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Chapter 1
Introduction

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

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1.1 Background to the Study

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1.1 Statement of the Problem

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1.2 Objectives of the Study

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

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

1.1.3 Overview of Chapters

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

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

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

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

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

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

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

Chapter 2
Comparative Analysis

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

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2.1 Introduction

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

2.2 Common Law Jurisdictions

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

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

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

2.2.1 United Kingdom

2.2.1.1 Historical Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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