

# Complicity in International Criminal Law and Canadian Refugee Law

A Comparison

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## Abstract

*International criminal law is normally seen as the purview of criminal prosecutions, either internationally or domestically. However, international criminal law is also increasingly being applied in refugee law. This is because the 1951 Refugee Convention contains an exclusion clause prohibiting asylum seekers from obtaining refugee status if they have committed a crime against peace, a war crime or a crime against humanity. Thus, refugee law refers back to international criminal law; however, while international criminal tribunals deal with persons who bear the greatest responsibility, in actual practice persons who have been excluded from refugee protection have been mostly from the lower echelons of organizations involved in atrocities. This article, based on Canadian case law, examines the concepts of complicity, aiding and abetting and joint criminal enterprise from both an international criminal law point of view and from a Canadian refugee law angle, in order to determine whether these notions have similar contents in the two jurisdictions.*

## 1. Introduction

International criminal law and international refugee law do not at first blush appear to have a great deal in common since they regulate different realms of interest. International criminal law is concerned with the punishment of perpetrators of international crimes, at the moment primarily genocide, crimes against humanity and war crimes. Refugee law, on the other hand, is an aspect of human rights law which is designed to set

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out in which circumstances states will extend protection to persons in fear of persecution.<sup>1</sup> However, these two areas of law intersect in a small but important manner, namely the use of the exclusion clause contained in the 1951 Refugee Convention. This exclusion clause was incorporated to ensure that very serious criminals would not obtain the benefits of the Refugee Convention;<sup>2</sup> exclusion clause 1F(a) prohibits an asylum seeker from obtaining refugee status if (s)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'.

Both areas of law are relatively new. Following an auspicious start after the Second World War, the development of international criminal law had been more or less stagnant until about a decade ago when the jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) started having its impact felt. Similarly, international interest in the exclusion clause did not begin in earnest until recently.<sup>3</sup> As a result, little

1 See Judgment, *Kupreskić* (IT-95-16), Trial Chamber, 14 January 2000, §§ 586–598 which was of the view that the interpretation of persecution in refugee law or human rights law was of little assistance to provide parameters for the crime against humanity of persecution.

2 See the United Nations High Commissioner for Refugees (UNHCR) Handbook 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/IP/4/Eng/REV.1 (1992)), §§ 148–150; see also J.-M. Henkaerts and L. Doswald-Becks (eds), *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge: Cambridge University Press, 2005), 610–611.

3 Work by the UNHCR includes 'The Exclusion Clauses: Guidelines on their Application' (December 1996); 'Note on Exclusion Clauses' by the Executive Committee of the High Commissioner's Programme (30 May 1997, Document EC/47/SC/CRP.29); the Summary Conclusions of the Lisbon Expert Roundtable on Exclusion as part of the Global Consultations on International Protection (20 May 2001, Document EC/GC/012Track/1); the 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' and its accompanying 'Background Note to the Guidelines' (4 September 2003, Document HCR/GIP/03/05); the 'Resettlement Handbook', 1 November 2004, chapter 3.7; and 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', 1 September 2005, chapter 4.8.

Internationally, there exists the Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), an informal group of 15 refugee receiving countries, two international organizations (International Organization for Migration [IOM] and UNHCR) and the European Commission, which has had exclusion on its agenda since May 2002.

In Europe, the Commission of the European Communities has issued a working document entitled 'The relationship between safeguarding internal security and complying with international protection obligations and instruments' (5 December 2001, Document COM (2001) 743), while the Council of the European Union issued Directive 2004/83/EC on 29 April 2004 of which Arts. 12 and 17 deal with exclusion and the Committee of Ministers of the Council of Europe did the same as a recommendation to its member states on 23 March 2005 (Rec (2005)6).

Academic work on this issue can be found in: J. Rikhof, 'War Crimes, Crimes against Humanity and Immigration Law', 19 *Immigration Law Reporter (Second Series)* (1993); N. Weisman, 'Article 1F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law', 8 *International Journal of Refugee Law* (1996) 11; P. van Dijk et al., *Refugee and Asylum Law: Assessing the Scope of Judicial Protection*, International Association of Refugee Law Judges, Second Conference, 1997; P.J. van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause* (Leiden: T.M.C.

comparative analysis between these two legal disciplines has taken place to date even though concepts such as complicity can ultimately be traced to a common legal ancestor — domestic criminal law. International criminal law has used domestic criminal law by relying on customary international law as a source<sup>4</sup> while domestic courts interpreting the exclusion ground 1F(a) have received inspiration in a more direct fashion.

The emphasis in this article is on *complicity* since this is the area where international criminal law and refugee law have the least in common. However, the notion of *joint criminal enterprise* (JCE) will also be discussed.

It should also be noted at the outset that international tribunals which are developing international criminal law have been on the whole dealing with *persons who bear the greatest responsibility*, while experience has shown that persons who have been excluded from refugee protection have been mostly from *the lower echelons of organizations* involved in atrocities.<sup>5</sup>

## 2. Complicity and Aiding and Abetting in International Criminal Law

### A. General

From the beginning, when individual responsibility was considered for international crimes, not only persons who had personally committed a war crime or crime against humanity were considered perpetrators of such crimes but also persons who had been involved in an indirect fashion, such as by aiding and abetting, by participating in a JCE, ordering, planning, instigating,<sup>6</sup>

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Asser Press, 1999); the Special Supplementary Issue of Volume 12 of the *International Journal of Refugee Law*, entitled 'Exclusion from Protection', issued in 2000.

4 See for instance, re joint criminal enterprise, Judgment, *Tadić* (IT-94-1), Appeals Chamber, 15 July 1999, (hereinafter '*Tadić* Appeals Judgment'), §§ 224–225; re *mens rea* of aiding and abetting, Judgment, *Krstić* (IT-98-33), Appeals Chamber, 19 April 2004, (hereinafter '*Krstić* Appeals Judgment'), § 141 and the notion of consent in rape, in Judgment, *Kumarac* (IT-96-23 & 96-23/1), Trial Chamber, 22 February 2001, §§ 454–456.

5 In Canada there have been 445 decisions by the administrative tribunal charged with applying exclusion clause 1F(a) between 1 April 1997 and 31 March 2004 (see the 2003–2004 annual report re Canada's War Crimes Program, Annex 3, <http://www.cbsa-asfc.gc.ca/general/enforcement/annual/annual7-e.html> (visited 31 August 2005) while between 7 February 1992 and 1 January 2005 there have been about 140 decisions by the Federal Court (mostly at the Federal Court, Trial Division level, but 12 decisions by the Federal Court of Appeal). Over 95% of these cases involved crimes against humanity as opposed to war crimes; of these cases very few involved personal involvement but were almost all based on complicity.

6 See Judgment, *Kordić* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, §§ 25–28 and Judgment, *Mpambara* (ICTR-01-65-T), Trial Chamber, 11 September 2006, §§ 18–20 for a description of the elements of these three modes of participation; see Judgment, *Semanza* (ICTR-97-20-A), Appeals Chamber, 20 May 2005, §§ 361–364; Judgment, *Kamuhanda* (ICTR-99-54A), Appeals Chamber, 19 September 2005, § 75 and Judgment, *Gacumbitsi* (ICTR-01-64-A), Appeals Chamber, 7 July 2006, (hereinafter '*Gacumbitsi* Appeals Judgment'), §§ 181–183 for the parameters of ordering. For the notion of instigation, see Judgment, *Orić* (IT-03-68-T), Trial Chamber, 30 June 2006, §§ 270–279 and *Gacumbitsi* Appeals Judgment, §§ 128–130.

inciting, conspiring such crimes<sup>7</sup> or being in a position of command or superior responsibility.

## B. Complicity

While the terms complicity and aiding and abetting appear to be similar,<sup>8</sup> they have been the subject of debate in the ICTY/ICTR jurisprudence. Since the ICTY and ICTR Statutes contain a specific provision with respect to complicity in genocide,<sup>9</sup> while at the same time having a general provision of re-extended liability which includes aiding and abetting for genocide,<sup>10</sup> the question arose whether these two notions overlap. The answer given was that aiding and abetting is only one aspect of the larger notion of complicity<sup>11</sup> and that in genocide the *mens rea* for complicity that goes beyond aiding and abetting could possibly be the narrower, specific intent of genocide.<sup>12</sup> It has also been said that complicity in genocide requires a positive act while aiding and abetting in the same crime can be accomplished by failing to act or refraining from taking action.<sup>13</sup>

7 The inchoate offences of conspiracy, attempt and incitement have received different treatments depending on the type of substantive offence. Conspiracy, incitement and attempt can only occur in relation to the crime of genocide according to the ICTY (Art. 4(3)(b), (c) and (d)) and ICTR (Art. 2(3)(b), (c) and (d)) Statutes, while the ICC Statute (Art. 25) extends the notion of attempt to all three crimes, retains incitement for genocide only, and does not mention conspiracy at all. For an explanation, see C. de Than and E. Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003), at 8–9 which states: ‘These are offences designed to cover situations when a full criminal offence has not yet been committed but was suggested (incitement), agreed to (conspiracy) or begun but not completed (attempt)’.

8 Judgment, *Blagojević* (IT-02-60-T), Trial Chamber, 27 January 2005 (hereinafter ‘*Blagojević* Trial Judgment’), § 777.

9 Articles 4(3)(e) and 2(3)(e), respectively.

10 Articles 7.1 and 6.1, respectively.

11 *Krstić* Appeals Judgment, *supra* note 4, §§ 137–139 and partial dissenting opinion of Judge Shahabuddeen, §§ 65–68; see also *Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Appeals Chamber, 13 December 2004, § 371 and *Blagojević* Trial Judgment, *supra* note 8, §§ 679 and 784; see, however, the Decision on Motion for Judgment of Acquittal, *Milošević* (IT-02-54-T), Trial Chamber, 16 June 2004, §§ 290–297 and Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, *Karemen, Ngirumpatse and Nzirore* (ICTR-98-44-T), Trial Chamber, 18 May 2006. See also C. Eboe-Osuji, ‘“Complicity in Genocide” versus “Aiding and Abetting Genocide”: Construing the Difference in the ICTR and ICTY Statutes’, in 3 *Journal of International Criminal Justice* (2005) 56–81, who argues (at 71–72 and 80–81) that the term ‘complicity’ connotes a substantive offence, namely a residual inchoate offence. An examination of state practice in respect to the domestic implementation of Art. 4(1) of the Torture Convention that obliges them to penalize ‘an act by any person which constitutes complicity or participation’ might be useful in providing further clarification in this regard.

12 No final position has been taken on this point in the jurisprudence; see *Krstić* Appeals Judgment, *supra* note 4, § 142 and footnote 247.

13 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, (hereinafter ‘*Akayesu* Trial Judgment’), §§ 547–548; Judgment, *Musema* (ICTR-96-13-T), Trial Chamber, 27 January 2000, (hereinafter ‘*Musema* Trial Judgment’), § 183.

### C. Aiding and Abetting

Liability based on aiding and abetting has not received a great deal of judicial attention. The general concepts related to the *actus reus* of aiding and abetting, which were summarized by the ICTR in *Bagilishema* in 2001,<sup>14</sup> have not undergone much further development; nor have they been applied to a large number of different fact situations. These concepts are:

For an accomplice to be found responsible for a crime under the Statute, he or she must assist the commission of the crime; the assistance must have a *substantial effect* on the commission of the crime. Further, the participation in the commission of a crime does not require actual physical presence or physical assistance. Mere encouragement or moral support by an aider and abettor may amount to 'assistance'. The accomplice need only be 'concerned with the killing'. The assistance need not be provided at the same time that the offence is committed. The Chamber agrees that presence, when combined with authority, may constitute assistance (the *actus reus* of the offence) in the form of moral support. Insignificant status may, however, put the 'silent approval' below the threshold necessary for the *actus reus*.<sup>15</sup>

As well, while there has to be a substantial effect on the commission of the crime, a causal connection is not required.<sup>16</sup> Lastly, aiding and abetting a crime can occur before, during or after the principal crime has been perpetrated, and the location where the *actus reus* of aiding and abetting takes place may be removed from the location of the principal crime.<sup>17</sup>

One issue that had been the subject of some debate was whether the substantial effect had to be direct or could also be indirect. This issue was laid to rest by the Appeals Chamber in *Tadić* in 1999, when it removed any qualifier to the contribution required.<sup>18</sup> Since that time reference has been made to both

14 Judgment, *Bagilishema* (ICTR-95-1A-T), Trial Chamber, 7 June 2001, (hereinafter '*Bagilishema* Trial Judgment'), §§ 32–34.

15 For approval of the statement in this last paragraph at the Appeals Chamber level, see Judgment, *Kayishema and Ruzindana* (ICTR-95-1-A), Appeals Chamber, 1 June 2001, (hereinafter '*Kayishema and Ruzindana* Appeals Judgment'), §§ 201–202; see also generally, regarding the notion of aiding and abetting judgments in *Kamuhanda* (ICTR-99-54), Trial Chamber, 22 January 2004, §§ 595–596 and 599; *Ndindabahizi* (ICTR-2001-71-T), Trial Chamber, 15 July 2004, §§ 455–457; *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, (hereinafter '*Blaškić* Appeals Judgment'), §§ 46–50; and *Brđjanin* (IT-99-36), Trial Chamber, 1 September 2004, (hereinafter '*Brđjanin* Trial Judgment'), §§ 271–274; for the most recent statements at the Trial Chamber level see *Blagojević* Trial Judgment, *supra* note 8, §§ 726–728 and 776–782 and *Strugar* (IT-01-42-T), Trial Chamber, 31 January 2005, §§ 349–350; also see Judgment, *Mpambara* (ICTR-01-65-T), Trial Chamber, 11 September 2006, §§ 22–23. There is a difference between aiding and abetting in that aiding means giving assistance to someone while abetting would involve facilitating the commission of an act by being sympathetic thereto (cf. *Kvočka* (IT-98-30/1), Trial Chamber I, 2 November 2001, (hereinafter '*Kvočka* Trial Judgment'), § 254.

16 *Kvočka* Trial Judgment, *supra* note 15, § 255.

17 *Blaškić* Appeals Judgment, *supra* note 15, § 48.

18 *Tadić* Appeals Judgment, *supra* note 4, § 229; see also *Kayishema and Ruzindana* Appeals Judgment, *supra* note 15, §§ 191–194. There had been a discrepancy about this test at the Trial Chamber level where on one hand in the cases of *Tadić* (IT-94-1), 7 May 1997, §§ 730 and 738; and *Celebici* (IT-96-21), 16 November 1998, §§ 325–327, the requirement of 'direct' had been

types of involvement by saying that committing (of which aiding and abetting is a subset) a crime means that a person participated, physically or otherwise, directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others.<sup>19</sup>

Given the fact that the *mens rea* for the international elements for war crimes and crimes against humanity committed by perpetrators falls below the threshold of intent, it is not surprising that for persons further removed from the scene of the crime the *mens rea* for both aspects of the crime, the underlying crime and the international element is also lower. The *mens rea* for aiding and abetting for the underlying crimes has been described as knowledge, in the sense of awareness, that the acts performed by the aider and abettor assist in the commission of a crime by the principal offender.<sup>20</sup> A more stringent test which has been used in earlier Trial Chamber decisions, namely that in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct, was rejected by the Appeals Chamber in the *Vasiljević* and *Blaškić* cases.<sup>21</sup>

It is not necessary that the aider and abettor had knowledge of the precise crime that was intended or that was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated. The aider and abettor must have been aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind, although there is no need to have shared the intent of the principal offender.<sup>22</sup>

Aiding and abetting in genocide does not require proof that the accomplice had the specific intent to destroy, in whole or in part, a protected group but only that he knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender's state of mind; it need not show that an accused shared the specific intent of the principal offender.<sup>23</sup>

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added while *Furundžija* (IT-95-17/1-T), Trial Chamber II, 10 December 1998, §§ 225 and 234; *Aleksovski* (IT-95-14/1), Trial Chamber I, 25 June 1999, § 61; *Rutaganda* (ICTR-96-3-T), 6 December 1999, § 42; *Musema* Trial Judgment, *supra* note 13, § 126; and *Blaškić* (IT-95-14), Trial Chamber I, 3 March 2000, §§ 283–288 had not.

19 Judgment, *Stakić* (IT-97-24-T), Trial Judgment, 31 July 2003, § 439.

20 *Brđjanin* Trial Judgment, *supra* note 15, § 272.

21 *Vasiljević* (IT-98-32), Appeals Chamber, 25 February 2004, (hereinafter '*Vasiljević* Appeals Judgment'), § 102 and *Blaškić* Appeals Judgment, *supra* note 15, § 49, respectively.

22 *Brđjanin* Trial Judgment, *supra* note 15, §§ 272–273.

23 *Brđjanin* Trial Judgment, *supra* note 15, § 730; see also the earlier cases of *Akayesu* Trial Judgment, *supra* note 13, § 544; *Musema* Trial Judgment, *supra* note 13, § 182; *Bagilishema* Trial Judgment, *supra* note 14, § 71; *Semanza* (ICTR-97-20-T), Trial Chamber, 15 May 2003, §§ 394–395.



#### D. Joint Criminal Enterprise

The concept of JCE, common purpose, common design, common criminal design, co-perpetration or common intention lies between conspiracy to commit a crime and the perpetration of such a crime, in that, two or more persons devise a plan to commit a crime and subsequently each carry out the entire or part of the plan.<sup>24</sup> According to the case law, this concept can be derived from the term ‘committed’ in the ICTY and ICTR Statutes.<sup>25</sup>

The Appeals Chamber jurisprudence has distinguished three types of JCE, namely:

In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose. The second form of joint criminal enterprise, the ‘systemic’ form, a variant of the first form, is characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps. This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the criminal purpose of that system.

The third, ‘extended’ form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose. The requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.<sup>26</sup>

The general requirements for this type of responsibility are as follows:

- a plurality of persons, who do not need to be organized in a military, political or administrative structure;<sup>27</sup>
- the existence of a common plan, design or purpose which amounts to or involves the commission of a crime. There is no necessity for this plan,

24 See E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Leiden: T.M.C. Asser Press, 2003), 94–109; S. Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ in 2 *Journal of International Criminal Justice* (2004) 606–619 and A. Marston Danner and J.S. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, in 93 *California Law Review* (2005) at 104–112, 117–120 and 134–146.

25 See *Kvočka* (IT-98-30/1-A), Appeals Chamber, 28 February 2005, (hereinafter ‘*Kvočka* Appeals Judgment’), § 79.

26 *Ibid.*, §§ 82–83; the concept of JCE has been considered at the Appeals Chamber level before this decision in: *Tadić* Appeals Judgment, *supra* note 4, §§ 220–229; Judgment, *Krnjelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, (hereinafter ‘*Krnjelac* Appeals Judgment’), §§ 28–33 and 65–98; *Vasiljević* Appeals Judgment, *supra* note 21, §§ 94–111; *Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Appeals Chamber, 13 December 2004, §§ 463–468; Decision, *Brđjanin* (IT-99-36-A), Appeals Chamber, 19 March 2004, (hereinafter ‘*Brđjanin* Appeals Decision’); re specifically the *mens rea* requirement see Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, (hereinafter ‘*Stakić* Appeals Judgment’), §§ 65 and 99–103.

27 *Tadić* Appeals Judgment, *supra* note 4, § 227; *Vasiljević* Appeals Judgment, *supra* note 21, § 100; *Stakić* Appeals Judgment, *supra* note 26, 22 March 2006, § 64.

design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;<sup>28</sup>

- participation of the accused in the common design involving the perpetration of one of the international crimes. This participation need not involve commission of a specific crime under one of those provisions but may take the form of assistance in, or contribution to, the execution of the common plan or purpose;<sup>29</sup> The participation in the enterprise must be significant, meaning an act or omission that makes an enterprise efficient or effective; e.g. a participation that enables the system to run more smoothly or without disruption.<sup>30</sup>

A JCE can also be a basis for liability in genocide,<sup>31</sup> although there is a difference of opinion at the Trial Chamber level as to the difference between escalation to genocide and the notion of genocide as a natural and foreseeable consequence of a JCE.<sup>32</sup>

The Appeal Chamber jurisprudence has clarified the difference between aiding and abetting and JCE.<sup>33</sup>

28 *Tadić* Appeals Judgment, *supra* note 4, § 227; *Kvočka* Appeals Judgment, *supra* note 25, §§ 116–119; *Stakić* Appeals Judgment, *supra* note 26, § 64.

29 *Tadić* Appeals Judgment, *supra* note 4, § 227; *Kvočka* Appeals Judgment, *supra* note 25, §§ 93–99; *Stakić* Appeals Judgment, *supra* note 26, § 64.

30 *Kvočka* Appeals Judgment, *supra* note 25, § 95, quoting the Trial Chamber in the same case.

31 On the question whether participation in a joint criminal enterprise corresponds to ‘genocide’ or ‘complicity in genocide’ see *Krstić* (IT-98-33), Trial Chamber, 2 August 2001, §§ 641–644.

32 *Stakić* Appeals Judgment, *supra* note 26, § 530 and *Brđjanin* Appeals Decision, *supra* note 26, § 710.

33 ● Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise (*Krnojelac* Appeals Judgment, *supra* note 26, § 75; *Vasiljević* Appeals Judgment, *supra* note 21, § 102; *Kvočka* Appeals Judgment, *supra* note § 25, § 92).

- the aider and abettor is always an accessory to a crime perpetrated by another person, the principal (*Tadić* Appeals Judgment, *supra* note 4, § 229).
- in the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution (*ibid.*);
- the aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has an effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose (*Tadić* Appeals Judgment, *supra* note 4, § 229; *Krnojelac* Appeals Judgment, *supra* note 26, §§ 31–33; *Vasiljević* Appeals Judgment, *supra* note 21, §§ 102; *Kvočka* Appeals Judgment, *supra* note 25, § 89);
- the requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or in crimes committed by a plurality of persons (*Kvočka* Appeals Judgment, *supra* note 25, § 90);



### 3. Modalities of Personal Responsibility in Canadian Refugee Law

#### A. Parameters of Complicity in Canadian Refugee Law

As an initial remark, there have been no cases regarding encouraging, ordering, and planning of inchoate offences in the context of refugee law in Canada.<sup>34</sup> The case law has been limited to a very extensive discussion of a number of aspects of complicity, a rudimentary examination of command responsibility<sup>35</sup> and some allusions to JCE, all arising from the notion of ‘committing’.

Within a time span of 20 months in the early nineties (February 1992 to November 1993), the Federal Court of Appeal set out the guiding principles with respect to complicity in three cases. All three cases, *Ramirez*, *Moreno* and *Sivakumar*,<sup>36</sup> sought a connection with criminal law.

*Ramirez* states that liability as an accomplice under the Refugee Convention cannot be read in the light of one domestic legal system, namely the Canadian Criminal Code.<sup>37</sup> The court goes on to say:

What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization which from time to time

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- in the case of aiding and abetting, the requisite mental element is the knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required, namely the intent to pursue a common purpose (*Tadić* Appeals Judgment, *supra* note 4, § 229; *Krnjelac* Appeals Judgment, *supra* note 26, §§ 31–33; *Vasiljević* Appeals Judgment, *supra* note 21, §§ 102; *Kvočka* Appeals Judgment, *supra* note 25, § 89).

34 There has been one case regarding incitement in the immigration context, namely the *Mugesera* case which has been the subject of litigation since 1995 before two levels of the Immigration and Refugee Board, an administrative tribunal, and three levels of courts, namely the Federal Court, Trial Division (IMM-5946-98, 12 April 2001), the Federal Court of Appeal (A-361-01, 8 September 2003) and finally, the Supreme Court of Canada (2005 SCC 40, 28 June 2005). For commentaries on the *Mugesera* case, see W.A. Schabas, ‘Mugesera v. Minister of Citizenship and Immigration: Canadian Immigration and Refugee Board appellate decision on expulsion of alien for inciting genocide in Rwanda’ 93 *American Journal of International Law* (1999) 529–533 and ‘National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes’, 1 *Journal of International Criminal Justice* (2002), at 49–51; J. Rikhof, ‘Hate Speech and International Criminal Law: The *Mugesera* Decision by the Supreme Court of Canada’, 3 *Journal of International Criminal Justice* (2005) 1121–1133.

35 The *Sivakumar* case states this proposition as follows: ‘the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes.’ ([1994] 1 F.C. 433)

36 The latter two cases have been mentioned in the ICTY jurisprudence, namely in the Appeals Chamber decision in *Kunarac* (IT-96-23&23/1), 12 June 2002, footnote 114 (which is part of § 98) in the context whether a plan or policy is a requirement for a crime against humanity; for a more contemporary reiteration of the principles set out in these three cases, see the *Zazai* case, Federal Court, IMM-377-02, 1 October, 2004, § 44.

37 *Ramirez*, [1992] 2 F.C. 306; (1992), 89 D.L.R. (4th) 173; 135 N.R. 390 (C.A.), § 13 in the unreported decision.

commits international offences is not normally sufficient for exclusion from refugee status . . . .

It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts. Similarly, mere presence at the scene of an offence is not enough to qualify as personal and knowing participation though, again, presence coupled with additional facts may well lead to a conclusion of such involvement.

At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (e.g., subsection 21(2) of the Criminal Code), and I believe is the best interpretation of international law.<sup>38</sup>

*Moreno* repeated the general tenets of the *Ramirez* case by indicating that

It is well settled that mere membership in an organization involved in international offences is not sufficient basis on which to invoke the exclusion clause. An exception to this general rule arises where the organization is one whose very existence is premised on achieving political or social ends by any means deemed necessary. Membership in a secret police force may be deemed sufficient grounds for invoking the exclusion clause. Membership in a military organization involved in armed conflict with guerrilla forces comes within the ambit of the general rule and not the exception.<sup>39</sup>

The court goes on to say that a person like the appellant who did not possess any prior knowledge of the acts of torture to be perpetrated or who did not render any direct assistance or encouragement to his superior officers in the commission of an international crime would not attract criminal liability under the parameters set out by *Dunlop and Sylvester*, the seminal case in Canada for aiding and abetting in criminal law.<sup>40</sup>

38 §§ 16–18. Since section 21(2) of the Criminal Code defines common intention along similar lines as the third category of JCE in the ICTY/ICTR case law it is likely that the court by also using the words ‘shared common purpose’ wanted the concept of common intention to be included in the notion of ‘committed’ in the same manner as the Appeals Chamber in the *Tadić* case; the Supreme Court of Canada declared unconstitutional the portion of section 21(2) which deals with the objective *mens rea* (‘ought to have known’) but only for murder or attempted murder (*R v. Logan*, [1990] 2 SCR 731; *R. v. Rodney*, [1990] 2 SCR 687; and *R. v. Hibbert*, [1995] 2 SCR 973; the first two cases are mentioned in the *Tadić* case, footnote 288). This concept has not been explored in any great detail in the subsequent case law although the following cases allude to this concept, especially recently and mostly in the negative, i.e. in finding no involvement: *Moreno*, 21 Imm.L.R. (2nd), 225; *Randhawa*, (1995) 93 F.T.R. 151 (India); *Ledezma*, IMM-3785-96, 1 December 1997 (Bolivia); *Kiared*, IMM-3172-97, 24 August 1998 (Algeria); *Quinonez*, IMM-2590-97, 12 January 1999 (El Salvador); *Rosas Meza*, IMM-705-00, 5 July 2001 (Peru); *Sungu*, IMM-1020-01, 22 November 2003 (Democratic Republic of the Congo); *Abbas*, IMM-6488-02, 9 January 2004 (Iraq); *Saftarov*, IMM-4718-03, 21 July 2004 (Azerbaijan); *Mankoto*, IMM-4455-04, 25 February 2005 (Democratic Republic of the Congo); *Valère*, IMM-8674-05, 19 April 2005 (Haiti) and *Chougui*, IMM-7339-05, 17 August 2006.

39 21 Imm.L.R. (2nd), 225 at 24 of the unreported decision.

40 [1979] 2 S.C.R. 881.

The court then goes further to examine whether such a person could be excluded under the parameters of refugee law ‘which, not surprisingly, overlap those of criminal law’.

In *Sivakumar* the court contrasted the two earlier decisions and concluded:

To sum up, association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a ‘limited, brutal purpose’, is not enough. Moreover, the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes.<sup>41</sup>

Another Federal Court of Appeal decision, *Bazargan*,<sup>42</sup> has set out in general the parameters of complicity, by saying that in summarizing active membership in an organization carrying out war crimes or crimes against humanity is not required, but that a person is complicit if this person contributes, directly or indirectly, remotely or immediately, while being aware of the activities of the organization, to this organization or makes these activities possible.<sup>43</sup>

## **B. Complicity in Non-brutal Organizations**

### *1. Type of Organizations*

The Canadian jurisprudence has indicated that non-brutal organizations are entities that have a legitimate purpose, but have committed war crimes or crimes against humanity outside its main function and incidental to its mandate. The types of organizations considered have ranged from regular armed forces;<sup>44</sup> ministries of the interior, including prisons;<sup>45</sup> other state organs that have the capacity to affect large numbers of people, such as other ministries

41 At 16–17 of the unreported decision.

42 A-400-96, 18 September 1996.

43 In an interesting reverse trend a variation of this definition was included in the *Criminal Code* to delineate participation in the activities of terrorist groups in section 83(18)(l) which says: ‘Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.’

44 *Ramirez*, [1992] 2 F.C. 306, 89 D.L.R. (4th) 780, 135 N.R. 390 (C.A.); *Moreno*, (1993) [1994] 1 F.C. 298, 21 Imm. L.R. (2d) 221, 107 D.L.R. (4th) 424, 159 N.R. 210; *Cibacic*, (1995) 105 F.T.R. 304; *Cortez Cordon*, IMM-1889-97, 14 April 1998; *Guardado*, IMM-2344-97, 2 June 1998; *Osagie*, IMM-3394-99, 13 July 2000; *Ordóñez*, IMM-2821-99, 30 August 2000; *Albuja*, IMM-Imama 3562-99, 23 October 2000; *Ariri*, IMM-2111-01, March 6, 2002; *Osayande*, IMM-3780-01, 3 April 2002; *Ghotara*, IMM-5312-05, 20 March 2006.

45 *Gutierrez*, (1994) 30 Imm. L.R. (2d) 106, 84 F.T.R. 227; *Mohammad*, (1995), 115 F.T.R. 161; *Alza*, (1996), 110 F.T.R. 187.

and courts<sup>46</sup> and police forces<sup>47</sup> to militias<sup>48</sup> and liberation movement and political parties.<sup>49</sup>

## 2. Actus Reus

The notion of complicity in non-brutal organizations, which is most akin to the criminal concept of aiding and abetting, has been applied in a number of different situations.

Complicity has been inferred in situations where a person handed over people to organizations involved in the commission of crimes against humanity, with the knowledge that the people handed over would come to harm. One example is a situation of a member of the National Police Force of Ghana between 1980 and 1991 who joined a special undercover unit and arrested people who were then handed over to the Bureau of National Investigations, the BNI, for interrogations that regularly included beatings and other forms of torture.<sup>50</sup> Similarly, a soldier of the Uruguayan military who transported prisoners to clandestine detention centres<sup>51</sup> and a sergeant in the ANP (Angolan National Police) in Angola in 1997–1998 who escorted prisoners to and from interrogations and trial where they knew torture was carried out, were excluded.<sup>52</sup>

Another example of complicity involved a person who was forcibly recruited into the army at age 15 and was appointed after 5 months' training to be the interrogator for his army unit. He conducted eight interrogations in 4 months. His role was to capture guerrilla suspects and then to interrogate them. He was entitled to use force but only used verbal threats in his interrogation. After the initial interrogation, he would pass the guerrilla suspects to a specialized army unit called S2 for further interrogation. The S2 tortured and often jailed its victims although some went free. The applicant handed seven suspects to the S2 but released the eighth one, for which he was punished by the S2. He then deserted the army.<sup>53</sup>

46 *Aden*, (1993) [1994] 1 F.C. 625, 23 Imm. L.R. (2d) 50; *Mohamud*, (1994) 83 F.T.R. 267; IMM-118-01, 6 November 2001; *Omar*, IMM-2452-03, 17 June 2004; *Kuburundi*, IMM-4281-05, 20 March, 2005; *Han*, IMM-2720-05, 4 April 2006.

47 *Randhawa*, (1995) 93 F.T.R. 151; *Kiared*, IMM-3172-97, August 24, 1998; *Cabrera*, IMM-4657-97, 23 December 1998; *Quinonez*, IMM-2590-97, 12 January 1999; *Grewal*, IMM-4674, 23 July 1999; *Allel*, IMM-6593-00, 3 April 2002; *Januario*, IMM-5258-00, 8 May 2002; *Saftarov*, IMM-4718-03, 21 July 2004.

48 *Rahal*, (1994), 83 F.T.R. 267; *Srouf*, (1995) 91 F.T.R. 24; *Harb*, IMM-425-01, 6 May, 2002; *Harb*, A-309-02, 27 January (2003).

49 *Solomon*, (1995) 31 Imm. L.R. (2d), 27; *Goncalves*, IMM-3140-00, 19 July 2001; *Shrestha*, IMM-2626-01, 19 August 2002.

50 *Sulemana*, (1995) 91 F.T.R. 53.

51 *Gutierrez*, IMM-2170-93, 11 October 1994.

52 *Januario*, IMM-5258-00, 8 May 2002.

53 *Gracias-Luna*, IMM-1139-92, 25 May 1995.

A large group of cases involve situations where individuals provided information to organizations, which might result in harm to those about whom this information was provided. This has happened in countries as Ethiopia (names disclosed to the Ethiopian security service);<sup>54</sup> Iran (liaison agent between regular police and SAVAK, the secret Iranian police);<sup>55</sup> Ecuador (liaison officer between two army groups);<sup>56</sup> Iraq (providing information regarding the opposition to the Mukharabat secret police,<sup>57</sup> as well as providing information to the Patriotic Union of Kurdistan (PUK), resulting in assassinations by that group);<sup>58</sup> Albania (overseer of the information-gathering activities of SHIK, the secret police);<sup>59</sup> Angola (member of youth organization which had as purpose the infiltration of Unita);<sup>60</sup> Lebanon (providing information to the South Lebanese Army<sup>61</sup> or Syrian Army);<sup>62</sup> Sri Lanka (identifying innocent people as LTTE members to the Sri Lankan army)<sup>63</sup> and Congo (working in the CSE (*Comité de Sécurité de l'Etat*) in the Republic of Congo in the late 1990s in which capacity she would listen incognito to conversations of individuals in public places and report on their opinions to the CSE).<sup>64</sup>

Another category of cases involve persons who provided support functions. Examples include a guard, which was the situation in the first case before the Federal Court of Appeal, *Ramirez*, and a driver and part-time bodyguard of the local militia leader and local KhAD (secret police) chief in Afghanistan.<sup>65</sup> This category also applies to a soldier of the Yugoslav People's army peripherally involved in the killing of civilians;<sup>66</sup> a soldier of the Honduran armed forces involved in the torturing and killing of prisoners;<sup>67</sup> a soldier involved in counter-insurgency operations in El Salvador;<sup>68</sup> a civilian driver on a military base in El Salvador between 1988 and 1992 (in which capacity he would drive persons belonging to a death squad to and from the base, together with captives);<sup>69</sup> a person who transported weapons and ammunitions and who

54 *Solomon*, (1995) 31 Imm. L.R.(2d) 27; *Bamlaku*, IMM-846-97, 30 December 1997.

55 *Bazargan*, A-400-95, 18 September 1996; *Shakarabi*, IMM-1371-97, 1 April 1998.

56 *Albuja*, IMM-3562-99, 23 October 2000.

57 *Sumaida*, A-800-95, 7 January, 2000 (Federal Court of Appeal).

58 *Hovaiz*, IMM-2012-01, 29 August 2002.

59 *Lalaj*, IMM-4779-99, 19 December, 2000.

60 *Goncalves*, IMM-3140-00, 19 July 2001.

61 *Harb*, A-309-02, 27 January 2003 (Federal Court of Appeal); *Alwan*, IMM-8204-3, 2 June 2004; *Salami*, IMM-6023-02, 16 December 2003.

62 *Diab*, IMM-3162-93, 10 June 1994.

63 *Kathiravel*, IMM-204-02, 29 May 2003.

64 *Bukumba*, IMM-3088-03, 22 January 2004; see also *Acevedo*, IMM-4365-05, 12 April 2006.

65 *Zadeh*, (1995) 90 F.T.R. 210.

66 *Cibaric*, (1995), 105 F.T.R. 304.

67 *Fletes*, (1994) 83 F.T.R. 49.

68 *Penate*, [1994] 2 E.C. 79.

69 *Guardado*, IMM-2344-97, 2 June 1998.

found safe meeting places for the commandants of the FMLN in El Salvador;<sup>70</sup> as well as a member of the Venezuelan military involved in the suppression of riots.<sup>71</sup>

A case in the periphery of this type of complicity was the *Khera* case. The applicant was a member of the Punjab Police Force (PPF), which he voluntarily joined in 1973 and stayed with for the next 24 years. He was a driver *munchie* or dispatcher who assigned drivers and allocated vehicles to police stations. The applicant knew that the vehicles were used for missions, especially after 1984, when Sikhs were victims of illegal arrest, torture and murder. He knew this information from the drivers themselves when they returned from their missions, from newspapers and from the fact that 10–20% of the vehicles that he arranged for came back bloodied and bullet-ridden.<sup>72</sup>

Another group of cases deals with assisting in increasing the efficiency of an organization, such as an intelligence officer in a prison in Iran;<sup>73</sup> a policeman in charge of political prisoners in a military hospital in Uruguay;<sup>74</sup> a security guard at a hospital where forced abortions are carried out in China<sup>75</sup> or a soldier providing maintenance and loading ordinance onto planes used to bomb civilians in Guatemala.<sup>76</sup>

An unusual case of exclusion pertains to a situation where a person was a vice president of training unit within the Cambodian police service in the mid-eighties in which capacity he taught police officers the substance of new legislation concerning crimes against the state upheld by court. He would attend meetings with senior officials of the Ministry of National Security where he learned that persons responsible for the implementation of the law, which he had taught, would identify, arrest, question, torture and execute political opponents of the government. The applicant was aware that 85% of the persons arrested under this law would be punished without trial, but he still continued his career.<sup>77</sup>

Financing of war crimes or crimes against humanity will also lead to imputation of liability.<sup>78</sup>

### 3. Mens Rea

The *mens rea* in all types of complicity is knowledge of war crimes or crimes against humanity; which also includes the fact that one must have known

70 *Rivera Aguilar*, IMM-4491-99, 16 August 2000.

71 *Rojas*, IMM-539-02, 2 April 2003.

72 IMM-4009-98, 8 July 1999.

73 *Torkchin*, A-159-92, 25 January 1995 (decided by the Federal Court of Appeal).

74 *Alza*, (1996), 110 F.T.R. 187.

75 *Chen*, IMM-541-00, 1 June 2001.

76 *Ordóñez*, IMM-2821-99, 30 August 2000.

77 *Say*, IMM-2547-96, 17 May 1997.

78 *Hajialakhani*, IMM-3105-97, 11 September 1998; *Rivera Aguilar*, IMM-4491-99, 16 August 2000; *Chitrakar*, IMM-2769-01, 19 August 2002; *Pushpanathan*, IMM-4427-01, 3 September 2002.



about the activities committed by the organization to which one belonged<sup>79</sup> or was wilfully blind to those activities.<sup>80</sup>

At times a mental element for complicity different from knowledge has been discussed in the context of the requirement of shared common purpose. The *Moreno* case was an example of not attributing complicity when such a shared purpose is not present. Another example was the case of *Bahamin* who joined the Revolutionary Guard in Iran involuntarily. He did not know what would happen to people he had arrested, except that he thought that they might be executed after a trial. He refused to kill civilians when ordered to do so, as a result of which he was imprisoned for a while after which he deserted the organization.<sup>81</sup> This person was found not to be complicit.

The Federal Court, Trial Division, came to the same conclusion in the case of *Randhawa*,<sup>82</sup> who voluntarily joined the Punjab police and who became aware of police excesses. On two occasions he refused to abuse people resulting in a reprimand and the threat of loss of employment. The court was of the opinion that although Randhawa had knowledge of murder and torture by the police department, he did not share the common purpose of this organization. Not only had he not participated in any abuse or torture, he had actually refused to participate, objected to these actions, complained about them and took action about his concerns. The fact that he was asked to resign was compelling evidence contrary to the notion of a shared common purpose in that he never participated and that his superiors recognized that he was unlikely to share their views.<sup>83</sup>

### C. Complicity in Brutal Organizations

#### 1. General

Some of the more important decisions in Canada in the last couple of years were related to the notion of brutal, limited purpose organizations. At the same time a significant international development occurred as well, namely the

79 *Bahamin*, (1994) 171 N.R. 79; *Castillo*, (1996) 106 F.T.R. 145; *Cordon*, (1995) 94 F.T.R. 208; *Mohammad*, IMM-4227-94, 25 October 1995; *Shakarabi*, IMM-1371-97, 1 April 1998; *Salazar*, IMM-977-98, 16 April, 1999; *M.*, IMM-1689-01, 31 July 2002.

80 *Cortez Cordon*, IMM-1889-97, 14 April 1998 *Loayza*, IMM-2392-05, 9 March 2006; the notion of wilful blindness has been addressed by the ICTY as part of the *mens rea* for crimes against humanity in Judgment, *Krnjelac* (IT-97-25-T), Trial Chamber, 15 March 2002, § 59; Judgment, *Kunarac* (IT-96-23 & 23/1-A), Appeals Chamber, 12 June 2002, § 102 and Judgment, *Simić* (IT-95-9-T), Trial Chamber, 17 October 2003, § 46, as well as for command responsibility in Judgment, *Orić* (IT-03-68-T), Trial Chamber, June 30, 2006, § 322.

81 *Bahamin*, (1994), 171 N.R. 79; the case of *Sungu*, IMM-1020-01, 22 November 2002 is similar in a situation involving a senior official in the Mobutu government of Congo.

82 *Randhawa*, (1995) 93 F.T.R. 151.

83 See also *Musansi*, IMM-5470-99, 21 January 2001 where a person working in administrative capacity for the *Services d'actions et de renseignements militaires* (the SARM) in Zaire found out that this organization was planning to kill leaders of the opposition, informed the opposition after which his life was in danger.

acceptance of the Canadian notion of brutal, limited purpose organization by the United Nations High Commissioner for Refugees (UNHCR) in the Guidelines on Exclusion of 4 September 2003.<sup>84</sup>

Some general comments about the Canadian case law are useful. The Federal Court has specifically stated that, when dealing with membership in an organization, the first step is to look at the type of organization and whether the main purpose of the organization is achieved by means of crimes against humanity or war crimes. If so, membership combined with knowledge is usually sufficient to establish complicity, as opposed to personal and knowing participation for non-brutal organizations.<sup>85</sup>

It has also become increasingly clear that the federal court is of the view that since mere membership<sup>86</sup> in, as well as knowledge of the activities, of a brutal, limited purpose organization, are an almost foregone conclusion for the purposes of attracting F(a) liability,<sup>87</sup> the characterization of an organization as brutal and limited will be subject to a high degree of scrutiny. This trend started with the *Hajialakhani* case<sup>88</sup> and was confirmed most recently by the *Mukwaya* case; the phrase used in both cases to express the level of scrutiny was that the initial decision maker has to be 'free from doubt' that the organization is principally directed to a limited, brutal purpose. As well, membership in a brutal organization has to coincide in time with the period or periods that the organization was conducting activities that would attract the characterization of 'brutal', according to the *Hajialakhani*, *Yogo* and *Mukwaya* cases.

84 *Yogo*, IMM-4151-99, 26 April 2001, *Mendez-Leyva*, IMM-4677-00, 24 May 2001, *Mukwaya*, IMM-5752-99, 29 June 2001; this was also done indirectly in the case of *Rai*, IMM-2249-00, 12 July 2001. UNHCR Document HCR/GIP/03/05, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, § 19 with further expansion in §§ 59–62 in the accompanying *Background Note to the Guidelines*; see also Committee of Ministers of the Council of Europe, Recommendation (2005) 6, 23 March 2005.

85 § 43 in the *Mendez-Leyva* case, IMM-4677-00, and implicitly in § 19 of the *Yogo* decision.

86 For an overview of the case law pertaining to membership see below under the heading 'Membership'.

87 For this proposition in respect to the knowledge factor see *Ahmed Abdulkadir Aden*, IMM-2912-95, 14 August 1996 (involving an elite unit of the Somali army, the Red Berets); *Shakarabi*, IMM-1371-97, 1 April 1998, *Cortez Cordon*, IMM-1889-97, 14 April 1998 (a member of the Guardia de Hacienda in Guatemala); *Zoya*, IMM-5256-99, 20 November 2000 (belonging to SNIP or National Intelligence and Protection Service in Congo); and *Mukwaya*, although in *Sariday*, IMM-5691-93, 5 October 1994 because of the age of the claimant at the time when he was involved with a terrorist organization, the court felt that the CRDD should have inquired whether the claimant had sufficient knowledge of the nature of the organization, *Dev Yol* in Turkey.

88 IMM-3105-97, 11 September 1998; this can be seen implicitly in the earlier case of *Balta*, IMM-2459-94, 27 January 1995 where a determination that the Bosnian Serb army was a brutal organization was overruled by the court; see also *Nagamany*, IMM-22-05, 17 November 2005 re the LTTE in Sri Lanka.

## 2. Membership

The case law of the Federal Court continues to make a number of observations regarding the parameters of membership in a brutal, limited purpose organization.

To be a member of a brutal and limited purpose organization, formal membership coupled with active participation in unlawful acts is not required; simply belonging to such an organization is sufficient.<sup>89</sup> There is no need to be a member of the criminal group in question, in order to be found complicit of its crimes by association. According to the federal court, an individual is a member of an organization if one devotes oneself full time or almost full time to the organization or if one is associated with members of the organization, especially for a lengthy period of time.<sup>90</sup>

Belonging to an organization is assumed where people join voluntarily and remain in the group for the common purpose of actively adding their personal efforts to the group's cause.<sup>91</sup> The expression 'membership in a particular group' implies the existence of an institutional link between the organization and an individual, accompanied by more than a nominal involvement in the activities of the organization.<sup>92</sup> There is no need to identify the specific acts in which the individual has been involved because of the notoriety and singular purpose of the group.<sup>93</sup>

## D. Complicity in Hybrid Organizations

According to the case law, in order to determine whether an organization that not only has a nefarious purpose but also engages in other activities such as education or providing health and other charitable services, should be considered a brutal limited purpose one, it is necessary to look at what is the organization's *sine qua non*, i.e. would the organization only exist for its benign projects? Or put differently, is there any evidence that the political objectives can be separated from militaristic activities?<sup>94</sup>

89 Chiau, IMM-1441-96, 3 February 1998, at 17–18, upheld by F.C.A., A-75-98, 12 December 2000, decided outside the parameters of 1F(a), namely in the context of § 19(1)(c.2) of the *Immigration Act*, now § 37(1)(a) of the *Immigration and Refugee Protection Act (IRPA)*, <http://laws.justice.gc.ca/en/I-2.5/index.html> (visited 31 August 2005); Shakarabi, IMM-1371-97, 1 April 1998 (visited 31 August 2005); Mohsen, IMM-3246-99, 15 August 2000.

90 Suresh, DES-3-95, 14 November 1997, §§ 18–23, decided outside the parameters of 1F(a), namely in the context of § 19(1)(f)(iii)(B) of the *Immigration Act*, now § 34(1)(f) of the *Immigration and Refugee Protection Act*; see also Owens IMM-5668-99, 11 October 2000, which also stated that membership goes beyond that of being a mere supporter or sympathizer.

91 Saridag, (1994) 85 F.T.R. 307.

92 Harb, A-309-02, 27 January 2003, Federal Court of Appeal.

93 Hajialakhani, IMM-3105-97, 11 September 1998; Pushpanathan, IMM-4427-01, 3 September 2002.

94 Mehmod, IMM-1734-97, 7 July 1998 (with respect to the SSP (Sepah-e-Sahaba) in Pakistan); Pushpanathan, IMM-4427-01, 3 September 2002 (involving the LTTE in Sri Lanka); Obita, IMM-1473-05, 10 February 2006 (involving the LRA in Uganda).

Being a member of a peaceful organization or section that has not severed its ties drastically with its violent sister organization, wing or section will bring a person within the parameters of membership of the entire organization which is then considered violent.<sup>95</sup>

## 4. Conclusion

This conclusion will compare the notion of complicity in international criminal law and Canadian refugee law which have developed virtually in isolation of each other.<sup>96</sup>

The general definition of complicity in war crimes and crimes against humanity has been very similar in both international and Canadian jurisprudence, in that both contemplate a contribution to international crimes, while having knowledge of the purposes of the organization. The statement made by the Federal Court of Appeal in the *Bazargan* case:

a person is complicit if this person contributes, directly or indirectly, remotely or immediately, to the criminal activities of an organization or makes these activities possible.<sup>97</sup>

and the observation made in *Strugar* Trial Chamber<sup>98</sup> decision:

aiding and abetting has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a crime.

are very similar. It does not appear that the requirement of 'contribution' indicates a lesser level of involvement than the notion of 'substantial effect', especially since the latter is not to be equated with a causal connection.<sup>99</sup> Both international criminal law and Canadian law are of the view that presence

95 *Cardenas*, (1994) 23 Imm. L.R.(2d) 244, 74 F.T.R. 214 (re the socialist party in Chile between 1981 and 1991); *Kudjoe*, IMM-5129-97, 4 December 1998 (re the Bureau of National Security (BNI) in Ghana); *Shrestha*, IMM-2626-01, 19 August 2002 (re the UPF in Nepal).

96 By 15 May 2006, the Federal Court had made reference to the ICTY jurisprudence three times and to the ICC Statute four times; the ICTY jurisprudence was invoked by the Federal Court, Trial Division, in *Harb* (IMM-425-01, 6 May 2002, in discussing the concept of civilian population as part of the crime against humanity requirement); in the case of *M.* (IMM-1689-01, 31 July 2002, regarding *mens rea* for crimes against humanity); and in *Nagamany* (IMM-22-05, 17 November 2005, in which the level of contribution for complicity was discussed). The ICC Statute was referred to by the Federal Court of Appeal in *Harb* (A-309-02, 27 January 2003, as being one of the international instrument contemplated by 1F(a), the contents of which could apply in Canadian refugee law even before the adoption of the Statute in respect to the notion of war crimes and crimes against humanity), the *M.* case again (re *mens rea*); the case of *Kathiravel* (IMM-204-02, 29 May 2003 re the defence of duress); the *Fabela* case (IMM-7282-04, 26 July 2005 whether state or organizational policy is an element of crimes against humanity), and the *Ali* case (IMM-8686-04, 23 September 2005 regarding the status of crimes against humanity under international law).

97 A-400-95, 18 September 1996.

98 Decision, *Strugar* (IT-97-24), Trial Chamber, 23 July 2003, § 439.

99 *Kvočka* Trial Judgment, *supra* note 15, § 255.

combined with authority can amount to aiding and abetting while they also agree on the *mens rea* aspect of complicity, namely knowledge.

The Canadian case law has applied the general principles not only in many more different instances than international jurisprudence, which is to be expected and legitimate given the different facts and situations faced by the courts, but has also expanded in two areas not contemplated by the ICTY/ICTR cases, namely membership in a brutal organization and JCE.

Membership in a brutal organization has been an essential element from the very beginning in complicity in Canadian law, while it has been rejected by the ICTY jurisprudence on more than one occasion as a basis for personal liability.<sup>100</sup>

Criminalization on the basis of membership is not unknown in either international or domestic criminal law. The Charter of the International Military Tribunal<sup>101</sup> after the Second World War had a provision to this effect which was applied by the Nuremberg Tribunal,<sup>102</sup> while a number of countries also have made membership in either terrorist or organized crime organizations a crime in itself, indicating a possible emerging international custom.<sup>103</sup>

100 *Ibid.*, § 281; also Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, *Milutinović* (IT-99-37-AR72), Appeals Chamber, 21 May 2003, §§ 24–26 and 31; *Stakić* (IT-97-24), Trial Chamber II, 31 July 2003, § 433; *Simić* (IT-95-9-T), Trial Chamber I, 17 October 2003, § 158.

101 The London Agreement made it possible to convict an individual of war crimes or crimes against humanity by having the International Military Tribunal declare the organization to which the individual belonged a criminal organization. Control Council Law No. 10 which applied in occupied Germany attached the same type of liability to a member of a group or organization declared criminal by the same International Military Tribunal.

102 The International Military Tribunal was called upon in the indictment to declare the following seven groups or organizations criminal: the Leadership Corps of the Nazi Party; the Gestapo; the SD; the SS; the SA; the Reich Cabinet; and the General Staff and High Command of the German Armed Forces. It did so with the first four above organizations. In addition, in a subsequent trial, the *Mauthausen Concentration Camp Trial*, which is mentioned in the *Dachau Concentration Camp Trial (Trial of Martin Gottfried Weiss and thirty-nine others, Law Reports of Trials of War Criminals, Volume XI, at 5)* all employees of concentration camps were held liable, the language of which appears to be broad enough to consider the findings of the military court a further refinement of the decision of the Nuremberg International Military Tribunal.

103 For instance:

Australia (section 102.3 of the *Criminal Code Act 1995*, <http://scaleplus.la.gov.au/html/pasteact/1/686/pdf/CriminalCode1995.pdf> (visited 31 August 2005));

Israel (section 3 of the *Prevention of Terrorism Ordinance No. 33, 5708-1948*, <http://www.mfa.gov.il/MFA/MFAArchive/1900.1949/Prevention+of+Terrorism+Ordinance+No+33+of+5708-19.htm> (visited 31 August 2005));

Mexico (section 164 of the *Federal Criminal Code*, <http://www.cddhcu.gob.mx/leyinfo/doc/9.doc> (visited 31 August 2005));

Romania (section 167 of the *Criminal Code*, <http://www.era.int/domains/corpus-juris/public.pdf/romania.criminal.code.pdf> (visited 31 August 2005));

Hungary (section 263/C of the *Criminal Code*, <http://www.era.int/domains/corpus-juris/public.pdf/hungary.criminal.code.pdf> (visited 31 August 2005));

Germany (sections 85 and 129 of the *Criminal Code*, <http://www.iuscomp.org/gla/statutes/StGB.htm#129> (visited 31 August 2005)).

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The reason that membership has not been considered by the ICTY as a basis for individual responsibility is because of the fact that it was specifically not given this jurisdiction rather than a lack of precedent for it in international criminal law.<sup>104</sup>

The last aspect of extended liability for completed offences — JCE — presents an interesting contrast between international criminal law and Canadian law. In Canada this concept has found its way into the jurisprudence from its beginnings in *Ramirez* without any further analytical development, but has been applied almost intuitively in some situations where large groups such as the military or the police were linked to the commission of war crimes or crimes against humanity and an individual had some close association with those groups.<sup>105</sup> The international jurisprudence, on the other hand, has used an in-depth analysis of this concept but only in limited situations, namely tight-knit groups such as small military units or civilian authorities or at

104 See § 26 of the *Milutinović* decision where the explanatory report of the Secretary-General in establishing the ICTY is quoted, including the following sentence: ‘The Secretary General believes that this concept should not be *retained* in regards to the International Tribunal’ which appears to acknowledge that such a possibility would have been possible but was decided against. As a result, the comment by the Trial Chamber in the *Stakić* case in § 433 that ‘the Trial Chamber emphasises that joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege*’ appears to be inaccurate since, although relying on the same Appeals Chamber decision, it does not refer to the above § 26; as well, the concept of *nullum crimen sine lege* applies to the creation of new crimes, not interpreting modalities of participation (see Art. 23 ICCSt., and the *Milutinović* decision, §§ 37–38).

105 The administrative tribunal applying exclusion clause 1F(a) has used a methodology of using a number of factors to determine whether a person’s association is close enough to constitute a shared common purpose. A combination of six characteristics such as method of recruitment, position or rank in the organization, nature of the organization, length of time in the organization, opportunity to leave and knowledge of atrocities are used for this purpose. Recently this approach has been adopted by the Federal Court in the following cases: *Fabela* (IMM-7282-04, 26 July 2005); *Bedoya* (IMM-592-05, 10 August, 2005); *Ali* (IMM-8686-04, 12 September 2005); *Ortiz Ardilla* (IMM-10337-04, 9 November 2005); *Catal* (IMM-102-05, 9 November 2005); *Akramov* (IMM-1780-05, 10 February 2006); *Loayza* (IMM-2392-05, 9 March 2006) and *Kasturiarachchi* (IMM-2952-05, 7 March 2006). While individually such personal factors are not conclusive for a finding of complicity (see *Ramirez*; *Penate*, (1994) 2 E.C. 79; *Saridag*, (1994) 85 E.T.R. 307; *Gracias-Luna*, IMM-1139-92, 25 May 1995 for the age factor; *Fletes*, (1994) 83 E.T.R. 49; *Cibacic*, (1995) 105 E.T.R. 304; *Gracias-Luna*, IMM-1139-92, 25 May 1995; *Aseel Khan*, IMM-422-02, 14 March 2003; *Asghedom*, IMM-5406-00, 30 August 2001 for the forcible recruitment factor and *Gracias-Luna*, IMM-1139-92, 25 May 1995; *Osagie*, IMM-3394-99, 13 July 2000; *Osayande*, IMM-3780-01, 3 April 2002 for the duration of involvement; the concept of disassociation as an element of complicity was first introduced as a separate concept by the *Penate*, 71 E.T.R. 171, decision and expanded by the case of *Gutierrez*, (1994) 84 E.T.R. 227). Canadian jurisprudence is still evolving with respect to the respective weight of the above factors when used in combination. Some of these factors have also been referred to in the international jurisprudence, see *Kvočka* Trial Judgment, *supra* note 15, § 311.



most persons associated with the administration of prison or concentration camps.

Some cross-pollination between international criminal law and Canadian refugee law would be useful to extend the parameters of the JCE concept to its logical conclusion. Canadian jurisprudence would benefit from a better analytical framework within which to place its willingness to find complicity for persons involved in large nefarious organizations.<sup>106</sup> And international jurisprudence, especially as will be developed by the International Criminal Court, could examine the Canadian example in which the outer limits of JCE have been or are still being explored to determine whether a specific domestic application of this concept has a useful precedential value.<sup>107</sup>

106 After all, as was already said immediately after the Second World War: 'An elaborate and complex operation, such as the deportation and extermination of the Jews and the appropriation of all their property is obviously the task for more than one man. Launching or promulgating such a programme may originate in the mind of one man or group of men. Working out the details of the plan falls to another. Procurement of personnel and the issuing of actual operational orders might fall to others. The actual execution of the plan in the field involves the operation of another, or it may be several other persons or groups. Marshalling and distributing the loot, or allocating the victims, is another phase of the operations that may be entrusted to an individual or a group far removed from the original planners . . . The acts of any one . . . within the scope of the overall plan, become the acts of all the others.' (Trial of Oswald Pohl, United States Military Tribunal in Nuremberg, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Volume 5, at 1173; see also Kvočka Trial Judgment, *supra* note 15, § 307.

107 It would appear that some willingness to extend the notion of JCE to larger organizations can be found in the *Report of the International Commission of Inquiry on Darfur*, 31 January 2005, § 54, as well as in the indictments before the Sierra Leone Special Court and the more recent indictments at the ICTY; on the other hand, there is already concern in academic circles that the parameters of the JCE concept are already drawn too widely, see W.A. Schabas, 'Mens Rea and the International Tribunal for the Former Yugoslavia', 37 *New England Law Review* (2003) 1015, at 1030–1036; See van Sliedregt, *supra* note 24, at 134–137; Danner and Martinez, *supra* note 24, at 124–126; and G.P. Fletcher and J.D. Ohlin, 'Relearning Fundamental Principles of Criminal Law in the Darfur Case', 3 *Journal of International Criminal Justice* (2005), 539 and 561.