GENOCIDIO, LA COSA NOSTRA: UNCOVERING THEORIES OF INDIVIDUAL RESPONSIBILITY FOR COLLECTIVE INTERNATIONAL CRIMES

by

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Abstract

The purpose of this study is to examine the dilemma of how individual criminal responsibility can be attributed, in a principled manner, for crimes that have been perpetrated through collective conduct within the context of international criminal law. International crimes are inherently collective, and raise issues of complexity and gravity that do not commonly arise in domestic law, but which share similarities with domestic law’s treatment of organized crime. The traditional foundation for attributing individual criminal responsibility, being causation, is examined and found to be problematic in the case of collective crimes, such as genocide, crimes against humanity, war crimes, and the crime of aggression. It is suggested that non-causal justifications for attributing criminal liability are consistent with societal concepts of blame, responsibility, and harm, and should be considered in the interests of generating a more comprehensive and predictable theory for personal guilt in collective crimes. Four approaches to individual criminal responsibility for collective conduct that have emerged in international criminal law are reviewed, and found to be problematic. However, as opposed to discovering a fifth approach, it is suggested that a return to the founding theory of Anglo-American common law conspiracy may offer a viable solution. A historical review of conspiracy theory demonstrates that when the theory is applied with integrity it presents a non-causal justification for individual criminal responsibility based an augmented form of agency theory, supported by concepts of risk creation. Its elements, when properly applied, present predictable and comprehensive limits on liability.
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Chapter 1

Introduction

1.1 The Problem of Organized Crime

In 1965, in the midst of an apparently urgent crime problem, American President Lyndon B. Johnson established the Commission on Law Enforcement and Administration of Justice to examine “every facet of crime and law enforcement in America.”¹ The Report identified 12 thematic areas of concern, ranging from juvenile delinquents to illicit narcotics trade and drug abuse, and gave specific attention to the problem of organized crime.² According to the Report:

Organized Crime is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.³

After citing numerous efforts to combat organized crime, the Report notes that President Johnson had specifically asked the Commission to determine why organized crime continued to expand, despite the American Government’s best efforts to prevent it.⁴ The Report concluded that, among other things, the challenge that organized crime posed to law enforcement was largely derived from the structure of criminal organizations themselves, noting: “criminal cartels

² Ibid. at 187.
³ Ibid.
⁴ Ibid. at 188.
have organized their groups and operations to insulate their higher echelon personnel from law
enforcement and regulatory agencies.”

The specific organized crime concern for the United States in 1965 was focused on the
impact of criminal activities perpetrated through a nationwide crime syndicate, originally known
as the “Mafia”, and later known as “La Cosa Nostra”, which consisted of 24 interrelated groups
that operated as criminal cartels in large metropolitan areas across the country. However, the
prosecutorial problem of trying to uncover vast criminal networks that are purposefully
constructed to frustrate the direct attribution of criminal responsibility to any given member of the
organization is a problem that exceeds domestic concern related to the Mafia, and becomes even
more profound in the international context of an armed conflict.

Similar to the patterns of criminal activity that confounded the Commission in 1965,
crimes that devastate nations during times of armed conflict and civil unrest are inherently
collective in their operation and are often perpetrated by highly structured organizations.
Following World War Two, as the allied nations gathered in an attempt to understand and address
the atrocities that had been perpetrated by Nazi Germany, the difficulty of trying to decipher the

5 Commission Report, supra note 1 at 198.
6 Ibid at 192. The Commission Report quotes J Edgar Hoover’s 1966 testimony before the a House of
Representative’s Appropriations Subcommittee, referring to the specific problem of the Mafia: “La Cosa
Nostra is the largest organization of the criminal underworld in this country, very closely organized and
strictly disciplined. They have committed almost every crime under the sun… La Cosa Nostra is a criminal
fraternity… and it has been found to control major racket activities in many of our larger metropolitan
areas, often working in concert with criminals representing other ethnic backgrounds. It operates on a
nationwide basis, with international implications, and until recent years it carried on its activities with
almost complete secrecy. It functions as a criminal cartel, adhering to its own body of ‘law’ and ‘justice’
and, in so doing, thwarts and usurps the authority of legally constituted judicial bodies.”
structure of the crimes and impute personal guilt was described in a manner similar to the prosecutorial problem posed by the Mafia:

The criminality of the German leaders… does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany… [that] goes back at least as far as 1933…

International crimes, such as genocide, crimes against humanity, war crimes, and the crime of aggression occur within highly complex environments, often spanning vast geographic regions and time periods. Similar to the phenomenon of domestic organized crime, these crimes tend to involve hundreds, if not thousands, of individuals, each of whom contribute to the commission of an atrocity through discrete acts that may not be individually criminal but which collectively produce a criminal effect. The difficulty for a society attempting to respond justly to collective crimes of this magnitude is how to address the conduct of individuals in a principled manner that prevents those responsible from benefiting from the systemic and decentralized nature of the offence. If an individual has intentionally contributed to the crime of genocide by providing logistical support that might not otherwise be criminal, how can the individual be prosecuted for the effects of that contribution, being genocide, when those effects represent the collective efforts of an organization and reach beyond the acts actually committed by the accused?

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1.2 Purpose of Study

The purpose of this study is to examine the dilemma of how individual criminal responsibility can be attributed, in a principled manner, for crimes that have been perpetrated through collective conduct. Specifically, this study asks: on what basis can an individual be blamed and punished for a criminal offence under international criminal law, where the harm to society that is caused by the offence is the product of collective conduct that exceeds the individual contribution of the blamed individual? This issue requires a society to consider on what basis is it appropriate and morally justified to apply criminal sanctions to any individual, and to consider how this reasoning can apply in a context where an accused may have contributed to an offence in a manner that does not appear to trigger a conventional justification for criminal responsibility. In the case of complex and collective offences such as genocide, for example, a society must consider: should the vast majority of wrongdoers be permitted to escape without any punishment or moral stigma, contrary to the principle of individual criminal accountability? Or should a concept of collective responsibility be adopted for the purpose of facilitating prosecution, in derogation of traditional standards of personal guilt based on causation? Or, is it possible to identify a theory of individual criminal responsibility that is compatible with the unique societal need to attribute blame for atrocities that are perpetrated through collective conduct?

This examination will focus specifically on the problem of individual criminal responsibility for international crimes, being genocide, crimes against humanity, war crimes, and

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the crime of aggression. While there are aspects of the broader question of individual criminal responsibility for collective offences that would be common to both the domestic issue of organized crime and to international criminal law, the unique characteristics of the international legal framework and the *sui generis* nature of international crimes warrant discrete consideration of individual criminal responsibility limited to international criminal law. However, as international law is often informed by the experiences of domestic law, some consideration will be given to domestic approaches to collective criminal conduct and the principles of individual criminal responsibility, in so far as doing so may provide guidance to the development of the international criminal law tradition. Similarly, the results of this study may be useful for further research into the development of domestic law in relation to organized crime generally, and more specifically in relation to domestic efforts to address prosecutions for international crimes.

1.3 Overview of Study

This study will be undertaken in four parts. Part I will review the unique context of international law which adds a layer of complexity to the issue of individual responsibility for collective conduct in international criminal law. Unlike domestic law, international law is primarily a system of reciprocal state expectations that was not designed to consider the criminal acts of individuals, be it for individual conduct or as part of collective criminal conduct. However, after centuries of having regard only for states, the crimes of World War Two forced the international community to consider how an individual might be tried for crimes against international law. This conceptual development, which allowed the issue of individual crimes to be brought forward in an international forum, was then complicated by the fact that the crimes that attract individual criminal responsibility under international law are inherently collective.
The resulting problem is that a system, which is not generally equipped to deal with individual conduct, must now develop a principled approach for attributing individual criminal responsibility for offences that are staggeringly complex and overwhelmingly collective.

In an attempt to address the problem set out in Part I, Part II reviews the traditional criminal law approach to attributing individual criminal responsibility based on causation. The theoretical concept of causation is examined and its theoretical operation identified. Through this review, the concept of legal causation, being distinct from physical causation, is found to be the product of deliberate societal choices regarding the appropriate attribution of criminal responsibility. Arguments are presented for and against a theory of individual criminal responsibility based on direct and indirect causal links to prohibited acts or results, demonstrating both that causation can act as an appropriate basis for ascribing liability and that there is no principled reason why criminal responsibility cannot also be based on concepts other than causal contributions. From this review, it is suggested that one difficulty that may be confounding efforts to create a coherent theory of individual criminal responsibility for international crimes is an unnecessary devotion to causation. It is suggested that opening theories of liability to justifications other than causation, or that are not strictly causal, may result in greater clarity and consistency in the law.

Having identified the source of the theoretical problem in Part I, and reviewed the traditional basis for attributing individual criminal responsibility in Part II, Part III reviews four approaches to personal guilt that have emerged in international criminal law, including: the organizations charge that was deployed at the International Military Tribunal in Nuremberg; the
Joint Criminal Enterprise doctrine that was developed by the International Tribunal for the former Yugoslavia; and the common purpose and indirect co-perpetration doctrines that are currently in use at the International Criminal Court. Each of these theories is examined, and it is suggested that each was constructed in light of the guiding theory of causation (by being either overly accepting of it, or overly adverse to it without providing an alternative justification), which has resulted in critical defects in each theory, leaving no satisfactory approach.

Finally, Part IV suggests a new approach to individual criminal responsibility for collective international crimes, which is in fact a return to the original approach. The first theory of personal guilt that was used after World War Two to indict Nazi organizations was based on the classic Anglo-American common law theory of conspiracy. Conspiracy functions as both a distinct offence, which prohibits the act of confederating for an unlawful purpose and as a mode of liability. According to the law of conspiracy, if an individual participates in an agreement with two or more parties for the purpose of committing an unlawful act or a lawful act by unlawful means, they may be liable for the substantive offence of conspiracy and for any other offence that is committed by a co-conspirator acting in furtherance of the parties’ common criminal purpose, if the prohibited act or result was within the scope of the criminal agreement.

Although the theory of conspiracy has a long legal history, from the moment of its adoption by the International Military Tribunal the theory has caused judicial aversion to its seeming disregard for the causal requirement. As a result it has been manipulated and reformulated into complex theories of causal links between low-level perpetrators participating together in a common group structure and contributing to the furtherance of a common criminal
purpose. Following a review of the history of the theory of conspiracy, it is suggested that the original theory presents an acceptable justification for attributing individual criminal responsibility for collective conduct that is not strictly based on casual links to prohibited acts or results, and that the original elements of conspiracy, when applied with integrity, create appropriate limits on liability that are reliable and predictable. It is suggested that a return to this original theory may serve as a better solution to the dilemma of individual criminal responsibility for international crimes then would the creation of a complex and non-comprehensive *sui generis* approach.
2.1 The Problem of Collectives and Individuals in International Law

In this chapter, Part I of the study reviews the unique context of international law that adds a layer of complexity to the issue of individual responsibility for collective conduct in international criminal law. This Part seeks to address two fundamental issues regarding individual criminal responsibility for collective international crimes, which require some comment before the central thesis can be examined:

1) As a foundational matter, how did the question of individual criminal responsibility become a live issue in international law generally, given that international law governs almost exclusively the reciprocal conduct of corporate entities (i.e., states)?

2) Once it is discovered how the question of individual criminal responsibility came before international law, how did this question become complicated by attribution of responsibility within a collective context?

In regards to this second issue, the central foundational concern is: once international law completed the conceptual work to separate the individual from the state in order to deal with questions of individual criminality, why were all such questions then complicated by a return to the collective context? The commonly understood answer to this is that international crimes are inherently collective. Part I seeks to substantiate this, in order to demonstrate the significance of
developing a predictable and principled approach to individual criminal responsibility within international criminal law.

2.2 The Question of the Individual in International Law

As indicated above, as a foundational matter, the question of how individual criminal responsibility became a live issue in international law generally, must be examined in order to provide context for the central question of attributing personal guilt in international criminal law. To begin this examination, a return to a period in history that struggled with this issue in a profound and existential way is presented. This period is the post World War Two era, in which the world searched for a principled and just approach to dealing with the individual criminal responsibilities of vast numbers of war criminals.

In 1961, Adolf Eichmann was indicted before the District Court of Jerusalem in Israel, charged with 15 counts of crimes against the Jewish people, crimes against humanity, war crimes, and membership in an organisation that had been declared criminal in 1946 by the International Military Tribunal in Nuremberg (Nuremberg Tribunal). He was accused of and eventually convicted for having “caused the deaths of millions of Jews, with the purpose of implementing the plan which was known as ‘the Final Solution of the Jewish Question’, with intent to exterminate the Jewish People”.

\[9\] Attorney General v Adolf Eichmann, Criminal Appeal 336/61, Supreme Court of Israel (29 May 1962) at 1 (Israel). [Eichmann]
Eichmann had joined the Nazi Party in 1932 as a member of the Austrian *Schutzstaffel* (SS) and was later appointed Special Officer of Zionist Affairs at the Head Office for Reich Security (RSHA).\(^\text{10}\) In 1938, Eichmann was transferred to Vienna to administer the Central Office for the Emigration of Austrian Jews, where he oversaw the forced emigration of approximately 150,000 people.\(^\text{11}\) He returned to Germany in 1939 as the head of the Reich Central Office for Jewish Emigration, where he planned and executed mass deportations of Jewish persons and explored the possibility of setting up a Jewish slave state in Madagascar.\(^\text{12}\)

In 1942, Eichmann was appointed the Referent of the RSHA for all matters connected to the Final Solution. In implementing the Final Solution, Eichmann: received information regarding the number of persons to be expelled; organized the transfer of money stolen from deported Jews to the SS; headed the Eichmann Special Operations Unit in Hungary; and oversaw the handling of “Transport Jews” who were taken to concentration camps or killed immediately if they were unfit for hard labour. Eichmann was also personally responsible for all administrative matters connected with the concentration camps in Terezin, Czech Republic, and Bergen-Belsen, Germany.\(^\text{13}\)

The District Court found Eichmann guilty on all 15 counts, and sentenced him to death.

In 1962, Eichmann appealed this decision to the Supreme Court of Israel, arguing that the District Court had acted contrary to the principles of international law by assuming it, a national court,

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\(^\text{10}\) *Attorney General v Adolf Eichmann*, Criminal Case No 40/61, District Court of Jerusalem, Israel (11 December 1961) (Israel) at 59. [*Eichmann (Trial level)]

\(^\text{11}\) *Ibid* at 64.

\(^\text{12}\) *Ibid* at 72.

\(^\text{13}\) *Ibid* at 75.
was competent to try a foreign national for international crimes. In upholding the decision of the
District Court, the Supreme Court addressed Eichmann’s objection as a question of universal
jurisdiction and observed that, at the time,

…on the question of the jurisdiction of a state to punish persons
who are not its nationals for acts committed beyond its borders,
there is as yet no international accord…\textsuperscript{14} [However] it is the
particular universal character of these crimes that vests in each
state the power to try and punish anyone who assisted in their
commission.\textsuperscript{15}

As a corollary to this reasoning, the Court had to reconcile itself with a novel issue that had also
confronted the Nuremberg Tribunal: how can international law, binding on states, create
individual criminal responsibility? In acknowledging the complexity of this problem, the Court
noted that:

…the life of the law has not been logic: it has been experience.
The felt necessities of the time, the prevalent moral and political
theories, intuitions of public policy, avowed or unconscious…
have had a good deal more to do than the syllogism in
determining the rules by which men should be governed… [this
applies] with even greater force to the criminal branch of
international law which, it is universally admitted, is as yet at the
initial—one might even say “primitive”—stage of its
development.\textsuperscript{16}

Part of the difficulty faced by the Supreme Court of Israel in 1962 was resolved in 2002
with the creation of a permanent International Criminal Court that is competent under
international law to try individuals who commit crimes against international law. The Court has

\textsuperscript{14} Eichmann, supra note 9 at 8.
\textsuperscript{15} Ibid at 10.
\textsuperscript{16} Ibid at 13.
an enabling statute based on the major premise that international law can directly impose criminal prohibitions on individuals, irrespective of any duties that might be owed under a national legal system.\textsuperscript{17} However, even with the establishment of the International Criminal Court, the central problem remains: international law governs the rights and responsibilities of corporate entities (i.e., states); criminal law, conversely, is explicitly concerned with prohibitions addressed to individuals and in identifying individual responsibility for violations of those prohibitions.\textsuperscript{18}

\textbf{2.3 Separating the Individual from the State}

With international law being a system that exists between states based on a form of reciprocity and common understanding that is intended to regularize state relations\textsuperscript{19}—what regard can this system have for individuals? How can Adolf Eichmann have committed a crime against this system, when he is not a state and the system itself was only intended to create mutual expectations regarding certain state conduct? The answer is that the state, the theoretical subject of international law, is a fiction.

The individual human being is manifestly the object of every legal system, and consequently also of international law.\textsuperscript{20} Modern practice demonstrates this, and has demonstrated that individuals are increasingly recognised as participants and subjects of international law.\textsuperscript{21} While this fact appears to conflict directly with the traditional concept of

\begin{flushleft}
\textsuperscript{20} Dinstein, \textit{supra} note 17 at 206.
\textsuperscript{21} Shaw, \textit{supra} note 19 at 232.
\end{flushleft}
international law as a form of self-regulation between states, the corporate entity that is the “state” is not actually a tangible res that exists in reality. A “state” is an abstract notion moulded through legal manipulation by and within the ambit of a superior legal system;\textsuperscript{22} natural persons (i.e., individuals) stand behind the fiction of the state’s legal personality. Therefore, the duties and rights of states that flow from international law devolve on the human beings who compose them, albeit indirectly and collectively.\textsuperscript{23}

In reality, international law is concerned with the conduct of individuals, committed on behalf of other individuals, against another group of individuals, the responsibility of which is offloaded to an artificial legal personality that cannot itself bear punishment but which has punishment ascribed to it on behalf of its individual subjects. However, a tension arises when state conduct injures a significant international interest or consists of egregious conduct that offends commonly shared values and that involves more than one state.\textsuperscript{24} This is because acts that cause injury in a deeply rooted and fundamental way are known to be criminal and only individuals can commit crimes.\textsuperscript{25}

\textbf{2.4 Bringing the Individual Before International Law}

The understanding of an individual’s relationship with international law that emerged from this period was recognized and codified in 1947 when the United Nations General Assembly

\textsuperscript{22} Dinstein, supra note 17 at 206.
\textsuperscript{24} Cryer, supra note 18 at 2.
\textsuperscript{25} 
\textit{Trial of the Major War Criminals before the International Military Vol 2} (Washington, DC: United States Government Printing Office, 1947) at 223. [\textit{Nuremberg Judgement Vol II}] at 150: “Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons.”
directed the International Law Commission to “formulate the principles of international law recognized in the Charter of the Nuremburg Tribunal and in the judgment of the Tribunal.”26 The first principle that was recognized by the Commission was that: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.”27 In one of the shortest and most conclusive commentaries provided for any of the seven principles identified, the Commission explained that, contrary to the classic Grotian tradition of international law: “The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the Tribunal were very definite on the question of whether rules of international law may apply to individuals.”28

From this perspective, the first foundational problem can be resolved. States are composed of individuals, and international law generally deals with the conduct of those individuals through their communal identity. However, the conduct being regulated is still, at its core, fundamentally individual. Therefore, in the event that a crime against international law occurs the perpetrator must be individual, since all conduct is actually individual, and the rest of the international community must be competent to come together to impose sanctions on that individual. The result is that a system that is designed to regulate collectives that are actually individuals may shift course to deal with individuals directly without referring to the legal

26 Formulation of the principles recognised in the London Charter of the Nuremberg Tribunal and in the judgement of the tribunal, GA Res 177 (II), UNGA, 2nd sess, UN Doc A/505 (1947) at para (a).
28 Ibid at 374.
personality of the state. This is the realization of the first principle of Nuremberg, which was formally achieved in 2002 when international criminal law’s concern for individual criminal responsibility was institutionalized in the International Criminal Court.

2.5 The Collective Nature of International Crimes

The theoretical foundation outlined above is sufficient to allow this study to proceed with a consideration of individuals and international obligations; however, as indicated at the beginning of this chapter, another complication arises in relation to the nature of international crimes. The principle of individual responsibility in criminal law states that individuals should only be held responsible for their own personal conduct and for the harm to society that is caused by that conduct, or that is the natural and probable consequence thereof.29 Criminal liability being essentially personal and individual has always depended upon proof of individual causation.30 Yet, in opposition to this preference for individual causation, international crimes are inherently collective and are notoriously difficult to separate into discrete acts that might satisfy the causal requirement.

The collective nature of international crimes was recently reviewed by Jens David Ohlin of Cornell University in his article Organized Criminality, where he highlights the unquestioned, and yet often unsubstantiated, assertion about the nature of international crimes, stating:

It is now almost a truism—another cliché of the field—that international crimes are collective crimes. As an empirical matter, I think it is probably safe to say that there does not yet exist a single—not one—pure individualized crime in the field of international criminal justice.31

While the fact that international crimes, being aggression, crimes against humanity, war crimes, and genocide, are often declared to be collective by nature, Ohlin provides a degree of credibility to this statement by systematically reviewing each crime to demonstrate the impossibility of a lone perpetrator. For example, the crime of aggression, Ohlin points out, explicitly includes a state action requirement such that it is impossible for individual conduct to result in liability. Individual conduct is criminalized only by virtue of the individual’s relationship to the collective endeavor; state action itself is primary and individual liability is parasitic on the collective action.32 Crimes against humanity is also inherently collective, as it requires as part of the conduct element a “widespread or systematic attack” that is pursuant to a state or organizational plan or policy. As Ohlin explains, the *sine qua non* of crimes against humanity is the perpetration of the crime by the organization that holds the policy that promotes the offence.33

The collective nature of crimes of aggression and crimes against humanity is not particularly controversial since, as Ohlin demonstrates, they both rely heavily on state or organizational involvement as part of the definition of the offence. War crimes and genocide pose a slightly different challenge, because theoretically either crime could be perpetrated by an individual. However, as Ohlin explains, when the contextual elements of the two crimes are

carefully considered, their individual nature melts away into yet another collective endeavour. In regards to the war crimes, an individual combatant could commit a single violation of the laws of armed conflict, which may appear to be a purely individual crime. The reason it is not a purely individual crime is because it will only become an international crime if it occurs during the collective endeavour of war;\textsuperscript{34} as Ohlin explains, if the act were truly individual—for example, a soldier committing a violent crime while off duty in a nightclub—it would not qualify as an international crime at all.\textsuperscript{35}

Finally, in relation to genocide, Ohlin concedes that the main reason why there could not be a lone génocidaire is because there are no lone génocidaires; they simply do not exist.\textsuperscript{36} Aside from this fact, Ohlin also notes that recent efforts have been made in international jurisprudence to read-in the existence of an organizational plan or policy into the definition of genocide. This is reflective of a need to standardize the doctrinal requirements of genocide with crimes against humanity because, as Ohlin explains:

\ldots genocide was once subsumed under crimes against humanity, and \ldots [if] the asymmetry between the two doctrines remains, the crime of persecution as a crime against humanity will require an organizational plan or policy but the same criminal acts, described under the rubric of genocide, would not.\textsuperscript{37}

\textsuperscript{34} Ohlin, \textit{supra} note 31 at 12.
\textsuperscript{35} \textit{Ibid.}
\textsuperscript{36} \textit{Ibid.}
\textsuperscript{37} \textit{Ibid} at 18.
2.6 The Present Problem

The problem identified in this chapter, which also faced the Supreme Court of Israel in *Eichmann*, and faced the Nuremberg Tribunal, is how to hold an individual responsible for a crime against international law when it was not clear that international law imposes any obligations on individuals in the first place. By reflecting on the structure of the international system, this issue has largely been resolved. Individuals form states collectively, but all conduct at its foundation is individual conduct. Through this understanding, and with the acceptance that only individuals can commit acts that violate shared international values and norms, international law can impose obligations on individuals who are capable of committing crimes against that law. The international system in turn is competent, through the International Criminal Court, to assess individual responsibility for crimes against international law and is authorized by the rest of the international community to issue criminal sanctions.

The foregoing context places the question of individual criminal responsibility before the International Criminal Court and other bodies authorized to enforce international criminal law. From this, another problem arises: how does an international court find individual criminal responsibility for crimes that are extensively and bafflingly collective?

In fairness to the international legal system, attempting to discern individual criminal responsibility for collective crimes has been a consistent problem for domestic legal systems for centuries. In attempting to explain why an individual should be held personally responsible for harms to society that they did not directly or indirectly cause, domestic law has created and recreated various theories of derivative liability. Under these theories, the liability of the accused
is dependent on the actions of a principal offender. The principal will satisfy the conduct element of a specific offence through a direct causal link to the prohibited act or result, while an accessory will satisfy it indirectly through the principal’s act, generally through facilitation or solicitation of that act. While the international system does try to draw on the experience of domestic jurisprudence to address the issue of derivative liability, domestic legal systems have never been overly comfortable or overly satisfied with their own treatment of individuals who participate in collective crimes. Aaron Fichtelberg of the University of Delaware, highlighted this discomfort in his article *Conspiracy and International Criminal Justice*, stating that:

> While it is clear that organizations like the mafia are criminal in nature, applying criminal liability to all mafia members undermines the delicate balance between individual accountability and organized criminal enterprises, pushing criminal law to the odious notion of collective punishment.

To date, international criminal law has attempted to resolve the dilemma of individual criminal responsibility for collective crimes with theories such as: the criminal organizations charge from the Nuremburg Tribunal; the Joint Criminal Enterprise doctrine from the International Criminal Tribunal for the Former Yugoslavia (ICTY); and the more recent common purpose and indirect co-perpetration theories from the International Criminal Court. For separate, yet related reasons, each of these approaches has been the subject of criticism, and therefore the solution of an internally consistent and doctrinally sound approach to this problem remains elusive. However, as a way forward, this issue might be addressed in a manner similar to the

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39 Fichtelberg, *supra* note 29 at 159.
original problem of individual responsibility under international law—by returning to the theoretical foundation of individual criminal responsibility and the causal requirement, and using this foundation to guide an assessment of the modern international theories of derivative liability. This exercise will begin in the next chapter, where Part II of the study will review the commonly understood basis for ascribing individual criminal responsibility: direct and indirect causal links to prohibited acts or results, which are criminalized based on their harmful, blameworthy, or otherwise damaging effect on society.
Chapter 3

Criminal Law Theory

3.1 The Problem of Criminal Responsibility

In this chapter, Part II of the study reviews the traditional criminal law approach to attributing individual criminal responsibility, which is based on causation. It is generally assumed that a causal approach to criminal liability is necessary in order to satisfy foundational, principled requirements of criminal law. It is this basis for attributing criminal liability that international criminal law often struggles with, as it suggests that in order to blame and punish an individual for a particular offence, their personal conduct must be linked to that offence through a chain of causal contributions. This exercise is impractical, if not impossible, to undertake with integrity within the context of mass atrocities. However, before examining how international law has tried to meet this standard through various theories of derivative liability for collective conduct, it is important to examine this initial causal requirement and consider whether there may be room for alternative justifications for criminal responsibility that are more conducive to international criminal law. This examination will provide three useful functions:

1) First, it will consider the central requirement of personal guilt in criminal law, as a core concept that must be addressed by any theory of liability. Based on this consideration, it is submitted that an accused must be personally implicated in a crime in some way. The question of how or on what basis an attribution of individual criminal responsibility occurs must flow from this principle.
2) Second, having acknowledged the need to make criminal responsibility individual and personal, the classic causal theory by which this attribution generally occurs is examined and its constituent elements are presented. This begins with a broader consideration of causation, as a method for understanding the physical world, and then focuses on how causation is transposed and operates within a legal context.

3) Finally, arguments for and against a causal requirement are considered. On one side of the debate, commentary is presented which suggests that a causal link to a prohibited act or result is an indispensable and irreplaceable requirement of criminal law. It is suggested in the next chapter that this view is the source of convoluted and manipulated theories of individual criminal responsibility for international crimes, which strain to find a causal link between discrete contributions and the commission of specific offences. On the other side of the debate, it is argued that, while causal contributions are a useful means of attributing individual criminal responsibility, there is no moral or theoretical imperative that would force a society to base liability exclusively on causation.

3.2 Understanding Individual Criminal Responsibility

As indicated above, the first matter to be considered is the individual nature of criminal responsibility. However, before this can be addressed, as a preliminary consideration it may be helpful to reflect on the nature of criminal conduct generally, to provide a deeper understanding
of what societal function is being performed when an individual is blamed and punished for a
“crime”.

What makes an act criminal, either internationally or domestically, is subject to extensive
philosophical debate. In his article *What is a Crime?*, Grant Lamond of Oxford University
explains that while the technical definition of a crime is simply a legal prohibition that is subject
to criminal proceedings, a purely doctrinal analysis is only capable of demarcating the scope of
criminal liability within legal liability as a whole. It cannot, for example, provide an account of
the basic features of criminal liability in a way that explains its normative status.40 According to
Lamond, another view of what is criminal concerns an important condemnatory function played
by criminal law in social life. Criminal prohibitions identify some behaviour as being especially
reprehensible such that the machinery of the state must be mobilized against it.41 Lamond refers
to this as a “public wrong” theory of criminal conduct.

What constitutes “especially reprehensible behaviour” is the subject of still further
debate. One theory suggests that an act is criminal when the anti-social effect it causes extends
beyond the immediate victim to everyone who might view themselves as a potential victim, and
who might suffer distress, anxiety, and widespread fear by what has been done.42 Another theory
suggests that an act is criminal when it causes “social volatility”, being “the potential for

41 Ibid.

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destructive disturbance of fundamental social structures”. Social volatility involves individuals being forced to contemplate abandoning one’s own socially stable behaviour in the interests of self-defence, which threatens a breakdown in all socially stable behaviour. Still other theories suggest that an act is criminal where the mischief done to the victim is also mischief done to the public at large, and another suggests that the criminal nature of an act is derived from the perpetrator’s refusal to submit to the authority of law. From his review, Lamond concludes that:

…accounts of crimes as public wrongs share a common assumption: that crimes are public wrongs in the sense that they are wrongs to the public, whether because they generate fear or social volatility, or because they violate values which the community shares, or because they defy the law itself. The intuitive idea is that… the victim of a public wrong is (solely or additionally) the community.

In the alternative, Lamond goes on to suggest that another way to understand crimes as “public wrongs” is to view certain conduct not as a wrong done to the public but as a wrong that the public is responsible for punishing because the anti-social effect of the act is appropriately a case for the community rather than the individual victim.

With this understanding of a crime as a public wrong, the issue of how to make responsibility for a public wrong personal and individual can be considered. The American
Supreme Court considered the question of a personal guilt requirement in *United States v Junius Irving Scales*.  

In 1958, a few short years before the District Court of Jerusalem in Israel considered the case of Adolf Eichmann, Junius Irving Scales was indicted before the United States Middle District Court of North Carolina accused of “intending to bring about [the] overthrow [of the Government of the United States] by force and violence as speedily as circumstances would permit”, and for being a member of an organization that was “a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit” contrary to s. 2(a)(3) of the *Smith Act*.

The *Smith Act* was a United States federal penal statute that was enacted on June 28, 1940 for the unstated purpose of outlawing the Communist Party in the United States by making participation in the party a crime punishable by fine, imprisonment, or both. The *Smith Act* was divided into four parts, the first dealing specifically with “subversive activities”. Section 2(a)(3) states that it is unlawful for any person to:

\[
\cdots \text{organize or help to organize any society, group, or any assembly of persons who teach, advocate, or encourage the}
\]

49 *Scales v United States*, 367 US 203 (1961) at 244 (USA). [*Scales*]

50 *United States v Junius Irving Scales*, “Indictment” (18 November 1954), United States District Court for the Middle District of North Carolina (USA).

51 *Ibid*.

52 *Alien Registration Act, 1940*, 18 USC § 2385 (1940) at s 2(a)(3) (USA). [*Smith Act*]

overthrow or destruction of any government in the United States by force or violence; or to become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.\footnote{Smith Act, supra note 52 at s 2(a)(3).}

According to commentary from the 1940’s, what differentiated the \textit{Smith Act} from other statues relating to subversive activities was the “dangerously broad and inclusive” wording in s. 2(a)(3).\footnote{Phillips, supra note 53.} It was suggested that this wording threatened to convert the \textit{Smith Act} into “an instrument of anti-democratic persecution”.\footnote{Ibid.} Of particular concern was that, under the \textit{Smith Act}, “advocacy”, “teaching subversion”, and having membership in certain classes of organizations were offences unto themselves without requiring any overt act towards subversion. During the 1940’s and 1950’s, s. 2(a)(3) of the \textit{Smith Act} was relied on to indict numerous Communist Party members, and was used by prosecutors who were attempting to establish a precedent in the case law that active and knowing participation in Communist activities was \textit{prima facie} evidence of intent to overthrow the United States Government.\footnote{Ibid.}

Junius Scales joined the Communist Party in 1939 while attending the University of North Carolina. He openly organized civil rights and labour events in the southern United States, advocating his belief that communism was the only way to “correct the wrongs done to poor working people and black Americans”.\footnote{Ari L Goldman, “Junius Scales, Communist sent to U.S. prison, dies at 82”, \textit{The New York Times} (7 August 2002) C23.} By 1948, Scales had been named the Chairman of the

\footnote{54 Smith Act, supra note 52 at s 2(a)(3).} \footnote{55 Phillips, supra note 53.} \footnote{56 Ibid.} \footnote{57 Ibid.} \footnote{58 Ari L Goldman, “Junius Scales, Communist sent to U.S. prison, dies at 82”, \textit{The New York Times} (7 August 2002) C23.}
North and South Carolina District Communist Party.\textsuperscript{59} While he was Chairman, Scales recruited new members; was the director of a school that promoted and advanced the theory of communism; and distributed literature which stated that the goals of communism could only be achieved by violent revolution that would have to start internally with the working classes and African Americans in the southern United States.\textsuperscript{60} In 1954, Scales was arrested when he attempted to recruit and mentor an FBI informant.\textsuperscript{61}

The Middle District Court of North Carolina first convicted Scales in 1955. He appealed this decision to the United States Supreme Court in 1956, which remitted the case back to the District Court for redetermination. Scales was retried in 1958, and again convicted and sentenced to six years in prison. He appealed this decision to the Supreme Court, which upheld the conviction in 1961.\textsuperscript{62}

In challenging his conviction, Scales argued that the membership offence in the \textit{Smith Act} violated the Fifth Amendment’s\textsuperscript{63} substantive due process protection by “impermissibly imputing guilt to an individual merely on the basis of his associations and sympathies, rather than because

\textsuperscript{59} Scales, supra note 49.
\textsuperscript{60} Ibid at 264-65.
\textsuperscript{61} Ibid at 244.
\textsuperscript{62} Ibid at 206 note 2.
\textsuperscript{63} “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”
of some concrete personal involvement in criminal conduct." In considering this issue, the Court returned to the foundation of criminal responsibility, stating:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity, that relationship must be sufficiently substantial to satisfy the concept of personal guilt…

Personal guilt defines the individual nature of criminal law that is at odds with the collective nature of international crimes and other crimes perpetrated by organizations, such as those contemplated by the *Smith Act*. Personal guilt suggests that an individual should only be “blamed” and punished by society for a public wrong that they are personally responsible for. That is, Scales should only have been convicted and sentenced to six years in prison if he was personally responsible for the alleged criminal acts of the Communist Party in the United States.

It is intuitive that the individual must be visible in the public wrong in order for blame and punishment to arise. However, the more difficult question that follows this simple principle is: what does it mean to be “responsible” for a public wrong? How does one define and limit responsibility in terms of an individual, particularly when the true effect of the public wrong is brought about by a collective? How can Scales, as an individual, be “responsible” and worthy of “blame” for social harm caused by a corporate entity, such as the Communist Party? How can his individual acts be extracted from the conduct of the collective in order to serve as a basis for

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64 *Scales*, *supra* note 49 at 204.
65 *Ibid* at 224-225.
criminal responsibility, and why should he, through those acts, inherit the responsibility for the
acts of other individuals who form the rest of the collective?

To further complicate the matter, the Supreme Court in *Scales* went on to obscure the
question of personal guilt and individual responsibility by stating:

> Any thought that due process puts beyond the reach of the
criminal law all individual associational relationships, unless
accompanied by the commission of specific acts of criminality,
is dispelled by familiar concepts of the law of conspiracy and
complicity. … [These] are particular legal concepts manifesting
the more general principle that society, having the power to
punish dangerous behavior, cannot be powerless against those
who work to bring about that behavior.  

Based on this, one might be left wondering how criminal law, international or domestic,
is able to function in a comprehensive manner by demanding on the one hand that guilt be
personal, even where perpetration is the result of collective action, but then qualifying this on the
other hand by stating that such guilt need not be accompanied by the commission of specific acts
of criminality.

3.3 Traditional Concepts of Individual Criminal Responsibility

Having established that responsibility for public wrongs must be personal, Part II of this
study now turns to questions of how and on what basis criminal responsibility can be attributed
individually. This aspect will proceed in three parts, including consideration of: (1) why causation

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66 *Scales*, supra note 49 at 225.
is relied on as basis for attributing responsibility; (2) what causation is; and (3) how causation is understood and applied in a criminal law context.

### 3.3.1 Causation as a Basis for Individual Criminal Responsibility

Questions regarding the legitimacy and justification for criminal liability rest on the concepts of harm, responsibility, and blame. Harm is the result of a public wrong, which damages society in some way and is deemed to be blameworthy. The act of blaming an individual, through criminal procedures, is society’s act of recognition that the blamed individual is responsible for the harm that resulted from the public wrong, and should therefore be punished. As Sanford Kadish of the University of California explains in his article *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*:

> …blame and its correlative, praise, serve as expressions of our disapproval or approval of some human action or quality…

> [Blame] is not intrinsically an expressive action, but a judgment of disapproval. It is an internal evaluation that need not be expressed. Blame is the sentiment of disapproval itself.

> From a doctrinal perspective, individual responsibility for a public wrong, being an act or result that society considers to be damaging, harmful, or blameworthy, is limited to allocating blame in accordance with legal rules under which it is permissible, if not mandatory, to assert blame. In this context, being “responsible” does not refer to a factual connection between the person held responsible and the harm committed but simply to their liability under law.

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The fact that the law describes certain acts and results as public wrongs worthy of blame and punishment is not controversial. As Lamond explains, the technical definition of a crime is simply a legal prohibition that is subject to criminal proceedings.\(^69\) However, once certain acts have been identified as public wrongs, and defined in the law as crimes, the question becomes: on what grounds or by what theory does society justify blaming and punishing an individual for a public wrong? This question is particularly complex in circumstances where the totality of the prohibited act or result is undertaken by a collective.

The most commonly accepted response to this question is that responsibility and blame should be attributed based on causation. According to HLA Hart and AM Honoré, in their book *Causation in the Law*, doing or causing harm is the primary ground for holding an individual responsible for a public wrong. Both in law and in moral theory, a causal connection between an act or omission and the resulting harm to society is the most obvious and least disputable reason for attributing responsibility and assigning blame.\(^70\)

Reliance on causation as a basis for personal guilt suggests that an individual should not be held responsible, blamed, or punished for a public wrong that they did not “cause”. This theory of individual criminal responsibility was reflected by the District Court of Jerusalem, which convicted Eichmann for “causing” the deaths of millions of Jews. Similarly, it was the perception that this theory is valid and essential that created a problem for the United States Supreme Court in *Scales*. The concern in that case was that the subversion provisions of the *Smith Act* may not

\(^{69}\) Lamond, *supra* note 40.

\(^{70}\) Hart and Honoré, *Supra* note 68 at 62.
have required causation; an individual could be personally guilty of subversion under the Smith Act, without actually having “caused” or causally contributed to any subversive activities. Finding implicitly that personal guilt requires causation, the Court agreed with Scales that if an individual could be convicted under the Smith Act without having “caused” any prohibited acts or results, then the Act would violate the principle of personal guilt and would be unconstitutional.

The difficulty posed by both the Eichmann and Scales cases is that the theory as to how either Eichmann or Scales actually, personally caused the public wrong they were accused of is not obvious. While Eichmann clearly participated in some horrific acts, it is not immediately apparent how a court might conclude that he personally caused, directly or indirectly, the literal death of millions of people. Similarly, while it is clear that Scales believed in and actively supported communist doctrine, it is not immediately apparent how a court might find that he personally caused, directly or indirectly, an attempted overthrow of the Government of the United States. The solution of the courts in both cases was to find that through their membership in collective organizations that had in fact perpetrated the public wrong, Eichmann and Scales gained a causal connection to the resulting harm to society that was sufficient to ground a finding of individual criminal responsibility.

The attribution of criminal responsibility based on membership in an organization that has committed a mass public wrong appears partially consistent with the reality that all conduct is in fact individual, even when groups of individuals unite and act collectively. Therefore if a group of individuals joined under the banner of the SS can commit crimes, then one or all of those individuals should be capable of being responsible for the crimes that resulted from the individual
conduct. However, if the charge of responsibility is to go beyond the actual physical conduct of the single individual, and beyond the limits of what effects that conduct could reasonably be expected to have causally contributed to, directly or indirectly, and is extended to the conduct of all of the individuals who formed the collective, no matter how temporally or spatially removed from the accused they might be, is it fair to say that individual responsibility is still based on causation? Or is there a way to personalize guilt within a collective context without relying on causation?

Before these questions can be addressed, it first must be considered: what does it mean to “cause” a public wrong? And why was it so essential to the courts in *Eichmann* and *Scales* that any theory of criminal responsibility be grounded in causation?

### 3.3.2 What is “Causation”?

At its most basic level, the notion of causation involves making a difference to what happens in the world, and can be either explanatory or attributive. 71 Explanatory causation looks to an event and moves backwards in search of its cause. 72 Attributive causation looks to an event and moves forward in an attempt to determine what consequences might properly be ascribed to it. 73 In 1748, the Scottish empiricist philosopher David Hume described what it means to make a difference to what happens in the world, in either an explanatory or attributive context, in his work *An Enquiry Concerning Human Understanding*. According to Hume:

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71 Hart and Honoré, *Supra* note 68 at 22.
72 Ibid.
73 Ibid at 23.
We may define a cause to be an object followed by another, and where all the objects, similar to the first, are followed by objects similar to the second. Or, in other words, where, if the first object had not been, the second never had existed.\footnote{David Hume, \textit{An Enquiry Concerning Human Understanding}, (New York: Oxford University Press, 2007) at 51.}

The first half of Hume’s sentiment reflects the “regularity” concept of causation. According to this theory, one event (or factor) is the cause of another event where it is an insufficient but necessary element of a set of conditions that are actually sufficient but not necessary for the occurrence of the second event. This is referred to as “indirect causation”. The second half of Hume’s statement reflects a concept of causation defined in terms of counterfactuals. According to this theory, determining causation focuses on the question of what might have happened if the alleged cause had not been present.\footnote{Christopher Kutz, “Causeless Complicity” (2007) 1 Crim Law and Philios 289 at 296.} This is referred to as “direct causation”.

In addition to describing direct and indirect causation in a manner that is familiar to causation’s modern use, Hume also described a third understanding of causation which betrays a sense of arbitrariness that is built into the concept. According to Hume:

\begin{quote}
The appearance of a cause always conveys the mind, by a customary transition, to the idea of the effect. Of this also we have experience. We may, therefore, suitably to this experience, form another definition of cause; and call it, an object followed by another, and whose appearance always conveys the thought to that other.\footnote{Hume, \textit{supra} note 74 at 51.}
\end{quote}
Hart and Honoré considered this third definition of causation, which is more dependent on human experience and assumption than natural causation, to be a generalizing theory that governs all applied interpretations of causation. According to this theory, to declare that \( x \) is the cause of \( y \) is to state that according to experience events of type \( x \) are invariably and unconditionally followed by events of type \( y \). The singular causal statement about \( x \) and \( y \) is supported by a generalization, founded on experience, about regular sequences between types of events.\(^{77}\) By this view, the type of conduct that is represented by \( x \) is not limited to direct or indirect causation. Instead, the nexus between \( x \) and \( y \) is determined based on common-sense causal principles restricted by two things: (1) the notion of a coincidence; and (2) the idea that causal connection cannot be traced through intervening voluntary action.\(^{78}\) The causal notion of a “coincidence” is what may relieve an individual of responsibility, and includes: (1) an abnormal circumstance (2) that is independent of the individual’s conduct and (3) did not exist at the time they acted.\(^{79}\)

Relying on human experience and common sense to identify casual events has prompted some theorists to dispute the usefulness of causation as a determining factor for attributing responsibility and blame for public wrongs. For example, Stephen Morse of the University of Pennsylvania has suggested that true causation is limited to the universe’s ontology of physical cause and effect.\(^{80}\) In his article *The Moral Metaphysics of Causation and Results*, Morse

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\(^{77}\) Hume, *supra* note 74 at 26-30.


\(^{79}\) *Ibid* at 508.

comments on the futility of trying to identify or artificially construct a causal source for the purposes of attributing responsibility. He explains that when a public wrong occurs, the society harmed by this wrong is motivated to search for causes and, through criminal procedure, will retrace the causal chain in search of a cause that can serve as the basis upon which responsibility can be fairly attributed. However, the actual causal chain for any event quickly devolves into a web of infinite complexity with no natural, non-arbitrary point of origination.\textsuperscript{81} There are no actual gaps in causation, no coincidences, and no interferences; causation is all one seamless, metaphysically homogeneous web.\textsuperscript{82}

From Morse’s perspective, an agent who sets a chain of causation in motion is a \textit{sine qua non} cause, regardless of whether the causal chain is legally “cut” by a later natural event or human intervention. The fact that the criminal law distinguishes between actual causes and proximate causes is not based on any real assessment of what in fact has caused an event or whether an act is internal or external to a causal chain. The differentiation, which may dictate the legal limits of causation for the purposes of attributing responsibility, is the result of policy considerations and not nature.\textsuperscript{83} Contrary to Hume’s assessment, for Morse there is no difference between direct or indirect causation. Legal doctrines of causation that attribute responsibility for public wrongs in some cases but not others, based on limits such as “foreseeability” and “remoteness”, are fictions having nothing to do with actual causation.

\begin{flushright}
81 Morse, \textit{supra} note 80 at 890.
82 \textit{Ibid} at 891.
83 \textit{Ibid}.
\end{flushright}
The futility of trying to scope causation is also reflected in Hume’s work, along with his view that true causation is beyond the realm of relevant human comprehension. In the passage following his definition of causation, Hume admits:

…we cannot… attain a more perfect definition, which may point out that circumstance in the cause, which gives it a connexion with its effects. We have no idea of this connexion; nor even any distinct notion what it is we desire to know, when we endeavour at a conception of it.\(^\text{84}\)

### 3.3.3 Legal Causation

If it is accepted, as Hart and Honoré claim and as the courts in *Eichmann* and *Scales* assumed, that individual criminal responsibility depends on causation—that an individual should only be responsible for prohibited acts or results they have “caused”—and if it is accepted that true causation is either not knowable or not useful for the purpose of attributing responsibility, as Morse argues and as Hume suggests, then what remains may be a distinct concept of legal causation. Based on policy considerations, or human experience plus common sense, a society must identify what type of conduct will qualify as a cause, particularly an indirect cause, and at what point the conduct loses its causal effect as it becomes distanced in time and space from the resulting societal harm. In cases of direct causation, where the conduct of a principal actor is *sine qua non* under a traditional causal analysis, attribution of responsibility is easily identified and not controversial. In cases of indirect causation, an individual’s conduct (which is necessary but not sufficient) is less obvious as a basis for responsibility.

\(^{84}\) Hume, *supra* note 74 at 51.
To address the problem of indirect causation, Hart and Honoré attempt to subdivide causation in several ways. First, they differentiate between: (1) causing events to occur in the physical world; and (2) causing another human being to act in a certain way. According to Hart and Honoré, the difference between these two forms of causation concerns the level of intent. They claim that no knowledge or intention is required in order for an individual to cause some event to physically occur, meaning that physical events can be caused in a strict liability sense or purely by accident. However, in order for an individual to cause another to act, some element of intention is required; an individual would have to intend another to act in a certain way, providing a reason for the non-voluntary act of the other.\footnote{Hart and Honoré, Supra note 68 at 327.}

This initial subdivision appears to reflect the basic distinction between direct and indirect causation set out by Hume. It also suggests that, irrespective of any actual legal requirements, direct causation does not by definition require a mental element, while indirect causation by definition does require it. This suggests the first, non-natural, society-imposed limit on causation as a basis for attributing responsibility. If an individual indirectly causes another to act, for example by providing an example of certain behaviour, but did not intend\footnote{Intention being used here in a non-legal sense to reflect all possible mental states ranging from specific intent to negligence.} to influence the other’s behaviour, they are not said to have caused the other’s actions or any resulting harm to society. In the case of Scales then, if Scales was accused of indirectly causing the alleged public wrongs of the Communist Party by recruiting new members and educating them on his theories,
then he must have in some way intended his acts to have a casual effect on others in order to be responsible for any prohibited acts or results.

Next Hart and Honoré differentiate between having caused an act or event and having occasioned or permitted it. To cause another to act requires the individual doing the causing to have some express or positive mandate over the other, or to have some authority over the other that arises from the circumstances of the case.\(^\text{87}\) Contrary to this, occasioning or permitting involves allowing an individual to choose a particular course of action while withdrawing an obstacle that may have otherwise prevented them from making a certain choice. As an example of this, Hart and Honoré point to the 1892 case \textit{Beatty v Gillbanks}, where members of the Salvation Army held parades that were frequently opposed by a rival organization called the Skeleton Army. The parades would generally result in breaches of the peace, and on one occasion resulted in charges being laid against the Salvation Army for having caused a disruption.\(^\text{88}\) Although it was agreed that the Salvation Army had not provoked the attacks of the Skeleton Army, it was argued that they had provided an “occasion” or temptation for the attacks with their parades and that they knew from previous occasions that such breaches of the peace were likely to occur.\(^\text{89}\)

\(^{87}\) See e.g. \textit{Shave v Rosner}, [1954] 2 QB 113 (UK) at 116.
\(^{88}\) \textit{Beatty v Gillbanks} (1892), 9 QBD 308 (UK).
\(^{89}\) \textit{Ibid.} Hart and Honoré review this case in an attempt to determine whether or not the criminalization of “causing” harm has been extended to “occasioning” harm. In this particular case, the Court did not find that “causing” harm extended to “occasioning” harm, and the accused was acquitted on appeal. The Court held that “the conviction of the accused must be quashed for if it were upheld a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act.” (at 314) This is reflective of a public policy driven decision to sever a causal chain at a given point, which is not dependent on any understanding of physical causation.
This division between causing another to act and occasioning them to act adds another layer of complexity to the direct-indirect theory of causation. It appears that causing (versus occasioning) would be a form of direct causation, since it requires that the individual doing the acting to have no choice but to obey the direction of the individual doing the causing. Occasioning appears to be a form of indirect causation, as the individual responsible is deliberately influencing the conduct of another by removing an obstacle or providing a temptation. However, as both of these forms of causation require one individual to cause another to act, as opposed to causing a physical event to occur, they would both require a level of intent as described above.

Finally, Hart and Honoré review the extent to which an indirect causal contribution must actually make a difference in the accomplishment of an offence. These different forms of indirect causal contribution, or modes of accessory participation, are identified as instigation, assistance, and encouragement. For each of these modes of participation, it is not entirely clear what casual act has contributed to the resulting harm to society. For example, an individual could be responsible for causing a public wrong by assisting another actor without it being shown that this assistance was the cause of the other’s act. To have caused the other’s act as it actually happened, an act of assistance must be either sine qua non or sufficient but not necessary. However, an individual is generally still responsible for a public wrong that follows an act of assistance, even if the resulting harm to society would have been possible without the assistance.

90 Hart and Honoré, supra note 68 at 336.
The only forms of accessory participation that are excluded are those that have completely failed to meet their target, and were therefore completely ineffective.\textsuperscript{91}

The fact that an indirect causal act, which may even fall within the category of occasioning, is accepted as being causal without evidence that the act made a material difference to the achievement of the public wrong, unless it is clear that the act had no effect whatsoever, is perhaps reflective of the human limitation that prevents actual comprehension of causation. If $x$ provides words of encouragement to $y$, following which $y$ directly causes some harm, how can it be known what effect $x$’s conduct had on $y$ and $y$’s choice to directly cause a particular harm? $X$’s actions may have been totally irrelevant to $y$’s, as $y$ may have acted in the exact same manner had $x$ not participated at all. Conversely, $x$’s words of encouragement may have been the only thing that prompted $y$ to act, and but for $x$’s conduct the resulting harm may not have occurred. It is not possible to know which of these two statements is true. Therefore, the only way to manage indirect causal acts of occasioning, being most modes of accessory participation, is to assume that it did have an effect if the act meets the requirement of having intended to have a causal effect—unless the act completely failed to have a causal effect. Contributions to a public wrong that might fail could include, for example, acts of assistance that arrive after the fact or words of encouragement that are never delivered.

\textsuperscript{91} Hart and Honoré, supra note 68 at 344. See also Kadish, supra note 67 at 358.
Based on the topology of causation provided by Hart and Honoré, it is possible to identify the following limits on causation that represent fictitious or arbitrary breaks that are imposed on physical causal chains for the purpose of attributing responsibility and blame for public wrongs:

<table>
<thead>
<tr>
<th></th>
<th>Full Mens Rea</th>
<th>No Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct Causation</td>
<td>Cause others to act (Authority)</td>
<td>Cause a physical event</td>
</tr>
<tr>
<td>Indirect Causation</td>
<td>Occasioning others to act</td>
<td>No responsibility</td>
</tr>
<tr>
<td>No Causation</td>
<td>Ineffective contribution (No responsibility)</td>
<td>No responsibility</td>
</tr>
</tbody>
</table>

With this understanding of the function and limits of legal causation, it can now be considered whether this model for attributing individual criminal responsibility is an essential element of criminal law, or if it is one option among potential others.

### 3.4 Debating the Causal Requirement

As was seen in the *Eichmann* and *Scales* cases, the use of the legal construction of causation as a basis for attributing responsibility and blame for public wrongs often goes unquestioned. As Douglas N Husak of Rutgers University explains in his article *Omissions, Causation and Liability*, when theorists present critiques of criminal responsibility they tend to present what Husak calls the “causal argument” which assumes: (1) no one should be responsible
for a public wrong they have not caused (the causal assumption); (2) a failure to avert a public wrong is not a cause of that wrong (the principle of causal efficacy); and (3) no one should be responsible for a public wrong they have failed to avert. According to Husak, most theorists take the casual assumption as a given and begin their defence with the principle of causal efficacy.

Consistent with Husak’s claim, even Hart and Honoré do not actually address why it is that no one should be responsible for a public wrong they have not caused. They simply begin their analysis by stating that causation is the most obvious ground on which to base a finding of individual criminal responsibility, and then move on to exploring what it means to have caused a particular harm to society. They do not pursue in any great detail the question of the relation between causal notions on the one hand and the nature of society’s judgment of an actor or their conduct on the other. Specifically, they do not address how the fact that an actor’s conduct has caused an individual or social injury affects our judgment of their blameworthiness. Instead, as with most arguments in favour of the causal assumption, the general defence of the causal assumption tends to be implicit in larger arguments regarding criminal responsibility and modes of participation generally.

However, some theorists have turned their mind to the question of the causal assumption, with some defending its utility, and others disputing its legitimacy.

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93 Ibid.
94 Mansfield, supra note 78 at 439.
3.4.1 Defending the Causal Assumption

Although Husak argues against the causal assumption in his article *Omissions, Causation and Liability*, he does offer three common arguments often presented in favour it. The first argument highlights the objective element of causation as a limiting principle. Since the concept of causation is derived from the physical world phenomenon of cause and effect, the use of causation to limit the scope of behaviour for which one could be held criminally responsible allows a society to believe that judgements of responsibility and blame are not entirely normative.\(^95\) The second possible defence of the causal assumption is based on a practical consideration that suggests, “[society’s] idea of responsibility requires that it should be uniquely ascribed… [and] in many situations causation is the only means by which we can satisfy the uniqueness requirement.”\(^96\) The third defence of the causal assumption that Husak provides is utilitarian and pragmatic. It suggests that some general principle must limit the scope of events for which one may be held criminally responsible, and one should not be too quick to reject causation as a plausible candidate for this role until a more suitable replacement can be found.\(^97\)

Other theorists have attempted to find a more satisfying explanation for the causal assumption that goes beyond Husak’s practical justifications. For example, Markus Dubber of the University of Toronto presents another possible explanation for the causal assumption in his article *Criminalizing Complicity* in which he reviews the structure of the American Model Penal Code’s derivative liability provisions. According to Dubber, the drafters of the Model Penal Code

\(^95\) Husak, *supra* note 92 at 323.
\(^97\) Husak, *supra* note 92 at 324.
set out to define culpability and modes of liability based on a “treatmentist” perspective. From the
treatmentist perspective, the purpose of criminal law should be to identify, diagnose, and treat
individuals who display an abnormal amount of “dangerousness”.98 According to this theory, an
individual who has assisted in the commission of a public wrong should only be responsible for
the wrong insofar as and only insofar as their actions indicate the type of abnormal dangerousness
which requires intervention in the form of peno-correctional treatment. Therefore, for
treatmentists, the causal assumption is necessary in order to determine individual culpability,
measured in terms of dangerousness, in order to achieve the peno-correctional treatment
objective.99

Finally, in his article Criminal Responsibility for the Acts of Another, Francis Sayre of
Harvard University does not expressly defend the legitimacy of the causal assumption but rather
identifies its distinct presence in the development of doctrines of derivative liability in criminal
and private law, particularly in relation to the doctrine of respondeat superior. Through his
analysis, a possible argument supporting the causal assumption can be found, which may
represent the limits of a truly satisfying defence of causation as a basis for criminal responsibility.

As Sayre explains, beginning in the 14th century, courts began to limit the liability of a
master for their servant’s acts to instances where the master specifically commanded or
authorized the servant to commit a tortuous act or gave their consent either before or after its

99 Ibid at 988.
commission.\(^{100}\) This is consistent with the causal concept of direct causation of another’s acts through an act of authority. However, towards the end of the 17th century, this ground of liability was widened in private law, such that the requirement for consent or an express command could be implied from a master’s general authority.\(^{101}\) Yet, as Sayre points out, during the same period there was no similar development in criminal law.\(^{102}\)

According to Sayre, to the extent that respondeat superior bases an assessment of responsibility for a public wrong on the existence of authority without any intention to exercise that authority in a causal manner, the doctrine does not depend on causation. This is consistent with Hart and Honoré’s theory of causation, which states that an individual can only cause another to act if they do so intentionally. Sayer is suspicious of a mode of liability in private law that is not based on causation, stating that no one has yet been able to explain exactly why an individual should be liable for the unauthorized acts of their agent.\(^{103}\) However, he flatly rejects such a mode of liability in criminal law, and in doing so he offers his defence of the causal assumption, stating:

The fundamental objective of the criminal law is to protect social interests. Penal treatment is administered to those who injure or menace social interests, in part to reform those guilty of anti-social activity, in part to prevent them from continuing such activity, in part to deter others from similar activity. If the defendant by his own conduct has injured or menaced no social interests. Penal treatment is administered to those who injure or menace social interests, in part to reform those guilty of anti-social activity, in part to prevent them from continuing such activity, in part to deter others from similar activity. If the defendant by his own conduct has injured or menaced no social

\(^{100}\) Sayre, supra note 30 at 691.

\(^{101}\) Ibid. at 692. See e.g. Boson v Sandford (1690), 2 Salk 440 (UK).

\(^{102}\) Sayre, supra note 30 at 694. See e.g. Rex v Huggins (1730), 92 Eng Rep 518 (UK).

\(^{103}\) Sayre, supra note 30 at 718.
interests, if he has measured up to the social standards imposed by the criminal law, what need is there of any penal treatment?\textsuperscript{104}

In the absence of an answer to this question, Sayre concludes that, in the case of a public wrong, the essence of society’s deeply rooted notions of criminal justice insist that guilt be personal and individual.\textsuperscript{105} Therefore, according to Sayer, responsibility and blame must be based exclusively on causation.\textsuperscript{106}

From this, it might be said that five possible explanations for causation as a basis for criminal responsibility are available:

1) To impart a sense of security on society, by giving the impression that assessments of criminal responsibility are not entirely normative.

2) To provide a mechanism through which guilt can be made personal where, in some cases, other personalizing mechanisms may not apply.

3) To provide a ground on which criminal responsibility may be based, in the absence of a better alternative.

4) To address the objectives of peno-correctional treatment by providing a mechanism through which criminal responsibility is attached to dangerous anti-social behaviour for the purposes of treatment.

\textsuperscript{104} Sayre, \textit{supra} note 30 at 717-718.
\textsuperscript{105} \textit{Ibid} at 717.
\textsuperscript{106} \textit{Ibid} at 719.
5) To address criminal law’s objective to protect social interests and reform those guilty of anti-social behaviour by limiting responsibility to those who by their own conduct have injured or menaced social interests.

3.4.2 Arguments Against the Causal Assumption

Several theorists have presented a response to the causal assumption explaining why, for various reasons, they do not find any of the five possible defences adequate to justify a theory of criminal law that relies solely on causation for the purposes of attributing responsibility and blame. Some of these critiques take issue with the pragmatic justifications for causation, and argue that the justifications are misleading and not in fact pragmatic at all. For example, Husak responds to the first three defences, which he himself offers in his article *Omissions, Causation and Liability*, and discounts each one for technical reasons.

In relation to the argument that causation is required to impart an aspect of non-normative assessment in judgements of responsibility and blame, Husak points out that all questions of criminal responsibility are normative despite any societal tendencies to pretend otherwise. Even if a legal causal analysis could be physically and scientifically accurate, the decision to use such an analysis to establish the limits of criminal responsibility would still be normative. No non-normative fact binds a society to the understanding that it is unjust to hold an individual responsible for a public wrong that they have not caused.\(^{107}\) Husak also argues that, in relation to the second causal defence, even if it is accepted that guilt must in fact be personal (without any

\(^{107}\text{Husak, supra note 92 at 323.}\)
further justification) it does not follow that causation is the only (or even the best) mechanism through which guilt can be made personal. According to Husak, there is no barrier to holding individuals who fail to avert harm to society responsible for public wrong in way that is distinct from attributing responsibility for actively causing that harm.\(^{108}\) Finally, in response to the argument that some principle must limit liability and causation is a valid candidate for this, Husak questions the \textit{a priori} conviction that general principles to limit liability must exist. He further suggests that, even if this were the case, a better limiting principle might be the concept of control. Under this theory, agents would be responsible only for the states of affairs over which they have control as opposed to those they have caused.\(^{109}\)

While Husak’s technical rebuttal to the casual assumption defences may expose deficiencies within those arguments, he does not provide further justification that might explain why the causal assumption is itself flawed or why it is inadequate as a basis for ascribing criminal responsibility generally. For the theorists that do address this broader foundational issue, the position they adopt against the causal assumption is unified by a common underlying theme that relates to metaphysical libertarianism. Metaphysical libertarianism views human action as being immune from the deterministic mechanism of the universe, which accounts for all other phenomena.\(^{110}\) For metaphysical libertarians, humans are the unmoved-movers, meaning that human action is uncaused except by human intention. This leaves humans uniquely and

\(^{108}\) Husak, \textit{supra} note 92 at 324.

\(^{109}\) \textit{Ibid}.

\(^{110}\) Morse, \textit{supra} note 80 at 883.
completely responsible for their uncaused actions but ultimately not responsible for the results of those actions that are actually the product of the causal universe.\footnote{Morse, \textit{supra} note 80 at 883.}

This view of a libertarian human within a deterministic universe is reflected in Kadish’s view of causation in relation to the doctrine of complicity, in which he accepts the concept of responsibility based on direct causation but disputes that indirect causation is even theoretically possible. For Kadish, an accessory cannot cause a base offence to occur or cause the actions of the principal because, while individuals are total subjects under the laws of the natural world, they are total sovereigns over their own actions. Except in special circumstances, individuals possess volition through which they are free to choose their actions.\footnote{Kadish, \textit{supra} note 67 at 330.} According to Kadish, this concept of individuals as responsible and autonomous agents is central to the concept of blame; without this concept of responsibility, moral judgment loses its essential character.\footnote{Ibid at 331.} Therefore, to treat the acts of an individual as causing another’s actions is inconsistent with the premise on which individual responsibility is based.\footnote{Ibid at 333.}

Morse goes even further in his adherence to metaphysical libertarianism, arguing that human action is different from the rest of the causal universe not because it is uncaused, but because it is the product of reason.\footnote{Ibid at 886.} According to Morse, individuals should only be responsible for their action because only action is guided by reason and not because action is free of the

\footnotesize{\begin{itemize}
\item \footnotetext{\footnotesize{111} Morse, \textit{supra} note 80 at 883.}
\item \footnotetext{\footnotesize{112} Kadish, \textit{supra} note 67 at 330.}
\item \footnotetext{\footnotesize{113} Ibid at 331.}
\item \footnotetext{\footnotesize{114} Ibid at 333.}
\item \footnotetext{\footnotesize{115} Ibid at 886.}
\end{itemize}}
causal processes of the universe. Based on this premise, Morse’s suggests that criminal responsibility should attach to specific acts as opposed to specific results that are said to have been caused by those acts, similar to a theory of liability based on risk creation. According to this theory, an individual should be held responsible and blamed for having created a risk which itself is recognized as a public wrong, even if no actual harm to society materializes.

In his article, *Complicity Beyond Causality*, Lindsay Farmer of the University of Glasgow provides support for the position that actions and not causal effects would be a more appropriate basis for attributing criminal responsibility and blame. As Farmer explains, there are several forms of non-causal conduct that may sustain, intensify or legitimize a public wrong in legally relevant ways, and while this conduct could be recast in causal terms, it would be both artificial and unduly constraining to do so. For example, courts are increasingly being forced to consider whether evidence of national security offences obtained by foreign states using torture should be admissible in criminal proceedings. In these cases, the courts in question have not caused the harm of torture, and there are often justifiable grounds of public policy supporting admission of the evidence. However, Farmer argues that most citizens would perceive admitting the evidence to be an act of complicity in the wrongdoing, which would result in the court or national government sharing in some sort of collective responsibility for torture. This perception is based on a theory of ratification, which suggests that to admit the evidence would be to legitimate the

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117 Hart, *supra* note 68 at 256. See also Parlsgraf v Long Island R Co (1928), 248 NY 339 (USA).
119 *Ibid* at 154.
use of torture and possibly contribute to the future use of torture. The physical harm suffered by the individual victim would also be compounded by the failure of the courts to exclude the evidence. For Farmer, these are various ways of making a “difference” in the world, of being complicit in existing wrongs or even acting wrongfully, in a way that has no causal link to the original wrong. 120

The suggestion that a theory of criminal responsibility based solely on causation may lead to unsatisfactory, artificial, or inconsistent results, and that responsibility should be based on actions and risk creation as opposed to causal effects, is further advanced by Christopher Kutz of the University of California, in his article Causeless Complicity. According to Kutz, it is the act that creates a prohibited risk which makes an individual responsible for a public wrong, regardless of whether or not that act of risk creation actually causes harm. 121 Similar to Morse who views the events that follow intentional human action to be beyond the control of the actor, Kutz states that whether social harm eventually materializes is essentially a matter of luck, simply a product of the causal universe, and the responsible individual should not be allowed to benefit from this luck if they have created a risk but no harm is caused. 122 As an example of this reasoning, Kutz points to a New Zealand case from 1987, Larkin v Police. 123

In Larkin v Police, Larkin was convicted of assisting in the robbery of a liquor store by acting as a lookout. However, his contribution to the robbery had demonstrably failed to meet its

120 Farmer, supra note 118 at 155.
121 Kutz, supra note 75 at 290.
122 Ibid at 303.
intended target, because: the principals were not aware of his participation; he arrived after the robbery had been completed; he fled the scene when another party alerted the principals to the arrival of the police; and he never issued a warning to the principals himself.\(^{124}\) According to Kutz, it was proper for the court to find Larkin responsible for the robbery despite the fact that his acts had no causal effect on the resulting public wrong, because:

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\ldots \text{what we require for responsibility… are acts of a certain type… we require [actors] to make differences to their worlds, creating through their actions worlds in which they exert agency, as opposed to one in which they reside passively. That difference is the basis of responsibility, and the object of responsibility is the target of the accomplice’s act.}^{125}\]

### 3.5 Whether to Consider a Non-Causal Requirement

Having reviewed the operation of a causal requirement as a means of attributing individual criminal responsibility, and having considered views that support this approach and views that suggest this approach is imperfect and not essential, it is submitted that there is theoretical room to consider alternatives. Considering alternatives may be particularly useful, especially in the context of international criminal law, if a causal requirement is generating irregularities or inconsistencies in the jurisprudence.

To clarify, theorists who disapprove of the causal assumption do not tend to disagree with causation’s general usefulness as a basis for attributing criminal responsibility, particularly in regards to direct causation. If an individual, by their own acts, directly and intentionally causes

\(^{124}\)Larkin was convicted as an accessory at the trial level; however, this conviction was overturned on appeal, where the Court of Appeal held that he was instead guilty as an accessory after the fact.

\(^{125}\)Kutz, supra note 75 at 299.
the death of another, in the absence of any clear intervening factors, few would object to attributing criminal responsibility, blame, and punishment to this person on the basis of causation. The essence of the complaint against the causal assumption is that it overlooks the fact that, even in the case of an intentional and directly causal act, the legal chain of causation is still essentially a fiction dependent on human interpretation and experience. The artificial nature of legal causation does not mean that it cannot or should not be used to ascribe personal guilt; however, it should be open to a society to rely on a different theory of criminal responsibility in cases where the theory of causation would have to be contorted in an unprincipled manner in order to arrive at a reasonable and fair result.

As described above, in the cases of Eichmann and Scales, a causal theory that would link Eichmann to the actual murder of millions of people, or Scales to the actual attempted overthrow of the Government of the United States would have to trace a causal chain through so many intervening acts, both natural and human, that the assessment of guilt may appear to lose its principled basis. Some of the intervening acts would have to be seen as having been caused by Eichmann and Scales’ intentional conduct, while other intervening acts would have to be viewed in some manner as external to the causal chain, lest the chain be broken. Such a differentiation would have to be dependent on a conclusory form of analysis that works backwards from the premise that the accused is responsible. Which is not to say that Eichmann and Scales were not responsible for public wrongs and did not deserve punishment. However, the legitimacy of their conviction may have been undermined when the courts, faced with a collective offence for which they were required to find individual responsibility, insisted on applying a causal theory of personal guilt as opposed to, for example, a theory based on action, control, or risk creation.
The problem of legitimacy in individual criminal responsibility that arises when theories of causation become artificially and arbitrarily contorted is a growing concern in international criminal law. The International Criminal Court and other tribunals that came before and after it have been continually pressed to find a fair and reasonable theory of personal guilt for individuals who have participated in collective offences. However, the causal link between an individual accused and the actual collective commission of a public wrong is often as obscure, or more obscure, than it was in *Eichmann* and *Scales*. As a result, the theories of liability that have come from these cases raise questions of fairness, impartiality, predictability, and legitimacy, in part because they all insist on relying on causation as the basis for responsibility, blame, and punishment. These theories will be examined in the next chapter, where Part III of the study will consider each theory as it has developed within the context of both the inherently collective nature of international criminal law, and traditional acceptance of a causal requirement. Based on the questionable results these theories have generated, it is suggested that a new basis for attributing individual criminal responsibility for international crimes committed by collective organizations, one that is not dependent on causal links to prohibited acts and results, should be considered.
Chapter 4

Individual Responsibility for International Crimes

4.1 Individual Criminal Responsibility and International Criminal Law

In this chapter, Part III of the study is presented. It reviews four approaches to personal guilt that have developed in international criminal law, including: (1) the organizations charge that was deployed at the International Military Tribunal in Nuremberg; (2) the Joint Criminal Enterprise doctrine that was developed by the International Criminal Tribunal for the former Yugoslavia; (3) the common purpose and (4) indirect co-perpetration doctrines that are currently in use at the International Criminal Court. Each of these theories is examined, and it is suggested that each was constructed in light of the guiding theory of causation (by being either overly accepting of it, or overly adverse to it without providing an alternative justification), which has resulted in critical defects in each theory, leaving no satisfactory approach.

4.2 Four Theories of Derivative Liability

While there have been numerous domestic and international permutations of theories of individual responsibility for public wrongs committed through the collective efforts of an organization, four variants in particular have emerged over the past 70 years as distinctive and influential doctrines in international criminal law.

The first is the theory of liability for organizations that took hold at the Nuremberg Tribunal. As noted previously, the egregious offences of World War Two placed a judicial challenge before the international community, which was exceedingly novel both in its scope and
complexity, particularly in relation to the roles and responsibility of individuals and collectives. For the first time since the development of the *Grotian* tradition of international law, the international community was forced to recognize that individuals were directly answerable for their conduct under international law and, more fundamentally, that “crimes against international law are committed by men, not by abstract entities”.\(^{126}\) However, this emphasis on the individual had to be reconciled, somehow, with the actual structure and nature of the crimes, which were committed in a systematic and organized fashion by vast criminal enterprises. Moreover, this reconciliation had to be governed by common and fundamental principles of criminal responsibility because the appearance of an unprincipled approach would risk rendering the entire exercise meaningless. The result was the creation of the criminal organizations doctrine, a theory that has been widely influential, but which has also been criticized for its breadth, imprecision, and ineffectiveness.

The second theory emerged 50 years later, in 1995, when the international community was again confronted with atrocities and crimes against international law of staggering proportions that occurred during the bloody dissolution of the former Yugoslavia. In the wake of the conflict, the ICTY was created to address questions of individual responsibility similar to those that had caused a problem in Nuremberg. Unlike the Nuremberg Tribunal, the ICTY did not need to struggle with the issue of how individuals might be the subject of international law. This question had been answered by the Nuremberg Tribunal and was addressed directly by the

ICTY’s statute, which was a United Nations Security Council Resolution that clearly placed individuals under the jurisdiction of the Court. However, similar to the Nuremberg Tribunal, the ICTY did have to reconcile individual criminal responsibility with the actual structure and nature of crimes that were committed in a systematic and organized fashion by vast criminal enterprises. Relying heavily on the jurisprudence from Nuremberg, the ICTY produced the Joint Criminal Enterprise doctrine. This doctrine has spread through the extensive body of case law that emerged from the ICTY, and was adopted by other international tribunals, such as the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and by national courts in countries such as Canada. Similar to the criminal organizations doctrine, the Joint Criminal Enterprise doctrine has been widely influential, but also highly criticized for its breadth and its seemingly unprincipled foundation.

The final two theories of individual criminal responsibility for offences committed by organizations are perhaps the most significant, not because they have been the most influential, but because they are the theories currently in use at the International Criminal Court: (1) common purpose, and (2) indirect co-perpetration. Unlike the Nuremberg Tribunal and the ICTY, the International Criminal Court was not created for the purpose of resolving complex issues of criminal liability arising from a particular conflict. However, within the framework of individual

127 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res 827, 1166, 1329, 1411, 1431, 1481, 1597, 1660, 1837, 1877, UNCOR, 2009 [ICTY Statute] at Article 1: “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia…” (emphasis added)
responsibility for international crimes, which was established through the jurisprudence of the previous international criminal tribunals and the Rome Statute,\(^\text{129}\) the Court is similarly required to find individual responsibility for inherently collective crimes. The Rome Statute provides a model of liability that includes attribution of individual responsibility for participation in a common criminal purpose. Although this approach is similar to both the criminal organizations doctrine and Joint Criminal Enterprise, to date the Court has primarily addressed personal guilt for collective conduct by leaning away from the organization-centric approach of the Nuremberg Tribunal and the ICTY, and has developed its own theory of indirect co-perpetration. Going forward, an individual accused of being responsible for an international crime will most likely have to contend with this theory of liability, which has already received a fair amount of criticism for its inventiveness.

Before reviewing these four theories in greater detail, it may be useful to first question the value of having a principled approach to individual criminal responsibility for international crimes. If prior to the trials at Nuremberg the international community was content to deal with international crimes through state interaction, and if causation in criminal law is a legal fiction that was the deliberate product of a societal choice regarding responsibility, why then is it essential to have a theory of individual criminal responsibility that goes beyond a simply stated

\(^{129}\) *Rome Statute of the International Criminal Court*, 18 December 1998, Can TS 2002 No 13, (Ratification 7 July 2000) at Article 1: “…It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern”. (emphasis added) [Rome Statute]
rule, even if such a rule amounts to guilt by association? Why must there be a deeper, more philosophical foundation for ascribing criminal responsibility?

This question was considered by the allied nations in the course of the Yalta conference in 1945 as they debated how to address the crimes of World War Two, and how to punish those responsible. Prior to the conference, Henry L Stimson the (then) American Secretary of War, Edward R Stettinius Jr the (then) Secretary of State, and Francis Biddle the (then) American Attorney General prepared a guide for President Roosevelt known as the “Yalta Memorandum”, which outlined the American position on this issue. In the memorandum, Stinson, Stettinius, and Biddle provided as satisfying an explanation as any to the question of why a principled approach:

After Germany’s unconditional surrender the United Nations could, if they elected, put to death the most notorious Nazi criminals, such as Hitler or Himmler, without trial or hearing. We do not favor this method. While it has the advantages of a sure and swift disposition, it would be violative of the most fundamental principles of justice, common to all the United Nations. This would encourage the Germans to turn these criminals into martyrs, and, in any event, only a few individuals could be reached in this way. We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.

130 Yalta Memorandum, supra note 7 at 3.
131 Ibid at 6. See also Nuremberg Judgement Vol II, supra note 30 at 101 (Prosecutor’s Address): “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.
4.3 Criminal Organizations

In the 1945 Yalta Memorandum, Stinson, Stettinius, and Biddle summarized the scope and dimensions of the “War Crimes Problem” that confronted the allied nations in considering how to manage the offences committed by Nazi Germany. As they explained:

The criminality of the German leaders… does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany… [that] goes back at least as far as 1933… It has been marked by mass murders, imprisonments, expulsions and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of “total” war, its prosecution with utter and ruthless disregard for the laws and customs of war.132

In recommending that those responsible for these atrocities be dealt with through a judicial process, they further explained why a strictly causation-based theory of liability would be problematic and practically not possible:

…the crimes to be punished have been committed upon such a large scale that the problem of identification, trial and punishment of their perpetrators presents a situation without parallel in the administration of criminal justice. In thousands of cases, it will be impossible to establish the offender’s identity or to connect him with the particular act charged. Witnesses will be dead, otherwise incapacitated and scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular offenses one of appalling dimensions. It is evident that only a negligible minority of the offenders will be reached by

must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.”

132 Yalta Memorandum, supra note 7 at 4.
attempting to try them on the basis of separate prosecutions for their individual offenses.\textsuperscript{133}

This resulted in a clear conflict between the recognition that the atrocities demanded justice, and the reality that criminal justice, as it then stood, was not particularly well equipped to address such wide reaching and inherently collective acts. As mentioned before, this created a dilemma: should the vast majority of wrongdoers be permitted to escape without any punishment or moral stigma, contrary to the principle of individual criminal accountability? Or should a concept of collective responsibility be adopted for the purpose of facilitating prosecution, in clear derogation of traditional standards of personal guilt based on causation?\textsuperscript{134} The answer to this was that impunity was not an option.\textsuperscript{135} Therefore, a procedure was needed that provided the maximum possible concern for individual justice that was compatible with the maintenance of public order.\textsuperscript{136} The procedure envisioned to achieve this effect was proposed by the American delegation and, although it was incorporated into the \textit{London Charter},\textsuperscript{137} it received unexpected treatment from the Nuremberg Tribunal.

According to the original proposal, the trial of major war criminals and those complicit in war crimes was to occur in two stages:

\begin{itemize}
\item \textsuperscript{133} Yalta Memorandum, \textit{supra} note 7 at 5.
\item \textsuperscript{134} Arens, \textit{supra} note 8 at 331.
\item \textsuperscript{135} \textit{Ibid} at 331-332: “While the effects of a widened prosecution appeared unforeseeable, it was clear that its abandonment would entail continued circulation within Germany of thousands of physical killers with explicit assurances of immunity…. [creating] unparalleled tension and a degree of European indignation capable of generating a St. Bartholomew’s Night Massacre…”
\item \textsuperscript{136} \textit{Ibid} at 332.
\item \textsuperscript{137} \textit{Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945}, 58 Stat 1544, EAS No 472, 82 UNTS 280. [\textit{London Charter}]  
\end{itemize}
1) The Nazi organizations themselves, represented by their highest ranking officials, would be tried before an international tribunal charged with joint participation in a broad criminal enterprise. The tribunal would make findings of fact to establish: the nature and purpose of the criminal enterprises; the identity of groups that were complicit in the enterprises; and the acts committed in execution of the criminal purpose.

2) Individual members of organizations found to be criminal would then be tried before occupation courts charged with complicity in atrocities through their membership. Based on the international tribunal’s findings regarding the criminal nature of the guilty organizations, in subsequent trials for individuals the only necessary proof of individual guilt would be membership in one of those organizations.138

Although this proposal appeared to suggest that the majority of wrongdoers would be dealt with in a summary fashion, in a series of assembly-line convictions once the guilt of their amorphous and sprawling organization had been decided in a trial that they had not had the opportunity to participate in, the American delegation insisted that this approach was principled. They claimed that holding individual members responsible for the public wrongs planned and committed by their organization was a theory of criminal responsibility “firmly founded upon the rule of liability, common to all penal systems… that those who participate in the formulation and

138 Yalta Memorandum, supra note 7 at 6-7.
execution of a criminal plan involving multiple crimes are jointly liable for each of the offences committed and jointly responsible for the acts of each other.”

The American proposal encountered some resistance, partially because it drew its doctrinal strength largely from an Anglo-American common law theory of conspiracy that was foreign to continental legal systems. It further irritated the Russians who could not comprehend how an organization as opposed to a natural person might be tried for criminality in the first place, and who could also not accept that, following the Moscow Declaration, any legal question could remain regarding the criminal nature of the Nazi organizations. More fundamentally, it raised concerns with Herbert Wechsler, the American Assistant Attorney General, who feared that the expansive nature of the organizational charges would lack legitimacy if too many people were caught in its wide net of criminal responsibility. However, regardless of these concerns six Nazi organizations were indicted before the Nuremberg Tribunal, charged with being criminal enterprises, including: the Reich Cabinet; the Leadership Corps of

139 Yalta Memorandum, supra note 7 at 6-7.
142 Declaration of the Four Nations on General Security, Third Moscow Conference, 30 October 1943. [Moscow Declaration] “…members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be … judged and punished according to the laws of these liberated countries and of free governments which will be erected therein.”
the Nazi Party; Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (SS), including Der Sicherheitsdienst des Reichsführer (SD); the Gestapo; the Die Sturmabteilungen der NSDAP (SA); and the General Staff and High Command of the German Armed Forces.\textsuperscript{145}

The Tribunal itself displayed a significant amount of discomfort with the organizational charges. Although the theory of liability that underlay the charges was based on the common law theory of conspiracy, it differed from the traditional doctrine in that individuals would not necessarily be held responsible for being a party to a conspiracy to commit crimes, but rather for their voluntary membership in an organization that actually committed crimes.\textsuperscript{146} The Tribunal received this approach with some hesitation, as it noted that: “a member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death… This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.”\textsuperscript{147} In an attempt to provide these safeguards, the Tribunal interpreted the charges restrictively by requiring clear evidence of a distinctively criminal purpose and applying a clear structural test to the organizations. According to the Tribunal’s theory of organizational liability, a group could only be criminal if:

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\textsuperscript{145} Nuremberg Judgement Vol I, supra note 126 at 227.
\textsuperscript{146} Bayley, supra note 38 at 49.
\textsuperscript{147} Nuremberg Judgement Vol I, supra note 126 at 256.
1) It was bound together and organized for a common purpose such that its membership would have understood that they were participating in a collective purpose;

2) The common purpose was connected to a crime under the *London Charter* and this purpose was pervasively held among the membership;

3) Membership in the group was voluntary, such that individuals who were conscripted could not be held liable for the actions of the group unless they were personally implicated in a specific offence;

4) Members had personal knowledge of the criminal purpose of the group or of its specific criminal acts; and,\textsuperscript{148}

5) The group was of a sufficient size so as to make it impractical to try each member individually.\textsuperscript{149}

This analysis had the unenviable effect of pleasing nobody. For those that had been in favour of the two-staged approach originally proposed by the American delegation, the Tribunal’s structural test and knowledge requirement had the effect of reversing the onus for all subsequent trials, negating its utility. Under the proposal, once an organization had been found to be criminal, the prosecution in individual trials would only have to establish membership in order to make out

\textsuperscript{148} *Nuremberg Judgement Vol I, supra* note 126 at 256.

\textsuperscript{149} *Ibid* at 227.
a prima facie finding of guilt. The only defence available to the individual would be to establish that their membership was coerced. However, with the Tribunal’s addition of the knowledge requirement, the prosecution would have to establish not only membership but also personal knowledge of either the criminal purpose of the organization or its criminal acts. As the Tribunal stated, “membership alone is not enough to come within the scope of these declarations [of criminality].”

For those who had opposed the original two-staged approach fearing it would cast too wide a net of criminality, the safeguards developed by the Tribunal did not go far enough to prevent injustice. The Tribunal’s interpretation of the doctrine had created a low fault requirement of personal knowledge, and an even lower conduct requirement of mere voluntary membership. The intention had been to offset these low individual requirements by setting the organizational requirements fairly high; however, despite this, the criminal organization doctrine still proved to be far reaching and resulted in the conviction of individuals who had done nothing more than maintain membership in one of the convicted Nazi organizations while being aware of its criminal purpose. For example, in The Justice Case one of the accused was acquitted of three charges for personal participation in specific crimes, but was still convicted for the apparent crime of membership. Josef Altstoetter was found not guilty of: participation in a common plan or conspiracy to commit war crimes and crimes against humanity; commission of war crimes

150 Nuremberg Judgement Vol I, supra note 126 at 256.
151 Bayley, supra note 38 at 50.
through the abuse of the judicial and penal process, resulting in mass murder, torture, plunder of private property; and commission of crimes against humanity, including utilizing slave labour. However, based on the Tribunal’s treatment of the organizational charges, he was convicted and sentenced to five years in prison for membership in a criminal organization based on the fact that he had provided legal advice to the SS.¹⁵³ In cases such as this, where the accused could not be linked to the commission of any specific offence, the doctrine still resembled a form of guilt by association.

However, the most unsatisfying aspect of the Tribunal’s treatment of the organizational charges may be how little consideration this theory of criminal responsibility actually received. The entire analysis of the structural test and knowledge requirement occurred within one paragraph, set deep inside a 191-page judgement. Justice Robert Jackson, the United States Prosecutor during the trials at Nuremberg, reflected on this point with frustration in his final report to the International Conference on Military Trials, stating that, “while the legal concept of conspiracy was accepted by the Tribunal, it was given a very limited construction in the judgment.”¹⁵⁴

4.4 Joint Criminal Enterprise

Forty-eight years after the Nuremberg Tribunal released its judgement, the question of individual criminal responsibility for participation in inherently collective international crimes gained a renewed prominence in the former Yugoslavia. The bloody dissolution of Yugoslavia in the early 1990’s was characterized by widespread atrocities, reminiscent of World War Two, including wilful killings, ethnic cleansing, mass killings, torture, rape, the pillaging and destruction of civilian property, destruction of cultural and religious property, arbitrary arrests, persecutions, extermination, deportation, and genocide.  

On February 22, 1993, the United Nations Security Council issued a resolution expressing:

…its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia… [and deciding] that an international tribunal … be established for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.”

In furtherance of this decision, the Council requested the Secretary General submit a report that was to include options for the creation of an ad hoc international tribunal.

In May 1993, the Secretary General returned to the Council with a proposal that provided suggestions in relation to: the legal basis for the establishment of a tribunal; the recommended

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157 Ibid at para 2.
organization; pre-trial, trial and post-trial procedures; cooperation and judicial assistance; and the competence of the tribunal, including personal jurisdiction and individual criminal responsibility. However, surprisingly, the report limited its consideration of the concerns regarding collective crimes and personal guilt that had been highlighted in the Yalta Memorandum to only three sentences:

An important element in relation to the competence ratione personae (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations. The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.

Flowing from this observation was the Secretary-General’s recommendation (which was adopted) that the statute for the ICTY should include the following provision, which defines individual criminal responsibility through a model of criminal participation:

A person who planned, instigated, ordered, committed, or otherwise aided or abetted in the planning, preparation or execution of a crime referred to in… the present Statute, shall be individually criminally responsible for the crime.

This provision became Article 7(1) of the ICTY Statute.

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158 Report of the Secretary General, supra note 155.
159 Ibid at 14 (original emphasis).
160 Ibid at 15.
Contrary to the approach advocated by the United States during the creation of the Nuremberg Tribunal, it does not appear that the Security Council was preoccupied with the question of how to ground individual responsibility for exceedingly complex and inherently collective crimes. Whereas the post-World War Two American delegation had suggested, and the allied nations eventually accepted, that basing personal guilt on a causal theory of liability was not practical by any metric and would not produce a fair result, the Security Council appeared satisfied that causation-based personal liability was not problematic. The Council appeared more concerned with neutralizing certain defences to causal liability, such as the defence of superior orders and head of state immunity.  

The model of participation recommended by the Secretary-General, and adopted by the Security Council contained five kinds of liability: two principal (commission and planning) and three accessorial (instigation, ordering, aiding and abetting). Both forms of principal participation require intention or wilful blindness and a causal contribution to a specific offence. Similarly, all three forms of accessorial participation require intention, wilful blindness, or knowledge, and a causal contribution. The model does not contain a form of derivative liability based on collective participation, such as the common purpose doctrine or the Anglo-American conspiracy doctrine.

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161 See e.g. Report of the Secretary-General, supra note 155 at 14-15.
163 Danner & Martinez, supra note 144 at 103.
It did not appear to be a concern to the Security Council that most crimes in the former Yugoslavia would have been committed by large groups that consisted of disparate members making individual and collective contributions, separated geographically, temporally, and causally, such that limiting individual criminal responsibility to primarily intentional casual contributions would likely result in few convictions. The reason for this lack of concern may be found in the Security Council meeting minutes on the day the Secretary-General’s proposal was considered. The transcript indicates that while the meeting participants mentioned “individual responsibility” five times during their discussion, the references appear within a context that suggest that the primary focus of the ICTY was intended to be major leaders. For example, in emphasizing the need to hold leaders individually accountable, the American delegate, (then) Secretary of State Madeline Albright, stated during the meeting: “The men and women behind these crimes are individually responsible for the crimes of those they purport to control; the fact that their power is often self-proclaimed does not lessen their culpability.” Whereas the American delegation in 1945 had been concerned that a causation-based approach to personal guilt would only allow for the prosecution of the Hitler’s and the Himmler’s, and would grant effective immunity to the thousands of physical murderers roaming free in Europe, the American

164 Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, UNSCOR, 1993, UN Doc S/PV.3217 [Security Council Meeting].
165 Ibid at 13. It should be noted that while the general tone of the speeches of the delegations appear to focus on prosecution of major leaders for causal-based offences, the American delegation does make one reference to collective offences at page 16, stating: “With respect to paragraph 1 of Article 7, it is our understanding that individual liability arises in the case of a conspiracy to commit a crime referred to in Articles 2 through 5”. As the ICTY Statute clearly does not include liability for conspiracy as a mode of participation (although it is included as an inchoate offence for genocide), it does not appear that this inconsistent observation was ever resolved.
delegation in 1993 appeared content to restrict prosecutions to the Milošević’s and the Karadžić’s.

Despite the seemingly different intention of the Security Council to focus on causal contributions of major leaders, as opposed to the allies’ intention to focus on the derivative and collective contribution of thousands of physical perpetrators, the ICTY responded to the model of criminal participation it had been provided similar to how the Nuremberg Tribunal had responded to the mandate it had been given: the Tribunal reinterpreted what it did not approve of. However, whereas the concern of the Nuremberg Tribunal had been that the organization charges were too far reaching, the ICTY was concerned that Article 7(1) was too limited and therefore required a “liberal interpretation”. The question of this “liberal interpretation” arose in the first case to come before the ICTY, *Prosecutor v Duško Tadić*.166

Duško Tadić was first indicted in 1995, charged with 34 individual counts of seizure, murder, maltreatment and other offences committed in 1992 against Bosniaks and Croats in opština Prijedor, an area in the northern part of the Republika Srpska in Bosnia and Herzegovina.167 The ICTY Trial Chamber found Tadić guilty on 11 counts of persecution and beatings, but acquitted him of 20 counts including for five murders that had been committed in the village of Jaskici by a group of armed Serbs that included Tadić. Five of the villagers, who had been alive when the armed group entered Jaskici, were found shot to death after the group’s

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166 *Prosecutor v Duško Tadić*, IT-94-1-A, Appeal Judgement (15 July 1999) [Tadić].
departure.\(^\text{168}\) While the Trial Chamber had accepted that Tadić was clearly a member of the group that had entered the village, they concluded “[the Chamber] cannot be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them... Nothing is known as to who shot them or in what circumstances.”\(^\text{169}\) The Prosecutor appealed the decision, alleging that “if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are the natural and probable consequences of that common purpose.”\(^\text{170}\)

The ICTY Appeal Chamber was sympathetic to the Prosecutor’s arguments, and agreed that the five murders were a predictable consequence of a central policy and that Tadić’s actions during the attack on Jaskici had directly and substantially assisted in that policy such that, regardless of which member of the Serb forces had actually killed the five victims, Tadić should be held accountable under Article 7(1) of the ICTY Statute. The problem was that Article 7(1) plainly did not attribute individual criminal responsibility for an apparent claim of participation in a Joint Criminal Enterprise, a common design or plan, or expanded forms of conspiracy.

Since there was not enough evidence to support a conviction under any of the modes of participation expressly provided for in Article 7(1), the Appeal Chamber turned to the “object and purpose” of the ICTY Statute, as set out in Article 1,\(^\text{171}\) to justify a more expansive reading of

\(^{168}\) Prosecutor v Duško Tadić, IT-94-1-T, Trial Opinion and Judgement (7 May 1997) at para 348.
\(^{169}\) Ibid at para 373.
\(^{170}\) Ibid at para 175.
\(^{171}\) Article 1 states: “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”
Article 7(1). The Chamber reasoned that a narrow reading of Article 7(1) would allow too many perpetrators to escape the reach of international criminal justice and that this would run contrary to the intentions of the Security Council in creating the ICTY. Based on this, they believed that the only reasonable interpretation of Article 7 must include a sufficiently liberal common purpose doctrine, similar to the organizations charges at Nuremberg, which would allow for the prosecution of offenders that might otherwise be acquitted. As Ohlin explains in his article *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, “the structure of the argument suggests that we can work backwards from the proposition that the defendants must be punished. Since the defendants must be punished, the statute must be read in such a way that it will yield the desired result.”

Based on an expansive reading of Article 7(1), the Appeal Chamber was not only able to attribute responsibility for the five murders to Tadić, but they were also able to invent a broad form of individual criminal responsibility derived from a new theory of group liability known as Joint Criminal Enterprise.

In order to convict an accused of an offence committed by a Joint Criminal Enterprise, based on the accused’s participation in the Enterprise, the ICTY constructed an elaborate and imprecise test. In addition to establishing the *actus reus* required for the specific offence, if the

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172 *Tadić*, supra note 166 at para 189.
prosecution was pursuing a charge of participation in a Joint Criminal Enterprise, the following conduct elements of the Enterprise also had to be established:

1) There had be a “plurality of persons”, which could include the spontaneous formation of a mob;⁷⁴

2) There had to be a common plan, which could materialise extemporaneously and could be inferred from the fact that a plurality of persons acted in unison to put a Joint Criminal Enterprise into effect;⁷⁵ and,

3) The accused had to have actually participated in the common plan of the plurality of persons.⁷⁶

Each of the conduct requirements presents procedural problems that create the potential for (and in many cases have in fact created) an overbroad theory of liability. For example, contrary to the criminal organizations charges, which required a group to be organized for a common purpose, such that its volunteer membership would have understood that they were participating in a common purpose, the Joint Criminal Enterprise’s “plurality of persons” requirement can apparently be satisfied by the random association of a mob.⁷⁷ Similarly, the “common purpose” of the “plurality of persons” may be imposed judicially ex post facto with no

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⁷⁴ Tadić, supra note 166 at para 210.
⁷⁵ Ibid at para 227.
⁷⁶ Ibid.
⁷⁷ Bayley, supra note 38 at 52.
requirements for specificity.\textsuperscript{178} Finally, while the requirements still seem to suggest a causal contribution from the accused is necessary, the ICTY Appeal Chamber later clarified that, in general, there is no specific legal requirement that the accused make a substantial (read causal) contribution to the furtherance of the common purpose.\textsuperscript{179}

In addition to the three conduct requirements, the Joint Criminal Enterprise theory of liability also provides three possible fault requirements:

1) Shared intention with the relevant physical perpetrator of the base offence;

2) Knowledge of the nature of a criminal “system”, and intention to further its common criminal purpose which includes the commission of the base offence; or,

3) Intention to take part in a Joint Criminal Enterprise, and the foreseeability of the possible commission by other members of the group of a base offence, which does not constitute the object of the common criminal purpose.\textsuperscript{180}

While the criminal organization doctrine had placed a high threshold on the conduct requirement and a lower threshold on the fault requirement, the first two variants of the Joint Criminal Enterprise doctrine take a reverse approach by compensating for a relatively weak concept of organization by requiring full intent to either affect a criminal result or further a

\textsuperscript{178} Bayley, supra note 38 at 52.
\textsuperscript{179} Prosecutor v Kvočka et al, IT-98-30/1-A, Appeal Judgement (28 February 2005) at para 97.
\textsuperscript{180} Tadić, supra note 166 at para 220.
system of criminal behaviour. Conversely, the third variant has both a low conduct requirement and a low fault requirement. Under this theory, if it can be established that the accused intended to take part in the Joint Criminal Enterprise, all that remains for the prosecution to demonstrate is a level of fault similar to recklessness or even negligence. Based on this theory, an accused can be vicariously liable for crimes they did not commit, did not intend, did not have knowledge of, but that were “foreseeable” as part of an overall common criminal purpose.

As might be expected, the third variant of the Joint Criminal Enterprise doctrine is the most controversial theory of group liability developed by the ICTY. Whereas the Nuremberg Tribunal reacted strongly to what appeared to be a distinct drafters’ intent to create a theory of individual criminal responsibility that is not anchored in causation, the ICTY appears to have reacted strongly to a distinct drafters’ intent to restrict individual criminal responsibility to causal-based modes of criminal participation. The result is that while the criminal organizations theory had causal elements that created structural barriers that negated its prosecutorial utility read into its doctrine, the concept of Joint Criminal Enterprise removed the causal restrictions from Article 7(1) leaving no obvious alternative to circumscribe personal guilt in collective crimes. It is from within this context that the International Criminal Court was presented with a choice between one of these two extreme approaches to individual criminal responsibility for international crimes, or choosing the task of finding a new path.

4.5 Common Purpose

Unlike the Nuremberg Tribunal and the ICTY, the International Criminal Court was not created to address international crimes related to a specific conflict. The idea of creating a
permanent International Criminal Court had been circulating, in a modern form, since 1936 when the League of Nations adopted a treaty that never came into force, which contemplated the establishment of an International Criminal Court.\textsuperscript{181} After World War Two, and in light of the principles that had emerged from the trials at Nuremberg, the International Law Commission began drafting the \textit{Code of Crimes Against the Peace and Security of Mankind}. The \textit{Code} was meant to provide a definition of crimes, over which a permanent International Criminal Court ought to have jurisdiction, along with general principles that would guide the development and application of international criminal law.\textsuperscript{182} Concurrent with the work of the International Law Commission, in 1952 the General Assembly established a committee charged with drafting a statute for an International Criminal Court. However, the work of the committee stalled in 1954 over difficulties relating the definition of the crime of aggression, and did not begin again in a meaningful way until 1989 when the International Law Commission was handed the task after Trinidad and Tobago raised concerns over illicit narcotics trade and transnational crime in the Caribbean.\textsuperscript{183}

In 1995, the same year Tadić was first indicted by the ICTY, the United Nations General Assembly issued a resolution establishing a preparatory committee for the establishment of an International Criminal Court to discuss the major substantive and administrative issues arising out

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\begin{itemize}
  \item \textsuperscript{182} William A Schabas, \textit{An Introduction to the International Criminal Court}, 4\textsuperscript{th} ed (UK: Cambridge University Press, 2011) at 9.
  \item \textsuperscript{183} \textit{Ibid} at 9.
\end{itemize}
of a draft statute that had been prepared by the International Law Commission in 1994. The preparatory committee was tasked with preparing a widely acceptable consolidated text of a treaty for an International Criminal Court that was finalized by a conference of plenipotentiaries in Rome in 1998. Following the ratification of the Rome Statute by 60 states, the International Criminal Court came into being in 2002.

Similar to the ICTY Statute, the Rome Statute provides the International Criminal Court with explicit jurisdiction over individuals, and clearly recognizes the fundamental principle of personal guilt for collective international crimes that was accepted by the Nuremberg Tribunal. The Rome Statute also defines individual criminal responsibility in Article 25(3) through a detailed model of criminal participation, which states:

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;

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186 Rome Statute, supra note 129 at Article 1: “…It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern…”
187 Ibid at Article 25(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.”
(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) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. 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 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;…

The model has a structure and a history that is distinct from both the ICTY Statute and the London Charter. It is similar to the London Charter in that it contains both principal and accessorial modes of participation that suggest a theory of individual criminal responsibility based on direct causation (such as commission, ordering, soliciting, aiding, or abetting), but also includes derivative forms of individual criminal responsibility based on collective conduct. Inclusion of this broader form of responsibility appears consistent with the original purpose of the Court, which was not to address the crimes of any particular conflict but to be a resource that is equipped to respond flexibly to varying situations relating to the commission of international crimes. However, at the same time, the Rome Statute also binds the Office of the Prosecutor with a gravity requirement that restricts the Prosecutor’s ability to commence proceedings against

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188 Rome Statute, supra note 129 at Article 25(3).
anyone other than those most responsible for the most serious crimes.\textsuperscript{189} Therefore, it may not have been predictable that the drafters of the \textit{Rome Statute} would prefer the flexible model used in the \textit{London Charter}, as opposed to the causation and commission-based model of the \textit{ICTY Statute} that was originally concerned with the conduct of major leaders.

Also similar to the \textit{London Charter}, and dissimilar to the \textit{ICTY Statute}, the drafters of the \textit{Rome Statute} appear to have actively turned their minds to the appropriateness of including a form of derivative liability based on collective conduct that is “firmly founded upon the rule of liability, common to all penal systems… that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offences committed and jointly responsible for the acts of each other.”\textsuperscript{190} Sensitive to the issues this suggestion had raised during the discussions surrounding the drafting of the \textit{London Charter}, the parties to the \textit{Rome Statute} adopted a definition for liability based on collective conduct that was previously agreed to in the \textit{International Convention for the Suppression of Terrorist Bombings}\textsuperscript{191} in an attempt to avoid divisive debates.\textsuperscript{192} The result was that Article 2(3)(c) of the \textit{Terrorism Convention} was transplanted into the \textit{Rome Statute} as Article 25(3)(d). While this approach may have provided a diplomatic solution to a controversial issue, the provision was unfortunately

\begin{itemize}
  \item \textsuperscript{189} \textit{Rome Statute}, supra note 129 at Article 53.
  \item \textsuperscript{190} Yalta Memorandum, supra note 7 at 6-7.
  \item \textsuperscript{191} \textit{International Convention for the Suppression of Terrorist Bombings}, 12 January 1998, Can TS 2002 No 8. \textit{[Terrorism Convention]}
\end{itemize}
replicated without the critical context provided by the Terrorism Convention necessary for the interpretation of this theory of criminal responsibility.\textsuperscript{193}

Without the benefit of the missing context, or more precise wording, several questions remain regarding the application of Article 25(3)(d). For example, it is unclear whether an individual charged pursuant to Article 25(3)(d) must have made a substantial contribution or even a causal contribution to a particular offence based on the ambiguous wording of “in any other way contributes”.\textsuperscript{194} Similarly, the intentional fault requirement is not entirely clear. From a common law perspective, intent is a distinct level of fault that may be inferred from personal knowledge or wilful blindness, but cannot be satisfied by recklessness or negligence. However, the civil law tradition contains an intentional fault standard, \textit{dolus} (intent), which broadly includes the common law concept of recklessness (\textit{dolus eventualis}).\textsuperscript{195} The definition of intent under the Rome Statute is not precise enough to preclude the common law or civil law approach; therefore, interpretation of the intent requirement may or may not include recklessness.

A central critique of Article 25(3)(d) is not that it expresses a disingenuous causal foundation, but more that it appears to have wandered from causal restraints without providing an

\textsuperscript{194} The required level of contribution is made less clear by the fact that Article 25(3)(c) provides for individual criminal responsibility for aiding and abetting, which typically requires the accused’s act to form a “substantial” contribution to the principal’s crime, based on the interpretation provided by the ICTY in \textit{Prosecutor v Furundžija}, IT-95-17/1-T, Trial Judgement (10 December 1998). To avoid redundancy, Article 25(3)(d)’s requirement of “in any other way contributes” likely cannot duplicate liability for “substantial” contributions, leaving only liability for non-substantial contributions. See e.g. \textit{Prosecutor v Ruto et al, ICC-01/09-01/11}, Pre-Trial Chamber II, Decision on Confirmation of the Charges (23 January 2012) at para 354.
adequate substitute to limit individual responsibility. For example, based on the broad wording of the provision, and the lack of clarity surrounding the civil or common law interpretation of “intent”, an individual may be held criminally responsible based on having recklessly contributed, in an less than substantial way, to a common criminal purpose, so long as they had knowledge of, but did not necessarily support, that purpose.196

To date, the International Criminal Court has overcome this lack of clarity in Article 25(3)(d) largely by avoiding its use. Of the 25 individuals who have been indicted before the Court, only three have been charged under Article 25(3)(d), while the majority have been charged under Article 25(3)(a). Of the 17 individuals charged under Article 25(3)(a), 10 were charged with a new theory of individual criminal responsibility based on collective conduct: indirect co-perpetration.197

4.6 Indirect Co-Perpetration

The development of the theory of indirect co-perpetration may in part be due to a normative choice by the Office of the Prosecutor and the Court to focus prosecutorial efforts on major leaders, similar to the original intent expressed by the drafters of the ICTY Statute. The proliferation of charges under the rubric of “commits” suggests that the Prosecutor and the Court are less concerned with the thousands of physical perpetrators who may have participated in a given atrocity, and are more concerned with those most responsible—i.e., the Kony’s and Al-

196 See e.g. Ohlin, supra note 173 at 79.
Bashir’s. As opposed to constructing complex theories of causal links between low level perpetrators who are participating in a common group structure and contributing to the furtherance of a common criminal purpose, the Court has focused on trying to identify those who have “control” over the commission of a crime in an attempt to link senior leadership to multiplicities of base offences, which collectively constitute an international crime.\(^{198}\) This concept of control became attached to an almost dogmatic devotion to causation, which spurred the development of indirect co-perpetration in the Pre-Trial Chamber’s 2008 consideration of the charges laid in *Prosecutor v Katanga and Chui*.\(^{199}\)

In February 2003, Germain Katanga and Mathieu Ngudjolo Chui, leaders of military groups in the Ituri district in the Oriental Province of the Democratic Republic of the Congo, conspired to attack and destroy the village of Bogoro. They ordered their respective militias to carry out the attack jointly, and, during the course of the operation, members of the groups killed most of the civilian population in Bogoro and committed other atrocities that amounted to war crimes and crimes against humanity. However, neither Katanga nor Chui were present for the attack.\(^{200}\)

Several theories of liability could be (and in fact were) applied in an attempt to attribute criminal responsibility to Katanga and Chui for the atrocities in Bogoro. For example, it could have been alleged that they were responsible for the crimes based on their having ordered the

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\(^{198}\) Ohlin, *supra* note 31 at 8.

\(^{199}\) *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Confirmation of Charges (30 September 2008). [Katanga and Chui]

\(^{200}\) *Ibid* at para 1-12.
attack, pursuant to Article 25(3)(b), or by virtue of command responsibility, pursuant to Article 28(a). However, neither of these charges appear to reflect the level of responsibility and blame that seems intuitively to be deserved by Katanga and Chui. The only allegation that ever seems to adequately satisfy a societal need for stigma and blame following a tragedy is principal commission. In order to fulfill a normative sense of fairness and justice, it must be that Katanga and Chui personally “committed” the atrocities at Bogoro, as principals not accessories. The question is: by what theory can this be established when Katanga and Chui were not even present at the attack?

Prior to Katanga and Chui, the Pre-Trial Chamber had demonstrated that it was open to interpreting principal responsibility as applying to individuals beyond those who physically commit an offence, stating: “principals… are not limited to those who physically carry out the objective elements of the offence but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.”\textsuperscript{201} According to the Court, “[having] control over the will of those who carry out the objective elements of the offence”\textsuperscript{202} is the defining criterion that distinguishes principals from accessories. This notion of control was taken one step further in Katanga and Chui, where the Pre-Trial Chamber held that “the [principal] perpetrator behind the perpetrator

\textsuperscript{201} Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges (29 January 2007) at para 330. [Lubanga]

\textsuperscript{202} Katanga and Chui, supra note 199 at para 488.
commits the crime through another by means of ‘control over an organization’.” 203 The Court arrived at this conclusion, based on the German concept of Organisationsherrschaft.

The German criminal law scholar, Claus Roxin, first articulated this theory of principal perpetration by means of an organization in the 1960’s. 204 The development of the theory was set against a German legal context that distinguished between principals and accessories primarily based on their subjective state of mind; if a person had the mind of a perpetrator, they would be treated as a perpetrator regardless of the causal significance of their contribution. 205 This understanding gave rise to the concept of, as the Pre-Trial Chamber noted in Katanga and Chui, the “perpetrator behind the perpetrator”—i.e., a criminally responsible individual committing a crime through another criminally responsible individual, resulting in two principals based on both perpetrators possessing principal intent. 206

Roxin was critical of this subjective approach, and advocated for an objective approach that was based on a concept of “domination over the act”. This concept of domination is similar to the focus on “control” that was demonstrated by the Pre-Trial Chamber. According to Roxin, a principal perpetrator is one who “dominates” the commission of an offence by exercising a power to determine whether or not the relevant acts are done. This act of domination can occur through direct physical perpetration, through joint conduct (co-perpetration), or by controlling the acts of

203 Katanga and Chui, supra note 199 at para 498.
204 Thomas Weigend, “Perpetration through an Organization: The Unexpected Career of a German Legal Concept” (2011) 9 JICJ 91 at 94.
205 Ibid at 95.
206 Ibid.
another individual, effectively rendering them a tool of the principal.\textsuperscript{207} This later former of perpetration is also known as “indirect perpetration”.

Based on Roxin’s theory of domination, indirect perpetration could only operate if the actual physical perpetrator lacked independent volition and was truly acting as an instrument of the principal, possibly as a result of duress or fraud. This requirement is known as the “autonomy principle”, which states that: indirect perpetration is not possible if the individual who carries out the offence is an autonomous, criminally responsible actor.\textsuperscript{208} This is consistent with causal theory, which suggests that a fully autonomous actor should sever the causal link between a potential perpetrator and the commission of an offence. However, Roxin reasoned that there must be an exception to this principle where an individual is in command of a hierarchically structured criminal organization whose members carry out orders without question, regardless of the fact that the members may also demonstrate a level of control over the crimes they commit.\textsuperscript{209} This theory of indirect perpetration through an organization is the theory of Organisationsherrschaft, which was adopted by the Pre-Trial Chamber in \textit{Katanga and Chui}.

According to the Court, in order for an individual to be convicted for commission under Article 25(3)(a) based on indirect perpetration through an organization, the accused must have exercised sufficient control over an organization that is:

1) Based on hierarchical relations between superiors and subordinates; and,

\footnotesize
\begin{itemize}
\item \textsuperscript{207} Weigend, \textit{supra} note 204 at 95.
\item \textsuperscript{208} \textit{Ibid} at 96.
\item \textsuperscript{209} \textit{Ibid}.
\end{itemize}
2) Composed of sufficient subordinates to guarantee that superiors’ orders will be carried out.\(^{210}\)

This theory of indirect perpetration through an organization has not been accepted without criticism even in Germany, let alone within the context of international criminal law.\(^{211}\) For example, it is not clear how the presence of a criminal organization could effectively neutralize the autonomy principle. How does one rationally explain attributing principal perpetrator responsibility to an organization’s leader if the independent members of the organization are supportive of the common purpose and are acting voluntarily, as opposed to acting based on the effective control of the senior leadership? While it may be true that a causal chain can be traced back to the organization’s leadership, on what basis would the chain then be severed and why would it not be severed based on the intervening acts of any number of actors who fill out the hierarchy between the leader and the physical perpetrator? Finally, if indirect perpetration requires the physical perpetrator to be used as an involuntary tool of the principal perpetrator, then how can a theory of *Organisationsherrschaft* attribute criminal responsibility to both the organizational leader and the physical perpetrator?

Regardless of these concerns relating to the theory of indirect perpetration through an organization, the applicability of the theory appears clear in relation to both Katanga and Chui. Each of them controlled an organized and criminal military group that they individually directed to attack Bogoro. Based on Roxin’s theory of *Organisationsherrschaft*, it is logical that they may

\(^{210}\) Katanga and Chui, supra note 199 at para 512.
\(^{211}\) Weigend, supra note 204 at 100.
be accused of commission through indirect perpetration. The difficulty for the prosecution came in trying to establish that they were both also responsible for the criminal acts of each other’s militias, based on their joint planning of the attack and instructions to their organizations to carry out the attack jointly, regardless of the fact that neither of them exercised control over the other’s militia. For this, the Court turned to the theory of co-perpetration.

According to the Court, co-perpetration requires a coordinated essential contribution be made by each co-perpetrator resulting in the realization of the objective elements of the crime.\(^{212}\) The Court bridged the gap between indirect perpetration and co-perpetration by stating that this coordinated essential contribution can consist of “activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.”\(^{213}\) By combining the theory of co-perpetration with indirect perpetration, the Court determined that an accused who lacks effective control over another individual, may nevertheless incur criminal responsibility for that individual’s acts, if the accused acted jointly with another individual who does exercise control over the physical perpetrator through a criminal organization.\(^{214}\) The result is: indirect co-perpetration.

The theory of indirect co-perpetration could be applied in cases of what might be called “Cabinet” liability, where a group of superiors control the behaviour of a group of subordinates, where the subordinates are divided into subgroups. In such a scenario, the superiors, similar to

\(^{212}\) Katanga and Chui, supra note 199 at para 524.
\(^{213}\) Ibid at para 525.
\(^{214}\) Harmen G van der Wilt, “The Continuous Quest for Proper Modes of Criminal Responsibility” (2009) 7 JICJ 307 at 313.
Ministers in a Cabinet, would collectively form the leadership of the entire organization, but would also independently control branches of the organization that might be brought together to act collectively for a specific criminal purpose. Indirect co-perpetration would suggest that, in this type of organization, the Minister of National Defence would be responsible for the criminal conduct of a police force, regardless of the fact that the police might be controlled by the Minister of Public Safety, based on the fact that the Cabinet collectively controls the entire organization and conspired collectively to use various branches in furtherance of a criminal purpose. This type of scenario may not be entirely inconsistent with the theory of indirect perpetration or co-perpetration, as the notion of control still applies in a more or less conventional sense but it must account for the complexity of a sprawling organization that may involve a committee of leaders instead of one. However, this is not the situation that was before the Pre-Trial Chamber in *Katanga and Chui*.

Katanga and Chui were not co-leaders of a single enterprise divided into sub-groups, over which they both exercised control. Katanga and Chui were leaders of separate and distinct militias that had independent hierarchies that did not intermingle, and which they decided should work in tandem for the purpose of achieving a specific goal. The attack was clearly the product of a conspiracy between the two accused, but no element of the conspiracy provided Katanga control over Chui’s forces or vice-verse. The lack of control exercised by the indirect co-perpetrator appears inconsistent with the causal premise for attributing liability to an indirect perpetrator, or a co-perpetrator, in the first place. If control is not present, and causation cannot be traced through control, then some other justification must be offered for holding an individual
criminally responsible for the public wrongs physically caused by another. To date, the Court has struggled to provide such a justification.

4.7 A New Approach

The experience of individual criminal responsibility for collective conduct at the ICTY and the International Criminal Court are similar in that each have created sprawling theories of Joint Criminal Enterprise, common purpose, and indirect co-perpetration. Each of these theories, whether codified or the product of judicial innovation, begins with the premise that if an individual participates as part of a collective effort to bring about a specific or general public wrong, that person should be individually responsible for the harm to society that follows. What is not clear in any of the modern theories, is why the person must be held responsible, and at what point and why this responsibility is limited. Each of the four theories require fulfilment of a fault and conduct element that amount to the accused knowing or consenting or acquiescing in some way to the criminal purpose, and a contribution of some sort. Woven throughout the case law is discussion of why a certain level of fault or conduct is or is not acceptable based on concepts of culpability based on causation. If an individual has personal knowledge of an organization’s criminal purpose and provides a less than substantial contribution to that purpose, can it said that the individual directly or indirectly caused the resulting harm to society?

As discussed previously, the problem with using causation as the only restraint on a sprawling theory of individual criminal responsibility is the malleable nature of causation, which puts the theory at the mercy of a desire to find a conviction. Given the shifting requirements of theories such as Joint Criminal Enterprise, common purpose, and indirect co-perpetration, an
individual accused can easily be found to have caused an endless chain of events that result in the
commission of a public wrong, and yet a similarly situated individual can benefit from the causal
chain being arbitrarily severed before responsibility can attach to their actions. In some cases,
such as the application of Article 25(3)(d)(ii) of the Rome Statute, the International Criminal
Court appears to have given up trying to provide a causal explanation for why a less than
substantial contribution, which may only arguably be a contribution, meets the fleeting
requirement of “in any other way contributes”. 215

The difficulty caused by moving away from a causal justification is not that causation is
the only sound justification for attributing individual criminal responsibility, but rather that a
substitute does not appear to have been developed. From this perspective, the experience of the
criminal organizations charges at the Nuremberg Tribunal is different from its modern
counterparts, and may provide the foundation for a less than causal alternative.

The organizations charges were built upon the Anglo-American theory of conspiracy,
which suggests that participation in the conspiracy itself and not causation gives rise to liability
for the distinct offence of conspiracy, but also for wrongs committed by co-conspirators which
fall within the scope of the criminal agreement. Even more so than the drafters of the ICTY
Statute and the Rome Statute, the drafters of the London Charter were acutely aware that a theory
of individual criminal responsibility based on causation was simply not compatible with the
actual lived experience of the crimes that occurred during World War Two. The solution of the

215 See e.g. Prosecutor v Ruto et al, supra note 194 at para 354.
organizations charges was an elegant and honest approach to addressing this problem in the most principled way possible under the circumstances. The problem arose when the Tribunal rejected this approach in a crucial way. The structural and fault requirements that the Tribunal read into the test for a criminal organization did not completely counter the original purpose and intent of the theory, except in so far as it applied to strategies to maximize judicial economy. However, the requirements appear to have been added without any corresponding development of theory to support the doctrine—what was the principled basis for demanding these new requirements? How did these requirements meet the social objectives of the organizational charges as justification for attributing individual criminal responsibility?

The next chapter will attempt to answer these questions through a review and analysis of Anglo-American conspiracy theory. Based on this review, it is submitted that a nuanced understanding of conspiracy may provide a way forward as a more principled approach to personal guilt for inherently collective international crimes.
Chapter 5

Conspiracy Theory

5.1 A New Interpretation of an Old Theory

In this chapter, Part IV of the study is presented. Based on the preceding analysis, this Part suggests a new approach to individual criminal responsibility for collective international crimes, which is in fact a return to the original approach: the classic Anglo-American common law theory of conspiracy. Consideration of this new approach is advanced in four stages:

1) First, primarily from within a common law perspective, the debate surrounding the use and principled nature of conspiracy is presented and the main objections to the theory are identified.

2) Second, the historical development of the theory is reviewed in order to discover the original justification for attributing individual criminal responsibility for a public wrong other than the substantive offence of conspiracy, based on participation in a conspiracy.

3) Third, flowing from both the overview of the debate, which suggests that a principled justification for liability based on conspiracy is lacking, and the deeper understanding of the theory that emerges from the historical review, a principled justification for conspiracy is presented.
4) Finally, assuming the legitimacy of the principled justification, the elements of conspiracy as both a distinct offence and mode of liability are defined with regard to predictable limits on liability.

Based on this analysis, it is suggested that a return to this original theory may serve as a better solution to the dilemma of individual criminal responsibility for international crimes then would the creation of a complex *sui generis* approach. However, before this analysis can be undertaken, it may be beneficial to revisit the original problem of how to hold individuals responsible for public wrongs that result from collective conduct. Regardless of whether conspiracy could be useful in accomplishing this, it may be helpful to reflect on why this is a valuable exercise and why, for example, it is not acceptable that an accused might be held liable for murder, an individual offence, instead of genocide, a collective offence.

5.2 Re-stating the Problem

Returning to the original dilemma of the allied nations in 1945, the judicial challenge was to identify a theory of individual criminal responsibility that could be applied within a context where millions of individual offences had been committed, but where the effect of the harm caused to society could only be understood through a combination of those offences, supplemented by other non-criminal acts which served to amplify the harm—resulting in the commission of the actual international crime. Within this context, an individual act of murder was not simply an act of murder, because it had been intentionally planned and combined with other acts of murder in order to commit the crime of genocide. Therefore the practical problem of how to hold an individual or group of individuals accountable for the atrocities committed was made
more complicated by the need to properly label the crime. The millions of people who had died during the holocaust had not been “murdered”; they had been victims of “genocide”.

Since it would have been much easier both doctrinally and procedurally to simply prosecute thousands of offenders for individual causation-based offences such as murder, why would the allies have increased their burden by insisting on prosecuting for collective crimes such as genocide? The Yalta Memorandum provided part of the answer for this. In the cases of those most responsible, the Hitler’s and the Himmler’s, prosecution for direct offences may have been difficult as the major leaders were unlikely to have personally committed many (or any) of the offences they were ordering. It may have been possible to describe their liability as “ordering” or “command responsibility”, but this would displace their principal role in the commission of the offence. There also would have been other individuals who would have assisted with the commission of the offences, for example by providing logistical support, who could not be clearly and causally linked to a particular offence. Finally, even for those who could be identified as having personally and directly committed a particular, singular, offence, gathering the individualized evidence of those offences in the aftermath of a complex armed conflict may not have been possible.

These considerations notwithstanding, it is still likely that thousands of physical perpetrators could have been directly linked to individual offences with sufficient evidence to support a conviction of murder. Why then, even for these cases, would there have been hesitation in applying a traditional causal analysis to convict for an individual causation-based offence? Why must such individuals be génocidaires and not murders? Could the qualitative difference
between these two labels not be addressed in sentencing, which would save a court from the doctrinal quagmire of trying to explain why an individual act should give rise to responsibility for collective conduct?

The reason why such an approach was found to be, and would be still, unsatisfactory is reflected in the principle of fair labeling.216 In 1981, Andrew Ashworth raised similar questions in his article The Elasticity of Mens Rea regarding the logic of diversifying the language used to describe a public wrong, suggesting that the criminal law could operate with only a very small number of offences, with moral culpability being reflected in sentencing.217 However, Ashworth noted that, “we shrink from this in the belief that the label applied to the offence ought fairly to represent the offender’s wrongdoing”.218 The object of fair labeling then, “is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labeled so as to represent fairly the nature and magnitude of the law-breaking.”219 The purpose of fair labeling, and the reason why it is important to recognize distinctions between classes of wrongdoing, is primarily understood to be ensuring fairness to the offender.220

The concern of fairness to the offender relating to how an offence is labeled is particularly evident in relation to offences that carry a high degree of social stigma. This reflects

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216 See e.g. G Williams, “Convictions and Fair Labeling” (1983) 42 CLJ 85.
218 Ibid at 53.
the different social functions of “blaming” and “punishing”, such that, even if the punishments were to be identical, it is not socially appropriate to “blame” an individual for a stigmatizing offence the definition of which exceeds their actual personal wrongdoing.

However, fair labeling also addresses an aspect of fairness owed to the individual or societal victim and the truth-telling function of the judicial method. As James Chalmers and Fiona Leverick explain in their article *Fair Labeling in Criminal Law*,

…the offence name has a symbolic function, or… a ‘declaratory’ function. It can symbolize the degree of the condemnation that should be attributed to the offender and signals to society how that particular offender should be regarded… The criminal law speaks to society as well as wrongdoers when it convicts them, and it should communicate its judgment with precision, by accurately naming the crime of which they are convicted.\(^{221}\)

The principle of fair labeling and this function of public communication was also reflected in the Yalta Memorandum, where Stinson, Stettinius, and Biddle suggested use of the judicial method in addressing the crimes of World War Two would “make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.”\(^{222}\)

This societal need to properly describe the public wrong and what an individual is responsible for, based on the principle of fair labeling, compels international criminal law to recognize collective acts of genocide as genocide and not as individual acts of murder. Therefore, a theory of individual criminal responsibility for collective conduct cannot be avoided, and, in

\(^{221}\) Chalmers and Leverick, *supra* note 220 at 226.

\(^{222}\) Yalta Memorandum, *supra* note 7 at 6.
1945, the American delegation believed the objectives of fair labeling could be achieved, along with the practical benefits of judicial economy, by relying on the Anglo-American theory of conspiracy. By returning to the this original and historic concept, guidance may be found on how to proceed with attributing individual criminal responsibility for collective conduct, in accordance with the principle of fair labeling.

5.3 The Conspiracy Theory Debate

Having established the social value of attributing individual criminal responsibility for collective conduct, this chapter will now consider the proposal of returning to the common law theory of conspiracy. To begin this analysis, the debate surrounding the appropriateness of relying on conspiracy theory as a just and appropriate method for attributing criminal liability will be reviewed.

Conspiracy, both as a substantive offence and as a mode of liability, is a familiar concept to common law jurists. As a substantive offence, the crime of conspiracy is an agreement between two or more parties to commit an unlawful act or a lawful act by unlawful means. As a mode of liability, an individual may be responsible for a separate substantive offence based on their participation in a conspiracy if the offence was: (1) committed by a co-conspirator (2) acting in furtherance of the parties’ common criminal purpose and (3) if the prohibited result was within the scope of the criminal agreement. However, notwithstanding its seemingly straightforward operation, it is difficult to confine the law of conspiracy within the bounds of a definite statement.

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223 Mulachy v R (1868), LR 3 Eng & Ir App 306 at 317 (UK).
and, due to the predominately mental nature of conspiracies, it is challenging to analyze the elements of this offence.\textsuperscript{224}

Conspiracy as an offence and as a mode of liability has been the subject of much debate and criticism, both domestically and during the development of the Nuremberg Tribunal, the ICTY, and the International Criminal Court. Those opposed to the doctrine, who view it as unprincipled, point to the fact that since a true conspiracy requires no act to be taken in furtherance of the criminal agreement in order for criminal responsibility to arise, the conduct requirement is extremely slight, if an “agreement” can itself even be considered an act as opposed to a simple expression of intent.\textsuperscript{225} With the agreement itself being the essence of the substantive offence, and the trigger for liability where conspiracy operates a mode of liability, the culpable act may not be casually connected to any resulting social harm. However, the parties to the agreement can be prosecuted for the hypothetical harm of an agreement before its execution even reaches the level of an “attempt”, or for the actual harm caused by a co-conspirator even where the accused may not have taken any steps in furtherance of the criminal agreement. Finally, because a party to a criminal agreement can be responsible for separate offences perpetrated by a co-conspirator of which they had no intent nor any advance knowledge, conspiracy theory is often accused of being a form of guilt by association. Based on these critiques, some commenters,

\begin{itemize}
\item \textsuperscript{224} Benjamin Pollack, “Common Law Conspiracy” (1946-47) 35 Geo LJ 328 at 329.
\item \textsuperscript{225} Albert J Harno, “Intent in Criminal Conspiracy” (1941) 89(5) Univ of Pen LR & Amer L Reg 624 at 646.
\end{itemize}
such as Francis Sayre, have declared that the doctrine of conspiracy “grew out of an historical mistake, and has no real basis in our law. It is logically unsound and indefensible.”

However, even if the modern crime of conspiracy is the result of a historical mistake, it should not be assumed that there is no further value or utility in the concept. The doctrine of conspiracy concerns the criminal efforts of a collective. Collective criminal enterprises have a peculiar nature that individual criminal activities do not, and these peculiarities create barriers to effective prosecution. A collective criminal enterprise is the product of numerous small acts and agreements among a variety of parties that are intended to culminate in a particular prohibited act or result. Parties may engage in discreet criminal acts that are separated geographically, temporally, and causally from each other and from the resulting public wrong. Conspiracy charges prevent such complexities from impairing the complete prosecution of collective offences by creating special rules for prosecuting collective criminal enterprises, allowing individual and disparate actors to be linked to the consequences of their collective actions through their criminal agreement.

Since conspiracy as a mode of liability was the original theory of individual criminal responsibility for collective conduct relied on in the first attempt try individuals for crimes against international law, and since the experience of conspiracy informed the subsequent development of theories of liability in international criminal law, revisiting the historic origins of this theory

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226 Francis Sayre, “Criminal Conspiracy” (1922) 35(4) Harvard L Rev 393 at 427. These same criticisms could now be made in regards to the alternatives to conspiracy, in particular Joint Criminal Enterprise and common purpose.
227 Fichtelberg, supra note 29 at 152.
228 Ibid at 153.
may provide guidance for future developments. While some commentators, such as Jens David Ohlin, suggest that a new *sui generis* approach to liability unique to international criminal law is a solution to the inadequate options that have been presented to date, a better solution may lie in a “return to first principles” approach. Support for this hypothesis can be seen in the coherent development of the organizational charges at the Nuremberg Tribunal. Although the charges were and remain controversial, their doctrine appears to have been the most internally consistent when compared with the other possible approaches, such as Joint Criminal Enterprise, common purpose, and indirect co-perpetration.

In order to salvage conspiracy theory as a mode of liability from its wandering and unprincipled developments, two doctrinal issues must be addressed. First, a principled justification must be identified for holding individuals criminally responsible for a public wrong that they have little or no direct or indirect causal connection to based on their participation in a criminal agreement. It could be reasoned that this form of liability is based on causation, similar to any other form of liability—but for the agreement, which was created in part by the accused, the planned and unplanned natural and probable consequences of the agreement, perpetrated by other parties to the agreement, would not have occurred. However, such an application of causal theory takes unprincipled advantage of the malleable nature of legal causation, tracing causation through several intervening actors, only to arbitrarily cut the causal chain once it reaches the

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accused. Another justification must be found if conspiracy as a mode of liability is to sustain itself as a principled doctrine.

Second, the fault and conduct requirements of conspiracy, as a mode or an offence, must be clearly identified. Given the historic nature of conspiracy, and its utility in prosecuting individuals for the results of collective conduct, the theory has been reinvented numerous times, with each permutation simply adding confusion to the doctrine. This pattern of reinvention can been seen in the development of theories of liability from the Nuremberg Tribunal, which added strict structural requirements to the original theory of conspiracy in the London Charter, to the ICTY which allowed for conviction based on the spontaneous association of a mob joined for a purpose that could be judicially imposed ex post facto. This history of reinvention has lead several commenters to say of conspiracy: “the law on the subject is as unsettled today as it was one hundred years ago, except that more decisions have been rendered and have made the subject more complicated”;230 “no branch of the law… is more uncertain and ill-defined than the law of Criminal Conspiracy”;231 and “[it] is more difficult to be ascertained precisely than any other [offence]; and is, indeed, rather to be considered as governed by positive decisions than by consistent and intelligible principles of law”.232

The justification and the elements of conspiracy must generate a principled operation that clearly and predictably circumscribes liability if conspiracy is to provide a workable alternative to

230 Pollack, supra note 224 at 330.
current theories of individual responsibility for collective conduct in international criminal law. It must be possible to know the outer limits of individual criminal responsibility under conspiracy theory, particularly when it operates as a mode of liability, such that individuals can understand in a meaningful way what conduct will or will not attract criminal sanction. In order to uncover these interwoven aspects of conspiracy, the historical origins of the theory must be examined. Informed by an understanding of why the theory was created, what mischief it sought to remedy, and how this developed over time, a sound doctrinal base can be identified.

5.4 A History of Conspiracy Theory

Criminal conspiracy is most commonly known as a substantive offence. Individuals who enter into criminal agreements for the purpose of committing an unlawful act or a lawful act by unlawful means are guilty of the distinct offence of conspiracy, irrespective of the object of the conspiracy. With the crystallization of the agreement, the offence of conspiracy is perfected without any act being committed in furtherance of the agreement. As the theory developed over time, it began to operate as a mode of liability separate from the substantive offence. Once any of the conspirators took steps in furtherance of the agreement, all parties to the agreement became responsible for these acts, and for the collective effect of those acts. Therefore, the distinction between the offence and the mode of liability is not the fault or conduct of the accused, but rather the further fault and conduct of co-conspirators acting within the scope of the agreement. While the substantive offence may be said to be causal, the fault and conduct of the accused having caused the creation of the criminal agreement, the mode of liability is distinctively not causal, or at least not necessarily causal. In order to discover the basis on which a non-causal form of conspiracy as a mode of liability can operate, examination of the development of the offence and
its justification as a public wrong will inform a principled understanding and justification for the mode of liability, particularly in light of the fact that the elements are in fact common to the offence and the mode of liability.

Conspiracy first appeared in the 14th century as a statutory creation that sought to protect individuals from false and malicious felony prosecutions effected by conspiratorial means. At that time, felony prosecutions were commenced either by private indictment, generally involving trial by battle, or by public inquest. If a private indictment was brought, the complainant risked fines, loss of property, injury, or death in the battle by which the truth of the accusation was tried. This potential liability tended to discourage individuals from deliberately bringing false indictments; however, despite this deterrence, a trend developed whereby individuals would form “combinations” with others to procure false indictments and maintain vexatious suits. This resulted in the enacted of the Ordinance of Conspirators in 1304, which gave a precise definition to conspiracy tailored to address the problem of false indictments:

Conspirators be they that do confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and support the Enterprise of each other falsely and maliciously to indite, or cause to be indited [or falsely to acquit people] or falsely to move or maintain Pleas...

The original offence was worded narrowly and was restricted to specific abuses against the administration of justice. It did not invite broad common law generalizations or analogies, but

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233 Sayre, supra note 226 at 394.
234 Ibid at 396.
235 Third Ordinance of Conspirators, 33 Edw. I (1304) (UK).
was confined to the precise and definite language of the statute. The elements of the offence were clear: only collective efforts to procure false indictments, to bring false appeals, or to maintain vexatious suits could constitute conspiracies.236 The conspiracy was not complete until the conspirators caused an indictment to be made and the individual indicted had been tried and acquitted.237 Furthermore, the original Ordinance did not treat conspiracy as a crime but as a particular kind of civil injury that was punishable by indictment following a writ of conspiracy.238

During this early period courts interpreted the definition and requirements of conspiracy restrictively, only permitting a charge of conspiracy after the injured party was successfully acquitted of the false indictment brought against them by the conspirators. In a case in 1351, a court was asked to broaden the definition of conspiracy to include combinations to commit acts of a generally illegal and oppressive nature, such as those committed by the defendants in that case who had imprisoned and generally oppressed a group of people.239 While the effects of the illegal activity were not entirely dissimilar to the mischief caused by false indictments, being the unjustified imprisonment of innocents, the court declined to expand the definition. In maintaining a narrow interpretation of the offence, the court held that in that case “the principal matter of the conspiracy alleged is not conspiracy, but rather damage and oppression of the people.”240

The common law did not intervene to expand the scope of the offence of conspiracy until the late 16th century when courts gradually began to acknowledge that a common law indictment

236 Sayre, supra note 226 at 396.
238 Sayre, supra note 226 at 395.
239 Pollack, supra note 224 at 340.
240 Anon (1351), Y B 24 EDW III, f 75 at 99 (UK) (emphasis added).
for conspiracy might be allowed against false accusers even where an indictment based on a false charge had been not been found by a grand jury. This point was seized on and further expanded by the Court of Star Chamber in the *Poulterers’ Case.*

In a civil case in 1610, several poulterers were accused of having conspired to have a false charge of robbery brought against the plaintiff, with the intent of having him arraigned, indicted, and hanged. The poulterers had procured warrants for his arrest, causing the man to be apprehended; however, after a review of the evidence it was found that the plaintiff was so manifestly innocent that an indictment could not be sustained. The defendants were then indicted for conspiracy, but argued that since the plaintiff had never been indicted or acquitted, no recovery could be had “because no writ of conspiracy for the party grieved, or indictment or other suit for the King lies, but where the party grieved is indicted, and *legitimo modo acquietatus.*” The Court of Star Chamber rejected this argument, which had been correct in law up until that point, and instead held that an agreement for a conspiracy was itself indictable whether the object of the conspiracy was actually carried into effect or not. According to the Court, the confederating together constituted the essence of the offence rather than the false indictment and subsequent acquittal.

The *Poulterers’ Case* provided a clear departure from the previous, limited doctrine of conspiracy that provided a form of civil redress against those who procured false indictments only

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241 See e.g. *Sydenham v Keilaway* (1574), 79 Eng Rep R 7 (UK).
242 *Poulterers’ Case* (1610), 77 Eng Rep 813 (UK) (emphasis added).
243 Sayre, supra note 226 at 398.
244 *Ibid.* (*legitimo modo acquietatus*, lawfully acquitted)
after a complete acquittal. With the direction provided by the Star Chamber, the doctrine of conspiracy as an agreement to commit a wrong becoming itself a common law crime was easily expanded to other cases and other forms of conduct going beyond false indictments. The Court’s interpretation, which focused on the agreement as the essence of the offence, also easily developed into the general doctrine of conspiracy that requires no overt act whatsoever done in execution of the agreement, and laid the foundation for the operation of conspiracy as a mode of liability. By 1716, conspiracy had broadened to such an extent that in Hawkins’ *Pleas of the Crown* it was stated that: “there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law.”

The Court of Star Chamber’s decision to expand the definition of conspiracy raises two fundamental questions about the doctrine’s origin, namely: on what basis was it thought justified to punish false indictments following acquittals originally; and, on what basis was it thought justified to convert conspiracy to a criminal offence which caught any agreement to “wrongfully prejudice a third person” in its definition?

### 5.5 A Principled Justification for Conspiracy

Under the original doctrine of conspiracy, where personal guilt would only attach to a false indictment following a complete acquittal, the relationship between the act of conspiring and the resulting harm done to the victim is slightly obscure, and not obviously causal. Through a successful false indictment, an individual might use the administration of justice to cause the

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murder of an otherwise innocent person by way of execution. Such an act would result in a clear harm, and provide a causal link to the perpetrator, justifying blame and punishment. However, this is not reflective of the original doctrine of conspiracy, which first required that the potential harm to the victim be entirely averted through an acquittal before a writ of conspiracy would lie. Based on this understanding of the offence, an individual was deemed worthy of punishment based on the harm that they had intended but were unable to affect.

There are three possible explanations for why the original conspiracy doctrine may have been viewed as a legitimate and justifiable basis for assigning criminal sanction. The first relates to the law of attempts, where the provision of a false indictment that resulted in an acquittal may have been viewed as a complete but imperfect attempt to commit the underlying harm of subjecting an innocent person to criminal punishment. The requirement of a complete acquittal may have been related to the inability of the justice system at the time to discover a false indictment in the absence of an acquittal, since individuals acting with improper motives could still correctly indict guilty parties. Under this view of conspiracy, it would be as justifiable to punish a false indictment as it would be to punish any other criminal attempt. However, based on this understanding, it is unclear why the law of attempts would not have sufficed to address the mischief of conspiracies.

A second possible justification for the original conspiracy doctrine relates to the concept of risk creation. The act of falsely accusing innocents of criminal conduct could be viewed as

\footnote{See e.g. Sayre, supra note 226 at 399.}
creating an unacceptable risk both to the innocent person who could be wrongfully subjected to
criminal punishment, and to the administration of justice. If individuals who are innocent of any
wrong doing could be punished by the justice system based on the malice of their neighbour, the
legitimacy of the entire administration of justice could be called into question unless this risk is
sufficiently guarded against. This risk itself could be viewed as a social harm that amounts to a
public wrong, and an individual who causes this risk, both to the innocent accused and to the
legitimacy of the justice system, could be justifiably punished.

Finally a third justification may concern the actual harm that occurs to the individual who
is falsely accused, notwithstanding their complete acquittal. While the innocent person is spared
the full criminal consequences of the false indictment, they may still suffer injury to their
reputation and must endure the emotional and financial burden of having to establish their
innocence. This particular harm appears to have been recognized in the original civil nature of the
writ of conspiracy, which would allow an acquitted accused to bring a claim for damages against
the conspirator.248

Each of these possible justifications identify a particular harm that causes anti-social
effects, which could be linked causally to the acts of the conspirator through the bringing of a
false indictment, notwithstanding the fact that the original intended harm is not achieved.
However, can the same be said of the Court of Star Chamber’s reinterpretation of the doctrine,

248 Sayre, supra note 226 at 395.
which criminalizes an agreement to wrongfully prejudice a third person without any further overt act?

The Court of Star Chamber’s decision to recast the law of conspiracy can be attributed to both the particular period of legal development that was occurring in the 17th century, and to the unusual jurisdiction of the Court itself. At the time, the common law was going through a period of exceptional growth, and there was a conscious effort on the part of jurists to infuse the law with moral principles. Within this context, the development in the law of conspiracy appears less radical, and more in keeping pace with other developments in the criminal law at that time.

The Court of Star Chamber was established to protect the King from the danger of possible insurrections or any combinations that were potentially dangerous to the security of the throne. The Court itself declared its jurisdiction to be:

…by the arm of sovereignty, it punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases, or which giveth life to the execution of laws, or the performance of such things as are necessary in the Commonwealth, yea, although no positive law or continued custom of common law giveth warrant to it.

Another description of the Court characterized it as the “curious eye of the state and King’s council prying into the inconveniencies and mischiefs which abound in the Commonwealth.”

\footnote{Pollack, supra note 224 at 343.}
\footnote{Ibid.}
\footnote{Harno, supra note 225 at 627.}
According to Sir William Searle Holdsworth, in his work *A History of English Law*, in light of this jurisdiction, the idea that a confederacy to affect a criminal result such as providing a false indictment should itself be treated as a conspiracy was something that came naturally to the Court of Star Chamber. However, the Court did not limit the operation of its new criminal concept of conspiracies to false indictments. Instead, the Court reasoned that: if it was the combinations themselves that were criminal, why restrict the doctrine to offences relating to legal proceedings? What did it matter that historically the crime was closely related to offences against the administration of justice?

With the *Poulterers’ Case*, a new field of vast potential was opened in criminal law. As Sir James Fitzjames Stephen explained in his work *A History of the Criminal Law of England*:

> The Star Chamber first treated conspiracies to commit crimes or indeed to do anything unlawful as substantive offenses, and after restoration this amongst other doctrines of theirs found its way into the Court of Kings Bench. The doctrine was expressed so widely or loosely, that it became in course of time a head of law of great importance, and capable of almost indefinite extension…. the word “unlawful” being used in a sense closely approaching to immoral simply and at the same time injurious to the public.  

The Court of Star Chamber, motivated by its morally infused, expansive jurisdiction to protect the throne from insurrections and to root out evil and mischief from the Commonwealth, criminalized behaviour that did not clearly cause a specific or tangible social harm. While it is

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true that the fault and conduct of a conspirator causes the prohibited result of a conspiracy, the unique justification for criminalizing a conspiracy in the first instance converts the basis of liability into something more closely resembling risk creation. This point becomes slightly academic when considering conspiracy as a substantive offence, as the basis for criminalizing a certain act or result is more a question of policy consideration than legal theory. However, when conspiracy operates as a non-causal mode of liability, risk creation can support a justification for individual criminal responsibility for the individual and collective acts of co-conspirators based on participation in a conspiracy.

There appears to be three types of risk created by conspiracies, each of which may be considered substantial enough in its anti-social effects to justify responsibility, blame, and punishment for conspiracy.

The first risk relates directly to the object of the conspiracy. A conspiracy is a conspiracy because the agreement the parties have entered into in meant to cause some social harm. It is not the agreement that causes the mischief, but rather what that agreement threatens. The question is how can the threat of an agreement be determined prior to the creation of any harmful consequences? As Albert Harno of the University of Illinois explains in his article Intent in Criminal Conspiracy, the danger in conspiracy lurks in the intent:

[The risk] is present when one person harbors an intent to do an anti-social act, and it is greater when two or more hold it separately. … The agreement, it is said, is the act in criminal conspiracy. In truth, it is but a step toward the accomplishment
of another act, the commission of which the state wishes to prevent...²⁵⁴

The second risk is generated by the operation of a conspiracy as a secret criminal enterprise that by its nature greatly increases the chances of harmful and anti-social acts occurring. As mentioned previously, participation in a common criminal enterprise involves numerous small acts and agreements among a variety of parties that are intended to culminate in an act that causes a social harm. This act of organization makes detection by law enforcement more difficult, as perpetrators are able to shield themselves from criminal liability by constructing a web of carefully managed interactions with their co-conspirators such that no one party can be causally linked to their own criminality.²⁵⁵

The difficulty of preventing the social harm caused by organized crime has been relied on as a justification for permitting a more lenient approach to conspiracy prosecutions. As American courts often proclaimed in the early 1900’s, “conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine.”²⁵⁶ Therefore, given this difficulty, if the agreement itself is the nexus of the criminal enterprise, then attacking it may be the only effective way to both deter and prosecute this type of dangerous, anti-social activity. This reasoning was reflected in a 1947 decision of the US Supreme Court in Blumenthal v United States, where the Court held:

²⁵⁴ Harno, supra note 225 at 635.
²⁵⁵ Fichtelberg, supra note 29 at 154.
²⁵⁶ Marrash v United States, 168 Fed 225 at 229 (2d Cir 1909) (USA); Radin v United States, 189 Fed 568 at 570 (2d Cir 1911) (USA).
Secrecy and concealment are essential features of 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 its 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. 257

In addition to making criminal conduct more difficult to detect, joining in collective criminal efforts is also believed to increase the likelihood that individual conspirators will maintain and continue on a path of criminality. American courts have expressed a belief that the reliance on co-conspirators, and possessing the intent to support and aid them in the future increases the likelihood of criminal conduct on the part of individual conspirators. 258

The final risk concerns what is best described as an amplification effect, and speaks most directly to the types of risks posed by organized uprisings that the Court of Star Chamber was meant to guard against. At the foundation of the conspiracy doctrine lies a fear that a confederacy of criminal purpose increases individual power to do wrong, and therefore presents a threat of criminality believed to be more dangerous than the efforts of a single wrongdoer.

257 Blumenthal v United States (1947), 332 US 539 at 557 (USA).
258 United States v Rabinowich (1914), 238 US 78 at 88 (USA); Pinkerton v United States (1945), 328 US 640 at 644 (USA) [Pinkerton]: “[C]onspiracy involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices, and it is characterized by secrecy, rendering difficult of detection, requiring more time for its discovery and adding to the importance of punishing it when discovered.”; Callahan v United States (1961), 364 US 587 at 593 (USA): “[C]ollective criminal agreement-partnership in crime presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.”
According to the English Criminal Law Commission of 1845,

…the general principle on which the crime of conspiracy is founded is this, that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint; although none would be necessary were the same thing proposed, or even attempted to be done, by any person singly.\(^{259}\)

This reflects an assumption that an act is made more harmful than it would otherwise be had the parties been working separately. The judicial effort to guard society against the anti-social conduct of many individuals acting in concert is therefore greater than the effort to safeguard against the anti-social conduct of individuals because of the danger arising from the increased power that results from a combination of many individuals. As explained by the Supreme Court of Pennsylvania in the 1821 case of *Commonwealth v Carlisle*:\(^{260}\)

The effort of an individual to disturb the equilibrium can never be perceptible, nor carry the operation of his interest, or that of any other individual, beyond the limit of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous, that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual.\(^{261}\)

With this understanding of the justification for conspiracy as a substantive offence, it is logical that the development of this theory was co-extensive with the measures taken by those in

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\(^{260}\) *Commonwealth v Carlisle* (1821), 36 Bright 38 (Pa) (USA). [*Commonwealth v Carlisle*]

\(^{261}\) *Ibid* at 41.
power to maintain themselves in their positions of power and to put down any possible assault on the status quo. As Benjamin Pollack of the American Department of Justice notes in his article *Common Law Conspiracy*, it is natural that the Court of Star Chamber should conceive of the crime of conspiracy during a time of social unrest, revolutionary activity, and general insecurity of the powers in control.\(^{262}\)

However, notwithstanding the practical utility of conspiracy for maintaining conventional power structures and preventing the masses from organizing, does a criminal act really pose a greater or lesser risk of harm to society if it is committed by one person or by one hundred? In defence of this reasoning, conspiracy can be analogized to riots.\(^{263}\) Under the common law, a riot requires the concurrence of three or more parties because, despite their best disruptive efforts, it is not possible for a single person to produce the anti-social effect or criminal consequences of a riot. The concerted, amplifying, menacing effect of several individuals acting with criminal intent is required in order to achieve the harm and social unrest of a riot.\(^{264}\)

The justifications provided by the case law and authorities provide a public policy rationale for attributing individual criminal responsibility on the basis of an agreement alone, whether based on the risk of what the agreement threatens, how the agreement operates to insulate criminal activity, or based on the amplifying anti-social effect of collective criminal conduct. This basis is shared by conspiracy as mode of liability. The risk created by criminal

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\(^{262}\) Pollack, *supra* note 224 at 339.

\(^{263}\) Sayre, *supra* note 226 at 412 note 62.

\(^{264}\) *Ibid.* Sayre admits this analogy is imperfect because, contrary to a riot, a single party can often procure the same criminal effect as a group acting in concert.
agreements provides a partial explanation for how or why an individual should be held responsible for the conduct of co-conspirators that falls within the scope of the agreement, even where the accused has not provided any causal contribution to the conduct. If it is accepted that the act of confederating for criminal purposes gives rise to an unacceptable risk of social volatility, then an individual may be held to have entered into the agreement and generated the risk at their own peril, and should be held responsible for the consequences—including any anti-social conduct that falls within the scope of the agreement intentionally created by the accused.

While the risk creation basis for conspiracy, as an offence or a mode of liability, is incomplete, it can provide a foundation that informs the interpretation of the elements that are common to both operations of conspiracy. Set against an understanding of risk creation, the elements can be articulated for the offence and mode of conspiracy in a manner that explains how non-causal liability may attach in a functional and predictable way.

5.6 The Elements of Conspiracy

Both the offence of conspiracy and conspiracy as a mode of liability require an individual to participate in a criminal agreement. For the offence, participation in the conspiracy represents the full fault and conduct requirements that perfect the crime. For the mode of liability, participation in the conspiracy plus the derivative conduct of a co-conspirator will trigger liability. However, what does it mean to “participate” in a conspiracy? What are the conduct and fault requirements of a conspiracy, and how does liability arise for the in-scope conduct of a co-conspirator?
5.6.1 Conduct Requirement

The ordinary definition of conspiracy speaks of an agreement to accomplish an unlawful end or to pursue a lawful end by unlawful means.\(^{265}\) It is the fact of confederating that is the essence of the offence, and not the actual perpetration of the object of the agreement.\(^{266}\) Under the traditional common law definition of conspiracy, the formation of a criminal agreement was all that was required to perfect the substantive offence of conspiracy, without any overt act being taken in furtherance of the agreement.\(^{267}\) As a mode of liability, entering into the criminal agreement is the only conduct required by the accused in order to trigger derivative liability for any acts taken by co-conspirators in furtherance of the agreement.

This focus on the agreement, which is a primarily mental act, has made it difficult to identify what if any are the conduct requirements for conspiracy, whether as an offence or a mode of liability. The solution has been to treat the formation of the agreement as an act unto itself, separate from the necessary level of intent that is required in order to enter into a crystalized agreement. Treating the agreement as an act is not dissimilar from how the creation of a contract is viewed as an act separate from the intent required to enter into a contract. As the United States Supreme Court explained in the 1910 case of *United States v Kissel & Harned*:\(^{268}\)

A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, such as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the

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\(^{266}\) Pollack, *supra* note 224 at 333.
\(^{267}\) *Ibid* at 338.
\(^{268}\) *United States v Kissel & Harned* (1910), 218 US 601 (USA).
partnership may endure as one and the same partnership for years.\textsuperscript{269}

The act of creating the agreement or the crystallization of a contract creates an otherwise enforceable partnership, the object of which is prohibited and constitutes a conspiracy. This is a step beyond merely having or evening communicating the intent to cause a public wrong. As the House of Lords explained in the 1868 case of \textit{Mulcahy v R}:\textsuperscript{270}

\begin{quote}
It is a mistake… to say that conspiracy rests in intention only… It cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. The argument confounds the secret arrangement of the conspirators amongst themselves with the secret intention which each must have previously had in his own mind, and which did not issue in act until it displayed itself by mutual consultation and agreement.\textsuperscript{271}
\end{quote}

The requirement for the accused to have entered into a fully crystalized agreement, the object of which is criminal, represents the first limit on liability that restrains the doctrine of conspiracy, particularly when it operates as a mode of liability. For example, in the case of Katanga and Chui, the two accused may have casually or seriously discussed their desire to attack the village of Bogoro. However, to prevent the theory of conspiracy from devolving into a tool to police every criminal thought an individual might have, neither Katanga nor Chui would have incurred individual criminal responsibility based on their participation in a conspiracy until they each, by their conduct, evidenced a meeting of the minds, intentionally creating an agreement to attack and destroy Bogoro. This intention must have been communicated and reciprocated,

\textsuperscript{269} \textit{United States v Kissel & Harned}, \textit{supra} note 268 at 608.
\textsuperscript{270} \textit{Mulcahy v R}, \textit{supra} note 223.
\textsuperscript{271} \textit{Ibid} at 328.
resulting in a fully crystalized agreement. As will be discussed later, the agreement provides a second function in conspiracy as a mode of liability. Not only does it set a threshold on the type and level of conduct that is required for an accused to trigger liability for the conduct of a co-conspirator, it also sets limits on what type of derivative liability can attach to the accused, who can only be liability for conduct that falls within the scope of the agreement that they voluntarily and intentionally consented to be a party to.

How the existence of a criminal agreement can be proven is a question of evidence. The agreement does not necessarily need to be formal, and often are not due once again to the fact that “conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine.” An agreement can be implied from circumstances, including the fact that two or more persons intend to do the same act or a similar act at the same time, or even that one knows the intention of the other to commit a particular act. However, in order to clarify and make certain the existence of a crystalized agreement, many jurisdictions now require at least one member of the conspiracy, or the accused in particular, to have committed some overt act in furtherance of the criminal objective. The overt act requirement is even reflected in the “in any way contributes” requirement of the common purpose provision in Article 25(3)(d) of the Rome Statute. It might be argued that the overt act requirement, both in the Rome Statute and elsewhere, is an attempt to tie individual criminal responsibility to causation where conspiracy is used as a mode of liability. This may be a valid interpretation of the

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272 Marrash v United States; Radin v United States, supra note 256.
273 Pollack, supra note at 333.
274 Ibid at 338.
requirement; however, it would be equally valid to interpret the requirement as setting an evidentiary threshold for establishing the existence of a criminal agreement, defined as either a “conspiracy” or a “common criminal purpose”.

In any event, regardless of the kind of evidence or method of proof relied on, in order to attribute individual criminal responsibility based on participation in a conspiracy, as a substantive offence or a mode of liability, a finder of fact must be convinced of an actual agreement in the sense of a meeting of minds, combined in the pursuit of a course of action according to a common plan.\textsuperscript{275}

5.6.2 Fault Requirement

Based on the fact that the act that constitutes a conspiracy is the creation of an otherwise enforceable criminal agreement, the fault requirement is largely dictated by the level of intent that is required for an individual to enter into a binding agreement. However, as Harno has explained, there are two types of intent in every conspiracy. First, it is necessary to establish through sufficient evidence that each of the accused intended to enter into an agreement, and that the separate intentions of each accused were successfully combined to create an agreement. Second, once the agreement is established, the next question is whether the purpose agreed upon involves a criminal intent.\textsuperscript{276}

\textsuperscript{275} Cousens, \textit{supra} note 265 at 910.
\textsuperscript{276} Harno, \textit{supra} note 225 at 631.
The specific intent\textsuperscript{277} to create and enter into a criminal agreement forms a second limit on liability for individual criminal responsibility based on participation in a conspiracy in two ways. First, the intent requirement, by definition, limits the types of offences that can be the object of a conspiracy to intentional offences; that is to say, one cannot intend to commit a negligent or reckless crime.\textsuperscript{278}

Second, the knowledge of the criminal design that forms the basis of the specific intent delineates the extent of criminal responsibility for the object of the conspiracy and any acts of co-conspirators when conspiracy operates as a mode of liability. This reflects the basic reality that an individual cannot agree to, or rather cannot intend to agree to, something that they have no knowledge of. For example, returning to Katanga and Chui, although both accused must have had knowledge of the plan to attack and destroy the village of Bogoro and both must have intended to enter into an agreement to achieve this objective, one of the accused may have had additional designs. Katanga may have conspired within his own militia to undertake the crime of genocide, and destroying Bogoro may have contributed to this criminal objective. The extent of Katanga’s objective may have exceeded his agreement with Chui, if Chui was not aware of the plan to commit genocide. Chui’s knowledge may have been limited to the plan to attack and destroy Bogoro, and he may only have had the specific intent to enter into an agreement to achieve this. Following the destruction of the village, Katanga and his militia could have been held criminally

\textsuperscript{277}Harno, supra note 225 at 635.
responsible for genocide based on their participation in a conspiracy, with the attack on Bogoro being an overt act in furtherance of this specific conspiracy. However, Chui could only be responsible for what he knowingly and intentionally agreed to, which would limit his individual criminal responsibility to the attack on Bogoro.

This second limit on liability created by the intent requirement is necessary in order to find a truly crystalized agreement. For a conspiracy to function as a doctrine, the agreement that forms the essence of the offence and triggers derivative liability must be a true agreement, which requires a real meeting of the minds. However, the minds of two or more conspirators can only meet if they are both fully informed of the limits of what they are agreeing to, in order for them to form the necessary intention to create the agreement. The question this raises is: to what extent must each conspirator be aware of the details of the common criminal plan? If a co-conspirator of Katanga’s had agreed with him to committing genocide, and if Katanga attacked and destroyed Bogoro in furtherance of that plan, would the co-conspirator have to have specifically known that the village would be destroyed as part of the plan to commit genocide in order to be responsible for it as a co-conspirator? This issue of whether or not a conspirator can be responsible for the unplanned acts of co-conspirator is often referred to as Pinkerton liability, based on an American case that considered this exact question.

5.6.3 Pinkerton Liability

In 1946, two brothers, Daniel and Walter Pinkerton, were engaged in an ongoing illegal whiskey business that lead to both of them being convicted several times for violating state liquor laws. Both were charged and convicted of conspiracy to violate the tax code, as well as a number
of substantive counts of tax evasion. Daniel challenged his conviction for the substantive
oxences, based on the fact that there was no evidence that he had participated directly or
indirectly in their commission, notwithstanding the evidence that established the clear
participation of his co-conspirator Walter. The US Supreme Court was not sympathetic, and
upheld Daniel’s conviction. The Court held that as a consequence of having entered into an
otherwise enforceable agreement, creating a criminal conspiracy, all conspirators are liable for
any crimes committed by any co-conspirators that were both reasonably foreseeable and in
furtherance of the conspiracy.

As might be expected, this interpretation of conspiracy as a mode of liability has been
criticized for being overly broad, malleable, and for importing the concept of vicarious liability
into criminal law. The criticisms of Pinkerton liability are actually quite similar to criticisms that
have been directed at the organizational charges, Joint Criminal Enterprise, common purpose, and
indirect co-perpetration. However, a closer review of Pinkerton liability demonstrates that in fact
this interpretation of conspiracy theory is consistent with the limits on liability that are set out in
the fault and conduct requirements. Conspiracy only begins to be overly broad when those
requirements are judicially relaxed.

The accusation that the Court’s interpretation in Pinkerton creates a form of vicarious
liability is not entirely wrong, as some form of agency theory would have to arise a consequence

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American U L Rev 585 at 592.
280 Pinkerton, supra note 258.
281 Kreit, supra note 279 at 586.
of the conspiratorial agreement itself. Under *Pinkerton*, conspiracies become agency relationships of perfect reciprocity, in which every conspirator authorizes each co-conspirator to act on their behalf.\footnote{282 James M Shellow, “*Pinkerton v. United States* and Vicarious Criminal Liability” (1984-84) 36 Mercer L Rev 1079 at 1083.} This interpretation is consistent with previous American case law dating back to the 1827 case of *United States v Goodling*, where the Court held: “…the act of one conspirator… is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other in furtherance of the common object.”\footnote{283 *United States v Goodling* (1827), 25 US 460 (USA) at 469.}

This precise understanding of express authorization occurring as a function of the agreement is what sets *Pinkerton* liability and conspiracy theory apart from a general claim of vicarious liability. By entering into the agreement, and by commanding and authorizing co-conspirators to act on their behalf, an individual is not risking liability for any and all wrongful acts that those who are in the perfectly reciprocal agency relationship may commit. However, what is being accepted is responsibility for all acts committed by the group that are specifically authorized by the criminal agreement, including those acts which are the natural and probable consequence of the agreement where they have been committed in furtherance of the agreement. In the case of Daniel Pinkerton, while he may not have personally participated in the substantive acts of tax evasion committed by Walter, these acts were the specific object of the conspiracy entered into by the two brothers. Daniel knowingly and intentionally agreed to the perpetration of these specific criminal acts, thereby authorizing and commanding his brother to carry out the...
actual offences. The Court captured this nuance of authorization in a perfectly reciprocal agency relationship by stating:

[a] different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.\(^{284}\)

The combination of this augmented form of agency theory, combined with the social and moral justification provided by an understanding of the risk to society posed by groups that confederate for a criminal purpose, creates an intelligible and principled basis for attributing derivative liability based on participation in a conspiracy.

5.7 The Proposed Approach

Following a review of the historic and social justification for conspiracy theory, and the common elements of conspiracy as an offence and a mode of liability, a possible new approach can be identified that may be compatible with and beneficial for addressing the issue of individual criminal responsibility for collective conduct in international criminal law.

Under the theory of conspiracy, a conspiracy is identified as being a complete, crystalized criminal agreement, the intent and object of which is to commit a public wrong. Members of the conspiracy are individually criminally responsible for the conspiracy itself, as well as for any other substantive offences that are: committed by a co-conspirator in furtherance of the

\(^{284}\) Pinkerton, supra note 258.
conspiracy; that fall within the scope of the criminal agreement; and that were reasonably foreseeable as a necessary or natural consequence of the agreement.

Individual criminal responsibility, both direct and derivative, attaches to individual conspirators based on their specific intention to join the conspiracy and their personal knowledge of the scope of the conspiracy. This defines the limits of which acts each individual member may be derivatively responsible for, based on their understanding of the scope of the conspiracy, and consequently which acts would be the necessary or natural consequence of carrying out the criminal agreement. The existence of the agreement, its scope, specific acts that were committed in furtherance of it, and a given individual’s intention to be a party to the agreement are questions of evidence and can be inferred from circumstances.

It could be argued that causation is still present when conspiracy operates as a mode of liability in that an agreement to commit a criminal act will itself indirectly cause the act to occur, as well as function as facilitation or solicitation of the act which should give rise to accessory liability. However, a more principled basis for conspiracy liability can be found in an augmented agency theory combined with a theory of risk creation.

Through the creation of a criminal agreement, each conspirator becomes a principal actor who authorizes their fellow co-conspirators, who are in fact co-principals, to carry out the object of the agreement. This perfectly reciprocal relationship of agent-principals is a product of the criminal agreement being an actual agreement, and not simply an expression of intent. Based on this principal-to-principal relationship, the conspirators are each responsible for the conduct of the other parties, where the conduct is within the scope of the agreement. Any conduct that goes
beyond the scope of the agreement would exceed the authority of the agent-principal. This form of augmented agency theory, while being non-causal or not necessarily causal, is predictable and offers intelligible limits on liability sufficient to ground the operation of conspiracy as a mode of liability.

However, just because conspiracy as a mode of liability can operate on a non-causal basis, that does not necessarily mean that it should. As noted in Chapter 3, agency theory and the theory of *respondeat superior* have never been warmly received by criminal law, despite being logical and comprehensive. As Francis Sayre declared: no one has yet been able to explain exactly why an individual should be liable for the unauthorized acts of their agent.\(^{285}\) While the unauthorized aspect is addressed through the augmented form of agency theory, Sayre’s central point remains. The answer to Sayre’s critique can be found in the unique risk creation that attaches to conspiracies.

The objects of conspiracies are themselves dangerous and harmful to society, and the formation of a conspiracy creates a palpable risk that the intended harms will actually occur. Further, the organizational structure of conspiracies has a destabilizing effect on a society, and is itself risk-generating. The very method of constructing a conspiracy conceals risk-generating behavior and frustrates the administration of justice, thereby increasing the risk that harm will occur and that those responsible will be able to shield themselves from liability behind the conspiratorial machine. Finally, as the Pennsylvania Supreme Court stated in *Commonwealth v*

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\(^{285}\) Sayre, *supra* note 30 at 718.
Carlisle: “… the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large….”286 There is something inherently dangerous in having groups of individuals organize for the purpose of committing a public wrong. The magnitude of the harm that can be caused by allowing such a criminal enterprise to operate should be sufficient to justify derivative liability.

The elements of the conspiracy and its principled justification provide comprehensive limits on derivative liability to a greater extent than has been seen with Joint Criminal Enterprise, and that is likely to be seen with an interpretation of common purpose or indirect co-perpetration that depends on the previous jurisprudence. An application of this traditional and structured approach to conspiracy theory as a mode of liability for collective conduct could revive the former period of international criminal law development at the Nuremberg Tribunal, where strict structural tests were applied in order to discover the existence and the scope of a true criminal conspiracy.

286 Commonwealth v Carlisle, supra note 260.
Chapter 6

Conclusion

Crimes against international law will always raise special considerations regarding society’s methods of attributing individual criminal responsibility, similar to domestic organized crime. However, unlike domestic organized crime, the prosecution of international crimes engages complexities unique to a “primitive” system of law and inevitably will bear the judgment of history. As was discovered in Part I, international criminal law has an inherent problem with individuals and collectives. The international legal system was designed to moderate the behavior of collective entities, being states; however, the concept of a “state” is a legal construct that does not exist in reality. In reality, only individuals exist, and only individuals commit public wrongs that violate values shared by the international community. This fact is complicated, and the problem of individual criminal responsibility manifests, when it is accepted that international crimes—being genocide, war crimes, crimes against humanity, and the crime of aggression—cannot be perpetrated by a solitary individual but require the combined efforts of a criminal organization. For this reason, questions of personal guilt and modes of liability applicable to collective criminal conduct will always be central to the application of international criminal law. In order to maintain the integrity and legitimacy of the law in this area, a comprehensive, predictable, and principled justification for attributing individual criminal responsibility for collective criminal conduct must found.

287 Eichmann, supra note 9 at 13.
In Part II, the traditional justification for attributing individual criminal responsibility was identified as causation, and its elements were reviewed. It was discovered that reliance on causation for the purposes of attributing responsibility in the context of offences perpetrated through collective conduct may be problematic. The legal limits that have been imposed on causation, which distinguish legal causation from physical causation, and which allow legal causation to function intelligibly as a basis for attributing liability, begin to lose their non-normative nature when applied to the context of collective conduct. In order to attribute responsibility based on a traditional causal analysis, individual contributions must be causally linked to the commission of public wrongs in a manner that approaches arbitrariness, which requires some intervening acts to be deprived of their own casual effect and others to be viewed as having severed the causal chain. The remedy proposed in Part II is to consider causation to be a valid ground for attributing individual criminal responsibility, but not the only ground. Reliance on causation in a liability analysis is based on a societal choice regarding the nature of blame and responsibility. While it may be a perfectly valid and logical choice for certain offences and certain circumstances, there is nothing prohibiting a society from adopting a different basis for liability, such as agency theory and risk creation. Acceptance of this, and creating theoretical space for non-causal justifications, is suggested as one method that may allow a solution to emerge for the problem of individual responsibility for collective international crimes.

In Part III, four approaches to individual criminal responsibility for international crimes were considered, including: the Nuremberg Tribunal’s criminal organizations charges; the ICTY’s Joint Criminal Enterprise doctrine; and the International Criminal Court’s common purpose and indirect co-perpetration doctrines. Through a review of these theories, it was
discovered that each operates in some relation to causation, and has, as a result, developed defects affecting the principled justification for supporting attribution of criminal responsibility. While the criminal organizations charges and the indirect co-perpetration have remained reliant on causation, the common purpose and Joint Criminal Enterprise doctrines have shed the restrictions of causation but failed to provide a suitable alternative. These halfway approaches have not resulted in a single theory that is comprehensive and predictable, and a principled justification for attributing individual criminal responsibility for collective criminal conduct must found. However, as opposed to investigating a new fifth way, it is suggested that the solution may lie in a return to the original approach—the Anglo-American common law theory of conspiracy, which informed the original criminal organizations charges. Of all four approaches, the criminal organizations charges created the most structured and comprehensive theory, and lacked only an explanation for how and why it deviated from causation. This explanation is necessary in order to articulate proper limits on liability, and can be found in a return to the original theory of conspiracy.

Finally, as a possible solution to the inherent international criminal law problem of how to attribute individual criminal responsibility for collective conduct, in a comprehensive, predictable, and principled manner, conspiracy theory is examined in depth. Through a historical review of the theory, it is discovered that a principled justification for conspiracy as a mode of liability that does not rely on causation can be found. Pursuant to conspiracy theory, it is justified to ascribe criminal liability to members of a conspiracy based on the augmented agency relationship that arises as a product of the criminal agreement, and based on the risk caused by the act of conspiring, in terms of: the object of the conspiracy; the manner in which conspiracies
frustrate the administration of justice; and the social volatility and harm that arises when groups of individuals confederate for anti-social purposes. In addition, a review of the elements of conspiracy revealed that, while the theory may be subject to manipulation and misapplication, when it is applied with integrity conspiracy does present appropriate and predictable limits on liability, based on the requisite knowledge and intent required to enter into and form an agreement, which in turn dictates the scope of the agreement and extent of any derivative liability.

6.1 Areas for Future Research

With a return to a traditional approach to conspiracy theory presented as a possible solution to the problem of individual criminal responsibility for collective conduct that is contrary to international criminal law, further inquiry is needed to determine in what ways conspiracy theory might be imported into international criminal law. Two possible avenues appear open. First, revisiting conspiracy theory may be possible and valuable for states such as Canada that have been tasked with implementing the provisions of the Rome Statute within their domestic legal framework. To the extent that modes of liability and interpretations of personal guilt have not already been dictated by constitutional limits, national courts or legislatures may be able to review the justification and elements for conspiracy in order to guide their application of international criminal law. Second, in light of the limited construction the International Criminal Court has given to Article 25(3)(d) of the Rome Statute, it would still be open to the Court to interpret Article 25(3)(d) consistently with the elements of conspiracy theory. While some aspects of the text would limit the adoption of conspiracy, such as the requirement for a contribution by
the accused to the common criminal purpose, it is likely that the rich history of conspiracy could provide much needed substance and grounding to the imprecise wording in Article 25(3)(d).

Returning to the 1965 American Commission on Law Enforcement and Administration of Justice, it is significant to note that when the United States was facing an epidemic of organized crime, in which the perpetrators of major crimes were sheltered from the imputation of direct liability through complex webs of collective interactions and contributions organized in dense corporate bodies, the Commission concluded that:

> Although earlier studies indicated a need for new substantive criminal laws, the Commission believes that… where organized crime exists, … The laws of conspiracy have provided an effective substantive tool with which to confront the criminal groups.\(^\text{288}\)

If conspiracy has been successful in breaking through the formidable barriers to attributing individual criminal responsibility intentionally designed and expertly deployed by *La Cosa Nostra*, then it is perhaps time this ancient tool was brought back into operation to bring to justice *la Génocidaire*.

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