On Complicity and Compromise:

A Reply to Peter French and Steven Ratner*

Peter French's and Steven Ratner's thoughtful comments are helpful in advancing the analysis we offered in our book *On Complicity and Compromise*.¹ Inevitably, there are areas of disagreement and bones to pick. However, our primary concern in this reply will be to press, with their assistance, the more positive agenda.

I.

The French and Ratner contributions complement our own by focusing on different points in the process of morally assessing and socially controlling contributions to wrongdoing. Those differences in turn arise largely from the different ways in which each of us came to the problem of complicity.

Ratner comes to it as an international lawyer. He is looking for ways to structure international rules and institutions to discourage contributions to wrongful behavior, primarily (but not exclusively) of and by states in the future.

French comes to it as a moral philosopher steeped in the law. There, the primary interest lies with all-in assessments of moral responsibility from a retrospective, end-of-the-day point of view.

Our interest in complicity was born instead of practical dilemmas facing humanitarian actors in conflict zones. The challenge facing them is to decide ahead of time whether and how much they should contribute, reluctantly but knowingly,

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¹ Peter French, "[Complicity: That Moral Monster, Troubling Matters](#)," and Steven Ratner, "Complicity and Compromise in the Law of Nations," both this issue. Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise* (Oxford: Oxford University Press, 2013).

to others' wrongdoing, where that is the only way in which they can do the good that they are striving to do.

II.

Because of that more practical concern, our focus was – as is that of any morality that seriously aspires to be action guiding – on assessments from the prospective rather than retrospective point of view.² An agent can be complicit with someone else's wrongdoing only if that wrongdoing actually occurs: that is the truth contained in French's remarks on "diachronic responsibility." But we do not have to wait to see if the wrongdoing actually occurs, at the end of the day, to judge that it is wrong at the time for the agent to do something that she could and should know might constitute a causally crucial contribution to wrongdoing occurring. Doing that amounts to running a risk of promoting wrongdoing, which is wrong in itself – and it remains so, regardless of how the risk eventually plays out.

If we are aiming to provide prospective guidance to an agent at the point at which she has to act, we must fix our focus accordingly. We must focus on what the agent could and should know at the time of action, and on what at that time she could and should realistically expect might well occur as a result of her action.³ Of course, *full* knowledge is almost always impossible. All that people can do is to act on such knowledge as they could and should obtain, and on probability assessments based on that. And of course if an outcome were literally "unimaginable" or

² In part, that reflects disciplinary differences as well. Criminal law (in the courts, if not the legislature) focuses on retrospective assessments, judging wrongdoing after the fact. Economics, decision theory and medicine focus instead primarily on prospective evaluations of alternative courses of action. Morality (at least in its action-guiding branch, if indeed there is any other) is clearly of the latter sort as well.

³ French (sec. 8) acknowledges this point at the very end of his contribution. Knowing that what you are doing might well make a potentially necessary contribution to another's wrongdoing does not require you to know, for sure and certain, what the potential wrongdoer's intentions are or will be sometime in the future (French, sec. 5); it requires only that you know that there is some real risk that that other person might well (come to) intend to commit some wrong and might well succeed with the aid of your contribution.

"unknowable" at the time of the agent's acting, then the agent can bear no responsibility for it.⁴ But that is literally part of our formula for assessing moral blame for complicity (the component that we call "Knowledge of Contribution"⁵) – it is not a criticism of it.

What could and should an agent have known at the time of acting, and what could and should she have reasonably expected in consequence of her action? Much depends on the circumstances, no doubt. But let us illustrate by reference to French's own two examples. In the snuff-sex case, after Worrell had committed one murder in the course of sexual intercourse that Miller had helped procure for him, Miller surely could and should have known the risk of Worrell murdering future women that Miller procured for him.⁶ In the case of Manes, who sold assault weapons to the Columbine killers, whether he could and should have known enough to count as complicit in the killings largely depends on what he could and should have been expected from overhearing them say on the shooting range, "Imagine that in someone's fucking brain!"⁷ (Of course, he was in any case guilty – and indeed convicted – of the separate wrongdoing of selling guns to purchasers whom he could and should have known were under the legal age.)

At the end of the day, things might turn out better or worse than the agent had any reason to expect at the time of action. Even if the wrongdoing to which she made a potentially essential contribution were somehow otherwise averted,

⁴ French (sec. 1, see also secs. 5, 6) and Ratner (sec. 1.1), respectively. But as French (sec. 6) goes on to say later – and we obviously concur – "contrived ignorance" is no excuse.

⁵ Lepora and Goodin, *On Complicity and Compromise*, pp. 104-5.

⁶ At least by then, if not before. As French (secs. 4, 5, n. 22) notes, the jury acquitted Miller of complicity in Worrell's first murder, on the grounds that that first murder was unanticipatable. But at the very end of his discussion of this case, French (sec. 4) mentions in passing that Miller had first met Worrell when both were in prison, the latter for the "abduction and violent rape of a young woman"; so, in truth, Miller could and should have known of Worrell's violent tendencies even before the first murder.

⁷ French sec. 4. For all we know, such things might be said on US firing ranges all the time, by a great many people who never act further on their fantasies – but that is an empirical question, and we defer to others with more experience of what happens on US firing ranges.

however, she still did something that was at least *pro tanto* wrong at the time, by contributing in that way to the risk of wrongdoing.

French demurs, in the following terms: "If the complicitor is held ... responsible for the consequences of his/her actions as well as those of another agent, for events that are well out of his/her control and utterly external to his/her mechanisms of action, a far too heavy burden of accountability is being piled on the complicitor's shoulders."⁸

But that is not what we were proposing. We propose holding an agent responsible for something that is very much internal to her own mechanisms of action – namely, doing something that she knows (or could and should have known) might be potentially essential for another person's wrongdoing to occur. That is very much a "doing" of her own, over which she most assuredly has control.⁹

True, she has no (further) control over whether the other person actually goes on to commit the wrong in view, or with what consequences. We do not propose holding her responsible for that. We would, were she a co-principal in the principal wrongdoing in question. But, by definition, a complicitor is a secondary agent – not a co-principal – in the wrongdoing in question.¹⁰ Whereas the acts of a co-principal

⁸ French sec. 7.

⁹ Cf. French sec. 2. If an action is involuntary, the agent is absolved of any blame for it in the formula we offer for assessing *pro tanto* blameworthiness for complicity; Lepora and Goodin, *On Complicity and Compromise*, pp. 104-5. Take Ratner's (sec. 2.1) case of states claiming the right to launch armed attacks on the territory of another state if the latter has proven "unwilling or unable" to control terrorists operating from its territory: the "host" state could arguably be complicit with the terrorists only in the first ("unwilling") case but not in the second ("unable"). Of course whether one state is legally (much less morally) permitted to launch attacks against the territory of another state is very much an open question; as Ratner (sec. 2.2) says *a propos* of civilians allegedly complicit with terrorists losing their immunity from drone attacks: "when the stakes of blameworthiness are this high – killing by the other side – then the complicity required in the wrongdoing ought to be quite serious."

¹⁰ French (sec. 2, cf. sec. 3) concurs with this. But several of his objections to our analysis seem predicated on an assumption that, if someone is deemed complicit in someone else's wrongdoing, she is as much to blame for it as the principal herself (French sec. 1). We see

constitute *part* of the wrongdoing, the acts of a complicitor merely contribute to the wrongdoing causally, from the outside.¹¹ That is why the blame attached to the complicitor is generally less than that attached to the principal wrongdoer himself.¹²

We propose to hold a complicit agent to blame, not for everything that actually occurs, but merely for her contribution to what could and should have been expected to occur, and with what probability, as a result of her chosen act of complicity. Think of the extent of her moral blameworthiness, if you like, as the "statistically expected moral disvalue" of her action (the probability that her contribution will be causally essential in the wrongdoing occurring, multiplied by the cost of the wrongdoing, were it to occur), as that which could and should have been assessed at the time of action.

The ultimate consequences may indeed be outside of the complicitor's control. Yet deciding whether to make what she could and should have known was a potentially essential contribution to the wrongdoing of another is (*pace* French) not at all "utterly external to his/her mechanisms of action." That is something that is well and truly within her intentional, volitional control. Take French's example of Manes' selling an assault weapon to the Columbine teenagers who used it to shoot up their school. We think that the blame that attaches to that act should be judged on the basis of what Manes could and should have known at the time he sold the kids the gun (i.e., that anyone purchasing an assault weapon might well use it for an assault of precisely the sort for which such weapons have been designed). French asks us to imagine that the kids were then unexpectedly run down by a truck before they could carry out their murderous plan. French is right to say that then Manes would not be complicit in any mass murder, since no mass murder would then have

no reason that that should necessarily be so, morally; nor is that how the law treats criminal complicity. See Lepora and Goodin, *On Complicity and Compromise*, pp. 99-102.

¹¹ In French's terms (sec. 2), they are "synthetically related to the ... wrongdoing," rather than "analytically necessary" to it.

¹² For further discussion (and a counterexample), see Lepora and Goodin, *On Complicity and Compromise*, pp. 99-102.

occurred.¹³ But the magnitude of the blame that Manes bears for running the risk of selling kids a weapon that could well be used in a mass murder remains the same.¹⁴

French poses the choice as one between saying either that the complicitor shares responsibility for the other's wrongdoing wholly or that she bears no responsibility for it whatsoever. The complicitor, not being a co-principal in that wrongdoing, bears no responsibility for the other's wrongdoing, of course – that wrongdoing was his, not hers. What she *is* responsible for, however, is her *own action*, in providing a causal contribution that (for all she could and should have known at the time) might well have been essential to his wrongdoing occurring.

All that is merely to say that the complicitor's act should be judged in its *own* terms, on the basis of what could and should have been known and expected by the agent at the time of acting. What French calls "resultant luck" – whether the murder plot is foiled by some other means – should form no part of that assessment of the complicitor's act. Of course whether the murders actually occur morally matters hugely in all sorts of other respects. But the gun seller's act – and blame – remains the same, either way. He ran the risk of contributing to mass murder, and the responsibility he bears for that is the same whether or not any murders actually occur.

III.

There are many dimensions to be considered in morally assessing *pro tanto* blameworthiness for contributing to the wrongdoing of another. It depends, among other things, on how bad the other's wrongdoing would be were it to occur, and on

¹³ French sec. 7.

¹⁴ That blame is of course less than the blame that would be borne by mass murders themselves, if the murders did occur. Still, as we have said, the complicit gun seller's act – and hence his (lesser) blame – remains the same, whether or not the mass murder occurs.

how causally important the complicitor's contribution might be to its occurring.¹⁵ Those matters lie at the heart of our book. Our primary concern was to provide a framework for how to think about the "complicity" component of those actions. How much *pro tanto* blame is borne by people who were contributing to other people's wrongdoing, even if they were at the same time trying their best to stop it, or to counteract or mitigate its consequences?

Within our framework for answering that question, we insist on four points. The first is that what you could and should have expected to happen – not what you intended or wanted to happen – is what gives rise to *pro tanto* blame in cases of complicity with someone else's wrongdoing.¹⁶ If you also share the evil intentions of the perpetrator of that wrongdoing, so much the worse: you would bear even more *pro tanto* blame, in consequence of that fact. But morally (and, in most if not quite all jurisdictions, legally), your not sharing the same evil intentions as the wrongdoer does not constitute a "get out of jail free" card when it comes to charges of being wrongfully complicit with his wrongdoing.¹⁷

¹⁵ Those two elements (like all others) interact, so taking even a small chance of contributing to something really, really bad can be seriously blameworthy. That fact puts paid to French's (sec. 5) suggestion that there might be any place for a "more likely than not" threshold in the moral assessment of blameworthiness for complicity. Ratner (sec. 3.2) concurs with our view, on this point.

¹⁶ Notice that, in his graffiti vandal case, French (sec. 2) slides between the two: "Her intention was to give a birthday present to the boy who she knew enjoyed building lawn ornaments and painting them. She did not expect his brother to run out of paint while tagging city hall and commandeer the cans from his brother." If there was no way she could or should have known the vandal would steal the paint from his brother and use it to paint graffiti, we too would exonerate her from blame. (Or praise, either, were the graffiti done by a budding Banksy or Basquiat and a great aesthetic accomplishment.) But just notice that what is warranted as a "reasonable expectation" cannot be grounded – as French's slide might seem to suggest – in "what she intends," and that alone.

¹⁷ The US is the odd jurisdiction out, in that respect, and US scholars easily fall into the trap of thinking what is true there is true in general. For the peculiar history of how Learned Hand's deathbed intervention hijacked the American Law Institute deliberations on this point, see Lepora and Goodin, *On Complicity and Compromise*, pp. 86-9. For a contrasting

Of course if your intentions differ from the wrongdoer's – particularly if you were contributing to his wrongdoing purely in order to achieve some genuine moral good that realistically could only be achieved in that way – then your contributing in that way might have been the right thing to do, on balance.¹⁸ But the fact remains that you were complicit in that wrongdoing, and the on-balance moral assessment does nothing to alter that fact.

Second, even if contributing to the wrongdoing was the right thing to do on balance, the complicitor nevertheless bears some *pro tanto* moral blame for contributing to the wrongdoing. Morally, it is important to avoid a "rush to the bottom line." The fact that what you did was right on balance is merely to say that any wrongs you did as part of that are counter-balanced – not that they are thereby completely wiped out. The wrongs remain. They are merely outweighed, not eradicated.

In such cases, a morally conscientious agent must always bear in mind that she had to do something that was genuinely wrong in order to do something that was the right thing to do on balance in those circumstances. Bearing that in mind is important for many reasons. One is to fix the proper form of the full moral calculus firmly in the agent's mind when it comes to assessing her future moral choices. She must resist any temptation to ignore moral costs in general, just because they were outweighed on one particular occasion. Another is to avoid any temptation to wishful thinking, supposing that fortuitous special circumstances surrounding one particular case will prevail quite generally.

Third, even where our principal focus is on prospective moral assessment – i.e., assessing the decision situation as it presented itself to the agent at the time she had

(and more typical) case, knowledge without shared purpose is the minimal standard of criminal complicity in the *Rome Statute of the International Criminal Court*, Article 25(3)(d)(ii); available at <<http://legal.un.org/icc/statute/rome.htm>>.

¹⁸ Or it might not: that just depends on the weight of moral reasons on both sides of the question.

to act¹⁹ – retrospective facts about how things turned out in the end are not altogether irrelevant. Suppose that, had she known then what she knows now, the complicitor should and indeed would have done things differently. That does not necessarily mean that she made the wrong choice at the time. (It would not have been, were there no way she could or should have known then what she knows now.) But it does mean that, going forward and knowing what she now knows about that past situation, she should bring that knowledge forward and use it as appropriate in making her subsequent decisions.

Fourth, the subsequent intervention of someone else's intentional agency does not serve as a "moral cut-out," exonerating a complicitor who – upstream of that – made what, for all she could have known at the time, might have been a potentially essential causal contribution to someone else's wrongdoing. We can and should hold people morally responsible for making potentially essential causal contributions to wrongful outcomes, even if there are other necessary conditions that remain within someone else's volitional control.²⁰

IV.

¹⁹ "Had to act," because a "rush to judgment" might itself be morally culpable, insofar as the agent could and should have known and expected that by waiting she could have been able to make a better moral judgment at no disproportionate cost from the waiting.

²⁰ French (sec. 2) is right that being in a position to supply or withhold a necessary condition puts the complicitor in control of the principal wrongdoer's action in the sense that, if she withheld that contribution, then the wrongdoing could not occur (in that way, anyway). But contrary to French's suggestion, that does not make the complicitor a co-principal in the principal's wrongdoing. A case outside of complicity shows this clearly: a commando attack will succeed only if the sentry is asleep, but that does not make the sleeping sentry a co-principal in the attack on his battalion (assuming, anyway, that he is not in cahoots with the commandos but merely sleepy). See Lepora and Goodin, *On Complicity & Compromise*, pp. 60-1.

The bulk of our book was devoted to elaborating all the multiple considerations that should go into the "complicity" component of an overall moral assessment of the agent's conduct. But of course that is only one component in any overall moral reckoning.

Much more needs to be said to determine whether the act of complicity was the right thing to do on balance, everything considered, despite the fact that it contributed to someone else's wrongdoing. Assessing moral blameworthiness for the "complicity" component of the act – the contribution it might have made to the wrongdoing of others – is only one part of that overall moral assessment of the act.

Sometimes there might be some greater good to be achieved by complicitly contributing to the wrongdoing of others. That is often the case for humanitarian workers in conflict zones, which is where our own interest in complicity originally arose. There, complicitly contributing to that wrongdoing could well be the right thing to do on balance, considering all the countervailing good that can only be achieved by so doing. That will not invariably be the case – it all depends on the weight of the reasons on each side of the moral ledger. But at least it might be the case. It is worth doing the moral calculation.

Other times, however, there is no greater good to be served by being complicit with the wrongdoing of others. That was clearly the case in the snuff-sex and mass-shooting cases that French discusses. In such cases, contributing to the wrongdoing of others is clearly wrong, not only *pro tanto* but also on balance. There, the complicity has no redeeming features.

V.

Such overall, on-balance assessments will always be fraught. This comes out clearly in Ratner's discussion of the plight of the International Committee of the Red Cross (ICRC) delegates who visit sites of detention and find evidence of torture. Standard ICRC practice is for the delegates not to denounce the torture publicly, but instead to raise the issue privately in discussions with the torturers and their governments.

Does that amount to their participating in a cover-up of torture? Does the public silence of the ICRC delegates about the torture make them complicit in it?²¹ And, if so, might that nonetheless be the right thing to do on balance, notwithstanding the *pro tanto* wrongness involved in being complicit with the practice of torture?

These questions arise with particular poignancy surrounding the ICRC's failure – for which they have since apologized – to reveal publicly what they knew about the Holocaust as early as 1942.²² But some of the same questions might arise with the ICRC's standard operating procedure, either generally or in certain specific cases.

On our analysis (and the ICRC's as well, presumably) the on-balance judgment would turn heavily on an assessment of likely consequences. Would the practice of torture be more likely to be brought to a halt by public silence and private entreaties? Or would it be more likely to be brought to a halt by public denunciation? On that issue, opinions might differ, both in general and in any particular case. But there is probably widespread agreement that that is the right question to be asking in this connection. We offer nothing novel, in that respect.

Where our analysis does have something distinctive to contribute lies in raising the question of whether the ICRC delegates' public silence constitutes complicity with the torture at all.²³ A key element in our formula for assessing moral

²¹ We distinguish "complicity" from "connivance" (turning a blind eye to the wrongdoing) and "contiguity" (being proximate to the wrongdoing), on the grounds that the former involves a potentially essential causal contribution to the wrongdoing in a way that the latter two categories do not; Lepora and Goodin, *On Complicity and Compromise*, pp. 44-7, 50-1. Ratner (sec. 1.1) rightly observes that the ICRC delegates' behavior might fall into one of those latter categories, even if it does not constitute complicity as such.

²² ICRC, "The ICRC in WWII: The Holocaust," available at <https://www.icrc.org/eng/resources/documents/misc/history-holocauste-020205.htm>.

²³ Note that the other option – publicly denouncing the torture – can never make the ICRC delegate complicit with torture. It may not succeed (or not as well as the alternative would have done) in stopping the torture, and it might have been the morally worse choice for that reason. Our point is simply that it would not have amounted to complicity because it did not provide even a potentially necessary causal contribution to the torture occurring

blameworthiness for complicity is "the Contribution Factor," the probability that the act in question will be causally essential for the other person's wrongdoing to occur.

As we have said, that must be judged at the time the contribution is made, and hence necessarily prior to the wrongdoing to which it contributes.²⁴ Of course nobody can know the future, and in that sense it is true that it is "unknowable" what the ICRC delegates' Contribution Factor will eventually turn out to be.²⁵ Yet, while nobody can predict with complete certainty what exact outcome any given act will contribute to, in what ways and how much, an informed guess is nevertheless both perfectly possible and morally well warranted, particularly when confronted with something so momentous as torture. That "informed guess" corresponds to what we have been talking about as "what one should and could have known at the time of making the potential contribution."²⁶

Thus, it would be wrong to dismiss the Contribution Factor as literally "unknowable." But there might be another reason for supposing the Contribution Factor to be small or even non-existent in the case of ICRC delegates. Given the regime in question, it might be the case that it would make no difference whatsoever to the regime's torturous practices whether the ICRC delegates publicly denounced it. Some states are simply impervious to the opinion of others, externally as well as internally. Some would clearly persist in torture, even if it was authoritatively revealed and roundly denounced. In such cases, the ICRC delegates' not publicly

²⁴ But there is a difference in the case of ongoing practices and "consolidated wrongdoings." When torture is part of a state's ongoing practice, condoning yesterday's torture can indeed causally contribute to tomorrow's. See Lepora and Goodin, *On Complicity and Compromise*, pp. 48, 55-6.

²⁵ Ratner sec. 1.1.

²⁶ Perhaps what Ratner meant here was something more like "knowable with sufficient certainty." But the possibility of something really bad happening, even with low probability, is surely something that a morally conscientious agent should take into account, in suitably probability-weighted fashion. Those probabilistic considerations enter into our formula for assessing the *pro tanto* moral blameworthiness for complicity through what we call the "centrality" component of our Contribution Factor; Lepora and Goodin, *On Complicity and Compromise*, pp. 66-8, 106-7.

denouncing torture can never make any causal contribution to the continuation of the torture – and, on our definition, if there is no potentially essential causal contribution, there is no complicity.

But imagine, now, another sort of regime, one that is still engaged in torture but one that is also sensitive to the opinion of others. Such a state might well be taking advantage of ICRC's presence, pointing to the very fact that they are opening their prisons to the ICRC as evidence that it has nothing to hide and that it is not engaged in torture. Suppose that, pursuant to ICRC's standard policy of public silence, the ICRC delegates who discover torture underway there do not publicly contradict those false claims. They then might be taken to be tacitly confirming those lies. The ICRC would in that case be making a contribution of sorts to the state's ongoing practice of torture²⁷ – and ICRC would indeed be complicit in that state's actions to some extent.²⁸

Perhaps, on balance, that was right for the ICRC delegates to do. Perhaps being complicit in the torture of some prisoners today was the unavoidable cost of successfully pursuing the greater good of restraining and eventually eradicating that state's torture in the future. Nevertheless, recognizing that as a case of complicity helps locate that question squarely within the complicity framework for decision making. Doing so emphasizes the importance of taking into account the use that a potential wrongdoer is likely to make of your own perhaps purely well-intended actions.

In closing his discussion of the case of the ICRC delegates, Ratner remarks that "the line between complicity and non-complicity ... may be more theoretical than

²⁷ And a "potentially essential" one, insofar as it could have been a "knife edge case" for the state whether or not to engage in torture, and it would desist from torture if only it were publically called to account for it.

²⁸ Paradoxically, therefore, the ICRC delegates' Contribution Factor – and hence blameworthiness for complicity, other things being equal – will generally be higher in democratic states that care for ICRC's "seal of approval," and where public opinion counts.

felt."²⁹ That, he says, is because the "delegates worry about *any* connection to the torture."³⁰

That may well be an accurate report about the mindsets of the ICRC delegates. But we would insist that they worry wrongly, in the case that their connection to the torture could not possibly have contributed to the torture occurring or recurring. It would clearly be wrong in that case for ICRC delegates to stop visiting detainees who are being tortured, and providing such comfort and assistance to them that they can, just to avoid "any connection to the torture." (And clearly ICRC delegates do not do any such thing, in practice – wring their hands, though they may, in the way Ratner describes.)

Contiguity with the wrongdoers is an ontological necessity for any organization hoping to improve the conditions of prisoners in detention – or improve the conduct of war, or discourage crimes against humanity, or engage in almost any other humanitarian endeavor occasioned by someone else's wrongdoing. Were there no wrong, there would be no need to assess it and work to correct it. It should be lack of contiguity to the torture (lack of access to detainees, for example) that should make the ICRC delegates worry about the utility of their presence, rather than contiguity with it.

It is precisely through being attentive to the distinction between contributory and non-contributory acts towards wrongdoing that an organization should decide whether a certain course of action would indeed constitute "looking out for the interests of victims" or a catastrophic moral failure. Such distinction, and the capacity to take difficult operational decisions based on it, is what truly preserves the institution's moral stance and reputation.

²⁹ Ratner sec. 1.1.

³⁰ Ratner sec. 1.1, emphasis added. They do so, he suggests for two reasons: (1) "because they want to fulfill their duties and choose the course of action that will end rather than prolong the torture"; and (2) "because they want to preserve the institution's reputation as a humanitarian actor, one looking out for the interests of victims." We fervently hope what Ratner dubs "the ICRC's concern about its reputation" is the weaker of those two motives.

VI.

The formula we provide in our book for assessing *pro tanto* blameworthiness for complicity with the wrongdoing of others can be fairly described as a "template for decision" (if not literally a "flowchart").³¹ It is designed precisely to aid the moral thinking of people, like humanitarian actors in conflict zones, who have to contribute to others doing wrong in order themselves to do good³² – although, as we have said, assessing just how bad it would be to be complicit in that way is only a first step for the agent in deciding whether that is the right thing to do, on balance.

Still, those are not judgments that should be left entirely to the agent's own discretion. The larger moral community has a legitimate interest in these matters as well – not just in praising and blaming individual moral agents on a case-by-case basis, but also in establishing formal social and legal institutions prescribing certain sorts of behaviors, proscribing others and bringing sanctions to bear in the cases of breaches of formal duties thus constituted.

Domestically, that is largely the business of the criminal law, and much of our exchange with French has been inflected by that. But the criminal law as it plays out in the courts is only one part of the story. By its nature, that is a retrospective exercise, passing judgment on conduct after it has already occurred. The criminal law has a prospective side as well, however. That comes clearly into focus when we think about the legislature enacting criminal statutes. The legislature's task is prospective – to determine what sorts of acts it should discourage, how heavily, through the threat of criminal sanctions.

Owing perhaps to the high drama of the courtroom, the retrospective tends to dominate the prospective in our thinking about criminal law. Precisely because it offers much less by way of courtroom drama, international law might afford a clearer view on the sorts of considerations that should bear on the formal

³¹ To borrow Ratner's (sec. 1.1) distinction.

³² Indeed, we printed a "Reader's Guide for Humanitarian Actors" at the front of our book.

institutionalization of duties bearing on complicity with wrongdoing. Ratner has most masterfully elucidated many of those considerations.

One important insight, which of course applies to domestic law as well, is that direct prohibitions targeting complicity itself might not be the best ways of tackling certain sorts of problems. If there are acts of (or akin to) complicity that are either bad in themselves or that have characteristically bad consequences, perhaps we ought to consider simply outlawing them in their own right rather than punishing them merely as secondary contributions to some other wrongdoing.

Thus, in French's case of the Columbine gun seller, there was actually a law on the books against selling minors assault weapons, and that law applied regardless of what the minors do or do not go on to do with the guns.³³ If they commit murders with the gun he has sold them, the gun seller might be criminally complicit with those murders as well – but that would be a second, separate criminal offense. He would be guilty of the first crime, even if circumstances were such as not to sustain a charge of complicity as well.

Conversely, if there are acts that are either good in themselves or that have characteristically good consequences, we might consider making those acts legally required – independently of any rectificatory duties that might or might not arise from an agent's complicity with past wrongdoings.

Thus, in Ratner's case of refugees fleeing from human rights abuses, it is perfectly sensible to suggest that our state should have a duty to assist them, independently of any complicity that our state may or may not have had with those whose abuse has driven the refugees from their homes.³⁴ Whether or not there is any such duty, at present, under international law, perhaps there should be. Once again, imposing a different, separate duty of that sort seems like a much cleaner way of

³³ As French (sec. 5, n. 22) notes.

³⁴ Ratner, sec 1.2. This is presumably what is being captured by the notion of "state bystander responsibility," to which he alludes (sec. 3).

handling such cases, rather than trying to shoehorn too much into a framework of "complicity."³⁵

VII.

Ratner masterfully demonstrates that much of international law can indeed be understood as an attempt to prevent states from complicitly contributing to the wrongdoing of others. Examples range across international conventions on refugees, human rights, torture, genocide, corruption, hazardous wastes and more.³⁶ Those examples are gratifyingly diverse, suggesting that the framework offered in our book can indeed unify broad swathes of international legal practice.

One important question that arises concerns the *form* that those legal requirements should take. Should they mandate "merely trying," or should they mandate "actually achieving"? Should they impose, in Ratner's terms, merely an "obligation of conduct" or an "obligation of result"?³⁷

The latter form of the requirement might seem to impose too onerous a burden, particularly where the actual outcome is not entirely under the control of the state in question (and few outcomes literally are entirely under the control of any one state, of course). Doubtless for that reason, most of the obligations Ratner discusses in international law are of the former ("trying," "obligation of conduct") form. But perhaps, just sometimes, it might be right to impose an obligation of the stronger sort. Perhaps that is the case, for example, where the obligation is not to harm (such as the duty of non-refoulement of refugees that Ratner discusses³⁸) as opposed to an obligation to assist.

³⁵ As Ratner (sec. 1.2) tries to do with his analysis of complicity with the "continued *impunity* ... caused by ... lack of enforcement of the relevant legal norms. ..."

³⁶ Ratner sec. 2.2.

³⁷ Ratner sec. 3.

³⁸ Ratner sec. 3.

Ratner's discussion invites more general reflection upon the sorts of considerations that are in play when moving from the moral calculus we recommend that individual agents should use in guiding their own conduct to its embodiment in formal legal codes. Any assessment of *pro tanto* blameworthiness for complicity on a case-by-case basis, whether by individuals or states, can and should take into account a rich array of particularized information about the case at hand. But when we are crafting general rules (whether of criminal law domestically or of international law) we can only do so on the basis of what is *typically true* of general classes of cases.

If the generalizations are not strong enough – if there is nothing that is typically true of all (or even enough) of them – then we probably should not try to impose any general rules covering those cases at all. Yet even the best generalizations are invariably imperfect at the margins. It is nonetheless an important principle of natural justice that rules that we impose on individuals or on states should be *general in form* – it is important that there not be one rule for some and another rule for others. So, any general rule is almost certain to be wrong in some particular case, even if it is right in virtually every other.

Still we might want to enforce the general rule unrelentingly, as a general rule brooking no exceptions – particularly where the bad that the rule is trying to prevent is sufficiently bad, and genuine exceptions are really very rare. The worry is the same as with the "ignorance of the law" excuse, to which John Selden objected in his delightful seventeenth-century *Table Talk*: "Ignorance of the Law excuses no Man; not that all Men know the Law, but because 'tis an excuse every man will plead, and no Man can tell how to confute him."³⁹ If we permitted too many excuses to general rules in international law, similar questions would be bound to arise. Did the state try as hard as it could or should have done? Did it do all it realistically could or should have been expected to do, in the circumstances? There is just too much wriggle room in any mere "duty to try," unaccompanied by any stronger "obligation of results." Strict liability and obligations "to achieve" (rather than merely "to try")

³⁹ Quoted in Glanville Williams, *Criminal Law*, 2nd edn. (London: Stevens & Sons, 1961), p. 290.

might thus be justifiable within the rules of international law, on the same basis as the "duty to know the law" is within domestic law.⁴⁰

Here, as elsewhere, it might also behoove us to think in terms of a system of nested "back-up" responsibilities.⁴¹ People ought to do what they ought to do. But suppose others cannot or will not do what they ought to do.⁴² Then there are certain other things – growing out of secondary back-up responsibilities assigned to you – that you ought to do in light of that fact, to help compensate for their moral failing.⁴³

Take the case of the humanitarian workers in a conflict zone, with which we began. Often they are in the situation that they are in, forced to be complicit with the wrongdoing of others in order to do any good themselves, because some state failed to do its job. First and foremost, we should try to incentivize each state to do its own job in protecting and not abusing people on its territory. As a back-up to that, we

⁴⁰ Ratner sec. 2.1, cf. sec. 3.1.

⁴¹ In international politics, this is most commonly discussed in connection with the so-called "responsibility to protect." Recent invocations of that doctrine have sometimes been disingenuous. (Likewise, the US claim to the right to use force against terrorists attacking it from abroad when the host state proves unwilling or unable to stop them; Ratner sec. 3.1.) But from a principled perspective, the idea of back-up responsibilities has much to be said for it. For a philosophical analysis that predates the "responsibility to protect" doctrine, see Robert E. Goodin, "What is so special about our fellow countrymen?" *Ethics* 98 (1988): 663-86.

⁴² What people can and cannot do defines their feasible set; and (morally, as well as legally) genuine feasibility constraints matter hugely (Ratner sec. 3.1). No one can be morally under an obligation to do something that she genuinely cannot; and second-best solutions might be required where first-best solutions are either impossible or where the first-best solution is inordinately costly or unreliable. But care must be taken not to let feasibility serve as an excuse for letting people off their moral obligations too lightly. It must not merely be a matter of "I don't want to (e.g., pay that price)" or of "I refuse to take steps now that would make it possible for me to do it later."

⁴³ Precepts of Islamic morality concerning what to do when facing injustice are instructive in this regard: "When you see injustice, stop it. If you can't stop it, tell others to stop it. If you cannot tell anyone to stop it, register your disagreement with it and do your best to prevent its outcomes. If you can't prevent its outcomes, do your best to improve their consequences."

might recommend that people on the ground (humanitarians, among others) should do what they decently can to ameliorate the suffering caused by the failure of others to do what they should – even if that involves complicitly contributing to the wrongdoing around them – if that is the only way for them to achieve outcomes that are morally better on balance.