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Six Degrees of Separation: Canadian Accessory Liability in Afghan War Crimes

Deborah Bayley*

INTRODUCTION

Since the early days of the post-September 11th era and the beginning of the infamous war on terror operations in Afghanistan and Iraq, Canadians have become acutely aware of the horrors of torture. Torture was originally publicized as a disgraceful practice only embraced by the enemy; an enemy who would shamelessly promote its cause by disseminating propaganda depicting nothing but the cruellest and most inhumane treatment of captured adversaries. This, the public was told, is why they are the “enemy” and we are the “liberators”. As early as 2004, this simple narrative started to change.

In 2004, allegations of torture began to surface at the US-operated Bagram Theatre Internment Facility in the Parwan province of Afghanistan. The abominable treatment of some 645 detainees held at Bagram was famously chronicled in the 2007 documentary *Taxi to the Dark Side*. The US Army Criminal Investigation Command at Bagram found 7 cases of confirmed or suspected detainee homicide¹ and probable cause to charge 27 military police guards and military intelligence interrogators with a variety of crimes including involuntary manslaughter.² In 2004 the world also became aware of the US detention centre Camp Delta, at Guantánamo Bay Naval Base in Cuba, when the *New York Times* published excerpts from a report of the International Committee of the Red Cross (ICRC), which had visited the facilities. Camp Delta was host to 550 detainees who, according to the ICRC, were exposed to loud noises, humiliating acts, solitary confinement, temperature extremes, forced positions, and beatings.³ As horrifying as the

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¹ United States, Army Criminal Investigations Command, *Army Criminal Investigators Outline 27 Confirmed or Suspected Detainee Homicides for Operation Iraqi Freedom, Operation Enduring Freedom* (Fort Belvoir, VA: CID Public Affairs Office, 2005) at 1.

² Tim Golden, “Army Faltered in Investigating Detainee Abuse” *The New York Times* (22 May 2005), online: NYTimes.com

< <http://www.nytimes.com/2005/05/22/international/asia/22abuse.html> >.

³ Neil A Lewis, “Red Cross Finds Detainee Abuse in Guantánamo” *The New York Times* (30 November 2004), online: NYTimes.com < <http://www.nytimes.com/2004/11/30/politics/30gitmo.html> >.

accounts of torture at both Bagram and Camp Delta were, what was perhaps most emblematic of the “liberators” fall from grace was the well documented series of atrocities that took place at the US Abu Ghraib detention centre in Iraq. The same year that stories of prisoner abuse in Afghanistan and Guantánamo Bay became public, *The New Yorker* magazine published a graphic account of American soldiers engaging in behaviour that ranged from urinating on detainees to pouring phosphoric acid on them.⁴

The world was shocked. Canada was shocked. Despite the fact that the allegations of torture all seemed to be contained within American facilities, Canadians were particularly concerned that if torture and “enhanced” interrogation methods had become acceptable for our closest military ally, the Canadian government would need to be vigilant in disassociating itself from these kinds of activities. Regardless of any special security concerns that may have developed in the post-9/11 world, Canadians, it can be said, have a low tolerance for torture. As one Canadian official expressed,

Canada has always been a powerful advocate of international law and human rights. That is a keystone of who we are as Canadians and what we have always stood for as a people and nation. If we disregard our core principles and values, we also lose our moral authority abroad. If we are complicit in the torture of [detainees], how can we credibly promote human rights in Tehran or Beijing?⁵

It was within this controversial and politically-charged context that Canadians initially became concerned with the fate of Afghan detainees who had passed through Canadian custody. Groups such as Amnesty International and the BC Civil Liberties Association have claimed that when the Canadian Forces first assumed command of the Provincial Reconstruction Team (PRT) in Kandahar city in 2005 and began transferring detainees to Afghan authorities, those detainees were tortured. It is further alleged that Canada was aware that detainees were being tortured by Afghan authorities but persisted with transfers regardless, thereby endangering the lives and security of an unknown number of detainees.⁶ This, it has been claimed, amounts to complicity in the torture of prisoners during a non-international armed conflict and qualifies as a war crime. In 2009, the Canadian Department of National Defence (DND) and the House of Commons Special Committee on the Canadian Mission in Afghanistan both began investigating the allegations of deficiencies in the detainee transfer process.⁷

⁴ Seymour M Hersh, “Torture at Abu Ghraib” *The New Yorker* (10 May 2004), online: [newyorker.com](http://www.newyorker.com)

< http://www.newyorker.com/archive/2004/05/10/040510fa_fact>.

⁵ Canada, House of Commons, Special Committee on the Canadian Mission in Afghanistan, “Study: Transfer of Afghan Detainees” in *Official Report of Debates (Hansard)*, No 15 (18 November 2009) [Special Committee] at 1545 (Richard Colvin, First Secretary, Embassy of Canada to the United States of America).

⁶ *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 FCR 546, 292 DLR (4th) 127 [*Amnesty International*].

⁷ Special Committee, *supra* note 5; Canada, Vice Chief of Defence Staff, *Final Report* (Ottawa: Afghanistan In-Theatre Detainee Handling Process Board of Inquiry, 2009).

Unsatisfied with the government's response and sceptical of how seriously the allegations of war crimes were being treated, human rights activists Michael Byers of the University of British Columbia and William Schabas of the Irish Centre for Human Rights appealed to the prosecutor of the International Criminal Court (ICC).⁸ Based on publicly available evidence, they claimed there was strong reason to believe that Canada had been complicit in the torture of Afghan detainees and had violated the war crimes provision of the *Rome Statute*.⁹ They further claimed that since Canada was a party to the *Rome Statute*, and since the Canadian government was not conducting a "genuine" investigation, the ICC should exercise jurisdiction over the matter and prosecute those responsible.

As confident as Byers, Schabas and many others are in their assertion that Canada has committed war crimes, the matter is unfortunately far more complex and far less certain. One of the primary reasons for this complexity is that Canada is not the party that allegedly committed torture. It is widely agreed that the acts of torture were undertaken solely by Afghan authorities, making them the perpetrators in this case. If the allegations against Canada turn out to be founded, Canada's participation could at best be characterised as accessory. This brings the matter into an exceptionally murky area of law that asks the question of how and to what extent accessory liability operates in war crimes both domestically and internationally. These issues will be explored in the balance of this paper.

In Part I, theories of individual criminal responsibility will be explored, including the doctrines of causation and complicity. The doctrine of causation attributes liability to principal offenders who cause some prohibited consequence through their own actions. The doctrine of complicity operates differently to create accessory liability for a party to an offence who does not actually commit the crime in question. A principal commits an offence through their own conduct, while an accessory derives criminal liability from the conduct of another through solicitation or facilitation.¹⁰

In the international setting, the doctrine of complicity has given rise to controversial forms of individual criminal responsibility, including: i) conspiracy; ii) criminal organizations; and iii) Joint Criminal Enterprise (JCE). Emerging from the post-World War II International Military Tribunal (IMT) and the International Criminal Tribunal for the former Yugoslavia (ICTY), all three concepts can operate to impute guilt to individuals who somehow participated in collective crimes even if they themselves did not commit the specific crime in question. While these concepts may initially seem to give credence to the allegations of Canadian criminal responsibility in Afghanistan, it will be shown that their liberal use in international law has come dangerously close to guilt by association and as a result they lack legitimacy as legal concepts.

⁸ Letter from Prof Michael Byers and Prof William A. Schabas OC to Luis Moreno-Ocampo, Prosecutor, International Criminal Court (3 December 2009) online: Rideau Institute <<http://rideauinstitute.ca/file-library/Byers-Schabas-Letter-to-ICC-3-Dec-2009.pdf>>.

⁹ *Rome Statute of the International Criminal Court*, 18 December 1998, Can TS 2002 No 13, (Ratification July 2000) [*Rome Statute*].

¹⁰ Markus D Dubber, "Criminalizing Complicity: A Comparative Analysis" (2007) 5 J Int'l Crim Just 977 at 987.

In Part II, the question of Canadian accessory liability will be considered under the legal framework of the *War Crimes Act*,¹¹ Canada's implementing legislation for the *Rome Statute*. The *War Crimes Act* criminalizes torture during armed conflict as a war crime, similar to the *Rome Statute*, and generates criminal responsibility for accessory participation in war crimes by reference to the *Criminal Code*.¹² The operation of the *Criminal Code* within the context of international crimes has the potential to bring two different systems of law into conflict. A comparative analysis of Canadian criminal law and judicial interpretation of the *War Crimes Act* will produce an estimation of where the law sits in this regard.

In Part III, the Canadian legal framework for accessories to war crimes will be compared with the international framework provided by the *Rome Statute*. Article 25¹³ of the *Rome Statute* identifies the specific modes of individual criminal responsibility that, in conjunction with the listed crimes, will satisfy the conduct and fault requirement of an offence. Two of these modes of responsibility are relevant to Canada's activities in Afghanistan: a) "aids, abets or otherwise assists" (Art. 25(3)(c)); and b) "in any other way contributes to... a crime by a group of persons acting with a common purpose" (Art. 25(3)(d)). While seeming comprehensive, the interpretation of these provisions has proved problematic; particularly with regard to their fault and conduct requirements. Both requirements will be considered in an attempt to provide an interpretation of the provisions consistent with the text of the *Rome Statute* and, where the text is found lacking, is informed by international jurisprudence and supplemented by general principles of criminal law.

Finally, in Part IV, the somewhat ambiguous domestic and international legal framework for accessories to war crimes will be applied to the case of the Canadian Forces detainee transfer operations in Afghanistan. As preliminary investigations are still ongoing, the precise facts of the case are not yet known, and no prediction can be made as to the relative culpability of any of the potential accused. What will be considered instead is the case the prosecution would have to meet if charges were laid in either a Canadian or international forum.

I. INDIVIDUAL CRIMINAL RESPONSIBILITY

The main function of criminal law is to affix blame to individuals for their actions or the harmful consequences of their acts.¹⁴ That the law describes certain acts and results as harmful, and therefore worthy of punishment, is not generally controversial. More disputed, however, is the justification for holding an individual legally responsible for a particular act or consequence. Over time, the law has presented different explanations for responsibility ranging from vicarious liability to direct causation. According to H.L.A. Hart and A.M. Honoré, in their book *Causation in the Law*, "doing" or "causing" harm

¹¹ *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [*War Crimes Act*].

¹² RSC 1985, c C-46.

¹³ *Rome Statute*, *supra* note 9 at art 25.

¹⁴ Sanford H Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73 Calif L Rev 323 at 329.

constitute the primary ground for holding someone responsible and is the most obvious, and least disputable, reason for ascribing individual criminal liability.¹⁵

According to Christopher Kutz of the Berkeley School of Law, the two modern dominant theories of causation both descend from David Hume's famous pronouncement: "We may define a cause to be an object followed by another, and where all the objects, similar to the first, are followed by objects similar to the second. Or, in other words, where, if the first object had not been, the second never had existed."¹⁶ As Kutz explains, the first half of this sentiment reflects the "regularity" concept of causation: one event (or factor) is the cause of another event when it is an insufficient but necessary element of a set of conditions that are actually sufficient but not necessary for the occurrence of the second event. The second half of Hume's statement reflects the classical theory of causation defined in terms of counterfactuals.¹⁷ The two concepts of causation might be referred to as direct and indirect causation. In cases of direct causation the conduct of a principal actor is *conditio sine qua non* under a traditional causal analysis, and attribution of responsibility is not controversial. In cases of indirect causation, the accused's conduct (which is necessary but not sufficient) is less obvious as a basis for responsibility. Indirect causation is generally referred to as complicity or accessory liability.¹⁸

a) Doctrine of Complicity

Complicity is a derivative form of criminal responsibility, in that the liability of the accused is dependent on the actions of the principal offender. As Markus D. Dubber explains in his article *Criminalizing Complicity: A Comparative Analysis*, the doctrine of complicity is simply one way of satisfying the conduct element of an offence without addressing other elements, such as the result. The principal will satisfy the conduct element through direct causation, while an accessory will satisfy it indirectly through the principal's act.¹⁹ In order to fulfil the conduct requirement of an offence under the doctrine of complicity the accessory must have participated in the commission of the offence in some way. While various jurisdictions differ on what threshold of participation will suffice, the common law traditionally requires more than mere

¹⁵ HLA Hart & AM Honoré, *Causation in the Law*, (UK: Oxford University Press, 1959) at 62.

¹⁶ Christopher Kutz, "Causeless Complicity" (2007) 1 Crim L Phil 289 at 296.

¹⁷ *Ibid.* Counterfactual analysis reflects the causal claim of: event *A* caused event *B*; but for *A*, *B* would not exist.

¹⁸ It is debateable as to whether or not complicity is a form of causation. For example, Sanford Kadish has said: "In the same sense and for the same reasons that a person's genes, upbringing, and social surroundings are not seen as the cause of his actions, neither are the actions of another seen as the cause of his actions. We regard a person's acts as the products of his choice, not as an inevitable, natural result of a chain of events. Therefore, antecedent events do not cause a person to act in the same way that they cause things to happen, and neither do the antecedent acts of others. To treat the acts of others as causing a person's actions (in the physical sense of cause) would be inconsistent with the premise on which we hold a person responsible." Kadish, *supra* note 14 at 333. For Kadish, complicity is distinct from causation as a method for imposing individual criminal responsibility.

¹⁹ Dubber, *supra* note 10 at 980.

presence at the commission of the offence and some link between the actions of the accessory and the harm caused.²⁰

Acts that will satisfy the conduct requirement of complicity have been characterized in numerous ways. The noted scholar Sanford Kadish of the University of California has described two categories of complicitous conduct: i) intentionally influencing the decision of the primary party to commit a crime, and ii) intentionally helping the primary actor commit the crime, where the helping acts themselves constitute no part of the acts prohibited by the definition of the crime.²¹ Alternatively, Francis Bowes Sayre of Harvard Law School has described three different categories of complicitous conduct: i) authorization, procurement, incitation or moral encouragement, ii) knowledge plus acquiescence, and iii) the proximate consequence that grows out of an offence that was indirectly caused under i) or ii) that results in a separate offence that has not been authorized or consented to.²²

In addition to having committed conduct that falls into one of these categories (regardless of which categories are chosen), Kadish also notes that an accomplice's efforts must have met with some success.²³ According to Kadish, "the common notion of success is captured in the ordinary locution of something having mattered, of it having made a difference."²⁴ This difference, however, need not have been necessary in order for the offence to have been committed; it is enough if the accessory's conduct merely rendered the offence easier for the principal.²⁵ Since it can never be known with certainty whether an unnecessary contribution to an offence by an accessory has actually "made a difference", Kadish explains that the conduct requirement will include any conduct other than that which "demonstrably failed to achieve its purpose because it never reached its target."²⁶ To avoid the injustice that could result from such an exceptionally low conduct requirement, one that notably strains the notion of indirect causation and may even suggest no causation, the fault requirement of complicity is consistently recognized as full intent—the accessory must intend their conduct to further the criminal purpose of the principal.²⁷

In the past few decades, a particular theory of complicity has gained prominence as a preferred method for ascribing liability in international criminal law. It developed as a way to address participation in group crimes where complex relationships may exist between the principal(s) and the accessory(ies) in which the contribution of an accessory may be remote from the commission of a specific crime but is linked to the actions of the principal through a common purpose. This form of complicity has become known for upholding the exceedingly low conduct requirement described by Kadish, while at the

²⁰ *State v Tally*, 102 Ala 25 at 736, 15 So 722 (1894).

²¹ Kadish, *supra* note 14 at 342.

²² Francis Bowes Sayre, "Criminal Responsibility for the Acts of Another" (1930) 43 Harv L Rev 689 at 704.

²³ Kadish, *supra* note 14 at 356.

²⁴ *Ibid* at 357.

²⁵ *State v Tally*, *supra* note 20.

²⁶ Kadish, *supra* note 14 at 358.

²⁷ *Ibid* at 354.

same time applying a lower and lower fault requirement. Theories of accessory liability that concern participation in a common purpose are subject to considerable criticism in the domestic sphere because, unless narrowly construed, this type of liability can come dangerously close to assigning guilt for mere membership in a group. In the realm of international criminal law, common purpose liability as a form of complicity has taken shape in three doctrinal stratagems that serve to expand the potential liability of an accused far beyond their physical perpetration of crimes.²⁸ These include prosecution of an accessory as part of: i) a conspiracy;²⁹ ii) a criminal organization; or iii) a JCE.

i. Conspiracy

Conspiracy is a common law theory of group liability that can operate as an inchoate offence separate from complicity, or as a form of complicity. As its own distinct concept, conspiracy is the criminalization of an agreement to engage in unlawful acts; a common design to do something unlawful and an intention by all parties to put the common design into effect.³⁰ Unlike complicity, conspiracy as a distinct offence can be a direct rather than derivative form of liability and does not require the intended offence actually be committed.

Conspiracy arises as a form of complicity when illegal acts which were not the primary objective of the conspirators nevertheless manifest as a product of the common design. If a party to a conspiracy commits an offence which was a foreseeable consequence of the common purpose of the collective, then all parties may derive liability for the offence whether or not they had personal knowledge of its actual or planned commission. This theory of liability was most famously articulated in the American *Pinkerton* doctrine of 1946. In *Pinkerton*,³¹ the defendant was held accountable for the illegal acts of his brother in operating an illegal still because he had previously conspired with his brother to operate the still, regardless of the fact that he was in prison during the commission of the offence. The US Supreme Court imputed liability to the defendant based on the theory that:

...so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that an overt act of one partner may be the act of all without any new agreement specifically directed to that act... The criminal intent to do the act is established by the formation of the conspiracy. The act done was in execution of the enterprise... [and is] attributable to the others for the purpose of holding them responsible for the substantive offense.³²

²⁸ Jens Meierhenrich, "Conspiracy in International Law" (2006) 2 Annu RL Soc Sci 341 at 352.

²⁹ While it is debateable whether or not conspiracy can be considered a proper form of complicity, for the purposes of this paper it will be included under the broad umbrella of complicity as a known form of derivative liability.

³⁰ *R v O'Brien*, [1954] SCR 666 at para 7, [1955] 2 DLR 311.

³¹ *Pinkerton v United States*, 328 US 640, 66 S Ct 1180 (1946) [*Pinkerton*].

³² *Ibid* at 1184.

Conspiracy theory has been referred to as the darling of the modern prosecutor's nursery³³ given the ease with which it allows responsibility for an offence to be imputed to an individual where there may not be sufficient evidence to establish principal or even accessory liability. There are public policy reasons underlying this expansive form of liability, most of which stem from the threat posed by organized crime and the peculiar nature of criminal groups which can create tremendous difficulties for prosecution. An individual may contribute to a criminal enterprise by committing a small act which, although lawful unto itself (such as providing minor financial support to an organization), may facilitate a criminal act through several degrees of separation that causes serious harm (such as the acquisition of weapons used to commit a massacre). The geographic, temporal and even causal distance between the accused and the specific offence may preclude prosecution without a special theory of liability.

While conspiracy theory appears practical from a prosecutorial stand point, it begs the question of whether an individual can ever be too far removed from the commission of a crime, or whether doctrines of criminal responsibility will simply continue to grow more expansive making everyone with any connection to anyone potentially liable for anything. As one scholar noted, "the sprawling and ambiguous nature of a conspiracy can cast a wide net and sweep up vast numbers of individuals who are likely to be innocent of any serious wrongdoing, particularly when the threat [posed by the common purpose of the organization] is an ambiguous one."³⁴

Conspiracy theory was absorbed into international criminal law during the Nuremberg trials after World War II. Given the effectiveness of conspiracy theory in dealing with organized crime, the US was a strong advocate of using it as a vehicle to convict the Nazi party, which was characterized as essentially a vast criminal organization. The American vision was for conspiracy theory to provide a solution to logistical problems of "appalling dimensions" in finding and organizing evidence, in connecting specific crimes to specific individuals and in staging the trials themselves.³⁵ The proposal to include a charge of conspiracy was initially developed by the US War Department, but the sweeping nature of such a charge immediately encountered resistance from the US's own Judge Advocate General and Justice Department, not to mention the other allied nations.³⁶ Controversy arose not only because of the perceived malleability of conspiracy to aggressive prosecutorial strategies but also because of the absence of this type of liability in civil law systems. During the discussions of whether or not to include conspiracy in the *London Charter* of the IMT, it was famously reported that:

The Russians [*sic*] and French seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely

³³ Allison Marston Danner & Jenny S Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93 Cal L Rev 75 at 137.

³⁴ Aaron Fichtelberg, "Conspiracy and International Criminal Justice" (2006) 17 Crim LF 149 at 157.

³⁵ Allan Ryan, "Nuremberg's Contributions to International Law" (2007) 30 BC Int'l & Comp L Rev 55 at 62.

³⁶ *Ibid.*

shocked. The French viewed it entirely as a barbarous legal mechanism unworthy of modern law, while the Soviets seemed to have shaken their head in wonderment—a reaction, some cynics may believe, prompted by envy.³⁷

In the end, conspiracy was added to the *London Charter* which attributed liability to “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy.”³⁸ It was suggested that the procedure by which an individual would be convicted on the basis of participation in a conspiracy would be a two stage process. First, the major organizations of the Nazi party and government would be tried “both with the commission of their atrocious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about.”³⁹ The conviction of the organization would provide the evidence of a conspiracy and common agreement that would be necessary to convict individual members in the second stage of the process. Once an individual’s membership in a criminal conspiracy was established, criminal responsibility for all crimes emanating from the common purpose could be imputed.

The idea that an enormous, abstract and amorphous organization such as the Nazi party could be convicted of a general conspiracy to commit aggressive war and that this conviction could then be followed by hundreds of thousands of summary convictions in which every member of the party, no matter how low ranking or uninvolved, could be liable for the most egregious crimes as the foreseeable consequence of a vaguely defined “conspiracy to commit aggressive war” made everyone, including the judges of the IMT, uncomfortable.⁴⁰ It was eventually decided by the tribunal that convictions based on a common plan or conspiracy had to amount to more than simply guilt by association, less the judicial process lose all legitimacy. As a result, the conspiracy theory was significantly reigned in and largely supplemented, if not completely replaced, by the related theory of criminal organizations which provided greater structural and procedural requirements for prosecution based on participation in a common plan.

ii. Criminal Organizations

As mentioned above, the original American proposal at Nuremberg was to use conspiracy as the legal vehicle through which mass convictions would ensue. The IMT would formally indict major Nazi organizations, establish their criminality based on a collective conspiracy and bind military courts in subsequent proceedings where individuals would be tried for their membership in the criminal organizations.⁴¹ Although this prosecutorial strategy was based on the common law conception of conspiracy, it differed from the traditional doctrine in that individuals would not

³⁷ Bradley F Smith, *Reaching Judgement at Nuremberg* (London: Deutsch, 1977) at 51.

³⁸ *Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945*, 58 Stat 1544, EAS No 472, 82 UNTS 280 [*London Charter*] at art 6.

³⁹ Ryan, *supra* note 35 at 63.

⁴⁰ Danner & Martinez, *supra* note 33 at 113.

⁴¹ *Ibid.*

necessarily be punished for being a party to a conspiracy to commit crimes, but for their voluntary membership in an organization that actually committed crimes. This approach was received with some hesitation by the IMT, which noted that, “a member of an organisation... [that is] declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death... This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.”⁴² This concern was echoed by the US’s own Assistant Attorney General Herbert Wechsler who feared that the expansive nature of the organizational charge would lack legitimacy if too many people were caught in its wide net of criminal responsibility.⁴³

Nevertheless, the Tribunal reluctantly undertook the daunting task of trying to determine the criminality of seven Nazi organizations: the Leadership Corps of the Nazi Party; the Gestapo; the Der Sicherheitsdienst des Reichsfuehrer (SD); the Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (SS); the Die Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei (SA); the Reich Cabinet; and the General Staff and High Command of the German Armed Forces.⁴⁴ As Allan Ryan, former Director of the Office of Special Investigations at the US Department of Justice, explains in his article *Nuremberg’s Contributions to International Law*:

It was a nightmarish task just to determine how these organizations were defined, particularly those that went through repeated rounds of reorganization and consolidation with both state and party offices, and whose missions and responsibilities were constantly adjusted, officially and unofficially. Was someone who joined the *Sicherheitsdienst* (SD) (the German intelligence service) in 1944 joining the same organization that had existed in 1939? Was a soldier in the *Waffen* SS—its military arm—a member of the same organization as a henchman in its domestic security operation?⁴⁵

In an attempt to resolve these issues comprehensively, the IMT articulated four main criteria that would define a criminal organization. First, there had to be a group bound together and organized for a common purpose such that its membership would have understood that they were participating in a collective purpose. Second, the common purpose had to be connected to a crime under the *London Charter* and this purpose had to be pervasively held among the membership. Third, membership in the group had to be voluntary; individuals who were conscripted could not be held liable for the actions of the group unless they were personally implicated in a specific offence. Finally, members needed to be aware of the criminal purpose of the group or aware of its criminal acts.⁴⁶ Also, since the criminal organization charge had been created as a mechanism for

⁴² Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgment* (Washington: United States Government Printing Office, 1947) [IMT] at 85.

⁴³ Danner & Martinez, *supra* note 33 at 119.

⁴⁴ IMT, *supra* note 42 at 86.

⁴⁵ Ryan, *supra* note 35 at 83-84.

⁴⁶ IMT, *supra* note 42 at 86.

judicial efficiency, the organization in question also had to be of a sufficient size so as to make it impractical to try each member individually. This informal size requirement was instrumental in the IMT's decision to acquit the Reich Cabinet from the criminal organization charge, because, as the Tribunal said, "the group of persons here charged is so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal."⁴⁷

In addition to the Reich Cabinet, the IMT's structural requirements for a criminal organization resulted in the acquittal of three other Nazi organizations, leaving only the Leadership Corps, the Gestapo, and the SS as criminal. The SA was acquitted because it was found that although its members "took part in the beer hall feuds and were used for street fighting in battles against political opponents,"⁴⁸ there was no pervasively held common purpose related to a crime under the *London Charter*. The General Staff and High Command, on the other hand, were acquitted because, as the IMT explained: "[a member] could not know he was joining a group or organisation, for such organisation did not exist except in the charge of the Indictment. He knew only that he had achieved a certain high rank in one of the three services, and could not be conscious of the fact that he was becoming a member of anything so tangible as a 'group,' as that word is [commonly] used."⁴⁹

Originally, once an organization's criminality had been determined the burden was supposed to shift to its members in subsequent hearings to prove that they did not join the organization voluntarily. This changed with the IMT's finding that for an organization to be criminal not only did its membership need to be voluntary but individual members also needed to be aware of the criminal purpose of the group. It was now the prosecution who would be required to establish both voluntary membership and personal knowledge in order to gain an individual conviction. This meant that contrary to the American proposal, membership in a criminal organization alone would not be enough to establish guilt.

The IMT's requirement of voluntariness and knowledge combined with the structural requirements for criminal organizations and the elimination of the reverse onus all served to negate some of the most controversial implications of the organizational and conspiracy charges in the Nuremberg trials. While the individual fault requirement of personal knowledge was low and the conduct requirement of mere voluntary membership even lower, fairness was thought to have been attained by setting the organizational requirements fairly high. Nevertheless, the criminal organization doctrine still proved to be far reaching and resulted in the conviction of individuals who had done nothing more than maintain membership in one of the convicted Nazi organizations while aware of its criminal purpose. In one instance, a judge in the Bavarian and Reich Ministries of Justice named Joseph Altstoetter was convicted based on his membership in a criminal organization because he had once been a member of the legal staff for the

⁴⁷ *Ibid* at 104.

⁴⁸ *Ibid* at 103.

⁴⁹ *Ibid* at 107.

main office of the SS.⁵⁰ In cases such as this, where the accused could not be linked to the commission of any specific offence, the doctrine still resembled a form of guilt by association and as a result remained one of the most controversial elements of the IMT.

Despite its controversial nature, however, the concept of group liability based on a common purpose did prove to be a particularly effective prosecutorial strategy. It provided a solution for dealing with individuals who were decidedly guilty of participation in heinous offences but where requiring a high standard of proof was unrealistic given the collective nature of the crimes and the chaotic nature of armed conflict. For this reason, the essence of both conspiracy theory and the criminal organization doctrine were revived when the international community faced similar problems trying to convict individual war criminals of collective criminal atrocities committed in the former Yugoslavia.

iii. Joint Criminal Enterprise

The bloody dissolution of the former Yugoslavia in the early 1990's was characterized by wide-spread atrocities, reminiscent of World War II. Both the scale and egregious nature of the crimes engendered global outrage and prompted a judicial response from the UN Security Council. Inspired by the IMT proceedings in Nuremberg, the Security Council adopted Resolution 827 in 1993 which created the ICTY "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."⁵¹ The first case that came before the ICTY was that of Duško Tadić.

Tadić was first indicted in 1995, charged with 34 individual counts of seizure, murder, maltreatment and other offences committed in 1992 against Bosniaks and Croats in opština Prijedor, an area in the northern part of the Republika Srpska in Bosnia and Herzegovina.⁵² The ICTY Trial Chamber found Tadić guilty on 11 counts of persecution and beatings, but more significantly they found him not guilty of 20 counts including five counts of murder.⁵³

Five of the murders that Tadić had been accused of committing took place in the village of Jaskici. Tadić was part of a group of armed Serbs who had entered the village, ordered the male villagers out of their homes and beat them severely. Five of the victims, who had been alive when the armed group entered Jaskici, were found shot to death after the group's departure.⁵⁴ While the Trial Chamber had accepted that Tadić was clearly a member of the group that had entered the village, they concluded that as to the murders "[the Chamber] cannot be satisfied beyond reasonable doubt that the accused had any

⁵⁰ Catherine H Gibson, "Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law" (2008) 18 Duke J Comp & Int'l L 521 at 533.

⁵¹ Resolution 827, SC Res 827, UNSCOR, 1993, UN Doc S/RES/827 at 2.

⁵² *Prosecutor v Duško Tadić*, IT-94-I-I, Second Amended Indictment (14 December 1995) at para 1.

⁵³ *Prosecutor v Duško Tadić*, IT-94-I-T, Trial Opinion and Judgement (7 May 1997).

⁵⁴ *Ibid* at para 348.

part in the killing of the five men or any of them... Nothing is known as to who shot them or in what circumstances.”⁵⁵ The Prosecutor appealed the decision alleging that the Trial Chamber had erred in concluding that there was insufficient evidence to convict Tadić of the five murders in Jaskici and claimed the Chamber had misdirected itself on the application of the common purpose doctrine.⁵⁶

In their submissions, the Office of the Prosecutor put forward an interpretation of the common purpose doctrine that closely resembles both conspiracy theory (particularly the *Pinkerton* doctrine) and the criminal organization doctrine. The Prosecutor suggested that, “if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.”⁵⁷ According to the Prosecutor, the accused had participated in an attack and the central policy of the attack had been “to rid the region of the non-Serb population by committing inhumane and violent acts against them in order to achieve the creation of a Greater Serbia.”⁵⁸ Based on this, it was submitted that the five murders were an entirely predictable consequence of the central policy and that the accused’s actions during the attack on Jaskici had directly and substantially assisted in that policy such that regardless of which member of the Serb forces had actually killed the five victims—the accused should be held accountable under Article 7(1) of the *ICTY Statute*.⁵⁹

The Appeal Chamber not only agreed with the Prosecutor that the five murders were attributable to Tadić under a version of the common purpose doctrine, but they further expanded this concept into an even broader form of individual criminal responsibility derived from a new theory of group liability known as Joint Criminal Enterprise (JCE).

To convict an individual under JCE, the Prosecutor must establish three elements to form the conduct requirement above and beyond the *actus reus* required for the specific offence. First, there must be a plurality of persons.⁶⁰ This requirement can be satisfied relatively informally and does not necessitate the strict structural requirements that were articulated by the IMT for criminal organizations. In support of this informal approach, the Appeal Chamber pointed to a case from World War II, the *Borkum Island* case, in which an American air crew had been stranded on the German island of Borkum. The crew members were first beaten by members of the Reich’s Labour Corps and then beaten by civilians on the street as they were marched to the city hall while the mayor reportedly incited citizens to kill the Americans “like dogs”.⁶¹ The mob that beat and eventually killed the crew members displayed none of the organizational markings that

⁵⁵ *Ibid* at para 373.

⁵⁶ *Prosecutor v Duško Tadić*, IT-94-1-A, Appeal Judgement (15 July 1999) [*Tadić*] at para 173.

⁵⁷ *Ibid* at para 175.

⁵⁸ *Ibid*.

⁵⁹ *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res.827, 1166, 1329, 1411, 1431, 1481, 1597, 1660, 1837, 1877, UNSCOR, 2009 [*ICTY Statute*] at art 7(1) (A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime).

⁶⁰ *Tadić*, *supra* note 56 at para 227.

⁶¹ *Ibid* at para 210.

were required by the IMT, however in quoting the prosecutor in the *Borkum Island* case the Appeal Chamber states that “all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man (*sic*).”⁶²

The second conduct requirement for JCE is the existence of a common plan, design or purpose which involves the commission of a crime. Similar to the “plurality of persons” requirement, this too can be satisfied rather informally. According to the Appeal Chamber, the common plan, design or purpose does not need to have been arranged beforehand, but “may materialise extemporaneously and be inferred from the fact that a plurality of persons... [act] in unison to put into effect a joint criminal enterprise.”⁶³ In order for a member of the JCE to inherit guilt from another member, the member committing the specific offence needs to have acted in pursuance of the common purpose. For example, in *Limaj et al.*,⁶⁴ a later case heard by the ICTY Appeal Chamber, three members of the Kosovo Liberation Army (KLA) were alleged to have “systematically beat detainees, committing the crimes of cruel treatment and torture in [a] prison camp.”⁶⁵ The prosecution argued that the KLA was a JCE and because of this the three were liable for their own crimes and crimes committed by others at the camp. Both the Trial Chamber and the Appeal Chamber dismissed the JCE charge because neither was convinced that the evidence had ruled out the possibility that the other crimes were committed by “outsiders” who had been acting for personal reasons rather than to affect the common purpose of the KLA.⁶⁶

The final conduct requirement for JCE is the accused’s actual participation in the common purpose of the plurality of persons. According to the Appeal Chamber, this participation does not need to be related to the commission of a specific crime, but can take the form of assistance in, or contribution to, the execution of the common purpose.⁶⁷

Each of the conduct requirements present procedural problems that create the potential for (and in many cases have in fact created) an overbroad theory of liability. Under the IMT’s theory of criminal organizations, one thing that prevented a flood of convictions for mere membership was the structural requirements placed on the organization. The group not only had to be organized for a common purpose, but the structure of the group had to be such that its volunteer membership would understand they were participating in the common purpose. This suggests a much higher threshold than the JCE’s “plurality of persons”, which can apparently be satisfied by the random association of a mob.

The lack of structural definition in the JCE common purpose requirement is equally problematic. Under conventional conspiracy theory, the criminal purpose must be agreed to in advance; a criminalized agreement is, after all, the essence of a conspiracy. The agreement requirement was somewhat negated under the criminal organization doctrine,

⁶² *Ibid.*

⁶³ *Ibid* at para 227.

⁶⁴ *Prosecutor v Limja et al*, IT-03-66-A, Appeal Judgement (27 September 2007) [*Limja et al.*].

⁶⁵ *Ibid* at para 105.

⁶⁶ *Ibid* at para 117.

⁶⁷ *Tadić*, *supra* note 56 at para 227.

however the IMT still required an identifiable common purpose that could be known to all members of the collective by virtue of the group's organization, and that was in fact pervasively held among the membership. Conversely, under the theory of JCE it appears that the "common purpose" may be imposed judicially *ex post facto* with no requirements for specificity. An innovative prosecutor may persuade a court that a plurality of persons are bound by their common purpose to take over the world—a broad and ambiguous threat from which just about any specific criminal act might be considered the natural and probable consequence of.

Finally, little assistance can be found in JCE's participation requirement. It is not necessary for the accused to have contributed to the commission of a specific crime, but only to have assisted or contributed to the common purpose of the plurality of persons in some way. The Appeal Chamber was clear that the accused's participation does not need to be *conditio sine qua non*, which is an acceptable position under the doctrine of complicity; however, there is no indication as to what the threshold of participation might be. For other forms of complicity, the ICTY considered relevant the requirements set out in the 1996 *Draft Code of Crimes* which calls for a "direct and substantial" contribution, which would facilitate the commission of a crime (or execution of a common purpose) in "some significant way".⁶⁸ In *Kvočka et al.*, the Trial Chamber echoed this requirement, holding that "an accused must have carried out acts that substantially assisted or significantly affected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise."⁶⁹ Unfortunately this did not stand for long and was overturned by the Appeal Chamber which held that in general, there is no specific legal requirement that the accused make a substantial contribution to a JCE.⁷⁰

With the conduct elements established, a prosecutor seeking a conviction of individual criminal responsibility by virtue of participation in a JCE would need to demonstrate that the accused met one of three possible fault requirements. The first possibility (JCE I) is best described as co-perpetration where all individuals acting pursuant to a common purpose possess the same criminal intention. Under JCE I, the accused must have voluntarily participated in at least one aspect of the common purpose and must have intended the specific crime, even if they did not personally affect the criminal result. The second possibility (JCE II) is characterised as "systematic", and requires the existence of an organized system that is guided by a common criminal purpose. Conviction under JCE II requires the accused to have been aware of the nature of the "system" and to have intended to further its common concerted purpose. The final possibility (JCE III) is considered the extended form of JCE and is most similar to the IMT's criminal organization doctrine. Under JCE III, if an individual participates in the common criminal purpose of a group they can be held responsible as a member of the JCE for crimes other than those envisaged by the common purpose. According to the Appeal

⁶⁸ *Draft Code of Crimes against the Peace and Security of Mankind*, UNILCOR, 48th Sess, A/CN.4/SER.A/1996, 7 [*Draft Code of Crimes*] at 21.

⁶⁹ *Prosecutor v Kvočka et al*, IT-98-30/1-T, Trial Judgement (2 November 2001) [*Kvočka et al*] at para 312.

⁷⁰ *Prosecutor v Kvočka et al*, IT-98-30/1-A, Appeal Judgement (28 February 2005) at para 97.

Chamber, JCE III has two key elements: “(i) the intent to take part in a joint criminal enterprise and to further—individually and jointly—the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.”⁷¹

As might be expected, JCE III is the most controversial theory of group liability developed by the ICTY. While the criminal organization doctrine and conspiracy theory placed a high threshold on the conduct requirement and a lower threshold on the fault requirement, JCE I and II take a reverse approach. As mentioned above, the conduct requirements for JCE I and II are minimal, both in terms of the group’s structure and loosely defined common purpose. However, the fault requirement for both requires full intent to either affect the criminal result or further a system of criminal behaviour. Conversely, JCE III has both a low conduct requirement and a low fault requirement. A prosecutor seeking a conviction under JCE III benefits from the same low structural requirements that apply to JCE I and II for the composition of the group, common purpose, and participation. The prosecutor also benefits from a low fault requirement similar to both conspiracy theory and the criminal organization doctrine. If it can be established that the accused intended to take part in the JCE, all that remains for the prosecutor to demonstrate is a level of culpability similar to recklessness or even negligence, in that, the accused can be vicariously liable for crimes they did not commit, did not intend, did not have knowledge of, but that were “foreseeable” as part of an overall common criminal purpose. Where conspiracy law was considered the darling of the US prosecutor’s nursery, JCE has been called the nuclear bomb of the international prosecutor’s arsenal.⁷²

The doctrine of complicity and its various forms of derivative liability have taken root in most national legal systems. The application of these forms of indirect individual criminal responsibility are interpreted by domestic courts, shaped by diverse legal traditions, and defined in light of constitutional limitations. In theory the various approaches taken by different countries that apply the doctrine of complicity would inform the international approach which is meant to be representative of a more or less unified theory of criminal justice. However, given the collective nature of international crimes and the peculiar evidentiary challenges to establishing individual criminal responsibility, for better or worse the international tribunals have become an authoritative source for theories of derivative and group liability. Consequently, the highly controversial and highly criticized doctrines of conspiracy, criminal organizations, and JCE have outgrown the confines of IMT and ICTY jurisprudence and are poised to influence interpretations of complicity in both the *Rome Statute* and its implementing legislation in Canada.

⁷¹ *Tadić*, *supra* note 56 at para 220.

⁷² Danner & Martinez, *supra* note 33 at 137.

II. CANADA AND COMPLICITY IN INTERNATIONAL CRIMES

From the few sorted facts that have emerged regarding the Canadian transfer of detainees to Afghan authorities, it appears possible that war crimes were committed. It is alleged that Afghan authorities tortured the detainees that were surrendered to them by the Canadian Forces, and it is claimed that Canadian officials knew this offence was taking place. Where the alleged offence is a war crime, states that are a party to the *Rome Statute* have agreed to grant primacy to national jurisdictions under the principle of complementarity.⁷³ According to this principle, a state whose nationals have been the victim of a war crime, or have been accused of war crimes, has the authority to conduct an investigation and if necessary prosecute the offenders without interference from the ICC. Only if the circumstances indicate that the relevant state is unwilling or unable to carry out proceedings genuinely can the ICC exercise jurisdiction over the matter.

In the case of the Afghan detainees, there are two potential offenders: i) the Afghan authorities who allegedly committed acts of torture, and ii) the Canadian officials who may have been complicit in the crimes of the Afghans. Afghanistan could claim jurisdiction over the first group of offenders, however it is likely that the Afghan government will be considered unwilling (or possibly unable) to carry out proceedings genuinely, and jurisdiction will be open to the ICC to investigate the accused Afghan authorities. The accused Canadian officials, on the other hand, may still face justice in Canada and may be prosecuted under the *War Crimes Act*.

The *War Crimes Act* was enacted in 2000 and echoes many of the provisions set out in the *Rome Statute*. It criminalizes acts of genocide, crimes against humanity and war crimes, both within and outside of Canada, including the torture of detainees during an armed conflict. Having been accused of directly torturing detainees, it is clear that the Afghan authorities would be at risk of prosecution under the *War Crimes Act* if they ever found themselves in Canada. The situation is less clear in the case of the accused Canadian officials since the allegations against them do not involve the direct commission of war crimes, but rather complicity. This poses a problem because it is not entirely clear to what extent complicity, a partially codified but still ambiguous common law doctrine, violates the *War Crimes Act*.

a) Complicity under Canadian Criminal Law

Complicity in Canadian criminal law began as a product of the common law, under which liability was divided into four categories:

- 1) Principals in the first degree: those who committed an offence either directly or indirectly through an innocent agent.
- 2) Principals in the second degree: those who aided in the commission of an offence at the scene of the offence (i.e. co-perpetrators).

⁷³ *Rome Statute*, *supra* note 9 at art 17.

- 3) Accessories before the fact: those who aided (facilitate) or incited (solicit) the commission of an offence but who are not present at the scene.
- 4) Accessories after the fact: those who assisted in the escape or concealment of an offender or who receive stolen property.⁷⁴

Under the common law, this structure represented what is known as a differentiated model of participation in which descending degrees of criminal responsibility are attributed such that an accessory bears less liability than a principal for their contribution to a crime. The alternative to the differentiated model is the unitary model in which all participants to a crime are placed on the same standing, carry the same criminal responsibility, and may receive the same punishment.

Although the differentiated model prevails in many of the world's criminal justice systems, Canada cannot truly be counted among this group. The Canadian model of participation was inherited from the English criminal law reform project in the late 19th century, known as *Stephen's Code*, in which the common law categories were merged and codified as party offences—with the exception of accessory after the fact which remained a distinct offence.⁷⁵ The Canadian adoption of the English party offences has created a partially unitary model in that those who commit, aid, abet, or form a common intention can all be convicted of the same thing—being a party to an offence.⁷⁶ The essence of the differentiated model is said to remain in the realm of sentencing, in that those who aid in the commission of a crime are not likely to receive the same punishment as those who commit it. This approach, however, could still be criticized for running afoul of the fair labelling principle in criminal law because, although an accessory may face a lesser sentence, as a “party” equal to the principal they are still being convicted for acts that go beyond their personal contribution.

Canadian criminal law is well developed and fairly settled in the area of party offences. The problems identified in the international complicity doctrines that have produced vague or unreasonable standards for accessorial fault and conduct are not generally an issue in Canada. The elements of aiding, abetting, and common intention have been defined in both the *Criminal Code* and in the jurisprudence, and where there has been potential for the fault and conduct requirements to imitate their unwieldy international counter-parts, constitutional guarantees for the rights of the accused have reined them in.

The elements for each of the party offences are fairly simple to articulate, but each begins with the often overlooked requirement that a crime must have been committed by the principal. To be liable, the aider needs only to have provided assistance with the intention of helping the principal to commit the offence.⁷⁷ Liability for aiding does not rest entirely on whether the accused's conduct has the actual effect of assisting the principal, but rather on the intention of the accused to bring about the consequences of

⁷⁴ Dubber, *supra* note 10 at 981.

⁷⁵ Great Britain, House of Commons, *Accounts and Papers: Law and Crime; Police; Prisons*, vol 18 (Sess 5 December 1878 – 15 August 1879) at 232.

⁷⁶ *Criminal Code*, *supra* note 12 at s 21.

⁷⁷ *R v Almarales*, 2008 ONCA 692 at para 66, 244 OAC 127, 237 CCC (3d) 148.

the principal's actions.⁷⁸ The subjective fault requirement of intent can also be satisfied with actual knowledge or wilful blindness.⁷⁹ To be liable as an abettor, the accused must say or do something that actually encourages the principal to commit the offence.⁸⁰ Similar to aiding, the act of abetting must be done with the intention of bringing about prohibited consequences; although intention can be satisfied by actual knowledge.⁸¹ Compared to their international counter-parts, the Canadian accessory offences of aiding and abetting provide a relatively low conduct requirement but an extremely high fault requirement.

Common intention is the Canadian version of international complicity doctrines such as conspiracy,⁸² criminal organizations and JCE. This form of complicity requires a group of individuals to have formed a common criminal intention, which according to the courts requires no more than having in mind the same unlawful purpose.⁸³ An offence must then be committed by a member of the group which is different from the unlawful purpose, and which the accused did not aid, abet, or commit. To be liable, the accused must have known, or ought to have known, that the offence committed was a probable consequence of carrying out the unlawful purpose in common with the principal.⁸⁴ The fault requirement for the accused generally requires only objective foresight unless the crime in question carries a particular societal stigma, which war crimes undoubtedly do.⁸⁵ This means that if an individual was charged under the *War Crimes Act* based on common intention, the prosecution would need to establish subjective foresight. Similar to conspiracy and criminal organizations, common intention has a somewhat higher conduct requirement and a lower fault requirement.

While Canadian law regarding party offences is generally straightforward and not particularly controversial, the application of this law to the *War Crimes Act* is complicated by the uncertain effect of international complicity doctrines. In theory, these doctrines should not be a live issue in Canada because, although the *War Crimes Act* implements the *Rome Statute* and is largely representative of its substantive provisions and underlying principles, the Canadian legislation was meant to create a unique criminal law regime wholly consistent with the rest of Canadian law. As Donald Piragoff of the Department of Justice said to the Standing Committee on Foreign Affairs and

⁷⁸ *R v Morgan* (1993), 80 CCC (3d) 16 at para 17, 1993 CarswellOnt 795 (Ont CA).

⁷⁹ *R v Roach*, 192 CCC (3d) 557 at para 32, 2004 CarswellOnt 2912 (Ont CA).

⁸⁰ *R v Greyeyes*, [1997] 2 SCR 825 at para 38, 148 DLR (4th) 634.

⁸¹ *R v Helsdon*, 220 OAC 302 at para 31, 275 DLR (4th) 209.

⁸² As previously discussed, the concept of conspiracy can be treated as its own distinct offence or as a theory of derivative liability. In Canadian law, conspiracy to commit an indictable offence is punishable under section 465 of the *Criminal Code*. A conviction of conspiracy requires that there be intent to agree among the parties, the completion of an agreement, and a common design to do something unlawful. With these three elements, the offence is complete before any acts that go beyond mere preparation are taken to put the design into effect (*United States of America v Dynar*, [1997] 2 SCR 462 at para 87, [1997] SCJ No 64.). This approach represents the traditional view of conspiracy: a criminalized agreement. The expanded theory of conspiracy as a mode of complicity is represented in Canadian law under the doctrine of common intention.

⁸³ *R v Hibbert*, [1995] 2 SCR 973 at para 41, 99 CCC (3d) 193.

⁸⁴ *R v Simpson*, [1988] 1 SCR 3 at para 14, 46 DLR (4th) 466.

⁸⁵ *R v Logan*, [1990] 2 SCR 731 at para 33, 73 DLR (4th) 40.

International Trade while the *War Crimes Act* was in development, “that’s one of the benefits of our system of ratification. We have to actually pass legislation if there are nuances or problems with respect to domestic law or constitutional law. Because we create new legislation to ratify, we’re able to rectify those kinds of problems when we come around to ratifying a treaty.”⁸⁶ The creation of a unique Canadian approach to the prosecution of international crimes may have been the original intention of Parliament, but the judicial consideration that the *War Crimes Act* has received so far indicates the distinct presence of international complicity doctrines.

b) Complicity and the *War Crimes Act*

Under Section 6 of the *War Crimes Act*, individual criminal responsibility is attributable to anyone who commits, conspires to commit, attempts to commit, counsels in relation to, or is an accessory after the fact in relation to a war crime. Several modes of participation that would incur criminal responsibility under the *Rome Statute* are conspicuously absent from the express wording in the *War Crimes Act*, most relevant to the allegations against Canadian officials is the absence of aiding, abetting, and common intention. The absent complicity provisions in the *War Crimes Act* have a unique legislative history in that it is clear from the parliamentary debates that the government had specifically intended to criminalize these types of participation.⁸⁷ As the Federal Court explained in *Zazai No. 1*,⁸⁸ this objective has been obtained by reference.

In *Zazai No. 1*, the applicant was a citizen of Afghanistan who came to Canada as a stowaway and made a refugee claim after he arrived at Montreal Harbour. The Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board determined that there were serious reasons for considering that Zazai had been complicit in crimes against humanity in Afghanistan and as a result he was considered inadmissible to Canada for violating the *War Crimes Act*. Zazai argued that while complicity in crimes against humanity may be criminalized in international law, it is not criminalized under the *War Crimes Act*. In response to this suggestion, the Court referred to the *Interpretation Act*⁸⁹ and found that complicity was indeed criminalized under the *War Crimes Act*:

...section 34[(2)] of the Interpretation Act ... provides that where an enactment creates an offence, all the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by the enactment. Thus, the partyship provisions that appear in the Criminal

⁸⁶ Canada, House of Commons, Standing Committee on Foreign Affairs and International Trade, “Study: Crimes Against Humanity Act” in *Official Report of Debates (Hansard)*, No 45 (11 May 2000) at 1020.

⁸⁷ Canada, *House of Commons Debates*, No 113 (13 June 2000) at 1310-1315 (Irwin Cotler) (“I will turn now to the basic principles underlying [the *War Crimes Act*] itself... Principle number 10 is the aiding and abetting principle. Persons who aid and abet, counsel, or otherwise assist in the commission of an offence are considered to be parties to that offence.”).

⁸⁸ *Zazai v Canada (Minister of Citizenship & Immigration)*, 2004 FC 1356, [2005] 2 FCR 78, 262 FTR 246 [*Zazai No. 1*].

⁸⁹ RSC 1985, c 1-21.

Code—including the aiding and abetting provisions in section 21—apply to the War Crimes Act.⁹⁰

This conclusion would have been a reasonable place for judicial consideration of this question to stop, however, after ruling on *Zazai No. 1* the Federal Court certified the following question of general importance: “Does the definition of ‘crime against humanity’ found at subsection 6(3) of the Crimes Against Humanity and War Crimes Act include complicity therein?”⁹¹

Despite the fact that this question seemed to be resolved by the *Interpretation Act*, it was considered a second time by the Federal Court of Appeal in *Zazai No. 2*.⁹² In *Zazai No. 2*, the Court did not consider the *Interpretation Act* but instead read “complicity” into the word “commits”. Section 6(1) of the *War Crimes Act* states:

6. (1) Every person who... commits outside Canada
- (a) genocide,
 - (b) a crime against humanity, or
 - (c) a war crime,
- is guilty of an indictable offence

According to the Court,

At common law and under Canadian criminal law, [complicity] was, and still is, a mode of commission of a crime. It refers to the act or omission of a person that helps, or is done for the purpose of helping, the furtherance of a crime. An accomplice is then charged with, and tried for, the crime that was actually committed and that he assisted or furthered. In other words, whether one looks at it from the perspective of our domestic law or of international law, complicity contemplates a contribution to the commission of a crime.⁹³

The Court’s suggestion that complicity is a mode of commission instead of a mode of participation is problematic for two reasons. First, it poses a problem of statutory interpretation. Section 21(1) of the *Criminal Code* creates the category of “parties to offence” which states that everyone is a party to an offence who a) commits; b) aids; or c) abets. Therefore, aiding and abetting (forms of complicity) are not modes of commission but rather, along with commission, distinct modes of party offences. Had section 6(1) of the *War Crimes Act* stated that every person who is a *party* to genocide,

⁹⁰ *Zazai No. 1*, *supra* note 88 at para 47 (*Interpretation Act* s.34(2): All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment... except to the extent that the enactment otherwise provides.).

⁹¹ *Ibid* at para 59.

⁹² *Zazai v Canada (Minister of Citizenship & Immigration)*, 2005 FCA 303, 259 DLR (4th) 281, 50 Imm LR (3d) 107 [*Zazai No. 2*].

⁹³ *Ibid* at para 13.

crimes against humanity, or war crimes is guilty of an indictable offence, then the use of “party” would have included commits, aids, and abets. However, the word “party” was not used and it is problematic to suggest that the same result can be attained through the word “commits”.

The second and more fundamental problem stems from the Court’s justification for the proposition that complicity is inherently included in definitions of crimes against humanity. For this, the Court turned to international criminal law and specifically the ICTY’s articulation of JCE II in *Kvočka et al.*:

Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning.⁹⁴

Turning to the ICTY’s concept of JCE for support of a charge of complicity under the Canadian *War Crimes Act* is itself problematic for two reasons. First, the Court highlighted the fact that the ICTY said aiders and abettors contribute to the commission of a crime by participating in a criminal system. The Court supposedly saw this as support for the proposition that aiding and abetting are modes of commission. Notwithstanding the fact that this is not what the ICTY said (they instead were identifying the conduct requirement for aiders and abettors in JCE II), there would have been no reason for the ICTY to suggest that aiding and abetting were modes of commission because the *ICTY Statute* clearly distinguished between “aids”, “abets” and “commits”, and attributed individual criminal responsibility to all three.

The second problem is that the JCE doctrine is itself highly controversial and, in fact, several scholars have suggested that the ICTY actually exceeded its jurisdiction by creating it.⁹⁵ Article 7(1) of the ICTY Statute attributed individual criminal responsibility to anyone who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime. Article 7(1) did not attribute individual criminal responsibility for a joint criminal enterprise, a common design or plan, or expanded forms of conspiracy. This posed a problem for the ICTY Appeal Chamber when it was considering how to impute liability to Tadić for the five murders in Jaskici. There was not enough evidence to support a conviction of any of the modes of participation expressly provided for in Article 7(1), so the Appeal Chamber turned to the “object and purpose” of the Statute as set out in Article 1 to justify a more expansive reading of Article 7.⁹⁶ The Appeal Chamber reasoned that a narrow reading of Article 7 would allow too many perpetrators to escape the reach of international criminal justice and that this would run contrary to the intentions of the Security Council in creating the

⁹⁴ *Ibid* at para 16.

⁹⁵ Darryl Robinson, “The Identity Crisis of International Criminal Law” (2008) 21 *Leiden J Int’l L* 925 at 943.

⁹⁶ *Tadić*, *supra* note 56 at para 189.

ICTY. Based on this, they believed that the only reasonable reading of Article 7 must include a sufficiently liberal doctrine of conspiracy that would allow prosecution for offenders that might otherwise be acquitted. As Jens David Ohlin of Columbia University explains in his article *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, “the structure of the argument suggests that we can work backwards from the proposition that the defendants must be punished. Since the defendants must be punished, the statute must be read in such a way that it will yield the desired result.”⁹⁷

Given the scope and nature of the crimes that the ICTY was forced to deal with, the evidentiary challenges they faced and the novelty of their procedure, it may be reasonable to forgive some of their conceptual failings. However, the Canadian Federal Court of Appeal is not the ICTY. It does not operate under the same somewhat illusive rules of international criminal law, and it is not faced with the daunting task of prosecuting those most responsible for the most serious crimes committed during a particularly bloody and complex armed conflict. Some consider the ICTY’s mandate to be broad enough to provide it with some conceptual space for prosecutorial innovation. The Canadian Federal Court of Appeal does not share that mandate, so there should be no justification to import the type of conviction-oriented reasoning that gave birth to JCE.

The findings from Canadian courts to date indicate that the party offences listed in the *Criminal Code* apply the *War Crimes Act* by virtue of section 34(2) of the *Interpretation Act*. However, this clear articulation of the law has become clouded by unnecessary references to international criminal law’s broad theories of derivative liability.⁹⁸ The result of this cross-pollination in the doctrine of complicity has been a lack of clarity. Unfortunately, further judicial consideration (not of whether complicity is a war crime but of what constitutes complicity in war crimes) has not resolved these ambiguities. Instead, the jurisprudence raises the question of to what extent Canadian criminal law

⁹⁷ Jens David Ohlin, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise” (2007) J Int’l Crim Just 69 at 72.

⁹⁸ It might be argued that in order to properly implement the *Rome Statute*, Canadian law must be interpreted as consistently as possible with its international counterpart. In response to this, it could be said that limiting the application of the *War Crimes Act* by the party provisions in the *Criminal Code* and Canadian constitutional principles meets this objective so far as is practicable. To apply theories of accessory liability that are wholly consistent with the international complicity doctrines would go beyond what is permitted in Canadian law. It is settled law in Canada that an accused can only be convicted of a statutory offence (*Frey v Fedoruk*, [1950] SCR 517—with the noted exception of the common law offence of contempt of court), and to introduce international modes of criminal participation that are not found in the *Criminal Code* through the common law would arguably violate this principle. It is also settled law in Canada that overbroad criminal provisions (which it is argued that international complicity doctrines are) will violate section 7 of the *Canadian Charter of Rights and Freedoms* (*R. v Heywood*, [1994] 3 SCR 761). In light of clear Canadian law to the contrary, the international doctrines are arguably ousted (*R v Hape*, 2007 SCC 26, at para 39 [2007] 2 SCR 292: “The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law” [emphasis added]).

has been displaced by international criminal law where the subject matter is complicity in war crimes.

III. THE *ROME STATUTE*

Even though a consideration of the Afghan detainee issue under the Canadian *War Crimes Act* would likely satisfy the complementarity requirement under the *Rome Statute*, there still remains the assertion made by Michael Byers and William Schabas that this is a matter for the ICC. Without addressing the issue of jurisdiction under the principle of complementarity, it is worthwhile to consider how relevant provisions in the *Rome Statute* might apply to the allegations that have been made against Canadian officials.

As previously mentioned, the *Rome Statute*, like the *War Crimes Act*, criminalizes acts of genocide, crimes against humanity, and war crimes—which includes the torture of detainees during an armed conflict. Article 25(3) of the Statute contains detailed provisions regarding criminalized modes of participation that will result in individual criminal responsibility. These include: commission, joint commission, commission through another, ordering, solicitation, inducement, aiding, abetting, or “otherwise assisting”, contribution to a common purpose, inciting genocide, and attempts.

Given the relative youth of the *Rome Statute*, it is not yet clear if the highly structured model of participation in Article 25(3) was intended to be unitary or differentiated. Some have suggested that the highly structured nature of Article 25(3) itself indicates a differentiated model—why else would the drafters have gone to such lengths to divide the various modes of participation into distinct subsections? In addition, it is argued that since the differentiated model prevails in many of the world’s main legal systems, it is logical to assume that an international legal regime would reflect this common practice.⁹⁹ Conversely, it is argued that while the *Rome Statute* does draw a distinction between different modes of participation, there is no evidence in the Statute to suggest that one mode was meant to be less blameworthy than any other. There is no indication that less responsibility should be attributed to accessorial modes as opposed to principal modes, and more significantly there is no indication that different levels of punishment should be applied. It has also been suggested that since many of the modes of participation overlap, it would be illogical to assume a differentiated model applies since this would render some of the subsections either redundant or contradictory.¹⁰⁰ For example, joint commission, commission through another, and ordering are all principal modes of participation that would be caught under the umbrella of “commits”. If Article 25(3) was a differentiated model of participation then someone who orders a crime would be attributed less responsibility than someone who commits a crime through another person, despite the fact that both are principal forms of commission. Based on this, it is more likely that Article 25(3) represents a unitary model that simply provides

⁹⁹ Vincenzo Militello, “The Personal Nature of Individual Criminal Responsibility and the ICC Statute” (2007) 5 J Int’l Crim Just 941 at 948.

¹⁰⁰ Kai Ambos, “General Principles of Criminal Law in the Rome Statute” (1999) 10 Crim LF 1 at 8-12.

the court with various modes of participation to choose from when trying to determine if the conduct requirement of a crime has been satisfied. Under a unitary model, these modes would only describe the nature of the participation in the conduct alleged and not necessarily the gravity of applicable penalties.¹⁰¹

If it is assumed that the *Rome Statute* applies a unitary model of participation, then the cost of prosecuting Canadian officials for complicity in war crimes increases dramatically. It must be remembered that under a unitary model the accessory and the principal carry the same amount of criminal responsibility for the offence, meaning that by being complicit the Canadian officials would not be convicted of being an accessory to torture, but would be guilty of the war crime itself. According to Byers and Schabas, this proposition could become a reality under Article 25(3)(c) or (d).

a) Article 25(3)(c)

Article 25(3)(c) of the *Rome Statute* states that criminal responsibility will be incurred if one:

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

The international concept of aiding and abetting is not substantially different from the Canadian concept. Aiding has been described as providing assistance to the principal; abetting has been described as encouraging the principal or granting moral support. Neither aiding or abetting require an accessory's contribution to the base offence be *conditio sine qua non*.¹⁰² In general the term "aiding and abetting" tends to be used as a catch all phrase that represents the weakest form of complicity in Article 25(3) and includes any contribution to a crime that is not caught by the preceding subsections.¹⁰³ The difficulty in interpreting the conduct requirement imposed by Article 25(3)(c) concerns the necessary relationship between the contribution and the commission of the crime.

In Canadian law, the contribution of aiders does not need to actually assist the principal's commission of a crime, so long as the accused had intended to provide assistance. In the case of abettors, the act of encouraging the principal to commit a crime must actually provide encouragement. Presumably if the principal is completely unaffected by the encouragement, a charge of abetting will not stand (although an accused may be charged in the alternative with (e.g.) counselling). International law seems less concerned with differentiating between the conduct of an "aider" versus that of an "abettor", and instead focuses on the effect of the "contribution". The formal

¹⁰¹ Rod Rastan, "Review of ICC Jurisprudence 2008" (2009) 7 *Northwestern J Int'l Human Rts* 261 at 269.

¹⁰² Attila Bogdan, "Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia" (2006) 6 *Int'l Crim L Rev* 63 at 93.

¹⁰³ Ambos, *supra* note 100 at 10.

standard for the contribution seems to oscillate between “direct and substantial” and merely “substantial”. As mentioned previously, the 1996 *Draft Code of Crimes* required that the contribution of aiding and abetting be “direct and substantial”, i.e., it must facilitate the commission of a crime in some significant way.¹⁰⁴ This standard was adopted by the ICTY Trial Chamber in *Tadić*, even though the Chamber did not seem to take this requirement very seriously since it included in the concept of aiding and abetting “all acts of assistance by words or acts that lend encouragement or support”.¹⁰⁵ The qualifier of “direct” was dropped in *Furundžija*, a later ICTY case, which stated that the use of the term was misleading “as it may imply that assistance needs to be tangible, or to have a causal effect on the crime.”¹⁰⁶ Requiring a causal link may actually have been the objective of the Draft Code provision’s use of the term “direct”, but nevertheless it was abandoned by subsequent ICTY jurisprudence leaving only “substantial”—which may now only set the bar as high as “all acts of assistance”, significant or otherwise.

Despite the fact that “substantial” was the standard settled upon at the ICTY (even without “direct” and notwithstanding the diminishing definition of “substantial”), the ICC is not bound by the decisions of the ICTY. Yet, the jurisprudence that emerged from the ICTY has been considered to reflect the current state of customary law in many regards, and its precedents are considered persuasive in numerous jurisdictions. Therefore, decisions from the ICTY have been and will probably continue to be considered by the ICC. However, the ICC is free to depart from standards set by the ICTY, particularly in relation to provisions set out in the *Rome Statute* that indicate a departure was intended. Article 25(3)(c) does not specifically adopt the “substantial” requirement, meaning that it is still for the ICC to decide whether the threshold for the contribution of the accused relative to the offence committed should be higher or lower than that articulated by the ICTY.

Just as the ICTY’s conduct requirement for aiding and abetting oscillated between “direct and substantial” and “substantial” or “all acts of assistance”, the fault requirement oscillated between “intent” and “knowledge”. In *Orić*, the Trial Chamber suggested that for a charge of aiding and abetting an accused must have “double intent” in that they must intend the furthering effects of their contribution, and they must intend completion of the crime committed by the principal.¹⁰⁷ In *Tadić*, the Appeal Chamber held that aiding and abetting only required knowledge that the acts performed by the accused would assist in the commission of a specific crime by the principal.¹⁰⁸ In *Furundžija*, the Trial Chamber agreed that knowledge was the correct standard, but held that the accused did not need to have knowledge of the precise crime committed by the principal.¹⁰⁹ In *Simić et al.*, the Appeal Chamber combined the rulings from *Tadić* and *Furundžija* holding that an accused must have had knowledge that their acts would assist

¹⁰⁴ *Draft Code of Crimes*, *supra* note 68.

¹⁰⁵ *Ambos*, *supra* note 100 at 11.

¹⁰⁶ *Prosecutor v Furundžija*, IT-95-17/1-T, Trial Judgement (10 December 1998) [*Furundžija*] at para 232.

¹⁰⁷ *Prosecutor v Orić*, IT-03-68-T, Trial Judgement (30 June 2006) [*Orić*] at para 288.

¹⁰⁸ *Tadić*, *supra* note 56 at para 229.

¹⁰⁹ *Furundžija*, *supra* note 106 at para 246.

in the commission of a specific crime, but did not have to have been aware of the precise crime that the principal intended or committed.¹¹⁰ To further complicate things, Article 25(3)(c) sets its own distinct fault requirement, “purpose”. By setting its own standard, it would be logical to assume that the *Rome Statute* has shut out ICTY jurisprudence on this matter. Conversely, since “purpose” is not defined in the Statute, the ICTY jurisprudence may yet prove relevant as the ICC attempts to develop a definition.

The use of “purpose” in Article 25(3)(c) implies a discrete fault requirement for aiding and abetting that must be separate from the fault requirement which applies to the *Rome Statute* generally under Article 30. Article 30 provides that, unless otherwise stated, the fault requirement for offences is intent and knowledge. Intent is defined as meaning to engage in the conduct and cause certain consequences. Knowledge is defined as being aware that a circumstance exists or that a consequence will occur in the ordinary course of events. The question that arises from this is: what can “purpose” mean that is different from Article 30?

Some commentators have explained that the difference between Article 30 and “purpose” relates to the scope of the required intent in terms of what particular consequence the accused sought to achieve; “purpose”, it is argued, signifies the need for specific intent.¹¹¹ This interpretation would be similar to the one advocated by the Trial Chamber in *Orić* which called for a “double intent” for aiders and abettors. It would also be consistent with judicial interpretations of the American Model Penal Code, from which the language of Article 25(3)(c) is borrowed. In determining when so-called accomplice liability will attach, American courts have held that an accomplice must share the purpose of the principal to commit the substantive offence charged, and have personally foreseen and intended the consequences of their acts.¹¹² Contrary to this, other commentators have suggested that while “purpose” does indicate a fault requirement stricter than mere knowledge, it is still a standard less than intent. They suggest, for example, that the accused is only required to have knowledge of the principal’s intent, specific or otherwise depending on the crime.¹¹³

In general, regardless of the varying interpretations, Article 25(3)(c) seems to set a relatively low conduct requirement bolstered by a higher (yet fleeting) fault requirement. An accused charged with participation in an international crime under Article 25(3)(c) must have contributed to the commission of an offence (through acts of assistance or encouragement) in some “substantial” way (or any way at all), and have done so for the “purpose” of facilitating the crime—which may mean sharing the specific intent of the principal, or simply knowing about the principal’s intent, accompanied by knowledge of the fact that the contributing acts will further the commission of the (general or specific)

¹¹⁰ *Prosecutor v Simić et al*, IT-95-9-A, Appeal Judgement (28 November 2006) [*Simić et al*] at para 86.

¹¹¹ Roy S Lee, ed, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York, NY: Transnational Publishers Inc, 2001) at 32.

¹¹² *State v Whitaker*, NJ Super AD2008 at 516, 955 A 2d 322, 402 NJ Super 495; *State v Rumbly*, NJ 2001, 766 A 2d 1141 at 555, 166 NJ 550.

¹¹³ Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute” (2007) 5 J Int’l Crim Just 953 at 969.

crime. The ambiguity of the deceptively simple language in Article 25(3)(c) is only surpassed by that of Article 25(3)(d).

b) Article 25(3)(d)

Article 25(3)(d) of the *Rome Statute* states that criminal responsibility will be incurred if one:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.

The use of the familiar phrase “common purpose” suggests that this provision is the *Rome Statute*’s version of the international complicity doctrines of conspiracy, criminal organizations and JCE. Even the ICC Pre-Trial Chamber held in *Lubanga* that the concept defined in Article 25(3)(d) is “closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY.”¹¹⁴ Given the vagueness, breadth, and malleability of the various international complicity doctrines it is curious that the drafters would have intended to replicate these theories of liability and yet would have done so without more precision. Some commentators have suggested that the reason for this was because of the divisive nature of concepts such as conspiracy and JCE which led to heated debates regarding their express inclusion at the Rome Conference. The solution was to borrow the wording from a provision of the International Convention for the Suppression of Terrorist Bombings which had been adopted by consensus in 1998.¹¹⁵ While this approach may have provided a diplomatic resolution to a controversial issue, the provision was transplanted without the critical context provided by the 1998 Convention for the interpretation of the common purpose doctrine.¹¹⁶ This oversight has resulted in a lack of clarity in the *Rome Statute*.

The conduct requirement of Article 25(3)(d) contains two elements: i) any contribution to the commission or attempted commission of a crime by ii) a group of persons acting with a common purpose. In the ICC Pre-Trial Chamber’s own words, the character of the contribution is simply a “residual form... which makes it possible to criminalize those

¹¹⁴ *Prosecutor v Lubanga*, ICC-01/04-01/06, Pre-Trial Chamber I Judgement (29 January 2007) [*Lubanga*] at para 335.

¹¹⁵ Steven Powles, “Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?” (2004) 2 J Int'l Crim Just 606 at 617.

¹¹⁶ Jens David Ohlin, “Joint Criminal Confusion” (2009) 12 New Crim LR 406 at 415.

contributions to a crime which cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting.”¹¹⁷ Unlike aiding and abetting which typically require the accused’s act to form a “substantial” contribution to the principal’s crime (although the ICC may still find otherwise), the necessary relationship between the contribution and the offence committed under Article 25(3)(d) is less clear. However, given the fact that Article 25(3)(c) probably includes all accessorial contributions that are “substantial”, and Article 25(3)(d) includes “any other” contributions (i.e., those that are insubstantial), it is likely that the threshold is extremely low.

The low conduct requirement is reminiscent of the criminal organizations doctrine and JCE II and III, but can be differentiated from the concept of conspiracy in that a contribution to the commission or attempted commission of a crime is actually required and an actual agreement between the accused and the principal is not. The phrase “group of persons acting with a common purpose” is also similar to the JCE III group requirement as it does not indicate the need for a formally organized entity that would meet the type of structural requirements articulated by the IMT. Presumably, this requirement could be satisfied by the formation of an ad hoc mob such as the one found responsible for killing the American air crew in the *Borkum Island* case. Ideally, the low conduct requirement would be offset by a higher fault requirement to ensure that only those who are truly criminally responsible are prosecuted. The provision’s reference to “intentional”, “aim”, and “knowledge” seem promising in this regard but, as with aiding and abetting, this once high standard may be fleeting.

Similar to the conduct requirement, the fault requirement has two elements: the accused’s contribution shall be 1) intentional, and shall be 2) (i) made with the aim of furthering the purpose of the group or (ii) made with knowledge of the intention of the group. From within a single domestic legal system, the standard of intent is easily defined by reference to a particular state’s statutory definitions and jurisprudence. Within the ICC various concepts of intent have collided, despite the best efforts of the drafters to define the term within the *Rome Statute*. As previously mentioned, Article 30 defines intent as meaning to engage in specific conduct and cause certain consequences. From a common law perspective, intent is a distinct fault requirement that may be inferred from personal knowledge, could be imputed from wilful blindness, but can never be satisfied by recklessness or negligence. The civil law tradition, on the other hand, knows only two standards for fault: *dolus* (intent) and *culpa* (negligence).¹¹⁸ The definition of intent under the *Rome Statute* is not precise enough to preclude the common law or civil law approach, and so interpretation of the default fault standard could go either way.

The uncertainty regarding intent was recently addressed by the Pre-Trial Chamber in *Lubanga*, where the Chamber found that the volitional element required by Article 30 included the three types of *dolus* regularly found in civil law systems:

¹¹⁷ *Lubanga*, *supra* note 114 at para 337.

¹¹⁸ George P Fletcher & Jens David Ohlin, “Reclaiming Fundamental Principles of Criminal Law in the Darfur Case” (2005) 3 J Int’l Crim Just 539 at 554.

- 1) situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (also known as *dolus directus* of the first degree)...
- 2) situations in which the suspect, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions (also known as *dolus directus* of the second degree); and
- 3) situations in which the suspect (i) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (ii) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).¹¹⁹

This finding of the Chamber that “intent” includes all three *dolus*, including *dolus eventualis*, has the effect of lowering the intent requirement in the *Rome Statute* to recklessness. For the purposes of Article 25(3)(d), this means that an accused’s “intentional” contribution to a group crime could be satisfied by recklessness.

The second element of the fault requirement under Article 25(3)(d) provides two alternatives. An accused can either act with the aim of furthering a group’s common purpose, or simply be aware of the group’s intentions. The first possibility is not particularly controversial—an intentional (or reckless) contribution made in knowing support of a common criminal purpose. This requirement could correspond to JCE I or II and is similar to the voluntary and knowing membership requirement of the criminal organizations doctrine (despite the contribution requirement being higher and the structural requirements of the group being lower). The second possibility raises more questions given its uncanny resemblance to JCE III’s extended theory of liability.

The second possibility requires only knowledge of, but not support for, the group’s intention to commit the crime. A key question raised by this is what exactly does the accused need to have knowledge of? Is it the group’s common criminal purpose, the intention to commit the specific (or general) crime, or both? Do the Pre-Trial Chamber’s three types of *dolus* also apply to the intentions of the group? If they do, then the group’s “intentions” may actually read as the group’s “recklessness”. This would mean that an accused would only need to be aware that a group of persons acting under a common purpose was reckless, and that their own reckless contribution supported this reckless conduct. If this interpretation is valid, a form of liability even broader than JCE III could be created within the *Rome Statute*; JCE III at least requires participation in the group with intent to further the common purpose.

Even if a higher standard is adopted—one that requires the accused to have intentionally and knowingly contributed to a crime committed by a group whose common purpose they were aware of but did not support—the result can still be quite unjust. In his paper

¹¹⁹ *Lubanga*, *supra* note 114 at para 351-352.

Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, Jens David Ohlin of Columbia University explains what type of broad and ostensibly blameless conduct could be caught under Article 25(3)(d)(ii):

Many members of the community may provide contributions to a criminal organization despite the fact that they disapprove of the group's criminality. Merchants sell food, water and clothing to criminals; they sell cars and gasoline and repair their vehicles; they rent them office space, apartments and houses. These services are no doubt contributions to criminal organizations, since, without them, a conspiracy could not continue. Furthermore, these services may well be performed knowing of a gang's criminal goals.¹²⁰

These seemingly innocuous contributions, made by a possibly oppressed community, would be enough to incur criminal responsibility under Article 25(3)(d)(ii) for whatever atrocities the criminal organization perpetrated.

Unfortunately, Article 25(3)(d)(ii) is unlike the other international complicity doctrines in that it is not a product of case law but rather is codified in the *Rome Statute*. This means that the ICC will not have the freedom to adjust the limits on the group criminality provision the way the ICTY could have reined in the concept of JCE. However, one way to prevent an unnecessary broadening of Article 25(3)(d)(ii) would be to impose an interpretation that required: i) the accused's intentional contribution include both voluntariness and an intent for the contribution to have a furthering effect; and ii) the accused's personal knowledge include awareness of the group's common purpose and awareness of the group's intention to commit a specific offence.

Article 25(3)(c) and (d) describe complex and dynamic modes of accessory participation that appear to capture a broader range of conduct than the Canadian *War Crimes Act*. The broader nature of these provisions may be why Byers and Schabas named the ICC as their preferred forum within which to prosecute the accused Canadian officials. However, it remains to be seen whether this somewhat ambiguous legal framework will raise the prospect of a conviction for war crimes when it is applied to the case of the Afghan detainees.

IV. CANADIAN COMPLICITY IN AFGHANISTAN: THE CASE TO BE MET

After more than two years of speculation and allegations regarding torture, complicity in war crimes, and supposed government suppression, the House of Commons Special Committee on the Canadian Mission in Afghanistan commenced its study of the transfer of Afghan detainees from the Canadian Forces to Afghan authorities in October 2009.¹²¹ Since then, only a few uncontroversial facts have emerged.

¹²⁰ Ohlin, "Three Conceptual Problems", *supra* note 97 at 79.

¹²¹ Special Committee, *supra* 5.

In August 2005, the Canadian Forces assumed control of the PRT in Kandahar City. In December 2005, the (then) Chief of Defence Staff Gen. Rick Hillier signed a memorandum of understanding with the Afghan Minister of Defence entitled “Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan”. Under this agreement the post-transfer monitoring of detainees would be carried out by the ICRC and the Afghan Independent Human Rights Commission. In May 2007, Canada and the government of Afghanistan concluded a second memorandum of understanding regarding the transfer of detainees. Under the new agreement, Canadian government personnel were given access to detainees transferred from Canadian to Afghan custody. In November 2007, the Canadian Forces suspended detainee transfers as a result of a “credible allegation of mistreatment”.¹²²

It is alleged that the Afghan authorities who received the detainees, directly or indirectly, tortured them and subjected them to other forms of ill-treatment. It is further alleged that Canadian officials were aware of these abuses and continued to transfer detainees regardless. It has even been suggested that Canada may have intended some of the detainees to be tortured as a form of “enhanced” interrogation and benefited from this practice by receiving intelligence after the fact from Afghan authorities.¹²³

The Canadian government is currently at the beginning of a process of investigation that may take months if not years to complete. Until the government is able to conclude a full inquiry into the transfer of Afghan detainees from the Canadian Forces to Afghan authorities, exactly what occurred between December 2005, when transfers began, and November 2007, when transfers were suspended, will remain a mystery. Without a clear determination of the facts it is impossible to consider if a crime has been committed and, if so, who the responsible parties might be. A different question, however, that would be suitable for consideration at this time is: how does the law apply in this case? While it may not be possible (or desirable) to speculate on the outcome of any potential criminal proceedings, it is worthwhile to consider what the prosecution would have the burden of establishing if this matter ever came before a Canadian or international court.

a) Canadian Criminal Proceedings under the *War Crimes Act*

As a party to the *Rome Statute*, Canada has assumed jurisdiction over crimes of genocide, crimes against humanity and war crimes through its enactment of the *War Crimes Act*. This legislation provides Canadian courts with the competency to decide on matters of international criminal law such as the alleged abuse of prisoners during an armed conflict outside of Canadian territory, in accordance with the international law of criminal jurisdiction. Under the *Rome Statute*’s complementarity principle, national judicial systems that are legislatively and institutionally capable of trying individuals for international crimes are granted primacy over the matter, unless or until they prove unwilling to carry out proceedings genuinely. In this regard, Canadian courts are, at least

¹²² *Amnesty International*, *supra* note 6 at para 66-76.

¹²³ “Canada wanted Afghan prisoners tortured: lawyer” *CBC News* (5 March 2010) online: cbc.ca <<http://www.cbc.ca/canada/story/2010/03/05/afghan-attaran005.html>>.

for now, the correct forum in which to hear allegations of war crimes in relation to the transfer of detainees from the Canadian Forces to Afghan authorities.

As mentioned previously, section 6(1) of the *War Crimes Act* declares that every person who commits a war crime outside of Canada is guilty of an indictable offence. A schedule to the *War Crimes Act* replicates article 8(2) of the *Rome Statute* which defines war crimes and includes within the definition the following provision:

(c) in the case of an armed conflict not of an international character... any of the following acts committed against persons taking no active part in the hostilities, including... those placed *hors de combat* by... detention....:

(i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

It is this particular war crime that Canada and other members of the International Security Assistance Force (ISAF) in Afghanistan are accused of participating in. Their accusers claim that ISAF members have transferred detainees to Afghan authorities who are subsequently accused of torture, ill-treatment, and arbitrary detention by the Afghan National Directorate of Security (NDS).¹²⁴ It is claimed that by transferring individuals to a situation where there is a grave risk of torture and other ill-treatment, ISAF members were complicit and in breach of their international legal obligations. It is worth noting that even Canada's most vehement accusers only accuse Canadian officials of being complicit in war crimes, or of being a party to the offence. Canadians are not alleged to have personally committed acts of torture or ill-treatment, but rather to have facilitated such acts. This claim of accessory liability engages the party offences in the *Criminal Code*, by virtue of section 34(2) of the *Interpretation Act*.

Under the *Criminal Code*, an individual could be attributed derivative liability for a violation of the *War Crimes Act* by: aiding, abetting, through common intention, counselling, or by being an accessory after the fact.¹²⁵ Since Canadian officials have been accused of "[choosing] to allow detainees to be transferred to the custody of Afghan authorities despite an apparent risk of torture and ... [choosing] not to take reasonable and readily apparent steps to protect detainees",¹²⁶ it does not appear the grounds of abetting, counselling, or acting as an accessory after the fact would apply. No one has suggested that Canadians encouraged, procured, solicited, or incited Afghan authorities to commit acts of torture, nor has it been suggested that Canada enabled any of the Afghan perpetrators to escape prosecution. It could be argued that, based on prior judicial consideration of the *War Crimes Act*, there is precedence to consider criminal responsibility based on the international complicity doctrines. Although these doctrines have managed to permeate certain aspects of immigration law as illustrated by *Zazai No. 1* and *2*, it is likely their overbroad nature would be found unconstitutional within a

¹²⁴ Amnesty International, *Detainees Transferred to Torture: ISAF Complicity?*, AI Index: ASA 11/011/2007 (2007) at 1.

¹²⁵ *Criminal Code*, *supra* note 12 at ss 21, 22, 23.

¹²⁶ Byers, *supra* note 8 at 3.

criminal context. Therefore, the only remaining grounds of accessory participation which might apply in this case are aiding, and common intention.

As derivative forms of liability, both aiding and common intention require someone other than the accused to have committed an offence before criminal responsibility for that offence can be imputed to the accused as a party. While section 23.1 of the *Criminal Code* states that an individual can be convicted as a party notwithstanding the fact that the principal has not or cannot be convicted, the principal still has to have committed the crime; they must be factually liable even if they are never found legally liable. In this case, the unnamed Afghan authorities must have committed acts of “violence to life and person” against the detainees they received from Canadian officials regardless of the fact they may never be prosecuted. Most of Canada’s accusers have taken it as a given that any individual transferred to Afghan custody was likely mistreated. They base this assumption on widespread reports from credible agencies which claim that this is a common practice in Afghan detention centres, particularly those operated by the NDS. However, individuals cannot be convicted of a crime that “likely” happened; a criminal charge can only stand if the evidence indicates a specific offence did happen and the accused was a party to it.

Locating specific instances where an individual who was tortured by Afghan authorities can be identified as having come through Canadian custody may prove more difficult than the widespread reports of abuse suggest. The first problem is the uncertainty regarding how many individuals were actually detained by Canadian Forces and subsequently transferred to Afghan authorities—claims range from 40 to more than 352.¹²⁷ The second problem arises in trying to locate those individuals who were transferred and are now (or are no longer) in Afghan detention. In April 2007, the *Globe and Mail* published an article which claimed that 30 interviews were conducted with men who had been captured by the Canadian Forces, transferred to Afghan custody, and tortured.¹²⁸ Conversely, when Richard Colvin, a senior representative from the Department of Foreign Affairs and International Trade at the PRT in Kandahar during the period of interest, testified before the Special Committee he admitted that when he and his colleagues tried to locate Afghans who had been transferred prior to the signing of the second transfer agreement “our records were so poor that the task was physically impossible.”¹²⁹

Even if evidence could not be adduced that specifically links a victim of torture to the Canadian Forces, and as a result it cannot be established that the offence in question has actually been committed, Canadian officials could potentially still face charges of conspiracy. Some have suggested that Canada may have intentionally transferred detainees to the NDS so that the NDS might utilize “enhanced” interrogation methods and gather intelligence which they would then share with Canada. Under a charge of

¹²⁷ Amnesty International, “Detainees Transferred to Torture”, *supra* note 124 at 23; Special Committee, *supra* note 5 at para 1530; “Afghan detainee hearings to resume without Tories” *CBC News* (27 January 2010), online: cbc.ca <<http://www.cbc.ca/politics/story/2010/01/27/afghan-committee-paul-dewar.html>>.

¹²⁸ Graham Smith, “From Canadian custody into cruel hands” *Globe and Mail* (23 April 2007) A1.

¹²⁹ Special Committee, *supra* note 5 at para 1535.

conspiracy, the prosecution would only need to establish that such an agreement existed and not that specific acts of torture ever took place.

Assuming evidence of a specific instance of torture can be produced, the prosecution would need to establish that the Canadian officials responsible for the transfer of a tortured detainee met the conduct and fault requirements for aiding or common intention. To meet the requirements of aiding, the accused Canadian officials must have intentionally provided assistance to the principal, i.e., the Afghan authorities. The conduct threshold for this contribution is low and need not have actually achieved the effect of assisting the principal. The Canadian contribution more than meets this requirement since the act of supplying the victims would not only have assisted the Afghans in committing acts of torture but would have been "direct and substantial". In addition to this, to meet the fault requirement the Canadian officials must have intended to bring about the consequences of the Afghans' actions. This is the crucial element that the evidence must show. Essentially, did the Canadian officials intend the detainees to be tortured by the Afghans? The intent of aiders can also be inferred from actual knowledge or wilful blindness, meaning that in the alternative one could ask: did the Canadian officials have actual knowledge of or were they wilfully blind to the fact that the Afghans *would* (not may) torture the detainees? This is a high subjective standard that cannot be satisfied by evidence of recklessness or negligence, and is something which only the yet unknown facts will be able to speak to.

If the high threshold fault requirement prohibits prosecution of Canadian officials as aiders, prosecution for common intention is still a possibility. This form of party offence would require the Canadians to have formed a common intention with the Afghans to carry out some unlawful purpose. As a result of this, criminal responsibility for any subjectively foreseeable acts committed by the Afghans in furtherance of this unlawful purpose can be imputed to the Canadians. It would likely be easier for a prosecutor to establish that it was subjectively foreseeable that detainees transferred to Afghan control would be tortured, as opposed to having to show that Canada intended to have the detainees tortured by the Afghans. Although, an innovative interpretation of the facts may be required to demonstrate that a common intention to carry out an unlawful purpose (one separate from the crime committed, i.e., not torture) existed between Canada and Afghanistan.

To summarize, under Canadian law the accused Canadian officials would be parties to the torture of detainees by Afghan authorities if they were found to have aided in the commission of the offence or to have participated in a common intention to carry out an unlawful purpose. To convict on a charge of aiding, the prosecution would need to demonstrate that the Canadians intended the Afghans to torture the detainees, or that they had actual knowledge of or were wilfully blind to the fact that the Afghans would torture the detainees. To convict based on common intention, the prosecution would need to demonstrate that a common intention to carry out an unlawful purpose aside from torture existed between the Canadians and the Afghans, and that torture was a subjectively foreseeable consequence of this unlawful purpose.

Although a consideration of this matter under Canadian law, regardless of the outcome, would likely satisfy the complementarity principle under the *Rome Statute* and render the case inadmissible to the ICC, the claim of Byers and Schabas that this is a matter for which ICC jurisdiction exists must still be addressed.

b) International Criminal Proceedings under the *Rome Statute*

As mentioned previously, a matter will be considered inadmissible to the ICC if a state party is already engaged in genuine proceedings concerning the matter. Since DND has conducted a Board of Inquiry into In-theatre Handling of Detainees in 2009; the matter was addressed by the Federal Court and Federal Court of Appeal in *Amnesty International* in 2008,¹³⁰ and currently the Special Committee on the Canadian Mission in Afghanistan is undertaking an investigation into the transfer of detainees from the Canadian Forces to Afghan authorities, it seems unlikely that the matter could ever be considered admissible to the ICC.

Hypothetically speaking, if there was a complete collapse of Canadian governmental investigatory efforts or if steps were taken by the Attorney General to place guilty parties above the law then the matter could become admissible and ICC jurisdiction could be exercised in one of three ways: i) the matter could be referred to the Prosecutor by a state party; ii) it could be referred by the Security Council acting under Chapter VII of the Charter of the UN; or iii) the Prosecutor could initiate an investigation.¹³¹ The likelihood of having the matter referred by a state party is possible but not likely. Since Canada is not alone accused of being complicit in war crimes but is joined by all participating members of ISAF (including all members of NATO and additional “friends” of NATO), it is likely that the collective influence wielded by those accused will deter any state referrals. For similar reasons, the Security Council is not likely to refer the issue considering several of the permanent five members are also members of the ISAF operation and it would not be in their interest to see the matter come before the ICC. The only remaining option for the ICC to exercise jurisdiction is at the discretion of the Prosecutor.

The current ICC Prosecutor, Luis Moreno Ocampo, has made it clear in statements to the media that he is prepared to investigate crimes committed by western nations: “I prosecute whoever is in my jurisdiction. I cannot allow that we are a court just for the Third World. If the First World commits crimes, they have to investigate, if they don’t, I shall investigate. That’s the rule and we have one rule for everyone.”¹³² This bold, ambitious, and obviously correct statement may overemphasize the resources of the Court and its ability to conduct investigations. With a limited budget of approximately

¹³⁰ *Amnesty International*, *supra* note 6; *Amnesty International Canada v Canada* (Chief of the Defence Staff), 2008 FCA 401, [2009] 4 FCR 149.

¹³¹ *Rome Statute*, *supra* note 9 art 13.

¹³² Daniel Schwammmenthal, “Prosecuting American ‘War Crimes’” *Wall Street Journal* (26 November 2009), online: Wall Street Journal <<http://online.wsj.com/article/SB10001424052748704013004574519253095440312.html>>.

€105 011 000¹³³ and five ongoing investigations in Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, and Kenya¹³⁴ the Prosecutor is restricted to selecting cases based on the standard of gravity.¹³⁵ Selecting cases based on gravity requires consideration of: the nature, scale, and impact of the crime, and the manner of commission. The torture and mistreatment of potentially hundreds if not thousands of detainees in Afghanistan is certainly a grave offence which has attracted the attention of the Prosecutor. However, the accessory participation of Canadian officials in as many as 30 cases¹³⁶ may not meet the gravity requirement in terms of nature and scale, especially when compared with the crimes of other accused that have been brought before the Court. In the interests of judicial efficiency, and in light of limited and diminishing resources, it seems much more likely that if an investigation is initiated it will target the actual perpetrators of the crime, i.e., Afghan officials. Yet in order to properly explore Byers and Schabas argument, it must be imagined that the ICC has been provided with the ability to investigate any and all admissible matters, regardless of gravity.

Article 8(1) of the *Rome Statute* declares that “the Court shall have jurisdiction in respect of war crimes”, and paragraph 2(c)(i) defines war crimes as including acts of “violence to life and person” committed against detainees during an armed conflict. Unlike the *War Crimes Act*, the *Rome Statute* has a self-contained model of participation in Article 25 which includes both principal and accessory modes that will incur criminal responsibility. Once again, since Canada is not accused of directly committing acts of torture only the accessory modes of participation could apply, including: Article 25(3)(c) “aids, abets, or otherwise assists” or Article 25(3)(d) “in any other way contributes to a crime by a group of persons acting with a common purpose”.

Prior jurisprudence from the international tribunals, and the wording of Article 25(3)(c) itself, suggests various interpretations of the conduct and fault requirements. The accused accessory is required to have provided assistance to the principal that was “direct and substantial” or “any form at all”. Although this ambiguity in the law is generally problematic, it is largely irrelevant in the case of the accused Canadians since the act of providing the victims to the alleged perpetrators meets even the highest threshold for conduct. The ambiguity of the fault requirement is more of a concern in this case. Article 25(3)(c) requires the acts of the accused to have been committed “for the purpose” of facilitating the principal. Some commentators have interpreted this to mean that specific intent is required,¹³⁷ meaning the Prosecutor would have to

¹³³ Secretariat, Assembly of States Parties, International Criminal Court, *Official Records Vol. II*, 8th Sess (18-26 November 2009) at 22.

¹³⁴ International Criminal Court, *Situations and Cases*, online: <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>>.

¹³⁵ *Ibid.*

¹³⁶ 30 being the highest number of reported cases of torture at the time of writing where it is alleged that specific detainees can be identified as having come through Canadian custody, transferred to Afghan custody and tortured (Graham Smith, “From Canadian custody into cruel hands” *Globe and Mail* (23 April 2007) A1.). This is in contrast to the higher numbers of estimated total detainees that were transferred to Afghan custody, but for whom there is no evidence (as of yet) of specific cases of torture.

¹³⁷ See e.g. Lee, *supra* note 111 at 32.

demonstrate that for each individual detainee transferred from Canadian custody to the Afghans and subsequently tortured, the Canadians intended *that* detainee to be tortured. Other commentators have denied that the standard is as high as specific intent, but have agreed that more than mere knowledge is necessary. Presumably, this would suggest that the level of knowledge required to satisfy the purpose requirement would be irrefutable knowledge of the fact that the detainee would be tortured if transferred such that any denial of intent or purpose to bring about this consequence would not be credible.

Based on these two possible interpretations of the fault requirement, the question before the court would be: is there evidence of a specific Canadian intent to have the detainees tortured? In the alternative, if the lower standard were accepted, the question before the Court would be: did the Canadians know with sufficient certainty that the detainees would be tortured, such that any denial of intent to bring about this consequence is not credible? Once again, these are high subjective standards that cannot be satisfied by evidence of recklessness or negligence and are elements which only the yet unknown facts will be able to speak to.

Article 25(3)(d) poses its own problems for interpretation regarding the requisite conduct and fault standards. The conduct requirement of “in any other way contributes” poses no bar to prosecution in this case since the Canadian act of providing the victims undoubtedly contributed to their torture. This contribution, however, must be made to the commission of a crime by a group of persons acting with a common purpose. Identifying this group may be a difficult task for the Prosecutor; are the Afghan authorities a group of persons acting with a common criminal purpose? Are “Afghan authorities” in this case defined as the NDS, the Afghan National Army, the Afghan National Police, the Ministry of the Interior, the Ministry of National Defence, or the entire Afghan government? Identifying a common criminal purpose in any of these groups could be difficult as each represents a large, multifaceted government organization. While the members of any of these groups might engage in criminal conduct it could be difficult to link the individual acts of criminality to the general purpose of the organization. This is similar to the situation the IMT faced when trying to prosecute the criminal organization charges. In that case, four of the accused seven organizations in the Nazi government were acquitted because the IMT had not been convinced that an individual who (e.g.) joined the armed forces would have been aware that he was becoming a member of something as tangible as a “group”.

The most likely candidate for a group of persons acting with a common criminal purpose is the NDS—Afghanistan’s domestic intelligence agency. Given the nature of the intelligence trade, and its propensity to operate on the border between law and criminality, intelligence agencies are often singled out as organizations that operate under a common criminal purpose. However, just because the NDS engages in intelligence gathering activities does not mean it is a criminal organization by default. To accuse the NDS of having a common criminal purpose the Prosecutor would have to identify that purpose and demonstrate that it was pervasively held among the NDS membership. Aside from the difficulty the Prosecutor might face in adducing this type of evidence, another problem raised by this accusation is that countless states, international organizations and non-governmental organizations are currently working to support the

operations of the Afghan government; many states, particularly those participating in ISAF, even work closely with and in support of the Afghan security forces including the NDS. If the Prosecutor was to accuse the NDS of having a common criminal purpose, then under Article 25(3)(d) anyone who contributed to the newly deemed criminal conduct of the NDS and is said to have had knowledge of the newly deemed criminal purpose inherits criminal responsibility for any crimes the NDS may have committed. Ironically, this widely cast net of criminal responsibility could potentially catch not only those currently accused of being complicit in war crimes, but also some of their accusers.

To satisfy the fault requirement of Article 25(3)(d) the accused's contribution must: (i) be intentional and (ii) must be made with the aim of furthering the group's criminal activity or common purpose, or with knowledge of the group's intention to commit the crime. The intentional contribution element requires, at a minimum, voluntary conduct. It is likely the element of voluntarism would be easily satisfied, since it is not likely the Canadian Forces surrendered the detainees to the Afghan authorities by accident or under duress. However, who the Canadians surrendered the detainees to may bring the element of voluntarism into question in some instances. For example, the Canadian Forces may have transferred a detainee to the Afghan National Army who was subsequently transferred them to the NDS where they were tortured. In that case, the Canadians might argue that they never intended to contribute to the NDS's activities but only intended to transfer the detainee to the Afghan National Army.

To satisfy the second part of the fault requirement, Canada must have supported the Afghan authorities' criminal activities or common purpose, or have had knowledge of their intention to commit the crime of torture. To be considered in support of criminal activities or a common criminal purpose, the Prosecutor would have to adduce evidence of (e.g.) an extraordinary rendition-type program, or clear Canadian approval of certain interrogation methods in Afghan detention centres. Absent such evidence, the claim may be hard to substantiate. A lower standard that might be more attractive to the Prosecutor would be to demonstrate that the Canadians were aware of the Afghan's intention to torture victims. To establish this, evidence would be required that indicated a premeditated intent to torture specific detainees on the side of the Afghans and actual knowledge of this intent on the side of the Canadians.

To summarize, under international law the accused Canadian officials would be criminally responsible for the torture of detainees by Afghan authorities if they were found to have aided, abetted or otherwise assisted the Afghans for the purpose of facilitating torture. Alternatively, they may be criminally responsible if they intentionally contributed in any way to the torture of the detainees if the torture was carried out by a group with a common purpose, and the Canadians were either supportive of the group's purpose or aware of its intention to commit torture. To convict the Canadians based on aiding, abetting or otherwise assisting, the Prosecutor would need to demonstrate that the Canadians specifically intended the detainees to be tortured and transferred them for this reason. Although actual knowledge that torture would be the inevitable outcome of transferring may suffice. To convict the Canadians of supporting a group with a common criminal purpose, the Prosecutor would first have to identify such a group and establish evidence of a pervasively held criminal purpose. If successful, the Prosecutor would then

have to establish that Canada was aware of this criminal purpose and supportive of it, or was simply aware of the group's specific intent to commit torture.

As many have suspected, the application of both Canadian law and international law in this case will largely turn on who among the Canadian officials knew what. If it can be established that specific detainees who were transferred from Canadian custody to Afghan custody were tortured, then it will be crucial to determine if Canadian officials knew this would be inevitable. Human rights advocates may believe that given the findings of reports produced by organizations such as Amnesty International, establishing Canadian knowledge of this practice should be no more than a mere formality. It may turn out when the facts come to light that the evidence is overwhelming and this interpretation is essentially correct. However, if the testimony heard before the Special Committee so far is any indication, it is far more likely that at the end of the day the evidence will be vague and incomplete, and the high level of subjective fault required for the alleged crimes will be difficult to establish.

CONCLUSION

The case of complicity in the torture of Afghan detainees raises complex and controversial questions regarding the nature of accessory liability, particularly: how many degrees of separation can exist between the accessory and the principal before the accessory's participation loses the flavour of criminal responsibility?

Originally, under the doctrine of complicity the accessory was required to have contributed directly to the commission of the crime. The contribution did not need to be *conditio sine qua non*, but did require a strong causal link to the prohibited consequence of the principal's actions. Over time this strong conduct requirement has diminished to "direct and substantial" to "substantial" to "in any way assists". Under Canadian law, the contribution is not even required to have any affect whatsoever on the commission of the crime and the principal does not even need to be aware that any contribution has been made. Regressing even further, under conspiracy theories an individual may not contribute to the commission of the crime at all or even have knowledge of its commission. If the accused was part of a criminal agreement which can in some way be related to the crime that was committed, then the conduct requirement is satisfied. This theory of liability goes even further in the criminal organizations doctrine and JCE. In both theories, an individual may not even be a party to a criminal agreement, but rather to a vague, amorphous criminal purpose, one which can in some way be linked to the crime that has been committed.

Advocates of accessory liability claim that the expansive reach permitted by a weak conduct requirement is balanced by a strong fault requirement. Originally, this requirement demanded that the accused intended the specific consequences of the principal's actions. Over time this high subjective fault standard has become as fleeting as the conduct requirement (particularly within the international context). Eventually, the accused needed only to have knowledge of the principal's intentions, or be wilfully blind to it. Under the theories of conspiracy and JCE the knowledge requirement was dropped in favour of a recklessness standard which often resembles negligence. Under the

criminal organizations doctrine, subjective foresight was not even required; if the accused was aware of the general criminal purpose of the organization to which they were a member, then they were vicariously liable for all the crimes committed by the organization, foreseeable or not.

A further issue of concern is the treatment of accessories relative to principals. Originally, conviction as an accessory to a crime was distinct from conviction as a principal. Under the criminal law reform project in England in the late 19th century, this changed so there was no distinction between accessories and principals. This unitary approach to criminal participation has not been adopted by all domestic legal systems, but it is prevalent in common law states and there is evidence to suggest it has been adopted in international criminal law. Under the *Rome Statute*, those who commit an offence are “criminally responsible” and so too are those who aid, abet, or otherwise assist without any apparent distinction.

It may be reasonable to suggest that an individual who voluntarily and intentionally drives the getaway car is equally guilty of robbery as the person who actually carries the money out of the vault. Similarly, it may be reasonable to suggest that the individual who voluntarily and intentionally acted as a guard at Auschwitz is equally guilty of genocide as the individual who operated the gas chambers. However, as the degrees of separation increase the reasonableness of this approach seems to decrease. Under the international complicity doctrines, an individual who has participated in a group with a common criminal purpose, such as Al Qaeda, through some minor contribution, such as a nominal monetary donation, and is linked to the organization, for example by being part of a listserv, is an accessory to the crimes committed by the group, such as the attacks of September 11th. It is one thing to convict this person for the distinct crime of supporting an illegal organization, but should such a person be found as guilty of murdering nearly 3000 people as the individual who actually flew a plane into the World Trade Centre?

Complicity has always been a slippery slope of individual criminal responsibility. Despite the egregious nature of the crime, and despite the strong societal desire to bring justice to victims, the essence of complicity is its derivative nature—the accessory is prosecuted for the crimes of someone else. However, the adoption of complicity as a criminalized mode of participation in international law was unavoidable. The crimes that attract the jurisdiction of international tribunals, and now the ICC, are not only the most serious but are also inherently collective.¹³⁸ In general, lone perpetrators are not capable of committing the types of atrocities that international criminal law was designed to address. These particular types of crimes can only be brought about through collective action which is as dependent on the accessory as it is the principal. Complicity developed in domestic law to address this type of collective crime, and it was necessarily adopted by international criminal law for the same reason. Yet the fact remains, complicity means holding an individual responsible for the physical acts of another person, and so caution must be had to minimize the risk of injustice.

¹³⁸ See e.g. Ohlin, *supra* note 97 at 72-74.