

# INCHOATE CRIMES AND CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW

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“Well, General Clark, I warned [General Ratko Mladic] not to do it, but he didn't listen to me.”

– Testifying before the international tribunal at the Hague, General Wesley Clark recounts Slobodan Milosevic's statement regarding the massacre of Bosnian Muslims at Srebrenica.<sup>1</sup>

## I. *Introduction*

Prosecuting crimes against international law often entails complex analysis of guilt in those who partake in organized violations of international law. Culpability for crimes against international law may not be limited under customary law to those who actually carry out those crimes. Most nations prosecute inchoate acts (such as conspiracy and incitation) in their domestic criminal law. At times, the international community has prosecuted inchoate crimes. The international community has not, however, clearly stated whether or not inchoate crimes such as conspiracy or incitation (solicitation, as American law refers to it) to violate international law should be included in a statement of customary international law. Such inchoate crimes have at times been punished in international court or laid out in the statutes establishing such tribunals.<sup>2</sup> In order to establish custom under international law, one must establish customary

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<sup>1</sup> Elaine Sciolino, “Milosevic Trial Helps Clark Try to Gain Notice,” N.Y. TIMES, Dec. 17, 2003, at A1.

<sup>2</sup> See, e.g., Charter for the International Military Tribunal (IMT) [hereinafter Nuremberg Charter], Art. 6(a) & 6(c), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 available at <http://www1.umn.edu/humanrts/instree/imt1945.htm> (last visited Apr. 4, 2004); Convention on the Prevention and Punishment of the Crime of Genocide, art. 3, Jan. 12, 1951, 78 U.N.T.S. 277, 288 I.L.M. 761 available at <http://www1.umn.edu/humanrts/instree/xlcpcpg.htm> (last visited Apr. 4, 2004); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, art. 4, annexed to S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993) reprinted in 32 I.L.M. 1159, 1170 (1993), available at <http://www.un.org/icty/basic/statut/statute.htm> (last visited Apr. 3, 2004); Statute of the International Tribunal for Rwanda, art. 2, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) available at [http://www.ict.org/ENGLISH/basicdocs/statute\\_old.html#statute](http://www.ict.org/ENGLISH/basicdocs/statute_old.html#statute) (last visited Apr. 3, 2004); Rome Statute of the

practice and *opinio juris*. In this paper I wish to consider the historical background of inchoate crimes, the current practice in individual nations around the world, and the contemporary treatment under international law. The criminalization of inchoate crimes under domestic law is essentially universal, sufficient to establish customary practice. International courts have relied on inchoate crimes such that their acceptance should represent *opinio juris*.<sup>3</sup> Both incitation and conspiracy to violate international law can and should be punished under customary international law.

## II. *History and Contemporary Practice in Common Law Jurisdictions*

### A. *Origins and Early History of Conspiracy in England*

While the origins of conspiracy law in England are often traced to the infamous Star Chamber, its heritage runs much earlier, to the birth of the common law itself. In 1304, the Third Ordinance of Conspirators recognized the offense of conspiracy to thwart justice, either by agreeing to commit perjury or agreeing to bring a false suit before the courts.<sup>4</sup> Conspiracy as a general criminal offense to commit any crime did not, however, arise until the seventeenth century. In 1611, in the *Poulterers' Case*, the Star Chamber tried and convicted a group of poulterers who had agreed to bring false charges of robbery, despite the fact that the plan had not

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International Criminal Court, Art. 25(3)(d), July 18, 2002, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], reprinted in 37 I.L.M. 999, available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Apr. 4, 2004).

<sup>3</sup> For another analysis of the modern history of conspiracy law in both common law and civil law jurisdictions as a background to the prosecution of the conspiracy to commit genocide at the International Criminal Tribunal for Rwanda (ICTR), see Alex Obote-Odora, *Conspiracy to Commit Genocide: Prosecutor v Jean Kambanda and Prosecutor v Alfred Musema*, MURDOCH U. ELECTRONIC J. L., Mar. 2001, at ¶10-27 available at <http://www.murdoch.edu.au/elaw/issues/v8n1/obote-odora81.html> (last visited Apr. 3, 2004). See also Edward M. Wise, *RICO Thirty Years Later: A Comparative Perspective*, 27 SYRACUSE J. INT'L L. & COM. 303 (2000) (describing the current status of conspiracy law in civil law jurisdictions); Alexander D. Tripp, Comment, *Margins of the Mob: A Comparison of Reves v. Ernst & Young with Criminal Association Laws in Italy and France*, 20 FORDHAM INT'L L.J. 263 (1996) (contrasting the RICO statute with Italian and French group criminality statutes).

<sup>4</sup> ROBERT SPICER, CONSPIRACY: LAW, CLASS AND SOCIETY 23 (1981). The statute reads: "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 move or maintain pleas." *Id.* at 23.

succeeded.<sup>5</sup> The case posed described the fundamental novelty of the charge of conspiracy, that “fake conspiracy betwixt divers persons shall be punished although nothing be put in execution.”<sup>6</sup>

In 1716, the crime of conspiracy was laid out by Hawkins in his *Pleas of the Crown*, stating that “all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law.”<sup>7</sup> This enduring description of conspiracy led to the criminalization of combination to produce any number of ill effects, some of which were not criminal when performed by a single person. In *R. v. Edwards*, the defendants conspired to have an impoverished woman married to a man in another parish, in order to impose the fees for her public assistance on the other parish.<sup>8</sup> Though the court acquitted the defendants, the court stated that a “bare conspiracy to do a lawful act to an unlawful end is a crime.”<sup>9</sup> This view of the nature of conspiracy, that a legal act could be rendered illegal when performed by a group, endured for centuries in English law.

Defendants have, in recent times, been convicted of conspiracies to promote sodomy after homosexual sodomy had been legalized.<sup>10</sup> English courts have also punished conspiracies with sentences longer than the statutory maximum for the substantive offense.<sup>11</sup> They have also convicted conspirators when the statute of limitations for the substantive offense has lapsed.<sup>12</sup> The Crown has also successfully brought charges against conspirators in trial courts when the

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<sup>5</sup> *Id.* at 25.

<sup>6</sup> *Id.* at 25.

<sup>7</sup> *Id.* at 26.

<sup>8</sup> [1725] 8 Mod. 320.

<sup>9</sup> *Id.* at 320.

<sup>10</sup> *Knüller v. DPP*, [1974] AC 435 .

<sup>11</sup> Verrier was found guilty of conspiracy to defraud and sentenced to seven years, where the maximum sentence for obtaining money by false pretences was five years. *Verrier v. DPP*, [1966] 3 WLR 924. Also, consider *R. v. Morris*, where the defendant was sentenced to four years for a conspiracy to smuggle watches, despite the statutory maximum for the substantive offense being two years. [1951] 1 KB 394. See SPICER, *supra* note 4, at 18.

<sup>12</sup> *R. v. Blamires Transport Services*, [1964] 1 QB 278.

substantive offense could only be tried before a magistrate.<sup>13</sup> The English courts for many years considered conspiracy to be an offense largely divorced conceptually from the underlying substantive offense. In 1977, the Parliament codified all criminal conspiracies except for the conspiracy to defraud.<sup>14</sup> In 1986, the Law Commission recommended codifying the conspiracy to defraud.<sup>15</sup> The Law Commission is still advancing such proposals, without any final codification of the conspiracy to defraud.<sup>16</sup>

One of the further dramatic changes in the English law of inchoate crimes is the expansion of jurisdiction over such crimes. Conspiracy or incitation enacted in England, when the substantive crime is to be planned to take place abroad, can be punished in England, provided the crime is an offense both in England and in the host country.<sup>17</sup> Similarly, a conspiracy or incitement made abroad to commit a crime in England can be punished in England, even where the substantive crime never took place.

## **B. *Development of American Criminal Law***

Though the founders of the American republic were so opposed to the inquisitorial system of English law that permitted the criminalization of many group activities as seditious that treason is the only crime explicitly described in the U.S. Constitution, the United States has long prosecuted solicitation and conspiracy aggressively. The passage of the RICO statute in the sixties greatly facilitated the prosecution of inchoate crimes, as well as putting racketeering into the jurisdiction of the federal government, rather than just state governments, who prosecute the

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<sup>13</sup> R. v. Simmonds, [1967] 3 WLR 367.

<sup>14</sup> *Call for Reform of Conspiracy Law*, 85 LAW SOCIETY 3 (1986).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> G. R. Sullivan, *Fraud -- The Latest Law Commission Proposals*, 67 J. CRIM. L. 139 (2003).

<sup>17</sup> Jessica Holyrod, *The Reform of Jurisdiction over International Conspiracy*, 64 J. CRIM. L. 323 (2000) (explaining the expansion of jurisdiction over conspiracy within English jurisdiction).

bulk of crimes. The drafting of the RICO statute drew many influences from the European tradition of prosecuting membership in a criminal organization, rather than simply the common law notion of conspiracy; even so, it looks not for mere membership, but “association-in-fact,” based on an individual’s participation in the group, rather than membership.<sup>18</sup>

The elements of criminal conspiracy under the major statute for American conspiracy law<sup>19</sup> are (i) an agreement between at least two parties, (ii) to achieve an illegal goal, (iii) the parties know the nature of the conspiracy and participate in it, and (iv) at least one party commits an overt act in furtherance of the conspiracy.<sup>20</sup> One of the recent American innovations is the overt act requirement, also required in many state jurisdictions.<sup>21</sup> Conspiracy and solicitation, though frequently prosecuted,<sup>22</sup> have additional restraints on their prosecution in the United States. The peculiar free speech and free association law under the First Amendment to the US Constitution, as well as an underlying national sentiment against criminalizing simple association, have restricted the scope of inchoate crime prosecution. Many of the great free speech and free association cases have been brought in the context of prosecutions for conspiracy.<sup>23</sup> The proposition that one cannot be convicted for mere membership in a group is well-established in American constitutional law,<sup>24</sup> which may explain the reason why the criminal organization statutes popular in civil law countries have not taken hold in the United States.

### **III. *Inchoate Crimes in Civil Law Countries***

#### **A. *Early Development of Inchoate Crimes***

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<sup>18</sup> 18 U.S.C. 1962(c) (2000).

<sup>19</sup> 18 U.S.C. § 371 (2000).

<sup>20</sup> Carrie Casey & Lisa Marino, *Federal Criminal Conspiracy*, 40 AM. CRIM. L. REV. 577 (2003).

<sup>21</sup> See, e.g., N.Y. Penal Law § 105.20 (McKinney 2004).

<sup>22</sup> See Casey & Marino, *supra* note 20, at 578 n.9.

<sup>23</sup> See e.g., *United States v. Whitney*, 274 U.S. 357 (1926).

<sup>24</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overturning defendant’s conviction under a criminal syndicalism statute).

Despite famous claims to the contrary,<sup>25</sup> notions of conspiracy and other inchoate crimes pervaded Roman criminal law. While a general offense of conspiracy was not cognized by Roman criminal law, numerous specific offenses are laid out in the *Digests* of Justinian which describe inchoate criminal acts that would be described as incitation or conspiracy today.<sup>26</sup> The elaborately described crime of treason allows criminal punishment for numerous inchoate acts.<sup>27</sup> The punishment for adultery also entails punishment for the crime of providing a house for the planning of adultery—an offense which seems to consist of facilitation of conspiracy.<sup>28</sup> Incitation of adultery was also a crime under Roman law.<sup>29</sup> Those who conspire to blackmail adulterers were punished as the adulterers would be.<sup>30</sup> Conspiracy to raise a mob could also be punished.<sup>31</sup> The English statute prohibiting conspiracies to commit perjury outlined above even had a Roman precursor, though no historical link suggests that the English statute was derived from the Roman one.<sup>32</sup> Considering the comparative paucity of the Roman criminal law, the frequent citations of punishment for inchoate acts, for rendering aid or counsel to another's criminal acts, for conspiring, inciting, or agreeing to a criminal act, suggest that the danger of group action concerned the Romans greatly.

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<sup>25</sup> Francis Sayre, *Criminal Conspiracy*, 35 HARV. L. REV 393, 427 (1922).

<sup>26</sup> See generally THE DIGEST OF JUSTINIAN, Vol. IV (Theodor Mommsen & Paul Krueger, eds., Alan Watson, trans. 1985).

<sup>27</sup> *Id.* at 803 (quoting Ulpian, “He is liable, by whose agency a plan is formed with malicious intent to kill hostages without the permission of the emperor; or that men armed with weapons or stones should be, or should assemble, within the city against the interests of the state, or should occupy places or temples....”).

<sup>28</sup> *Id.* at 806 (quoting Ulpian, “And if men have been accustomed to meet at a certain house to plan an adultery even if nothing was committed at that place, nevertheless the occupier seems to have made available his house for the commission of *stuprum* or adultery, because without that specific discussion the adultery would not have been committed.”).

<sup>29</sup> *Id.* at 807 (quoting Ulpian, “The words of the statute ... apply both to him who counsels *stuprum* and to him who brings it about.”).

<sup>30</sup> *Id.* at 808 (quoting Scaevola, those “by whose aid and counsel” blackmail adulterers or entrap them will be punished like adulterers).

<sup>31</sup> *Id.* at 816 (quoting Marcian, accusing those who “have entered into a conspiracy to raise a mob or a sedition....”).

<sup>32</sup> *Id.* at 822 (quoting Marcian, “The penalty of the *lex Cornelia* is imposed on a person who with malicious intent conspires for the giving of false witness or the delivering one after another of false evidence.”).

Though the fall of Rome led to the decline of the kind of city-oriented lifestyle that most fosters concerns about conspiracy and group action, the so-called “dark ages” included a legal conception of inchoate crime. In the pastoral world of the Salian Franks, the solicitation of murder, even where the deed went undone, could incur punishment.<sup>33</sup> The Salic Law also punished soliciting a slave to leave his master.<sup>34</sup> Beyond solicitation, the Salic Franks also punished group criminal action, even where some members of the group did not partake. Where a murder occurs in a group of less than seven, the Salic law outlines punishment for members of the group who do not render up the culprit.<sup>35</sup> The Franks also punished members of a group who attacked a free woman, even when the members were known not to have actively participated in the attack.<sup>36</sup> Later codes, though not imposing liability, would also find group action sufficient grounds for further examination under torture.<sup>37</sup>

As Europeans returned to living in increasingly larger cities and as religious conflict gripped the continent, Continental authorities began to recognize the dangerousness of group crime and punish inchoate acts. Canon law throughout the medieval and Renaissance period punished conspiracies. Clerics involved in or knowing of a conspiracy would be defrocked and imprisoned.<sup>38</sup> Hugo Grotius acknowledged a hierarchy among crimes, determined by the degree

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<sup>33</sup> PACTUS LEGIS SALICAE [THE SALIC LAW] in LAWS OF THE SALIAN FRANKS, Sec. XXVII, p.92 (Katherine Fischer Drew, trans. 1991).

<sup>34</sup> *Id.* at Sec. LXVI, p.101.

<sup>35</sup> *Id.* at Sec. XLIII, p.107.

<sup>36</sup> *Id.* at Sec. LXXII, p. 131.

<sup>37</sup> CONSTITUTIO CRIMINALIS CAROLINA translated in JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE, App. B at 278 (1974) (“Concerning sufficient suspicion of those who aid robbers or thieves: (40) When someone knowingly and maliciously takes robbed or stolen goods, or loot, or shares therein; or when someone knowingly and maliciously gives the culprits food and drink, or knowingly takes in, conceals, or harbors the culprits... or when someone otherwise in some similar way maliciously furnishes the culprits with help, advice or assistance or had improper association with them in their crime, that is also an indication upon which to examine under torture.”).

<sup>38</sup> Kate Lowe, *The Political Crime of Conspiracy in Fifteenth- and Sixteenth-Century Rome* in CRIME, SOCIETY, AND THE LAW IN RENAISSANCE ITALY 186 (Trevor Dean & K.J.P. Lowe, eds. 1994).

of their progress toward the final goal. Immediately after completed crimes, Grotius listed “criminal designs” as occupying the second tier of criminal behavior.<sup>39</sup>

### **B. *Modern Civil Law Description of Inchoate Crimes***

Generally speaking, the traditional punishment of inchoate group acts within civil law countries has been through the “criminal association” rule, rather than the common law “conspiracy” rule. The “criminal association” focuses on the formation of a criminal gang with the purpose of committing criminal acts. Under the common law, a conspiracy focuses on the common purpose of multiple persons, whether or not they are organized into a single group. In recent times, the distinction has grown far less significant, as France and Germany have also adopted common law-like rules where agreement is sufficient to find culpability. On the other side of the Atlantic, the American RICO statute punishes association-in-fact enterprises rather than specific agreements to perform specific criminal acts.

In France, the prosecution of inchoate acts has become common. In 1810, group criminality was first addressed with a statute outlawing all criminal organizations with clear hierarchies and organizational structures.<sup>40</sup> Today, the elements of the group offense include a collective understanding of the criminal purpose, an aim to prepare for certain criminal acts, and an intent that those criminal acts be brought about.<sup>41</sup> French law requires physical evidence and an overt act to prove the *association de malfaiteurs*.<sup>42</sup> French law also enumerates certain

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<sup>39</sup> HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 241 (A.C. Campbell, trans. 1901).

<sup>40</sup> CATHERINE ELLIOT, FRENCH CRIMINAL LAW 101 (2001).

<sup>41</sup> *Id.* at 101.

<sup>42</sup> NOUVEAU CODE PENAL [NEW PENAL CODE] 699 (1994).

specific conspiratorial crimes, such as any plot against the state followed by a material act advancing the plot.<sup>43</sup>

French complicity law also plays a role in the punishment of inchoate crimes. Simple advice will sometimes suffice to establish guilt where the accomplice knows of the criminal purpose of the actor. A mother, knowing that her child's father was going to drown their child in a canal, advised the father to bring a blanket and a sack along, for the purposes of wrapping the child in the blanket and placing the child inside the sack.<sup>44</sup> She was found guilty as an accomplice in the death of her child.<sup>45</sup> The French Penal Code also incorporates incitation into its complicity statute, allowing a finding of complicity where an actor brings about a criminal act by provocation or instruction.<sup>46</sup>

The German statutes on inchoate crimes may, in fact, impose more stringent liability than their Anglo-American counterparts. The German Penal Code punishes a failure to report a planned crime, provided that the crime was not a serious one and not one abandoned by the conspirators.<sup>47</sup> Essentially, such a penalty is one for conspiracy, even where the defendant did not agree to the conspiracy and merely fails to report it. The Penal Code also allows punishment for praising or rewarding crime after the fact, even where the defendant had no knowledge that the crime would be committed beforehand.<sup>48</sup> Such crimes come close to defining "thought crimes" by imposing affirmative duties on citizens to thwart crimes in which they have never taken active part beyond simple awareness of the plan, or where they have taken no part in the

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<sup>43</sup> *Id.* at 567.

<sup>44</sup> *Id.* at 87.

<sup>45</sup> *Id.* at 81.

<sup>46</sup> *Id.* at 92. BENOIT CHABERT & PIERRE-OLIVIER SUR, DROIT PENAL GENERAL [GENERAL PENAL LAW] 74 (1997).

<sup>47</sup> GERMAN PENAL CODE, Sec. 138 (Steven Thaman, trans. 2002).

<sup>48</sup> *Id.* at Sec. 140.

crime except to applaud it afterwards. German law punishes individuals much less culpable than those that run afoul of Anglo-American laws.

Incitement to commit a crime in Germany can be punished; similarly, an unsuccessful attempt to incite can be punished as an attempt.<sup>49</sup> A separate crime is defined for the public incitement to crime.<sup>50</sup> In a nod to Germany's twentieth century history, a particular crime of agitating one segment of the people against another or defaming one segment of the people has been defined.<sup>51</sup> Instruction intended to encourage others to commit crimes is also criminalized.<sup>52</sup>

Group criminality is strongly punished in German criminal law. Formation of armed groups for any purpose is forbidden.<sup>53</sup> German law also prohibits the formation of an organization for the purpose of committing crime (as well as membership in such a group, recruiting for such a group, or otherwise supporting such a group).<sup>54</sup> Any of the above crimes performed on the behalf of a terrorist group will incur an increased penalty.<sup>55</sup>

Italy has not made substantive offenses out of inchoate criminal acts to the extent of its European neighbors. However, even Italy has recognized the greater danger present in group criminality. Even before the reform of the criminal code in 1989, the Italian criminal code provided heightened penalties for participants in crimes involving more than five people, as well as for anyone who incites or directs others under his authority to commit crimes.<sup>56</sup> The Italian law largely prohibits group criminality by making illegal criminal organizations, rather than criminal agreements.<sup>57</sup> However, the scope of criminal association law has recently been

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<sup>49</sup> *Id.* at Sec. 26 & 30.

<sup>50</sup> *Id.* at Sec. 111.

<sup>51</sup> *Id.* at Sec. 130.

<sup>52</sup> *Id.* at Sec. 130a.

<sup>53</sup> *Id.* at Sec. 127.

<sup>54</sup> *Id.* at Sec. 129.

<sup>55</sup> *Id.* at Sec. 129a.

<sup>56</sup> ITALIAN PENAL CODE 39-40 (Edward M. Wise & Allen Maitlin, trans., 1978).

<sup>57</sup> *Id.* at art. 416.

expanded by the Corte di Cassazione, where non-members can be tried as accomplices to the association, recalling the American RICO standard of punishing an association-in-fact rather than mere membership.<sup>58</sup> Further, in considering the question of whether extradition from Italy to the United States would be appropriate where the extraditee would face conspiracy charges, Italian treaty negotiators that the RICO statutes in the United States and the Italian criminal association law are sufficiently similar to satisfy the “mutual criminality” requirement and allow extradition.<sup>59</sup>

Japan, like Italy, has not made some of the strides other nations have towards making substantive offenses out of inchoate crimes. However, Article 61(1) of the Japanese criminal law does punish instigators of crime just as the law would punish the principal actor, not by creating a substantive offense of “instigation,” but by allowing that instigation can be one means by which a principal achieves the aim of his crime.<sup>60</sup> While the Code is obscure on the point, the opinion of experts seems to agree on the notion that finding an instigator guilty is prefaced on action by the actual perpetrator of the crime.<sup>61</sup> Further, the instigation must “conclusively precipitate” the co-principal’s acts.<sup>62</sup> Otherwise, the Japanese Criminal Code only assigns culpability for acts of conspiracy or instigation where the ultimate criminal act is not completed under limited circumstances. The Subversive Activities Prevention Law allows prosecution for instigation of a homicide for political reasons, even where no homicide actually occurs.<sup>63</sup> Insurrection, assisting the enemy, inducing a foreign nation to attack the home country, or

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<sup>58</sup> See Tripp, *supra* note 3, at 297.

<sup>59</sup> Wise, *supra* note 3, at 319.

<sup>60</sup> SHIGEMITSU DANDO, THE CRIMINAL LAW OF JAPAN; THE GENERAL PART 222 (B.J. George, trans., 1997).

<sup>61</sup> *Id.* at 223.

<sup>62</sup> *Id.* at 242.

<sup>63</sup> *Id.* at 222.

waging private war are all crimes for which simple incitement or conspiracy to bring them about is sufficient to incur punishment.<sup>64</sup>

Finally, Chinese law recognizes the criminality of preparatory acts, as well as a French-style “criminal organization.”<sup>65</sup> The statute allows for punishment of leaders for all the acts of their subordinates, and of every principal for the crimes they personally led or carried out.<sup>66</sup> Chinese criminal law also punishes instigators in proportion to their part in the crime.<sup>67</sup>

### C. *Summary of Civil Law Standards*

The roots of prosecution of inchoate crimes run deep and branch wide in the civil law. Civil law nations are uniform in agreeing that incitation of a crime (or solicitation, provocation, instigation, etc.) is generally an inchoate crime and can be prosecuted. The dramatic shift in recent time is the shift of their theory on group criminality. While essentially all civil law countries retain a “criminal organization” statutory offense, several of the most prominent countries among civil law states (including France and Germany) have vastly broadened their standards on group criminality, so as to encompass most, if not all, of the Anglo-American standard of “conspiracy.”

This dual, though overlapping, system is a sensible system for prosecuting group criminality throughout the world. For a conspiracy is simply a group (defined by its agreement) with a commonly agreed-upon criminal aim. Only those conspiracies which do not involve an organized group would fall outside the civil law model of “criminal organization.” The number of groups outside that European model will be small, as a criminal agreement could be construed,

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<sup>64</sup> JAPANESE CRIMINAL CODE Art. 129, 131, 134, 135, 138, 139, 140, 141 (1978).

<sup>65</sup> WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE’S REPUBLIC OF CHINA 40 (1997).

<sup>66</sup> *Id.* at 40.

<sup>67</sup> *Id.* at 42.

essentially, as the formation of an organization toward that criminal end. The substantive differences in between the two models are, at heart, minimal. The benefits to maintaining two standards are in many ways procedural rather than theoretical. The drafting of the RICO statute in the United States, for instance, came about at least in part because membership in such a group was easier to prove, under certain circumstances, than agreement to a particular goal. On the other hand, the original provisions of the 1810 code relating to criminal organizations in France have been stripped of most of their requirements that the criminal group have structure and hierarchy. I imagine this is because the agreement, whether explicit or implicit, is the essence of any criminal group (the purpose of joining a pirate band being to commit piracy, the purpose of joining a band of brigands to commit armed robbery), regardless of how organized the group is.

I propose that there is a clear rule in the domestic law of the nations of the world that all incitation to crime should be punished as a criminal act. I further propose that the two standards of common law “conspiracy” and civil law “criminal organization” are convergent standards, whose individual requirements may change from country to country, but whose essential scope and justification are the same.

#### **IV. *International Opinio Juris on the Question of Inchoate Crimes***

The discussion of the treatment of inchoate crimes in international forums begins with the Nuremberg trials. Herbert Wechsler, the legal scholar, was the Assistant Attorney General for the War Department. He received a memo from Murray Bernays proposing a post-war tribunal for the war crimes committed by Nazi generals and civilian administrators. The original proposal entailed an enormous prosecution for a single conspiracy. Wechsler rejected that notion, saying

that “maybe international law didn't similarly recognize the criminality of conspiracies.”<sup>68</sup> However, Wechsler recognized at the same time, that, “Bernays himself was confused between conspiracy as a crime and conspiracy as a mode of complicity in substantive offenses, committed by one of the conspirators. All civilized systems recognize conspiracy – or at least agreement, encouragement—as a mode of criminal participation in the commission of substantive offenses.”<sup>69</sup> The list of charges set forth at Nuremberg, therefore, included not only substantive offenses against the law of nations, but conspiracy to commit crimes against peace.<sup>70</sup>

The articles of the Nuremberg Charter also allowed for the declaration of certain organizations as illegal.<sup>71</sup> The IMT included six Nazi organizations on the list of illegal organizations.<sup>72</sup> The criminal organization articles of the Nuremberg Charter were criticized before the IMT. Even the prosecution felt compelled to narrow the sweep of the criminal organization standard in order to salvage the prosecution at all.<sup>73</sup> IMT judge Francis Biddle, who had helped to draft the plan leading up to the tribunal at Nuremberg while acting as U.S. Attorney General, felt compelled to criticize the criminal organization offense after observing its

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<sup>68</sup> Norman Silber and Geoffrey Miller, *Toward “Neutral Principles” in the Law: Excerpts from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854 at 894.

<sup>69</sup> *Id.* at 894.

<sup>70</sup> Nuremberg Charter, *supra* note 2, Art. 6(a). The conspiracy provision had, in an earlier draft proposed by the Americans, applied to all three categories of crimes defined by Article 6: crimes against peace, war crimes, and crimes against humanity. Stanislaw Pomorski, *Conspiracy and Criminal Organizations in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 222* (George Ginsburgs & V.N. Kudriatsev, eds. 1990). In subsequent negotiations, the conspiracy provision relating the latter two categories of crimes was removed. *Id.*

<sup>71</sup> *Id.* at Art. 9 & 10.

<sup>72</sup> Pomorski, *supra* note 70, at 238 n.100. The list of indicted groups included the Reich Cabinet, the Leadership Corps of the Nazi Party, the SS, the Gestapo, the SA, and the General Staff and High Command of the German Armed Forces. *Id.*

<sup>73</sup> *Id.* at 239. Foremost among the numerous objections to the Charter provisions was the lack of any defense to membership, such as compulsion or renunciation. *Id.* at 239.

operation in the tribunal.<sup>74</sup> His objections to the entire charge, however, were not shared by the rest of the tribunal.<sup>75</sup>

However, simply designating the crime of conspiracy to wage aggressive war as prosecutable at Nuremberg could not insulate the crime from criticism by French and Soviet lawyers and judges.<sup>76</sup> In the Justice case, which put a number of German judges on trial, the Allied judges dismissed Count One entirely against the defendants, as they felt that they lacked jurisdiction to try a charge that listed conspiracy as a separate and substantive offense, though they also acknowledged that the portion of the count which alleged that the defendants had planned the crimes of aggression described performance of actual crimes, rather than simple conspiracy.<sup>77</sup>

The Krupp case at Nuremberg outlined the first international conception of conspiracy law, requiring a finding that of 1) a plan involving at least two persons 2) a clearly outlined criminal purpose and 3) that the plan cannot be too far removed from the time of decision and action.<sup>78</sup> Nevertheless, the evidentiary concerns of the tribunal were high, requiring that knowledge of the conspiracy be proven directly (not by inference) and beyond a reasonable doubt.<sup>79</sup> Not surprisingly, such a standard hobbled conspiracy prosecution. A separate “conspiracy”-like form of participation (in successful endeavors) was also defined by the tribunal

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<sup>74</sup> *Id.* at 241.

<sup>75</sup> *Id.* at 241. Judge Biddle sought to eliminate the criminal organization articles entirely but failed to obtain support from any colleague, even French judge Donnedieu de Vabres, who had roundly criticized the conspiracy charge. *Id.* at 230, 241. Biddle’s objections were more striking as Justice Jackson had referred to Articles 9 & 10 during the presentation of the American proposal for the IMT as “the heart of our proposal.” *Id.* at 219.

<sup>76</sup> *Id.* at 218-19, 230.

<sup>77</sup> Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 810-11 (1999).

<sup>78</sup> ILIAS BANTEKAS, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW 46 & 46, n.3 (2002).

<sup>79</sup> *Id.* at 47.

where 1) there was an existing system to commit the offences, 2) awareness of the system by the accused and 3) that the accused be involved in the operation of the system.<sup>80</sup>

At the IMT at Nuremberg, the conspiracy and incitation crimes were defined after the events prosecuted occurred.<sup>81</sup> The implications of these statutes are subtle but powerful. The international community cannot draft an *ex post facto* statute and punish criminals for acts performed before they were forbidden. The only way in which the international community could punish culprits would be if the international community agreed to the existence of some natural law or *jus cogens* prohibition which needed no prior notification. That is, the crime of conspiracy to effect aggressive war must be so self-evident that one can prosecute such a conspiracy, even where no code of law specifically forbade them.

Though the trials at Nuremberg were an achievement for humanity and international law, they were rather a disappointment for some of the men who went to Germany hoping to convict every defendant on every charge. And no man suffered more disappointment than Justice Jackson, who was widely thought to have been humiliated by Hermann Goering while Jackson cross-examined Goering.<sup>82</sup> In the first and most important trial of the central Nazi leaders, he failed even to convict three of the twenty-two defendants.<sup>83</sup> Of the nineteen convicted, only twelve were sentenced to death.<sup>84</sup> His bitterness may not have been limited to concerns over his own performance, but may have arisen from his frustrations in working with members of legal systems and judiciaries with which he was unfamiliar. Some of the bitter lessons Jackson learned in the rejection of the count of conspiracy by civil law jurists at Nuremberg come out in

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<sup>80</sup> *Id.* at 47.

<sup>81</sup> Nuremberg Charter, *supra* note 2, Art. 6(a) & 6(c).

<sup>82</sup> ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL (1984), at 273-88.

<sup>83</sup> *Id.* at 504.

<sup>84</sup> *Id.* at 504.

his terse and angry concurrence in *Krulewitch v. United States*, shortly after his return from Europe.<sup>85</sup>

After the prosecutions at Nuremberg (and the counterpart prosecutions in Tokyo), the world community created a pact describing genocide for future reference in prosecution. The UN decided to enforce liability for conspiracy to commit genocide on the grounds of simple agreement, because of the collective action required in order to achieve genocide and to prevent future acts of genocide.<sup>86</sup> The ILC also set out a principle of individual responsibility allowing conspiracy as a general means of achieving a crime in its Draft Code of Crimes against the Peace and Security of Mankind, wherever the defendant “directly participates in planning or conspiring to commit such a crime which in fact occurs.”<sup>87</sup> The Draft Code of the ILC also imposes liability on incitation where the crime occurs.<sup>88</sup> In the discussion of the statute of the ICC, delegates considered such a standard for the court. The statute of the ICC now imposes liability on those who intentionally contribute to a crime and where they act to further the criminal purpose of the group or where they act in knowledge of the intention of the group to commit the crime.<sup>89</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case outlined the statutes to encompass the actions of those who plan and further any criminal design,

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<sup>85</sup> 336 U.S. 440, 450 (1949) (“The [conspiracy] doctrine does not commend itself to jurists of civil-law countries, despite universal recognition that an organized society must have legal weapons for combatting organized criminality. Most other countries have devised what they consider more discriminating principles upon which to prosecute criminal gangs, secret associations and subversive syndicates.”).

<sup>86</sup> BANTEKAS, *supra* note 78, at 48.

<sup>87</sup> International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, [hereinafter ILC Code] Art. 2, § 3(e) available at <http://www.un.org/law/ilc/texts/dcodefra.htm>. See also BANTEKAS, *supra* note 78, at 48.

<sup>88</sup> ILC Code, *supra* note 87, Art. 2(3)(f).

<sup>89</sup> ICC Statute, *supra* note 2, Art. 25(3)(d). See also BANTEKAS, *supra* note 78, at 49.

though only conspiracy to commit genocide was outlined in the statute.<sup>90</sup> The tribunal essentially found three degrees of criminality in the planning and “common criminal design” criminality: intentional perpetration, knowing perpetration, and negligent facilitation.

The international community has developed an elaborate theory of command responsibility for the actions of subordinates, which imposes responsibility where commanders fail to act. Originally derived from the established responsibility of military commanders, it has been extended to civilian and political leaders.<sup>91</sup> The origin of the doctrine in modern international criminal law derives from the Yamashita prosecution after World War II.<sup>92</sup> The essence of the doctrine is that a superior can be held responsible for crimes done by his inferior, either where the commander knew or should have known of the crime beforehand and did nothing to stop it, or where the commander discovered the crime after the fact and failed to punish it.<sup>93</sup> The doctrine of command responsibility has been applied in force in both the ICTY and the ICTR.

The doctrine of command responsibility has much to commend of it. First, by condemning failure to stop crimes of which the commander knew or should have known, the doctrine allows no defense of willful blindness. Within political structures, particularly, the doctrine also gives special force to the work of outside agencies like human rights groups. Even where human rights abuses or war crimes might reasonably go unnoticed, an outside body that brings such abuses to light will require a government to deal with such abuses or face potential

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<sup>90</sup> *ICTY Prosecutor v. Tadic*, Appeals Judgment (15 July 1999), paras. 185-193. See also BANTEKAS, *supra* note 78, at 49-50.

<sup>91</sup> BANTEKAS, *supra* note 78, at 95.

<sup>92</sup> See generally RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982).

<sup>93</sup> See BANTEKAS, *supra* note 78, at 108-24.

criminal liability in the future. The doctrine thus gives incentives for vigorous advocacy to NGO's and other monitoring bodies as well as special force to their work.

However, the command responsibility doctrine is specially tailored to the political needs of these sorts of tribunals. Namely, these tribunals act after the crimes are already essentially complete and prosecute the members of the highest echelons of the conspiracy. The doctrine would not serve the interests of a body trying to use international law to bring down an ongoing conspiracy against the law of nations using the law alone. The large-scale conspiracies addressed by domestic laws on group criminality are generally prosecuted by working the way up the hierarchy, one rung at a time. The command responsibility doctrine only has serious effects where the conspiracy is broken up from by extralegal forces (external military invasion, as in Yugoslavia, or merely the passage of the old regime, as in Rwanda) and the commanders of illegal action are corralled for trial. To combat an ongoing action, the international community will need different methods. The different method I propose should reflect the methods domestic legal systems use to combat ongoing group criminality.

The first inchoate crime I would propose for use as a tool of customary international law is incitation. As for the crime of incitation, little formal analysis needs to be done, where the different domestic standards overlap almost identically. The most substantive difference between legal systems would be in those jurisdictions (such as Japan) which generally do not punish incitation which does not result in a crime. Where two people possessing the same *mens rea* advocate a particular crime with the same vehemence, no serious theoretical system should punish one instigator because his audience complied with his instigation while letting the second escape simply because his audience was not as receptive. Such a stance would be tantamount to punishing a successful murderer but refusing to punish an equally culpable defendant who failed

to kill his target solely because his aim was poor. Regardless, the consensus of the international community that even unsuccessful incitement to genocide should be punished in Rwanda and Yugoslavia should assuage any concerns about criminalizing incitement.

The second concern over criminalizing incitement rests only on a semantic concern. In common law countries, incitement (or solicitation) is punished as a substantive offense. In civil law countries, incitement is generally considered a means to achieve a substantive crime, rather than an offense on its own. I see little importance to such a distinction. One effect of making incitement a means of commission rather than an independent offense would be to make unsuccessful incitement a form of attempt, and subject to potentially lesser punishment than a successful incitement. Such a concern, however, rests on the larger debate of whether attempts should be punished to the same extent as a successful crime, which I need not resolve here. Ultimately, the classification of incitement under customary international law is less important than whether it can be prosecuted as a crime against customary international law at all.

The thornier problem in deriving customary international law rules on inchoate crimes from domestic standards is the resolution of the “conspiracy”/“criminal organization” conflict. Even though common law and civil law countries have come much closer on the question of group criminality since 1945,<sup>94</sup> material distinctions on the domestic legal standards still remain. However, the core of their group criminality law overlaps to such an extent that an amalgam of the two legal standards would still apply to many, if not most, group criminal acts. I would propose that a criminal conspiracy involving both an agreement between the parties to violate customary international law and some evidence of individual participation in the conspiracy’s

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<sup>94</sup> The best example of the approximation of civil law criminal organization to the common law standard on conspiracy is the alteration of the French standard for an *association de malfaiteurs* to encompass smaller and less organized groups. The requirements that a criminal organization be of a large size and have substantial structure have been reduced from the original 1810 standard. The *association de malfaiteurs* statute has also incorporated the common law overt act requirement. See note 40-43 and accompanying text.

activities should be understood to violate customary international law. Whether the statute would create a substantive “conspiracy” offense or merely be understood to make conspiracy a means to accomplish a separate crime is not, I think, as important as recognizing its culpability and prosecuting such offenses.

The applicability of a customary international law understanding of incitement and conspiracy would dramatically affect the prosecutions before international tribunals or the ICC. Consider the epigram of this article from General Wesley Clark’s testimony before the ICTY. Under a command responsibility analysis, the ICTY would be required to find that Slobodan Milosevic held a position of command over General Ratko Mladic, in order to impose liability for the massacre at Srebrenica. Under a conspiracy analysis, the ICTY would only be required to find that Milosevic and Mladic had made an agreement to facilitate the Bosnian Serb army’s invasion of Bosnian Muslim and Bosnian Croat territory. Criminal culpability does not merely flow vertically from one superior to an inferior. It may also flow horizontally between two groups who agree to violate international law and cooperate in violating international law. Still, since those tribunals and courts are governed by statutes established by the international community, the international community could adopt a conspiracy standard by statute. Rather, the primary effect of construing these inchoate crimes as tools of customary international law would be seen in domestic law.

The *erga omnes* or universal jurisdiction over certain crimes against international law allows prosecution anywhere in the world for many war crimes, crimes against humanity, genocidal crimes, and, most relevantly, crimes of terrorism, even where no nexus with the forum state is established.<sup>95</sup> By expounding a customary international law notion of incitement and

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<sup>95</sup> David Fitzpatrick, *Variations on Conspiracy*, 143 NEW L.J. 1180 (1993) (“Extending the reach of conspiracy, by alleging acts of secondary participation, is an appropriate response to the increasing sophistication and ruthlessness

conspiracy, inchoate crimes committed in one country could be prosecuted in another. Of course, terrorism in general has not been sufficiently defined as a crime against international law. Still, a number of particular terrorist acts have been defined as violating international law.<sup>96</sup>

Consider the following hypothetical case: country A obtains intelligence of a conversation between numerous suspects which takes place in country B, whether from another country or from their own surveillance. In the conversation, the suspects discuss a plan to launch an attack in country C. By the time the conversation is received, translated, and analyzed in country A, several weeks have passed. Country A also receives information that one of the terrorist suspects involved in the conversation has entered country A. When the law enforcement agencies in country A capture the suspect, they cannot obtain any evidence that the suspect planned any attacks in country A. Without the capacity under international law to try the suspect for the plot in country B to act in country C, country A would be in the unfortunate position of having to either let the suspect go or hold him by some extralegal means (such as “illegal combatant” status). This situation presumes that for one reason or another countries B and C have not requested extradition of the suspect, or that for other reasons it is not appropriate or desirable to extradite the suspect to country B or country C. Where inchoate crimes against international law can be prosecuted under customary international law, however, the suspect can

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of organised criminality and terrorism. Attacking acts of assistance given with knowledge of the conspiracy cuts the criminal from his life support systems and the upper echelons from those who act upon their orders.”).

<sup>96</sup> See Convention for the Suppression of the Unlawful Seizure of Aircraft, Oct. 14, 1971, 22 U.S.T. 1641, 860 U.N.T.S.; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1973, 24 U.S.T. 565, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Feb. 20, 1977, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention on the Physical Protection of Nuclear Material, Feb. 8, 1987, T.I.A.S. 11080, 18 I.L.M. 1419; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Aug. 6, 1989, S. Treaty Doc. 100-19, 1589 U.N.T.S. 484; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 1, 1992, 1678 U.N.T.S. 221; International Convention Against the Capture of Hostages, June 3, 1983, 1316 U.N.T.S. 205; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 1, 1992, 1673 U.N.T.S. 304; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 116 Stat. 721, 37 I.L.M. 249; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 116 Stat. 724, 39 I.L.M. 270. The above treaties are all collected at <http://untreaty.un.org/English/Terrorism.asp>.

be held on a cognizable criminal charge. The important effect here is to create more numerous legal means to try suspects under international law, in preference to creating extralegal alternatives, like “illegal combatant” status or preventive detention.

The international community has committed itself to fighting terrorism, as well as fighting organized crime internationally.<sup>97</sup> Recognizing the need for an international standard for a crime of conspiracy to violate customary international law could help the prosecution of international organized criminal organizations. Similarly, incorporating inchoate crimes into customary international law could facilitate human rights and war crimes prosecutions under domestic law. Where the ordinary forum state opposes prosecution, prosecution elsewhere may provide an acceptable alternative. Consider the Cambodian situation with former Khmer Rouge leaders whom the state was unwilling to prosecute. Alternately, consider potential cultural sensitivities, as where a Muslim state might be willing to extradite a suspect to another Muslim state but not to the United States or Israel. Expanding the number of potential forum states may facilitate prosecution of crimes against humanity, war crimes, and human rights violations.

## **V. Conclusion**

Inchoate crimes have deep historical roots in both common law and civil law systems. Incitement is prosecuted in essentially every jurisdiction as either a means to accomplish a crime or a substantive offense on its own. Group criminality has been addressed by both a “conspiracy” standard (traditionally in common law systems) and a “criminal organization” standard (traditionally in civil law systems). Both incitement and group criminality have been

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<sup>97</sup> CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53 (2000) (describing the need for international cooperation to fight money laundering and other organized crime and discussing the UN's attempt to codify a solution in the International Convention Against Organized Transnational Crime, commenced under the auspices of the Commission on Crime Prevention and Criminal Justice of the United Nations Economic and Social Council).

punished by international tribunals, showing that *opinio juris* backs the introduction of such crimes into the customary international law. In order to punish violations of international law, the international community should formally recognize the existence of customary norms on inchoate crimes, to facilitate domestic prosecution of crimes against the law of nations.