

Analysis: Extended Liability in the Magnitsky Act

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By: Joseph Rikhof

The Magnitsky Act contains some unusual concepts in respect to extended liability, which cannot be interpreted by referring to Canadian criminal law. This article will attempt to address this lacuna by looking at a wide range of domestic and international instruments to suggest a reasonable interpretation of the words used in this piece of legislation to connote involvement in prohibited activities.

When the Magnitsky Act[1] was first discussed in this journal,[3] the Commentary ended with the following exhortation: “In short, the notion of the word “responsibility” in the Act is vulnerable because of its lack of judicial interpretation …While we recognize that the Act is not criminal legislation, nonetheless, its extraterritorial application and engagement of fundamental international human rights law point to the need for legislative coherence.”

The text in the Act.

Section 4 of the Magnitsky Act says the following:

Orders and Regulations

(1) The Governor in Council may, if the Governor in Council is of the opinion that any of the circumstances described in subsection (2) has occurred,

(i) make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (3) in relation to a foreign national that the Governor in Council considers necessary; and

(ii) by order, cause to be seized, frozen or sequestrated in the manner set out in the order any of the foreign national's property situated in Canada.

Circumstances

(2) The circumstances referred to in subsection (1) are the following:

(a) a foreign national is **responsible for, or complicit in**, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state who see

(i) to expose illegal activity carried out by foreign public officials, or

(ii) to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and the right to a fair trial and democratic elections;

(b) a foreign national acts as an agent of or on behalf of a foreign state in a matter relating to an activity described in paragraph (a);

(c) a foreign national, who is a foreign public official or an associate of such an official, is **responsible for or complicit** in ordering, controlling or otherwise directing acts of corruption — including bribery, the misappropriation of private or public assets for personal gain, the transfer of the proceeds of corruption to foreign states or any act of corruption related to expropriation, government contracts or the extraction of natural resources — which amount to acts of significant corruption when taking into consideration, among other things, their impact, the amounts involved, the foreign national's influence or position of authority or the complicity of the government of the foreign state in question in the acts; or

(d) a foreign national has **materially assisted, sponsored, or provided** financial, material or technological support for, or goods or services in support of, an activity described in paragraph (c).

The words in bold are the operative ones in delineating the liability for persons who are targeted by the act, namely "responsible for", "complicit in" or "materially assisted, sponsored or provided … support". These terms will be discussed in turn, beginning with the notion of "complicit". Apart from the terms sponsoring or providing support, the other notions are rarely used in the Canadian criminal or quasi-criminal context and require legal clarification, which will be useful both for persons implementing the

provisions the Act as well those who will be made subject to them.

I. “Complicit” – Canada

The term “complicit” is only found in Canadian legislation 30 times, two of which are in the Act itself and in the *Special Economic Measures Act* (SEMA), which uses this term when referring to the Magnitsky Act. The other 28 times, the word “complicit” is used not to denote a form of extended criminal liability but only civil consequences in the context of seizure provisions, often with following text: “whether the member referred to in paragraph (a) appears innocent of any complicity in the offence or of any collusion in relation to the offence”.[2]

The most common terms used in Canadian criminal statues, notably the Criminal Code, to define extended liability are aiding[4] (including accessory after the fact), abetting,[5] common intention,[6] counselling,[7] conspiracy,[8] and attempt.[9] Some extension or clarification of especially the concept of aiding and abetting can be found in sections 83.18-83.23 of the Criminal Code dealing with anti-terrorism, which sets out the forms of extended liability of participating in or contributing to,[10] facilitating,[11] leaving Canada to commit an offence related to terrorism,[12] instructing to carry out a terrorist activity,[13]or advocating or promoting the commission of a terrorist offence[14] and concealing or harbouring a person involved in terrorism.[15] The concept of advocating or promoting can also be found in the Criminal Code in the context of genocide[16]and as such used to interpret the same words in the Magnitsky Act.

The term “complicity” has been used in a generic sense for extended liability in one area of refugee law, namely exclusion, which is the device used to deny asylum seekers the status of refugee due to their involvement in serious criminality[17]although the legal term used is ‘committed’.[18] The test for this notion of complicity, based on the broadest notions of extended liability in international criminal law,[19] was set out by the Supreme Court of Canada as follows: “To exclude a claimant from the definition of ‘refugee” by virtue of art. 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization’s crime or criminal purpose.”[20]

“Complicit” – International Law –Introduction

The term “complicity” has been used in the two areas of international law which regulate criminal conduct, namely transnational criminal law and international criminal law. The difference between these two areas is that international criminal law refers to conduct which is prohibited under international law itself and it is international law which provides for individual liability; the enforcement of this area of law manifests itself either directly, by international institutions applying international law, or indirectly, by states bringing perpetrators before national courts through the application of extended forms of jurisdiction, primarily universal jurisdiction (where a prosecution can be initiated when the crime is not committed in Canada but the perpetrator is present in Canada after having committed crimes abroad). On the other hand, transnational criminal law covers the indirect suppression by international law through the domestic criminalization of activities that have actual or potential

transboundary effects; enforcement of transnational law is always indirect, namely prosecution by domestic courts as a result of the application of internationally negotiated, multilateral suppression treaties.[21]

“Complicit” – International Law – Transnational Criminal Law

These suppression treaties, which are part of transnational criminal law, have dealt with the issues of terrorism, organized crime, drug trafficking, human rights and cybercrime in almost 30 treaties.

All treaties have set out forms of extended liability to be penalized by countries which have ratified these treaties. Over time, the spectrum of participation has been extended to the extent that the most recent treaties have included ten different types of involvement.[22] Out of this multitude of treaties only two have used the concept of complicity, namely the 1984 Torture Convention[23] and the 2000 Protocol to the Convention on the Rights of the Child[24] and in both treaties this form of extended liability is only one of three types, the other two being attempt and participation.[25] It would appear that the use of complicity in the Magnitsky Act has been inspired by the Torture Convention but, apart from this general reference, the use of the word complicit is not helpful as it is not further defined in the treaty and since Canada has implemented the treaty with reference to the regular notions of extended liability in the Criminal Code.

“Complicit” – International Law – International Criminal Law

In international criminal law, the 1948 Genocide Convention has a reference to complicity, namely in article III(e).[26] Because of the fact that the Statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) also had general provisions for indirect involvement, they were called upon to explain the parameters of complicity, especially in relation to aiding and abetting.

The answer given 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.[27] 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.[28] The question remained unresolved at the ICTY and ICTR[29] but has been dealt with in the Statute of the International Criminal Court by separating the crime of genocide and the means of committing such a crime and by deleting the term complicity.

“Complicit” – International Law – the International Law Commission

The International Law Commission,[30] the United Nations legal thinktank, has examined participation in international crimes on four occasions: in the 1950 “Principles of International Law Recognized in the Charter of the Nürmberg Tribunal and in the Judgment of the Tribunal”, the 1954 “Draft Code of Crimes against the Peace and Security of Mankind”, the 1996 updated version of the “Draft Code of Crimes against the Peace and Security of Mankind” and the ongoing Crimes against Humanity project, which started in 2015.

The second attempt to develop a draft code started in 1981 with a request from the General Assembly [31] and was completed in 1996. The 20 articles of this draft code have three provisions dealing with participation, with article 2 addressing individual responsibility in general, article 6 dealing with the responsibility of the superior and article 16, which puts a limitation on article 2 when a crime of aggression has been committed.[32] The commentaries with respect to those articles are much more detailed than in the two previous documents.[33] In general, they make it clear that the provisions in the draft code are based on, or inspired by, earlier documents addressing punishable participation and mention specifically throughout this part of the document, the Charter of the International Military Tribunal in Nuremberg, the Genocide Convention, the Geneva Conventions and its Additional Protocols, and the Statutes of the ICTY and ICTR, as well at times, its own earlier work in this area.

However, of interest for the discussion of complicity, in an earlier draft of this document[34] there is detailed discussion of the parameters of this notion[35] in the following draft article:

1. Participation in the commission of a crime against the peace and security of mankind constitutes the crime of complicity.
2. The following are acts of complicity:

(a) aiding, abetting or provision of means to the direct perpetrator, or making him a promise;

(b) inspiring the commission of a crime against the peace and security of mankind by, inter alia, incitement, urging, instigation, order, threat or abstention, when in a position to prevent it;

[(c) aiding the direct perpetrator, after the commission of a crime, to evade criminal prosecution, either by giving him refuge or by helping him to eliminate the evidence of the criminal act.].[36]

II. “Responsible”

The word “responsible” is used quite a few times in Canadian legislation but not in terms of assigning criminal guilt: not in the Criminal Code nor in other quasi criminal statutes. It is often used to connote persons who are in charge of organizations, operations or practices by using terms such as “The Agency is responsible for the implementation of policies of the Government of Canada that relate to …”[37]; it also used to indicate lack of criminal guilt in the sense of not being responsible.[38]

In international humanitarian and criminal law there is the concept of command or superior responsibility to create criminal accountability for omissions of persons in charge of military and civilian organizations where persons for whom they are responsible have committed international crimes.[39]

The requirements to hold persons liable for this form of responsibility are threefold: 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.[40]

III. “Materially assisted”

With respect to this phrase, it has not been used very much at all in Canadian jurisprudence,[41] but seems to have found its inspiration in US immigration law where the notion of material support can be found as part of the definition of engaging in a terrorist activity in the Immigration and Nationality Act.[42]

The jurisprudence interpreting this provision has given it a broad meaning. Participation in military activities for the Liberation Tigers of Tamil Eelam (LTTE) amounts to material support,[43] as does providing food and shelter to militant Sikhs organizations such as the Babbar Khalsa, International Sikh Youth Federation and Khalistan Commando Force, combined with membership in these organizations.[44] It also includes soliciting funds for the Jammu Kashmir Liberation Front (JKLF), even though these funds were for the non-violent, political wing 'because money donated to an organization's political wing is considered to be support for the militant wing as well'.[45] Working for a newspaper under the control of the LTTE would also fall within the parameters of this provision.[46] As well, activities such as collecting funds for the Eritrean Liberation Front (ELF), supplying the ELF with provisions such as sugar, shoes, and cigarettes, and passing along secret documents, amount in the aggregate to material support.[47] The same result was reached for a person who was forced by LTTE operatives to cook, dig trenches, fill sandbags and help build fences.[48]

Conclusion

It would appear from domestic and international sources, both criminal and non-criminal, that the terms "responsible for", "complicit in" or "materially assisted" should be given a broad interpretation. This interpretation most likely includes all known forms of extended liability known in Canadian criminal and quasi-criminal statutes for both horizontal and vertical relationships and could very well also capture omission liability in certain situations, specifically in hierarchical structures.

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Joseph Rikhof **About the Author**

Globally-recognized as an expert in cases of war crimes, Dr. Joseph Rikhof was with the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and teaches International Criminal Law in the Faculty of Law at University of Ottawa. Dr. Rikhof was a visiting professional with the International Criminal Court in 2005 and Special Counsel & Policy Advisor to the Modern War Crimes Section of Canada's Department of Citizenship and Immigration between 1998 and 2002. Extensively published, Dr. Rikhof lectures around the world on organized crime, terrorism, genocide, war crimes, and crimes against humanity.

References

1. The official name is "*Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*", which can be found here: http://laws.justice.gc.ca/eng/acts/J-2.3/; the regulations, to which the Act refers can be found here: http://laws.justice.gc.ca/eng/regulations/SOR-2017-233/page-1.html#h-1 while this is the link to the Schedule referred to in the regulation, which was the vehicle to designate 52 persons (Russians and Venezuelans) who have been found to violate the sections of the Act: http://laws.justice.gc.ca/eng/regulations/SOR-2017-233/page-2.html#h-5. In addition to being affected by this particular legislation, the persons mentioned in the schedule are also inadmissible to Canada as a result of an amendment of the *Immigration and Refugee Protection Act* (IRPA), which added a paragraph (e) to subsection 35(1) of IRPA, dealing with human or international rights violations and which says: "being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*".
2. See for instance section 139.1(6)(b) of the *Customs Act*, section 281(b) of the *Excise Act* and section 119(2)(b) of the *Canada Marine Act*.
3. See CCIJ "The Magnitsky Act: A Bold Step Forward, but Changes Needed" (2017) 1 PKI Global Just J 12.
4. Section 21(1)(b).
5. Section 21(1)(c).
6. Section 21(2).
7. Section 22(1); there is also counseling as an inchoate offence, which can be found in section 464.
8. Section 465.
9. Section 463.
10. Section 83.18(1), which clarifies these two terms by saying that providing, receiving, recruiting, offering, entering or remaining in any country for the benefit of a terrorist group and making oneself available to facilitate or commit a terrorism offence.
11. Section 83.19.
12. Sections 83.181 and 83.201-83.202.
13. Sections 82.21-83.22.
14. Section 83.221.
15. Section 83.23.
16. Section 318(1).
17. See at the highest level, *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 (Ezokola).
18. Section 98 of IRPA, which in turns refers to article 1F of he Refugee Convention.

19. *Ezokola*, paragraphs 48-68.
20. *Ezokola*, paragraph 84.
21. Robert Currie and Joseph Rikhof, "*International & Transnational Criminal law, Second Edition*", Irwin Law, Toronto, 2013, pages 325-334.
22. See article 1 of the 2010 Convention on the Suppression of Unlawful Acts Relating to International Aviation (Beijing Convention) and article 5.1 of the 2010 United Nations Convention against Transnational Organized Crime. The types of involvement in the latter treaty are conspiracy, attempt, organizing, directing, aiding, abetting, facilitating, counselling and common purpose while the former adds assisting after the fact and threat but deletes facilitating and counselling.
23. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
24. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.
25. Articles 4 and 3.2 respectively.
26. Convention on the Prevention and Punishment of the Crime of Genocide.
27. Judgment, *Krsti?* (IT-98-33-A), Appeals Chamber 19 April 2004, paragraph 137–139; Judgment, *Ntakirutimana*(ICTR-96-10-A and ICTR-96-17-A), Appeals Chamber, 13 December 2004, paragraph 371; Judgment, *Blagojevi? & Joki?* (IT-02-60), Trial Chamber, 17 January 2005, paragraph679, 784; Judgment, *Krajišnik*, (IT-00-39&40), Trial Chamber, November 28, 2006, paragraph 864-866; Judgment, *Ngirabatware* (ICTR-99-54-T), Trial Chamber, 20 December 2012, paragraph 1347; see, however, Partial Dissenting Opinion of Judge Shahabuddeen in Judgment, *Krsti?* (IT-98-33-A), Appeals Chamber 19 April 2004, paragraph 59-68; the Decision on Motion for Judgment of Acquittal, *Miloševi?* (IT-02-54-T), Trial Chamber, 16 June 2004, paragraph 290–297 and Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, *Karemena, Ngirumpatse and Nzirorera* (ICTR-98-44-T), Trial Chamber, 18 May 2006, paragraph 6; Judgment *Nyiramasuhuko et al.* (ICTR-98-42-T), Trial Chamber, 24 June 2011, paragraph 5980.
28. Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, paragraph547–548; Judgment, *Musema*(ICTR-96-13-T), Trial Chamber, 27 January 2000, paragraph 183.
29. Judgment, *Krsti?* (IT-98-33-A), Appeals Chamber 19 April 2004, paragraph 142, footnote 247; regarding the latter case, see also G. Boas, J.L. Bischoff and N.L. Reid, *Forms of Responsibility in International Criminal Law*(Cambridge: Cambridge University Press, 2007) at 422-423.
30. See for its mandate, background and work in international law http://legal.un.org/ilc/.
31. United Nations General Assembly Resolution 36/106, 1981.
32. *Yearbook of the International Law Commission, 1996*, vol. II, part Two, pp. 18, 25 and 47.
33. Idem, pp. 18-22, 25-26 and 42-43.
34. *The Report of the International Law Commission on the work of its Forty-second Session, 1990*, pp. 12-14, paras. 40-56.
35. Idem, page 14, paragraph 52.

36. Idem, page 14, paragraph 52, footnote 36.
37. See for instance Section 6 of the *Parks Canada Agency Act* or 3.1 of the *Railway Safety Act*.
38. See for instance sections 490.011 of the *Criminal Code* and 202.14 of the *National Defence Act*.
39. This form of liability can also be found in one human rights treaty namely the International Convention for the Protection of All Persons from Enforced Disappearance.
40. These requirements were fleshed out in the jurisprudence of the ICTY and ICTR while they are also reflected in article 28 of the Rome Statute, which is in turn followed in Canada in sections 5 and 7 of the *Crimes against Humanity and War Crimes Ac*t.
41. The Supreme Court in *R. v. Khawaja*, 2012 SCC 69, paragraphs 4, 42, 51-53, 57 and 62-63 uses the terms materially support, contribute materially or materially enhance when interpreting section 83.18 of the *Criminal Code*.
42. Section 212(a)(3)(B)(iv).
43. *Perinpanathan v INS*, 310 F.3d 594 (8th Circuit, 2002).
44. *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Circuit, 2004).
45. *Khan v. Holder*, 584 F.3d 773 (9th Circuit, 2009), confirming the same position as accepted in the case of Humanitarian Law Project v. Reno, 205 F. 3d 1130 (9th Circuit, 2000).
46. *Raghunathan v. Holder*, Docket No. 08-2475, 08-3147 (2d Circuit, 2010).
47. *Haile v. Holder*, 658 F.3d 1122 (9th Circuit, 2011).
48. *Annachamy v. Holder*, 686 F.3d 729 (9th Circuit, 2012).