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1. The Concept of Conspiracy

2. The concept of conspiracy, as applied in criminal law, originated from the law of fraud.[15] Fraud used to be equated with cheating. However, the form of cheating was restricted to: "Offences that ...affect the public. For there are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat; ordinary care and caution is no guard against this." [16]
3. Gradually the concept of conspiracy was incorporated into the laws of war, primarily, because "The laws of war is to be found not only in treaties, but in customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts." [17] Consequently, it was during the Nuremberg Trial that the concept of conspiracy, as understood under the laws of war, developed within the context of international criminal law. During these trials, a number of individuals were prosecuted for commission of specific criminal offences as well as for having acted in pursuance of a common design, crimes that did not materially differ from that of conspiracy.[18] For instance, in the Dachu Concentration Camp Trial, forty defendants were convicted of having actively and knowingly participated in a common enterprise to abuse, starve, torture, and murder the inmates of the camp.[19] Similarly, in the Belsen Trial the Military Tribunal observed that the staff of the concentration camps of Auschwitz and Belsen deliberately took part in procedures that:

- (a) were a calculated disregard of the ordinary duties which fell upon a staff to look after the well-being and health of the inmates;
- (b) throughout these camps the staff quite clearly understood that the brutalities, ill-treatment, and matters of that kind would not be punished if they were inflicted on the Jews; and
- (c) there was a common concerted design of the staff to do these terrible things to the Jews.[20]

4. The expansive scope of criminal liability reflected in the decisions of the Military Tribunals meant that defendants who knowingly participated in the "selection parades," in which those who were to be exterminated were singled out, could be held liable for having participated in "deliberately organised murders." Thus, the prosecutor successfully submitted before the Military Tribunal that: "Proof of a conspiracy could be deduced from tactics of the accused and could well arise between persons who had never seen each other and had never corresponded together. Furthermore, the accused were as guilty if they joined the conspiracy already formed as they would have been had they originated it." [21]
5. It is against this background that the current law of conspiracy under both civil and common law, and applied in international criminal prosecution, should be understood.

The Civil Law System

6. The civil law system applies in continental Europe and many of its former colonies, particularly that of France, Spain and Portugal. The result is that civil law system applies in most of Latin America, parts of Africa and Asia. However, the French criminal law is seen as reflecting the basic legal principles as generally applied under civil law. It is therefore prudent to start with an examination of the concept of conspiracy as understood and applied in the French legal system.
7. According to the French Penal Code, there are some inchoate offences that are generally not punishable if they relate to crimes against individuals. These inchoate offences include:

- (a) decisions to commit a crime,
- (b) propositions to conspire to commit a crime,
- (c) acceptance of those propositions to conspire, and
- (d) some material acts, preparatory to the execution of the purposes of the conspiracy.[22]

8. The above situations are punishable, but limited to offences where the security of the state or another comparable public interest is at stake. For example, Article 89 of the French Penal Code provides:

"The conspiracy aiming to perpetrate crimes referred to in Articles 86 and 87 [crimes against the state and assault in order to destroy or change the government, respectively], if followed by an act committed or begun in order to prepare their execution shall be punished by deportation. If it was not followed by any act committed or begun in order to prepare their execution, the punishment shall be that of detention."

9. Note that a greater penalty is attached if the agreement to commit the offence was followed by an overt act in furtherance of the agreement. Other offences allowing for the punishment of a mere agreement were:

- (a) conspiracies to incite a civil war, or
- (b) to trouble the state by devastation, massacre or plunder;[23]
- (c) conspiring to form an armed band;[24] and,
- (d) crimes against the public peace.[25]

10. At the same time, the Code also treated group criminality as an aggravating circumstance rather than as a separate substantive offence. For example, Article 109 enhanced the punishment for impeding citizens in the exercise of their civil rights if this crime was a result of a plan. In all other cases, conspirators were punished as perpetrators only if the crime was actually committed or attempted. Thus, under French law, to constitute genocide, an enumerated act must be taken within the context of a criminal enterprise having as its goal the destruction of a protected group. Under French law, the objective of the narrow definition of conspiracy, or "complot" is to protect an accused person from the possibility of being punished for mere criminal intent or preparatory acts, without actually

committing the intended criminal act. In this context, preparatory acts are distinct and separate from the substantive crime. No crime is committed if the substantive crime was not actually carried out. The exception is a conspiracy to commit crimes against national security interests. For instance, conspiracy is punishable where its criminal objective is to commit categories of crimes classified as extremely serious, such as undermining the security of the State or treason. To some extent, the criminal laws of many former and current socialist states, including Hungary^[26] and China,^[27] mirror the French legal position.

11. Under the Spanish criminal law, conspiracy exists when two or more persons act in concert for the execution and implementation of a crime. Conspiracy is punishable only for certain prescribed offences, such as:

- (a) offences against international community,
- (b) offences committed in armed groups, and,
- (c) offences committed by illegal associations.

The Spanish Penal Code provides for the punishment of conspiracy under Article 17.1. Under Spanish law, the conspiracy charge merges into the substantive offence once the latter is committed. The law imposes equal liability on all members of the conspiracy. This is to be distinguished from the law of illegal associations, which imposes differential liability for those who found such an organisation vis-à-vis its members.^[28]

12. Under Italian law, Article 110 of the Penal Code effectively considers all participants in an offence, regardless of the degree of involvement, as principals, subject to certain exceptions for aggravating or mitigating circumstances. According to Article 112, aggravating circumstances include:

- (a) the collaboration of five or more persons;
- (b) the promotion, organisation or direction of criminal activities;
- (c) the use of authority to induce subordinates to commit a crime; and,
- (d) the inducement of a minor or mentally-infirm person to commit a crime.

Under Article 114, attenuating circumstances include participation:

- (a) of minimal importance,
- (b) through reverence to a superior, and
- (c) by minors or the mentally infirm.

The Italian law does not criminalize the mere agreement to commit a criminal offence, or an attempted instigation, if the primary offence is not ultimately carried out.^[29] However, there are certain circumstances in which the mere agreement to commit a crime is punishable.^[30] According to Article 304, the punishment is always less than that for the crime to which the agreement relates.

Individuals who assist participants in a conspiracy are punishable although with sentences less than that for the conspiracy itself.

13. In Sweden, conspiracy is not generally an independent substantive crime. Instead, the Swedish Penal Code specifically criminalizes conspiracy to commit certain offences, such as high treason. In order to be liable for any preparatory offences, the individual must also be punishable for the substantive offence. Under the Swedish Penal Code, Chapter 2(2)(2) governs conspiracy.^[31] The Chapter outlines three different kinds of acts that may constitute conspiracy. It requires that:

- (a) someone must be acting in concert with another in order to decide to commit an act.
- (b) someone incites another to commit the act, and
- (c) someone accepts or offers to commit the crime.

Consequently, there must be more than a negligible risk that the crime would be completed, and the perpetrator must manifest the intent to commit a crime through some undertaking. Further, while the Swedish Penal Code does not require that the perpetrator act with intent to commit the crime, these acts presuppose an intent to commit or promote the commission of a crime. A person can hardly make a decision in concert with another to commit a crime, without having acted with intent to commit or promote the crime.

14. The German Criminal Code of 1871 criminalizes conspiracy per se only with respect to offences against the state, such as the inducement to wage war against the Reich,^[32] diplomatic treason,^[33] or high treason.^[34] It has been noted, "The concept of conspiracy as a crime in cases where the interests of the Reich or of the German states as such were not impaired, was unknown to the German Criminal Code of 1871."^[35] In 1934 the German Code was amended to augment the penalties for treasonous conspiracy. Further amendment, by decree in 1939, provided in Article 3(1) that "whoever supports, or participates in, an organisation inimical to the national defence shall be punished by confinement."^[36] Article 49b provided for the punishment of any person who "participated in a combination or an agreement" which had for its purpose "the commission of major crimes against life." In 1943, these conspiracy provisions were extended to apply to agreements to commit all major crimes.
15. The Polish Penal Code of 1932 manifested broader notions of conspiracy than in other civil law countries. While preparation by one person did not constitute a crime, preparation by multiple persons in some cases did.^[37] Under Polish law, conspiracy constituted a substantive offence under Articles 93-95 and 98. For instance conspiracy was a substantive offence where the criminal purpose amounted to an offence against the state, such as:

- (a) seeking to deprive the State of independence;
- (b) seeking to overthrow the President or Diet;

- (c) seeking to detach a part of the State's territory; (d) treason; or
- (e) incitement to war.

Similarly, Articles 164 through 167 made it criminal to participate in an organisation that was kept secret from public authorities:

- (a) an assembly or group having the purpose of committing an offence, or
- (b) an illegally organised armed association.[38]

16. While some aspects of Israeli law are modelled on common law, it also borrows, to a certain extent, from civil law. However, the Israeli law on conspiracy to commit genocide, is one of the few national laws that fairly accurately reflect the state of the law as provided in the Genocide Convention? For instance, Israeli law criminalizes the substantive crime of committing genocide and that of conspiracy to commit genocide.[39] The legislation mirrors the definition of genocide in the Genocide Convention and provides that a person guilty of:

- (a) conspiracy to commit genocide,
 - (b) incitement to commit genocide,
 - (c) attempt to commit genocide, or
 - (d) complicity in genocide;
- shall be treated as guilty of genocide.

The provisions further provide that conspiracy; incitement; complicity or attempt is to be interpreted with respect to analogous provisions in the Criminal Code Ordinance.[40]

17. The law on conspiracy that emerges under civil law creates two types of actus reus:

- (a) simple conspiracy that is not followed by any act at all, but only remains at the level of planning or preparation. This type of conspiracy is usually not punishable.
- (b) a conspiracy that refers to a plan or preparation that is followed by material or tangible acts.

The plan, at this stage includes the putting in place of a process of implementing the conspiracy. In other words, the plan or preparation goes beyond a mere attempt at committing the substantive offence. At this point, it is necessary that some actual deed must have been undertaken to implement the conspiracy. This conspiracy is described as aggravated conspiracy and is usually punishable.

18. Simple conspiracy is defined as a concerted agreement to act, decided upon by two or more persons. Thus, in a conspiracy, an individual cannot conspire, or plan, alone. All acts, plans and activities that the conspirators are engaged in remain at the preparatory stage. As soon as the conspirators begin to implement

their plans, that is, when the conspiracy is followed, or accompanied, by preparatory acts, the plan or simple conspiracy, transforms itself and becomes aggravated conspiracy. Both forms of conspiracy rise to the level of criminal acts when three common elements are proved to exist. These elements are:

- (a) an agreement to act,
- (b) concerted wills to act, and
- (c) the common goal to achieve the substantive criminal act.

19. Under civil law systems, if a charge of conspiracy to commit a crime is prosecuted successfully and the substantive offence is proved beyond a reasonable doubt, the accused will only be convicted of the substantive criminal act and not of conspiracy to commit such an act. The rationale for this position is that there is no reason to punish the accused for his mere criminal intent, or even for the preparatory acts committed. Further, it is argued that if the substantive offence has not been realised or if the accused was part of a conspiracy, which was perpetrated by his co-conspirators, without his direct participation, it serves no useful purpose to punish him.

The Common Law System

20. The common law system applies in states that were former British colonies or protectorates. This includes the thirteen states that defeated the British and established the United States of America, and many of the other colonies that now form the Commonwealth. States that apply the common law system include countries that have a predominantly Muslim population, for example, Pakistan. I will therefore focus on the law as applied in the Commonwealth states.
21. Under common law, conspiracy, or "entente" is treated as a specific form of criminal participation and punishable in itself. Conspiracy to commit a crime is classified as a distinct and a separate crime from the substantive offence that the conspirators plan to commit. Thus, under common law, the general rules are that in a conspiracy trial, a crime is committed when two or more persons agree to conduct a common criminal act. An accused can, in principle, be convicted of both conspiracy and the substantive criminal act, in particular, where the objective of the conspiracy extends beyond the criminal acts actually committed. As indicated above, the common law system is based on the American and British legal systems - sometimes described as Anglo-Saxon. The Anglo-Saxon legal influence is extensive, particularly in countries that have been ruled or occupied by the United States, for example, The Philippines, and the former British colonies or protectorates, now under the Commonwealth.^[41]
22. Canada, one of the states with a more advanced and developed legal systems in the Commonwealth is a good starting point for us to look at. Under Canadian law, conspiracy is defined as "an agreement between persons to pursue an illegal enterprise."^[42] The agreement "must be to participate together in the co-operative pursuit of a common object."^[43] In terms of the elements of criminal law, the agreement to conspire constitutes the actus reus. On the other hand, mens

rea precipitates if the participant had the intent to pursue the unlawful purpose. It is therefore not sufficient that two persons agree in order for a crime of conspiracy to be established. The conspirators must also have the intent to pursue the unlawful purpose. Conversely, two persons are not conspirators in a case where both persons are pursuing the same unlawful purpose, and consequently sharing the common intent to commit a crime, because they have not formed an agreement to commit a crime by conspiracy. Mere knowledge of conspiracy or passive acquiescence to a plan of criminal conduct is not sufficient to hold someone liable for conspiracy. It is not necessary for the prosecution to demonstrate the execution of a formal agreement. One can easily find the formation of a tacit agreement in cases where the conspirators did not openly express their consent to pursue the unlawful purpose; but where their acts clearly demonstrate their agreement and their intent to pursue an unlawful purpose.^[44] In terms of the relationship between conspiracy and complicity, to aid or abet does not necessarily require the existence of a conspiracy between the person who aids and the person who commits the offence. An accomplice is not necessarily a co-conspirator, but a co-conspirator is an accomplice when he aids or abets his principal in the commission of the offence or any other offence.^[45] The New Zealand law of conspiracy, like that of many Commonwealth states, is similar to that of Canada.^[46]

23. India, another Commonwealth state, defines conspiracy in section 120-A of its Penal Code as follows:

"When two or more persons agree to do, or cause to be done
(1) an illegal act, or
(2) an act which is not illegal by illegal means,
such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement [must]...be done by one or more parties to such agreement in pursuance thereof."

24. Conspiracy operates in Indian law as a substantive offence. In other words, the offence of conspiracy to commit a crime is different from the crime that is the object of the conspiracy: "The conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed."^[47] The above definition indicates that Indian law requires the commission of an overt act only for conspiracies to commit an act, which is not illegal, by-illegal means. In contrast, an agreement to commit an offence amounts to a conspiracy even without an overt act.^[48] In order to prove the existence of a conspiracy, it is not necessary to establish by direct evidence that the accused persons did enter into such agreement.^[49] However, the agreement may be inferred or deduced from certain criminal acts of the parties accused, done in pursuance of apparent criminal purposes in common between them.^[50] According to one Indian legal scholar:

"If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, they will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object.[51]

Similarly,

"If you see several men taking several steps, all tending towards one obvious purpose, and you see them through a continued portion of time, taking steps that lead to an end, why, it is for you to see whether these persons had not combined together to bring about that end, which their conduct so obviously appears adapted to effectuate."[52]

25. As a general rule, such an inference can be made only where the circumstances are such that no other reasonable interpretation exists. It is not necessary that each member of the conspiracy knows all of the details of the conspiracy, but the mere presence at meetings is not sufficient to render someone a member of the conspiracy.[53] The offence is complete when there is an agreement to commit an unlawful act. It is immaterial that the details of the commission are not complete.[54] Conspiracy operates as a continuing offence, because the conspiracy exists so long as the persons constituting the conspiracy remain in agreement and act in furtherance of the conspiracy.[55] In general it is not necessary that an individual conspirator knows of the specific act or acts taken by the other members of the conspiracy.[56] If individuals who are not parties to the agreement are procured to commit illegal acts in furtherance of the criminal purpose of the conspiracy, those individuals do not become members of the conspiracy unless they are made aware of the existence and nature of the conspiracy.[57] The Pakistani conspiracy law mirrors the Indian law.[58] Under Nigerian law, criminal conspiracy alone is punishable if it has as its object an offence, but an agreement to commit a lawful act by unlawful means is punishable only if an overt act has been taken. With respect to certain serious crimes, co-conspirators are punished as abettors; otherwise co-conspirators receive mitigated sentences. Conspiracy remains a continuing offence so long as the parties remain in agreement.[59]
26. When the concept of conspiracy as applied in civil and common law systems is compared, the differences between the two legal systems stand out vividly. While the Genocide Convention, prima facie, adopts the common law principles, it is still necessary to examine it more closely in order to discern which aspects of both legal systems, civil or common, if any, it adopts or discards.