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Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals

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Article

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In landmark decisions developing international humanitarian law of sexual violence and enslavement, the International Criminal Tribunal for the Former Yugoslavia (ICTY) handed down several convictions for mass rape of women during conflicts in the former Yugoslavia.[1] International scholars, critics, advocates, and other thinkers have lauded the architects of the Yugoslav tribunal for making possible these successful prosecutions of rape and other sexual offenses against women. Much energy has focused on analyzing how the substantive and procedural rules governing the rape prosecutions were sufficiently

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1. Perhaps the most heralded decision concerned three ethnic Serbians, convicted in March 2001 for their abuse of women at a "rape camp" near a small Bosnian town named Foca. Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, para. 858 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Feb. 22, 2001), *at* http://www.un.org/icty/foca/trialc2/judgement/kun-tj01022e.pdf, *aff'd* Case Nos. IT-96-23, IT-96-23/1-A (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber June 12, 2002), *at* http://www.un.org/icty/foca/appeal/judgment/kun-aj020612e.pdf. Earlier cases also involved rape prosecutions within the context of other atrocities, although the rapes were not as central to the prosecutions as in *Kunarac*. *See, e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-A (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber July 21, 2000), *at* http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf.

broad and robust as to treat the crimes with the grave seriousness they deserve, but have not always received, within the context of war. Likewise, those studying the subject of rape as a war crime have trumpeted the benefits of prosecution in an international—rather than domestic—forum, with particular emphasis on an international tribunal's ability to maintain victim confidentiality, to attain a level of impartiality not possible in the unsettled domestic arena, and to express world condemnation of the crime.[2]

As important as the ICTY convictions have been, equally important for the future are the failures to prosecute and the acquittals of rape crimes. For example, the commander of a special reconnaissance unit of the Bosnian Serb Army, Dragoljub Kunarac, was acquitted of responsibility as a superior for rape crimes committed by persons under his authority.[3] Other individuals whose indictments and trials suggested greater individual responsibility for rape crimes were not convicted on the basis that they were not responsible for the actions of the soldiers they command.[4]

Given the unstructured and chaotic nature of the Yugoslav conflict, it is not surprising that the tribunal was unsatisfied with the proof that Kunarac and individuals like him were actually commanding subordinate soldiers at the time of the alleged crimes.[5] The guerrilla quality of the war and the con-

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2. Scholars have also started to scrutinize the evidentiary and procedural rules followed by the Yugoslav tribunal and to analyze how these rules—in conjunction with the other benefits of the international tribunal—made possible the convictions handed down. Indeed, the evidentiary and procedural rules followed by the ICTY are markedly more favorable to the prosecution than those in place in many domestic legal systems. See *infra* note 10 for further discussion of the particular importance of maintaining balanced principles of substance and procedure within the international criminal law context.

3. *Kunarac*, Case Nos. IT-96-23-T, IT-96-23/1-T, at para. 629.

4. For other individuals acquitted of command responsibility for rapes that occurred, see, for example, Prosecutor v. Delalic, Case No. IT-96-21-A, paras. 268, 313 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Feb. 20, 2001) (affirming the acquittals for command responsibility of Zejnil Delalic, a high-level Bosnian Muslim military commander with no direct authority over the Celebici camp, and Hazim Delic, a Bosnian Muslim deputy commander of the Celebici camp who was found not to have command responsibility for the prison guards at the camp), *at* http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf.

5. *See Kunarac*, Case Nos. IT-96-23-T, IT-96-23/1-T, at para. 628 (holding that the proof failed to show that "the soldiers who committed the offences in the indictment were under the effective control of Kunarac *at the time they committed the offences*"); *see also* Kelly D. Askin, *News from the*

fused hierarchy of various military and quasi-military organizations participating create ambiguity in the lines of authority and in causes for soldiers' actions.[6] In light of the often loose military structure in modern wars, one would expect the command responsibility theory to fail repeatedly not only in other cases arising from the Yugoslav conflict, but also in cases arising from atrocities occurring in Rwanda and Sierra Leone, and in matters that are eventually brought before the International Criminal Court (ICC). The likely precedential effect of ICTY decisions in ICC proceedings should be a major concern motivating scholars and practitioners to understand obstacles to criminal liability in ICTY cases.[7]

Command responsibility is a symbolic and important option for convicting high profile leaders associated with wartime atrocities. Where convictions are unattainable for lack of proof, however, this symbolic role is not fulfilled. Acquittals of important figures "impair the inhibitory effect of international justice on those whom it is most important to deter."[8] Indeed, the acquittal in *Kunarac* is particularly significant because the case represents essentially the first international rape prosecution since the Tokyo War Crimes Trial.[9] The appropriate response is not necessarily to expand the reach of command responsibility. The ICTY and other international tribunals that read command responsibility provisions rigorously and restrictively are upholding international criminal law's important commitment to convictions based on individual culpability, rather than collective guilt.[10]

International Criminal Tribunals: Part IV—ICTY (2001), 8 HUM. RTS. BIEF. 20, 22 (2001) (discussing the *Kunarac* acquittal for command responsibility).

6. *See infra* notes 86–89 and accompanying text for further discussion of the structure of the organizations participating in the conflict.

7. *See* Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 629 (2001) (noting that reliance on the Yugoslav and Rwanda ad hoc tribunals "was visible and often persuasive throughout the ICC negotiations"); Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, STAN. J. INT'L L. 255, 258 (2001) (arguing that the ICTY's work will likely serve as precedent in subsequent international decision-making bodies).

8. Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 471 (2001).

9. *See* GARY JONATHAN BASS, STAY THE HANDS OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 258 (2000).

10. *See* NORMAN CIGAR & PAUL WILLIAMS, INDICTMENT AT THE HAGUE: THE MILOSOVIC REGIME AND THE CRIMES OF THE BALKAN WAR 30 n.7 (2002) (noting that "[t]he need to establish individual responsibility in order to avoid

That is not to say, however, that wartime leaders do not merit prosecution and punishment for their involvement in plans to perpetuate rape. In fact, the ICTY has developed and applied a theory of liability—which the tribunal calls "joint criminal enterprise" liability—that often makes convictions possib le where command responsibility or direct individual responsibility might fall short.[11] This Article explores yet another important substantive law option for pursuing that end: expanded use of conspiracy law to capture those who promoted, but did not necessarily commit, systematic rapes. Conspiracy law can not only compensate for command responsibility's shortcomings, but can also satisfy the need for direct criminal responsibility for wrongdoing. As such, conspiracy law can negotiate a calibrated balance, avoiding purely vicarious liability for the criminal acts of others while imposing independent criminal liability for preliminary actions forming crucial foundations for widespread criminality. Conspiracy law also enables prosecution of multiple defendants—thus expanding the reach of war crimes tribunals' work and thereby reinforcing their deterrent, retributive, and educative functions.[12] Because of its status as an independent crime, conspiracy law allows this expanded reach without threatening the respect for fairness and individual responsibility that undergirds international criminal law.[13] At the same time, conspiracy also pro-

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conclusions of collective guilt has been highlighted by both the United Nations Secretary-General and the Chief Prosecutor" for the ICTY); *see also* Damaška, *supra* note 8, at 456 (arguing that a broad reading of command responsibility can be inconsistent with notions of individual culpability).

11. *See, e.g.*, Prosecutor v. Kvoka, Case No. IT-98-30/1-T, paras. 284–93 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Nov. 2, 2001) (outlining the principles of joint criminal enterprise), *at* http://www.un.org.icty/kvocka/trialc/judgement/kvo-tj011002e.pdf.

12. *See Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1947, 1962–74 (2001) [hereinafter *Developments*] (reviewing the proffered purposes behind ICTY prosecutions including incapacitation, deterrence, moral education, rule of law, retribution, restorative justice, and historiographic accuracy).

13. International war crimes tribunals are remarkable in their treatment of humankind's most horrific criminals in accordance with orderly procedures. Bound to this commitment to the rule of law is the risk that not guilty verdicts will result and the criminals will not be punished. It is therefore somewhat ironic that the justice dispensed within the international tribunals—although in large part designed to protect the rights of victims—is sometimes less solicitous of defendants and occasionally structured as to make convictions more likely. *Cf.* Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 112 (2002) (observing that ordinary political roles are switched in the war crimes context, with the politi-

vides a robust alternative to joint enterprise liability.

While arguments about conspiracy and command responsibility are important to understanding prosecutions of many crimes in diverse international contexts, we explore them here primarily through the lens of rape crimes, searching for lessons useful in prosecutions pursuant to the Rome Statute creating the ICC. This Article begins by reviewing the basic skeleton of the ICTY statute making possible broader prosecution for conspiracy to rape and observes how the Trial and Appeals Chambers have broadly interpreted the joint criminal liability provisions of the statute to include joint criminal enterprise, a theory of criminality that resembles, but does not duplicate, conspiracy. Because much language of the ICTY statute tracks provisions from other international law contexts (most notably the ICC statute), this statutory analysis provides guidance beyond the Yugoslav context. We review limitations and problems with command responsibility as a means of prosecuting proponents of mass rape as an instrument of war, genocide, and inhumane treatment. With this background, we analyze conspiracy as a prosecutorial theory, arguing that conspiracy's focus on an agreement among perpetrators is well suited to past experience with prosecuting widespread, systematic rape. Finally, we gaze into the future, outlining whether the ICC's structure is suited to conspiracy as an alternative to command responsibility or joint criminal enterprise liability and identifying legal issues needing further refinement.

I. THE ICTY STATUTE: SEX CRIMES AND INDIVIDUAL RESPONSIBILITY

An analysis of the avenues available in the ICTY statute for pursuing architects of systematic rape raises two broad

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cal left tending to favor potent tribunals and the political right opposing such tribunals, or at least the ICC).

It is indeed important for the ICTY and other contemporary tribunals to dodge the criticism that the Tokyo and Nuremberg Tribunals had been unfair manifestations of "victors' justice." For discussion of this perspective on the Tokyo and Nuremberg Tribunals, see Theodor Meron, *From Nuremberg to The Hague*, *in* WAR CRIMES COMES OF AGE 198 (Oxford 1998) and RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971). *See also Developments*, *supra* note 12, at 1982–2006 (analyzing whether the ICTY escapes the allegation of unfair treatment for defendants). Given the unprecedented and symbolic nature of the rape convictions—and their likely influence on jurisprudence of the International Criminal Court—these observations are particularly important.

questions about the statute: How, and to what extent, does the statute authorize prosecution of sex crimes? Do the parameters of individual criminal responsibility include conspiracy along with command responsibility and joint criminal enterprise liability?

A. SEXUAL ASSAULT

Crimes prohibited under the ICTY statute divide into four substantive categories: grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. On its face, the statute explicitly mentions sexual assault only as a crime against humanity.[14] In Article 3, a nonexhaustive list of violations of the laws and customs of war permits the direct criminalization and prosecution of rape. In practice, the ICTY recognizes that rape prosecutions can be pursued not as an enumerated crime itself, but as an element (usually *actus reus*) of the four crime categories.[15] The Yugoslav tribunal has defined rape to require actual penetration of the victim's mouth, anus, or vagina, although it has acknowledged that international criminal rules punish "any serious sexual assault falling short of actual penetration."[16]

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14. Statute of the International Tribunal art. 5(g), 32 I.L.M. 1192–94, *available at* http://www.un.org/icty/badic/statut/stat2000.htm, *adopted by* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 [hereinafter ICTY Statute].

15. *See, e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-T, para. 172 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Dec. 10, 1998) (stating that the prosecution of rape authorized explicitly "in Article 5 of the Statute of the International Tribunal as a crime against humanity" may also be punished as "a grave breach of the Geneva Conventions, a violation of the laws of customs of war or an act of genocide, if the requisite elements are met"), *at* http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf, *aff'd,* Case No. IT-95-17/1-A (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber July 21, 2000), *available at* http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf; *see also* Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 57 (1997) (describing the prosecution theory).

16. *Furundzija*, Case No. IT-95-17/1-T, at para. 186. The Trial Chamber has stated that the objective elements of rape include:

> (i) the sexual penetration, however, slight:
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> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
>
> (b) of the mouth of the victim by the penis of the perpetrator;
>
> (ii) by coercion or force or threat of force against the victim or a third person.

Id. at para. 185.

B. INDIVIDUAL CRIMINAL RESPONSIBILITY

1. Statutory Language

Article 7 of the ICTY statute authorizes command responsibility for each of the categories of substantive offenses set forth in the statute. Specifically, the statute provides that a superior should bear criminal responsibility "if he knew or had reason to know that the subordinate was about to commit [violations] or had done so" under circumstances where "the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[17] The *Kunarac* prosecutor unsuccessfully joined this provision in a rape prosecution.[18]

Article 7 also authorizes accomplice liability, providing for individual responsibility for all four broad categories of substantive offenses for persons "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of" the offense.[19] The tribunal has not hesitated to use this section with rape prosecutions. An example is the 1998 conviction of Bosnian Croat paramilitary chief Anto Furundzija for rape as an outrage against personal dignity. Although Furundzija was an acknowledged local commander,[20] aiding and abetting, rather than command responsibility, formed the foundation for his criminal liability.[21] Reasoning that the ICTY statute prohibits "the planning, ordering or instigating . . . [of rape] as well as aiding and abetting in the perpetration,"[22] the Trial Chamber found aiding and abetting liability because Furundzija, as a superior, was present during the rape of a woman; interrogated her before,

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17. ICTY Statute, *supra* note 14, at art. 7(1).

18. Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, para. 858 (Int'l Crim. Trib for Former Yugoslavia Trial Chamber Feb 22, 2001), *at* http://www.un.org/icty/foca/trialc2/judgement/kun-tj01022e.pdf, *aff'd* Case Nos. IT-96-23, IT-96-23/1-A (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber June 12, 2002), *at* http://www.un.org/icty/foca/appeal/judgement/kun-aj020612e.pdf.

19. ICTY Statute, *supra* note 14, at art. 7(1).

20. *Furundzija*, Case No. IT-95-17/1-T, at para. 40.

21. *Id.* at para. 274.

22. *Id.* at para. 187. In such situations, "the fellow perpetrator plays a role every bit as grave as the person who actually inflicts the pain and suffering." *Id.* at para. 281; *see also* Kate Nahapetian, *Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 14 BERKELEY WOMEN'S L.J. 126, 132 (1999).

during, and after the rapes; and encouraged the rapes.[23] The Appeals Chamber endorsed this approach, affirming Furundzija's liability as co-perpetrator of the rape.[24]

2. Accomplice Liability, Joint Criminal Enterprise, and Conspiracy

Although Article 7 embraces accomplice liability, the article does not necessarily authorize conspiracy prosecutions. Indeed, many see complicity and conspiracy as distinguishable concepts, and this Article adopts that position. American hornbook law provides, for example, that "one is not an accomplice to the crime merely because [a] crime was committed in furtherance of a conspiracy of which he is a member, or because [the] crime was a natural and probable consequence of another offense as to which he is an accomplice."[25] Moreover, the hallmark of conspiracy is agreement among co-conspirators[26] and the ICTY crime definitions nowhere mention agreement. The statute does mention conspiracy in connection with genocide in Article 4, identifying "conspiracy to commit genocide" as a punishable act.[27] This of course raises the questions whether conspiracy is a crime reserved solely for acts of genocide, or, alternatively, whether prosecutors and judges of the ICTY should ascribe no particular meaning to conspiracy's omission from other contexts. The word may simply be an artifact of its earlier

23. *Furundzija*, Case No. IT-95-17/1-T, at paras. 266, 273–74.

24. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, para. 119 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber July 21, 2000), *at* http://www.un.org/icty/furundzjia/judgement/fur-aj000721e.pdf.

25. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 587 (2d ed. 1986); *see also* SARAH N.WELLING ET AL., 1 FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO § 4.5 (1998) (stating that "federal courts treat membership in a criminal conspiracy as a specialized basis for accomplice liability for offenses committed by other members of the conspiracy" and that "accomplice liability is established if (1) the defendant was a member of a conspiracy, (2) a co-conspirator committed a substantive offense in furtherance of the conspiracy, and (3) the offense could be 'reasonably foreseen' as a 'necessary or natural consequence of the unlawful agreement'") (citing Pinkerton v. United States, 328 U.S. 640 (1946)).

26. *See infra* notes 52–59 and accompanying text for a discussion of conspiracy definitions.

27. ICTY Statute, *supra* note 14, at art. 4(3)(b). This reference in large part derives from the Convention on the Prevention and Punishment of the Crime of Genocide art. III, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, 280 (1951), *reprinted in* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 263 (2000).

use in the Genocide Convention.[28]

Several commentators maintain that the ICTY statute embraces conspiracy as a general theory of liability.[29] One writer even reasoned that the statute authorizes conspiracy prosecutions, since "anyone who 'aided and abetted in the planning, preparation or execution' of a crime would, from the common law point of view, be guilty of having participated in a criminal conspiracy."[30] Whatever the force of this reasoning, it does not define the full scope of the statute's apparent embrace of conspiracy law. The statute nowhere states that a war criminal could be held liable as a conspirator where his or her co-conspirator independently committed an unplanned act that was a natural and foreseeable consequence of the conspiracy's purpose. Nonetheless, several Trial and Appeals Chamber decisions suggest that the statute is broad enough to authorize liability under such circumstances, without clarifying whether the ICTY views the statute as authorizing conspiracy liability itself.

One of the earliest ICTY expositions on joint criminal enterprise occurred in the *Tadic* case, involving the prosecution

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28. Background materials on the Genocide Convention itself suggest that conspiracy was included in the convention in order to recognize that, in view of the highly serious nature of genocide, mere agreement to commit genocide should be punishable even in the absence of a preparatory act. *See* Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September–10 December 1948, Official Records of the General Assembly (discussed in Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 185 (Int'l Crim. Trib. for Rwanda Trial Chamber I Jan. 27, 2000) (attributing to the Secretariat the statement that conspiracy is necessary to fulfill the preventative purposes of the Convention and was designed to include such acts as systematic propaganda designed to incite hatred), *at* http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm, *aff'd on other grounds*, Case No. ICTR-96-13-A, (Int'l Crim. Trib. for Rwanda Appeals Chamber Nov. 16, 2001), *at* http://www.ictr.org/ENGLISH/cases/Musema/judgement/Arret/index.htm).

29. *See, e.g.*, AMNESTY INTERNATIONAL, THE INTERNATIONAL CRIMINAL COURT: MAKING THE RIGHT CHOICES, pt. 1, § VI(D) (1997) (stating that the concept of "conspiracy" is recognized in the Yugoslavia and Rwanda statutes), *available at* http://web.amnesty.org/library/index/ENGIOR40001997; Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look to the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 11 (1995) (pointing out the similarity between the ICTY statute and Article 6 of the 1945 London Charter, which provided that individuals "participating in the formulation or execution of a common plan or conspiracy to commit any [defined criminal acts] are responsible for all acts performed by any person in execution of such plan").

30. Levie, *supra* note 29, at 11 n.60 (quoting ICTY Statute, *supra* note 14, at art. 7).

of a relatively low level Bosnian Serb politician who participated in ethnic cleansing of the Prijedor area and in detention camp abuses. Although Tadic was convicted of war crimes and crimes against humanity for numerous violent incidents, the Trial Chamber acquitted him of the murder of five men in the village of Jaskici, concluding that no evidence established that he was personally responsible for the crime.[31] Although Tadic and his group had been seen in the village beating and seizing various victims, no one could testify that Tadic executed them.[32] The Appeals Chamber reversed, holding Tadic liable for murder because he "took part in the common criminal purpose to rid [the Prijedor region] of the non-Serb population, by committing inhumane acts," and because the killing of non-Serbs in furtherance of this plan was a foreseeable outcome of which he was aware.[33]

In reaching this ruling, the Appeals Chamber derived from customary international law three categories of joint activity that could subject a perpetrator to liability for the acts of others.[34] First are those cases in which all co-defendants, acting pursuant to a common design, possess the same criminal intention. For example, defendants may form a plan to kill with each participant carrying out a different role, but nevertheless each possessing the intent to kill.[35] The Appeals Chamber derived a second category of joint activity from World War II concentration camp cases, where members of military or administrative units act pursuant to a concerted plan,[36] each with the requisite mental element deriving from "knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment."[37] A prosecutor can prove intent "either directly or as a matter of inference from the nature of the

31. Prosecutor v. Tadic, Case No. IT-94-1-T, paras. 371–73 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II May 7, 1997) *at* http://www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf., *aff'd*, Case No. IT-94-1-A, (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber July 15, 1999), *at* http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf.

32. *Id.* at para. 373.

33. Prosecutor v. Tadic, Case No. IT-94-1-A, at paras. 231–33.

34. *Id.* at para. 220 (stating that the notion of common design as a form of accomplice liability "is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal").

35. *Id.* at para. 196.

36. *Id.* at para. 202.

37. *Id.* at para. 220.

accused's authority within the camp or organizational hierarchy."[38] The most attenuated cases for joint criminal enterprise liability are in a third category: offenses that do not necessarily fall within a common plan or are not the object of a common criminal purpose. Liability attaches if two factors are present: (1) the accused possesses "the intention to take part in a joint criminal enterprise and to further . . . the criminal purposes of that enterprise" and (2) the offenses committed by members of the group are foreseeable.[39] Thus, if participants had the intent to mistreat concentration camp prisoners and one of the prisoners died as a result of mistreatment, liability can attach to a participant who was not actually involved in the mistreatment so long as "everyone in the group [could] *predict* this result."[40]

The tribunal's inclination to find a joint criminal enterprise has its limitations.[41] For example, the tribunal reasoned in one case that the defendant's conduct did not constitute participation in a joint criminal enterprise because of the lack of shared intent and the absence of agreement among the participants.[42]

A useful exposition on complicity theories appears in the Trial Chamber judgment of Radislav Krstic, a commander of the Drina Corps of the Bosnian Serb Army, who was prosecuted for genocide, crimes against humanity, and violations of the laws and customs of war committed in the Srebrenica enclave in July 1995. In addition to listing definitions for each statutory component of individual criminal liability,[43] the Trial Chamber

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38. *Id.* In this regard, the Appeals Chamber appeared to endorse the notion that liability could attach because a person possessed a "position of authority," and "had the power to avoid unlawful treatment of others," but failed to do anything to avoid that treatment. *Id.* at para 203.

39. *Id.* at para. 220.

40. *Id.*

41. *See* Prosecutor v. Krnojelac, Case No. IT-97-25-T, para. 127. (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II Mar. 15, 2002) (rejecting the prosecution's theory that the defendant shared the intent of the joint criminal enterprise related to offenses committed while he was warden of the KP Dom prison camp), *at* http://www.un.org/icty/krnojelac/trialc2/judgement/krn-tj020315e.pdf.

42. *Id.* at paras. 127, 170, 315, 346, 487.

43. The Trial Chamber summarized:

> - "Planning" means that one or more persons design the commission of a crime at both the preparatory and execution phases;
> - "Instigating" means prompting another to commit an offence;
> . . . .
> - "Aiding and abetting" means rendering a substantial contribution to the commission of a crime; and
> - "Joint criminal enterprise" liability is a form of criminal responsibil-

explained in the *Krstic* judgment that joint criminal enterprise liability includes three *actus reus* elements: (1) a "plurality of persons"; (2) the "existence of a common plan," which amounts to or involves the commission of the crimes listed in the ICTY statute; and (3) participation in the "execution of the common plan."[44] As for *mens rea*, the tribunal has stated that where a crime falls within the joint criminal enterprise, "the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime."[45] When, on the other hand, "the crime charged went *beyond* the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise."[46]

In *Furundzija*, the Appeals Chamber continued this broad reading of co-perpetration in the context of a rape prosecution, stating that criminal liability does not require a preexisting plan or purpose.[47] Instead, the "common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise."[48] The *Furundzija* Appeals Chamber found this standard satisfied in the context described above: One perpetrator interrogated a victim during the same period in which another perpetrator raped her.[49] Under such circumstances, the Appeals Chamber found proof of a common purpose because "the act of one accused contributed to the purpose

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> ity . . . implicitly included Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.

Prosecutor v. Krstic, Case No. IT-98-33-T, para. 601 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber August 2, 2001) (citing the findings of several trial and appellate cases of the ICTY and ICTR for its summary), *at* http://www.un.org/icty/krstic/trialc1/judgement/krs-tj010802e.pdf.

44. *Id.* at para. 611 (citing *Tadic*, IT-94-1-A, at para 227).

45. *Id.* at para. 613 (quoting Decision on Form of Further Amended Indictment and Prosecution Application to Amend at para. 31, Prosecutor v. Brdjanin, Case No. IT-99-36 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II June 26, 2001), *at* http://www.un.org/icty/brdjanin/trialc/decision-e/10626FI215879.htm).

46. *Id.*; *see also* Decision, at para. 30, Brdjanin (No. IT-99-36).

47. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, para. 119 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber July 21, 2000), *at* http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf.

48. *Id.* (quoting *Tadic*, Case No. 94-1-A, at para. 227).

49. *Id.* at para. 120.

of the other, and both acted simultaneously, in the same place and within full view of each other."[50]

These descriptions draw a picture difficult to distinguish from conspiracy, which focuses on agreements to commit a criminal act. One may even ask whether the ICTY treats proof of a "common plan" as the same as proof of an agreement to commit a crime. The Appeals Chamber's statement that a common purpose may materialize "extemporaneously" suggests that a common plan is no more challenging to establish than a conspiratorial agreement. Language in at least one ICTY opinion actually treats agreement and common plan as coextensive.[51] Specifically, the Trial Chamber opinion states that the prosecution failed to prove joint criminal enterprise because it did not show that the accused "entered into . . . an agreement" to effect a crime.[52] Such reasoning suggests that the ICTY statute may in fact embrace conspiracy as a form of criminality already recognized within Trial and Appeals Chamber decisions.

Domestic and international law materials, however, reveal that conspiracy is analytically separate from complicity theories such as joint criminal enterprise liability. In accepting this distinction, this Article defines conspiracy as common law thinkers: an offense consisting in the agreement of two or more persons to effect any unlawful purpose.[53] Conspiracy is thus

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50. *Id.*

51. Adding to the confusion is the *Tadic* Appeals Chamber's unexplained observation that conspiracy appears in the genocide section. *Tadic*, Case No. IT-94-1-A, at para. 189 (observing that Article 4 "sets forth various types of offences in relation to genocide, including conspiracy, incitement, attempt and complicity").

52. Prosecutor v. Krnojelac, Case No. IT-97-25-T, para. 170 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Mar. 15, 2002) (finding insufficient proof of joint criminal liability for inhumane acts and cruel treatment while the defendant was a warden of KP Dom because he lacked the requisite intent and had not entered into an agreement with the guards), *at* http://www.un.org/icty/krnojelac/trialc2/judgement/km-tj020315e.pdf.

53. For an example of this approach, see *Prosecutor v. Musema*, in which the International Tribunal for Rwanda adopted the common law approach to conspiracy in interpreting the meaning of its statute. Case No. ICTR-96-13-T, paras. 187, 191 (Int'l Crim. Trib. for Rwanda Trial Chamber I Jan. 27, 2000), *at* http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm, *aff'd on other grounds*, Case No. ICTR-96-13-A, (Int'l Crim. Trib. for Rwanda Appeals Chamber Nov. 16, 2001), *at* http://www.ictr.org/ENGLISH/cases/Musema/judgement/Arret/index.htm. Specifically, the tribunal concluded that "conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide." *Id.* at para. 191. A comparable defi-

distinguishable as a free-standing crime itself, rather than simply a theory of liability such as joint enterprise, which attaches to substantive offenses and depends upon those offenses for analytical usefulness.[54] Under this view, the crime of conspiracy is punishable even if the substantive offense that is the object of the conspiracy never transpires and conspiracy remains an inchoate crime.[55] In contrast, the civil law tradition strictly defines conspiracy by emphasizing that a "person cannot be punished for mere criminal intent or for preparatory acts committed."[56]

Adopting a common law approach does not require embracing the additional position that an individual can be convicted of both the substantive offense and the conspiracy to commit that offense.[57] This Article suggests that conspiracy is both useful and appropriate in mass rape prosecutions whether or not a perpetrator has committed an underlying crime. Conspiracy offers a suitable theory whether prosecutors use conspiracy as an inchoate crime or whether they connect it with a crime that actually occurred. Conspiracy to commit a crime and the substantive underlying crime itself are analytically separate and

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nition of conspiracy in the war crimes context appears in UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 196 (1948), *quoted in Musema*, Case No. ICTR-96-13-T, para. 188, in which the United Nations War Crimes Commission stated: "The doctrine of conspiracy is one under which it is a criminal offence to conspire or to take part in an alliance . . . to achieve a lawful object by unlawful means." For a similarly expansive reading of the concept of complicity by the International Military Tribunal at Nuremberg, see 6 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, at 84, 85 n.4 (1948) (observing that it is not necessary for defendants accused of being "connected with" war crimes and crimes against humanity to be part of a prearrangement with the person who actually commits the crime to be found guilty).

54. *See infra* notes 104–36 and accompanying text for further discussion of joint enterprise liability and conspiracy.

55. *Musema*, Case No. ICTR-96-13-T, at para. 191 (reaching his conclusion by interpreting the conspiracy to commit genocide provisions in the statute for the Rwanda tribunal).

56. *See id.* at para. 187 (comparing the civil law approach to conspiracy with the common law approach).

57. *See, e.g.*, *Musema*, Case No. ICTR-96-13-T, at paras. 196–98 (adopting a common law definition of conspiracy while holding that an accused cannot be convicted of both genocide and conspiracy to commit genocide). The argument that one can be convicted for both the substantive crime and conspiracy is a position espoused in *Callanan v. United States*, 364 U.S. 587, 592 (1961) (citing Pinkerton v. United States, 328 U.S. 640, 643 (1946)), but rejected in *Prosecutor v. Musema*, Case No. ICTR-96-13-T, at para. 198.

distinct criminal offenses. As shown below, this quality provides an important distinction between conspiracy and other theories of joint perpetrator liability.[58]

The choice of the common law approach to conspiracy not only derives from familiarity with the concept,[59] but also from the conclusion that this approach is more consistent with the relevant international law materials. Indeed, the Genocide Convention's reference to conspiracy to commit genocide—which provides the basis for the ICTY statute's authorization for the same crime[60]—appears grounded on the common law approach to conspiracy.[61] Myriad other international materials, discussed below, support this conclusion.[62] Conspiracy, con-

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58. *See infra* notes 137–93 and accompanying text.

59. The Model Penal Code and the Federal Crimes Code are the major texts that inform understanding of conspiracy in American criminal law. The Model Penal Code defines criminal conspiracy as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

MODEL PENAL CODE § 5.03(1) (Proposed Official Draft 1962). Courts describe the elements of federal conspiracy as including "(1) an agreement among conspirators to commit an offense; (2) specific intent to achieve the objective of the conspiracy; and (3) usually an overt act to effect the object of the conspiracy." United States v. Pinckney, 85 F.3d 4, 8 (2d Cir. 1996). While recent precedent does not reveal international negotiators making use of the Model Penal Code in international materials, United States federal law appeared in negotiations over the ICC statute. *See* Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L.F. 291, 294 n.13, 316, 317 n.86 (2001) (observing that the United States delegation was guided by federal law and U.S. military materials, rather than the Model Penal Code).

60. *See* David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231, 242 (2002) (reporting that "Article II of the Genocide Convention is reproduced verbatim in the . . . ICTY and ICTR [International Criminal Tribunal for Rwanda] Statutes").

61. *Musema*, Case No. ICTR-96-13-T, at para. 187 (stating that background materials on the Genocide Convention establish that the "concept of conspiracy relied upon the Anglo-Saxon doctrine of conspiracy"); *see also Continuation of the Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633]*, U.N. GAOR 6th Comm., 3d Sess, pt. 1, 83d mtg., at 212–13 (statement of Mr. Maktos) (defining conspiracy under "Anglo-Saxon law . . . [as] the agreement between two or more persons to commit an unlawful act" and the importance of conspiracy theory as a means "to prevent genocide as far as possible").

62. *See infra* notes 115–36 and accompanying text for discussion of con-

ceived as a free-standing crime and defined as an agreement to effect an unlawful purpose, is a distinct and important complement to the theories of both command responsibility and joint criminal enterprise as articulated by the ICTY. Such precedent would prove important for the ICC, which operates pursuant to a statute arguably congenial to conspiracy prosecutions.

II. COMMAND RESPONSIBILITY, JOINT ENTERPRISE, AND CONSPIRACY

Command responsibility, joint criminal enterprise liability, and conspiracy are closely connected. Indeed, as Professor Mirjan Damaška has explained, "the primary responsibility of commanders under international law is but a perfectly justified application of municipal criminal law doctrines on complicity, or various modalities of perpetration, to a special organizational setting."[63] The ICTY has noted command responsibility's overlap with joint criminal enterprise, finding that where a commander participates in the commission of a crime through the acts of his or her subordinates by "planning, instigating or ordering" the crime, the commander's liability for command responsibility "is subsumed under" the commander's liability under the joint enterprise doctrine.[64]

Despite this relationship, command responsibility has proven a troublesome theory for ICTY prosecutors in the context of rape prosecutions. The difficulties encountered may derive from practical and theoretical obstacles inherent in the command responsibility doctrine, which may be partially avoided through greater reliance on joint criminal enterprise theory. Conspiracy provides an even more appropriate approach than joint criminal enterprise theory.[65] Well tailored to the goals and mode of perpetuating rapes in wartime, conspiracy would prove particularly helpful in prosecuting leaders or tactical masterminds, providing the world community another means of deterring rape as an incident of war.

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spiracy's presence in other international materials.

63. Damaška, *supra* note 8, at 456.

64. Prosecutor v. Krstic, Case No. IT-98-33-T, para. 605 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Aug. 2, 2001), *at* http://www.un.org/icty/krstic/trialC1/judgement/krs-tj010802e.pdf.

65. *See infra* notes 104–12 and accompanying text for further comparison of conspiracy with joint criminal enterprise.

A. COMMAND RESPONSIBILITY: PAST EXPERIENCE AND PROBLEMS OF PROOF AND THEORY

1. Experience in the ICTY

Defining command responsibility, the ICTY statute provides for liability of an individual when culpable acts were "committed by a subordinate" and the individual "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[66] In the face of this relatively expansive definition, the ICTY has resisted attempts to expand command responsibility. For example, the Appeals Chamber refused to interpret this provision as embracing liability for individuals holding equal authority to those who committed acts, holding steadfastly to the requirement that the liable individual must hold a superior position.[67] Opinions emerging from ICTY rape prosecutions likewise reflect a restrained approach to command responsibility, despite international law precedent for command responsibility for wartime rapes.[68]

The *Kunarac* acquittal, which arose from the prosecution of Bosnian Serb paramilitary officers for the 1992 rape and enslavement of Bosnian Muslim women at the Foca prison camp, provides an illustration. Trial evidence showed that Kunarac operated as a commander during a period of time when soldiers raped women prisoners, and that Kunarac himself admitted to leading a permanent group of approximately

66. ICTY Statute, *supra* note 14, at art. 7(3).

67. *See* Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT'L L. 1, 78–79 (2001) (discussing the acquittal in *Prosecutor v. Delalic*, Case No. IT-96-21, paras. 197, 214 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Nov. 16, 1998), *at* http://www.un.org.icty/celebici/trialc2/judgement/cel-tj981116e.pdf, *aff'd,* Case No. IT-96-21-A, paras. 293, 314 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Feb. 20, 2001), *at* http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf).

68. The Tokyo War Crime Trials convicted Japanese commanders of command responsibility for the rapes committed by their soldiers during World War II. *See* Christopher Scott Maravilla, *Rape as a War Crime: The Implications of International Criminal Tribunal for the Former Yugoslavia's Decisions in* Prosecutor v. Kunaric, Kovac & Vukovic *on International Humanitarian Law*, 13 FLA. J. INT'L L. 321, 337 (2001) (discussing the introduction of rape as a war crime at the end of World War II). For a discussion of the Japanese proceedings, see Lippman, *supra* note 67, at 11.

fifteen soldiers.[69] Evidence also revealed, however, that individual tasks would require Kunarac to use only four or five soldiers from this group at any one time and that the soldiers returned to their respective brigades or detachments after completing individual tasks. The Trial Chamber therefore concluded that more proof was required to establish that "the soldiers who committed the offences charged in the Indictment were under the effective control of Kunarac at the time they committed the offences."[70]

While showing willingness to expand command responsibility to accommodate loose hierarchical structure in contemporary military conflicts,[71] the tribunal also revealed the doctrine's limitations in prosecutions of those in powerful positions in the Celebici detention camp. Although convicting one of the defendants—Zdravko Mucic—of command responsibility for rapes and sexual assaults that took place under his watch,[72] the tribunal's application of command responsibility principles to others resulted in acquittals.[73] The tribunal acknowledged that

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69. Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, para. 626 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Feb. 22, 2001), *at* http://www.un.org/icty/foca/trialc2/judgement/knu-tj01022e.pdf, *aff'd,* Case Nos. IT-96-23/1-A, IT-96-23/1-A, para. 125 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber June 12, 2002), *at* http://www.un.org/icty/foca/appeal/judgement/kun-aj020612e.pdf.

70. *Id.* at para. 628 (emphasis omitted). The Trial Chamber opinion, however, is peppered with references that support knowledge and participation in the rapes. *See, e.g., id.* at para. 651 (finding that Kunarac "was aware" of a gang rape and that he worked "in concert" with another soldier in raping women); *id.* at 652 (finding that Kunarac "was aware that [a woman] would be subject to rapes and sexual assaults by soldiers at [a] house . . . when he took her there"); *id.* at para. 656 (finding that Kunarac not only "committed the crimes of torture and rape as a principal perpetrator," but that he also "aided and abetted the other soldiers in their role as principal perpetrators").

71. The effects of this are reflected in the *Milosevic* case, where prosecutors are attempting to hold Milosevic responsible for atrocities not only in Kosovo, where his legal authority was clear, but also in Bosnia and Croatia, where he was not in "direct *de jure* control." *See, e.g.*, Leila Nadya Sadat, *ASIL Insights: Trial of Milosevic* (Oct. 2002) (explaining this distinction), *available at* http://www.asil.org/insights/insigh90.ktm; *see also* Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 139 (2000) (discussing alternative prosecution strategies against Milosevic depending upon the degree of *de jure* control that could be established).

72. *Delalic*, Case No. IT-96-21, at para. 1047 (rejecting Mucic's challenges to command responsibility liability). Mucic was not convicted of rape itself. *Id.* at para. 3.

73. *Delalic*, Case No. IT-96-21-A, at paras. 293, 314 (affirming the acquittal of Delalic and Delic on the command responsibility charges).

responsibility could result even though an individual possessed no formal commission or authority.[74] Observing that a "tribunal could find itself powerless to enforce humanitarian laws . . . if it only accepted as proof of command authority a formal letter of authority,"[75] the tribunal made clear that the ICTY statute recognized liability for power possessed "in either a *de jure* or a *de facto* form."[76] The ICTY added, however, that no liability would follow where "the link of control ... [was] absent or too remote."[77] The tribunal explained that command culpability would not follow from mere "substantial influence" not amounting to effective control (defined as the material ability to prevent or to punish subordinate wrongdoers).[78]

The tribunal applied these principles to Hazim Delic, a Bosnian Muslim deputy commandant assigned to the Celebici camp. Finding Delic guilty of rape as torture and therefore guilty of a war crime in grave breach of the Geneva Conventions,[79] the ICTY acquitted him of command responsibility for crimes committed by lower ranked guards.[80] Referring to witness statements that Delic "occasionally criticized" camp guards severely and that they were afraid of him, the Trial Chamber concluded this testimony did not establish a superior/subordinate relationship, but merely showed a "'degree of influence' which could be 'attributable to the guards' fear of an intimidating and morally delinquent individual.'"[81] The Appeals Chamber upheld this restrained application of the command responsibility doctrine, explaining that the doctrine is "anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops."[82] A subordinate/superior relationship "is a *sine qua non* for superior responsibility," the Appeals Chamber reasoned, because the command responsibility doctrine provides

74. *Id.* at para. 193.

75. *Id.*

76. *Id.* at para. 192.

77. *Id.* at para. 197.

78. *Id.* at paras. 257, 267 (rejecting the prosecution's push for a lower threshold of control).

79. *See* Nahapetian, *supra* note *22*, at 130 (1999) (reviewing the facts of the *Delic* case).

80. *Delalic*, Case No. IT-96-21-A, at para. 305.

81. *Id.* at para 308 (quoting Prosecutor v. Delalic, Case No. IT-96-21, para. 806 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Nov. 16, 1998), *at* http://www.un.org/icty/celebici/trialc2/judgement/cel-tj98116e.pdf).

82. *Id.* at para. 254 (quoting *Delalic*, Case No. IT-96-21, at para. 647).

for "a species of vicarious responsibility"[83] that is designed to regulate and ensure "military discipline."[84]

2. Problems with Command Responsibility Liability

The *Delalic* and *Kunarac* acquittals are symptomatic of practical and theoretical problems with command responsibility.[85] Practical problems stem from difficulties of obtaining competent proof. The essentially vicarious nature of liability under the command responsibility theory largely accounts for the theory's analytical shortcomings.

a. Practical Problems with Getting Command Liability Convictions

In recognizing *de facto* authority as a basis for command responsibility, the ICTY responded to the realities of the Yugoslav conflict. Most notably, the tribunal pragmatically concluded that requiring a formal manifestation of authority could undermine the ability of international criminal law to redress the atrocities that attended the Yugoslav conflict.[86] As one commentator has explained, liability for command responsibility requires a court to make the highly fact specific findings that individuals hold the status of a superior or subordinate.[87] The difficulties with this "status-based" standard are especially pronounced "[i]n an era of . . . paramilitary organizations practicing terrorism and guerrilla warfare."[88] The Yugoslav conflict is well known for its guerilla quality, with combatants often

83. *Id.*

84. *Id.*

85. Another example may be the case against General Tihomir Blaskic, who was convicted and found responsible for the 1993 massacre at the village of Ahmici in Croatian-controlled Western Bosnia. *See* Prosecutor v. Blaskic, Case No. IT-95-14-T, paras. 384–495 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Mar. 3, 2000), *at* http://www.un.org/icty/blaskic/trialc1/judgement/bla-tj000303e.pdf. Subsequent to his conviction, documents came to light casting doubt on whether he was the actual commander. Specifically, Blaskic's lawyers maintain that they can demonstrate that "the political leadership who had set up their own parallel command, and not General Blaskic, ordered the Ahmici massacre." Marlise Simons, *Archives Force Review of Croat's Atrocity Case*, N.Y. TIMES, Nov. 21, 2002, at A14.

86. *Delalic*, Case No. IT-96-21-A, at para. 193 (stating that a "tribunal could find itself powerless to enforce humanitarian law[s] . . . if it only accepted as proof of command authority a formal letter of authority").

87. *See* Vetter, *supra* note 71, at 127 (arguing against the fact-specific standard in the ICC).

88. *Id.*

organized in loose structures lacking formal hierarchy. One media observer described the warfare style as follows: "Except for the city siege situations and a few large battles, the combat has been mostly spontaneous, more resembling heavily armed anarchy than organized warfare."[89] Proving command responsibility is so difficult that prosecutors have resorted to using war reporters as witnesses, a practice that the tribunal has disapproved due to its problematic free speech implications.[90]

Yugoslavian commanders have proven unusually elusive in other respects as well. In contrast to the Nuremberg trials—where prosecutors had access to vast documentary evidence—officials in the former Yugoslavia apparently produced few such documents.[91] By necessity, therefore, ICTY prosecutors have had to rely on circumstantial proof. Moreover, unlike Rwandan leaders, who tended to be more open about their actions, leaders in the former Yugoslavia typically acted by stealth.[92] ICTY prosecutors have pursued prosecutions of lower level fighters "in order to have the necessary building blocks to indict people right at the top."[93] Command responsibility convictions are likely one of the casualties of this covert style of warfare and

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89. J.P. Mackley, *The Balkan Quagmire Myth; Taking on the Serbs Would Be More Grenada Than Vietnam*, WASH. POST, Mar. 7, 1993, at C3. Mackley continues:

> Warfare in former Yugoslavia falls into four categories: 1) siege situations in which heavily armored Serbs employ artillery fire to cut off and wear down defenders occupying fixed positions; 2) house-to-house fighting where largely unorganized small groups spray automatic fire at each other until the side that runs out of ammunition retreats; 3) largely unopposed movements against villages full of civilians; 4) small-unit commando raids.

Id.

90. *See* Nina Bernstein, *Should War Reporters Testify Too*?, N.Y. TIMES, Dec. 14, 2002, at B9 (reporting that "tribunal investigators have typically sought from reporters . . . legal links in a chain of evidence to prove that accused officials had what prosecutors call 'command and control responsibility' for what happened on the killing fields"); *see also* Decision of Interlocutory Appeal at para. 56, Prosecutor v. Brdjanin, Case No. IT-99-36-AR73.9 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Dec. 11, 2002) (quashing the subpoena of war correspondent), *at* http://www.un.org/icty/brdjanin/appeal/decision-2/randall021211.htm.

91. *See* Ivkovic, *supra* note 7, at 302 (explaining that "[u]nlike the circumstances after World War II, in the former Yugoslavia there are no victors and losers, no easy access to evidence, and no detailed documentation").

92. *See* Judge Richard Goldstone, *Living History Interview*, 5 TRANSN'L L. & CONTEMP. PROBS. 373, 380–81 (1995).

93. *Id.*; *see also* BASS, *supra* note 9, at 206–07, 223–76 (describing the strategy of starting with low-level figures in conducting the ICTY prosecutions).

control.

The practical problems of obtaining convictions for command responsibility are exacerbated in the context of rape. Because wartime rapes often do not appear in public settings and are frequently unsubstantiated by accurate eyewitness testimony,[94] finding proof that a commander knew of the rapes or acquiesced in their commission is especially difficult. Proof problems are heightened where the command responsibility theory is premised on failure to supervise, because actions that occurred in private are less likely to fall within the superior's reasonable control.

b. Theoretical Problems of Justifying Command Culpability

The ICTY's difficulties in catching and convicting "big fish"[95] highlights a conceptual irony of prosecuting leaders for war crimes they did not complete with their own muscle. On the one hand, one can argue that these leaders are the most culpable. The first lead ICTY prosecutor, Justice Goldstone, embraced this perspective as a guiding principle of the tribunal: "With regard to the seriousness of the crimes, the most guilty are those who ordered them."[96] Goldstone also argues that ascribing blame to leaders can help to disassociate communities or groups of people from wrongdoing, a process vital to effective healing.[97] On the other hand, prosecuting leaders

94. *See* BASS, *supra* note 9, at 223 ("Some of [the cases against lower level figures] rested on a small number of witnesses, if two or three could be intimidated out of testifying . . . then the case would collapse.").

95. *See, e.g.*, RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 107 (2000) (describing the media criticism about ICTY's initial indictments of "small fish"); Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT'L & COMP. L. 353, 356–57 (2001) (analyzing criticisms of "relative paucity of indictments of high-level officials in the former Yugoslavia"). The reasons for the difficulties are complex and include concerns related to political pressures, practical realities, and prosecutorial strategy. GOLDSTONE, *supra*, at 107 (2000) (describing the obstacles to obtaining indictments, including political influence of the Dayton negotiations).

96. Richard J. Goldstone, *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*, 6 DUKE J. COMP. & INT'L L. 5, 7 (1995) (outlining the strategies and principles for ICTY prosecutors).

97. Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485, 488 (1996) (explaining that prosecuting leaders can focus blame away from ethnic, religious, or other groups). For example, Goldstone maintains that the "most important beneficiaries of the Nuremberg Trials were the German people" because "focus was placed upon the accused as individual

because they are leaders is inconsistent with the retributive goal of international criminal law. The practical problems of proving command responsibility may be symptomatic of a deeper theoretical flaw in attempting to lay blame on individuals who are physically removed from war crimes.[98]

The process of establishing blame at a criminal trial helps to satisfy the victim's and society's need for retribution. Yet, command responsibility can cloud notions of individual guilt. Command responsibility arguably includes vicarious liability and thus suggests "a measure of insensitivity to the degree of the actor's own personal culpability."[99] This problem is most extreme where command responsibility does not concern direct orders, but simply a "failure to control" subordinates.[100] Under these circumstances, command responsibility acts as a form of "criminalized negligence," rather than a theory of direct wrongdoing.[101] Victims and society are therefore less able to experience the retribution that flows from identifying blameworthy persons who actively committed a crime.

Recognizing that not every war criminal will come to justice, tribunal supporters point out that retribution is partially served simply because victims have an opportunity to speak, to expose the truth, and thereby to begin the process of healing. Justice Goldstone argues that this healing takes place in part because "exposure of the truth can help individualize guilt and thus avoid the imposition of collective guilt on an ethnic, religious, or other group."[102] A command responsibility prosecution may not actually individualize guilt where the prosecution

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criminals or leaders and not as Germans." *Id.* at 489.

98. *Cf.* Damaška, *supra* note 8, at 471 (illustrating the protections inherent in a hierarchy structure that protect superiors from prosecution). Damaška explains that:

> [T]he more removed [superiors] are in ranks of authority from immediate perpetrators, the more the hierarchical *hauteur* enables them to evade punishment by concealing either their complicity or acquiescence in crimes of their subordinates or by disingenuously pleading ignorance of criminal activity. Paper trails leading to higher-ups can be missing, or other circumstances arise that *bedevil efforts to establish their links to the wrongdoing.*

Id. (emphasis added).

99. *Id.* at 456.

100. *See* Barbara Crossette, *At the Hague, It's a Leader on Trial, Not a People*, N.Y. TIMES, Feb. 17, 2002, § WK, at 3 (quoting Professor Ruth Wedgewood, commenting on the war crimes trial of Slobodan Milosevic).

101. *Id.*

102. Goldstone, *supra* note 97, at 488 (outlining the ways in which peace and justice are interwoven).

lacks graphic proof of physical wrongdoing by the defendant himself. Even where graphic proof of official misconduct is available, the leader, prosecuted under a theory of official responsibility and control over an intricate web of subordinates, becomes a symbol for the people or for the community.[103] In this respect, direct criminal liability may more effectively identify individual wrongdoers. A command responsibility theory, by contrast, can cast the group as the perpetrator of the crimes, either because they operated as puppets under control of a leader or as individual agents of evil that the commander was negligent in failing to control. A tension (if not a contradiction) emerges between the theory of command responsibility and the retributive goal of individualizing guilt.

B. JOINT CRIMINAL ENTERPRISE

Understanding that symbolically potent war crimes prosecutions require more than trials for the direct perpetrators of physical crimes, the International Tribunal for the Former Yugoslavia developed an extensive body of joint criminal enterprise law.[104] Prosecutors have made extensive use of joint criminal enterprise theories, applying the concept to establish culpability where the proof necessary to establish command responsibility was lacking.[105] The ICTY's broad interpretation of joint criminal enterprise liability is at times difficult to distinguish from the crime of conspiracy.[106] The limitations of joint criminal enterprise liability emerge from a careful review of the pertinent cases, in which the tribunal focused on the facts underlying the ultimate crimes necessary to support joint criminal enterprise liability, rather than the facts surrounding planning of the crime. For example, prosecutions for joint enterprise liability require proof "that the accused shared with the person who personally perpetrated the crime the state of

103. An obvious test for this is the *Milosevic* trial. For a detailed description of events leading up to the trial, see CIGAR & WILLIAMS, *supra* note 10, at 19–29.

104. *See supra* notes 29–48 and accompanying text for discussion of the ICTY's expositions on joint criminal enterprise liability.

105. For example, the Appeals Chamber has said that intent in the joint criminal enterprise liability can be shown "either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy." Prosecutor v. Tadic, Case No. IT-94-1-A, para. 220 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber July 15, 1999), *at* http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf.

106. *See supra* notes 31–48 and accompanying text.

mind required for that crime."[107] Prosecutorial energy therefore focuses on proof of an ultimate crime that the accused may not have committed, and is diverted from exposing the planning of the crime. This focus is appropriate to joint criminal enterprise liability, which is a theory of complicity in crimes committed by another. Experience suggests that ICTY prosecutors have encountered obstacles and committed precious resources meeting this standard, and may have been more successful convicting culpable individuals if they were not required to focus on the elements of the ultimate crime.[108]

This burden appears particularly significant in the context of rape, where trauma may prevent witnesses from testifying with adequate detail to prove the ultimate acts of rape and accurate eyewitness testimony is often lacking.[109] The *Vukovic*

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107. Prosecutor v. Krstic, Case No. IT-98-33-T, para. 613 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Aug. 2, 2001) (quoting Decision on Form of Further Amended Indictment and Prosecution Application to Amend at para. 31, Prosecutor v. Brdjanin, Case No. IT-99-36 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II June 26, 2001), *at* http://www.un.org/icty/brdjanin/trialc/decision-e/10626F1215879.htm), *at* http://www.un.org/icty/krstic/trialc1/judgement/krs-tj010802e.pdf.

108. Another example comes from the *Furundzija* prosecution, in which the tribunal carefully considered the presence or nonpresence of the accused during the torture and rape of a woman. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, paras. 124–30 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Dec. 10, 1998), *at* http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf. The accused did not commit the rape, but interrogated the woman while the rape occurred. *Id.* Because the accused questioned the woman, the tribunal found that Furundzija aided and abetted the rape by his presence. *Id.* The Trial Chamber reached this conclusion, however, only after a reconstruction of the precise order of events. *Id.*

109. An example emerges from the acquittal of Zoran Vukovic, a member of a military unit that repeatedly raped women from detention camps in the Foca area. Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, para. 10 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Feb. 22, 2001), *at* http://www.un.org/icty/foca/trialc2/judgement/kun-tj01022e.pdf. Vukovic was acquitted of rapes that occurred in a classroom at a detention camp. *Id.* at para. 878. The circumstances of the rape were traumatic and confusing. Five women detainees were called out by name, taken to an empty classroom, and each raped and abused by a different soldier. *Id.* at para. 786. A victim identified Vukovic as the man who raped her, and several other women corroborated his presence. *Id.* at paras. 786–87. But the victim's testimony suggested that she had identified the wrong man. *Id.* at paras. 788–89. The tribunal admitted evidence focusing on the accuracy of the identification. When that evidence failed, the Trial Chamber concluded that the prosecution did not meet its burden of showing that Vukovic had any role in the rape incident at all. *Id.* at paras. 789–92. In other words, Vukovic may have been present raping another woman or may have helped to plan and facilitate the rapes, but was acquitted of any involvement because the victim could not identify which soldier raped

acquittal may represent a typical breakdown in proof that could arise in any context. The acquittal nonetheless suggests how criminal law may fail to combat mass rape where the theory of prosecution requires focus on the specifics of the ultimate act of rape, rather than planning and strategy. The war crimes context magnifies these difficulties. Women subject to repeated rapes may be unable to differentiate among different rapes and different rapists. In the former Yugoslavia, these crimes often occurred during extensive periods in captivity, under conditions making it impossible for victims to keep track of time and variations in circumstances.[110] Victims were subject to violence, duress, and psychological oppression that are generally unmatched in the domestic context,[111] and were unable, legally, politically, and practically, to make a "swift complaint" to municipal authorities who might take action to preserve evidence.[112]

Unlike joint criminal enterprise liability, conspiracy establishes liability without necessary proof that others committed some underlying offense. Thus, conspiracy avoids the special problems in establishing the elements of an underlying offense such as rape. This quality would enable conspiracy to contribute uniquely to the prosecution of those instrumental in making rapes committed as war crimes, grave breaches of the Geneva Conventions, crimes against humanity, and genocide possible. This Article now turn to this proposition.

C. CONSPIRACY: ITS ADVANTAGES AND SUITABILITY IN THE WAR CRIMES CONTEXT

A key distinguishing characteristic of conspiracy is its status as an independent crime imposing direct responsibility on an accused. As such, conspiracy neither tracks the "complicity-based responsibility" of joint criminal enterprise responsibility[113] nor imposes the vicarious liability that command re-

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her.

110. *See* Patricia Viseur Sellers & Kaoru Okuizumi, *Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 52 (1997).

111. *See id.* (contending that in formulating a special procedural rule of rape—Rule 96—the ICTY judges "arguably differentiated the probative value of victim testimony about sexual assaults committed during armed conflict from the probative value of victim testimony concerning sexual assaults in a non-armed conflict municipal trial court").

112. *Id.*

113. CIGAR & WILLIAMS, *supra* note 10, at 37 (describing the distinctions

sponsibility may impose.[114] These qualities of conspiracy not only make it an effective prosecutorial tool, but also an analytically appropriate theory suited to the goal of bringing to justice those who use rape as an instrument of war, genocide, and inhumane treatment.

1. Conspiracy's Role in International Criminal Law

The ICTY statute mentions conspiracy in the genocide context, declaring that "conspiracy to commit genocide" is a punishable act.[115] An identical provision appears in the statute of the International Tribunal for Rwanda.[116] Thus, where prosecutors establish mass rapes that are committed with the intent to destroy a national, ethnic, racial, or religious group, conspiracy to commit rape may be an available theory of culpability. The question remains, however, whether ICTY prosecutors may pursue convictions for conspiracy to commit rape outside of the genocide context. To evaluate conspiracy's availability to the ICTY prosecutors outside of the genocide context, we look to international customary law and the prohibition against *ex post facto* laws, known in international law as the doctrine of *nullem crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law).

Conspiracy's status in international customary law is somewhat ambiguous. Materials as far back as the Nuremberg Charter include conspiracy to commit crimes against peace as a separate crime,[117] and an identical provision appeared in the

between "direct responsibility," "command responsibility," and "complicity-based responsibility" under ICTY statute). The ICTY prosecutor appears to have marshaled all three approaches in the case against Slobodan Milosevic. *See* Indictment at paras. 5, 6, 27, Prosecutor v. Milosevic, Case No. IT-01-51-I (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II Nov. 22, 2001), *at* http://www.un.org/icty/indictment/English/mil-ii011122e.htm.

114. *See* Damaška, *supra* note 8, at 456 (observing that command responsibility's embrace of vicarious liability suggests "a measure of insensitivity to the degree of the actor's own personal culpability").

115. ICTY Statute, *supra* note 14, at art. 4(3)(b).

116. ICTY Statute for Rwanda art. 2(3)(b), 33 I.L.M. 1602–03, *available at* http://www.ictr.org/ENGLISH/basicdocs.statute.html, *adopted by* S.C. Res. 955, U.N. SCOR 49th Sess., 3453rd mtg. at 2, U.N. Doc S/RES/955 (1994), 33 I.L.M. 1600 [hereinafter Rwanda Statute].

117. The Nuremberg Charter defined crimes against peace to include the "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, § 2, art. 6(a), 82 U.N.T.S. 279, 288, 59

charter for the Tokyo trials.[118] Yet, neither tribunal apparently interpreted the charters as establishing conspiracy to commit war crimes or crimes against humanity as separate crimes.[119] One commentator on Nuremberg reported that "[e]ven though the Charter provided that complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law, the [t]ribunal considered this provision to be a theory of individual liability and not separate crimes."[120] Apparently, representatives of civil law countries, whose traditions did not embrace conspiracy as a theory of criminal responsibility, were troubled by including conspiracy in the Charter.[121]

Despite conspiracy's status as a theory relatively foreign to civil law countries,[122] the crime has frequently, albeit not con-

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Stat. 1544, 1547, *reprinted in* PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 142 (2000) and *in* M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 141 (1998).

118. International Military Tribunal for the Far East, Apr. 26, 1946, § 2, art. 5(a)–(b), 4 Bevans 20, 28 (using the same language to define crimes against peace to include "the planning, preparation, initiation or waging of a . . . war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or *conspiracy* for the accomplishment of any of the foregoing" and also assigning criminal responsibility to "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or *conspiracy* to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan") (emphasis added). The Allied Powers also used the same provisions to describe crimes against peace and similarly assigned criminal responsibility for lower level military tribunals in Allied occupied Germany. *See* Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50, 50–51 (1946).

119. WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG 555 (1954).

120. Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275, 281 (1995).

121. Howard S. Levie, *The ICTY Statute for the Former Yugoslavia: A Comparison with the Past and a Look to the Future*, 21 SYRACUSE J. OF INT'L L. & COM. 1, 11 n.60 (1995) (noting that the crime of conspiracy concerned civil law countries/representatives); *cf.* Michael P. Scharf, *Trial of Milosovic*, ILSA J. OF INT'L & COMP. L. 389, 392 (2002) (observing that a frequent complaint about Nuremberg was its use of the "concept of conspiracy which had never before been recognized in continental Europe").

122. *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 186 (Int'l Crim. Trib. for Rwanda Trial Chamber Jan. 27, 2000) (describing the limited view of conspiracy in civil law countries), *at* http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm, *aff'd on other grounds*,

sistently, appeared in international materials. The language concerning conspiracy in the ICTY statute and the statute for the International Tribunal for Rwanda owes direct lineage to the Convention on Genocide, which obliges United Nations members to make conspiracy to commit genocide a punishable act in their domestic criminal codes.[123] Conspiracy also appears in a myriad of other international conventions covering criminal law matters. For example, the crime is proscribed in various conventions dealing with the international drug trade[124] and money laundering,[125] as well as slavery and apartheid.[126]

Musema v. Prosecutor, Case No. ICTR-96-13-A, (Int'l Crim. Trib. for Rwanda Appeals Chamber Nov. 16, 2001), *at* http://www.ictr.org/ENGLISH/cases/Musema/judgement/arret/index.htm.

123. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. III(b), S. EXEC. DOC. O, at 7 (1949), 78 U.N.T.S. 277, 280 (including "conspiracy to commit genocide" in a list of punishable acts). The Genocide Convention imposes criminal responsibility for conspiracy, attempt, complicity, and incitement to commit the crime of genocide. Pertinent Geneva Conventions and Protocols, however, "limit the imposition of criminal responsibility to those who committed or ordered the commission of a grave breach." Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783, 800 n.58 (1995). *But cf. Musema*, Case No. ICTR-96-13-T, at para. 187 (noting that the Genocide Convention adopted the broad Anglo-Saxon definition of conspiracy).

124. *See* Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, art 2(c), 198 L.N.T.S. 299, 309, *amended by* Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs Concluded at the Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925, and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, Dec. 11, 1946, T.I.A.S. No. 1671, 12 U.N.T.S. 179 (requiring signatory states to make legislation providing for the severe punishment of conspiracy to traffick drugs). Later drug trade conventions also referenced conspiracy. *See* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *adopted* Dec. 19, 1988, art. 3(1)(c)(iv), 28 I.L.M. 493 (1989) (including "conspiracy to commit [drug trafficking]" as an offence); Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, art. 14, 1976 Can. T.S. No. 48, 18 (mending art. 36(2)(a)(ii) to include "conspiracy to commit" narcotics offences as a crime).

125. Signatories to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime are encouraged to incorporate the crime of conspiracy in their domestic money laundering statutes. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, art. 6(1)(d), E.T.S. No. 141, 3 (requiring "each party to adopt legislation . . . establishing *conspiracy to commit* laundering offences as an offence under domestic law") (emphasis added).

126. *See* International Convention on the Suppression and Punishment of the Crime of "Apartheid", U.N. GAOR, 28th Sess., 2185th plen. Mtg., Annex, Supp. No. 30 at 76, art. III(a), U.N. Doc. A/9030 (1973) (providing for international criminal responsibility for those who "[c]ommit, participate in, directly

Discussion of conspiracy in the context of head of state immunity and the International Criminal Court reinforce the crime's presence within the fabric of international criminal law.[127] Courts have also discussed conspiracy as it relates to the United States Alien Tort Claims Act.[128] Interpreting that Act, "courts have concluded that certain forms of indirect participation in state-committed wrongs may render an individual liable," with individual liability arising from "conspiracy or conspiracy-like participation with state actors committing violations of the laws of nations."[129]

Conspiracy's validity in these myriad contexts suggests that the *ex post facto* prohibition does not stand as an obstacle for ICTY prosecutors and others who wish to use the offense in executing provisions under international criminal law.[130] In making this argument, we note that, beginning in 1992, the Security Council informed those involved in the Yugoslavian

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incite or conspire in the commission of the acts [of apartheid]"); Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 6(1), T.I.A.S. 6418, 3206, 266 U.N.T.S. 3, 43 (making "being a party to conspiracy" to engage in slavery a punishable act); *see also* Study on Ways and Means of Insuring the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention, HUM. RTS. COMM., 37th Sess., Provisional Agenda Item 17, at 35, 76, U.N. Doc. E/CN.4/1426 (1981), *reprinted in* BASSIOUNI, *supra* note 117, at 697, 725 ("A person commits conspiracy when, with intent to commit a specific offence, he agrees with another to the commission of that offence and one of the members of the conspiracy commits an overt act in furtherance of the agreement.").

127. *See* Leila Sadat Wexler, *The Proposed Permanent International Criminal Court*, 29 CORNELL INT'L L.J. 665, 720 (1996) (noting that the International Criminal Court could play an important role in eliminating uncertainties about definitional concepts "such as complicity and conspiracy and the attempt to commit such crimes, whose content varies from one country to the next"); Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 154 (1999) (arguing that creating "loophole[s] for heads of state merely because they do not themselves have blood on their hands runs contrary to the established laws of conspiracy and accomplicity"); *see also infra* notes 202–10 and accompanying text for a review of ICC statutory drafts and other materials discussing conspiracy.

128. 28 U.S.C. § 1350 (2003).

129. Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487, 497 (2001).

130. *See* Jordan J. Paust, *Addendum: Prosecution of Mr. Bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims*, ASIL INSIGHTS (Sept. 21, 2001) (pointing out instances in which ex post facto problems have been avoided because international crimes were already recognized under customary international law), *at* http://www.asil.org/insights.htm.

atrocities that "they were bound by existing international humanitarian law, in particular the Geneva Conventions and Genocide Convention."[131] These warnings, as well as conspiracy's well-established roots in international conventional and customary law, put on notice those who may be prosecuted for conspiracy. By avoiding vicarious liability, conspiracy arguably presents a milder theory of responsibility than two others that the ICTY has expressly embraced: command responsibility and joint criminal enterprise. From this perspective the ICTY prosecutors should encounter no *ex post facto* obstacle to conspiracy prosecutions, given authority that *nullem crimen sine lege, nulla poena sine lege* presents no obstacle to milder criminal laws imposed after a criminal transaction or occurrence.[132] The conclusion that the doctrine of *nullem crimen sine lege, nulla poena sine lege* is not an obstacle does not eliminate questions that often emerge in conspiracy prosecutions, such as the availability of the co-conspirators' exception to the hearsay

131. *See* Scharf, *supra* note 121, at 393.

132. *See* United States v. List, 11 Trials of War Crime 1230, 1239 (U.S. Military Tribunal, Nuremberg, 1948) (opining that "[i]t is not essential that a crime be specifically defined"); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 8 (2000) (discussing the principle of *nullem crimen sine lege, nulla poena sine lege* and noting that "principles of legality in international criminal law differ from those of many legal systems in that they are less rigorous than, for example, positivist legal systems"); *cf.* Damaška, *supra* note 8, at 483 (arguing that imputed responsibility for war crimes as a greater stigma than the offence of faulty supervision and that *nullem crimen sine lege, nulla poena sine lege* "does not bar the use of milder criminal laws enacted after the event").

Conspiracy's context-sensitive quality should not provide an obstacle under ICTY precedent. Indeed, the tribunal's Appeals Chamber has recognized that such contexual understanding of criminal law is appropriate in adjudicating crimes against humanity. In *Prosecutor v. Kuranac*, the Trial Chamber explained that crimes against humanity must be widespread and systematic, but that requirement may be demonstrated by a link between a single criminal act and a systematic campaign against a civilian population. Case Nos IT-96-23-T, IT-96-23/1-T, para. 417 (Int'l Crim. Trib. for Former Yugoslavla Trial Chamber Feb. 22, 2001) (quoting Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence Case at p. 510, Prosecutor v. Mrksic, Case No. IT-95-13-R61 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Apr. 3, 1996), *at* http://www.un.org/icty/ind-e.htm), *at* http://www.un.org/icty/foca/trialc2/judgement/kun-tj010222e.pdf). Within the context of the Nazi's systematic persecution of Jews during World War II, the act of turning in a Jew to Nazi authorities takes on special significance and is linked to the campaign against an entire population. *Id.* at para. 431 (quoting Prosecutor v. Kupresic, Case No. IT-95-16-T, para. 550 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Jan. 14, 2000), *at* http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf).

rule, venue and joinder rules, and the necessity of an overt act requirement. Many materials cover these issues, although the Model Penal Code is a particularly helpful starting place.[133]

The same holds true for those who will prosecute at the ICC. While the state of the law under the ICC is still uncertain and subject to some debate,[134] the statute's relatively broad command responsibility[135] renders conspiracy milder and thus less problematic. Finally, because the world community condemns rape as a *jus cogens* crime,[136] the joinder of the rape and conspiracy crimes are unlikely to encounter doctrinal obstacles in either the ICC or the ICTY.

2. Conspiracy Is Likely an Effective Theory for War Criminals

Conspiracy prosecution has at least two faces. First, prosecutors sometimes charge conspiracy as an inchoate crime. In this context, the law's purpose is generally to prevent further crime from occurring and to prosecute criminal conduct at the early stages of growth before harmful activity unfolds on a large scale.[137] Equally relevant are conspiracy prosecutions that occur after an attempted or completed "substantive offense" occurs.[138] In these contexts, society punishes conspiracies on the theory that "joint action is, generally, more dangerous than individual action."[139] The United States Court of

133. *See* MODEL PENAL CODE § 5.03 cmt. at 389–90 (Proposed Official Draft 1962).

134. *See infra,* notes 187–207 for an outline of relevant ICC provisions and analysis of their scope.

135. Rome Statute of the International Criminal Court, July 17, 1998, art. 28(b)(i), U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute] (including such things as liability for civilian leaders who "either knew, or consciously disregarded information which clearly indicated, that subordinates were committing or about to commit . . . crimes"), *available at* http://www.un.org/law/icc/statute/romefra.htm.

136. *See, e.g.*, Angela M. Higgins, Comment, *Else We Are Condemned to Go from Darkness to Darkness: Victims of Gender-Based Crimes and the Need for Civil Redress in U.S. Courts*, 70 U. MO. KAN. CITY. L. REV. 677, 691 (2002) (observing that condemnation of sexual slavery is a *jus cogens* norm).

137. MODEL PENAL CODE § 5.03 cmt. at 387–88 (Proposed Official Draft 1962) (describing the reasons for authorizing conspiracy prosecutions for inchoate crimes as a basis for "preventive intervention by the agencies of law enforcement and for the corrective treatment of persons who reveal that they are disposed to criminality").

138. Paul Marcus, *Criminal Conspiracy Law: Time To Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 3 (1992).

139. United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991); *see*

Appeals for the Seventh Circuit has noted that joint action of a group is more threatening than individual actions because collaboration makes possible division of labor and psychological support.[140] According to this view, conspiracies pose an additional risk that the object of the conspiracy will be achieved and therefore warrant a penalty as a separate crime.[141] Indeed, as the United States Supreme Court has recently reiterated, the agreement to commit a crime is "a distinct evil," which may exist and be punished whether or not the substantive crime ensues.[142] The law deems conspiracy to pose a public threat "over and above the threat of the commission of the relevant substantive crime."[143] This conclusion has two premises: The law assumes that the combination of individuals to commit crime not only makes commission of other crimes more likely, but also reduces the chance that individuals will abandon their criminal plans.[144]

Though conspiracy is an available theory for all defendants, these rationales are particularly well suited for prosecuting criminal masterminds and heads of conspiracies. It is these key players who often initiate the agreements to commit crime

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also MODEL PENAL CODE § 5.03 cmt. at 387 (Proposed Official Draft 1962) (explaining that the crime of conspiracy is "a means of striking against the special danger incident to group activity, facilitating prosecution of the group, and yielding a basis for imposing added penalties when combination is involved").

140. *Townsend*, 924 F.2d at 1394. According to the Model Penal Code:

> In the course of preparation to commit a crime, the act of combining with another is significant both psychologically and practically, the former because it crosses a clear threshold in arousing expectations, the latter because it increases . . . the fortitude to purpose. The actor knows, moreover, that the future is no longer governed by his will alone; others may complete what he has had a hand in starting, even if he has had a change in heart.

MODEL PENAL CODE § 5.03 cmt. at 388 (Proposed Official Draft 1962).

141. *See supra* note 140 and accompanying text. In making this argument, we do not suggest that it is necessary to provide for liability for conspiracy where the perpetrator is found guilty of the ultimate crime itself. See *supra* note 57 and accompanying text for discussion of controversy surrounding this concept. We note, however, that liability for both conspiracy and an underlying crime is particularly appropriate where the perpetrator acted as a leader of the conspiracy.

142. United States v. Recio, 123 S. Ct. 819, 820 (2003) (quoting Salinas v. United States, 522 U.S. 52, 65 (1997)).

143. *Id.*

144. *Id.* (quoting Callanan v. United States, 364 U.S. 587, 593 (1961)); *see also* United States v. Rabinowich, 238 U.S. 78, 88 (1915) (arguing that the public may be more injured by conspiracy than from the commission of the underlying crime itself).

and whose charisma, intelligence, and power fuel the conspiratorial process. Ironically, these actors are also most often capable of eluding conviction, either because their status and power provide them with a network for maintaining underworld or fugitive status, or because they have skillfully distanced themselves from actual acts of substantive crime.[145] They may be able to avoid individual responsibility under aiding and abetting or joint enterprise theories because of a prosecutor's inability to connect their conduct or state of mind with a particular ultimate crime.

Prosecuting conspiracy may help bring to justice leaders who organize and inspire criminal activity. By focusing on agreement among parties and by taking on the status of an individual crime, conspiracy allows the prosecution to avoid the unnecessary and sometimes fatal focus on a crime committed by another perpetrator. Conspiracy makes possible punishment for integral organizational actors who plan, deliberate, and reflect on criminal schemes but do not necessarily perpetuate the planned action.[146] Any concerns that this approach gives prosecutors undue license to pursue vicarious liability[147] can be checked by requiring a clear showing of membership in the conspiratorial group as well as intent to enter into an agreement with a criminal purpose.

Two ICTY cases illustrate how conspiracy would have proven an appropriate and effective theory in prosecuting leading figures: Dragoljub Kunarac and Hazim Delic.[148] In the

145. Damaška, *supra* note 8, at 471.

146. Arguably, conspiracy helps to bolster the view of a mastermind in such circumstances as a "perpetrator behind the perpetrators." *Id.* at 460 n.7 (reviewing some of the literature on this controversial construct).

147. *See, e.g., id.* at 456 (questioning whether it is appropriate for international criminal justice to disregard the culpability restricting principles of municipal law of vicarious liability).

148. Despite the prosecutorial advantages of a conspiracy theory, one common advantage for conspiracy prosecutions—the co-conspirator exception to the hearsay rule—would probably not provide special service to ICTY prosecutors. Indeed, ICTY evidentiary rules appear flexible enough that a co-conspirator exception would not add significantly to the admission of hearsay and other evidence that might be excluded under stricter evidentiary regimes. The court has given chamber judges broad discretion for the admissibility and probative value of hearsay evidence. *See* Judgment on Allegations of Contempt Against Prior Counsel Milan Vujin at para. 93, Prosecutor v. Tadic, Case No. IT-94-1-A-R77 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Jan. 31, 2000) (rejecting the common law approach that excludes hearsay evidence and emphasizing the broad discretion ICTY judges may employ in evaluating such evidence), *at* http://www.un.org/icty/tadic/appeal/

Kunarac case, the record is replete with Trial Chamber findings suggesting that Kunarac acted in concert with other soldiers, assisted them, and was aware that the soldiers were committing rape, even though he was acquitted of command responsibility for the rapes.[149] The Trial Chamber findings that Kunarac himself committed rape with more abstract goals than mere sexual gratification were particularly telling of possible conspiratorial intent.[150] Kunarac also left women "with his men in the knowledge that they would rape them"[151] and acted as a "co-perpetrator" with other soldiers.[152] The Trial Chamber further found that he "played a leading organisational role and that he had substantial influence over some of the other perpe-

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vujin-e/uuj-aj010227e.pdf; *see also* Decision on Prosecutor's Appeal on Admissibility of Evidence at para. 15, Prosecutor v. Aleksovkski, Case No. IT-95-14/1-A (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Feb. 16, 1999) (noting that it is well settled that hearsay evidence is admissible), *at* http://www.un.org/icty/ind-e. This latitude and flexibility is based on Rule 89(C) of the ICTY Rules of Evidence and Procedure, which allows trial chambers to admit "any relevant evidence which it deems to have probative value." Rules of Procedure and Evidence of the International Criminal Court, R. 89(C), *reprinted in* JOHN E. ACKERMAN & EUGENE O'SULLIVAN, PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 421 (2000); *see also* Damaška, *supra* note 8, at 481–82 (noting that evidentiary barriers are not as high in international tribunals as those in the Anglo-American legal tradition, as demonstrated by liberal use of hearsay).

149. *See, e.g.*, Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, para. 651 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Feb. 22, 2001) (finding that Kunarac "was aware" of a gang rape and that he worked "in concert" with another soldier in raping women), *at* http://www.un.org/icty/foca/trialc2/judgement/kun-tj010222e.pdf, *aff'd,* Case Nos. IT-96.23, IT-96-23/1-A (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber June 12, 2002), *at* http://www.un.org/icty/foca/appeal/judgement/kun-tj020612e.pdf; *id.* at para. 652 (finding that Kunarac "was aware that [a woman] would be subject to rapes and sexual assaults by soldiers at [a] house . . . when he took her there"); *id.* at para. 656 (finding that Kunarac not only "committed the crimes of torture and rape as a principal perpetrator," but that he also "aided and abetted the other soldiers in their role as principal perpetrators").

150. *See id.* at para. 654. (finding that Kunarac "acted intentionally and with the aim of discriminating between the members of his own ethnic group and the Muslims"). The Trial Chamber also found that Kunarac told women "that they would give birth to Serb babies; or that they should 'enjoy being fucked by a Serb.'" *Id.* The findings also support a conspiracy theory in that Kunarac not only "committed the crimes of torture and rape as a principal perpetrator," but that he also "aided and abetted the other soldiers in their role as principal perpetrators." *See id.* at para. 656.

151. *Id.* at para. 670 (using this finding to establish that Kunarac aided and abetted in the rape and torture his men committed).

152. *Id.* at para. 714 (finding that "Kunarac and the two other soldiers acted as principal co-perpetrators").

trators."[153] Although Kunarac was convicted of some rapes himself, and was convicted of aiding and abetting other rapes, these findings could have provided the basis for a conspiracy conviction, which would have reflected more directly Kunarac's culpability for his leadership role.[154] A conspiracy prosecution would have better met the retributive and preventative purposes of the war crimes tribunal and recognized more fully the particular damage that Kunarac caused in leading a campaign of rapes.

In the *Delic* case, the ICTY convicted Hazim Delic of individual responsibility for a number of crimes committed at the Celebici prison camp, but acquitted him of command responsibility.[155] Despite this acquittal, the Trial Chamber determined that he "was instrumental in creating an atmosphere of terror," "abused his position of authority and trust as deputy commander," and "encouraged others among the camp guards to engage in their own forms of mistreatment of the detainees."[156] The Trial Chamber record contains many findings suggesting that, had the prosecutors tried the case with a conspiracy theory, they would have successfully proven criminal culpability for conduct that otherwise eluded punishment under the failed command responsibility theory. Representative findings supporting a conspiracy theory include determinations that Delic was ordered to assist the camp commander by "organising and arranging for the daily activities in the camp,"[157] and that he was "involved in the operation of the camp on a daily basis."[158] The findings also suggest that Delic was known for intimidating guards into criminal acts,[159] and that the crimes committed against prisoners at the camp were so common that there was

153. *Id.* at para. 863 (finding that Kunarac's leadership role amounted to an aggravating circumstance for the purpose of sentencing).

154. *See id.*

155. Prosecutor v. Delalic, Case No. IT-96-21-T, paras. 800–09 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Nov. 16, 1998), *at* http://www.un.org.icty/celebici/trialc2/judgement/cel-tj981116e-1.htm, *aff'd* Case No. IT-96-21-A (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Feb. 20, 2001), *at* http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220/pdf.

156. Statement of the Trial Chamber at the Judgment Hearing at 10, Prosecutor v. Delalic, Case No. IT-96-21-T (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Nov. 16, 1998), *at* http://www.un.org/icty/pressreal/celsumj981116e.htm.

157. *Delalic*, Case No. IT-96-21-A, at para. 310.

158. *Id.* at para. 313.

159. *See id.* at para. 305.

"no way that Delic could not have know about them."[160]

While these examples suggest that conspiracy would be effective in bringing justice to the masterminds and leaders, the theory might also provide a useful, and perhaps necessary, alternative for prosecuting those on the periphery of a conspiracy. Such "smaller fish" include those whose support is detached from any underlying offense but is nonetheless essential to the conspiracy's object. For example, a local civilian official who agrees with a military leader to keep civilian law enforcement away from a house that the military plans to use for large-scale rape of local women could be prosecuted under a conspiracy theory. The civilian official may not be involved in planning or perpetrating the rapes themselves and may for that reason not be subject to successful aiding and abetting or joint criminal enterprise liability. Nonetheless, the law enforcement official's agreement contributes significantly to the rape house's effect of terrorizing the local population. While the official may not be as influential to the criminal enterprise as a leader, his actions merit punishment and his prosecution may make possible successful convictions of those higher up the ladder of culpability.[161]

3. Conspiracy Is Analytically Suited for Prosecuting Systematic or Wartime Rape

Not only can conspiracy afford prosecutors a potent weapon, but the crime is well suited to the purposes and context of international rape prosecutions. As examined below, the particular contexts in which rapes were perpetrated within the

160. *Id.* at para. 313. While it is true that the Appeals Chamber did not accept the prosecutor's argument that Delic had command responsibility, the argument might have been more compelling in the conspiracy context. *See id.*

161. Another fact pattern that could illustrate how conspiracy could be helpful for prosecuting peripheral—yet essential—figures who contribute to perpetrating war crimes and crimes against humanity comes from the World War II figure Hermann Roechling. Roechling was a steel industry executive who owned or operated factories that used prison labor. Many of these factories existed symbiotically with military prison camps where workers were mistreated. *See generally* Vetter, *supra* note 71, at 128. One could imagine facts under which a factory owner such as Roechling is not sufficiently tied to various ultimate crimes committed at the prison camps to subject him to aiding and abetting or joint enterprise liability. Likewise, camp guards may not have been under the control of Roechling for the purpose of command responsibility. Yet, the factory owner such as Roechling was clearly operating pursuant to an agreement with the prison camp official, the object of which was to systematically mistreat and exploit the inmates. *See id.*

former Yugoslavia were not isolated instances of rape,[162] but rather were strategically implemented, and sometimes systematic and large-scale campaigns directed at whole communities. Using a conspiracy theory to prosecute these crimes ensures that the law vindicates the goals of preventing and punishing such community violence. Yoking the crime of conspiracy with the crime of rape emphasizes this special context for international criminal law's intervention. Criminalizing conspiracy to rape thus operates symbolically, emphasizing the gravity of rape as a *jus cogens* crime[163] and specifically condemning its use in a collective, wartime, or systematic context.

a. Conspiracy and the Goals of International Criminal Law

Conspiracy's unique contribution to combating wartime or systematic rapes derives from its purpose of reaching collective activity. The crime acknowledges the special danger of group criminality and reaches those who use rape as an instrument of terror, war, and genocide, whether or not they actually perpetrated or planned a sexual act. Such broad criminal goals likely emerge within a group context and can take hold as governing justifications for large-scale activity with or without the assistance of a formal hierarchy needed to make out command

162. We note that controversy exists concerning the role of international criminal law in punishing what can be characterized as isolated instances of rape. *See, e.g.*, Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 B.Y.U. J. PUB. L. 317, 347 (2002) (arguing that the failure to include rape as an independent crime inappropriately fails to vindicate violence done to individual women raped as part of isolated incidents). Making such distinctions is indeed fraught with potential difficulty. We hasten to note the substantial overlap between "domestic" rapes and more systematic rape campaigns. For example, Fionnuala Ni Aolain points out evidence establishing that "during the Yugoslav conflict, women were assaulted and raped by men they knew, by neighbors and acquaintances." Fionnuala Ni Aolain, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 ALB. L. REV. 883, 902 (1997). It was the domestic quality of these rapes that gave them special potency: "There was perceptible danger that the proximity of pre-war relationships would give defendants the intimate knowledge and capacity to exploit their victims' prior relationships as a means to justify their own behavior." *Id.*

163. *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 187 (Int'l Crim. Trib. for Rwanda Trial Chamber I Jan. 27, 2000) (explaining that in civil law traditions conspiracy is confined to truly egregious acts), *at* http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm, *aff'd on other grounds*, Case No. ICTR-96-13-A, (Int'l Crim. Trib. for Rwanda Appeals Chamber Nov. 16, 2001), *at* http://www.ictr.org/ENGLISH/cases/Musema/judgement/arret/index.htm.

responsibility. Thus, not only do conspiracy prosecutions make possible greater numbers of convictions, but these prosecutions also specifically recognize the special dangers of group criminality that international criminal law is designed to deter.

The fact that conspiracy assigns direct responsibility (which is not always accomplished under command responsibility)[164] reinforces this deterrent purpose. Too many wrongs go unpunished, however, for criminals to believe that prosecution is certain in all cases. As a result, fear of punishment cannot account for all of a war tribunal's deterrent effect. International criminal law's deterrent function thus hinges on the credibility and power of those limited convictions that are achieved. The more direct the liability and proof of individual wrongdoing, the more important the conviction is in shaping the conduct of others. Under such circumstances, war crime trials help prevent a society from engaging in denial and perpetrators from crying "victor's justice" and characterizing themselves as scapegoats.[165] As a crime of individual wrongdoing, conspiracy avoids this criticism and reinforces the goal of deterrence.

At the same time, the crime of conspiracy stands as an important counterpoint to the occasional reluctance to treat rape seriously in both the international as well as the domestic setting. Scholars have noted that sexual violence may not be taken seriously because "sex is something people also engage in voluntarily—unlike, for example, beatings and similar violent crimes."[166] Many legal systems refer to rape as a "crime of honor, which sounds less serious than a crime of violence."[167]

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164. *See, e.g.*, Damaška, *supra* note 8, at 456–65 (reviewing the reasons why command responsibility may be problematic in the war crimes context); Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 43 (2002) (arguing that the liberal construction of command responsibility by ICTR and ICTY "blurs any meaningful distinction between a legal duty and moral obligation").

165. *See* Michael Ignatieff, *Article of Faith*, INDEX ON CENSORSHIP, Sept./Oct. 1996, at 117–18 (arguing that legal proceedings such as the war crimes trials can use evidentiary rules to "confer legitimacy on otherwise contestable facts" and "[can] make it more difficult for societies to take refuge in denial") *cited in* Goldstone, *supra* note 97, at 503.

166. M. CHERIF BASSIOUNI & MARCIA MCCORMICK, SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA 35 (Occational Paper No. 1, Int'l Human Rights Law Inst., DePaul Univ. 1996) (discussing challenges the International Criminal Tribunal faces in proving sexual violence as a method of ethnic cleansing).

167. *Id.*

Combining the crimes of conspiracy and rape helps to counteract this tendency to trivialize sexual violence.

b. Conspiracy and the Context of Wartime and Systematic Rapes

The world population will likely benefit greatly from the considerable efforts by scholars and prosecutors to study and to document systematic rape perpetrated in the Yugoslav conflict. This effort exposes not only what women in the former Yugoslavia experienced, but populations in other conflicts as well. With this learning and understanding we will best be able to tailor international criminal prosecutions in the future and may ultimately come closer to preventing the crimes altogether. For present purposes, the studies reveal diverse schemes for rapes perpetrated in the Yugoslav conflict. This Article's review of these schemes uncovers many appropriate circumstances for conspiracy prosecutions, circumstances that unfortunately may repeat themselves in other conflicts.

Simon Chesterman summed up rape campaigns in the former Yugoslavia as follows:

> [Rape] is at once an instrument of the military objective to drive populations from their homes and the subject of widespread political propaganda. It is used as an instrument of fear as well as a means of impregnating women (seen to be bearing children of the conqueror's ethnicity). In this way, rape functions as both an intimate violation of a woman and a grotesque public display of domination: The rape of a woman's body symbolically represents the rape of the community itself.[168]

The United Nations Commission of Experts—whose work formed the basis for the ICTY—provides detail that expands and catalogues the various strands of this analysis. The Commission identified a number of ways in which rape was used as part of a greater plan that, by necessity, was the subject of a conspiracy. In fact, the Commission identified five separate patterns of rape; some or all of these patterns emerged from plans to accomplish a predetermined objective. As described by the Commission, the schemes included (1) sexual assault related to the looting and intimidation of the target ethnic group; (2) sexual assault related to the local fighting; (3) sexual assault in detention facilities; (4) sexual assault used as part of

168. Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 327–28 (1997).

"ethnic cleansing"; and (5) detention of women for the sole purpose of sexually entertaining soldiers.[169]

Each of these patterns presents a role for conspiracy theory, with each suggesting varying degrees of agreement to rape. In the first pattern, the commission reported that the rapes occurred within a gang atmosphere in which all attackers participated in the event, even though all did not sexually assault the victims.[170] In some instances, women were taken from their homes to specific locations,[171] indicating preplanning and agreement among a broad group of individuals as to where to move the women. In the second group of rapes, the assaults occurred either as attacking forces secured an area or thereafter in connection with a roundup or public assault followed by transportation to camps.[172] This also suggests prior agreement among perpetrators and possibly others.

The third and fourth patterns of sexual assault, occurring in detention camps, provide the most compelling suggestions of conspiracy. In the third pattern, soldiers, camp guards, paramilitaries, and others picked out women from camps and usually took them away to rape and sexually assault them.[173] In some instances, women were raped and sexually assaulted within the camps in front of other detainees.[174] Sexual assault of men usually occurred at the camps in public.[175] In the fourth pattern, women reported that they were detained for the sole purpose of rape and sexual assault.[176] They based this conclusion on their observations that all women detained were attacked in this way, the attacks were frequent, and the captors often stated that they were trying to impregnate the women.[177] Captors frequently treated pregnant women better than their nonpregnant counterparts, and pregnant women remained in custody beyond the point when they could abort

169. *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution* § I(C) (1992), Annex IX: Rape and Sexual Assault, adden. 2 (Vol. 5), U.N. Doc. S/1994/674 (1994), *available at* http://www.ess.uwe.ac.uk/comexpert/IX.htm [hereinafter *Final Report*].

170. *Id.*

171. *Id.* (reporting that the size of the groups of men ranged from four to fifteen).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

the pregnancy.[178] Some detainees reported that women were raped once per night on an apparent schedule.[179] For both of the third and fourth patterns, evidence of conspiracy among perpetrators and others emerges from the similarities among the incidents, the high rate of occurrence, and the necessity for consent or complicity by those who ran the camps.

The fifth pattern shows similar signs of deliberate planning. Women were taken to predesignated sites where they provided sexual gratification for the armed forces.[180] Unlike in the detention camps, perpetrators did not try to provoke reactions among other detained women, and the victims were ultimately killed more often than exchanged.[181]

In addition to the necessity for preplanning reflected in these patterns, the presence of motive as well as apparent organization and hierarchy among perpetrators reveal that culpable conspiracies existed. As explained by two scholars who investigated these crimes, M. Cherif Bassiouni and Marcia McCormick, sexual violence in the former Yugoslavia was "deliberately and systematically employed as a tool of 'ethnic cleansing'" and in service of the "strategic objective of forcibly removing civilian populations from certain areas" so as to "achieve the political goal of 'Greater Serbia.'"[182] These conclusions are derived in part from the context, circumstances, and patterns of the rapes. The reported cases occurred "in conjunction with an effort to displace the civilian population of a targeted ethnic group from a given region."[183] Sexual violence proved a particularly effective instrument in the campaign of ethnic cleansing in Bosnian Muslim communities.[184] According to the culture of these communities, women become tainted by sexual relations outside marriage, even when the relations were forced.[185] "Unmarried women become unmarriageable; married women become outcasts in their own families."[186] The Ljubljana newspaper apparently carried a report of a plan followed by the Yugoslav National Army, Psychological Opera-

178. *Id.*
179. *Id.* § II(A)(38)(a).
180. *Id.* § I(C).
181. *Id.* at 7.
182. BASSIOUNI & MCCORMICK, *supra* note 166, at 15.
183. *Final Report*, *supra* note 169, § I(C).
184. BASSIOUNI & MCCORMICK, *supra* note 166, at 6.
185. *Id.*
186. *Id.*

tions Department, that concluded that Muslim "morale, desire for battle, and will could be crushed . . . easily by raping women, especially minors and even children, and by killing members of the Muslim nationality inside their religious facilities."[187]

According to a report issued by a United Nations Security Council Commission of Experts, factors showing organization include victim recollections of perpetrators declaring that they were ordered to assault victims sexually.[188] Other factors identified in the report suggesting that the rapes occurred as part of a structured campaign included "similarities among practices in noncontiguous geographic areas; simultaneous commission of other humanitarian law violations; simultaneous military activity; . . . [and] maximizing shame and humiliation to not only the victim but also the victim's community."[189] In citing these patterns, the Security Council Commission reasoned that "some level of organization and group activity" was required to perpetrate the rapes and sexual assaults reported.[190] The widespread incidence of rape and sexual assault is the first indication of a policy: The Security Council Commission was able to document at least 1100 cases.[191] Other evidence suggesting a plan consented to or developed by military and political leadership includes the large number of rapes occurring within controlled environments, such as detention camps, and the decrease in incidents after world media attention reached its peak.[192] This reduction in the face of media attention also suggests that the violations were part of a controllable plan known by the leader. The Security Council Commission that took evidence on sexual violence concluded that, although Bosnian Muslims and Croats allegedly perpetrated widespread rapes and other crimes against Serbian women, evidence of policy planning was confined largely to Serbian perpetrators.[193]

187. *Id.* at 21 n.4 (quoting Kresimir Meier & Mirjana Glusac, *Rape as a Means of Battle*, DELO, Feb. 23, 1993, at 6, *reprinted in* F.B.I.S. Daily Report, Eastern Europe, Mar. 23, 1993, at 25).

188. *Final Report*, *supra* note 169, § I(C).

189. *Id.*

190. *Id.* § I(D).

191. *Id.* § I(A).

192. BASSIOUNI & MCCORMICK, *supra* note 166, at 21–22.

193. *Id.* at 22.

III. A GLANCE TO THE FUTURE: RAMIFICATIONS FOR THE INTERNATIONAL CRIMINAL COURT

Even after conflicts in the former Yugoslavia began to dissipate, rape continued to be a significant component of violent political strife and guerrilla warfare in such contexts as the Rwandan civil war, the ethnic violence in Liberia, the violent conflict attending Indonesia's occupation of East Timor, and the extended internal conflict in Peru.[194] Advancing international law principles used to prosecute mass rape therefore continues to be a necessary and important enterprise. Even as the opportunities for using conspiracy in ICTY rape prosecutions begin to fade as the tribunal pushes to finish its work,[195] innovations concerning the joinder of conspiracy and sex crime prohibitions hold continuing relevance for the work of the ICC and other enterprises developed for combating international crime. Opportunities within the ICC are particularly important, given the tribunal's worldwide support and its close link with the jurisprudence of the ICTY. Both scholarship[196] and ICTY opinions[197] note the lineage the ICC owes to the ICTY's treatment of

194. *See* Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326, 327 (1994) (reviewing the recent history of rape and violent sexual abuse of women in armed conflict).

195. The reasons for this push are myriad, including the expense of the tribunal and concern for speedy trial privileges of the accused. *See* Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 536 (2001) (citing concerns with expense, emergence of ICC, and speedy trial); Rosemary Bennett & Carola Hoyos, *US Launches Campaign to Close UN Criminal Tribunals*, FIN. TIMES, Mar. 1, 2002, at 10 (quoting the United States ambassador as stating that the tribunal has been too slow and inefficient); Colum Lynch, *U.S. Seeks End to War Crimes Tribunals by 2008*, WASH. POST, Mar. 1, 2002, at A19 (reporting on statements by the United States ambassador-at-large for war crimes urging closing of the tribunal by 2008). One innovation making it problematic for the ICTY to use conspiracy in connection with rape prosecutions is an increased reliance on written evidence. Wald, *supra*, at 536–37 (reporting that the ICTY is making much greater use of written testimony). This practice may not be amenable to the complex proof requirements in a conspiracy trial. *Cf.* Albert J. Harno, *Intent in Criminal Conspiracy*, U. PA. L. REV. 624, 631 (1941) (describing the complexity of intent issues in proving conspiracy).

196. *See, e.g.*, Nicole Eva Erb, *Gender Based Crimes Under the Draft Statute of the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 432 (1998) (describing the relationship between the treatment of rape in the ICTY statute and in the ICC statute).

197. *See, e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-A, para. 117 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber July 21, 2000) (cit-

rape and co-perpetrator liability. The specific provisions in the ICC statute relevant to prosecutions for conspiracy to commit rape as well as strengths, weaknesses, and ambiguities in the statute's structure pertinent to such prosecutions are outlined below.

A. ICC: STATUTORY PROVISIONS CONCERNING RAPE AND CO-PERPETRATOR LIABILITY

Unlike the ICTY statute, which does not explicitly proscribe rape or related crimes, the statute of the International Criminal Court enumerates sex crimes. The crimes are listed explicitly in articles of the ICC statute governing both crimes against humanity and war crimes. The inhumane acts listed in Article 7 include not only "rape," but also "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."[198] The war crimes section, Article 8, proscribes these same acts.[199] Sex crimes are also implicit in the more general defined crimes of torture and inhumane treatment[200] and the crime of genocide.[201]

Advocates for women also point to an interpretation provision in Article 21 as another potential source of protections for women. Under this provision, which makes special citation to gender issues, the ICC must interpret all its laws in accordance with existing internationally recognized human rights.[202] The

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ing the Rome statute for guidance on the issue of co-perpetrator liability for torture), *at* http://www.un.ord/icty/furundzija/appeal/judgement/furaj00721e.pdf.

198. Rome Statute, *supra* note 135, art. 7(1)(g).

199. *Id.* art. 8(2)(b)(xxii). The list of sexual offenses was developed in the context of war crimes negotiations and then repeated for the final version of the article pertaining to crimes against humanity. Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 79, 100 n.6 (Roy S. Lee ed., 1999) (recounting the negotiation history).

200. Hebel & Robinson, *supra* note 199, at 117.

201. Rome Statute, *supra* note 135, art. 6; *see also* Boon, *supra* note 7, at 636 (observing that a footnote to Article 6(b) on genocide in the ICC statute recognizes the link between genocide and rape made by the Rwandan tribunal). Article 6(b) provides simply: "For the purpose of this statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . [c]ausing serious bodily or mental harm to members of the group." Rome Statute, *supra* note 135, art. 6(b).

202. This section provides in full that:

> The application and interpretation of law pursuant to this article

Article 21 provision arguably grants license to the ICC for interpreting crime definitions expansively in light of gender concerns and condemned activities from other international conventions.[203]

The ICC provisions governing co-perpetrator liability do not clearly grant authority to prosecute conspiracies. Article 25 contains provisions creating liability for committing a crime individually or jointly; ordering, soliciting, or inducing "the commission of such a crime which in fact occurs or is attempted"; and aiding, abetting, or otherwise assisting in the commission of a crime "or its attempted commission, including providing the means for its commission."[204] The provision that comes closest to authorizing prosecution for conspiracy is Section 3(d) of Article 25. According to this section, a person is criminally responsible if that person "contributes to the commission or attempted commission of . . . a crime by a group of persons acting with a common purpose."[205] For liability to attach, such contribution must be intentional and shall either:

> (a) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (b) Be made in the knowledge of the intention of the group to commit the crime.[206]

The other relevant group of provisions, which appear separately in Article 28, provide for command responsibility. Article 28 states that a "military commander or person effectively acting as a military commander shall be criminally responsible for crimes . . . committed by forces under his or her effective command and control, or effective authority and control."[207] Liability attaches where that person "knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes" and that person "failed to take all necessary steps and reasonable measures . . .

> must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national ethnic or social origin, wealth, birth or other status.

Rome Statute, *supra* note 135, art. 21(3).

203. *See, e.g.*, Lehr-Lehrnardt, *supra* note 162, at 341–42 (noting the importance of the Article 21 provision to women's groups).

204. Rome Statute, *supra* note 135, art. 25(3)(a)–(c).

205. *Id.* art. 25(3)(d).

206. *Id.*

207. *Id.* art. 28(1).

to prevent . . . the crimes" or to "submit the matter to competent authorities."[208] Pursuant to this article, other superiors (i.e., civilians) may bear liability for the acts of subordinates if:

> (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[209]

B. ICC: QUALITIES RELEVANT TO RAPE CONSPIRACY PROSECUTIONS

1. Uncertainties About Command Responsibility and Joint Enterprise Liability

Uncertainties and possible failures of command responsibility and joint criminal enterprise prosecutions under the ICTY have both legal and practical roots. Prosecutors have little reason to believe they can avoid the practical problems encountered under the ICC scheme as well. War criminals will not likely return to the days of detailed documentation and clear lines of authority exposed at Nuremberg.

Legal materials do not establish definitively whether the ICC will entertain joint criminal enterprise liability theories similar to those pursued under the ICTY. If the tribunal follows ICTY precedent, ICC prosecutors may pursue joint enterprise prosecutions under the language of Article 25 providing for liability where a person contributes to a crime "by a group of persons acting with a common purpose."[210] Significant authority suggests that this language owes its lineage to the International Convention for the Suppression of Terrorist Bombings[211] rather than any ICTY materials.[212] Nevertheless, ICTY inter-

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208. *Id.* art. 28(1)(a)–(b).

209. *Id.* art. 28(2)(a)–(c).

210. *Id.* art. 25(3)(d).

211. For information on the Convention, see International Convention for the Suppression of Terrorist Bombings, U.N. GAOR, 52d Sess., Annex, Agenda Item 152, art. 2(3)(2), U.N. Doc. A/RES/52/164 (1998) [hereinafter International Convention], *available at* http://odsddsny.un.org/doc/undoc/gen/n98/761/17pdf/n9876117.pdf.

212. Mahnoush H. Arsanjani, *The Rome Statute of the International*

pretations should be relevant because the ICTY at one time used the term "common purpose liability"[213] and later used similar language in enunciating the *actus reus* elements of joint criminal enterprise liability: a "plurality of persons"; the "existence of a common plan," which amounts to or involves the commission of the underlying crimes; and "[p]articipation in the execution of the common plan."[214] Even if the ICC language does embrace joint criminal enterprise liability, that theory may have limited use for ICC prosecutors pursuing group rape convictions. Indeed, ICC authority for joint enterprise liability would not obviate the proof problems encountered in the ICTY when prosecutors used the theory to prosecute individuals involved in systematic rape campaigns.

While the command responsibility provisions in the ICC statute are more explicit than joint criminal enterprise concepts, legal analysis of the command responsibility provisions also exposes limitations for prosecutors seeking culpability for group rape. First, the statute's requirement that officials exercise "effective command" or "effective authority" appears to limit criminal liability to those "who possess the material capacity to control troops."[215] Likewise, the ICC imposes liability on "civilian 'superiors' for the acts of their subordinates" over whom they exercise "effective authority and control," again apparently restricting liability to circumstances where prosecu-

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Criminal Court, 93 AM. J. INT'L L. 22, 36–37 (1999) (explaining the connection between the International Convention for the Suppression of Terrorist Bombings, art. 2(3)(c) and the ICC section); Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199–200 (Roy S. Lee ed., 1999) (reporting on the connection between the two provisions). See *infra* notes 221–23 and accompanying text for further discussion of this issue.

213. Prosecutor v. Krstic, Case No. IT-98-33-T, para. 613 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Aug. 2, 2001), *at* http://www.un.org/icty/krstic/trialci/judgement/krs-tj010812e.pdf. Early ICTY cases used the term "common purpose" liability, but subsequently dropped the moniker in favor of "joint enterprise liability." *Id.* at para. 613 n.1366 (stating that the language "joint enterprise liability" is preferred to "common purpose liability") (citing Prosecutor v. Brdjamin, Case No. IT-99-36, para. 37 (Int'l Crim/ Trib. for Former Yugoslavia Trial Chamber June 26, 2001), *at* http://www.un.org/icty/brdjanin/trialc/decision-e/10626FI225879.htm).

214. *Id.* at para. 611 (citing Prosecutor v. Tadic, Case No. IT-94-1-A, para. 227 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber July 15, 1999), *at* http://www.un.orc/icty/tadic/appeal/judgement/tad-aj990715e.pdf). For further discussion of this standard, see *supra* notes 29–53 and accompanying text.

215. Lippman, *supra* note 67, at 86 (interpreting Article 28 of the ICC).

tors have proof of formal influence and demonstrable ability to control subordinates.[216] Although the matter has prompted debate,[217] these provisions suggest an intent to circumscribe the reach of liability for command responsibility. Moreover, given the complementarity theory behind ICC jurisdiction, the general tendency among domestic courts to interpret the scope of command liability narrowly will reinforce the restrictions on criminal liability for those in leadership positions.[218]

For these reasons, one would expect joint enterprise liability and command responsibility to provide limited use for prosecutors pursuing rape convictions. The ICC would likely benefit from a supplemental theory such as conspiracy to allow prosecution of individuals involved in group criminality.

2. Uncertainties About Conspiracy Prosecutions

As with the ICTY, the ICC faces uncertainty about whether its statute authorizes conspiracy prosecutions. The version of the ICC statute presently in force mentions neither the word *conspiracy* nor the concept of an agreement to commit a crime. If authorized by the statute, conspiracy most likely is implicit in the co-perpetrator liability concept of Article 25, Section 3(d).[219] At least one commentator argues that the statute envisions liability for conspiracy.[220] Given the ICTY's influ-

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216. *Id.* at 88. Critics maintain that this command responsibility standard "may weaken the reach of the doctrine for civilian superiors." Vetter, *supra* note 71, at 93. Vetter also enumerates reasons why weakening civilian command responsibility is undesirable. *Id.* (citing AMNESTY INTERNATIONAL, THE INTERNATIONAL CRIMINAL COURT: MAKING THE RIGHT CHOICES, pt. V (1998), *available at* http://www.igc.org/icc/html/n.g.o.html).

217. Gurulé, *supra* note 164, at 40–43 (reading the ICC command responsibility provisions in light of ICTY and ICTR cases and arguing that the statute "dramatically reduces the burden of proof" for command responsibility and makes possible the conviction of civilians who have "the ability to influence others to prevent criminal activity" and "fail to do so").

218. Jordan Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 N.Y.L. SCH. J. HUM. RTS. 547, 565–66 (1995) (discussing cases from Canada and the United States where courts apparently strayed from international law principles in order to absolve officers from command responsibility).

219. *See supra* notes 204–05 and accompanying text for the text of this provision.

220. *See* William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT'L L. J. 477, 485 (1999) (stating that the "ICC Statute provides for inchoate offenses, including several forms of vicarious liability (e.g., command responsibility, solicitation, and incitement of genocide) as well as standard attempt,

ence on the ICC's development, one could argue that the ICTY statute may authorize conspiracy prosecutions. Countervailing evidence, however, clouds the issue.

The link between ICTY decisions and the ICC statute's reference to "common purpose" liability is weakened by materials showing that the ICC drafters borrowed the term from the International Convention for the Suppression of Terrorist Bombings.[221] That convention apparently adopted the language from a European Union extradition treaty, anticipating that its breadth would facilitate prosecutions.[222] At least one report explained that the International Terrorist Bombing Convention's language provided a ready compromise, which avoided controversy between common law and civil law countries over including a crime of conspiracy in the convention.[223] Highlighting the effect of this type of concerted ambiguity in the ICC context, other commentators have noted the difficulties this creates in determining whether the statute authorizes prosecutions for conspiracy and other crimes.[224]

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conspiracy, and aiding and abetting theories").

221. *See supra* note 212 and accompanying text. The relevant provision in the Terrorist Bombing Convention provides that:

> 3. Any person . . . commits an offense if that person:
>
> . . . .
>
> (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

International Convention, *supra* note 211, art. 2(3)(c) (explaining the connection between the International Convention for the Suppression of Terrorist Bombings, art.2(3)(c) and the ICC section); *see also* Saland, *supra* note 212, at 199 (reporting on the connection between the two provisions).

222. *See* Arsanjani, *supra* note 212, at 36–37; Samuel Witten, *The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT'L L. 774, 776 (1998) (anticipating that the broad scope of Terrorism Convention language would facilitate prosecution).

223. *See* Saland, *supra* note 212, at 199 (reporting that conspiracy was "a concept strongly advocated by common law countries but unknown in some civil law systems").

224. *See* Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2284 (1999) (analyzing whether Article 25(3)(d) is open to a broad, conspiracy standard); *see also* Panel, *The International Criminal Court: Contemporary Perspectives and Prospects for Ratification*, 16 N.Y.L. SCH. J. HUM. RTS. 505, 541 (2000) (observing that the ICC statute was typical of multilateral treaty negotiations in that ambiguous wording on substantive aspects of crimes served "to

Documentary materials created as the ICC statute developed are also ambiguous on the issue of conspiracy.[225] Perhaps most difficult to interpret is the fact that conspiracy appeared (either by explicit name or by description) in early versions of the statute, but vanished from later versions. Significantly, one proposal for the statute included a detailed multipart provision for a crime of conspiracy.[226] Also relevant is that early in the development of an international criminal court, the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes also provided for

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facilitate compromise, allowing each part that has a concern over a particular issue to interpret terminology in the way that benefits their side").

225. *See Proceedings of the Preparatory Commission at Its Eighth Session* (24 September–5 October 2001), U.N. Preparatory Commission for the International Criminal Court, 8th Sess., at 13, U.N. Doc. PCNICC/2001/L.3/Rev.1, 13 (2001) (including the term "conspiracy" in one of the proposed definitions of the crime of aggression), *available at* http://www.un.org/law/icc/prepcomm/eighth.htm; *Report of the Ad Hoc Committee on the Establishment of the International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, at 59, U.N. Doc. A/50/22 (1996), *reprinted in* BASSIOUNI, *supra* note 117, at 489 (listing "conspiracy/complot" as an item to be discussed); AMNESTY INTERNATIONAL, THE INTERNATIONAL CRIMINAL COURT FACT SHEET 3: PROSECUTING THE CRIME OF GENOCIDE (Jan. 8, 2000) (observing that conspiracy to commit genocide is not expressly defined as a crime under the Statute), *available at*; http://web.amnesty.org/web/web.nsf/pages/fact_sheets; AMNESTY INTERNATIONAL, THE INTERNATIONAL CRIMINAL COURT: MAKING THE RIGHT CHOICES, pt. 1, § VI(D) (Jan. 1, 1997) (arguing that although the common law concept of conspiracy as a crime is foreign to some national legal systems, the crime is well recognized under international law and should be included in the ICC statute as a means to prosecute persons who conspire to commit genocide and other crimes against humanity or serious violations of humanitarian law), *available at* http://web.amnesty.org/library/index/ENGIOR40001997.

226. The proposal provided as follows:

> 1. A person is criminally responsible and is liable for punishment for conspiracy if that person, [with the intent to commit a specific crime] agrees with one or more persons to perpetrate that crime [or that a common intention to commit a crime will be carried out] and an overt act is committed by that person [or by another party to the agreement] [for the purpose of furthering the agreement] [that manifests the intent].
>
> 2. A person is guilty of conspiracy even if the object of the conspiracy is impossible or is prevented by a fortuitous event.
>
> 3. A person shall only be criminally responsible for conspiracy in respect of a crime where so provided in this Statute.
>
> 4. A person who is criminally responsible for conspiracy is liable for the same punishment as the person who committed or would have committed the crime as a principal.

Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22A, at 94–95, U.N. Doc. A/51/22 (1996), *reprinted in* BASSIOUNI, *supra* note 117, at 489.

conspiracy, defined as follows: "A person commits conspiracy when, with intent to commit a specific offence, he agrees with another to the commission of that offence and one of the members of the conspiracy commits an overt act in furtherance of the agreement."[227] Discussion of this proposal within the United Nations documents notes that negotiators encountered "conceptual differences concerning conspiracy among . . . different legal systems."[228] Views on the question ranged from those who questioned whether the crime might be reserved for "exceptionally serious crimes" to those who believed that it would be "retrogressive not to include" the crime of conspiracy because it was a form of liability at the Nuremberg trials.[229] For the most part, however, the concerns focused on fine points of *when* conspiratorial liability should attach rather than the question *whether* the statute should proscribe conspiracy.[230]

Later in its development, the draft ICC statute described the crime of conspiracy without mentioning it by name. Specifically, the draft statute authorized criminal responsibility if a person "agrees with another person or persons that . . . a crime be committed and an overt act in the furtherance of the agreement is committed by any of these persons that manifests their

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227. *Study of the Ways and Means of Ensuring the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention*, U.N. ESCOR, at 35, 76, U.N. Doc. E/CN.4/1426 (1981), *reprinted in* BASSIOUNI, *supra* note 117, at 697, 725.

228. *See* BASSIOUNI, *supra* note 117, at 490.

229. *Id.*

230. For example, the negotiators queried whether the crime of conspiracy would ever merge with a completed crime. *Id.* Other questions about conspiracy appearing in the background materials included:

> (a) whether the accused conspirator must have an intent to commit the crime or whether it is sufficient that there is an intention that a crime be carried out and that others might be the actual committers;
> (b) whether the accused conspirator must commit the overt act or whether it is sufficient if one of the other co-conspirators commits the overt act;
> (c) what must be the nature of the overt act (e.g. the act is undertaken for the purpose of furthering the agreement or must it actually manifest the agreement);
> (d) whether a conspiracy exists even if the object of the conspiracy is factually impossible to achieve;
> (e) whether conspiracy should be limited in respect of an agreement to commit certain listed crimes; and
> (f) the appropriate punishment for the crime.

Id.

intent."[231] M. Cherif Bassiouni reports that "[t]he inclusion of this paragraph gave rise to divergent views."[232] Accordingly, it was after this draft that negotiators omitted any mention of the crime in the ICC.

One may interpret these events by attributing to the drafters a pragmatic judgment made necessary by the many uncertainties and disagreements surrounding the ICC's development. In light of these difficulties, the drafters may have chosen to sacrifice clear authorization for conspiracy prosecutions in the interest of completing the enterprise. In other words, by avoiding the word *conspiracy*, the drafters increased the likelihood that the ICC would become a reality, yet left open the possibility that prosecutors may pursue conspiracy convictions under the more oblique version of co-perpetrator liability that currently appears in the statute.

Consistent with this theory, one could argue that judges interpreting the ICC statute may appropriately read conspiracy into the statute.[233] The ICTY's expansive reading of co-perpetrator liability and articulation of the contours of the joint criminal enterprise theory provides precedent for such an approach. Moreover, the admonition in Article 21 that interpretation of ICC law must be "consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender"[234] provides further foundation for imputing a crime of conspiracy to commit rape. Because conspiracy appears in many international human rights materials and the world community condemns systematic rape as a *jus cogens* crime,[235] one may argue that the joinder of rape and conspiracy is well rooted in the landscape of customary international law.

The ICC statute's strong articulation of *nullem crimen sine lege* in Article 22, however, weighs against a conclusion that

231. *Decisions Taken by the Preparatory Committee in Its Session Held from 11 to 21 February*, U.N. Preparatory Committee on the Establishment of an International Criminal Court, 1997, U.N. Doc. A/AC.249/1998/L.13, at 22 (1998), *reprinted in* BASSIOUNI, *supra* note 117, at 369, 379.

232. *See* BASSIOUNI, *supra* note 117, at 379 n.11 (editor's footnote).

233. Lietzau, *supra* note 220, at 481 (observing that many delegations to the ICC negotiations argued that, as with the ICTY, judges should address any problems arising from ambiguities in the statute).

234. Rome Statute, *supra* note 135, art. 21(3).

235. *See, e.g.*, Higgins, *supra* note 136, at 677, 691 (observing that enforced sexual slavery violated a *jus cogens* norm of international law as it existed during World War II).

ICC prosecutors are free to pursue rape conspiracy convictions. Article 22(1) provides that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of this Court."[236] Perhaps more problematic for our purposes, Article 22(2) provides: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted."[237] While the arguments against a *nullem crimen sine lege* obstacle to conspiracy prosecutions under the ICTY apply with equal force for the ICC, the strength of the prohibition in Article 22 and the rule of lenity generally invoked in criminal contexts suggest the wisdom of persuading the Assembly of State Parties to the ICC statute to make explicit that the statute encompasses the crime of conspiracy.[238] To follow this route would not only clarify the *nullem crimen sine lege* issue, but would also allow statutory drafters to resolve matters raised earlier in ICC negotiations, such as the necessity for proving an overt act, the intent requirements for conspiracy, the nature of crimes with which conspiracy may be combined, the appropriate punishment for conspiracy,[239] and whether to confine conspiracy to certain perpetrators.[240]

CONCLUSION

In international criminal law, history testifies that each new tribunal improves on the previous. At Nuremberg, the prosecutor did not want to burden the court with the grim details of the rapes that occurred. The ICTY statute specifically mentioned rape in the section defining crimes against humanity.[241] The Rwanda statute goes further, mentioning rape twice,

236. Rome Statute, *supra* note 135, art. 22(1).

237. *Id.*

238. *Cf.* Lietzau, *supra* note 220, at 480–84 (noting a conflict between the Statute's imprecise treatment of offenses and the principle of *nullem crimen sine lege* articulated in Article 22).

239. *See supra* note 230 and accompanying text.

240. For an analysis of how conspiracy standards may be overbroad in application, see Greenawalt, *supra* note 224, at 2284 (arguing that if the ICC constructs the provision to cover subordinate perpetrators, it will face "difficult questions regarding how to place principled limitations on the potential scope of liability" and may inappropriately "extend the liability of particular contributors to the entire genocidal campaign").

241. *See supra* note 14 and accompanying text.

once in Article 4(e), enumerating rape and enforced prostitution as grave breaches of the Geneva Conventions, and again in Article 3(g), condemning rape as a crime against humanity.[242] The ICTY developed evidentiary rules, victim protections, and other procedural mechanisms that substantially advanced the efficacy of rape prosecutions.[243] By pursuing the crime of conspiracy to rape, ICTY and ICC prosecutors would continue this trajectory of advancing international justice.

Without conspiracy theory, prosecutors miss an entire category of potential defendants. The experience in the Balkans illustrates the many substantial practical obstacles that stand between indictment and actual arrest, and the importance of broadening the candidates for successful prosecution if a tribunal is to satisfy its mission of bringing closure to conflict and punishing guilty offenders. As former ICTY Prosecutor Richard Goldstone stated: "[I]f there is no justice, there is no hope of reconciliation or forgiveness because these people do not know who[m] to forgive. People in that situation end up taking the law into their own hands, and that is the beginning of the next cycle of violence."[244]

In contributing to the retribution and deterrence goals of international criminal tribunals, conspiracy prosecutions promise more than merely increasing the numbers of convictions. Conspiracy is a theory that can bring leaders to justice for organizing and inspiring criminal activity. In addition, the crime of conspiracy recognizes the special dangers of joint action, allowing the sweep of prosecution to focus on group criminality, which is often more potent and effective than individual wrongdoing. Unlike some other forms of co-perpetrator liability, however, conspiracy requires individual culpability.

It is particularly important that tribunals such as the ICTY and the ICC experiment with new approaches in order to expand the effectiveness of international criminal law. These tribunals are poised to advance and refine the law more quickly than treaty drafters and negotiators, on whom the task of

242. Rwanda Statute, *supra* note 116, arts. 3–4; *see also* Nahapetian, *supra* note 22, at 133–34.

243. *See generally* Aolain, *supra* note 162, at 883, 902.

244. Goldstone, *supra* note 92, at 258.

refining the conspiracy theory would otherwise rest were it not for flexibility by judges and prosecutors.[245]

245. *Developments*, *supra* note 12, at 1977 (reasoning that the absence of an "international legislature" leaves humanitarian law dependent on "painstakingly negotiated treaties and judicial interpretations of customary international law," and that "tribunals amenable to flexible interpretation may be able to advance the law more quickly than the convention process permits").