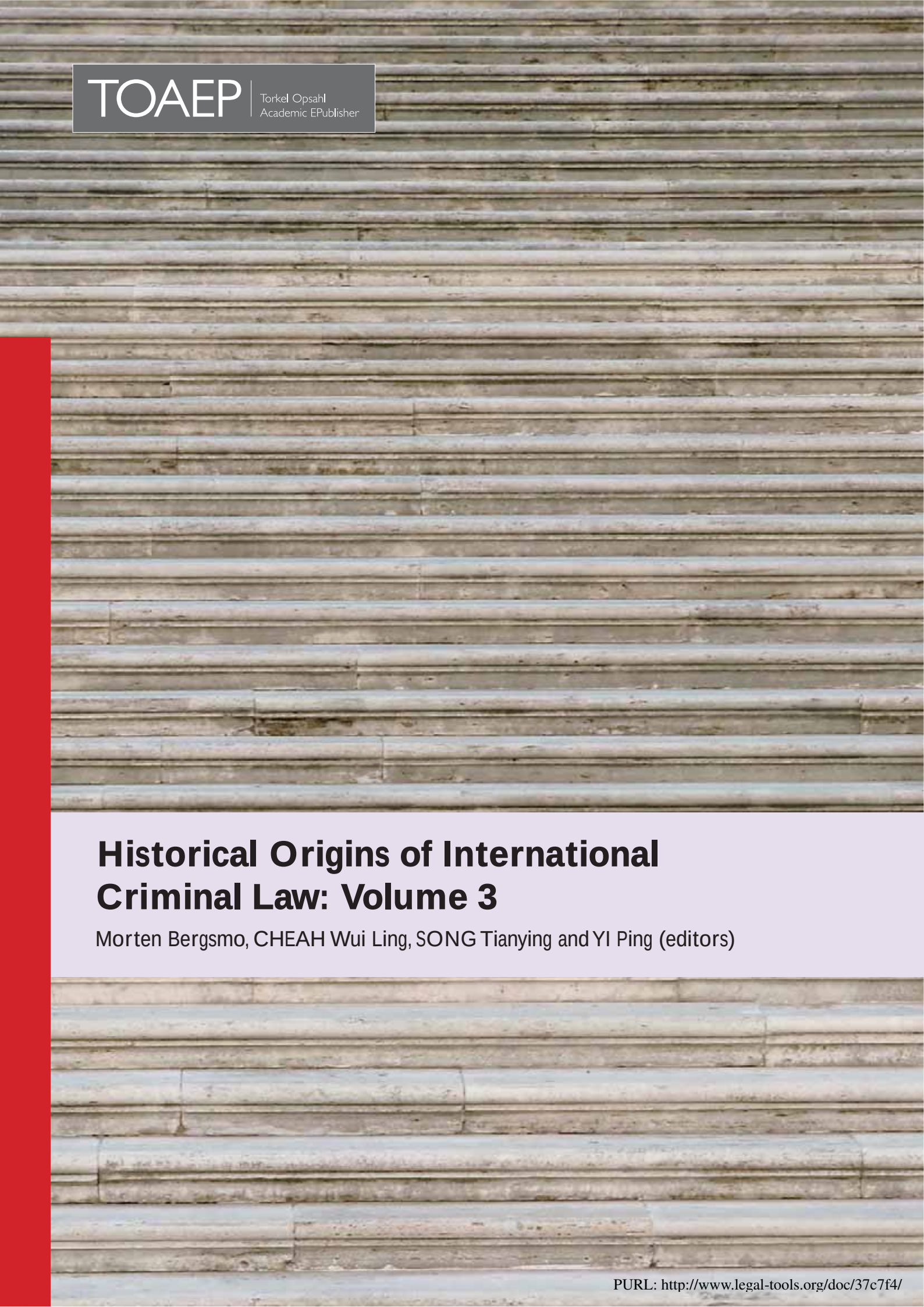

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16

The Evolution of Conspiracy as a Mode of Collective Criminal Liability Since Nuremberg

Zahra Kesmati*

16.1. Introduction

By looking at the very nature of serious international crimes one realises that committing such crimes through the contribution of individuals is a prerequisite under international criminal law. Serious international crimes such as war crimes, crimes against humanity and genocide share a common feature: they are typically large scale, planned and executed through systematic structures, usually pursuant to a common plan.[1] As the Appeals Chamber in Tadić case at the International Criminal Tribunal for the former Yugoslavia ('ICTY') states, serious crimes under international criminal law "do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups or individuals acting in pursuance of a common criminal design".[2] Given that such mass crimes usually involve intensive efforts of many individuals and multiple layers of culpability, the hypothesis of having a single defendant in such atrocities is almost impossible. Therefore, allocating responsibility among those individuals and the question of how to punish those involved in committing an international

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1 Héctor Olásolo, *The Criminal International Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, Hart Publishing, Oxford, 2010, p. 1.

2 International Criminal Tribunal for former Yugoslavia, *Prosecutor v. Duško Tadić et al.*, Appeals Chamber, Judgment, IT-94-1, 15 July 1999, para. 191 ('Tadić Appeal Judgment') (http://www.legal-tools.org/doc/8efc3a/).

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crime has gained immense importance within the theories of criminal responsibility.[3]

International criminal responsibility for collective criminal actions has been recognised in case law and jurisprudence, stretching from Nuremberg to the most current proceedings of the *ad hoc* tribunals and the International Criminal Court ('ICC'). As Jens Ohlin argues, there are "three doctrines for imposing individual liability for collective endeavors which have been recognised in international case law and jurisprudence: conspiracy, joint criminal enterprise and co-perpetration".[4]

Conspiracy can be conceived in two major forms. First, conspiracy can be considered as an *inchoate* criminal offence as in common law.[5] Under this conception, conspiracy is a distinct crime, separate from the target crime that conspirators agree upon and plan to commit. The common law requires only an agreement in order for the conspirators to be guilty of the substantive crime of conspiracy.[6] In case of "pure agreement" conspiracy functions as a rule of an inchoate crime instead of attribution.[7] The second conception of conspiracy can be traced back to the Pinkerton liability rule. In its most expansive form, the Pinkerton rule states that "any conspirator in a continuing conspiracy is responsible for the illegal acts committed by his cohorts in furtherance of the conspiracy, within the scope of the conspiracy and reasonably foreseeable by the conspirators as a necessary or natural consequence of the unlawful agreement".[8] Under the latter conception, conspiracy can provide liability when other substantive crimes have been committed by one of the co-

3 Alison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", in *California Law Review*, 2005, vol. 93, no. 1, p. 1.

4 Jens David Ohlin, "Joint Intentions to Commit International Crimes", in *Chicago Journal of International Law*, 2010, vol. 11, no. 2, p. 695.

5 Neal Kumar Katyal, "Conspiracy Theory", in *Yale Law Journal*, 2003, vol. 112, p. 1307.

6 Joshua Dressler, *Understanding Criminal Law*, 6th ed., LexisNexis, New Providence, NJ, 2012, p. 493.

7 Mark A. Summers, "Attribution of Criminal Liability: A Critical Comparison of the U.S. Doctrine of Conspiracy and the ICTY Doctrine of Joint Criminal Enterprise from an American Perspective", in *Croatian Annual of Criminal Law and Practice*, 2011, vol. 18, p. 183.

8 Mathew A. Pauley, "The *Pinkerton* Doctrine and Murder", in *Pierce Law Review*, 2005, vol. 4, no. 1, p. 6.

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conspirators.[9] According to this concept, an individual is held criminally liable for agreeing to commit unlawful acts and offences for his co-conspirators. Liability based on conspiracy can also be raised under this broad conception of conspiracy theory. Within this an individual can be held liable for offences that he would not participate in, as long as the offence was predictable given a common plan.[10] Therefore, conspiracy-based liability requires: 1) a conspiratorial agreement or a common plan; 2) a crime committed by any of the co-conspirators; such that 3) the crime is one of the obvious goals of the agreement. This chapter focuses on conspiracy as a mode of liability, but also touches on its use as an inchoate crime where there is a need to clarify.

Historically, the conspiracy doctrine was established within international law to aid prosecution of key war criminals.[11] Conspiracy was considered a response to the inability of the 'causation doctrine' to deal with situations in which multiple individuals were jointly responsible for the commission of a crime.[12] Generally, this was raised to ease the burden of producing evidence in post-war situations where witnesses and physical evidence were difficult to obtain.[13] Accordingly, it was considered an essential legal device for the prosecution of criminal groups during the Second World War. The authors of the Charter of the International Military Tribunal ('IMT') stated that "it will never be possible to catch and convict every Axis war criminal […] under the old concepts and procedures".[14] Therefore they specifically looked to the doctrine of conspiracy to facilitate doing so.[15] As Aaron Fichtelberg notes: "Some individuals who are intimately involved with the discrete criminal acts may be a great distance geographically, temporally or even causally from the actual

9 *Ibid*.

10 George P. Fletcher, *Rethinking Criminal Law*, Oxford University Press, Oxford, 2000, pp. 218–20.

11 Danner and Martinez, 2005, p. 1, see *supra* note 3.

12 Elies van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide", in *International Criminal Justice*, 2007, vol. 5, no.1, pp. 196–97.

13 Anthony Dinh, "Joint Criminal Enterprise at the ECCC: The Challenge of Individual Criminal Responsibility for Crimes Committed under the Khmer Rouge", in *Cambodia Tribunal Monitor*, 18 June 2008.

14 Quoting Colonel Murray Bernays of the US War Department, cited in Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues*, Springer-Verlag, Berlin, 2008, p. 132.

15 *Ibid*.

PURL: http://www.legal-tools.org/doc/37c7f4/

crime and thus may have no direct relation to the harm that the crimes caused".[16] The main purpose of this theory was to net "big fish"[17] as the District Court in the Eichmann trial noted: "On the contrary, in general, the degree of responsibility increases, as we draw further away from the man who uses fatal instrument with his own hands and reach the higher ranks of command".[18]

Although conspiracy may not be expressly an essential tool of accountability before the ICTY and ICC, new versions of the conspiracy doctrine including joint criminal enterprise and co-perpetration have been recognised by ICTY jurisprudence, the ICC Statute and recent proceedings elucidating that they are basically the product of conspiracy theory blended with doctrines of accomplice liability.

The purpose of this chapter is not to determine whether the three collective doctrines conform to the principle of culpability. Rather, it intends to evaluate the development of conspiracy as a mode of liability within the evolution of international criminal jurisprudence. The discussion tries to determine whether this concept has been transformed into new variants such as joint criminal enterprise and co-perpetration, and clarify the evolution of collective liability theories relating to conspiracy under international jurisprudence. The chapter also explores the commonalities and differences of these theories.

The discussion traces the conspiracy doctrine from the IMT at Nuremberg and subsequent Nuremberg trials, to the jurisprudence of the *ad hoc* tribunals of the ICTY, the International Criminal Tribunal for Rwanda ('ICTR') and the ICC. Section 16.2. provides an overview of what role conspiracy-based liability played in shaping the IMT Charter and Nuremberg trials as well as trials conducted pursuant to Control Council Law No. 10 ('CCL 10'). Section 16.3. analyses the ways that conspiracy has been articulated in key international documents. Sections 16.4. and 16.5. consider the ICTY and ICTR case law by looking into the relationship between conspiracy and joint criminal enterprise, and examine the extent to which conspiracy has influenced the development of liability theories,

[16] Aaron Fichtelberg, "Conspiracy and International Criminal Justice", in *Criminal Law Forum*, 2006, vol. 17, no. 2, p. 152.

[17] Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record 1944–1945*, Hoover Institution Press, Stanford, CA, 1982, p. 98.

[18] Supreme Court of Israel, *Adolf Eichmann v. The Attorney General of the Government of Israel*, Criminal Appeal No. 336/61, Judgment, 29 May 1962, para. 197.

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especially joint criminal enterprise. Section 16.6. turns to co-perpetration and common purpose liability under the ICC Statute and their links with conspiracy.

16.2. Conspiracy at the Nuremberg Trials

After the Second World War the victorious powers concluded an agreement to establish a tribunal at Nuremberg for the prosecution of war criminals whose offences could not be attributed to a certain geographical territory.[19] Conspiracy formed part of Nuremberg documents and proceedings "at the instigation of the Americans because of its unique features of combating collective criminality in common law jurisdictions".[20] Murray Bernays was the American lawyer who designed and "planned the legal framework and procedures for the Nuremberg War Crimes Trials after World War II, basing the trials on the legal foundation of conspiracy and publically trying the war crimes defendants through well-established legal methods, resorted to the United States domestic law of criminal conspiracy".[21] Indeed Bernays proposed the initial idea of including conspiracy in the IMT Charter. He maintained that conspiracy might provide an appropriate basis for catching and convicting "a large number of guilty people against whom there might not have been direct evidence of having carried out the atrocities, but they participated in the common enterprise".[22] In his famous memorandum Bernays wrote:

> The Nazi Government and its Party and State agencies […] should be charged before an appropriately constituted international court with conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of the laws of war […] once the conspiracy is established, each act of every member thereof during its continuance and in

[19] International Military Tribunal, *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Judgment, part 22, 1 October 1946 ('Nuremberg Judgment') (http://www.legal-tools.org/doc/45f18e/).

[20] Juliet R. Amenge Okoth, *The Crime of Conspiracy in International Criminal Law*, Asser Press, The Hague, 2014, p. 80.

[21] Jacob A. Ramer, "Hate by Association: Joint Criminal Liability for Persecution", in *Kent Journal of International and Comparative Law*, 2007, vol. 7, no. 1, p. 40; see also Smith, 1982, pp. 33–37, *supra* note 17.

[22] Smith, 1982, p. 35, see *supra* note 17.

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> furtherance of its purposes would be imputable to all other members thereof.[23]

He supported the idea that using conspiracy to prosecute Nazi defendants would be adequate to establish the guilt of all participants. Eventually Bernays found that "a conspiracy to wage aggressive war could rightfully include everything the Nazi regime had done since coming to power on 30 January 1933". Moreover, conspiracy removed the central legal problem that defendants could claim obedience to higher orders as a defence.[24]

However, Herbert Wechsler, who served at Nuremberg as assistant Attorney General on the part of the United States, rejected this idea by explaining that "maybe international law did not similarly recognize the criminality of conspiracies".[25] As regards the meaning of the term 'conspiracy', Wechsler further added that "Bernays himself was confused between conspiracy as a crime and conspiracy as a mode of complicity in substantive offences, committed by one of the conspirators".[26] Telford Taylor, one of the primary architects of the IMT, also disagreed with the view of Bernays: "The Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war".[27]

In preparation for the IMT the American delegation proposed to use conspiracy at the London Conference in 1945. Since the concept was absent in the continental criminal systems, it caused much controversy and provoked divergent approaches between common law and civil law countries.[28] At the conference "the French viewed conspiracy entirely as a bar-

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23 *Ibid*.

24 NAII, RG 107, Stimson Papers, Memorandum on War Crimes, 9 October 1944: Letter from Stimson to Stettinius (Secretary of State), 27 October 1944, enclosing "Trial of European War Criminals: The General Problem", pp. 1–5, cited in Richard Overy, "The Nuremberg Trials: International Law in the Making", in Philippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge, 2003, p. 16.

25 Norman Silber and Geoffrey Miller, "Toward 'Neutral Principles' in the Law: Selections from the Oral History of Herbert Wechsler", in *Columbia Law Review*, 1993, vol. 93, no. 4, p. 894.

26 *Ibid*.

27 Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred A. Knopf, New York, 1992, pp. 35–36.

28 Danner and Martinez, 2005, p. 115, see *supra* note 3.

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barous legal mechanism unworthy of modern law, while the Soviet attack on conspiracy was that it was too vague and so unfamiliar to the French and themselves, as well as to the Germans, that it would lead to endless confusion".[29] The concept of imputed liability for unlawful acts of co-conspirators was known in common law jurisdictions at the time, and consisted of an agreement between two or more persons with the intention of carrying out a crime and playing a role in furtherance of the agreement. "Its justificatory existence is apparently of a preventive nature."[30]

This kind of liability for co-conspirators had not been embraced in any civil law jurisdictions. Despite French and Soviet objections to the conception,[31] conspiracy was ultimately included in Nuremberg proceedings due to the United States' supremacy during the post-war period. Justice Robert H. Jackson, the chief American negotiator of the IMT Charter and chief prosecutor at the IMT, proposed two varied concepts of conspiracy at the London Conference: the *inchoate* concept that had been inherited from English law and was included in Article 6(a); and the *parties* concept which was traced back to Pinkerton rule,[32] crystallised into the last and general provision of Article 6. It is obvious that the main elements of conspiracy based liability were extracted "as a matter of general principles" from the Pinkerton rule, and at Nuremberg "conspiracy was mainly employed as a form of participation rather than as an inchoate crime".[33]

The focus of the following sections is to examine the role conspiracy has played in shaping the Nuremberg Proceedings. Accordingly, the discussion is divided into three parts devoted to the IMT Charter, the IMT trial and the CCL 10 trials to clarify how conspiracy was historically conceptualised in this process.

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29 Stanislaw Pomorski, "Conspiracy and Criminal Organizations", in George Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, Martinus Nijhoff, Dordrecht, 1990, pp. 213–16.

30 Ilias Banktekas and Susan Nash, *International Criminal Law*, 3rd ed., Routledge-Cavendish, London, 2007, p. 34.

31 Danner and Martinez, 2005, p. 115, see *supra* note 3.

32 US Supreme Court, *Pinkerton v. United States*, 328 U.S. 640, 1946.

33 Banktekas and Nash, 2007, p. 34, see *supra* note 30.

PURL: http://www.legal-tools.org/doc/37c7f4/

16.2.1. The International Military Tribunal Charter

The Charter of the IMT annexed to the London Agreement, which formed the statutory and legal basis for the IMT, included conspiracy within its *ratione personae* and subject matter jurisdiction. Article 6 of the IMT Charter provided:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against peace: namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[34]

[34] Charter of the International Military Tribunal, Article 6, 8 August 1945 ('IMT Charter') (https://www.legal-tools.org/doc/64ffdd/).

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The initial perception of Article 6 was that only participation in a conspiracy for the perpetration of a *crime against peace* could be prosecuted and similar conspiracy provisions were not included in the definitions of *war crimes* or *crimes against humanity*. By looking closely at the final paragraph it becomes clear that it covers "leaders, organizers, instigators and accomplices" who have taken part in the formulation or execution of a "common plan or conspiracy" to commit any of those crimes. It is obvious that this wording is directly concerned with the *ratione personae* jurisdiction of the IMT.[35] This paragraph provided for attribution of liability to persons who did not personally execute the listed crimes but nevertheless participated or contributed to their formulation or execution in other capacities.

It seems that Article 6 of the IMT Charter did not distinguish between principal and accessorial liability. As Kai Ambos pointed out, "the IMT […] embraced a unitary model which did not distinguish between the perpetration of a crime (which gives rise to principal liability) and participation in a crime committed by third person (which gives rise to accessorial liability)".[36] However, Article 6 distinguishes conspirators according to the nature of their contributions in up to four different categories of individuals participating in the common plan or conspiracy: the leaders, the organisers, the instigators and accomplices.

As noted, Article 6 contains two provisions relating to "common plan or conspiracy". First, the term "conspiracy" appears in Article 6(a) in the phrase "participation in a common plan or conspiracy". Conspiracy within this concept was included within the provision defining crimes against peace (Article 6(a)), but not within the provisions defining war crimes and crimes against humanity (Articles 6(b)) and 6(c)).[37] Article 6(a) seems to provide the substantive offence of crimes against peace *and* "participation in a common plan or conspiracy for the accomplishment of any [crimes against peace]", while Article 6(b) and (c) included the substantive offences of war crimes and crimes against humanity without any

[35] Edoardo Gereppi, "The Evolution of Individual Criminal Responsibility under International Law", in *International Review of the Red Cross*, 1999, vol, 81, no. 835, pp. 531–53.

[36] Kai Ambos, *La Parte General del Derecho Penal Internacional: Bases Para un a Elaboración Dogmática* [The General Part of International Criminal Law: Bases for a Dogmatic Development], Uruguay, Konrad-Adenauer-Stiftung, Berlin, 2005, p. 75, cited in Olásolo, 2009, p. 21, see *supra* note 1.

[37] Banktekas and Nash, 2007, p. 35, see *supra* note 30.

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corresponding conspiracy within their texts.[38] Although the wording of Article 6(a) suggests that a crime against peace may be perpetrated through a conspiracy to commit war crimes and crimes against humanity, its inclusion in Article 6(a) was clearly aimed at formulating a particular form of perpetration – the crime of aggression.

Second, the reference to "common plan or conspiracy" is also found in the last paragraph of Article 6. Some scholars maintain that the inclusion of this phrase twice within the same Article raises some confusion.[39] The interpretation of the last paragraph and its connection with the previous paragraphs are matters that demand consideration. As Article 31(1) of the Vienna Convention on the Law of the Treaties states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[40] It has been argued that its textual interpretation and the order and placement of the provision in the Charter support the view that the last paragraph of Article 6 modifies each of the paragraphs numbered (a), (b) and (c).[41] Kevin Jon Heller refers to the last paragraph of Article 6 as a "catch-all" provision.[42] He submits that a form of responsibility/mode of participation contained in the last paragraph of Article 6 attaches to all three previous categories of crimes, that is, crimes against peace, crimes against humanity and war crimes.[43] Indeed Article 6 closed with a general conspiracy provision that applied to all three offences. Accordingly, the final provision does not support an inchoate conspiracy charge, its language is more consistent with conspiracy-based mode of liability.

On the other hand, and as noted, the main provisions of Article 6 of the IMT Charter refer to participating in the formulation or execution of a

38 *Ibid*.

39 Jonathan A. Bush, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said", in *Columbia Law Review*, 2009, vol. 109, no. 5, pp. 1094–1262.

40 Vienna Convention on the Law of Treaties, 23 May 1969.

41 Roger S. Clark, "Nuremberg and the Crime against Peace" in *Washington University Global Studies Law Review*, 2007, vol. 6, no. 3, pp. 527–50.

42 Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011, p. 276.

43 *Ibid*.

PURL: http://www.legal-tools.org/doc/37c7f4/

"common plan or conspiracy".[44] It seems that this equates the concept of common plan which contains main elements such as plurality of persons, common design, participation in a common design and shared intent, with the notion of conspiracy.

Apart from the concept of conspiracy, another controversial theory of liability that was considered before the IMT was that of criminal organisations. The concept of criminal organisations has been considered to be equivalent to criminal conspiracy. Article 9 of the ITM Charter provides: "At trial of any individual of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization". Article 10 further reinforces Article 9 by providing that once the Tribunal declared an organisation criminal, this would be final and the "competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein".

As noted by the IMT: "A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes".[45] Like conspiracy, the concept of criminal organisation was established to create criminal responsibility for situations involving mass organised criminality with many participants. It was an ambitious attempt by the prosecution to overcome any evidentiary or procedural burden that it would otherwise encounter in proving every individual's role in the crimes perpetrated by the Nazi regime. In fact the prosecution maintained that it was part of the conspiracy concept. It was noted that as soon as an organisation was declared criminal, its members would become responsible for the criminal acts of one another, like in a conspiracy. As conspiracy was intended to "net the big fish", criminal organisation was to be used for "netting the smaller fish".

16.2.2. Trial at International Military Tribunal

The IMT trial started in 1945 with the indictment of 24 major war criminals and six organisations. The indictment contained four counts: 1) participation in a common plan or conspiracy for the accomplishment of a crime against peace, war crimes and crimes against humanity; 2) plan-

[44] IMT Charter, see *supra* note 34.

[45] Nuremberg Judgment, p. 82, see *supra* note 19.

PURL: http://www.legal-tools.org/doc/37c7f4/

ning, initiating and waging wars of aggression and other crimes against peace; 3) war crimes; and 4) crimes against humanity.[46]

The first count echoed the exact wording of Article 6, charged the defendants with participating as "leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy".[47] The first count clarified the particulars of the nature and development of a common plan and conspiracy which had been founded in Germany under the Nazis and covered 25 years from the time of establishment of the Nazi Party in 1920 to the end of the war in 1945. This addressed the Nazi Party as the core of the common plan or conspiracy. It recognised that the Nazi Party was the "instrument of cohesion among the defendants" from which they executed the purpose of conspiracy, and further the most important thing is that participation in affairs of the Nazi Party and the government was evidence of the participation in the conspiracy.[48] When defence counsel objected to conspiracy, the IMT recognised that there was no definition of conspiracy in the IMT Charter. In its judgment the Tribunal stated its understanding of conspiracy: "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action".[49]

Although defendants were charged under the first count with conspiracy to carry out all the three listed crimes in Article 6, the Tribunal did not recognise the two later conspiracies on crimes against humanity and war crimes. It declared that contrary to the prosecution's view, the Charter did not provide for conspiracy to commit war crimes and crimes against humanity. The Tribunal held that although the last paragraph of Article 6 seemed to create the perception that it provided for conspiracy with respect to all crimes, this provision did not actually generate new or separate crimes. The Tribunal instead asserted that the provision was only designed to establish responsibility of persons participating in the common plan to wage a war of aggressions.[50]

On the other hand, the Tribunal found five important principles within Article 6 of the Charter: 1) it imposes "individual responsibility"

[46] *Ibid.*
[47] *Ibid*., p. 14.
[48] *Ibid*., p. 56.
[49] *Ibid*., p. 57.
[50] *Ibid*., p. 55.

PURL: http://www.legal-tools.org/doc/37c7f4/

for acts constituting crimes against peace; 2) crimes against peace contain planning, preparation, initiation or waging of illegal war; 3) crimes against peace also include participation in a common plan or conspiracy to commit illegal war; 4) an illegal war consists of either a war of aggression or a war in violation of international treaties; accordingly the prosecution had to address whether the war planned, prepared, initiated and waged by the Nazi conspirators were illegal; and 5) individual criminal responsibility of a defendant is imposed by this provision not merely by reasons of direct, immediate participation in the crime. The IMT asserted: "It is sufficient to show that a defendant was a leader, an organizer, instigator, or accomplice who participated either in the formulation or in the execution of a common plan or conspiracy to commit crimes against peace". The judgment further stated "that the responsibility of conspirators extends not only to their own acts but also to all acts performed by any persons in execution of the conspiracy".[51] Thus under Article 6 "all the parties to a common plan or conspiracy are the agents of each other and each is responsible as principal for the acts of all the others as his agents". Referring to this provision the IMT recognised the conspiratorial nature of the planning and preparation of the Nazi aggression and the individual participation of named persons in the Nazi conspiracy for aggression leading to the attacks during from 1933 to 1939. The count of conspiracy to wage aggressive war dealt with crimes committed immediately before the Second World War began. The Tribunal decided to investigate the law on common plan or conspiracy together with the second count of planning and waging war, justifying that the same evidence had been produced to support both counts.[52]

The IMT indictments and judgments used the terms 'common plan' and 'conspiracy' interchangeably.[53] For example, count one of the IMT indictment is entitled "The Common Plan or Conspiracy", suggesting that the terms are synonymous, or are, at the very least, similar to one another. The IMT judgment also frequently used the expression "common plan or conspiracy" and equates the concept of common plan with the notion of

[51] *Ibid*., p. 14.

[52] *Ibid*., p. 55.

[53] Damgard, 2008, p. 185, see *supra* note 14.

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conspiracy.[54] The IMT justified that both had been carried out in a systematic and organised manner and decided that it would still proceed to find the guilt of the defendants under both counts,[55] while it seemed that the joint planning and preparation of such war by the defendants was the only evidence showing the existence of a conspiracy.

As noted, the IMT observed that the Nazi Party was an instrument for carrying out the aims of their conspiracy. Accordingly it recognised the existence of a plan under a dictatorial regime and rejected the defence argument that a plan cannot exist in a dictatorship. The Tribunal stated that a plan executed by several persons, though plotted by single person, was still a plan, and the participants could not escape from liability by alleging that they had been directed to do so by its author.[56] The IMT declared that by co-operating with the architect of the main plan with full knowledge of his aims, the defendants had made themselves members of the plan.[57]

It is well understood that the IMT was unwilling to embrace any form of vicarious liability that was not closely tied to an underlying offence under Article 6; therefore some level of *actus reus* and *mens rea* was necessary for defendants. Unlike in some American jurisdictions,[58] where the accused can be held strictly liable for any and all crimes committed by conspirators, the IMT sought to restrict liability to individuals who knew or should have known about their role in committing war crimes.[59] Indeed the IMT required a very high threshold of participation and knowledge of the plan and limited the charge of conspiracy only for those who participated in preparatory acts materialising into the actual acts of aggression.[60] Nevertheless the evidentiary threshold of the IMT

54 Nuremberg Judgment, pp. 12, 23, 56, see *supra* note 19. See also Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, TMC Asser Press, The Hague, 2003, p. 17.

55 Nuremberg Judgment, *ibid*., p. 64.

56 Ibid.

57 Ibid.

58 Raha Wala, "From Guantanamo to Nuremberg and Back: An Analysis of Conspiracy to Commit War Crimes under International Humanitarian Law", *Georgetown Journal of International Law*, 2010, vol. 41, no. 3, p. 693.

59 Bush, 2009, p.1100, see *supra* note 39.

60 Banktekas and Nash, 2007, pp. 50–53, see *supra* note 30.

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was high, requiring that knowledge of the conspiracy be proven directly and beyond reasonable doubt.[61]

The IMT found guilty under the charges of participation in a common plan or conspiracy, with great caution, only eight of the 24 indicted war criminals.[62] These eight defendants were regarded as having had a close link with Hitler's policy and were also a part of his inner circle of advisers. They had attended the conference at which Hitler had expressed his plans. Therefore the Tribunal considered them to be Hitler's co-conspirators. Their liability for conspiracy was based on the substantial role they played in the formulation and execution of plans, with full knowledge of the unlawful nature of the war and with the common intent that force be used along with their position to contribute to the decision to invade.[63]

16.2.3. Control Council Law No. 10 Trials

CCL 10 adopted by the Allied Control Council in post-war Germany provided the occupying authorities with the instruments to try suspected war criminals in their respective occupation zones. The crimes defined in Article II of CCL 10 were to a great extent similar to those set out in the Article 6 of the IMT Charter, with conspiracy only being specifically mentioned under the commission of crimes against peace.[64] The following overview is strictly with respect to the post-war tribunals' interpretation of the conspiracy-based liability.

The CCL 10 trials regarding conspiracy and common plan can be divided into three categories. The first category involved groups of individuals acting together to perpetrate a crime and, most often, included the killing of victims. An example could be the so-called Almelo trial in which four individuals worked together to execute two victims but where only one person pulled the trigger each time, while the others merely stood watch or dug the graves.[65] The British Military Court convicted all

61 *Ibid*.

62 Nuremberg Judgment, pp. 101–154, see *supra* note 19.

63 *Ibid*.

64 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Article II, 20 December 1945 (https://www.legal-tools.org/doc/ffda62/).

65 British Military Court for the Trial of War Criminals, Trial of Otto Sandrock and Three Others (Almelo Trial), 24–26 November 1945, in United Nations War Crimes Commis-

PURL: http://www.legal-tools.org/doc/37c7f4/

four individuals for murder. The Court found that the charged persons' intention to affect the result and their participation in the execution of the plan rendered them individually liable for murder. This liability would persist even if all of the charged persons did not personally effectuate the crime. The judge ruled that

> there was no dispute that all three (Sandrock, Schweinberger and Hegemann in the case of Pilot Officer Hood, and Sandrock, Schweinberger and Wiegner in the case of van der Wal) knew what they were doing and that they had gone to the wood for the very purpose of having the victims killed. If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law.[66]

In this case the Court also considered the problem of collective responsibility, with reference to a British Royal Warrant that had been issued on 4 August 1945:

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group, may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime.
>
> In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.[67]

The main elements of this category included: 1) the existence of a common plan to commit a crime, 2) involving a plurality of persons who all shared the intent to commit the crime, and 3) the participation of the charged person in the execution of the plan. The essence of this category is that participants in the plan were responsible for the crime, despite the fact that not all of them physically perpetrated the crime. The problem raised is that this category does not define the degree of participation nec-

sion, *Law Reports of the Trials of War Criminals*, vol. 1, His Majesty's Stationery Office, London, 1947, p. 35.

66 *Ibid*., p. 43.

67 Ibid.

PURL: http://www.legal-tools.org/doc/37c7f4/

essary to invoke this form of liability nor does it define any limits on the scope of the plan for which this liability can be applied.

The second category involves convictions of individuals who fulfilled different roles at concentration camps and bore responsibility for the crimes perpetrated at those camps so long as they were aware of the abuses and willingly took part in the functioning of the institution. The case that can be considered as an example is from the Dachau concentration camp.[68] The indictment stated that the accused "acted in pursuance of a common design to commit the acts hereinafter alleged and as members of the staff of the Dachau Concentration Camp […] did […] willfully, deliberately and wrongfully aid, abet and participate in the subjection of civilian nations".[69] The definition of common design was given at the Dachau trial as "a community of intention between two or more persons to do an unlawful act".[70] This definition does not differ materially from the definition of conspiracy offered in a standard criminal law textbook of the time: "the agreement of two or more persons to effect any unlawful purpose whether as their ultimate aim or only as a means to it".[71] The Dachau judgment stated that the elements required were: "1) that there was in force […] a system to ill-treat the prisoners and commit the crimes listed in the charges, 2) that each accused was aware of the system, 3) that each accused, by his conduct 'encouraged, aided and abetted or participated' in enforcing this system".[72]

The other case that may fall into this category is that of Oswald Pohl and 17 co-defendants.[73] The defendants were charged with maintaining and administering concentration camps in a manner so as to cause in-

[68] General Military Government Court of the United States Zone, The Dachau Concentration Camp Trial; Trial of Martin Gottfried Weiss and Thirty-nine Others, Case No. 60, 15 November–13 December 1945, in United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals*, vol. 11, His Majesty's Stationery Office, London, 1949, p. 5 ('Dachau case').

[69] *Ibid*., The Charges, p. 5.

[70] *Ibid*., p. 14.

[71] Courtney Stanhope Kenny, *Outlines of Criminal Law*, 15th ed., Cambridge University Press, Cambridge, 1936.

[72] Dachau case, p. 13, see *supra* note 75.

[73] United States Military Tribunals, United States v. Oswald Pohl, et al., Judgment, 3 November 1947, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, vol. V, US Government Printing Office (http://www.legal-tools.org/doc/84ae05/).

PURL: http://www.legal-tools.org/doc/37c7f4/

jury, disease, starvation, torture and death of the inmates. The indictment filed against the defendants contained four counts: 1) participation in a common design or conspiracy; 2) war crimes carried out through the administration of concentration camps and extermination camps; 3) crimes against humanity also carried out through the administration of concentration camps and extermination camps; and 4) membership in a criminal organisation.[74] According to counts one and four, all the defendants acted according to a common design unlawfully, wilfully and knowingly conspired and agreed with each other and with various other persons, to commit war crimes and crimes against humanity. Count one states: "all of the defendants herein, acting pursuant to a common design, unlawfully, wilfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit War Crimes and Crimes against Humanity".[75] Count one also declares that

> all of the defendants […] participated as leaders, organizers, instigators, and accomplices in the formulation and execution of the said common design, conspiracy, plans, and enterprises to commit, and which involved the commission of War Crimes and Crimes against Humanity, and accordingly are individually responsible for their own acts and for all acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprise.[76]

Although the Tribunal acknowledged that administration of concentration camps involved a broad criminal programme requiring cooperation of many persons, it decided to disregard certain parts of count one in as far as it charged conspiracy as a separate crime. The Tribunal declined to strike out the whole of count one, choosing to retain parts of it that referred to the unlawful participation in the formulation and execution of common plan.

The third category involved individuals who were convicted for crimes committed by others and for which there was no apparent evidence that a shared intent existed regarding the crime. These cases generally involved mob actions that resulted in the unlawful killing of Allied prison-

[74] United States Military Tribunals, *United States v. Oswald Pohl, et al.*, Indictment, Case No. 4, 13 January 1947, Office of Military Government for Germany, Nuremberg (https://www.legal-tools.org/doc/b4a1c8/).

[75] *Ibid.*, p. 4.

[76] *Ibid.*, p. 7.

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ers of war. In the Essen lynching case that tried Erich Heyer and six others, there was no evidence that a shared intent to kill the prisoners existed (only the intent to abuse them) nor that the defendants physically caused the deaths.[77] The prosecution argued that no such intent was necessary when everyone knew that the prisoners were doomed: "every person in that crowd who struck a blow was both morally and criminally responsible for the deaths".[78] The British Military Court convicted all the defendants for murder.

Each category discussed here – groups of individuals acting together to perpetrate a crime, individuals who fulfilled different roles at concentration camps and bore responsibility for the crimes perpetrated at those camps, and individuals who were convicted for crimes committed by others and for which there was no apparent evidence that a shared intent – requires, at the least, that a form of criminal recklessness existed within the common plan doctrine. Additionally, each category determines conspiracy as a form of participation and requires the existence of a common plan to commit the offences, awareness of the system by the accused, and that the accused be involved in the operation of the system.

16.3. Conspiracy in International Documents

This section addresses how conspiracy has been articulated in well-known international legal documents. The Hague Conventions of 1899 and 1907 and the Geneva Convention IV of 1949 do not include conspiracy to commit war crimes within the lists of grave breaches, or in other provisions that proscribe conduct.[79] Additional Protocol I to the Geneva Conventions does address vicarious liability, but only under a principle of command responsibility, suggesting that exclusion of other liability theories was intentional.[80]

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77 British Military Court for the Trial of War Criminals, Trial of Erich Heyer and Six Others (Essen Lynching Case), 18–19 and 21–22 December 1945, in United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals*, vol. 1, His Majesty's Stationery Office, London, 1947, p. 88–92.

78 *Ibid.*, p. 89.

79 Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, arts. 146–47.

80 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, arts. 86–87.

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In its first session, the United Nations General Assembly adopted a resolution affirming the principles of the London Charter and the IMT judgment as well as the Nuremberg Principles, and established the International Law Commission ('ILC'), which was tasked with codifying international law.[81] The ILC first published its codification of the Nuremberg Principles in 1950, which did not include the conspiracy-based liability provision for war crimes that the London Charter contained. Instead it included "complicity" in war crimes and other offences, but listed participation in a common plan or conspiracy to commit crimes against peace as a separate crime.[82]

The ILC's 1996 Draft Code of Crimes against the Peace and Security of Mankind with commentaries ('Draft Code') makes clear that the conspiracy provision was only intended to apply to high-level military commanders and government officials.[83] Therefore mid-level officials and their subordinates would need to be held liable through other liability theories. More generally, the 1996 Draft Code (Article 2(3)(e)) provides responsibility when an individual "[d]irectly participates in planning or conspiring to commit such a crime which in fact occurs".[84] Sub-paragraph 3(e) intends to ensure that high-level government officials or military commanders who formulate a criminal plan or policy, as individuals or as co-conspirators, are held accountable for the major role that they play which is often a decisive factor in the commission of the crimes covered by the Draft Code.

The crimes set forth in the Draft Code, due to their very nature, often require the formulation of a plan or a systematic policy by senior government officials and military commanders. Such a plan or policy may require more detailed elaboration by individuals in mid-level positions in the governmental hierarchy or the military command structure, who were

81 United Nations General Assembly Resolution, GA Res. 94(I), UN doc. A/94, 11 December 1946, establishing the International Law Commission; GA Res. 95(I), UN doc. A/95, 11 December 1946, affirming the Nuremberg Principles; GA Res. 177(II), UN doc. A/177, 21 November 1947, tasking the International Law Commission with codifying the Nuremberg Principles.

82 "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal", in *Yearbook of the International Law Commission*, 1950, vol. 2, no. 13, pp. 374–78.

83 "Draft Code of Crimes against the Peace and Security of Mankind", *Yearbook of the International Law Commission*, 1996, vol. 2, pp. 18–19.

84 *Ibid.*, p. 18.

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responsible for ordering the implementation of the general plans or policies formulated by senior officials. The criminal responsibility of the mid-level officials who ordered their subordinates to commit the crimes is provided for in Article 2(3)(b). Such a plan or policy may also require a number of individuals in low-level positions to take the necessary action to carry out the criminal plan or policy. The criminal responsibility of the subordinates who actually committed the crimes is provided for in Article 2(3)(a). Thus, the combined effect of sub-paragraphs (a), (b) and (e) is to ensure that the principle of criminal responsibility applies to all individuals throughout the governmental hierarchy or the military chain of command who contributed in one way or another to the commission of a crime set out in the code.[85]

Irrespective of these provisions, George P. Fletcher notices that over the last half-century "every relevant international treaty on international humanitarian law or international criminal law ha[s] deliberately avoided the concept and language of conspiracy".[86] While conspiracy as a substantive offence has generally been rejected at the international level, it was included in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention').[87] Conspiracy to commit genocide is explicitly illegal under the Genocide Convention. The Genocide Convention is the treaty with the most prominent use of conspiracy as a substantive crime. "The *travaux preparatories* revealed that inclusion of conspiracy was justified by the serious nature of the crime of genocide, which made the criminalization of mere preparatory acts such as agreement to commit it imperative."[88] As Taylor Dalton states: "The Genocide Convention includes the charge of conspiracy as a direct response to Nazi Germany's actions against the Jewish population".[89] Article 3 of the Genocide Convention states:

> The following acts shall be punishable:
>
> (a) Genocide;

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85 *Ibid*.

86 George P. Fletcher, "Hamdan Confronts the Military Commissions Act of 2006", in *Columbia. Journal of Transnational Law*, 2007, vol. 45, no. 2, p. 448.

87 Ohlin, 2010, p. 702, see *supra* note 4.

88 Sliedregt, 2003, p. 32, see *supra* note 54.

89 Taylor R. Dalton, "Counterfeit Conspiracy: The Misapplication of Conspiracy as a Substantive Crime in International Law", in *Cornell Law School Graduate Student Papers*, 2010, no. 24, p. 16.

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(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.[90]

The crime of conspiracy to commit genocide reflects the drafters' desire to criminalise even the planning of genocide.[91] Many of the provisions in the Genocide Convention, particularly Article 3, have become a part of customary international law since it has been adopted in the statutes establishing the ICTY and ICTR, even though it was not included in the ICC Statute.[92] The 1998 International Convention for Suppression of Terrorist Bombing did not recognise conspiracy, but seemed to have included the main concept of conspiracy, namely common purpose. Article 2 states that a person is considered to have committed an offence it they contribute "to the commission of one or more offences as set forth […] by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned".[93] This formulation of liability was adopted by the subsequent ICC Statute.

Generally, conspiracy-based liability, as Ohlin says, "does not exist in the relevant international instruments dealing with international crimes – at least not under this doctrinal name".[94] However, other modes of liability based on collective conduct, for example the doctrine of joint criminal enterprise, share many of the characteristics of conspiracy and continue to be used in international criminal jurisprudence.[95] This is discussed next.

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90 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Art. 3.

91 Dalton, 2010, p. 8, see *supra* note 89.

92 Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2008, pp. 189–209.

93 International Convention for the Suppression of Terrorist Bombings, UNTS 256, adopted 15 December 1997.

94 Jens David Ohlin, "Attempt to Commit Genocide", in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary*, Oxford University Press, Oxford, 2009, p. 209.

95 Cassese, 2008, pp. 189–90, see *supra* note 92.

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16.4. Conspiracy in International Criminal Tribunal for the Former Yugoslavia

While conspiracy as a mode of liability is absent from the ICTY, planning, which seems to have some similar elements with conspiracy, exists in Article 7(1) of the ICTY Statute on individual criminal responsibility.[96] Planning is the first form of participation under this article. It usually encompasses those who are on the top of a hierarchy, and likely to be applied to 'leaders' in a governmental or a military structure. The *actus reus* of planning is composed of three elements: an act of planning, the commission of a crime, and a causal link between the act and the crime. A significant difference between planning and conspiracy is that while the planning of a crime may be committed by a single person, conspiracy requires at least two. Planning involves "one or several persons contemplating designing the commission of a crime at both the preparatory and execution phases".[97] The existence of a plan, whether this is formal or informal, must be demonstrated by direct or circumstantial evidence. The level of participation of the accused in the plan is an additional important factor. According to the Brđanin Appeals Chamber, planning liability arises only if it was "demonstrated that the accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance".[98]

The *mens rea* for planning requires that the accused intended the crime in question materialised through the plan. With regard to direct intent, the Kordić Appeals Chamber stated that "a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan" has the requisite *mens rea* for planning, since this is regarded as accepting that crime.[99] This would

96 United Nations, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Resolution 827, 25 May 1993 (https://www.legal-tools.org/doc/b4f63b/).

97 International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, 2 September 1998, ICTR-96-4-T, para. 480 ('Akayesu Trial Judgment') (https://www.legal-tools.org/doc/b8d7bd/).

98 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radoslav Brđanin*, Appeal Judgment, 3 April 2004, IT-99-36-T, para. 267 ('Brđanin Appeal Judgment') (http://www.legal-tools.org/doc/782cef/).

99 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Kordić*, Appeal Judgment, IT-95-14/2, 17 December 2004 (https://www.legal-tools.org/doc/738211/). See also Banktekas and Nash, 2007, p. 27, see *supra* note 30.

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be referred to as an oblique intent which does not seem to be supported by conspiracy doctrine. Therefore, joint participation in planning a crime is only the earliest evidence of a conspiracy.

The Anglo-American concepts of conspiracy have been incorporated into the ICTY and ICTR and have been blended with the civil law doctrines of accomplice liability to create the doctrine of joint criminal enterprise. The question that may arise in this regard is whether joint criminal enterprise theory provides individual responsibility for contributions to group criminality in the same way that conspiracy does or does joint criminal enterprise have a more stringent threshold for *mens rea* and *actus reus*. In other words, could we consider joint criminal enterprise as an extension or manifestation of conspiracy?

Joint criminal enterprise is one of the concepts that has been developed under international criminal law to deal with the issue of collective criminal actions.[100] As noted, at Nuremberg the terms 'common plan' and 'common design' were used to refer to conspiracy. Similar terms have been used interchangeably to describe joint criminal enterprise by the ICTY. Although joint criminal enterprise was not included in the ICTY Statute, it was first proposed in the Tadić Appeal Judgment as a form of commission.[101] The ICTY Appeals Chamber in the Krnojelac case concluded that the doctrines of conspiracy and joint criminal enterprise were related, noting that a "joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime".[102] The accused may also be held responsible not only for the crimes that he committed or participated in with intent and knowledge but also for crimes performed by other participants, when crimes are a natural and foreseeable consequence of the purpose of the criminal enterprise. Indeed, as Kai Ambos notes, "[t]he Chamber looked for a theory of international criminal participation that takes sufficiently into account the *collective, widespread and systematic context* of such crimes".[103] Statistics show that 64 per cent of the indict-

[100] Okoth, 2014, see *supra* note 20.

[101] Tadić Appeal Judgment, see *supra* note 2.

[102] International Criminal Tribunal for former Yugoslavia, *Prosecutor v. Milorad Krnojelac*, Judgment, 15 March 2002, IT-97-25, para. 80 (Krnojelac Judgment) (https://www.legal-tools.org/doc/1a994b/).

[103] Kai Ambos, "Joint Criminal Enterprise and Command Responsibility", in *Journal of International Criminal Justice*, 2007, vol. 5, p. 159.

PURL: http://www.legal-tools.org/doc/37c7f4/

ments submitted to the ICTY between 25 June 2001 and 1 January 2004 relied on this doctrine.[104]

While the purpose of the conspiracy as a mode of liability as "the method of choice for targeting senior military and political leaders"[105] and to facilitate the burden of producing evidence in post-war situations where witness and physical evidence were likely difficult to obtain, it seems that joint criminal enterprise is the developed form of conspiracy that has "most often been used in the *ad hoc* tribunals as part of the conceptual development of a mode of liability in international criminal law".[106] The main element of both joint criminal enterprise and conspiracy is a common plan or an agreement, whether explicit or tacit, which is based on a common purpose. The participants in both theories are united within their common purpose to achieve an ultimate goal. They act on a common enterprise/plan with a common intention.

The Tadić Appeals Chamber distinguished joint criminal enterprise relying on the post-Second World War case law's three categories of collective criminality.[107] The first *basic* form ('JCE I') requires liability for a common intention and/or purpose. In both joint criminal enterprise and conspiracy there is a common criminal purpose, whether we label it an enterprise or agreement, and under both theories the defendant must have had the specific intent that the crime to be carried out is explicitly a part of the common criminal purpose; under both all defendants must intend that the target crime of the joint criminal enterprise must be committed. The second category is the *systematic* form ('JCE II') which creates liability for participation in an institutionalised common plan and incidental criminal liability based on foresight. The third category is known as the *extended* joint enterprise ('JCE III'), that is to say the co-perpetrators are actually involved in acts beyond the common plan but which are the natural and foreseeable consequence of the main plan.[108]

It is well established that the roots of joint criminal enterprise liability can be found in the Nuremberg jurisprudence, which considered the reciprocal attribution of the doctrine of common designs in that a plan or

[104] Danner and Martinez, 2005, p. 107, see *supra* note 3.
[105] Danner and Martinez, 2005, p. 107, see *supra* note 3.
[106] Dalton, 2010, p. 16, see *supra* note 89.
[107] Tadić Appeal Judgment, paras. 185 ff., see *supra* note 2.
[108] Ambos, 2007, p. 160, see *supra* note 103.

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collective enterprise serves as the basis for attribution. In the aforementioned CCL 10 cases, the three categories of conspiracy largely correspond to the three forms of JCE.

There are remarkable resemblances between joint criminal enterprise and conspiracy. The objective elements of joint criminal enterprise requires 1) a plurality of persons, 2) a common plan, design or purpose, which implies 3) the existence of a group of persons who agree to carry out a crime. This equates it to a conspiracy.[109] While the common plan forms part of the *actus reus* for joint criminal enterprise, the agreement is the *actus reus* for conspiracy, both resulting from the decision of at least two or more persons working together to achieve a criminal objective. The extended form of joint criminal enterprise, JCE III, attributes liability to an accused for criminal acts he did not personally perform or even have knowledge of as long as they were natural and foreseeable. Here we can see the footprint and impact of the Pinkerton case. The legal justification of this form of joint criminal enterprise is its resemblance to the legal bases of the Pinkerton doctrine, which holds individuals responsible for foreseeable crimes by co-conspirators. It is obvious that the prosecution does not need to prove an express agreement or common plan; their existence may be inferred from the conduct of a group of persons acting jointly. The resemblances between the two concepts gives the impression that perhaps the ICTY was seeking to remove a gap resulting from the failure to provide for a conspiracy theory that would include all the crimes within the Statute, by adopting a concept of conspiracy with a different name, that would be applicable to all crimes and become a convenient tool for the prosecution.[110]

The Appeals Chamber in the Tadić case not only identified the three separate categories of joint criminal enterprise but also distinguished two different elements – subjective and objective – of each category.[111] The objective elements include three items: 1) a plurality of persons which requires the involvement of two or more persons; 2) existence of a common plan, design or purpose; and 3) contribution to further the com-

[109] Beatrice I. Bonafè, *The Relationship between State and Individual Responsibility for International Crimes*, Martinus Nijhoff, Leiden, 2009, p. 178.

[110] Antonio Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 1, p. 110.

[111] Tadić Appeal Judgment, para. 209, see *supra* note 2.

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mon criminal plan involving the perpetuation of one of the crimes.[112] The subjective elements also require that "all of the co-perpetrators possess the same intent to effect the common purpose".[113] In the Brđanin case the Appeals Chamber tried to develop objective elements of joint criminal enterprise by stating that: 1) in respect of the plurality of persons, it is not necessary to identify each member of the criminal groups by name; 2) regarding the common purpose the prosecutor must prove that the purpose is effectively common for all members and prove a significant contribution of the accused in the execution of the purpose of joint criminal enterprise; and 3) with respect to attributing the crimes of the external perpetrators to the members of enterprise it is necessary to prove at least the existence of a link between the direct perpetrators and their acts and at least one members of the enterprise.[114]

Accordingly, in addition to planning, the ICTY has linked joint enterprise to conspiracy to commit war crimes and it seems that conspiracy has been transformed into a joint criminal enterprise liability theory after Nuremberg. The conclusion may be that joint criminal enterprise is similar to conspiracy as a form of participation, with the former typically includes more stringent *mens rea* and *actus reus* requirements than conspiracy, although it similarly relies on a criminal agreement.

The ICTY has also tried defendants for conspiracy to commit genocide as an inchoate crime, pursuant to Article 4(3) of the ICTY Statute. For instance Zdravko Tolimir, the assistant commander for intelligence and security of the Bosnian Serb Army, was tried for, *inter alia*, genocide and conspiracy to commit genocide for events that took place in Srebrenica.[115] Additionally, in the Popović case four defendants were charged with, *inter alia*, genocide and conspiracy to commit genocide. The charges alleged that the men entered a "joint criminal enterprise to murder all

[112] *Ibid.*, para. 227.

[113] International Criminal Tribunal for former Yugoslavia, *Prosecutor v. Kvočka et al.*, Appeals Chamber Judgment, 28 February 2003, IT-98-30/1, para. 82 (https://www.legal-tools.org/doc/006011/).

[114] Brđanin Appeal Judgment, paras. 364–437, see *supra* note 98.

[115] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zdravko Tolimir*, Third Amended Indictment, Count One, 4 November 2009, IT-05-88/2 (https://www.legal-tools.org/doc/026f86/).

PURL: http://www.legal-tools.org/doc/37c7f4/

the able-bodied Muslim men from Srebrenica", with the purpose "to destroy, in part, a national, ethnic, racial, or religious group".[116]

It should be mentioned that the ICTY distinguished conspiracy as an inchoate crime from joint criminal liability, for example in the Milutinović case, where Dragoljub Ojdanić challenged the court's jurisdiction:

> Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.[117]

16.5. Conspiracy in the International Criminal Tribunal for Rwanda

More cases of conspiracy as an inchoate crime were tried before the ICTR. Article 2 of the ICTR Statute gives the Tribunal power to prosecute persons suspected of committing genocide. Conspiracy is only mentioned here with respect to the crime of genocide.[118] The ICTR's judgments have so far addressed the issue of conspiracy in 14 cases.[119] Conspiracy to commit genocide was first defined in the Musema case as "an agreement between two or more persons to commit the crime of genocide".[120] The agreement between members of conspiracy may be explicit or implicit, as expressed in the later Nahimana case: "the existence of a formal or ex-

[116] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Popović et al.*, Indictment, 4 August 2006, IT-05-88, paras. 31, 35 (https://www.legal-tools.org/doc/ce4324/).

[117] International Criminal Tribunal for former Yugoslavia, *Prosecutor v. Milutinović et al.*, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging the Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, IT-99-37-AR72, para. 23 (http://www.legal-tools.org/doc/d51c63).

[118] Statute of the International Criminal Tribunal for Rwanda, Art. 2, 31 January 2010 (https://www.legal-tools.org/doc/8732d6/).

[119] Okoth, 2014, p. 130, see *supra* note 20.

[120] International Criminal Tribunal for Rwanda, *Prosecutor v. Alfred Musema*, Judgment, 27 January 2000, ICTR-96-13, para. 191 ('Musema Judgment') (https://www.legal-tools.org/doc/6a3fce/).

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press agreement is not needed to prove the charge of conspiracy".[121] It is important that the members of the group act together in a concerted and co-ordinated way within a unified framework. The Nahimana Chamber noted that the prosecution should adduce evidence that the accused conspired with others to commit genocide. This form of agreement is considered the main element of a conspiracy charge. The ICTR in the Musema and Nahimana cases thus addressed the issue of criminal conspiracy as it pertains to the crime of genocide.[122] In the Kambanda case, the defendant was accused of both genocide and conspiracy to commit genocide.[123]

In the Musema case, the Trial Chamber held that an individual can be found guilty solely for the crime of conspiracy to commit genocide even if no genocide takes place.[124] It is not therefore surprising that the Trial Chamber in the Musema case, after defining genocidal conspiracy as "an agreement between two or more persons to commit the crime of genocide", argued that since it is the agreement that is punishable, it is irrelevant whether or not it results in the actual commission of genocide.[125] It is obvious, moreover, that in this manner genocidal conspiracy is treated as an inchoate crime, rather than as a form of liability. As to the existence of a conspiratorial agreement, the Nahimana trial judgment concluded that this may be inferred:

> Conspiracy can be comprised of individuals acting in an institutional capacity as well as or even independently of their personal links with each other. Institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action.[126]

The *mens rea* for conspiracy to commit genocide is similar to that of the crime of genocide. The persons involved must all share the *dolus*

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[121] International Criminal Tribunal for Rwanda, *Prosecutor v. Ferdinand Nahimana et al.*, Judgment, 3 December 2003, ICTR-99-52, para. 1045 ('Nahimana Judgment') (https://www.legal-tools.org/doc/45b8b6/).

[122] International Criminal Tribunal for Rwanda, *Prosecutor v. Ferdinand Nahimana et al.*, Appeals Chamber Judgment, 28 November 2007, ICTR-99-52 (https://www.legal-tools.org/doc/04e4f9/).

[123] International Criminal Tribunal for Rwanda, *Prosecutor v. Jean Kambanda*, Judgment, ICTR-97-23-S, 4 September 1998 (https://www.legal-tools.org/doc/49a299/).

[124] Musema Judgment, para. 74, see *supra* note 120.

[125] *Ibid*.

[126] Nahimana Judgment, para. 1048, see *supra* note 121.

PURL: http://www.legal-tools.org/doc/37c7f4/

specialis of genocide, namely, the intent to destroy in whole or in part a national, ethnical, racial or religious group as such. The *mens rea* includes a general awareness of the existence of the conspiracy by its members, they participate knowingly in it along with others, and the knowledge of their role in furtherance of their common purpose, which is to commit genocide. The agreement between members of a conspiracy may be explicit or implicit, as expressed in the Nahimana case.

The ICTR is, nonetheless, divided as to whether upon the occurrence of a genocide the accused should be convicted of both genocide and conspiracy or just one of the two, on the basis of the same facts. The Musema trial judgment took a negative approach to this question,[127] while in the Niyitegeka case the Trial Chamber was inclined to punish the accused for both.[128]

16.6. Consipracy in International Criminal Court

Unlike the ICTY and ICTR Statutes, the ICC Statute leaves out conspiracy as an inchoate crime, even with regards to the crime of genocide. The term 'conspiracy' is not expressly referred to in any way in the ICC Statute. The question remains whether Article 25(3)(a) and (d) of the ICC Statute could be regarded as a substitute for conspiracy as a mode of liability. This section looks at the link between conspiracy and the collective responsibility doctrines under the ICC.

During the debates over whether to include conspiracy in the ICC Statute, two proposals were raised: "one where the conspirators simply plan but do not carry out the conspiracy themselves and another where it is the conspirators that perpetrate the overt act".[129] Initial drafts of the Statute "oscillated between the traditional common-law approach to conspiracy",[130] which considers conspiracy as an inchoate crime, and the modern approach, which considers conspiracy as a mode of participation in a crime. The compromise solution was Article 25(3)(a) and (d) of the

[127] Banktekas and Nash, 2007, p. 35, see *supra* note 30.

[128] International Criminal Tribunal for Rwanda, *Prosecutor v. Eliezer Niyitegeka*, Judgment, 16 May 2003, ICTR-96-14 (https://www.legal-tools.org/doc/325567).

[129] Banktekas and Nash, 2007, p. 36, see *supra* note 30.

[130] Albin Eser, "Mental Elements – Mistake of Fact and Mistake of Law", in Antonio Cassese, Paola Gaeta and John R.W.D Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, Oxford, 2002, p. 913.

PURL: http://www.legal-tools.org/doc/37c7f4/

ICC Statute on individual criminal responsibility, which has similar characteristics to the Nuremberg concept of 'common plan'.[131] It seems that some sort of conspiracy-based liability has been recognised by the ICC Statute, by replacing conspiracy with the idea of "a crime by a group of persons".[132] This implicitly permits joint and common liability as a mode of liability where it provides that a person shall be criminally responsible for an international crime if he "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible".[133] The Statute thus seems to be able to encompass conspiracy with a different level of *mens rea* since it appears to refer to co-perpetration.

The ICC Pre-Trial Chamber in the Lubanga case took the position that with regards to co-perpetration under Article 25, the ICC Statute requires action "with intent" as a required mental element within the Statute.[134] The prosecutor charged Lubanga "with criminal responsibility under Article 25(3)(a) of the Statute, which covers the notions of direct perpetration (commission of a crime jointly with another person) and indirect perpetration (commission through another person, regardless of whether that other person is criminally responsible)".[135] The prosecution also referred to Article 25(3)(d) of the ICC Statute in addition to Article 25(3)(a) arguing that it "believed that 'common purpose' in terms of Article 25(3)(d) could properly be considered as a third applicable mode of criminal liability".[136] The Pre-Trial Chamber, with reference to Article 25(3)(a), held that although the common plan must include an element of criminality, it does not need to be specifically directed at the commission of a crime. It is sufficient:

> i) that the co-perpetrators have agreed (a) to start the implementation of the common plan to achieve a non-

[131] United Nations, Rome Statute of the International Criminal Court, Art. 25, p. 18, 1 July 2000 (https://www.legal-tools.org/doc/7b9af9/).

[132] *Ibid.*, Art. 25(3)(d).

[133] *Ibid.*, Art. 25(3)(a).

[134] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, Décision sur la confirmation des charges, ICCC-01/04-01/06, 29 January 2007, para. 410 ('Lubanga case') (https://www.legal-tools.org/doc/b7ac4f/).

[135] *Ibid*.

[136] William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed., Cambridge University Press, Cambridge, 2007, p. 212.

PURL: http://www.legal-tools.org/doc/37c7f4/

criminal goal, and (b) to only commit the crime if certain conditions are met; or

ii) that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such and outcome.[137]

It seems that the Pre-Trial Chamber tried to explain that individual responsibility arises when an offence is committed by a "plurality of persons".[138] This is based on the assumption that "any person making a contribution can be held vicariously responsible for the contributions of all the others and as a result can be considered as a principal to the whole crime".[139] The contribution has to be one that, in some way, helps the group's activities towards the commission or attempted commission of a crime. Article 25(3)(d) of the ICC Statute provides for the criminal responsibility of a person who "in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose".[140] It is borrowed almost verbatim from Article 2(3) of the International Convention for the Suppression of Terrorist Bombing, establishing complicity in collective criminality. It appears to provide derivative liability for accomplices.

The Lubanga Pre-Trial Chamber concluded that Article 25(3)(d) "is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY".[141] It also referred to this as being a "residual form of accessory liability which makes it possible to criminalise those contributions to a crime who cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made".[142]According to the accomplice liability theory, defendants are

[137] Lubanga case, para. 344, see *supra* note 134.

[138] *Ibid.*, para. 327.

[139] *Ibid.*, para. 326.

[140] Kevin Jon Heller, "Lubanga Decision Roundtable: More on Co-Perpetration", *Opinio Juris*, 16 March 2012, available at: http://opiniojuris.org/2012/03/16/lubanga-decision-roundtable-more-on-co-perpetration/.

[141] Lubanga case, para. 335, see *supra* note 134.

[142] *Ibid*., para. 337.

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prosecuted especially because they are considered participants in a criminal action with a unity of purpose or a commonality of intention. The essential element of the contribution is thus intention. In fact, Article 25(3)(d) provides that the contribution be intentional and that it either 1) be made with the aim of furthering the criminal activity of group or 2) be made in the knowledge of the intention of the group to commit the crime.[143] The emphasis of Article 25(3) of the ICC Statute on 'contribution' rather than on conspiracy is thus in a certain sense a development in international criminal law.

16.7. Conclusion

Initially the conspiracy doctrine was established in international law to aid the prosecution of the main war criminals of the Second World War. Conspiracy may also be considered to be a response to the inability of the causation doctrine to deal with situations in which multiple individuals were jointly responsible for the commission of a crime. Because of its unique features of combating collective criminality it was considered an ideal tool for prosecutors. Post-Second World War jurisprudence rejected conspiracy as an inchoate crime, but as a mode of liability it was included in international proceedings under different names.

Conspiracy-based liability no longer exists in the relevant international instruments dealing with international crimes and humanitarian law at least not called as such. However, the ICTY developed the joint criminal enterprise theory based on Nuremberg and subsequent jurisprudence, despite the criticisms made against it. Joint criminal enterprise has become a collective liability theory in modern international criminal law. The mode of liability of planning also bears certain resemblances to conspiracy. It is obvious that conspiracy has not been recognised as an inchoate crime in the ICC, but the constitutive elements of conspiracy-based liability forms the basis for Article 25(3)(a) and (d) of the ICC Statute, which establishes both principal liability according to the collective mode of liability, namely "jointly with another" under Article 25(3)(a) and accessorial liability under Articles 25(3)(d) in collective criminality.

[143] Andrea Sereni, "Individual Criminal Responsibility", in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal* Court, vol. 2, Editrice il Sirente Piccola Società Cooperativa a r.l., p. 111.

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Therefore the doctrines of joint criminal enterprise, co-perpetration and common purpose/plan liability might be considered as new forms and extensions of the conspiracy doctrine. The common denominator that links the three doctrines is the existence of a criminal agreement or a common plan among the participants, as an externalised evidence, that the parties intend for the crime to be committed.

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Historical Origins of International Criminal Law: Volume 3

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

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