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THE QUADRANGULATION PROJECT: RECONCILING INTERNATIONAL MODES OF LIABILITY WITH DOMESTIC INDIVIDUAL LIABILITY FOR GENOCIDES, WAR CRIMES, AND CRIMES AGAINST HUMANITY

Chelsea Rubin*

ABSTRACT

Political ideology aside, Canada has been seen as a global leader in the ever-developing international criminal law project. Yet, this position, and the legitimacy that accompanies it, is increasingly under threat. As Prosecutor Bensouda of the International Criminal Court begins her investigation into war crimes and crimes against humanity in Afghanistan, it is possible Canadians will fall within the scope of potential indictments. Herein lies the threat to Canada's position. Canada was among the earliest states to adopt implementing legislation following its ratification of the *Rome Statute* of the ICC. Yet, efforts to prosecute war criminals domestically have lagged. Should Canada prove unwilling or unable to pursue these criminals there will be no legitimate grounds to refuse prosecutions at the international level, per the principle of complementarity. These prosecutions – or potential lack thereof – threaten Canada's role in the international criminal law project. While not ultimately conclusory, this paper aims to assess whether and how Canadian principles of liability can reflect the realities of international crimes, in full respect of the principle of complementarity, while staying true to the canons of domestic law. It is this analysis that will provide a basis for the normative and legal quadrangulation that needs to be done as Canada moves into a potentially precarious international legal position.

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INTRODUCTION: CANADA, SOFT POWER, AND “LEGITMACY” UNDER THREAT

Political ideology aside, Canada has been seen as a global leader in the ever-developing international criminal law project. Yet, this position, and the legitimacy that accompanies it, is increasingly under threat. As Prosecutor Bensouda of the International Criminal Court [ICC] begins her investigation into war crimes and crimes against humanity in Afghanistan, it is possible Canadians will fall within the scope of potential indictments.¹ Herein lies the threat to Canada’s position. Canada was among the earliest states to adopt implementing legislation following its ratification of the *Rome Statute* of the ICC.² Yet, efforts to prosecute war criminals domestically have lagged. Should Canada prove unwilling or unable to pursue these criminals there will be no legitimate grounds to refuse prosecutions at the international level, per the principle of complementarity. These prosecutions – or potential lack thereof – threaten Canada’s role in the international criminal law project. This paper is a response to this “threat.”

The domestic adoption of international criminal law, however, is not simple; when transferring these modes to the domestic criminal system there are normative and legal gaps requiring quadrangulation. So long as the dichotomies between “international law” and “national law” on the one hand, and “criminal law” and “human rights law” on the other, continue to structure legal theory, doctrine, and practice, this quadrangulation remains evasive, and the need for it acute.

Following the defining of key concepts and a brief exploration of this Canadian “legitimacy,” this paper proceeds as follows. The first section defines and critiques the modes of liability utilized by the ICC and the International Criminal Tribunals for the Former Yugoslavia and Rwanda.³ Understanding the

¹ See “Preliminary Examination, Focus: Alleged crimes against humanity and war crimes committed in Afghanistan since 1 May 2003”, *International Criminal Court*, online: <www.icc-cpi.int/afghanistan/> [Preliminary Examination]. For information on potential Canadian culpability see: Craig Scott, *Brief on the Investigation of Canadian Nationals for War Crimes and Crimes Against Humanity in Afghanistan*, submitted to the International Criminal Court (26 November 2017) [Craig Scott, *Afghanistan Brief*].

² Fannie LaFontaine, “Canada’s Crimes against Humanity and War Crimes Act on Trial: An Analysis of the *Munyaneza* Case” (2010) 8:1 *J Intl Crim Justice* 269 [“LaFontaine, CAHWCA On Trial”].

³ While formally two separate institutions, the Tribunals have largely followed the same jurisprudential path with regards to modes of individual liability. Additionally, the two now operate under the guise of the same

jurisprudential and normative context that gave rise to these modes of liability is critical to understanding challenges with their domestic importation. The next section provides an overview of the relevant Canadian legislation: *The Crimes Against Humanity and War Crimes Act*. Following this, the paper begins the exercise of domestic extrapolation, directly comparing the international modes of liability with Canadian liability modes articulated in section 21 of the *Criminal Code*. The paper then turns to critiquing this attempted reconciliation. While outside Canadian jurisdiction, the legal reasoning in recent American counter-terrorism proceedings outlines the dangers that arise from the legal gymnastics involved in attempting the domestic importation of international modes of liability. Finally, the paper briefly discusses the potential challenges arising from the indictment of Canadians at the ICC. While not ultimately conclusory, this paper aims to assess whether and how Canadian principles of liability can reflect the realities of international crimes, in full respect of the principle of complementarity, while staying true to the canons of domestic law. It is this analysis that will provide a basis for the normative and legal quadrangulation that needs to be done as Canada moves into a potentially precarious international legal position. Canada's global position has long been as a "soft-power" player; Canadian participation in the international criminal justice project was, and still is, emblematic of this role. It is the loss of the soft power that comes from this legitimacy that is potentially under threat.

TERMS AND DEFINITIONS

This paper relies on a number of specific ontological terms, which may have varied meanings depending on context; of specific concern here are the terms "complementarity" and "normative quadrangulation." For the purpose of clarity, the definitions for these terms through the duration of this paper are as follows:

"Complementarity": The principle of complementarity is the basis for the argument being presented here. A key concept in international law – specifically international criminal law – complementarity is the base jurisdictional principle

institution, the Residual Mechanism for International Criminal Tribunals (MICT). Thus, for the purposes of simplicity, they are considered to be one and the same for the purposes of this paper.

for the ICC.⁴ As outlined in Article 17 of the *Rome Statute*, complementary ensures that domestic bodies have the first responsibility and right to process international crimes. The ICC, “may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.”⁵ The principle is a contrast to universal jurisdiction; primary jurisdictional interest still rests with domestic institutions. The central question of this paper is whether the ICC can assume jurisdiction of Canadian individuals based on the principle of complementarity. In the event that Canadian domestic modes of liability do not permit the indictment or prosecution of these individuals domestically – as this paper will show they may not – then, and only then, per the principle of complementarity, may the ICC assume jurisdiction.⁶

“Normative quadrangulation”: Essential to the exercise of determining whether or not the ICC can assume jurisdiction on the basis of the complementarity principle is the exercise of both normative and legal quadrangulation. These are different, though interlinked, concepts. The argument being put forth is that both are necessary in order for Canada to avoid any liability for its nationals based on complementarity. Legal quadrangulation in this context refers to the alignment of domestic and international modes of liability. Simply put: can the individual in question be indicted/liability be imputed in both the domestic *and* international contexts? The modes of liability in the international sphere, given the nature of the crimes the courts were designed to create, tend to be much broader in scope. If the individual cannot be held liable in a domestic court by the very structure of domestic laws and constitutional protections, then there may be a jurisdictional basis for the ICC based on complementarity. Thus, to avoid liability, legal quadrangulation is a vital first step. The second step, while not necessary in a complementarity framework *per se*, is the process of normative

⁴ “The Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes” (4 September 2009), online: *Forum for International Criminal and Humanitarian Law* <www.ficlh.org/activities/the-principle-of-complementarity-and-the-exercise-of-universal-jurisdiction-for-core-international-crimes/>. For a more detailed discussion on the complementarity principle see, ICC Office of the Prosecutor (OTP), “Informal Expert Paper: The Principles of Complementarity in Practice” 2003, online: <www.icc-cpi.int/nr/rdonlyres/20bb4494-70f9-4698-8e30-907f631453ed/281984/complementarity.pdf> [OTP Report].

⁵ *Ibid*, OTP Report at 3.

⁶ This is of course barring any voluntary extradition of Canadians for prosecution at the ICC.

quadrangulation. As will be seen throughout this paper, there is a perception element to the legitimacy of international law: for justice to be done it must be seen to be done. Even if the letter of domestic Canadian law is aligned with the ICC governing frameworks, if it appears that such laws or Canadian institutions allow individuals to evade potential culpability for war crimes, the threat to Canada remains immense. As noted in the introductory section, and as will be elaborated on below, the “threat” here is to Canada’s inherent legitimacy as a founder of the international criminal law project. Even if Canada is able to avoid turning over individuals for prosecution based on a strict interpretation of complementarity, if it is perceived as harboring war criminals this soft-power legitimacy is equally – if not more deeply – threatened.

A NOTE ON LEGITMACY: CANADA’S GLOBAL POSITION AND THE *ROME STATUTE*

While opinions on the current state of the Canadian geo-political position on the global stage are outside of the scope of this paper, the perception of Canada’s role in the development of the international criminal law project warrants description here. Understanding Canada’s historic position vis-à-vis international criminal law is critical to contextualizing the need for quadrangulation of Canada’s domestic system with its international obligations, and the impact of a failure of quadrangulation on Canada’s global position. Despite recent misgivings, Canada has long been seen as a “leader” in international criminal law; other countries “look to Canada for its recognized expertise in the intricacies of domestic implementation.”⁷

Canada’s history of war crimes, crimes against humanity, and genocide prosecutions pre-dates the proliferation of international criminal mechanisms in the 1990s. Due largely to a formal policy of inaction Canada was perceived as a haven for war criminals until the 1970s.⁸ In the 1980s the policy shifted: Canada

⁷ William Schabas, “Foreword” in Fannie LaFontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012) at ix [“LaFontaine, *Prosecuting Genocide*”].

⁸ Valerie Oosterveld, “Canada and the Development of International Criminal Law: What Role for the Future?” (2018) 16 Centre for International Governance Innovation (Canada in International Law at 150 and Beyond) at 2 [“Oosterveld”].

addressed the issue through extradition.⁹ In response to Nazi doctor Joseph Mengele's attempt to seek refuge in Canada, Prime Minister Mulroney ordered a federal inquiry on the subject.¹⁰ In its final reports, the Deschênes Commission recommended Parliament amend the Criminal Code to allow for the prosecution and punishment of war crimes and crimes against humanity, and that immigration and citizenship laws be amended to allow for the expulsion of perpetrators.¹¹ For the next two decades, Canada's domestic attempts to enforce international law norms yielded some successes and a number of high profile failures.¹² The result was a focus on administrative law to "deal with" those accused of such international crimes.

The creation of the International Criminal Tribunal(s) for the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively) shifted Canada's focus to international fora. The drafting and adoption of the *Rome Statute* of the ICC [*"Rome Statute"*] in the late 1990s and early 2000s established Canada's position as a "recognized world leader" in the international criminal law project.¹³ A "prominent player" in the drafting of the *Rome Statute*, Canada continued to play a major role in the ICC after its entering into force.¹⁴ Canada also took a leading position in establishing and supporting international criminal institutions with jurisdiction over atrocities in Sierra Leone, Lebanon, and Cambodia.¹⁵

⁹ *Ibid* at 2. See also, *Federal Republic of Germany v Rauca*, (1992) 38 OR (2d) 705 (HC), aff'd 41 OR (2d) 225 CA; Sol Littman, *War Criminal on Trial: Rauca of Kaunas* (Toronto: Key Porter Books, 1998) at 19-20.

¹⁰ Oosterveld, *supra* note 8 at 2.

¹¹ Oosterveld, *ibid*. See also, Commission of Inquiry on War Criminals, *Report, Part I (Public)* (Ottawa: Supply and Services Canada, 1986) (Commissioner: Jules Deschênes) at 5-9.

¹² Of particular note is the case of Imre Finta, accused of crimes against humanity and war crimes due to his role in detaining and deporting to death 8,617 Jewish persons while serving as commander of the Gendarmerie in Hungary during WWII. After the war Finta immigrated to Canada and became a citizen in 1956. Finta was acquitted on trial and appeal. The SCC judgment, while positive in confirming the retrospective criminalization of crimes against humanity and war crimes, interpreted the Criminal Code so as to impose additional elements of crime, creating a very high threshold for the proof of crimes against humanity and war crimes. The SCC also imposed as double burden on the prosecution to prove both the international offence and the Canadian domestic offence. As a result, the *Finta* decision essentially stopped the federal government from using criminal prosecution as a tool to address serious international crimes, forcing them to focus on administrative remedies. See *R v Finta*, [1994] 1 SCR 701 at 725-726 [*"Finta"*]. See also *R v Pawlowski* (1992), 13 CR (4th) 228 (Ont Ct J (Gen Div)), aff'd (1993), 12 OR (3d) 709 (CA), leave to appeal to SCC refused, (1993), 15 OR (3d) xvi; *R v Reistetter*, (1990) OJ No 2100 (QL) (Ont Ct J (Gen Div)); *R v Grijčić* (1994), 25 WCB (2d) 49, [1994] OJ No 2280 (QL) (Ct J (Gen Div)). For reliance on administrative remedies see, e.g., *Canada (Secretary of State) v Luitjens* (1991) 46, FTR 267 (FCTD), aff'd 1992 CarswellNat 1315 (FCA).

¹³ Oosterveld, *supra* note 8 at 4-8.

¹⁴ *Ibid*. Note that the *Rome Statute* entered into force on 1 July 2002.

¹⁵ *Ibid*.

Under the Conservative Harper administration, Canada's role with respect to international criminal justice institutions waned; the current Liberal administration, under Prime Minister Trudeau, has initiated yet another policy shift. In 2016 when three African states parties announced their intention to withdraw from the ICC, then Minister of Foreign Affairs Stéphane Dion stated that “[w]e need more of the ICC, not less.”¹⁶ It is this role that Canada seems to continually assert— as global “gatekeeper” of international criminal justice institutions — that must guide any quadrangulation of the Canadian legal system and international legal norms. Should Canada wish to continue to position itself in this role, as it seemingly does, such quadrangulation is vital to stave of the threat of loss of legitimacy, mentioned at the outset of this paper.

THE PRINCIPLE OF EFFECTIVENESS: RECONCILING HUMAN RIGHTS, TRANSITIONAL JUSTICE, AND INDIVIDUAL CRIMINAL RESPONSIBILITY

In order to contextualize the nature of this threat, it is necessary to discuss the driving factors behind both domestic and international criminal law. The gaps requiring quadrangulation exist for a reason: domestic and international criminal law are different tools, borne of different goals and serving different, often contradictory ends. As opposed to domestic criminal law, which is tasked solely with punishing individual wrongdoing for a specific criminal act, international criminal law is based on various legal traditions, each with a distinct purpose. The doctrines of international criminal liability, “being generalizations of the conditions in which punishment is proper, are primarily statements of normative import.”¹⁷ Domestic Canadian criminal law frameworks and institutions, which are innately based in the rule of law, have a different foundation than international criminal law and legal institutions, which have been developed within the UN

¹⁶ *Ibid.* See also Canada, “Statement by the Hon. Stéphane Dion, Minister of Foreign Affairs, Global Affairs Canada, Fifteenth Assembly of States Parties to the Rome Statute” (16 November 2016) at 2-3, online: <asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDebaCANADA-ENG-FRA.pdf>.

¹⁷ Allyson Marston Danner and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law” (2005) 93 Cal L Rev 75 at 79 [“Danner and Martinez, *Guilty Associations*”], citing Stanford H Kadish, “Complicity, Cause and Blame: A Study in the Interpretation of Doctrine” (1985) 73:2 Calif L Rev 323 at 326.

paradigm, centering on respect for human dignity, international human rights law, and humanitarian law.¹⁸ Thus, a critical analysis of the moral commitments that guide this “importation” is necessary to understanding the emergence of these modes and potential challenges of their domestic use.

International criminal law draws from three legal traditions: domestic criminal law, human rights law, and transitional justice. These traditions are not always complimentary and, in many ways, are deeply at odds.¹⁹

Domestic criminal law focuses on individual wrongdoing as a necessary prerequisite to the imposition of criminal punishment. This “principle of personal culpability” has been understood to pertain to international criminal law as well.²⁰ The specific procedural and substantive criminal law doctrines, and the culpability principle they help defend, distance the liberal trial from the “show trials” of Tokyo and Nuremberg, preventing the basing of guilt on association alone.²¹

Human rights law, however, is not concerned with the deprivation of personal liberty; institutions enforcing international human rights rarely need to justify such an assertion of power.²² As a victim-centered enterprise, human rights law actively refrains from making determinations of individual responsibility for wrongdoing; the nation-state as a whole, not individual members, is liable for violations of human rights.²³ While the basic assumption of international law remains *nulla poena sine culpa* – the principle of personal culpability; that no person may be held criminally responsible for acts or transactions in which he has not personally engaged – this is pursued in light of broader objectives of human rights law.²⁴ Importing the interpretive techniques and analytical modes drawn from a

¹⁸ Terje Einarsen & Joseph Rikhof, *A Theory of Punishable Participation in Universal Crimes* (Brussels: Torkel Opsahl Academic EPublisher, 2018) [Einarsen and Rikhof]; See also *Prosecutor v Tadić*, Case No IT-94-1-A, Judgment (15 July 1999) at 40 (International Criminal Tribunal for the former Yugoslavia) [*Tadić* Judgment].

¹⁹ Danner and Martinez, *Guilty Associations*, *supra* note 17 at 81-82.

²⁰ See *Tadić* Judgment, *supra* note 18.

²¹ Danner and Martinez, *supra* note 17 at 83.

²² *Ibid* at 86.

²³ *Ibid*; see also Silvia Borelli, “State Responsibility in International Law”, *Oxford Bibliographies* (27 June 2017), online: <www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0031.xml>.

²⁴ Einarsen and Rikhof, *supra* note 18, citing *Tadić* Judgment, *supra* note 18.

human rights paradigm to a system designed to punish individuals for previously articulated crimes, poses dangers for the integrity of the criminal system.²⁵

In the transitional justice context, the criminal trial becomes a tool aimed towards a broader political goal; it is a mechanism used to enforce the political transition from one regime to another.²⁶ The model fixes liability on key leaders to exonerate society at large. As former ICTY Judge Antonio Cassese has explained, “[T]rials establish individual responsibility over collective assignation of guilt...victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes.”²⁷ Individual accountability is thus a means to an end, promoting reconciliation by “breaking the collective cycle of guilt that frequently fuels conflicts that result in mass atrocity.”²⁸

It is the combination of these three legal traditions which give rise to the modes of liability used by the international courts. Their use in international courts is justified by the unique goals of these institutions and the need to assign individual liability for collective crimes; the end seemingly justifies the means. The enhanced accountability that these theories enable however – the ability to attribute individual liability for collective crimes, in various circumstances – comes at the expense of key criminal law principles. While legitimate in the international context their importation into the domestic context is devoid of these traditions and, thus, these justifications.

“THE END JUSTIFIES THE MEANS”: JCES, CO-PERPETRATION, AND THE CHALLENGES OF INTERNATOINAL MODES OF LIABILITY

Of primary importance to this quadrangulation experiment are the “modes of liability” [herein, “modes”] utilized by the international criminal justice institutions to confer liability on an accused. Contemporary international law is

²⁵ *Ibid* at 101.

²⁶ *Ibid* at 90.

²⁷ Antonio Cassese, “Reflections on International Criminal Justice” (1998) 6:1 *Mod L Rev* 1 at 6.

²⁸ Danner and Martinez, *Guiltly Associations*, *supra* note 17 at 93.

largely concerned with holding individual defendants responsible for mass atrocities. Because the crimes usually involve the concerted efforts of many individuals, allocating responsibility among them is critical to individual criminal proceedings.²⁹

Two liability doctrines have emerged from the jurisprudence of the principle organs of international criminal law: the ICTY/ICTR, and the ICC. These liability doctrines – joint criminal enterprise (“JCEs”) and command responsibility, respectively – play a central role in the allocation of guilt in international criminal law. What is critical to understand is that both doctrines operate squarely within the principle of individual culpability: both doctrines seek the attribution and calibration of individual responsibility for mass atrocities while simultaneously upholding the idea that an individual may be punished only for conduct for which she or he is personally responsible.³⁰ As will be discussed in subsequent sections, international criminal law includes the most serious consequences of domestic criminal proceedings – the right to deprive individuals of their liberty – but lacks the security provided by a clearly articulated and time-tested criminal code.³¹

The ICTY, the ICTR, and the Principle of Joint Criminal Enterprise

Perhaps the more controversial of the two identified modes, the JCE doctrine was first articulated by the ICTY Appeals Chamber in *Prosecutor v Dusko Tadić*. While JCE liability is not explicitly described in the ICTY/ICTR Statutes, the doctrine has been confirmed through case law and the judges have deemed it implicitly included in the language of Article 7(1) of the ICTY Statute.³² Generally, under this mode, an individual may be criminally responsible as co-perpetrator for crimes committed in furtherance of a common purpose if it is known to him or her that his or her assistance is supporting the crimes of the broader JCE, and he or she “shares [the JCE’s] intent.”³³

²⁹ Danner and Martínez, *Guilty Associations*, *ibid* at 77. See also *Tadić* Judgment, *supra* note 18 at 191.

³⁰ Danner and Martínez, *Guilty Associations*, *ibid* at 78.

³¹ *Ibid* at 98.

³² *Ibid*, at 103, referring to *Prosecutor v Mitar Vasiljević*, Case No IT-98-32-A, Judgment (25 February 2004), paras 94-101 [*Vasiljević* Judgment].

³³ Catherine 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) 18:2

As articulated in the *Tadić* appeal, JCE refers to three forms of liability, aptly referred to as JCE (I), (II), and (III). In all three, the prosecution must show: (1) “a plurality of persons”; (2) “[t]he existence of a common plan, design, or purpose which amounts to or involves the commission of a crime provided for in the [ICTY] Statute;” and (3) “[p]articipation of the accused in the common design.”³⁴ Thus, the requirements of JCE liability may be divided into requirements for the group (plurality of persons with a common purpose) and requirements for the individual (participation and the requisite *mens rea*).³⁵ The requirements for the group are minimal. The “plurality of persons” requirement may be satisfied when the prosecution proves that the group “included the leaders of political bodies, the army, and the police who held power [in a given area]”; there is no need to establish an organized “military, political, or administrative structure.”³⁶ The second requirement – the existence of a common purpose – may be established even if that purpose was not arranged prior to the conduct of the crime; the common purpose “may materialize extemporaneously.”³⁷ It is with individual participation – particularly in establishing requisite *mens rea* discussed below – on which individual culpability seems to turn. Participation must be proven in all three forms.³⁸ This requires a minimal contribution to the group in question; once an individual in a JCE shares the intent of the group, and “assists” or contributes to the carrying-out of the enterprise’s common purpose, the relatively low threshold of contribution is met.³⁹ The physical presence of the accused when the crime is committed is irrelevant to JCE liability.

Given the breadth of these *actus reus* requirements, findings of individual liability turn largely on establishing the requisite *mens rea*. The requisite *mens rea* may be met in one of three ways, each constituting a different form of JCE liability:⁴⁰

Duke J Comp & Intl L 521 at 524 [“Gibson”], referring to: *Prosecutor v Kvočka*, Case No IT-98-30/A-A, Judgment (28 February 2005) at 90 [“*Kvočka* Judgment”].

³⁴ Gibson, *ibid*, at 524; referring to *Tadić* Judgment, *supra* note 18 at 227.

³⁵ Gibson, *ibid* at 524.

³⁶ Gibson, *ibid* at 524, referring to *Vasićević* Judgment, *supra* note 32 at 100; *Prosecutor v Milomir Stakić*, Case No IT-97-24-A, Judgment (22 March 2006) at 69.

³⁷ Gibson, *ibid* at 525, referring to *Vasićević* Judgment, *supra* note 32 at 100.

³⁸ Gibson, *Ibid*.

³⁹ Gibson, *Ibid*, referring to *Prosecutor v Krnojelac*, Case No IT-97-35-A, Judgment (17 September 2003) at 81.

⁴⁰ Gibson, *Ibid* at 526.

JCE I: In the most basic form of JCE liability, the prosecution must prove that the perpetrator acted with “the *intent* to perpetrate a certain crime.” What matters is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose. An individual defendant may be held responsible pursuant to JCE I if she or he participates in that enterprise with a plurality of persons and has the specific intent to achieve a common purpose that violates the ICTY statute.⁴¹

JCE II: In the “systemic” form of JCE liability, the requisite *mens rea* is established where an individual holds a position of authority in a military or administrative unit and participates in some way in an organized system of criminality perpetrated by that unit. As *mens rea* must be assessed in relation to the *knowledge* of a particular accused, the accused must have personal knowledge of the system of criminality and intend to further this system – the crimes must be a natural and foreseeable consequence *to him/her* of his/her participation in the system.⁴²

JCE III: The most controversial form of JCE liability, “extended liability,” is established where an individual “manifests a criminal intention to participate in a common criminal design” and “criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.”⁴³ Two findings of *mens rea* are thus required: (1) the accused must have the intention to participate in and contribute to the common criminal purpose; and (2) the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.⁴⁴ Thus, JCE III allows the prosecution to impute criminal liability to individuals for crimes they neither committed nor knew were taking place.⁴⁵ Where both “intent” and “knowledge” appear to be required with regard to the first two forms, they are

⁴¹ Gibson, *ibid* at 526-527. See also *Prosecutor v Radoslav Brđanin*, Case No. IT-99-36-, Judgment (3 April 2007) at 410 [“*Brđanin* Case”].

⁴² Gibson, *ibid* at 527.

⁴³ *Tadić* Judgment, *supra* note 18 at 204, 206.

⁴⁴ Gibson, *supra* note 33 at 528, referring to *Kovčeka* Judgment, *supra* note 18 at 83.

⁴⁵ Gibson, *ibid*.

not required here: the requisite *mens rea* is lowered to a standard akin to recklessness.⁴⁶

In theory, the JCE doctrine allows for all crimes committed against a particular group within an entire region over a period of years to be attributed to a defendant if she or he was part of a group that intended to perpetrate these crimes.⁴⁷ In practice, this endows international prosecutors with significant discretion to determine the scope of wrongdoing that will be attributed to any single defendant. Depending on how broadly prosecutors describe the criminal goal of a given enterprise, or how loosely foreseeability is construed, and individual's liability can vary.⁴⁸

Of note here is the fact that, per the definition in *Tadić*, JCE liability is not “a form of accomplice liability, but as a form of *commission*” [sic]. If an individual “knows that his assistance is supporting the crimes of a group of persons involved in a [JCE] and shares that intent, he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.”⁴⁹ This recognition of group criminality was deemed essential for the enforcement of international law because the nature of these international crimes lends to perpetration by a group, not individual criminality. Any meaningful criminalization of contributions to such groups must take into account the culpability of individual participants *as well as* the “increased social endangerment” of collective criminal enterprises.⁵⁰ On the other hand, concerns of fairness and legitimacy have required international legal bodies to prevent JCE [liability] from evolving into a doctrine of “guilt by association.”⁵¹ It is the danger posed in reconciling these opposing positions – in potentially limiting the latter to facilitate the former – that arises in the domestic importation of the JCE mode.

⁴⁶ Stefano Manacorda & Chantal Meloni, “Indirect Perpetration *versus* Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?” (2011) 9:1 J Intl Crim Justice 159 at 162 [“Manacorda and Meloni”].

⁴⁷ Danner and Martínez, *GUILTY ASSOCIATIONS*, *supra* note 17 at 98.

⁴⁸ *Ibid* at 135.

⁴⁹ Gibson, *supra* note 33 at 523-524.

⁵⁰ Einarsen and Rikhof, *supra* note 18 at 43.

⁵¹ Gibson, *supra* note 33 at 522-523.

The ICC: Command Responsibility and Direct/Indirect Co-Perpetration

In its earliest decisions, the ICC has rejected the JCE approach, developing a jurisprudential alternative to attribute individual responsibility vis-à-vis the joint commission of crimes. In interpreting Article 25(3) of the *Rome Statute* – the provision delineating the modes of individual liability – the judges of the ICC have developed the “co-perpetration” model, based on the concept of “control over the crime.”⁵² Pursuant to this model, principals are distinguished from accessories according to their “control over the crime.”⁵³ In contrast to the ICTY/ICTR, the ICC has taken a restrictive approach in determining what constitutes principal liability. The Pre-Trial Chamber [“PTC”] has determined that “committing”, per article 25(3)(a), constitutes principle liability, while other forms of liability under Article 25(3)(b-d) amount to accessorial liability.⁵⁴

In applying the co-perpetration model based on command theory, the ICC has developed four modes of principal responsibility: (1) direct perpetration, (2) co-perpetration, (3) indirect perpetration, and (4) indirect co-perpetration.

Direct perpetration: Direct perpetration takes place when an individual physically carries out the objective elements of a crime and has the mental state required by article 30(1) of the *Rome Statute* and the crime in question.⁵⁵ Direct perpetration is rare in relation to *Rome Statute* crimes, given their wide-scale nature.⁵⁶

⁵² Manacorda and Meloni, *supra* note 46 at 164, referring to *The Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06-88-Corr, Decision on the issuance of a warrant of arrest, Pre-Trial Chamber I (24 February 2006). It bears noting here that “control over the crime” has been codified as command theory. The modes of liability discussed in this section are derived from command theory as a basis for individual criminal liability. When referred to in the body of this work, command theory is an overarching theory of liability, not a basis for individual principal responsibility.

⁵³ Sofia Lord, Joint Criminal Enterprise and the International Criminal Court: A Comparison between Joint Criminal Enterprise and the Modes of Liability in Joint Commission in Crime under the Rome Statute; Can the International Criminal Court Apply Joint Criminal Enterprise as a Mode of Liability? (International Criminal Law Thesis, Stockholm University Faculty of Law, 2013) [unpublished] [“Lord”].

⁵⁴ Lord, *ibid* at 37-38, referring to *The Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01-04-01-06-803, Decision on the Confirmation of Charges, Pre-Trial Chamber I (29 January 2007) [“Lubanga Confirmation of Charges”].

⁵⁵ Lubanga Confirmation of Charges, *ibid* at para 332. See also Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Case No ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I (30 September 2008), [“Katanga and Ngudjolo Decision”].

⁵⁶ Lord, *supra* note 53 at 38.

Co-perpetration: Per the *Rome Statute*, this refers to crimes committed jointly with another. The PTC has analyzed co-perpetration in the context of the “control over the crime theory”, noting principal liability is “not limited to those who physically carry out the objective elements of the offence, but also include[s] those who... control or mastermind its commission because they decide whether and how the offence will be committed.”⁵⁷ This is the closest ICC analogue to JCE liability, though it does not seem to extend to JCE III.⁵⁸

Indirect perpetration: Defined as committing a crime through another person, regardless of whether that other person is criminally responsible,⁵⁹ indirect perpetration requires either that the defendant use a subordinate individual who is used as an instrument to commit the crime, or that the defendant have authority over a hierarchical and rule-governed organization whose members carry out the crimes under their command. When assessed with regard to “control theory”, the requisite *mens rea* is met where the individual has control of the will of those who carry out the objective elements of the offence.⁶⁰ Ordinarily this requires that the accused control an organization, such as the military or government administration.⁶¹ The accused must be aware of the character of their organization, their authority within the organization, and the factual circumstances enabling near automatic compliance with their orders.⁶²

Indirect co-perpetration: A construct of the PTC, indirect co-perpetration requires the combined objective and subjective elements of co-perpetration based on joint control and indirect perpetration. It is the mode of liability used when command of various groups, which could not or would not be integrated into a single organization and therefore are not subject to the same chain of command, are concerned.⁶³

⁵⁷ Lord, *ibid* at 40, referring to *Lubanga Confirmation of Charges*, *supra* note 54 at para 330.

⁵⁸ Lord, *ibid* at 40. See also Antonio Cassese and Paola Gaeta, *International Criminal Law, 3rd Edition* (Oxford: Oxford University Press, 2013) at 3.

⁵⁹ Lord, *ibid* at 38.

⁶⁰ Lord, *ibid* at 42, referring to *Lubanga Confirmation of Charges*, *supra* note 54 at para 332.

⁶¹ Lord, *ibid* at 43.

⁶² Lord, *ibid*. See also *Katanga and Ngudjolo Decision*, *supra* note 55 at para 515.

⁶³ See, e.g., Lord, *ibid* at 45. In the warrant for his arrest, President Al Bashir of Sudan is named as an “indirect co-perpetrator”, bearing criminal responsibility for genocide, crimes against humanity and war crimes committed against members of the Fur, Masalit, and Zaghawa groups in Darfur. His responsibility stems from his role in coordinating the design and implementing the common criminal plan through his position as a director of a branch of the apparatus of the Sudanese state. See, *The Prosecutor v Omar Al Bashir*,

While on its face narrower in scope than the JCE mode of liability, the doctrine of command theory and the principles of direct and indirect perpetration/co-perpetration invite many of the same dangers. While the JCE doctrine creates liability for participation in joint endeavors, Article 25 instead establishes liability for individuals who “contribute” to a group acting with a common purpose. The *Rome Statute* thus criminalizes individual commission, but also, explicitly, joint commission and commission through another person, regardless of whether that person is criminally responsible.⁶⁴ Just as JCE provides vicarious liability for members who conspire to pursue collective criminal action, Article 25(3)(d) appears to provide derivative liability for accomplices.⁶⁵ Accomplice liability is, by definition, derivative, as it presupposes the existence of a primary offence. However, in a narrow interpretation of Article 25(3)(d), there need not be a “primary offence” of direct participation in a group crime, only derivative liability for contributing as an outside accomplice. The only solution to this problem, as pointed out by Professor Jens David Ohlin, is to find this primary offence in the Article 25(3)(a) notion of committing an offence “jointly with another.” This would require equating committing a crime “jointly with another” as being equivalent to “a crime committed by a group of persons acting with a common purpose”; bearing striking similarity to the JCE model.⁶⁶

CO-PERPETRATION AND DOMESTIC LEGISLATION: THE CRIMES AGAINST HUMANITY AND WAR CRIMES ACT

International criminal tribunals, particularly the ICC, rely however on the domestic importation of these justifications. One of the pre-eminent challenges of the ICC’s work is thus ensuring states have the capacity to act as the primary

Case No ICC-02/05-01/09, Decision on the Issuance of a Warrant of Arrest, Pre-Trial Chamber (04 March 2009), at paras 209-223. Al Bashir is still not under arrest, thus there has been no decision on the confirmation of charges.

⁶⁴ Fannie LaFontaine, “Parties to Offences under the Canadian Crimes Against Humanity and War Crimes Act: An Analysis of Principal Liability and Complicity” (2009) 50:3-4 C de D 967 [“LaFontaine, *Principal Liability Analysis*”].

⁶⁵ Jens David Ohlin, “Joint Criminal Confusion” (2009) 12:3 New Crim L Rev 406 at 408 [“Ohlin, *Confusion*”], referring to Kai Ambos, *Amicus Brief for Pre-Trial Chamber on Joint Criminal Enterprise in Criminal Investigation Against Kaing*, Case No. 001/18-07-2007-ECCC/OCIJ, Pre-Trial Chamber II, Extraordinary Chambers in the Courts of Cambodia (27 October 2008) at 15.

⁶⁶ Ohlin, *Confusion*, *ibid* at 415-416.

fora for such prosecutions.⁶⁷ The most significant obstacle faced by national jurisdictions in this endeavour is situating their regimes within the broader international criminal law system, which requires translating international law norms into domestic ones.⁶⁸ The normative reconciliation outlined at the outset of this paper – of international norms with domestic rights – is thus vital to the international criminal law project.

As noted above, Canada was quick to adopt implementing legislation following its ratification of the *Rome Statute*.⁶⁹ What is noteworthy, however, is not the speed with which Canada ratified such legislation, but, rather, the legislation's unique structure. Canada's approach diverges from that of other states parties, as it does not adopt the *Rome Statute* outright. Rather, the *Crimes Against Humanity and War Crimes Act* [CAHWCA] relies on the *Rome Statute* as an "interpretive guide" for customary international law.⁷⁰ The definitions of offences in the CAHWCA refer exclusively to international law, while available defences are those of both Canadian law and international law, and the modes of liability are exclusively of domestic Canadian origin.⁷¹ It is this explicit reliance on international law as a driving force for domestic Canadian legal regimes that exacerbates the potential threat to Canadian legitimacy should Canada be found unable or unwilling to prosecute alleged perpetrators. Canada has *chosen* to construct legal institutions based on these international frameworks, yet, it may be determined that the operability of these frameworks in Canada does not meet international standards, enabling the ICC to assume jurisdiction on the basis of complementarity. This seems to be a risk that the drafters of the legislation overlooked: in its reliance on the *Rome Statute* as an interpretive guide for the domestic implementation of customary international law, the CAHWCA does not instruct courts on the resolution of conflicts between the two regimes.

⁶⁷ Robert J Currie, "Fannie LaFontaine, Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts", Book Review, (2013) 11:5 J Intl Crim Justice 1166 at 1167.

⁶⁸ LaFontaine, *Prosecuting Genocide*, *supra* note 7 at 1-11.

⁶⁹ LaFontaine, CAHWCA On Trial, *supra* note 2 at 269.

⁷⁰ Andrew Halpenny, "Prosecuting Genocide: Crimes Against Humanity and War Crimes in Canadian Courts", Book Review of *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* by Fannie LaFontaine, (2012) 50 Can YB Intl L 640 at 643 ["Halpenny"].

⁷¹ LaFontaine, *Principal Liability Analysis*, *supra* note 63 at 974.

In drawing this normative separation, and failing to implement a mechanism for conflict resolution, the CAHWCA invites normative confusion.⁷² While the liability modes of international law are based on the collective nature of international crimes, the CAHWCA rests largely on classic criminal law categories “built on a ‘mononuclear’ paradigm (one author, one fact, one victim).” Such categories therefore seem irreconcilable with the ‘collective’ criminality” of international crimes.⁷³ Canadian modes of participation in offences may be found to be maladapted or in need of a different interpretation when applied to international crimes.⁷⁴ In particular, although various modes of commission recognized in international criminal law articulate a broad concept of complicity, the reliance on the mononuclear paradigm means that individuals in Canada “will not be held liable for crimes committed by a group simply because they are associated with that group or because they passively acquiesced to the group’s criminal purpose.”⁷⁵

Given the central purpose of this paper –to assess whether and how Canadian principles of liability can reflect the realities of international crimes, in full respect of the principle of complementarity, while staying true to the canons of domestic law – the modes of liability employed by the CAHWCA are of primary interest here. Sections 4(1) and 6(1) of the CAHWCA outline the modes of liability used by the statute, stating that “[e]very person is guilty of an indictable offence *who commits*” one of the core crimes.⁷⁶ It specifically adds, at paragraph

⁷² Halpenny, *supra* note 70 at 643. This is in contrast to the war crimes legislation of other like countries. See, e.g., New Zealand’s *International Crimes and International Criminal Court Act 2000*, (NZ), 2000/26, s 12, which incorporates art 25(3) of the *Rome Statute* and also clarifies that in the event of a conflict with New Zealand law (particularly art 66 of the *Crimes Act, 1961* (NZ), 1961/43, which provides for modes of criminal liability), art 25(3) of the *Rome Statute* will prevail.

⁷³ Stefano Manacorda, “Foreword to the Symposium: *The Principles of Individual Criminal Responsibility: A Conceptual Framework*” (2007) 5:4 J Int’l Crim Justice 913 at 913, referenced in LaFontaine, *Principal Liability Analysis*, *supra* note 63 at 970.

⁷⁴ The Supreme Court recognized the “analysis of international jurisprudence in the interpretation of domestic principles of liability” may be of crucial importance in light of this. See *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 134 [*Mugesera*].

⁷⁵ *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

⁷⁶ *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, assented to 29 June 2000, at ss 4(1) and 6(1) [*si*]. As noted by LaFontaine, interestingly, the marginal note at ss 4(1.1) and 6(1.1) of the CAHWCA, reads differently in English than it does in French. In English it reads “[c]onspiracy, attempt, etc.”, while in French it reads: “[p]lunition de la tentative, de la *complicité*, etc.” [emphasis added]. It is puzzling that “conspiracy” has been rendered in French as “*complicité*” despite the fact that the *Criminal Code* generally uses the translation “complot”. Discussions were held on this marginal note in the debates before the Standing Committee on Foreign Affairs and International Trade, without however taking issue on this matter. See: Canada, House of Commons, Standing Committee on Foreign Affairs and International Trade, “Crimes Against Humanity”

1.1, that “[e]very person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.”⁷⁷ As will be discussed in a subsequent section, the particular language of these modes, when reconciled with the Canadian *Criminal Code* [“*Code*”] provisions on liability, provide a basis for the exercise of reconciliation with international modes of liability. The following sections aim to begin this reconciliation.

A COMPARISON OF THE “COMMON PURPOSE DOCTRINE”, JCES AND INDIRECT CO-PERPETRATORSHIP THROUGH THE LENS OF SECTION 21 OF THE *CRIMINAL CODE*

As Canada embraces a dualist paradigm of international law – reflected in the decision not to necessarily import the *Rome Statute* outright but rather to import particular provisions for the purpose of incorporation into the domestic context – all international law must be reconciled with existing domestic paradigms to be of force and effect. The Canadian *Criminal Code* [“*Code*”] details the modes of liability of Canadian domestic law. Section 21 of the *Code* outlines four ways in which a person can be criminally liable for an act: (1) as a principal, (2) as an aider, (3) as an abettor, or (4) as an individual with a “common intention” to commit an offence.⁷⁸ The purpose of the section is “to make the difference between aiding and abetting and personally committing an offence legally irrelevant.” It is thus unnecessary for the purposes of indictment whether the person is charged as a principal or as a party.⁷⁹ However, section 21 effectively codifies the common law distinction between principal and secondary liability; a distinction used primarily for sentencing purposes.⁸⁰ It is with this particular

Meeting 52 – Evidence, (1 June 2000), online:

<www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040378&Mode=1&Parl=36&Ses=2&Lang=E>.

⁷⁷ *Ibid.*

⁷⁸ *Criminal Code*, RSC 1985, c C-46, ss 21(1) & 21(2).

⁷⁹ *R v Thatcher*, [1987] 1 SCR 652, 1987 CanLII 53 at para 68, [*Thatcher*] per Dickson CJC: “This provision (s. 21) is designed to make the difference between aiding and abetting and personally committing an offence legally irrelevant.”

⁸⁰ *R v Pickton*, 2010 SCC 32 at para 51 [*Pickton*] per LeBel J: “Generally speaking, there are two forms of liability for *Criminal Code* offences, primary or principal liability (actually or personally committing the offence), and secondary liability (also known as party liability), both codified in s. 21 of the *Criminal Code*. Whether an accused is found guilty either as a principal offender or as a party to the offence, the result is the

understanding of liability – where there is no formal distinction required between “principal” and “party” liability – that the international modes must be reconciled.

Given the breadth of modes of liability covered by section 21 of the *Code*, and the confluence of principal and party liability, on its face it would seem that reconciliation between domestic and international regimes is possible. While not untrue, this is an over-simplification: reconciliation may be possible, but it is not simple. The Supreme Court has recognized the challenges in this reconciliation.⁸¹ Of note here is *how* the court has gone about this exercise: the intentional course of action taken by the court has been to analyze international jurisprudence in the interpretation of domestic principles of liability – not vice versa. The international is thus to *inform* the domestic, not *shape* it outright.

Consider, for example, the Supreme Court’s analysis in determining the individual criminal liability of Léon Mugesera. Mugesera, a hard-line Hutu political party member gave a speech at a meeting of the party in Rwanda. The contents of this speech led Rwandan authorities to issue a warrant for his arrest. He subsequently fled to Canada. In 1995 the Minister of Citizenship and Immigration commenced proceedings under subsections 27(1) and 19(1) of the *Immigration Act* to deport Mugesera on the basis that by delivering his speech he had incited murder, genocide, and hatred, and committed a crime against humanity. After appeals at numerous levels, the crux of the Supreme Court case turned on whether or not Mugesera had committed the aforementioned crimes in the commission of this speech. At paragraph 134 of the judgment, in establishing Mugesera’s personal criminal liability, the Court relied on international jurisprudence to contextualize domestic modes of liability, reasoning:

The statutes of the ICTY and the ICTR [...] do not use the word “counselling” [...] This Court found in *Sharpe* ... that counselling refers to active inducement or encouragement from an objective point of view. The ICTR has found that instigation “involves prompting another to commit an offence”: ... The

same in law: the accused will be convicted of the substantive offence. It is for this reason that it is sometimes said that it is “a matter of indifference” at law whether an accused personally committed a crime, or alternatively, aided and/or abetted another to commit the offence.”

⁸¹ See *Mugesera*, *supra* note 74 at para 134.

two terms are clearly related. As a result, we may look to the jurisprudence of the ICTY and the ICTR [...] in determining whether counselling an offence that is not committed will be sufficient to satisfy the initial criminal act requirement for a crime against humanity under s. 7(3.76) of the *Criminal Code*.⁸²

The Court justified its reliance on international case law by the similarity in the interpretation given to the term “counselling” in the two decisions (*R v Sharpe* and *The Prosecutor v Akayesu*).⁸³ In determining the applicability of international modes of liability one must therefore consider whether they are reconcilable with the modes of liability outlined in the CAHWCA, the *Criminal Code*, and Canadian jurisprudence – as opposed to attempting to make these “fit” within international paradigms. The basis for normative reconciliation must start with the domestic context and stem outwards. As such, the three forms of perpetration that are controversial in terms of modes of liability are assessed in this section: co-perpetration, perpetration through another person, and aiding and abetting/the common purpose doctrine.⁸⁴

Co-Perpetration

Both the *Rome Statute* and the jurisprudence of the ad hoc tribunals imbue individual liability for co-perpetration: through article 25(3) and the JCE doctrine, respectively. While the application of the JCE doctrine to co-perpetration has been explained in great detail, the reasoning of the ICC’s PTC in its application of article 25(3) warrants further elaboration.

With respect to co-perpetration, the ICC PTC established an intricate test aimed at determining whether the alleged co-perpetrator had sufficient *control* over the offence.⁸⁵ Control is established where *objective* elements were established, including: (1) the existence of a plan or agreement between two or more persons

⁸² Ibid.

⁸³ LaFontaine, *Principle Liability Analysis*, *supra* note 63 at 972, referring to *R v Sharpe* [2001] 1 SCR 45, at para 56; *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998) (ICTR Trial Chamber), at para 482.

⁸⁴ Given its relatively straightforward nature, liability for individual commission has not been discussed here. For more information on the subject see LaFontaine, *Principle Liability Analysis*, *ibid* at 973-976.

⁸⁵ This is to maintain adherence to the “control of the crime” theory adopted by the Court. See *Lubanga Confirmation of Charges*, *supra* note 54 at para. 342-367. See also LaFontaine, *Principle Liability Analysis*, *ibid* at 977.

and, (2) an essential contribution by each co-perpetrator to the realization of the offence. *Subjective* elements are also required, including: (1) that the suspect have the requisite *mens rea* for the crime at issue, (2) that the suspect and other co-perpetrators share in the knowledge that the crime may result from the implementation of their common plan, and (3) that the suspect knew of the factual circumstances allowing him to exercise joint control over the commission of the crime.⁸⁶ The requirements are thus similar to those required to establish liability per JCE I: (1) the participation in an enterprise with a plurality of persons, (2) with the specific intent to achieve a common criminal purpose pursuant to the statute.⁸⁷

Subsection 21(1)(a) of the *Code*, despite its use of the singular, does not exclude a plurality of perpetrators; the *Code* is thus *prima facie* reconcilable with the ICC's co-perpetration model. However, analogies between the domestic and international contexts end here. In Canadian law it is also essential that the accused *actually committed* an essential element of the crime.⁸⁸ Herein lies the fundamental difference between international and domestic liability for “co-perpetratorship”: domestically, such liability stems from the individual's performance of the *actus reus*, not the significance of their action to the common plan.⁸⁹ By requiring the physical commission of an element of the crime, Canadian “co-perpetratorship” is far narrower in scope than its international counterparts.

Perpetration Through Another Person

The commission of a crime “through another person” covered through article 25 of the *Rome Statute* and the JCE model is akin to the Canadian jurisprudential concept of “innocent agency.”⁹⁰ In situations of “innocent

⁸⁶ *Ibid.*

⁸⁷ See *Brdanin Case*, *supra* note 41.

⁸⁸ LaFontaine, *Principle Liability Analysis*, *supra* note 63 at 977-978.

⁸⁹ LaFontaine, *Principle Liability Analysis*, *ibid* at 978.

⁹⁰ Note that, as LaFontaine recognizes, the ICC Pre-Trial Chamber in *Prosecutor v Katanga and Ngudjolo Chui* further confirmed that co-perpetratorship through a guilty or innocent agent is contemplated by the Statute: “basing a person's criminal responsibility on the *joint commission of a crime through one or more persons is therefore a mode of liability* [in accordance with the Statute]” [emphasis added]. See *Prosecutor v Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-17, Decision on Confirmation of Charges, 30 September 2008, at para 491. This amounts to the creation of an additional mode of principal liability under article 25(3) of the *Rome Statute*. For the concept of innocent agency in Canada see *R v Berryman*, [1990] 78 CR (3d) 76, 57 CCC (3d) 275 BCCA at paras 381-387.

agency”, the perpetrator uses a person who lacks the requisite *mens rea* to be convicted of the offence to commit the criminal act. The perpetrator is thus principally liable for the crimes despite not personally committing any material element of the offence.⁹¹

Article 25 of the *Rome Statute*, however, does not limit itself to perpetration through an innocent agent; it specifies that commission through another person occurs, “regardless of whether that other person is criminally responsible.” Thus, the ICC recognizes perpetration through a “guilty agent”, imbuing liability for the “perpetrator behind the perpetrator” based on control theory.⁹²

While highly pertinent to ICC prosecutions, considering the absence of “guilty agent” liability of under Canadian law, principal liability “will be inapplicable for a wide range of persons responsible for the ‘most serious crimes of concern to the international community as a whole.’”⁹³ Should this hold true, and such participants to international offences not be found liable by other applicable principles, they would be subject to the ICC’s jurisdiction.⁹⁴

Aiding, Abetting, and the Common Purpose Doctrine

Accomplice liability is an essential tool in the imputing of liability on numerous individual who contribute to the commission of international crimes, given their collective nature. The CAHWCA, however, does not explicitly include important forms of participation provided for at section 21 of the *Criminal Code*, namely aiding, abetting, and liability stemming from a “common intention” to commit an offence.⁹⁵ However, considered in conjunction with subsection 34(2) of the *Interpretation Act*, all modes of liability outlined in section 21 of the *Code* can

⁹¹ *Ibid.* See also LaFontaine, *Principal Liability Analysis*, *supra* note 63 at 978.

⁹² Katanga and Ngudjolo Decision, *supra* note 55 at para 497. See also LaFontaine, *Principal Liability Analysis*, *ibid* at 978-979.

⁹³ LaFontaine, *Principal Liability Analysis*, *ibid* at 980, referring to *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, UN Doc A/CONF 183/9 (entered into force 1 July 2002) [“*Rome Statute*”].

⁹⁴ LaFontaine, *Principal Liability Analysis*, *ibid* at 981.

⁹⁵ *Ibid.* As LaFontaine notes, this is in stark contrast with the repealed s 7 (3.77) of the *Criminal Code*, which has since been replaced by the CAHWCA, which was much more explicit. Per s 7 (3.77): “In the definitions ‘crime against humanity’ and ‘war crime’ in subsection (3.76), ‘act or omission’ includes, for greater certainty, attempting or conspiring to commit, counseling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.”

be said to apply to offences prosecuted under the CAHWCA.⁹⁶ Thus, their analysis is warranted.

There has been a tendency in international criminal law to consider parties as having a “lower degree of criminal responsibility” than principals.⁹⁷ As noted above, per the jurisprudential interpretation of section 21 of the *Code*, principal and secondary parties in Canada are charged with the same offence; the trial judge retains discretion to sentence in accordance with individual culpability.⁹⁸ The particularities of material and mental elements for each crime, causality requirements, and defences, mean the scope of principal liability is narrower in Canada than in international criminal law. Thus, party liability represents “the limits of Canadian law” regarding liability for international crimes that must be reconciled with complementarity.⁹⁹

There is relative consistency between the applicable principles determining party liability in domestic and international criminal law. Neither requires a causal connection between the individual and the crime to establish *actus reus*.¹⁰⁰ As regards the requisite *mens rea*, however, there is a key distinction between the regimes: both Canadian law and ICC jurisprudence require *specific intention* to assist, where the ad hoc tribunals require the only accused have had *knowledge* that his or her conduct will assist a specific crime.¹⁰¹ However, this does prevent reconciliation: the similar *mens rea* requirements outlined in the *Rome Statute* and Canadian domestic law lend to an interpretation of Canadian law regarding party liability in harmony with the *Rome Statute*, if not with international customary law as interpreted by the tribunals. This fits seamlessly with Canada’s dualist approach

⁹⁶ *Interpretation Act*, RSC 1985, c I-21, s 34(2). See also LaFontaine, *Principal Liability Analysis*, *ibid* at 982. On the applicability of Section 21 to Federal Statutes, see e.g., *Nagalingam v Canada (Minister of Citizenship and Immigration)*, [2009] FCR 52 292 DLR (4th) 463 at para 67. With respect to the CAHWCA the Federal Court of Appeal was unambiguous in its conclusion that complicity was contemplated by the Act in the case of *Zazai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 303, 4 FCR D-23 (though the conclusion was not based on the applicability of the *Interpretation Act*). This was solidified by the court most recently, and in the criminal law context, in *R c Jacques Mungrarere*, 2013 ONCS 4594, OJ No 6123 (QL) at paras 48-51 [Mungrarere].

⁹⁷ LaFontaine, *Principal Liability Analysis*, *supra* note 63 at 985.

⁹⁸ *Thatcher*, *supra* note 79 at para 690. See also, LaFontaine, *ibid* at 986.

⁹⁹ LaFontaine, *Principal Liability Analysis*, *ibid* at 986.

¹⁰⁰ The ad hoc tribunals require a “substantial effect” on the crime. See *Kwojka* Judgment, *supra* note 33 at para 98. See also *Tadić* Judgment, *supra* note 18 at para 229. In Canada however, and likely per Article 25(3) of the ICC, the gravity of the effect of the act on the commission of the crime is likely irrelevant.

¹⁰¹ LaFontaine, *Principal Liability Analysis*, *supra* note 63 at 988-991.

to international law, as recognition of the *Rome Statute* has been formally recognized through the ratification of the CAHWCA. Whether a finding of party liability is morally sufficient when determining the criminal liability of high-ranking perpetrators, however, is a question Canadian courts will be left to grapple with.

The third type of party liability provided under section 21 of the *Code*, “common purpose” liability, poses additional challenges. Both the ad hoc tribunals – through JCE III – and the ICC allow for vicarious liability. While not explicitly outlined in the *Rome Statute*, Article 25(3) contemplates “a residual” form of liability for crimes of a group acting with a common purpose.¹⁰² However, there are three key differences between this and party liability per section 21:

- (1) Section 21(2) *only* applies to *additional offences* which were not agreed to between the participants in the joint enterprise. Thus, subsection 21(2) cannot serve to capture enterprises the ad hoc tribunals would identify as JCE I or II.¹⁰³
- (2) The requirement of a common illegal design is more stringent in Canadian law than it is under the international joint criminal enterprise doctrine.¹⁰⁴ While in international law the design can materialize extemporaneously, in Canada the jurisprudential interpretation seems to require formulation of the common purpose before the commission of the crime.¹⁰⁵
- (3) Subsection 21(2) requires to or more persons form an intention “*in common*” to carry out an unlawful purpose. This requirement, when considered in conjunction with the necessity that parties have the intention to mutually assist each other in the commission in the offence, implies the participants in the enterprise must be identifiable and must include the actual perpetrators. This requirement essentially shields leaders of organizations, who are remote

¹⁰² Lubanga Confirmation of Charges, *supra* note 54 at para 320.

¹⁰³ *R v Simpson*, [1988] 1 SCR 315, CanLII 15039 (NSSC) at para 14: “the unlawful purpose mentioned in s. 21(2) must be different from the offence which is actually charged.”

¹⁰⁴ LaFontaine, *Principal Liability Analysis*, *supra* note 63 at 999.

¹⁰⁵ While the temporal element of the common purpose is not fully settled in Canadian jurisprudence, Fannie LaFontaine aptly notes that the wording of the provision which, in French, imposes the existence of a “*projet*”, as well as some judicial interpretations, seem to indicate a need for the criminal purpose to have been formed prior to the commission of the crime. See LaFontaine, *Principle Liability Analysis*, *ibid* at 999.

from the principal.¹⁰⁶ This is far more stringent than the international liability doctrines, which were designed to assign liability to these exact individuals.

The “common purpose” doctrine is thus far more stringent than the various international modes of vicarious liability. JCE III or a broad interpretation of Article 25(3) of the *Rome Statute* are seemingly irreconcilable with the domestic context – a logical byproduct of the purposes of the “mononuclear” paradigm and the opposing purposes of domestic and international criminal law.

Finally, it should be noted that CAHWCA crimes are included in the category of domestic crimes afforded a special degree of *mens rea* due to the social stigma surrounding them.¹⁰⁷ For these offences *subjective mens rea* will be required as a principle of fundamental justice. Per the Supreme Court’s decision in *R v Logan*, “when the principles of fundamental justice required *subjective* foresight to convict a principal...that same minimum degree of *mens rea* is constitutionally required to convict a party to the offence.”¹⁰⁸ Thus, the objective elements of section 21 are unconstitutional in relation to CAHWCA crimes; the establishment of a subjective version of the requisite *mens rea* for a given offence (i.e. recklessness in the case of war crimes and crimes against humanity, and knowledge for the specific-intent crime of genocide) is necessary for *either* principal or party liability to arise under section 21.¹⁰⁹

When considered in conjunction with these constitutional protections, the extended liability outlined in subsection 21(2) may serve to cover situations akin to those of vicarious liability used by the international criminal institutions.¹¹⁰

¹⁰⁶ *Ibid* at 1000.

¹⁰⁷ *Finta*, *supra* note 12. Interestingly, LaFontaine notes that the “essence of the justification given by the majority in *Finta* to require subjective *mens rea* has lost its relevance in Canadian law following the coming into force of the CAHWCA and the reformulation of the applicable law by the Supreme Court of Canada in *Mugesera*.” See *Ibid*, at 1001, n. 141. Genocide, crimes against humanity, and war crimes are now criminalized as such under Canadian law and there is no justification for any “further measure of blameworthiness.” However, as LaFontaine goes on to note, there is little doubt that the gravity and stigma attached to the crimes, as well as the severity of the related sentences, would justify similar conclusions to those reached by the court in *Finta* regarding the minimum constitutional requirement. For a post-CAHWCA example of this reasoning see, *Mugesera*, *supra* note 74 at para. 176.

¹⁰⁸ *R v Logan*, 1990 2 SCR 731 at para 24.

¹⁰⁹ For a more extensive discussion on the requisite *mens rea* for the specific crimes of genocide, crimes against humanity, and war crimes based on the language of the CAHWCA (i.e. recklessness vs. knowledge/specific-intent) see LaFontaine, *Principal Liability*, *supra* note 63 at 1001-1007.

¹¹⁰ For the application of s. 21 in the Canadian criminal context re. the CAHWCA see *Mungwarere*, *supra* note 106 at paras 52-55, referring to *Pickton*, *supra* note 90 at para 6. It should be noted that the court in *Mungwarere* held the term “real help” used in *Pickton* could be equated to the term “largely facilitated the

However, the scope of its applicability is undoubtedly narrower: the recognition of the collective nature of the core crimes pursuant to the common purpose doctrine applies *only* to additional offences that may have been committed as a probable consequence of the criminal design formed before the commission of the crime in question.¹¹¹

THE DANGERS OF INTERNATIONAL MODES OF LIABILITY AND THE DOMESTIC CONTEXT: *HAMDAN V RUMSFELD*

Up until now, this paper has dealt with the theoretical problem of applying the modes of liability of international criminal law [“ICL”] in the domestic context. This section aims to ground this theoretical analysis in practical examples. Recent developments in American terrorism prosecutions highlight the practical implications of applying ICL liability outside of the narrow confines of the international tribunals, and the tangible consequences that follow.¹¹²

In 2003, the U.S. commenced its first prosecutions against Guantanamo detainees. Rather than trying them before Federal courts, the U.S. elected to pursue the prosecutions of Salim Ahmed Hamdan – Osama Bin Laden’s driver – and Ali Hamza Ahmad Suliman Al Bahlul before Military Commissions (MC’s) for violations of the laws of war. Both indictments stemmed from the Military Commission Act (MCA) of 2006, which codified thirty-two offences, deemed triable by MCs.¹¹³ Both men appealed to the Court of Military Commission Review (CMCR) and, subsequently, the DC Circuit Court of Appeals, contending

crime”, used by the ICTY Appeals Chamber in *Prosecutor v. Kvočka* IT-98-30/1-T, Judgment (2 November 2001), This is emblematic of the direct attempt to incorporate international modes of liability into domestic law.

¹¹¹ Lafontaine, *Principal Liability*, supra note 63 at 1008.

¹¹² While this analysis focuses on the JCE mode of liability (as opposed to command theory/co-perpetration), given the analysis in previous sections of this paper, particularly the finding that a broad interpretation of Article 25(3) allows for vicarious liability (see pg. 20), it seems logical that the arguments would naturally extend to the ICC model. Further, it should be noted here that the U.S. is not bound by the *Rome Statute*; the use of an American case here is solely as an illustrative tool to highlight the dangers and challenges of the wholesale domestic importation of modes of liability designed for the international criminal context. The post-9/11 U.S. context serves as a particularly good example for this analysis.

¹¹³ The details of the prosecution’s, including the basis for prosecution under the Congressional power to “define and punish” and the Military Commission Act of 2006, while incredibly interesting, is outside the scope of this paper. For an intricate analysis of the manner in which these prosecutions were justified see: Alexandra Link, “Trying Terrorism: Joint Criminal Enterprise, Material Support, and the Paradox of International Criminal Law” 34 *Michigan J of Intl L* 2 (2013) 439-490 [“Link, *Trying Terrorism*”].

that, irrespective of the new provisions in the MCA, both of the “effectively inchoate offences” (conspiracy and material support for terrorism) were not violations of the customary international laws of war, and thus that the MCs thus lacked subject matter jurisdiction. The issue presented by the appeals – whether a recognized criminal’s associates may be tried for war crimes on the theory that his actions contributed to the crimes – brings to the fore the need to reconcile international liability models and domestic legal regimes.¹¹⁴

Since neither the CMCR’s statute nor any judgment explicitly recognizes any inchoate offence for war crimes, U.S. courts have sought recourse in analogy to the JCE mode of liability.¹¹⁵ This confluence in the *Al Bablul* and *Hamdan* cases analogizes the terrorist organization to the “criminal enterprise” and the provision of material support to the “contribution to the enterprise.”¹¹⁶ This analogy overlooks decisive differences in the *mens rea* and causation requirements under U.S. law for the relevant crimes.¹¹⁷

As outlined above, for JCE I, the prosecution must identify the criminal object of the common plan and prove that all members of the JCE shared the intent to bring about this common criminal goal.¹¹⁸ The basis for individual liability is thus intent, not knowledge. The charge of material support for a terrorist act, however, does not require a shared intent but only that the accused provided support with *knowledge* that the support would be used to commit the underlying crime. The fact that there is no requirement that the support be in furtherance of a particular act is antithetical to JCE liability, which requires support in furtherance of a specific common end.¹¹⁹

Additionally, the analogizing of membership in a terrorist organization with participation in a JCE essentially means that “membership” is conflated with

¹¹⁴ *Ibid* at 145.

¹¹⁵ *Ibid* at 456. In *Al Bablul*, the CMCR Panel specified that: “Assuming that [the charges alleged are violations of the law of war] and that “joint criminal enterprise” is a theory of individual criminal liability under the law of armed conflict, what, if any, impact does the “joint criminal enterprise” theory of individual criminal liability have on this Court’s determinations of whether [the charges] constitute offences triable by military commission...” *United States v Al Bablul*, 820 F Supp 2d 1141 at 1158 n 11 (CMCR 2011) (en banc), rev’d No. 11-1324 (DC Cir 25 Jan 2013) (*per curiam*).

¹¹⁶ Link, *Trying Terrorism*, *supra* note 113 at 469.

¹¹⁷ *Ibid*.

¹¹⁸ See also Gibson, *supra* note 33 at 526-527. See also *Brdanin* Case, *supra* note 41.

¹¹⁹ Link, *Trying Terrorism*, *supra* note 113 at 469.

“shared intent”: a clearly problematic conflation. Mere membership does not amount to shared intent toward a particular crime. Further as membership in this case is established by government “listing”, an element of the crime is established by government designation as opposed to through the evidentiary burden of a criminal trial.¹²⁰ Thus, a finding of individual criminal liability for the crimes of an organization based on this “membership” is one in which the charge takes as a predicate one of the key elements of the offence. The label “terrorist organization” obviates the need for the prosecution to actually prove shared criminal intent or link the accused’s mental state to the specific crime. In contrast, per the international jurisprudence, a JCE must be defined by its temporal and geographic scope, the plurality of participants, and its common criminal objective.¹²¹ In obviating these requirements it is unclear how domestic courts can determine if a crime was within the scope of a JCE, and, thus, which JCE model, and which *mens rea* standard, applies.¹²²

The problems with conflation of *mens rea* requirements bring to the fore a primary problem with material supports *actus reus* requirements: a JCE is not an entity that can be “joined.” Membership in a JCE amounts to no more than shared intent; this is irrelevant to membership in a terrorist organization.¹²³ While the concept of “joining” in domestic criminal law thus refers to the *actus reus* (i.e. through the giving of *bayat* or acting as a driver), “joining” a JCE goes to establishing the *mens rea*, it is irrelevant to the *actus reus*.¹²⁴ This is anathema to the concept of JCE, where the *purpose* of membership in the particular group is to bring about said harm.

While an abstraction from the broader purpose of this paper – i.e. to address the threat to Canada in losing legitimacy on the international stage by being seen as failing to comply with international criminal law – the *Hamdan* case illustrates a broader concern that is directly relevant to the Canadian context. The international modes of liability are doctrines designed to serve a body of law whose *purpose* is to provide accountability and justice to societies devastated by

¹²⁰ Ibid.

¹²¹ *Ibid* at 469-470. See also *Brdanin* Case, *supra* note 41 at 430.

¹²² Link, *Trying Terrorism*, *ibid* at 470.

¹²³ *Ibid*.

¹²⁴ *Ibid*.

mass atrocity.¹²⁵ As noted in section IV of this paper, it responds to crimes that are collective by nature, attempting to imbue individual criminal liability for collective action, where the theories of domestic criminal liability often prove insufficient. The purpose of these theories of liability is to expand liability's reach up, not down, the chain of culpability;¹²⁶ any move to import these theories into the mononuclear domestic context must bear this in mind.¹²⁷

INTERNATIONAL OBLIGATIONS VERSUS NATIONAL RIGHTS: POTENTIAL CHALLENGES ARISING FROM THE INDICTMENT OF CANADIANS AT THE ICC

Previously a matter of abstract theoretical debate, the normative quadrangulation discussed throughout this paper is rendered concrete by the cases of Hamdan, Al Bahlul, and other detainees whose futures appear to rely on the substantive and authoritative limitations placed on the domestic importation of international modes of liability.¹²⁸ These effects are not felt exclusively by American detainees. On 20 November 2017 the Prosecutor of the ICC, Fatou Bensouda, “requested authorization ... to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in the Islamic Republic of Afghanistan since 1 May 2003,” as well as similar crimes that have a nexus to the armed conflict in Afghanistan occurring after 1 July 2002.¹²⁹

Given Canada's role in the Afghan conflict, it is possible – if not probable – that certain Canadians may face international indictment.¹³⁰

Herein lies the danger of importation of international modes of liability into the Canadian context. As Professor Fannie LaFontaine describes in her work on the subject,

Differences between the two sets of principles [domestic and international] or gaps in either, could potentially lead to

¹²⁵ *Ibid* at 490.

¹²⁶ *Ibid* at 490.

¹²⁷ See e.g., concerns raised in *Ezpekola*, *supra* note 75.

¹²⁸ Link, *Trying Terrorism*, *supra* note 113 at 445.

¹²⁹ See Preliminary Examination, *supra* note 1.

¹³⁰ For more information on potential Canadian liability see: Craig Scott, *Afghanistan Brief*, *supra* note 1.

admissibility issues before the ICC, or at least create inconsistency in the scope of responsibility for the same crimes, depending on whether they are prosecuted in Canadian courts, or before the ICC or other international jurisdictions. For instance, if Canadian law was found *not* to contemplate a principle of liability encompassed by the *Rome Statute*, or to provide for one more limited in scope, Canada could find itself unable to prosecute in its domestic courts a person who would be punishable by the ICC for the same acts, thereby opening the door to a finding of admissibility of the case before the international body.¹³¹

If Canada proves unable to close these “gaps”, then, subject to the principle of complementarity, Canadians can be subject to ICC jurisdiction. The “theoretical” problem of reconciling these international modes of liability with the domestic context are thus far from theoretical – applying ICL sources to find criminal liability on international models outside of the narrow confines of the international criminal justice bodies has deeply practical implications.

CONCLUSION

In light of the principles developed in international criminal law with respect to individual responsibility – particularly the modes of liability developed by the international criminal courts and tribunals – this paper has aimed to assess whether and how Canadian law may be adapted to the particular “collective” nature of international crimes.

A gap in the net cast by the Canadian legal regime may be anticipated in cases where the contribution of the accused – mostly leaders but also mid-range perpetrators – will be more difficult to link to the elements of a particular crime. Their role may be essential for the realization of the common criminal plan but may be more difficult to link to the *actus reus* of the crime itself. The limited recognition of the reality of collective criminality in the domestic criminal system may impact the “perceived gravity” of certain conduct and on the attached sentences: as the *actus reus* requirements may restrict findings of liability to party

¹³¹ LaFontaine, *Principal Liability Analysis*, *supra* note 63 at 971-972.

(as opposed to principal) liability, the “indirect perpetrator” may be perceived as less culpable, may have access to defences not available to principals, and may be generally subject to less stringent punishments/a less stringent legal regime than those found principally liable.¹³²

The purpose of this paper has been to assess whether and how Canadian principles of liability can reflect the realities of international crimes, while staying true to the canons of domestic law. While the CAHWCA forces Canadian criminal law to evolve and move away from the mononuclear paradigm of criminal law, barriers to the reconciliation of domestic and international criminal law remain in place Canada’s global position has long been as a “soft-power” player; Canadian participation in the international criminal justice project was, and still is, emblematic of this role. Should Canada wish to maintain the legitimacy that stems from this role, Canadian law must adapt to the reality of international crimes. A failure to achieve both legal and normative quadrangulation with international modes of liability could mean the evasion of criminal liability by alleged war criminals, or the perception that such liability is evaded. Differences between the two sets of legal or normative principles, or gaps in either, could lead to the admissibility of issues before the ICC.¹³³ Either could be devastating to Canadian legitimacy in the international criminal law project. Whether such quadrangulation is done through principal or secondary liability is a decision for domestic lawmakers – it is frankly irrelevant to the assumption of jurisdiction based on complementarity. As this paper has shown, there is still much to do in terms of legal and normative quadrangulation; recognizing this acute gap, however, is the beginning of this exercise.

¹³² LaFontaine, Principal Liability Analysis, *ibid* at 1009-1010.

¹³³ *Ibid.*