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Exclusion at a Crossroads: The Interplay between International Criminal Law and Refugee Law in the Area of Extended Liability

Joseph Rikhof

Senior Counsel, Crimes against Humanity and War Crimes Section, Department of Justice, Canada

DIVISION OF INTERNATIONAL PROTECTION

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DIVISION OF INTERNATIONAL PROTECTION

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

CP2500, 1211 Geneva 2

Switzerland

E-mail: hqpr02@unhcr.org

Website: www.unhcr.org

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1. Introduction

Article 1F of the 1951 Refugee Convention excludes an individual from obtaining benefits ordinarily available to refugees in the country to which they have fled if:

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;[1]
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;[2]
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.[3]

The terms 'committed' and 'guilty' have been utilized in the jurisprudence of nine leading refugee-accepting countries[4] to apply concepts of extended liability. While these terms appear to be different textually, they have generally been given the same meaning by refugee tribunals and courts in these countries. In addition, given the reference to international instruments in article 1F(a), those national judicial institutions have sought a connection with the notion of extended liability as developed in international criminal law.

This paper will examine both the jurisprudence in international criminal law and domestic refugee law to assess the contours of the various forms of indirect liability, their overlap as well as some difficulties, which have been encountered in applying these principles of accountability.

2. Extended liability in international criminal law

The areas of liability which will be discussed are ordering, instigating, planning, aiding and abetting, joint criminal enterprise, co-perpetration, command responsibility and membership in a criminal organization. Concepts such as conspiracy, attempt and incitement fall outside the parameters of the paper, as they are not forms of indirect liability but independent inchoate offences.

[1] For the crimes set out in this clause, 'crimes against humanity' has been used most often while crimes against peace has been applied rarely with only one case in Belgium in relation to an Ethiopian asylum seeker (*CPRR No. 99-1280/W7769*, 6 August 2002); France is unique in that it has used art. 1F(a) primarily for genocide, art. 1F(b) for war crimes and art. 1F(c) for crimes against humanity, see for instance *CRR, 15 February 2007, 564776, Mme K. veuve H*; *CNDA, 12 February 2009, 598383, K.;* and *CRR, 23 May 2007, 577110, A.* respectively.

[2] Art. 1F(b) is used for regular crimes such as murder, assault, drug trafficking while in some countries, such as Canada (*Xie v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 250) and the Netherlands *(AbRS 30 December 2009, nr. 200902983/1)* it is also used for economic crimes such as embezzlement.

[3] Art. 1F(b) used to be the mainstay for terrorist activities but that changed in 2001 when the United Nations Security Council in Resolution 1373 equated terrorism with acts against the purposes and principles of the United Nations with the result that a number of countries now use art. 1F(c) for terrorist activities, in addition to human rights violations, namely Belgium, Canada, France, Germany and the Netherlands.

[4] Australia, Belgium, Canada, France, Germany, the Netherlands, New Zealand, the United Kingdom and the United States.

2.1 Ordering

Ordering implies that a person in a position of authority uses that authority to convince another to commit an offence,[5] with the intent that a crime be committed in the realization of that act or omission or with the awareness of the substantial likelihood that a crime would be committed in the realization of that act or omission.[6]

For the person ordering the crime to be held responsible, it is also required that the person who received the order actually proceeds to commit the offence.[7] As well, a causal link between the act of ordering and the physical perpetration of a crime needs to be demonstrated in that the order must have had direct and substantial effect on the commission of the illegal act.[8]

While ordering entails a superior-subordinate relationship between the person giving the order and the person carrying it out,[9] effective control will not have to be proven as is not a necessary element of this mode of criminal participation nor is a formal superior-subordinate relationship required for a finding of ordering so long as the person possessed the authority to order, including *de facto* authority.[10] It is not necessary that an order be given in writing or in any particular form.[11] Presence at the scene of the crime is not required for this type of criminal responsibility.[12]

2.2 Instigating

Instigating entails prompting another to commit an offence[13] with the intent that a crime be committed or prompted an act or omission with the awareness of the substantial likelihood that a crime would be committed in the realization of that act or omission.[14] A causal relationship between the instigation and the physical perpetration of the crime is required in the sense that the instigation contributed substantially to the conduct of the person

[5] *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment, 28 November 2007, para. 481 ('*Nahimana* Appeals Judgment'); *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Judgment, 20 October 2010, para. 213 ('*Kalimanzira* Appeals Judgment'); *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Judgment, 23 February 2011, para. 1871 ('*Đorđević* Trial Judgment').

[6] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, paras 41-42 ('*Blaškić* Appeals Judgment'); *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-T, Judgment, 1 November 2010, para. 620 ('*Kanyarukiga* Trial Judgment'); *Đorđević* Trial Judgment, note 5 above, para. 1871.

[7] *Nahimana* Appeals Judgment, note 5 above, para. 481; *Đorđević* Trial Judgment note 5 above, para. 1871.

[8] *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-A, Judgment, 19 September 2005, para. 76 ('*Kamuhanda* Appeals Judgment'); *Đorđević* Trial Judgment, note 5 above, para. 1871.

[9] *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgment, 20 May 2005, para. 360 ('*Semanza* Appeals Judgment').

[10] *Semanza* Appeals Judgment, note 9 above, para. 361; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Judgment, 19 May 2010, para. 164 ('*Boškoski and Tarčulovski* Appeals Judgment'); *Kanyarukiga* Trial Judgment, note 6 above, para. 620; *Đorđević* Trial Judgment, note 5 above, para. 1871.

[11] *Kamuhanda* Appeals Judgment, note 8 above, para. 76; *Boškoski and Tarčulovski* Appeals Judgment, note 10 above, para. 160; *Đorđević* Trial Judgment, note 5 above, para. 1871.

[12] *Boškoski and Tarčulovski* Appeals Judgment, note 10 above, para. 125.

[13] *Nahimana* Appeals Judgment, note 5 above, para. 440; *Đorđević* Trial Judgment, note 5 above, para. 1870.

[14] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, paras 27, 30 ('*Kordić and Čerkez* Appeals Judgment'); *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment, 28 May 2008, para. 51 ('*CDF* Appeals Judgment'); *Kanyarukiga* Trial Judgment, note 6 above, para. 619; *Đorđević* Trial Judgment, note 5 above, para. 1870.

committing the crime.[15] However, it will not be necessary to prove that the crime would not have been perpetrated without the instigation.[16]

Both express and implied conduct may constitute instigation.[17] Presence at the scene of the crime is not required for this type of criminal responsibility.[18]

2.3 Planning

Planning requires that one or more persons plan or design the criminal conduct constituting one or more crimes, which are later actually perpetrated with at least the awareness of the substantial likelihood that a crime will be committed in the execution of that plan.[19] It implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[20]

The level of participation in the planning of the accused must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.[21] The person who perpetrated the *actus reus* of the offence must have acted in furtherance of the plan.[22] In that respect, it will be sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[23] Presence at the scene of the crime is not required for this type of criminal responsibility.[24]

2.4 Aiding and abetting[25]

The *actus reus* of aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of an international crime.[26]

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[15] *Nahimana* Appeals Judgment, note 5 above, para. 678; *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-T, Judgment, 5 July 2010, para. 428; *Đorđević* Trial Judgment, note 5 above, para. 1870.

[16] *Kordić and Čerkez* Appeals Judgment, note 14 above, para. 27; *Đorđević* Trial Judgment, note 5 above, para. 1870.

[17] *Kamuhanda* Appeals Judgment, note 8 above, para. 593; *Boškoski and Tarčulovski* Appeals Judgment, note 10 above, para. 157.

[18] *Boškoski and Tarčulovski* Appeals Judgment, note 10 above, para. 125.

[19] *Nahimana* Appeals Judgment, note 5 above, para. 479; *Prosecutor v, Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A, Judgment, 22 February 2008, para. 301 ('*AFRC* Appeals Judgment'); *Đorđević* Trial Judgment, note 5 above, para. 1869.

[20] *Kordić and Čerkez* Appeals Judgment, note 14 above, para. 26.

[21] *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Judgment, 13 December 2006, para. 303 ('*Seromba* Trial Judgment'); *AFRC* Appeals Judgment, note 19 above, para. 301.

[22] *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, 5 December 2003, para. 168.

[23] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010, para. 1006 ('*Popović et al.* Trial Judgment'); *Kanyarukiga* Trial Judgment, note 6 above, para. 618.

[24] *Boškoski and Tarčulovski* Appeals Judgment, note 10 above, para. 125.

[25] While the terms 'aiding and abetting' are usually used in conjunction, the two notions are slightly different in that aiding refers to some form of physical assistance in the commission of the crime while abetting connotes encouragement or another form of moral suasion, see W. A. Schabas, *The International Criminal Court: A Commentary of the Rome Statute* (Oxford: OUP, 2010) 434.

[26] *Nahimana* Appeals Judgment, note 5 above, para. 482; *Popović et al.* Trial Judgment, note 23 above, para. 1014; *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Judgment, 20 October 2010, para. 52 ('*Rukundo* Appeals Judgment') and *Kanyarukiga* Trial Judgment, note 6 above, para. 621. There had been disagreement at the Trial Chamber level as to whether the contribution had to be 'direct and substantial'. The requirement of 'direct' was added in the cases of *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, 7 May 1997, paras 730, 738 and *Prosecutor v. Mucić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, paras 325–327 while it was not present in *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, paras 225, 234; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, para. 61; *Prosecutor v.*

Either aiding or abetting alone is sufficient to render the perpetrator criminally liable.[27] Aiding and abetting can be committed at a time and place removed from the actual crime.[28]

Mere presence at the scene of a crime can be an example of an omission. While such presence of an individual in a position of superior authority does not suffice to conclude that he encouraged or supported the crime, the presence of a person with superior authority, such as a military commander, can be a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.[29] Where the presence of a person bestows legitimacy on, or provides encouragement to, the actual perpetrator, this may be sufficient to constitute aiding and abetting.[30] Aiding and abetting is also possible where a commander allows the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.[31]

The *mens rea* required for aiding and abetting is the knowledge that the practical assistance, encouragement, or moral support assists or facilitates the commission of the offence though the accused does not need to have the intent to commit the crime.[32] It is not necessary that the aider and abettor knows the precise crime that was intended and that was committed but he must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind.[33] However, the aider and abettor does need not share the intent of the principal offender[34] nor does he even need to know who is committing the crime.[35]

With respect to aiding and abetting genocide, the *Akayesu* case found that this form of commission is present if a person knowingly aided or abetted one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the aider and abettor himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[36]

Rutaganda, Case No. ICTR-96-3-T, Judgment, 6 December 1999, para. 42; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, 27 January 2000, para. 126 and *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, paras 283–288. The directness requirement was eliminated in *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, para. 229 ('*Tadić* Appeals Judgment'); see also *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgment, 1 June 2001, paras 191-194.

[27] *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004, para. 102 ('*Vasiljević* Appeals Judgment').

[28] *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, paras 154, 157-158 ('*Blagojević & Jokić* Appeals Judgment'); *CDF* Appeals Judgment, note 14 above, para. 72.

[29] *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Judgment, 10 July 2008, para. 402 ('*Boškoski and Tarčulovski* Trial Judgment'); *Seromba* Trial Judgment, note 21 above, para. 308.

[30] *Boškoski and Tarčulovski* Trial Judgment, note 29 above, para. 402; *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, 11 September 2006, para. 22.

[31] *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Judgment, 18 December 2008, para. 2009.

[32] *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, 3 April 2007, para. 484 ('*Brđanin* Appeals Judgment'); *Popović et al.* Trial Judgment, note 23 above, para. 1016. It would appear that art. 25(3)(c) of the ICC Statute imposes a higher level of *mens rea* by adding the words 'for the purpose of facilitating the commission'.

[33] *Nahimana* Appeals Judgment, note 5 above, para. 482; *AFRC* Appeals Judgment, note 19 above, paras 242-243; *CDF* Appeals Judgment, note 14 above, para. 367.

[34] *Seromba* Trial Judgment, note 21 above, para. 309.

[35] *Brđanin* Appeals Judgment, note 32 above, para. 355.

[36] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 545 ('*Akayesu* Trial Judgment'); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 140 ('*Krstić* Appeals Judgment'); *Rukundo* Appeals Judgment, note 26 above, paras 52, 61 and *Kalimanzira* Appeals Judgment, note

2.5 Complicity

While the terms complicity and aiding and abetting appear to be similar,[37] they have been the subjects of debate in the ICTY and ICTR jurisprudence. Since the ICTY and ICTR Statutes contain a specific provision with respect to complicity in genocide,[38] while at the same time having a general provision of extended liability, which includes aiding and abetting for genocide,[39] the question arose whether these two notions overlap.

The answer provided by the case law was that aiding and abetting is only one aspect of the larger notion of complicity and that for genocide, the *mens rea* for complicity, which goes beyond aiding and abetting, could possibly be the narrower, specific intent of genocide.[40] It has also been said that complicity in genocide requires a positive act, while with aiding and abetting, the same crime can be accomplished by failing to act or refraining from taking action.[41]

The question remains unresolved at the ICTY and ICTR[42] but has been dealt with in the ICC Statute by separating the crime of genocide and the means of committing such a crime and by deleting the term 'complicity'.

2.6 Joint criminal enterprise

With respect to the legal aspects of this concept, in general the ICTY Appeals Chamber jurisprudence has distinguished three types of JCE.[43]

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

The third, 'extended' form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose. The requisite *mens rea* for the extended form is

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5 above, para. 220; see *contra:* Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-II-OI/I/AC/RI76bis, Appeals Chamber, 16 February 2011, para. 249.

[37] *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgment, 27 January 2005, para. 777.

[38] Art. 4(3)(e) of the ICTY Statute and 2(3)(e) of the ICTR Statute.

[39] Art. 7(1) of the ICTY Statute and art. 6(1) of the ICTR Statute.

[40] *Krstić* Appeals Judgment, note 36 above, paras 137–139; *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004, para. 371; *Blagojević & Jokić* Appeals Judgment, note 28 above, paras 679, 784 and *Prosecutor v. Krajišnik*, Case No. IT-00-39&40-T, Judgment, 28 November 2006, paras 864-866. See, however, Partial Dissenting Opinion of Judge Shahabuddeen in *Krstić* Appeals Judgment, note 36 above, paras 59-68; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras 290–297 and *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006, para. 6.

[41] *Akayesu* Trial Judgment, note 36 above, paras 547–548; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, 27 January 2000, para. 183 ('*Musema* Trial Judgment').

[42] *Krstić* Appeals Judgment, note 36 above, para. 142, note 247.

[43] *Tadić* Appeals Judgment, note 26 above, para. 227; *Vasiljević* Appeals Judgment, note 27 above, para. 100; *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 64 ('*Stakić* Appeals Judgment').

twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.

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

- a plurality of persons, who do not need to be organized in a military, political or administrative structure;
- the existence of a common plan, design or purpose which amounts to or involves the commission of a crime. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;
- participation of the accused in the common design involving the perpetration of one of the international crimes. This participation need not involve commission of a specific crime under one of those provisions but may take the form of assistance in, or contribution to, the execution of the common plan or purpose; the participation in the enterprise must be significant, meaning an act or omission that makes an enterprise efficient or effective; e.g. a participation that enables the system to run more smoothly or without disruption.[44]

More recently, some refinements and clarifications have been made to these broad principles. In general, the doctrine of joint criminal enterprise can apply to high level functionaries[45] and is not restricted to small-scale cases but can also apply to large criminal enterprises.[46] Conversely, where the common purpose includes crimes committed over a wide geographical area, a person may be found criminally responsible for his participation in the enterprise, even if his contribution to the enterprise occurred only in a much smaller geographical area.[47]

With respect to the first two categories, it has been made clear that mere membership in the group having a common criminal purpose is not sufficient.[48] However, it is not required that each member in the JCE be identified by name but it can be sufficient to refer to categories or groups of persons.[49] The common criminal objective of the JCE may also evolve over time, as long as the members agreed on this modification of means. It means that the crimes that make up the common purpose may evolve and change over time and as such the JCE may have different participants at different times.[50]

[44] *Tadić* Appeals Judgment, note 26 above, para. 227; *Vasiljević* Appeals Judgment, note 27 above, para. 100; *Stakić* Appeals Judgment, note 43 above, para. 64.
[45] *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgment, 17 March 2009, para. 194 ('*Krajišnik* Appeals Judgment').
[46] *Brđanin* Appeals Judgment, note 32 above, para. 425.
[47] *Tadić* Appeals Judgment, note 26 above, para. 199 and *Popović et al.* Trial Judgment, note 23 above, para. 1024.
[48] *Prosecutor v. Brđanin*, Case No. IT-99-36, Judgment, 1 September 2004, para. 263.
[49] *Krajišnik* Appeals Judgment, note 45 above, para. 156.
[50] *Krajišnik* Appeals Judgment, note 45 above, para. 163.

It is not necessary that the persons carrying out the *actus reus* of the crime forming part of the common purpose be participants in or members of the JCE. Consequently, persons carrying out the crime need not share the intent of the crime with the participants in the common purpose. Nor is the mental state of persons carrying out the crime a determinative factor in finding the requisite intent for the participants in a JCE. But if a JCE member used a non-member to commit a crime, that crime must be traced back to the member of the JCE.[51]

With respect to the contribution factor, the participation or contribution of an accused to the common purpose need not be substantive but it should at least be a significant contribution to the crimes committed.[52] The fact that different persons might have different levels of involvement does not negate the existence of a JCE and a different level of involvement can be dealt with at the sentencing stage.[53]

With respect to the third category of JCE a person:

> can only be held responsible for a crime outside the common purpose, if under the circumstances of the case: (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk (*dolus eventualis*). The crime must be shown to have been foreseeable to the accused in particular.[54]

Willingly taking a risk means a decision to participate in a JCE with the awareness that a crime act was a possible consequence of the implementation of that enterprise.[55] For third category JCE liability, the accused does not need to possess the requisite intent for the crime falling outside the common purpose. This also applies to specific intent crimes. The mental state of the person or persons carrying out the extended crime is not relevant for the finding of the mental state of the accused, but is determinative to the finding of which extended crime was committed.[56] According to ICTY case-law, JCE can also be a basis for liability in genocide, including the third category.[57]

JCE has been used outside the ICTY and ICTR context in the proceedings of the Sierra Leone Special Court[58] as well as in the Extraordinary Chambers in the Court of Cambodia, although in the latter institution it was decided that the third category was not part of customary international law nor was it included in the law of Cambodia during the time for which the Chambers has jurisdiction, in the 1970s.[59]

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[51] *Krajišnik* Appeals Judgment, note 45 above, paras 225-226.
[52] *Krajišnik* Appeals Judgment, note 45 above, para. 215. This implies a lesser level of contribution for JCE as compared to aiding and abetting.
[53] *Brđanin* Appeals Judgment, note 32 above, para. 432.
[54] *Brđanin* Appeals Judgment, note 32 above, para. 365
[55] *Brđanin* Appeals Judgment, note 32 above, para. 411.
[56] *Popović et al.* Trial Judgment, note 23 above, para. 1031.
[57] *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras 5-10.
[58] *AFRC* Appeals Judgment, note 19 above, paras 72-86 and *Prosecutor v. Sesay et al.*, Case No. SCSL-04-14-A, Judgment, 26 October 2009, paras 295-306 and 312-318.
[59] *Co-Prosecutors v. Nuon*, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras 69-72 in regards to JCE I and II and paras 77, 83 and 87 for JCE III; see also *Kaing Guek Eav alias Duch*. Case File 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, paras 504-513.

The ICC Statute includes a concept similar to JCE, namely common purpose, the formulation of which was based on the 1997 International Convention for the Suppression of Terrorist Bombings and which is generally seen as encompassing JCE I and II but not the 'outer limits'[60] of JCE III.[61]

2.7 Co-perpetration

While the ICTY and to a lesser extent, the ICTR have used JCE as a key tool to hold individuals responsible for the commission of international crimes,[62] the ICC seems to have embraced the concept of co-perpetration.[63]

There are three forms of committing a crime as a perpetrator under the ICC Statute, namely where a person:

> (a) physically carries out the objective elements of the offence (commission of the crime in person, or direct perpetration);
>
> (b) has, along with others, control over the offence by reason of the essential tasks assigned to him or her (commission of the crime jointly with others, or co-perpetration); or
>
> c) controls the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration.[64]

The distinction between principals and accessories in a situation with a plurality of persons can also be made along a spectrum, in which different aspects of the involvement are emphasized. If the objective manifestation of the crime (in that all the elements are carried out by the same person) is the focal point of investigation this can be called an objective

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[60] Art. 25.3(d). See R. Cryer, H. Friman, D. Robinson and E. Wilmhurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: CUP, 2010) 374; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T.M.C. Asser Press, 2003) 108-109; and F. Lafontaine, 'Parties to Offences under the Canadian Crimes against Humanity and War Crimes Act: An Analysis of Principal Liability and Complicity' (2009) 50 *Les Cahiers de Droit* 967, 998.

[61] There might be some clarification on this issue as one of the most recent arrest warrants issued by the ICC was exclusively based on the common purpose provision of the ICC Statute, charging the Executive Secretary of the FDLR in the Democratic Republic of the Congo with war crimes and crimes against humanity committed by this armed group, see *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10, Warrant of Arrest for Callixte Mbarushimana, 28 September 2010, para. 8.

[62] G. Boas, J.L. Bischoff and N.L. Reid, *Forms of Responsibility in International Criminal Law* (Cambridge: CUP, 2007) 420-422.

[63] Art. 25.3(a) of the ICC Statute, which allows for direct co-perpetration ('jointly with another') or indirect co-perpetration ('through another person'), and has been used in almost half of the warrants for arrest issued. Co-perpetration was rejected by a majority of judges of the Appeals Chamber of the ICTY in *Stakić* Appeals Judgment, note 43 above, paras 58-63; Separate Opinion of Judge Shahabuddeen in *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment, 7 July 2006, paras 42-52; Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide in *Prosecutor v. Gacumbit*si, Case No. ICTR-2001-64-A, Judgment, 7 July 2006, paras 17-27; Dissenting Opinion of Judge Schomburg in *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgment, 28 November 2006, paras 11-21.

[64] *Prosecutor v. Lubanga*, *Situation in the DRC*, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, 29 January 2007, para. 332 ('*Lubanga* Confirmation of the Charges Decision'); *Prosecutor v. Katanga and Chui*, *Situation in the DRC*, Case No. ICC-01/04-01/07-717, Decision of the Confirmation of the Charges, 30 September 2008, para. 488 ('*Katanga and Chui* Confirmation of the Charges Decision'); *Prosecutor v. Abu Garda*, *Situation in Darfur, Sudan*, Case No. ICC-02/05-02/09-243, Decision of the Confirmation of the Charges, 8 February 2010, para. 153 ('*Abu Garda* Confirmation of the Charges Decision').

approach with a person liable as a principal. The subjective approach does not primarily examine the level of contribution but instead the shared intent to carry out a crime, which is done in the JCE or common purpose doctrine. Co-perpetration focuses on the degree of control carried out by a person who is removed from the scene of the crime but has control or is the mastermind behind the commission of the offences.[65]

The *actus reus* of co-perpetration is twofold, the existence of an agreement or common plan between two or more persons and the co-ordinated essential contribution by each of these persons resulting in the commission of a crime.[66] The *mens rea* of this type of liability has three components, namely, the subjective element of the co-perpetrators with respect to underlying crime; secondly, the fact that the co-perpetrators are all mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime; and thirdly, the fact that the persons are aware of the factual circumstances enabling them to jointly control the crime.[67]

2.8 Command/superior responsibility

A superior will be subject to individual criminal liability if the following elements exist: a superior-subordinate relationship; the superior knew or had reason to know that a criminal act was about to be, was being or had been committed, and failure to take necessary and reasonable measures to prevent or punish the conduct in question.[68]

A superior-subordinate relationship exists where a superior has effective control over a subordinate, which means that the superior has the material ability to prevent or punish the subordinate's criminal conduct.[69] Superior responsibility can arise by virtue of the superior's *de jure* or *de facto* power over the relevant subordinate.[70] The possession of *de jure* power may not suffice for the finding of superior responsibility if it does not manifest itself in effective control.[71] A superior cannot incur responsibility for crimes committed by a subordinate before he assumed his position as superior.[72] A superior may however incur

[65] *Lubanga* Confirmation of the Charges Decision, note 64 above, paras 327-331.
[66] *Lubanga* Confirmation of the Charges Decision, note 64 above, paras 343-348; *Katanga and Chui* Confirmation of the Charges Decision, note 64 above, paras 519-526; *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-424, Confirmation of the Charges Decision, 15 June 2009, para. 350 ('*Bemba* Confirmation of the Charges Decision'); *Abu Garda* Confirmation of the Charges Decision, note 64 above, para.160.
[67] *Lubanga* Confirmation of the Charges Decision, note 64 above, paras 349-350; *Katanga and Chui* Confirmation of the Charges Decision, note 64 above, paras 527-528, 533-534 and 538-539; *Bemba* Confirmation of the Charges Decision, note 66 above, para. 351; *Abu Garda* Confirmation of the Charges Decision, note 64 above, para. 161.
[68] *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgment, 3 July 2008, para. 18 ('*Orić* Appeals Judgment'). For a more detailed description see art. 28 of the ICC Statute.
[69] *Orić* Appeals Judgment, note 68 above, para. 20. In the Rwandan context it was held that a priest can have effective control, see *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, Judgment, 17 November 2009, paras 819-828.
[70] *Prosecutor v. Mucić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, paras 195-197.
[71] *Prosecutor v. Halilović*, Case No. IT-01-48-A, Judgment, 16 October 2007, para. 204.
[72] *Prosecutor v. Hadžihasanović et al*., Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras 37-56 and *Prosecutor v. Halilović*, Case No. IT-01-48-A, Judgment, 16 October 2007, para. 67;

superior responsibility no matter how far down the chain of authority the subordinate may be[73] and even if the subordinate has participated in the crimes through intermediaries.[74]

With respect to the second requirement, this element is fulfilled if a superior knew or had reason to know that a subordinate's criminal act had been carried out, was taking place or was about the happen.[75] A superior had reason to know only if information was available to him, which would have put him on notice of offences committed by subordinates.[76] The 'reason to know standard' is met if the superior possessed information sufficiently alarming to justify further inquiry.[77]

With respect to the third requirement, necessary measures means appropriate action, which show that the superior genuinely tried to prevent or punish while reasonable measures are those reasonably falling within the material powers of the superior.[78] A superior is not expected to perform the impossible but must use every means within his ability.[79] Such measures may include carrying out an investigation, transmitting information in a superior's possession to the proper administrative or prosecutorial authorities, issuing special orders aimed at bringing unlawful practices of subordinates in compliance with the rules of war, protesting against or criticizing criminal action, reporting the matter to the competent authorities or insisting before a superior authority that immediate action be taken.[80]

2.9 Membership

Membership was both a form of accessory liability as well as an inchoate offence after the Second World War. [81] The Statute of the International Military Tribunal at Nuremberg allowed it to declare any organizations criminal and four organizations were given this predicate, the Leadership Corps of the Nazi Party, the Gestapo, the SD and the SS[82] while this concept was also applied to other organizations in national legislation and jurisprudence.[83] Under this system a person was held liable if he was found to belong to a designated organization and had knowledge that the organization was used for criminal purposes.

This concept has fallen in disuse since then,[84] but the judicial reasoning for not applying this concept is unclear. The discussion of membership was part of developing the JCE approach

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Blaškić Appeals Judgment, note 6 above, para. 67.

[74] *Orić* Appeals Judgment, note 68 above, para. 20.

[75] *Kordić and Čerkez* Appeals Judgment, note 14 above, para. 839.

[76] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, 17 September 2003, para. 156.

[77] *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008, para. 298; *Popović et al.* Trial Judgment, note 24 above, para. 1041.

[78] *Orić* Appeals Judgment, note 68 above, para. 177.

[79] *Popović et al.* Trial Judgment, note 23 above, para. 1043.

[80] *Popović et al.* Trial Judgment, note 23 above, para. 1045.

[81] For a detailed analysis, see van Sliedregt, note 60 above, 20-28 and S. Darcy, *Collective Responsibility and Accountability Under International Law* (Leiden: Transnational Publishers, 2007) 257-291.

[82] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, Volume XXII, 505, 511, and 516-517; Darcy, note 81 above, 278.

[83] Van Sliedregt, note 60 above, 20-28 and Darcy, note 81 above, 26-28 referring to legislation in Norway, France and the Netherlands and decisions by Polish courts and U.S. Military courts in occupied Germany with respect to concentration camps as criminal organizations.

[84] There have been some musings about this type of liability in academic literature and as a result of a French proposal to include such a concept in the Statute of the ICTY; see Darcy, note 81 above, 282-284 and A. M.

and in that context it has been made clear that mere membership in a JCE without further plan or activities is not sufficient to attract liability.[85]

There has been one unequivocal comment about the notion of membership in the ICTY case law, namely in the *Stakić* case where the Chamber stated:

> joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege.*[86]

This judgment refers to a decision by the Appeals Chamber, which comes to the same conclusion but in doing so makes mention of the explanatory report of the Secretary-General establishing the ICTY, including the following sentence: 'the Secretary General believes that this concept should not be *retained* in regards to the International Tribunal'.[87] This could be interpreted as an acknowledgment that membership in criminal organizations was part of international criminal law in 1993 but that for jurisdictional reasons it was deemed not desirable to include it in the Statute of the ICTY.[88] The *Stakić* decision does not refer to this part of the Appeals Chamber's decision and does not provide any further analysis of this statement nor makes any reference to the practice in this regard after the Second World War.[89]

During the negotiations of the ICC Statute, France made a proposal to include a provision dealing with criminal organizations as part of the debate to have legal persons fall within jurisdiction of the ICC but there was not sufficient support to make either variation part of the Statute.[90]

3. Refugee law

3.1 General

The most common types of extended liability used at the domestic level have been aiding and abetting and common/shared purpose while at times presence at the scene of the crime and command responsibility have been given some attention. Until recently, there has been very little reference made to international criminal law when developing concepts of extended

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Danner and J. S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 118.

[85] *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, para. 281; *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgment, 17 October 2003, para. 158; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, para. 263. See also C. Damgaard, *Individual Criminal Responsibility for Core International Crimes, Selected Pertinent Issues* (Berlin-Heidelberg: Springer Verlag, 2008) 192-193.

[86] *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003, para. 433.

[87] *Prosecutor v. Milutinović*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paras 24-26 ('*Milutinović* JCE Jurisdiction Appeals Decision'); the report referred to is the *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc. S/25704, 3 May 1993, para. 51.

[88] *Milutinović* JCE Jurisdiction Decision, note 87 above, para. 26.

[89] The judgment is not clear whether membership is a crime or a mode of liability. Although in the excerpt it speaks of membership as a crime, it also equates this notion with JCE.

[90] Darcy, note 81 above, 283-284; Schabas, note 25 above, 425-427.

liability in domestic refugee law[91] unlike the approach taken with respect to parameters of the international crimes of war crimes and crimes against humanity.

The jurisprudence in Canada, the Netherlands, New Zealand and the U.S. and a manual in the U.K. are of the view that presence at an international crime can amount to complicity if this presence was with authority (Canada,[92] France[93]), with influence (the Netherlands[94]), of long duration and with a view to encourage the perpetrators (New Zealand[95]), or if such presence impedes the movement of those persecuted or otherwise subjects them to an increased risk of harm (U.S.[96]). Acquiescence or inaction would not result in liability according to Canadian[97] and U.S.[98] case law.

Aiding and abetting is universally accepted under the headings of participation, furthering, personal and knowing participating, assisting, being integral or actively involved in an organization, all of which require a substantial contribution to international crimes with a knowledge that these crimes would occur. Activities such a providing information or intelligence about a person resulting in harm have been considered complicity by the courts or tribunals in all countries,[99] except France, Germany and the U.K., while activities such as financing (Canada,[100] New Zealand[101]), arresting a person and handing the person over (Belgium,[102] Canada,[103] The Netherlands,[104] New Zealand,[105] and the U.S.[106]) and providing support functions (Australia,[107] Canada,[108] France,[109] Germany,[110] the Netherlands,[111] and the U.S.[112]) have also attracted negative attention from the courts.

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[91] The seminal case dealing with complicity, the *Ramirez* case ([1992] 2 F.C. 306) at 317 also relied on the Charter of the IMT to set out the parameters of complicity, including the provision dealing with membership (albeit indirectly by referring to A. Grahl-Madsen, *The Status of Refugee in International Law, Volume I, The Status of Refugees in International Law* (Leiden: A.W. Sijthoff, 1966) 277). Also, the common purpose enunciation in a number of countries bears some similarity to an early ICTY case, namely *Prosecutor v. Kvočka* Case No. IT-98-30/1-T, Judgment, 2 November 2001, paras 285-286, although this case has not been mentioned in national refugee jurisprudence.

[92] *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306.

[93] *CNDA, 15 July 2009, 549950/05024108*, N. alias N.

[94] *AbRS 12 December 2003, nr. 200305099/1*.

[95] *RSAA Appeal No. 72635*, 6 September 2002.

[96] *Doe v. Gonzalez*, 484 F.3d 445 (7th Circuit, 2007); *Ntamack v. Holder*, 372 Fed. Appx. 407 (4th Circuit, 2010).

[97] *Moreno v. Canada (Minister of Employment and Immigration)* (C.A.), [1994] 1 F.C. 298.

[98] *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814-15 (BIA 1988).

[99] *SRNN and Department of Immigration and Multicultural Affairs* [2000] AATA 983 (Australia); *CE No. 186.913*, 8 October 2008 (Belgium); *Harb v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 39 (Canada); *AbRS 2 August 2004, nr. 200401637/1* (The Netherlands); *RSAA Appeal No. 73823*, 11 August 2003 (New Zealand); *Higuit v. Gonzales*, 433 F.3d 417 (4th Circuit, 2006) (the U.S.).

[100] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 867.

[101] *RSAA Appeal No. 75896*, 10 November 2006.

[102] *CCE No. 30.244*, 31 July 2009.

[103] *Januario v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 527.

[104] *AbRS 31 August 2005, nr. 200502650/1*.

[105] *RSAA Appeal No. 73343*, 28 November 2002.

[106] *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Circuit, 2005).

[107] *SZCWP v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 9.

[108] *Ordonez v. Canada (Minister of Citizenship and Immigration)*, IMM-2821-99.

[109] *CRR, 13 April 2005, 375214, S*.

[110] Asylum Procedure Act, section 3(2), last sentence.

Command responsibility has been given some attention in Canada by saying that the more senior a person is the more likely that person will be complicit[113] and in Australia where the courts have examined the question whether a person had a position of authority to determine complicity.[114]

When employing the common/shared purpose approach, the national courts or tribunals did not use the international criminal law JCE analysis to find liability, at least not until 2009. This category of complicity, called shared or common purpose (Australia, Canada, New Zealand) or sometimes joint purpose (Australia) in the jurisprudence, which have also been slotted under the general personal and knowing participation rubric (Belgium and the Netherlands) or even more generally as part of committed in 1F(a) (France) has not been conceptually analyzed in any of the countries which make use of this notion but instead assessed a number of factors to determine whether the presence of such factors would result in liability. It would appear that in the cases examined, when using these factors to assess almost intuitively whether an association with a nefarious group or organization amounted to culpable exclusion, would have yielded a similar result as when using a formal JCE analysis.

Factors examined have been: the manner in which a person joined an organization (Belgium,[115] Canada,[116] The Netherlands,[117] U.K.[118]); the nature of the organization (Belgium,[119] Canada,[120] France,[121] the Netherlands,[122] U.K.[123]), the size of the organization (U.K.[124]), whether the organization was proscribed and by whom (U.K.[125]), the rank obtained in the organization (Belgium,[126] Canada,[127] France,[128] New Zealand,[129] the Netherlands,[130] U.K.[131]), the standing or influence in the organization (the Netherlands,[132] U.K.[133]), the time

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[111] *Rb, The Hague, Awb 02/63919*, 15 September 2005.

[112] *Im v. Gonzales*, 497 F.3d 990 (9th Circuit, 2007); *Parlak v. Holder*, 578 F.3d 457 (6th Circuit 2009).

[113] *Sivakumar v. Canada* (Minister of Employment and Immigration), [1994] 1 F.C. 433.

[114] *WAKN v. Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1245.

[115] *CCE No. 2055*, 27 September 2007.

[116] *Fabela v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1028.

[117] *Rb, The Hague, Awb 01/8334*, 2 June 2003.

[118] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15.

[119] *CCE No. 25.649*, 3 April 2009.

[120] *Ponce Vivar v. Canada (Public Safety and Emergency Preparedness)* 2007 FC 286.

[121] *CRR, 15 February 2007, 564776, Mme K. veuve H.*

[122] *Rb, The Hague, Awb 01/17246*, 13 November 2002.

[123] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15.

[124] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15.

[125] *Ibid.*

[126] *CCE No. 25.061*, 26 March 2009.

[127] *Justino v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1138.

[128] *CRR, 21 March 2003, 352817, Ntilikina*.

[129] *RSAA Appeal No. 1248/93*, 31 July 1995.

[130] *AbRS 23 July 2004, nr. 200402639/1*.

[131] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15.

[132] *Rb, The Hague, Awb 03/38359*, 31 December 2004.

[133] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15.

served (Belgium,[134] Canada,[135] Netherlands,[136] New Zealand,[137] U.K.[138]), the person's age (Canada[139]), the manner in which a person disassociated him or herself from the organization (Canada,[140] France,[141] New Zealand,[142] the Netherlands,[143] U.K.[144]). Not all factors are of the same significance (Canada[145]) nor are they exhaustive (U.K.[146]). The U.S. has not examined this notion in its courts, most likely because of the wording in its enabling statute.

Membership as a form of extended liability is in flux. Canada,[147] New Zealand[148] and the U.K.[149] had readily accepted that membership in an organization dedicated to a limited, brutal purpose can amount to a rebuttable presumption for complicity until the decision of the Supreme Court in the U.K. in 2010 (where this notion was rejected *obiter*) while the courts in the U.S. are divided on this issue in that even though the statement that membership is not participation has been repeated in several cases, two courts are of the view that membership in an organization, which complete existence was premised upon persecution could amount to aiding and abetting.[150]

The courts in Australia have rejected this notion, albeit again in *obiter* and although while doing so they have provided a definition of association as a form of complicity (a link to an organization),[151] which is very similar to the notion of membership (institutional link accompanied by more than a nominal involvement) given by the Federal Court of Appeal in Canada.[152]

On the European continent, Belgian[153] and French jurisprudence[154] have rejected this notion while in the Netherlands a unique approach has been developed outside the judicial system. In the latter country, the Minister in charge of refugee and immigration matters can designate

[134] *CCE No. 2055*, 27 September 2007.
[135] *Torres Rubianes v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1140
[136] *Rb, The Hague, Awb 01/8334*, 2 June 2003.
[137] *RSAA Appeal No. 74129*, 29 July 2005.
[138] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15.
[139] *Bedoya v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1092.
[140] *Ardila v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1518.
[141] *CRR, 16 December 2003, 420926, Rwamucyo.*
[142] *RSAA Appeal No. 71398*, 10 February 2000.
[143] *Rb, The Hague, Awb 10/4388*, 23 December 2010.
[144] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)* [2010] UKSC 15.
[145] *Kasturiarachchi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 295.
[146] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)*, [2010] UKSC 15.
[147] *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306.
[148] *Sequeiros Garate v. Refugee Status Appeals Authority, M826/97*, High Court, 9 October 1997.
[149] *JS (Sri Lanka) and Secretary of State for the Home Department* [2009] EWCA Civ 364.
[150] *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Circuit, 2005) and *Gao v. U.S. Attorney General*, 500 F.3d 93 (2nd Circuit 2007).
[151] *Minister for Immigration and Citizenship v. Haneef* [2007] FCAFC 203.
[152] *Harb v. Canada (Minister of Citizenship and Immigration)* [2003] FCA 39.
[153] *CPRR No. 04-2088/E666*, 22 February 2006.
[154] *CE, 25 March 1998, 170172, Mahboub*.

certain categories of functionaries in specific regimes against whom personal and knowing participation can be levelled as a rebuttable presumption.[155]

The jurisprudence examined in nine countries around the world with respect to extended liability in 1F(a), apart from the membership, is remarkably consistent in utilizing the various forms of liability, such as presence at the scene of a crime, the aiding and abetting type of complicity and the common purpose guilty association, as is the fact that within the aiding and abetting category all countries found that handing over people or information with the knowledge of harm amounted to complicity.

Since the factual situations underlying such legal determination move along a wide spectrum, variations in results can be observed especially in the outer reaches of complicity. Even so, it is striking to see that for instance interpreters carrying out work for people involved in human rights abuses were excluded both in the Netherlands[156] and the U.S.[157]

While in most cases (with the exception of France) 1F(b) was applied to persons personally involved in serious crimes, there has been little hesitation by the judiciary to extend the reach of this clause also to persons who carried out such activities in an indirect fashion. The contours of complicity were specifically addressed in Australia,[158] Belgium,[159] Canada,[160] France,[161] the Netherlands[162] and New Zealand,[163] mostly by stating that the same principles, which apply to 1F(a), should be used for 1F(b) as well, while Germany employed the words 'substantial contribution' to describe the level of involvement required for 1F(b) activities.[164] At the lower end of indirect involvement providing food and shelter to the armed groups, such as the LTTE was seen as complicity in the U.S.[165] but not in France.[166] In Australia peripheral support functions by crews of ships involved in people smuggling were found not to be complicit.[167]

In this context, the issue of whether membership can be a form of complicity was addressed in a few countries and resolved positively in general in Canada,[168] in the negative in general

[155] Vreemdelingencirculaire (Aliens Manual) 2000 (C), article C4/3.11.3.3.
[156] *AbRS, 2 June 2004, nr. 200308871/1*.
[157] *Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006).
[158] *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7.
[159] *CPPR No. 99-0164/W5686*, 17 September 1999.
[160] *Zrig v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 178.
[161] *CNDA, 31 January 2008, 536076, C.*
[162] *Rb, The Hague, Awb 02/60920,* 19 July 2004.
[163] *RSAA Appeal No. 74273*, 10 May 2006.
[164] Bundesverwaltungsgericht (Federal Administrative Court), *BverwG 10 C 48.07*, 14 October 2008.
[165] *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Circuit, 2004).
[166] S. Kapferer, 'Exclusion Clauses in Europe: A Comparative Overview of State Practice in France, Belgium and the United Kingdom' (2000) 12 *IJRL* 200.
[167] *SRCCCC and Minister for Immigration and Multicultural and Indigenous Affairs* [2004] AATA 315.
[168] *Chong v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1335.

in France[169] and Germany,[170] while in New Zealand and the U.S., membership in terrorist organizations is prohibited by legislation (in the U.S. in general,[171] in New Zealand for organizations that have been so designated[172]).

Although the wording in 1F(c) with respect to responsibility differs from 1F(a) and 1F(b) in that it refers to 'guilty' rather than 'committed' this has had no discernable impact on the application of this clause as all countries have applied it to persons who had indirect involvement. This is made explicitly clear in Canada,[173] France[174] and the U.K., in the latter through legislation.[175] In France a naval engineer for the Sea Tigers of the LTTE was caught by 1F(c)[176] but a person working for the MEK in Iran in which capacity he distributed leaflets and wrote slogans over a period of 18 months was found not to be complicit by a Canadian judge.[177]

3.2 Recent developments in refugee law

While the connection between international criminal law and exclusion in the area of extended liability had been tenuous at best in the past, this changed recently in the United Kingdom and New Zealand, culminating in decisions by the Supreme Courts in those countries in March and August 2010.

In the United Kingdom, the Court of Appeal had an opportunity to pronounce itself on the issue of complicity under Article 1F(a) of the Refugee Convention in the *JS* case,[178] involving a member of the LTTE who, between 1997 and 2000, took part in various military operations against the Sri Lankan army. In 2000, he had been fighting as a platoon leader in charge of 45 soldiers trying to protect the LTTE's supply lines to the coast when he was injured. He required medical treatment for 6 months. Upon his return, he became one of the chief security guards of the leader of the LTTE Intelligence Division, while from 2004 to September 2006, he served as second in command of the Intelligence Division's combat unit.[179]

Since the main issue in this case evolved around the notion of complicity, the court canvassed in detail international materials on this issue, such as the ICC Statute and the jurisprudence of the ICTY,[180] as well as the Canadian Federal Court of Appeal case law[181] and the jurisprudence of the Immigration Appeal Tribunal and the U.K. courts in all areas of

[169] *CRR, 13 September 2005, 509227, Mlle T.*

[170] Bundesverwaltungsgericht (Federal Administrative Court), *BverwG 10 C 48.07*, 14 October 2008, see also *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Court of Justice, 9 November 2010, paras 87-99.

[171] Section 212(a)(3)(B)(i)(VI) of the Immigration and Nationality Act as a result of the reference in section 208(b)(2)(A)(v) of the same Act.

[172] Section 16(1)(b) of the Immigration Act 2009.

[173] *El Hayek v. Canada (Citizenship and Immigration)* 2005 FC 835.

[174] *CRR, 29 April 2005, 511158, C.*

[175] Section 54(1) of Immigration, Asylum and Nationality Act 2006.

[176] *CNDA, 27 June 2008, 611731, M.*

[177] *Bitaraf v. Canada (Minister of Citizenship and Immigration)* 2004 FC 898.

[178] *JS (Sri Lanka) v. Secretary of State for the Home Department*, [2009] EWCA Civ 364.

[179] *Ibid.*, paras 8-14.

[180] *Ibid.*, paras 30-52.

[181] *Ibid.*, paras 53-58.

exclusion[182]. The court came to the conclusion that there should be close link between international law sources and exclusion under Article 1F(a) and that priority should be given to all aspects of indirect liability as regulated by the ICC Statute, including its concepts of command/superior liability, aiding and abetting and common purpose/joint criminal enterprise. Where such notions have not completely crystallized, regard could be had to the ICTY jurisprudence, especially with respect to the development of JCE.[183]

As regards membership in a brutal organization the court says:

> a person who becomes an active member of an organisation devoted exclusively to the perpetration of criminal acts may be regarded as a person who has conspired with others to commit such acts and will be criminally responsible for any acts performed in pursuance of the conspiracy.[184]

The court goes on to state:

> active membership is considered to be present when there is the requisite proximity between the person and the crime or crimes in question which in the case of an active member of an organisation dedicated entirely to terrorist activities is unlikely to present any problem.[185]

The court makes it clear that in situations of hybrid organizations or an organization, which pursues its political ends in part by acts of terrorism and in part by other means, the analysis has to be different. The court does not describe in detail how this analysis should be conducted but states that there is a need to consider the extent to which an organisation is fragmented.[186]

In conclusion, with respect to the law to be applied, the Court says the following in paragraph 119 with respect to joint enterprise liability:

> 1. There must have been a common design which amounted to or involved the commission of a crime provided for in the statute;
> 2. The defendant must have participated in the furtherance of the joint criminal purpose in a way that made a significant contribution to the crime's commission; and
> 3. The participation must have been with the intention of furthering the perpetration of one of the crimes provided for in the statute.[187]

Indicating that the essence of complicity lies in 'whether there are serious reasons to consider the asylum applicant to be guilty of an international crime or crimes applying those

[182] *Ibid.*, paras 54-92.
[183] *Ibid.*, paras 115-122.
[184] *Ibid.*, para. 107.
[185] *Ibid.*, para.107.
[186] *Ibid.*, paras 107 and 111-114.
[187] *Ibid.*, paras 119. In para. 120, referring to the common purpose article of the ICC Statute, the Court says: 'the clause which may need the most unpacking is article 23(3)(d), dealing with joint criminal enterprise liability. In particular, the clause says nothing about the degree of contribution required or about the third category of joint criminal enterprise liability recognised in *Tadić*, that is, where a crime was committed as a foreseeable way of effecting a shared criminal intent and the defendant knowingly took the risk of this happening.'

principles',[188] the court was of the view that the tribunal had not properly applied these principles of JCE to the case at hand.[189]

The Court of Appeal decision was appealed to the Supreme Court, which issued its unanimous judgment on March 17, 2010.[190] Like the Court of Appeal, the Supreme Court was of the view that the main issue in this case was the notion of extended liability and canvassed a wide range of sources, including the ICC Statute, the ICTY jurisprudence, especially as regards JCE, foreign jurisprudence (including Canadian, American and German) and the views of UNHCR to determine the desirable parameters of this concept.[191] Like the Court of Appeal, it was of the view that the starting point for assessing extended liability should be the ICC Statute.[192]

The court says in *obiter* that membership in a brutal organization by itself is not sufficient to result in complicity,[193] but that the essential test for extended liability is 'if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose'.[194]

The court makes positive mention of the six factor approach developed in the Canadian jurisprudence by saying that:

> it is surely preferable to focus from the outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.[195]

In the final analysis, the Supreme Court was of the view that in using domestic notions of liability in relation to participation in international crimes, the Court of Appeal had taken too narrow a path.[196]

On the types of liability envisaged in Article 1F, the Court found that:

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[188] *Ibid.*, para. 120.
[189] *Ibid.*, para. 123.
[190] *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)*, [2010] UKSC 15.
[191] *Ibid.*, paras 9-24 (Lord Brown) and 42-43 (Lord Hope).
[192] *Ibid.*, para. 47 (Lord Hope).
[193] *Ibid.*, para. 2 (Lord Brown), indicating that this was a common grounds among the parties while in paragraph 57, Lord Kerr says it was wise for the Secretary of State not to rely on this aspect of the Canadian case of Ramirez; see also para. 49 (Lord Hope).
[194] *Ibid.*, paras 38 (Lord Brown) and 49 (Lord Hope), although the latter equates the terms 'significant' with 'substantial' for the level of contribution.
[195] *Ibid.*, paras 30-31 (Lord Brown) and 54-55 (Lord Kerr) although the latter points out that these factors are not exhaustive.
[196] *Ibid.*, paras 26, 38 (Lord Brown) and 48 (Lord Hope); this seemed to be based on the analysis of JCE I of low level participants (Lord Brown in paras 19-20, 37).

> [Article 1F] merely gives expression to what is already well understood in international law. This is true too of paragraphs (b), (c) and (d) of article 25(3) of the ICC Statute, each of which recognises that criminal responsibility is engaged by persons other than the person actually committing the crime (by pulling the trigger, planting the bomb or whatever) who himself, of course, falls within article 25(3)(a). Paragraph (b) encompasses those who order, solicit or induce (in the language of article 12(3) of the Directive, "instigate") the commission of the crime; paragraph (c) those who aid, abet, or otherwise assist in its commission (including providing the means for this); paragraph (d) those who in any other way intentionally contribute to its commission (paras (c) and (d) together equating, in the language of article 12(3) of the Directive, to "otherwise participat[ing]" in the commission of the crime). All these ways of attracting criminal liability are brought together in the ICTY Statute by according individual criminal responsibility under article 7(1) to anyone who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of the relevant crime. The language of all these provisions is notably wide, appreciably wider than any recognised basis for joint enterprise criminal liability under domestic law.[197]

Regarding the Court of Appeal decision, one of the Judges found that:

> paragraph 119 does seem (…) too narrowly drawn, appearing to confine article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. Certainly paragraph 119 is all too easily read as being directed to specific identifiable crimes rather than, as to my mind it should be, wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes.[198]

The case was sent back for a redetermination of the asylum claim.[199]

In the first case at the Upper Tribunal (Immigration and Asylum Chamber) since the Supreme Court decision was issued, these principles were applied in a situation in Zimbabwe where a person had been involved in violent invasions of land owned by two white farmers and the violent expulsion of their black farm workers from their houses and jobs on those farms.[200] With respect to the person's involvement, it was found that she was excludable on the basis of a joint enterprise domestic law since she had been part of such mob violence including meting out beatings.[201]

In New Zealand, the decision of the Court of Appeal in the *X & Y v. Refugee Status Appeals Authority*[202] involved the exclusion of a person who was the chief engineer of a ship, which was owned by the LTTE and which was sunk during a confrontation with the Indian Navy in January 1993. At the time, it was carrying several LTTE members and substantial quantities of arms and explosives while it has also been found by the Refugee Status Appeal Authority that the LTTE had committed crimes against humanity. The notion of complicity was

[197] *Ibid.*, para. 33-34
[198] *Ibid.*, para. 38.
[199] *Ibid.*, para. 40.
[200] *SK (Article 1F(a) – exclusion) Zimbabwe v. Secretary of State for the Home Department* [2010] UKUT 327 (IAC).
[201] *Ibid*, paras 42-43. The tribunal added in the following paragraph, that if there was an additional legal requirement of a substantial contribution to this concept, that element was also fulfilled on the evidence.
[202] *X & Y v. Refugee Status Appeals Authority*, CIV-2006-404-4213, High Court, 17 December 2007; this was the judicial review of the RSAA Appeal No. 74796 & 74797, 19 April 2006.

summarized once again by relying on the Canadian case law as participating, assisting or contributing to the furtherance of a systematic and widespread attack against civilians knowing that the acts will comprise part of it or takes the risk that it will do so without the need for a specific event to be linked to the accomplice's own acts.[203]

The Court of Appeal overturned this decision for a number of reasons in 2009.[204] With respect to complicity, one judge of the court, Hammond J., was of the view that instead of the Canadian jurisprudence, the more recent case law of the U.K. Court of Appeal should be followed resulting in a less generous acceptance of the notion of membership and a close linkage with international criminal law concepts of extended liability such as set out in the Rome Statute or as developed by the international tribunals with respect to JCE.[205] Applying these principles, the Court found that the combination of the unquantifiable risk that the cargo on the ship would be used unlawfully and the person's presence on the ship (even in the face of the lack of credibility of the claimant) could not result in a finding of complicity based on joint criminal enterprise.[206] Another judge, Arnold J., was less equivocal on the lack of the importance of the Canadian jurisprudence in the area of complicity and when examining this jurisprudence in detail[207] together with the recent U.K. court of appeal jurisprudence[208] he was of the view that membership could still be used as a form of complicity. However, he agreed on the result with Hammond J.[209]

The Supreme Court of New Zealand also issued a decision on 27 August 2010 containing a number of relevant findings.[210] In terms of sources of extended liability, it concludes that the ICC Statute is the most authoritative international instrument outlining the various modes of liability in international criminal law,[211] one of which is joint criminal enterprise, which was also the most appropriate one in the situation at hand.[212] After canvassing in detail the concept of JCE and the Canadian and U.K. jurisprudence[213] in the area of extended liability, the court comes to this conclusion:

> Refugee status decision-makers should adopt the same approach to the application of joint enterprise liability principles when ascertaining if there are serious reasons to consider that a claimant seeking recognition of refugee status has committed a crime or an act within art 1F through being complicit in such crimes or acts perpetrated by others. That approach fully reflects the principle that those who contribute significantly to the commission of an international crime with the stipulated intention, although not direct perpetrators of it, are personally responsible for the crime. This principle is now expressed in articles 25 and 30 of the Rome Statute and was earlier well established in customary international law. Its application recognises the importance of domestic courts endeavouring to develop and maintain a common approach to the meaning of the

[203] *Ibid.*, para. 81.
[204] *X v. Refugee Status Appeals Authority*, [2009] NZCA 488.
[205] *Ibid.*, paras 95-107.
[206] *Ibid.*, paras 109-112.
[207] *Ibid.*, paras 152-155.
[208] *Ibid.*, paras 156-168.
[209] *Ibid.*, paras 169-171.
[210] *The Attorney-General (Minister of Immigration) v. Tamil X and the RSAA*, [2010] NZSC 107.
[211] *Ibid.*, paras 51-53.
[212] *Ibid.*, paras 56 and 71, referring to JCE III.
[213] *Ibid.*, paras 51-69; the court indicates in paras 58-61 that the notion of shared purpose as used in the Canadian jurisprudence is in effect a reference to JCE while in paras 66-69 the court discussed and agrees with the *JS* decision of the UK Supreme Court, which is discussed below.

> language of an international instrument which is given effect as domestic law in numerous jurisdictions of state parties.[214]

Based on the facts of the case, the court concludes that the claimant should not be excluded. While it was clear that he supported the LTTE in general and had done so in the past, his past activities did not reach the threshold of complicity while the activities underlying the case in question could not support an exclusionary finding, as the weapons on the ship never reached the LTTE for a possible nefarious purpose. In the view of the court, while the conditions for a JCE were fulfilled, there could be no exclusion as JCE required a completed crime or in the words of the court 'had it been shown that he participated in voyages where armaments were delivered to the Tamil Tigers in Sri Lanka and subsequently that organization committed crimes against humanity, the position would be different.'[215]

4. Conclusion

International criminal law as practiced at the international level has been quite consistent in applying notions of indirect liability with the exception of co-perpetratorship and JCE III.

The ICTY and ICTR have rejected co-perpetratorship as a form of extended liability but it has figured prominently in the arrest warrants issued by the ICC, while the reverse is true with JCE, which has been used in the majority of cases of the ICTY but less so at the ICC. To be sure, both at the ICC and ICTY, alternative charges were also laid, together with either co-perpetration or JCE, but the jurisprudence at the ICC regarding extended liability has concentrated on the contours of co-perpetrators in the same manner as the JCE case law has dominated the judicial debate at the ICTY during the last decade. While ICC judges have not provided any insights yet as to the meaning of the common purpose notion under the ICC Statute, commentators have opined that while JCE I and II are undoubtedly included within article 25(3) (d) of the Statute, it is not clear whether JCE III is part of common purpose, and if so whether all aspects of JCE III are concomitant with the concept of common purpose.

This debate will impact the interpretation of JCE at the domestic level, both in the criminal and refugee realms. In the criminal context, most common law countries have provisions in their criminal legislation regarding common intention, akin to JCE III. This raises questions as to whether these countries will apply their national interpretation of extended liability, or will yield to the ICC interpretation of the Statute, which they have ratified and implemented into their domestic legislation. It is likely that if situations arise where domestic jurisdictions can charge persons with broader forms of liability, they will likely do so, since countries such as Australia, Canada, New Zealand, and the U.K. did not make exceptional provisions to adjust their regular forms or liability or inchoate offences when implementing the ICC Statute. Conspiracy, incitement, as well as common intention come to mind in this context.

Similarly, as regards refugee law, the question will need to be addressed, - now that all nine countries surveyed in this paper will be relying on international criminal law concepts as developed by the ICTY, ICTR and ICC -, which notions should prevail in the event of disagreement between international criminal justice institutions. Again, the JCE III question comes to mind, given that in 2010 the two highest courts in the U.K. and New Zealand

[214] *Ibid.*, para. 70.
[215] *Ibid.*, para. 79.

examined JCE under international law, yet left the JCE III question either undecided, given that the situation did not require an analysis of that particular aspect of extended liability (U.K.), or did not carry out an in-depth legal analysis of the concept (New Zealand). The interaction between international criminal law, domestic criminal law and refugee law was to some extent highlighted in the decision of the U.K. Supreme Court, when it criticized the Court of Appeal for relying on U.K. criminal law as being too restrictive in the interpretation of the term 'committed' in Article 1F(a) of the Convention. It thus called upon refugee decision makers to apply the broader concepts embedded in international criminal law. This approach assumes that British criminal law is indeed narrower than international criminal law as presently embodied in the ICC Statute, which, given the availability of the concept of common intention in U.K. law and the present uncertainty about the parameters of common purpose in the ICC, might eventually prove incorrect.

This interaction between international criminal law, domestic criminal law and refugee law can also cause some unexpected problems of interpretation regarding membership. The origin of the brutal organization approach in Canada, which was the inspiration for this notion in New Zealand and the U.K. was directly linked to post Second World War jurisprudence. This approach was adopted in 1992 when international criminal law had as its only source post-Second World War sources and as such it was entirely legitimate and legally valid. The question asked then with respect to the use of membership as a possibility for complicity is threefold, namely: to what extent should refugee law decision-makers be following international criminal law if this law is changing? What is the current status of the concept of membership in international law? And, what is the role of domestic criminal law in this equation?

To begin with international criminal law, and as stated earlier in this paper, the concept of membership as a form of liability, either as a crime or as extended liability, is not entirely clear. It was recognized as such after the Second World War but not revived for any of the international tribunals, mixed tribunals or the ICC, although some attempts were made to include this concept in the Statutes of the ICTY and ICC. What also remains unclear is whether the fact that membership was not included in these statutes should be regarded as a rejection on substantive grounds of this concept, or only as a matter of jurisdiction, namely, that while membership did exist in international criminal law, it was deemed unwise to make it part of the statutes for policy or political reasons. The latter approach is certainly not unusual with respect to liability related questions. Conspiracy, liability under 18 years of age and corporate liability did not find their way into the ICC Statute, while one can easily argue that they have been and still are recognized under international criminal law, in particular the first two forms of liability.

This then leads to the related question of whether, given the fact that membership had at one point certainly been part of international criminal law, it is appropriate for refugee decision makers to use concepts recognized in international criminal law but which have fallen into disuse for criminal liability. This generates in turn some questions about the nature of criminal law, including international criminal law, as opposed to exclusion in refugee law. The purposes of these different areas of law are not the same, as criminal law is in general more concerned with individual punishment, while exclusion supports the broader objective of refugee law by denying the benefits of refugee protection to undeserving claimants while

ensuring that the integrity of the refugee system remains intact.[216] The different standard of proof between the two systems ('beyond reasonable doubt' versus 'serious reasons for considering') is but one reflection of these differences.

It may be argued that such differences could lead to a broader approach with respect to extended liability in so far as this approach needs to find its source in Article 1F(a) of the Refugee Convention, which refers to international instruments set out for the regulation of international crimes without specifying a hierarchy between those instruments. If a domestic court is faced with the dilemma of choosing between various forms of extended liability, if there is more than one, non-compatible, choice, as could be the case with joint criminal enterprise III, should this court select the most recent concept of liability, or try to find compatibility in any event? This was the solution offered by the British Court of Appeal when it said that the ICC Statute should be the preferred instrument for assessing extended liability but with recourse to ICTY and ICTR case law if necessary. The U.K. Supreme Court also examined both the ICC Statute and the ICTY jurisprudence regarding joint criminal enterprise. However, if one accepts the possibility for interpretations of liability, which might lose their currency after a period of time, why should there be a cut off in time? Why can one form of liability be used even if no longer current in the near future (i.e. JCE III) while another is dismissed even if it was established earlier and not displaced until possibly 1993 (as is the case with membership)?

This issue comes in even starker contrast when one considers domestic criminal law. While exclusive reliance on domestic criminal law in refugee law has been discouraged by courts in most countries under examination in this paper, it can play some role in framing the liability discussion. The decision of the Supreme Court in the U.K. overruled the decision of the Court of Appeal on the grounds that it applied domestic criminal law, which was more restrictive than international criminal law. This would mean *a contrario* that, in the view of the Supreme Court, if domestic criminal law was wider than international criminal law, resort could be had to domestic concepts, including common intention.

It is interesting to note that the two common law countries with the most resistance from the judiciary on the issue of membership, Australia and the U.K., have criminalized membership.[217] While this is done for membership in terrorist organization, one would not expect this to be a fatal problem as the language of the U.K. Supreme Court is quite general regarding criminal concepts. Nor should the fact that Australia and the U.K. made membership an offence rather than a mode of liability,[218] be considered overly problematic as a main tenet of refugee law is generally seen as encompassing broader notions with the result that a higher level of criminal responsibility with its concomitant higher sentencing regime (i.e. a criminal offence) can be transferred to a lower level of personal culpability (i.e. extended liability to commit an offence). As a matter of fact, creating membership as an offence is much broader than having membership as a form of liability, as it would be possible to be a party or conspirator to the offence of membership as well as incite somebody

[216] *The Attorney-General (Minister of Immigration) v. Tamil X and the RSAA*, [2010] NZSC 107.

[217] For Australia it is section 102.3 of the Criminal Code Act of 1995 while in the U.K. it is section 11 of the Terrorism Act 2000.

[218] In Germany, membership in a criminal or terrorist organization is a form of liability rather than a substantive offence, see sections 129 and 129A of the Criminal Code; membership in a terrorist organization is also a ground for removal in German immigration law, see section 54.5 of the Residence Act.

to be a member, all forms of casting the net of involvement wider than for membership as complicity.

To sum up, while the notion of membership in exclusion has been put in doubt by the influential decision of the U.K. Supreme Court, the reasoning underlying this rejection is by no means clear or persuasive either from an international or domestic point of view. One hopes that when another court is faced with this issue in a more direct manner, it will consider it with a fulsome understanding of international criminal law and an appreciation of the notion of criminality in refugee law. If countries are uncomfortable with a wholesale application of the notion of membership, the cautious approach of UNHCR, as set out in it 2003 Exclusion Guidelines, or the legislative implementation by the executive rather than through judicial activism, as done in the Netherlands, could be given consideration.

Neither the U.K. nor New Zealand decisions are paragons of clarity with respect to their general reasoning on extended liability. With respect to the U.K. case, while the analysis is couched in JCE language, the test for complicity suggested by the court, by not including as part of this test the common design aspect, resembles closely the notion of aiding and abetting in international criminal law, especially since the court equates 'significant' with 'substantial'. This means that either the court has provided an incomplete definition of JCE or that it has collapsed all aspects of complicity known in international criminal law into only one type, namely aiding and abetting. The decision of the Supreme Court of New Zealand was clearer in describing JCE by including the common intention element and restricting the general definition given in the U.K. Supreme Court to the JCE concept. However, this judgment is not free from confusion either as it also stated that the situation at hand pertained to a JCE III fact pattern while using the U.K. judgment and adopting its general definition, even though that definition pertained to JCE I.

The result of the Supreme Court of the U.K. analysis in terms of the relationship between international criminal law and domestic criminal law for purposes of refugee law and in terms of laying down a test purporting to be a general test of complicity, is that it might not have helped elucidate the parameters of complicity as much as one had hoped. This is clear from the first judgment at the tribunal level since the rendering of the Supreme Court decision, which states that the claimant is excludable on a JCE basis while the facts would have allowed an aiding and abetting conclusion or even personal participation in beating people. This illustrates the problem that when following the Supreme Court guidelines, one will attempt to put the facts into the legal straightjacket of the difficult concept of JCE and ignoring other, conceptually proximate but easier constructs of extended liability.

Therefore, given the fact that JCE is a difficult legal concept in international criminal law and given the fact that it might be difficult to find evidence of common design in the often cursory refugee proceedings, an approach using a number of factors (which had also been approved by the Supreme Court of the United Kingdom) to find a person accountable based on the common purpose concept in situations where there is no direct link between the asylum seeker and the commission of atrocities might be preferable when employing exclusion concepts. Lastly, two other important forms of liability known in international criminal law, aiding and abetting and command responsibility, can be transferred to the exclusion context with less difficulty.