

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

**B E T W E E N :**

**RACHIDI EKANZA EZOKOLA**

Appellant  
(Applicant)

- and -

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

Respondent  
(Respondent)

- and -

**THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES,  
AMNESTY INTERNATIONAL,  
THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE AND THE  
INTERNATIONAL HUMAN RIGHTS PROGRAM AT THE UNIVERSITY OF  
TORONTO FACULTY OF LAW,  
THE CANADIAN CIVIL LIBERTIES ASSOCIATION,  
THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS**

Interveners

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**FACTUM OF THE  
CANADIAN CENTRE FOR INTERNATIONAL JUSTICE AND  
AND THE INTERNATIONAL HUMAN RIGHTS PROGRAM AT THE UNIVERSITY  
OF TORONTO FACULTY OF LAW**

*(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)*

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## PART I – OVERVIEW

1. In its decisions over the past two decades, the Federal Court has relied on imprecise concepts – such as “complicity” and “personal and knowing participation” – to assess whether a refugee claimant should be excluded under Article 1F(a) of the Refugee Convention on the grounds that there are “serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity” (collectively, “international crimes”). In doing so, and contrary to the express terms of Art. 1F(a), the Federal Court has departed from the provisions of international criminal law (“ICL”), as applied by the International Criminal Court (the “ICC”) and other international criminal tribunals and courts.
2. Modern ICL does not hold individuals culpable for international crimes simply because they belong to an organization that is connected with such crimes – that is, there is no “complicity by association” in ICL. Instead, like domestic criminal law, ICL establishes specific crimes that include both an *actus reus* and *mens rea* element that must be proven. For example, the *actus reus* for crimes against humanity requires committal of an underlying act (such as murder or rape) as part of a widespread or systematic attack directed against any civilian population; the *mens rea* is knowledge of the attack. Also like domestic criminal law, ICL establishes various modes of liability (such as co-perpetration or aiding and abetting) to determine whether a particular individual has “committed” the international crime in question. However, while some of the modes of liability in ICL bear resemblance to domestic criminal law, they are, by necessity, different since the main inquiry in ICL is often whether an individual who is geographically or temporally disconnected from the international crimes in question (such as a politician or military commander) can be held culpable for such crimes.
3. Each mode of liability in ICL has its own *actus reus* and *mens rea* that determine whether an individual is culpable for an international crime. In cases like this appeal, involving alleged individual culpability for crimes committed by a multitude of individuals that may be separated by both distance and time (“group commission”), there are four modes of liability that are most relevant: co-perpetration, aiding and abetting, contribution, and joint criminal enterprise (JCE). Below, we have distilled the *actus reus* and *mens rea* for these modes of liability to provide a guide for the decision-maker in determining whether an individual has committed an international crime.

4. The decision-maker applying Art. 1F(a) must first establish that an international crime has been perpetrated, and then determine whether there are “serious reasons for considering” that the refugee claimant “committed” that crime. For the “commission” question in a case of this type, ICL requires that the *actus reus* and *mens rea* for one of the modes discussed below (and set out in table at Annex “A”) be established for an individual to be found culpable. Anything less is contrary to the clear language of Art. 1(F)(a), and would result in an overbroad approach to exclusion such as that taken by the Federal Court, which is at odds with modern ICL and the goals of the Refugee Convention.

## PART II – STATEMENT OF POSITION ON ISSUES

5. The position of the CCIJ and IHRP on the issues is summarized in the Overview.

## PART III – STATEMENT OF ARGUMENT

### **The Federal Court’s Approach is Not Consistent with ICL, Which Establishes Specific Modes of Liability for Violations of ICL**

6. Despite the clear language in Art. 1F(a) – that only those for whom there are serious reasons to consider that they have “committed” an international crime should be excluded – the Federal Court has applied Art. 1F(a) to exclude refugee claimants determined to be “complicit” in international crimes. “Complicity”, often used loosely, has been defined as “personal and knowing participation” in the crime.<sup>1</sup> In this case, before the Refugee Protection Division, the legal standard was described as “personal and knowing awareness”.<sup>2</sup> Before the Federal Court of Appeal, the certified question was whether “complicity by association” could be established.<sup>3</sup>

7. Modern ICL does not hold individuals culpable for international crimes simply because they belong to an organization that is connected with such crimes. Instead, ICL – once a sparse body of law but now expanded through sources that include the Rome Statute of the ICC,<sup>4</sup> the

<sup>1</sup> *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, Canadian Centre for International Justice and International Human Rights Program Book of Authorities [CCIJ/IHRP Authorities], **Tab 4**, at paras. 16-18 (F.C.A.); See also *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, CCIJ/IHRP Authorities, **Tab 5**, at paras. 5, and 13 (F.C.A.); *Bazargan v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1209, CCIJ/IHRP Authorities, **Tab 6**, at para. 11 (F.C.A.).

<sup>2</sup> *Minister of Citizenship and Immigration v. Ezokola*, [2011] FCA 224, [*Ezokola* FCA], CCIJ/IHRP Authorities, **Tab 7** at paras. 74-79 (emphasis added).

<sup>3</sup> *Ezokola* FCA, *ibid.*, at para. 44 (emphasis added).

<sup>4</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, Can T.S. No. 13, (last amended 2010), [Rome Statute], CCIJ/IHRP Authorities, **Tab 1**. In *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department*, [2010] UKSC 15, [*JS*], CCIJ/IHRP Authorities, **Tab 8**, at para. 9, Lord Brown for the U.K.



statutes of the *ad hoc* tribunals that apply ICL,<sup>5</sup> and the jurisprudence of these bodies -- has evolved to establish various modes of liability, each with their own *actus reus* and *mens rea*, that determine when an individual can be held culpable for an international crime.

**The Modes of Liability Potentially Applicable in Cases of This Kind are Co-Perpetration, Aiding and Abetting, Contribution, and JCE**

8. Crimes committed by many are often separated by distance and time. While control over these crimes may be in collective hands, criminal culpability under ICL is individual, not organizational.<sup>6</sup> In order for an individual to be culpable in respect of a crime under ICL, a specific mode of liability must attach. The following modes of liability are those that may apply to a case of this kind: co-perpetration, aiding and abetting, contribution, and JCE.

***Co-Perpetration***

9. A person is criminally responsible if that person commits an international crime “whether as an individual, jointly with another or through another person, regardless of whether that person is criminally responsible”.<sup>7</sup> Though the ICC Appeals Chamber has yet to outline the elements of co-perpetration, the ICC Trial Chamber has set out the following requisite elements:

- (a) There must be an agreement or common plan between the accused and at least one other person that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;
- (b) The accused must have provided an essential contribution to the agreement or common plan that resulted in the commission of the relevant crime;
- (c) The accused and at least one other person meant to engage in the criminal conduct, or they were aware that by implementing the common plan that the

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Supreme Court explained that the Rome Statute is “the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes”.

<sup>5</sup>The *ad hoc* tribunals are the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL). With respect to the statutes of the *ad hoc* tribunals, the CCIJ and IHRP will focus on the statutes of the ICTY and ICTR, which are substantially similar: *Statute of the International Criminal Tribunal for the former Yugoslavia*, SC res. 827, UN SCOR 48th sess.; 32 ILM 1159 (1993), [ICTY Statute], CCIJ/IHRP Authorities, **Tab 2**; *Statute of the International Criminal Tribunal for Rwanda*, SC res. 955, UN SCOR 49th sess.; 33 ILM 1598 (1994), [ICTR Statute], CCIJ/IHRP Authorities, **Tab 3**.

<sup>6</sup>*Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06, Judgment (14 March 2012) (International Criminal Court, Trial Chamber), [*Lubanga* Trial Judgment], CCIJ/IHRP Authorities, **Tab 9**, at paras. 976, 994; *Prosecutor v. Radoslav Brđanin*, IT-99-36-A, Appeal Judgment (3 April 2007), (ICTY Appeals Chamber), [*Brđanin* Appeal Judgment], CCIJ/IHRP Authorities, **Tab 10**, at para. 427; see also Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute” (2007) 5:4 JICJ 953, CCIJ/IHRP Authorities, **Tab 30**.

<sup>7</sup>Rome Statute, *supra* note 4, Art. 25(3)(a), CCIJ/IHRP Authorities, **Tab 1**.

crime would occur in the ordinary course of events; and

- (d) The accused must be aware that he or she provided an essential contribution to the implementation of the common plan.<sup>8</sup>

10. In *Lubanga*, the accused, a commander and “minister of defence” in a Congolese rebel faction, was found to have made an “essential contribution” to the war crime of conscripting and enlisting child soldiers. An “essential contribution” is made by individuals who “assist in formulating the relevant strategy or plan, become involved in directing or controlling other participants or determine the roles of those involved in the offence”.<sup>9</sup> The “essential contribution” standard can be contrasted with the “significant act” standard used in JCE jurisprudence, described below. However, with either, more than mere membership in an organization connected with international crimes is required for culpability to follow.

### *Aiding and Abetting*

11. Aiding and abetting, as a mode of liability, is found in both the Rome Statute<sup>10</sup> and the statutes of the *ad hoc* tribunals.<sup>11</sup> It has been applied by the *ad hoc* tribunals to instances of “rendering a substantial contribution to the commission of a crime.”<sup>12</sup> In *Ntawukulilyayo*, the Appeals Chamber of the ICTR summarized the *actus reus* of aiding and abetting as “acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime”.<sup>13</sup> The *mens rea* of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.<sup>14</sup>

12. For example, in *Ntawukulilyayo*, the ICTR Appeals Chamber upheld a conviction for genocide on the grounds that the accused, a local Rwandan politician, aided and abetted the

<sup>8</sup> *Lubanga* Trial Judgment, *supra* note 6, CCIJ/IHRP Authorities, **Tab 9**, at paras. 984, 1006, 1013, 1018.

<sup>9</sup> *Lubanga* Trial Judgment, *ibid.* at para. 1004.

<sup>10</sup> Rome Statute, *supra* note 4, Art. 25(3)(c), CCIJ/IHRP Authorities, **Tab 1**.

<sup>11</sup> ICTY Statute, *supra* note 5, Art. 7(1), CCIJ/IHRP Authorities, **Tab 2**; ICTR Statute, *supra* note 5, Art. 6(1), CCIJ/IHRP Authorities, **Tab 3**.

<sup>12</sup> *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-A, Judgement, Appeals Chamber, (14 December 2011) [*Ntawukulilyayo*], CCIJ/IHRP Authorities, **Tab 11**, at para. 214.

<sup>13</sup> *Ntawukulilyayo*, *ibid.*, at para. 214. Acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in commission of an international crime: *Prosecutor v. Blagoje Simić*, IT-95-9-T (17 October 2003) (ICTY), [*Simić* Trial Judgment], CCIJ/IHRP Authorities, **Tab 12**, at paras. 135, 162; *Prosecutor v. Naser Orić*, IT-03-68-T, (30 June 2006) (ICTY), [*Orić* Trial Judgment], CCIJ/IHRP Authorities, **Tab 13**, at para. 271.

<sup>14</sup> *Ntawukulilyayo*, *ibid.*, at para. 222; *Prosecutor v. Vasiljević*, IT-98-32-A (25 February 2004), (ICTY Appeals Chamber), [*Vasiljević* Appeals Judgment], CCIJ/IHRP Authorities, **Tab 14**, at para. 102.

killing of Tutsis by instructing Tutsi refugees to move to a specific location, promising them food and protection, and then transporting soldiers who participated in an attack on them at that location. The Appeals Chamber stated that such “acts alone suffice to constitute the *actus reus* of aiding and abetting”.<sup>15</sup>

### *Contribution*

13. Contribution is set out in Art. 25(3)(d) of the Rome Statute.<sup>16</sup> The scope of contribution remains to be addressed in depth by the ICC.<sup>17</sup> While few cases have considered “contribution” liability, as with the other modes of liability highlighted in these submissions, mere membership in an organization connected with international crimes is not enough. For example, in *Mbarushimana*,<sup>18</sup> which concerned crimes against humanity and war crimes allegedly committed by the *Forces Démocratiques de Libération du Rwanda* (“FDLR”), the ICC Pre-Trial Chamber II dismissed Art. 25(3)(d) charges against Mbarushimana, a Rwandan Hutu who was the Executive Secretary of the FDLR and a former United Nations employee. This was a relatively high position, in which Mbarushimana generally supported the FDLR and disseminated propaganda about it while in France, after having obtained refugee status there. This was not enough to ground culpability for contribution.

14. The Pre-Trial Chamber determined, among other things, that the FDLR, as an organization, did not constitute a common criminal purpose or plan, and that, even if it did, Mbarushimana “did not provide any contribution to the commission” of the charged crimes. Furthermore, the degree of such contribution was insufficient, as a matter of law, because it was not significant.<sup>19</sup> This finding was upheld by the Appeals Chamber, which concluded that the Pre-Trial Chamber’s conclusions suggested “that there was no link between the accused’s

<sup>15</sup> *Ntawukulilyayo, ibid.*, at para. 216.

<sup>16</sup> Rome Statute, *supra* note 4, Art. 25(3), CCIJ/IHRP Authorities, **Tab 1**. See *Lubanga* Trial Judgment, *supra* note 6, CCIJ/IHRP Authorities, **Tab 9**, at para. 977.

<sup>17</sup> In *Mbarushimana*, discussed below, the ICC Pre-Trial Chamber analyzed contribution liability in depth, but the Appeals Chamber disagreed with the PTC’s formulation and overruled it, but did not engage in a full treatment of the issue itself. See also *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, (23 January 2012), CCIJ/IHRP Authorities, **Tab 15**, at para. 421.

<sup>18</sup> *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on Confirmation of Charges, Pre-Trial Chamber (16 December 2011) [*Mbarushimana* Pre-Trial Chamber Decision], CCIJ/IHRP Authorities, **Tab 16**; see also *Prosecutor v. Mbarushimana*, ICC-01/04-01/10 OA4, Appeals Chamber (30 May 2012) [*Mbarushimana* Appeal Decision], CCIJ/IHRP Authorities, **Tab 17**.

<sup>19</sup> *Mbarushimana* Pre-Trial Chamber Decision, *ibid.*, at paras. 291-292.

conduct and the alleged crimes of the FDLR”.<sup>20</sup>

15. The findings in *Mbarushimana* illustrate two key principles. First, the fact that an organization contains individuals who commit international crimes does not automatically render that group a “common purpose” for the purpose of group commission liability.<sup>21</sup> Second, the actions of an individual accused of acting with a common purpose must specifically relate to the commission of the alleged international crimes. Involvement like *Mbarushimana*’s was found not to be acts that contributed to commission of war crimes.

### *Joint Criminal Enterprise*

16. JCE, a mode of liability developed by the *ad hoc* tribunals, is similar to the “co-perpetration” and “contribution” modes in the Rome Statute, when the two are viewed together.<sup>22</sup> In *Tadić*,<sup>23</sup> the ICTY Appeals Chamber held that the concept of “commission” of an international crime encompasses the JCE mode of liability: “Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions”.<sup>24</sup>

17. *Tadić* and subsequent decisions<sup>25</sup> established that JCE involves a common *actus reus*, with three different forms of *mens rea*. The *actus reus* requires (a) a plurality of persons, (b) with a common purpose or plan which amounts to or involves the commission of an international crime, and (c) the participation of the accused in this common purpose.<sup>26</sup> In *Kvočka et al.*,<sup>27</sup> the

<sup>20</sup> *Mbarushimana* Appeal Decision, *supra* note 18, CCIJ/IHRP Authorities, **Tab 17**, at para. 70.

<sup>21</sup> *Mbarushimana* Appeal Decision, *ibid.*, at para. 65.

<sup>22</sup> Jens David Ohlin, “Joint Intentions to Commit International Crimes” (Winter 2011) 11(2) Chicago J Int’l L 693, CCIJ/IHRP Authorities, **Tab 31**, at 721. The ICC Pre-Trial Chamber has differentiated between co-perpetration and JCE; see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on Confirmation of Charges (29 January 2007), (ICC Pre-Trial Chamber I), [*Lubanga* Confirmation Decision], CCIJ/IHRP Authorities, **Tab 18**, at paras. 347-355 (in which the Chamber declined importation of the JCE doctrine to the ICC and opting for a “control over the crime” approach to group commission liability). The judgment in *Lubanga* followed this approach.

<sup>23</sup> *Prosecutor v. Du[Ko Tadi]*, IT-94-1-A, Appeals Judgment (15 July 1999) (ICTY) [*Tadić* Appeal Judgment], CCIJ/IHRP Authorities, **Tab 19**.

<sup>24</sup> *Tadić* Appeal Judgment, *ibid.*, at para. 190.

<sup>25</sup> See e.g. *Brđanin* Appeal Judgment, *supra* note 6, CCIJ/IHRP Authorities, **Tab 10**, at paras. 363-65; *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Appeal Judgment (28 September 2011), [*Munyakazi* Appeal Judgment], CCIJ/IHRP Authorities, **Tab 20**, at para. 160.

<sup>26</sup> *Brđanin* Appeal Judgment, *ibid.*, at para. 364. [internal citations omitted]; *Prosecutor v. Vlastimir Đorđević*, IT-05-87/1-T, Judgment (23 February 2011), (ICTY Trial Chamber) [*Đorđević* Trial Judgment], CCIJ/IHRP Authorities, **Tab 21**, at paras. 1862-1863; *Tadić* Appeals Judgment, *supra* note 23, CCIJ/IHRP Authorities, **Tab 19**, at para 227.

ICTY Trial Chamber clarified that the requisite act of the accused must form a “significant” contribution to the overall JCE. The Chamber then stated that “[b]y significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption.”<sup>28</sup> This “significant” threshold was adopted by the Appeals Chamber and has become the standard language used to describe the necessary contribution of the accused for culpability to impute.<sup>29</sup> As noted above, it differs from the “essential” language used for co-perpetration.

18. There are three “categories” of JCE that are distinguished based on their requisite *mens rea*: “basic” JCE (or “JCE I”), “systemic” JCE (or “JCE II”) and “extended” JCE (or “JCE III” or “*dolus eventualis*”). For JCE I, the *mens rea* is the intent (shared with the co-perpetrators) to perpetrate the crime. For JCE II, it is personal knowledge of a system of ill-treatment, and the intent to further this common concerted system of ill-treatment. For JCE III, the *mens rea* is the intention to participate in and further the criminal activity or purpose of a group and to contribute to the joint criminal enterprise, or, in any event, to the commission of a crime by the group. Responsibility for a crime other than the one agreed on in the common plan can arise under JCE III only if, in 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.<sup>30</sup>

19. JCE III has been the subject of criticism,<sup>31</sup> and is not explicitly included in the Rome Statute (as the concept of JCE evolved around the same time as the drafting of the Rome

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<sup>27</sup> *Prosecutor v Miroslav Kvočka*, IT-98-30/1-T, Judgment (2 November 2001) (ICTY Trial Chamber), [*Kvočka* Trial Judgment], CCIJ/IHRP Authorities, **Tab 22**.

<sup>28</sup> *Kvočka* Trial Judgment, *ibid.*, at para. 309.

<sup>29</sup> See e.g. *Brđanin* Appeal Judgment, *supra* note 6, CCIJ/IHRP Authorities, **Tab 10**, at para. 430; *Prosecutor v. Momčilo Krajišnik*, IT-00-39-A, Judgment (17 March 2009), (ICTY, Appeal Chamber), CCIJ/IHRP Authorities, **Tab 23**, at para. 696; *Dorđević* Trial Judgment, *supra* note 26, CCIJ/IHRP Authorities, **Tab 21**, at para. 1863; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgment Volume II of II (15 April 2011), (ICTY Trial Chamber), CCIJ/IHRP Authorities, **Tab 24**, at para. 1954; *Prosecutor v. Vujadin Popović et al.*, IT-05-88-T, Judgment Volume I (10 June 2010), (ICTY Trial Chamber), CCIJ/IHRP Authorities, **Tab 25**, at para. 1027; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgment Volume III of IV (26 February 2009), (ICTY Trial Chamber), [*Milutinović* Trial Judgment I of IV], CCIJ/IHRP Authorities, **Tab 26**, at para. 104. The “significant” threshold was originally rejected by the Appeals Chamber but then later adopted: *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeal Judgment (28 February 2005), (ICTY, Appeal Chamber), [*Kvočka* Appeal Judgment], CCIJ/IHRP Authorities, **Tab 27**, at para. 187.

<sup>30</sup> *Tadić* Appeal Judgment, *supra* note 23, CCIJ/IHRP Authorities, **Tab 19**, at para. 228 [emphasis in original]; *Brđanin* Appeal Judgment, *ibid.*, CCIJ/IHRP Authorities, **Tab 10**, at para. 365.

<sup>31</sup> See e.g. Jennifer S. Martinez & Allison Marston Danner, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law” 93 Cal. L. Rev 75 (2005), CCIJ/IHRP Authorities, **Tab 32**.

Statute). However, the *ad hoc* tribunals have held that JCE III is part of customary international law.<sup>32</sup> Regardless, even under JCE III, mere involvement in a group in which some members commit international crimes is not enough to establish individual culpability for all group members. There must be, at least, an intention to join in the joint criminal enterprise, and a willingness by the individual to take the risk that a foreseeable international crime might be carried out by someone in the group.

20. A number of cases applying JCE demonstrate the level of involvement required for an individual to be held culpable for a crime committed by a group.<sup>33</sup> In *Milutinović*, for example, it was alleged that six accused participated in a JCE to “modify the ethnic balance in Kosovo ... through a widespread or systemic campaign of terror”.<sup>34</sup> Milutinović served as “the President of the Republic of Serbia” during that time and was a member of the Supreme Defence Council (“SDC”) of the Federal Republic of Yugoslavia, itself headed by Slobodan Milošević. The ICTY Trial Chamber found that although the alleged JCE existed, Milutinović was not culpable.

21. Despite having held a high *de facto* position within the relevant political and military hierarchies, giving “two morale-boosting speeches”, “fail[ing] to raise certain issues during SDC meetings and generally exhibit[ing] loyalty to Milošević”, the Chamber held that Milutinović’s actions were “not a significant contribution to the [JCE]” and acquitted him of all charges.<sup>35</sup>

22. In addition to considering Milutinović’s acts, the Chamber declined to find him criminally culpable based on passive acquiescence to the commission of crimes as President of Serbia. Therefore, the Chamber did not acquit Milutinović merely on a lack of evidence sufficient to satisfy the high burden of proof, but rather held that even though he had been

<sup>32</sup> See, e.g., *Vasiljević* Appeals Judgment, *supra* note 14, CCIJ/IHRP Authorities, **Tab 14**, at para. 100; *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, (22 March 2006), CCIJ/IHRP Authorities, **Tab 28**, at para. 64; There have been some specific outlying decisions, e.g. *Nuon Chea et al.*, Trial Chamber Decision on Joint Criminal Enterprise (holding that JCE III did not exist in customary international law from 1975 to 1979).

<sup>33</sup> See, for example: the *Tadić* Appeal Judgment, *supra* note 23, CCIJ/IHRP Authorities, **Tab 19**, in which a low-level politician was found culpable under extended JCE (JCE III) because he had personally committed violent acts and murders, and personally assisted Serb forces in confining civilians in internment camps; the *Stakić* appeal, *ibid.*, CCIJ/IHRP Authorities, **Tab 28**, in which the accused, a politician and the leader of a *coup d’etat* government that established internment camps for Bosnians and Croats, was found to have acted with the requisite *mens rea* for JCE III (*Stakić*; and *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, (17 September 2003), CCIJ/IHRP Authorities, **Tab 29**, at para. 97, in which the accused, the prison warden, was found liable as an aider and abettor of persecution, and not as a principal perpetrator under systemic JCE, or JCE II.

<sup>34</sup> *Milutinović* Trial Judgment, *supra* note 29, CCIJ/IHRP Authorities, **Tab 26**, at para. 6.

<sup>35</sup> *Milutinović* Trial Judgment, *ibid.*, at para. 275 [emphasis added].

President of Serbia and had close ties to Milošević, Milutinović's various actions were not, as a matter of law, a "significant contribution" to the JCE.<sup>36</sup>

**The Application of These Modes of Liability to Cases of This Type Requires that Minimum Standards be Met Before an Individual may be Excluded Under Art. 1F(A)**

23. As set out above, at ICL, there are numerous modes of liability that may be relevant in a situation involving group commission. There are themes common to all of them. There is no such thing as organizational, rather than individual, culpability. There is no "complicity by association". In light of this, the current, over-inclusive Canadian approach must be revised; at present, it risks excluding individuals from refugee protection who would not be culpable for committing an international crime at ICL.

24. Determining whether a person can be excluded under Art. 1F(a) requires a case-by-case analysis that looks at whether there are "serious reasons for considering" that an individual's actions would give rise to culpability pursuant to one or more of the established ICL modes of liability. For the four "group commission" modes of liability discussed above, ICL requires that the *actus reus* and *mens rea* of one of them be present for an individual to be found culpable for an international crime. Excluding a refugee claimant in this kind of case on anything less than one of these sets of elements, using the "serious reasons for considering" standard, would be contrary to the wording of Art. 1F(a), the goals of the Refugee Convention, and modern ICL.

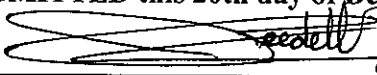
**PART IV – COSTS**

25. The CCIJ and IHRP do not seek costs and ask that no costs be awarded against them.

**PART V – ORDER SOUGHT**

26. The CCIJ and IHRP request permission to present oral argument at the hearing of the appeal. They take no position on the specific outcome of the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of December, 2012:**

  
 \_\_\_\_\_ as agent for  
 John Terry and Sarah R. Shody, Torys LLP  
 Renu Mandhane, University of Toronto  
 Lawyers for the CCIJ and IHRP

<sup>36</sup> *Ibid.* The Trial Chamber's decision to acquit Milutinović was not appealed by the prosecution and as such, is final.

## ANNEX "A" – MODES OF LIABILITY CHART

Mode	<i>Actus Reus</i>	<i>Mens Rea</i>
Co-perpetration	The existence of an agreement or common plan between the accused and at least one other person that, if implemented, would result in the commission of a crime in the ordinary course of events, and the provision of an essential contribution to the common plan that resulted in the commission of the relevant crime	With at least one other person, intention to engage in the criminal conduct or awareness that in implementing the common plan this consequence would occur in the ordinary course of events; and awareness of providing an essential contribution to the implementation of the common plan
Aiding and abetting	Act or omission specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, which has a substantial effect on the perpetration of the crime	Knowledge that the acts performed assisted with the commission of the specific crime of the principal perpetrator
Contribution	Contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose	Intention to so contribute, either: (i) Made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime; or (ii) Made in the knowledge of the intention of the group to commit the crime
JCE	Participation, with a plurality of persons in a common purpose or plan, which amounts to or involves the commission of a crime, with the contribution of the individual to the crime being significant	(i) Intention that the crime be committed and intention to participate in the common plan aimed at its commission (JCE I); (ii) Personal knowledge of an organized criminal system and intention to further the criminal purpose of that system (JCE II); or (iii) For a crime outside the common purpose perpetrated by other member(s) of the group, foreseeability of that crime to the individual, and willingly taking that risk by the individual (JCE III)



## PART VI—TABLE OF AUTHORITIES

<b>INTERNATIONAL CONVENTIONS</b>		<b>Reference in Argument</b>
<b>Tab 1</b>	<i>Rome Statute of the International Criminal Court</i> , 17 July 1998, Can T.S. No. 13, available online: < <a href="http://www.unhcr.org/refworld/docid/3ae6b3a84.html">http://www.unhcr.org/refworld/docid/3ae6b3a84.html</a> >.	4, 7, 10, 16
<b>Tab 2</b>	<i>Statute of the International Criminal Tribunal for the former Yugoslavia</i> , SC res. 827, UN SCOR 48th sess.; 32 ILM 1159 (1993), available online: < <a href="http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf">http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf</a> >.	5, 11
<b>Tab 3</b>	<i>Statute of the International Criminal Tribunal for Rwanda</i> , SC res. 955, UN SCOR 49th sess.; 33 ILM 1598 (1994), available online: < <a href="http://www.unict.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf">http://www.unict.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf</a> >.	5, 11
<b>CANADIAN JUDGMENTS</b>		<b>Reference in Argument</b>
<b>Tab 4</b>	<i>Ramirez v. Canada (Minister of Employment and Immigration)</i> , [1992] 2 F.C. 306, available on LexisNexis Quicklaw.	1
<b>Tab 5</b>	<i>Sivakumar v. Canada (Minister of Employment and Immigration)</i> , [1994] 1 F.C. 433, available on LexisNexis Quicklaw.	1
<b>Tab 6</b>	<i>Bazargan v. Canada (Minister of Citizenship and Immigration)</i> , [1996] F.C.J. No. 1209, available on LexisNexis Quicklaw.	1
<b>Tab 7</b>	<i>Minister of Citizenship and Immigration v. Ezokola</i> , [2011] FCA 224, available on LexisNexis Quicklaw.	2, 3
<b>FOREIGN JUDGMENTS</b>		<b>Reference in Argument</b>
<b>Tab 8</b>	<i>R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department</i> , [2010] UKSC 15, available online: < <a href="http://www.supremecourt.gov.uk/docs/UKSC_2009_0121_Judgment.pdf">http://www.supremecourt.gov.uk/docs/UKSC_2009_0121_Judgment.pdf</a> >.	4

<b>INTERNATIONAL JUDGMENTS</b>		<b>Reference in Argument</b>
<b>Tab 9</b>	<i>Prosecutor v. Thomas Lubanga Dyilo</i> , Judgment, ICC-01/04-01/06, Judgment (14 March 2012), (International Criminal Court, Trial Chamber), available online: < <a href="http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf">http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf</a> >.	6, 8, 9, 16
<b>Tab 10</b>	<i>Prosecutor v. Radoslav Brđanin</i> , IT-99-36-A, Appeal Judgment (3 April 2007), (ICTY Appeals Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	6, 25, 26, 29, 30
<b>Tab 11</b>	<i>Prosecutor v. Ntawukulilyayo</i> , ICTR-05-82-A, Judgement, Appeals Chamber, (14 December 2011), available online: < <a href="http://www.unict.org/Cases/tabid/127/PID/8/default.aspx?id=4&amp;mnid=2">http://www.unict.org/Cases/tabid/127/PID/8/default.aspx?id=4&amp;mnid=2</a> >.	12, 13, 14, 15
<b>Tab 12</b>	<i>Prosecutor v. Blagoje Simić</i> , IT-95-9-T (17 October 2003) (ICTY Trial Judgment), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	13
<b>Tab 13</b>	<i>Prosecutor v. Naser Orić</i> , IT-03-68-T, (30 June 2006) (ICTY Trial Judgment), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	13
<b>Tab 14</b>	<i>Prosecutor v. Vasiljević</i> , IT-98-32-A (24 February 2004), (ICTY Appeals Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	14, 32
<b>Tab 15</b>	<i>Prosecutor v. Muthaura et al.</i> , ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the <i>Rome Statute</i> , Pre-Trial Chamber II, (23 January 2012), available online: < <a href="http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Related+Cases/ICC01090211/Court+Records/">http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Related+Cases/ICC01090211/Court+Records/</a> >.	17
<b>Tab 16</b>	<i>Prosecutor v. Mbarushimana</i> , ICC-01/04-01/10, Decision on Confirmation of Charges, Pre-Trial Chamber (16 December 2011), available online: < <a href="http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx">http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx</a> >.	18, 19
<b>Tab 17</b>	<i>Prosecutor v. Mbarushimana</i> , ICC-01/04-01/10 OA4, Appeals Chamber (30 May 2012), available online: < <a href="http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx">http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx</a> >.	18, 20, 21
<b>Tab 18</b>	<i>Prosecutor v. Thomas Lubanga Dyilo</i> , ICC-01/04-01/06-803-tEN, Decision	22

	on Confirmation of Charges (29 January 2007), (ICC Pre-Trial Chamber I), available online: < <a href="http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF">http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF</a> >.	
<b>Tab 19</b>	<i>Prosecutor v. Du[Ko Tadi]</i> , IT-94-1-A, Appeals Judgment (15 July 1999) (ICTY), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	23, 24, 26, 30, 33
<b>Tab 20</b>	<i>Prosecutor v. Munyakazi</i> , ICTR-97-36A-A, Appeal Judgment (28 September 2011), available online: < <a href="http://www.unict.org/Portals/0/Case%5CEnglish%5CMunyakazi%5Cjudgement%5C110928.pdf">http://www.unict.org/Portals/0/Case%5CEnglish%5CMunyakazi%5Cjudgement%5C110928.pdf</a> >.	25
<b>Tab 21</b>	<i>Prosecutor v. Vlastimir Đorđević</i> , IT-05-87/1-T, Judgment (23 February 2011), (ICTY Trial Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	26, 29
<b>Tab 22</b>	<i>Prosecutor v. Miroslav Kvočka</i> , IT-98-30/1-T, Judgment (2 November 2001) (ICTY Trial Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	27, 28
<b>Tab 23</b>	<i>Prosecutor v. Momčilo Krajišnik</i> , IT-00-39-A, Judgment (17 March 2009), (ICTY, Appeal Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	29
<b>Tab 24</b>	<i>Prosecutor v. Gotovina et al.</i> , IT-06-90-T, Judgment Volume II of II (15 April 2011), (ICTY Trial Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	29
<b>Tab 25</b>	<i>Prosecutor v. Vujadin Popović et al.</i> , IT-05-88-T, Judgment Volume I (10 June 2010), (ICTY Trial Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	29
<b>Tab 26</b>	<i>Prosecutor v. Milutinović et al.</i> , IT-05-87-T, Judgment Volume I of IV (26 February 2009), (ICTY Trial Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	29
<b>Tab 27</b>	<i>Prosecutor v. Kvočka et al.</i> , IT-98-30/1-A, Appeal Judgment (28 February 2005), (ICTY, Appeal Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	29
<b>Tab 28</b>	<i>Prosecutor v. Stakić</i> , Case No. IT-97-24-A, Judgment, (22 March 2006), (ICTY Appeal Chamber), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	32, 33
<b>Tab 29</b>	<i>Prosecutor v. Krnojelac</i> , Case No. IT-97-25-A, Judgment, (17 September 2003), available online: < <a href="http://www.icty.org/sections/TheCases/JudgementList">http://www.icty.org/sections/TheCases/JudgementList</a> >.	33

**SECONDARY SOURCES**

		<b>Reference in Argument</b>
<b>Tab 30</b>	Gerhard Werle, "Individual Criminal Responsibility in Article 25 ICC Statute" (2007) 5:4 JICJ 953, available through HeinOnline.	6
<b>Tab 31</b>	Jens David Ohlin, "Joint Intentions to Commit International Crimes" (Winter 2011) 11(2) Chicago J Int'l L 693, available through HeinOnline.	22
<b>Tab 32</b>	Jennifer S. Martinez & Allison Marston Danner, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" 93 Cal. L. Rev 75 (2005), available through HeinOnline.	31