International crimes, such as genocide, crimes against humanity, and war crimes are rarely, if ever, the product of individual action. “As distinct from common crimes,” A.N. Trainin wrote, “international crimes are almost always committed not by one person but by several or many persons—a group, a band, a clique.” Such commission is often in execution of a predetermined plan. International criminal law has accordingly borrowed a number of domestic criminal law doctrines, such as conspiracy and common purpose liability, in its efforts to prosecute international crimes. For example, conspiracy to commit genocide, that is, the making of an agreement to commit the crime of genocide, attracts international criminal responsibility. Under the Rome Statute of the International Criminal Court, persons may be criminally liable for contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose. Many of the convictions by the International Criminal Tribunal for the Former Yugoslavia have relied upon the joint criminal enterprise doctrine of liability. Described by the Tribunal itself as a theory of “collective criminality,” joint criminal enterprise liability renders all participants in the common plan criminally responsible for the agreed crimes and


4 Article 25, paragraph 3(d), Rome Statute of the International Criminal Court.

for those that are a natural and foreseeable consequence of the operation of the criminal enterprise.

The dynamics of these models of criminal liability are such that an individual member of the collective may be made criminally responsible for crimes committed by the group even where the punishable acts may have been outside the scope of the agreed criminal plan. With regard to conspiracy, it should be noted that the concern is less with the inchoate crime than with conspiratorial liability, whereby co-conspirators can be made equally liable for acts done in furtherance of the criminal conspiracy. As will be seen, aspects of these criminal liability models may conflict with *nulla poena sine culpa*, the principle that persons may be punished only for crimes for which they are personally culpable.

### a. Accounting for the Crimes of the Second World War

In 1904, the British jurist Thomas Erskine Holland contemplated the collective nature of violations of the laws of war and proposed that “[w]hen a whole corps systematically disregards the laws of war, e.g., by refusal of quarter, any individuals belonging to it, who are taken prisoners, may be treated as implicated in the offence.”6 The crimes of the Second World War involved considerably more than just transgressions by individual corps of the German army. The challenge of criminal prosecution was decidedly more daunting. Writing prior to the end of the war, a Canadian Air Force Officer, M.H. Myerson, put it that “the problem of Germany’s war crimes and punishment, like that of any other crime and punishment, is chiefly a legal problem.”7 It was one that would have to be addressed using existing international law and established principles of criminal liability. The U.S. government, for its part, was not deterred by the scope of Nazi criminality:

> The very breadth of the offense, however, is not in itself an argument against judicial action. [...] The application of [international] law may be novel because the scope of the Nazi activity has been broad and ruthless without precedent. The basic principles to be applied, however, are not novel and all that is needed is a wise application of those principles on a sufficiently comprehensive scale to meet the situation.8

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8 “American Memorandum Presented at San Francisco, April 30, 1945” (Document V), *Report of Robert H. Jackson United States Representative to the International*