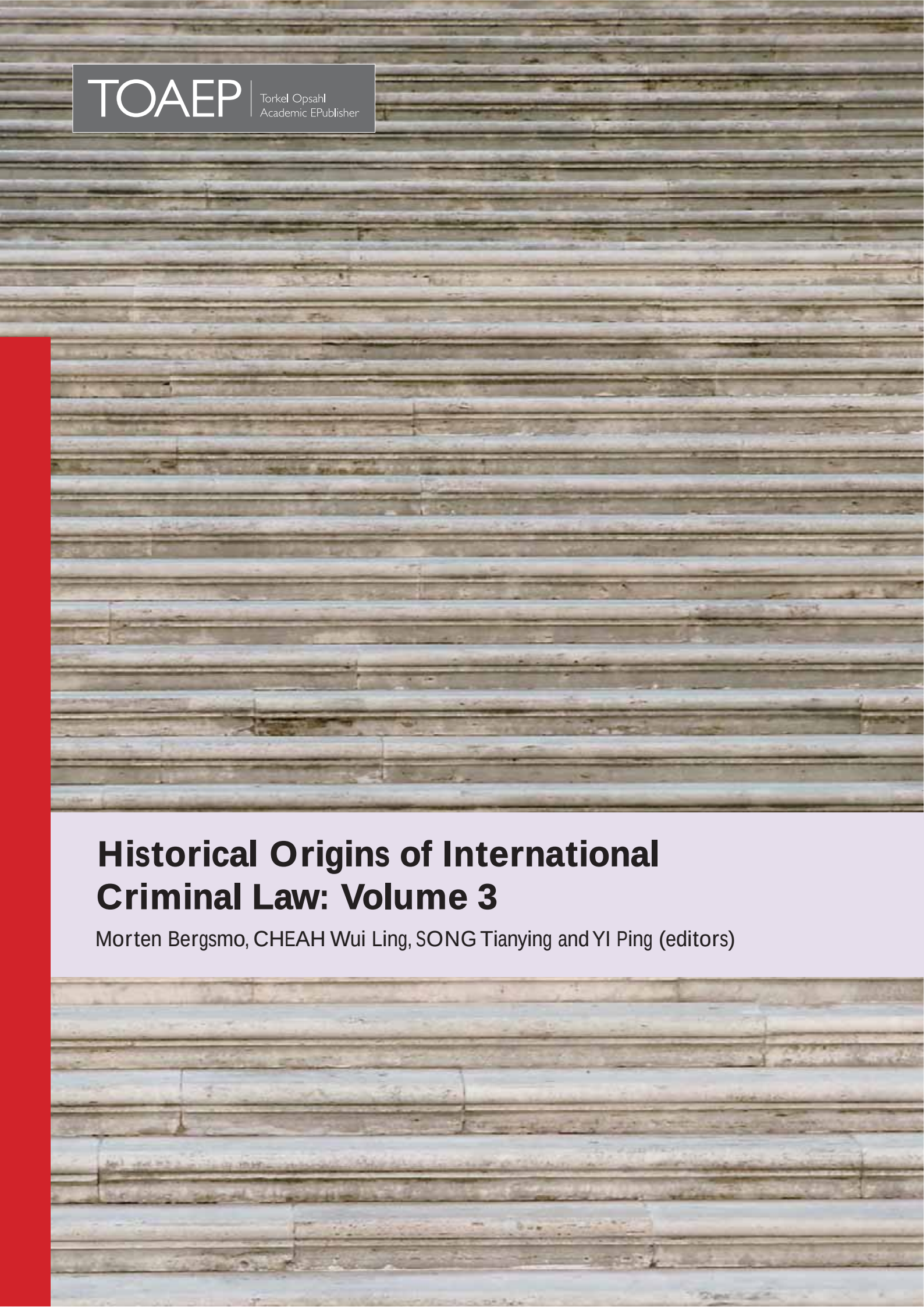

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15

Shaping the Definition of Complicity in International Criminal Law: Tensions and Contradictions

Marina Aksenova[*]

15.1. Introduction

This chapter explores the historical evolution of the concept of complicity in international criminal law. The main argument is that complicity is just one example of the legal construction resulting from tensions characteristic of international criminal law in general. A historically orientated approach allows us to see the difficult choices faced by the creators of the first international Tribunals at Nuremberg and Tokyo as well as the subsequent developments shaping the field. Judge Henri Donnedieu de Vabres, who represented France at the International Military Tribunal ('IMT'), noted the extraordinary nature of the new institution created in the aftermath of the unconditional surrender of Germany on 5 June 1945.[1] Only high-level officials stood trial at Nuremberg, many of them occupying purely bureaucratic posts within the system. Complicity as a traditional criminal law concept for attributing criminal responsibility to those who do not physically perpetrate the crime was at the heart of the tension

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[1] Henri Donnedieu de Vabres, "Le procès de Nuremberg devant les principes modernes du droit penal international" [The Nuremberg Trial and the Modern Principles of International Criminal Law], in *Recueil des Cours de l'Academie de droit international de la Haye*, vol. 70, 1947, pp. 477–582, reprinted in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, pp. 213–73.

stemming from the need to declare individual guilt while capturing the collective nature of wrongdoing.[2]

International criminal law was born out of necessity. Necessity drove the occupying powers to discard the traditional notion of sovereignty and prosecute individuals for criminal acts stipulated in the IMT Charter.[3] Necessity did not entail chaos, however. De Vabres pointed out that the judges avoided arbitrariness when interpreting and applying the IMT Charter. They filled the inevitable lacunae by the principles of international law with the reference to the IMT Charter. The IMT Charter was the constitution of Nuremberg and served as a solid framework for further development of international criminal law. Decades have gone by, and international criminal law judges still engage in a struggle to respond adequately to the "aspirations of the universal conscience" and to "pursue traditional through innovative spirit".[4]

This chapter aims at understanding how the community of lawyers and scholars approached the problem of individual responsibility for mass crimes in the presence of legal gaps as well as the means through which they arrived at complicity as a mode of criminal participation. The question is whether the traditional modes of liability were suitable in resolving the problem of attributing responsibility for mass atrocities. Judge B.V.A. Röling of the International Military Tribunal for the Far East ('IMTFE') referred to international crimes as "system criminality" – a term underlining the complexity of networks involved in collective offending.[5]

The history of individual criminal responsibility for violations of international law starts at Nuremberg with the establishment of the IMT

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2 In this regard, the International Criminal Tribunal for the former Yugoslavia ('ICTY') Trial Chamber in the *Čelebići* case correctly noted that the principle of individual criminal responsibility implies that even those who do not physically commit the crime in question are still liable for other forms of participation. See ICTY, *Prosecutor v. Mučić et al*., Trial Chamber, Judgment, IT-96-21-T, 16 November 1998, para. 319 ('Čelebići case') (https://www.legal-tools.org/doc/6b4a33/).

3 Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis ('IMT Charter') (http://www.legal-tools.org/doc/64ffdd/).

4 De Vabres, 1947, p. 217, see *supra* note 1.

5 See Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press, Oxford, 2012, p. 20.

pursuant to the London Agreement of 8 August 1945.[6] The IMT Charter attached to the London Agreement was one of the first international legal instruments targeting persons, as opposed to states. Article 6 established the jurisdiction of the IMT over persons acting in the interests of the European Axis countries, "as *individuals* or as *members of organizations*".[7] Control Council Law No. 10, passed a few months later, provided a framework for the subsequent prosecution of war criminals in occupied Germany.[8] The Charter of the IMTFE established in Tokyo focused on Japanese war criminals.[9] The text of the IMTFE Charter largely replicated the IMT Charter.

Right from the beginning, the principle of individual criminal responsibility for the violations of international law struggled with the complexity of the offences in question. The famous pronouncement of the IMT – "[c]rimes against international law are committed by men, not by abstract entities"[10] – stands in contrast with the constructions developed by this Tribunal to capture the collective nature of crimes committed by Nazi Germany: conspiracy, criminal organisation and inference of guilt based on the official position of the accused in the apparatus of power. Likewise, the Judgment of the IMTFE relied heavily on the notion of conspiracy and group responsibility of members of the Japanese government for violations of the law of war.[11]

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6 Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol I., Nuremberg, 1947, pp. 8–9 ('London Agreement') (https://www.legal-tools.org/doc/844f64/).

7 IMT Charter, Art. 6, see *supra* note 3 (emphasis added).

8 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Art. 2(2) (http://www.legal-tools.org/doc/ffda62/).

9 Charter of the International Military Tribunal for the Far East, Art. 6, 19 January 1946, as amended 26 April 1946 ('IMTFE Charter') (https://www.legal-tools.org/doc/a3c41c/).

10 International Military Tribunal ('IMT'), *Prosecutor v. Hermann Wilhelm Göring et al.*, Judgment, 1 October 1946 ('Nuremberg Judgment') (https://www.legal-tools.org/doc/f41e8b/).

11 International Military Tribunal for the Far East ('IMTFE'), *United States of America et al. v. Araki Sadao et al*., Judgment, 12 November 1948 ('Tokyo Judgment') (https://www.legal-tools.org/doc/3a2b6b/). See Neil Boister, "The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International

Three main vectors of the historical evolution of complicity can be identified: the Nuremberg and Tokyo trials, the subsequent trials of war criminals before the Nuremberg Military Tribunals and domestic courts, and, finally, the efforts of the International Law Commission ('ILC') in codifying the Nuremberg Principles and drafting the Code of Crimes against the Peace and Security of Mankind.[12] Complicity was barely used by the IMT and IMTFE save for the opinions of the French judges sitting in both Tribunals. Rather, conspiracy was the instrument employed by these two Tribunals to address the questions of collective criminality. The subsequent trials relied on the two sets of rules relating to criminal responsibility: provisions implementing Control Council Law No. 10 and national criminal law.[13] The rules enacted in the British and American zones were based on Control Council Law No. 10, while other states, such as France and Norway, relied exclusively on their domestic law in trying war criminals.[14] Even those states that relied on Control Council Law No. 10 drew heavily on their domestic law in determining the main criminal law concepts. Complicity crystalized in the case law emanating from these trials, in particular in the French and British zones.

Finally, going outside a purely judicial analysis, the United Nations General Assembly decided through resolution 177 (II) of 21 November 1947 to entrust the ILC with a twofold task: first, to formulate the principles of international law recognised in the IMT Charter and the Nuremberg Judgment; and second, based on those principles, to prepare a Draft Code of Offences against the Peace and Security of Mankind ('Draft Code').[15] In fulfilling its mandate, the ILC contributed significantly to understanding the scope and the meaning of complicity in international criminal law. The Special Rapporteur of the ILC assigned with drafting the Code of Crimes against the Peace and Security of Mankind, Doudou Thiam, insightfully pointed out that in the context of international crimes,

Military Tribunal", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 2, pp. 425–47.

12 Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996, Report of the ILC to the General Assembly, Forty-Eighth Session, UN GAOR, 51st Sess., Suat No. 10 UN A/51/10, 1996 ('Draft Code').

13 Van Sliedregt, 2012, pp. 30–31, see *supra* note 5.

14 *Ibid*.

15 UNGA resolution 177 (II), Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 21 November 1947, UN doc. A/RES/177(II).

the "traditional moulds are broken", and "the classic dichotomy of principal and accomplice, which is the simplest schema, is no longer applicable because of the plurality of actors".[16]

The ultimate question is how the legal instrument of complicity was born in international criminal law and what preconditions it implies. The main claim of this chapter is that the concept of complicity emerged through the following three tensions inherent in international criminal law: domestic versus international law, collective wrongdoing versus individual criminal responsibility, and substantive crimes versus forms of participation. The second part of the chapter defines complicity and conspiracy for reasons of clarity, while the subsequent sections address each of the tensions that helped in shaping the content and the definition of complicity.

15.2. Complicity and Conspiracy: Definitions

It is important to give some essential definitions prior to embarking on the exploratory journey. Complicity is a mode of liability doctrine that attributes criminal responsibility to those who do not physically perpetrate the crime.[17] This is a generic definition that applies to both domestic and international criminal law. The functional core of complicity is constructing a link between the accomplices' contribution and the criminal act of another person. This legal instrument assists in addressing the situations when someone does not "pull the trigger of a gun", but significantly contributes to the crime. Various domestic legal systems recognise different types of complicity: aiding and abetting and instigating being the most common. Aiding and abetting presupposes knowledge of the crime, intention to assist and a contribution that is significant enough to impact on the offence. Instigation differs from aiding and abetting in that the instigator prompts the commission of the crime by influencing the principal offender and creating an inclination towards to the offence.

Conspiracy is different from complicity because it is a distinct crime and not just a mode of liability. Conspiracy exists in both English and American law as an offence consummated upon entering into the ar-

[16] Doudou Thiam, Special Rapporteur, Eighth Report on the Draft Code of Crimes against the Peace and Security of Mankind, UN doc. A/CN.4/430 and Add. 1, § 23, para. 30.

[17] For more on complicity in international criminal law, see Marina Aksenova, *Complicity in International Criminal Law*, Hart Publishing, 2016, Oxford (forthcoming).

rangement to commit criminal acts. Conspiracy typically requires an agreement between two or more conspirators that at least one of them will commit a substantive offence.[18] Conspiracy is a legal instrument widely used in American criminal law for holding someone responsible if they agree with another person to commit an offence, without regard for whether the other person is returning the agreement. An overt act performed in furtherance of the accord is typically also required to maintain the conviction.[19]

In *Pinkerton v. United States* (1946) the US Supreme Court held that each member of a conspiracy can be liable for substantive offences carried out by co-conspirators in furtherance of the conspiracy, even when there is no evidence of their direct involvement in – or even knowledge of – such offences provided they were "reasonably foreseen as a necessary or natural consequence of the unlawful agreement".[20] The practical outcome of the *Pinkerton* rule is that conspiratorial complicity destroys the distinction between accomplices and perpetrators since the effect of finding membership in the conspiracy is making the defendant a co-perpetrator of substantive offences committed in furtherance of the conspiracy.[21] The *Pinkerton* case has been widely criticised both in the US and abroad.[22] The rule has never been incorporated in the US Model Penal Code but applied in a number of cases.[23] Conspiracy remains highly contested crime in the prosecutions of the Guantánamo detainees by the US Military Commissions. These courts refer to international law when US domestic law does not cover certain conduct. The US DC Court of Appeals recently voiced an opinion in *Al Bahlul v. United States* that international law of war offences does not include conspiracy, thus vacating *Al Bahlul*'s inchoate conspiracy conviction.[24] The implications of this new

18 American Law Institute, Model Penal Code, section 5.03(1).

19 Paul H. Robinson, "United States", in Kevin Jon Heller and Markus D. Dubber (eds.), *The Handbook of Comparative Criminal Law*, Stanford University Press, Stanford, CA, 2011, pp. 579–80.

20 United States Supreme Court, *Pinkerton* v. *United States* (1946) 328 US 640.

21 George P. Fletcher, *Rethinking Criminal Law*, Little, Brown, Boston, 1978, p. 674.

22 Harmen van der Wilt, "Joint Criminal Enterprise: Possibilities and Limitations", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 1, pp. 91–108.

23 Fletcher, 1978, pp. 634 ff., see *supra* note 21.

24 United States Court of Appeals, *Ali Hamza Ahmad al Bahlul v. United States*, No. 11-1324 (DC Cir. 2014) Court of Appeals for the DC Circuit, 12 June 2015.

ruling are still to be determined. What is clear, however, is the charge of conspiracy was found to be incompatible with international law.

15.3. Domestic versus International Law

When it comes to the first contradiction of national and international law, it is important to remember that from the very beginning international criminal law was significantly influenced by domestic penal law systems.[25] The drafters of the IMT Charter came from different legal and political cultures. The need to compromise shaped not only the language of the constituent documents but also the charges against the accused and the final judgments. The Charters were the products of a political compromise between the Allied powers.[26] A number of conflicts, mostly rooted in national variations, characterised the London Conference where the IMT Charter was adopted. The US Chief Prosecutor at Nuremberg, Robert H. Jackson, stressed, among other things, the ideological dissimilarities between the Soviet and the Western European legal traditions and the differences between the common law adversarial proceedings and the Continental inquisitorial criminal trial.[27]

The struggle among legal traditions coupled with various extra-legal considerations did not stop at the stage of the drafting of the IMT and IMTFE Charters. Framing the charges and, in particular, defining the link between the accused and the crime, were highly influenced by the Anglo-Saxon concept of conspiracy. The first count of the IMT indictment – general conspiracy incorporating all actions of the accused deemed to be criminal from the formation of the Nazi Party in 1919 to the

[25] Solis Horwitz, "The Tokyo Trial", in *International Conciliation*, 1950, no. 465, Carnegie Endowment for International Peace, p. 540.

[26] Richard Overy notes that the British delegation initially insisted on summary executions for the perpetrators of war crimes while the Soviets and the Americans were in favour of trial in front of a military tribunal, but with different understanding of what the trial entailed (the Soviet authorities regarded the trial as a show trial). The final list of the defendants to be prosecuted before the IMT represented a series of compromises as well: the Allied powers assembled an eclectic list of persons, who represented the dictatorial regime in different capacities. See 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, pp. 1–29.

[27] Robert Jackson, "Nuremberg in Retrospect: Legal Answer to International Lawlessness", in *American Bar Association Journal*, 1949, vol. 35, pp. 813–16 and 881–87, reprinted in Mettraux, 2008, pp. 358–59, see *supra* note 1.

end of the war in 1945 – was the solution proposed by Jackson on the basis of a memorandum by the US military lawyer Murray Bernays.[28] The Nuremberg prosecution team charged, under count one, conspiracy to commit crimes against peace, war crimes and crimes against humanity, as defined in Article 6 of the IMT Charter. This Article called for individual criminal responsibility for the following acts:

> (a) Crimes against peace: namely, planning, preparation, initiation or waging of 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 the 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.

Continental lawyers at Nuremberg objected to the grand conspiracy charge and rejected the idea of conviction without proof of the specific crimes perpetrated by the defendant.[29] As a result of this disagreement,

[28] Nuremberg Judgment, p. 222, see *supra* note 10; Overy, 2003, pp. 14–16, see *supra* note 26; van Sliedregt, 2012, p. 22, see *supra* note 5.

[29] Overy, 2003, p. 19, see *supra* note 26.

the IMT felt compelled to narrow the scope of the charge in two respects. First, it rejected the prosecution's idea of a single conspiracy capturing all the criminal conduct of the defendants, and instead held that the evidence established the existence of many separate plans. The Tribunal declined to accept Hitler's *Mein Kampf* as the evidence of a common plan.[30]

Second, the IMT distinguished between conspiracy to commit acts of aggressive war as a substantive crime flowing from Article 6(a) of the IMT Charter and conspiracy in the sense of Article 6(c) aimed at establishing the responsibility of persons participating in a common plan. The IMT proceeded with charges under count one only in relation to the substantive crime of conspiracy to wage aggressive war.[31] As a result of curtailing the conspiracy charge, three of the defendants – von Papen, Schacht and Fritzsche – were acquitted on all four counts of the indictment.[32] The IMT entered convictions for this charge only in relation to seven defendants who were "informed and willing participants of German aggression".[33]

The Tokyo prosecution team, like the Nuremberg prosecutors, opted for the all-encompassing count of conspiracy (count one), but also supplemented it with a number of subsequent counts, breaking down the grand conspiracy into constituent parts. The reason for these extra counts was to secure convictions if the umbrella charge failed, as happened at Nuremberg.[34] The IMTFE prosecution extended conspiracy over a period of over 18 years and defined its objective in broad terms of securing "the military, naval, political, and economic domination of East Asia and the Pacific and Indian Oceans, and for all countries and islands therein and bordering thereon".[35] However, in contrast with the Nuremberg Judgement that rejected the existence of grand conspiracy, the first broad count of the Tokyo indictment proved to be successful, rendering the subsequent sub-conspiracy counts redundant. The majority Judgment supported the broad interpretation of conspiracy to wage aggressive war – all of the defendants, except General Matsui Iwane and Foreign Minister Shigemitsu

30 Nuremberg Judgment, p. 222, see *supra* note 10.

31 *Ibid*., pp. 223–24.

32 Overy, 2003, p. 28, see *supra* note 26.

33 For example, Rudolf Hess; Nuremberg Judgment, p. 276, see *supra* note 10.

34 Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008, p. 207.

35 *Ibid.*; Tokyo Judgment, pp. 48, 421, see *supra* note 11.

Mamoru, were convicted on count one as "leaders, organizers, instigators, or accomplices" in the conspiracy.[36] The IMTFE established that "the conspiracy existed for and its execution occupied a period of many years", and that "[a]ll of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in Count I".[37]

Complicity, as an alternative mechanism for addressing system criminality, never arose in the Nuremberg and Tokyo Judgments notwithstanding the fact that Article 6(c) of the IMT Charter and Article 5(c) of the IMTFE Charter specifically provided for the liability of accomplices participating in the execution of a common plan or conspiracy to commit any of the aforementioned crimes. However, the separate and dissenting opinions of individual judges from different jurisdictions reflected divergent views on the issue. These separate voices serve as the best indicators of the complexity of the legal landscape of the time. Complicity surfaced in the opinions of the French judges, primarily because of the importance of this mode of responsibility in France. Judge de Vabres of the IMT insisted that complicity would have been a more appropriate form of dealing with group criminality because of its wider acceptance in the variety of legal systems and its focus on the subjective indicators of individual culpability, rather than external evidence of common agreement. De Vabres thought that the French counterpart of conspiracy – complicity – was more consistent with modern doctrines that insist on the idea of individualised punishment.[38] He insisted that the last paragraph of Article 6(c) of the IMT Charter adopted the French notion of complicity and endorsed the principles of ordinary criminal law.[39] De Vabres stressed that the lack of solidarity and equality among the conspirators made it difficult to distinguish the guilt of each individual perpetrator.[40]

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36 Tokyo Judgment, pp. 49, 773, see *supra* note 11. See Gordon Ireland, "Uncommon Law in Martial Tokyo" in *Yearbook of World Affairs*, 1950, vol. 4, p. 80; Boister and Cryer, 2008, pp. 217–19, see *supra* note 34.

37 Tokyo Judgment, pp. 49, 770, see *supra* note 11; Boister and Cryer, 2008, p. 223, see *supra* note 34.

38 Boister and Cryer, 2008, p. 243, see *supra* note 34. De Vabres, however, acknowledged the tempting nature of conspiracy as a charge, giving to the Hitlerian enterprise "the cover of a romantic prestige that is not without seductive appeal".

39 *Ibid*., p. 250.

40 De Vabres, 1947, pp. 244–45, see *supra* note 1.

The other criticism of the doctrine of conspiracy is that it is specific to common law and unknown to German and French law.[41] De Vabres explained that the charge of conspiracy stemmed from the same social necessity to capture the acts of a multitude of individuals that is present in both Continental and English law. The technical means of addressing this legal problem in Continental law are, however, different. French law uses the notion of complicity or accessory participation in relation to the intended crime. The French point of view is subjective in that it captures the moral or psychological element connecting separate conducts which aim at the same result, namely the commission of the common crime. In contrast, the English notion of conspiracy focuses on the external objective indicators of the existence of a common plan.

Just like the French judge at Nuremberg, the French judge at the IMTFE – Henri Bernard – insisted on the broader use of complicity. His point of view was that the Japanese Emperor should have been punished as a principal author of the Pacific War and all the defendants standing trial at Tokyo could only be considered his accomplices.[42] Judge Röling from the Netherlands held a different view on this matter, which he based on cultural differences. He considered that the decision not to try the ceremonial head of state – the Emperor – was correct. The allegations were that the Emperor was the mastermind of the war, but Röling pointed towards the very complicated structure of the Japanese government and the differences in Japanese speech. There was, for example, a misunderstanding of some of the Emperor's words such as: "If the war starts, shall we win?". This is the Japanese way of expressing that he was against it, but many critics interpreted this line otherwise.[43]

The subsequent proceedings against former Nazis were conducted under the Control Council Law No. 10 and national penal laws of the trying states. France, for example, used its domestic criminal law during these prosecutions. Thus, it is not surprising that French courts relied almost exclusively on the complicity/perpetratorship dichotomy when determin-

41 *Ibid*., pp. 242–51.

42 IMTFE, *United States of America et al. v. Araki Sadao et al.*, Dissenting Judgment of the Member from France of the International Military Tribunal for the Far East (Bernard), 12 November 1948, p. 22 (https://www.legal-tools.org/doc/d1ac54/). See also Ireland, 1950, p. 64, fn. 22, *supra* note 32.

43 B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press, Cambridge, 1993, p. 42.

ing the modes of responsibility of the accused.[44] In the trial of *Gustav Becker et al.*, the Permanent Military Tribunal in Lyon convicted the former German customs officers in French Savoy for illegal arrest and ill treatment of French citizens, which resulted in the death of the three victims later in Germany. Two of the accused were convicted as perpetrators, while the remaining 17 individuals were convicted as their accomplices.[45] The court stipulated: "It is a principle of penal law that accomplices are held responsible in the same manner as actual perpetrators, and this principle is recognized in the field of war crimes as it is in that of common penal law".[46]

Prosecutions in the British and American zones pursuant to rules based on the Control Council Law No. 10 were also highly "domesticated". The British courts used the national concept of "common design" to determine whether the accused were "concerned in" committing the specific war crimes while the courts located in the US zone adhered to the common law "concerted approach" to criminal participation and focused on the link between the accused and the crime on a case-by-case basis. For example, the term "concerned in the killing" was clarified in the case of *Werner Rohde et al.* decided by the British Military Court in Wuppertal. The Judge Advocate in this case held that:

> [T]o be concerned in a killing it was not necessary that any person should actually have been present. […] If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with the knowledge that other man was going to put the killing into effect then he was just as guilty as the person who fired the shot or delivered the blow.[47]

In this case the Court convicted several officials working at the Natzweiler-Stuthof concentration camp of killing four captive women

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44 Van Sliedregt, 2012, p. 35, see *supra* note 5.

45 French Permanent Military Tribunal, Lyon, *France v. Becker et al.*, in United Nations War Crimes Commission, *Law Reports of the Trials of the War Criminals*, vol. 7, His Majesty's Stationery Office, London, 1948, p. 70.

46 *Ibid*.

47 British Military Court, Wuppertal, *United Kingdom v. Rohde et al.*, in United Nations War Crimes Commission, *Law Reports of the Trials of the War Criminals*, vol. 15, His Majesty's Stationery Office, London, 1948, p. 56.

prisoners. The roles of the accused varied but none was charged with actually killing the women concerned: the medical officer at the camp admitted to giving lethal injections; the prisoner working in the crematorium acknowledged preparing the oven for the occasion; while another accused, a functionary at the camp, followed the order to bring the harmful drug and overheard the conversations relating to the execution of the four prisoners.[48]

Finally, the work of the ILC on defining the modes of responsibility for the Draft Code of Crimes against the Peace and Security of Mankind was predicated on the exploration of domestic legal systems. The Special Rapporteur, Doudou Thiam, looked at complicity in various jurisdictions in an attempt to define the concept in international law. Thiam identified the gap in international criminal law in attributing responsibility for the crimes committed by a plurality persons.[49] He attempted to fill this gap by investigating the notion of complicity in domestic and international law and delimiting its scope. Thiam explored domestic law and found that the scope of the concept and its content varied from country to country: complicity may include physical acts (aiding and abetting, provision of means) and intellectual or moral assistance (counsel, instigation, orders). In some countries, those who provide intellectual assistance are labelled "indirect perpetrators", while in others "originators".[50] Moreover, the boundary between the concepts of perpetrator, co-perpetrator and accomplice shifts depending on the legislation in question.[51] When it came to complicity in international law, Thiam acknowledged the need for a broad definition of criminal participation corresponding to the complexity of international justice. One of the reasons for this is the difficulty of assigning the actors to one category or another and determining the precise role played by each in the context of international law.[52] Based on the work of

48 *Ibid*., p. 55.

49 Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, 11 March 2986, UN doc. A/CN.4/398 and Corr. 1–3, para. 89, p. 61 ('Fourth Report').

50 Eighth Report on the Draft Code of Crimes against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, 8 March and 6 April 1990, UN doc. A/CN.4/430 and Add. 1, paras. 7–13, p. 29 ('Eighth Report').

51 Fourth Report, para. 99, p. 64, see *supra* note 49.

52 Eighth Report, para. 22, p. 30, see *supra* note 50.

the Special Rapporteur, the ILC adopted a new version of the Draft Code in 1991[53] and a further version in 1996.[54]

There is one concluding observation in relation to the role of domestic law in shaping complicity in international criminal law. It is the frequency with which the first war crimes courts referred to the wide domestic acceptance of a certain rule in order to secure its international legitimacy. For example, the IMT alluded to the "criminal law of most nations" in support of the rule that following the unlawful order does not absolve the defendant from responsibility.[55] The United Nations War Crimes Commission held that British rules regarding complicity in crimes are found in substance in the majority of legal systems.[56] This trend shows the historical importance of the general principles of law recognised by civilised nations as a source of international criminal law.

15.4. Collective Wrongdoing versus Individual Criminal Responsibility

The second tension between individual criminal responsibility and collective wrongdoing stems from the need for some medium between the crime and the offender in international criminal law. This is because very few men standing trial for mass crimes directly order or perpetrate certain offences. The ILC Special Rapporteur emphasised the difficulty of applying the traditional domestic law principal/accomplice dichotomy to international offences. He acknowledged that the latter require a broader definition of complicity to cover the complexity of the legal context associated with international crimes.

The IMTFE settled for conspiracy as a tool designed to capture collective criminality. Conspiracy declared an agreement to commit mass atrocities criminal without the need to prove underlying offences. The leadership position was determinative, in the eyes of the IMTFE judges, of whether the accused belonged to a conspiracy or was responsible for

53 Report of the International Law Commission on the Work of its Forty-third Session, 29 April–19 July 1991, UN doc. A/46/10.

54 Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May–26 July 1996, UN doc. A/51/10.

55 Nuremberg Judgment, p. 221, see *supra* note 10.

56 United Nations War Crimes Commission, *Law Reports of the Trials of the War Criminals*, vol. 11, His Majesty's Stationery Office, London, 1949, p. 72 ('Law Reports, vol. 11').

the crimes committed under his supervision. The IMT relied on conspiracy to a lesser extent than its Tokyo counterpart. The Nuremberg response to the problem of attribution of responsibility for the acts committed by distant others was to focus on the factual contribution of the accused to the common plan and his official position within the Nazi hierarchy. The IMT therefore avoided a legalistic discussion about the modes of participation of each accused.

The prosecutions of former Nazis by national authorities in the aftermath of the IMT signified a shift from the fact-based approach to criminal participation of Nuremberg and Tokyo to a more nuanced and developed body of law regarding the ways in which the defendant was involved in a crime. These trials were driven, to a large extent, by national law. Thus, many ambiguities characteristic of the domestic legal systems affected the way various modes of participation were used. For example, the British court in *Schonfeld* struggled to distinguish participation in the common design and aiding and abetting. In the trial of *Franz Schonfeld and Others* the British Military Court in Essen faced the task of determining whether several members of the German Security Police (*Sicherheitspolizei*) were concerned in the killing of three unarmed members of the Allied air force, who were hiding in the house provided by members of the Resistance.[57] Instead of puting into effect the arrest, the defendants shot the pilots. The court convicted four of the defendants and acquitted the remainder.[58] The evidence clearly established that the actual shooting was carried out by only one of the defendants, but the court convicted three more individuals of the same crime based on their actual or constructed presence at the scene of the crime (entering the pilots' house together with the direct perpetrator). All four persons convicted of war crimes were sentenced to death.

The precise basis for conviction in *Schonfeld* is unclear.[59] The Judge Advocate made several conflicting observations: first, he held that if the object of the visit to the house was initially lawful, that is, to arrest the pilots, the three others were not guilty of the charge of "being con-

[57] British Military Court, Essen, United Kingdom v. Franz Schonfeld and Nine Others, ibid., p. 64.

[58] *Ibid*., p. 67.

[59] Rupert Skilbeck, "Cases: Schonfeld and Others", in Antonio Cassese (eds.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 905.

cerned with the killing" that resulted from one of them starting to shoot. They were innocent so long that they did not aid or abet the direct perpetrator. Second, if the three men aided and abetted the shooter, they would be guilty. And, finally, if the rule regarding "common design" were found to be applicable, the others present would be guilty of murder whether or not they aided or abetted the offence.[60] The Judge Advocate referred to the theory of actual or constructive presence at the scene of the crime, used by the traditional English law doctrine to establish a boundary between the two forms of participation. Notwithstanding the reference to this theory in the judgments, the British courts failed to consistently apply it in cases like *Rohde* or *Schonfeld* and instead settled for a half-hearted compromise.

The US Military Tribunals adopted the unitary model of criminal participation, thereby placing all modes of responsibility on an equal footing. This does not mean, however, that the judges paid no attention to the way in which the defendants became involved in the crimes. Quite the opposite; the US courts developed the fault and conduct requirement of the individual criminal responsibility. For example, the *Justice* case stressed the importance of the personal knowledge of the accused,[61] while *Pohl* guarded against assuming criminality solely on the basis of official capacity.[62] The *Pohl* Tribunal also highlighted the importance of positive action in establishing a defendant's consent to the commission of the crimes. By focusing on legal requirements of responsibility the US Tribunals sitting in Nuremberg distanced themselves from the approach adopted at the IMT and IMTFE.

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60 The Judge Advocate went on to explain the difference between various modes of participation in English law: accessory before the fact is always absent from the scene of the crime; a principal in the first degree is an actual perpetrator; and a principal in the second degree is present at the commission of the offence and aids and abets its commission. Law Reports, vol. 11, pp. 69–70, see *supra* note 56.

61 Nuremberg Military Tribunal, *United States of America v. Josef Alstötter et al.*, Judgment, 4 December 1947, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, vol. III, US Government Printing Office, p. 62 ('Justice case') (https://www.legal-tools.org/doc/04cdaf/).

62 Nuremberg Military Tribunal, United States of America v. Oswald Pohl et al., Judgment, 3 November 1947, in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, vol. V, US Government Printing Office, pp. 176–77 ('Pohl case') (https://www.legal-tools.org/doc/84ae05/).

The trials of industrialists in the aftermath of the war are yet another example of the tension stemming from the complexity of crimes in question. Corporations represent the middle ground between the state and the person. As demonstrated in the *Krupp* case, for example, these corporations are perfectly capable of committing violations of international law.[63] However, the attribution of responsibility for these violations to a particular individual within the firm is challenging. Nonetheless, the American and British courts undertook this task and acknowledged the responsibility of firms' officers for breaching the laws and customs of war.

15.5. Substantive Crimes versus Forms of Participation

The third tension between complicity as a mode of participation and complicity as a substantive crime flows directly from the collective nature of the offences in question. The distinction between the wrongdoing and the manner in which individuals become involved is not always clear in international criminal law. One can trace how judicial reasoning evolved in this regard. The first international criminal Tribunals hardly referred to the form of liability of each accused, despite their being explicitly mentioned in the IMT and IMTFE Charters. The Nuremberg and Tokyo Judgments did not explicitly distinguish between primary perpetrators and other crime participants and instead adopted a rather fact-based approach to attributing responsibility.[64] As Kai Ambos notes, "the Nuremberg approach can be called pragmatic rather than dogmatic".[65] One can find two explanations for this peculiarity: first, the lack of theoretical framework during the first international criminal trials; and second, the adoption of an inchoate offence of conspiracy, rather than various forms of complicity, as a method of capturing the collective nature of crimes.

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63 Nuremberg Military Tribunal, United States of America v. Alfried Felix Alwyn Krupp von Bohlen und Halbach et al., Judgment, 31 July 1948, in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, vol. X ('Krupp case'), (https://www.legal-tools.org/doc/ad5c2b/).

64 Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, TMC Asser Press, The Hague, 2003, p. 39; Kai Ambos, "Individual Criminal Responsibility", in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*, vol. 1: *Commentary*, Kluwer Law International, The Hague, 2000, pp. 8–9.

65 Ambos, 2000, p. 8, see *supra* note 64.

In 1950 the ILC first codified complicity in the commission of a crime against peace, a war crime or a crime against humanity as a substantive crime under international law.[66] Arguably this was the result of the lack of a distinction between the modes of participation and the substantive offences at Nuremberg. The ILC's position regarding complicity changed only with the adoption of the 1991 Draft Code of Crimes against the Peace and Security of Mankind which recognised that complicity is a mode of participation and belongs to the section on general principles of law.[67] The same 1991 Draft Code provided the definition of complicity for the first time since the beginning of the ILC's work on the issue in the early 1950s. This shift, leading to a deeper and more nuanced understanding of complicity, was likely the result of the scrupulous work on the issue by the ILC's Special Rapporteur in the 1980s.[68] The other reason for this change of attitude towards complicity was the legacy of the post-IMT prosecutions of war criminals pursuant to the Control Council Law No. 10. These trials rejected the fact-based approach of Nuremberg and Tokyo and stressed the importance of defining the link between the accused and the crime. The final 1996 Draft Code contained a detailed list of the modes of criminal participation, paving the road to the relevant provision of the Rome Statute of the International Criminal Court ('ICC Statute').[69]

15.6. Conclusion

International criminal law was born out of necessity. Law and politics came together in a moment of universal revulsion and outrage to create a space for international prosecutions. The Charters of the IMT and IMTFE provided the future trials with a basic framework, but the novelty of the whole enterprise left a lot of legal lacunae to be filled by practice. Individual criminal responsibility is one vivid example of the concept that re-

66 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, Principle VII, *Yearbook of the International Law Commission*, vol. II., United Nations, New York, 1950.

67 Report of the International Law Commission on the Work of its Forty-third Session, 29 April–19 July 1991, UN doc. A/46/10.

68 At its 34th session, in 1982, the International Law Commission appointed Doudou Thiam as Special Rapporteur for the topic. The Commission, from its 35th session in 1983 to its 42nd session in 1990 received eight reports from the Special Rapporteur. *Ibid*., p. 80.

69 Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May–26 July 1996, UN doc. A/51/10.

quired refinement and redefinition throughout the history of international criminal law. Article 6 of the IMT Charter and Article 5 of the IMTFE Charter extended jurisdiction of these Tribunals to individuals, thus breaking away from the traditional conception of state sovereignty as standing in between the collective international enforcement and a person. At the same time, the Charters only briefly mentioned the modes of liability as a concluding remark in the above-mentioned articles: "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 person in execution of such plan".

The first international judges and prosecutors had to solve many practical questions, while being true to the respective Charters and satisfying the aspirations of international law. Domestic law often played a gap-filling role in the situations when no legal solution grounded in international law was available. This was a reasonable approach and this is why conspiracy was the first legal instrument to tackle the problem of collective offending. Promoted by American scholars, this doctrine allowed for criminalising agreement to commit acts of aggressive war without requiring any underlying activity. It provided evidentiary relief, but caused a lot of discomfort among Continental lawyers, who saw this doctrine as an imposition of guilt by association. This is the reason conspiracy mostly failed at the IMT. It survived at the IMTFE, but was criticised in some strong dissenting opinions. The cosmopolitan nature of international criminal law comes to light in this failure of conspiracy as a crime under international law. The community of lawyers and judges arriving from different legal cultures and traditions had to legitimise the whole process and, without near-universal approval, the new legal solutions were likely to be doomed. The recent *Al Bahlul* judgment by the US DC Court of Appeals, which rejects conspiracy as a crime under international law, supports this proposition.

The chapter has shown how complicity made its way onto the stage of international criminal law. This mode of liability is more nuanced than conspiracy in that it focuses on the individual and may often serve as a usual tool for attaching criminal responsibility. Complicity barely surfaced in the Nuremberg and Tokyo Judgments, but started gaining ground during the prosecutions pursuant to Control Council Law No. 10. The work of the UN Special Rapporteur contributed significantly to under-

standing the modes of liability in general and complicity in particular. One needs to underscore the role of the UN and the ILC in developing the tools for further international prosecutions. The Draft Code of Crimes against the Peace and Security of Mankind that embodied decades-long developments of international criminal law served as a basis for the ICC Statute.

The chapter has discussed the following tensions that led to the dislocation of complicity from the periphery to the centre of international criminal law: those between the domestic and international law, the substantive crimes and modes of liability, and the collective wrongdoing and individual criminal responsibility. These tensions are inherent in the discipline as a whole for they reflect the choices that judges, prosecutors and defence counsel regularly make when handling the cases of insurmountable scope and gravity, when working with international colleagues, and when deciding on how to qualify certain acts and the ways in which the accused became involved in them.

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Historical Origins of International Criminal Law: Volume 3

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

This volume carries on the "comprehensive and critical mapping of international criminal law's origins" started by the previous two volumes. Twenty-seven authors investigate the evolution of legal doctrines and pertinent historical events, many in an attempt to inform contemporary theory and practice. Contributors include Narinder Singh, Eivind S. Homme, Manoj Kumar Sinha, Emiliano J. Buis, Shavana Musa, Jens Iverson, Gregory S. Gordon, Benjamin E. Brockman-Hawe, William Schabas, Patryk I. Labuda, GUO Yang, Philipp Ambach, Helen Brady, Ryan Liss, Sheila Paylan, Agnieszka Klonowiecka-Milart, Meagan Wong, Marina Aksenova, Zahra Kesmati, Chantal Meloni, Hitomi Takemura, Hae Kyung Kim, ZHANG Binxin, Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping.

Part 1 of the book further expands the landscape of international criminal law in terms of geography, time and diversity of legal concepts in their early forms. Parts 2 and 3 turn to the origins and evolution of specific doctrines of international criminal law. Part 2 explores four core international crimes: war crimes, crimes against humanity, genocide, and aggression. Part 3 examines doctrines on individual criminal responsibility: modes of liability, grounds of criminal defence, and sentencing criteria. The doctrine-based approach allows vertical consolidation within a concept. The chapters also identify common and timeless tensions in international criminal law, symptomatic of ongoing struggles, offering parameters for assessment and action.

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