she was transgender. The ride back to the police station was rough, and the claimant hit her head against the car because she was handcuffed and unable to steady herself. At the station, officers made her undress when she got to her cell and she was subjected to the humiliating experience of being watched by a number of officers while undressing, prevented from hiding her genitals, and subjected to crude comments and catcalls. The claimant's legal aid lawyer strongly encouraged her to plead guilty after a very short meeting, and she was later sentenced to a period in prison, of which she served half the time. The precise length of the sentence has been redacted in the publicly released version but reading the decision it appears that the sentence was comparatively short.<sup>102</sup>

<sup>99</sup> *X(Re)* 2012 CanLII 100170, para 21.

<sup>100</sup> The decision notes that the claimant identifies herself as a transgender person, not as a woman: *X(Re)* 2011 CanLII 67655, para 45. She is referred to here in the manner used by the panel, even though this may not be the claimant's preference.

<sup>101</sup> *ibid* para 7.

<sup>102</sup> The imprisonment is part of a narrative which covers several years. The reasons state: '[17] Two years later, in XXXX, the Court summoned the claimant to appear. She stated at the hearing that her understanding of the facts at the time was that she was going to be freed of her probation conditions, and that she [translation] "had made herself beautiful for the occasion." It seems instead that she had been summoned to appear in order to receive her sentence; the claimant stated at the hearing that she had been told that there had been a long delay because they had lost her file and that the judge had told her [translation] "that she was guilty and that she had to serve time." [18] The claimant allegedly received a sentence of XXXX in prison. She allegedly served only XXXX; the probation officers informed her that she could get out earlier than expected because it was her first offence and because she had been a [translation] "mule." [19] The claimant allegedly continued her monthly meetings with a probation officer. She stated that no additional obligation was imposed on her. She allegedly completed her XX years of probation in XXXX': *ibid*.

The RPD found that the offence to which the claimant pleaded guilty was equivalent to possession for the purpose of trafficking, which has a maximum sentence in Canada of life imprisonment. It determined, however, that the presumption of seriousness had been rebutted because the nature of her arrest may have prevented her from full answer and defence: ‘the particularly humiliating circumstances of her arrest, which go to the heart of the discrimination she claims she has faced since her childhood, suggest that she would not at that time have been able to make use of all of the means available to defend herself.’<sup>103</sup> Having found that the claimant should not be excluded, the panel then proceeded to an inclusion analysis in which it considered the conditions facing transgender women and men in Mexico. The panel considered the claimant’s time in the US, where she was able to access female hormones before undergoing gender reassignment surgery in Mexico, and the fact that her application to be sponsored by an American citizen whom she had married failed as a result of her criminal conviction. When it became too difficult for the claimant to continue living in the US without legal status, she returned to Mexico, where she faced discrimination by members of the public and by the Mexican authorities. The RPD acknowledged some of the systemic factors that make it difficult and at times dangerous to live in Mexico as a transgender person, including police harassment and employment and education discrimination, and the harms that come with having to survive by prostitution. It found that ‘the cumulative effect of the various acts of discrimination to which the claimant was subjected because of her gender identity and to which there is a serious possibility that she could be subjected again, if she had to return to Mexico, amounts to persecution’ and that the claimant met the definition of a Convention refugee.<sup>104</sup>

This case is a good example of how attention to gender and gender identity ought to inform both inclusion and exclusion analyses – the claimant’s gender identity is no less relevant to the seriousness of her crime than to her risk of being persecuted.

### 3.3 *X(Re)* 2004 CanLII 56805

In this case the claimant was a 47-year-old woman from China who raised a fear of persecution on the basis of her political opinion and membership in a particular social group.<sup>105</sup> In the course of her work at a company’s family planning office, the claimant convinced a woman from a prominent family to have an abortion in accordance with China’s one-child family policy. It was this act for which the Minister sought to have her excluded under both article 1F(a) and article 1F(c).<sup>106</sup>

The claimant worked for the family planning office of this large company for 20 years. When she left in 2000, she was in a managerial position and responsible for enforcing family planning regulations for the company’s 3,800 female employees. According to the claimant, during her last 15 years at the company there were no ‘out-of-plan’ births among

<sup>103</sup> *ibid* para 29.

<sup>104</sup> *ibid* paras 41–54.

<sup>105</sup> *X(Re)* 2004 CanLII 56805.

<sup>106</sup> Forced abortion is not listed in the Rome Statute as a ‘war crime.’ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010) (adopted 17 July 1998, entered into force 1 July 2002).

the employees, which was a laudable achievement because the government would impose significant fines on the company for such births. The claimant said she personally did not agree with China's one-child policy but nevertheless strove to do her job at the family planning office to the best of her ability. The claimant told the panel that she had never forced another woman to have an abortion, but that she did use persuasion and incentives to convince women to have abortions when they already had one child. The incident that both triggered the claimant's fear of persecution and the Minister's exclusion argument occurred in 2000, when the claimant 'forced' the daughter-in-law of the company's general manager to have an abortion when she was seven months pregnant. Regardless of whether the term 'forced' or 'persuaded' should be used (the panel debated this), the claimant told the panel that she had visited the pregnant woman's home on more than 15 occasions, staying for three to six hours each time, to try to convince her to have an abortion. After about a month, the claimant accompanied the woman to the hospital, where she had an abortion.<sup>107</sup> The woman's family found out only after the procedure was complete.

The pregnant woman's family was angry with the claimant in the aftermath of this incident, and she told the panel that she had suffered property damage, a number of physical assaults, and the loss of her job. She also claimed that the police and family planning authorities would not step in and protect her, and that the Public Security Bureau was after her. The claimant feared further reprisals and a lack of State protection if she were forced to return to China. In its exclusion analysis, the RPD determined that the claimant forced the general manager's daughter-in-law to have an abortion and that forced abortion is a crime against humanity; as a result, it excluded the claimant from protection under article 1F(a).<sup>108</sup> The RPD also found that the claimant was not credible, and not a Convention refugee or a person in need of protection. The panel reasoned that the forced abortions perpetrated by the claimant were part of an established policy in China, that the claimant appeared to take pride in her work and success in running the family planning office, and that the claimant could have quit her job but did not. In closing, the panel pointed out that the claimant had no defence for this charge: 'I agree that she did not do this for the purpose of being cruel. She was doing it to enforce the one-child policy. However, I find that acting for a valid political or social goal is not a defence for people who commit, or are complicit in the commission of, acts of barbarous cruelty or serious violations of human rights in pursuing those goals.'<sup>109</sup>

<sup>107</sup> In its analysis of whether the claimant actually forced the other woman to have an abortion, the panel addressed whether the claimant had used the term 'forced' or 'pressured' in an interview with an immigration officer, and whether the two terms could have been used interchangeably by the interpreter. The panel ultimately found that the claimant had said she 'forced' women to have abortions, and that 'forced' was the appropriate term for her conduct in 2000 and meant that she had forced the woman to have an abortion by 'relentless and extreme psychological pressure and threats'. At the hearing, the claimant took issue with the term 'forced', claiming not to have used it; she did tell the panel that she had persuaded the woman to have an abortion through persistent visits to her home and with threats that the woman and her husband could lose their jobs, lose their house, be fined, and be prevented from registering the second child: *X(Re)* 2004 CanLII 56805, para 5.

<sup>108</sup> See Rome Statute (n 106); this conclusion is not supported in law. It is arguable that it should be.

<sup>109</sup> *X(Re)* 2004 CanLII 56805, para 11.

This case is remarkable because the question at its centre – forced abortion – is undeniably gendered as it can only happen to women, and is one that has been central to a number of significant gender-based persecution cases in Canada. Astonishingly, the analysis in this case does not consider gender at all, and does not mention the gender-related persecution guidelines. If the question of gender does not come to the fore in this setting, it is unlikely ever to do so.

#### 4. CONCLUSIONS

What is most remarkable about the question of ‘making gender matter’ in this dataset is that at the broadest level it seems to be the overwhelming explanatory variable. That is, the largest number of cases are about child abduction, and there are almost no cases of violent crimes; it is only by knowing that these claimants are women that one can make sense of these trends. But at the level of close analysis, gender is almost completely absent from the exclusion decisions, as if it had no role to play at all. Indeed, in searching for cases where the analysis brought gender to the fore, the individuals for whom decision makers truly focused on gender and gender identity were lesbian and transgendered; heterosexual women attracted scant attention in these cases. In only two of the 23 cases where domestic violence or sexual violence was central to the narrative was there some discussion of power imbalance between women and men.

One way to assess this dataset of first-instance decisions is to query whether the weaknesses identified would be corrected by better application of Supreme Court of Canada jurisprudence. The Supreme Court has now issued a significant decision on each of the article 1F subsections.

The first of these decisions, *Pushpanathan*, was handed down in 1998, before our dataset begins.<sup>110</sup> The principal article 1F issue in the ruling was whether drug trafficking constitutes an act contrary to the purposes and principles of the UN so as to trigger exclusion under paragraph (c). The majority held that drug trafficking was not, at least at that time, considered contrary to the purposes and principles of the UN.<sup>111</sup> This central ruling is not directly relevant to any of the cases in the dataset as all the drug crimes under consideration took place prior to the claimants arriving in Canada and were therefore dealt with under paragraph (b). *Pushpanathan* remains relevant, however, as it lays the groundwork for the Supreme Court’s overall approach to the exclusion clauses, including an interpretive commitment to the human rights character of the Convention and to its humanitarian aims.<sup>112</sup>

<sup>110</sup> *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

<sup>111</sup> *ibid* 1033. Interestingly, Bastarache J considered that this might change at some point in the future (1032–33 and 1035). Cory and Major JJ, dissenting, strenuously disagreed on this point (1053).

<sup>112</sup> Specifically, the court stated that: ‘Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination. [1023] ... the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, ... that purpose is served by Article 33 of the Convention. Rather, it is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status’ (1023–24). The court held that there were two categories of offences likely to be considered contrary to the

The second decision, *Ezokola*, addressed article 1F(a) and was handed down in 2013.<sup>113</sup> Its central issue was the proper interpretation of liability for complicity in the context of exclusion. In the court's words, 'when does mere association become culpable complicity?'<sup>114</sup> The court explicitly criticized what it referred to as the 'guilty-by-association' approach to the question of complicity.<sup>115</sup> Rejecting much of the earlier Canadian Federal Court jurisprudence, the court articulated a test that focuses on knowledge, voluntariness, and a link to the actual criminal purpose of the group or organization to which an individual belongs. The court summed up its test this way:

an individual will be excluded from refugee protection under art 1F(a) for complicity in international crimes if there are serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime.<sup>116</sup>

Unlike *Pushpanathan*, *Ezokola* is highly relevant to our dataset. All 11 of the article 1F(a) cases involved an allegation based on complicity. While reported decisions generally do not offer a full enough account of the evidence to allow us to speculatively apply the *Ezokola* test after the fact, it is clear that at the very least the reasoning in these cases would be different post-*Ezokola*. Tellingly, in the one post-*Ezokola* 1F(a) case in the dataset, the decision maker concluded that, despite membership of a group involved in crimes against humanity, the individuals before him ought not to be excluded.

The third relevant Supreme Court of Canada ruling is the 2014 decision in *Febles*, which concerns article 1F(b), the most frequently applied exclusion provision.<sup>117</sup> In *Febles* the issue was whether article 1F(b) should apply solely to fugitives from justice, or whether it captures all those who have committed serious crimes, regardless of whether they have already been duly punished for those acts. The court rejected the fugitives from justice argument and took the opportunity to clarify how 'serious' crimes ought to be understood in Canada.<sup>118</sup> The court embraced the approach – borrowed from Canadian immigration legislation – of presumptively considering any crime to be serious if the theoretical maximum sentence in the Canadian Criminal Code is 10 years or more.<sup>119</sup> While warning that this presumption cannot be applied mechanically

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purposes and principles of the UN: (1) explicitly recognized acts expressed in an international agreement or UN resolution (1030); and (2) serious, sustained, and systemic violations of fundamental human rights constituting persecution (1032).

<sup>113</sup> *Ezokola v Canada (Citizenship and Immigration)* 2013 SCC 40, [2013] 2 SCR 678.

<sup>114</sup> *ibid* para 4.

<sup>115</sup> *ibid* para 30.

<sup>116</sup> *ibid* para 29.

<sup>117</sup> *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68, [2014] 3 SCR 431.

<sup>118</sup> This part of the analysis was unnecessary, as there was no dispute that *Febles*' crimes – two serious assaults with weapons – were serious. Despite this, the court's guidance on the question of seriousness is highly relevant in Canada, where there are few opportunities for the Supreme Court of Canada to interpret the Refugee Convention. The parties and interveners all urged the court to provide guidance on the question of seriousness.

<sup>119</sup> Criminal Code (n 91).

given the wide sentencing ranges in the Code, the court did confirm that ‘crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion ...’.<sup>120</sup> It also endorsed the list of serious crimes used in UNHCR guidelines: homicide, rape, child molesting, wounding, arson, drug trafficking, and armed robbery.

Attempting to apply the *Febles* analysis to our dataset is instructive in regard to how slippery all exclusion rulings are at their core. The easiest example is the so-called ‘child abduction’ cases. Child abduction, which could be captured by a number of Criminal Code provisions, is undoubtedly a serious crime (even though not on the UNHCR list).<sup>121</sup> The issue is, rather, whether characterizing fleeing to seek protection with one’s children ought ever to be labelled ‘child abduction’ in the first place. Indeed, for the majority of the relevant Code offences an element of the crime includes the requirement that the offender not be a parent or guardian.<sup>122</sup> The document-related offences, some of which may have ‘serious’ Criminal Code analogues (for example, forgery is punishable by a maximum of 10 years, but may also be treated as a summary offence, in which case a custodial sentence would be very unlikely), should never be excludable offences given article 31 of the Refugee Convention. Setting aside, therefore, these two groups of cases (and thus the majority of the article 1F(b) cases in the dataset), we are left with two groups: economic crimes and drug-related offences. Many of the offences represented here would meet the *Febles* seriousness presumption, but in at least some of these cases (for example, the \$20 trafficking offence) the presumption would surely be rebutted by the specifics of the case. In at least two cases, the presumption would not have applied (resisting arrest and pointing a firearm). Ironically, in three of the most serious crimes (manslaughter, sexual interference, and robbery), all of which appear in some form on the UNHCR list, the claimant was not actually excluded because of the specific circumstances of the alleged criminal act.

The lessons from this brief consideration of the governing jurisprudence in Canada are twofold. First, the Supreme Court of Canada has not made any attempt to introduce a gendered analysis into the matter of exclusion and, furthermore, its decisions do not easily lend themselves to extrapolation in order to take gender into consideration. Second, the *Ezokola* ruling will have far-reaching implications for all claimants and, possibly stereotypically, even greater implications for women, but the *Pushpanathan* and *Febles* rulings would not be likely to reshape the dataset in any particular direction. Indeed, *Pushpanathan* was decided shortly before our dataset begins. For the obvious reason that ‘acts contrary to the purposes of the United Nations’ are inherently rare,

<sup>120</sup> *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68, [2014] 3 SCR 431, para 62.

<sup>121</sup> There are a range of kidnapping and abduction offences in the Canadian Criminal Code, most of which have a theoretical maximum of either 10 years imprisonment or life imprisonment (ss 275–86).

<sup>122</sup> Section 282(1) specifies a crime of ‘abduction in contravention of a custody order’ and is aimed specifically at parents and guardians. The theoretical maximum penalty for this offence is 10 years in prison. The Code does, however, specify that this crime may also be prosecuted as a summary offence (in which case any sentence would be at the very low end of the range and would likely not involve imprisonment).

*Pushpanathan* will rarely be binding precedent. The broad directions for exclusion set by *Pushpanathan* appear to be just that – broad enough references to human rights and humanitarianism that any exclusion sufficiently clothed in notions of ‘desert’ will fit within them. In short, greater attention to the Supreme Court’s work here is not likely to address the shortcomings of this jurisprudence beyond the question of complicity. Furthermore, given the difficulty of getting a refugee case to the highest court, it is unlikely that further guidance will come from this court any time soon.<sup>123</sup>

When it comes to excluding women, the case law in Canada demonstrates that the idea of ‘desert’, which is built into the logic of exclusion, has been feminized in a very particular way. Those who are potentially excluded are assessed against a standard of desert which coincides with a stereotypical ‘good woman’, often a devoted wife and mother. Rejection in the exclusion context is not only coloured with a lack of being deserving, but also conforms or is made to conform with stereotypes of bad women, such as those who ‘abandon’ their children or neglect their husband’s needs.

This article is preliminary in that it does little more than gather the cases and make observations. But this preliminary work is enough to demonstrate two things: exclusion cases have starkly gendered patterns that call for further attention, and there is a need for the kind of detailed work that has gone into developing guidelines for inclusion in matters of exclusion as well. Looking beyond Canada at other jurisdictions would also be useful and while one might hope to find better outcomes elsewhere, we believe that optimism would be misplaced.

Our research also suggests a number of starting points for next-step projects. In addition to delving deeper into the question of how a gendered analysis would affect outcomes, it would be potentially insightful to pay particular attention to how men are treated in exclusion cases, and to conduct an analysis of how gender stereotypes may affect them. The preponderance of men in these cases suggests this analysis would be revealing.<sup>124</sup> While first-instance decision data is much more available in Canada than elsewhere, some comparisons can be gleaned even from a handful of cases. Finally, this research points out that first-instance decision makers do not systematically follow the direction of the Supreme Court of Canada in exclusion matters. Given the incredible hurdles to seeking judicial review of refugee determinations in Canada, this factor highlights the need for other forms of correction, such as Chairperson’s guidelines in the RPD. While it is well beyond the scope of this article, keen followers of exclusion jurisprudence globally will have discerned that the Supreme Court of Canada’s jurisprudence is out of line with international trends in exclusion analysis. This is of concern to refugee advocates in Canada, and also risks triggering yet another race to the bottom in international refugee protection.

<sup>123</sup> In matters of refugee law, judicial review by the Federal Court of Canada is only possible after the court itself grants leave. A ‘certified question’ and further leave are required to proceed to the Federal Court of Appeal. The Supreme Court of Canada also has a leave-seeking requirement.

<sup>124</sup> Kaushal and Dauvergne (n 1); Catherine Dauvergne, *New Politics of Immigration and the End of Settler Societies* (Cambridge University Press 2016) ch 5.