ASSER PRESS

The Crime of Conspiracy in International Criminal Law

Juliet R. Amenge Okoth

Springer

The Crime of Conspiracy in International Criminal Law

Juliet R. Amenge Okoth

The Crime of Conspiracy in International Criminal Law

ASSER PRESS

Springer

Juliet R. Amenge Okoth
Commercial Law
University of Nairobi
Nairobi
Kenya

ISBN 978-94-6265-016-9 ISBN 978-94-6265-017-6 (eBook)
DOI 10.1007/978-94-6265-017-6

Library of Congress Control Number: 2014936431

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Acknowledgments

This research has been made possible by the South African-German Centre for Transnational Criminal Justice, supported by the German Academic Exchange Service (DAAD) with funds from the Federal Foreign Office of Germany. The Centre is based on cooperation between Humboldt University of Berlin and University of the Western Cape (UWC).

I would like to thank Professor Gerhard Werle of Humboldt University and a director of the South African-German Centre, for supervising my work, giving invaluable intellectual input and practical advice throughout the process. I am also very grateful for the support he gave enabling me to have a two-year stay in Germany, carrying out my research at the Humboldt University, which proved to be very crucial for my research. I would also like to thank Professor Lovell Fernandez of the University of the Western Cape for the general support he has given me as a director of the Criminal Justice programme.

I am deeply indebted to Dr. Moritz Vormbaum and Victor Manuel Macias Caro who both played a crucial role in helping me with the comparative study on civil law jurisdictions. Dr. Vormbaum particularly helped with my study of German Law, especially with the translations and references, and offered some sound advice on my work on the International Tribunals. Victor Manuel Macias Caro was essential to my work on Spanish and Italian Law, helping with the much needed translation and giving critical comments. I am also grateful to Dr. Chantal Meloni and Professor Emanuela Fronza for their contribution to Italian Law and Dr. Nicolas Bertrand's contribution to my work on French Law. For their editorial support I would like to thank Dr. Paul Bornkamm and Sosteness Materu. I am also grateful to my colleague Charity Wibabara for her critical comments on certain aspects of my work.

I am very grateful to the German Academic Exchange Service and the Federal Foreign Office of Germany for their generous financial support of my entire study duration in both South Africa and Germany.

I also owe a debt of gratitude to Frau Anja Schepke and Frau Ulrike Brodien for their invaluable administrative support throughout my research stay in Germany. On this aspect, I would also like to thank my colleague Windell Nortje for his diligent support with administrative issues in the University of the Western Cape.

I would also like to thank my parents and siblings for their constant support, as well as Rachel Okong'o and my husband Florian Schmachtenberg for their invaluable social support during my stay in Germany.

Special thanks also go to the staff and team of T. M. C. Asser Press and Springer for their professional input in the publication process.

Contents

Chapter 1
Introduction

Abstract One of the main challenges in International Criminal Law is establishing criminal responsibility for perpetrators of international crimes. The nature of international crimes is that their commission will almost always involve a group of persons. The crime of conspiracy has been one of the main tools of accountability. At the Nuremberg Tribunal, conspiracy was considered to be one of the gravest crimes. Its prominence as a crime peaked with the ad hoc tribunals of the former Yugoslavia and Rwanda, but there is no reference to it in the International Criminal Court Statute. This raises the question of the relevance of the crime conspiracy in the current and future practice of international criminal law. This chapter gives an introduction to the statement of the problem, giving a brief outline of the debate surrounding the crime of conspiracy as a tool of accountability in international criminal law. It also briefly sets out an outline of the constituent chapters of the work.

Contents

J. R. A. Okoth, *The Crime of Conspiracy in International Criminal Law*,
DOI: 10.1007/978-94-6265-017-6_1,

1.1 Background to the Study

The nature of international crimes is that they are crimes that are typically committed by a collective.[1] The contextual element of these crimes shows that they almost always involve organised violence and large-scale atrocities, which can only be achieved by a large number of individuals working together towards such criminal purpose. One question that the international community then often has to grapple with is how to hold the individual perpetrators involved in such systemic criminality accountable. A legal tool that has been considered appealing in such circumstances is the crime of conspiracy.

Conspiracy is an inchoate crime used to punish two or more people who agree to carry out a crime.[2] As a crime, conspiracy is considered to be well established in common law jurisdictions.[3] In common law, conspiracy is a distinct crime, separate from the target crime that the conspirators agree upon and plan to commit. The common law concept of conspiracy carries with it certain evidential and procedural features, which enable the prosecution to construct a broad umbrella of liability at the early stages of planning to carry out criminal conduct.[4] All that is required in a conspiracy charge is to establish whether from a defendant's conduct it can generally be inferred that he was in some way aware of and part of an agreement to commit the underlying crime, and was in some way concerned to see it carried out. Thus, the concept of conspiracy is capable of linking several individuals in one general criminal scheme, facilitating their prosecution and making it easier to obtain convictions against the alleged defendants.[5] Described as "the darling of the modern prosecutor's nursery",[6] conspiracy is considered an essential

---

[1] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, decision on the confirmation of charges, 30 September 2008, para 501; *Prosecutor v. Tadic*, IT-94-1-A (AC), Judgment, 15 July 1999, para 191; M. A. Drumbl, 99 *Northwestern University Law Review* (2005), pp. 570–571; A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 167; G. P. Fletcher, 111 *Yale Law Journal* (2002), p. 1514, asserting that international crimes involve deeds that are by their very nature 'committed by groups and typically against individuals and members of groups'; A. Nollkaemper, in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (2009), p. 1; J. D. Ohlin, 5 *JCIJ* (2007), p. 73; B. Swart, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 82.

[2] J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), p. 187; W. A. Schabas, *An Introduction to the International Criminal Court*, 3rd edn. (2007), p. 214; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2005), marg. no. 621.

[3] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 227; G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 221; J. D. Ohlin, 98 *J. Crim. L. & Criminology* (2007), p. 149; H. Donnedieu de Vabres, in G. Mettraux, *Perspectives on the Nuremberg Trial* (2008), p. 244.

[4] See Chap. 2, Sect. 2.2.

[5] A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 149; P. Gillies, 10 *Ottawa L. Rev*. (1973), p. 275; see Chap. 2, Sect. 2.2 for detailed illustration.

[6] See statement of Learned Hand an American philosopher and judge, in *Harrison v. United States*, 7 F. 2d 259 (2d Cir.1925), cited in W. R. La Fave, *Criminal Law* (2003), p. 615.

and appealing legal device for the prosecution of criminal groups.[7] The main justifications for punishing conspiracy is that group offences are considered to pose more danger than offences committed by individuals, and it is also seen to play a central role in preventing crime.[8]

The significant role of conspiracy in common law jurisdictions contributed to its introduction in the international realm for the first time at Nuremberg. The prosecutor representing the United States while advocating for inclusion of the charge of conspiracy, asserted that the atrocities committed by the Nazi regime were the inevitable outcome of the criminal conspiracy of the Nazi party.[9] In 1948, the Convention on the Prevention and the Punishment of the Crime of Genocide (the Genocide Convention) was agreed upon and entered into force on 12 January 1951.[10] The Genocide Convention establishes genocide as an international crime. Article 3(b) of the Convention criminalises conspiracy to commit genocide. The *travaux préparatoires* of the Genocide Convention show that the rationale for this was to ensure that, in view of the serious nature of the crime of genocide, the mere agreement to commit genocide should be punishable.[11] The adoption of this Convention marked the second instance in which conspiracy was recognised in international criminal law.

In 1993 to manage the conflict in the former Yugoslavia, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY).[12] Article 4(3)(b) of the ICTY Statute provides for conspiracy to commit genocide. In 1995 to deal with the atrocious crimes committed in Rwanda, the International Criminal Tribunal for Rwanda (ICTR) was established and likewise, its Statute provides for conspiracy to commit genocide.[13] The United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (ICC) adopted the Rome Statute of the International Criminal Court (Rome Statute) in 1998.[14] Departing from previous statutes in the field of international criminal law, the Rome Statute did not expressly provide for the crime of conspiracy.[15] This course of events raises the question of the relevance of the crime of conspiracy in the modern practice of international criminal

---

[7] A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 149 describing it as a, 'legal weapon that works well against the mob'; N. Kaytal, 112 *Yale Law Journal* (2003), p. 1307 et seq.

[8] See Chap. 2, Sect. 2.2.3.

[9] See Chap. 2, Sect. 2.2.

[10] Adopted by Resolution 260 (III) A of U.N General Assembly on 9 December 1948, 78 U.N.T.S 277, 288 I.L.M. 761.

[11] *Prosecutor v Musema*, ICTR-96-13-A (TC), para 185.

[12] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827(1993) annex.

[13] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994) annex.

[14] The Rome Statute was adopted on 17 July 1998 and came into force on 1 July 2002.

[15] G. P. Fletcher, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 107 opines that in this sense the 'Rome Statute breaks from the common law pattern of defining criminal liability by rejecting the crime of conspiracy'.

law, creating doubts about the future of a crime once suggested to have 'irretrievably entered into the international criminal law regime'.[16] This issue requires further critical reflection.

1.1.1 Statement of the Problem

Despite its underlying function of facilitating prosecution of crimes perpetrated by a plurality of persons, and addressing the need of law enforcement to stop criminal conduct while still at its preliminary stage before it results into any serious social harm, the crime of conspiracy has been surrounded by controversy in both the domestic and international spheres. Criminal conspiracy in the domestic front has especially been criticised for being ambiguous and prone to abuse by prosecutors, threatening the safeguards that constitute a healthy notion of due process.[17] The crime has in the past been used by prosecutors to exploit vulnerable defendants, and it may be used to cast a wide net of criminal liability catching a number of individuals likely to be innocent of any wrongdoing.[18] It is also seen as a tool that may be used to repress freedom of association and speech, threatening the main foundations of a liberal democratic society.[19] Conspiracy has also been criticised for undermining the delicate balance between individual criminal responsibility and organised criminal groups, by applying criminal liability to all members of a group perceived to be criminal; it creates an unacceptable form of collective guilt.[20]

On the international front, from the onset of its introduction, the concept of conspiracy was rejected and has continually been objected to by countries from civil law jurisdictions.[21] It is often alleged that the crime of conspiracy is largely a common law concept alien to the civil law countries.[22] Although vigorously

---

[16] A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 151.

[17] A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 157; P. Gillies, 10 *Ottawa L. Rev*. (1973), p. 274; see Chap. 2, for detailed analysis.

[18] A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 157; P. Marcus, 65 *Geo. L. J*. (1977), p. 946.

[19] A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 158.

[20] See *U.S. v. Falcone*, 109 F. 2d 579 (1940) p. 581, with Judge Learned Hand noting the possibility of great oppression from the doctrine of conspiracy, when prosecutors use it as a drag net to catch all those who have been associated 'in any degree whatever with the main offenders'; A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 159; P. Gillies, 10 *Ottawa L. Rev*. (1973), p. 291; J. Meierhenrich, 2 *Annu. Rev. Law. Soc. Sci*. (2006), p. 346; J. D. Ohlin, 98 *J. Crim. L. & Criminology* (2007), p. 158, in this respect Ohlin asserts that 'conspiracy doctrine demonstrates the tension between collective action and individual liability'.

[21] See Chaps. 3 and 5 for further analysis.

[22] See Jackson J. in *Krulewitch v United States*, 336 U.S. 440, 450 (1949), asserting that the conspiracy doctrine does not commend itself to jurists of civil law countries; A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 151; G. P. Fletcher, 45 *Columbia Journal of Transnational Law* (2007), p. 444; E. Wise, 27 *Syracuse J. Int'l L. & Com*. (2000), p. 305.

opposed, conspiracy was eventually included in the Charter of the Nuremberg Tribunal, formed to hold major war criminals of the Third Reich in Nazi Germany accountable. Conspiracy thereafter formed an essential part of the prosecution strategy, and was one of the main charges against the defendants. Objections against inclusion of the conspiracy offence in the Charter did not, however, rest with the compromises finally adopted at the negotiation table; they later emerged to haunt the prosecution during the trials, greatly affecting the interpretation and application of the crime of conspiracy.[23]

Although negotiations on the Genocide Convention did not generate much objection to the crime of conspiracy to commit genocide,[24] its use as a tool of accountability before the ad hoc tribunals has seen the tension between the two leading legal systems (common law and civil law) resurface. The dilemma of the tribunals is particularly displayed in the debate on the prudence of convicting a defendant both for the crime of conspiracy and its underlying crime.[25] Under common law a defendant's liability for conspiracy subsists even in face of its executed underlying crime. In several civil law jurisdictions, the idea of merely criminalising an agreement to commit a crime is generally not acceptable, and even in the exceptional cases where it is considered punishable, the justification for punishing the agreement disappears once its underlying crime has been committed. The conspiracy in this latter instance merges into the completed substantive crime. These conflicting perceptions on punishing an agreement to commit a crime have found their way into the jurisprudence of the ad hoc tribunals, contributing to contradictory judgments on the same issue.

The criticisms against conspiracy in the domestic front have also followed with equal fervour into the international realm. Conspiracy has been labelled as a tool of collective guilt,[26] and is also attributed to providing the legal underpinnings of two equally controversial concepts. These concepts include declaring certain organisations to be criminal and subsequently punishing its members, which was done at Nuremberg, and joint criminal enterprise in the ad hoc tribunals. These concepts have also invariably been referred to as forms of conspiracy liability.[27] Whether the aforesaid criticism is justified and to what extent these concepts are related to conspiracy is questioned.

---

[23] See Chap. 3, Sect. 3.2.3.

[24] See J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), p. 186; W. A. Schabas, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 6 marg. no. 26.

[25] See Chap. 3, Sect. 3.7.2.2.

[26] G. P. Fletcher, 45 *Columbia Journal of Transnational Law* (2007), p. 448; E. van Sliedregt, *The Criminal Responsibility of individuals for violations of International Humanitarian Law* (2003), pp. 15–38.

[27] R. P. Barrett and L. E. Little, 88 *Minn. L. Rev* (2003), p. 53; A. M. Danner, J. S. Martinez, 93 *Calif. Law Rev*. (2005), p. 110; A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 165; J. Meierhenrich, 2 *Annu. Rev. Law Soc. Sci*. (2006), pp. 341–357; S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), pp. 219–220, observing that conspiracy supplied the doctrinal underpinnings of the idea of criminal organisations.

The failure to expressly include criminal responsibility for conspiracy in the Rome Statute has drawn mixed reactions, leading to the question whether conspiracy was intentionally dropped in the Rome Statute,[28] or its exclusion was the work of inadvertent drafters.[29] While some scholars view such exclusion as a step in the right direction, asserting that it is an indication of a stronger commitment 'to the principle of individual accountability',[30] others consider it a setback especially with respect to prosecution of the crime of genocide, where conspiracy is considered to have played an essential role in holding perpetrators of such crimes accountable before the ad hoc tribunals.[31] Some scholars nonetheless, submit that conspiracy may still be punishable under the Rome Statute by virtue of Article 21, which recognises customary law as one of the sources of law that the ICC may look into.[32] It is doubtful that the ICC will consider recognising criminal responsibility for conspiracy through this avenue. It has also been questioned whether conspiracy as a crime has indeed developed into a norm of customary international law, with some scholars asserting that conspiracy as a substantive offence has generally been rejected at the international level.[33]

Although it has been expressed that adoption of an international standard for a crime of conspiracy as a customary international norm would facilitate the prosecution of international crimes,[34] it has also been asserted that a sceptical eye should be cast upon the use of the concept of conspiracy as a crime, especially in international criminal trials, given the multifaceted problems that come with it.[35] The above considerations set the stage for further investigation as to why conspiracy, a concept designed essentially to combat collective criminal action, which

---

[28] See T. R. Dalton, *Cornell Law Student Papers* (2010), p. 2; J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), p. 201, asserting that exclusion of the crime of conspiracy to commit genocide was a desire by states to change the law in this regard.

[29] W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn. (2009), p. 315.

[30] G. P. Fletcher, 45 *Columbia Journal of Transnational Law* (2007), p. 448.

[31] Y. Askar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court* (2004), p. 230; Mohamed C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 224; W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn. (2009), pp. 314–315.

[32] R. P. Barrett and L. E. Little, 88 *Minn. L. Rev* (2003), p. 82.

[33] T. R. Dalton, *Cornell Law Student Papers* (2010), p. 1 et seq. asserting that there is no firm foundation for conspiracy as a substantive international crime; J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), pp. 188 et seq; see also T. Stenson, 1 *The Journal of International Law & Policy* (2003–2004), p. 1, stating that the international community has failed to clearly state whether or not inchoate crimes such as conspiracy should be included in a general statement of customary international law; B. Swart, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 91, stating that conspiracy to commit an international crime does not form part of customary law.

[34] T. Stenson, 1 *The Journal of International Law & Policy* (2003–2004), p. 23.

[35] A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 151.

happens to be one of the distinct features of international crimes, does not seem to have universal approval, and remains one of the most contested areas in contemporary criminal law.[36]

1.1.2 Objectives of the Study

The use of criminal conspiracy as a tool of accountability in international criminal law has been surrounded with both controversy and confusion from its inception, putting into question its legitimacy and effectiveness as a crime in international criminal law where group dynamics are often involved. The main objective of this study is to address what constitutes the crime of conspiracy, what role it has played in the development of international criminal law and whether it will play any significant role in future prosecutions before the ICC following the failure to expressly provide for it in the Rome Statute. More specifically, the study will critically analyse the following issues:

1. It will look into the origins and functions of conspiracy in domestic jurisdictions, clarifying its precise legal contours and the rationale for its existence.
2. The study will establish whether punishment of conspiracy is a general principle of law recognised by the major legal systems of the world, discussing in particular the legal theory and practice of jurisdictions considered to be representative of common law and civil law legal systems, in punishing crimes carried out in concert.
3. The study will also illuminate on the evolution of the crime of conspiracy in the international front, discussing the controversy between the common law and civil law jurisdictions and the influence this has had in the interpretation, application and development of criminal conspiracy as a substantive crime in international criminal law.
4. The study will establish:
   (a) The status of conspiracy as a norm under international criminal law and,
   (b) Whether conspiracy is a legitimate substantive crime under international criminal law.
5. It will consider what role if any criminal conspiracy is likely to have in establishing criminal responsibility in future prosecutions before the ICC.

1.1.3 Overview of Chapters

The study consists of six chapters. This first chapter is the introduction, setting out the background to the study, statement of the problem and an outline of the chapters.

---

[36] J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), p. 187.

The second chapter traces the historical background of criminal conspiracy in the domestic front, and includes a comparative analysis of the current practice in individual nations both in common law and civil law jurisdictions. The research focuses on the laws of the countries that the author perceives to be leading representative countries in the common law (United States and United Kingdom), and civil law (Germany, Spain, France, Italy) legal systems. An understanding of the perception and function of the concept of criminal conspiracy within the different systems will clarify the controversy surrounding the crime at the international level.

The third chapter entails a critical analysis of the jurisprudence of the Nuremberg and Tokyo Trials, the ICTY and ICTR with respect to the crime of conspiracy. It discusses the treatment and function of conspiracy before the international tribunals and its effectiveness as a tool of accountability in international criminal law. It also looks into the influence of conspiracy legal theory on other tools of accountability recognised in the jurisprudence of the international tribunals.

The fourth chapter illuminates the debate of the status of conspiracy as a substantive crime under customary international law.

The fifth chapter contains an analysis of the place of conspiracy in the Rome Statute, discussing whether it may be punishable under this legal regime, and if not whether a gap has resulted in the prosecution of international crimes following its exclusion, with appropriate recommendations made thereafter.

A general conclusion is laid out in chapter six, the final chapter of this study.

Chapter 2
Comparative Analysis

Abstract It has been asserted that conspiracy is wholly a common law concept. This chapter shows that some civil law countries such as Germany and Spain also punish the act of agreeing to commit a crime. The main point of departure is that whereas conspiracy is an independent crime in common law jurisdictions, it is more attempted participation in the civil law jurisdictions that recognise it. To combat group criminality civil law countries have preference for offences related to criminal associations. This chapter gives a systematic analysis of the elements of conspiracy in both common law and civil law jurisdictions. It also compares the elements of the crime of conspiracy with those of offences of criminal association. The study shows that although conspiracy may not expressly be punished in all civil law countries, features of criminal association offences indicate that they do punish conduct similar to that punished by conspiracy.

Contents

J. R. A. Okoth, *The Crime of Conspiracy in International Criminal Law*,
DOI: 10.1007/978-94-6265-017-6_2,

2.1 Introduction

It has been suggested that conspiracy is predominantly a common law concept and does not have a prominent role in civil law countries.[1] In fact, the majority of the civil law jurisdictions are considered to reject the idea of criminal conspiracy in principle, and instead have alternative criminal concepts that perform the analogous function of conspiracy. The difference in perception and use of criminal conspiracy between common law and civil law jurisdictions has been the centre of controversy at the international front and has influenced the role and development of criminal conspiracy in international criminal law. Since national criminal laws and doctrine inspire and guide the development of international criminal law, a study of the various systems will create a better understanding of the theories surrounding the international law concept of conspiracy. It is therefore important to analyse the historical background of conspiracy, the practice adopted by individual states in its application, its merits and demerits in the various criminal law systems. This chapter consists of a comparative analysis on the law of criminal conspiracy in common law and civil law jurisdictions. A look at the alternative structures that seem to perform the equivalent function of common law conspiracy within the civil law jurisdictions is also undertaken. Special attention is given to the law in the United Kingdom and United States, two countries under the common law system in which conspiracy law is well established. In the case of civil law countries, the study will focus on the laws of four prominent countries, Germany, France, Italy and Spain, which have well-established legal systems and present a good overview of the laws in most civil law jurisdictions.

2.2 Common Law Jurisdictions

Criminal conspiracy may be described to be as old as common law, with its origins being traced back to the early developments of law in the United Kingdom.[2] This study therefore begins with an analysis of conspiracy law in the United Kingdom from its historical background to the current developments.

---

[1] G. P. Fletcher, *Rethinking Criminal Law*, 2nd edn. (2000), p. 221; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 17; W. J. Wagner, 42 *The Journal of Criminal Law, Criminology, and Police Science* 2 (1951), p. 171.

[2] *People v. Schwimmer* 66 A, D, 2d 91, 94 (2d Dept. 1978).

2.2.1 United Kingdom

2.2.1.1 Historical Background

The birth of criminal conspiracy can be traced back to the reign of Edward I.[3] Conspiracy was introduced to redress the abuse of ancient criminal procedure. Incidences of persons coming together and instituting false charges were frequent with insufficient legal mechanisms in force to address this vice.[4] To fill this gap in the law, the crime of conspiracy was introduced through the enactment of several statutes, culminating into the enactment of The Third Ordinance of Conspirators, 33 Edw. I passed in 1304, and The Statute of 4 Edward III, C.II (1330).[5] When persons agreed to obtain false charges or to bring false appeals or to maintain malicious suits, they could be held liable for conspiracies. The early offence of conspiracy was restricted to the offences against the administration of justice and was strictly construed, confining it to the precise and definite language of the statutes. A defendant's liability for conspiracy would only arise when the person he or she had falsely accused was charged and later acquitted.[6]

The later part of the sixteenth century saw the court revise its stand on the strict interpretation of the crime of conspiracy. This revolution was initiated by the Court of Star Chamber in the *Poulterers' Case* decided in 1611.[7] In this case, the defendants had agreed to bring a false accusation of robbery against Mr. Stone. Their efforts failed because the innocence of Mr. Stone was so obvious that the jury refused to charge him of the crime alleged. Mr. Stone subsequently instituted an action for damages against his false accusers. The defendants argued that Stone was not entitled to his claim as he had neither been indicted nor acquitted as provided for in the statutes on conspiracy. The court rejected the defendants' submissions and found them guilty. It made the ground-breaking decision that the essence of the offence of conspiracy was the agreement the defendants had made together, rather than the false indictment and subsequent acquittal. This decision led to the development of the well settled doctrine of modern law of conspiracy, which recognises that the agreement is the gist of this crime, and no further steps need to have been taken to put it into effect.[8]

---

[3] For a detailed account of historical evolution, see A. Harding, *Transactions of the Royal Historical Society* (1982), pp. 89–108; B. F. Pollack, 35 *Geo. L. J.* (1947), pp. 328–352; F. B. Sayre, 35 *Harvard Law Review* (1922), pp. 393–427; R. S. Wright, *The Law of Criminal Conspiracies and Agreements* (1873).

[4] F. B. Sayre, 35 *Harvard Law Review* (1922), p. 394.

[5] B. F. Pollack, 35 *Geo. L. J.* (1947), p. 340.

[6] A. Harding, *Transactions of the Royal Historical Society* (1982), p. 91; F. B. Sayre, 35 *Harvard Law Review* (1922), at p. 396, 397.

[7] 77 Eng. Rep. 813 (1611) cited in F. B. Sayre, 35 *Harvard Law Review* (1922), p. 398; Cf. R. Hazel, *Conspiracies and Civil Liberties* (1974), p. 14.

[8] B. F. Pollack, 35 *Geo. L. J.* (1947), p. 342.

In the seventeenth century, conspiracy was further expanded to include agreements to commit all crimes of whatever nature.[9] This interpretation later opened a door for the idea that a combination may be criminal, although its object would not be strictly criminal when performed by a single person.[10] Much ambiguity and confusion prevailed during this period with respect to the crime of conspiracy. In 1832 Lord Denman, in an attempt to clarify what constituted a conspiracy charge, made the statement that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means".[11] This well-known and now important statement was perceived to provide a solution to the difficulties experienced in the application of criminal conspiracy, and other judges who had struggled with the concept of conspiracy, enthusiastically embraced this guideline.[12] The principle provided by Lord Denman's statement could conveniently be adapted to suit any case relating to conspiracy, without giving much thought to the prevailing circumstances of the case. The ambiguity generated by use of the term 'unlawful' made conspiracy a convenient charge to bring against offenders when other ways of establishing their guilt were unavailable.[13] The elasticity of the term also made it possible for judges to reflect their prejudices in their decisions leading to unpredictability in this class of cases and in

[9] This expansion was motivated by several factors among them the need for a broader and more moral law. The seventeenth century witnessed the confusion of law and morals fuelling ambiguity in the justice system, see F. B. Sayre, 35 *Harvard Law Review* (1922), p. 400; R. S. Wright, *The Law of Criminal Conspiracies* (1873), p. 26.

[10] The expansive interpretation of conspiracy at the time, was especially as a result of what Pollack and Sayre termed as an unfortunate statement made by a renowned scholar Hawkins, who asserted in Pleas of crowns that "… there can be no doubt but that all confederacies whatsoever, wrongful to prejudice a third person are highly criminal at common law". The ambiguity of the term "wrongful" created confusion as to whether it meant "criminal means" on the one hand or on the other hand "tortious" or "immoral". See B. F. Pollack, 35 *Geo. L. J.* (1947), p. 345; F. B. Sayre, 35 *Harvard Law Review* (1922), p. 402; also D. Harrison, *Conspiracy as a Crime and as a Tort in English Law* (1924), pp. 25 et seq.

[11] Quoted in, F. B. Sayre, 35 *Harvard Law Review* (1922), p. 405. This statement is viewed by Sayre as a reincarnation of the statement made by the renowned scholar Hawkins, and is seen to have created more confusion in the law of conspiracy. The formula was used in several circumstances to expand criminal conspiracy to apply to acts that, though considered immoral, were not in any way criminal. Though this formula became notorious it was later to be repudiated by its author. This ambiguity gave judges the liberty to conveniently impose their individual notions of justice. See also, R. Hazel, *Conspiracies and Civil Liberties* (1974), p. 15 noting that the term 'unlawful' actually meant something wider than merely criminal.

[12] W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 614.

[13] B. F. Pollack, 35 *Geo. L. J.* (1947), p. 346.

some instances undesirable results.[14] The leeway judges had in conspiracy cases is seen to have made them serve as quasi-legislators, creating new offences.[15]

This broad nature of conspiracy law also made it subject to abuse by prosecutors who used it to pursue a government agenda.[16] In the United Kingdom, prosecutors used conspiracy in the late eighteenth century to suppress critics of the government and later in early twentieth century it was used in both the United Kingdom and United States to counter union movements.[17] Lord Denman's statement eventually shaped the crime of conspiracy in common law jurisdictions, where it often refers to a combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means.[18]

The unpredictability of common law criminal conspiracy was mainly because it extended its reach beyond the boundary of criminal offences, making it subject to much criticism.[19] Until the 1970s conspiracy under English criminal law was left to the whims of the judiciary. In this context, it was capable of infinite growth and could accommodate any situation. Often conspiracy was used to prosecute conduct which was more of an antisocial nature rather than a criminal end.[20] On several occasions, criminal conspiracy convictions punished acts that were civil wrongs and not essentially criminal. Two cases illustrate the tendency of the courts to expand conspiracy. In *Shaw v. DPP*,[21] Shaw had published a booklet called the 'Ladies Directory', which advertised the names and addresses of prostitutes. The booklet indicated, "…that the advertisers could be got in touch with at the telephone numbers given and were offering their services for sexual intercourse and, in some cases, for the practice of sexual perversion".[22] Shaw was convicted for a number of offences under the Sexual Offences Act 1956 and the Obscene Publications Act 1959, and was also convicted for "conspiracy to corrupt public morals". On appeal, his counsel's submission that no offence such as conspiracy to

---

[14] B. F. Pollack, 35 *Geo. L. J.* (1947), p. 347, observing that interpreting "unlawful" to mean "criminal" was seen as a much too narrow definition. Conversely, interpreting it to mean "wrongful" made the definition much too wide, making it possible to include in the crime any type of combination which seemed to be socially oppressive or undesirable, though the acts committed in themselves did not constitute crimes; see also criticism by R. S. Wright, *The Law of Criminal Conspiracies* (1873), pp. 62–67.

[15] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 956; A. Harding, *Transactions of the Royal Historical Society* (1982), p. 91.

[16] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 956.

[17] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 956; also see D. Burgman, 29 *DePaul L. Rev*. (1979), p. 80; R. S. Wright, *The Law of Criminal Conspiracies* (1873), pp. 45–62, making reference to cases misused by judges against trade unions in the course of the nineteenth century.

[18] W. R. La Fave, *Criminal Law* (2003), p. 615.

[19] D. Harrison, *Conspiracy as a Crime and as a Tort in English Law* (1924), pp. 80–114.

[20] A. Ashworth, *Principles of Criminal Law* 5th edn. (2006), p. 455; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 73.

[21] *Shaw v. DPP* (1962) A. C. 220.

[22] *Shaw v. DPP* (1962) A. C. at 220–221.

corrupt public morals existed was rejected and the House of Lords upheld his conviction. In the judgment Lord Tucker observed: "It has for long been accepted that there are some conspiracies which are criminal although the acts agreed to be done are not *per se* criminal or tortious if done by individuals". The court held that where defendants agree to carry out acts that threaten to cause extreme injury to the public, they would be guilty of conspiracy to effect public mischief. In *Kamara v. DPP*,[23] students were convicted for conspiracy to trespass after occupying the High Commission of Sierra Leone in London with the intent of gaining publicity for their political grievances although trespassing was a tort and not a crime. On appeal, their contention that there was no such offence as conspiracy to trespass was dismissed and their conviction upheld. The appellate court was of the view that since an agreement to do an unlawful act was a conspiracy and the commission of a tort was an unlawful act, it followed that an agreement to commit any act of trespass was an indictable conspiracy. In the judgment, Lord Hailsham observed that conspiracy to trespass was a form of conspiracy to effect a public mischief.[24]

The uncertainty and elasticity of criminal conspiracy led to much criticism by legal scholars and practitioners. The criticisms catalysed the making of certain reforms and continues to affect contemporary developments on conspiracy law. To some extent, the judiciary's conscience to the injustice caused by several decisions made with respect to conspiracy cases was awakened, and as a result it began to make decisions that rejected the broad policy of social defence, adopted to justify the extension of criminal conspiracy to all sorts of conduct considered to be anti-social.[25] To streamline the law on conspiracy, the legislature decided to codify criminal conspiracy, following recommendations of the Law Commission report number 76.[26] The report observed that common law conspiracy was vague and capable of growing in silly ways, which might offend the principle of certainty. The legislature enacted the Criminal Law Act of 1977 (CLA) in which part 1 provides for statutory conspiracy. The House of Lords has acknowledged that this change was a radical amendment to the law of criminal conspiracy.[27] Only two

[23] (1973) 2 All E. R. 1242.

[24] *Kamara v. DPP* (1973) 2 All E. R. 1242 at p. 1254 and 1258.

[25] A. Ashworth, *Principles of Criminal Law* 5th edn. (2006), p. 456. The two notable decisions that rejected the elasticity of conspiracy were: *DPP v. Bhagwan* (1972) A. C. 60, and *DPP v Withers* (1975) A. C. 842. In *Bhagwan* the House of Lords held that there is no general crime of conspiracy to defeat the purpose of an Act of Parliament, and in *Withers*, the accused had been convicted for conspiring to obtain confidential information by deceit from the banks and government departments, the House of Lords while quashing these convictions declared that there was no general offence known to law of conspiracy to effect a public mischief.

[26] Law Commission No. 76, Conspiracy and Criminal Law Reform, 1976 [hereinafter Law Com. No. 76]. This commission based its analysis from: The Law Commission Working Paper No. 50, Inchoate Offences: Conspiracy, Attempt and Incitement [hereinafter Law Com. 50].

[27] See *Regina v. Ayres* (1984) A. C. 447, 453–454.

forms of conspiracy are maintained under the new law: statutory conspiracy and the common law conspiracies to defraud and to corrupt public morals or to outrage public decency.[28]

2.2.1.2 Statutory Conspiracy

Section 1(1) of the Criminal Law Act (CLA) makes it an offence for a person to agree with another or others to carry out what would amount to a criminal offence.[29] Such an agreement amounts to conspiracy to commit the underlying offence. The CLA requires that the parties make the agreement with the intention that it will result in commission of the object of the conspiracy.

A minimum of two people are sufficient to form a conspiracy. However, certain persons are exempt from liability for the offence of conspiracy. Section 2(1) CLA provides that the intended victim of the offence cannot be guilty of conspiracy.[30] Section 2(2) CLA provides that there can be no conspiracy where the only other person to the agreement is a spouse, a person under the age of criminal responsibility, or an intended victim.[31]

---

[28] A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 457 et seq; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 508; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 359 et seq.; N. Padfield, *Criminal Law*, 6th edn. (2008), p. 155 et seq. This study however, mainly concerns itself with statutory conspiracy, which consists of the majority of cases.

[29] The offence of Statutory Conspiracy is set out by s 1(1) and s 1(2) of the CLA which states:

1(1) Subject to the following provisions of this part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either-

(a) will necessarily amount to or involve the commission of any offence or offences by one or more parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any offences impossible, he is guilty of conspiracy to commit the offence or offences.

(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and one other party to the agreement intend or know that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

[30] It is suggested that victim here refers to offences which exist for purposes of protecting the victim, see M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 273; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 513; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 395.

[31] A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 460, stating that the law in this case places, 'the value of marital confidence above the public interest in having conspirators brought to justice…'; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials* 5th edn. (2003), p. 513; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 394; N. Padfield, *Criminal Law*, 6th edn. (2008), p. 156; also see *Chrastny* (1991) 1 W. L. R 1381, where the court noted it was possible to hold a husband and wife liable for conspiracy where a third

Elements of Statutory Conspiracy

The jurisprudence illustrates that to prove statutory conspiracy the prosecution must show the existence of two elements: the agreement, which is the *actus reus*, and the *mens rea*, which is the intention to enter into the agreement to carry out the intended underlying offence. The exercise of distinguishing between these two elements with respect to the offence of conspiracy is not always an easy task. This is because the act of agreeing is itself considered to be essentially a 'mental operation'.[32]

(a) The Agreement

The offence of conspiracy lies in making the agreement and it is not necessary for any other action to be performed in pursuance of the agreement.[33] In *R v Simmonds*,[34] the court observed that a conspiracy involves two or more persons acting or planning to act in concert under some agreement in pursuit of a criminal design.[35] Conspiracy is a continuing offence that lasts until either the criminal purpose is achieved or the agreement is brought to an end.[36]

It must be shown that the parties to the agreement had a meeting of minds for the agreement to exist. Mere negotiation does not suffice.[37] This requires that the conspirators at least define the main elements of the agreement, which means they

(Footnote 31 continued)
party was also involved. The husband and wife were considered as one conspirator and the third party considered the second conspirator; The agreement would also be punishable if the married couple had entered into it before marriage, M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 273.

[32] D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 374; see also M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 276.

[33] *Mulcahy v R* (1868) LR 3 HL 306; Law Com. No. 76, para 1.21; M. Allen, *Criminal Law*, 9th edn. (2007), p. 272; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 460; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 504; P. Gillies, *The Law of Criminal Conspiracy*, 2nd edn. (1990), p. 16; J. Herring, *Criminal Law: Text, Cases, and Materials*, 3rd edn. (2008), p. 799; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 362; N. Padfield, *Criminal Law*, 6th edn. 2008, p. 156.

[34] [1969] 1 Q. B. 685.

[35] *R v. Siracusa* [1989] Crim. L. R. 712, with O'Connor LJ stating, 'the essence of conspiracy is the agreement'.

[36] *DPP v. Doot* (1973) All E. R. 940 HL, noting that conspiracy is a continuing offence that lasts until the agreement is realised or otherwise terminated, and different conspirators may join it at various times; *R v Simmonds* [1969] 1 Q. B. 685; M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 273; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 363.

[37] M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 276; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 459–460; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 513; J. Herring, *Criminal Law: Text, Cases, and Materials* 3rd edn. (2008), p. 799; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 363.

agree on a course of conduct that also has to embrace the intended consequences.[38] If no agreement is reached the conspiracy charge will fail. It is not necessary for the parties to have physically met. All that needs to be shown is that the co-conspirators knew there were other parties to the agreement, and the defendant at least communicated with one other party to the conspiracy on the common criminal objective.[39] The agreement may be express or implied.[40] In practice, courts usually infer the existence of the agreement from behaviour that appears to be concerted, rather than direct evidence of a meeting, which the prosecution can hardly rely on, given the secretive nature of conspiracies.[41] The danger of such focus is that too much attention is given to these acts, which may blur the fact that the acts in themselves are not the conspiracy but merely evidence of it.[42] The two or more persons must agree to carry out conduct that is criminal, and not knowing that the conduct agreed upon is criminal does not amount to a defence.[43]

(b) The Mental Element

The *mens rea* of criminal conspiracy requires that each party to the conspiracy know the facts or circumstances with respect to the agreement's objective, and must intend to be part of the agreement, intending also that its underlying offence be carried out.[44] Knowledge of the facts or circumstances surrounding the objective of the conspiracy means that a conspirator must have full intention to

---

[38] A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 81; see also M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 276; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), at p. 461; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 513; J. Herring, *Criminal Law: Text, Cases, and Materials*, 3rd edn. (2008), p. 799, 800.

[39] This was observed in *West* (1948) 1 K. B. 709; "In law all must join in one agreement, each with others, in order to constitute one conspiracy. They may join in at various times, each attaching himself to that agreement; any one of them may not know all the other parties, but only that there are other parties; any one of them may not know the full extent of the scheme to which he attaches himself, but what each must know is that there is coming into existence, or is in existence a scheme which goes beyond the illegal act which he agrees to do". Also see M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 273; J. Herring, *Criminal Law: Text, Cases, and Materials*, 3rd edn. (2008), p. 799; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 365.

[40] M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 272.

[41] See *R v. Simmonds* (1969) 1 Q. B. 685; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 461; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 364.

[42] A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 461; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 364.

[43] *R v. Griffiths* (1966) 1 Q. B. 589, where the court observed that it must be shown that the alleged parties to a conspiracy were acting in pursuance of a criminal purpose held in common between them; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 461.

[44] M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), pp. 280–284; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 462; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), pp. 374–382; N. Padfield, *Criminal Law*, 6th edn. 2008, pp. 157–160.

commit the underlying crime, or has knowledge of the facts or circumstances that make the underlying conduct criminal. The requirement of full intention and knowledge of circumstances applies to all offences even those of strict liability, negligence, or recklessness.[45] In *R v Ali, Hussan, Khan and Bhatti*,[46] it was held that statutory conspiracy has a strict *mens rea* requirement. Recklessness does not suffice. The court observed that to the extent to which a substantive offence imposed liability without knowledge of any particular fact or circumstance necessary for commission of the offence, a defendant would nevertheless not be liable of conspiracy to commit such an offence. Such liabilty would only arise in a case that the defendant and at least another party to the agreement intended or knew this fact or circumstance shall exist at the time the conduct constituting the offence is to take place.[47]

The *mens rea* requirement that a party to a conspiracy also needs to intend the consequences of such conspiracy has raised some difficulties resulting in diverse opinions. The House of Lords held in *R v Anderson*,[48] that it was sufficient for the prosecution to establish by way of *mens rea* that the defendant had agreed on a course of conduct that he intended to play some part in and knew it would involve the commission of an offence, adding that it was not necessary to prove that he intended the course of action. In this case, the defendant was convicted with several others on account that they had conspired to facilitate the escape of one of them from prison. The defendant's submission that although he had supplied diamond wire to cut bars, he had not intended for the plan to be carried out, neither did he believe in the possibility of its success, was rejected. Lord Bridge in the case asserted:

> The necessary *mens rea* of the crime is, in my opinion, established if, and only if, it is shown that the accused when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve.

This rationale has been criticised for being a distortion of substantive principles of criminal law. It is asserted that it creates the strange impression that one may be guilty of conspiracy to commit a crime although they did not intend it, and it also raises some difficulty where the defendant although being part of the conspiracy does not agree to play some part in the agreed course of conduct.[49] Departing from this position, other decisions require that the prosecution clearly establish the

---

[45] Section 1(2) CLA 1977; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 462–463; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), pp. 377–381.

[46] (2006) Q. B. 322.

[47] See also *R v. Saik* (2006) UKHL 18, Lord Hope of Craighead at para 58.

[48] (1986) A. C. 27 HL.

[49] M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 280–282; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), at p. 463–464; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials* 5th edn. (2003), p. 518; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 375–377; N. Padfield, *Criminal Law*, 6th edn. 2008, p. 157.

intended consequence of the conspiracy and a conspirator's intention in relation to these consequences.[50] This often determines the extent of each conspirator's criminal responsibility. This later view was confirmed in *R v. Siracusa,*[51] a case involving organised smugglers trading in massive quantities of heroin from Thailand and cannabis from Kashmir to Canada, where the court tried to clarify the confusion created by the *Anderson* case. The court held that although a person smuggling heroin could be convicted of the substantive crime if he thought he was smuggling cannabis, the same analogy would not apply to the conspiracy charge, asserting that the prosecution is required to prove the accused's intent in relation to specific intended consequences. O' Connor LJ observed:

> [I]f the prosecution charge a conspiracy to contravene…the Customs and Excise Management Act by the importation of heroin, then the prosecution must prove that the agreed course of conduct was the importation of heroin. This is because the essence of the crime of conspiracy is the agreement and in simple terms, you do not prove an agreement to import heroin by proving an agreement to import cannabis.

On the issue of a conspirator's intention to participate in some way in the commission of the underlying offence, the court in *Siracusa* noted that 'participation in conspiracy is infinitely variable: it can be passive or active'.[52] Further, it clarified that it was sufficient for the prosecution to show that an accused assented to play his part 'in the agreed course of conduct, however innocent in itself, knowing that the part to be played by one or more of the others will amount to or involve the commission of an offence'.[53]

Another issue of concern is where the agreed course of conduct leads to commission of other offences that were not intended. The main question posed here is whether such consequences in the case that they were foreseeable should be deemed as intended. The most common view is that consequences should only be limited to those that were intended by the parties.[54]

Accessorial Liability

Under the United Kingdom criminal law system, a party to a conspiracy that intends the underlying crime to be committed shall be guilty of such offence when

---

[50] *R v. Edwards* (1991) Crim. L. Rev. 45; *R v. Ashton* (1992) Crim. L. Rev. 667; *R v. Harvey* (1999) Crim L. R. 70; *Yip Chiu-Cheung v. R* (1994) 3 W. L. R. 514; M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 276.

[51] (1989) Crim. L. Rev. 712.

[52] *R v. Siracusa* (1990) 90 Cr. App. R 340 at p. 349.

[53] *R v. Siracusa* (1990) 90 Cr. App. R 340–357; *R v. Hollinshead, Dettlaf and Griffiths*, Crim. L. Rev. 653 (1985).

[54] D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 377; see also C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 514; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 93.

committed by a co-conspirator.[55] This however, is not the rule with respect to cases where the conspirators although involved in a form of conspiracy have had no contact with each other or are unaware of each other's existence. In such an instance, the commission of an offence by one of the conspirators only makes the other/s liable for the conspiracy but not the underlying substantive offence.[56] A conspirator who plays a very minor role in the commission of the substantive offence, which is the object of the conspiracy, may be charged as if they actually committed the substantive crime. The reasoning behind this practice was explained by Lord Pearson in *Director of Public Prosecution v. Doot*,[57] when he likened a conspirator's agreement to a contract. Each conspirator being a party to the agreement benefits from each of the acts of the co-conspirators. In practice however, few cases follow the guidelines laid out in the *Doot* case. The courts prefer to hold a conspirator who does not participate directly in the commission of an offence liable for accessorial liability, and not principally liable for the object of the conspiracy.[58]

Charging Practice

Conspiracy 'in the eye of the law'[59] is considered to be a crime on its own merit. The practice under common law was that all conspiracies except for conspiracy to commit treason were punishable as misdemeanours.[60] Being a misdemeanour meant that in situations where the conspirators agreed to commit a substantive crime that was classified as a felony and successfully carried it out, the conspiracy would merge into the substantive crime. This practice was allowed because of certain procedural advantages that the law availed to a defendant in a trial involving a misdemeanour and not in a felony trial.[61]

Under the CLA, in principle statutory conspiracy remains a separate offence from its underlying substantive offence, and does not merge with the substantive offence even when the substantive offence is committed. Unlike the practice under common law, this position also applies even in the case where the crime involved is a felony. This principle of law was recognised in the case of *Regina v. O' Connell*,[62] when Lord Campbell stated:

---

[55] D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 170.

[56] D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 170.

[57] 1973 A. C. 807.

[58] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 980; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 170.

[59] *Regina v Button* 11 Q. B. 929 (1848).

[60] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 970.

[61] See K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 970.

[62] 8 Eng. Rep. 1061 (H. L.1844) at p. 1154 cited in K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 971.

> Where they have actually done what they intend to do, it may be more proper to prosecute them for their illegal acts; but, in point of law, they remain liable for the offence of entering into the conspiracy.

In support of this position, the Queen's Bench in *Regina v. Button*,[63] dismissed an appeal by appellants who had been convicted for conspiracy to defraud their employer. The appellants had argued that there being evidence of commission of the substantive offence, no conviction should be allowed for the charge of conspiracy, which merges into the substantive offence. The court rejected this proposition affirming that the two offences were different, dismissing the appellants concerns that they might be punished twice for the same offence.[64]

Prosecutors therefore, also have the option of prosecuting suspects only for conspiracy, even in the instance where there is sufficient evidence of commission of the substantive offence.[65] The prosecutors especially prefer to charge conspiracy for the procedural and evidential advantages that come with it.[66] The courts however, do not encourage this practice because a conspiracy charge is usually seen as causing confusion both to the judge and jury. Furthermore, the courts consider conspiracy to be a more difficult concept to comprehend than its underlying substantive crime.[67] In addition, an indictment for the vague offence of conspiracy is seen to create difficulty for a defendant in laying out a defence.[68]

The prosecution may also choose to simultaneously institute charges for conspiracy and the substantive crime. This practice is also not viewed favourably by the British appellate courts because of the confusion that is usually characteristic of most such trials. Although the appellate courts do not prohibit double charging, they have been very critical of the practice.[69] The additional conspiracy charge is seen to complicate the trial and is considered to add nothing beneficial to the trial. It is also seen as making trials intolerably long and allows the admission of evidence that would otherwise be inadmissible. This was the courts view in *Regina*

---

[63] 11 Q. B. 929 (1848).

[64] See also *R v. Dawson* (1960) 1 W. L. R. 163; *R v. Griffiths* (1966) 1 Q. B. 589; *Verrier v. DPP* (1966) 3 All E. R. 568.

[65] The courts have interpreted section 3(3) of the Criminal Law Act 1977 as allowing this practice, K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 973; also see A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458.

[66] C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 507; K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 973; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 363, 400.

[67] *Regina v. West* 32 Crim. App. 152 (1948); A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 95; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), pp. 392–393.

[68] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 972; P. Gillies, 10 *Ottawa L. Rev*. (1973), p. 274; these criticisms were also noted in Law Com. No. 50, paras 54–58 and Law Com. No. 76, paras 1.64–1.71.

[69] A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458; The Law Society according to para 57 of the Law Com. No. 50, also recommended that prosecutors should not be allowed to charge both conspiracy and its underlying complete substantive offence.

v. Dawson,[70] where the court quashed the conviction of six defendants who had been charged and convicted of one count of conspiracy and 14 counts of fraud. The court, to deal with the problem created by double charging, devised a new analytical approach of first evaluating the substantive charge and then determining the viability of the conspiracy charge. This approach changed the traditional practice of first evaluating the conspiracy charge.[71] The court's view on the benefit of such an approach was that it would enable the state to bring smaller and more manageable conspiracies before the court, as opposed to a single, large and complicated conspiracy.

The case of *Regina v. Griffiths*,[72] also illustrates the courts disdain towards the practice of double charging. Nine defendants were charged and convicted of one count of conspiracy to defraud the government and 24 counts of the substantive offence of false pretences. During the trial the state called 60 witnesses and the defence 35 witnesses. A total of 263 exhibits were produced by both sides. On appeal, the court reversed the convictions holding that the prosecution had failed to prove that there was a single comprehensive conspiracy among all the defendants. The appellate court observed that during the trial two types of confusion were experienced. The first was the "general confusion", which made the jurors to complain. The second was the "procedural confusion", which required the judge to instruct the jury that certain evidence though admissible with respect to the conspiracy charge could not be considered in the instance of the substantive offence. The court, in expressing its disapproval of the practice, stated:

> The practice of adding what may be called a rolled–up conspiracy charge to a number of counts of substantive offences has become common. We express the very strong hope that this practice will now cease and that the courts will never again have to struggle with this type of case […].

In spite of their disapproval, the appellate courts have continued to allow convictions for both conspiracy and the completed offence to stand. This especially occurs in the instance where an appellant does not question the double conviction on appeal.[73] The courts have also refrained from establishing a rule restricting the prosecution from bringing both a charge of conspiracy and the substantive offence, preferring to deal with the problem on a case by case basis.[74] The Law Reform Commission also recognised the challenges raised by double charging, but instead

---

[70] 44 Crim. App. 87 (1960).

[71] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 976.

[72] (1966) 1 Q. B. 589.

[73] See K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 980. This is illustrated by the case of *Director of Public Prosecution v. Doot* 1973 A. C. 807 where the court let a conviction for the offence of importing cannabis into the United Kingdom together with the conspiracy to import dangerous drugs to stand because the defendants did not challenge it on appeal. The court nonetheless, observed that had the issue been raised the court would have rejected the argument, because the court accords deference to the trial court's determinations.

[74] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 978.

of recommending a rule that would abolish this practice, it preferred to issue a practice rule that requires the prosecution to justify joinder of the conspiracy and substantive counts, failure to which the prosecution has to choose to pursue one of either of the counts.[75] This recommendation was adopted by the Queen's Bench division issuing a practice notice direction dated 9th May 1977 to the effect that, 'where an indictment contains counts alleging substantive offences and a related conspiracy count, the prosecution may justify the joinder or be required to elect to proceed on the substantive or conspiracy counts […]. A joinder is justified for this purpose if the judge considers that the interests of justice demand'.[76]

Enforcement

An accused may be convicted on both counts of conspiracy and the substantive offence, and if the court makes such a conviction it is required to give separate sentences on each count.[77] The possibility of double punishment is however, not encouraged by the appellate courts. In *D.P.P. v. Stewart*,[78] the defendant was charged for the offence of conspiracy under the Customs Act and for the substantive crime of failing to offer foreign currency to an authorised dealer. The defendant was convicted and sentenced to a fine of 30,000 pounds or six months for each offence. On appeal, the sentence for the conspiracy offence was reduced to a nominal 100 pounds. The court's reasoning was that because the two offences arose from the same set of facts to impose substantial penalties on both counts would be excessive. On acquittals, the law recognises that an accused may be found guilty although his alleged co-conspirators are acquitted.[79] Such a conviction can be quashed if the circumstances of the conviction are inconsistent with the acquittal of the other persons involved.

One question that had previously presented a dilemma to the courts is whether a conspiracy conviction can receive a longer sentence than the sentence available for the substantive crime. Under common law, the punishment of conspiracy was not dependent on the punishment of the completed crime. Therefore, it was possible to

---

[75] Law Com. No. 76, paras 1.67, 1.69, its justification for this approach was, 'to guard against the jury having to acquit a defendant because he has not been charged with what the evidence establishes he is guilty of, whether it is conspiracy or the substantive offence. Substantive counts are charged in case the evidence of the conspiracy breaks down; conspiracy is charged in case the evidence on the substantive counts against one or more defendants breaks down'.

[76] Practice Direction [1977] 2 All E. R. 540.

[77] A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 95; Wasik M., *Emmins on Sentencing*, 3rd edn. (2001), p. 147.

[78] 3 W. L. R. 884 (1982).

[79] Section 5(8) CLA; M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), pp. 274–275; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 397.

receive any of the wide range of sentences available at the discretion of the court.[80] It was the practice of the courts to give a harsher penalty for conspiracy charges in the event two situations: The first situation applied in the instance where the conspiracy involved a continuing criminal activity. In *Rex v Morris*,[81] the court rejected the defendant's appeal against his four-year sentence for the misdemeanour of conspiracy to evade duties of customs. The defendant had argued that this sentence was historically disproportionate. The court was of the view that a longer sentence was appropriate in the case where the conspiracy involved more than one distinct activity. The defendant's activity of importing more than 10,000 watches daily was described as 'wholesale smuggling' that had taken place over several months. The conspiracy in this case was regarded as much more significant than any other objective of the conspiracy. The second situation was in the case where the conspiracy involved a single crime of exceptional circumstances. In *Verrier v Director of Public Prosecutions*,[82] the defendant received a seven-year sentence for conspiracy to defraud, when the maximum sentence for the crime of fraud was 5 years. His appeal against the sentence was dismissed. The House of Lords held that a judge may have reasons to treat the conspiracy offence differently and to consider it more serious than the substantive offence.

The law in the United Kingdom on this aspect has since changed, following recommendation by the Law Commission. Part I Section 3 of the 1977 Act sets out the penalties for conspiracy. Section 3(3) of the CLA provides that a person convicted of statutory conspiracy is only liable to a sentence of imprisonment not exceeding the maximum sentence provided for its target offence. Where the conspiracy involves the commission of more than one offence, the maximum sentence would be the longest of the sentences provided. The possibility of receiving a life imprisonment also exists for one convicted of conspiracy to commit murder, or any offence for which a sentence for life imprisonment is provided by law, and other offences punishable by imprisonment for which no maximum term is given.[83] In some instances, the Act gives the court powers to impose a fine at their discretion *in lieu of* or in addition to dealing with the accused person.[84]

In the case where the court convicts for both conspiracy and substantive offence, the court is required to state whether the underlying sentences of the respective convictions will be served concurrently or consecutively.[85] If the sentences are to be served concurrently, the longer of the sentences is taken as the

---

[80] M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 398; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 508; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 397.

[81] 1 K. B. 394 (1951); K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 973.

[82] 2 A. C. 195 (1967).

[83] Section 3(2) CLA.

[84] Section 3(1) CLA.

[85] A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 95.

aggregate sentence, whereas in the case of consecutive sentences, the sum of both sentences is the aggregate even if it is greater than the maximum that would be imposed for any one of the offences.[86] It is important that the court ensures that even while imposing in particular consecutive sentence, the overall sentence should reflect the total seriousness of the conduct being punished.[87]

2.2.2 United States

Conspiracy law in the United States was inherited from its common law background. Congress has since enacted several conspiracy statutes. The current law on federal conspiracy is one provided by Congress, and includes the jurisprudence showing the courts understanding of the law on conspiracy.[88] Conspiracy is widely used to counter organised crime, and is one of the most commonly charged federal crimes in the United States.[89] It has played and continues to have a pivotal role in the punishment of uncompleted criminal conduct in white-collar cases, narcotics, and more recently terrorism.[90] Congress enacted a general criminal conspiracy statute U.S.C.18 § 371, which makes it a crime to conspire to commit any crime against the United States or to defraud the United States.[91] In addition to this general statute, specific provisions in other federal statutes criminalise conspiracy to commit certain substantive offences.[92] Most of the conspiracy laws are broadly tailored, usually setting out the statement of conspiracy objective considered to be criminal, and in some instances providing for an overt act requirement. This gives

---

[86] *R v. Prime* (1983) 5 Cr. App. R(s) 127.

[87] See Powers of Criminal Courts (Sentencing) Act 2000, Section 158(2); Criminal Justice Act 2003, Section 166(3)(b); *Jones v. DPP* (1962) A. C. 635, at p. 647; Wasik M., *Emmins on Sentencing*, 3rd edn. (2001), pp. 148–149.

[88] See Doyle C., *Federal Conspiracy Law: A Brief Overview, Congressional Research Service*, Congress Report April 30, 2010, p. 3.

[89] P. Marcus, 65 *Geo. L. J*. (1977), p. 947; J. Winograd, 41 *Am. Crim. L. Rev*. (2004), p. 611.

[90] R. M. Chesney, 80 *S. Cal. L. Rev*. (2007), p. 425 et seq; P. Marcus, 65 *Geo. L. J*. (1977), p. 950; Strader K. J., *White Collar Crime Cases, Materials, and Problems* (2009), p. 51.

[91] Section 371 states;

If two or more persons conspire either to commit any offence against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than 5 years, or both.

If, however, the offence, the commission of which is the object of the conspiracy, is a misdemeanour only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanour.

[92] Examples include conspiracy to restrain trade 15 U.S.C. Sec 1 (2000); conspiracy to bribe in sporting events 18 U.S.C. Sec 224 (2000); conspiracy to deprive persons of their civil rights 18 U.S.C Sec 241 (2000); conspiracy to violate Controlled Substances Act 21 U.S.C. Sec 846 (2000).

latitude to the courts to define the elements of the crime, and the law pertaining to several issues that arise during the prosecution of conspiracy cases.[93] The Model Penal Code is the other source of law that attempts to add more certainty and coherence to the law on criminal conspiracy.[94] Section 5.03 of the Model Penal Code provides that to agree with another to commit a crime or an attempt or solicitation to commit a crime, or to agree to aid a person in the planning or commission of a crime or attempt or solicitation to commit such a crime, makes one liable for conspiracy. Although Congress has not adopted the Model Penal Code into federal law, a significant portion of it has been adopted by several States.[95]

A conspiracy must involve two or more persons.[96] At common law, a husband and wife were considered to be one unit and could not make up the two parties necessary to form a conspiracy where they were the sole conspirators. Several courts in the United States have rejected this rule, observing that the reasons that existed to support the rule no longer prevail in present day settings.[97] A corporation may also be held criminally liable for conspiracy, if its employees and agents carried out such conspiracy at least in part for the benefit of the company.[98] Following the introduction of Wharton's rule, when the nature of a crime is such that it necessarily requires concert of action to be committed, which means it is impossible to commit such crime without agreeing to do so, then the prosecution in such a case is precluded from charging the participants with conspiracy. An example would be in the case where adultery is a crime, the two participants can only be charged with the substantive offence and not conspiracy.[99]

2.2.2.1 Elements of the Offence

The jurisprudence shows that under federal law most conspiracies consist of three elements: an agreement to carry out an unlawful act, knowingly engaging in the

---

[93] H. Wechsler, W. K. Jones, and H. L. Korn, 61 *Columbia Law Review* (1961), p. 957.

[94] H. Wechsler, W. K. Jones, and H. L. Korn, 61 *Columbia Law Review* (1961), p. 957; also see G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), pp. 6–8, they comment that the model penal code is a proposed formulation of statutes relating to criminal law, and is available to the legislature as a guide in making legislation in the underlying field.

[95] K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 960; G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 6.

[96] *United States v. Dumeisi*, 424 F. 3d 566, 580 (7th Cir. 2005), where the court observed that 'the elements of the crime of conspiracy are not satisfied unless one conspires with at least one true co-conspirator'; *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

[97] See *United States v. Dege*, 364 U.S. 51, 54–55 (1960). This rule however, is not decisively settled; see further views in W. R. La Fave, *Criminal Law,* 4th edn. (2003), p. 657.

[98] *United States v. Singh*, 518 F. 3d 236, 249–251 (4th Cir. 2008).

[99] See *Iannelli v United States*, 420 U. S. 770 (1975) at p. 774; W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 658; for further discussions on limitations of this rule see V. J. Tatone, 61 *Journal of Urban Law* (1984), p. 505 et seq.

conspiracy with intention to realise its object, commission of an act by one or more members of the conspiracy directed towards realising the object of the conspiracy, otherwise referred to as the 'overt act'.[100]

(a) The Agreement

The agreement to carry out the unlawful act is the *actus reus* and is the essence of criminal conspiracy.[101] It is considered to be a manifestation of the intention conceived in the mind.[102] It is the act of agreeing in itself which is criminalised. In *United States v. Pullman*,[103] the court observed that the agreement to commit an unlawful act was the essential evil the crime of conspiracy is directed at. It is from the agreement that courts can determine issues such as, the requisite mental element, the requisite number of conspirators, and the number of conspiracies in existence.[104]

The prosecution does not have to prove the existence of a formal or express agreement. The agreement may be implicit, inferred from the facts and circumstances of the case.[105] In *United States v. Delgadio*,[106] the court noted that a conspiracy may be proved by circumstantial evidence showing concert of action. Since conspiracy is largely surrounded by secrecy, proving it by direct evidence is a difficult if not impossible task to fulfil. In such circumstances, the use of circumstantial evidence to prove conspiracy becomes essential. Courts being sympathetic to the prosecution's hardship have been willing to let the prosecution 'rely on inferences drawn from the course of conduct of the alleged conspirators'.[107] The course of conduct from which the courts may infer conspiracy include: '…the joint appearance of defendants at transactions and negotiations in furtherance of the conspiracy; the relationship among co-defendants; mutual representation of defendants to third parties; and other evidence suggesting unity of purpose or

[100] G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), pp. 355–356; G. P. Fletcher, *Rethinking Criminal Law* (2000), pp. 218–219; W. R. La Fave, *Criminal Law,* 4th edn. (2003), p. 621.

[101] See *Iannelli v. United States*, 420 U.S. 770 (1975); *United States v. Feola*, 420 U.S. 671, 694 (1975); *United States v. Beil*, 577 F. 2d 1313, 1315 n. 2 (5th Cir. 1978); *United States v. Chavez*, 549 F.3d 119, 125 (2d Cir. 2008); G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 356; G. P. Fletcher, *Rethinking Criminal Law* (2000), pp. 218, 219.

[102] This was the expression of the court in *State v. Carbone*, 10 N. J. 329, 91 A. 2d 571 (1952), it observed that "…the mind proceeds from a secret intention to the overt act of mutual consultation and agreement," cited in W. R. La Fave, *Criminal Law,* 4th edn. (2003), p. 622.

[103] 187 F. 3d 816, 820 (8th Cir. 1999).

[104] W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 622.

[105] *Iannelli v. United States*, 420 U. S. 770, 777 (1975); *United States v Rodriguez-Velez*, 597 F. 3d 32, 39 (1st Cir. 2010); G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 356.

[106] 321 F. 3d 1338, 1344 (11th Cir. 2008).

[107] *Interstate Circuit v. United States*, 306 U.S. 208, 59 S. Ct 467, 83 L. Ed. 610 (1939).

common design and understanding among conspirators to accomplish the objects of the conspiracy'.[108]

The parties to the agreement must agree on a common objective. In *United States v Milligan*,[109] the court asserted that it was necessary for the government to prove a meeting of minds between the alleged conspirators to achieve an unlawful objective.[110] The meeting of minds in this instance does not however, apply the same standard like that required with respect to contracts.[111] A mere tacit understanding does suffice. In *United States v. Desena*,[112] the court stated that although the proof of a formal agreement was not necessary, the prosecution had to at least prove a tacit understanding between the parties to further violation of the law. The objective of the agreement should be to achieve an illegal goal.[113] Under common law, it was possible for acts not considered criminal when carried out by a single person, to be punishable as conspiracy when carried out by a combination of persons. This common law position may still prevail in some jurisdictions in the United States, save for instances where statute limits conspiracy to apply only where its object is a crime or a felony.[114] Most States have preferred to restrict the application of conspiracy to criminal objectives following its history of prosecutorial and judicial abuse.[115]

(b) The Mental Element

An accused is only culpable of conspiracy if he knew of the conspiracy and voluntarily participated in it.[116] This implies that the accused had the intent to bring about the object of the conspiracy. In *United States v. Ceballos,*[117] the court observed that in order to convict a defendant of conspiracy, the prosecution had to prove that the defendant knew of the conspiracy, and joined it with intent to commit the offences, which were part of the conspiracy's objectives. The knowledge requirement is satisfied once the prosecution shows the defendant's

---

[108] *United States v. Wardell*, 591 F. 3d 1279 at 1287–288 (10th Cir. 2009).

[109] 17 F. 3d 177, 182–183 (6th Cir. 1994).

[110] See also G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 366.

[111] W. R. La Fave, *Criminal Law,* 4th edn. (2003), p. 622.

[112] 260 F. 3d 150, 155 (2d Cir. 2001); *United States v. Searan*, 259 F. 3d 434, 442 (6th Cir. 2001).

[113] *State of New Jersey v. Brian Samuels* A-0967-02 T 40967-02T4 court noted that the agreement must have a specific crime as its goal.

[114] W. R. La Fave, *Criminal Law,* 4th edn. (2003), p. 636; P. Marcus, 65 *Geo. L. J.* (1977), pp. 962–965.

[115] W. R. La Fave, *Criminal Law,* 4th edn. (2003), p. 639.

[116] See G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 372, asserting that there has to be an intent to agree and intent to realise the object of the conspiracy; see also R. M. Chesney, 80 *S. Cal. L. Rev*. (2007), pp. 452–454; W. R. La Fave, *Criminal Law,* 4th edn. (2003), pp. 628–629.

[117] 340 F. 3d 115, 123 (2d Cir. 2001).

awareness of the essential nature of the conspiracy. This means it suffices to prove that the defendant only had knowledge of the general scope of the conspiracy. This was aptly expressed by the Supreme Court in *Blumenthal v. United States*,[118] when it stated:

> Secrecy and concealment are essential features of [a] successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

The evidence of knowledge must be clear.[119] Furthermore, in cases involving specific intent crimes, the prosecution is required to show beyond reasonable doubt that the defendant had the specific intent to violate the substantive statute involved.[120] The element of knowledge may also be satisfied by showing the accused acted with wilful blindness. A defendant will not be shielded from culpability where the defendant is seen to have deliberately avoided knowledge of a conspiracy.[121] Wilful blindness is a form of constructive knowledge that allows imputation of knowledge if the evidence shows the accused purposely closed his eyes to avoid knowing what was taking place around him, when given reason to believe further inquiry is necessary and can satisfy the mental element of the underlying offence.[122] In *United States v. Reyes*,[123] the court stated that wilful blindness in a conspiracy case exists where the defendant realised the probability of existence of the conspiracy, but avoided final confirmation. This was also confirmed in *United States v. Faulkner*,[124] where the court held that it would be appropriate to infer deliberate ignorance where a defendant claims lack of guilt, but the evidence supports inference of deliberate indifference.

However, mere knowledge of the existence and goals of a conspiracy does not of itself make one a conspirator, the prosecution must show that the defendant has a more positive attitude towards the forbidden undertaking. The evidence must show that more than just knowledge there is informed and interested cooperation by the defendant. The defendant 'must in some sense promote [the] venture

---

[118] 332 U.S. 539, 557 (1947).

[119] *United States v. Cellabos*, 340 F. 3d 115, 123 (2d Cir. 2001).

[120] See *United States v. Cellabos*, 340 F. 3d 115, 123 (2d Cir. 2001); *United States v. Samaria*, 239 F. 3d 228 (2d Cir. 2001).

[121] See *United States v. Whittington*, 26 F. 3d 456 (4th Cir. 1994), where the court noted that in a case of wilful blindness if the defendant was unaware of what was happening it was because he deliberately shut his eyes to it.

[122] *United States v. Ereme*, No. 05-4263 (4th Cir.) Unpublished.

[123] 302 F. 3d 48, 54 (2d Cir. 2002).

[124] 17 F. 3d 745, 767–768 (5th Cir. 1994).

[…making] it his own, have a stake in its outcome or make an affirmative attempt to further its purpose'.[125]

On the aspect of voluntary participation, it is sufficient for the prosecution to show the defendant wilfully participated in the conspiracy at some stage with knowledge of the unlawful nature of his participation. This does not require proof that the accused entered into the conspiracy with full knowledge of its details or that he participated in all phases and aspects of the conspiracy.[126] Once the existence of a conspiracy is established, evidence of the accused person's slight or remote connection with the conspiracy will be enough to show the accused was a knowing member of the conspiracy.[127] The acts carried out by the defendant in furtherance of the conspiracy objective suffice to prove that the accused was a knowing participant. In the alternative, the prosecution needs only to establish the existence of a conspiracy, and the accused person's intent to further its objectives. The prosecution may prove the defendant's participation entirely through circumstantial evidence. In *United States v. Whittington,*[128] the court observed that proof of knowing participation in conspiracy can be shown by 'circumstantial evidence such as relationship with other members of the conspiracy, the length of his association, attitude, conduct and the nature of the conspiracy'. It is not necessary to show the defendant knew all the details, objectives or participants in a conspiracy.

The courts have nonetheless been very cautious in establishing 'knowing participation' from mere association.[129] In *United States v. Maliszewski*,[130] the court observed that participation in a conspiracy's common purpose and plan can be inferred from the defendant's actions and reactions to circumstances, but mere presence at the scene of crime was not sufficient evidence of participation. This was illustrated in *United States v. Pupo*,[131] where the court held that mere knowledge, acquiescence, or approval of crime was not enough to establish an individual as being part of a conspiracy to distribute drugs, and mere presence at the scene of a drug distribution was not sufficient to prove participation in a conspiracy. The court observed that the defendant's actions must be more consistent with participation than with mere acquiescence. In such cases, the jury has often preferred the addition of other evidence to find conspiracy apart from mere close association with co-conspirator. In *United States v. Samaria*,[132] the court

---

[125] *United States v. Ceballos*, 340 F. 3d 115, 123 (2d Cir. 2001); *United States v. Falcone*, 109 F. 2d 579 at 580 (2d. Cir. 1940); *Direct sales v United States*, 319 U.S. 703 (1943); G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 356.

[126] *United States v. Ereme*, No.05-4263 (4th Cir.) Unpublished.

[127] See *United States v. Leahy*, 82 F. 3d 624, 633 (5th Cir. 1996).

[128] 26 F. 3d 456, 465 (4th Cir. 1994).

[129] Doyle C., *Federal Conspiracy Law: A Brief Overview, Congressional Research Service*, Congress Report April 30, 2010, p. 6.

[130] 161 F. 3d 992, 1006 (6th Cir. 1998).

[131] 841 F. 2d 1235, 1238 (4th Cir. 1988).

[132] 239 F. 3d 228, 235 (2d Cir. 2001).

observed that a cab driver, who took conspirators in a stolen credit card scheme to their requested destinations, did not have the requisite knowledge and specific intent necessary to be considered a participant in the conspiracy. The court stated '[t]he broad reach of the federal conspiracy statute does not extend so far as to permit conviction upon evidence of mere association or suspicion'.

(c) The Overt Act Requirement

Although under common law it was not necessary to establish conspiracy by proving an overt act, most conspiracy statutes in the United States now require proof that one or more members of the conspiracy carried out an act (otherwise known as an overt act) in furtherance of the conspiracy.[133] In *Yates v United States*,[134] the court stated that the rationale for the overt act requirement was to show that the conspiracy is at work and not a mere scheme in the minds of the perpetrators.[135] To support a conspiracy conviction, the overt act does not have to be unlawful, neither does it need to be the substantive offence itself, it only needs to be a step toward the criminal objective.[136] The defendant needs not to have personally carried out the overt act, a co-conspirator's overt act will be sufficient to hold other co-conspirators liable.[137] The overt act must be an act carried out before commission of the substantive crime, or before the objective of the conspiracy is realised.[138]

Accessorial Liability (The Pinkerton Doctrine)

A party to a conspiracy may be held liable for foreseeable substantive offences committed by a co-conspirator in furtherance of the conspiracy, even though the party did not participate in commission of such substantive offences, or have any

---

[133] G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 357; Doyle C., *Federal Conspiracy Law: A Brief Overview, Congressional Research Service*, Congress Report April 30, 2010 p. 8; G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 223; P. J. Henning, 44 *Wayne L. Rev*. (1998–1999), p. 1316.

[134] 354 U.S. 298, 334 (1957).

[135] See also D. Burgman, 29 *DePaul L. Rev*. (1979), p. 101, stating that the overt act shows the conspiracy is meant to be carried out, and thus evidence of the serious threat it poses.

[136] See *United States v. Rehak*, 589 F. 3d 965, 971 (8th Cir. 2009); *United States v. Crabtree*, 979 F. 2d 1261, 1267 (7th Cir. 1992), where the court stated that an overt act does not have to be the substantive crime; *United States v. Montour*, 944 F. 2d 1019, 1026 (2d Cir. 1991), here the court observed that an overt act need not be inherently criminal; G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 358; G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 224.

[137] *United States v. LaSpina*, 299 F. 3d 165, 176 (2d Cir. 2002).

[138] See *United States v. McKinney*, 954 F. 2d 471, 475 (7th Cir. 1992).

knowledge of them. This rule was laid down in *Pinkerton v. United States.*[139] Pinkerton was convicted for conspiring with his brother to evade tax, including other substantive counts of tax fraud allegedly carried out by his brother. The Court of Appeal dismissed his appeal, rejecting the allegation that he was not the party that carried out the plan, although, there was evidence showing that at the time some of the offences were committed the appellant was in jail. The court observed that as long as co-conspirators had not withdrawn from the conspiracy, they were aiding the commission of the substantive offence.[140] The court while making this holding observed that the offence for which a conspirator will be held liable must be one in furtherance of the conspiracy and was reasonably foreseeable. It added that a defendant could only escape liability for such an offence, by showing they had withdrawn from the conspiracy at the time of commission of the alleged offence.[141]

Courts have been willing to interpret knowing participation and find liability on account of foreseeability mainly because of due process concerns.[142] In *United States v. Corneaux*,[143] the court held that the defendants who were experienced drug dealers must have been aware of the prevalent use of firearms in drug deals, therefore, they could be held liable for the foreseeable offence of a co-conspirator possessing a firearm during the drug deal in furtherance of conspiracy.

A defendant who joins a conspiracy is also likely to be considered to have adopted acts done by co-conspirators prior to joining the conspiracy, therefore, liable for them. In *United States v. Rea*,[144] the court observed that being present from the inception of a conspiracy was not a prerequisite for a defendant to incur liability for acts committed by co-conspirators, both before and after the defendant became a member of the conspiracy. This rule of liability does not extend to substantive crimes committed by co-conspirators before the defendant joined the conspiracy.[145] In *United States v. Ocampo*,[146] the court held the defendant was liable for acts done by co-conspirators prior to having joined the conspiracy, but declined to extend culpability to substantive offences committed in furtherance of

---

[139] 328 U.S. 640 (1946); also see *United States v. Solis* 299 F. 3d 420 (5th Cir. 2002) the court observed that a party to a conspiracy may be held criminally liable for an act, committed by a co-conspirator even if the party did not know of the act and did not participate in it, as long as it was foreseeable.

[140] *United States v. Pinkerton,* 328 U.S. 640 (1946) at p. 646.

[141] *Pinkerton v. United States,* 328 U.S. 640 (1946) at 646; *State v. Barton*, 424 A. 2d 1033 (R. I.1981); *United States v. Robertson*, 474 F. 3d 432 (7th Cir. 2007).

[142] *United States v. Collazo-Aponte*, 216 F. 3d 163, 196–197 (1st Cir. 2000).

[143] 955 F. 2d 586, 591 (8th Cir. 1992).

[144] 958 F. 2d 1206, 1214 (2d Cir.1991).

[145] *United States v. Blackmon*, 839 F. 2d 900, 908–909 (2d Cir. 1988).

[146] 973 F. 2d 1015, 1022–1023 (1st Cir. 1992).

the conspiracy, prior to the defendant's participation. Liability does not also extend to acts done after the defendant's withdrawal from the conspiracy.[147]

Under the Pinkerton doctrine, distinction between accessories and perpetrators is eliminated, and any conspirator can be liable for the multitude of offences carried out by co-conspirators in pursuance of the conspiracy. Every participation or contribution makes one a perpetrator under the conspiracy, and all participants thereto are equally responsible for all actions pursuant to the conspiracy.[148] The Pinkerton doctrine is criticised for spreading liability too widely, carrying with it the strong implication of guilt by association. It is seen as undermining a fundamental principle of criminal law that requires liability to be founded on an individual's personal guilt.[149] Holding a co-conspirator liable for acts that he had no knowledge of, or control over, or would have objected to, is seen as imposing liability for a crime to which the co-conspirator did not have the requisite *mens rea*.[150] Not all states favour the principle in this doctrine and some courts have rejected it.[151] The Model Penal Code's provision on conspiracy also rejects Pinkerton liability.[152]

To counter the criticisms, various theories have been used to justify the Pinkerton rule. Participation in the formation of the conspiracy is considered to sufficiently establish intent of the conspirators in respect to commission of the underlying crimes. As a consequence, each conspirator is seen to have instigated the commission of the underlying crimes, thereby making them vicariously criminally responsible. Here, commission of the said criminal acts is considered to have been dependent upon the encouragement and material support of members of the conspiracy as a whole.[153] Pinkerton liability is also favoured for its supposed

---

[147] See *United States v. Luthian*, 976 F. 2d 1257, 1262 (9th Cir. 1992), the court held that a defendant could not be held liable for substantive offences committed after withdrawal from a conspiracy.

[148] G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 660; see also 18 U.S.C.A. § 2 (a), which states: 'Whoever commits an offence against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal'.

[149] G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 663, observes that this controversial theory derives from the influence of the law of agency.

[150] W. R. La Fave, *Substantive Criminal Law,* 2nd edn. (2005), §13.3 a.

[151] The doctrine has been rejected in the State of Washington, see *State v Stein*, 144 Wn. 2D 236, 241–242, 27P. 3d 184, 188–189 (Wash. 2001); State of Arizona, see *State ex.rel. Woods v Cohen*, 173 Ariz.497, 501, 844. P. 2d 1147, 1151 (Ariz.1992); *State v. Small*, 301 N.C. 407, 272 S. E. 2d 128 (1980), where the North Carolina Supreme Court asserted that the principle behind Pinkerton was an erroneous idea, cited in G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 137; J. D. Ohlin, 98 *J. Crim. L. & Criminology*, (2007), p. 148.

[152] Model Penal Code § 5.03.

[153] G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 137; see also J. D. Ohlin, 98 *J. Crim. L. & Criminology* (2007), pp. 147 et seq., grounding the justification for Pinkerton liability on the group will, which results from collective reasoning, asserting at p. 183, 'that group deliberations are sufficiently integrated to yield collective intentions of the sort that might ground the *mens rea* for Pinkerton'.

deterrent effect. It is argued that group activity presents a greater potential danger to the public than the action of an individual, and should therefore, be discouraged with rules such as Pinkerton. This provides an incentive against joining a criminal conspiracy in the first place.[154]

The theory underlying Pinkerton liability resembles the accessorial liability theory in the United Kingdom criminal law, known as joint enterprise liability.[155] Under this concept, persons who agree to undertake a criminal venture are liable for all criminal acts arising from the ambit of the common criminal purpose.[156] Similar to conspiracy, agreement forms an essential part of this theory of liability.

Withdrawal, Impossibility, and End of Conspiracy

To avoid liability on account of withdrawal, a conspirator is required to make an unequivocal withdrawal. The court has interpreted this to mean that the conspirator must commit 'affirmative acts inconsistent with the object of the conspiracy and in a manner reasonably calculated to reach co-conspirators'.[157] Merely stopping to participate in the conspiracy is not sufficient. In *United States v. Febus*,[158] the court held that the defendant was still part of a conspiracy despite a decade long absence from the conspiracy, because the defendant had not affirmatively acted to abandon the conspiracy. Such withdrawal only stops a defendant from being held liable for any further acts committed in the future pursuant to the conspiracy, but does not exempt him from liability for acts carried out before the withdrawal.[159]

Failure to achieve the illegal objective of a conspiracy does not shield a defendant from liability. In *United States v. Feola,*[160] the court stated that the law of conspiracy permits punishment for the agreement and overt act whether the crime agreed upon is committed or not. A defendant may be held liable for conspiracy even in the case where the object of the conspiracy is impossible to achieve. In *United States v. Rodriguez*,[161] the court held that factual impossibility is no defence to a conspiracy charge. It observed that the crime is the illegal

---

[154] G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 137; Katyal N. K., 112 *Yale Law Journal* (2003), pp. 1372–1373.

[155] J. D. Ohlin, *Chicago Journal of International Law* (2011), pp. 705–706.

[156] *R. v. Anderson; R. v. Morris* (1966) 2 Q. B. 110; see *R. v. Powell (Anthony) and English*, 1 A. C. 1 (HL 1999), for a detailed discussion of the various situations that may arise under this concept; J. Herring, *Criminal Law: Text, Cases, and Materials*, 3rd edn. (2008), pp. 849–850.

[157] *United States v. United States Gypsum Co*., 438 U.S. 422, 464 (1978); *Hyde v. United States*, 225 U.S. 347, 369 (1912); *United States v. Dabbs*, 134 F. 3d 1071 (11th Cir. 1998).

[158] 218 F. 3d 784, 796 (7th Cir. 2000).

[159] Ohlin J. D., 98 *J. Crim. L. & Criminology* (2007), p. 205.

[160] 420 U.S. 671, 694 (1975).

[161] 215 F. 3d 110.116 (1st Cir. 2000).

agreement and it did not matter that the purpose of the agreement was not achieved, or even that achieving such purpose was factually impossible.[162]

A conspiracy only comes to an end once its objective is achieved or its purpose abandoned.[163] In *United States v. Roshko*,[164] the court held that a conspiracy to defraud the government ended when the INS approved the defendant's application for a green card, which was the object of the conspiracy.

Procedural Attributes of a Conspiracy Charge

In the United States, a conspiracy charge allows the prosecution to have the trial in any location where any of the conspirators carried out an overt act.[165] This possibility gives the prosecution the choice of having the trial at a place of its convenience regardless of the inconvenience it may pose to the defendant.[166] The prosecution is also allowed to try the conspirators jointly in one trial.[167] Alleging a

---

[162] There is a distinction between factual impossibility and legal impossibility. Whereas factual impossibility is "impossibility due to the fact that an illegal act cannot physically be accomplished" a legal impossibility refers to "impossibility due to the fact that what the defendant intended to do is not illegal". Black's Law Dictionary, 7th edn. (1999), p. 759. In the latter case of legal impossibility a defence lies. In *United States v. Rosario-Diaz*, 202 F. 3d 54, 64 (1 st Cir. 2000), the court held that a defendant cannot be held liable for a crime for which there was no charge and which does not exist under federal law. §371 inherently recognises the defence of legal impossibility by requiring proof that the defendant intended to commit any offence against the United States; see also J. Winograd, 41 *Am. Crim. L. Rev*. (2004), p. 632.

[163] See *United States v. Knowles*, 66 F. 3d 1146, 1155 (11th Cir. 1995).

[164] 969 F. 2d 9, 11 (2d Cir. 1992).

[165] See *Whitfield v. United States*, 543 U.S. 209, 218 (2005).

[166] One of the constitutional guarantees for a defendant under the Sixth Amendment of the United States Constitution is to have the criminal trial at the place where the crime occurred. In the case of conspiracy this would be where the agreement was made, but to establish this in an 'omnipresent' offence such as conspiracy is difficult. In *United States v. Corres*, 356 U.S. 405, 78 S.Ct. 875, 2 L.Ed. 2d 873 (1958), the court criticised the advantage given to the prosecution on this account, stating that it defeated the purpose of the sixth amendment, which is to "safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place"; see G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 354; W. R. La Fave, *Criminal Law*, 4th edn. (2003), pp. 616, 617.

[167] Federal Rules of Criminal Procedure rule 8 states:-

(a) Joinder of offences. The indictment or information may charge a defendant in separate counts with 2 or more offences if the offences charged-whether felonies or misdemeanours or both-are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offence or offences. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count; also see *Zafiro v. United States*, 5056 U.S. 534, 537 (1993), noting that Joint trials are seen to promote efficiency in the justice system and serve the interest of justice by avoiding inconsistent verdicts; see W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 613 at 620, arguing that such

conspiracy allows the prosecution to introduce certain co-conspirator statements made 'during the course and in furtherance of the conspiracy', which would otherwise be excluded under the hearsay rule.[168] A conspiracy charge also gives the prosecution the possibility of eluding restrictions under the statute of limitations.[169] Since conspiracy is a continuing offence, it is able to avoid the constraints of *ex post facto* principle.[170] An enhancement of the penalty of an on-going conspiracy would not offend the *ex post facto* laws as long the conspiracy had not yet been completed at the time the new law was enacted.[171] In addition, since conspiracy and its contemplated crime are considered to be separate crimes, the double jeopardy clause is no impediment for their successive prosecution or punishment.[172]

Enforcement

The conspiracy charge is considered to be a separate offence from the target offence and does not merge with the completed substantive offence.[173] Therefore,

(Footnote 167 continued)
joint trials are seen to present the defendant with certain disadvantages, which include a limited discretion in determining members of the jury, and increase the likely hood of a defendant's conviction.

[168] Federal Rules of Evidence rule 801 (d) (2) (E), the rationale for this exception is that co-conspirators are agents of one another, and a co-conspirator is considered the best witness to a conspiracy; In *United States v. Angiulo*, 847 F. 2d 956 (1st Cir. 1988), the court observed, "As long as it is shown that a party, having joined a conspiracy, is aware of the conspiracy's features and general aims, statements pertaining to the details of the plans to further the conspiracy can be admitted against the party even if the party does not have specific knowledge of the acts spoken of"; *Anderson v. United States*, 417 U.S. 211, 94 S. Ct. 2253, 41 L, Ed. 2d 20 (1974); *United States v. Kelly*, 204 F. 3d 652, 656 (6th Cir. 2000); W. R. La Fave, *Criminal Law,* 4th edn. (2003), p. 618; J. Winograd, 41 *Am. Crim. L. Rev.* (2004), p. 633.

[169] 18 U.S.C 3282 provides that the statute of limitations for most federal crimes is five years. In reference to conspiracy crimes with an overt act requirement, the statute of limitations begins with the last overt act carried out in furtherance of the conspiracy, while for those with no overt act requirement, it begins to run when the conspiracy is abandoned or its objectives accomplished; see *United States v. Seher*, 562 F. 3d 1344 1364 (11th Cir. 2009); *United States v. Bornman*, 559 F. 3d 150, 153 (3d Cir. 2009).

[170] The law governing ex post facto prohibits the application of criminal laws to conduct that was not criminal at time of its commission, and the application of more severe punishment than that prescribed at the time the criminal conduct was carried out, U.S. Constitution Article I, §§ 9, 10.

[171] *United States v. Julian*, 427 F. 3d 471, 482 (7th Cir. 2005), noting "It is well established that a statute increasing a penalty with respect to a criminal conspiracy which commenced prior to, but was continued beyond the effective date of the statute, is not ex post facto as to that crime".

[172] *United States v. Yearwood*, 518 F. 3d 220, 223 (4th Cir. 2008); U.S. Constitution Amendment V declares that no person shall' be subject for the same offence to be twice put in jeopardy of life or limb'.

[173] The merger doctrine was rejected by the court in *Pinkerton v. United States*, 328 U.S. 640 (1946) at 643, when it noted that a conspiracy 'has ingredients, as well as implications, distinct

a defendant may be sentenced separately for the two offences. In *Callanan v. United States*,[174] the court held that a defendant, who had been convicted of one count of conspiracy and another for the substantive offence under the Hobbs Anti-Racketeering Act, could be sentenced separately for each conviction. The court stated that cumulative sentencing was permissible unless there was a statute prohibiting this practice. It further observed that cumulative sentencing was not cumulative punishment, justifying the practice with the danger inherent in a conspiracy that extends beyond the target crime. Nonetheless, the court acknowledged that cumulative sentencing could in some cases amount to harsh punishment. In *Pereira v. United States*,[175] the Supreme Court held that cumulative sentencing did not violate the double jeopardy rule, because the legal requirements and evidence of proving conspiracy and the completed substantive offence were different. The court, in addition, observed that even in the instance where the prosecution used the same overt acts to prove the conspiracy and the substantive offence this still did not violate the double jeopardy rule.[176] However, practice shows that persons convicted of both conspiracy and its target offence are hardly punished separately. Most convictions on conspiracy and its object crime require that the sentences be served concurrently, and consecutive sentences are very rarely given.[177]

In principle, it may also be possible in some cases for a defendant convicted of conspiracy to be given a longer sentence than that which is prescribed for the substantive offence.[178] In *Clune v. United States*,[179] the defendants were found guilty of conspiracy to obstruct the United States mail and were sentenced to 18 months in prison. This sentence was more severe than the $100 fine penalty for the substantive offence. The appellate court upheld this sentence stating that since conspiracy was a separate offence from the substantive offence, it could be punished separately. The court noted that a statute could provide a penalty for the offence of conspiracy that was more severe than the penalty for the substantive offence.[180] In *United States v. Cattle King Packing Co*,[181] the court of appeal upheld a sentence where the defendant was convicted on one count of conspiracy and six separate counts of substantive offences connected with the conspiracy.

(Footnote 173 continued)
from the completion of the unlawful project'; also in *Iannelli v. United States*, 420 U.S.770, 777–778 (1975).

[174] 364 U.S. 587 (1961); see also G. C. Thomas, 47 *U. Pitt. L. Rev*. 1 (1985), pp. 49–50.

[175] 347 U.S. 1(1954).

[176] For further critics on the double jeopardy rule see K. G. Schuler, 91 *Michigan Law Review* (1993), p. 2220 et seq: V. J. Tatone, 61 *Journal of Urban Law* (1984), p. 505 et seq.

[177] P. Marcus, 65 *Geo. L. J*. (1977), p. 938.

[178] *Iannelli v. United States*, 420 U.S. 770, 777–778 (1975).

[179] 159 U.S. 590 (1895).

[180] *Clune v. United States*, 159 U.S. 590 (1895) at 595.

[181] 793 F. 2d 232 (10th Cir. 1986).

The defendant was sentenced to 4 years for the conspiracy offence, although the maximum sentence for any of the substantive offences was 3 years.[182]

Reforms have led to streamlining of sentencing laws in respect to conspiracy charges. Currently, under the general conspiracy law U.S.C 18 section 371, conspiracies are punishable by imprisonment for not more than 5 years. In reference to other conspiracies, their respective statutes prescribe punishment similar to their underlying crimes, making them subject to more severe punishment than conspiracies covered in section 371.[183] In addition, all conspiracies are subject to a fine of not more than $ 250,000 (in the case of organisations not more than $ 500,000) and may serve as a basis for a restitution or forfeiture order.[184]

A defendant may be convicted of conspiracy even if the charge alleges that unknown persons participated in the conspiracy as long as the evidence supports such participation.[185] A defendant may also still be convicted of conspiracy although all other defendants alleged to have been members of the conspiracy are acquitted.[186]

2.2.3 *The Rationale of Conspiracy Law in Common Law Systems*

Doubts have been raised about the logic of making conspiracy criminal. The critics often question the wisdom of attaching punishment at the moment of agreement, which is seen to pose no known social danger or harm.[187] Several justifications have been advanced for the existence of conspiracy as a distinct crime. An overview shows that generally two main rationales support the use of criminal conspiracy in common law jurisdictions. The first is its role in the prevention of crime, also known as the early intervention rationale. An agreement to commit a crime presents with it the potential danger of its adherents actually setting out to realise its criminal objective. Second, conspiracy is seen to have an important role

---

[182] See also *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *cf Pinkerton v. United States*, 328 U.S. 640 (1946).

[183] 21 U.S.C 846 (conspiracies relating to drug trafficking); 18 U.S.C 2339 B (conspiracies relating to terrorist attacks); 18 U.S.C § 1962 (d) (conspiracies relating to racketeering); 18 U.S.C (conspiracies relating to fraud).

[184] See Doyle C, Federal Conspiracy Law: A Brief Overview, Congressional Research Service, Congress Report April 30, 2010, pp. 10–12.

[185] In *United States v. Martinez*, 83 F. 3d 371, 375, (11th Cir. 1996), the court declared that a conspiracy conviction could stand even if the other alleged conspirators had not been identified.

[186] *United States v. Loe*, 248 F. 3d 449, 459 (5th Cir. 2001); Model Penal Code § 5.04 (1).

[187] See A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 455–460; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), pp. 504–508; I. H. Dennis, 93 *LQR* (1977), pp. 31 et seq.; Abraham S. Goldstein, 68 *Yale L.J.* (1959), pp. 414 et seq.; Philip E. Johnson, 61 *Cal. L. Rev.* (1973), pp. 1140 et seq.; P. Marcus, 65 *Geo. L. J.* (1977), p. 966.

in combating criminal enterprises, since any group dedicated to the commission of crimes is considered to present an on-going threat to society.[188]

The early intervention or prevention rationale was the main reason for retention of criminal conspiracy in the United Kingdom. The Law Commission observed that 'conspiracy needs to be retained as a crime as it enables the criminal law to intervene at an early stage before a contemplated crime had actually been committed…'.[189] Conspiracy is seen as essential in tackling preparatory criminal conduct, as opposed to attempt which applies to conduct, which '[…] is more than merely preparatory to the commission of an offence'.[190] This rationale is also recognised in the United States, where conspiracy is seen as an important tool in striking at preparatory activities involving crimes.[191] In *United States v. Feola*,[192] the court observed that early intervention and prosecution was justified by the increased likelihood of the crime occurring once the parties came to agreement. It described the agreement as the crystallisation of criminal intent. Doubts have been cast on this rationale, since a majority of cases involve conspiracies that have already been carried out far enough that their constitutive acts could be punished as attempt and incitement, or the underlying crime has in any case been committed making it sufficient to charge the defendants for the substantive criminal conduct.[193]

The second justification for conspiracy may be referred to as the 'group danger' rationale. It aims at dealing with the supposed continuous and inherent danger that criminal enterprises are seen to pose to the society.[194] The exceptional danger is inferred from the special dynamics that group behaviour is considered to cultivate. These dynamics include: (i) the group develops a destructive identity that suppresses personal identity, (ii) groups are considered likely to have extreme attitudes and behaviour, (iii) it is more difficult to discourage a group from undertaking criminal activities, (iv) several persons working together encourage specialisation creating more efficiency in execution of crimes, (v) specialisation means criminal conduct is spread over a number of persons making it difficult to trace criminal responsibility to any particular individual, especially those who may

---

[188] R. J. Hoskins, 6 *N.Y.U. J. Int'l & Pol*. (1973), p. 245; also see D. Burgman, 29 *DePaul L. Rev*. (1979), pp. 84–86.

[189] Law Com. No. 76, report, para 1.5; see also C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; D. Omerod, *Smith & Hogan: Criminal Law*, 11th edn. (2005), p. 399; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 455.

[190] The Criminal Attempts Act of 1981 at Section 1(1).

[191] R. M. Chesney, 80 *S. Cal. L. Rev*. (2007), p. 448; N. K. Katyal, 112 *The Yale Law Journal* (2003), p. 1310, 1311; W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 620.

[192] 420 U.S. 671 (1975) at 694.

[193] A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 458–459; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; P. Marcus, 65 *Geo. L. J*. (1977), pp. 930–931, 937.

[194] A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 455, 458; D. Omerod, *Smith & Hogan: Criminal Law*, 11th edn. (2005), p. 399.

be considered most criminally responsible for their organisation and planning roles.[195] The group danger rationale was particularly popular with the English courts in the seventeenth and eighteenth centuries. The focus by the courts on the potential harm of group conduct is illustrated by a statement made in *Quinn v. Leathem.*[196] Here, the court made an interesting observation that innocent acts carried out by an individual may "become dangerous and alarming [when performed in a conspiracy], just as a grain of powder is harmless but a pound may be highly destructive". This rationale was later viewed with disfavour by the courts. Several courts now regarded it as flawed and misguided because the focus in conspiracy cases shifted from the combination of conspirators to the damage the conspiracy caused.[197] Lord Glaisdale's quote in *Regina v. Withers*,[198] shows the emerging criticism to the group conduct theory:

> And although some conduct which causes or tends to cause extreme injury to the public may be heinous and more damaging when committed by numbers, not all such conduct will be so; nor may some such conduct when committed by numbers be necessarily more heinous and damaging than other such conduct when committed by an individual.

Currently, the courts in England hardly mention the group conduct rationale in their conspiracy decisions, preferring to justify the enforcement of conspiracy simply from the perspective that it is provided in the criminal law statute.[199] In contrast, the group danger rationale is especially prominent in the United States. The courts have often observed that the action of two or more people coming together poses more threat to the society than the act of one. In *Krulewitch v. United States,*[200] Justice Jackson observed that 'the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone ranger'. The potential danger is seen from the possibility that a criminal partnership can achieve more complex goals in comparison to an individual effort, and furthermore, the likelihood of abandoning the object of the agreement decreases when people act

---

[195] See N. K. Katyal, 112 *The Yale Law Journal* (2003), pp. 1315–1325; see also Law Com. No. 76, para 1.6, on conspiracy's important role in 'striking at the heart' of criminal activities by providing a 'useful means whereby persons who plan or organize crimes, but take no active part in them, can more easily be brought to justice'; D. Burgman, 29 *DePaul L. Rev*. (1979), pp. 84–86; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; K. A. David 25 *Vand. J. Transnat'l L.* (1993), p. 966; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 76.

[196] (1901) A. C. 495, cited in K. A. David 25 *Vand. J. Transnat'l L.* (1993), p. 963.

[197] *R. v. Kamara* (1974) A. C. 104.

[198] (1975) A. C. 842 at 870 (appeal taken from England).

[199] K. A. David 25 *Vand. J. Transnat'l L.* (1993), p. 966; also see A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507, stating that this rationale is unproven.

[200] 336 U.S. 78 (1915) at 88.

in a group.[201] This apprehension towards concerted criminal activity is also compounded by the possibility of the group evolving to perpetrate other criminal activities.[202] Certain scholars have cast doubt onto the presupposition that group behaviour presents a greater danger to society as opposed to a single individual with equal motivation and determination to cause harm. It is argued that it doesn't always follow that several persons who come together towards a criminal purpose necessarily mean a greater danger to society, than an individual who is resolute on committing equally if not more heinous crimes.[203]

To combat the exceptional danger and the special circumstances that relate to group criminal activity, the conspiracy charge carries with it certain procedural conveniences and evidential benefits. These exceptional advantages of a conspiracy charge are used by investigators as bargaining tools to extract information from co-conspirators. They particularly, facilitate the prosecution of persons who would otherwise escape criminal responsibility, because it is difficult to determine their exact role in commission of a crime. This especially applies to the organisers and planners who often do not have a direct role in commission of the crimes.[204] As a consequence, the prosecution is able to roll up charges indicting several crimes, which otherwise on their own would not be considered serious enough, under the charge of conspiracy. This makes it possible for a large number of defendants to be held criminally responsible.[205] In such cases, the conspiracy charge is considered to give a more rounded impression or a true picture of facts and circumstances surrounding commission of the crimes, especially, in terms of planning and the various roles played by the participants.[206]

---

[201] *Callanan v. United States*, 364 U.S 587, 593 (1961); K. A. David 25 *Vand. J. Transnat'l L.* (1993), p. 969; *cf* A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 77.

[202] The court in *United States v. Rabinowich*, 238 U.S. 78, 88 (1985), observed that the group had potential of 'educating and preparing conspirators for further and habitual practices'; also see Justice Frankfurter in *Callanan v. United States*, 364 U.S. 587, 593 (1961) where he states, 'Nor is the danger of a conspiratorial group limited to the particular end toward which it was embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise'.

[203] A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; I. H. Dennis, 93 *LQR* (1977), p. 49; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), pp. 76–77; P. Marcus, 65 *Geo. L. J.* (1977), pp. 932–934.

[204] See Law Com. No. 76, para 1.6, asserting that conspiracy makes it easier 'to explain to a jury a simple requirement of proof of an agreement than to make clear that someone who has not actually done anything can be guilty, by reason of complicity, of the substantive crime'; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; N. K. Katyal, 112 *The Yale Law Journal* (2003), p. 1307 et seq.

[205] P. Marcus, 65 *Geo. L. J.* (1977), p. 940.

[206] See A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 457–558; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507, describing this as the

2.2.4 Summary

Under common law jurisdictions, conspiracy is a crime that creates criminal responsibility for the mere fact of agreeing to commit a criminal offence, irrespective of whether its underlying objective is carried out. It is an inchoate crime, distinct and separate from the substantive crime that the conspirators plan to commit. Several jurisdictions have now codified the law on conspiracy. This has given more clarity to a concept that has had a long winding history, initially created to punish those who collaborated to subvert the justice system and later gradually evolved to accommodate all sorts of crimes and nuisances. In the United Kingdom, Section 3 of the CLA provides for statutory conspiracy while in the United States, 18 U.S.C 371 the general conspiracy provision, outlaws conspiracy to commit some other federal crime. In addition, both jurisdictions have other statutes that specifically prohibit conspiracy to carry out other proscribed criminal conduct.

The essential elements of conspiracy are similar in both jurisdictions. The first element is the agreement which forms the backbone of a conspiracy charge. It must involve at least two people. The crime is complete upon making of the agreement. Although the act of agreeing may be considered to be a wholly mental operation, it is usually manifested in the spoken or written words of the conspirators, or by some other overt action. The second element is the intent to enter into an agreement, and intent to carry out its underlying objective, which involves the commission of a substantive crime. It must be shown that the conspirators engaged in the conspiracy with knowledge and intention to further its goals. A third element that certain statutes in the United States specifically provide for, as a safeguard against prosecution of what may be termed to be mere thought or speech alone, is the overt act requirement. The prosecution should show that one of the conspirators has carried out some overt act in furtherance of the conspiracy scheme. Although the overt act requirement is not specifically provided for in all conspiracy statutes, in practice, it is an element that may be inferred from all conspiracy cases. The conspiracy is not only some wish resting in the mind of its authors, there is often some outward manifestation indicating that the conspirators are already at work. An overt act by a single conspirator is sufficient to use in a conspiracy charge against all other alleged conspirators.

The conspiracy charge has a double personality trait. A defendant charged with conspiracy may be held liable under two heads. First, the defendant may be held liable for agreeing to be part of a conspiracy to commit an underlying offence, and second, for any other substantive offences carried out by co-conspirators in furtherance of the conspiracy. The defendant need not have contemplated or

(Footnote 206 continued)
"full story" rationale; D. Omerod, *Smith & Hogan: Criminal Law*, 11th edn. (2005), p. 400; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), p. 77; P. Marcus, 65 *Geo. L. J.* (1977), p. 928 et seq.

participated in these substantive offences to be criminally responsible, it is only sufficient for the prosecution to show that given the object of the conspiracy these offences were foreseeable. In the first sense, conspiracy is a separate inchoate crime, while in the second sense, it is a form of complicity.

Once the conspiracy is entered into, to escape liability, a renouncing defendant must show he carried out positive acts to prevent the conspiratorial plan from being realised. A defendant may be convicted of conspiracy even though all other alleged conspirators are acquitted. Since conspiracy is an independent offence, one may be charged with either the conspiracy or its target offence or both. The practice of charging both the conspiracy and its underlying offence is however not encouraged, particularly in the United Kingdom where the prosecution is required to justify a decision to institute cumulative charges.

In principle, a defendant may also be convicted for both conspiracy and its underlying substantive crime. The practice of double conviction again finds most disfavour in the appellate courts of the United Kingdom. In many instances, this practice has been viewed as carrying with it implications of double punishment. Even in the United States where conviction for both charges may be common, most courts have a preference to order that both sentences be served concurrently. Previously, it was possible for a conspiracy charge to attract more punitive measures than its underlying offence, this possibility has since radically been curtailed. Reforms have led to adoption of provisions that set out specific punishment for a conspiracy charge. At most, punishment of conspiracy can only be equivalent to the punishment prescribed for its underlying substantive crime.

2.2.5 Analysis

Certain critical issues stand out with respect to the conspiracy doctrine under the common law jurisdictions. First, conspiracy is considered to be inherently an ambiguous and vague crime.[207] Perhaps, the statement that perfectly captures this alleged characteristic is Justice Jackson's description of conspiracy as an 'elastic, sprawling and pervasive offence…so vague that it almost defies definition, chameleon like [taking] on a special coloration from each of the many independent offences on which it may be overlaid'.[208] While the idea of making an agreement to commit a crime is clear and has no ambiguity, the challenge emerges with proving the existence of an act that is often mental in its composition. The uncertainty and ambiguity of conspiracy often manifests itself in the difficult

[207] See F. B. Sayre, 35 *Harvard Law Review* (1921–1922), p. 393, 'A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought'; see also P. Gillies, 10 *Ottawa L. Rev*. (1978), p. 274; W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 616.

[208] *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949).

task of the prosecution showing what constitutes the agreement and its requisite mental element. These elements are not easy to prove.

Second, often persons who agree to pursue a criminal end will do it in very secretive circumstances. Such persons are very discreet in their conduct to avoid discovery. To deal with the challenge posed by proving the existence of conspiracies several procedural and evidential exceptions are availed to the prosecution. Here, the rationale is that the defendants should not benefit from their ingenuity. Therefore, the law allows wide latitude in the use of circumstantial evidence to infer existence of conspiracy. This latitude has, in some cases, led to defendants being connected to a conspiracy with very little evidence to prove it.[209] In addition, once the prosecution shows on a balance of probability that a conspiracy exists, a declaration by any of the co-conspirators may be admitted in evidence against all other alleged co-conspirators to prove involvement in the conspiracy. These exceptions are heavily skewed in favour of the prosecution and have been criticised for 'overcompensating for the difficulties faced by prosecution'.[210] The conspiracy charge does away with stringent *mens rea* and *actus rea* requirements, which are needed to establish responsibility for traditional forms of crime. This makes it a very attractive charge for the prosecution, especially, because it presents a high probability that the alleged conspirators will be found guilty.[211] Although it is true that these exceptions place the defendant in a conspiracy case in a particularly vulnerable position, without them the conspiracy charge would be rendered redundant. To guard against unjust verdicts arising from conspiracy charges, several constitutional and procedural safeguards exist in the various jurisdictions, where a balance is drawn between the benefits that any exception presents as against its prejudicial effect to the defendant. In practice, these safeguards are also bolstered with the cautious manner in which the judiciary often treats conspiracy charges, always demanding a higher standard of proof from the prosecution than that actually asserted in theory. These safeguards ensure that more often than not only defendants who have played a meaningful role in the conspiracy are held criminally liable.

The third issue that perhaps is the most controversial aspect of common law conspiracy arises from its second personality trait, which makes a defendant liable for all foreseeable substantive crimes carried out in furtherance of the conspiracy even without his contribution, knowledge or participation. This broad reach of conspiracy, which recognises vicarious liability for acts of accomplices, shows the

---

[209] W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 619; P. Marcus, 65 *Geo. L. J.* (1977), p. 943.

[210] W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 619.

[211] Despite the conspiracy charge being considered the "darling" of the prosecutor, several interests are usually considered before resorting to this charge. The decision to prosecute must be balanced against the possibility of it being outweighed by the undesirable factors associated with conspiracy prosecutions. See S. A. Selz, 5 *Am. J. Crim. L.* (1977), p. 35, for a more detailed account, of factors influencing conspiracy prosecutions in Chicago; also P. Marcus, 65 *Geo. L. J.* (1977), p. 938; J. Winograd, 41 *Am Crim. L. Rev.* (2004), p. 613.

potential danger of a conspiracy charge lapsing into a crime that promotes guilt by association. The advantage of this practice is that the prosecutor's burden is lightened. Once it is shown that the defendant had some connection with a conspiracy, the need to show the defendant's role in other offences committed pursuant to the conspiracy is absolved. Prosecutors often take advantage of this feature of common law conspiracy, using it as a bargaining tool to extract information from alleged co-conspirators. This complicity feature of the common law conspiracy is also applauded for its potential deterrent effect. The knowledge that a conspiracy charge carries with it such far-reaching consequences can act as a discouragement of any desire to be involved in such criminal association. Nonetheless, to hold a defendant liable for crimes that he neither contemplated nor approved of violates the principle personal culpability. One should only be criminally responsible for an offence that he consciously contributes to or participates in. There has certainly been a withdrawal from applying this aspect of conspiracy with the courts in the United Kingdom. The courts mostly demand that an accused can only be held liable for crimes that he specifically intended pursuant to the conspiracy, this effectively excludes the alleged foreseeable crimes. Some States in the United States have also rejected this rule, which is reflected in the Pinkerton doctrine, choosing instead to adopt provisions reflected in the Model Penal Code that exclude liability for such conduct.

The fourth critical issue is the practice of cumulatively charging and punishing conspiracy and its target crime. Since conspiracy is a crime distinct from its underlying offence, the practice of charging both offences is both legally and logically justifiable. The main contention is the rationale of pursuing conspiracy when there is evidence that its contemplated crime has in any case been realised. The idea of punishing both the conspiracy and its contemplated offence and even in some instances giving a harsher sentence to a conspiracy charge seems to be excessive punishment. It is inequitable to the perceived damage that the conspiracy may seem to present. Prosecutors prefer to have the cumulative charges in circumstances in which they are not sure of obtaining a conviction for the substantive crime alone. The conspiracy charge in this case acts more like a buffer zone or safety net mechanism. The practice of charging both the conspiracy and its underlying offence is often superfluous and there is very little or no practical justification for it, given that more often than not the same set of facts and same evidence is used to prove both offences. Several courts have expressed their general disapproval of this practice, noting that the extra conspiracy charge only brings more confusion and adds no particular benefit to the trial. So much time is also consumed as a result of such trials. It would be preferable in the circumstances if the use of conspiracy is restricted to only prosecute incomplete crimes and should be prosecuted with its complete underlying offence in exceptional circumstances. A rule to restrict this practice would be most appropriate. The practice adopted by the United Kingdom to deal with this problem provides a highly recommendable guideline. Any choice by a prosecutor to bring cumulative charges is required to be justified, with the conspiracy charge only being allowed in instances it is considered to be of particular benefit to a case. The circumstances

under which a conspiracy charge may be allowed include: (i) cases of factual and legal complexity where the interest of justice demands the need to present the overall picture of prevailing circumstances of commission of the crime, (ii) cases where evidential constraints make it difficult to meet the requisite burden of proof for the underlying offence and (iii) cases where the conspiracy is seen to have more far-reaching dangerous consequences than just its contemplated crime.[212]

2.3 Civil Law Countries

The Nuremberg trial made obvious that the common law approach to criminal conspiracy was foreign to civil law countries.[213] A crime considered to be so vague as to defy definition and always "predominantly mental in composition", does not fit well in the civil law countries' approach to the principle of legality.[214] Traditionally, civil law countries do not recognise the broad concept of common law conspiracy, where conspiracy is a separate crime punishable regardless of its results. Among the few civil law countries that proscribed conspiracy, most mainly restricted its punishment to politically subversive crime and it was rarely prosecuted.[215] Whereas conspiracy in common law countries is considered to be an effective tool in combating criminal enterprises, civil law jurisdictions have alternative methods of dealing with criminal enterprises. In the recent past, however, more civil law jurisdictions have introduced conspiracy in their criminal law systems and extended its use to crimes beyond the field of political plots. This section of the thesis looks at to what extent conspiracy is recognised and the approach used with respect to the concept of criminal conspiracy in Germany, Spain, France, and Italy. It also looks at the alternative structures that these jurisdictions use to deal with crimes carried out by combinations, explaining to what extent they differ with or are similar to the common law concept of conspiracy.

---

[212] See N. Kaufman, 'Problems Encountered in Investigating and Prosecuting Conspiracies to commit Terrorist Offences'. Paper presented at the First Annual Conference on Human Security, Terrorism and Organized Crime in the Western Balkan Region (2006), commenting on the British Practitioners Handbook Archbold, p. 6.

[213] Justice Jackson in *Krulewitch v. United States*, 336 U.S. 78 (1915) at 88 observed that conspiracy as understood in common law, 'does not commend itself to jurists of civil law countries, despite universal recognition that an organised society must have legal weapons for combating organised criminality'; R. J. Hoskins, 6 *N.Y.U. J. Int'l & Pol.* (1973), p. 245; W. J. Wagner, 42 *The Journal of Criminal Law, Criminology, and Police Science* (1951), p. 171; see also Chap. 3.

[214] *Krulewitch v. United States*, 336 U.S. 78 (1915), pp. 447–448; C. Pelser, 4 *Utrecht Law Review* (2008), p. 58.

[215] C. Pelser, 4 *Utrecht Law Review* (2008), p. 58; W. J. Wagner, 42 *The Journal of Criminal Law, Criminology, and Police Science* (1951), p. 171.

2.3.1 Germany

§§ 30 (2), 31, 127, 129 and 129a of the German "Strafgesetzbuch" (StGB)[216] are the main provisions which criminalise conduct that would otherwise be punished under the notion of conspiracy in common law countries.

2.3.1.1 Criminal Agreement ("Conspiracy")[217]

§ 30 (2) StGB provides for punishment of criminal agreement. This section is part of the general part ("Allgemeiner Teil") of the StGB which contains basic legal principles that apply to all crimes of the special part ("Besonderer Teil"). The history of § 30 goes back to 1876, when it was included into the German criminal code as a reaction to the so called *Duchesne case*.[218] In 1873, Duchesne, a blacksmith from Belgium, tried to instigate the Archbishop of Paris and the Jesuit province of Belgium Joseph Hippolyte Guibert, to pay him money for the killing of German chancellor Otto von Bismarck. The Archbishop refused to do so, and reported the matter to the authorities. This type of conduct was at the time not criminal in Belgium and at the request of German authorities, the Belgian Criminal Code was amended to make it punishable in the future. This incident influenced the German government to include in the German criminal code a crime that would criminalise conduct such as Duchesne's, leading to introduction of the then § 49a on 26 February 1876. For the first time in Germany, this provision implicitly made punishable conduct relating to criminal agreements.[219] The law on criminal

---

[216] The German Penal Code.

[217] "Versuch der Beteiligung".

[218] See on the Duchesne case C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. II (2006), § 28, marginal no. 75; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil,* 40th edn. (2010), marginal no. 564.

[219] § 49a *Strafgesetzbuch für das Deutsche Reich* (Reichsgesetzblatt 1876, p. 25), stated: (1) *Wer einen Anderen zur Begehung eines Verbrechens oder zur Theilnahme an einem Verbrechen auffordert, oder wer eine solche Aufforderung annimmt, wird, soweit nicht das Gesetz eine andere Strafe androht, wenn das Verbrechen mit dem Tode oder mit lebenslänglicher Zuchthausstrafe bedroht ist, mit Gefängniß nicht unter drei Monaten, wenn das Verbrechen mit einer geringeren Strafe bedroht ist, mit Gefängnis bis zu zwei Jahren oder mit Festungshaft von gleicher Dauer bestraft*.

(2) *Die gleiche Strafe trifft denjenigen, welcher sich zur Begehung eines Verbrechens oder zur Theilnahme an einem Verbrechen erbietet, sowie denjenigen, welcher ein solches Erbieten annimmt*.

(1) Whosoever asks another to commit a crime or to take part in a crime, or whosoever accepts such an invitation, shall unless the law states otherwise, where the crime is punishable by death or life imprisonment be liable to not less than three months imprisonment, where the crime is punishable by a lesser punishment be liable to imprisonment of up to two years, or of equal duration as the crime.

(2) The same punishment shall be imposed to one who offers to commit a crime or take part in a crime, and to one who accepts such an offer or proposition. (Translation by Author).

agreement has evolved over a number of years to what it is now in the StGB.[220] § 49a was amended in 1943 and the term agreement was then explicitly added. Apart from criminalising unsuccessful instigation and unsuccessful aiding and abetting, the provision created criminal responsibility for whoever offers or agrees to commit a criminal offence, or seriously gets involved in such activities.[221] A minor change was introduced in 1953, exempting from punishment those who withdrew from the criminal agreement.[222] The second law on reform of the criminal law changed the wording of § 49a, splitting the content into § 30, and § 31 of the current StGB.[223] Consequently, § 30 (1) StGB, provides that a person who attempts to induce another to commit a felony shall be liable, and § 30 (2) StGB makes it criminal for one to declare willingness or accept an offer or agree with another to commit or abet the commission of a felony.[224] § 31 StGB provides for an opportunity for a participant (perpetrator) in the criminal agreement to avoid criminal responsibility, by exempting from liability the perpetrator who voluntarily withdraws from the inducement, declaration or agreement to commit a felony, and makes some earnest effort to prevent commission of the crime.[225] Two

---

[220] See for a more detailed account on its development H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; C. Roxin; *Strafrecht Allgemeiner Teil*, Vol. II (2003), § 28, marginal no. 75; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil,* 40th edn. (2010), marginal no. 564; in English language see R. J. Hoskins, 6 *N.Y.U. J. Int'l & Pol.* (1973), pp. 254–260; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy*' (2011); also W. J. Wagner, 42 *The Journal of Criminal Law, Criminology, and Police Science* (1951), pp. 175–177.

[221] Verordnung zur Angleichung des Strafrechts des Altreichs und der Alpen- und Donau-Reichsgaue (Strafrechtsangleichungsverordnung) from Reichsgesetzblatt 1943 I, p. 339.

[222] Drittes Strafrechtsänderungsgesetz, Bundesgesetzblatt 1953 I, p. 735.

[223] Zweites Gesetz zur Reform des Strafrechts, Bundesgesetzblatt 1969 I, p 717.

[224] § 30 StGB reads:

(1) Wer einen anderen zu bestimmen versucht, ein Verbrechen zu begehen oder zu ihm anzustiften, wird nach den Vorschriften über den Versuch des Verbrechens bestraft. (…)

(2) Ebenso wird bestraft, wer sich bereit erklärt, wer das Erbieten eines anderen annimmt oder wer mit einem anderen verabredet, ein Verbrechen zu begehen oder zu ihm anzustiften.

(1) A person who attempts to induce another to commit a felony or abet another to commit a felony shall be liable according to the provisions governing attempted felonies. (…)

(2) A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable under the same terms. (Translation from M. Bohlander, *The German Criminal Code*, *a modern English translation*).

[225] § 31 StGB reads:

Rücktritt vom Versuch der Beteiligung

(1) Nach § 30 nicht bestraft, wer freiwillig

1. den Versuch aufgibt, einen anderen zu einem Verbrechen zu bestimmen, und eine etwa bestehende Gefahr, daß der andere die Tat begeht, abwendet,

2. nachdem er sich zu einem Verbrechen bereit erklärt hatte, sein Vorhaben aufgibt oder,

3. nachdem er ein Verbrechen verabredet oder das Erbieten eines anderen zu einem Verbrechen angenommen hatte, die Tat verhindert

(2) Unterbleibt die Tat ohne Zutun des Zurücktretenden oder wird sie unabhängig von seinem früheren Verhalten begangen, so genügt zu seiner Straflosigkeit sein freiwilliges und ernsthaftes Bemühen, die Tat zu verhindern

instances of exemption are given to the renouncing perpetrator. The first exemption is in the instance where the contemplated crime is not carried out independent of the renouncing perpetrator's efforts, and the second exemption is when the contemplated crime occurs independent of the renouncing perpetrator's previous conduct. In both instances, the renouncing perpetrator's good faith effort to stop the crime is sufficient.

The offence of participation in a criminal agreement in the StGB is a form of criminal participation rather than a specific or distinct criminal offence, like in the case of conspiracy in the common law countries.[226] This provision on punishing criminal agreements extends criminal responsibility to the earliest stages of preparing to commit serious offences. Its location in the general part of the StGB is interpreted to mean that it allows for protection of all legal interests.[227]

Elements of the Offence of Participation in Criminal Agreement

§ 30 (2) only punishes agreements in relation to commission of a felony ("Verbrechen"). § 12 (1) StGB, defines a felony as an unlawful act punishable by a minimum sentence of one year imprisonment. Unlike the American federal criminal conspiracy, this provision on criminal agreement makes no reference to an 'overt act' requirement.

(Footnote 225 continued)

Withdrawal from conspiracy

(1) A person shall not be liable under § 30 if he voluntarily

1. gives up the attempt to induce another to commit a felony and averts any existing danger that the other may commit the offence;

2. after having agreed to commit a felony or accepted the offer of another to commit a felony prevents the commission of the offence; or

3. after having agreed to commit a felony or accepted the offer of another to commit a felony prevents the commission of the offence.

(2) If the offence is not completed regardless of his actions or if it is committed independently of his previous conduct, his voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability. (Translation from M. Bohlander, *The German Criminal Code*, *a modern English translation*).

[226] H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; C. Roxin; *Strafrecht Allgemeiner Teil*, Vol. II (2006), § 28, marginal no. 75; Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 1; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil,* 40th edn. (2010), marginal no. 564; also see M. Bohlander, *Principles of German Criminal Law* (2009), p. 175, referring to the offence of participation in a criminal agreement as attempted participation; G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 221; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives* (2011), p. 59. Some commentators, especially those of the nineteenth century, argued that it should be considered a separate criminal offence, see Franz v. Liszt, *Lehrbuch des Deutschen Strafrechts*, 5th edn. (1996), p. 344.

[227] T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 2 et seq; B. Schünemann, *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 1.

(a) Agreement

Under German criminal law agreement forms the essence of the offence of participation in a criminal agreement. It is the *actus reus* and is defined as the coming together of wills to commit a crime, or to instigate another to commit a crime.[228] At least two people are required to enter into the agreement.[229] Such agreement may be reached by different means of communication and may be demonstrated either explicitly or implicitly. It is imperative that the parties had finished negotiations on the main elements of the purpose of the agreement and jointly made the decision to carry it out.[230]

Only two forms of participation in a criminal agreement are punishable. Those who agree to commit a crime as co-perpetrators and those who agree to jointly instigate commission of a crime will be considered to be the perpetrators in a criminal agreement.[231] Agreements between aiders, or aiders and perpetrators are seen to have neither the quality, nor the seriousness that makes them worthy of punishment.[232] This clearly differs from the common law perspective where all participants in an agreement to commit a crime, regardless of what their form of participation was, are considered criminally responsible under conspiracy.

---

[228] T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 12; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collective*s (2011), p. 62; R. Maurach, 'Die Problematik der Verbrechensverabredung', *Juristen Zeitung* (1961), p. 137, 139; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. II (2006), § 28, marginal no. 43; Schünemann B, *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 60; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil,* 40th edn. (2010), marginal no. 564.

[229] RGSt (decisions of the Supreme Court of the German Reich) Vol. 5, p. 8; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. II (2006), § 28, marginal no. 43; Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), marginal no. 60.

[230] T. Fischer, *Strafgesetzbuch und Nebengestze*, 58th edn. (2011), § 30 marginal no. 12; A. Hoyer, Systematischer *Kommentar*, 7th edn (2001), § 30 marginal no. 46 et seq; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collective*s (2011), p. 63.

[231] See Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 72, who refers to conspiracy as a pre-stage of co-perpetration; also see H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collective*s (2011), p. 65; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil*, 40th edn. (2010), § 30 marginal no. 560.

[232] Decision of the Federal Supreme Court of 11.7.1961, no. 1 StR 257/61; decision of the Federal Supreme Court of 27.1.1983, no. 3 StR 437/81; Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 72.

(b) Mens Rea

The participants in the agreement have to know that they agree upon the commission of a criminal offence and they must intend that the agreed crime be committed.[233] Since the object of the agreement does not need to be agreed upon in full detail, the perpetrators do not need to have knowledge of every detail of commission of the crime. It suffices if they only know the basic elements of the agreed crime.[234] The participant in a criminal agreement does not need to have personally known the other participants. The prosecution is only required to show that the perpetrator knows there is at least another person with whom he agrees to carry out the underlying criminal objective.[235] Perpetrators may also be held criminally liable for criminal agreement even if they acted only with indirect intent (*Eventualvorsatz/Dolus eventualis*).[236]

Merger and Enforcement

Under German criminal law, once the underlying crime of the criminal agreement has been completed or attempted, the criminal agreement merges with the substantive crime, making only the substantive crime punishable.[237] The rationale behind such merger seems to be the value that is actually protected is that which the substantive crime makes criminal, hence, once the substantive crime has been carried out, the need of punishing the criminal agreement disappears. This may also be considered from the perspective that the whole idea behind conspiracy, like all other inchoate crimes, is to punish incomplete crimes. Therefore, when the underlying crime is completed the justification for punishing conspiracy

[233] Commentators refer to the need of the conspirators to seriously want to commit the underlying crime, see T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 12; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; R. Maurach, 'Die Problematik der Verbrechensverabredung', *Juristen Zeitung* (1961), pp. 137, 139.

[234] T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 7; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy*' (2011), p. 67.

[235] T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 9; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives* (2011), p. 68.

[236] Decision of the German Federal Supreme Court of 18.10.1955, Neue Juristische Wochenschrift 1956, pp. 30, 31; decision of the Higher Regional Court of Cologne of 1.6.1951, Neue Juristische Wochenschrift 1951, p. 612; C. Roxin, *Leipziger Kommentar*, 11th edn. (2003), § 30 marginal no. 63.

[237] T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 18; R. J. Hoskins, 6 *N. Y. U. Int'l & Pol.* (1973), p. 257; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 V.; W. Joecks, *Münchener Kommentar zum Strafgesetzbuch*, 2nd edn. (2011), § 30 marginal no. 66.

disappears. This is a characteristic that makes the German concept of conspiracy differ from the conspiracy under common law countries, where conspiracy is a distinct crime that remains punishable even when its underlying offence has been executed.

There may be instances where the perpetrators agree to carry out a crime but actually commit a completely different offence, a situation referred to as cases of 'qualitative excesses'.[238] In these latter cases, the perpetrators will be held simultaneously liable for the criminal agreement and the committed crime. There may also be occasions where the perpetrators agree to commit a crime and end up committing a crime more serious than the crime agreed upon. In such cases of 'quantitative excesses', the perpetrators will only be held criminally liable for the committed offence.[239]

One who participates in a criminal agreement under the German criminal law is considered to be less culpable than one who participates in actual commission of the substantive criminal conduct. The law directs that a mere participant in a criminal agreement should get a much lower sentence.[240] Participants in a criminal

---

[238] H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 V.; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives* (2011), p. 70.

[239] H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 V.; W. Joecks, *Münchener Kommentar zum Strafgesetzbuch*, 2nd edn. (2011), § 30 marginal no. 66; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives* (2011), p. 70.

[240] See § 49 StGB *Besondere gesetzliche Milderungsgründe*:

(1) Ist eine Milderung nach dieser Vorschrift vorgeschrieben oder zugelassen, so gilt für die Milderung folgendes:

1. An die Stelle von lebenslanger Freiheitsstrafe tritt Freiheitsstrafe nicht unter drei Jahren

2. Bei zeitiger Freiheitsstrafe darf höchstens auf drei Viertel des angedrohten Höchstmaßes erkannt werden. Bei Geldstrafe gilt dasselbe für die Höchstzahl der Tagessätze.

3. Das erhöhte Mindestmaß einer Freiheitsstrafe ermäßigt sich

im Falle eines Mindestmaßes von zehn oder fünf Jahren auf zwei Jahre,

im Falle eines Mindestmaßes von drei oder zwei Jahren auf sechs Monate,

im Falle eines Mindestmaßes von einem Jahr auf drei Monate,

im Falle eines Mindestmaßes von einem Jahr auf drei Monate,

(2) Darf das Gericht nach einem Gesetz, das auf diese Vorschrift verweist, die Strafe nach seinem Ermessen mildern, so kann es bis zum gesetzlichen Mindestmaß der angedrohten Strafe herabgehen oder statt auf Freiheitsstrafe auf Geldstrafe erkennen.

Special mitigating circumstances established by law

(1) If the law requires or allows for mitigation under this provision, the following shall apply:

1. Imprisonment of not less than three years shall be substituted for imprisonment for life.

2. In cases of imprisonment for a fixed term, no more than three quarters of the statutory maximum term may be imposed. In case of a fine the same shall apply to the maximum number of daily units.

3. Any increased minimum statutory term of imprisonment shall be reduced as follows:

a minimum term of ten or five years, to two years;

a minimum term of three or two years, to six months;

a minimum term of one year, to three months;

in all cases to the statutory minimum.

agreement under the StGB are punished in accordance with the rule defining punishment for attempted crime, with the difference being that whereas the rules on punishing attempt allow for the possibility of mitigation, § 30 makes mitigation mandatory for cases related to the offence of criminal agreement.[241] Furthermore, the offence of criminal agreement under the German criminal law does not recognise features of vicarious criminal liability like the common law conspiracy.

2.3.1.2 Criminal Associations

To address the specific problem of criminal enterprises the StGB has specific provisions that deal with criminal organisations. §§ 127, 129 and 129a prohibit the forming, joining or participating in activities of armed groups (§ 127 StGB), criminal organisations (§ 129 StGB) and terrorist organisations (§ 129 a StGB) respectively.

Under § 127 StGB one is liable to imprisonment or a fine if he or she unlawfully forms or commands a group in possession of weapons or dangerous instruments or joins such a group, provides it with weapons, money or any support.[242]

To form or participate as a member, recruit members, or in any way support an organisation whose aim or activities are directed at the commission of crimes, makes one liable under § 129 StGB to imprisonment of up to 5 years or a fine. The provision even goes as far as creating criminal responsibility for attempt to form such an organisation.[243] Participation as a member requires that one integrate

---

(Footnote 240 continued)

(2) If the court may in its discretion mitigate the sentence pursuant to a law which refers to this provision, it may reduce the sentence to the statutory minimum or impose a fine instead of imprisonment. (Translation from M. Bohlander, *The German Criminal Code*, *a modern English translation*).

[241] See § 30 (1) read together with § 30 (2) StGB; § 23 StGB defining rules on sentencing criminal attempt; § 49 StGB setting out rules on limits of mitigation.

[242] *§ 127 Bildung bewaffneter Gruppen*

Wer unbefugt eine Gruppe, die über Waffen oder andere gefährliche Werkzeuge verfügt, bildet oder befehligt oder wer sich einer solchen Gruppe anschließt, sie mit Waffen oder Geld versorgt oder sonst unterstützt, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft.

§ 127 Forming armed groups.

Whosoever unlawfully forms or commands a group in possession of weapons or other dangerous instruments or joins such a group, provides it with weapons or money or otherwise supports it, shall be liable to imprisonment of not more than two years or a fine. (Translation from, M. Bohlander, *The German Criminal Code, a modern english translation*).

[243] The provision reads in part:

Forming criminal organisations

(1) Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment of not more than five years or a fine.

(2) …

(3) The attempt to form an organisation as indicated in subsection (1) above shall be punishable.

into the association, subordinate one's will to that of the association and take part in activities of the association directed towards the commission of criminal offences.[244] This means that criminal responsibility for membership does not arise by mere declaration of membership or by one's passive behaviour.[245] § 129 extends criminal responsibility to the preparatory stage of criminal offences. By making it possible for intervention of criminal law at these initial stages it represents one of the preventive tools used to counter criminal associations.[246] This provision was initially adopted to fight political associations trying to achieve their goals by illegal means, but from 1951 its course changed to punish behaviour related to criminal activities in general.[247] Since the 1970s it has mainly been used against terrorist and other organised criminal associations.

To qualify as a criminal organisation pursuant to § 129 StGB, such an association requires a certain level of organisation,[248] needs to exist for a certain period

(Footnote 243 continued)

§ 129 *Bildung krimineller Vereinigungen*

(1) Wer eine Vereinigung gründet, deren Zwecke oder deren Tätigkeit darauf gerichtet sind, Straftaten zu begehen, oder wer sich an einer solchen Vereinigung als Mitglied beteiligt, für sie um Mitglieder oder Unterstützer wirbt oder sie unterstützt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.

(2)…

(3) Der Versuch, eine in Absatz 1 bezeichnete Vereinigung zu gründen, ist strafbar.

[244] K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 59.

[245] T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 24; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy*': *Different Legal Models against Criminal Collective*s (2011), p. 43; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 61.

[246] Decision of the German Federal Supreme Court of 11.10.1978, Neue Juristische Wochenschrift 1979, pp. 172, 173; decision of the German Federal Supreme Court of 21.10.2004, Neue Juristische Wochenschrift 2005, pp. 80, 81; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 3; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 1.

[247] See T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no.1; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collective*s (2011), pp. 26–33 for a detailed discussion on the historical development of this law which is traced back to the end of the eighteenth century during the reign of Friedrich Wilhem, the King of Prussia.

[248] Decision of the German Federal Supreme Court of 11.10.1978, Neue Juristische Wochenschrift 1979, p. 172; decision of the German Federal Supreme Court of 10.1.2006, Neue Juristische Wochenschrift 2006, p. 1603; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 6; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 21 H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 5.

of time,[249] should consist of at least three persons,[250] who subordinate their individual will to the will of the organisation.[251] These requirements make up the objective elements of this provision.[252] In reference to its subjective elements, all forms of participation in this provision (i.e. founding, membership, recruiting and supporting) presume a direct intent, and with the exception of recruiting, indirect intent (*dolus eventualis*) would also apply to the other forms.[253] Intent here embraces an awareness of all objective elements of such criminal association and a general awareness that its activities are directed towards commission of criminal offences.[254]

It is possible that a member commits certain criminal activity pursuant to the criminal organisation, and such criminal activity happens to breach some additional criminal norms other than membership in a criminal association punishable under § 129. The general rule is that if the crimes are of the same seriousness or less serious than the crime of membership in a criminal organisation, in accordance with § 52 StGB all these offences will be considered to be one criminal offence, that is membership in a criminal organisation.[255] If however, various criminal activities are committed by a member pursuant to the criminal organisation, which other than violating § 129 violate other criminal norms that are more serious than the crime of membership in a criminal association itself, then in this case § 53 StGB directs that the situation be treated as concurrence of offences. Here, the perpetrator will be convicted separately for each of the more serious crimes, but the penalty given shall be an aggregate sentence taking into account the sanction prescribed for the most serious offence and increasing it.

---

[249] H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 6a.

[250] Decision of the German Federal Supreme Court of 11.10.1978, Neue Juristische Wochenschrift 1979, pp. 172–173; idem decision of 10.1.2006, Neue Juristische Wochenschrift 2006, p. 1603; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 6; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch,* (2005), § 129 marginal no. 22.

[251] Decision of the German Federal Supreme Court of 1.10.1991, Neue Juristische Wochenschrift 1992, 1518; decision of the German Federal Supreme Court of 11.10.1978, Neue Juristische Wochenschrift 1979, p. 172; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 7; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 30–33; H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 6b, 6c.

[252] A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives* (2011), pp. 35–38.

[253] Decision of the German Federal Supreme Court of 3.10.1979, Neue Juristische Wochenschrift 1980, p. 64; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 34.

[254] A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives* (2011), p. 68, 69.

[255] Decision of the German Federal Supreme Court of 11.6.1980, Neue Juristische Wochenschrift 1980, 2718; H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 34.

Stiffer penalties of imprisonment ranging from six months to five years are prescribed for the ringleaders or "Hintermänner",[256] and in cases where the organisation is formed to carry out certain serious crimes.[257] An accomplice whose role was minor may be discharged from liability, and one who voluntarily makes effort to prevent the organisation from carrying out the planned crime or discloses the same to the authorities may also be discharged from liability, or the same may act as a mitigating factor to the sentence the court decides to give.[258]

In 1976, in times when the German government had to deal with the terroristic radical left wing organisation RAF ("Rote Armee Fraktion"—Red Army Fraction), § 129 a StGB was introduced as a qualified crime in relation to § 129 StGB.[259] In addition to the material elements of § 129 StGB, § 129 a StGB requires a special intent that is directed at the commission of serious crimes (felonies), which include murder or other grave offences against persons, and since 2002, genocide, crimes against humanity, war crimes or grave offences against a person. § 129 a (3) StGB, further introduces an independent crime that makes a person liable to imprisonment from six months to five years, for forming an organisation 'directed at threatening' the commission of any of the offences highlighted in subsections 1 and 2. This subsection was created to comply with the EU Framework decision of 13 June 2002 (2002/584/JHA) on combating terrorism.[260] It can be inferred from the provisions and the respective commentaries that with the group crimes, an accused's criminal responsibility only accrues for participation in the group or organisation, and not for other crimes committed by the group, unless they participate or contribute to their commission.

---

[256] See § 129 (4) StGB. The "Hintermann" is one who although not a member of the criminal organisation, exercises spiritual or economical influence on the leading structures of such an organisation; decision of the German Federal Supreme Court of 12.5.1954, Neue Juristische Wochenschrift 1954, p. 1253.

[257] See A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives* (2011), p. 55, describing the three situations recognised as defining the category of serious crimes, (i) if the association has a serious goal such as removing the constitutional order of Germany to replace it with a dictatorial one, (ii) if activities of the criminal association are directed towards carrying out offences usually defined as organised criminal activities such as drug trafficking, human trafficking, and (iii) in case of less serious crimes if their consequences are of an extraordinary nature.

[258] See § 129 (5) and (6) StGB.

[259] T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129a, marginal no. 2; H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 1 et seq; also see M. Kilchling, 'Organised Crime Policies in Germany', in C. Fijnaut and L. Paoli (eds), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), pp. 717–762, at p. 746, observing that courts tend to interpret terrorist activities in Article 129a as an aggravated form of Article 129.

[260] Gesetz zur Umsetzung des Rahmenbeschlusses des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung vom 22.12.2002, Bundesgesetzblatt 2003 I, 2836.

The creation of §§ 129, 129a StGB as well as every amendment with respect to these provisions have been accompanied by harsh criticism from German scholars.[261] The criticism has especially been directed towards the very low threshold used to criminalise supporting acts. One scholar observes for example, that §129 penalises to a great extent behaviour that may be considered to be socially acceptable ("sozialadäquate Verhaltensweise").[262] By this, it is said, the legislator criminalises the mere mental attitude of the perpetrator ("Gesinnungsstrafrecht").[263] The high minimum penalty and extension of the catalogue of crimes, for which the organisation must be directed at, to crimes that are not typically terrorist acts has also been the subject of criticism.[264] This position of law is seen to lead to the possibility of circumstances in which mere membership to a group that aims to commit certain crimes in some cases may most likely receive a stiffer penalty, than the commission of the crimes provided for in § 129a StGB.[265]

Criminal associations are seen to pose increased danger for the legal goods and interests that the state and its citizens seek to protect.[266] Generally, the legal interest protected under the provisions §§ 127, 129 and 129a StGB is 'public security and the state's order'.[267] In addition, criminal associations are considered to present a general danger to society arising from their internal dynamics, where the individual's will is subordinated to that of the group. This reduces a feeling of individual responsibility thereby making it easier for its members to commit

[261] For an overview see T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129a marginal no.1a.

[262] F. Dencker, *Kritische Justiz* (1987), p. 36, 49.

[263] F. Dencker, *Kritische Justiz* (1987), p. 36, 49: also see M. Kilchling, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 746, who states that as a result the Federal Court of Appeals has established very high evidentiary standards for the subjective elements of the offences set out in Articles 129 and 129 a to avoid abuse of the two provisions.

[264] K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129a, marginal. no. 11, 12, give as examples § 305a ("Destruction of important means of production") and § 316b ("Disruption of public services") StGB.

[265] K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129a, marginal. nos. 11, 12; see further F. Dencker, *Kritische Justiz* (1987), p. 36, 49, who considers measures adopted in these provisions to be rather similar to those of a state run by the police ("polizeistaatlichen Charakters").

[266] A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy: Different Legal Models against Criminal Collectives*' (2011), p. 34.

[267] Decision of the German Federal Supreme Court of 22.2.1995, Neue Juristische Wochenschrift 1995, p. 2117, 2118; decision of the German Federal Supreme Court of 10.3.2005, Neue Juristische Wochenschrift 2005, p. 1668, 1669; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129, marginal no. 2; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 1.

crimes.[268] The practical relevance of §§ 127 to 129a StGB is relatively low, given that there have been few prosecutions.[269]

The crimes set out in §§ 127, 129 and 129a StGB bear certain similarities with the offence of criminal agreement in § 30 StGB. Both concepts create criminal responsibility for co-operation in carrying out crime, and criminalise conduct involved in the preparatory stages of a crime. However, some crucial conceptual differences can be identified. While it is sufficient for two people to form a criminal agreement, the crimes of criminal association require the involvement of at least three people and a certain level of organisation. In particular, under § 129 and § 129a StGB the mere agreement by a perpetrator to commit or contribute directly to the target crimes would not be sufficient to create criminal liability, instead, they require the performance of an act by such a perpetrator that supports the functional ability of the organisation itself. Whereas the offence of criminal agreement in § 30 StGB is classified as a mode of participation, the crimes on criminal association are distinct crimes in their own right.

2.3.2 Spain

2.3.2.1 The Offence of Conspiracy (Criminal Agreement)

The offence of conspiracy in Spain is not considered a crime in its own right but is classified as attempted participation.[270] Liability for conspiracy is provided in Article 17 of the Spanish criminal code.[271] This article actually refers to punishment for attempted participation in respect only to some crimes.[272]

---

[268] The German Federal Supreme Court decision of 11.10.1978, Neue Juristische Wochenschrift 1979, 172–173; A. Maljevic, '*Participation in a Criminal Organisation' and 'Conspiracy*'::*Different Legal Models against Criminal Collectives* (2011), p. 34.

[269] Most authors consider the provisions to be important rather for their symbolic value, see T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129a, marginal no. 3; with regard to symbolic criminal law in general see W. Hassemer, *Neue Zeitschrift für Strafrecht* (1989), p. 553.

[270] F. Muñoz Conde and M. García Arán, *Derecho Penal-Parte General*, 8th edn. (2010), p. 448 et seq; José Luis De la Cuesta, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 802.

[271] *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*.

[272] Article 17 states:

1. La conspiración existe cuando dos o más personas se conciertan para la ejecución de un delito y resuelven ejecutarlo.

2. …

3. La conspiración y la proposición para delinquir sólo se castigáran en los casos especialmente prexistos en la Ley.

1. Conspiracy exists when two or more persons agree to the commission of a crime and resolve to execute it.

2.…

3. The conspiracy and incitement to commit a crime is punished only in cases expressly provided for by law. (Translation by Author).

Article 17.1 provides that two or more people are liable for conspiracy when they agree upon the commission of a crime and resolve to execute it. Subsection three of the article further makes conspiracy punishable only with respect to those crimes specifically proscribed by law. It is interesting to note that genocide, crimes against humanity and war crimes are among the crimes, which are punishable under conspiracy in the Spanish criminal code.[273]

To constitute a conspiracy there should be a union of wills by its participants, reflected in a complete and concrete plan, aimed towards the commission of the same act, and with a firm intention to carry it out.[274] In the instance that the underlying crime is committed, the conspiracy merges into the substantive offence.[275] The participants in the conspiracy are then classified either as perpetrators or accessories depending on their role in contributing to commission of the target crime. This fact of merger confirms that conspiracy under Spanish law is a mode of participation as opposed to a crime in its own right. All members of a conspiracy are equally liable for participation in the conspiracy.[276] Since conspiracy is classified as attempted participation, it is also absorbed into attempt of the target offence, once the actions of the participants qualify as such.[277] Conspiracy under Spanish law, unlike the common law conspiracy, does not attribute vicarious liability to a defendant for acts carried out by other co-conspirators in pursuance of the conspiracy, without any contribution on the part of the defendant.[278] Liability for conspiracy attracts a much lower punishment or penalty in comparison to its target offence.[279] A co-conspirator who decides to abandon a

[273] Article 615 referring to crimes against the international community. Other provisions which provide for crimes punishable for conspiracy are: Articles 141 makes it criminal to conspire to commit murder; 151 conspiracy to assault; 168 conspiracy to kidnap; 269 conspiracy to commit robbery with violence; extortion, fraud, criminal conversion; 304 knowingly receiving stolen goods; 373 conspiracy to commit drug related crimes; 477 conspiracy to commit treason; 488 conspiracy to commit crimes against the crown (killing, assaulting and kidnapping); 519 illegal association (described in Article 515 to constitute those who come together for purposes of committing a crime); 548 conspiracy to commit crimes against public order; 553 conspiracy to attack a public servant; 579 conspiracy to commit terrorist crimes; 585 conspiracy to help Spanish enemies attack Spain.

[274] José Luis De la Cuesta, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 802.

[275] Muñoz Conde and García Arán, *Derecho Penal Parte General*, 8th edn. (2010), p. 447.

[276] Obote-Odora A., 8 *Murdoch University Electronic Journal of Law* (2001), para 19.

[277] Muñoz Conde and García Arán, *Derecho Penal Parte General*, 8th edn. (2010), p. 449.

[278] José Luis De la Cuesta, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 802, stating that no special attributes have been introduced in Spain to broaden the field of conspiracy.

[279] Muñoz Conde and García Arán, *Derecho Penal Parte General*, 8th edn. (2010), p. 448, referring to conspiracy as attracting a penalty which is lower in one or two degrees than the punishment of its target offence. For example in the case of homicide the Spanish Penal code provides for a penalty of 10–15 years imprisonment, following the formula provided for punishing conspiracy, conspiracy to commit homicide would make one liable for 5 years to

conspiracy will only escape liability if the act is done voluntarily and sufficient effort is used to effectively frustrate the conspiracy.[280]

2.3.2.2 Criminal Organisation Offences

To counter the special dangers posed by group criminal activity the Spanish criminal code, in its special part, provides for certain group crimes that specifically address this issue. The first category of crimes is that referring to illicit associations. Although the Spanish constitution does recognise the fundamental right of association,[281] illicit associations are criminalised in Articles 515 to 521, to punish those who abuse this fundamental right. Article 515 criminalises and provides for punishment of four types of illicit associations.[282] The first refers to illicit associations whose goal is to commit a felony or after their formation, promote

(Footnote 279 continued)
10 years (one degree lower) or 2 years and 6 months to 5 years (two degrees lower) imprisonment.

[280] Muñoz Conde and García Arán, *Derecho Penal Parte General*, 8th edn. (2010), p. 449. Voluntarily in this context means a decision made without any initial intervention from the authorities.

[281] Article 22 of the Spanish Constitution.

[282] Article 515 states: *Son punibles las asociaciones ilícitas, teniendo tal consideración*:

1. Las que tengan por objeto cometer algún delito o, después de constituidas, promuevan su comisión, así como las que tengan por objeto cometer o promover la comisión de faltas de forma organizada, coordinada y reiterada.

2. (abroged)

3. Las que, aun teniendo por objeto un fin lícito, empleen medios violentos o de alteración o control de la personalidad para su consecución.

4. Las organizaciones de carácter paramilitar.

5. Las que promuevan la discriminación, el odio o la violencia contra personas, grupos o asociaciones por razón de su ideología, religión o creencias, la pertenencia de sus miembros o de alguno de ellos a una etnia, raza o nación, su sexo, orientación sexual, situación familiar, enfermedad o minusvalía, o inciten a ello.

6. (abroged)

The following shall be considered punishable as illicit associations:

1. An association formed to commit a felony, or an association which after its foundation, promotes the commission of such crimes, and those association formed for purposes of committing or to promote the commission of misdemeanours in an organised, coordinated and consistent manner.

2. [Deleted].

3. Those associations which, although designed for a lawful purpose, use violent means or alter or control personality to achieve their goals.

4. Any paramilitary organizations.

5. Those associations which promote discrimination, hatred or violence against persons, groups or associations on grounds of ideology, religion or beliefs, membership of its members or any of them to an ethnic group, race or nationality, gender, sexual orientation, family situation, illness or disability, or incite such conduct.

6. [Deleted]. (Translation by Author).

commission of such crime, or those whose intention is to continually commit or promote the commission of misdemeanours in an organised, and co-ordinated manner. The second type (subsection 3) refers to associations which although have a legitimate aim use violent means or means that control personalities to achieve their aim. The third one (subsection 4) refers to associations of paramilitary character and the last one (subsection 5) refers to associations that promote discrimination, hatred or violence against people, groups, or associations because of ideology, religion or other beliefs. Under Article 517 it is criminal to be a member of an illicit association. The provision further provides for a distinction between simple members and the founders, directors and presidents of such a group by giving more severe punishment for those in leadership positions.[283] Co-operation with such an illicit association is also punishable under Article 518. Co-operation here means any help or support given to the association, which is not sufficient to qualify one giving such assistance as a member of the association.[284]

Both conspiracy in the Spanish criminal code and the crime of illicit associations punish cooperation for purposes of committing crimes, but certain differences exist. Unlike the concept of conspiracy in the Spanish criminal code, the crime of membership in an illicit association is independent and is punishable regardless of commission of crimes pursuant to its criminal goal.[285] Therefore, a defendant in this case would be liable for both the crime of membership and any other crime he contributes to. The concept of illicit association further targets associations with a long-term goal and such associations should consist of at least three persons. It may have a complex or organised power structure depending on its activities, with a criminal programme and division of labour.[286]

---

[283] Leaders will be sentenced to 2–4 years' imprisonment, a fine and are prohibited from holding public office for 6–12 years. Members are only sentenced to 1–3 years' imprisonment and a fine.

Article 517 reads: *En los casos previstos en los números 1 y 3 al 6 del artículo 515 se impondrán las siguientes penas:*

1. A los fundadores, directores y presidentes de las asociaciones, las de prisión de dos a cuatro años, multa de doce a veinticuatro meses e inhabilitación especial para empleo o cargo público por tiempo de seis a doce años.

2. A los miembros activos, las de prisión de uno a tres años y multa de doce a veinticuatro meses.

[284] See Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 849.

[285] Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 847.

[286] The Spanish Supreme Court defines criminal associations as groups of at least three persons organised in a hierarchical manner, with discipline being an integral part of their operation, STS, 2nd hall, 25-1 and 27-5-1988; Muñoz Conde, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 847; José Luis De la Cuesta, 'Organised Crime Control Policies in Spain: A 'Disorgansied' Criminal Policy for 'Organised' Crime, in in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 800.

Recently, to fortify the crime of illicit associations, the legislature introduced certain provisions in the criminal code creating criminal responsibility for belonging to criminal organisations or groups.[287] The promotion, creation, organisation, co-ordination, or leadership of a criminal organisation is a criminal offence.[288] Active participation, membership and co-operation with such an organisation are also punished. The constitutive elements of a criminal organisation are five: (i) the existence of a group, (ii) such group should consist of more than two persons, (iii) it should have an indefinite time structure/stable character, (iv) its members share functions and tasks in an agreed or co-ordinated manner and (v) has a goal to commit serious crimes or repeatedly commit misdemeanours.[289] Punishment for involvement in such an organisation depends on the crimes, which constitute the goal of the organisation.[290] The punishment here is cumulative with punishment for other crimes committed by such organisation.

[287] Organic Law 5/2010 of 22 June.

[288] Article 570 bis of the Spanish criminal code states:

1. *Quienes promovieren, constituyeren, organizaren, coordinaren o dirigieren una organización criminal serán castigados con la pena de prisión de cuatro a ocho años si aquélla tuviere por finalidad u objeto la comisión de delitos graves, y con la pena de prisión de tres a seis años en los demás casos; y quienes participaren activamente en la organización, formaren parte de ella o cooperaren económicamente o de cualquier otro modo con la misma serán castigados con las penas de prisión de dos a cinco años si tuviere como fin la comisión de delitos graves, y con la pena de prisión de uno a tres años en los demás casos.*

A los efectos de este Código se entiende por organización criminal la agrupación formada por más de dos personas con carácter estable o por tiempo indefinido, que de manera concertada y coordinada se repartan diversas tareas o funciones con el fin de cometer delitos, así como de llevar a cabo la perpetración reiterada de faltas.

1. Whosoever promotes, constitutes, organises, directs, coordinates an organization created for criminal purposes will be punished with imprisonment from four to eight years if its purpose or object is the commission of serious crimes, with imprisonment of three to six years in other cases, and those who actively participate in the organization, form part of it or support it financially or otherwise, shall be punished with imprisonment from two to five years if it was intended to commit serious crimes and with imprisonment of one to three years in other cases.

For the purposes of this Code a criminal organization means a group of a stable nature or exists for an indefinite period consisting of more than two people, who concertedly and in a coordinated manner carry out various tasks or functions in order to commit serious crimes and to repeatedly bring about the commission of misdemeanours. (Translation by Author).

[289] Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 910.

[290] For those involved in formation and leadership of the organisation punishment ranges from 4 to 8 years for serious crimes and 3–6 years for misdemeanours. Those involved at the membership or co-operation level will be liable for 2–5 years for serious crimes and 1–3 years for misdemeanours, see Article 570 bis 1 note 241 of the Spanish criminal code.

Article 570 *ter* further criminalises the creation, financing or membership in a criminal group.[291] A criminal group is defined as a union of at least two people not having one or more traits of the criminal organisation with the goal of committing serious crimes or repeatedly committing misdemeanours. Criminal groups are not necessarily organised in any hierarchical manner and may be referred to as loose associations. Also punishable under criminal groups are terrorist groups, which were previously punishable as illicit associations.[292] Similarities can be drawn between the constitutive elements of a criminal group and the concept of conspiracy under common law jurisdictions. Like with common law conspiracy, two people suffice to form a criminal group, and it does not need to be organised in a hierarchical structure. The offence on criminal groups is also an independent crime.

The element of shared functions or tasks in an agreed manner makes the crimes of criminal organisation and groups resemble the conduct punishable as conspiracy

---

[291] Article 570 ter in part reads: 1. *Quienes constituyeren, financiaren o integraren un grupo criminal serán castigados*:

…

A los efectos de este Código se entiende por grupo criminal la unión de más de dos personas que, sin reunir alguna o algunas de las características de la organización criminal definida en el artículo anterior, tenga por finalidad o por objeto la perpetración concertada de delitos o la comisión concertada y reiterada de faltas.

Whosoever constitutes, finances a criminal group or integrates into it will be punished

…

For the purposes of this Code a criminal groups means the union of at least two people who concertedly, without meeting one or more of the characteristics of the criminal organization as defined in the previous article, have the purpose or intend the commission of serious crimes or the repeated commission of misdemeanours. (Translation by Author).

[292] Article 571 states in part:

1. *Quienes promovieren, constituyeren, organizaren o dirigieren una organización o grupo terrorista serán castigados con las penas de prisión de ocho a catorce años e inhabilitación especial para empleo o cargo público por tiempo de ocho a quince años.*

…

3. *A los efectos de este Código, se considerarán organizaciones o grupos terroristas aquellas agrupaciones que, reuniendo las características respectivamente establecidas en el párrafo segundo del apartado 1 del artículo 570 bis) y en el párrafo segundo del apartado 1 del artículo 570 ter, tengan por finalidad o por objeto subvertir el orden constitucional o alterar gravemente la paz pública mediante la perpetración de cualquiera de los delitos previstos en la Sección siguiente.*

1. Whosoever promotes, constitutes, organises or directs a terrorist organization or group shall be punished with imprisonment from eight to fourteen years and specific disqualification from holding public office for a period of eight to fifteen years.

…

3. For the purposes of this Code terrorist organizations or groups is considered to comprise of those that bring together all the characteristics set forth respectively in the second subparagraph of paragraph 1 of Article 570 bis) and in the second paragraph of Article 570 paragraph 1 ter, whose purpose or intention is to subvert the constitutional order or seriously alter the public peace by the perpetration of any offense provided for in the next section. [The next section refers to Section II on TERRORISM AND RELATED CRIMES added by Law 5/2010 of 22 June].

under the Spanish criminal code. However, certain fundamental differences can be identified.[293] First, while only two persons form a conspiracy, a criminal organisation ought to consist of more than two persons, even though, two people may be considered to form a criminal group. Second, punishment of conspiracy is restricted to only certain crimes specifically proscribed by law, whereas a criminal organisation or group may have the goal to commit any crime. Third, while punishment for conspiracy is more dependent on its target crime, the law proscribes specific punishment for participants in a criminal organisation or group independent of punishment proscribed for their target crimes. Fourth, whereas the concept of conspiracy under the Spanish criminal code is punishable only while its target crime remains unexecuted, the criminal organisations and groups offences are autonomous and are punishable irrespective of their target crimes. The elements of criminal organisation in the Spanish criminal code sufficiently resemble those of illicit associations, which also include organisation in a hierarchical structure and have a fairly permanent structure (established for an indefinite period), it is admitted that indeed an overlap exists between both crimes.[294]

2.3.3 France

The French Penal Code[295] has several provisions that proscribe conduct carried out through criminal association. Chapter II makes punishable certain offences involving co-operation for criminal purposes against the institutions of the Republic. This chapter falls under the fourth book of the penal code, which proscribes felonies and misdemeanours against the nation, the state and public peace.[296] Conspiracy as a distinct crime does not exist under French law, but conduct of conspiracy nature is made punishable in two concepts, that of '*complot*' and '*association de malfaiteurs*'.

2.3.3.1 Complot

Article 412-2 proscribes *complot*. This offence has also been referred to in other forums as conspiracy.[297] The translation of Article 412-2 reads:

---

[293] Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 910.

[294] Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 911. It is argued that the crime of illicit associations was not sufficient to accommodate all possible types of criminal organisations.

[295] Referred to as *Code Pénal*.

[296] *Livre IV Des crimes et délits contre la nation, l'État et la paix publique* (*Code Pénal*).

[297] See *Musema*, ICTR (TC), para 186.

> Plotting consists of a resolution agreed upon by two or more to commit an attack where the resolution was put into effect by one or more material actions.
> Plotting is punished by ten years' imprisonment and a fine of € 150,000.
> The penalty is increased to twenty years' criminal detention and a fine of € 300,000 where the offence was committed by a person holding public authority.[298]

The term 'attack' means 'the commission of one or more acts of violence liable to endanger the institutions of the Republic or violate the integrity of the national territory'.[299] Use of the terms 'resolution agreed upon by two or more persons' equates *complot* or 'plotting' to punishing conduct of conspiracy nature, under which an agreement to commit a crime is punishable. *Complot* becomes punishable only when one or more material acts in relation to it are carried out. This requirement of performance of 'one or more material acts' may be equated to the Anglo-American common law conspiracy 'overt act' requirement. *Complot* is only punishable if it is proved that it was a precisely determined concrete plan.[300] In the first case that *complot* is punished with 10-years' imprisonment it is considered to be a misdemeanour (*délit*), and in the second case of 20-years imprisonment it is punished as a felony (*crime)*.

2.3.3.2 Association *de malfaiteurs* (Criminal Associations)

The provisions that create criminal responsibility for participation in a criminal association also make punishable conduct of conspiratorial nature.[301] Article 450-1 defines a criminal association as any group formed or any conspiracy ('*entente*') established with a view to prepare for the commission of a felony or a misdemeanour punishable by at least five years. The preparation must be marked by one

---

[298] The article reads: *Constitue un complot la résolution arrêtée entre plusieurs personnes de commettre un attentat lorsque cette résolution est concrétisée par un ou plusieurs actes matériels.*
Le complot est puni de dix ans d'emprisonnement et de 150000 euros d'amende.
Les peines sont portées à vingt ans de détention criminelle et à 300000 euros d'amende lorsque l'infraction est commise par une personne dépositaire de l'autorité publique.(Translation in text extracted from French Penal Code -translated version, in www.legifrance.gouv.fr/html/codes).

[299] Article 412-1 French Penal Code states: *Constitue un complot la résolution arrêtée entre plusieurs personnes de commettre un attentat lorsque cette résolution est concrétisée par un ou plusieurs actes matériels*.

[300] See decision of the French High Court (Criminal Division), 12 mai 1980: *Bull. Crim*., no. 153.

[301] T. Godefroy in, C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 769, actually refers to this offence as criminal conspiracy; also see H. Donnedieu de Vabres, in G. Mettraux, *Perspectives on the Nuremberg Trial* (2008), p. 245.

or more material actions.[302] This essentially means that simple membership in a criminal association will not create criminal responsibility unless it is tied to the preparation of an offence.[303] This provision especially targets conduct preliminary to commission of serious crimes carried out by criminal associations.[304] The crime of illicit associations has undergone a number of transformations since its inception after the French Revolution.[305] The first provisions that proscribed organised criminal groups were contained in the Napoleonic Penal Code of 1811.[306] It was adopted to punish the gangs of rural bandits that emerged after the revolution and

[302] Article 450-1 states: *Constitue une association de malfaiteurs tout groupement formé ou entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un ou plusieurs crimes ou d'un ou plusieurs délits punis d'au moins cinq ans d'emprisonnement.*

Lorsque les infractions préparées sont des crimes ou des délits punis de dix ans d'emprisonnement, la participation à une association de malfaiteurs est punie de dix ans d'emprisonnement et de 150000 euros d'amende.

Lorsque les infractions préparées sont des délits punis d'au moins cinq ans d'emprisonnement, la participation à une association de malfaiteurs est punie de cinq ans d'emprisonnement et de 75000 euros d'amende.

(A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.

Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, the participation in a criminal association is punished by ten years' imprisonment and a fine of € 150,000.

Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of € 75,000).

[303] T. Godefroy in, C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 770.

[304] See decision of the French High Court (Criminal Division), 29 December 1970: *JCP* 71, II, 1670, affirming the application of this provision to situations where members of such association had not yet committed the crimes.; T. Godefroy in, C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 769.

[305] See Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996), p. 263, pp. 304–310 for a brief account of the history.

[306] *Code Pénal* Articles 265–68 (1811) (Fr.). The respective articles stated:

Article 265: Every association of those who would commit crimes against persons or property is a crime against the public peace.

Article 266: The crime is complete when the group is organised, or there is correspondence between the groups and their leaders or commanders, or by gatherings to settle accounts or to distribute or divide the gains from their misdeeds.

Article 267: When no one else has joined or followed in the crime, the principals, the directors of the association, and the commanders in chief or those of lower rank, shall be punished by forced labour.

Article 268: All other individuals who provided any service whatsoever to the gangs, and those who freely and knowingly provided the gangs or their divisions with arms, munitions, instruments of crimes, lodgings, hiding places, or meeting places, shall be incarcerated. (Extracted from Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996), pp. 305–306.

terrorised the French countryside.[307] Any association of persons with a criminal goal directed towards person or property was declared to be a crime against the public peace (Article 265). This law only applied to criminal organisations with a hierarchical or formal structure constituting of leaders and subordinates (Article 266), and membership in such organisations was punishable although no crimes had yet been executed following their establishment (Article 267). The requirement that such organisation had to be large, have a fairly permanent structure, be organised in a hierarchical manner and have members with a criminal past proved to be ineffective with the increase of loosely organised criminal groups otherwise referred to as anarchist groups.[308] These anarchist groups by their very nature and philosophical ideologies were opposed to hierarchical organisations.[309] In response to this new phenomenon, the French Parliament revised the criminal association statutes, removing the requirement that a criminal association must have a formal structure. The revised laws no longer required a specified number of members, hierarchy, or division of spoils, and a criminal association could be created by an agreement to commit serious crimes.[310] A requirement that defendants must commit at least one overt act in furtherance of the criminal association was further, added by parliament in 1981.[311] The revised French Penal Code that came into effect on 1 March 1994 expanded the target offences of criminal associations to include misdemeanours punishable by 10-years imprisonment.[312]

Criminal association is an offence independent of its target offences.[313] As currently defined in the French Penal Code, the offence of illicit associations refers to a group offence whose main elements include, a collective understanding of the criminal purpose, an aim to prepare for certain criminal acts and an intention that the criminal acts be carried out.[314] The members do not need to know every activity of the group; all that is necessary is that they are aware of the criminal

---

[307] T. Godefroy, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 769.

[308] See E. M. Wise, 27 *Syracuse J. Int'l L. & Com* (2000), p. 315.

[309] Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996), p. 307.

[310] *Code Pénal* Article 265 (1893) (Fr.). "Toute association formée, quelle que soit sa durée ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés, constituent un crime contre la paix publique".

(Every association, regardless of the number of its members, every understanding made with the goal preparing to commit or committing crimes against people or property, is a crime against the public peace) [Extracted from, Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996), p. 307].

[311] Law no. 81–82 of 2 February 1981, 1981 B.L.D, 86 (Fr).

[312] Loi n. 92-1336 of 16 Dec. 1992, Article 373, J.O at 17,586, 23 Dec. 1992, (Fr.) modified by loi n. 93-913 of 19 July 1993, J.O. at 10,199, 20 July, 1993 (Fr.); see Articles 450-1 to 450-3 *Code Pénal*.

[313] See decision of the French High Court (Criminal Division), 22 January 1986: *Bull. crim*., no. 29; decision of the French High Court (Criminal Division), 30 April 1996: *Bull. crim*., no. 176; also Alexander D. Tripp, 20 *Fordham Int'L.J*. (1996) 263, p. 308.

[314] Decision of the French High court (Criminal Division), 26 May 1999: *Bull. crim*., no. 103; T. Stenson, 1 *The Journal of International Law & Policy* (2003–2004), p. 23.

nature of such association.[315] It is not necessary that the crimes that constitute such an association's objective are clearly defined or determinable; it suffices that the members of such an association carry out one or more preparatory acts in relation thereto.[316] The members do not need to have personally carried out the offences or preparatory acts to be considered liable under this offence.[317] These requirements resemble common law conspiracy, and the provision has also in some instances been referred to as a conspiracy provision.[318] Although conspiracy constitutes an integral part of what may be defined as a criminal association, it is not the agreement that creates criminal responsibility but rather the criminal association created as a result of such criminal agreement ('*entente*').

The French Penal Code also gives an opportunity to a renouncing member of the criminal association to be exempted from liability. Any person, who has participated in a criminal association and discloses the existence of such group or conspiracy to competent authorities, enabling its members to be identified before any prosecution is instituted, will be exempted from punishment.[319] Under the French Law one is only criminally liable for his own conduct.[320] This provision negates the possibility of having an expansive conspiracy theory, which allows for attribution of liability for conduct carried out by other members of such criminal association or co-conspirators.

Certain circumstances under the French Penal Code are considered to lead to heavier sentences.[321] Among these special circumstances are included crimes committed by organised gangs and agreements made to carry out certain offences.[322] This is a clear indication of how serious such conduct is considered to be, in terms of endangering society. An organised gang is defined as any group formed or association established with a view to the preparation of one or more criminal

[315] Decision of the French High Court (Criminal Division), 11 June 1970: *Bull. crim*., no. 199.

[316] Decision of the French High Court (Criminal Division), 22 August 1959: *Bull. crim*., no. 389; decision of the French High Court (Criminal Division), 20 June 1989, *Martin*, inédit; decision of the French High Court (Criminal Division), 15 déc. 1993: *Dr. pénal* 1994, comm. No 131.

[317] Decision of the French High Court (Criminal Division), 4 July 1989, inédit.

[318] See the translated French Penal Code, the Code actually uses the term 'conspiracy' for the term '*entente*' which refers to agreement in www.legifrance.gouv.fr/html/codes; also see *Musema*, ICTR (TC) para 186.

[319] Article 450-2 French Penal code.

[320] Article 121-1 French Penal Code.

[321] Section III of the French Penal Code ('*De la définition de certaines circonstances entraînant l'aggravation, la dimunition ou l'exemption des peines*').

[322] T. Godefroy, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 770.

offences.[323] Such preparation should be marked by one or more material actions. The definition of an organised gang includes a criminal association, which may be constituted by an agreement and also includes conduct of conspiracy nature itself ('*entente*'). The penal code also makes it criminal to participate in a group formed or an agreement established with a view to preparation of certain serious crimes.[324]

2.3.4 Italy

2.3.4.1 Criminal Agreement

As a general principle of law, preparatory acts under Italian law are not punishable if their underlying crime is not committed, unless the preparatory acts in themselves are considered to be crimes.[325] In Italian criminal law, when two or more people agree to carry out a crime and fail to execute it, they are not liable for punishment for the mere act of agreement (conspiracy), unless the law specifically provides otherwise.[326] The exceptional cases in which criminal agreements may be punishable relate to offences directed against the state that are subversive in

---

[323] Article 132-71 French Penal Code states: *Constitue une bande organisée au sens de la loi tout groupement formé ou toute entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'une ou de plusiers infractions*. (An organised gang within the meaning of the law is any group formed or association established with a view to the preparation of one or more criminal offences, preparation marked by one or more material actions) (Translation from the translated French Penal Code).

[324] These crimes include felonies defined by Articles 211–1(Genocide) and 212–2(Crimes against humanity) and crimes punished by criminal imprisonment for life (Article 212–3 French Penal Code); (Article 214-4) participation in an organised gang to carry out eugenic practice aimed at organising the selection of persons or carrying out any procedure designed to cause the birth of a child identical to another person, is punished by criminal imprisonment for life and a fine of €7,500,000.00; (Article 222–4) where an organised gang subjects a person to torture or to acts of barbarity the penalty is aggravated and the persons involved will be liable to 30 years criminal imprisonment; (Article 222–34) leading or organising a group with the objective to produce, manufacture, import, export, transport, retention, offer, sale, acquisition or unlawful use of drugs is punished by criminal imprisonment for life and a fine of € 7,500,000.00; (Article 225-4-1) when human trafficking is carried out by an organised gang it is punishable by 20 years imprisonment for life and a fine of € 3,000,000.

[325] See Article 56 *Codice Penale* (The Italian Penal Code); G. Marinucci and E. Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), p. 376.

[326] Article 115 *Codice Penale* states:

Salvo che la legge disponga altrimenti, quolora due o più persone si accordino allo scopo di commettere un reato, e questo non sia commesso, nessuna di esse è punibile per il solo fatto dell' accordo. (Except as the law provides otherwise, whenever two or more persons agree to commit an offence, and it is not committed, none of them shall be punishable for the mere fact of agreement). [Translation from. THE ITALIAN PENAL CODE 40 (American Series of Foreign Penal Codes vol. 23, Edward M. Wise & Allen Maitlin trans., 1978 extracted from E. M. Wise, 27 *Syracuse J. Int'l L & Com* (2000), p. 312]; also see G. Marinucci and E. Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), pp. 377–378.

nature.[327] The rationale behind this is that conspiracy is considered to be a mere state of mind, which causes no harm. Although conspiracy in itself is not punishable, the judge may make an order for security measures (*libertà vigilata*).[328] Security measures are applied if a person shows the capability of being socially dangerous. This however, is not considered to be punishment. Criminal liability only begins after an attempt of the crime is carried out.[329]

Instead of the concept of conspiracy like in the common law countries, to deal with situations in which crimes are committed through the cooperation of more than one person, the Italian law recognises the concept *il Concorso di Persone Nel Reato* (Persons working together in crime).[330] To be punishable under this concept there must be a plurality of persons, the commission of a crime, the accused's conduct must have some causal influence to the crime committed, and an accused must participate with knowledge and intention to contribute to perpetration of the crime.

2.3.4.2 Criminal Associations

To deal with the problem of crimes committed by a group of people acting in concert, the Italian penal code provides for the crime *Associazione per delinquere* (Criminal Association) under part IV on crimes against public order.[331] Italy has a long history of criminal organisations, and provisions against criminal groups exist from the time of Roman law.[332] The current Italian Penal Code promulgated in 1931 introduced Article 416, which provides that where three or more persons combine to carry out criminal acts they shall be punishable for this reason alone.[333]

---

[327] These include: Article 270 Associazioni sovversive (Subversive associations); Article 271 Associazioni antinazionali (Anti-national associations); Article 304 Cospirazione politica mediante accordo (Political conspiracy by agreement); Article 305 Cospirazione politica mediante associazione (Political conspiracy through association); Article 306 Banda Armata: Formazione e partecipazione (Armed gang: Training and participation). [Translation by Author].

[328] See Article 228 *Codice Penale*; M. Maiwald, *Einführung in das italienische Strafrecht und Strafprozessrecht* (2009), p. 139.

[329] See Article 56 (*Delitto tentato*) *Codice Penale*.

[330] G. Marinucci and E. Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), p. 394 et seq.

[331] Provided in *Codice Penale* titled '*Dei Delitti Contro L'ordine Pubblico*'.

[332] See A. D. Tripp, 20 *Fordham Int'l. L. J.* (1996), pp. 297–304 for a brief overview of history.

[333] I. *Quando tre o più persone si associano allo scopo di commettere più delitti, coloro che promuovono o costituiscono od organizzano l'associazione sono puniti, per ciò solo, con la reclusione da tre a sette anni.*

II. *Per il solo fatto di partecipare all'associazione, la pena è della reclusione da uno a cinque anni.* (I. When three or more people associate for the purpose of committing more than one crime, those who promote or constitute or organise the association shall be punished, for that alone, by imprisonment from three to seven years.

II. For the act of participating in the association alone, the punishment shall be imprisonment from one to five years) (Translation extracted from E. M. Wise, 27 *Syracuse J. Int'l L & Com* (2000), p. 316).

In this provision the agreement that underlies such combination is not punished, but rather the product of it, which is the criminal association.[334] The criminal association is not required to have a specific hierarchical structure, only that it should be of a permanent nature, consisting of at least three persons committed to carrying out an open ended series of criminal conduct.[335] Membership to such an association or organisation should be voluntary, with its members agreeing to pursue the shared criminal goal of such association.[336] It is not sufficient for the members to plan only a fixed number of crimes or commit isolated criminal acts they must intend to engage in a continuous series of criminal conduct, otherwise, they would only be considered liable as accomplices in the case of the isolated or fixed number of crimes committed, as opposed to being guilty as members of a criminal association.[337] The criminal association is punished in such circumstances, for the additional danger it poses to the society with its indeterminate criminal programme.

To further reinforce the provision on criminal associations, in 1982, Article 416 *bis* was added into the Italian Penal Code, making anyone who forms a mafia type organisation liable to a penalty of imprisonment.[338] A group of three or more people who use intimidation to commit crimes, or gain control over businesses or

---

[334] A. D. Tripp, 20 *Fordham Int'l. L. J.* (1996) at p. 300; E. M. Wise, 27 *Syracuse J. Int'l L & Com.* (2000), p. 317.

[335] 7 Manzini, *Trattaro Di Diritto Penale Italiano* (1986), p. 195.

[336] 7 Manzini, *Trattaro Di Diritto Penale Italiano* (1986), p. 195.

[337] 7 Manzini, *Trattaro Di Diritto Penale Italiano* (1986), pp. 194, 195, 202.

[338] Law no. 646 of 13 September 1982, 9 Racc. Uff. 2537 (1982) (It.); Article 416 *bis* states in part:

I. Chiunque fa parte di un'associazione di tipo mafioso formata da tre o più persone, è punito con la reclusione da cinque a dieci anni

II. …

III. *L'associazione è di tipo mafioso quando coloro che ne fanno parte si avvalgano della forza di intimidazione del vincolo associativo e della condizione di assoggettamento e di omertà che ne deriva per commettere delitti, per acquisire in modo diretto o indiretto la gestione o comunque il controllo di attività economiche, di concessioni, di autorizzazioni, appalti e servizi pubblici o per realizzare profitti o vantaggi ingiusti per sé o per altri,….*

…

VII. *Le disposizioni del presente articolo si applicano anche alla camorra e alle altre associazioni, comunque localmente denominate, che valendosi della forza intimidatrice del vincolo associativo perseguono scopi corrispondenti a quelli delle associazioni di tipo Mafioso.*
(Whoever belongs to a mafia-type association comprised of three or more persons shall be punished by imprisonment from five to ten years…

An association is a mafia-type association when those who belong to it rely on the intimidative force of associative ties, and on the discipline and code of silence resulting therefrom, in order to commit crimes, to acquire directly or indirectly the management or control of economic activities, of concessions, permits, public contracts and services, or to obtain unjust profits or benefits for themselves or others….

The provisions of this article also apply to the Camorra, and other associations regardless of their local titles, that use the force of intimidation of the associative bond to follow the same goals as a mafia-type association).

public contracts may be labelled a Mafia association. A person who gives assistance to the Mafia organisation without intending to join it may be held criminally responsible for aiding and abetting the organisation under the doctrine of external complicity. Such a person is liable for the same penalties that a member of such an organisation would receive.[339]

2.3.5 Summary

The act of merely agreeing to commit a crime is expressly punished only in the German and Spanish Criminal Codes, and even so the offence of criminal agreement ("conspiracy") in both instances is not a distinct crime, but a general form of liability dependent on its target offence. While in common law jurisdictions conspiracy is utilised as the main legal tool for dealing with the challenges of criminal enterprises, the countries under civil law jurisdiction prefer to use the concept of punishing participation in a criminal association (organisation/group) or what is otherwise referred to as the 'criminal association rule'.

Under the German criminal code when two or more people agree to commit a crime or jointly instigate commission of a crime they shall be liable for punishment. Unlike in common law jurisdictions, the offence of criminal agreement here is applied more restrictively. It only applies to felonies and once the contemplated crime is realised, it merges into the substantive crime. Whereas conspiracy under common law jurisdictions may in some cases be considered equally serious as or more serious than its contemplated criminal act, under the German criminal code the mere participation in a criminal agreement is considered to attract less culpability than the substantive crime. A participant in a criminal agreement is only liable for his personal contribution to such agreement, and will not be held criminally responsible for other acts, which he did not contemplate, consent, or in any way contribute to, although carried out in pursuance of the criminal agreement. This is in contrast to the doctrine of Pinkerton or accessorial liability under the common law concept of conspiracy.

To combat crimes carried out by criminal groups the German criminal code prohibits the formation, membership, recruitment or supporting activities of armed groups (§127 StGB), criminal organisations (§ 129 StGB) and terrorist organisations (§ 129 a StGB). These crimes, like the common law concept of conspiracy, extend criminal responsibility to the preparatory stages of criminal participation. A criminal organisation ought to have at least three people who subordinate their will to that of the organisation. It needs to exist for a certain period of time and have a certain level of organisation. This definition excludes cases where persons

[339] A. D. Tripp, 20 *Fordham Int'l. L. J.* (1996), p. 304. By virtue of Article 110 *Codice Penale*, accomplices are held liable as principals in commission of a crime; also see G. Marinucci and E. Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), p. 408.

spontaneously come together to execute a certain crime, a situation that common law conspiracy would address. The offence of participation in a criminal organisation, like common law conspiracy, is a distinct offence, creating separate criminal responsibility from its contemplated crimes. Participation in a criminal organisation does not act as a form of complicity like in the case of common law conspiracy. It requires that the alleged accused through some personal act promoted the criminal objectives of the organisation, and such participant is only liable to the extent of their contribution.

The Spanish criminal code also makes punishable the act of two or more people agreeing to commit a crime. Similar to the offence of criminal agreement under German criminal law, conspiracy here is not a distinct crime but is classified as attempted participation. Punishment for conspiracy is restricted to only those crimes specifically proscribed by law. Conspiracy under Spanish law does not also act as a form of complicity. Group criminal activity is preferably dealt with under the offences on illicit associations (Articles 515 to 521), criminal organisations (Article 570 *bis* 1) and criminal groups (Article 570 *ter*). The crimes on criminal association require a combination of more than two persons with a long-term goal of committing crimes, and with exception of the crime of criminal groups, which requires a minimum of two persons, such an association should have some form of hierarchical organisation. Like the common law conspiracy, the crimes on criminal association are independent crimes punishable irrespective of commission of their underlying crimes. Whereas punishment of conspiracy under the Spanish criminal code is restricted to only some crimes, criminal organisations are punishable regardless of the crimes they intend to pursue.

Conspiracy as a distinct crime does not exist under French law, but punishment for conduct of conspiracy nature may be inferred from punishment of two forms of crime, *complot* and *association de malfaiteurs*. A resolution by two or more people to carry out acts of violence that endanger institutions of the republic or violate the integrity of the national territory is punishable under *complot* (Articles 412-2). *Association de malfaiteurs* creates criminal responsibility for participation in a criminal association (Articles 450-1). A criminal association is created either by a group or by an agreement ('entente') to commit serious crimes that is, felonies or misdemeanours, punishable by a minimum sentence of five years. The offence of illicit associations does not require a specified number of members or structure, all that is needed is a collective of persons with a common understanding of the criminal purpose, who aim to prepare for certain crimes and have an intention that they be committed. To prove criminal agreement (either as *complot* or *entente*) the prosecution must show the carrying out of an overt act or some physical evidence aimed at procuring a certain criminal end. The elements of the offence of illicit associations closely resemble common law conspiracy, however, this offence does not punish the criminal agreement itself but rather the criminal association that it creates. The offence of criminal association like common law conspiracy is a distinct crime independent of its target offences. Unlike common law conspiracy, which also acts as a form of complicity, the offence of criminal associations under French law is distinct from complicity. Under French criminal law carrying out

certain crimes by organised gangs whose definition includes criminal associations is seen as a circumstance that may lead to aggravation of penalty. A clear indication of how serious the act of combining for criminal purposes is considered.

As a general rule, conspiracy is not punishable under Italian law unless the law expressly provides otherwise. It may be inferred from this principle that in certain circumstances conduct of conspiracy nature will be punished. These exceptional circumstances refer mainly to crimes considered to be a threat to public order. Although conduct of conspiracy nature is not punishable *per se*, a Judge may make an order on security measures to ensure the goals of such conduct do not materialise. Such measures are applied only if a person shows capability of being socially dangerous. Like in most civil law countries, criminal enterprises under the Italian criminal code are combated through the offences on criminal associations. The combination of three or more persons committed to carrying out an open-ended series of crimes is subject to punishment by imprisonment (Article 416). Although it can be inferred that agreement is the underlying factor behind such combination, the crime of criminal association does not target the agreement but rather the product of it. Such an association need not have any specific hierarchical structure, but it ought to be of a permanent nature and must have an indeterminate programme for the commission of several criminal acts. The offences on criminal associations are independent crimes and are also distinct from complicity. To deal with the issue of complicity like in the situations envisaged by the common law conspiracy, the Italian criminal law prefers to analyse such conduct under the concept of 'Il Concorso Di Persone Nel Reato', a concept of complicity that deals with situations where two or more persons are involved in commission of a crime.

2.4 Evaluation

The above analysis shows that express punishment for the offence of criminal agreement or conspiracy is only found in the United Kingdom, United States, Germany and Spain. The constitutive elements of conspiracy as defined by both systems are similar. These elements include an agreement, concerted will to act, and the common goal to achieve the contemplated criminal act. In the United States, there is the added requirement that there is need for proof of an overt act carried out in furtherance of the conspiracy, for such conspiracy to be punishable. This requirement can be compared to the legal requirements under Spanish law, where a conspiracy is only punishable on the evidence of a complete and concrete plan aimed towards commission of its underlying crime. This overt act requirement is often to ensure that the conspiracy being punished is not an act that still rests in the minds of its participants, but is actually an act already being implemented. Although, the other jurisdictions do not expressly provide for an overt act requirement, this is an element that can be inferred from the practical cases.

Whereas under common law jurisdictions conspiracy is an independent inchoate crime, in Germany and Spain conspiracy is a mode of attempted

participation that merges into the crime once it is attempted or committed. Conspiracy under the common law jurisdictions has special evidential and procedural advantages and also acts as a form of complicity. The civil law countries do not provide any exceptional rules for charges relating to the offence of criminal agreement, and the principle of liability for personal conduct is strictly adhered to. Therefore, under civil law jurisdictions, participation in a conspiracy does not conclusively act as a form of complicity for crimes committed pursuant to it. The conspiracy offence under common law jurisdictions is considered serious enough to at times attract a penalty almost equivalent to that of its contemplated crime. This contrasts to the perception of the conspiracy offence in civil law countries, where it is seen to involve the least culpability, with the law directing that punishment thereof be considerably low in comparison to that required for its target offence.

Unlike common law countries, which use conspiracy as the main legal tool to deal with the special challenges presented by crimes carried out by organised criminal groups, most civil law countries prefer to use the "criminal association rule". Here, the focus is in the formation of a criminal gang for purposes of carrying out criminal acts. The relevant laws that deal with criminal association mainly place emphasis on the criminal organisation or group rather than its underlying criminal agreement. Criminal responsibility here arises as a result of participation in an organisation or group with a criminal objective. Like conspiracy under common law jurisdictions, the offences related to criminal associations are independent crimes. This means they are distinct from their target offences, with criminal liability arising although none of the crimes that form part of their criminal objective have been committed.

While it would be sufficient for two persons to form a conspiracy, in most cases participation in criminal association offences require a minimum of at least three participants and should have some form of hierarchical structure. A conspiracy exists from the moment an agreement is made. Therefore, a combination of individuals spontaneously formed to commit a crime might be held criminally responsible under the concept of conspiracy. In contrast, most offences on criminal association are punishable only from the moment that such an association is functionally and organisationally capable of realising its criminal goals. This often requires that such association has existed for a certain period or has a long term goal to commit crimes. Participation in a criminal association requires involvement in activities of forming and supporting such organisation or group. This means that a mere declaration indicating that one agrees with the aims of such an association might not suffice to create criminal responsibility, one must through some personal act support the objectives of such association.

Under the concept of conspiracy, because all participants are considered to have equally contributed in reaching the agreement, the only form of participation is that of a conspirator. Common law conspiracy also acts as a conclusive form of complicity, making participants in such conspiracy liable for all offences carried pursuant to it. The offences on criminal associations recognise that participants can have different roles in their operation and often prescribe different punishment for

the various roles, with the highest penalties being proscribed for those who participate in the formation and leadership roles. Participation in a criminal organisation does not form an automatic basis to be held liable for crimes carried out pursuant to it, for an accused has to have specifically contributed to such offence to be found culpable. Most civil law countries instead prefer to use their specific complicity provisions to deal with such conduct.

Intention in conspiracy is directed to the agreement and target crime, while intention in criminal associations is mostly directed towards the criminal association and not its underlying offences save for the instances where members demonstrate their membership through commission of offences that form part of the association's criminal objective.

Of the two concepts, the common law conspiracy model seems obviously to have a broader scope of application. The restrictive requirements on what constitutes criminal associations have proved insufficient in combating all circumstances involving group criminal activity. This situation is created by the ingenious ways used by such groups to circumvent the law continuously. To deal with these challenges, some civil law jurisdictions have been forced to reform their law. As a result, they choose to enact laws that broadly define what constitutes criminal associations, making the constitutive elements closely resemble those of conspiracy under common law jurisdictions. This is reflected in the French criminal law, where an illicit association can be formed by an agreement marked by some form of material action. In Spain, a criminal group can be constituted by a union of two persons excluding the need for a hierarchical structure. The illicit association crime under Italian law also excludes the hierarchical structure requirement. The German law goes to the extent of even making criminal the mere attempt to form a criminal organisation. In fact, some German scholars criticise German laws on what may create criminal responsibility for supporting a criminal organisation, which is seen to go as far as criminalising the mere mental attitude. This criticism reflects similar views that have been raised against the conspiracy offence. All these reforms are an indication of the continuous need to deal with potential criminal activity at the most earliest possible opportunity. The aim is to achieve this goal by use of a legal tool that can adequately deal with all forms of criminal outfits that present potential danger to the public.

If one looks at conspiracy as a group of persons cooperating for criminal purposes, it may be correct to draw an inference that the concept of punishing participation in a criminal association is equivalent to criminal responsibility that arises under conspiracy. Those persons come together in a criminal association agreement must be an important underlying factor for such cooperation. Both conspiracy and participation in criminal association offences extend criminal responsibility into the earliest preparatory stage of committing crimes and are generally justified on grounds of prevention. Whereas conspiracy under common law jurisdictions generally has the goal of preventing all crimes, prevention under the offences on criminal association is directed towards protecting the integrity and security of the state from specific dangerous groups seen to pose a threat to public order.

2.5 Conclusion

In conclusion, it may be observed that criminalisation of the mere act of agreeing to a commit a crime is not a general principle of law in all jurisdictions. However, there seems to be a gradual acceptance, albeit with much criticism, that in certain instances the punishment of an agreement to commit serious crimes is necessary. The concept of conspiracy as a distinct crime is predominantly accepted in common law jurisdictions. Although in Germany and Spain agreeing to commit a crime is expressly made punishable with regard to certain serious crimes, such an offence is not a distinct crime but rather a form of attempted participation. Therefore, under common law jurisdictions when two or more people agree to carry out a crime and execute it, in principle, they are liable for both conspiracy and its underlying offence. In contrast, for the aforesaid civil law jurisdictions, liability for the criminal agreement only stands if its underlying offence is not executed or even attempted. The practice in common law countries, however, shows an increase in policy and practice that discourages the prosecution of conspiracy and its complete underlying offence, save for specific cases where the interests of justice may so demand.

As an inchoate crime, conspiracy provides the state with a legal tool, which allows it to intervene early before the criminal object of the conspiracy is even attempted. Apart from its preventive relevance, it is also seen to address the inherent danger, which crimes carried out by combinations pose to the society. The judiciary in common law jurisdictions has interpreted the elements of conspiracy expansively. Thus, conspiracy has acquired certain distinct features, which make it an especially attractive tool for law enforcers in combating collective criminality. A defendant charged with conspiracy faces the possibility of his liability being extended to other criminal acts carried out in pursuance of the conspiracy by co-conspirators, although these were carried out without his knowledge, consent or participation. The expansive features of common law conspiracy theory are often criticised for violating the criminal law principle, which demands that there can be no punishment without personal fault.

To deal with the danger of group criminality, the offences on participation in a criminal association in civil law jurisdictions can be considered to perform the analogous function of the conspiracy doctrine under common law jurisdictions. Originally, the constitutive elements of such criminal organisations required that they be organised in some form of hierarchical structure to be considered punishable, but continuous reforms show that in some jurisdictions, such as France, such organisations are constituted upon merely agreeing to engage in certain criminal conduct, accompanied by some material action towards their preparation. These reforms are instigated by the need to adopt a model of criminal liability that sufficiently deals with criminal collectives. Such a model needs to create criminal responsibility for such conduct, early enough before fairly advanced plans are made, and ensure that all associated with such collectives, both at the leadership and merely supportive level, are held accountable. Towards this goal, the conspiracy concept seems to be the more flexible model.

Chapter 3
Conspiracy in the Jurisprudence of the International Criminal Tribunals

Abstract Conspiracy was considered one of the most serious crimes before the Nuremberg tribunal and years later formed a major part of the ICTR prosecution strategy. However, despite the enthusiasm that has informed the use of conspiracy in the prosecution of international crimes, the judges of the various tribunals have not shared the same enthusiasm. As a result, the convictions on conspiracy have not been many. Conspiracy in the international tribunals is construed more restrictively in comparison to the common law conspiracy. This practice has considerably downplayed the several perceived advantages of the common law conspiracy charge.

Contents

J. R. A. Okoth, *The Crime of Conspiracy in International Criminal Law*,
DOI: 10.1007/978-94-6265-017-6_3,

3.1 Introduction

Criminal conspiracy entered the scene of international criminal law at the instigation of the Americans because of its unique features of combating collective criminality in common law jurisdictions. The use of conspiracy in the prosecution of international crimes has, however, not received overwhelming support, affecting its role and status as a tool of accountability in international criminal law. As explained in Chap. 2 of this study, the concept of conspiracy as an independent crime is not a general principle of law and is mainly appreciated by common law countries. Although the act of agreeing to commit a crime has gradually come to be accepted as giving rise to criminal responsibility in civil law jurisdictions, it is not an independent crime and is punished very restrictively with respect to certain serious crimes that are specifically proscribed by law. Also, the criminal agreement offence in civil law jurisdictions does not have certain features that are distinctively characteristic of the common law conspiracy. The dilemma of the conspiracy charge before the international criminal tribunals is reconciling these two conflicting perspectives. This chapter traces the journey of criminal conspiracy from the Nuremberg and Tokyo tribunals, through to the ad hoc tribunals of Yugoslavia and Rwanda. The purpose is to give an insight into the status of conspiracy as a crime in international law, in light of the jurisprudence of international tribunals. It contains an overview of what role conspiracy has played in the prosecution of international crimes, giving a clearer understanding of conspiracy as it has been perceived and developed by the international tribunals. It further shows the balance or compromises that the international tribunals have adopted to resolve the conflicting common law and civil law ideologies on the concept of conspiracy.

The concept of conspiracy has also been accredited for providing the doctrinal legal foundation of two liability theories that have equally generated much criticism. These theories are criminal organisations as dealt with at Nuremberg and joint criminal enterprise applied by the Yugoslavia and Rwanda ad hoc tribunals. This part of the study will look into the relationship between conspiracy and these two concepts. It also clarifies on the nature of the relationship between conspiracy and certain concepts such as planning and preparation that have often been equated to the idea of conspiracy.

3.2 The Nuremberg Tribunal

At the end of World War II the victorious powers entered into an agreement to establish a tribunal for the prosecution of war criminals whose offences had no particular geographical location.[1] Attached to the agreement was a charter, which defined the constitution, jurisdiction and function of the tribunal.[2]

3.2.1 The Charter

Article 6 of the Charter provided for the crimes that would be the subject matter jurisdiction for the tribunal. These crimes included crimes against peace, war crimes and crimes against humanity. Conspiracy was mentioned in two instances in the Article. In the first place, conspiracy was included within the provision on crimes against peace. Its second appearance was in a general conspiracy clause in the last paragraph of Article 6. This latter clause provided for attribution of liability to persons who, although they did not personally execute the listed crimes, participated or contributed to their formulation or execution in other capacities. It must be noted that this last provision referred to all the crimes within Article 6.[3]

---

[1] International Military Tribunal, Nazi Conspiracy and Aggression, Vol. I: A collection of Documentary Evidence and Guide Materials Prepared by the American and British Prosecuting Staffs for Presentation before the International Military Tribunal at Nurnberg, Germany, in the case of The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Goering, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjlamar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Doenitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Paper, Artur Seyss-Inquart, Albert Speer, Constatin von Neurath, and Hans Fritzche, Individually and as Members of Any of the Following Groups or Organisations to which they respectively belonged, namely: Die Reichsregierung (Reich Cabinet); Das Korps der Politischen Leiter der Nationalsozial istischen Deustchen Arbeitepartei (commonly known as the "SS") and including die Sicherheitsdienst (commonly known as the "SD"); die Geheime Staatspolizei (Secret die Sturmabteilungen der N.S.D.A.P. (commonly known as the "SA") and the General Staff and High Command of the German Armed Forces. (Hereinafter IMT, Nazi Conspiracy and Aggression): 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, Chapter 1, pp. 1–3.

[2] See IMT, Nazi Conspiracy and Aggression, Vol. I: Chapter II, Charter of the International Military Tribunal, pp. 4–12.

[3] Article 6 of the Charter reads:

The following acts, or any of them, are crimes within the jurisdiction of the Tribunal for which there shall be individual responsibility:

The Americans proposed the idea of including conspiracy in the Nuremberg Charter.[4] The rationale behind this proposal was to have a concept that provided a basis to reach a large number of guilty people against whom there might not have been direct evidence of having carried out the violent acts, but who were nonetheless participants in the 'common plan or enterprise or conspiracy'.[5] The Anglo-American conspiracy was a very appealing concept to the Americans, more particularly for the evidentiary advantages it promised. The use of conspiracy would facilitate the possibility of netting the big fish in the Nazi Regime, who it seemed would otherwise elude justice. Not surprisingly, this proposal received much opposition from the French and Russians who were not familiar with the concept.[6] These differences necessitated negotiations that eventually led to the

(Footnote 3 continued)

1. Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or 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;
2. War crimes: namely, violations of the laws of customs of war. Such violations shall include, but not be limited to, murder, ill treatment or deportation to slave labour 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;
3. 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, organisers, 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. See IMT, Nazi Conspiracy and Aggression, Vol. I: Charter of the International Military Tribunal, part II. Jurisdiction and General Principles, p. 5.

[4] The proposal was initiated by Colonel Murray C. Bernays an American lawyer working in the war Department, see B. F. Smith, *The American Road to Nuremberg. The Documentary Record 1944–1945*, Doc. 16 (1982), pp. 33–37; T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992), pp. 35–36; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 16.

[5] B. F. Smith, *The American Road to Nuremberg. The Documentary Record 1944–1945*, Doc. 16 (1982), p. 35; also see J. A. Bush, 109 *Columbia law Review* (2009), pp. 1137–1140, opining that conspiracy was proposed due to the sheer volume of devastation and the shortage of individualised documentary evidence; S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 219.

[6] The French especially found the concept most appalling. This opposition had already been anticipated by the Americans following the advice of the then Assistant Attorney General, Professor Herbert Wechsler. See S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), pp. 218–219; B. F. Smith, *Reaching Judgment at Nuremberg* (1977), p. 36.

adoption of a conspiracy, which Pomorski describes as a product of 'compromise and patchwork', although, superficially it seemed to largely resemble the Anglo-American conspiracy.[7]

3.2.2 The Trial

The trial of the International Military Tribunal (IMT) began on October 18, 1945, with the indictment of 24 major war criminals and six organisations.[8] The indictment constituted four counts[9]: (i) participation in a common plan or conspiracy for the accomplishment of a crime against peace; war crimes and crimes against humanity, (ii) planning; initiating and waging wars of aggression and other crimes against peace, (iii) war crimes and (iv) crimes against humanity. The focus of this study is mainly restricted to the analysis of the conspiracy charge and the charge on criminal organisations in the IMT judgment.

3.2.2.1 Count One—The Common Plan or Conspiracy: The Findings

The first count charged the defendants with participating as 'leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved commission of, crimes against peace, war crimes and crimes against humanity…and…are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy'.[10]

The prosecution presented a conspiracy that covered 25 years from the time of formation of the Nazi Party in 1919 to the end of the war in 1945. It submitted that the party was the "instrument of cohesion among the defendants" from which they carried out the purpose of the conspiracy, and further, that participation in affairs of the Nazi Party and the government was evidence of participation in the conspiracy.[11] The tribunal rejected this submission on the time frame of the conspiracy, holding that although the Charter had not defined conspiracy, it was

---

[7] S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 221; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 18.

[8] See IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, pp. 1–190.

[9] See IMT, Nazi Conspiracy and Aggression, Vol. I: Chapter III, Indictment, pp. 14–82, attached Appendix 1.

[10] IMT, Nazi Conspiracy and Aggression, Vol. I: Chapter III, Indictment, p. 15.

[11] IMT, Nazi Conspiracy and Aggression, Vol. I: Chapter III, Indictment, p. 16; see also H. Leventhal et al., 60 *Harvard LR* (1947), pp. 863–867, for summary of the prosecution's case on conspiracy.

essential that the conspiracy referred to be clearly outlined in its criminal purpose, and not too far removed from the time of its decision and action.[12] The tribunal then proceeded to limit the time span of the conspiratorial acts it would consider to those carried out between 1937 and 1939. Despite recognising the submission by the prosecution of a single grand conspiracy, the tribunal did not make any finding on this. It instead asserted that the evidence established with certainty the existence of many separate plans by certain defendants to prepare and wage war.[13]

Although the first count charged the defendants with conspiracy to carry out all the three listed crimes in the Charter, the tribunal rejected the two later conspiracies on crimes against humanity and war crimes. It observed that contrary to the prosecution's perception, the Charter did not provide for conspiracy to commit war crimes and crimes against humanity. The tribunal was of the view that although the last paragraph of Article 6 seemed to give the impression that it provided for conspiracy with respect to all crimes, this provision did not actually create new or separate crimes. The tribunal instead asserted that the provision was only intended to establish responsibility of persons participating in the common plan to wage aggressive war.[14]

The count on conspiracy to wage aggressive war addressed crimes committed immediately before the war began. The tribunal, for purposes of convenience, decided to analyse the law on the common plan or conspiracy together with the second count of planning and waging war, observing that the same evidence had been produced to support both counts.[15] The tribunal was of the view that both counts were similar in substance. In effect, the tribunal equated conspiracy to the planning and preparation of aggressive war, observing that the same had been carried out in a systematic manner. Interestingly, in spite of the above assertion, the tribunal decided that it would still proceed to determine the guilt of the defendants under both counts.[16] The tribunal rejected the defence argument that a plan cannot exist in a dictatorship, stating that a plan executed by several persons, though conceived by one person, was still a plan, and the participants could not avoid liability by alleging that they had been directed to do so by its author.[17] It was noted that by co-operating with the author of the plan with full knowledge of his aims, the defendants had made themselves parties to the plan.[18]

---

[12] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgement, p. 54.

[13] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgement, p. 55.

[14] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgement, p. 56.

[15] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgement, p. 54.

[16] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgement, p. 54.

[17] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgement, p. 55.

[18] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, pp. 55–56, the tribunal asserted, 'Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them if they knew what they are doing'.

It appears that the tribunal approached a finding of guilt under the charges of participation in a common plan or conspiracy with great caution. In the end, only eight of the 24 indicted war criminals were found guilty of participation in a common plan or conspiracy.[19] The eight were considered to have, at some occasion, had a close association with Hitler as part of his inner circle of advisers. The respective defendants were found to have attended the conferences in which Hitler had expressed his aggressive plans. Their liability for conspiracy was inferred from the substantial role they played in the formulation of aggressive plans with full knowledge of the illegal nature of the war, having intent that force be used and were in a position to contribute to a decision to invade.[20] A finding of guilt was only made where the evidence of knowledge and active participation was conclusive.

3.2.2.2 Membership in a Criminal Organisation

Apart from the crime of conspiracy, another controversial theory of liability considered before the IMT was that of criminal organisations. The concept of criminal organisations has been considered to be equivalent to criminal conspiracy, with Meierhenrich describing it as an 'innovative and highly controversial conspiracy theory'.[21] He considers that the doctrinal underpinnings of the criminal organisations concept were founded on conspiracy, observing that it was another tool of accountability that reflected the prosecution's obsession with the idea of collective criminality after World War II. This makes it necessary to analyse the relationship between these two concepts, establishing the extent of their similarity or difference.

While conspiracy was intended to net the big fish, criminal organisation was to be used for the smaller fish.[22] The idea was to use conspiracy to prosecute the Nazi leaders alongside certain organisations, and a conviction of the organisations

---

[19] The eight defendants include: Herman Goering, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Keitel, Alfred Rosenburg, Alfred Jodl, Von Neurath and Erich Raeder.

[20] S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 221; see also J. A. Bush, 109 *Columbia law Review* (2009), pp. 1162–1163; H. Donnedieu de Vabres, in G. Mettraux, *Perspectives on the Nuremberg Trial* (2008), p. 251; H. Leventhal et al., 60 *Harvard LR* (1947), pp. 878–879.

[21] J. Meirhenrich, 2 *Annu. Rev. Law Soc. Sci.* (2006), p. 342; also see E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 16, 21, describing the concept as an 'offshoot' of conspiracy.

[22] B. F. Smith, *The American Road to Nuremberg. The Documentary Record 1944–1945*, Doc. 16 (1982), pp. 98–102; see also J. A. Bush, 109 *Columbia Law Review* (2009), p. 1140; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (2008), p. 189; H. Leventhal et al., 60 *Harvard LR* (1947), p. 887; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 16.

would be sufficient to establish guilt of any of their members.[23] Article 9 of the Nuremberg Charter provided:

> At trial of any individual of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.[24]

Article 10 further reinforced 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'.[25] In light of these provisions, Control Council Law No. 10 (CCL. 10) of Germany made it criminal to be a member of the organisations declared criminal by the tribunal, providing that this would be punishable by death, life imprisonment with or without hard labour or a fine.[26] The rationale of this concept was illuminated in the memorandum of Colonel Murray C. Bernays, also the brain behind the use of conspiracy in prosecution of the crimes committed by the Nazi regime:

> Behind each Axis war criminal […] lies the basic criminal instigation of the Nazi doctrine and policy. It is the guilty nature of this instigation that must be established, for only thus will the conviction and punishment of the individuals concerned achieve their true moral and juristic significance. In turn, this approach throws light on the nature of the individual's guilt, which is not dependent on the commission of specific criminal acts, but follows inevitably from the mere fact of voluntary membership in organisations devised solely to commit such acts.[27]

As a result, six Nazi organisations were indicted at Nuremberg: the Reich Cabinet, the leadership Corps of the Nazi Party, the SS and SD, the Gestapo, the SA and the General Staff and High Command of the German Armed Forces. Although the tribunal did accept the criminalisation of organisations in principle, the far-reaching consequences proposed by the prosecution on this theory did not appeal to its sense of justice. The tribunal stated that group criminality, being a novel concept, should be carefully addressed to avoid punishing innocent persons.[28] It noted, rightly so, that the declaration of organisations as criminal should be

---

[23] A. Fichtelberg, 17 *Criminal Law Forum* (2006), p. 162; IMT, Nazi Conspiracy and Aggression, Vol. I: Chapter V, Opening Address for the United States, p. 170, asserting that the tribunal's 'verdict of guilt, against these organisations will render *prima facie* guilt…upon thousands of members'; B. F. Smith, *The American Road to Nuremberg. The Documentary Record 1944–1945*, Doc. 16 (1982), p. 35.

[24] IMT, Nazi Conspiracy and Aggression, Vol. I: Charter of the International Military Tribunal, Chapter II, Article 9, p. 6.

[25] IMT, Nazi Conspiracy and Aggression, Vol. I: Charter of the International Military Tribunal, Chapter II, Article 10, p. 6.

[26] See CCL. 10, Article II, subsection 1(d) making it criminal to be a member "in categories of a criminal group or organisation declared criminal by the tribunal" and subsection 3, setting out forms of punishment.

[27] B. F. Smith, *The American Road to Nuremberg. The Documentary Record 1944–1945*, Doc. 16 (1982), p. 35.

[28] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgement, p. 86.

exercised in accordance with certain well settled legal principles, one of which is that criminal guilt is personal and mass punishment should be avoided. With this observation, the tribunal proceeded to clip wings of the criminal organisation concept curtailing its far reaching consequences, indicating that membership in such an organisation alone would not be sufficient to show criminality. It stated:

> Since the declaration with respect to the organisations and groups will […] fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation.[29]

In essence, once the tribunal declared that an organisation was criminal, the criminal nature of the group could no longer be challenged. This then created a rebuttable presumption of guilt to members of such an organisation. To be criminally responsible a member of such an organisation must have had knowledge of its criminal nature and voluntarily decided to remain a member. The tribunal eventually declared only three of the accused organisations criminal with certain rigorous qualifications: the Leadership Corps of the Nazi Party, the SS and SD and the Gestapo.[30]

The concept of criminal organisations bears some similarity with the concept of conspiracy. As noted by the tribunal, '[a] criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes'.[31] Like conspiracy, the concept of criminal organisations was designed to create criminal responsibility for situations involving mass organised criminality with many participants. It was an ambitious attempt by the prosecution to overcome any evidential or procedural burden that it would otherwise encounter in proving every individual's role in the crimes perpetrated pursuant to the Nazi regime. In fact, when submitting on the concept of criminal organisations at Nuremberg, the prosecution maintained that it was part of the conspiracy concept. It added that as soon as an organisation was declared criminal, its members would be responsible for the criminal acts of each other like in a conspiracy.[32] The defence opposed this submission, with one of the defence counsels even describing it as a 'legal monstrosity'.[33] Similar to criticisms against the common law concept of conspiracy that recognises vicarious liability for acts of accomplices to the

---

[29] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, p. 86.

[30] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, pp. 86–107.

[31] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, p. 86; see also H. Donnedieu de Vabres, in G. Mettraux, *Perspectives on the Nuremberg Trial* (2008), p. 251, asserting that the common feature to both concepts is they 'involve a plurality of agents who associate and coordinate their efforts with a view to achieve the purposes of a criminal enterprise'.

[32] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 23.

[33] See S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 240.

extent that they were foreseeable although not intended, the main criticism against the proposed theory of criminal organisations was that it had an element of collective criminality.[34]

Certain distinctions can be identified between the two concepts. While conspiracy by itself is an inchoate crime, the concept of criminal organisation at Nuremberg required commission of crimes by its members before such an organisation was declared criminal. Secondly, the indictment with respect to criminal organisations was directed at the alleged criminal organisations themselves, while the conspiracy indictment did not charge the conspiracy itself but the individual defendants alleged to have participated in the conspiracy as conspirators.[35] Similarities may be drawn between the concept of criminal organisations at Nuremberg and the criminalisation of membership in certain organisations formed for the purpose of criminal ends in civil law jurisdictions.[36]

3.2.3 Evaluation

Whether the conspiracy at Nuremberg was successful is debatable. Although on the face of it conspiracy set out in the Charter largely resembled the Anglo-American conspiracy, the interpretation eventually applied by the tribunal leads to a different conclusion. The conspiracy recognised by the tribunal was a narrow version of the conspiracy proposed by the Americans and submitted by the prosecution. This is a clear reflection of the distrust or disfavour the judges of the tribunal had towards this concept.[37] The tribunal decided to limit liability for conspiracy in several ways.

---

[34] H. Kelsen, in G. Mettraux, *Perspectives on the Nuremberg Trial* (2008), pp. 284–285; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 16, asserting that both conspiracy and the concept of criminal organisations are concepts of collective criminal theory; B. Swart, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 90.

[35] See N. H. B. Jorgensen, in Andre Nollkaemper and Harmen van der Wilt, (eds.), *System Criminality in International Law* (2009), p. 207.

[36] See Chap. 2 Sect. 2.3, the law of criminal associations in the jurisdictions of Germany, Spain, France and Italy. The prosecution had noted at Nuremberg that this concept was not novel with several national jurisdictions penalising members of certain bodies considered criminal and the bodies themselves. The proposal to criminalise certain organisations actually came from France; see E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 21.

[37] The charge drew various sentiments from the Judges in the tribunal strangely having the Judge from the Soviet Union highly in its favour and the American Judge like his French colleague very critical of it. Eventually a compromise was reached. See S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), pp. 229–230; B. F. Smith, *Reaching Judgment at Nuremberg* (1977), pp. 119–136; T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992), pp. 550–554.

In the first place, conspiracy was restricted to the crime of aggression. This decision has largely been attributed to the ambiguous manner in which the Charter was drafted with respect to the crime of conspiracy.[38] Whereas the American proposal had envisaged conspiracy as a crime in its own right, the conspiracy provided for in the Charter failed to feature as one of the separate principal offences. It was relegated to the background in the clause of paragraph 6(a), which referred to crimes against peace. No similar clause was provided with respect to war crimes and crimes against humanity. By placing conspiracy within the provision on crimes against peace alongside other ways of participating in this crime, the conspiracy in the Charter resembled more a mode of participation in the crime of aggression, as opposed to an independent crime.[39]

The language of the general clause on conspiracy in the last paragraph of Article 6 is consistent with conspiracy as a form of complicity. It refers to all the crimes, giving the impression that conspiracy as a form of complicity would be applicable to all the listed crimes. Under common law, conspiracy as a form of complicity makes it possible to hold conspirators criminally responsible for all acts carried out in pursuance of the conspiracy by other co-conspirators, but only if the alleged criminal agreement between them has been proved. In this sense therefore, the common law conspiracy would allow the defendants to be considered vicariously liable for all crimes listed in the Charter. The tribunal, contradicting the express language of the Charter, chose to limit the application of this clause to crimes against peace. Although one may be critical of the tribunal's decision to limit conspiracy in this manner, its interpretation in the circumstances was consistent with its initial decision to limit conspiracy to crimes against peace. Criminal responsibility for conspiracy as a form of complicity under common law derives from and is only applicable in the instance where the independent crime of conspiracy is considered punishable. In the circumstances, crimes against peace were the only category of crime for which such vicarious liability could be construed. The tribunal's decision to restrict conspiracy only to the crime of aggression put the possibility of being held liable for conspiracy for the other two crimes out of reach. If the drafters had intended for conspiracy to apply to all crimes then the eventual draft of the Charter was a poor reflection of such intention, leaving much room for the judges to construe their own interpretation.

Secondly, the tribunal limited the duration of the conspiracy by restricting it only to acts carried out just before the war, between 1937 and 1939. This, in effect, put out of the tribunal's reach acts carried out in preparation of the war before

---

[38] J. A. Bush, 109 *Columbia law Review* (2009), p. 1139; H. Leventhal et al., 60 *Harvard LR* (1947), p. 868; S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 222; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 18, noting that the controversies surrounding negotiations at Nuremberg left their mark as reflected in the final draft, that saw the proposed conspiracy loose much of its initial prominence.

[39] In fact this is the view expressed by the French Judge H. Donnedieu de Vabres, in G. Mettraux, *Perspectives on the Nuremberg Trial* (2008), p. 249.

1937, and other conspiratorial plans carried out in much later years. Thirdly, the tribunal rejected the common law rule of conspiracy, which imputes liability for all acts done in pursuance of the conspiratorial objective, to participants who joined the conspiracy at a much later stage.[40]

Fourthly, the decision by the tribunal to address both counts of conspiracy and aggression together resulted, to a great extent, in a limited legal and critical analysis of the crime of conspiracy, with more emphasis being placed on analysing the crime of aggression.[41] This decision may be attributed to the tribunal's failure to clearly outline the elements of the conspiracy or discuss the propriety of cumulatively charging conspiracy and its executed underlying offence.[42] As a result, the tribunal equated conspiracy with planning and preparation to wage war, confusing the element of agreement and the acts used to prove its existence. Since conspiracy is an agreement to pursue a criminal course, in this case the war of aggression, the joint planning and preparation of such war by the defendants was only evidence showing existence of a conspiracy, and should not have been equated to the conspiracy itself.

The consequence of the aforementioned limitations was that certain defendants who might have otherwise been found liable under a broader interpretation escaped liability for the crime of conspiracy. Of these defendants those that may be particularly mentioned include Funk, Schacht, Speer and Bormann. Regarding the defendant Funk, the tribunal observed that he had served in various capacities in the Nazi regime, including being the Minister of Economics and Plenipotentiary General for War Economy in 1938 and the president of the Reichs bank in January 1939. It observed that he only became active in the economic field after the Nazi plans to wage aggressive war had clearly been defined.[43] It noted that although he had participated in the economic preparation for aggressive wars against Poland and the Soviet Union, his liability on this aspect could adequately be addressed in count two on waging aggressive war.[44] Under common law conspiracy, a defendant may be held liable for acts committed pursuant to the conspiracy by co-conspirators both before and after joining the conspiracy, and it is not a prerequisite for the defendant to be present from inception of the conspiracy. This principle was clearly disregarded in this instance. Further, the failure to hold Funk

[40] For example see the tribunal's findings on defendant Speer who they considered to have only joined the conspiracy much later when it was already underway, and therefore, not liable. IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, pp. 156–159; also opinion on defendant Bormann, IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, pp. 164–166; see also F. Biddle, in G. Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008), p. 208; J. A. Bush, 109 *Columbia Law Review* (2009), p. 1162.

[41] J. A. Bush, 109 *Columbia Law Review* (2009), p. 1162, stating that this decision led to a further collapse of the count on conspiracy into the count on aggression.

[42] S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 236.

[43] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, p. 131.

[44] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, p. 132.

liable for conspiracy for his participation in the economic planning of certain aggressive wars in preference of establishing his liability under the count of waging aggressive war shows the tribunal's obvious aversion for establishing liability under the conspiracy charge.[45]

As for the defendant Speer, the tribunal found that he had been Hitler's architect and personal confidant, and later became Minister for Armaments and Munitions. However, it held that he was not liable under the count of the common plan to engage in aggressive war.[46] The tribunal's reasoning was that Speer only became head of the armament industry well after all the wars had been commenced and were underway. Under common law conspiracy, his later participation long after the conspiracy was underway would not have made him any less liable than the initiators of the conspiracy. This restriction and rationale was also applied in the case of Bormann who, although the tribunal observed that he became head of the party chancery in 1941 and later in 1943 its secretary, making him then privy to Hitler's plans, his participation was considered to be much later, falling outside the restricted time frame of the conspiracy recognised by the tribunal.[47]

In the case of Schacht, he had served as President of Reichs bank, Minister of Economics, and Plenipotentiary General for War Economy, and later Minister without portfolio.[48] The tribunal found that he had played a role in the vigorous German rearmament programme, which was heavily supported by facilities from the Reichs bank. It was also recognised that he was a central figure in organising the German economy for war and the steps he had taken in the early days of the Nazi regime were responsible for Germany's rapid rise to military power. He began to lose influence, however, by 1936, because of his conflicts with Goering and later with Hitler. This led him to resign as Minister of economics and plenipotentiary general for war economy in 1937, and in 1939 he was dismissed by Hitler as Reichs bank president. The tribunal found that although Schacht had continued to participate in German economic life and that in some minor way he even participated in some early Nazi aggressions, the case against him depended on inference that he in fact knew of the Nazi aggressive plans, which inference the tribunal declared was not established beyond reasonable doubt. Schacht was clearly a beneficiary of the restricted time application to conspiracy, making his earlier participation in the Nazi programme not count for much in establishing his culpability.

In addition, the tribunal required strict proof of knowledge of the objective of the conspiracy, refusing to infer any knowledge on the part of Schacht. The tribunal held to this view despite making a finding that the position that Schacht had occupied, would have made him realise the true significance of Hitler's frantic

---

[45] See H. Leventhal et al., 60 *Harvard LR* (1947), p. 879, asserting that Funk's acquittal is only explicable on the ground that his planning was not at the Hitler level.

[46] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, pp. 156–159.

[47] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, pp. 164–166.

[48] IMT, Nazi Conspiracy and Aggression, Vol. I: Opinion and Judgment, pp. 134–137.

rearmament programme and the economic policy adopted was consistent only with war as its object. The position taken by the tribunal contrasts with the practice in common law jurisdictions where knowledge may be inferred from circumstantial evidence, and in the case of Schacht, the concept of wilful blindness may have been applied. This concept would imply that he had closed his eyes to avoid knowing what was taking place around him. The tribunal should have perhaps made a finding that the defendant Schacht had participated in the conspiracy but later unequivocally withdrew from it. His withdrawal could be inferred from his insistence on adoption of policies that frustrated the conspiracy or were inconsistent with the object of the conspiracy.[49]

The prosecution's submission on conspiracy did not wholly carry the day at Nuremberg, with its perceived advantages being greatly watered down. Several factors contributed to this result. Conspiracy was ambiguously structured in the Charter. It was neither defined nor were its elements outlined. This task was left to a tribunal that proved to be very sceptical and critical of the concept.[50] The Charter was also silent on the issue of cumulatively charging conspiracy and its underlying crimes. The potential breadth of liability of the conspiracy presented by the prosecution was a cause of concern to the tribunal, with the apprehension that it might lead to collective criminality by imputing guilt to all defendants by virtue of mere association. This latter possibility would especially have caused a great dent on the legitimacy of the tribunal's decision. These factors were compounded with two other factors: the one is that conspiracy was an unfamiliar concept in civil law jurisdictions; and secondly, conspiracy as a concept was also a subject of much criticism within common law jurisdictions themselves. The totality of these factors made conspiracy a shaky concept on which to ground liability.[51] This decision was to later greatly influence the decisions of post-World War II trials, and was considered a great setback to the overall prosecution strategy to use conspiracy as the best concept of establishing liability of perpetrators under the Nazi regime.[52]

The concepts of conspiracy and criminal organisations were included in the IMT Charter to deal with the problem of mass criminality. They were both considered important by the prosecution to overcome evidentiary or procedural difficulties. Not surprisingly, the use of the concept of conspiracy came from the Americans; and the idea of declaring certain organisations criminal, the result of

---

[49] See also H. Leventhal et al., 60 *Harvard LR* (1947), pp. 875–878; S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 234, noting that Schacht benefited from the restrictive interpretation of knowledge.

[50] S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 223; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 18.

[51] H. Leventhal et al., 60 *Harvard LR* (1947), p. 881. See also H. Ehard, in Wilbourn E Benton and Georg Grimm (eds), *Nuremberg: German Views of the War Trials* (1955), p. 81; S. Twist, 27 *Liverpool Law Review* (2006), p. 40, at p. 42 asserting conspiracy in the IMT Charter violated the principle of criminal law against retrospectivity.

[52] J. A. Bush, 109 *Columbia Law Review* (2009), p. 1163.

which its members would be considered criminally responsible, came from the French. This is a reflection of the different concepts used in the common law and civil law jurisdictions respectively in dealing with group criminality.[53] The use of the concept of conspiracy was opposed by the civil law jurisdictions from the onset of its proposal, declaring it as a foreign concept. A compromise was reached for its inclusion resulting into a Charter that was ambiguously drafted, especially the aspect of criminal conspiracy. This ambiguity left room for the judges to develop an interpretation quite reflective of their own prejudices towards the conspiracy charge, failing to capture the intention of the drafters.[54]

The prosecution's attempt to have expedient mass trials through a broad interpretation of both concepts of conspiracy and criminal organisations was rebuffed by the tribunal. The breadth of submissions by the prosecution had the potential of casting a wide net of liability over all defendants remotely associated with the alleged conspiracy even by passive acquiescence. This would have resulted in convictions that reflect collective criminal guilt. Such a result would have violated a fundamental criminal law principle that guilt should be personal. This possibility also greatly contributed to the tribunal's hostility towards conspiracy. The decision of the tribunal to apply the concept of conspiracy restrictively, thus avoiding the possibility of guilt by mere association, is in this aspect laudable.[55]

However, the tribunal must also be criticised for being overly cautious and for excluding certain elements that would otherwise be considered admissible in conspiracy trials within domestic jurisdictions. This resulted in certain defendants escaping criminal responsibility, and certain criminal acts supposedly carried outside the recognised time span of the conspiracy were left unpunished altogether. The tribunal's decision to restrict criminal responsibility for membership in a criminal organisation to those who remained members of such organisations with knowledge of the crimes perpetrated by such organisations is also commendable. This restriction ensured that fundamental principles of criminal law carried the day.[56]

---

[53] See Chap. 2 on comparative analysis.

[54] Also see W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn. (2009), p. 312, observing that the Judges at Nuremberg did not fully grasp the intent of the drafters.

[55] See also G. Mettraux, in W. A. Schabas and N. Bernaz (eds.), *Routledge Handbook of International Criminal Law* (2011), p. 11.

[56] F. Biddle, in G. Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008), p. 210; S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 243; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 24.

3.3 Subsequent Nuremberg Trials

The main victorious parties, after the IMT judgment, carried out a series of other trials. Control Council Law No. 10 (CCL. 10) empowered the occupying authorities to try suspected war criminals in their respective occupation zones.[57]

The crimes defined in Article II of CCL. 10 are to a great extent similar to those set out in the IMT Charter, with conspiracy only being specifically mentioned under the commission of crimes against peace. Under this law, the United States proceeded to hold 12 trials from 9 December 1946 to 13 April 1949.[58] Seven of these trials included a charge on conspiracy. The following analysis is strictly with respect to the seven cases, and is restricted to the tribunals' interpretation of the law on conspiracy. Of the respective cases where applicable, an overview and

[57] The following acts were considered crimes in Article II(1) of CCL. 10:-

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or violation of international treaties, agreements or assurances, or *participation in a common plan or conspiracy for the accomplishment of any of the foregoing*. (Emphasis added).
(b) War Crimes. Atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from 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. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.
(d) *Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal*. (Emphasis added).

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in para 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime or (f) with reference to paragraph 1(a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country. (Accessed from the Avalon Project Documents in Law, History and Diplomacy: Yale Law School, Lilian Goldman Law Library).

[58] See K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), for a comprehensive analysis of the cases.

comparison between conspiracy and its "sister concept" membership in a criminal organisation is also included, giving a more clear picture of the relationship between the two concepts.

3.3.1 *The United States of America v. Josef Altstöetter et al. (Justice Trial)*[59]

This case involved 16 German jurists and lawyers charged with participating and furthering the crimes perpetrated by the Nazi regime. Nine of the defendants had been officials at the Reich Ministry of Justice, the others were prosecutors and judges of the Special Courts and People's Court of Nazi Germany. The defendants were charged under four counts: count one charged participation in the common design and conspiracy to commit war crimes and crimes against humanity; count two charged war crimes; count three alleged commission of crimes against humanity; and count four charged seven of the defendants for membership in the criminal organisations of SS, SD, or the Leadership Corps of the Nazi Party.[60] In brief, the tribunal considered that the defendants had been charged with consciously participating 'in a nationwide government-organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts', asserting that, '*[t]he dagger of the assassin was concealed beneath the robe of justice*'.[61]

The essence of Count one is illustrated in the following excerpts from the indictment:

(a) Between January, 1933 and April, 1945, 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, as defined in Control Council Law No. 10, Article II.
(b) Throughout the period covered by this Indictment all of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving, the commission of War Crimes and Crimes against Humanity.

---

[59] The other defendants included; Wilhelm Von Ammon, Paul Barnickel, Hermann Cuhorst, Karl Engert, Guenther Joel, Herbert Klemm, Ernst Lautz, Wolfgang Mettgenberg, Guenther Nebelung Rudolf Oeschey, Hans Petersen, Oswald Rothaug, Curt Rothenberger, Franz Schlegelberger, and Carl Westphal. Source, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (Oct 1946–April 1949) (TWC), Vol. III, "The Justice Case".

[60] TWC, Vol. III, Indictment, pp. 15–26.

[61] TWC, Vol. III, p. 985 (emphasis added).

(c) All of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly participated as leaders, organisers, 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 enterprises.

5. It was a part of the said common design, conspiracy, plans, and enterprises to enact, issue, enforce, and give effect to certain purported statutes, decrees, and orders, which were criminal both in inception and execution, and to work with the Gestapo, SS, SD, SIPO and RSHA for criminal purposes, in the course of which the defendants, by distortion and denial of judicial and penal process, committed the murders, brutalities, cruelties, tortures, atrocities, and other inhumane acts….
7. The said common design, conspiracy, plans, and enterprises embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi regime regardless of nationality and for the persecution and extermination of "races"….[62]

The defendants challenged the sufficiency of count one, which charged conspiracy to commit war crimes and crimes against humanity as a separate crime, on jurisdictional grounds. A joint session of United States Military Tribunals was held to hear counsels in this case and two other cases that of *Karl Brandt et al.* (The Doctor's trial),[63] and the trial of *Oswold Pohl et al.*,[64] all in which the count on conspiracy had been charged and was being challenged by the respective defendants.[65]

The main arguments presented by the defence were the following[66]:

(i) Both the IMT Charter and CCL.10 when referring to war crimes and crimes against humanity do not mention common planning as a punishable separate crime, whereas with the crime against peace, participation in a common plan or conspiracy is expressly declared punishable under both laws.

(ii) The IMT judgment declared that the IMT Charter only recognised conspiracy to commit acts of aggressive war, dismissing charges referring to conspiracy to commit war crimes and crimes against humanity.

(iii) The wording "was connected with plans or enterprises involving its commission" contained in Article II, 2(d) of CCL.10 could not be interpreted to allow charges of conspiracy to commit war crimes and crimes against

[62] TWC, Vol. III, 'Count One-The Common Design and Conspiracy', pp. 17–23.

[63] See Sect. 3.3.2.

[64] See Sect. 3.3.3.

[65] See *Law Reports of Trials of War Criminals*, Vols. VI–X, pp. 104–110.

[66] *Law Reports of Trials of War Criminals*, Vols. VI–X, pp. 105–106.

humanity, because the structure of CCL.10 makes it clear that the crimes are defined in sub-paragraph 1 whereas sub-paragraph 2 only defines forms of complicity in the crimes.

(iv) The introduction of Anglo-American concept of conspiracy was inadmissible because it was a foreign concept to Germany. The concept of conspiracy, being strictly an Anglo-American notion when applied to a German accused would violate the maxim *nullum crimen sine lege*.

(v) The words "including conspiracy to commit such crimes", contained in Article I of Ordinance No. 7 must be restricted to crimes against peace because this ordinance was not intended to alter matters of substantive law in CCL. 10.[67]

The prosecution in response argued[68]:

(i) Conspiracy as a concept under common law elaborates on the law of attempts in cases where there was no success in attaining its unlawful objective, and in circumstances where the conspiracy was successful, the conspiracy charge was simply an elaboration on the law of accessories and accomplices. It emphasised that the conspiracy charged involved crimes well established at international law, and referred to crimes that had in fact been committed.

(ii) In the effort to ensure all persons connected to a crime are punished, 'and in approaching the question of what degree of connection with these crimes must be established in order to attribute guilt to a defendant', international law must be drawn from various legal sources and systems, including both common law and civil law, and the notion of conspiracy if used in a fairly and sensible way would be a useful doctrine in the circumstances.[69]

(iii) Under common law, conspiracy to commit felonies such as "murder, torture, enslavement, rape, plunder, destruction, devastation, …", are punishable although not expressly provided for in the statutes, it is for this reason the drafters of the IMT Charter and CCL.10 saw no need to expressly refer to conspiracy in the definition of war crimes and crimes against humanity, which in essence constitute the above mentioned crimes. It added that the only reason conspiracy was included in the definition on crimes against peace

[67] Article I of Ordinance No. 7 states: "The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offences". See *Law Reports of Trials of War Criminals*, Vol. III p. 115. The Military Governor of the American Zone enacted this ordinance pursuant to CCL. 10.

[68] *Law Reports of Trials of War Criminals*, Vols. VI–X, pp. 106–109.

[69] The defendants response to this argument was that the danger of conspiracy as a mode of participation unlike other modes of participation such as instigation, which were also recognised in continental jurisdictions, was that the conspiracy charge risked many people being caught up in its net, even those "who did not themselves desire such a deed but who got involved not through their own volition….", see *Law Reports of Trials of War Criminals*, Vols. VI–X, p. 107.

was because of abundance of caution. The crime against peace, it argued, was peculiarly an international crime and the acts declared criminal under acts against peace were not acts declared criminal in most criminal codes, unlike those constituting war crimes and crimes against humanity.

(iv) It opined that the decision in the IMT judgment to exclude conspiracies with respect to crimes against humanity and war crimes was made in disregard to the express provisions of Article 6 of the IMT Charter, mainly because of hostility on the part of the continental members of the court. Nonetheless, the prosecution was of the view that the decision of the IMT judgment was not binding on points of law to the tribunals constituted pursuant to Ordinance No. 7.

(v) The scope of sub-paragraph 2 of Article II of CCL.10 was broad enough to accommodate the doctrine of conspiracy and other notions of criminal participation.

(vi) Conspiracy is not necessarily a separate, subsequent crime but is more in this case an additional mode of participation in commission of the crime.

(vii) IMT Charter and CCL.10 are not complete codification of international penal law. They are merely illustrative rather than exhaustive attempts at statutory definition.

(viii) Ordinance No. 7 expressly made conspiracy punishable.

(ix) It also submitted that legal concepts, analogous to conspiracy were known in continental law systems giving the example on the law of criminal associations in the French *Code Pénal.*

The joint tribunals decided in favour of the defendants dismissing the counts on conspiracy to commit crimes against humanity and war crimes. The tribunal ruled 'that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime' therefore, the tribunal had no jurisdiction over count one. The tribunal however, refrained from striking out the whole of count one, noting that this count, 'in addition to the separate charge of conspiracy, also alleged unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes'.[70]

[70] See *Law Reports of Trials of War Criminals*, Vols. VI–X, pp. 5–6. In the end these later parts of count 1 had no impact on the final judgment, with the tribunal stating: 'This Tribunal has held that it has no jurisdiction to try any defendant for the crime of conspiracy as a separate substantive offence, but we recognise that there are allegations in Count One of the Indictment which constitute charges of direct commission of war crimes and crimes against humanity. However, after eliminating the conspiracy charge from Count One, we find that all other alleged criminal acts therein set forth and committed after 1st September 1939, are also charged as crimes in the subsequent counts of the indictment. We therefore find it unnecessary to pass formally upon the remaining charges in Count One. Our pronouncements of guilt or innocence under Counts Two, Three, and Four dispose of all issues which have been submitted to us', TWC, Vol. III, *The Justice Trial*, p. 1177.

Judge Blair, on this count, had a dissenting opinion. He argued that: 'Since the language of paragraph 2 of Law No. 10 expressly provides that any person connected with plans involving the commission of a war crime or crime against humanity is deemed to have committed such crimes, it is equivalent to providing that the crime is committed by acts constituting a conspiracy under the ordinary meaning of the term'.[71] He observed that the facts, under which certain defendants had been found criminally responsible for participating in plans and schemes to carry out the underlying war crimes and crimes against humanity, were similar to the facts alleged to constitute a conspiracy. He was of the view that no material difference existed between a plan or scheme to commit a particular crime and a common design or conspiracy to commit the same crime, asserting that both CCL. 10 and Ordinance No. 7 authorised conviction for the crimes of conspiracies to commit war crimes and crimes against humanity.[72] In his opinion a conviction on conspiracy was the most appropriate '…because the Nazi crimes [were] in reality indivisible and each plan, scheme or conspiracy proved in the instant case was in reality an interlocking part of the whole criminal undertaking or enterprise'.[73]

Nine of the defendants were found guilty for various crimes, with the tribunal noting that some of the defendants had actively participated in the plans or schemes involving commission of the underlying crimes.[74] On the count of membership in a criminal organisation the tribunal observed that, to be considered guilty, a defendant had to have been a voluntary member with full knowledge of the criminal character of such organisation or was personally implicated in commission of crimes carried out by such organisation.[75] Three of the seven defendants charged under this count were declared guilty of membership in certain criminal organisations: the defendant Joel was found to have been a member of the SS and SD with full knowledge of the criminal character of these organisations. Oeschey was found guilty of membership in the NSDAP, and Altstöetter was found to have been a member of the SS. Whereas both Joel and Oeschey were also found to have participated in the commission of other crimes, the defendant Altstöetter was declared guilty only for the count of membership in the SS, on grounds that he retained membership in this organisation on voluntary basis and with the knowledge of its criminal activities, this earned him a sentence of five years imprisonment.[76]

---

[71] TWC, Vol. III, *The Justice Trial*, p. 1197.

[72] TWC, Vol. III, *The Justice Trial*, pp. 1195–1196.

[73] TWC, Vol. III, *The Justice Trial*, p. 1195.

[74] This is a notion that can generally be inferred from the analysis on the defendants found guilty, but was expressly stated in the case of some defendants, for example the defendant Joel is described to have taken 'an active part in the execution of the plan or scheme for the persecution and extermination of Jews and Poles', see TWC, Vol. III, *The Justice Trial*, p. 1142.

[75] TWC, Vol. III, *The Justice Trial*, pp. 1029–1030.

[76] See TWC, Vol. III, *The Justice Trial*, p. 1176, the tribunal while declaring his guilt under count four noted: 'Surely whether or not he took a part in such activities or approved of them, he must have known of that part which was played by an organisation of which he was an officer'.

Like in the IMT judgment the tribunal in this instance was not ready to acknowledge jurisdiction over conspiracy to commit war crimes or crimes against humanity, basing its decision merely on lack of express provisions in CCL. 10. If indeed the allies had intended for the aforesaid conspiracies to be prosecuted as separate crimes, CCL. 10 was another poor reflection of such intention. The final draft structure of CCL. 10 left sufficient room for the tribunal to arrive at the interpretation it adopted. The term conspiracy had only been expressly referred to under the crime against peace and not even an alternative general clause on conspiracy liability had been provided for like in the IMT Charter, which may have supported an inference that conspiracy would be applicable to all crimes. Such a general clause would probably have formed a more valid basis to consider conspiracy as a mode of participation or form of complicity as suggested by the prosecution.

In essence, by suggesting that conspiracy liability could be inferred within Article II of CCL. 10, the prosecution required that the tribunal use an expansive rule of interpretation. This is contrary to the practice in national jurisdictions where rules of strict interpretation are used, especially, on issues of criminal law. The tribunal did not address the assertion that conspiracy was only to be considered in this instance as a form of complicity as opposed to a separate crime. It may be argued that by choosing to deal with the alleged conduct under the other forms of complicity expressly provided in CCL. 10, the defendants were still sufficiently held criminally responsible for their conduct. The tribunal did not, therefore, have to rely on conspiracy as a form of complicity, which was supposedly to be inferred through broad rules of interpretation. The choice not to hold the defendants accountable under the count of conspiracy did not in the circumstances create any big loophole in their prosecution. In addition, if indeed the conspiracy charged was only to be considered a form of complicity, the prosecution did not have to draft it as a count on its own in the respective indictments. Rather, the prosecution should instead have alleged it as a form of participation within the other counts.

The decision to adopt strict interpretation rules for provisions in CCL. 10 may have also been informed by the fear of perpetrating an injustice through applying conspiracy liability, a concept considered to be purely Anglo-American in its nature and not a general principle of law in all jurisdictions, to defendants from continental Europe who did not recognise such concept. This fear was most likely further compounded, with a supposition that the broad theory of conspiracy liability advanced by the prosecution threatened to impose collective criminality. Yet, it was inaccurate to assert, as submitted by the defendants, that the conspiracy concept was at the time alien to the German defendants, because the German law already made punishable the mere agreement to commit certain crimes.[77]

[77] See Chap. 2 Sect. 2.3.1, Germany had introduced a provision in its criminal code that made punishable conduct relating to criminal agreements by 1876, mainly relating to treasonable acts.

Two shortcomings may, however, be identified from the decision to dismiss the conspiracy count. The first as perhaps expressed in Judge Blair's dissenting opinion is a question of the interest of justice which, considering the factual and legal complexities involving the cases at hand, demanded the need to give an overall picture of the circumstances of commission of the crimes. In this instance, the conspiracy charge may have been considered to carry out a 'truth telling' function.[78] The Judge argued that to punish the acts of participating in the planning of criminal schemes and enterprises under conspiracy, would have given a more accurate picture of the circumstances under which the Nazi crimes had been committed. That the defendants had acted concertedly with others in criminal schemes and enterprises it may be inferred that underlying such conduct was some form of criminal agreement, thus, the question whether to punish such conduct merely as forms of participation in certain 'plans and schemes' or conspiracy. The second shortcoming is with regards to the time frame of crimes committed. The conspiracy count provided a larger time frame charging crimes allegedly committed from 1933 to 1945, whereas the other counts only charged conduct from 1939 to 1945. Dismissal of the conspiracy count meant that the defendants were not held accountable for any crimes committed prior to 1939.

One of the main reasons behind the conspiracy charge was to ensure every defendant that was in any way closely linked to commission of the underlying crimes would be held accountable, this purpose seems to have also been satisfied by the charge of membership in a criminal organisation, ensuring that defendants such as Altstöetter were, in any case, held criminally responsible, where the conspiracy charge failed.

3.3.2 *The United States of America v. Karl Brandt et al. (Medical Case)*[79]

This trial involved 23 leading German physicians and administrators charged for their willing participation in war crimes and crimes against humanity perpetrated by the Nazi regime. Twenty of the defendants were doctors. The defendants had carried out medical experiments, using the concentration camp prisoners without their consent. They also planned and enacted the "Euthanasia" programme, which involved the systematic killing of those they deemed "unworthy of life". Their victims included the mentally retarded, the institutionalised mentally ill and the physically impaired.[80]

---

[78] See Chap. 2 Sect. 2.2.3, on the rationale of punishing conspiracy under common law jurisdictions.

[79] See TWC, Vols. I and II, "The Medical Case".

[80] TWC, Vol. II, *The Medical Case*, Judgment, pp. 171–297.

The defendants were charged with four counts: (i) common design or conspiracy to carry out war crimes and crimes against humanity, (ii) war crimes committed through carrying out medical experiments on prisoners of war and civilians of occupied countries without the subject's consent, (iii) crimes against humanity committed by carrying out medical experiments against the German Nationals (iv) membership in a criminal organisation, the SS.[81]

The first count on the common design or conspiracy charged the defendants with, 'acting pursuant to a common design, unlawfully, wilfully, and knowingly [conspiring and agreeing] together and with each other and with divers other persons, to commit war crimes and crimes against humanity'. It also asserted that the defendants acting in concert with each other wilfully and knowingly took a consenting part in and were connected with plans and enterprises involving the underlying crimes as principals, accessories, ordering and abetting. It further, alleged that they were responsible as leaders, organisers, instigators, and accomplices, in the formulation and execution of the said common design, conspiracy, plans and enterprises to commit war crimes and crimes against humanity.[82]

The defence counsel filed a motion challenging the jurisdiction of the tribunal with respect to conspiracy to commit war crimes and crimes against humanity. This motion was consolidated with similar motions in the *Justice* and *Pohl* cases. The ruling delivered dropped the count on conspiracy, with the tribunal holding that the charge was beyond its jurisdiction. The tribunal did not however, wholly strike out this count. Instead it chose to retain parts of it relating to the planning and preparation of the underlying crimes, describing these as involving actual commission of the underlying crimes.

While making pronouncements on guilt of certain defendants, the tribunal specifically declared that they were connected with plans and enterprises involving commission of crimes against humanity and war crimes. Examples include: the defendant Karl Brandt who was declared responsible for, aiding and abetting, taking a consenting part in, 'and being connected with plans and enterprises involving medical experiments conducted on non-German nationals against their consent, and in other atrocities…'[83]; the tribunal found the prosecution had proved beyond reasonable doubt that the defendant Mrugowsky 'was a principal in, accessory to, ordered, abetted, took a consenting part in, and was knowingly connected with plans and enterprises' involving commission of the alleged crimes.[84] The tribunal in these instances considered the respective defendants criminally responsible for conduct that the prosecution had initially described as forming part of the conspiracy count, only that the alleged conduct was now punished as a form of complicity rather than the independent crime of conspiracy.

[81] TWC, Vol. I, *The Medical Case*, Indictment, pp. 8–17.

[82] TWC, Vol. I, *The Medical Case*, Indictment, pp. 10–11.

[83] TWC, Vol. I, *The Medical Case*, Judgment, p. 198.

[84] TWC, Vol. I, *The Medical Case*, Judgment, pp. 247–248.

Ten defendants were charged with being members in an organisation declared criminal by the IMT namely, "SS". All the respective defendants charged under this count were found guilty of this charge. The tribunal not only found that most of the defendants were members of the SS, but also made findings that the defendants had been implicated in commission of war crimes and crimes against humanity. Only the defendant Poppendick was found liable under this count without being implicated in the commission of the underlying crimes. The tribunal considered that the prosecution had provided insufficient evidence to implicate Poppendick in the commission of war crimes and crimes against humanity, stating that mere suspicion was not sufficient to secure a conviction. The tribunal nonetheless, made a finding that the defendant was guilty under count four because he remained a voluntary member of SS, with actual knowledge of the facts that the organisation was being used to carry out acts declared criminal by CCL. 10.[85] This earned the defendant a sentence of 10 years imprisonment. Eventually, 16 of the defendants were found guilty on various counts and seven sentenced to death.[86]

3.3.3 The United States of America v. Oswald Pohl et al.[87]

The defendant Oswald Pohl and 17 of his co-defendants were indicted under CCL. 10. At varying times between January 1933 and April 1945, the defendants had been associated with *Wirtschafts-Verwaltungshauptamt* (WVHA), the Economics and Administrative department of the SS. The WVHA was the Nazi government office that maintained, administered, and operated the concentration and extermination camps.

The defendants were charged with maintaining and administering concentration camps in a manner as to visit injury, disease, starvation, torture, and death on the inmates. The indictment also charged them with participation in a programme of mass murders, spoliation, and expropriation on millions of Jews, Slavs, Poles and other people both in and out of the conquered territories.[88] The indictment filed against the defendants contained four counts. The counts charged included: (i) participation in a common design or conspiracy; (ii) war crimes carried out through the administration of concentration camps and extermination camps; (iii) crimes against humanity also carried out through administration of the concentration and extermination camps, including slave labour charges; and (iv) membership in a criminal organisation.

---

[85] TWC, Vol. I, *The Medical Case*, Judgment, pp. 248–253.

[86] TWC, Vol. I, *The Medical Case*, Sentences, pp. 298–300.

[87] See, TWC, Vol. V, *The Pohl Case*. The other defendants included August Frank, George Loerner, Heinz Karl Fanslau, Hans Loener, Josef Vogt, Erwin Tsdentscher, Rudolf Schide, Max Kiefer, Franz Eirenschmalz, Karl Sommer, Hermann Pook, Hans Baier, Hans Hohberg, Leo Volk, Karl Mummenthey, Hans Bobermin, and Horst Klein.

[88] TWC, Vol. V, *The Pohl Case*, (Indictment), pp. 200–208.

Counts one and four stated in part[89]:
Count one (THE COMMON DESIGN);

6. Between January 1933 and April 1945 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…
7. …all of the defendants …, acting in concert with each other and with others, unlawfully, wilfully, and knowingly, were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of war crimes and crimes against humanity.

….

11. All of the defendants…participated as leaders, organisers, 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 enterprises….

Count four (MEMBERSHIP IN CRIMINAL ORGANISATION);

26. All of the defendants herein, except defendant Hohberg, are charged with membership, …in the *Schutsfaffeln der Nationalsozialistischen Deustchen Arbeiterpartei* (commonly known as the "SS"), declared to be criminal by the International Military Tribunal and Paragraph 1(d) Article II of CCL 10.

Although the tribunal acknowledged that administration of concentration camps involved a broad criminal programme, requiring cooperation of many persons, the count on conspiracy was never used to establish criminal liability of the defendants. During the trial the defendants challenged the tribunal's jurisdiction over the count of conspiracy, moving that the same be quashed and stricken from the indictment. The defence alleged that under the basic law the tribunal had no jurisdiction to try the charge of conspiracy as a separate substantive crime. This motion was granted together with similar motions in the *Justice* and *Medical* cases. The tribunal decided to disregard certain parts of count one in as far as it charged conspiracy as a separate crime.[90] It however, 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 plans, involving the underlying crimes. It considered this conduct to constitute actual commission of the crimes, making an additional clarification that even these remaining parts would only be regarded in so far as they were not repeated in substance in counts two and three.[91]

---

[89] TWC, Vol. V, *The Pohl Case*, (Indictment), pp. 200–208.

[90] See summary of decision in the *Justice case*, Sect. 3.3.1.

[91] TWC, Vol. V, *The Pohl Case*, pp. 961–962.

Thirteen of the defendants were found guilty under the count charging membership in a criminal organisation and four others were acquitted.[92] To be considered criminally responsible under this count the conditions set out in the IMT judgment had to be met. An organisation declared criminal would fix the criminality of its members, but this liability would exclude defendants who had no knowledge of the criminal purposes or acts of the organisation and defendants drafted by the state, unless they were personally implicated in commission of any of the acts declared criminal under the IMT Charter. Although it was evident that the four defendants acquitted under count four had been associated with the criminal organisation SS, with one of them even admitting membership, the tribunal found that three of the said defendants had no knowledge or any connection with the criminal activities perpetrated by the organisation.[93] Of these four defendants, only Leo Volk was found to be guilty of war crimes and crimes against humanity, the others were acquitted on all other counts. The defendant Leo Volk was in any case found to have never been a member of the organisation.[94]

3.3.4 *The United States of America v. Carl Krauch et al. (I.G. Farben Trial)*[95]

This trial involved the prosecution of 24 defendants who had been officials of *I.G. Farben-Industrie Aktiengesellschaft* (I.G. Farben), a large German Conglomerate of Chemical firms. During World War II Degesch a subsidiary of I.G. Farben was involved in the manufacture of Zykoln B, the poison gas used at extermination camps. I.G. Farben also developed the processes of synthesising gasoline and rubber from coal, and thereby contributing much to Germany's ability to wage war, although, it was cut off from all major oil fields.[96]

The charges included five counts; (i) planning, preparation, initiation, and waging wars of aggression and invasions of other countries, (ii) war crimes and crimes against humanity through the plundering, exploitation, spoliation and other offences against property of occupied territories, and the seizure of plants in Austria, Czechoslovakia, Poland, Norway, France, and Russia, (iii) war crimes and crimes against humanity through participation in the enslavement and deportation to slave labour, and mistreatment, terrorization, torture, and murder of enslaved persons, (iv) membership in criminal organisation, the SS, (v) participation in the

[92] The four include Rudolf Scheide, Josef Vogt, Horst Klein and Leo Volk.

[93] Rudolf Scheide admitted being a member of SS. The others who were also acquitted for lack of knowledge were Josef Vogt and Horst Klein.

[94] TWC, Vol. V, *The Pohl Case*, pp. 1047–1051.

[95] TWC, Vols. VII and VIII, *The I. G. Farben Case*.

[96] TWC, Vol VIII, *The I. G. Farben Case,* pp. 1085–1096, on 'Farben as an Instrumentality'.

formulation and execution of a common plan or conspiracy to commit the crimes under counts one, two, and three.[97]

This time the prosecution adopted a new strategy in its formulation of the count on conspiracy. It alleged the defendants had been involved in a conspiracy involving crimes against peace, asserting that the commission of war crimes and crimes against humanity also formed an integral part of such crimes against peace.[98] This new formulation was obviously an attempt to overcome the hurdle set by previous judgments, which had dismissed all counts of conspiracy to commit war crimes and crimes against humanity.

The tribunal in reaching its decision acknowledged the central relevance of the IMT judgment involving the 24 major war criminals stating that:

> [We] have determined that Control Council Law No. 10 cannot be made the basis of a determination of guilt for acts or conduct that would not have been criminal under the law as it existed at the time of the rendition of judgment by the IMT in this case of United States of America vs. Hermann Wilhelm Goering et al. That well considered judgment is basic and persuasive precedent as to all matters determined therein.[99]

As a result, the tribunal only proceeded with the count on conspiracy to commit crimes against peace, making no reference to allegations of commission of war crimes and crimes against humanity, as part of this conspiracy. Recognising that indeed a conspiracy had existed in the aggressive wars waged by Germany against other nations, the question before the tribunal was whether the defendants in this case had been a part of it.[100] The tribunal stated that to be considered a participant in the common plan or conspiracy an accused must have had knowledge of it. Construction of knowledge in participation of the conspiracy was inferred from knowledge in the planning, preparation or initiation of an aggressive war.[101]

---

[97] TWC, Vol. VII, *The I. G. Farben Case*, pp. 10–60.

[98] Count five on the Common Plan or Conspiracy provided:

146. All the defendants acting through the instrumentality of Farben and otherwise, with divers other persons, during a period of years preceding 8 May 1945, participated as leaders, organisers, instigators, and accomplices in the formulation and execution of a common plan or conspiracy to commit, or which involved the commission of, crimes against peace (including the acts constituting war crimes and crimes against humanity which were committed as an integral part of such crimes against peace) as defined by control council law no. 10, and are individually responsible for their own acts and for all acts committed by any persons in the execution of such common plan or conspiracy.

147. The acts and conduct of the defendants set forth in counts one, two and three of this indictment formed a part of [the] said common plan or conspiracy and all the allegations made in said counts are incorporated in this count. (See TWC, Vol. VII, *The I. G. Farben Case*, p. 59).

[99] TWC, Vol. VII, *The I. G. Farben Case*, p. 1098.

[100] TWC, Vol. VII, *The I. G. Farben Case*, p. 1127.

[101] To infer this knowledge the tribunal following the precedent of the IMT judgment, restricted it to the leaders who formed part of Hitler's close knit 'circle of Nazi and military fanatics', holding that defendants did not form part of this circle and being merely followers therefore lacked the knowledge that they were preparing Germany for participation in an aggressive war, see TWC, Vol. VII, *The I. G. Farben Case*, pp. 1096–1127.

Having held that there was no evidence of the defendants knowingly participating in the planning, preparation, and initiation or waging of aggressive war, the tribunal considered that consequently, the defendants were not guilty under the count on conspiracy.[102]

Of the 'sister' count to conspiracy, i. e membership in a criminal organisation, only the defendants Schneider, Buetefisch, and von der Heyde were charged with membership subsequent to 1 September 1939 in the 'SS'.[103] As observed by predecessor tribunals, the tribunal here declared that one would only be considered a member of an organisation declared criminal by the IMT, if one voluntarily became a member or remained a member of such organisation with knowledge that it was involved in commission of war crimes and crimes against humanity. All three defendants were eventually acquitted of this count, with the tribunal asserting that the evidence adduced had failed to establish their membership beyond reasonable doubt.[104]

3.3.5 *The United States of America v. Alfred Krupp et al. (Krupp Trial)*[105]

This case involved 12 former directors of the Krupp Group. The Krupp concern was considered the 'principal German maker of large calibre artillery, armour plate, and other high quality armament, the largest producer of iron and coal in Germany' and as a result, it was alleged to have contributed substantially to Germany's ability to wage its wars of aggression.[106] The defendants were accused of holding high positions in the political, financial, industrial, and economic life of Germany and using their influence to facilitate coordination between activities of the Krupp firm and the German programme for rearmament.[107] The indictment contained four counts which in summary included: (i) Planning, preparation, initiation, and waging aggressive war, (ii) plunder and spoliation, (iii) crimes involving deportation, exploitation of prisoners of war and abuse of slave labour,

---

[102] TWC, Vol. VII, *The I. G. Farben Case*, p. 1128, 'Since we have already reached the conclusion that none of the defendants participated in the planning or knowingly participated in the preparation and initiation or waging of a war or wars of aggression or invasions of other countries, it follows they are not guilty of the charge of being parties to a common plan or conspiracy to do these same things'.

[103] TWC, Vol. VII, *The I. G. Farben Case*, p. 59.

[104] TWC, Vol. VII, *The I. G. Farben Case*, pp. 1196–1204.

[105] See TWC, Vol. IX, *The Krupp Case*. The other defendants included Ewald Loeser, Eduard Houdremont, Erich Mueller, Friedrich Janssen, Karl Pfirsch, Max Otto Ihn, Karl Eberhardt, Heinrich Korshan, Friedrich von Buelow, Werner Lehmann, and Hans Kupke.

[106] TWC, Vol. IX, *The Krupp Case*, Indictment, p. 11.

[107] TWC, Vol. IX, *The Krupp Case*, Indictment, p. 19.

and (iv) common plan or conspiracy to commit crimes against peace.[108] The conspiracy charge was formulated with the same ingenuity like in the *I.G. Farben* case, with the defendants being accused of participating as 'leaders, organisers, instigators, and accomplices in the formulation and execution of a common plan and conspiracy to commit, and which involved commission of crimes against peace (including the acts constituting war crimes and crimes against humanity which were committed as an integral part of such crimes against peace)'.[109] Upon conclusion of the prosecution's case-in-chief, the defence filed a motion for dismissal of counts one and four for lack of sufficient evidence. On evaluating the evidence produced by the prosecution, the tribunal concluded that the relevant and competent evidence failed to show beyond reasonable doubt the liability of any of the defendants under both counts one and four. The defendants were acquitted of both counts of conspiracy and wagging of aggressive war.[110]

3.3.6 The United States of America v. Ernst von Weizsäcker et al. (Ministries Trial)[111]

This trial involved 21 defendants who had been officials of various Reich ministries. Most of the defendants were charged with criminal conduct arising principally out of their functions as officials under the Reich government, all covered in eight counts, which included charges for preparing and initiating aggressive war, war crimes, and crimes against humanity.[112] Initially, 18 of the defendants were charged with the second count of having participated as leaders, organisers, instigators, and accomplices in a common plan or conspiracy to commit crimes against peace, which included war crimes and crimes against humanity.[113] On the motion of the prosecution three of the defendants were later dismissed from this count. In any case, the tribunal did not proceed to analyse in detail the validity of this count. Instead, it summarily discharged the remaining defendants of liability under this count, stating that 'no evidence has been offered to substantiate a conviction'.[114] Count eight charged some of the defendants with membership in

[108] TWC, Vol. IX, *The Krupp Case*, Indictment, pp. 7–36.

[109] TWC, Vol. IX, *The Krupp Case*, Indictment, p. 35.

[110] See TWC, Vol. IX, *The Krupp Case*, pp. 390–466, order and opinions of the tribunal acquitting the defendants of the charges of crimes against peace and conspiracy.

[111] TWC, Vols. XII, XIII, & XIV, *The Ministries Case*. The case is also referred to as the Wilhelm Strasse Trial because the German Foreign office was located at the Wilhelm Strasse in Berlin.

[112] See TWC, Vol. XII, *The Ministries Case*, Indictment, pp. 13–63.

[113] TWC, Vol. XIV, *The Ministries Case*, pp. 435–436.

[114] TWC, Vol. XIV, *The Ministries Case*, p. 436.

various criminal organisations.[115] Like its predecessor tribunals, this tribunal avoided the possibility of mass punishment, asserting that guilt must be personal. Criminal liability under this count was restricted to those who were voluntary members with knowledge of the organisations criminal activities, or were personally implicated as members of the organisations in the commission of the acts declared criminal under Article 6 of the IMT Charter.[116] Eventually 11 defendants were considered criminally responsible for the charge of membership in a criminal organisation.

3.3.7 *The United States of America v. Wilhelm von Leeb et al. (High Command Trial)*[117]

The 14 defendants were high ranking generals of the German Wehrmacht and former members of the High Command of Nazi Germany's military forces. The indictment contained four counts: (i) crimes against peace by waging aggressive war against other nations violating international treaties, (ii) war crimes carried out through murder, ill treatment and other crimes against prisoners of war and enemy belligerents (iii) crimes against humanity by participating or ordering the murder, torture, deportation, hostage taking among others of civilians in occupied countries, (iv) participating and organising the formulations and execution of a common plan and conspiracy, which involved the commission of crimes against peace, including the acts constituting war crimes and crimes against humanity that formed an integral part of the crimes against peace.[118]

In an interesting twist, the count of conspiracy was dismissed on the ground that it was already covered by the other charges. The tribunal expressed that it failed to see of what use the conspiracy count was for the prosecution, asserting that if the defendants had committed the acts alleged under the conspiracy count, they would in any case be considered guilty as principals in crimes charged in preceding counts.[119] In other words, the tribunal considered that the conspiracy in this case had merged into the completed crimes. In the words of the tribunal:-

---

[115] TWC, Vol. XII, *The Ministries Case*, Indictment, pp. 62–63. Defendants von Weizsäcker, Keppler, Bohle, Woermann, Veesenmayer, Lammers, Stuckart, Darré, Dietrich, Berger, Schellenberg, Rasche, Kehrl, and Koerner, charged with membership in the SS; Schellenberg also charged with membership in the SD; Bohle, Darré, Dietrich and Keppler, also charged with membership in the Leadership Corps of the Nazi Party.

[116] TWC, Vol. XIV, *The Ministries Case*, pp. 855–865.

[117] TWC, Vols. X, XI, *The High Command Case*.

[118] TWC, Vol. X, *The High Command Case*, Indictment, pp. 10–55.

[119] TWC, Vol. XI, *The High Command Case*, p. 483.

> The conspiracy count has not resulted in the introduction of any evidence that is not admissible under the other counts, nor does it, as the evidence has developed in this case, impose any criminality not attached to a violation under such preceding counts.[120]

3.3.8 Evaluation

Despite the restrictive construction of the conspiracy count in the IMT judgment, the prosecution decided to engage in a renewed effort to establish broad conspiracy liability theory in the subsequent Nuremberg trials. Evidently, the conspiracy charge was a favourite of the American prosecutions. This conspiracy was alleged with respect to all the crimes in CCL. 10. The theory that informed this prosecutorial policy was that the IMT judgment was not binding on subsequent tribunals, and in any case, the prosecution was of the view that Article II(2) of CCL. 10 provided a non-exhaustive list of different forms of liability, and conspiracy liability could also be read in it.

The defence in most of the cases vehemently opposed the charging of conspiracy to commit war crimes and crimes against humanity on jurisdictional grounds. It submitted that while the IMT judgment had rejected conspiracy to commit war crimes and crimes against humanity, CCL. 10 did not have any provision establishing criminal responsibility for such crimes. It also submitted on the impropriety of introducing an American concept into international law, arguing that the criminalisation of an agreement being a thought crime violated the principle of legality. It emphasised on the retroactivity of imposing criminal responsibility for such conduct upon a German defendant. The submission that conspiracy was a totally foreign concept to a German defendant was a misrepresentation by the defence, because Germany at the time already recognised agreements to commit certain crimes as punishable, although, they did not expressly relate to war crimes and crimes against humanity.

In answer thereto, the prosecution emphasised that Article II(2) was so broad also assigning liability to conspirators. The prosecution sought to distinguish between inchoate conspiracy, which the IMT judgment had rejected in reference to crimes against humanity and war crimes, and conspiracy as a form of complicity that applied to consummated conspiracies. It submitted that the later form of conspiracy was provided for in CCL. 10. The prosecution stressed that the conspiracy charged in the respective cases were complete conspiracies with all the crimes having been committed, and not conspiracies based on incomplete or preparatory criminal conduct. The conspiracy charged by the prosecution was therefore, intended to act as an elaboration on the law of accessories and accomplices. The defendants eventually carried the day in the joint ruling before the en banc panel in the *Medical*, *Pohl* and *Justice* cases. The counts of conspiracy

[120] TWC, Vol. XI, *The High Command Case*, p. 483.

to commit war crimes and crimes against humanity were rejected on the ground of lack of jurisdiction. This was in line with the decision of the IMT judgment, with the tribunal reiterating that neither the IMT Charter nor CCL. 10 bestowed such jurisdiction. It only recognised jurisdiction over conspiracy to commit crimes against peace.

In the subsequent trials of *I.G Farben*, *Krupp*, *Ministries* and *High Command* cases, the prosecution adopted a second formulation of conspiracy to circumvent the restrictions of the IMT judgment. Therefore, rather than flout the IMT judgment, it charged the crime of conspiracy to commit crimes against peace describing it to include war crimes and crimes against humanity, which acts it alleged were committed as an integral part of crimes against peace. An innovative approach, but it proved to be an exercise in futility. In both the *I.G Farben* and *Krupp* cases conspiracy was again restricted to war of aggression. In the *I.G Farben* trial the defendants were discharged from liability of conspiracy on account of lack of knowledge of the aggressive nature of the war, and in the *Krupp* case the tribunal found the evidence against the defendants insufficient to support a conviction. In respect to the *Ministries* case, the count on conspiracy was summarily dismissed, with the tribunal asserting that the prosecution had failed to discharge its burden of proof on this charge and no further analysis was made on the validity of the charge. In the High Command case, the conspiracy count was dismissed because the tribunal considered that the acts charged under this count had sufficiently been covered in the other counts referring to completed crimes.

It is clear from the rulings that conspiracy did not enjoy favour before the Nuremberg tribunals. The tribunals simply chose to dismiss the charges of conspiracy to commit crimes against humanity and war crimes on jurisdictional grounds, failing to make any elaborate analysis on certain issues raised by the parties that merited a more detailed or reasoned judicial response.[121] First, the tribunal should have considered addressing the prosecution's submission that conspiracy to commit acts punishable under war crimes and crimes against humanity such as "murder, torture, enslavement, rape, plunder, destruction, devastation, etc.", were indictable offences at common law although not expressly provided for in the statutes. The tribunal in response could have reasoned that this practice was not a general principle of law therefore, should not be used on defendants from continental Europe, whose system of law required a strict adherence to the principle of legality.[122] To be considered as punishable, CCL. 10 should have expressly provided for conspiracy to commit war crimes and crimes against humanity as separate crimes.

---

[121] See also K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), p. 280, on this aspect he observes that the en blanc panel in fact never made a ruling at all.

[122] On this aspect, K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), p. 279, observes that the tribunals were not willing 'to use conventional and customary international law' to supplement CCL. 10, although, the same was all too willingly used to limit CCL.10.

Second, the tribunal should also have responded to the submission that the conspiracy alleged by the prosecution was an 'adjunct of the crime' as opposed to a separate subsequent crime. In other words, the prosecution considered conspiracy here to be a form of accessory or accomplice liability. A possible approach would have been to expressly dismiss this submission with the reason that conspiracy as a form of accessorial liability is derivative from the independent inchoate crime of conspiracy. This implies that conspiracy as a form of complicity can only be punished in the instances that conspiracy is expressly provided for as an independent crime in the applicable law. This was not the case in CCL. 10, especially, not with respect to war crimes and crimes against humanity. The prosecution's submission on this point was therefore, not acceptable.[123]

The charge of conspiracy was treated with extreme caution such that even in the cases where jurisdiction over conspiracy to commit crimes against peace was acknowledged, no conviction was obtained because of the high evidentiary standard requirements. Knowingly participating in a conspiracy to wage an aggressive war was strictly construed and linked to planning and knowingly participating in the preparation and initiation to wage a war, which the defendant knew was aggressive and illegal in nature. This knowledge was only strictly inferred from the group of men who allegedly had a particular close and confidential relationship with Hitler, leaving out several other defendants who although played a crucial role in furthering the war, did not fall within the category of Hitler's inner circle.

A general positive observation that may be made is that the restrictive interpretation of the conspiracy charge played an essential role in avoiding the possibility of mass punishment. The counts on conspiracy in the indictments were generally and broadly drafted not giving any particulars of an accused's actual participation in the conspiracy. This gave the prosecution the advantage of adducing a wide range of evidence, which only revealed particulars of a defendant's alleged participation in the conspiracy during the course of the trial. This already put the defendants at a disadvantaged position because they were not fully forewarned of the case against them. The decision to strictly construe the conspiracy charge was positive to the extent that it ensured guilt could not be established by the mere fact of association, without any culpable conduct, therefore, upholding fundamental principles of criminal law.

The main conduct that the conspiracy count seemed to create criminal responsibility for in the face of complete crimes, as illustrated in the respective indictments, was the acts involving planning and preparatory activities with respect to the underlying crimes. This conduct was in any case considered punishable, by the tribunals, as actual participation in the committed crimes. Therefore, no big gap was created following the exclusion of the conspiracy charges. Save that, the conspiracy count had presented with it a time frame that made it

[123] See also K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), p. 280, noting that the prosecution's presentation on this point undermined the conspiracy counts.

possible to punish acts committed way before the war began, its dismissal effectively made it impossible to hold defendants criminally responsible for such acts. This is in fact one of the criticisms that have been labelled against the decision to dismiss the conspiracy charge.[124] These results may again like in the case of the IMT Charter be traced to the drafting of CCL.10, which failed to expressly provide for conspiracy to commit war crimes and crimes against humanity, probably under the assumption that the tribunals would not be too hostile towards the possibility of punishing such conduct through expansive rules of construction.

Comparing conspiracy to the count of membership in a criminal organisation, the later count had a more prominent role. The mere fact of voluntary membership with knowledge of the criminal activities of an organisation declared criminal by the IMT, made one criminally responsible, even with no evidence of having participated in the crimes themselves or having contributed to the functioning of such organisation. This seems to be a lower standard of addressing the question of a defendant's degree of connection with the underlying crimes than the standards set out for the count on conspiracy. Under conspiracy, a defendant's guilt was only inferred if he had knowledge of the aggressive nature of the war (with knowledge here being strictly construed), and had participated in its planning and preparation, mere acquiescence would not suffice. The count of membership in a criminal organisation in this sense compensated to some extent for the strategy by the prosecution to use conspiracy as a tool that ensured a substantial number of those who had even been remotely connected with the crimes, or supported the system that perpetrated the crimes would be punished.[125]

3.4 Conspiracy Before the International Military Tribunal for the Far East (IMTFE)

The IMTFE (Tokyo tribunal) was established by a special proclamation by General MacArthur, the Supreme Commander for the allied powers, following surrender of the Japanese at the end of the Second World War.[126] The tribunal was established to implement the Cairo declaration, Potsdam declaration and Moscow conference, which all recommended the restraint and punishment of the aggression

[124] J. A. Bush, 109 *Colum. L. Rev*. (2009), pp. 1211; J. Schnitzer, 'The Nuremberg Justice Trial 1947-Vengeance of the Victors?', LLM Thesis (2010), University of Wellington, p. 94.

[125] See also J. A. Bush, 109 *Colum. L. Rev*. (2009), pp. 1211; R. Wala, 41 *Georgetown Journal of International Law* (2010), p. 701; also see decisions Sect. 3.3.1, on Altstöetter in the *Justice* case, and Sect. 3.3.2, on Poppendick in the *Medical* case.

[126] Special Proclamation-Establishment of an International Military Tribunal for the Far East (19 January 1946), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), pp. 5–6; also Japanese Instrument of Surrender at pp. 3–4.

by Japan, and stern justice to be meted out to all war criminals.[127] The tribunal was established for 'the trial of those persons charged individually or as member of organisations or in both capacities with offences which include crimes against peace'.

3.4.1 The Charter[128]

Article 5 of the Charter of the IMTFE provided for the crimes under the tribunal's jurisdiction.[129] Similar to the Nuremberg Charter, the IMTFE Charter recognised conspiracy in two aspects: in Article 5(a) included under crimes against peace was participation in a common plan or conspiracy, and in Article 5(c) following the provision on crimes against humanity, an extra phrase was added to extend liability of all crimes to leaders and others participating in a conspiracy to commit any of the aforementioned crimes.[130]

28 defendants were indicted with having carried out crimes against peace, war crimes, and crimes against humanity during the period from 1st January 1928, to 2nd September 1945. The indictment contained 55 counts, divided into three groups, and among the charges the defendants faced was that of conspiracy. In group one charging crimes against peace, counts 1, 2, 3, 4, and 5 alleged the defendants conspired as leaders, organisers, instigators or accomplices to have

---

[127] See for a detailed narration N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), pp. 17–27; IMTFE judgment (48,415–48,420), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), pp. 5–6; also Japanese Instrument of Surrender at pp. 71–73 (hereafter IMTFE judgment).

[128] Charter of the International Military Tribunal for the Far East (26 April 1946), in N. Boister and R. Cryer, Documents on the Tokyo International Military Tribunal (2008), pp. 7–15.

[129] It reads:-

The following acts, or any of them, are crimes within the Jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or *participation in a common plan or conspiracy for the accomplishment of any of the foregoing* (emphasis added);
(b) Conventional War Crimes: Namely, violations of the laws or customs of war;
(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial 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, organisers, 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* (emphasis added).

[130] See M. Futamura, 14 *European Review* (2006), p. 472, observing that the IMTFE Charter was influenced by the IMT Charter.

Japan, either alone or with other countries wage wars against other countries. Count 1 outlined a broad grand conspiracy basically giving a general outline of all charges in relation to crimes against peace. Counts 2 to 5 gave a breakdown of the grand conspiracy, alleging separate conspiracies with different goals. The prosecution adopted this strategy to guard against the possibility of failing to establish or rely on the charge of conspiracy should the tribunal decide to dismiss the first count for being too broad.[131] In group two charging murder, conspiracy was alleged in counts 37, 38 and 44, stating the defendants conspired to murder soldiers, civilians and prisoners of war. The third group charged conventional war crimes and crimes against humanity with count 53 alleging that the defendants had conspired to carry out war crimes.[132]

3.4.2 The Trial and General Findings on Conspiracy

The Prosecution at the Tokyo tribunal apparently experienced difficulty in drafting the conspiracy charges. This has been attributed to the ambiguous structure of conspiracy in the IMTFE Charter.[133] The Charter did not provide for a stand-alone conspiracy offence applying to all crimes, it failed to define and state the elements of 'conspiracy or common plan', with the final phrase on Article 5(c) suggesting that the concept of conspiracy that creates vicarious criminal responsibility would apply to all substantive crimes recognised by the Charter. The use of conspiracy in the indictment for all the categories of crimes was a reflection of the American proposal to establish total collective responsibility for all harm to those who conspire to start aggressive war.[134] The trial eventually proceeded against 25 defendants because two of the defendants died while in custody and another was adjudged not fit for trial.

During the trial, the prosecution submitted that conspiracy was an international crime and a general principle of law recognised by all civilised nations. It argued that conspiracy could be established by circumstantial evidence and it was not necessary that individuals be aware of each other's actions to establish its existence.[135] The defence countered by refuting the existence of conspiracy as a crime

---

[131] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), p. 207; Y. Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the wake of World War II* (2008), p. 82, asserting that counts 2–4 were in a complementary relationship with count 1.

[132] International Military Tribunal for the Far East, Indictment, in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), pp. 16–69 (hereafter IMTFE indictment). See Appendix I.

[133] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), p. 207.

[134] N. Boister, *ANZLH* (2006), part 5, E-Journal.

[135] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), p. 209.

in international law and advocated for a more limited application of the conspiracy. The defence submitted that a defendant should only be declared guilty of conspiracy if he had been part of the inner circle that made decisions and had a guilty knowledge and intention to act. It contended that mere occupation of a prominent position when a certain incident occurred was not sufficient to establish guilt, conspiracy required its schemers to work together to achieve its unlawful end.[136] To this extent, the defendants' submission was clearly in line with the IMT's judgment findings on conspiracy. The defence further submitted that once the object of conspiracy had been realised, the conspiracy should be consummated into the substantive offence.

The tribunal noted that under the IMTFE Charter participation in a common plan or conspiracy was one of the five listed separate crimes under which one could be considered to have participated in the commission of crimes against peace. The tribunal defined conspiracy to wage aggressive war as an agreement by two or more persons to carry out unlawful war, stating that what followed in furtherance of the conspiracy is the planning and preparation for such war.[137] The implication of this definition was an acknowledgement that the conspiracy provided for in the Charter was an inchoate crime, with the bare agreement being sufficient to establish criminal liability.

The tribunal noted that those who participated in the planning and preparation were either the original conspirators or later adherents. In respect to the later adherents, the tribunal observed that by adopting the purpose of the conspiracy and planning and preparing for its fulfilment they became conspirators. Having made this evaluation, the tribunal concluded that it would refrain from declaring an accused guilty of planning and preparation in the event that they were found guilty of conspiracy.[138] Although the tribunal did not expressly equate conspiracy to planning and preparing to wage the war like their counterparts at Nuremberg, this inference can be drawn from their decision in this instance. As a result, the tribunal decided not to take into consideration counts six to 17 of the indictment, which had exclusively alleged planning and preparation to wage the war, considering it to be subsumed into the count on conspiracy if the prosecution proved the latter.

In line with the precedent at Nuremberg, the tribunal rejected the charges of conspiracy to carry out crimes against humanity. These charges specifically accused the defendants of conspiracy to commit murder. It observed that the IMTFE Charter did not provide for such a crime. An attempt by the prosecution to have the counts sustained under Article 5(a), arguing that waging aggressive war was unlawful and this also involved unlawful killing, was not persuasive. The tribunal rejected the prosecution's submission, emphasising that the Charter did

[136] See for further details on the submissions, N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), pp. 209–210.

[137] IMTFE Judgment (48, 448), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), p. 84.

[138] IMTFE Judgment (48,448), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), p. 84.

not provide for conspiracy to commit murder by the waging of aggressive war.[139] The tribunal also rejected the counts that charged the defendants with conspiracies to commit crimes in breach of the laws of war, observing that this was also not recognised in the Charter.

Conspiracy to wage aggressive war was therefore, the only conspiracy the tribunal proceeded with. The tribunal found that the prosecution had proved the existence of a criminal conspiracy spelled out in count one, whose object was to secure Japan's military, naval, political and economic domination over East Asia, the Western and South western Pacific Ocean and the India Ocean, and certain islands in these oceans.[140] It decided not to make any findings on counts two, and three, which were considered to charge conspiracies with more limited objects than count one, and the same treatment was given to count four noting that it was merely a replica of count one. The conspiracy in count five, which had alleged that Japan had also entered into a conspiracy with Germany and Italy for the purpose of mutual assistance to wage war was dismissed. The tribunal stated no sufficient evidence had been given to justify this count. The tribunal held that conspiracy to wage wars of aggression was a crime of the highest degree observing that:-

> Indeed no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war aggression [,] for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it. The probable result of such a conspiracy and the inevitable result of its execution is that death and suffering will be inflicted on countless human beings.[141]

The tribunal narrated the history of Japan in relation to the wars it had participated in, setting out the various policies formulated by the alleged conspirators, illustrating the execution of these policies and the role played by the defendants in these acts. It concluded that the far reaching plans and prolonged and intricate preparation for waging the wars of aggression were not the work of one man but were, '…the work of many leaders acting in pursuance of a common plan for the achievement of a common object'.[142] It found that the conspiracy and its execution had occupied a period of many years, upholding the prosecution's submission of the 18 years grand conspiracy. With respect to participation in the conspiracy the tribunal observed:-

---

[139] IMTFE Judgment (48,451), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), p. 85.

[140] IMTFE Judgment (49,770), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), pp. 596–597.

[141] IMTFE Judgment (49,769), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), p. 596.

[142] IMTFE Judgment (49,769), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), p. 596.

> Not all of the conspirators were parties to it at the beginning, and some of those who were parties to it had ceased to be active in its execution before the end. All 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 1.[143]

23 of the defendants were convicted of conspiracy to wage aggressive war in violation of international law, treaties, agreements and assurances.[144]

3.4.3 Evaluation

The conspiracy at the Tokyo tribunal clearly played a more prominent role than its Nuremberg counterpart.[145] Various terms were used to describe the role played by the defendants in the conspiracy. These terms included "leader", "collaborator", "accomplice", "principal", "energetic member", "active member", "association", "active association" and "close association". This classification however, did not have any particular influence on the sentences eventually imposed on the accused. Several factors were used to infer a defendant's participation in the conspiracy. These included: occupation of a prominent position in the military or government, this made one capable of contributing to the formulation and execution of the aggressive plans; presence at meetings in which the conspiracy agenda was discussed; participation in political schemes which involved the overthrowing and murder of leaders considered to be against the conspirators war plans; supporting the coming into power of the conspirators; suppression of democracy and condemnation of the opposition; spread of propaganda through publications which supported the aggressive plans of the conspirators and incited 'the appetite of the Japanese people for the possessions of Japan's neighbours'.[146]

As for the mental element, the tribunal seemed to require a twofold test.[147] First, the accused had to have knowledge of the conspiracy's aggressive aims. This was inferred from the position occupied by an accused or participation in official decisions, or from public statements, published articles and private

---

[143] IMTFE Judgment (49,770), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), p. 596.

[144] The accused convicted of conspiracy included:- Araki Sadao, Dohihara Kenji, Hashimoto Kingoro, Hata Shunroko, Hiranuma Kiichiro, Hirota Koki, Hoshino Naoki, Itagaki Seishiro, Kaya Okinori, Kido Koichi, Kimura Heitaro, Koiso Kuniaki, Minami Jiro, Muto Akira, Oka Takasumi, Oshima Hiroshi, Sato Kenryo, Shimada Shigetaro, Shiratori Toshio, Suzuki Teiichi, Togo Shigenori, Tojo Hideki, Umezu Yoshijiro.

[145] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 20.

[146] IMTFE Judgment (49,782), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), pp. 600–601, see the tribunal's view on the defendant's Hashimoto's contribution to the success of the conspiracy.

[147] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), p. 220.

correspondence. The second element was the accused's special intention to support the objects of the conspiracy. This latter requirement although not specifically referred to, can be inferred from the tribunal's decision to acquit the defendant Matsui of the conspiracy charge. Although the evidence revealed that by his close association with the conspirators, he was most probably aware of their purposes and policies, the tribunal held that this was not sufficient to sustain a conviction on conspiracy.[148]

Participation in the conspiracy seemed to also act as evidence to show the *mens rea* of an accused for the offence of waging a war of aggression in respect to some defendants. Therefore, with the defendant Matsui, although evidence was adduced to show that he had served in the Military operation in China, the tribunal, having held that he was not guilty of conspiracy, further observed that the prosecution had failed to tender evidence in which an inference could be drawn that he knew of the criminal character of the war.[149] The tribunal did not maintain a consistent view in drawing its findings on this aspect. Thus, although it found that the defendant Shigemitsu was not liable for conspiracy because in its opinion at the time he became Foreign Minister, '…the policy of the conspirators to wage certain wars of aggression had been settled and was in course of execution',[150] and he did not participate in any formulation or development of policy on the war, the tribunal nonetheless, found him guilty of waging certain aggressive wars for the principal role that he had played in them.[151]

Apart from submitting that the accused be held liable for the inchoate crime of conspiracy, the prosecution also advocated for the use of conspiracy to attribute criminal responsibility to its adherents for all other substantive crimes, pursuant to the final clause in Article 5(c). The tribunal however, was reluctant to wholly apply the full implication of this phrase. Upon holding an accused liable of conspiracy this did not automatically imply that an accused was liable for all wars of aggression perpetrated in pursuance of the conspiracy. An accused's liability for any aggressive war would only be established if there was direct evidence showing their particular role of participation or contribution in the aggressive war charged. To illustrate this, the defendant Araki who had been a prominent figure in the hierarchy of the Japanese Army, was found to have been a leader of the conspiracy and liable under count one on conspiracy, but he was only held liable for waging the war against China because he had actively participated in it, and was discharged from liability of the other wars on account of lack of participation. Another example is the defendant Doihara, who was found guilty of conspiracy

[148] IMTFE Judgment (49,819), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), pp. 613–614.

[149] See verdict on Matsui in IMTFE Judgment (49,815); N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), p. 612.

[150] IMTFE Judgment (49,828), in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), p. 617.

[151] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), p. 224.

and had also been prominent in the Japanese army often referred to as a specialist on China. He was found guilty with respect to waging war in specific territories, which included China and U.S.S.R, on account of his actual contribution. However, in the case of waging war against France, the tribunal discharged Doihara of any liability, saying that he had not participated in the decision to wage this war and evidence did not establish that he took part in it.[152]

Boister and Cryer suggest that perhaps the tribunal's failure to wholeheartedly embrace the full implications of the liability clause in Article 5(c), was because it would have exposed weakness of the tribunal's factual finding on the existence of a conspiracy.[153] The tribunal did not also want the foundation of its convictions to be on account of mere association and therefore, the danger of being criticised for establishing collective guilt.[154] The tribunal's findings of a grand conspiracy has nevertheless been criticised by a number of scholars for being a contradiction of the true circumstances of the Japanese war, with the assertion that the Japanese government during that period had no unifying planning group or even a figure like Hitler as was the case in Germany.[155] It is observed that a finding of multiple conspiracies to wage aggressive war would have been more consistent with the tribunal's specific factual findings and a more accurate reflection of the 'historical reality of Japan's war-making process'.[156] Some critics view the finding of conspiracy among the co-defendants some of whom had been political enemies and many of whom did not know each other by sight to be incredulous.[157] This criticism is however, countered by the opinion that conspiracy punishes those who collude to carry out a crime and defendants don't need to have known each other to establish that they worked together towards such criminal end.[158]

Of the 23 defendants found liable for conspiracy, two defendants Oshima and Shiratori were found guilty only on the count of conspiracy, which eventually

---

[152] Also see the defendant Hashimoto, despite his prominent role in the conspiracy, his liability for waging war was only found with respect to China for his direct participation. The defendant Hirota was also convicted for conspiracy and waging war against China but discharged from liability of other wars due to lack of evidence showing his participation.

[153] N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), p. 226.

[154] N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), p. 226.

[155] R. H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (2001), pp. 129–130; K. Noboru, in Hosoya et al. eds., *The Tokyo War Crimes Trial* (1986), p. 76; also see Yu Xinchun, in Hosoya et al. eds., *The Tokyo War Crimes Trial* (1986), p. 99, who adds that although conspiracy might not have been present in the early stages of the war it developed with its subsequent progress.

[156] Y. Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the wake of World War II* (2008), p. 90.

[157] Noboru Kojima in Hosoya et al. eds., *The Tokyo War Crimes Trial* (1986) p. 76; Okawa Shumei in Hosoya et al. eds., *The Tokyo War Crimes Trial* (1986) p. 109.

[158] Y. Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the wake of World War II* (2008), p. 83; O. Toshio, in Hosoya et al., eds., *The Tokyo War Crimes Trial* (1986), p. 108.

earned each of them a life sentence. A clear indication of how grave the crime of conspiracy was considered to be.

3.5 Comparison Between the Nuremberg and Tokyo Tribunals Conspiracy

Judging from the number of defendants convicted of conspiracy, of the two tribunals, conspiracy seems to have had a better field day at Tokyo, with the Judges at Tokyo giving it more life and being more receptive to it in comparison to their Nuremberg counterparts. At Nuremberg, the decision to lump the analysis of conspiracy and the crime against peace together may have contributed to a more limited analysis of the elements of criminal conspiracy. At Tokyo, the tribunal set out the definition of conspiracy and gave it a broader interpretation.

While the Tokyo tribunal made a finding of one grand conspiracy, at Nuremberg, it was found that the conspirators engaged in several separate conspiracies. The Nuremberg tribunal insisted on a conspiracy clearly outlined in its criminal purpose and sufficiently connected to the time of decision and action, these conditions did not have any role at the Tokyo tribunal. At Nuremberg, the conspiracy was zeroed into those considered to have been part of Hitler's inner circle and as a result, an inference was drawn of having knowledge of the conspiracy's aggressive aims and participating in its formulation. In Tokyo, the conspiracy was viewed as having taken place over a long period of time, taking into account all of Japan's domestic and foreign affairs for about a period close to two decades. Here, knowingly participating in the formulation of conspiracy was inferred from a wide aspect of activities, which included: political plots leading to the coming into power of the alleged conspirators who adopted policies that led to the war (this aspect of conspiracy was not accommodated at Nuremberg), occupation of a position in the military or Japanese government and society capable of influencing policy and decisions that promoted aggressive war, the use of propaganda was also seen as an integral part of the conspiracy. In fact, the Tokyo tribunal has been criticised for mostly accepting the prosecution's submission on conspiracy without giving much thought to what in some instances were more reliable inferences and submission on the evidence by the defence.[159]

Both the Nuremberg and Tokyo tribunals restricted conspiracy to crimes against peace. The tribunals' decisions on the general liability clause of conspiracy failed to capture the initial intention of the proponents of the crime of conspiracy. The proponents had intended that the brains behind the aggressive wars would be held criminally responsible for all consequential crimes perpetrated in pursuance of the

[159] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008) p. 217; E. Borgwardt, 26 *Law and History Review* (2008), pp. 698–699; see also criticisms on finding of conspiracy, Okawa Shumei in Hosoya et al. eds., *The Tokyo War Crimes Trial* (1986) p. 109; see J. Pritchard, 149 *Mil. L. Rev*. (1995), p. 30 stating that, 'the defence interpretation at Tokyo was more trustworthy than that of the prosecution on many of the hotly contested issues'.

war, for they were considered to bear the most culpability. The judges in the tribunals may have been mainly apprehensive of enforcing collective guilt because of the broad conspiracy liability clause. The ultimate blame must however, be attributed to the drafters of the respective Charters, who are responsible for the ambiguous drafts that failed to capture the true intention of the proponents of the conspiracy crime. This left more possibilities for the judges to adopt their own interpretation. Both tribunals did not expressly address the issue of cumulative charges. By finding defendants liable for both conspiracy and its underlying offence, it can be inferred that the tribunals approved of the practice, and considered conspiracy punishable in spite of its consummation.

3.6 The International Criminal Tribunal for the Former Yugoslavia

The ICTY was established following a resolution by the UN Security Council under Chapter VII of the UN Charter.[160] The resolution was made in response to a report by the Secretary-General, which revealed that war crimes were being committed in a systematic manner in the former Yugoslavia more particularly, in Bosnia and Herzegovina, where the scale of atrocities and magnitude of the resultant human suffering was horrific.[161] In recognition of the threat posed by this situation to international peace and security, the ICTY was established in the belief that it would assist in restoration of peace in the region. The statute of the tribunal authorises it to deal with individuals responsible for four different categories of crimes: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, crimes against humanity, and genocide.

3.6.1 Conspiracy

Article 4 of the ICTY Statute gives the ICTY power to prosecute persons who committed genocide and also makes other acts punishable. Liability for conspiracy to commit genocide is recognised under Article 4(3), having been adopted directly from the Genocide Convention.[162] Article 4 reads in part:

1. The International Tribunal shall have power to prosecute persons committing genocide as defined in paragraph 2 of this article or of Committing any other acts enumerated in paragraph 3 of this article.

---

[160] Resolution 827 of 25 May 1993.

[161] I. Simonovic, 23 *Fordham Int'l L.J.* (1999–2000), at p. 443; see Report of the Secretary-General pursuant to para 2 of Security Council Resolution 808 (1993) S/25704 3 May 1993.

[162] See Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948).

…

3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

> The Genocide Convention was adopted by the United Nations General Assembly on 9 December 1948.[163] The *Travaux Preparatoires* reveal that inclusion of conspiracy was justified by the serious nature of the crime of genocide, which made the criminalisation of mere preparatory acts such as the agreement to commit it imperative. This was considered important, especially on the aspect of preventing genocide. As stated by the secretariat when advising the General Assembly, "[t]his prevention may involve making certain acts punishable which do not themselves constitute genocide, for example, certain material acts preparatory to genocide, an agreement or a conspiracy with a view to committing genocide, or systematic propaganda inciting to hatred and thus likely to lead to genocide".[164] As a result, Article III of the Convention makes the following acts punishable: (a) Genocide, (b) Conspiracy to commit genocide, (c) Direct and public incitement to commit genocide, (d) Attempt to commit genocide, (e) Complicity in genocide.[165]

Conspiracy has not featured prominently in the jurisprudence of the ICTY. It was only recently that the ICTY considered a charge of conspiracy for the first time in its judgment *Prosecutor v Vujadin Popovic, Ljubisa Beara, Prago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero and Vinco Pandurevic* (hereinafter *Popovic et al.*).[166] Another case currently proceeding before the ICTY is that of Zdravko Tolimir, a former assistant commander for Intelligence and Security of the Bosnian Serb Army (VRS), who has been indicted for conspiracy to commit genocide among other crimes.[167] In *Popovic et al.*, five of the seven accused persons were charged with the second count of conspiracy to commit genocide. The count alleged that the defendants Popovic, Beara, Nikolic, Borovcanin and Pandurevic entered into an agreement with others to kill the able bodied Muslim men from Srebrenica and to remove the remaining Muslim Population of Srebrenica and Zepa from Republika Srpska, with intent to destroy these Muslims. The ICTY while assessing the count on conspiracy adopted the ICTR definition, which refers to an agreement between two or more people to commit

---

[163] Adopted by Resolution 260 (III) A, and entered into force 12 January 1951. Source http://www.preventgenocide.org/law/convention/text.htm last visited 25 November 2010.

[164] *Musema* (TC), para 185.

[165] See E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), at p. 32, observing that the conspiracy referred to here is the 'inchoate, Anglo-American, type of conspiracy', which surprisingly the drafters of the Genocide Convention had less trouble accepting.

[166] ICTY, IT-05-88-T, Judgment (TC II), 10 June 2010.

[167] See Zdravki Tolimir, case information "Srebrenica" IT-05-88/2 available at http://www.icty.org/x/cases/tolimir/cis/en/cis_tolimir_en.pdf.

genocide.[168] The tribunal confirmed that conspiracy to commit genocide as a crime was complete on conclusion of the agreement regardless of whether genocide is committed thereafter or not. It also confirmed that conspiracy is a continuing crime and an individual may join it after the initial agreement is concluded.[169] The tribunal made a finding that:

> […] the organised and systematic manner in which the executions were carried out […] presupposes the existence of a concerted agreement to destroy the Muslims of Eastern Bosnia. The conduct of members [of] the Bosnia Serb Forces was not merely similar, it was concerted and coordinated. This level of similarity of purpose and conduct could not be achieved but by prior agreement.[170]

Eventually, the tribunal only found Popovic and Beara, two of those charged with conspiracy guilty of entering into an agreement to commit genocide. The tribunal also made findings that the two were liable for genocide, and then had to deal with the issue of cumulative conviction. The tribunal, although acknowledging that conspiracy to commit genocide and genocide were two distinct crimes,[171] it declined from convicting the accused on both counts, declaring that it would be 'duplicative and unfair to the accused'.[172] The reasoning behind this conclusion was that the purpose of criminalising conspiracy was to prevent the commission of genocide, and once genocide was committed this justification became less compelling. This was especially true in instances like the present case, where proof of the genocide was found to be the main piece of evidence upon which criminal agreement could be inferred to obtain a conviction on conspiracy. In the circumstances, the tribunal found that a conviction on genocide made the conviction on conspiracy redundant.[173] The chamber therefore, convicted the accused only for the count on genocide following the decision of ICTR in *Musema*.[174]

3.6.2 Joint Criminal Enterprise

Conspiracy may not be a leading tool of accountability before the ICTY but another alternative and equally controversial concept known as Joint Criminal Enterprise ("JCE") seems to take precedence. Like the preceding concepts of conspiracy and criminal organisation, JCE is another one of the concepts that have been developed under international criminal law to deal with the issue of collective criminal action. It is suggested by some scholars that JCE is just another form of

---

[168] See Sect. 3.7.1, (ICTR Jurisprudence).

[169] *Popovic et al.* (TC), para 876.

[170] *Popovic et al.* (TC), para 886.

[171] *Popovic et al.* (TC), para 2118.

[172] *Popovic et al.* (TC), para 2127.

[173] *Popovic et al.* (TC), paras 2124, 2125 and 2126.

[174] See Sect. 3.7.2, (ICTR Jurisprudence), for further discussions on the issue of cumulative convictions before the ICTR.

conspiracy doctrine if not its equivalent, contending that it is basically a product of conspiracy theory blended with doctrines of accomplice liability from civil law jurisdictions.[175] This impression has been expressed variously with the JCE concept being described as an offshoot of the concept of conspiracy, the modern relative of conspiracy or as analogous to conspiracy theory. At Nuremberg, the terms 'common plan', 'common design' were used to refer to conspiracy.[176] Similar terms have been used interchangeably to describe JCE.[177] This makes it essential to analyse the extent to which JCE intersects with the concept conspiracy, if at all. A brief clarification of the genesis of JCE and particulars of its elements is therefore important, to enable one to make a full and clear distinction and explain the relationship between these two concepts.

Although not expressly referred to in the ICTY Statute, JCE was first identified to exist in Article 7 of the Statute in the *Tadic* appeal judgment, as a form of commission. Article 7 provides that individual criminal responsibility is considered to arise from planning, instigating, ordering, committing or otherwise aiding and abetting the planning, preparation, or execution of any of the crimes in the Statute. JCE forms the basis of holding an accused criminally responsible for the criminal acts carried out by a criminal enterprise involving commission of international crimes, if the accused is found to have participated in or contributed with intent to such criminal enterprise.[178] The accused may be held responsible not only for the crimes that he committed or participated in with intent, but also for crimes carried out by other participants in the criminal enterprise for which the accused did not intend or participate in, if in the latter case the crimes were a 'natural and foreseeable consequence' of the purpose of the criminal enterprise.

---

[175] *Presbyterian Church of Sudan v Talisman Energy* 582 F. 3d 244, 260 (2d Cir. 2009), here the court describes JCE as a "conspiracy theory of liability"; R. P. Barret and L. E. Little, 88 *Minnesota Law Review* (2003), p. 42; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (2008), p. 185, observes that the conspiracy concept is one of the founding bases of JCE; T. Dalton, *Cornell Law School Graduate Student Papers* (2010), p. 16; G. P. Fletcher, 9 *JICJ* (2011), p. 186, generally asserting that JCE derives from the Anglo-American conspiracy concept; J. Meirhenrich, 2 *Annu. Rev. Law Soc. Sci*. (2006), pp. 341–357, describing the theory of conspiracy as revolving around the concept of JCE; J. D. Ohlin, *Cornell Law Faculty Publications* Paper 24 (2009), p. 196, refers to conspiracy as a mode of liability found in the concept of JCE.

[176] See Sect. 3.2.2.2, the Nuremberg indictment refers to a 'common plan or conspiracy'; also see Sect. 3.3.3, the indictments of the relevant subsequent tribunals referring to conspiracies pursuant to a 'common design'.

[177] *Prosecutor v Dusko Tadic*, IT-94-1-I, Judgment (AC), 15 July 1999 (Tadic AC), describes JCE as 'common criminal plan' at para 185, 'common criminal design' para 196, 'common enterprise' para 199.

[178] See *Tadic* (AC), paras 190, 191, 192.

The ICTY recognises three forms of JCE, the basic (JCE I), systemic (JCE II) and extended forms (JCE III).[179] The *actus reus* of all three forms is similar. First, there must be a group of persons who decide to work towards a certain goal (plurality of persons). Second, a common plan should exist involving the commission of an international crime, the plan need not have existed before commission of the crime it may be spontaneous and may be inferred from the cooperation of several persons in carrying out a criminal act.[180] Third, the accused must participate in execution of the common plan, any form of contribution suffices. The *mens rea* for the three categories however, differs. Under JCE 1 also referred to as co-perpetration cases,[181] a group of persons sharing the same intent, plan to commit a certain crime and the crime is carried out according to the plan. Each participant is considered responsible for the crime. In the case of JCE II also known as "concentration camp" cases,[182] they involve running a system of ill treatment of prisoners, the accused must be aware (knowledge) of the criminal nature of the system and participate in it with intent to further it. The accused will then be held responsible for all criminal acts committed within the common purpose. The third category JCE III represents the most controversial aspect of JCE. It involves holding an accused responsible for crimes carried out by other participants in the criminal enterprise although they were not part of the common plan, as long as such crimes were natural and foreseeable and the accused willingly took this risk.[183] It is not necessary that the accused himself fulfil the *mens rea* of the crimes involved in this third category.

The JCE concept seems to resemble criminal conspiracy in several aspects. Its objective element requirement for plurality of persons and a common plan, merely imply the existence a group of persons who agree to carry out a crime, equating it to a conspiracy.[184] While the common plan forms part of the *actus reus* for JCE, the agreement is the *actus reus* for conspiracy, both result from the decision of at least two or more persons working together to achieve a criminal objective. It is not necessary for the prosecution to prove an express agreement or common plan, their existence may be inferred from the conduct of a group of persons acting in

---

[179] For a detailed analysis on JCE see C. Damgaard, *Individual Criminal Responsibility for Core International Crimes. Selected Pertinent Issues* (2008), pp. 127–258; also J. D. Ohlin, 5 *JICJ* (2007); N. Piacente, 2 *JICJ* (2004); S. Powles, 2 *JICJ* (2004); I. M. Ralby, 28 *Boston University International Law Journal* (2010).

[180] *Prosecutor v Anto Furundzija*, IT-95-17/1, Judgement (AC), 21 July 2000, para 119.

[181] *Tadic* (AC), paras 196, 197.

[182] *Tadic* (AC), paras 202, 203.

[183] *Tadic* (AC), paras 204, 205.

[184] See *Prosecutor v Krnojelac,* IT-97-25-T, Judgment (TC), Mar 15, 2002, at para 80 stating 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'; also J. D. Ohlin, 11 *Chicago Journal of International Law* (2011), p. 695, asserting that, '[t]he underlying and essential criteria that unites the two doctrines is the existence of a criminal agreement between the parties'.

unison. The extended form of JCE imputes liability to an accused, for criminal acts he did not personally carry out or even have knowledge of as long as they were natural and foreseeable. The legal reasoning in this form of JCE is similar to the legal theory behind the Pinkerton doctrine under Anglo-American common law conspiracy.[185] In addition, some of the criticisms towards JCE are similar to the criticisms towards the conspiracy concept. Both have been considered to be imprecise and vague doctrines, with vicarious conspiracy liability and JCE III being seen to violate the principle of personal culpability. Similar to conspiracy, JCE has also been considered by one of the Judges of the ICTY as a waste of time and confusing.[186] The similarities between the two concepts gives the impression that the ICTY perhaps to fill a gap following the failure to provide for a conspiracy theory that would include all the crimes in the Statute, decided to let in through the backdoor, a concept of conspiracy camouflaged in a different name that would be applicable to all crimes, and like the common law conspiracy a convenient tool for the prosecution.[187] In fact in one of the cases before the ICTY, a defence counsel submitted that the concept of conspiracy "is precisely the basis of liability for joint criminal enterprise".[188]

Despite the above converging structural similarities, conspiracy and JCE have certain diverging aspects. On the one hand, conspiracy is a crime in its own right used to punish inchoate liability, with criminal responsibility accruing the moment the parties agree to carry out a criminal conduct. A conviction for conspiracy does not require its underlying offence to have been carried out. JCE on the other hand, is not a crime in itself but a tool used to attribute individual liability for substantive offences committed by groups, otherwise referred to as a mode of participation. To impute criminal responsibility through JCE the substantive offence must have actually been committed. While the mere act of agreement without more suffices for *actus reus* in conspiracy, JCE seems to have gone a step further in its *actus reus*

---

[185] See Chap. 2 Sect. II. 1.1, Pinkerton Doctrine: A party to a conspiracy is liable for substantive offences committed in furtherance of the conspiracy by co-conspirators, even though the party did not participate in their commission or have knowledge of them, if the offences were reasonably foreseeable; G. P. Fletcher, 9 *JICJ* (2011), p. 186; J. D. Ohlin, 98 *J. Crim. L. & Criminology* (2007), p. 149, asserting that JCE is the international version of Pinkerton liability; J. Meirhenrich, 2 *Annu. Rev. Law Soc. Sci.* (2006), p. 351.

[186] Judge Johan Lindholm in *Prosecutor v Blagoje Simic, Miroslav Tadic and Simo Zaric*, IT-95-9-T, Judgment, Separate and Partly Dissenting Opinion, (TC II), 17 October 2003, §§ 2 and 5.

[187] See A. Cassese, 5 *JCIJ* (2007), at p. 110, who describes JCE as the darling notion of the prosecution. It has also been considered a doctrine that may be used by the prosecution in addressing evidential barriers they face in proving international crimes. Compare this with the prosecutorial advantages of a conspiracy charge in common law jurisdictions cited in Chap. 2, Sect. II.1.3; also see R. Wala, 41 *Georgetown Journal of International Law* (2010), p. 692 asserting that, 'the absence of conspiracy liability in modern IHL is inextricably linked with the emergence of JCE liability in international criminal law'.

[188] See *Prosecutor v Milan Milutinovic, Nikola Sainovic and Dragoljub Ojdanic*, IT-99-37-AR72, "Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise"; see also G. P. Fletcher and J. D. Ohlin, 3 *JICJ* (2005), p. 548, who view JCE as 'the law of conspiracy dressed up in the jargon of modern economic activity'.

demanding that the individual have made some contribution towards the common plan over and above merely agreeing to it.[189] Clearly, the distinction between the two concepts is subtle and the doctrines indeed have some relation, with certain aspects in both concepts overlapping.[190] The conclusion that may be drawn here is that JCE resembles conspiracy as a form of complicity in common law jurisdictions. In fact, participation in JCE is often evidence of an existing conspiracy.[191]

3.7 The International Criminal Tribunal for Rwanda

In April 1994 the death of the Rwandan President Juvenal Habyarimana following the shooting down of his Plane, sparked off a blood bath. Within a few hours of this incident a wave of violence spread throughout the country from its capital leading to the massacre of an estimated 800,000 Rwandans mostly of Tutsi ethnicity, in what seemed to have been a well organised and methodically executed genocide plan. The UN Security Council responding to the serious violations of humanitarian law committed in Rwanda created the ICTR, acting under Chapter VII of the UN Charter by resolution 955 of 8 November 1994.[192] The ICTR was established to prosecute the organisers and leaders of these serious crimes and contribute to the national reconciliation of Rwanda and peace in the region.[193]

3.7.1 The Statute

The ICTR is governed by its statute and has jurisdiction over genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Article 2 of the ICTR Statute gives the tribunal power to prosecute persons suspected of committing genocide. Conspiracy is only mentioned with respect to the crime of genocide.[194] Like the ICTY Statute, the ICTR also reads verbatim as Article III in the Genocide Convention.

---

[189] H. Olasolo, 20 *Criminal Law Forum* (2009), p. 270; R. Wala, 41 *Georgetown Journal of International Law* (2010), p. 704.

[190] I. M. Ralby, 28 *Boston University International Law Journal* (2010), p. 309; R. Wala, 41 *Georgetown Journal of International Law* (2010), p. 687, observing that JCE provides individual responsibility for contributions to group criminality much in the same way as conspiracy.

[191] This was clearly established in the *Popovic* case, and in the *Gatete* and *Karamera* cases in the ICTR. See *Gatete* (TC), paras 623, 626; *Karamera* (TC), para 1576.

[192] See UN Security Council Resolution on the Establishment of an International Criminal Tribunal for Rwanda S/RES/955 (1994).

[193] See ICTR website www.unictr.org last accessed on 26th October 2011.

[194] See Article 2(3) ICTR.

Investigations by the office of the prosecutor of the ICTR have been carried out on the premise that the atrocities committed in Rwanda constituted one overarching and interconnected crime of genocide.[195] It is believed that for the Rwandan tragedy to have taken place in the presence of a government, its armed forces and an entrenched civil administration, there must have been either a conspiracy of silence or a conspiracy of participation to allow perpetrators to kill.[196] The crime of conspiracy to commit genocide has been brought to life by the ICTR. The perception that the Genocide in Rwanda was largely as a result of a conspiracy, guided the prosecution in charging a majority of the accused persons with conspiracy to commit genocide.[197] In a report in support of its strategy the office of the prosecutor stated[198]:

> …the systematic, generalised and methodical nature of the crimes that were perpetrated throughout Rwanda during 1994 give rise to the inference of coordination, hence conspiracy to destroy in whole or in part the Tutsi, as such.

The prosecution opted for a selective indictment approach and as a result proceeded to charge thematic, regional or national homogenous groups.[199] The rationale behind this strategy was that it would facilitate the handling of evidence and witnesses, and easily connect the co-perpetrators with the overt acts. This would disclose a conspiracy, which resulted in the commission of genocide in Rwanda in 1994. This strategy has led to development of jurisprudence on the crime of conspiracy to commit genocide by the ICTR.

---

[195] M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 224; also see ICTR Third Annual Report to the U.N. General Assembly, UN Doc. A/53/429, S/ 1998/ 857, para 57, asserting, 'The investigations have revealed the existence of a nationwide plot in which the State authorities and elements of Civil Society, in particular members of the militia, were implicated. Determination of the components of the application and execution of this conspiracy remains a major objective of the investigations'; also ICTR Fourth Annual Report to the U.N. General Assembly, UN Doc. A/54/315, S/ 1999/ 943, para 53.

[196] M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 234.

[197] M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 224, stating that over 50 % of the cases have charged conspiracy.

[198] ICTR Fifth Annual Report to the U.N. General Assembly, UN Doc. A/55/435, S/2000/927, 2 October 2000, para 132.

[199] M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 225; also see ICTR Fifth Annual Report to the U.N. General Assembly, UN Doc. A/55/435, S/2000/927, 2 October 2000, para 60.

3.7.2 Jurisprudence

3.7.2.1 The Law and Findings

The tribunal's judgments have so far addressed the issue of conspiracy in 14 cases: *Kajelijeli, Kambanda, Musema, Nahimana et al., Niyitegeka, Ntagerura et al., Ntakirutimana, Seromba, Bagosora et al., Ndindiliyimana et al., Gatete, Nyiramasuhuko et al.*, *Bizimungu et al.* and *Karemera*.[200] Of the 14 cases, the Trial Chamber gave a conviction for conspiracy in five cases, namely, *Kambanda*, *Niyitegeka, Nahimana et al*., *Nyiramasuhuko et al*., and *Bizimungu et al*. The conviction in the *Nahimana et al.* case was however, later overturned by the Appeals Chamber.

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'.[201] Musema a former director of a public enterprise, the Gisovu Tea Factory, was accused of having conspired with others to destroy the Tutsi community in Bisesero region. He was acquitted of this count. The Chamber noted that the prosecutor had neither alleged clearly nor adduced evidence that the accused conspired with others to commit genocide. This definition has been adopted in all subsequent cases on conspiracy to commit genocide including as established above in the ICTY.[202]

The agreement is considered the essence of a conspiracy charge.[203] In *Nahimana et al.*, the chamber recognised that 'the offence of conspiracy requires the existence of an agreement, which is the defining element of the crime of conspiracy'.[204] Three individuals Nahimana, Barayagwiza and Ngeze were charged with conspiring with each other and others to kill the Tutsi population. Ferdinand Nahimana was a former

---

[200] *Prosecutor v Kajelijeli*, ICTR-98-44A-T (TC), paras 785–798; *Prosecutor v Kambanda*, ICTR-97-23-S (TC), para 40; *Prosecutor v Musema*, ICTR-96-13-A (TC), paras 184–198, 937–941; *Prosecutor v Nahimana et al.*, ICTR-99-52-T (TC), paras 1040-1055; also *Prosecutor v Nahimana et al.*, ICTR-99-52-A (AC), paras 893–912; *Prosecutor v Niyitegeka*, ICTR-96-14-T (TC), paras 422–479; *Prosecutor v Ntagerura et al.*, ICTR-96-10A (TC), paras 41, 50, 51, 70; *Prosecutor v Ntakirutimana*, ICTR-96-17-T (TC), paras 797–801, 838–841; *Prosecutor v Seromba*, ICTR-2001-66-1 (TC), paras 344–351; also *Prosecutor v Seromba,* ICTR-2001-66-A (AC), paras 207–225; *Prosecutor v Bagosora et al.*, ICTR-98-41-T (TC), paras 2084–2113; *Prosecutor v Gatete*, ICTR-2000-61-T, paras 610–629; *Prosecutor v Ndindiliyimana et al*., ICTR-00-56-T (TC), paras 2041–2069; *Prosecutor v Nyiramasuhuko et al.*, ICTR-98-42-T (TC), paras 5653–5728; *Prosecutor v Casimir Bizimungu et. al*., ICTR-99-50-I (TC), paras 1954–1971; *Prosecutor v Édouard Karemera and ano*., ICTR-98-44-T, paras 1575–1591.

[201] *Musema* (TC), para 191.

[202] See *Niyitigeka* (TC), para 423; *Ntakirutimana and Ntakirutimana* (TC), para 798; *Kajelijeli* (TC), para 787;*Nahimana et al.* (TC), para 1041; *Seromba* (AC), paras 218, 221; *Bagosora et al.* (TC), para 2087; *Nyiramasuhuko et al*. para 5655.

[203] *Nahimana et al.* (TC), para 1045; *Seromba* (AC), para 218, stating that the agreement is the *actus reus*.

[204] *Nahimana et al.* (TC), para 1042.

university lecturer of history, co-founder of *Radio Television Libre des Mille Collines S.A* (RTLM), which was used to broadcast information and propaganda during the genocide helping to coordinate the killings and fuel hatred against the Tutsis. He was also a member of the party *Mouvement Revolutionnaire National pour le Development* (MRND). Jean-Bosco Barayagwiza a lawyer by profession was a founding member of the *Coalition pour la Defense de la Repulique* (CDR) party, and also co-founded RTLM, at the material time during the genocide he held the post of Director of Political Affairs in the Ministry of Foreign Affairs. Hassan Ngeze was a journalist and founded the newspaper *Kangura* used to spread propaganda and incite hatred against the Tutsi ethnic group, which was initially financed by powerful people within the MRND party and later the CDR party, he held the post of Editor in Chief. He was also a founding member of the CDR party. The Trial Chamber drew an interesting inference by making a finding of conspiracy from institutional coordination. The Trial Chamber held that the accused persons were guilty of having conspired with one another, and others, through personal collaboration, as well as consciously interacting with one another, using the institutions that they controlled, namely, RTLM, *Kangura* and CDR to promote a joint agenda, which was targeting of the Tutsi population for destruction.[205] It confirmed that, 'conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their personal links with each other'.[206] The chamber asserted that, 'institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action'.[207] The finding of conspiracy was however, reversed by the Appeals Chamber because in its view though the factual basis for the conviction was consistent with a joint agenda to commit genocide, it was not the only reasonable conclusion that could be drawn from the evidence.[208]

The tribunal has stated that conspiracy is an inchoate offence with a continuing nature that culminates in commission of acts contemplated in the conspiracy.[209] The purpose of the conspiracy need not be successful, it is the act of conspiracy itself, in other words the process of making the agreement, which is punishable and not its result.[210] 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 specialis* of genocide, namely, the intent to destroy in whole or in part a national, ethnical,

[205] *Nahimana et al.* (TC), paras 1054–1055.

[206] *Nahimana et al.* (TC), para 1048.

[207] *Nahimana et al.* (TC), para 1048.

[208] *Nahimana et al.* (AC), paras 906, 910.

[209] *Nahimana et al.* (TC), para 1044.

[210] *Musema* (TC), para 193; *Kajelijeli* (TC), para 788; *Niyitegeka* (TC), para 423; *Seromba* (TC), para 345.

racial or religious group as such.[211] The *mens rea* includes a general awareness of existence of the conspiracy by its members, knowing they participate in it together with others, and knowledge of its role in furtherance of their common purpose, which is to commit genocide.[212] In this aspect, a tacit understanding of the criminal purpose by those participating in the conspiracy would be sufficient.

The agreement between members of a conspiracy may be explicit or implicit, as expressed in *Nahimana et al.*, 'the existence of a formal or express agreement is not needed to prove the charge of conspiracy'.[213] It may be established through direct evidence by the existence of meetings planning for genocide, or may also be inferred from circumstantial evidence.[214] To constitute evidence of an agreement, it is important that the action of the group members working within a unified framework be 'concerted and coordinated'.[215] The mere similarity of conduct is not enough.[216]

In *Niyitegeka*, the tribunal inferred the existence of a conspiracy to commit genocide based on circumstantial evidence from various actions of the accused.[217] The accused was a former information minister in the interim government in charge of Rwanda during the genocide period. He was alleged to have acted in concert with others in the interim government to plan and implement the genocide against the Tutsis. Among the conspiratorial acts he was accused of included, participating in meetings in which the genocide policies were generated and implemented, transporting armed individuals to Bisesero area to kill the Tutsi, organising to ensure the assailants were provided with weapons, colluding with local administrators in Kibuye prefecture to not protect the Tutsi, and failing to maintain public order or deliberately undermining it in districts in which he exercised authority, to facilitate the destruction of the Tutsi. At paragraph 428 the Chamber noted,

> Bearing in mind that the Accused and others acted together as leaders of attacks against Tutsi [. . .] taking into account the organised manner in which the attacks were carried out, which presupposes the existence of a plan, and noting, in particular, that the Accused sketched a plan for an attack in Bisesero at a meeting [. . .] to which the people in attendance [. . .] agreed, the Chamber finds that the above facts evidence the existence of an agreement between the Accused and others [. . .] to commit genocide.

---

[211] *Nahimana et al.* (AC), paras 894, 896; *Musema* (TC), para 192; *Seromba* (TC), para 347 *Bagosora et al.* (TC), para 2087; *Niyitegeka* (TC), para 423; *Nyiramasuhuko et al*. para 5655.

[212] *Ndindiliyimana et al*. (TC), para 2047; *Nahimana et al.* (TC), para 1047, where the tribunal observed, 'A coalition, even an informal coalition, can constitute such a framework so long as those acting within the coalition are aware of its existence their participation in it, and its role in furtherance of their common purpose'.

[213] *Nahimana et al.* (TC), para 1045.

[214] *Seromba* (AC), para 221; *Bagosora et al.* (TC), para 2088; *Nyiramasuhuko et al*. para 5656.

[215] *Nahimana et al.* (TC), para 1047.

[216] *Bagosora et al.* (TC), para 2088; *Bizimungu et al*. (TC), para 1956.

[217] *Niyitegeka* (TC), paras 427–429.

The evidence adduced must show that the members of the conspiracy had indeed reached an agreement. The mere showing of a negotiation in process does not suffice.[218] It is not necessary for the chamber to conclude that all of the accused conspired together; it will suffice if the prosecution can establish that the accused conspired with at least one other, with whom they are alleged to have planned to commit genocide.[219]

Although circumstantial evidence may be used to establish conspiracy, the ICTR has not been too eager to infer the existence of a conspiracy, especially, when of the view that it is not the only reasonable inference that may be made from the evidence. This was the case with the Appeals Chamber judgment in *Nahimana et al.*, as well as in the Trial Chamber judgments of *Kajelijeli*, *Bagosora et al.*, *Ndindiliyimana et al*. and *Nyiramasuhuko et al*. This reluctance was especially displayed in the case of Bagasora, one of the cases that had been expected to confirm the prosecution strategy on the conspiracy theory. Colonel Bagosora labelled mastermind of the genocide that occurred in Rwanda, was the *Directeur de Cabinet of the Ministry of Defence* at the material time.[220] The indictment stated that given his rank, office and the personal relations he had with the commanders of the units most implicated during the genocide, he had authority over the persons and members of the militia.[221] It further noted that in his position of authority he acted in concert with others and participated in the 'planning or execution of a common scheme, strategy or plan', to commit atrocities set forth in the indictment. The other accused persons in this case were: General Gratien Kabiligi, the head of operations bureau (G-3) of the army general staff; Major Aloys Ntabakuze, the commander of the elite Para Commando Battalion; and Colonel Anatole Nsengiyumva, the commander of the Gisenyi operational sector. It was alleged the accused conspired amongst themselves and with others from late 1990 through 7 April 1994 to exterminate the Tutsi population.[222] The evidence relied on by the prosecution was mostly circumstantial. Among the conspiratorial acts relied on was Bagosora's alleged comment about the coming of 'apocalypse', reference in a letter to a 'Machiavellian plan', participation in a commission that defined the enemy of which the Chamber noted the troubling over emphasis to Tutsi ethnicity, drafting of a target list and the arming of the civilian militia.[223] While making its decision, the Chamber observed that even though certain aspects of the evidence had indications that may be construed as evidence of a plan to commit genocide in view of the targeted and speedy killings that happened immediately after the shooting down of the presidential jet, this however, was not the only inference that could be drawn from the evidence. It emphasised that '[…]

[218] *Kajelijeli* (TC), para 787.

[219] *Bagosora et al.* (TC), para 2096; *Ndindiliyimana et al*. (TC), para 2050.

[220] See para 4.2 *Bagasora* indictment.

[221] Para 4.4 *Bagasora* indictment.

[222] See *Bagosora et al.* (TC), paras 1, 2 and 6.

[223] *Bagosora et al.* (TC), para 2085.

the evidence is also consistent with preparations for a political or military power struggle and measures adopted in the context of an on-going war with the RPF[…]'.[224] The Chamber therefore, held that it was not satisfied that the prosecution had proved beyond reasonable doubt that the four accused conspired amongst themselves or with others to commit genocide before it unfolded on 7 April 1994.[225]

The Chamber in *Ndindiliyimana et al*. also shared the above interpretation.[226] The case concerned the role of four members of the Rwandan Army and *Gendarmerie nationale* in the events in Rwanda between 6th April and 17th July 1994. At the material time, Augustin Ndindiliyimana was Chief of Staff of the *Gendarmerie nationale*; Augustin Bizimungu was the Commander of Operations for Ruhengeri secteur and Chief of Staff of the Rwandan Army; Xavier Nzuwonemeye was the Commander of the elite Reconnaissance (RECCE) Battalion and Innocent Sagahutu was Commander of Squadron A of the RECCE Battalion. The defendants were alleged to have conspired among themselves together with other high ranking Hutu civilian and military authorities to commit genocide against the Tutsi. Here, the prosecution also mainly relied on circumstantial evidence. Among some of the visible components that the prosecution alleged underpinned the conspiracy included: a document drafted by the Enemy Commission that depicted the Tutsis as enemies or accomplices of the enemy; provision of military training and weapons to the interahamwe militiamen where Augustin Bizimungu and Innocent Sagahutu played key roles; participation in several meetings and gatherings between 1992 and 1994 by Augustin Bizimungu, at which he devised with others a strategy for fighting the Tutsi enemy and allegedly also informed others that he did not want to see any Tutsi alive; opposition to the successful implementation of the Arusha Accords that set out a strategy of the return to peace and institutionalised power-sharing between the various political and/or military factions; transfer of *Gendarmerie* unit commanders opposed to the massacres; the killing of the Prime Minister and Belgian UNAMIR soldiers; Augustin Bizimungu's alleged anti-Tutsi remarks and conduct.[227] The Chamber dismissed this charge against the defendants stating it was not proved beyond reasonable doubt. Although, admitting that certain elements of the alleged visible components that the prosecution had proved could collectively be suggestive of a conspiracy to commit genocide, it asserted that this was not the only reasonable inference that could be drawn from the evidence.[228] Certain allegations by the prosecution on the count of conspiracy were also dismissed for lack of proof, and others were dismissed on account of failure by the prosecution to specifically allege them in the

[224] *Bagosora et al.* (TC), para 13.

[225] *Bagosora et al.* (TC), paras 2097–2113.

[226] Case No. ICTR-00-56-T, Judgment delivered 17 May 2011.

[227] *Ndindiliyimana et al*. (TC), paras 2052–2065.

[228] *Ndindiliyimana et al*. (TC), paras 2068, 2069.

indictment, this, the tribunal observed, made the indictment defective specifically with respect to these allegations.[229]

The need for prosecution to specifically particularise the count on conspiracy, is further illustrated by the judgment delivered in *Nyiramasuhuko et al.*[230] All six defendants in the case were alleged to have held position of authority in the préfecture of Butare in 1994, and were charged with elaborating, adhering to and executing a government plan to exterminate the civilian Tutsi population and moderate Hutus in that region. It was alleged that massacres in the Butare region started later than in the rest of the country, after a careful planning and after removal of the Préfet Habyalimana who had resisted the assassination of Tutsis in the area. Habyalimana was replaced with an individual who supported such crimes. The six accused were charged with contributing to the massacres by forming an alliance that used state apparatus to facilitate such activity. The respective indictments alleged the accused acted 'in concert with one another to participate in the planning, preparation, or execution of a common scheme, strategy, or plan, to commit the atrocities'.[231] In the end, only the defendant Pauline Nyiramasuhuko who served as Minister of Family and Women's Development under the interim government, was found guilty of conspiracy to commit genocide. Discussing the count of conspiracy, the Chamber noted that an indictment that charged conspiracy had to identify specific individuals who entered into the agreement or state when and where the agreement was executed and when the conspiracy ended, failure to do this made the indictment ambiguous and defective.[232] This was the situation relating to the conspiracy charge before the Chamber in the instance case, but the prosecution having further clarified particulars of the conspiracy charge during its opening statement, the tribunal considered this to have sufficiently cured the defects in the indictment with regards to the charge. The Chamber observed that the defendants in the circumstances had not suffered prejudice.

To prove the charge of conspiracy the prosecution mainly relied on circumstantial evidence. On evidence relating to the defendant Nyiramasuhuko, the tribunal asserted that the only reasonable conclusion that could be drawn in the circumstances was that the defendant participated in a conspiracy to kill the Tutsis within Butare préfecture with intent to destroy in whole or in part, the Tutsi ethnic group.[233] As part of the conspiracy, she was found to have participated in meetings at which Tutsi massacre was discussed, and she took part in decisions such as removal of the Préfet Habyalimana, which led to massacres in the concerned region.[234] In relation to the other defendants, the tribunal observed that being part

[229] *Ndindiliyimana et al.* (TC), para 2055.

[230] Case No. ICTR-98-42-T, Judgment delivered 24 June 2011.

[231] *Nyiramasuhuko et al.* (TC), para 5654.

[232] *Nyiramasuhuko et al.* (TC), paras 5661–5665.

[233] *Nyiramasuhuko et al.* (TC), para 5678.

[234] *Nyiramasuhuko et al.* (TC), paras 5666 et seq.

of the conspiracy of the interim government was not the only reasonable inference that could be drawn from the evidence adduced against them in support of the conspiracy charge. As a result, they were acquitted of the charge.[235] Of particular interest is the tribunal's analysis of the evidence adduced against the defendant Ntahobali, where it noted that:

> Ntahobali did participate in the attacks at the BPO [Butare *préfecture* office] and these attacks were methodical. Further, Ntahobali co-perpetrated these attacks at the BPO with Nyiramasuhuko, who was a member of the Interim Government which formulated a conspiracy to kill Tutsis in Butare *préfecture*. However, there was no clear-cut evidence that Ntahobali acceded to Nyiramasuhuko's agreement with the Interim Government. The only evidence that could lead to an inference that Ntahobali agreed to commit genocide was his participation in acts of genocide. However, the co-perpetration of genocide does not equate to a conspiracy to commit genocide. Without some evidence pointing to Ntahobali's awareness of, and accession to, the Interim Government's conspiracy, the inference that Ntahobali joined a pre-existing plan is not the only reasonable one from the evidence.[236]

It is curious that the tribunal was not ready to infer conspiracy even in such circumstances where the defendant had obviously acted at least in a concerted and coordinated manner with another one of his co-accused, already considered to have been part of the conspiracy. In asserting its position, the tribunal opined that the prosecution had to be held to the case it formulated prior to the trial and for which the defence had prior notice of. Since the prosecution had not alleged prior to the trial that it would base the defendant's participation in the conspiracy in the attacks at Butare *préfecture* office, it could not now rely on it to secure a conviction.[237]

Judgment delivered recently by the ICTR in *Bizimungu et al.,* convicting two co-accused persons of conspiracy to commit genocide while acquitting another two co-accused of the same charge, is another demonstration of the Tribunal's strict construction of the rule requiring particularisation of the conspiracy charge.[238] The four accused had been appointed ministers in the interim government formed following shooting down of the plane of the late Rwandan president Juvénal Habyarimana. The prosecution alleged that the four like all other members of the interim government had been selected on the basis of their dedication to the elimination of Tutsis. It asserted that as a result, the four accused supported the interim government's genocide plans, which included replacing local authorities who opposed the killing of Tutsis with individuals who supported it. The main foundation of the conspiracy count in this case was the interim government's dismissal of Jean-Baptiste Habyalimana as Butare's prefect on 17 April 1994 and President Théodore Sindikubwabo's speech in Butare on 19 April 1994, during the installation ceremony of Sylvain Nsabimana as the region's new prefect.[239] The

---

235 *Nyiramasuhuko et al.* (TC), paras 5679 et seq.

236 *Nyiramasuhuko et al.* (TC), para 5683.

237 *Nyiramasuhuko et al.* (TC), para 5684.

238 ICTR-99-50-T, Judgement delivered on 30 September 2011.

239 *Bizimungu et al.* (TC), para 1954.

Tribunal specifically found that the accused Mugenzi and Mugiraneza had agreed with several other interim government ministers who included the then Prime Minister Jean Kambanda, to commit genocide against the Tutsis. It found that they had participated in a decision to remove Jean-Baptiste Habyalimana, the prefect of the Butare region, because of a common perception that he was a Tutsi and political moderate, and would have opposed ethnically driven killings and had indeed done so, considering that under his watch the location of Butare had remained relatively peaceful. To confirm their genocide intent the Chamber found that the two co-accused Mugenzi and Mugiraneza had attended the installation ceremony of Habyalimana's replacement where President Théodore Sindikubwabo made an inflammatory speech that called for Tutsis in Butare to be killed.[240] However, although the Chamber considered the allegations with respect to the Butare installation ceremony to be relevant to the conspiracy count, it refused to rely on it as an independent basis for conviction of the defendants on account of the conspiracy charge. The Chamber considered that the indictment, when read as a whole was ambiguous as to whether the Butare installation ceremony had been charged under the count on conspiracy. It therefore found that the indictment in as far as it related to this specific incident was defective, asserting that even the prosecution's attempt to more clearly link this event as evidence of the conspiracy to commit genocide count in its opening statement was not sufficient to cure the defect.[241]

3.7.2.2 The Issue of Merger

An issue that has drawn conflicting decisions in the ICTR is whether the Trial Chamber may convict simultaneously or only in the alternative a charge of genocide and that of conspiracy to commit genocide, particularly when the offences arise from the same set of facts. The Trial Chamber in *Musema* confirmed that an accused person may be charged with both the offence of conspiracy and the substantive crime of genocide.[242] This is because conspiracy to commit genocide is a separate crime from genocide. Since conspiracy does not merge with its contemplated crime, the prosecution is permitted to charge the accused with both. This has been the practice in the ICTR. Two main reasons exist in support of this practice. The first reason is that, prior to the presentation of evidence it is difficult to know which of the charges against the accused will be proved.[243] Secondly, the two crimes being separate, the cumulative charging is important to hold the

[240] *Bizimungu et al*. (TC), paras 1959–1962.

[241] *Bizimungu et al*. (TC), paras 1964–1971.

[242] Musema (TC), para 194.

[243] M.C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 205.

accused accountable for both crimes, reflecting the totality of crimes the accused has committed.[244]

The Trial Chamber in *Musema* also discussed the civil and common law approaches to the issue of cumulative conviction. Under civil law systems, if conspiracy is successful and the substantive offence is consummated, the accused will be convicted only for the substantive offence and not the conspiracy. However, under common law systems, an accused may, in principle, be convicted for both conspiracy and the underlying substantive offence, in particular where the objective of the conspiracy extends beyond the offences actually committed.[245] The Trial Chamber observed that conspiracy in the Genocide Convention was an inchoate crime more akin to conspiracy in common law systems, but curiously, it went ahead to adopt a definition of conspiracy it considered more favourable to the accused. This definition reflected the civil law approach to conspiracy. It stated that an accused could not be convicted for both genocide and conspiracy to commit genocide on basis of the same facts.[246] This interpretation has influenced other decisions recently made by various chambers in the ICTR, choosing to dismiss the conspiracy count although it was proved, on account that the genocide count also proved by the same facts sufficiently covered the alleged crimes.[247] In these later cases, the Chambers, although conceding that genocide and conspiracy to commit genocide constituted different material elements, took queue from the judgment in the *Popovic* case-influenced by *Musema*- and asserted that the basis of multiple convictions was not only about different material elements but also about fairness to the accused.[248]

Other cases also before the ICTR reflect a different view from the *Musema* judgment. This was case in *Kambanda*, the accused a former prime minister in the interim government, was convicted on his own plea of guilty to several charges, which included both the charges of genocide and conspiracy to commit genocide. He admitted to having participated in meetings where the course of massacres was actively followed and his government took no action to stop them.[249] The Chambers in *Nahimana, Niyitigeka,* and *Nyiramasuhuko et al*. also allowed cumulative convictions for conspiracy to commit genocide and genocide charges. In *Nahimana*, the Chamber observed that cumulative charging was generally permissible only if the crimes involved had materially distinct elements.[250] It established that since the defining element for the offence of conspiracy was the agreement, an accused could be held criminally responsible for both the act of

---

[244] A. Obote-Odora, 8 *Murdoch University Electronic Journal of Law* No. 1 (2001), para 95.

[245] *Musema* (TC), paras 196–197; also see Chap. 2 on comparative analysis.

[246] *Musema* (TC), para 198.

[247] See *Gatete* (TC), paras 654–662; *Karamera et al.* (TC), paras 1709–1713.

[248] *Gatete* (TC), para 661; *Karamera et al.* (TC), para 1713.

[249] *Kambanda* (TC), para 39 et seq.

[250] *Nahimana et al.* (TC), paras 1043, 1089–1090.

conspiracy and the substantive offence of genocide, which is the object of the conspiracy.[251]

3.8 Evaluation of the Ad Hoc Tribunals

The conspiracy charge has clearly not had a prominent role in establishing criminal responsibility before the ad hoc tribunals, with the least cases before the ICTY. Despite the prosecution strategy and assertion that conspiracy formed an integral part of the genocide committed in Rwanda, the judgments that have been delivered before the ICTR do not overwhelmingly support this view. Given that genocide was committed, the conspiracy charge often most valuable for punishing incomplete crimes seems to have added no particular value to the prosecution's case. It is even suggested that in certain cases the chambers decision to dismiss a charge of conspiracy to commit genocide, might mainly have been influenced by the reason that there was sufficient evidence to convict for the substantive crime of genocide.[252]

The evidence before the tribunals has been strictly construed making the possibility of inferring conspiracy a difficult endeavour. The conspiracy that has been punished often has to deal with participation in some concrete plan, and even in cases where a defendant is seen to have acted concertedly with others to commit genocide, a conspiracy conviction will not be given unless it is the only reasonable inference that can be drawn in the circumstances. The prosecution must strictly prove conspiracy only from acts asserted in the indictment. The tribunals are not prepared to draw any other possible inference, regardless of how convincing it is, from other facts and evidence arising in the course of the prosecution if they were not alleged prior to the trial giving the defence sufficient notice.

It is clear the ad hoc tribunals do not agree on the issue of cumulatively convicting conspiracy to commit genocide and the crime of genocide itself. While the ICTY so far seems to have adopted the merger doctrine, the chambers in the ICTR are divided. This division in opinion is strange in light of the fact that the chambers acknowledge that the inchoate crime of conspiracy is an independent crime punishable regardless of its results. This is clearly the form of conspiracy understood in common law jurisdictions where the merger doctrine does not apply.

The argument advanced against the conviction of an accused on two or more counts in relation to the same facts, is that it amounts to judging the accused twice for the same crime. In other words, it violates the principle of double jeopardy or a

---

[251] *Nahimana et al.* (TC), paras 1089–1090.

[252] T. R. Dalton, *Cornell Law School Graduate student papers* (2010), p. 4, commenting on the Musema judgment; see also A. Zahar & G. Sluiter, *International Criminal Law* (2008), p. 183. This is especially reflected in the chambers decision to dismiss the conspiracy count against the defendant Ntahaboli in the case of *Nyiramasuhuko et al.*

substantive *non bis in idem* principle in criminal law.[253] The ICTR jurisprudence has confirmed that multiple convictions need not be sustained by different factual situations.[254] The principle of cumulative convictions recognises that a single criminal act may offend two or more criminal provisions and justify a finding of guilt on multiple counts.[255] The Chamber in *Akayesu* set out the instances where this practice is justified. It stated that it was acceptable to convict an accused of two or more offences based on the same set of facts only where the offences have different elements,[256] or where the laws in question protect different social interests, or when it is necessary to record a conviction for more than one of the offences in order to reflect what crimes an accused had committed.[257] The Chamber also noted that the accused suffers no prejudice as the Chamber, to avoid double punishment for the same acts, imposes concurrent sentences for each cumulative charge.[258]

Although it might seem duplicative and of no essence to convict an accused of conspiracy once genocide has been established, taking into consideration that similar facts and evidence are used to prove both charges, the interest of justice might dictate a necessity to record a conviction on both counts to reflect the totality of the accused's culpable conduct. Here, conspiracy has the role of reflecting the whole story or the true circumstances under which the underlying crimes were carried out, in particular, the situation of Rwanda. The ICTR has acknowledged that the conspiracy adopted at the Genocide Convention was one founded on the principle of common law conspiracy.[259] Interestingly, the chambers always admit that both conspiracy and genocide have different material elements.[260] Viewed from this perspective, it follows that a conviction should be recorded for both conspiracy and its underlying offence in resonance with the common law theory of conspiracy. The double conviction does not have to translate to a harsher penalty, as is often the case. This therefore, takes away the question of fairness to the accused because even in the cases of double conviction, there is never an extra penalty for the conspiracy offence. In the circumstances, the rationale adopted by

[253] See *Prosecutor v Akayesu,* ICTR (TC), para 462.

[254] *Akayesu* (TC), paras 461–470.

[255] A. Obote-Odora, 8 *Murdoch University Electronic Journal of Law* No. 1 (2001), para 97.

[256] See also *Nyiramasuhuko* et al. para 6069, asserting that multiple criminal convictions on the same conduct is permissible when entered under different statutory provisions, only if the provisions have materially distinct and different elements.

[257] *Akayesu* (TC), para 468.

[258] *Akayesu* (TC), paras 463, 464, 465, 466.

[259] See A. Obote-Odora, 8 *Murdoch University Electronic Journal of Law* No. 1 (2001), para 34, asserting the Genocide Convention adopts common law principles.

[260] See *Gatete* (TC), para 654; *Karamera et al.* (TC), para 1709.

the chambers that allow cumulative convictions on this issue, such as in *Nahimana* and *Kambanda*, reflects the correct legal position.[261]

3.8.1 Planning and Preparation

The concept of planning has an intimate correlation with conspiracy. In most prosecutions concerning the conspiracy charge before the international tribunals, the focus has been on facts surrounding planning and preparation for the respective crimes. This explains the inferences that give the impression of conspiracy and planning actually referring to one and the same concept. At the Nuremberg tribunal, conspiracy was equated to the planning and preparation to wage the war of aggression, with conspiracy also being referred to as the common plan. The Tokyo tribunal observed that 'conspiracy' and the acts of 'planning and preparation' covered similar issues therefore, deciding that an accused could only be declared guilty for conspiracy and not for both. In the subsequent Nuremberg trials, while setting out particulars of the conspiracy counts in the various indictments, the prosecution used terms such as 'the defendants were connected with plans and enterprises', 'participated in the said common design, conspiracy, plans and enterprises'. The equation of conspiracy to planning is especially reflected in Judge Blair's dissenting opinion in the Justice case, when he asserted that 'there was no material difference between a plan or scheme to commit a particular crime and a common design or conspiracy to commit the same'.[262] The 1996 ILC Draft at Article 2 sub-paragraph 3 (e) provided criminal responsibility for one who 'directly participates in planning or conspiring to commit such a crime which in fact occurs'. The conspiracy charges before the ICTR also describe the defendants as having formulated and participated in plans to kill their victims among other acts. In fact, conduct that has been punished before the international criminal

[261] See A. Obote-Odora, 8 *Murdoch University Electronic Journal of Law* No. 1 (2001), para 46, he asserts that conspiracy to commit genocide and the crime of committing genocide are independent and separate offences and as a result an accused ought to be found guilty on both counts; M.C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 198 et seq, stating that such conviction is necessary for the truth function of accountability, especially in the case of Rwanda, showing that the genocide was not committed just by a certain individual but it was the result of conceived, prepared for, organised and well executed plan. In p. 239 he concludes, 'As an accountability tool the prosecution of the consummated crime of genocide, without conspiracy, offers an unfinished explanation of the collective, collaborative, and coordinative nature of the atrocity crimes committed in 1994 in Rwanda'; *cf* But compare with T. R. Dalton, *Cornell Law School Graduate student papers* (2010), p. 13, who opposes such reasoning asserting that the application of a substantive crime of conspiracy by the ad hoc tribunals is dubious, stating that to hold conspiracy to commit genocide as a substantive crime contrasts with general principles of international law.

[262] NT-war criminals-vol III *Justice case* p. 1195.

tribunals as conspiracy mostly relates to the accused's participation in the planning of the underlying crimes together with other perpetrators.[263]

Interestingly, the statutes that make conspiracy punishable, also expressly provide for punishment of the act of planning. Apart from conspiracy, planning and preparation to wage aggressive war was criminalised in both the IMT and IMTFE Charters.[264] The planning or aiding and abetting in the planning of an international crime also attract criminal responsibility in the ICTY and ICTR Statutes.[265] Both planning and conspiracy represent the preliminary stages of a crime and have been used to punish similar conduct before the international tribunals.[266] This explains why the two concepts are often equated to each other.

Inspite of the aforementioned similar aspects, the two terms are legally different concepts. In the *Akayesu* judgment the Trial Chamber made the following observation:

> …planning is similar to the notion of complicity in Civil law, or conspiracy under Common law… (b)ut the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[267]

Planning refers to the design to carry out a specific international crime,[268] whereas conspiracy is the agreement to carry out such crime. In this context one might say that the conspiracy takes place before the planning.[269] The successful implementation of a conspiracy often times requires planning.[270] The defendants' unison participation in planning commission of a crime often manifests the existence of a conspiracy between them. In addition, planning is a form of complicity that requires the underlying crime to be carried out,[271] whereas conspiracy is an inchoate crime, punishable regardless of it results. While planning can be a solitary

---

[263] Also see J. D. Ohlin, 5 *JCIJ* (2007), p. 71 referring to Article 7(1) of the ICTY which provides for criminal responsibility for those 'who planned…or otherwise aided and abetted in the planning, preparation…of a crime…' asserting that it refers to punishment of conspiracy.

[264] Nuremberg Charter Article 6; Article 5 IMTFE Charter.

[265] Articles 7(1) ICTY and 6(1) ICTR.

[266] See V. Morris and M. P. Scharf, *The International Criminal Tribunals for Rwanda* (1998), p. 236 stating that the planning phase represents the initial stage of a crime.

[267] *Akayesu* ICTR (TC), para 480.

[268] *Prosecutor v Krstíc*, ICTY (TC), judgment of 2 August 2001, para 601; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), para 624.

[269] See *Gatete* ICTR (TC), confirming this position on its analysis of conspiracy at paras 618, 626.

[270] J. D. Ohlin, 98 *J. Crim. L. & Criminology* (2007), p. 176, stating that a plan makes the essence of a criminal conspiracy.

[271] *Prosecutor v Kordíc & Cerkez* (TC), para 26; *P v Nahimana* (AC) para 479; E. van Sliedregt, *The Criminal Responsibility of Individuals for violations of International Humanitarian Law* (2003), p. 79.

task,[272] conspiracy is a collective crime that must be carried out by at least two persons. Therefore, the conclusion that may be drawn here is that the joint participation in planning a crime is only the earliest evidence of a conspiracy, but not the conspiracy itself.

3.9 Conclusion

An overview on conspiracy shows that its use in the international plane has mainly emerged in the context of complete crimes. Conspiracy was introduced to deal with the post-world war II atrocities in response to the nature of crimes committed. The perpetrators had acted in a cohesive and concerted manner resulting into large-scale atrocities. The common law offence of conspiracy was seen as a central feature in the preparatory work to Nuremberg. The main motivation for its inclusion was that it presented with it unique characteristics, which created a basis for attributing liability to all its adherents, regardless of what role they played, as long as they had participated in the conspiracy with intent. A similar rationale was used to introduce conspiracy into the Charter of the Tokyo tribunal and into CCL. 10.

The coming into force of the Genocide Convention introduced conspiracy to commit genocide. This crime was later to be provided for in the ICTY and ICTR Statutes and has formed a major part of the prosecution strategy before the ICTR, where the law on this aspect has evolved. Although, the idea behind conspiracy in the Genocide Convention was to facilitate the arrest of potentially harmful criminal conduct while still in its infancy stages, conspiracy before the ad hoc tribunals has been adjudicated in the context of completed genocide crimes, perpetrated in a large-scale and systematic manner. The ICTY and ICTR have proceeded to use conspiracy to hold certain accused persons criminally liable, for conduct showing they participated in the planning of genocide, more particularly, in the case of the Rwanda tribunal.

Generally, the records of the international tribunals confirm that the prosecution of conspiracy is a difficult task, with most tribunals having adopted a strict approach to the conspiracy charge. In the face of complete crimes, conspiracy is inferred if the pattern of events discloses sufficient unity to qualify as such. Therefore, conspiracy will only be inferred if the crimes were committed in a concerted and coordinated manner, and in the case of circumstantial evidence, the ad hoc tribunals require that such conspiracy must be the only reasonable inference that can be drawn.

An accused will only be considered criminally responsible if he participated in the conspiracy with intent that the underlying crime is committed. Intent here has

[272] *Akayesu* ICTR (TC), para 480; *Kordíc & Cerkez* ICTY (TC), para 386; E. van Sliedregt, *The Criminal Responsibility of Individuals for violations of International Humanitarian Law* (2003), p. 80.

also strictly been construed with some tribunals, for example the IMT, having preference for direct proof. The prosecution must often also prove that the alleged defendant had intent to participate in the conspiracy apart from having intent to commit the underlying crime. In applicable cases, the tribunals have restricted a defendant's criminal responsibility to the actual finding of their complicity in a given conspiracy. The tribunals have refused to give effect to vicarious criminal responsibility, which makes co-conspirators liable for all substantive crimes committed in furtherance of conspiracy as long as they were foreseeable.

There is also the requirement that the conspiracy counts be properly particularised, with the prosecution setting out in the indictment all overt acts that it intends to rely on to prove a defendant's participation in the conspiracy. The ad hoc tribunals have especially adhered to this requirement, insisting that a conviction of conspiracy will only be obtained for the illegal acts that the prosecution specifically alleged in the indictment. This has put a heavy burden on the prosecution because often the evidence against an accused may not be too clear and is only disclosed in the course of trial. This requirement was not followed in the Nuremberg and Tokyo tribunals, but as a result, the judges in these respective tribunals treated the prosecution's evidence on conspiracy with extreme caution.

An issue that has been of concern before the ad hoc tribunals is the rationale of punishing both conspiracy and its executed target crime. This issue was not addressed in the Nuremberg and Tokyo tribunals. Although, the ad hoc tribunals consider conspiracy itself to be an independent crime, in the face of complete crimes some of the tribunals have preferred to merge conspiracy with the underlying crimes, punishing only the latter. The rationale applied here is that since inchoate conspiracy is intended for prevention purposes, when its underlying crime is committed then the justification for punishing conspiracy disappears. This issue has seen the ideologies of common law rationale of punishing conspiracy clash with the civil law theory behind punishing criminal agreements, resulting into a disparity of judgments.

Common law conspiracy has obviously not had the prominence its proponents intended for it in holding perpetrators of international crimes accountable. It first encountered opposition from practitioners from civil law jurisdictions and even with its adoption; the tribunals prefer to exercise extreme caution when dealing with the conspiracy charge. This has led to far much fewer convictions for the offence of conspiracy than initially expected. The general apprehension is that the conspiracy charge often requires broad inferences to be drawn from circumstantial evidence, and if not watched can lead to application of liability standards that are unsatisfactorily close to the doctrine of guilt by association. The theory of conspiracy that the prosecution has at times advocated for involves grand conspiracies spanning over a period of many years, and involving the commission of several crimes. This tends to exaggerate a defendant's culpability exposing such accused to the possibility of greater punishment. In such a scenario, a minor participant in a conspiracy has the potential of being held criminally responsible for the commission of many crimes over which they had little or no control. These looming dangers have made the tribunals have preference for a conspiracy interpreted more

restrictively than even the standards used in common law jurisdictions. This practice has downplayed the several perceived advantages of the common law conspiracy charge. This then presents the question whether the practice before the international tribunals has sufficiently established conspiracy as an independent crime in international criminal law.

Chapter 4
Customary International Law

Abstract There is a general view that conspiracy as a crime under customary international law is only established with respect to the crimes of aggression and genocide. This chapter argues that the exclusion of conspiracy to commit war crimes and crimes and against humanity can no longer be supported. The argument is that state practice supports an assertion that conspiracy to commit war crimes and crimes against humanity have also now evolved into crimes under customary international law.

Contents

4.1 Introduction

Having discussed the status, elements and function of conspiracy in the various domestic jurisdictions both from common law and civil law countries, and also analysed its use in prosecuting international crimes before the international tribunals, it is pertinent to discuss whether the aforesaid practice has given rise to a

J. R. A. Okoth, *The Crime of Conspiracy in International Criminal Law*,
DOI: 10.1007/978-94-6265-017-6_4,

norm of customary international law. The following discussion will clarify the ambiguity on the status of conspiracy as a substantive crime under customary international law, and also forms an essential step towards analysing the position of such status in relation to the Rome Statute.[1]

4.2 Characteristics of Customary International Law

Customary law is unwritten and its existence is established by state practice and a belief that such practice is required as a matter of law (*opinio juris*).[2] State practice is considered to include both what the state does and says. This will often be found in various official government acts such as the legislation made, court decisions, official statements and other actions taken by government agents with respect to international issues.[3] Treaty practice is also relevant, including the decisions of international tribunals and international organisations, which may be classified as indirect evidence of state practice.[4] Customary law is considered important in clarifying the content of treaty provisions that are inadequately covered, or filling in the gaps of such provisions.[5] It is binding on all states. When a treaty restates a customary international rule, obligations and responsibilities arising from such a rule are also binding on non-party states.[6]

---

[1] See Chap. 5, Sect. 5.4; see also G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg no. 141, asserting the importance of customary law in international criminal law, 'even after the ICC Statute's entry into force'.

[2] Statute of the International Criminal Court of Justice, Article 38(1)(b) describing customary law as "a general practice accepted as law"; International Court of Justice, *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)*, 3 June 1985, ICJ Reports 1985, pp. 29–30, § 27, '…the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States'; see also I. Brownlie, *Principles of Public International Law*, 7th edn. (2008), pp. 6 et seq; A. Cassese, *International Law*, 2nd edn. (2005), p. 156; M. N. Shaw, *International Law*, 6th edn (2008), p. 84.

[3] I. Brownlie, *Principles of Public International Law*, 7th edn. (2008), p. 6; M. N. Shaw, *International Law*, 6th edn (2008), pp. 81–84; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg no. 142.

[4] *Tadic*, ICTY (AC), decision of 2 October 1995, para 133; I. Brownlie, *Principles of Public International Law*, 7th edn. (2008), p. 15; R. R. Baxter, 41 *Brit. Y. B. Int'L.*, (1965–1966), pp. 275 et seq; M. N. Shaw, *International Law*, 6th edn (2008), pp. 82–83; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg no. 142.

[5] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 17.

[6] B. Swart, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 91; A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 17.

4.2.1 State Practice

The question to be answered here is whether conspiracy to commit international crimes is expressly punishable within the domestic legislation of the representative major legal jurisdictions discussed in Chap. 2 of this study, and to what extent similar conduct has been prosecuted. In the United Kingdom, the International Criminal Court Act of 2001 makes punishable genocide, war crimes and crimes against humanity including ancillary conduct in relation to these crimes committed outside the jurisdiction of England and Wales.[7] Ancillary conduct is defined to include conspiracy to commit the aforementioned crimes.[8] To determine if any offence under this Act has been committed the court is allowed to apply general principles of the law of England and Wales, this can be interpreted to also include criminal responsibility for conspiracy.[9]

In the United States, Congress has enacted legislation prohibiting Genocide,[10] and although it does not include a specific provision on conspiracy, this conduct may be punished under the general federal statute on conspiracy.[11] Crimes against humanity are not codified in the United States domestic law. Save for legislation that prohibits torture,[12] most of the other crimes punishable under crimes against humanity such as murder, aggravated assault, or the like are punishable under the ordinary domestic law.[13] It follows that conspiracy to commit such crimes is also punishable under the general federal statute on conspiracy. The War Crimes Act of 1996 gives the federal courts ability to prosecute persons suspected of committing war crimes.[14] Although this statute does not also expressly refer to punishment of conspiracy, it is presumed that this being a federal statute, the general federal conspiracy statute would also be applicable for punishment of crimes proscribed by it.

Punishment of war crimes in the United States is also supplemented by the military justice system, where suspects may be subject to trial by a military tribunal for violation of the law of war.[15] The law of war punished under the military courts is derived both from treaty law and custom, giving it a wide range

---

[7] See Sections 51 and 52.

[8] Section 55.

[9] See Section 56(1).

[10] The Genocide Convention implementation Act (also known as Proxmire Act), Pub. L. No. 100-606, §2(a), 102 Stat. 3045 (4 Nov. 1988) (codified at 18 U.S.C. §§ 1091 ff).

[11] J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), p. 202.

[12] 18 U.S.C. § 2340.

[13] E. Silverman, in Eser/Sieber/Kreicker (eds.), *National Prosecution of International Crimes*, vol. 5 (2005), pp. 430–431.

[14] 18 U.S.C. § 2441.

[15] 10 U.S.C. § 818; E. Silverman, in Eser/Sieber/Kreicker (eds.), *National Prosecution of International Crimes*, vol. 5 (2005), p. 433.

of conduct punishable as war crimes.[16] Only recently, the United States in further effort to combat terrorism enacted the Military Commissions Act of 2009, with a provision on conspiracy to commit war crimes.[17] The use of the charge of conspiracy in the military war crimes trials has been a subject of contention.[18] In a recent case before the U.S Supreme Court, the issue of the customary law status of conspiracy to commit war crimes was revisited.[19] Hamdan, a Yemeni national had been Osama bin Laden's driver for 5 years and was arrested after the 9/11 attacks, during the hostilities between the United States and the Taliban in Afghanistan.[20] He faced the charge of conspiracy to commit offences triable by the military commission convened by the president of the United States.[21] Hamdan filed an application contesting the authority of the military commission to adjudicate conspiracy to commit certain crimes under the law of war, and the procedures adopted by the president that denied him a right to be present when the government's witnesses testified. The issue on conspiracy emerged because under American laws the jurisdiction of military tribunals is limited to violations of the law of war. It thus follows that if conspiracy to commit war crimes is not recognised under the law of war, the military commission would not have jurisdiction to try Hamdan.[22] A majority vote of four against one held that the standalone crime of conspiracy was not part of the law of war and therefore, the tribunal did not have jurisdiction to try Hamdan on this aspect. The Supreme Court advanced the reasons that the crime of conspiracy did not appear in the major treaties on the law of war (The Geneva Conventions and Hague Conventions) and that international sources confirmed that conspiracy under the law of war was not recognised, with specific reference made to the Nuremberg judgment where such

[16] E. Silverman, in Eser/Sieber/Kreicker (eds.), *National Prosecution of International Crimes*, vol. 5 (2005), p. 427.

[17] Military Commissions Act of 2009, Pub. L. No. 111-84 (2009). The Act replaced the Military Commissions Act of 2006, formed to authorise use of military tribunals to try violations of laws of war; R. Wala, 41 *Georgetown Journal of International Law* (2010), p. 684, asserts that, 'the majority of cases pending in the military commissions contain allegations of conspiracy to commit war crimes, with many of [the] cases relying on conspiracy as the primary charge'.

[18] G. P. Fletcher, 4 *JICJ* (2006), pp. 442–447; G. P. Fletcher, 45 *Colum. J. Transnat'l. L* (2007), pp. 427–467; R. Wala, 41 *Georgetown Journal of International Law* (2010), pp. 683–709.

[19] *Hamdan v Rumsfeld*, 126 S. Ct. 2749 (2006).

[20] 9/11 attacks refer to a series of coordinated suicide attacks conducted by al Qaida against the United States on 11 September 2001.

[21] The charge sheet charged Hamdan with wilfully and knowingly joining 'an enterprise of persons who shared a common criminal purpose and conspired and agreed with Osama bin Laden…and other members and associate of the al Qaida organisation, to commit the following offences…attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged; and terrorism.' See List of charges at 2 (July 13, 2004), *United States v Hamdan* (U.S. Military Commission) at http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf.2004/d20040714hcc.pdf.

[22] G. P. Fletcher, 4 *JICJ* (2006), pp. 444–445.

conspiracy was rejected, alongside conspiracy to commit crimes against humanity.[23]

In reference to the civil law countries, the German code of Crimes against International Law ("Völkerstrafgesetzbuch, VStGB") expressly recognises criminal responsibility for genocide, crimes against humanity and war crimes.[24] Pursuant to section 2 of the VStGB, general criminal law is considered to be applicable to offences under this statute. It is presumable that this would include punishment of agreement to commit the underlying international crimes as recognised in § 30 of the German Criminal Code ("StGB"). Article 615 of the Spanish penal code makes conspiracy to commit crimes against the international community punishable; these include genocide, crimes against humanity and war crimes.

The French penal code in Article 212-3 creates criminal responsibility for participation in a group formed or in an agreement made with a view to preparing to commit any of the international crimes. Such agreement must be demonstrated by one or more material actions. Under Italian law only conspiracy to commit genocide is expressly proscribed and is punishable with a sentence of imprisonment of between 1 and 6 years.[25]

To sum up, this survey shows that agreeing to commit an international crime is punishable in most of the selected countries, albeit with varying application. Under common law countries such conduct is punishable under the independent crime of conspiracy. In Continental Europe such conduct although expressly punishable in Spain, Germany, and France, it is not an independent crime, but is considered to be a form of attempted participation only punishable to the extent that its underlying crime is not committed. Consistent with their obligation under the Genocide Convention it seems most states have enacted legislations that cover conspiracy to commit genocide, even in the case of Italy.

4.2.2 Treaty Law and Practice of International Tribunals

At the end of World War II the Nuremberg and Tokyo tribunals were established to prosecute those considered most criminally responsible for the crimes committed during the war. The controversial crime of aggression was made punishable and with it the equally controversial crime of conspiring to commit the crime against peace was introduced.[26] Most defendants who especially held leadership positions or high military rankings and took part in the planning of the war were

---

[23] *Hamdan v Rumsfeld*, 126 S. Ct.2749 (2006), at 2784.

[24] *Völkersträfgesetzbuch*, Federal Gazette 1 (2002) 2254, Sections 6, 7, 8, 10, 11, 12.

[25] Article 7, Italian Law 9 October 1967, no. 962, Prevention and Repression of the crime of Genocide.

[26] See Chap. 3.

eventually held liable for the crime of conspiracy to wage the war of aggression. The Nuremberg tribunal and all subsequent tribunals established after the end of World War II recognised conspiracy as a separate crime only with respect to the crime of aggression. The law under Nuremberg is recognised as forming part of customary international law following the United Nations General Assembly resolution 95(1), which affirmed the principles of international law recognised by the IMT Charter and Judgment.[27] Principle VI recognises the crimes punishable under international law codified in Article 6 of the IMT Charter this includes, "(a) Crimes against Peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)". Conspiracy with respect to the crime of aggression has since this period never been prosecuted.

In 1948, the Genocide Convention criminalised conspiracy to commit genocide. This statute was later to be replicated in the statutes of the ad hoc tribunals, and as a result, several defendants have been prosecuted for conspiring to commit genocide with respect to atrocities committed in the territories of the former Yugoslavia and Rwanda.[28] The Genocide Convention is recognised as forming part of customary international law and by virtue of this, conspiracy to commit genocide is also considered to form a part of customary international law.[29]

The Nuremberg judgment dismissed the charges with respect to conspiracy to commit war crimes and crimes against humanity citing that the same were not recognised in the IMT Charter. This restrictive interpretation is usually attributed to the fact that conspiracy was not a concept recognised by the continental European legal systems. This interpretation influenced the decisions of all subsequent tribunals formed to deal with crimes after WWII, rendering all attempts by the prosecution to have these acts punished futile.[30] The Geneva Conventions of 1949 and the Hague Conventions of 1899 and 1907 do not include conspiracy to commit war crimes. Both statutes of the ICTY and ICTR do not recognise criminal responsibility for conspiracy to commit war crimes and crimes against humanity,

[27] See www.un.org/documents/ga/res/I/arel.htm (last visited 21. 02. 2011); *Attorney General of Israel v Eichmann*, Supreme Court of Israel (1962) 36 ILR 277, which affirms Nuremberg principles as forming part of customary international law.

[28] Article III Genocide Convention; Articles 4(3) ICTY and 2(3) ICTR.

[29] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 228; K. Kittichaisaree, *International Criminal Law* (2001), pp. 248 et seq.; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg no. 622, specifically recognises conspiracy to commit genocide as a crime under customary international law; cf J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), he asserts that the provision on conspiracy does not form part of customary law, contending that the Genocide Convention is merely a treaty law, and not evidence of state practice.

[30] See analysis on Nuremberg and Tokyo tribunal judgments, in Chap. 3.

neither have the same been prosecuted and punished in any other international tribunal.

A further look also at the Hybrid tribunals, whose jurisdictions partly include punishment of the international crimes of genocide, crimes against humanity and war crimes, these are the Special Court of Sierra Leone,[31] the Special Panels in East Timor,[32] and the Extraordinary Chambers in Cambodia,[33] shows that only the Extraordinary Chambers in Cambodia makes punishable conspiracy to commit genocide. Interestingly, although the law in relation to the Special Panels of East Timor recognises criminal responsibility for genocide, no reference is made to punishment of conspiracy to commit genocide. This law instead adopts the principles of individual criminal responsibility as reflected in the Rome Statute,[34] which has no express provisions on punishment of conspiracy.[35] All these hybrid courts do not punish conspiracy to commit war crimes or crimes against humanity.

4.3 Evaluation

The general view is and as clearly indicated from the aspect of international practice above, conspiracy as a crime under customary international law has only been established with respect to the crimes of aggression and genocide.[36] The status of conspiracy under customary international law with respect to war crimes and crimes against humanity is rejected.[37] Two main reasons are usually cited to

[31] Statute of the Special Court for Sierra Leone accessed from www.sc-sl.org on 24 August 2011.

[32] See UNTAET Regulation 2000/15 On Establishment of Panels with exclusive jurisdiction over serious criminal offences (East Timor).

[33] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 4.

[34] See UNTAET Regulation 2000/15, Section 4 on Genocide, and Section 14 on Individual Criminal Responsibility.

[35] See further discussions on the Rome Statute and conspiracy in Chap. 5.

[36] *Hamdan v Rumsfeld*, 126 S. Ct. 2749 (2006), at 2784; B. Swart, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 91, commenting on conspiracy to commit genocide as creating liability under customary international law; A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 228; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg no. 622.

[37] G. P. Fletcher, 45 *Colum. J. Transnat'l. L* (2007), pp. 448–449, in this regard Fletcher asserts 'When only some countries accept a particular doctrine, it cannot become part of customary international law applicable to all nations as part of the law of war'. Observing further that the general trend of treaties on international criminal law over the last half century, has been to deliberately avoid the concept of conspiracy; also see J. A. Bush, 109 *Colum. L. Rev*. (2009), pp. 1094 et seq; D. Scheffer, *Why Hamdan is Right About Conspiracy Liability*, Jurist, Mar. 30, 2006, http://jurist.law.pitt.edu/forumy/2006/03=why-hamdan-is-right-about-conspiracy.php; R. Wala, 41 *Georgetown Journal of International Law* (2010), p. 683 et seq stating that, 'conspiracy to commit war crimes is not a cognizable law of war violation'.

support restriction of the offence of conspiracy to the crimes of aggression and genocide. First is the existence of express provisions in international instruments. The judges at Nuremberg rejected conspiracy with respect to war crimes and crimes against humanity on the grounds of jurisdiction, arguing that unlike conspiracy to commit crimes against peace, no such separate crime with regards to the other crimes existed in the Charter. This decision was largely influenced by the fact that conspiracy was a notion not recognised in civil law jurisdictions, and the fear that the theory behind conspiracy would lead to collective punishment violating a major principle of criminal law that criminal responsibility should be personal.[38] The second argument suggests that the apparent collective nature of the crimes of aggression and genocide makes it necessary to criminalise conspiracy to commit such conduct. Schabas asserts that, '(b) y its very nature, the crime of genocide will inevitably involve conspiracy and conspirators',[39] and with respect to the crime of aggression the general view is that the very dynamics of war involve organised activity carried out by a group of persons.[40]

Whereas the first reason on express treaty provisions is self-explanatory, the second reasoning is questionable. The history of international crimes shows that in almost all contexts regardless of the crimes committed, collective action has been involved in their execution. It is also difficult to reconcile the fact that conspiracy to commit genocide is punishable, while it is excluded in the case of crimes against humanity, a crime from which genocide has evolved.[41] Perhaps, the practice within domestic jurisdictions confirms the incredulous nature of such restriction, because there is a gradual recognition of criminal responsibility arising from agreeing to commit any of the international crimes, including both war crimes and crimes against humanity.

---

[38] See T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (1992), p. 36, a prominent figure at the Nuremberg trial noting that "The Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of international recognised laws of war", cited in *Hamdan v Rumsfeld* 548 U.S-(2006), p. 47.

[39] W. A. Schabas, *Genocide in International Law; The Crime of Crimes*, 2nd edn. (2009), p. 310; H. van der Wilt, 4 *JICJ* (2006), p. 242, asserts, 'It would simply be preposterous for an individual to boast that by his actions alone he could achieve the goal of destroying a whole group. In the normal situation, the perpetrator of genocide may at most feel confident that his conduct might contribute to the concerted action of annihilating the group'.

[40] See G. P. Fletcher, 45 *Columbia Journal of Transnational Law* (2007), p. 447, describing the acts of "planning, preparing, initiating, and waging" aggressive war as being by their very nature collective action; also see The *Justice* case, *Law Reports of Trials of War Criminals*, Vols. VI–X, p. 108, the prosecution while making its arguments for the count on conspiracy made the following observation, "…while war crimes and crimes against humanity can certainly be committed by a single individual, it is hard to think of any one man as committing the crime of waging an aggressive war as a solo venture. It is peculiarly a crime brought about by the confederation or conspiracy of a number of men acting pursuant to well-laid plans. It matures over a long period of time, and many steps are involved in its consummation".

[41] See also G. P. Fletcher, *Columbia Journal of Transnational Law* 45 (2007), p. 448, observing the peculiarity of this status.

4.4 Conclusion

The Status of conspiracy as an independent crime under customary international law has only been confirmed in the case of the crime of aggression and genocide. This status mainly emerges from the fact that these are the only two crimes that the international tribunals have been willing to recognise criminal responsibility arising from conspiracy. This recognition stems from their interpretation of the jurisdiction expressly created by their underlying statutes.

The rejection of conspiracy to commit crimes against humanity and war crimes in the Nuremberg tribunal, has greatly affected any further attempts to create criminal responsibility for such conduct even in domestic jurisdictions that would normally punish such conduct. This is reflected in the case relating to Hamdan in the United States. It should be noted that the rejection by the Nuremberg and Tokyo tribunal was based on lack of express provisions creating jurisdiction over such conduct, and was not an assertion that punishment of such conduct was not a general principle of law. Therefore, the rationale of restricting punishment of conspiracy to only some of the international crimes is questionable, considering that the practice within domestic jurisdictions even among civil law jurisdictions shows a gradual recognition of criminal responsibility arising from agreeing to commit any of the international crimes. This conduct is considered punishable by virtue of the serious nature of crimes that underline such agreement. Of course, in the case of civil law countries conspiracy is not an independent crime but remains a mode of participation.

Chapter 5
Conspiracy in the Statute of the International Criminal Court

Abstract Conspiracy in international criminal law has so far only been punished in the context of complete crimes. It has therefore mainly been punished as a mode of participation. It is argued that the modes of participation in the ICC Statute satisactorily meet the role of conspiracy as a mode of participation. However, the express exclusion of criminal responsibility for conspiracy from the ICC statute loses out on the value of conspiracy as an inchoate crime. This part of the study shows that the result of this exclusion has created a gap in holding the perpetrators of international crimes accountable, creating the need for an amendement of the ICC Statute.

Contents

J. R. A. Okoth, *The Crime of Conspiracy in International Criminal Law*,
DOI: 10.1007/978-94-6265-017-6_5,

5.1 Introduction

The coming into force of the Rome Statute is heralded as one of the greatest achievements in the field of international criminal justice.[1] The main principle behind the court is to ensure that those who commit the most heinous and serious crimes that shock the conscious of humanity must be held accountable.[2] Although the court stands for a noble course, its journey towards becoming a reality was encumbered by many roadblocks.[3] Even now its existence continues to face several challenges.[4] The ICC Statute is the result of negotiations and compromises made in an attempt to have an international criminal justice system that is compatible with and acceptable to most of the major world legal systems. In the end, every provision in the Statute is tailored to reflect to the greatest extent possible the views of all groups.[5] The crime of conspiracy was one of the controversial issues considered during the negotiations.[6] Like it had happened previously with negotiations on the IMT Charter, the common law countries strongly advocated for inclusion of the conspiracy crime, whereas their civil law counterparts did not appreciate its relevance, a compromise had to be reached. This chapter explores the results of this decision. It answers the question to what extent specific provisions in the Rome Statute accommodate prosecutions for conspiracy and if not, whether a gap has been created as a result of its exclusion making it necessary to amend the Rome Statute.

---

[1] R. S. Lee, *The International Criminal Court, The Making of the Rome Statute* (1999), p. 37, stating that the Statute represents an enormous progress; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 75.

[2] Preamble of the Rome Statute para 4.

[3] See M. C. Bassiouni, *The Legislative History of the International Criminal Court*, Vol. I (2005), p. 41 et seq., for a detailed discussion; W. A. Schabas, *An Introduction to the International Criminal Court*, 3rd edn. (2007), pp. 1–21.

[4] For example see objections by the United States discussed in P. Malanczuk, 11 *EJIL* (2000), p. 77 et seq; W. A. Schabas, 15 *EJIL* (2004), p. 701 et seq. The African Union (AU) has also raised objections on the ICC's focus on Africa with all cases before the ICC being situations in Africa. As a consequence the AU has made various resolutions refusing to cooperate with the ICC on arrest warrants for Sudan's president Bashir (decision adopted in July, 2009 at a summit in Sirte Libya), and has also rejected a request by the ICC to open a liaison office in Ethiopia. See 3 July 2009 AU Decision Doc. Assembly/AU/13 (XIII), Assembly/AU/Dec.245 (XIII) Rev. l, para 10.

[5] P. Kirsch, Introductory note, in O. Triffterer (edn.), *Commentary on the Rome Statute of the International Criminal Court:Observers' Notes, Article-by-Article* (1999), p. XXIV.

[6] See Per Saland, in *The International Criminal Court: The Making of the Rome Statute* (1999), p. 199; K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article-by Article*, 2nd edn. (2008), Article 25 marg. no. 24.

5.2 Negotiations Surrounding the Conspiracy Doctrine

The term conspiracy is not expressly referred to in any way in the Rome Statute. One does not find it in the definition of crimes,[7] and neither is it mentioned in Article 25, which provides for modes of perpetration and participation in an international crime. It is interesting to note that in previous proposed drafts of the Rome Statute conspiracy had expressly been included.[8] These earlier drafts curiously reflect a general trend of viewing conspiracy as a mode of participation as opposed to a separate inchoate crime.[9] During the 51st session of the General Assembly a detailed provision on conspiracy was set forth and several issues were

[7] See Articles 5, 6, 7 and 8.

[8] The 1954 Draft Code of Offences against the Peace and Security of Mankind, Article 2 para 13 provided for conspiracy to commit offences recognised in the code, see Yearbook of the International Law Commission (YILC), 1954, Vol. II; Draft Code of 1991, Article 3 on Responsibility and Punishment provided in part (2) 'An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment', see A/CN.4/SER.A/1991/Add.1 (Part 2) YILC, 1991, Vol. II; Article 2(3) of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind lists various forms of participation or contribution to the crimes. 'An individual shall be responsible for a crime …if that individual:

(a) Intentionally commits such a crime;
(b) Orders the commission of such a crime which in fact occurs or is attempted;
(c) Fails to prevent or repress the commission of such a crime in the circumstances set out in Article 6;
(d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for commission,
(e) *Directly participates in planning or conspiring to commit such a crime which in fact occurs* (emphasis added),
(f) Directly and publicly incites another individual to commit such a crime which in fact occurs;

(…)', Report of the International Law Commission (ILC) to the General Assembly (1996 ILC Draft Code), UN Doc. A/51/10 (1996).

[9] The Report of the Commission to the General Assembly on the work of its 43rd Session with reference to the Draft Code of 1991, shows the conspiracy discussed was participation in a common plan for commission of a crime against peace and security of mankind, with the meaning of conspiracy being a form of participation and not a separate crime, A/CN.4/SER.A/1991/Add.1 (Part Two) YILC 1991 Vol. II; also Report of the ILC's 48th Session containing commentaries on the Draft Code of 1996, commentary 13 on participating in planning or conspiring to commit a crime shows liability in this context was limited only to situations where the criminal plan is in fact carried out, and referred to individual responsibility with respect to a particular form of participation rather than a distinct crime, YILC, 1996, Vol. II (Part Two).

raised following this proposal.[10] The divisiveness on this provision arose because of different conceptual approaches on the crime of conspiracy between the common law and civil law traditions.[11] It can be deduced from the negotiation sessions that the conspiracy offence was intended to punish offenders who participated in planning and other preparatory activities involving the underlying crimes.[12] The delegates expressed various sentiments with some wondering whether this concept should be included in the general part of the Statute, although, it was generally acknowledged that punishment of such conduct should be reserved for exceptionally serious crimes.[13] Some delegates urged the inclusion of the concept of conspiracy in the ICC Statute because it had previously been recognised under international law, with particular reference to the Nuremberg Trials. Among the issues raised were, whether conspiracy should merge into the completed crime, and once conspiracy merged into the completed crime whether a conspirator would

[10] The proposal stated:-

1. A person is criminally responsible and is liable for punishment for conspiracy if that person, (with the intent to commit a specific crime) agrees with one or more persons to perpetrate that crime (or that a common intention to commit a crime will be carried out) and an overt act is committed by that person (or by another party to the agreement) (for the purpose of furthering the agreement) (that manifests the intent).
2. A person is guilty of conspiracy even if the object of the conspiracy is impossible or is prevented by a fortuitous event.
3. A person shall only be criminally responsible for conspiracy in respect of a crime where so provided in this Statute.
4. A person who is criminally responsible for conspiracy is liable for the same punishment as the person who committed or would have committed the crime as a principal.

Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N.GAOR, 51 st Sess., Supp. No. 22A, at 94–95, U.N.Doc. A/51/22 (1996), reprinted in M. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998), p. 489.

[11] See M. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998), p. 490, indicating that discussions showed that the negotiators encountered 'conceptual differences concerning conspiracy among…different legal systems'.

[12] See M. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998), p. 490, on the question whether a planner should still be punished when the crime was not completed, yet action had been taken to implement the plan. A previous proposal had recognised importance of being able to punish planners and during this session it was noted that an alternative way of addressing the situation of planners would be through the concept of conspiracy. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II (Proceedings of the Preparatory Committee during March-April and August 1996, Doc. A/51/22 (1996) reprinted in M. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998), p. 483.

[13] M. Bassiouni, *The Legislative History of the International Criminal Court, Vol. 2: An Article-by Article Evolution of the Statute from 1994–1998* (2005), p. 228, 229.

still be responsible for other foreseeable crimes committed pursuant to the conspiracy.[14] Other specific questions arising from this draft included:

(a) whether the accused conspirator must have an intent to commit the crime or whether it is sufficient that there is an intention that a crime be carried out and that others may be the actual committers;
(b) whether the accused conspirator must commit the overt act or whether it is sufficient if one of the other co-conspirators commits the overt act;
(c) what must be the nature of the overt act (e.g. the act is undertaken for the purpose of furthering the agreement or must it actually manifest the agreement);
(d) whether a conspiracy exists even if the object of the conspiracy is factually impossible to achieve;
(e) whether a conspiracy should be limited in respect of an agreement to commit certain listed crimes; and
(f) the appropriate punishment for the crime".[15]

The negotiations led to the development of a draft, which described conspiracy without mentioning its name, but even this was not sufficient to settle the issue.[16] A compromise was further reached with guidance from previous negotiations carried out in 1997 with respect to the Convention for the Suppression of Terrorist Bombings.[17] As a result, a mode of participation was adopted in Article 25(3)(d) ICC Statute referring to contribution to commission or attempted commission of a crime within the court's jurisdiction by a group of persons acting with a common purpose, omitting any express mention of conspiracy in the ICC Statute. The Article provides that a person may be considered criminally responsible for an international crime if he:

> In any other way contributes to the commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or criminal purpose involves the commission of a crime within the jurisdiction of the Court; or
> (ii) Be made in the knowledge of the intention of the group to commit the crime.

---

[14] M. Bassiouni, *The Legislative History of the International Criminal Court, Vol. 2: An Article-by Article Evolution of the Statute from 1994–1998* (2005), p. 229.

[15] See M. Bassiouni, *The Legislative History of the International Criminal Court, Vol. 2: An Article-by Article Evolution of the Statute from 1994–1998* (2005), p. 229.

[16] The draft provided for criminal responsibility if one "agrees with another person or persons that such a crime be committed and an overt act in the furtherance of the agreement is committed by any of these persons that manifests their intent (and such a crime in fact occurs or is attempted)", see Decision Taken by the Preparatory Committee in Its Session Held from 11 to 21 February, U.N Preparatory Committee on the Establishment of an International Criminal Court, 1997, U.N. Doc. A/AC.249/1998/L.13, reprinted in M. C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998), p. 379.

[17] Per Saland, in *The International Criminal Court: The Making of the Rome Statute* (1999), p. 199; see also K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 24; International Convention of the Suppression of Terrorist Bombings of 1997-UN Doc. A/RES/52/164 (1998), annex, Article 2(3).

This mode of participation has been referred to in recent cases before the ICC as 'common purpose criminal liability'.[18] To what extent this provision substantially covers the doctrine of conspiracy is called to question. A cursory look at the above provision dictates that it cannot in the context of this study be analysed in isolation. The words at the beginning of the provision are a clear indication that the provision is intricately linked to the other provisions in Article 25 of the Rome Statute. To give a sufficient and comprehensive evaluation of the relationship between this provision and the concept of conspiracy, the rules of interpretation and construction require an analysis of the provision in its proper context, which is together with the other provisions that constitute in particular Article 25(3) of the Rome Statute.

5.3 Article 25 of the Rome Statute

The provision adopted at the Rome conference provides a basis for which to look into the particulars of Article 25, setting out the limits to which this provision significantly accommodates or excludes conduct that is punishable under the concept of conspiracy.[19] The various modes of liability by which an individual will be considered criminally responsible for international crimes are set out

[18] See ICC-01/09-30-Red 15-12-2010 Pre-Trial Chamber II Situation in the Republic of Kenya, Prosecutor's Application Pursuant to Article 58 as to William SamoeiRuto, Henry KipronoKosgey and Joshua Arap Sang, para 27; ICC-01/09-31 Red 15-12-2010 Pre Trial Chamber II Situation in the Republic of Kenya Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, para 31.

[19] Article 25 specifically states:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) …;
(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gaves up the criminal purpose.

No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

in para 25(3).[20] Paragraphs (a–d) systematically enumerate the modes of criminal perpetration and participation, while paras (e–f) provide for the inchoate crimes of incitement to commit genocide and attempt.

Conspiracy has been considered in the international context as providing a basis to attribute individual criminal responsibility for contributing to crimes carried out in concert, particularly, in respect to the preparatory and coordination activities surrounding the underlying crimes. It has been seen as a useful tool to punish those who in any way make some meaningful contribution to the commission of a crime by a collective. A brief enumeration of the elements of the specific modes of liability with regards to this context is therefore necessary, taking into account the following questions: To what extent would a defendant who participates together with others in planning and coordinating the commission of international crimes be liable under Article 25? To what extent is the idea of cooperating for purposes of committing international crimes sufficiently covered by the modes of liability set out in Article 25? Is the element of agreement, which is the cornerstone of conspiracy a fundamental element in the modes of perpetration? Would a defendant who simply agrees with others in commission of international crimes, merely setting up a plan for them but no further action follows thereafter still be liable under any mode of liability in the Rome Statute?

5.3.1 Commission

The first level of criminal responsibility in para 25(3)(a) represents the highest form of culpability.[21] It refers to three forms of commission or what is otherwise

(Footnote 19 continued)

The 2010 amendments to the Rome Statute add the following to this paragraph: 'In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.', See The Crime of Aggression, RC/Res. 4, Annex I, para 5.

[20] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 2, observes that the article differentiates at level of allocation of responsibility the degree of participation, rejecting a purely Unitarian concept of perpetration; G. Werle, 5 *JCIJ* (2007), p. 956, describes it as a '…differentiated system of participation, involving value-oriented levels of responsibility…'.

[21] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 2; G. Wlerle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 449, describes the distinction of modes of participation as also indicators of degree of individual guilt and refers to commission as warranting the highest level of individual responsibility.

known as modes of perpetration.[22] Criminal responsibility here arises when the crime has been executed. The defining factor of all three forms of commission is the perpetrator having control over commission of the crime.[23] In the first alternative, a person may commit the crime in person, which means the perpetrator physically carries out the criminal act with the requisite *mens rea*.[24]

The second alternative of commission refers to joint commission, also known as co-perpetration.[25] The elements of this form of participation have been discussed before the ICC Pre-Trial Chamber.[26] It connotes several persons acting together and contributing to commission of a crime. Such cooperation forms the basis of mutually attributing the acts of the co-perpetrators to each other, making each of

[22] *Prosecutor v Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, para 318, referring to 'direct perpetration', 'coperpetration' and 'indirect perpetration'; *Prosecutor v Katanga et al*. (ICC-01/04-01/07), decision on the confirmation of the charges, 30 September 2008, para 488. Although not explicitly mentioned in the Rome Statute the general view is that commission under Article 25 also includes commission by omission, for this see *Prosecutor v Krnojelac*, ICTY (AC), judgment of 17 September 2003, para 73; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), pp. 53–57; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 453.

[23] *Prosecutor v Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, para 332, the Chamber observes that only those who have control over commission of the crime and are aware of such control should be considered principals because:

(i) they physically carry out the objective elements of the offence (commission of the crime in person, or direct perpetration)
(ii) they control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration), or
(iii) they have, along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others or coperpetration)'; *Prosecutor v Katanga and Ngudjolo Chui*, ICC (Pre-Trial Chamber), decision of 30 September 2008, para 488; *Prosecutor v Jean Pierre Bemba* Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the prosecutor against Jean-Pierre Bemba Gombo", ICC-01/ 05-01/08-424, paras 346–347, acknowledging that the concept of co-perpetration must go together with the notion of "control over the crime".

[24] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Art 25 marg. no. 7; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 789; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 453.

[25] See E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), pp. 72–76, he views this mode of participation as having evolved from the ad hoc tribunals theory of common purpose or JCE.

[26] *Prosecutor v Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, para 342 et seq., decision on confirmation of charges.

them responsible for the whole crime.[27] The important criterion here is the existence of a plurality of persons bound together by a common plan or agreement, and the task carried out by each co-perpetrator must be essential in fulfilment of the crime. Each co-perpetrator must also personally fulfil the subjective elements of the crime.[28] The ICC has identified agreement or common plan between two or more persons as being one of the fundamental objective elements for the concept of co-perpetration.[29] This common plan must have an element of criminality, although, it need not specifically be directed at the commission of a crime and it need not be explicit, it may be inferred from the concerted action of the co-perpetrators.[30] Under the notion of conspiracy, the mere existence of such an agreement would sufficiently form a basis of punishing an accused found to be associated with it. It is clear from this observation that the constitutive elements of conspiracy form the preliminary basis or foundation for joint perpetration. However, this mode of perpetration requires more for an accused to be labelled as a co-perpetrator pursuant to the common plan (agreement). Such a participant must also have essential tasks assigned to him making it possible for him to frustrate commission of the crime.[31] Defendants, who have been held criminally responsible for conspiracy inferred from their participation in the planning and preparatory activities of the underlying crimes, may be punished as co-perpetrators if their contribution is considered to have been essential to commission of the underlying crimes.[32] Co-perpetratorship like the Anglo American form of

---

[27] *Prosecutor v Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, para 326, the Pre-Trial Chamber has noted, 'the concept of co-perpetration is originally rooted in the idea that when the sum of coordinated contributions of a plurality of persons results in realisation of all objective elements of a crimes, 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'; K. Ambos, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. no. 8; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 790; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 72; G.Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 471.

[28] K. Ambos, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. no. 8; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 472.

[29] *Prosecutor v Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, paras 343, 344, 345.

[30] *Prosecutor v Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, paras 344, 345.

[31] *Prosecutor v Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, para 347; *Prosecutor v Bemba,* (ICC-01/05-01/08), decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para 350.

[32] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), pp. 792–793; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 467.

conspiracy creates a basis for crimes perpetrated by persons cooperating for purposes of their commission to be attributed to each of one of them. This mode of perpetration would capture the leading figures in a conspiracy, but only in the case that crimes are actually committed.

The third alternative mode of perpetration is committing an international crime through another person, also referred to as 'indirect perpetration', 'perpetration by means' or 'intermediary perpetration'.[33] The rationale under this form of perpetration is that the dominant indirect perpetrator uses as a tool the perpetrator who physically carries out the crime.[34] Criminal responsibility for the indirect perpetrator arises regardless of culpability of the direct perpetrator.[35] This means of perpetration is especially relevant in the typical situations involved in commission of international crimes through having control over an organised hierarchical structure.[36] This connotes that the indirect perpetrator through means of an organisation, dominates the acts of subordinates who carry out crimes conceived and directed by the indirect perpetrator. Discussing its elements, the Pre-Trial Chamber established the objective elements for control of another person by means of control over a hierarchical organisation to include: (i) control over the organisation, (ii) organised and hierarchical apparatus of power, (iii) execution of the crimes secured by almost automatic compliance with the orders.[37] On the mental element, the Chamber observed that the accused ought to fulfil all subjective elements of the subject crime.[38] Although this mode of perpetration caters for certain circumstances involving group criminality or cooperation for purposes of committing international crimes, the notion of agreement does not form the basis of the relationship between the direct and indirect perpetrator. At Nuremberg, one problem encountered by the allies was how to attribute to the leaders crimes carried out by their subordinates. It was obvious the leaders were the most criminally responsible,

[33] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. no. 10; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 793.

[34] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 793; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 68; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 473.

[35] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. nos. 12, 13; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 475; for some critical views see T. Weigend, 9 *JCIJ* (2011), p. 91 et seq.

[36] K. Ambos, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. no. 11; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 70, 71; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 476 et seq.

[37] *Prosecutor v Katanga and Ngudjolo Chui*, ICC (Pre Trial Chamber), decision of 30 September 2008, para 494 et seq.

[38] *Prosecutor v Katanga and Ngudjolo Chui*, ICC (Pre Trial Chamber), decision of 30 September 2008, para 527 et seq.

although, most of them had not personally or directly executed any of the underlying crimes. The common law theory of conspiracy was then considered to offer an appropriate solution. Recognising the leaders as being part of a criminal agreement with their subordinates, formed a basis to connect the leaders with crimes committed by their subordinates, and as a result, attribute criminal responsibility for the underlying crimes to the respective leaders. The notion of agreement in most cases connotes persons with equal bargaining power, or persons of more or less equal standing coming together and having a meeting of minds. In reality, the relationship between the leaders and their subordinates can hardly be described as one of an agreement between supposed equals. The subordinates are usually there to serve the wishes of their masters, in actual sense, mere tools at the disposal of the leaders to execute their criminal ends. The mode of indirect perpetration in the circumstances gives a more accurate description of the connection between the leaders, their subordinates and the underlying crimes. In addition, the Chamber has recognised the possibility of joint commission by several indirect perpetrators referred to as indirect co-perpetration.[39] The concept of indirect co-perpetration integrates the elements of joint perpetration and indirect perpetration, and it refers to several persons in control of different hierarchical organisations agreeing to commit crimes. As a result, the crimes committed pursuant to the agreement by the direct perpetrators they use as tools, are subject to reciprocal attribution.[40]

5.3.2 Accomplice Liability

Apart from perpetration, criminal responsibility for other forms of participation in commission of international crimes is addressed in the subsequent para of Article 25(3). Complicity or accomplice liability is specifically provided for in sub para (b) and (c).

---

[39] *Prosecutor v Katanga and Ngudjolo Chui*, ICC (Pre Trial Chamber), decision of 30 September 2008, para 520 et seq.

[40] *Prosecutor v Katanga and Ngudjolo Chui*, ICC (Pre Trial Chamber), decision of 30 September 2008, para 520 et seq; The Pre Trial Chamber cited its elements to include: '(i) the suspect must be part of a common plan or an agreement with one or more persons, (ii) the suspect and other coperpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime, (iii) the suspect must have control over the organisation, (iv) the organisation must consist of an organised and hierarchical apparatus of power, (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect, (vi) the suspect must satisfy the subjective elements of the crime, (vii) the suspect and the other coperpetrator(s) must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s)'; see also Pre Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo", ICC-01/ 05-01/08-424, paras 350–351; Pre Trial Chamber I, "Decision on the Prosecution's Application for a warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3, paras 209–213.

5.3.2.1 Instigation

A person may incur criminal responsibility by ordering, soliciting or inducing another to commit an international crime.[41] These forms of participation are generally referred to as instigation.[42] Liability here only accrues when the crime is carried out or attempted. This mode of liability targets those who may be classified as 'accessories before the fact'.[43] Criminal responsibility for ordering presupposes a superior–subordinate relationship between the one giving the order and the one receiving it. Soliciting and inducement have an element of the accused prompting or encouraging the direct perpetrator to commit the crime, and these two latter forms do not necessarily need the existence of a superior-subordinate relationship.[44] Subjectively, in the case of ordering, the accused while giving the order must intend that a crime be executed pursuant to the order or be aware of the substantial likelihood that the crime will be committed.[45] In respect to soliciting and inducing, the accused should wish to "provoke or induce" the commission of the crime or be aware of the substantial likelihood that his conduct would lead to the commission of the crime.[46] Under instigation, the accused does not need to have a specific intent with respect to the underlying crime, it is sufficient for him to have known the perpetrator's specific intent without having to share it.[47]

The act of instigation obviously has some influence on the actions of the direct perpetrator and to some extent portrays an understanding between the parties towards attaining a criminal end. To the extent that a defendant's participation in a conspiracy may be inferred from their role in encouraging or prompting commission of its target offence, this mode of participation would capture such conduct. However, unlike conspiracy agreement does not form the basis of the relationship between the instigator and direct perpetrator. The understanding between the parties falls short of the mutual understanding and the somewhat 'intimate' connection required of parties who form part of a conspiracy. Whereas the instigator does not have to have a specific intent with respect to the

---

[41] Article 25(3)(b).

[42] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 795; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 77.

[43] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 795; R. Gallmetzer and M. Klamberg, 'Individual Responsibility under International Law: The UN Ad Hoc Tribunals and the International Criminal Court' (March 21, 2007), p. 73.

[44] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 78; see also K. Ambos, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. nos. 14, 15.

[45] *Nahimana et al*., ICTR (AC), para 481; *Prosecutor v Martic* ICTY (AC), judgment of 8 October 2008, para 221 et seq.

[46] *Nahimana et al*., ICTR (AC), para 480; *Prosecutor v Kordic and Cerkez*, ICTY (AC), judgment of 17 December 2004, para 32.

[47] G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. nos. 485, 488.

commission of the underlying crime, nor share such intent with the perpetrator, so far, the cases that have been adjudicated at the international level make it imperative that conspirators have knowledge of the facts constituting the underlying crime and share the intent for its commission.

5.3.2.2 Assistance

The other form of accessorial liability is assisting in the commission or attempted commission of an international crime.[48] Although like instigation it is a form of complicity, it actually implies a lower degree of responsibility than instigation.[49] To be punishable, such assistance must have a substantial effect on commission of the crime.[50] This assistance may be given before, after or during commission of the crime.[51] The accused in this case must have knowledge that his contribution is supporting the perpetrator in commission of the crime and he must also wish that his assistance facilitates commission of the crime.[52] The accused does not have to share the primary perpetrator's specific intent, it suffices that he has knowledge of it.[53]

Assistance in a crime implies some level of cooperation to achieve such criminal end. Defendants whose participation in a conspiracy could be implied from the assisting role they give in achieving the collective criminal activity, for example by giving advise or seemingly lending moral support to the physical perpetrator, would be considered criminally responsible under this mode of liability. However, again like instigation, assistance does not imply consensus because it lacks the level of mutual understanding and 'intimate' connections that constitute conspiracy relationships. Agreement does not form the basis of this

---

[48] This liability is also recognised in the judgements of the ad hoc tribunals see *Prosecutor v Vasiljevic*, ICTY (AC), judgment of 25 February 2004, para 102; Prosecutor v Furundzija, ICTY (TC), judgment of 10 December 1998, paras 192 et. seq, which analyses the state of customary law on assistance in carrying out an international crime.

[49] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. no. 16; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 798; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 87.

[50] *Prosecutor v Blaskic*, ICTY (AC), judgment of 29 July 2004, para 46; *Nahimana et al.*, ICTR (AC), para 482; K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. no. 21.

[51] G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 491.

[52] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 801; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 88; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 492.

[53] *Prosecutor v Aleksovski*, ICTY (AC), judgment of 24 March 2000, para 162; *Prosecutor v Seromba* ICTR (AC), judgment of 12 March 2008, paras 56, 65, 173; also see G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 492.

relationship. A perpetrator might receive assistance in commission of a crime and not be aware of it or if aware of it rejects it, for conspiracy to be construed the perpetrator must have been aware of such assistance and worked in concert with the person offering the assistance.[54] The requirement that an accomplice does not have to share in the direct perpetrator's specific intent to commit the underlying crime would also negate an inference of conspiracy, in as far as such intent has been considered an essential element in cases that have so far been adjudicated concerning conspiracy at the international level.

5.3.3 Complicity in Group Crimes

Article 25(3)(d) sets out a special form of participation and as indicated above it was specifically adopted as a 'surrogate' to the crime of conspiracy.[55] Participation under this paragraph connotes complicity in group crimes. An accused's criminal responsibility is as a result of contributing to the commission or attempted commission of international crimes by a group acting with a common purpose. The *actus reus* for participation under this mode of liability is not specifically stated, but by providing for contribution in 'any other way' it leaves room for the accommodation of a wide range of activities not captured in the other forms of participation, setting out the lowest possible objective standard requirements.[56] It is considered that contribution here refers to other indirect forms of support that may be given for the commission of international crimes.[57] Such support may involve financing the group, giving technical support such as advice on the logistics of an area, providing a base from which the group plans its activities, or sale of weapons and other necessary material support. It is interesting to see how far or wide the ICC in the future will be willing to stretch the list of activities considered as contribution in this mode of liability, whether this could also include

---

[54] See A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 791, stating that 'aiding and abetting does not presuppose a common concerted plan, as it is possible that the principal is not aware of the accomplice's support'; B. Swart, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 86.

[55] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, *Individual Criminal Responsibility Mental Elements*, Vol. 1 (2002), p. 802; K. Kittichaisaree, *International Criminal Law* (2001), p. 235; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 623.

[56] See K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), marg. no. 25; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 802; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 107; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 493.

[57] G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 494.

conduct such as merely connecting the group with a person willing to supply it with weapons, or willing to carry out the killings. The only limit provided in its objective element is the requirement that such assistance must be to a group involved in carrying out an international crime. The group referred to here should consist of a minimum of three people.[58] In comparison to other modes of liability in the preceding paragraphs of the differentiation model of participation in Article 25(3), participation at this level implies the lowest level of culpability.[59]

The main focus of this mode of participation is with respect to its mental element where more specific restrictions are provided. The mental element has two prongs, the first relates to the contribution itself and the second relates to the underlying crime.[60] In respect to the first mental standard, any such contribution by the accused given to the group must be with intention, for example intentionally selling machetes and clubs to a militia group engaged in exterminating members of another ethnic group. The second mental standard refers to the underlying crime and codifies two possible qualifications. In the first place, the accused's intentional act of contribution may be carried out with the aim of promoting the group's common criminal objective. This means that the accused has a specific intention to support the group's criminal activities, which in the case of our example means the accused possesses the specific intention to promote the group's practical acts of exterminating the targeted ethnic group.[61] The second alternative requires the accused to only have knowledge of the group's intention, which means the accused in this instance does not have the specific intent that may be required of a crime or share the same intent as the actual perpetrator, offering a lower mental standard than in the first alternative.[62] The common view is that knowledge here requires

---

[58] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 802; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 494; see also Fletcher-Ohlin, 3 *JICJ* (2005), p. 546, who reiterate that this provision contemplates groups such as military units, militias and gangs engaged in a common criminal purpose.

[59] *Prosecutor v Lubanga Dyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, para 337, the chamber considers it a residual form of accessory liability; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 493, describes it as 'the least grave, mode of participation'.

[60] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 107.

[61] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 29; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 803; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 107.

[62] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 30; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 108; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 495.

the accused to be personally aware of the specific crime that the group intends to commit, and therefore, mere knowledge of the general common purpose of the group would not suffice.[63]

An overview of the qualifications given with respect to the subjective elements of this mode of liability reveals that the second mental qualification seems to provide an even lower mental standard, than that which the international tribunals have often required to establish an accused's criminally responsibility under the charge of conspiracy. Only those who specifically intended that the underlying crime be committed, for example having genocide intent as illustrated by the ad hoc tribunals' jurisprudence, have been adjudged guilty of conspiracy.[64] These defendants would in the circumstances fall under the first mental culpability standard. Some scholars that have critically looked at the elements of this mode of liability consider that the drafters of the Rome Statute included this provision into the Statute without giving much regard to whether it was doctrinally comprehensible under criminal law theory.[65]

Recent cases filed by the ICC prosecutor with respect to the situation in Kenya, refer to this mode of participation as 'common purpose criminal liability'. This term is similar to the language the ad hoc tribunals have used to describe the concept of JCE. Some scholars opine that Article 25(3)(d) embraces ICTY's JCE mode of perpetration, which as shown previously in this study also creates individual criminal responsibility for contributions to group criminality, and has also been referred to as a form of conspiracy liability.[66] On first impression this analogy may be drawn from use of the phrase 'group of persons acting with a common purpose', and also because the focus of this mode of participation places greater emphasis on its mental elements. The ad hoc tribunals have used the same terms

---

[63] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 30; G. A. Knoops, 30 *Fordham International Law Journal* (2006), p. 617.

[64] See Chap. 3.

[65] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 28; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 803; J. D. Ohlin, *12 New Crim. L. Rev.*(2009), pp. 406 et seq.

[66] C. Damgaard, *Individual Criminal Responsibility for Core International Crimes* (2008), p. 167 et seq.; Fletcher-Ohlin, 3 *JICJ* (2005), p. 546, 547 describing Article 25(3)(d) as the statutory surrogate of JCE; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), pp. 94–109; R. Wala, 41 *Georgetown Journal of International Law* (2010), p. 703; T. Weigend, 9 *JCIJ* (2011), pp. 108–109; but compare with the later opinion of J. D. Ohlin, *12 New Crim. L. Rev.* (2009), p. 407, 408, expressing that the exact relationship between this mode of liability and JCE is not clear, although he acknowledges that Article 25(3)(d) covers similar ground as both JCE and common law conspiracy; also see B. Swart, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 85, stating that both JCE and Article 25(3)(d) 'contain elements that are reminiscent of the notion of conspiracy'; W. A. Schabas, *An Introduction to the International Criminal Court*, 3rd edn (2007), p. 215, indicating the ICC may draw a lot from the ad hoc tribunals case law in its application of this provision.

and a similar analytical approach to describe the constitutive elements of JCE, placing more emphasis on JCE's subjective elements.[67] The common assumption is that should the Court read the JCE concept in this mode of participation it can only infer elements of JCE I and JCE II in its understanding of this provision.[68] Although the ICC had previously acknowledged the close resemblance between this mode of participation and the JCE concept,[69] the latest analysis by the Pre-Trial Chamber on the elements of Article 25(3)(d) makes no reference to the JCE concept.[70] This is a strong indication that the Court is not likely to infer JCE in its interpretation of this Article. Looking at para 25(3)(d) in light of the logic that flows from the differentiated model of participation under Article 25(3), and given that it provides for the lowest level of culpability, it is incompatible to read in it JCE a form of liability that creates a basis for co-perpetration, which to the contrary provides for the highest form of culpability.[71]

'Common purpose criminal liability' makes it possible to punish persons who cooperate for purposes of committing international crimes. Like conspiracy, it creates individual criminal responsibility for contributions to group criminality, but no reference so far implies that agreement is one of its fundamental elements. It is suggested that by use of the word 'contributes' an accused's action is required to form part of the causal nexus of commission or attempted commission of the crime.[72] As a result a defendant who only agrees to support in some aspect a group

---

[67] *Prosecutor v LubangaDyilo*, ICC (Pre-Trial Chamber), decision of 29 January 2007, para 329; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 107, asserting that this mode of participation is similar to JCE because its focus is on the *mens rea*.

[68] C. Damgaard, *Individual Criminal responsibility for Core International Crime: Selected Pertinent Issues* (2008), p. 255, 405, 406, stating that it avoids connotations of collective responsibility; Fletcher and Ohlin Darfur Commission of inquiry, 3 *JCIJ* (2005), p. 550; G. A. Knoops, 30 *Fordham International Law Journal* (2006), p. 617; E. van Sliedregt, *The Criminal Responsibility Of Individuals For Violations Of International Humanitarian Law* (2003), p. 36, 108, 109 who suggests that sub-paragraph (d) reflects albeit weakly JCE and that it only leaves out 'collateral liability' recognised under JCE III.

[69] See *Prosecutor v LubangaDyilo*, ICC (Pre Trial Chamber), decision of 29 January 2007, para 335.

[70] See Pre Trial Chamber II, 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kosgey and Joshua Arap Sang', 8 March 2011, ICC-01/09-01/11, para 51. The Court at this stage does not shed much light on the particulars of the elements apart from reiterate what the Statute provides; Pre-Trial Chamber I, 'Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana', 28 September 2010, ICC-01/04-01/10, para 39.

[71] See G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 493, who considers that this mode of participationhas no model under customary international law and further argues that while JCE is a mode of perpetration, Article 25(3)(d) in contrast provides for the lowest level of mode of participation; also see A. Cassese, *International Criminal Law*, 2nd edn (2008), p. 213, this latest view of Cassese differs from a previous opinion expressed in A. Cassese, 5 *JICJ* (2007), p. 132 et seq; B. Swart, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 86.

[72] G. A. Knoops, 30 *Fordham International Law Journal* (2006), p. 616.

already engaged in committing international crimes, but the criminal endeavour of such group is brought to an end before it receives the aforementioned support might not meet the criteria of contribution under 25(3)(d), whereas such conduct would be considered to create criminal responsibility under the concept of conspiracy. This seems to also imply that an alleged accused may only be considered criminally responsible under this mode of liability if their support amounts to some form of physical support to the group as opposed to mere psychological support. This latter form of support may be inferred from instances like publicly expressing agreement with the aims of such group or through some other solidarity actions that increase or encourage the group's readiness to carry out crimes. Under the concept of conspiracy, this latter form of conduct could be used to infer criminal responsibility.[73] Under the current provisions of Rome Statute, such conduct would perhaps be punishable as instigation, but only if the crimes are committed or attempted. Therefore, while this mode of participation would be available to punish crimes involving relationships of a conspiracy nature and some conduct that has been considered punishable under conspiracy,[74] it is more restrictive than traditional conspiracy provisions.[75] The delegates while adopting this mode of participation specifically in place of conspiracy liability don't seem to have given enough consideration on its implication in relation to conduct that has previously been punished under conspiracy. Conduct involving conspiracy has often implied the highest level of culpability involving persons who usually hold leadership positions. Such defendants cannot in the relevant context be described as the least culpable. In this sense, Article 25(3)(d) would only essentially capture those that may be considered to be the lower level participants in a conspiracy. Admittedly though, given the low threshold that assisting under Article 25(3)(c) presents, Article 25(3)(d) may hardly be utilised to establish responsibility in cases before the ICC.[76]

---

[73] See for example *Bizimungu et al*., ICTR (TC), para 1965, the Trial Chamber considered that, the attendance of a meeting by two of the defendants, where a new prefect viewed to be more dedicated to and in support of the genocidal plan to kill Tutsis in the Butare region was installed in replacement of the former who opposed such activities, was further evidence of their involvement in a conspiracy to commit genocide. However, this evidence was not eventually considered in their conviction for other technical reasons. See discussion Chap. 3 Sect. 3.7.2.1, ICTR jurisprudence.

[74] See H-H Jescheck, 2 *JCIJ* (2004) p. 51, who suggests that this provision creates criminal responsibility that lies somewhere between the concepts of conspiracy, JCE and preparation; also see K. Kittichaisaree, *International Criminal Law* (2001), p. 235, suggesting that planning the commission of an international crime is covered under this mode of participation.

[75] See K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 24.

[76] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 803.

5.3.4 Attempt

Article 25(3)(f) of the Rome Statute contemplates liability for attempt to commit a crime under international law.[77] Attempt begins from the moment the perpetrator carries an act that commences the execution of an international crime by a substantial step, but the crime fails to occur because of some action independent of the perpetrator's intention.[78] Criminal attempt is reached only once the perpetrator has begun to execute the crime with a material element that forms part of the crime definition already being in place.[79] This means the defendant has already carried out an act that constitutes a significant step towards commission of the crime. The main question here is whether the threshold liability for attempt is low enough to make the mere act of agreeing without more to commit an international crime punishable. It is opined that by use of the words 'by means of a substantial step', attempt gives more stringent requirements and the conduct punishable under this heading excludes criminal liability for mere preparatory acts not criminalised by the Rome Statute.[80] Although attempt may avail a threshold low enough to accommodate prosecution of certain conduct prior to the actual commission of a crime, it would not be sufficient in the face of plans made by several persons in contemplation of international crimes with no sufficient step taken to execute them. Such a situation could sufficiently be punished under the crime of conspiracy.

5.3.5 Evaluation

The offence of conspiracy is distinct from its target offence, it precedes commission of the target offence and is complete at the moment of agreement before such offence is attempted or completed. Article 25 by imputing criminal responsibility for conduct involving commission or attempted commission effectively negates criminal responsibility for the inchoate form of conspiracy, which creates criminal responsibility for acts preceding even the preparation or attempt to

---

[77] See G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 628, stating that the law of attempt forms part of international criminal law by virtue of being a general principle of law.

[78] A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 809; K. Kittichaisaree, *International Criminal Law* (2001), p. 250.

[79] K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 37; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), pp. 812–813; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 629.

[80] G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 629.

commit a crime.[81] Despite the attribute of being an inchoate crime, thereby providing an opportunity to punish incomplete crimes, conduct that has actually been punished before the international tribunals (apart from the ICC) under the conspiracy concept refers to defendants' participation in the collective planning, preparation, coordination and organisation of crimes that have actually been committed. All the cases under which conspiracy has been prosecuted involve complete crimes, with conspiracy often being construed from the defendants' action of simultaneously pursuing the same object. A defendant's association with the agreement is mainly inferred from his course of conduct in the concerted and coordinated action involving commission of the underlying international crime. In this context, the underlying theory of punishing conspiracy has been to ensure all those who cooperate for purposes of committing international crimes, regardless of whether their role had a direct causal contribution in the execution phase of the respective crimes, are held criminally responsible. In this latter case, conspiracy has performed more the function of a form of criminal participation or mode of complicity creating a basis for holding co-conspirators reciprocally liable for their respective crimes.

The analysis on Article 25(3) shows that the concepts of joint perpetration, indirect perpetration, instigation, assistance and contributing to a group crime variously create criminal responsibility for conduct that has been considered punishable under the doctrine of conspiracy. Co-perpetration under Article 25(3)(a) sufficiently lays a basis to punish the combination of two or more persons to commit a crime, when their role in the criminal endeavour forms an essential contribution to the crime with the requisite subjective elements being present. The Pre-Trial Chamber has acknowledged that essential tasks here could constitute tasks carried out either before or during the executing stages of a crime and this would include 'designing the attack' and 'coordinating and monitoring activities' that form part of commission of the crime.[82] The theory of indirect perpetration offers a sufficient, and may be considered a better alternative legal theory than conspiracy, to ensure the leaders who mastermind crimes in criminal enterprises are held accountable. The concept of conspiracy does not capture the reality of relations between the leaders and their subordinates, especially in the context of warfare, for such circumstances the theory of indirect perpetration gives a more accurate picture of the reality and true relationship of persons involved in such criminal endeavours.

---

[81] G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 621; see also A. Eser, in A. Cassese; P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 802.

[82] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07, para 526; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 790; G. Werle, *Principles of International Criminal Law*, 2nd edn. (2009), marg. no. 467.

Apart from the perpetrators, accused persons whose participation in a conspiracy may be inferred from acts that prompt, encourage or lend moral support and give practical assistance to commission of crimes carried out by a collective, are under Article 25(3)(b) and (c) punished as instigators or assistants of the underlying criminal conduct. Unlike conspiracy, these modes of participation would not require proof of agreement between the perpetrators and accomplices. Here again, the accomplices do not need to share in the intent to commit the crime, which is a prerequisite for conspiracy, it only suffices that they know the perpetrator intends to commit the crime.

Article 25(3)(d) does not expressly mention conspiracy but like conspiracy, its elements indicate that it provides an opportunity to punish crimes committed in a collective context by creating individual criminal responsibility for contributions to group criminality. It would cover, although to a more limited extent, conduct that has been considered punishable under the conspiracy concept that does not otherwise satisfy the criteria of criminal responsibility provided by the other modes of participation.[83] The concepts of co-perpetration and indirect perpetration under Article 25(3)(a) would capture the architects, planners and those who coordinate criminal plans involving commission of international crimes. Article 25(3)(d) would capture those who simply subscribe to these plans (the small fish) and cooperate by rendering support for commission of group crimes, if such support does not sufficiently qualify as instigation or assistance.

5.4 Can Conspiracy be Punished Through a Purposive Construction of the Rome Statute?

It has been suggested that although the Rome Statute does not expressly authorise conspiracy, the provision in Article 25(3)(d) is seen to indirectly cover the concept of conspiracy and creates an ambiguity sufficient to accommodate pursuit of conspiracy convictions by the prosecutor.[84] This issue calls for further reflection. Article 21 of the Rome Statute provides that the sources of which the ICC may look into apart from the Statute itself include ‘principles and rules of international

[83] W. A. Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd edn. (2009), p. 314, describing the Rome Statute as contemplating conspiracy as a form of complicity; see also J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), p. 199, http://scholarship.law.cornell.edu/facpub/24.

[84] See R. P. Barret and L. E. Little, 88 *Minn. L. Rev.* (2003), p. 75, asserting that Article 21 grants licence to ICC to expansively interpret crime definitions ‘…in light of gender concerns and activities from other international conventions’; K. Kittichaisaree, *International Criminal Law* (2001), p. 250, asserting that in the case of genocide the ICC is likely to construe punishment of conspiracy under this article seeking guidance from jurisprudence of the ICTR on the issue.

law'.[85] This later source of law although not expressly mentioned, refers to customary international law.[86] Conspiracy as a crime under customary international law is only acknowledged with respect to the crime of aggression and genocide.[87] The Rome Statute in a clear departure from customary international law neither provides for the crime of conspiracy to commit genocide, nor even for the crime of aggression as reflected in the recent consensus on the definition of aggression.[88] In the case of genocide, only the inchoate crime of incitement to commit genocide is retained.[89] It may be presumed that by virtue of Article 21, the Rome Statute leaves room for judicial creativity, which allows an interpretation for the prosecution and punishment of conspiracy as a substantive crime under customary international law, at least with respect to genocide and the crime of aggression.

The Rome Statute does not give express guidance on rules of interpretation. Two schools of thought exist, either an expansive or restrictive rule of interpretation may be used. Under the expansive interpretation, one may look into the Vienna Convention on the Law of Treaties Articles 31 and 32, which respectively provide for a general rule and subsequent means of interpreting treaties.[90] As a general rule, a treaty should be interpreted in good faith with an ordinary meaning given to its terms in their context and in light of its object and purpose. The context includes the text of the treaty, its preamble, annexes and subsequent treaties adopted by state parties in relation to the treaty. If the meaning resulting from the general rule is ambiguous or obscure or leads to an absurd or unreasonable result,

---

[85] Article 21 reads in part:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

[86] D. Akande, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 50; M. McAuliffe deGuzman, in O. Triffterer (ed.), in *Commentary on the Rome Statute of the International Criminal Court* (2008), Article 21 marg. no. 13, asserting that 'rules of international law' actually refer to customary international law; W. A. Schabas, *An Introduction to the International Criminal Court*, 2nd edn. (2004), p. 92.

[87] See Chap. 4 discussing the customary status of conspiracy as a substantive crime.

[88] See RC/Res. 6, adopted at the 13th plenary meeting, on 11 June 2010, by consensus. Article 8 bis paragraph 1 states the '"crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.

[89] Article 25(3)(e).

[90] Adopted on 22 May 1969, and entered into force on 27 January 1980, United Nations, Treaty series, vol. 1155, p. 331.

the Vienna Convention provides for supplementary means of interpretation. This includes resolving to look into the drafting history of the treaty. In light of these rules an expansive approach may be used to interpret the Rome Statute. This approach in interpretation was used by the ICTY in the Tadic decision while adopting JCE as a mode of liability. The Appeals Chamber on realising that adhering to the strict language of the ICTY Statute limited the proper analysis and categorisation of the defendant's criminal responsibility in respect to the underlying crimes, it went ahead to adopt an expansive approach in its interpretation. As a result, the Chamber construed a reading of the ICTY Statute that recognised JCE as a mode of perpetration in the object and purpose of this Statute.[91] Consistent with this expansive view of interpretation, some scholars see the possibility of the ICC judges reading conspiracy in Article 25(3)(d).[92] This reasoning is tied to the negotiating history on the crime of conspiracy, which culminated into the mode of participation adopted in Article 25(3)(d).

In the second alternative, under the practice of national jurisdictions, criminal law statutes are often interpreted restrictively. In case of ambiguity the result more favourable to the accused is adopted. Subsequently, since the Rome Statute is a source of international criminal law rules, it is asserted that it should be subject to the rule of strict construction.[93] By virtue of this reasoning, any ambiguity that may be construed in Article 25(3)(d) can only be interpreted to exclude the crime of conspiracy. This rationale is strongly bolstered by a reading of Article 22 of the Rome Statute, which articulates the principle of *Nullum crimen sine lege*.[94] This Article provides that a person may only be criminally responsible for a conduct that constitutes a crime under the Statute at the time it is carried out, further, instructing that the definition of crimes should be strictly construed.[95] Pursuant to

---

[91] Tadic (AC), para 189; G. P. Fletcher, 9 *JCIJ* (2011), p. 185; J. D. Ohlin, 5 *JICJ* (2007), p. 72; W. A. Schabas, *An Introduction to the International Criminal Court*, 2 edn. (2004), p. 94, observing that the Judges at the ICTY often relied on the principles of interpretation of the Vienna Convention, 'which are essentially contextual and purposive in scope'.

[92] R. P. Barret and L. E. Little, 88 *Minn. L. Rev*. (2003), at p. 75; A. K. A. Greenwalt, 99 *Colum. L. Rev*. (1999), p. 2284; K. Kittichaisaree, *International Criminal Law* (2001), p. 250; W. K. Letzau, 32 *Cornell Int'l. J*. (1999), p. 485.

[93] W. A. Schabas, *An Introduction to the International Criminal Court*, 2nd edn. (2004), p. 94.

[94] Article 22 reads:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

[95] W. A. Schabas, *An Introduction to the International Criminal Court*, 2 edn. (2004), p. 95, observes that Article 22(2) leaves room for 'the question of whether or not strict construction applies to provisions of the Statute other than those that define the offences themselves', making it possible for the use of the contextual interpretation rule of the Vienna Convention.

this rule of strict construction, conspiracy under customary international law cannot be construed to form part of the crimes within the ICC's jurisdiction. The *nullum crimen* principle also restricts customary law, making it impossible for a court or tribunal to apply a customary rule, which criminalises conduct that does not fall under one of the categories of crimes over which its statute gives jurisdiction.[96]

5.5 A Deliberate Decision or Inadvertent Omission: A Case for Conspiracy

The decision to exclude criminal responsibility for conspiracy as a distinct crime in the Rome Statute has drawn mixed sentiments. This has especially generated much debate with respect to the crime of genocide, where prosecution of conspiracy has featured prominently in the practice of the ad hoc tribunals. There is the view that the exclusion of conspiracy particularly in reference to genocide could have been the result of inadvertence on the part of drafters of the Rome Statute.[97] The opposing view asserts that this exclusion represents a deliberate desire by States to change the applicable law regarding conspiracy to commit genocide.[98]

The assertion that such exclusion was a result of carelessness is not persuasive, when analysed in light of the background information on the drafting history of the Rome Statute. This history reveals a deliberate adoption of the common purpose mode of participation as a substitute to the offence of conspiracy. The opinion that it was a deliberate attempt by States to change the law may on the face of it seem more convincing. This later opinion however, contradicts the fact that at the level of domestic law, several jurisdictions continue to at least maintain conspiracy to commit genocide as a crime.[99] This confirms the fact that States continue to acknowledge the criminal nature of conspiracy conduct, although, there is some hesitation with respect to its implementation at the international level. This hesitation can be attributed to the different treatment accorded to a conspiracy charge

---

[96] D. Akande, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), p. 50; A. Cassese, *International Criminal Law*, 2nd edn. (2008) p. 17; M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 223.

[97] W. A. Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd edn. (2009), p. 315, Schabas sees it as 'an oversight of exhausted drafters', a view which stems from the inclusion of the inchoate crime of direct and public incitement to genocide. He opines that the Diplomatic conference was attempting to transfer to the Rome Statute 'all of the offences defined in the Genocide Convention'.

[98] J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), p. 201, http://scholarship.law.cornell.edu/facpub/24.

[99] See Chap. 4.

in the common law and civil law legal systems.[100] These differences resulted into what has been termed as a political compromise on the question of conspiracy, to ensure the Rome Statute became a reality.[101] On the one hand, the mode of liability adopted in Article 25(3)(d) avoids the express language of punishing conspiracy thereby meeting demands of the civil law countries. On the other hand, like the concept of conspiracy under common law jurisdictions, it creates criminal responsibility for participation in group criminality seemingly meeting the demands of this later group of countries, with the modification that such conduct can only be punished if the underlying crime has been attempted or carried out.

This inevitably creates a need to discuss the wisdom of such compromise, especially in light of suggestions that it represents a drawback in prosecutions before the ICC, particularly, in reference to the crime of genocide.[102] This argument is drawn against a contrary view that supports the exclusion of conspiracy liability, asserting that this has resulted into a more defensible Statute from the perspective of criminal law theory, and is evidence of a stronger commitment to the principle of individual accountability.[103] The following discussion answers the question whether such exclusion has created a dangerous gap in the prosecution of international crimes, or it may be considered to have been a prudent decision. The question at hand is answered from the perspective of justifications that have been given in support of conspiracy as a distinct crime, and in light of the function the conspiracy charge has had in prosecution of international crimes. It shall also include an analysis of the objections that have been directed towards the offence of conspiracy. These findings will be weighed against the alternative structures that Article 25(3) presents in holding perpetrators of international crimes accountable.

5.5.1 Rationale for Punishing Conspiracy in International Criminal Law

Under international criminal law several justifications for the offence of conspiracy have been set forth.[104] These justifications may generally be classified under three main categories: prevention, procedural convenience and the full story rationales.

---

[100] See Chap. 2 on comparative analysis; M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 222.

[101] R. P. Barret and L. E. Little, 88 *Minn. L. Rev* (2003), p. 82, view this decision as a pragmatic move made by the drafters who 'may have chosen to sacrifice clear authorization for conspiracy prosecutions in the interest of completing the enterprise'.

[102] Y. Askar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court* (2004), p. 230; M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 224.

[103] G. P. Fletcher, 45 *Columbia Journal of Transnational Law* (2007), p. 448; J. D. Ohlin, *Cornell Law Faculty Publications*, Paper 24 (2009), p. 200, http://scholarship.law.cornell.edu/facpub/24.

[104] In comparison see Chap. 2 Sect. 2.2.3, for the rationale of conspiracy under domestic jurisdictions.

5.5.1.1 Prevention

The first justification emanates from the characteristic of conspiracy as an inchoate crime, making it an essential tool for prosecuting criminal conduct while still in its early stages. Therefore, it prevents further criminal activity from occurring on a large scale. Conspiracy's role in prevention was first acknowledged and emphasised in the General Assembly's resolution 96(1) of 11 December 1948 adopting the Genocide Convention. This resolution acknowledged that the Convention would not only concern punishment for the crime of genocide but also focus on prevention.[105] To facilitate prevention, it was considered imperative to make certain preparatory acts punishable, although, they did not amount to genocide. These acts would include agreements or plots with a view to committing genocide. In this sense therefore, conspiracy satisfies the international criminal law goal of prevention. It provides a legal foundation for punishing conduct involved in the very preliminary stages when the commission of a crime is conceived and agreed upon, and before any substantial step is taken towards its commission. Yet the practice in international criminal law has only addressed crimes retrospectively. Conspiracy in the respective cases before the international tribunals has been punished after substantive crimes have occurred. This puts the notion of prevention into doubt.

Although the basic idea of conspiracy is to punish incomplete crimes, the common law concept of conspiracy also offers certain special features that have made it an appealing tool for prosecuting international crimes, even in the circumstances that the underlying crimes have already been committed. In the prevailing circumstances, the prosecution of conspiracy has mainly been maintained under the banner of procedural convenience and the full story justifications.

5.5.1.2 Procedural Convenience

International crimes almost always occur on a large scale and systematic context usually involving a group of persons executing a pre-determined plan. Given the collective nature of international crimes, it is not always readily apparent or clear what an individual's contribution to the resulting crime was. A feature common in the reality of international crimes is that their execution involves cooperation between several persons. This means that the responsibility for commission of a single crime is spread over a number of actors who have various responsibilities

[105] The resolution reads in part, '…the General Assembly…recommends that international cooperation be organised between States with a view to facilitating the speedy prevention and punishment of the crime of genocide…', cited in H. Abtahi and P. Webb, "From The Ad Hoc Committee Draft To The Sixth Committee." *The Genocide Convention: The Travaux Preparatoires* (2008), Martinus Nijhoff Online. 04 March 2011 DOI:10.1163/ej.9789004164185.i-2236.III, E/AC.25/3 665.

towards its completion, a phenomenon termed as 'diffusion of crime'.[106] This makes it difficult to establish a person's culpability in commission of the crime.[107] When several individuals commit parts of a crime proving a person's *actus reus* becomes difficult. This distribution of tasks also makes it difficult to prove a more culpable mental state for individuals who carry out a minor or discrete task. The common law conspiracy has been considered to give a suitable answer to this problem. First, it offers the lowest possible objective element by which one may be held criminally responsible for a crime, the mere act of agreeing. Second, to combat the special challenges presented by crimes carried out by a collective, common law conspiracy also acts as a special criterion of complicity. The underlying idea is that a conspirator will be held liable for all substantive crimes committed by his co-conspirators in the course of the conspiracy. The crimes referred to here include those that were reasonably foreseeable within the scope of the agreement or criminal enterprise. Thus, the common law conspiracy in these circumstances offers a legal tool that facilitates prosecution of those who hide behind the veneer of the group, giving the possibility of securing several convictions.[108] As a result, following the end of World War II with crimes involving a large number of victims and perpetrators, which were executed in a highly organised manner, the common law conspiracy was seen to have the necessary special legal underpinnings that made it suitable for prosecution of such crimes.[109]

Further, under the banner of procedural convenience, the conspiracy charge has especially been considered to be an important tool in holding accountable, leaders who organise and inspire their subordinates to carry out international crimes, but do not themselves soil their hands in actual execution of the crimes.[110] One main feature of atrocities perpetrated during the Second World War was the fact that the crimes were planned and ordered by leaders, and eventually carried out by a powerful apparatus consisting of several subordinates.[111] This is a feature that

---

[106] N. K. Kaytal, 112 *The Yale Law Journal* (2003), p. 1326; see also K. Ambos, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. (2008), Article 25 marg. no. 3; T. Weigend, 9 *JCIJ* (2011), p. 108, also briefly illuminates on this problem, asserting that it contributed to the introduction of the concepts of JCE and indirect perpetration.

[107] A. Maljevic, *'Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives* (2011), p. 20, also reflects this position by stating that the participants in the upper and lower level of a criminal collective hardly meet the strictly defined subjective elements of criminal liability.

[108] R. P. Barret and L. E. Little, 88 *Minn. L. Rev*. (2003), p. 68; N. K. Kaytal, 112 *The Yale Law Journal* (2003), p. 1326.

[109] J. A. Bush, *Columbia Law Review* (2009), p. 1137; S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 213; B. F. Smith, *The American Road to Nuremberg. The Documentary Record 1944–1945*, Doc. 16 (1982), p. 35.

[110] R. P. Barret and L. E. Little, 88 *Minn. L. Rev*(2003), p. 63, describing such persons as the 'key players…whose charisma, intelligence, and power fuel the conspiratorial process'. A similar argument is given under domestic jurisdictions; see Chap. 2 Sect. 2.2.3.

[111] S. Pomorski, in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), p. 213.

recurs in almost all scenarios involving commission of international crimes. The leaders, often the masterminds of such criminal schemes, skilfully distance themselves from the actual acts involving the substantive crimes. This makes it difficult to prove their *actus reus* and *mens rea*, helping them to evade punishment. By focusing on the agreement between the actors who form an integral part in the planning and deliberations of criminal schemes, the conspiracy charge is seen to allow the prosecution to avoid the unnecessary focus on a crime committed by another, of which the accused's proximate role in its commission may be difficult to prove.[112] The conspiracy charge was proposed at Nuremberg because it presented with it characteristics that would ensure the most notorious criminals (the leaders) who manage to insulate themselves from direct liability, by hiding their actions behind layers of middle persons would not escape criminal responsibility.[113] The idea of holding the leaders accountable under conspiracy also seemed to offer a better theory that would reflect their true level of criminal responsibility, rather than holding them accountable merely as accessories by reason of complicity, which infers a lower level of responsibility. As a result, conspiracy was a fundamental charge in the case of the 24 major war criminals before the IMT, and the 28 Japanese leaders before the Tokyo tribunal. This rationale is also one of the contributing factors that have informed prosecution of conspiracy before the ICTR.[114] It has resulted in the indictment of several leaders who formed part of the interim government of Rwanda during the genocide period, with the charge of conspiracy. Among the leaders prosecuted was a former prime minister of the Republic of Rwanda Jean Kambanda, who pleaded guilty to the count of conspiracy to commit genocide among other charges.[115]

This justification behind using conspiracy for its procedural convenience is also questionable, in view of the few convictions that have been obtained under this charge. The tribunals have often restrictedly interpreted the elements of conspiracy, rendering its perceived procedural advantages redundant. This restrictive application is driven by the apprehension of applying collective guilt. The preferred tendency is to find the accused liable for the underlying crimes through other modes of participation. In this respect, modes of participation such as JCE in the ad hoc tribunals, and to some limited extent the theory of criminal organisations in the subsequent Nuremberg tribunals have had a more prominent function.[116]

---

[112] Y. Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the wake of World War II* (2008), p. 83.

[113] J. A. Bush, *Columbia Law Review* (2009), p. 1138; See Chap. 3 Sects. 3.2.1 and 3.2.2.

[114] M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (2005), p. 228.

[115] *Kambanda,* ICTR (TC).

[116] See Chap. 3.

5.5.1.3 Full Story Rationale

One main challenge against the conspiracy charge is what benefit accrues to prosecute and convict for inchoate liability in the face of complete crimes. This dilemma is even more persistent when the evidence used to prove conspiracy is inferred from the evidence used to establish commission of the underlying substantive crimes. In the perspective of continental jurisdictions legal theory, the essence of convicting or even prosecuting conspiracy disappears once its underlying crimes have been perpetrated. In contrast, under the common law jurisdictions since conspiracy is an independent crime, conviction for conspiracy even when its underlying objective has been achieved can still be maintained. The reasoning under the common law school of thought is that an accused found guilty of the underlying crimes, should nonetheless, be held liable for conspiracy to give a complete representation of the accused's criminal responsibility.[117] Second, a conviction for conspiracy is also considered imperative when the crimes underlying the objective of such conspiracy, in fact, exceed the crimes actually committed pursuant to the same conspiracy. Third, a conviction for conspiracy is necessary to show that the crimes were part of some overall criminal scheme carefully planned and executed.[118] Conspiracy in this aspect is seen to play a bigger picture in the truth-telling function of judicial decisions, showing the true context in which the underlying crimes were carried out. The full story justification seems to emphasise and considers it important to punish conspiracy because it gives a good account of the group behaviour involved in committing the underlying crimes, and for the extra stigma that such conviction carries with it. Therefore, the conspiracy charge in this case captures the collective circumstances under which the crimes were committed and acts as an aggravating factor. In this sense, it is not sufficient to only allege that an accused perpetrated certain crimes, but it is also imperative to say that the crimes were perpetrated as part of a conspiracy of which the accused was party to, ensuring the accused's criminal responsibility is analysed in its true context.

This rationale has been a major guiding principle for the use of the conspiracy charge before the ICTR.[119] The investigations on the genocide in Rwanda revealed that from its conception through to its execution stages, the genocide was planned and organised and evidently involved the collaboration of the State and certain elements of the civil society. This ensured that a large number of the population

---

[117] A. Obote-Odora, 8 *Murdoch University Electronic Journal of Law*, No. 1 (2001), para 95.

[118] M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*(2005), p. 206, referring to judicial truth of atrocity crimes which requires full accountability for both conspiracy and the substantive crime; see also C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 507 describing this as the "full story" rationale; P. Marcus, 65 *Geo. L. J*. (1977), p. 937.

[119] See M. C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*(2005), p. 224 et seq.

participated in the killings, thus evidence of some grand conspiracy.[120] Whether this rationale actually plays an essential role is also doubtful. In the ad hoc tribunals, there has been a tendency not to convict for conspiracy, when the underlying crime of genocide has been proved.

5.5.2 *Objections to Punishing Conspiracy*

Despite the above special attributes of conspiracy, in the context of international crimes the propriety of having it as a stand-alone crime has continually been challenged. Among the main objections is often citing conspiracy as distinctively a common law idea.[121] Historical evidence shows that civil law jurisdictions have continuously opposed use of the common law concept of conspiracy to prosecute international crimes.[122] Many countries under civil law jurisdiction are generally cautious about the idea of criminalising the mere act of agreement. It is considered to amount to criminalising mere thoughts, which are seen to pose no actual danger to society. In most civil law jurisdictions, the preference is to punish group crimes through offences of participation in a criminal association.[123] To a great extent, these offences punish conduct of the nature punished under the common law conspiracy, although, there is the requirement in most instances that such associations have a more structured organisation as opposed to loosely formed spontaneous criminal associations. Conversely, recent continuous reforms in some major civil law jurisdictions disclose a gradual tendency towards punishing criminal agreements in their penal laws with respect to certain serious crimes, among these include international crimes.[124]

In addition to a general objection to the common law conspiracy concept, even in instances that criminal responsibility for the offence of criminal agreement is recognised, most continental jurisdictions adopt a different approach to punishing conspiracy.[125] While under common law jurisdictions conspiracy is an autonomous crime punishable the moment two or more people agree regardless of its results, under continental jurisdictions conspiracy is a form of attempted

---

[120] See Annual Report of ICTR to the U.N. General Assembly, UN Doc. A/55/435, S/2000/927, 2 October 2000, para 132; also Annual Report of ICTR to the U.N. General Assembly, UN Doc. A/53/429, S/1998/857, 23 September 1998, para 57.

[121] G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 221; A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 227; also see Chap. 3, arguments of defence counsel in the Nuremberg tribunal and subsequent Nuremberg tribunals.

[122] This was a main argument raised during the Nuremberg trials opposing the conspiracy charges, see Chap. 3.

[123] See Chap. 2 Sect. 2.3, discussing punishment of group criminality under civil law countries.

[124] Chapter 2 Sects. 2.3.1, 2.3.2. and 2.3.4. (Germany, Spain and France).

[125] *Musema,* ICTR (TC), paras 196, 197; W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn. (2009), p. 310.

participation that is only punishable to the extent that its target crime is not committed or even attempted. In this latter form, conspiracy is absorbed in the completed or attempted crime. These conceptual differences have contributed to a number of contradictory decisions with respect to the charge of conspiracy to commit genocide before the ad hoc international tribunals.[126]

The special features of the common law concept of conspiracy have also generated much criticism from several scholars, with some labelling it as a theory of collective criminality. By virtue of its features, participation under the common law conspiracy is conclusive on complicity, making such a participant punishable for all crimes carried out pursuant to the conspiracy even if they contributed only marginally. Participation in such a conspiracy also carries with it the potential of being held liable for foreseeable crimes committed thereto. In this sense, conspiracy is considered to cast a wide net over its adherents making it indistinguishable from collective punishment.[127] It is thus seen to violate the principle of *Nulla Poena Sine Culpa*. Fletcher on this aspect in fact observes that the conspiracy charge before Nuremberg 'reflected a yearning to impose collective guilt on the German leadership'.[128]

5.5.3 Evaluation

In the context of complete crimes, conspiracy before the international criminal tribunals has mainly performed the function of a mode of participation as opposed to an inchoate crime. This explains the dilemma that has been displayed before the ad hoc tribunals, questioning the essence of convicting an accused for conspiracy, mainly seen as an inchoate crime, when commission of the substantive crime has been proved. In such circumstances, the international tribunals have in most cases inferred an accused's criminal responsibility for conspiracy from participating in the planning and preparatory activities relating to the underlying crimes. The agreement is often deduced from the concerted and coordinated action involved in commission of these crimes.

From the onset of negotiations on formation of a permanent international criminal court, conspiracy in the proposed draft statutes was labelled either advertently or inadvertently as a mode of complicity, losing out on its value as a

[126] See Chap. 3 Sect. 3.7.2.2.

[127] A. Fichtelberg, 17 *Criminal Law Forum* (2006), at p. 159, 160; also see P. Marcus, 65 *Geo. L. J*. (1977), p. 943, who asserts that if conspiracy is not approached with caution it can be a 'drag net' capable of great oppression; C. Robert, *Southern California Law Review* (2007), p. 473; E. van Sliedregt: *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 17.

[128] G. P. Fletcher, 45 *Columbia Journal of Transnational Law* (2007), p. 448.

purely independent inchoate crime essential for punishing incomplete crimes.[129] The influence that led to this course of events can most likely be attributed to the actual function and context in which conspiracy has been used to prosecute international crimes and the interpretation of its elements by the international tribunals.[130]

If one looks at conspiracy strictly from the perspective of its actual role in prosecuting complete international crimes that is as proof of participation in other substantive crimes (a mode of participation), then it suffices to say that this conduct has sufficiently been captured by the modes of liability under Article 25 of the Rome Statute. First, those who plan and prepare for execution of crimes in a concerted and coordinated manner, which conduct has previously been punished by conspiracy, may in Article 25(3)(a) be criminally responsible under the concept of joint perpetration or indirect co-perpetration. The concept of joint perpetration provides a basis to punish those who act concertedly as co-perpetrators and give essential contribution pursuant to a common plan for accomplishment of a crime. Agreement is one of the fundamental elements of this mode of liability. Co-perpetration would sufficiently capture the leading figures in a criminal scheme that come together, plan, prepare and make essential decisions regarding commission of crimes. Second, the concept of indirect perpetration offers an alternative legal tool to conspiracy, for the cases in which conspiracy was considered essential in facilitating the prosecution of leaders who manage to insulate themselves from direct liability in actual commission of international crimes, although, they are the brains that plan and ensure execution of such crimes through a 'powerful machinery'. Indirect perpetration provides a sufficient basis to punish those who engineer execution of international crimes through control of an organisation.

Apart from the perpetrators, there are those participants who though not having control over the crimes, give essential support to a collective criminal endeavour. They are generally termed as accessories to the crime and would under the theory of conspiracy be punished together with the perpetrators as conspirators. These participants are usually responsible for prompting, encouraging, advising and giving some other practical assistance that facilitates the commission of the crime or crimes. Under the Rome Statute they are responsible pursuant to Article 25(3)(b) and (c), which recognises criminal responsibility for ordering, soliciting or inducing, and aiding, abetting or otherwise assisting in commission or attempted commission of crimes punishable in the Statute. Accessories under the Rome Statute do not have to share an intention with the perpetrators on commission of the crimes, it suffices only that they knew of the perpetrator's intention to commit

[129] See Chap. 5 Sect. 5.2 on negotiations; A. Eser, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), p. 786, wonders if the drafters had realised that structuring conspiracy on accessorial principles would lead to loosing its function as an inchoate crime.

[130] On this, also see W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn. (2009), p. 314, commenting that '[l]aw-makers continue to be haunted by the restrictive construction given to conspiracy at Nuremberg'.

the crime. This contrasts the liability theory under conspiracy, which requires an inference of shared intentions.

Third, to deal with the challenges of system criminality, where several persons commit crimes by hiding behind the veil of the group making it difficult to ascertain who actually committed the crime in question, the conspiracy charge provided a safety net for the prosecution. It offered the lowest possible objective element by which an accused may be held criminally responsible, the mere act of agreeing. To address this challenge Article 25 offers an alternative legal approach under the 'common purpose' or 'complicity in group crimes' liability. This mode of participation also provides for the lowest possible objective requirement that would create criminal responsibility for commission of international crimes. When it is obvious that an accused made some contribution to the commission of a crime carried out by a collective, but such contribution does not satisfy the definitional elements of a perpetrator, nor is the contribution substantial to suffice as instigation or assistance, Article 25(3)(d) covers such subsidiary conduct. Although, the contribution that qualifies for punishment under this mode of participation would require more than the mere act of agreement, it still makes it possible to punish those who give indirect but what may be considered to be essential support for criminal collectives. This mode of liability can be considered to provide an opportunity to hold accountable those who participate at the periphery of criminal schemes. Therefore, the mode of common purpose liability like conspiracy seems to compensate for challenges of diffusion that are evident in group crimes. It however, avoids the threat of criminal responsibility arising from the mere fact of association by excluding the possibility of 'collateral liability', which is often associated with the Anglo American concept of conspiracy under its Pinkerton liability theory and JCE III. A defendant under the common purpose mode of liability is only responsible for criminal conduct that he is actually complicit in. This excludes criminally responsibility for additional crimes committed by a member of the group that were allegedly foreseeable, even though, they were not part of the crimes intended by the group or the defendant was unaware of them.

In addition, the common purpose mode of participation expressly makes punishable conduct that commentators under domestic law in common law jurisdictions have classified as 'aiding and abetting' a conspiracy. It makes it possible to establish criminal responsibility for those who contribute to a group crime with the mere knowledge of the group's intention to commit certain criminal activities, without having to share in such intention. This conduct although considered punishable by domestic courts, they often have difficulties in supporting such convictions under the conspiracy theory liability.[131]

Fourth, in response to the full story justification for conspiracy, the manner in which the charges are drawn and the judgments drafted before the ICC, satisfactorily give a full account of a defendant's alleged participation in commission of international crimes. This counters the need for a conspiracy charge and conviction

[131] See Chap. 2 Sect. "The Mental Element".

to give a rounded impression of facts surrounding commission of the crimes. The modes of liability in Article 25 are structured in a manner that recognises the various ways that individuals may collectively contribute to commission of crimes. In practice, an indictment charging an accused before the ICC not only includes the crimes he is suspected of, but also the mode of participation by which it is alleged he contributed to the crimes. In addition, the ICC's jurisdiction is restricted to serious crimes that are either termed as collective by their very nature or were part of a plan or policy.[132] The inference here is that all crimes punishable before the ICC by their very nature have a collective element, or involve the cooperation of several individuals. All these factors provide an opportunity to give a full account, or tell the whole story with respect to any incident involving commission of international crimes. This negates the need to label the commission of such crimes under the term conspiracy, for one to draw conclusion that an accused acted in cooperation with others in commission of such crimes.

It can be said that Article 25 of the Rome Statute comprehensively covers all conduct by which an individual may contribute to commission or attempted commission of international crimes. Under the theory of conspiracy as a mode of participation, all who contribute to commission of the crime in whatever form or degree are equally liable as conspirators without making a distinction between the perpetrators and mere accessories to the crime. Unlike the concept of conspiracy that bundles all participants together in one mode of participation, the differentiated model of participation in Article 25 provides for a qualitative distinction for the different levels of contribution undertaken by participants in a group crime. In this sense, Article 25 avoids the dangers that are more apparent in the conspiracy offence, which blur's the difference in degree of participation of accused involved in a collective criminal scheme, exposing a minor participant to the possibility of criminal responsibility that is wider than their actual extent of participation.

Whereas the function of conspiracy as a mode of complicity is satisfactorily covered under Article 25, its function as an inchoate crime designed for punishment of incomplete crimes is obviously excluded in the Rome Statute. The importance of inchoate conspiracy within domestic jurisdictions cannot be gainsaid. It has the essential role of providing a tool that enables early intervention by law enforcers, frustrating the realisation of any criminal schemes involving crimes with serious repercussions to the society. To implement this aspect of law embodied in the conspiracy concept, domestic jurisdictions put in place several monitoring mechanisms and measures that facilitate early intervention. This

[132] See A. Chouliaras, in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (2010), p. 68; G. P. Fletcher *Columbia Journal of Transnational Law* 45 (2007), p. 447, describing aggressive war as being by its very nature collective; W. A. Schabas, *Genocide in International Law; The Crime of Crimes*, 2nd edn. (2009), p. 310, asserting on the collective nature of Genocide; Rome Statute Article 7(2)(a) indicating an attack against any civilian population should be pursuant to or in furtherance of a State or organisational policy; Rome Statute 8 (1) stating the court shall have jurisdiction for war crimes particularly when committed as part of a plan or policy.

ensures effective utilisation of the conspiracy doctrine. The reality of practice in international law, and the manner in which states relate to each other under the doctrine of state sovereignty, makes the possibility of putting in place effective mechanisms for early intervention a difficult if not impossible ideal to achieve.[133] In most cases, the international community only intervenes after substantive crimes have been committed. The practice before the international tribunals reveals that the idea of conspiracy as an inchoate crime is almost entirely fictional, with all prosecutions relating to the conspiracy charge only involving consummated conspiracies. An intervention after commission of crimes defeats the very idea of conspiracy, which is to prevent crimes even before they are attempted. In the circumstances, if conspiracy is not functional as a mode of complicity and neither is it considered necessary under the full story rationale it becomes a redundant crime. It may be stated that given the reality of relations between states in the international arena, conspiracy is an irrelevant crime and the decision by the states to exclude it within the ambit of the ICC, does not in any way affect the prosecution of international crimes.[134] This argument may also be reinforced by an assertion that by the time the international community considers to intervene in a situation where the potential to commit international crimes is eminent, steps to implement such plans will often have been substantially undertaken. This is enough to meet the standards that create criminal responsibility under attempt. Therefore, the Rome Statute may be considered to still adequately satisfy the rationale of prevention, because in practice the criminalisation of conspiracy may have no real significance. On account of this perspective alone it would be correct to assert that there is no gap in the law.

Looking at conspiracy exclusively from the above limited perspective misses out on the symbolic and functional value of the Rome Statute, and the need to deter certain criminal activities that threaten the very existence of humanity from the moment of their conception. Supposing investigations carried out in a certain area reveal that international crimes have been committed, and apart from plans relating to the executed crimes, there were more plans to perpetrate other crimes but no further substantial steps had yet been taken towards their accomplishment. The international community in such a case under the Rome Statute would only be able to hold accountable the most responsible figures with respect to crimes committed or at least attempted. This leaves out the extra plans relating to unexecuted crimes. Perhaps a hypothetical situation would better illustrate the problem.

The leader of a country ‘A’ is facing political dissent. He has been the president for several years and has successfully suppressed all political dissent. The political

---

[133] See G. P. Fletcher, 4 *JICJ* (2006), p. 455, on States jealously guarding their sovereignty.

[134] See G. P. Fletcher, 4 *JICJ* (2006), p. 455, asserting that the international community has rejected purely inchoate offences, including conspiracy because of lack of an early intervention mechanism. A good example is the Veto adopted by China and Russia stopping UN’s bid to exert pressure on Syria to stop attacks on civilians calling for regime change and the right to democratic space.

structures in country 'A' make it impossible for the election of another leader through democratic institutions. Uprising by the civilian population in certain countries neighbouring country 'A' leads to the overthrowing of equally autocratic leaders in the respective countries. This course of events inspires the civilian population in country 'A' leading to demonstrations in certain parts of the country. Country 'A' is highly divided along ethnic lines, and its leader mainly enjoys majority support from his ethnic community, and a few other ethnic communities whose members seem to benefit from their close relationship with the leader. The protests in country 'A' are seen to arise from parts of the country occupied by other ethnic communities from which the leader does not seem to have a majority support. To suppress these protests, the leader and other leading personalities in his government decide to engage the army to attack the population perceived to be opposing the current leadership. Country 'A' has a vast landscape and logistics do not allow the army to concurrently attack the demonstrating population in various parts of the country. The leading figures of country 'A' proceed to make plans that will guide the systematic attack by the army against the protestors, deciding to start in the cities 'X, Y, Z', considered most crucial for the governance of country A and later to follow cities 'K, L, M'. The army following these plans begin to attack city 'X' and thereafter city 'Y'. These attacks generally seem to target persons who come from the ethnic groups perceived to be steering the protests. In the course of the army's operations, the international community notices the large number of civilians fleeing from country 'A', and realises the potential death of several defenceless civilians. Through a United Nations resolution troops are sent into protect the civilians of country A. This eventually leads to arrest of the leader in country A alongside his generals and key leaders of his government. They are arraigned before the ICC following a reference by the Security Council. Evidence before the prosecutor reveals that plans of the leader and his cronies extended beyond the crimes actually committed or attempted. The attacks were only executed in city 'X' and measures had been taken to begin attacks in city 'Y', but no further measures had been taken on cities 'Z, K, L and M' apart from the initial plans made. The prosecutor realises that he can only prosecute for crimes committed in city 'X' and possibly city 'Y' but no judicial recourse is available for the plans made with respect to the other cities because no further steps were taken with respect to their execution.

If the doctrine of conspiracy were available to the prosecutor it would suffice to hold the leaders criminally responsible for all the unexecuted plans, although, no substantial steps had been undertaken to execute some of them. In the prevailing focus of international criminal law it may suffice to argue that the ICC's focus on the most serious crimes means that it concerns itself only with crimes that pass the 'gravity test'.[135] Such a test may be considered to only apply in the context of committed and attempted crimes. However, since the Rome Statute reiterates that certain crimes are considered so serious that they threaten the very core of

[135] See Rome Statute Articles 17(1)(d).

humanity, hence, certain conduct towards their accomplishment will not be tolerated; this conduct should also include conspiracies that do not extend beyond the conceptual or planning stage. A conspiracy charge would also especially be useful in the context of a criminal plan that extends beyond the criminal acts actually carried out. The justification for making such conduct punishable is that such plans or preparatory conduct, although still a long way from execution or the beginning thereof, are a clear manifestation of their authors' intentions to carry out serious crimes. It may also be said that by their mere existence, these plans already create an increased danger to humanity. Such plans also have the potential of creating a situation beyond the control of those who drew them up, given that other persons may still choose to adopt them and execute them at a later stage. Hence, there is a need to create criminal responsibility for such conduct making it possible to expressly condemn such plans through a judicial process. This would act as deterrence to any future adherence to the alleged plans or ideology, avoiding any possibilities of commission of the conceived international crimes.

5.5.4 Recommendation

Although, the exclusion from punishment of the inchoate form of conspiracy in the Rome Statute can be described as a relatively small gap, given the serious threat that commission of international crimes pose to humanity, I would recommend that any conduct towards their execution, even the mere act of agreement, should be punished. This is a notion already recognised in many domestic jurisdictions mostly within the common law and is gradually gaining ground in continental jurisdictions, with some civil law countries already making the act of agreeing to commit certain serious crimes punishable albeit with different parameters.

The realities in international relations dictates that States will almost only intervene when crimes have been committed. This means that the Rome Statute sufficiently covers all conduct that may be involved with respect to commission and attempted commission of crimes. This however, excludes the possibility of holding defendants criminally responsible for criminal plans that extend beyond the crimes committed or attempted, in the case that no substantial steps are taken towards their execution. As demonstrated by the hypothetical situation above, there may be instances where the modes of liability are not sufficient to capture criminal responsibility for certain preparatory conduct that may otherwise be considered punishable under conspiracy. Conspiracy should therefore, be included as a back-up option or safety net mechanism for punishment of criminal plans and such acts that do not qualify as attempt but may still be considered to pose a serious danger to humanity by initiating the possibility of commission of international crimes.

An amendment of the Rome Statute in the circumstances is therefore necessary in order to broaden the possibility of intervention in relation to international crimes, and to give the ICC the potential of dealing with such conduct in future.

Apart from prevention and censure, criminal law also has a declaratory function.[136] It then follows that it is important and imperative, to create criminal responsibility for conspiracy for its symbolic and deterrent value, underscoring the seriousness of international crimes, and confirming that states will not tolerate even the slightest notion of simply agreeing to commit an international crime. Conspiracy also needs to be included in the Rome Statute because it sets the standards of the ideal model statute on international crimes that several domestic jurisdictions look up to. This revision is also important because the Rome Statute will most likely influence the structure of statutes formed for other institutions that the U.N might create to deal with special situations like in the case of the Special Tribunal of Lebanon, and Special Panels of East Timor.[137]

I suggest that the notion of conspiracy being included in the Rome Statute is one likely to be acceptable by a majority of the states. In this case the conspiracy punishable should be a form of attempted participation as opposed to an independent crime, leaving out all its controversial features that are provided for under common law countries. Since the function of conspiracy as a form of complicity is sufficiently covered by the current modes of liability, the only justification left is for the punishment of conspiracy under the notion of prevention. Therefore, conspiracy should only be restricted to punishment of incomplete crimes, to the extent that they are not committed or attempted. It may be confined to punish instances where there is evidence of concrete plans to commit international crimes, but no further steps have been carried out that satisfy the attempt threshold. I would recommend that Article 25(3) be revised and a sub para (g) be introduced that provides:

[A] person shall be criminal responsible… if that person:

…

(g) Agrees with another or others to commit a crime punishable under this Statute.

[136] A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 15 et seq.

[137] The language of Article 3(I)(b) of the statute of Special Tribunal of Lebanon greatly resembles Article 25(3)(d) of the Rome Statute, and Section 14 on Individual Criminal Responsibility in the Special Panels of East Timor, resembles Article 25(3) of the Rome Statute.

Chapter 6
General Conclusion

Since it was first proposed to hold the major war criminals accountable for atrocities committed in the course of Second World War, to the most recent negotiations on codification of the Rome Statute, objections have often been raised against the use of conspiracy as a tool of accountability. Its greatest proponents mainly come from a common law background, whereas its opponents mostly come from civil law jurisdictions.

It has often been asserted that conspiracy is strictly a common law concept. Under common law, conspiracy is an independent crime that creates criminal responsibility for the mere act of agreement.[1] The agreement is seen as a manifestation of the criminal intent of the parties participating in it. It is essentially an inchoate crime that punishes conduct preliminary to the commission of crimes. This makes it a crucial tool for the prevention of crimes, particularly, those committed by groups.

In contrast, most civil law jurisdictions prefer to combat collective criminal activity through the criminal association rule.[2] Thus, the jurisdictions of Germany, Spain, France and Italy create criminal responsibility for participating in a criminal organisation. To participate in founding, or to be a member, or to participate in other activities that support such organisation, is subject to punishment. In most jurisdictions, a criminal organisation constitutes at least three members, should exist for a certain period of time, has some form of hierarchical structure, with a long term goal of carrying out criminal activity. These requirements distinguish the criminal organisation offences from the offence of conspiracy, where a minimum of two people who spontaneously agree to commit a crime are considered punishable. Offences formed under the criminal association rule are independent crimes, and they perform in civil law jurisdictions the analogous function of conspiracy in common law jurisdictions. They are intended to prevent criminal activity while still at the preparatory stage.

Nonetheless, contrary to popular belief, civil law jurisdictions also punish conduct of a conspiracy nature. This negates the assertion that this conduct is only

[1] See Chap. 2, Sect. 2.2.
[2] See Chap. 2, Sect. 2.3.

J. R. A. Okoth, *The Crime of Conspiracy in International Criminal Law*,
DOI: 10.1007/978-94-6265-017-6_6,

punishable under common law jurisdictions. Although most civil law jurisdictions did not for some time favour creating criminal responsibility for the mere act of agreeing to commit a crime, and initially restricted punishment for such conduct to subversive acts or what may be termed as offences against the state such as treason, there has been a gradual extension of punishment of such conduct in relation to other serious crimes. The objection against punishing conspiracy in civil law jurisdictions has been that it is considered purely mental in composition, and is seen to present no apparent harm to society. Punishment of conspiracy in civil law jurisdictions has mainly been motivated by the realisation that the requirements for offences under the criminal association rule are not broad enough to meet all situations of group criminality. The criminal association offences, in some instances, could not sufficiently arrest criminal conduct while in its preliminary stages. Hence, there has been a need to broadly define what constitutes a criminal association, making it possible to even punish an agreement made to form such an association.

This gradual extension of criminal responsibility to capture conduct of conspiracy nature in some civil law jurisdictions can mainly be attributed to the ingenuity of criminals who continually pursue criminal activities that threaten security of the state and public goods, particularly, the increased threat of terrorist activities. This increasingly creates the demand for criminal law to intervene at the earliest possible point, even before the said crimes have been attempted. Conspiracy in this case seems to present a more flexible concept, than that of criminal organisations, sufficient to meet this need.

The main controversy between civil law and common law countries arises not so much from the principle behind criminalising conspiracy, but from the approaches used to prosecute and punish conspiracy. The common law conspiracy charge carries with it broad liability rules, where an alleged conspirator faces the possibility of his criminal responsibility being extended to other criminal acts carried out in pursuance of the conspiracy by co-conspirators. Liability for such acts arises although they were carried out without the defendant's knowledge, consent or participation, as long as they were a foreseeable consequence of such conspiracy. This extensive characteristic of liability in common law conspiracy is mainly manifested in the controversial Anglo-American Pinkerton liability doctrine.[3] Circumstantial evidence is often used expansively to establish existence of the agreement and intention of the parties in relation to participation in the agreement and its underlying crime.

Unlike common law conspiracy, conspiracy under the respective civil law countries is a form of attempted participation and not an independent crime. It is used to strictly punish preparatory conduct, and once the target offence has been realised or even attempted the criminal agreement offence merges into it. The civil law countries do not provide any special procedural or evidential advantages for charges relating to the offence of criminal agreement. The criminal agreement

[3] See Chap. 2, Sect. 2.2.2, "Accessorial Liability (The Pinkerton Doctrine)"

offence does not also act as a form of complicity and the principle of liability for personal conduct is strictly adhered to. Whereas participation in a conspiracy under common law jurisdictions may be considered to be as serious as commission of its underlying crime, under civil law jurisdictions participation in a conspiracy attracts less culpability and is punished more leniently.

The distinct attributes of common law conspiracy have made it the subject of much criticism, with some scholars even calling for its complete elimination. The respective civil law countries have clearly chosen to leave out the controversial aspects of common law conspiracy. Although, the critics of the common law conspiracy raise some valid concerns, the radical view of abolishing it altogether ignores the significant role of conspiracy in arresting criminal activity while still in its infancy, and would not be the best solution. A more appropriate approach is to carry out reforms that eliminate the unacceptable elements of common law conspiracy. Indeed, several steps have been made towards this end, if not expressly by law, at least in practice. There is the persistent and quite persuasive view that conduct punished under conspiracy often involves action where sufficient steps have been taken, and can satisfactorily be punished as attempt or in some cases instigation. The rationale of punishing conspiracy once its contemplated crime has been committed is also objected to. The recommended view is that conspiracy should be restricted to punish only incomplete crimes that do not meet the standards of criminal responsibility under attempt. There could also be exceptional cases where the interest of justice demands that conspiracy still be punished, even when its underlying crime has been committed. Circumstances embracing the interest of justice could include where the conspiracy involved commission of crimes beyond those actually executed.

Conspiracy was introduced into the scene of international criminal law on the initiative of Americans.[4] It was included in the Nuremberg Charter despite objection from participants of civil law jurisdictions, and was later included in both the Tokyo tribunal Charter and Control Council Law (CCL) No. 10.[5] Although, its proponents intended that conspiracy would be used as a tool of accountability for all crimes under the jurisdiction of the international tribunals, conspiracy was eventually only punished with respect to the crime against peace. The conspiracy count was so serious that a conviction on account of this charge alone earned two accused before the Tokyo tribunal life imprisonment sentences. In the end, however, conspiracy was strictly construed by the tribunals. It was considered to be a leadership crime and was restricted to punish conduct relating to the top brass who were able to plan, prepare and make decisions with respect to the waging of war with full knowledge of its criminal nature. This limited construction is attributed to the ambiguous manner in which the Charters were drafted, and the skeptical attitude of the judges, especially those from civil law jurisdictions, towards the conspiracy charge.

[4] See Chap. 3, Sect. 3.2.

[5] See Chap. 3.

The limited construction given to the conspiracy count by the Nuremberg tribunal affected all further attempts by the prosecution to charge conspiracy in the subsequent Nuremberg military tribunals.[6] No further conviction on account of the conspiracy charge was obtained in these tribunals. They also rejected counts on conspiracy to commit war crimes and crimes against humanity on jurisdictional grounds. Even though conspiracy was not punished in these tribunals, a conclusion drawn from the analysis is that conduct the prosecution actually charged under the conspiracy count, which referred to planning and preparatory activities in relation to the underlying crimes, was still sufficiently punished by the tribunals as participation in the completed crimes.

The main reason for including conspiracy in the Nuremberg and Tokyo Charters was to overcome the procedural and evidential burden involved in proving every defendant's participation in commission of the crimes. The crimes in question had been committed on a large scale and in a systematic manner. Since conspiracy under common law is conclusive on complicity, an inference of conspiracy in such circumstances would have ensured all participants involved are punished for all crimes carried out pursuant to the alleged conspiracy. This was the same reasoning that influenced introduction of the concept of criminal organisation, the other tool of accountability often associated with conspiracy, adopted in the Nuremberg, Tokyo Charters and CCL. 10, to facilitate prosecution of collective criminal activity.[7] Here, the idea was that once a certain organisation was declared criminal it would create a rebuttable presumption of guilt for its members. This, as a result, would make such members criminally responsible for all crimes carried out by other members of the criminal organisation.

The tribunals were especially wary of the broad theories of liability that these two concepts presented, because they raised the possibility of guilt being established by the mere fact of association. This would have violated a general principle of criminal law that guilt should be personal. Therefore, the tribunals decided to treat both concepts with extreme caution. The vicarious form of criminal responsibility arising from conspiracy did not play any role. Most accused persons were held liable specifically for their contribution to the commission of crime/s for which he was charged. Criminal responsibility for membership in a criminal organisation was restricted to defendants who voluntarily remained members of such organisation with knowledge of its criminal nature, or were personally implicated in commission of crimes attributed to such organisation. As opposed to conspiracy, the concept of criminal organisations played a bigger role in the subsequent Nuremberg tribunals, with defendants such as Altstötter in the *Justice Case* and Poppendick in the *Medical Case* being declared guilty for this offence alone.[8] This earned Altstötter a sentence of 5 years imprisonment, and Poppendick was sentenced to 10 years imprisonment. It can be concluded that in the subsequent

[6] See Chap. 3, Sect. 3.3.

[7] Chapter 3, Sect. 3.2.2.2

[8] See Chap. 3, Sects. 3.3.1, 3.3.2.

Nuremberg military tribunals the offence of criminal organisation in a way compensated for the restricted theory of conspiracy liability, where mere knowledge or acquiescence was not sufficient to establish criminal responsibility. This concept has since been abandoned.

The coming into force of the Genocide Convention in 1948 introduced criminal responsibility for conspiracy to commit genocide. Genocide was considered to be a very serious crime against humanity, whose occurrence needed to be prevented at the earliest possible opportunity. Therefore, preliminary activities such as the mere conduct of agreeing to commit genocide were declared punishable. Punishment of this conduct only began with the formation of the ICTY and ICTR, following atrocities committed in the early nineties in the territories of former Yugoslavia and Rwanda.

The law on conspiracy to commit genocide has mainly been articulated by the jurisprudence of the ICTR.[9] Several defendants have been charged with the conspiracy count. However, the conviction rate has been very low. So far of the 14 judgments that have discussed conspiracy, only five have returned a verdict of guilty, with one being overturned on appeal. Conspiracy is defined as the agreement between two or more persons to commit genocide, and is punishable regardless of its results. Conspiracy may be proved through direct or circumstantial evidence. To establish conspiracy by circumstantial evidence, it must be the only reasonable inference that may be drawn in the circumstances. This rule has been strictly followed by the tribunal, and has contributed to dismissal of the conspiracy charge in a number of cases in which otherwise a conspiracy conviction would have been obtained.[10] The prosecution is also required to aver in the indictment all acts that it intends to rely on to prove the conspiracy charge. The failure to adhere to this rule has led to the dismissal of a number conspiracy charges before the ICTR.

An issue that has drawn varying opinions from the chambers in the ICTR is the justification of convicting an accused of conspiracy when his liability for the offence of genocide has been established.[11] This controversy especially arises if the same facts and evidence were used to prove both counts. The controversy is catalysed by the differences between civil and common law systems in punishing conspiracy. Although, the practice of cumulatively charging conspiracy and genocide is allowed on the principle that both are independent crimes with different elements, at the point of conviction some chambers hesitate to convict for both. The justification often is that to convict on both counts violates the rule of double jeopardy, and since the purpose of conspiracy is prevention, once the crime is committed the reason for punishing conspiracy is seen to disappear. While the opposing views against convicting conspiracy in light of complete crimes may be justified, to look at it only from its purpose of prevention, especially when relating

[9] Chapter 3, Sect. 3.7.

[10] Chapter 3, Sect. 3.7.2.

[11] Chapter 3, Sect. 3.7.2.2.

to the ICTR, is a very limited perspective that fails to reflect on the other functions intended for the conspiracy count in this respect. The conspiracy here should also be seen as having the role of fully explaining the circumstances under which the genocide in Rwanda was perpetrated. The prosecution before the ICTR proceeded under the notion that the genocide in Rwanda was a result of one overarching conspiracy between the government, civil and military authorities, who hatched plans, organised and facilitated the massacre of Rwandans mostly of the Tutsi ethnicity. It would therefore, be more prudent to meet the interests of justice in these circumstances by convicting an accused on both counts of conspiracy and genocide to reflect the totality of crimes that he is culpable of. Since the conspiracy adopted in the Genocide Convention was intended to reflect common law conspiracy, it should follow that conviction of conspiracy even when commission of its underlying crime has been established should in principle still be maintained. Having established that conspiracy in the ICTR Statute is an independent crime, the chambers should consistently apply the rules of conviction like with all other independent crimes. Such conviction does not necessarily need to translate to harsher punishment, as the tribunals can and indeed order that the sentences be served concurrently.

In the ICTY, conspiracy has not played a major role in establishing criminal responsibility of the accused.[12] In the only judgment in which conspiracy to commit genocide was proved, the chamber decided to apply the merger rule, choosing to convict the defendants only for genocide, for which their guilt had also been determined. The criminal responsibility of most defendants before the ICTY has mainly been established through the concept of JCE, a tool of accountability that may be referred to as conspiracy's sister concept.[13] Several scholars have equated JCE to conspiracy because of the many similarities that run across both concepts. JCE forms the basis of holding an accused criminally responsible for crimes carried out by a criminal enterprise involving commission of international crimes, if the accused participated in it with intent. This resembles the underlying theory of conspiracy as a form of complicity in common law jurisdictions. Just like the American Pinkerton conspiracy liability theory, criminal responsibility in JCE also includes foreseeable crimes. Both concepts are used to establish criminal responsibility for crimes carried out by a group, and require a plurality of persons involved in a common plan or agreement. However, whereas conspiracy is an independent inchoate crime punishable regardless of its results, JCE is a mode of perpetration that only comes into use after and is dependent upon the commission of crimes. The conclusion drawn here is that JCE reflects conspiracy as a form of complicity.

The international tribunals have severally equated conspiracy to participating in the planning and preparation of the underlying international crimes. Often, conduct that has been charged under the conspiracy count is that of planning and preparing

[12] Chapter 3, Sect. 3.6.

[13] Chapter 3, Sect. 3.6.2.

for the underlying crimes. As a result, the Nuremberg and Tokyo tribunals did not find it prudent to punish both conspiracy and the charge of planning and preparing to wage war, choosing instead to punish such conduct under conspiracy. This practice has also in certain instances been adopted by other subsequent international tribunals. The linking of both concepts often arises because both present preliminary stages of a crime. However, it has been established that planning and conspiracy are two different concepts.[14] While planning is a form of complicity that can be carried out by a single person, conspiracy is an independent collective crime. The former when carried out by a group of persons is often conclusive evidence of conspiracy.

Conspiracy before the international tribunals has only been punished in the context of complete crimes. In the respective cases, conspiracy has been used more as a mode of participation. First, it has been used to punish the leaders who although did not directly carry out the crimes were the brains behind them. Second, it has been used as a liability net to ensure all those who act in a concerted and coordinate manner in commission of international crimes, or support persons participating in such activities, even if their role in the circumstances was not very distinctive, are held criminally responsible. Third, it has been seen as an important theory of accountability that illustrates the collective context in which the underlying crimes were carried out.

Conspiracy as an independent crime under customary international law is only confirmed with respect to the crime of aggression and genocide.[15] Two assertions are advanced to reject conspiracy with respect to war crimes and crimes against humanity: The first is often traced back to the judgment of the Nuremberg tribunal, and the second opines that punishment of conspiracy is only restricted to genocide and the crime of aggression because these crimes will always involve a collective. The validity of both arguments is questioned because in the first case, the tribunal's rejection of the other forms of conspiracy was purely on account of jurisdictional grounds, with no further analysis made on its status as a general principle of law. This judgment should thus not be seen as having given a conclusive position on the status of conspiracy. The second argument cannot also hold fort because all situations involving commission of international crimes of all forms, more often than not, involve a plurality of persons. This puts to doubt the collective theory restriction of conspiracy to only genocide and the crime of aggression. Current state practice shows a growing recognition of punishment of conspiracy at least in respect to serious crimes, which includes the international crimes. This supports a view that goal posts have since shifted and the restricted status of conspiracy under customary international law should now include all international crimes.

In spite of steps made in civil law countries towards criminalising conduct of conspiracy nature, they still objected to its inclusion as a tool of accountability

[14] Chapter 3, Sect. 3.2.1.

[15] Chapter 4.

during negotiations on the Rome Statute. Instead, a substitute was adopted in Article 25(3)(d), a mode of participation in international crimes otherwise known as 'complicity in group crimes' or 'common purpose liability'.[16] Criminal responsibility in this mode of participation arises from contributing to the commission or attempted commission of an international crime by a group of persons acting with a common purpose.

It is established that the common law conspiracy concept has two characteristic traits. In the first case, it is an inchoate crime intended to punish incomplete crimes. Criminal responsibility here is created even before the crimes have been attempted. In the second instance, it is a form of complicity that creates a basis to hold, all who contribute to the commission of crimes carried out pursuant to a common plan or agreement, criminally responsible for the underlying crimes. A more critical look at Article 25(3)(d) shows that it does not wholly encompass the features of conspiracy liability theory. It does not create criminal responsibility for conspiracy in its pure inchoate form because like all other modes of liability in the Rome Statute, it requires that responsibility begin at the point of attempt. Therefore, merely agreeing to commit an international crime would not be punishable under this mode of liability. It represents the lowest form of culpability for participating in commission or attempted commission of international crimes. This means it would be available mainly for punishing those who work at the periphery of a conspiracy and not the masterminds who are often considered to be most criminally responsible. Instead of conspiracy, to hold the leaders or masterminds of a criminal enterprise accountable, the Rome Statute provides for alternative modes of individual criminal liability under its concepts of co-perpetration or indirect perpetration.[17] Further, the Rome Statute through its modes of liability of instigation and assistance covers other persons who although not in a leadership position substantially support commission of crimes by a collective. Indeed, Article 25(3) satisfactorily captures conduct for which other international criminal tribunals may have had to rely on the theory of conspiracy to establish criminal responsibility.

What is obviously excluded in the Rome Statute is punishment of conspiracy for purely inchoate liability. This refers to instances where there is evidence of plans made but no further acts are carried out towards their realisation, or where it is revealed that accused persons participated in plans involving commission of international crimes beyond those actually committed. In these circumstances, even the crime of attempt, which requires substantive steps to have been taken towards commission of the crimes, would not suffice in creating criminal responsibility. Since international crimes are classified as the gravest crimes against humanity, even the mere conduct of coming together and agreeing to carry out such acts ought to be punished. Especially, when such conduct is manifested in concrete plans, although, no further action has been undertaken in relation to them.

[16] Chapter 5, Sect. 5.2.

[17] Chapter 5, Sect. 5.3.

It may be argued that given the reality of relations between states in the international arena, any intervention to stop commission of international crimes while still merely at the preparatory stage is highly unlikely. Indeed, prosecuting crimes that are merely agreed upon, discussed and planned, with no further steps undertaken would be rare. Nevertheless, even with the possibility of such exceptional circumstances, punishment of conspiracy should be considered imperative, both for its symbolic value and deterrent function. This would be a confirmation that humanity will not tolerate even the mere fact of agreeing to carry out conduct that appears to threaten its peace and security. The practice, even among civil law jurisdictions shows a gradual acceptance of criminal responsibility arising from the mere act of agreement for very serious crimes, this often includes international crimes. Therefore, it would be recommendable for the international community to revise the Rome Statute and include criminal responsibility for conspiracy. The main objection it seems is adopting a conspiracy concept with the objectionable elements of the common law conspiracy. It is recommended that if conspiracy is made punishable, it should strictly be adopted for its inchoate liability function, and should fall within the standards accepted by most civil law jurisdictions. This means that when the crimes underlying such agreement are attempted or committed, the conspiracy will merge into them. Such conspiracy will also not need to act as a form of complicity, as the other modes of liability already in the Rome Statute satisfactorily meet this requirement.

Bibliography

Statutes: International

Rome Statute of the International Criminal Court
2010 amendments to the Rome Statute, The Crime of Aggression, RC/ Res.4, Annex I
Statute of the International Criminal Court of Justice
Vienna Convention on the Law of Treaties
Convention on the Prevention and Punishment of the Crime of Genocide
Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827(1993) annex
Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994) annex
International Convention of the Suppression of Terrorist Bombings of 1997-UN Doc. A/RES/52/164 (1998), annex
1954 Draft Code of Offences against the Peace and Security of Mankind, in Yearbook of the International Law Commission, (1954), vol II
Draft Code of Offences against the Peace and Security of Mankind (1991), in Yearbook of the International Law Commission, vol II
Draft Code of Crimes against the Peace and Security of Mankind (1996), in Report of the International Law Commission to the General Assembly, UN Doc. A/51/10(1996)
Charter for the International Military Tribunal, August 8, (1945), in *Nazi Conspiracy and Aggression*, vol I, pp 4–12
Control Council Law No. 10, Punishment of Persons Guilty of War crimes, Dec. 20, 1945, Official Gazette Control Council for Germany No. 3, 31 Jan 1946, pp 50–55
Agreement for and Statute of the Special Court for Sierra Leone, 16 Jan 2002, U.N. Doc. S/2002/246 appended to letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council
United Nations Transitional Administration in East Timor (UNTAET) Regulation 2000/15: On establishment of panels with exclusive jurisdiction over serious criminal offences (East Timor), 6 June 2000
UN Doc. A/RES/57/228 B, 'Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea' (2003); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct 2004 (NS/RKM/1004/006)

National

Criminal Law Act of (1977) Chap. 45 (United Kingdom)
Criminal Attempts Act of (1981) Chap. 47 (United Kingdom)
Practice Direction (Crime: Conspiracy (1977) 1 WLR 537; (1977) 2 All ER 540; (1977) 64 Cr App R 258; 9/5/77

DOI: 10.1007/978-94-6265-017-6, © T.M.C. ASSER Institute and the author 2014

Powers of Criminal Courts (Sentencing) Act (2000) (United Kingdom)
Criminal Justice Act (2003) (United Kingdom)
International Criminal Court Act of (2001) (United Kingdom)
Constitution of the United States
Federal Statute, Title 18 United States Code § 371
Federal Statute, Title 15 United States Code § 1 (2000)
Federal Statute, Title 18 United States Code § 224 (2000)
Federal Statute, Title 18 United States Code § 241 (2000)
Federal Statute, Title 21 United States Code § 846 (2000)
Federal Statute, Title 18 United States Code § 3282
Federal Statute, Title 18 United States Code § 2339 B
Federal Statute, Title 18 United States Code § 1962 (d)
Federal Statute, Title 18 United States Code § 2340
Federal Statute, Title 10 United States Code § 818, War Crimes Act of (1996)
The Genocide Convention implementation Act (also known as Proxmire Act), Pub. L. No. 100-606, §2(a), 102 Stat. 3045 (4 Nov 1988) (codified at Federal Statute, Title 18 United States Code §§ 1091 ff)
Federal Rules of Criminal Procedure
Federal Rules of Evidence
Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006)
Military Commissions Act of 2009, Pub. L. No. 111-84 (2009)
The German Penal Code as amended on 31 Dec 2007 (*Strafgesetzbuch*), Bundesgesetzblatt I (2007), 3209
German code of Crimes against International Law (*Völkerstrafgesetzbuch*), Federal Gazette 1 (2002) 2254
Strafgesetzbuch für das Deutsche Reich, Deutsches Reichsgesetzblatt 1876 Nr. 6
Drittes Strafrechtsänderungsgesetz, Aug 4, 1953, Bundesgesetzblatt Nr. 44, 6 Aug (1953)
Zweites Gesetz zur Reform des Strafrechts, July 4, 1969, Bundesgesetzblatt Nr. 56, 10 July 1969
Gesetz zur Umsetzung des Rahmenbeschlusse des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung vom 22.12.2002, Bundesgesetzblatt 2003 I, 2836
Spanish Penal Code (*Código Penal*), *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*
French penal code (*Code Pénal* 2010)
The Italian Penal Code (*Codice Penale*)
Prevention and Repression of the crime of Genocide, Italian Law 9 Oct 1967, no. 962

Case Law International Criminal Court

ICC-01/09-30-Red 15-12-2010 Pre Trial chamber II Situation in the Republic of Kenya, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang
ICC-01/09-31 Red 15-12-2010 Pre Trial Chambers II Situation in the Republic of Kenya Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali
Prosecutor v. Thomas Lubanga Dyilo, ICC (Pre-Trial Chamber), (ICC-01/04-01/06), Decision on Confirmation of the Charges, 29 Jan 2007
Prosecutor v. Katanga and Ngudjolo Chui, ICC (Pre-Trial Chamber) (ICC-01/04-01/07), Decision on the Confirmation of the charges, 30 Sept 2008
Prosecutor v. Jean Pierre Bemba (Pre-Trial Chamber II), (ICC-01/ 05-01/08) Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the charges of the prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009

Yugoslavia Tribunal

Prosecutor v. Milorad Krnojelac, ICTY (Trial Chamber) (IT-97-25-T), judgment of 15 March 2002; and ICTY (Appeals Chamber) (IT-97-25-A), judgment of 17 Sept 2003
Prosecutor v. Milan Martic, ICTY (Appeals Chamber) (IT-95-11-A), judgment of 8 Oct 2008
Prosecutor v. Dario Kordic and Mario Cerkez, ICTY (Appeals Chamber) (IT-95-14/2-A), judgment of 17 Dec 2004
Prosecutor v. Mitar Vasiljevic, ICTY (Appeals Chamber) (IT-98-32-A), judgment of 25 Feb 2004
Prosecutor v. Anton Furundzija, ICTY (Trial Chamber) (IT-98-17/1), judgment of 10 Dec 1998
Prosecutor v. Milan Milutinovic, Nikola Sainovic and Dragoljub Ojdanic, ICTY (IT-99-37-PT), Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, decision of 22 March 2006
Prosecutor v. Blagoje Simic, Miroslav Tadic and Simo Zaric, ICTY (Trial Chamber II) (IT-95-9-T), judgment of 17 Oct 2003
Prosecutor v. Tihomir Blaskic, ICTY (Appeals Chamber) (IT-95-14-A), judgment of 29 July 2004
Prosecutor v. Zlatko Aleksovski, ICTY (Appeals Chamber) (IT-95-14/1-A), judgment of 24 March 2000
Prosecutor v. Dusko Tadic, ICTY (Appeals Chamber) (IT-94-1-I-A), judgement of 15 July 1999
Prosecutor v. Vujadin Popovic, Ljubisa Beara, Prago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero and Vinco Pandurevic, ICTY (Trial Chamber II) (IT-05-88-T), judgment of 10 June 2010
Prosecutor v. Zdravko Tolimir, ICTY (IT-05-88/2-PT)

Rwanda Tribunal

Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T (Trial Chamber), Judgment, 2 Sept 1998
Prosecutor v. Jean Kambanda, ICTR-97-23-S (Trial Chamber), Judgment 4 Sept 1998
Prosecutor v. Alfred Musema, ICTR-96-13-A (Trial Chamber), Judgment, 27 Jan 2000
Prosecutor v. Eliézer Niyitegeka, ICTR-96-14-T (Trial Chamber), Judgment, 16 May 2003
Prosecutor v. Juvénal Kajelijeli, ICTR-98-44A-T (Trial Chamber II), Judgment, 1 Dec 2003
Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, ICTR-96-10 & ICTR-96-17-T (Trial Chamber), Judgment, 21 Feb 2003
Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, ICTR-99-52-T (Trial Chamber), Judgment, 3 Dec 2003
Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, ICTR-99-52-A (Appeals Chamber), Judgment, 28 Nov 2007
Prosecutor v. Aloys Simba, ICTR-01-76 (Trial Chamber), Judgment, 13 Dec 2005
Prosecutor v. Athanase Seromba, ICTR-2001-66-1 (Trial Chamber), Judgment, 13 Dec 2006
Prosecutor v. Athanase Seromba, ICTR-2001-66-A (Appeals Chamber), Judgment, 12 March 2008
Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, ICTR-98-41-T (Trial Chamber), Judgment, 18 Dec 2008
Prosecutor v. Jean-Baptiste Gatete, ICTR-2000-61-T (Trial Chamber III), Judgment, 31 March 2011
Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Élie Ndayambaje, ICTR-98-42-T (Trial Chamber II), Judgment, 24 June 2011
Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerome Bicamumpaka, Prosper Mugiraneza, ICTR-99-50-I (Trial Chamber), Judgment, 30 Sept 2011

Prosecutor v. Édouard Karamera, Matthieu Ngirumpatse, ICTR-98-44-T (Trial Chamber III), Judgment, 2 Feb 2012

International Military Tribunal (Nuremberg)

International Military Tribunal, judgment of 1 Oct 1946, in *Nazi Conspiracy and Aggression*, vol I

International Military Tribunal for the Far East (Tokyo)

International Military Tribunal for the Far East, judgment of 12 Nov 1948 (2008). In: Neil B, Robert C (eds) Documents on the Tokyo international military tribunal

International Court of Justice

Continental Shelf Case (Libyan Arab Jamahiriya v. Malta) (1985), 3 June 1985, ICJ Reports
Attorney General of Israel v Eichmann, Supreme Court of Israel (1962) 36 ILR 277

U.S. Military Tribunals at Nuremberg

Josef A et al (1947) U.S. Military Tribunal Nuremberg, Judgment of 4 Dec 1947. In: Trials of war criminals before the Nuremberg military tribunals under control council law no. 10, vol III; also in *Law Reports of Trials of War Criminals: Selected and Prepared by The Unite Nations War Crimes Commission*, vols VI–X, pp. 1–110

Karl B et al (1947) U.S. Military Tribunal Nuremberg, Judgment of 20 Aug 1947. In: Trials of war criminals before the Nuremberg military tribunals under control council law no. 10, vols I–II

Oswald P et al (1947) U.S. Military Tribunal Nuremberg, Judgment of 3 Nov 1947. In: Trials of war criminals before the Nuremberg military tribunals under control council law no. 10, vol V

Carl K et al (1948) U.S Military Tribunal Nuremberg, Judgment of 30 July 1948. In: Trials of war criminals before the Nuremberg military tribunals under control council law no. 10, vols VII–VIII

Alfred K et al (1948) U.S. Military Tribunal Nuremberg, Judgment of 31 July 1948. In: Trials of war criminals before the Nuremberg military tribunals under control council law no. 10, vol IX

von Weizsäcker E et al (1949) U.S. Military Tribunal Nuremberg, Judgment of 11 April 1949. In: Trials of war criminals before the Nuremberg military tribunals under control council law no. 10, vols XII, XII, XIV

von Leeb W et al. (1948) U.S. Military Tribunal Nuremberg, Judgment of 28 Oct 1948. In: Trials of war criminals before the Nuremberg military tribunals under control council law no. 10, vols X, XI

National Courts: United Kingdom

People v. Schwimmer 66 A, D, 2d 91, 94 (2d Dept. 1978)
Poulterers' Case 77 Eng. Rep. 813 (KB 1611)
Shaw v. Director of Public Prosecutions (1962) AC 220
Kamara v. Director of Public Prosecutions (1973) 2 All ER 1242; (1974) AC 104
Director of Public Prosecutions v. Bhagwan (1972) AC 60
Director of Public Prosecutions v. Withers (1975) AC 842
Regina v. Ayres (1984) AC 447
Regina v. Anderson (1986) AC 27
Regina v. Chrastny (1991) 1 WLR 1381
Mulcahy v. Regina (1868) LR 3 HL 306
Director of Public Prosecutions v. Doot (1973) 1 All ER 940 HL
Regina v. Simmonds (1969) 1 QB 685
Regina v. West (1948) 1 KB 709; 32 Cr. App. 152
R v. Ali, Hussan, Khan and Bhatti (2006) QB 322
R v. Griffiths (1966) 1 QB 589
R v. Edwards (1991) Crim. L. Rev. 45
R v. Harvey (1999) Crim. L. Rev. 70
Siracusa R v (1989) 90 Cr App R 340. Crim L, Rev 712
R v. Hollinshead, Dettlaf and Griffiths, Crim L Rev 653 (1985)
R v. Ashton (1992) Crim L Rev 667
Yip Chiu-Cheung v. R (1994) 3 WLR 514
Regina v. Button 11 QB (1848) 929
O' Connell v. Regina 8 Eng. Rep.1061 (HL1844)
R v. Dawson (1960) 1 WLR 163
Regina v. Dawson (1960) 44 Cr. App. R 87
Rex v. Morris (1951) 1 KB 394
Verrier v. Director of Public Prosecutions 2 AC 195 (1967); (1966) 3 All ER 568
Director of Public Prosecutions v. Stewart (1982) 3 WL R 884 (PC)
Jones v. Director of Public Prosecutions (1962) AC 635
Quinn v. Leathem (1901) AC 495
Regina v. Anderson and Morris (1966) 2 QB 110
Regina v. Powell (Anthony) and English, (1999)1 AC 1 (HL) (UK)
Regina v. Prime (1983) 5 Cr. App. R(s) 127

United States

Harrison v. United States, 7 F. 2d 259 (2d Circuit 1925)
Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006)
United States v. Dumeisi, 424 F. 3d 566 (7th Circuit 2005)
United States v. Jimenez Recio et al., 537 U.S. 270 (2003)
United States v. Dege, 364 U.S. 51 (1960)
United States v. Singh, 518 F. 3d 236 (4th Circuit 2008)
Iannelli v. United States, 420 U. S. 770 (1975)
United States v. Pullman, 187 F. 3d 816 (8th Circuit 1999)
United States v. Delgadio, 321 F. 3d 1338 (11th Circuit 2008)
United States v. Chavez, 549 F. 3d 119 (2d Circuit 2008)
State v. Carbone, 10 N. J. 329, 91 A. 2d 571(1952)
United States v. Rodriguez-Velez, 597 F. 3d 32 (1st Circuit 2010)

Interstate Circuit v. United States, 306 U.S. 208, 59 S. Ct 467, 83 L. Ed. 610 (1939)
United States v. Wardell, 591 F. 3d 1279 (10th Circuit 2009)
United States v. Milligan, 17 F. 3d 177 (6th Circuit 1994)
United States v. Desena, 260 F. 3d 150 (2d Circuit 2001)
United States v. Searan, 259 F. 3d 434 (6th Circuit 2001)
State of New Jersey v. Brian Samuels, A-0967-02 T 40967-02T4
United States v. Ceballos, 340 F. 3d 115, 123 (2d Circuit 2001)
Blumenthal v. United States, 332 U.S. 539 (1947)
United States v. Samaria, 239 F. 3d 228 (2d Circuit 2001)
United States v. Whittington, 26 F. 3d 456 (4th Circuit 1994)
United States v. Ereme, No.05-4263 (4th Circuit) Unpublished
United States v. Reyes, 302 F. 3d 48 (2d Circuit 2002)
United States v. Faulkner, 17 F. 3d 745 (5th Circuit 1994)
United States v. Falcone, 109 F. 2d 579 (2d. Circuit 1940)
Direct sales v. United States, 319 U.S. 703 (1943)
United States v. Leahy, 82 F. 3d 624 (5th Circuit 1996)
United States v. Maliszewski, 161 F. 3d 992 (6th Circuit 1998)
United States v. Pupo, 841 F. 2d 1235 (4th Circuit 1988)
United States v. Collazo-Aponte, 216 F. 3d 163 (1st Circuit 2000)
United States v. Corneaux, 955 F. 2d 586 (8th Circuit 1992)
Yates v. United States, 354 U.S. 298 (1957)
United States v. Crabtree, 979 F. 2d 1261 (7th Circuit 1992)
United States v. Montour, 944 F. 2d 1019 (2d Circuit 1991)
United States v. LaSpina, 299 F. 3d 165 (2d Circuit 2002)
United States v. McKinney, 954 F. 2d 471 (7th Circuit 1992)
Pinkerton v. United States, 328 U.S. 640 (1946)
United States v. Solis, 299 F. 3d 420 (5th Circuit 2002)
United States v. Rea, 958 F. 2d 1206 (2d Circuit 1991)
United States v. Ocampo, 973 F. 2d 1015 (1st Circuit 1992)
United States v. Luthian, 976 F. 2d 1257 (9th Circuit 1992)
State v. Stein, 144 Wn. 2D 236, 27P. 3d 184 (Wash. 2001)
State ex.rel. Woods v. Cohen, 173 Ariz. 497, 844 P. 2d 1147 (Ariz.1992)
United States v. United States Gypsum Co., 438 U.S. 422 (1978)
United States v. Febus, 218 F.3d 784 (7th Circuit 2000)
United States v. Feola, 420 U.S. 671 (1975)
United States v. Rodriguez, 215 F. 3d 110 (1st Circuit 2000)
United States v. Rosario-Diaz, 202 F. 3d 54 (1st Circuit 2000)
United States v. Knowles, 66 F. 3d 1146 (11th Circuit 1995)
United States v. Roshko, 969 F. 2d 9 (2d Circuit 1992)
United States v. Corres, 356 U.S. 405, 78 S. Ct. 875, 2 L. Ed. 2d 873 (1958)
Zafiro v. United States, 5056 U.S. 534 (1993)
United States v. Angiulo, 847 F. 2d 956 (1st Circuit 1988)
Anderson v. United States, 417 U.S. 211, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974)
United States v. Kelly, 204 F. 3d 652 (6th Circuit 2000)
United States v. Seher, 562 F. 3d 1344 (11th Circuit 2009)
United States v. Bornman, 559 F. 3d 150 (3d Circuit 2009)
United States v. Julian, 427 F. 3d 471 (7th Circuit 2005)
United States v. Yearwood, 518 F. 3d 220 (4th Circuit 2008)
Callanan v. United States, 364 U.S. 587 (1961)
Pereira v. United States, 347 U.S. 1(1954)
United States v. Rabinowich, 238 U.S. 78 (1985)
Clune v. United States, 159 U.S. 590 (1895)
United States v. Cattle King Packing Co., 793 F. 2d 232 (10th Circuit 1986)

United States v. Martinez, 83 F. 3d 371 (11th Circuit 1996)
United States v. Loe, 248 F. 3d 449 (5th Circuit 2001)
United States v. Rehak, 589 F. 3d 965 (8th Circuit 2009)
Krulewitch v. United States, 336 U.S. 78 (1915)
State v. Barton, 424 A. 2d 1033 (R.I. 1981)
State v. Small, 301 N.C. 407, 272 S. E. 2d 128 (1980)
United States v. Blackmon, 839 F. 2d 900 (2d Circuit 1988)
Hyde v. United States, 225 U.S. 347 (1912)
United States v. Beil, 577 F. 2d 1313 (5th Circuit 1978)
United States v. Dabbs, 134 F. 3d 1071 (11th Circuit 1998)
Whitfield v. United States, 543 U.S. 209 (2005)
United States v. Roberson, 474 F. 3d 432 (7th Circuit 2007)
Presbyterian Church of Sudan v.Talisman Energy, 582 F. 3d 244 (2d Circuit 2009)

Germany

RGSt (decisions of the Supreme Court of the German Reich) Vol. 5
Decision of the Federal Supreme Court (BGH) of 11.7.1961, no. 1 StR 257/61
Decision of the Federal Supreme Court (BGH) of 27.1.1983, no. 3 StR 437/81
Decision of the Federal Supreme Court (BGH) of 18.10.1955, Neue Juristische Wochenschrift 1956
Decision of the Higher Regional Court of Cologne (OLG Köln) of 1.6.1951, Neue Juristische Wochenschrift 1951
Decision of the Federal Supreme Court (BGH) of 11.10.1978, Neue Juristische Wochenschrift 1979
Decision of the Federal Supreme Court (BGH) of 21.10.2004, Neue Juristische Wochenschrift 2005
Decision of the Federal Supreme Court (BGH) of 10.1.2006, Neue Juristische Wochenschrift 2006
Decision of the Federal Supreme Court (BGH) of 1.10.1991, Neue Juristische Wochenschrift 1992
Decision of the Federal Supreme Court (BGH) of 3.10.1979, Neue Juristische Wochenschrift 1980
Decision of the Federal Supreme Court (BGH) of 11.6.1980, Neue Juristische Wochenschrift 1980
Decision of the Federal Supreme Court (BGH) of 12.5.1954, Neue Juristische Wochenschrift 1954
Decision of the Federal Supreme Court (BGH) of 22.2.1995, Neue Juristische Wochenschrift 1995
Decision of the Federal Supreme Court (BGH) of 10.3.2005, Neue Juristische Wochenschrift 2005

Spain

Decision of the Spanish High Court 2nd Hall [sentencia del Tribunal supremo], 1 Jan 1988 and 27 May 27 STS

France

Decision of the French High Court (Criminal Division) [Chambre Criminelle de la Cou de cassation], 12 May 1950: *Bull. crim*., no. 153
Decision of the French High Court (Criminal Division), 29 Dec 1970: *JCP* 71, II, 1670
Decision of the French High Court (Criminal Division), 22 Jan 1986: *Bull. crim*., no. 29
Decision of the French High Court (Criminal Division), 30 April 1996: *Bull. crim*., no. 176
Decision of the French High Court (Criminal Division), 26 May 1999: *Bull. crim*., no. 103
Decision of the French High Court (Criminal Division), 11 June 1970: *Bull. crim*., no. 199
Decision of the French High Court (Criminal Division), 22 Aug 1959: *Bull. crim*., no. 389
Decision of the French High Court (Criminal Division), 20 June 1989, *Martin*, inédit
Decision of the French High Court (Criminal Division), 15 Dec 1993: *Dr. pénal* 1994, comm. No 131
Decision of the French High Court (Criminal Division), 4 July 1989, inédit

Israel

Attorney General of Israel v Eichmann, Supreme Court of Israel (1962) 36 ILR 277

Reports

Report of the International Law Commission to the General Assembly on the work of its 43rd Session, A/CN.4/SER.A/1991/Add.1 (Part Two), YILC, 1991, vol II
Report of the International Law Commission to the General Assembly on its 48th Session, (Part Two),YILC,1996, vol II
Annual Report of ICTR to the U.N. General Assembly, UN Doc. A/55/435, S/2000/927, 2 Oct 2000
ICTR Third Annual Report to the U.N. General Assembly, UN Doc. A/53/429, S/ 1998/ 857, 23 Sep 1998
ICTR Fifth Annual Report to the U.N. General Assembly, UN Doc. A/55/435, S/2000/927, 2 Oct 2000
Annual Report of ICTR to the U.N. General Assembly, UN Doc. A/53/429, S/1998/857, 23 Sep 1998
Criminal Law: Report on Conspiracy and Criminal Law Reform, 7 Law Commission Report No. 76 (14 March 1976)
Inchoate Offences: Conspiracy Attempt and Indictment, 6 Law Commission Working Paper No. 50 (5 June 1973)
Doyle C (2010) Federal conspiracy law: a brief overview, congressional research service, congress report 30 April 2010 www.fas.org/sgp/crs/misc/R41223.pdf
Amicus Curiae Brief of Specialists in Conspiracy and International Law in support of Petitioner, [Conspiracy-not a triable offence], in the Supreme Court of the United States, *Salim Ahmed Hamdan v Donald H. Rumsfeld*, George P. Fletcher, Counsel for Amici Curiae
Einhorn Lorin, 'Issue: Mens Rea required for Genocide vs mens rea required for conspiracy to commit genocide', Memorandum to Deputy Prosecutor of the International Criminal Tribunal for Rwanda, 9 Jan 2004

Punja RK (2003) 'Issue: What is the distinction between "Joint Criminal Enterprise" as defined by the ICTY case law and Conspiracy in Common Law Jurisdictions?', *Memorandum for the Office of The Prosecutor of the ICTR*, (2003), Case Western University School of Law International War Crimes Research Lab

African Union, Assembly, "Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII)", 3 July 2009, Assembly/AU/Dec.245 (XIII) Rev.l

Books

Akande D (2009) 'Sources of international criminal law'. In: Antonio C (ed) The Oxford companion to international criminal justice. Oxford University Press, Oxford

Allen M (2007) Textbook on criminal law, 9th edn. Oxford University Press, Oxford

Ambos K (20008) 'Article 25 individual criminal responsibility', In: Otto T (ed) Commentary on the Rome statute of the international criminal court: observers' notes, article by article, 2nd edn. Verlag, C. H. Beck, München

Ashworth A (2006) Principles of criminal law, 5th edn. Oxford University Press, Oxford

Askar Y (2004) Implementing international humanitarian law: from the Ad Hoc tribunals to a permanent international criminal court. Routledge, London

Bassiouni MC (1998) The statute of the international criminal court: a documentary history. Transnational Publishers, Ardsley

Bassiouni MC (2005) The legislative history of the international criminal court, an article-by article evolution of the statute from 1994 to 1998, vol 2. Transnational Publishers, Ardsley

Francis F (2008) 'The Nuremberg trial'. In: Mettraux G (ed) Perspectives on the Nuremberg trial (2008). Oxford University Press, Oxford

Bohlander M (2008) The German criminal code, a modern English translation. Hart Publishing, Oxford and Portland, Oregon

Bohlander M (2009) Principles of German criminal law (2009). Hart Publishing, Oxford and Portland, Oregon

Boister N, Robert C (2008) Documents on the tokyo international military tribunal: charter, indictment and judgments. Oxford University Press, Oxford

Boister N, Robert C (2008) The Tokyo international military tribunal: a reappraisal. Oxford University Press, Oxford

Brownlie I (2008) Principles of public international law, 7th edn. Oxford University Press, Oxford

Cassese A (2008) International criminal law, 2nd edn. Oxford University Press, Oxford

Chouliaras A (2010) 'Discourses on international criminality'. In: Smeulers Alette (ed) Collective violence and international criminal justice: an interdisciplinary approach. Intersentia, Antwerpen-Oxford-Portland

Clarkson CMV, Christopher MV, Heather MK (2003) Criminal law: text and materials, 5th edn. Sweet & Maxwell, London

Damgaard C (2008) Individual criminal responsibility for core international crimes: selected pertinent issues (2008). Springer, Berlin

Dix E. George and Michael M. Sharlot (1999) Criminal law, 4th edn. West/Wadsworth, An International Thomson Publishing Company, Belmont USA

Donnedieu de Vabres H (2008) 'The Nuremberg trial and the modern principles of international criminal law'. In: Mettraux G (ed) Perspectives on the Press, Oxford

Ehard H (1955) 'The Nuremberg trial against the major war criminals and international law'. In: Wilbourn E Benton, Georg G (eds) Nuremberg: German views of the war trials. Southern Methodist University Press, Dallas

Eser A (2002) 'Individual criminal responsibility'. In: Antonio C, Paola G, Jones JRWD (eds) The Rome statute of the international criminal court: a commentary, vol 1. Oxford University Press, Oxford

Fischer T (2010) Strafgesetzbuch und Nebengesetze, 58th edn. C.H. Beck, München

Fletcher GP (2000) Rethinking criminal law. Oxford University Press, Oxford

Fletcher GP (2009) 'The influence of the common law and civil law traditions on international criminal law'. In: Antonio C (ed) The Oxford companion to international criminal justice. Oxford University Press, Oxford

Francisco, Munoz Conde, Mercedes García Arán, *Derecho Penal, Parte General*, 8th edn. (2010), Tiranto Lo Blanch

Francisco, Munoz Conde, *Derecho Penal, Parte Especial*, 18th edn. (2010), Tiranto Lo Blanch

Gillies P (1990) The law of criminal conspiracy, 2nd edn. The Federation Press, Sydney

Glanville W, Law Criminal (1961) The general part, 2nd edn. Steven & Sons, London

Godefroy T (2004) 'The control of organised crime in france: a fuzzy concept but a handy reference' In: Fijnaut C, Paoli L (eds) Organised crime in Europe: concepts, patterns, and control policies in the European union and beyond. Springer, The Netherlands

Harrison D (1924) Conspiracy as a crime and as a tort in English law. Sweet & Maxwell, London

Hazel R (1974) Conspiracies and civil liberties: a memorandum submitted to the law commission by the cobden trust and the national council for civil liberties (occasional papers on social administration), Bell (for the Social Administration Research Trust)

Heller KJ (2011) The Nuremberg military tribunals and the origins of international criminal Law. Oxford University Press, Oxford

Herring J (2008) Criminal law: text, cases, and materials, 3rd edn. Oxford University Press, Oxford

Hosoya C, Ando N, Onuma Y, Minear RH (eds) (1986) The Tokyo war crimes trial: an international symposium. Kodansha Ltd and Kodansha International Ltd., Tokyo

Andreas H (2001). In: Wolter J et al *Sytematischer Kommentar zum Strafgesetzbuch*, 7th edn. 35th "Lieferung", Carl Heymans Verlag, Köln

Jänke B, Laufhütte HW, Odersky W (2003) Strafgesetzbuch Leipziger Kommentar, 11th edn. De Gruyter Recht, Berlin

Jescheck, Hans-Heinrich/ Thomas Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996). Duncker & Humblot, Berlin

De la Cuesta JL (2004) 'Organised crime control policies in Spain: a 'disorganised' criminal policy for 'organised' crime'. In: Fijnaut C, Paoli L (eds) Organised crime in Europe, concepts, patterns and control policies in the European union and beyond. Springer, The Netherlands

Jorgensen NHB (2009) 'Criminality of organisations under international law', In: Nollkaemper PA, van der Wilt HG (eds) System criminality in international law. Cambridge University Press, Cambridge

Kelsen H (2008) 'Will the judgment in the Nuremberg trial constitute a precedent in international law? In: Mettraux G (ed) Perspectives on the Nuremberg trial. Oxford University Press, Oxford

Kilching M (2004) 'Organised crime policies in Germany'. In: Fijnaut C, Paoli L (eds) Organised crime in Europe: concepts, patterns, and control policies in the European union and beyond. Springer, The Netherlands

Kittichaisaree K (2001) International criminal law. Oxford University Press, Oxford

Laufhütte HW et al (2006) Strafgesetzbuch, Leipziger Kommentar, 12th edn. De Gruyter Recht, Berlin

Lee RS (ed) (1999) The international criminal court: the making of the Rome statute, issues, negotiations, results. Kluwer Law International, The Hague

v. Listz Franz (1996) Lehrbuch des Deustchen Strafrechts, 5th edn. Keip Verlag, Goldbach

Maiwald, Manfred, *Einführung in das italienische Strafrecht und Strafprozessrecht* (2009), Peter Lang GmbH, Internationaler Verlag der Wissenschaften Frankfurt am Main

Maljevic, Almir, *'Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models Against Criminal Collectives* (2011), Max-Plank-Gesellschaft zur Förderung der Wissenschaften e.V, Duncker & Humblot. Berlin

Marinucci, Giorgio and Emilio Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), Dott. A. Giuffré Editore, S. p. A. Milano

Mettraux G (ed) (2008) Perspectives on the Nuremberg trial. Oxford University Press, Oxford

Mettraux G (2011) 'Trial at Nuremberg'. In: Schabas WA, Bernaz N (eds) Routledge handbook of international criminal law. Routledge, New York

Miebach, Klaus/ Jürgen Schäfer (2005) *Münchener Kommentar zum Strafgesetzbuch*. C. H. Beck, München

Minear RH (2001) Victors' justice: the Tokyo war crimes trial. Princeton University Press, Princeton

Nollkaemper PA, van der Wilt HG (eds) (2009) System criminality in international law. Cambridge University Press, Cambridge

Ormerod D (2005) Smith and hogan criminal law, 11th edn. Oxford University Press, Oxford

Othman MC (2005) Accountability for international humanitarian law violations: the case of Rwanda and East Timor. Springer, Heidelberg

Padfield N (2008) Criminal Law, 6th edn. Oxford University Press, Oxford

Per S (1999) 'International criminal law principles'. In: Roy SL (ed) The international criminal court: the making of the Rome statute issues, negotiations, results. Kluwer Law International, The Hague

Pomorski S (1990) 'Conspiracy and criminal organization'. In: George G, Kudriavtsev VN (eds) The Nuremberg trial and international law. Martinus Nijhoff Publishers, Dordrecht/Boston/ London

Rudolphi, Hans-Joachim/Ulrich Stein, in *Systematischer Kommentar zum Strafgesetzbuch*, 7th/ 8th edn. (2006), Luchterhand, München

Roxin C (2006) in Strafrecht Allgemeiner Teil, vol II. C.H. Beck, München

Roxin C (1994) Lepiziger Kommentar, 11th edn. de Gruyter, Berlin

Schabas WA (2009) Genocide in international law, the crime of crimes, 2nd edn. Cambridge University Press, Cambridge

Schabas, William A (2007) An introduction to the international criminal court, 3rd edn. Cambridge University Press, Cambridge

Schabas WA (2008) 'Article 6 Genocide'. In: Otto T (ed) Commentary on the Rome statute of the international criminal court: observers' notes, article by article, 2nd edn. Verlag C. H. Beck, München

Shaw MN (2008) International law, 6th edn. Cambridge University Press, Cambridge

Silverman E (2005) 'Prosecution of international crimes in the United States of America'. In: Eser A, Sieber U, Helmut K (eds) National prosecution of international crimes: nationale Strafverfolgung völkerrechtlicher Verbrechen, vol 5, Max-Plank-Gesellschaft zur Förderung der Wissenschaften e.V, Duncker & Humblot, Berlin

van Sliedregt E (2003) The criminal responsibility of individuals for violations of international humanitarian law. T.M.C. Asser Press, The Hague

Smith BF (1982) The American road to Nuremberg, the documentary record 1944–1945. Hoover Institution Press, Stanford University, Stanford, California

Smith BF (1977) Reaching judgment at Nuremberg. Andre Deutsch Limited, New York

Strader KJ, Sandra DJ (2009) White collar crime cases, materials, and problems, 2nd edn. Matthew Bender, United States

Swart B (2009) 'Modes of international criminal liability'. In: Antonio C (ed) The Oxford companion to international criminal justice. Oxford University Press, Oxford

Taylor T (1992) The anatomy of the Nuremberg trials: a personal memoir. Little Brown & Co (P), London

Totani Y (2008) The Tokyo war crimes trial, the pursuit of justice in the wake of world war II. Havard University Asia Center, USA Massachusetts

Vincenzo M (1986) 7 Trattaro Di Diritto Penale Italiano, 5th edn. Gian Domenico Pisapia
Wasik M (2001) Emmins on sentencing, 3rd edn. Oxford University Press, Oxford
Wayne R, LaFave D (2003) Criminal law, 4th edn. West, a Thomson business, St. Paul, Minnesota
Wayne R, LaFave D(2005) Substantive criminal law, 2nd edn. West, a Thomson business, St. Paul, Minnesota
Werle G (2009) Principles of international criminal law, 2nd edn. T.M.C. Asser Press, The Hague
Wessels J, Beulke W (2010) *Strafrecht Allgemeiner Teil*, 40th edn. C.F. Müller, Hüthig Jehle Rehm GmbH Heidelberg, München, Landsberg, Frechen, Hamburg
Wolfgang J, Klaus M (2005) Münchener Kommentar zum Strafgesetzbuch, Band 2/2 § 80-184f. C.H. Beck, München
Wright RS (1873) The law of criminal conspiracies and agreements. Butterworths, London
Zahar A, Göran S (2008) International criminal law. Oxford University Press, Oxford

Articles

Ambos K (1999) 'General principles of criminal law in the Rome statute'. Crim Law Forum10:1–32
Barrett RP, Laura EL (2003) 'Lessons of Yugoslav rape trials: a role for conspiracy law in international tribunals'. Minn Law Rev 88:30–84
Baxter RR (1965–1966) 'Multilateral treaties as evidence of customary international law'. Br Yearb Int Law 41:275–300
Borgwardt E (2008) 'A new deal for the Nuremberg trial: the limits of law in generating human rights norms'. Law Hist Rev 26:679–705
Bush JA (2009) 'the prehistory of corporations and conspiracy in international criminal law: what Nuremberg really said'. Columbia Law Rev 109:1095–1261
Burgman DA (1979) 'Unilateral conspiracy: three critical perspectives' DePaul Law Rev 29:75–113
Cassese A (2007) 'The proper limits of individual responsibility under the doctrine of joint criminal enterprise'. J Int Crim Justice 5:109–133
Chesney RM (2007) 'Beyond conspiracy? anticipatory prosecution and the challenge of unaffiliated terrorism'. South Calif Law Rev 80:425–502
Clark RS (2007) 'Nuremberg and the crime against peace'. Wash Univ Glob Stud Law Rev 6:527–550
Dalton TR (2010) 'Counterfeit conspiracy: the misapplication of conspiracy as a substantive crime in international law'. Cornell law student papers, pp 1–21. http://scholarship.law.cornell.edu/lps_papers/24
Danner AM, Jenny SM (2005) 'Guilty associations: joint criminal enterprise, command responsibility and the development of international criminal law'. Calif Law Rev 93:75–170
David KA (1993) 'the movement toward statute-based conspiracy law in the United Kingdom and the United States'. Vanderbilt J Transnatl Law 25:951–990
Dencker F (1987) 'Kronzeuge, Terroristische Vereinigung und Rechtsstaatliche Strafgesetzgebung'. *Kritische Justiz* 36–53
Dennis IH (1977) 'The rationale of criminal conspiracy'. Law Q Rev 93:31–64
Drumbl MA (2005) 'Collective violence and individual punishment: the criminality of mass atrocity'. Northwestern Univ Law Rev 99:539–610
Fichtelberg A (2006) 'Conspiracy and International criminal justice'. Crim Law Forum 17:149–176
Fletcher GP (2002) 'The storrs lectures: liberals and romantics at war: the problem of collective guilt'. Yale Law J 111:1499–1573

Fletcher GP. Jens DO (2005) 'The commission of inquiry on darfur and its follow-up: a critical view reclaiming fundamental principles of criminal law in the darfur case'. J Int Crim Justice 3:539–561

Fletcher GP (2006) 'The hamdan case and conspiracy as a war crime'. J Int Crim Justice 4:442–447

Fletcher GP (2007) 'Hamdan confronts the military commissions act of 2006'. Columbia J Transnatl Law 45:427–467

Fletcher GP (2011) 'New Court, Old Dogmatik'. J Int Crim Justice 9:179–190

Gallmetzer R, Mark K (2005) 'Individual responsibility for crimes under international law the Un *Ad Hoc* Tribunals and the international criminal court' (March 21, 2007) the summer school on international criminal law. http://ssrn.com/abstract=1576024. Accessed SSRN

Giles P (1973) 'The indictment of criminal conspiracy'. Ottawa Law Rev 10:273–298

Goldstein AS (1959) 'Conspiracy to defraud the United States'. Yale Law J 68:405–463

Greenawalt AKA (1999) 'Rethinking genocidal intent. the case for a knowledge-based interpretation'. Columbia Law Rev 99:2259–2294

Guliyeva G (2008–209) **'**The concept of joint criminal enterprise and ICC Jurisdiction'. Eyes ICC 5:49–84

Harding A (1982) 'The origins of the crime of conspiracy'. Trans Roy Hist Soc 89–108

Harno AJ (1941) 'Intent in criminal conspiracy'. Univ Pennsylvania Law Rev 89:624–647

Hassemer W (1989) 'Symbolisches Strafrecht und Rechtsgüterschutz' *Neue Zeitschrift für Strafrecht* 553–559

Henning PJ (1998–1999) 'Individual liability for conduct by criminal organisations in the United States'. Wayne Law Rev 44:1305–1349

Hoskins RJ (1973) 'A comparative Analysis of the crime of conspiracy in Germany, France and the United States'. 6 N.Y.U. J Int Law Politics 245–270

Jescheck H-H (2004) 'General principles of international criminal law set out in, Nuremberg, as mirrored in the ICC statute'. J Int Crim Justice 2:38–55

Johnson PE (1973) 'The unnecessary crime of conspiracy'. Calif Law Rev 61:1137–1188

Matti J 'International cooperation against transnational organized crime: criminalising participation in an organised criminal group', Resource material series no. 59, 119th international training course visiting experts' papers, pp 417–428

Katyal Neal K (2003) 'Conspiracy theory'. Yale Law J 112:1307–1398

Kaufman N (2006) 'Problems encountered in investigating and prosecuting conspiracies to commit terrorist offences'. Paper presented at the first annual conference on human security, terrorism and organised crime in the western Balkan region, organised by the HUMSEC project in Ljublana, 23–25 Nov 2006, pp 1–11

Knoops G-JA (2006) 'The proliferation of the law of international criminal tribunals within terrorism and "unlawful" combatancy trials after Hamdan v. Rumsfeld'. Fordham Int Law J 30:599–641

Laughland J (2009) 'Conspiracy, joint criminal enterprise and command responsibility in international criminal law', speech given at the international law defence conference, The Hague, 14 Nov 2009, pp 1–9

Leventhal H, Sam H, John MW Jr, Farr Warren FF (1947) 'The Nuremberg verdict'. Harvard Law Rev 60:857–907

Lietzau WK (1999) 'Checks and balances and elements of proof: structural pillars for the international criminal court'. Cornell Int Law J 32:477–488

Luban D (1999) 'Contrived ignorance'. Georgetown Law J 87:957–980

Madoka F (2006) 'Individual and collective guilt: post-war Japan and the Tokyo war crimes tribunal.' Eur Rev 14:471–483

Malanczuk P(2000) 'The international criminal court and landmines: what are the consequences of leaving the U.S. behind?' Eur J Int Law 11:77–90

Manacorda S, Chantal M (2011) 'Indirect perpetration versus joint criminal enterprise: concurring approaches in the practice of international criminal law?' J Int Crim Justice 9:159–178
Marcus P (1977) 'Conspiracy: The Criminal Agreement in Theory and in Practice'. Georgetown Law J 65:925–969
Maurach R (1961) 'Die Problematik der Verbrechensverabredung', *Juristen Zeitung*, 137–148
Meierhenrich J (2006) 'Conspiracy in international law'. Annu Rev Law Soc Sci 2:341–357
Noferi ML (2006) 'Towards attenuation: a "new" due process limit on pinkerton conspiracy liability. AmJ Crim Law 33:91–156
Alex O-O (2001) 'Conspiracy to Commit Genocide: Prosecutor v Jean Kambanda and Prosecutor v Alfred Musema'. Murdoch Univ Electron J Law 8(1) (March 2001), paras 1–52
Ohlin JD (2009) 'Joint criminal confusion'. New Crim Law Rev 12:406–419
Ohlin JD (2007) 'Group think: conspiracy and collective reason'. J Crim Law Criminol 98:147–206
Ohlin JD (2007) 'Three conceptual problems with the doctrine of joint criminal enterprise. J Int Crim Justice 5:69–90
Ohlin JD (2009) 'Incitement and conspiracy to commit genocide'. Cornell law faculty publications, Paper 24 pp 186–204. http://scholarship.law.cornell.edu/facpub/24
Ohlin JD (2011) 'Joint intentions to commit international crimes'. Chicago J Int Law 11:693–753
Olasolo H (2009) 'Joint criminal enterprise and its extended form: a theory of co-perpetration giving rise to principal liability, a notion of accessorial liability, or a form of partnership in crime?' Crim Law Forum 20:263–287
Orchard GF (1974) 'Agreement in criminal conspiracy'. Crim Law Rev 297–304
Osiel M (2005) 'The banality of the good: aligning incentives against mass atrocity'. Columbia Law Rev 105:1751–1862
Pelser CM (2008) 'Preparations to commit a crime: The Dutch approach to inchoate offences'. Utrecht Law Rev 4(3) 57–80
Piacente N (2004) 'Importance of the joint criminal enterprise doctrine for the ICTY prosecutorial policy'. J Int Crim Justice 2:446–454
Pollack BF (1947) 'Common law conspiracy'. Georgetown Law J 35:328–352
Powles SN (2004) 'Joint criminal enterprise: criminal liability by prosecutorial ingenuity and judicial creativity?' J Int Crim Justice 2:606–619
Pritchard J (1995) 'The international military tribunal for the far east and its contemporary resonances'. Mil Law Rev 149:25–35
Ralby, Ian M. (2010) 'Joint criminal enterprise liability in the Iraqi high tribunal'. Boston Univ Law J 28:281–340
Ramer JA (2007) 'Hate by association: joint criminal enterprise liability for persecution'. Chicago-Kent J Int Comp Law 7:31–116
Sayre FB (1921–1922) 'Criminal conspiracy'. Harvard Law Rev 35:393–427
Schabas WA (2004) 'United States hostility to the international criminal court: it's all about the security council'. Eur J Int Law 15:701–720
Scheffer D (2006) 'Why Hamdan is right about conspiracy liability', Jurist. http://jurist.law.pitt.edu/forumy/2006/03=why-hamdan-is-right-about-conspiracy.php. Accessed 30 March 2006
Schuler KG (1993) 'Continuing criminal enterprise, conspiracy, and the multiple punishment doctrine'. Michigan Law Rev 2220–2258
Schnitzer J (2010) 'The Nuremberg justice trial 1947-Vengeance of the victors?', LLM thesis. Faculty of law, University of Wellington, pp 1–233
Selz SA (1977) 'Conspiracy law in theory and in practice: federal conspiracy prosecutions in Chicago'. Am J Crim Law 5:35–71
Stenson T (2003–2004) 'Inchoate crimes and criminal responsibility under international law'. J Int Law Policy 1:1–24. http://www.pennjil.com/jilp.html
Tatone VJ (1984) 'Conspiracy and double jeopardy'. J Urban Law 61:505–517

Thomas GC (1985) 'A unified theory of multiple punishment'. Univ Pittsburgh Law Rev 47:1–94
Tripp AD (1996–1997) 'Margins of the mob: a comparison of REVES .V. ERNST § YOUNG with criminal association laws in Italy and France'. Fordham Int Law J 20:263–322
Twist S (2006) 'Rethinking retrospective criminality in the context of war crimes trials'. Liverpool Law Rev 27:31–66
van der Vyver, Johan D (1999) 'Prosecution and punishment of the crime of Genocide'. Fordham Int Law J 23:286–356
Wala R (2010) 'From Guantanamo to Nuremberg and back: An analysis of conspiracy to commit war crimes under international humanitarian law'. Georgetown J Int Law 41:683–709
Wechsler H, William KJ, Harold LK (1961) 'The treatment of inchoate crimes in the model penal code of the american law institute: attempt, solicitation, and conspiracy'. Columbia Law Rev 61:957–1030
Weigend T (2011) 'Perpetration through an organisation'. J Int Crim Justice 9:91–111
Werle G (2007) 'Individual criminal responsibility in article 25 ICC statute'. J Int Crim Justice 5:953–975
Whitman JQ (2005) 'The comparative study of criminal punishment'. Ann Rev Law Soc Sci 1:17–34
Wienczyslaw WJ (1951) 'Conspiracy in civil law countries'. J Criml Law Crim Police Sci 42(2):171–183
van der Wilt, Harmen (2006) 'Genocide, complicity in genocide and international v. domestic jurisdiction reflections on the *Anraat* Case'. J Int Crim Justice 4:239–257
van der Wilt H (2007) 'Joint criminal enterprise possibilities and limitations'. J Int Crim Justice 5:91–108
Winograd J (2004) 'Federal criminal conspiracy'. Am Crim Law Rev 41:611–646
Wise EM (2000) 'RICO and its analogues: some comparative considerations'. Syracuse J Int Law Comp 27:303–324
Wright Q (1947) 'The law of the Nuremberg trial'. Am J Int Law 41:38–72