

8-18-2009

Attempt, Conspiracy, and Incitement to Commit Genocide

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Attempt to Commit Genocide

Jens David Ohlin

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1. Introduction

The Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the ‘Genocide Convention’ or ‘Convention’) explicitly penalizes attempt to commit genocide,¹ and the statutes for the International Criminal Tribunal for Yugoslavia (ICTY)² and the International Criminal Tribunal for Rwanda (ICTR)³ also confer upon the two ad hoc Tribunals jurisdiction over attempt to commit genocide. Despite the presence of these provisions in these key instruments, however, the offence is burdened by theoretical confusion.

The basic dilemma underlying the crime of attempt to commit genocide stems from the fact that no one knows for sure what it means. In national criminal law the category of attempts is by definition an inchoate category, in the sense that attempted offences penalize criminal actions that are never completed.⁴ Consequently, attempt to commit genocide is presumably an offence where the

¹ Genocide Convention, Art. III(d).

² ICTY Statute, Art. 4(3)(d). ³ ICTR Statute, Art. 2(3)(d).

⁴ See P.H. Robinson, *Criminal Law* (New York: Aspen Publishers, 1997), 611.

genocide itself is never completed. However, the crime of genocide has, in a sense, an inchoate component already built into it, since the crime does not require the *successful* destruction ‘in whole or in part’ of an ethnic group or another group protected by Article II of the Genocide Convention.⁵ Indeed, the crime of genocide simply requires the *intent* to destroy a protected group and the *actus reus* of the offence does not require the actual destruction of the group.⁶ In one sense, this suggests that all crimes of genocide are better characterized as attempt to commit genocide.⁷ For whatever reason, however, the statutory definitions of the crime do not make this clear.⁸

This theoretical anxiety has led to confusion among scholars about the basic understanding of attempt to commit genocide and whether it means that the genocide itself is attempted but not completed, or whether the *underlying offence* is attempted but not completed. Consequently, on the one hand, one leading commentator concludes that ‘[w]hat can be attempted in relation to genocide is the underlying offence (killing, causing serious bodily or mental harm, etc.)’ and that given the ‘limited resources at the disposal of the Office of the Prosecutor, it is unlikely that the prosecutor of either ad hoc Tribunal will ever bring charges of attempt to commit genocide.’⁹

However, not everyone is in agreement that attempt to commit genocide refers to the underlying offence. Another commentator concludes that there is no general attempt provision in either the ICTY or ICTR Statutes because ‘[t]his is quite logical, as there is hardly a need to prosecute attempt when a tribunal is set up *ex post facto*.’¹⁰ In other words, since at the moment in time when the

⁵ See A. Cassese, *International Criminal Law*, (2nd edn, Oxford: Oxford University Press, 2003), 134 (discussing the question of how many members of an ethnic group must be killed to constitute genocide).

⁶ See, e.g., W.A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 154–5; Cassese, *supra* note 5, at 133.

⁷ Indeed, attempt was not even mentioned in the International Military Tribunal (IMT) Charter governing the Nuremberg trials. However, the broad definition of criminality offered by the Charter suggests an inchoate element that encompasses attempt liability. It is for this reason that Eser suggests that attempt was implicitly covered by the broad definition of crimes that included punishment for preparatory acts. See A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. I, at 807 (noting that crimes against peace in Article 6(a) of the Nuremberg Charter included liability for acts falling short of completion such as preparation and planning). Eser concludes that ‘it appears fair to say that, prior to the Rome Statute, neither a duly generalized nor an adequate concept of attempt as a category of criminal responsibility of its own was in force.’ *Ibid.* at 808.

⁸ See Article 6 of the ICC Statute: ‘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 . . . killing members of the group’; Article 25(3)(f) (‘attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intention’).

⁹ See G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), 257. Mettraux argues that the genocidal *mens rea* is the same for attempted genocide as it is for genocide proper. The only difference is that the underlying offence is frustrated.

¹⁰ W.A. Schabas, *supra* note 6, at 281.

Security Council enacted both the ICTY and ICTR Statutes, both the Rwandan and Yugoslavian tragedies had already occurred, it was hardly necessary for the Security Council to include jurisdiction to try crimes associated with attempted but not completed genocides.

There is no definitive judicial resolution of this doctrinal quandary for the simple reason that there have been no direct prosecutions for attempt to commit genocide, thus escaping the judicial need to directly clarify this confusion.¹¹ Nor is their likely to be one in the foreseeable future.¹² There is no reason—in theory—that one could not conclude that *both* versions of attempt are plausible offences, though it is best to keep them conceptually distinct, as each may have different legal requirements. Furthermore, in assessing whether any given statutory scheme criminalizes attempt to commit genocide, it is imperative that one make clear which version one is considering. We must keep this distinction in our minds as we proceed with the foregoing analysis.

To date, no scholar has completed a systematic analysis of attempted genocide. Furthermore, the general category of attempt appears to be the forgotten mode of liability in international criminal law. Scholars tend to address the question only with regard to the more general relationship between attempt and other modes of liability and other inchoate crimes, such as complicity, aiding and abetting, conspiracy, and incitement—all of which are analysed in other chapters of this volume. The present chapter focuses exclusively on attempted genocide by analyzing the attempt provision in the Genocide Convention, its text and negotiating history, the Statute of the International Criminal Court (ICC), attempts under general principles of criminal law, and attempts in the case law of the ICTY and ICTR.

2. Attempt to Commit Genocide in the Genocide Convention

Article III(d) of the Genocide Convention explicitly penalizes attempt to commit genocide, a provision that—as I have noted above—was directly replicated in the ICTY and ICTR Statutes. The earlier drafts of the Convention all provided slightly different renderings of the concept. The Secretariat Draft contained a provision on punishable offences that deemed ‘any attempt to commit genocide’ as one of the ‘crimes of genocide’.¹³ This provision of the Secretariat Draft placed attempt to commit genocide along with its other expansive list of preparatory genocide crimes, including:

studies and research for the purpose of developing the technique of genocide; setting up installations, manufacturing, obtaining, possessing, or supplying of articles or substances

¹¹ See Mettraux, *supra* note 9, at 257.

¹² *Ibid.*, where Mettraux concludes that such a charge is highly unlikely and if used would be a prosecutorial ‘safety net’ along with other genocidal categories.

¹³ Secretariat Draft of the Genocide Convention, Art. II(I)(1).

with the knowledge that they are intended for genocide; [and] issuing instructions or orders, and distributing tasks with a view to committing genocide.¹⁴

The qualifying phrase ‘any attempt’, when read in conjunction with the incredibly broad subsequent provision on preparatory acts, suggests that the negotiators of the Secretariat Draft intended a similarly broad reading of the attempt provision, perhaps even broader than the standard definition of attempt as ‘an act carried out with intent to commit a certain crime which is more than merely preparatory to the commission of that crime but which has not been fully successful.’¹⁵ The ad hoc Committee Draft included a slightly more streamlined provision which included ‘attempt to commit genocide’ among acts that ‘shall be punishable’.¹⁶

Attempt to commit genocide also figured in the negotiations regarding incitement to commit genocide. The US offered, unsuccessfully, an amendment that would have excluded the crime of incitement to commit genocide from the Convention, due to concerns that the provision might be used to undermine freedom of expression.¹⁷ The US also pointed out that an incitement provision was redundant because such conduct could be prosecuted as conspiracy to commit genocide and attempt to commit genocide.¹⁸

The Draft Code of Crimes against the Peace and Security of Mankind included an attempt provision in Article 2 stating that ‘[a]ttempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions’.¹⁹ This provision appears to depart from the attempt provision of the Genocide Convention which makes no explicit reference to the appropriate standard from which to judge the frustration element of attempt.²⁰ On the other hand, it is unclear what is added to the provision by stating that the frustration must stem from ‘circumstances independent of his intentions’. If the circumstances were tied to the intentions of the defendant, then the crimes would be evaluated as a case of abandonment, for which no crime of attempt should attach.²¹ It is also unclear on the basis of

¹⁴ *Ibid.*, Art. II(1)(2).

¹⁵ Mettraux, *supra* note 9, at 257 (quoting Article 25(3)(f) of the ICC Statute).

¹⁶ Ad hoc Committee Draft of the Genocide Convention, art. IV(d).

¹⁷ See Schabas, *supra* note 6, at 267; UN Doc. E/623. See also W.K. Timmermann, ‘Incitement in international criminal law’, 88 *Int’l Review of the Red Cross* (2006) 823, at 835.

¹⁸ J.F. Metz, ‘Rwandan Genocide and the International Law of Radio Jamming’, 91 *American Journal of Int’l Law* (1997) 628, at 637–8.

¹⁹ Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission on Its Forty-eighth Session*, UN GAOR, 51st Sess., Supp. No. 10, at 9, UN Doc. A/51/10 (1996).

²⁰ R. Rayfuse, ‘The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission’, 8 *Criminal Law Forum* (1997) 43, at 63 (‘this appears to impose a higher threshold than that set out in the Genocide Convention and could cause considerable difficulty in the prosecution of these crimes in states not party to the Genocide Convention’).

²¹ See K. Ambos, ‘Article 25 Individual Criminal Responsibility’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn., Oxford, UK & Munich, Germany: Hart Publishing & Verlag C.H. Beck, 2008) 743, at 764. Ambos discusses a

the Draft Code of crimes whether the crime ‘which does not in fact occur’ refers to the underlying offence outlined in Article 17 (e.g. killing members of a group, causing serious bodily or mental harm to members of the group, etc.) or whether it refers to the collective genocide itself.²²

3. Attempts under National Criminal Law

A comparative survey of criminal law systems suggests that there are three general requirements for attempt and one defence. The elements are the intent to commit the crime (*mens rea*), an objective requirement (*actus reus*), and incompleteness of the crime. The defence is abandonment. Each will be considered here.

3.1 Intention

The required mental element for attempt does not differ from the required mental element for a completed offence.²³ For example, the US Model Penal Code states that a person is guilty of an attempt to commit a crime if he, inter alia, acts ‘with the kind of culpability otherwise required for commission of the crime.’²⁴ This suggests that crimes of negligence might be covered by an attempt provision, except the Code also reads that the defendant must either ‘purposely engage[] in conduct that would constitute the crime if the attendant circumstances were as he believes them to be,’²⁵ ‘does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part,’²⁶ or ‘purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.’²⁷ In keeping with the common law rule, this raises the culpability requirement for attempts by requiring purposeful action for offences that do not require purposeful action when the offence is completed.²⁸ The practical effect is to avoid penalizing mere innocent conduct.²⁹ The relevant baseline is the required mental element for the penal statute in question, which remains the same for attempted crimes.

In the case of the ICC Statute, the required mental state is ‘intent and knowledge,’ where intent is defined as ‘that person means to engage in the conduct’ or

similar issue with regard to Article 25(3)(f) of the Rome Statute and notes that it is consistent with French law which ‘conceives of abandonment as a negative element of the attempt definition’. *Ibid.*

²² Cf. Rayfuse, *supra* note 20, at 51.

²³ Cf. Robinson, *supra* note 4, at 632–3 (discussing elevated culpability requirements in the common law). See also G.P. Fletcher, *Rethinking Criminal Law*, (2nd edn., New York: Oxford University Press, 2000) 180.

²⁴ See Model Penal Code, § 5.01(1).

²⁵ *Ibid.*, § 5.01(1)(a).

²⁶ *Ibid.*, § 5.01(1)(b).

²⁷ *Ibid.*, § 5.01(1)(c).

²⁸ See Robinson, *supra* note 4, at 632.

²⁹ *Ibid.*, at 631.

‘that person means to cause that consequence or is aware that it will occur in the ordinary course of events.’³⁰ The ICC Statute also defines knowledge as ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events.’³¹ Some commentators have seized upon this language to conclude that the Rome Statute covers *dolus eventualis* and therefore this lower mental requirement is also sufficient for attempts.³² This strongly suggests that the ICC Statute rejects the approach of the common law and the US Model Penal Code in favour of the more prosecution-friendly rule of German law.³³

3.2 Act Requirement

The required act is generally that the perpetrator must, at the very least, take a ‘substantial step’ toward execution of the crime. The requirement of a substantial step can also be found in the US Model Penal Code.³⁴ The pattern is replicated in the ICC Statute, which requires that the perpetrator take ‘action that commences its execution by means of a substantial step.’³⁵ The question, of course, is where to draw the line on the spectrum covering mere preparatory acts on one end and the completed offence on the other. An attempt involves more than just planning, but where exactly it is located on the spectrum is the subject of some scholarly dispute. For example, German penal law requires a direct movement toward the accomplishment of the crime.³⁶ The US Model Penal Code helpfully offers seven illustrations, including lying in wait, enticing the victim to the place of the crime, ‘reconnoitering’ the place of the crime, unlawful entry to the place of the crime, possession of necessary materials for the crime’s execution, and ‘soliciting an innocent agent to engage in conduct constituting an element of the crime.’³⁷ The ICC Statute offers no similar guidance.

Criminal law theorists have long fretted over the status of so-called impossible attempts.³⁸ If a crime could not have been completed, is the perpetrator’s substantial step still sufficient to generate liability for attempt? Often, the impossibility stems from the perpetrator’s mistake of fact about an important element of the offence, such as shooting at an inanimate object in the mistaken belief that the object is the perpetrator’s intended victim.³⁹ The outcome of the jurisprudential paradox turns on whether one accepts an objective or subjective theory of attempts. Under the former theory, the elements of the action include the objective facts on the ground, i.e. that it was an inanimate object that was being fired at, which is no crime. Under the latter theory, what matters is the perpetrator’s

³⁰ See ICC Statute, Art. 30(2).

³² See Eser, *supra* note 7, at 811.

³⁴ See Model Penal Code, § 5.01(1)(c).

³⁶ See StGB § 22; Eser, *supra* note 7, at 812.

³⁸ For a discussion of the history of impossible attempts, see Fletcher, *supra* note 23, at 146–57. See also Eser, *supra* note 7, at 813.

³⁹ Fletcher divides the case law into three groups: the shooting cases, the poisoning cases, and the empty receptacle cases. See Fletcher, *supra* note 23, at 149, 152, 154.

³¹ See ICC Statute, Art. 30(3).

³³ *Ibid.*

³⁵ See ICC Statute, Art. 25(3)(f).

³⁷ See Model Penal Code, § 5.01(2).

subjective state of mind, i.e. that he believed that he was firing at a human being, which is a crime. One distinguished author suggests that the objective theory can still generate liability for an impossible attempt if the act is a 'manifestly apt effort to commit a proscribed offense.'⁴⁰

3.3 Incompleteness

An attempt, by definition, must be incomplete. Obviously, if the offence is completed, the attempt is transformed into a completed offence. This criterion helps explain why attempt provisions 'merge' with a completed offence. This is to be contrasted with conspiracy which in some jurisdictions does not merge with the completed offence, thus allowing prosecutors to charge a defendant with both conspiracy to commit murder and murder *simpliciter*. Merger is impossible because an attempted offence and a completed offence are mutually exclusive possibilities by virtue of the incompleteness requirement. Otherwise, every completed offence could be characterized as encompassing a shadow attempt, which reduces the notion of attempt to an absurdity.

In cases of genocide, the operative question is whether the incompleteness refers to the underlying offence or to the genocide itself. Two paradigms are possible with regard to the incompleteness criterion. In considering the case of an intentional killing constituting genocide, the incompleteness might stem from the fact that the individual in question was not killed, though the genocide was completed in another manner (and perhaps by other perpetrators). Under the second paradigm, the victim is killed (with genocidal intent), though the overall genocide against the group never materializes, and no other individuals (or perhaps not a significant number) are killed. A third paradigm might also be possible, where the intentional killing of the single victim is incomplete because he or she survives and the overall genocidal plan is frustrated as well and no other victims are killed. Which is the relevant incompleteness where attempted genocide is concerned? At least with regard to the second paradigm it can be argued that this satisfies the definition for genocide as a completed offence, since the ICC, ICTR and ICTY Statutes only require 'killing members of the group' with intent to destroy 'in whole or in part' a protected group.⁴¹ Consequently, an isolated killing committed with genocidal intent would appear to meet the statutory definition of completed genocide, even though it may depart from the historical, non-legal understanding of the concept as involving the widespread killing of an ethnic group as opposed to a hate crime directed against an individual motivated by genocidal hatred.⁴²

⁴⁰ See Fletcher, *supra* note 23, at 152.

⁴¹ See, e.g., ICC Statute, Art. 6. The language stems directly from Article II of the Genocide Convention.

⁴² Cf. A. Cassese, 'Jurisdiction *ratione materiae*—Genocide', in Cassese, Gaeta, and Jones (eds), *supra* note 7, Vol. I, 335, at 347–48 (concluding that genocide may involve the killing of a

3.4 Abandonment

Most jurisdictions allow a perpetrator to escape criminal liability if they abandon the attempt. The defence originally stemmed from an inference from the basic standard for an attempt: i.e. that liability attached for an attempted offence if the crime was interrupted as a result of factors beyond the perpetrator's control.⁴³ By inference, then, an interruption that stems from within the actor's control, such as a decision to reverse course and abandon the effort, was seen as sufficient to escape liability under this standard.⁴⁴ While a change of course (or expression of regret) might be insufficient to nullify culpability for a completed offence, something in the nature of attempted offences makes the change of course legally and morally significant for matters of culpability.⁴⁵ On one theory the defence gives an incentive to perpetrators to abandon their criminal efforts; on a second theory, abandonment makes the perpetrator less dangerous to society; a third theory suggests that the perpetrator lacks the necessary intent to follow through with his or her plan (by virtue of voluntarily abandoning it).⁴⁶ Of course, setting the correct standard for determining a *voluntary* abandonment is controversial, especially in cases where the victim dissuades the perpetrator from completing the offence or when the expected gains from the criminal venture suddenly diminish.⁴⁷

4. Attempt to Commit Genocide under the ICC Statute

The ICC Statute's drafters did not follow the Genocide Convention in including attempt in its Article 6 genocide provision, preferring instead to codify a general attempt provision applicable to all crimes within the court's jurisdiction:

Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent

small number of individuals). Cassese appears to believe that, in theory, genocide might be legally accomplished by the killing of two individuals, since the predicate acts referred to in Article 6 of the ICC Statute are all plural (e.g. killings *members* of the group), and anything more than one victim would appear to meet the grammatical requirements of the plural form of the noun. Compare with G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 *Journal of Int'l Criminal Justice* (2005) 539, at 545–8 (genocide as a collective endeavor). See also A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008), 174 (noting that 'it will be very difficult to prove the genocidal intent of an individual if the crimes committed were not widespread and were not backed by an organization or a system').

⁴³ See Robinson, *supra* note 4, at 624. For a discussion, see Fletcher, *supra* note 23, at 184–97.

⁴⁴ See Fletcher, *supra* note 23, at 185 (citing French Penal Code of 1810).

⁴⁵ Eser, *supra* note 7, at 815 (discussing forms of abandonment).

⁴⁶ See Fletcher, *supra* note 23, at 186–8.

⁴⁷ See Fletcher, *supra* note 23, at 191 (noting that under German law a thief is guilty of attempt if he or she 'desists because the bounty is not large enough').

of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.⁴⁸

The second sentence is somewhat redundant since the first sentence already suggests abandonment.⁴⁹ The crucial criterion of 'circumstances independent of the person's intentions' perfectly tracks the attempt provisions that have long existed in domestic criminal law, such as the French Penal Code's provision of 1810 of 'circumstances independent of the actor's will'.⁵⁰ However, the provision requires more than just voluntary abandonment of the criminal purpose—the perpetrator must also 'completely' abandon the criminal purpose as well. The provision is somewhat different from its precursor in the 1996 Draft Code, which penalized 'attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions,' though it made no explicit mention of abandonment.⁵¹ The 1991 Draft Code included attempt liability for crimes that were 'failed' or 'halted' due to 'circumstances independent of the perpetrator's intention' and likewise did not explicitly mention abandonment.⁵² The 1954 Draft Code did not include attempt in its genocide provision,⁵³ though it did include a general attempt provision.⁵⁴

It is worthwhile scrutinizing the International Law Commission (ILC) negotiating process that produced the Draft Codes in order to resolve the question of whether attempted genocide was meant to cover an incomplete underlying offence or an incomplete genocide. The Commentary to the 1954 Draft Code noted that its general attempt provision was necessary because attempt was included in the Genocide Convention.⁵⁵ The Commentary to the 1996 Draft Code noted that attempt should be punished because 'a high degree of culpability attaches to an individual who attempts to commit a crime and is unsuccessful only because of circumstances beyond his control rather than his own decision to abandon

⁴⁸ ICC Statute, Art. 25(3)(f).

⁴⁹ See Ambos, *supra* note 21, at 764 (noting that the second sentence was added based on a proposal from the Japanese delegation and supported by Germany, Argentina and others). Ambos concludes that '[i]n the heat of the negotiations, the drafters, including this author, overlooked the fact that the first clause already contained a rule on abandonment, albeit only an implicit one.' *Ibid.*

⁵⁰ See Fletcher, *supra* note 23, at 185. Similar language is found in the German penal codes of 1871 and 1975.

⁵¹ See 1996 Draft Code, *supra* note 19, Art. 2(3)(g).

⁵² See Draft Code of Crimes Against the Peace and Security of Mankind, *Report of the International Law Commission on the work of its forty-third session*, UN GAOR, 46th Sess., Supp. No. 10, at 94, UN Doc. A/46/10 (1991), Art. 3(3).

⁵³ See Draft Code of Offenses Against the Peace and Security of Mankind, *Report of the International Law Commission on Its Sixth Session*, 9 U.N. GAOR Supp. (No. 9) at 11, UN Doc. A/2693 (1954), Art. 2(9).

⁵⁴ *Ibid.*, Art. 2(12)(iii).

⁵⁵ See Report of the International Law Commission to the General Assembly, *Yearbook of the International Law Commission* (1951), Vol. II, at p. 137.

the criminal endeavor.⁵⁶ In addition to specifically noting that attempt was covered by the Genocide Convention as well as by the 1954 Draft Code of Crimes, the ILC also argued that ‘the fact that an individual has taken a significant step towards the completion of one of the crimes set out in Articles 17 to 20 entails a threat to international peace and security because of the very serious nature of these crimes.’⁵⁷ (The 1994 Draft Statute and its commentary include no discussion of attempt whatsoever.) Although certainly the same rationale applies to the ICC Statute’s scheme to criminalize only the most serious crimes of concern to the international community (crimes against humanity, genocide, war crimes, and aggression), as well as the Genocide Convention, the same cannot be said of domestic penal systems which also penalize attempt even in cases of crimes that are minor (and not of concern to the international community).

It is also true that attempts ought to be punished because perpetrators of attempts share the same culpability as perpetrators of completed offences. The same is true with regard to the more specific case of genocide. However, this view is not universally shared. The rapporteur at the 1942 London International Assembly argued that the category of war crimes should not include attempts, regardless of the reason for the incompleteness of the offence,⁵⁸ and the 1968 Convention on Statutory Limitations also excluded liability for attempts.⁵⁹ The current ICC Statute has definitively resolved at least this aspect of the disagreement.

5. Attempt in ICTY and ICTR Case Law

Because there have been no prosecutions for attempt to commit genocide, either before the ICTY or ICTR, or anywhere else, recourse must be had to how the tribunals have treated attempts in their case law with regard to other international crimes. However, attempt to commit genocide is the only attempt offence in the ICTY and ICTR Statutes (unlike the ICC Statute where attempt is covered by a general provision). The ICTY and the ICTR Statutes call out genocide for special treatment by listing specific modes of liability, including attempt, unlike the other crimes which must refer to Article 7 and Article 6 respectively to determine the covered modes of liability. The unfortunate overlap between the general modes of liability in Article 7 and Article 6 and the genocide-specific modes of liability listed in Article 4(3) and Article 2(3) was caused by the fact that Articles 4 and 2 were lifted—modes of liability and all—from Article III of the Genocide Convention without apparent concern for the overlap it created with Articles 7

⁵⁶ See 1996 Draft Code, *supra* note 19, at 22.

⁵⁷ *Ibid.*

⁵⁸ See M. De Baer, London International Assembly, Commission for the Trial of War Crimes, ‘Scope and Meaning of the Conception of War Crimes,’ quoted in Mettraux, *supra* note 9, at 294, note 84.

⁵⁹ See Mettraux, *supra* note 9, at 294.

and Article 6. This problem was identified by the ICTY Trial Chamber in *Kristić* when it noted that Article 4(3) was not just taken in substance from Article III of the Genocide Convention, but taken *verbatim*.⁶⁰

Prosecutions for attempt for other international crimes are also extremely rare. One possible explanation is that attempted war crimes or crimes against humanity might never be significant enough to meet the ‘seriousness threshold of Article 1 of the statutes and therefore come within the Tribunals’ jurisdiction.’⁶¹ This might be one reason why some international statutes have ignored attempt liability.⁶² On this view, the drafters of the ICTY and ICTR Statutes clearly did not intend to cover attempted crimes against humanity and war crimes because such attempts would not have implicated the collective considerations of peace and security that animated the creation of the tribunals in the first instance. Under this view, however, genocide is different, because even an attempted genocide implicates the twin aims of the Security Council’s Chapter VII authority.

Also, the analysis depends entirely on whether attempt refers to the overall international crime or the underlying criminal act. If it is the former, the seriousness of the situation for international peace and security—and the accompanying Article 1 threshold—may indeed be called into doubt (although not necessarily so), but if it is the latter, it is still easy to imagine that an attempted underlying criminal act may be part of an overall criminal endeavor that is sufficiently consequential so as to be, in the words of the ICC Statute preamble, of the ‘gravest concern to the international community’.

Nonetheless, in *Vasiljević*, the ICTY Trial Chamber found that the defendant ‘incurred individual criminal responsibility for the attempted murder of these two Muslim men as inhumane acts pursuant to his participation in a joint criminal enterprise to murder them.’⁶³ The victims had survived after being shot. According to the Trial Chamber, the incomplete offence constituted a serious attack on their human dignity, and thus constituted a crime against humanity. This particular theoretical move was not critically analysed by the Appeals Chamber.⁶⁴

The *Akayesu* case dealt more directly with attempted genocide. The ICTR Trial Chamber noted that Article 6(1) of the ICTR Statute only penalized those who ‘planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute.’⁶⁵ Although this covers a wide range of preparatory acts ‘ranging from its initial planning to its execution, through its organization,’ the Trial

⁶⁰ Judgment, *Kristić*, Trial Chamber, 2 August 2001, § 640.

⁶¹ See Mettraux, *supra* note 9, at 293.

⁶² For example, Control Council Law No. 10 did not include attempts, at least not explicitly, though it allowed courts to draw general conclusions from national penal law (most of which penalize attempts).

⁶³ ICTY, Judgment, *Vasiljević*, Trial Chamber, 29 November 2002, § 239.

⁶⁴ *Ibid.*

⁶⁵ ICTR, Judgment, *Akayesu*, Trial Chamber, 2 September 1998, § 546.

Chamber concluded that this wide liability nonetheless contemplated the existence of a completed offence, i.e. that ‘the planning or preparation of the crime actually leads to its commission.’⁶⁶ The one exception to this rule is attempt to commit genocide, which by definition is inchoate, and the Trial Chamber noted that individual criminal responsibility for attempts was limited by the ICTR Statute to genocide.⁶⁷ In addition to appealing to Nuremberg (which the court argued stood for the proposition that liability for ordering the commission of a crime required a completed offence),⁶⁸ the Trial Chamber also noted that Article 2(3) of the Draft Code of Crimes penalized most modes of liability for a crime ‘which in fact occurs’.⁶⁹ The subsection on attempts stands out for its language that liability attaches for a ‘crime which does not in fact occur’.⁷⁰

The ICTR Trial Chamber also concluded in *Akayesu* that complicity in genocide requires an actual genocide because ‘complicity can only exist when there is a punishable, principal act, in the commission of which the accomplice has associated himself.’⁷¹ This argument was based on the legislative history of the Genocide Convention. The Chamber concluded that ‘[i]t appears from the *travaux préparatoires* of the Genocide Convention that only complicity in the completed offence of genocide was intended for punishment and not complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the eyes of some states, too vague to be punishable under the Convention.’⁷² The Trial Chamber reiterated the same position in *Musema* (in virtually identical language).⁷³ The position was left undisturbed by the Appeals Chamber.

6. Concluding Remarks

Many of these doctrinal controversies are unlikely to be resolved any time soon. Of course, any truly complete international penal statute must out of necessity include an attempt provision, but this is no guarantee that prosecutors will charge it and judges will apply it. However, future hybrid courts, specialized tribunals, and national criminal courts applying international law may indeed make more use of the attempt category. The ICC is unlikely to develop this area of the international doctrine since it concentrates its efforts on the highest level offenders whose conduct threatens regional peace and security and whose alleged violations are unlikely to be described as attempts. But specialized and

⁶⁶ *Ibid.*, § 473. ⁶⁷ *Ibid.*, §§ 473 and note 80. ⁶⁸ *Ibid.*, § 474.

⁶⁹ *Ibid.*, § 475; 1996 Draft Code, *supra* note 19, at Art. 2(3).

⁷⁰ 1996 Draft Code, *supra* note 19, at Art. 2(3)(g).

⁷¹ *Akayesu*, *supra* note 66, § 529. Although the crime of genocide must be completed, it is not necessary for the principal perpetrator to be charged as well.

⁷² *Akayesu*, *supra* note 66, note 105.

⁷³ Judgment, *Musema*, Trial Chamber, 27 January 2000, §§ 171–4.

local courts may indeed prosecute lower rung criminal offences where the category of attempt may arise more frequently. It is in these locations where the exact contours of the crime of attempt to commit genocide are most likely to be judicially developed and tested. The jurists presiding over these courts will therefore bear a heavy burden to see that they tread carefully through these uncertain jurisprudential waters.

Incitement and Conspiracy to Commit Genocide

Jens David Ohlin

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1. Introduction

Incitement and conspiracy to commit genocide are both inchoate offences whose criminalization at the international level has historically been justified by the especially reprehensible nature of genocide as a unique crime of historical proportions.¹ This unique nature of genocidal crimes has been evoked to justify expansive liability for genocide, even among criminal lawyers who would normally eschew general conspiracy or incitement liability in their domestic penal systems. Although there are great jurisprudential and theoretical questions raised by the criminalization of conspiracy to commit genocide and incitement to commit genocide, the bare fact that such actions should yield international criminal liability has generated remarkably little controversy or dispute.² However,

¹ See Decision on Sentence, *Prosecutor v. Akayesu*, Trial Chamber, 2 October 1998 ('[T]he Chamber is of the opinion that genocide constitutes the crime of crimes').

² See, e.g., W.A. Schabas, 'Article 6 Genocide', in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2nd edn., Oxford, UK & Munich, Germany: Hart Publishing & Verlag C.H. Beck, 2008) 143, at 155 ('There was no real debate on this point, and the inconsistency with the terms of *Genocide Convention* would appear to be inadvertent.').

questions regarding conspiracy are among the most contested areas of contemporary criminal law theory.³

2. Incitement and Conspiracy

At common law, incitement involved ‘encouraging or pressuring another to commit an offence.’⁴ A conspiracy is an agreement between two or more individuals to commit an unlawful act. Both incitement and conspiracy are preparatory offences. They are two points on the path toward a completed offence, and it is precisely for this reason that domestic penal law systems have sought to criminalize them.⁵ First, the rationale is that those who engage in the preparatory acts betray a culpable mental state, even if they did not participate in the completed offence.⁶ Second, criminalizing the preparatory acts allows the authorities to intervene in developing criminality before a completed act can be consummated.⁷ On this view, restricting criminal liability to completed offences would needlessly hamstring legal authorities who stumble upon an ongoing criminal endeavour whose work is still in the preparatory phases, either by virtue of conspiring to commit the offence, instigating it, or inciting others to commit it. Arguably, it is precisely such early interventions that policy-makers want to encourage by penalizing incitement and conspiracy.

However, conspiracy is both a mode of liability and a substantive offence in the sense that under some domestic penal systems the existence of the criminal agreement allows the government to charge a defendant with the crime of conspiracy to commit murder, but the criminal agreement may also be the foundation for charging the defendant with murder itself, under the theory that by joining the conspiracy, the actions of one member of the conspiracy may be legally attributed to each member of the group.⁸ The former is conspiracy as a substantive offence and the latter is conspiracy as a mode of liability.

Conspiracy as a mode of liability does not exist in the relevant international instruments dealing with international crimes—at least not under this doctrinal

³ See, e.g., J.D. Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’, 5 *Journal of Int’l Criminal Justice* (2006) 69; G.P. Fletcher, ‘Amicus Curiae Brief of Specialists in Conspiracy and International Law in Support of Petitioner’, 2006 WL 53979 (arguing that conspiracy is not a triable offence under the laws of war), filed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁴ R. Geary, *Essential Criminal Law* (2nd edn., London: Cavendish Publishing Ltd., 1998), 36.

⁵ See P.H. Robinson, *Criminal Law* (New York: Aspen Publishers, 1997), 645 (‘[C]onspiracy has the advantage of commonly allowing earlier intervention than the substantial-step requirement of attempt allows’).

⁶ *Ibid.*, at 644–5. ⁷ *Ibid.*, at 645.

⁸ This is vicarious liability, and in the US the doctrine is referred to as ‘Pinkerton’ liability after the case of *Pinkerton v. United States*, 328 U.S. 640 (1946). For a discussion, see J.D. Ohlin, ‘Group Think: The Law of Conspiracy and Collective Reason’, *Journal of Criminal Law & Criminology* (2007) 147.

name. However, other modes of liability reach similar collective conduct. For example, the doctrine of joint criminal enterprise (JCE) yields criminal liability for defendants at the ad hoc international criminal tribunals, which was recognized by the International Criminal Tribunal for the former Yugoslavia's (ICTY) decision in *Tadić*.⁹ Under the so-called JCE III, members of a joint criminal endeavour may be prosecuted for the actions of other members of the collective endeavor, even if those actions fall outside the scope of the criminal plan, as long as these actions were reasonably foreseeable.¹⁰ This latter aspect of JCE is directly analogous to the conspiracy doctrine, known as *Pinkerton* liability, applied by US federal courts.¹¹

Conspiracy as a substantive offence has generally been rejected at the international level.¹² The concept was deeply controversial at Nuremberg, with representatives from civil law countries (particularly France) at the London Conference arguing against the concept's application at the International Military Tribunal (IMT) because the notion was foreign to their legal systems and violated basic principles of individual criminal liability by imposing liability for collective conduct.¹³ Consequently, the IMT only convicted defendants of one conspiracy charge: conspiracy to wage aggressive war on the theory that aggression was already, by definition, a collective crime such that the doctrine of conspiracy did not greatly increase the inculpation faced by the individual defendants.¹⁴

Incitement as a codified offence was unknown at Nuremberg, although Streicher, convicted of publishing genocidal articles in *Der Sturmer*, was essentially prosecuted for incitement although he was not formally charged with that offence.¹⁵ But the substance of his trial indicates that this was the underlying

⁹ Judgment, *Prosecutor v. Tadić*, Appeals Chamber, 15 July 1999, § 195 *passim*. See also A. Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2003), 189–209.

¹⁰ See *Tadić*, *supra* note 9, § 228.

¹¹ See Ohlin, *supra* note 8, at 149 and note 10.

¹² See Fletcher, *supra* note 3, at 9 ('European scholars are unanimous on this point.') and 11.

¹³ See Fletcher, *supra* note 3, at 15 (noting that French jurist Henri Donnedieu de Vabres 'made the argument virtually every Continental jurist wanted to make against the American and British effort to include conspiracy within the realm of permissible charges against the Nazi leaders, namely that conspiracy is foreign to every legal system outside the English-speaking world'); see also B.F. Smith, *Reaching Judgment in Nuremberg* (1963), 123.

¹⁴ See J.A. Bush, 'The Supreme . . . Crime' and its Origins: The Lost Legislative History of the Crime of Aggressive War', 102 *Columbia Law Review* (2002) 2324; J.A. Bush, 'Nuremberg: The Modern Law of War and its Limitations', 93 *Columbia Law Review* (1999) 2022.

¹⁵ Streicher was convicted of persecution as a crime against humanity under Count Four, but acquitted of participation in the common plan or conspiracy under Count One. But it is clear from the judgment that the nature of the persecution was incitement. See Judgment, *Streicher*, International Military Tribunal at Nuremberg ('Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity.'). The Tribunal acquitted Hans Fritzsche of the Nazi Propaganda Ministry because although he expressed virulent anti-semitic views, his

theory of the prosecution.¹⁶ Similarly, Otto Dietrich was convicted at the US Military Tribunal sitting at Nuremberg, under Control Council Law No. 10, for crimes against humanity.¹⁷ Dietrich worked under Goebbels at the Ministry of Public Enlightenment and Propaganda and had effective control over its press operation.¹⁸ The ministry issued press directives that required that news outlets emphasize the 'noxiousness of the Jews' and the world danger posed by them.¹⁹

3. The Drafting History

Incitement and conspiracy to commit genocide are both explicitly illegal under the Genocide Convention. The Secretariat Draft of the Genocide Convention explicitly included liability for 'direct public incitement to any act of genocide whether the incitement be successful or not,'²⁰ as well as liability for 'conspiracy to commit acts of genocide.'²¹ However, the Secretariat Draft also included a separate provision for the following more specific 'preparatory acts' that arguably created a scheme of overlapping liability:

studies and research for the purpose of developing the technique of genocide; setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; issuing instructions or orders, and distributing tasks with a view to committing genocide.²²

broadcasts 'did not urge persecution or extermination of Jews' nor did they incite the Germans to 'commit atrocities on conquered peoples.' See Judgment, *Fritzsche*, International Military Tribunal at Nuremberg. In fact, the Tribunal noted that Fritzsche attempted to suppress publication of *Der Sturmer*. The *Fritzsche* case is cited by the ICTR Judgment, *Prosecutor v. Nahimana*, Trial Chamber, 3 December 2003, § 982.

¹⁶ See D.F. Orentlicher, 'Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana', 21 *American University Int'l Law Review* (2006) 557, at 582–3. The *Streicher* precedent was cited by the ICTR Trial Chamber in *Nahimana*, *supra* note 15, § 1073, which described the influence of Streicher's articles as 'a poison that infected the minds of the Germany people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people'. The ICTR Trial Chamber concluded that 'in Rwanda, the virulent writings of Kangura and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed'. See Orentlicher, above, at 583–4 (describing the ICTR Trial Chamber's reading of *Streicher* as misleading because, inter alia, Streicher was only convicted for articles published during the Holocaust, not for his articles that stretched back for 25 years, and these articles were closely linked to the extermination of Jews during World War II and Streicher 'continued to write and publish his propaganda of death' knowing full well that Jews were being exterminated). See also H.R. Davidson, 'The International Criminal Tribunal for Rwanda's Decision in *Prosecutor v. Ferdinand Nahimana et al.*: The Past, Present, and Future of International Incitement Law', 17 *Leiden Journal of Int'l Law* (2004) 505; C.A. MacKinnon, 'International Decision: *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*', 98 *American Journal of Int'l Law* (2004) 325, at 328.

¹⁷ See W.K. Timmermann, 'Incitement in International Criminal Law', 88 *Int'l Review of the Red Cross* (2006) 823, at 831–2.

¹⁸ *Ministries Case*, 14 Trials of War Criminals 314, at 565–76.

¹⁹ *Ibid.*

²⁰ Secretariat Draft, Art. II(II)(2).

²¹ Secretariat Draft, Art. II(II)(3).

²² Secretariat Draft, Arts. I(I)(2)(a), (b), (c).

Obviously, liability for ‘studying and research’ is almost unparalleled in other areas of the criminal law, but drafters of the Secretariat Draft were motivated by a desire to stop genocidal programs before they were consummated.²³ The provision was not without its critics who viewed the provision as infringing freedom of expression.²⁴ Similarly, criminalizing the setting up of installations or the possession of articles or substances that are otherwise legal, but that may be used for genocide, represents a truly expansive view of liability for preparatory acts to genocide. Presumably, the distinction between mere innocent possession of some article and an illegal preparatory act under Article II(2) of the draft convention was to be determined by genocidal intent. However, the expansive liability for ‘setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances’ was provided not just in cases where the individual in question intends to use them for genocidal purposes, but also where the individual has knowledge that they are intended for genocide; this suggests that by its terms, liability under the provision would have attached even if an individual only had *knowledge* that *someone else* planned to use the installations for genocide. This early-intervention strategy of the Secretariat draft is also evidenced by the explicit mention that ‘direct public incitement’ is a crime regardless of whether the incitement is successful or not.²⁵ There can be no question where the framers of the Secretariat draft stood on the question of preparatory and conspiratorial liability.

The ad hoc Committee Draft retained the language that incitement was criminal ‘whether such incitement be successful or not’, but the entire section on illegal preparatory acts was excised from the working draft.²⁶ The draft includes no separate liability for creating installations, possessing materials to be used for genocide, or issuing instructions, though at least the latter category was presumably covered by the draft’s remaining provisions on conspiracy to commit genocide and ‘complicity in any of the acts enumerated’ in Article IV of the draft. Indeed, depending on how narrow or wide one reads conspiracy and complicity in genocide (particularly the latter), potentially all of the excluded preparatory acts might remain criminal. However, by the time the final draft of the Convention was adopted, even the language establishing liability for incitement in the absence of a completed genocide was excluded from Article III—an exclusion which has prompted a long-term scholarly and judicial dispute over the exact scope of incitement as a crime under international criminal law.²⁷

The question of conspiracy generally was a controversial one during the negotiating process. Although conspiracy as such was unknown in civil law,²⁸ civil

²³ See W.A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), at 266–7, citing Secretariat Commentary, UN Doc. E/447, at 30–11.

²⁴ *Ibid.*, at 267.

²⁵ Secretariat Draft, Art. II(II)(2).

²⁶ Ad hoc Committee Draft, Art. IV.

²⁷ See *infra* § 4.1.

²⁸ Civil law jurisdictions use similar concepts that cover the same functional ground. See G.P. Fletcher, *Rethinking Criminal Law* (2nd edn., New York: Oxford University Press, 2000), 647

law nations were willing to accept its inclusion in the Convention, although there was some difficulty in translating the concept of conspiracy into languages such as French that include corresponding legal terms (e.g. *complot* or *entente*) that are similar but not an exact match.²⁹ This stands in marked contrast to the scholarly and judicial controversy surrounding conspiracy at Nuremberg, and the International Military Tribunal for the Major War Criminals' (IMT) near-universal rejection of the legal concept (except for the now-inert crime of aggression which has never been prosecuted by an international court since Nuremberg and still awaits a definition from the state parties to the ICC Statute).³⁰ There is little direct evidence to explain the different attitude about the concept. Why were French jurists so bothered by the common law concept at Nuremberg, claiming that its very foundation was anathema to civil law systems, yet when the Genocide Convention was adopted in 1948 just a few years later, the idea of criminalizing conspiracy to commit genocide was not vigorously contested, even among French international lawyers involved in the drafting process (though the issue was discussed)? True, genocide was not explicitly charged at Nuremberg, although it is clear that genocidal acts were covered as a subcategory of the more general 'crimes against humanity'. Indeed, it would appear that the exception allowed by the civil law judges at Nuremberg for conspiracy to commit aggression has been transferred now to conspiracy to commit genocide. Is the rationale for the latter the same as the former? It is at least plausible to argue that genocide is inherently collective in the same way as aggression is collective (genocide cannot be committed without a widespread governmental policy or social practice).³¹

(‘this single crime fills a number of diverse functions that are satisfied by other doctrinal devices in Continental legal systems’).

²⁹ See Schabas, *supra* note 23, at 260–1.

³⁰ See Fletcher, *supra* note 3, at 16 (noting that both Francis Biddle and his aide Herbert Wechsler were sympathetic to the French critique regarding conspiracy). Prof. Wechsler would later become the chief drafter of the US Model Penal Code. See also Smith, *supra* note 14, at 126. Fletcher refers to the decision to convict for conspiracy for aggression but not for war crimes and crimes against humanity as a ‘compromise’ verdict. Furthermore, the conspiracy charge was also rejected in every case argued by prosecutor Telford Taylor before the subsequent US Military Tribunals sitting at Nuremberg. See Fletcher, *supra* note 3, at 17.

³¹ See, e.g., Judgment, *Prosecutor v. Tadić*, Appeals Chamber, 15 July 1999, § 191 (referring to ‘manifestations of collective criminality’). See also J.D. Ohlin and G.P. Fletcher, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, 3 *Journal of Int’l Criminal Justice* (2005) 539, at 545–8. The requirement that the genocidal acts must be committed as ‘part of a wider plan to destroy the group as such’ originates with Judgment, *Prosecutor v. Jelisić*, Trial Chamber, 14 December 1999, §§ 66, 79. The Appeals Chamber rejected this view that a wider plan or policy was a necessary ingredient, though it conceded that ‘in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases.’ See Judgment, *Prosecutor v. Jelisić*, Appeals Chamber, 5 July 2001, § 48. For a critical discussion of the Trial Chamber’s theory, see A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008), 173–5. See also Cassese, *supra* note 9, at 140 (rejecting the views of both the Trial Chamber and the Appeals Chamber in *Jelisić*). Cassese concludes that some underlying crimes of genocide ‘not only presuppose, but necessarily take the shape of, some sort of collective or even organized action’ (e.g. preventing births within a group,

However, the more likely answer is somewhat less conceptual: conspiracy was allowed as a crime under the Genocide Convention simply because the whole point of the Convention was to deter genocide from happening again and the drafters were particularly concerned with creating sufficient inculcation for domestic authorities to intervene in developing genocidal programs. In this sense, the retention of conspiracy in the final draft of the Genocide Convention represents a compromise approach balanced by the removal of the Secretariat draft's expansive provisions on preparatory acts. Genocide was horrendous enough that conspiracy to commit it was sufficiently disruptive to the international system, but penalizing mere preparatory acts such as the building of installations that might also be used to for other purposes was simply going too far.

4. ICTY and ICTR Statutes and Case Law

The incitement and conspiracy provisions of the Genocide Convention were carried over directly into the ICTY and ICTR Statutes, although the other international crimes under the jurisdiction of the two ad hoc Tribunals do not encompass liability for conspiracy and incitement.³² Such differential treatment is usually explained as being necessitated by the horrendous nature of genocidal crimes such that the international community is justified in penalizing mere preparatory acts, even those such as incitement that are merely verbal acts at the opposite end of the spectrum from the completed offence.³³ Apparently, the Security Council believed that the appropriate standard for genocidal liability was contained in the Convention and copied the provisions virtually *verbatim* when it drafted the ICTY and ICTR Statutes.

4.1 Incitement to Commit Genocide

Incitement must be distinguished from instigation, which is listed as a mode of liability under Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute. The practical effect of this distinction is that for instigation, the prosecution must demonstrate that the defendant's instigation 'substantially contributed' to the commission of the genocide.³⁴ In contrast, a conviction for incitement as a

forcibly transferring children, etc.) but that other underlying crimes (e.g. individual rape, killing, or torture) do not. *Ibid.* at 141.

³² See ICTY Statute, Arts. 4(3)(b) and 4(3)(c); ICTR Statute, Arts. 2(3)(b) and 2(3)(c).

³³ See, e.g., Cassese, *supra* note 9, at 229 ('Genocide is held to be such a heinous crime involving annihilation of entire human groups, that any act or conduct leading to, or pushing towards, its perpetration is banned and criminalized'); Schabas, *supra* note 23, 257 ('The seriousness of genocide and its dire consequences for humanity compel the application of the law before the crime actually takes place.').

³⁴ Judgment, *Nahimana*, 12 January 2007, Appeals Chamber, § 678.

substantive offence may be obtained even if the incitement did not 'substantially contribute' to the commission of genocide.³⁵

Unfortunately, the ICTY and ICTR Statutes make no mention of whether incitement could be penalized in cases without a completed genocide, an absence that can be traced back explicitly to the removal of this provision when the final text of the Genocide Convention was prepared (which in turn was transferred over to the ICTY and ICTR Statutes). Presumably, the absence is explained less by a desire of the Security Council to remove liability for incitement for unconsummated genocide, but rather the existence of the Rwandan and Yugoslavian genocides made such questions moot: since the genocides had already occurred, all prosecutions for incitement at the ICTY and ICTR would have resulted in completed genocides. Indeed, the ICTR concluded in *Akayesu* that '[n]evertheless, the Chamber is of the opinion that it cannot thereby be inferred that the intent of the drafters was not to punish unsuccessful acts of incitement. In light of the overall *travaux*, the Chamber holds the view that the drafters of the Convention simply decided not to specifically mention that such a form of incitement could be punished.'³⁶ However the ICTR felt compelled to determine whether incitement required a completed offence. In *Akayesu*, the Trial Chamber held that a completed offence was not necessary for an incitement conviction; the crime incited does not have to be committed.³⁷ Arguably, the issue was moot since the ICTR was conducting its work in the aftermath of the Rwandan genocide. However, there is a more practical consequence for treating incitement as an inchoate offence that does not require a completed genocide: it relieves the prosecution of the burden of establishing a causal connection between the incitement and the completed genocide—an evidentiary obstacle that may be difficult to achieve with anything other than circumstantial evidence. Indeed, in *Nahimana* the ICTR Trial Chamber explicitly held that the crime of incitement requires no causal link at all between the incitement and the genocide.³⁸ On a theoretical level, this is entirely consistent with the crime's inchoate nature.

That being said, prosecutions for incitement to commit genocide at the ICTR are constrained by a number of legal requirements. (Although primarily a common law crime, the Trial Chamber in *Akayesu* found a civil law precedent in the form of provocation.³⁹) First, the incitement must be 'direct' since both the ICTR Statute and the Genocide Convention include this provision. According to the Trial Chamber in *Akayesu*, the directness prong requires that the incitement 'specifically provoke another to engage in a criminal act, and that more than mere

³⁵ *Nahimana*, *supra* note 34, § 678.

³⁶ Judgment, *Akayesu*, Trial Chamber, 2 September 1998, § 561.

³⁷ *Ibid.*, § 561. ³⁸ *Nahimana*, *supra* note 15, § 1015.

³⁹ See *Akayesu*, *supra* note 36, § 555 ('such a provocation, as defined under Civil law, is made up of the same elements as direct and public incitement to commit genocide covered by Article 2 of the Statute, that is to say it is both direct and public.'). But see *contra* Sluiter and Zahar, *supra* note 31, at 168 (referring to this argument as 'difficult to follow').

vague or indirect suggestion goes to constitute direct incitement.⁴⁰ This creates the somewhat complex standard that the incitement must be direct enough to provoke the criminal act, but does not need to actually provoke the criminal act (given the offence's inchoate nature)—an uncomfortable tension. Furthermore, according to the Trial Chamber, the question of directness 'should be viewed in the light of its cultural and linguistic content' and 'a particular speech may be perceived as direct in one country, and not so in another, depending on the audience.'⁴¹ Also, the Trial Chamber noted that incitement may be both direct and implicit at the same time, and specifically quoted the drafting process of the Genocide Convention:

the Polish delegate observed that it was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime.⁴²

All that is required is that 'the persons for whom the message was intended immediately grasped the implication.'⁴³ Consequently, the required *mens rea* is that the defendant desires 'to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging.'⁴⁴ Therefore, the defendant must himself desire the destruction of the group and must seek to produce that intention in others as well.⁴⁵ These legal conclusions have generated scholarly criticism.⁴⁶

As to the possible distinction between incitement to commit genocide and garden-variety 'hate speech', the ICTR Appeals Chamber concluded in *Nahimana* that '[d]irect incitement to commit genocide... has to be more than a mere vague or indirect suggestion'⁴⁷ and 'cannot be held accountable for hate speech that does not directly call for the commission of genocide.'⁴⁸ However, according to the Appeals Chamber, the 'directness' requirement does not entail that the incitement must be 'explicit' in its call for genocide. This view arguably departs from the precedent set at Nuremberg, where Streicher was convicted but Fritzsche was not, precisely because the latter never directly called for the extermination of the Jews.⁴⁹ The Appeals Chamber dismissed this argument by noting that neither Streicher nor Fritzsche were charged with direct and public incitement to commit genocide, since that specific formulation of the crime (created by the Genocide Convention), did not yet exist under international law.⁵⁰

⁴⁰ *Akayesu*, *supra* note 36, § 557.

⁴¹ *Ibid.* This point was also reiterated in Judgment, *Prosecutor v. Kajelijeli*, Trial Chamber, 1 December 2003, § 853.

⁴² See Zahar and Sluiter, *supra* note 31, at 169 (noting that the position of the one Polish delegate contradicts the ILC position that the incitement cannot be *indirect*).

⁴³ *Akayesu*, *supra* note 36, § 558. ⁴⁴ *Ibid.*, § 560. ⁴⁵ *Ibid.*, § 561.

⁴⁶ See especially Sluiter and Zahar, *supra* note 31, at 168 ('We are entitled to read between the lines. This is *Akayesu's* idea.')

⁴⁷ *Nahimana*, *supra* note 34, § 692. ⁴⁸ *Ibid.*, § 693. ⁴⁹ *Ibid.*, § 702.

⁵⁰ For a criticism of this point, see Orentlicher, *supra* note 16, at 582 (concluding that, *pace* the ICTR, the *Fritzsche* judgment unquestionably stands for the proposition that incitement must

The incitement must also be ‘public’ according to both the ICTY and ICTR Statutes and the Genocide Convention. Implicitly, merely ‘private’ incitement is therefore not criminal, though charting the exact definition of private is more difficult than at first it would appear. Incitement by definition involves communication to other parties, so the question is how many other parties must hear the incitement before it becomes ‘public’. In *Akayesu*, the Trial Chamber held that the public criterion is established by looking to ‘the place where the incitement occurred and whether or not assistance was selective or limited.’⁵¹ The Trial Chamber cited the International Law Commission (ILC) for the proposition that ‘public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.’⁵²

The ICTR applied this standard in several cases dealing directly with media executives responsible for broadcasting or distributing incendiary material. In *Nahimana*, officials at a Rwandan radio network were convicted of participating in the Rwandan genocide for allowing broadcasts that specifically targeted Tutsi individuals.⁵³ The individuals were also convicted of genocide and conspiracy to commit genocide, though several convictions for genocide were later reversed by the Appeals Chamber, which let convictions for incitement stand. Much of the case turned on issues of language and the supposed meaning of the word *Inyenzi* as ‘cockroaches’—an inflammatory term from which genocidal intent might be inferred—and its relationship to the words *Inkotanyi*, which referred to the Tutsi rebels (a fighting force) and the composite term *Inkotanyi-Inyenzi* (which draws on elements of both terms). Did the broadcasts in question urge elimination of enemy soldiers (arguably military propaganda, but not an international crime) or did it refer to an enemy ethnic group (thus constituting incitement to commit genocide)? The ICTR was persuaded that the call to action targeted an ethnic group, not just a fighting force.⁵⁴

4.2 Conspiracy to Commit Genocide

Several ICTR Trial Chambers have convicted individuals of conspiracy to commit genocide. Like incitement, conspiracy is an inchoate offence, and a completed genocide need not occur in order for a conviction to obtain. This is consistent

include a call to action or violence or persecution). Orentlicher refers to *Nahimana* as a ‘misreading’ of the Nuremberg cases.

⁵¹ *Akayesu*, *supra* note 36, § 556.

⁵² *Ibid.*, citing Draft Code of Crimes Against the Peace and Security of Mankind, art. 2(3) (f); Report of the International Law Commission to the General Assembly, 51 UN GAOR Supp. (No. 10), at 26, UN Doc. A/51/10(1996).

⁵³ Hassan Ngeze and Jean Bosco Barayagwiza, two other executives, were also convicted.

⁵⁴ The linguistic issues are expertly and critically parsed in Zahar and Sluiter, *supra* note 31, at 186–90.

with the common law understanding of conspiracy, i.e. that once the individuals in question make the criminal agreement, the crime has in fact occurred.⁵⁵ Several scholars have noted that this distinguishes conspiracy to commit genocide from conspiracy as a mode of liability as found in the doctrine of joint criminal enterprise.⁵⁶

The ICTR noted in *Musema* that the *travaux préparatoires* to the Genocide Convention made clear that the rationale for penalizing conspiracy to commit genocide was ‘to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide should be punishable even if no preparatory act has taken place.’⁵⁷ Although the concept of conspiracy is far less accepted in the civil law, the ICTR accepted and applied basic principles of common law conspiracy on the theory that the drafters of the Genocide Convention (and presumably by extension the drafters of the ICTY Statute, i.e. the Security Council), meant to codify the common law concept of conspiracy with full knowledge that the concept’s acceptance was not universal among all legal systems, but that its application in the case of genocide was warranted by the exigencies of the crime.⁵⁸ Consequently, the ICTR borrowed the common law definition of conspiracy and eschewed the civil law version of *complot*.

As for the elements, the ICTR held that the *mens rea* for conspiracy to commit genocide is the *dolus specialis* of genocide (i.e. the intent to destroy, in whole or in part, a national, ethnic, racial or religious group).⁵⁹ As for the material element, the requirement is that the individual agree with one or more individuals to commit genocide, also known as a ‘concerted agreement to act’.⁶⁰ The element of acting ‘in concert’ is key because it distinguishes a conspiracy from mere ‘conscious parallelism’.⁶¹ The agreement need not be an express or formal one but may be inferred from the ‘concerted or coordinated action on the part of the group of individuals.’⁶² Consequently, a ‘tacit understanding of the criminal purpose is

⁵⁵ See Robinson, *supra* note 5, at 644–5 (‘The underlying theory of conspiracy as an inchoate offense is the same as that for attempt: It punishes an actor who intends to commit an offense and externally manifests his or her willingness to carry out that intention. The agreement is an externalization of what, until then, may have been simply a thought of the actor. The act of agreeing suggests that the actor has moved beyond mere fantasizing.’). See also US Model Penal Code, § 5.03.

⁵⁶ See G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), 253.

⁵⁷ See Judgment, *Musema*, Trial Chamber, 27 January 2000, § 185.

⁵⁸ See Cassese, *supra* note 9, at 228–9.

⁵⁹ *Musema*, *supra* note 57, § 192.

⁶⁰ *Nahimana*, *supra* note 34, § 894. See also *Musema*, *supra* note 57, §§ 189–91; Judgment, *Ntagerura*, Appeals Chamber, 7 July 2006, §§ 91–92; *Kajelijeli*, *supra* note 41, § 787 (‘The agreement in a conspiracy is one that may be established by the prosecutor in no particular manner, but the evidence must show that an agreement had indeed been reached. The mere showing of a negotiation in process will not do.’); Judgment, *Niyitegeka*, Trial Chamber, 16 May 2003, § 423.

⁶¹ *Nahimana*, *supra* note 34, § 897.

⁶² *Nahimana*, *supra* note 34, § 1045. Cf. *Ntagerura*, *supra* note 60, §§ 91–2. International tribunals have engaged in a similar debate regarding the need for an express agreement for a joint criminal enterprise. See, e.g., K. Gustafson, ‘The Requirement of an “Express Agreement” for Joint Criminal Enterprise Liability’, 5 *Journal Int’l Criminal Justice* (2007) 134.

sufficient.⁶³ In practice, the inference can be drawn from ‘coordinated actions by individuals who have a common purpose and are acting within a unified framework’ such as a coalition where ‘those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of their common purpose.’⁶⁴

While some scholars were at first uncertain if the tribunals would consider conspiracy to commit genocide as an inchoate offence,⁶⁵ the ICTR was quite clear in *Musema* that conspiracy is an inchoate offence and that it ‘is punishable even if it fails to produce a result,’⁶⁶ an understanding of conspiracy that is consistent with both civil and common law versions of the concept.⁶⁷ Somewhat curiously, however, the tribunal applied the doctrine of merger in this case, such that *Musema* could not be convicted of conspiracy to commit genocide if he was also convicted of genocide proper (because the former merged into the latter).⁶⁸ Although the civil law applies the doctrine of merger for its version of conspiracy, the common law rejects the merger doctrine for conspiracy, and prosecutors are fond of seeking convictions for both murder and conspiracy to commit murder when they can (though the issue is often moot if the defendant receives a life term for the top count of murder). The application of the merger doctrine in *Musema* is somewhat strange since it was the common law version of conspiracy that the Trial Chamber was explicitly applying.⁶⁹ The Trial Chamber relied on scholarly criticism of the common law rejection of merger by a treatise writer,⁷⁰ and by the fact that the trial Chamber should ‘adopt [] the definition of conspiracy most favourable to *Musema*.’⁷¹ But it is unclear why this rule of construction applied to the doctrine of merger but did not apply to the choice between civil law and common law models, since the more restrictive civil law notion may very well have proved more helpful to the defence.⁷²

The Trial Chamber’s view was rejected by other trial chambers in several cases, which allowed convictions for both genocide and conspiracy to commit genocide.⁷³ For example, in *Nahimana*, the Trial Chamber held that such cumulative convictions are appropriate since the material elements of conspiracy to commit genocide differ (by at least one element) from the material elements of genocide proper,⁷⁴ since conspiracy requires the existence of an agreement while genocide itself does not.⁷⁵ In *Niyitegeka*, the Trial Chamber convicted the defendant of both conspiracy to commit genocide and genocide itself, though it did so without

⁶³ *Nahimana*, *supra* note 34, § 1045.

⁶⁴ *Ibid.*, § 1047.

⁶⁵ See Schabas, *supra* note 23, at 265.

⁶⁶ *Musema*, *supra* note 57, § 194.

⁶⁷ *Ibid.*, § 193.

⁶⁸ *Ibid.*, § 198.

⁶⁹ *Ibid.*, § 187.

⁷⁰ *Ibid.*, § 197.

⁷¹ *Ibid.*, § 198.

⁷² See, e.g., *ibid.*, § 189 and the requirement of ‘material acts’ under civil law.

⁷³ See, e.g., *Niyitegeka*, *Nahimana* and *Kambanda*, though the latter involved a guilty plea as opposed to a finding after trial.

⁷⁴ *Nahimana*, *supra* note 15, § 1043.

⁷⁵ Some scholars have supported this view. See, e.g., Mettraux, *supra* note 56, 254.

explicit analysis of the merger doctrine.⁷⁶ Michel Bagaragaza was charged with both genocide and conspiracy to commit genocide, and at the time of writing, his trial is pending.⁷⁷ In *Bagosora et al.*, four top military officials were acquitted by the Trial Chamber of conspiracy to commit genocide, though three of the officials were convicted on other charges.⁷⁸ The prosecution had alleged a series of conspiratorial acts between 1990 and 1994 that led up to the genocide, including the creation of a commission that defined the enemy with reference to the Tutsi ethnicity, Bagosora's comment about the coming 'apocalypse', a reference in one letter to a 'Machiavellian plan', the drafting of a target list, and the arming of the civilian militia.⁷⁹ The Trial Chamber found insufficient evidence of genocidal intent to sustain a conviction and concluded that much of the evidence was consistent with preparations for war, not genocide directed against the Tutsi population. The Chamber rejected as not credible the evidence regarding the alleged target list and the comments of a coming apocalypse and a Machiavellian plan.⁸⁰

5. Incitement and Conspiracy under the ICC Statute

The ICC Statute departs significantly from the strategy of the ICTY and ICTR Statutes. Instead of borrowing directly from the list of genocide offences contained in the Genocide Convention, the ICC Statute eschews this strategy in favour of relying on general principles regarding individual liability that will apply to all international crimes covered by the Statute, not just for genocide. One of the principle benefits of this approach is its coherence; it prevents overlapping liability generated by the special genocide crimes contained in the ICTY and the ICTR Statutes and the individual liability provisions of those Statutes. However, the

⁷⁶ *Niyitegeka*, *supra* note 60, § 502.

⁷⁷ The prosecution move to refer his case for trial before a domestic court in Norway, a request that was not opposed in principle by the defence, but the motion was rejected by the ICTR. See Decision on the Prosecution Motion for Referral to the Kingdom of Norway, *Bagaragaza*, Trial Chamber III, 19 May 2006 ('The Prosecution further states that, even if those requirements are met, strong public policy reasons favour the involvement of other countries in the prosecution of the Accused because it would be a manner of educating people in other countries on the lessons to be learned from the Rwandan genocide and would promote the development of ideas to prevent future similar tragedies.'). The Trial Chamber denied the referral because Norway does not have a domestic penal law against genocide, and the government in Norway planned to try the defendant under universal jurisdiction 'as an accessory to homicide or negligent homicide, for which the maximum sentence is 21 years imprisonment.' The prosecution subsequently successfully moved to have the case referred to a domestic court in the Netherlands. See Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, *Bagaragaza*, Trial Chamber, 13 April 2007. But the referral was subsequently revoked by the Trial Chamber after a district court in the Netherlands rejected domestic jurisdiction in a similar case.

⁷⁸ See *Prosecutor v. Théoneste Bagosora et al.*, Trial Chamber, 18 December 2008. As of February 2009, the written version of the judgment had not been filed. The Trial Chamber issued a written summary at the time it issued the oral judgment.

⁷⁹ *Ibid.* ⁸⁰ *Ibid.*

conversion is far from complete, since the ICC Statute still includes, in Article 25 (a section nominally devoted to *general* principles of individual criminal responsibility), a specific provision only applicable to genocide that penalizes ‘directly and publicly incit[ing] others to commit the crime [of genocide]’.⁸¹ Other general principles that would apply to genocide also are covered by Article 25, including aiding and abetting (Article 25(3)(c)), attempt (Article 25(3)(f)), and common purpose liability (Article 25(3)(d)). The latter provision covers at least some of the same ground as conspiracy liability for genocide, though the provision establishes a mode of liability, not a separate inchoate offence.⁸²

Conspiracy as a substantive offence is excluded from the ICC Statute, for all offences, because the drafters of the Statute could not agree to its inclusion. Representatives from civil law jurisdictions announced their opposition to it, echoing essentially the same concerns raised from civil law jurists at Nuremberg, which rejected conspiracy as a crime in all cases except aggression. Although individual liability was established by Article 25(3)(d), which creates a form of individual liability for collective criminal endeavors,⁸³ it is neither inchoate (since it requires the commission or attempted commission of an offence) nor an offence (it is a mode of liability). Schabas concludes that although Article 25(3)(d) embodies a civil law approach (requiring a completed offence), ‘there was no real debate on this point’ and that ‘the inconsistency with the terms of the Genocide Convention would appear to be inadvertent.’⁸⁴ This is difficult to countenance, especially since the parties explicitly drafted a provision to retain incitement as an inchoate offence.⁸⁵ In any event, conspiracy to commit genocide is a crime under the Genocide Convention and the ICTY and ICTR Statutes, but it is not a crime under the ICC Statute. Incredibly, Schabas attributes the discrepancy to ‘an oversight of exhausted drafters,’ which implies some degree of inadvertence or mistake when the Rome diplomatic conference transferred the genocide offences from the Convention to the Rome ICC Statute.⁸⁶ Other scholars have made much more of this shift. Fletcher, for one, concludes that the ICC Statute is evidence of a ‘calmer moment of history’ when the passions created by the Rwandan and

⁸¹ ICC statute, Art. 25(3)(e).

⁸² See Schabas, *supra* note 2, at 155 (‘This result was achieved only partially.’).

⁸³ The exact relationship between Article 25(3)(d), the doctrine of joint criminal enterprise, and the common law concept of conspiracy is a matter of some controversy. Compare Cassese, *supra* note 9, at 202 and 213, with Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, *Milutinović, Šainović and Ojdanić*, Appeals Chamber, 21 May 2003, § 23 (JCE requires agreement plus a showing of action in furtherance of that agreement). See also A. Zahar, ‘Commentary: Prosecutor v. Krnojelac’, 14 *Annotated Leading Cases of International Criminal Tribunals*, 842.

⁸⁴ Schabas, *supra* note 2, at 155, citing Committee of the Whole, ‘Working Group on General Principles of Criminal Law,’ UN Doc. A/ CONF.183/C.A./WGGP/L.3 (18 June 1998). The citation on this point gives no evidence either way and is simply the text of the proposed provision.

⁸⁵ See K. Ambos, ‘Article 25 Individual Criminal Responsibility’, in Triffterer, *supra* note 2, 743, at 760.

⁸⁶ See Schabas, *supra* note 23, at 264.

the Yugoslavian tragedies had cooled and resulted in a more defensible statute from the perspective of criminal law theory.⁸⁷ For Fletcher, the ICTY and ICTR Statutes are exceptions in this regard and their conspiracy provisions ‘reflect the afterglow of a dying concept.’⁸⁸ In contrast, Cassese views the difference between Article 6 of the ICC Statute and the ICTY and ICTR Statutes as embodying a fissure between ‘customary international law’ and the ICC Statute.⁸⁹ In other words, the view here is that customary international law criminalizes conspiracy to commit genocide, while the ICC Statute does not.

This view requires some critical reflection. First, it is unclear how exactly the prohibition contained in the ICTY or ICTR Statutes can give rise to a norm of customary international law. First, customary law is based entirely on state practice and *opinio juris*.⁹⁰ The ICTY and ICTR Statutes are indeed binding pronouncements of international law (issued from the Security Council under its Chapter VII authority), but these are hardly a form of *customary* international law. Indeed, the issuance of the ICTY and ICTR Statutes by the Security Council cannot meet the requirement of a widespread practice of states sufficient to establish a norm.⁹¹ Furthermore, the prosecutions at the ICTR for conspiracy to commit genocide,⁹² cannot be considered evidence of an emerging norm of customary international law, because these decisions were announced by an international ad hoc Tribunal whose actions cannot be attributed to a specific state (or group of states).⁹³ It is true that the Genocide Convention itself may be one source of state practice, given that it was signed and ratified by a large number of states (though the US declined to ratify it until 1988). Or, the Genocide Convention might be thought to *embody* customary international law, though if this is the case, it would appear that the Rome Statute indicates a clear desire on the part of a large number of states to alter the customary norm.⁹⁴ Also, the Genocide Convention is more properly described as a case of treaty (i.e. positive) law, not customary law, in which case it is just one treaty whose value as a source of law is to be balanced on the one hand with another multilateral treaty, the Rome Statute, which expressly excludes liability for conspiracy to commit genocide. In cases of treaty-based law,

⁸⁷ See Fletcher, *supra* note 3, at 12.

⁸⁸ *Ibid.*

⁸⁹ See A. Cassese, ‘Jurisdiction *ratione materiae*—Genocide’, in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 335, at 347.

⁹⁰ See International Law Association, Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000); H.W.A. Thirlway, *International Customary Law and Codification* (Leiden, Sijthoff, 1972), 47.

⁹¹ M. Bos, *A Methodology of International Law* (Amsterdam, New York: North-Holland, 1984), 234 (state practice must achieve ‘virtual uniformity’).

⁹² See, e.g., *Musema*, *supra* note 35, § 185.

⁹³ See generally *Statement of Principles Applicable to the Formation of General Customary International Law*, *supra* note 90, at 18 (‘Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice.’).

⁹⁴ To date, 108 states are parties to the treaty.

if one treaty conflicts with another, one looks to the more recent treaty over the older one.⁹⁵ Consequently, it would appear that the Rome Statute represented a desire (whether or not it was explicitly notarized in the *travaux préparatoires*) on the part of state parties to change the applicable law regarding conspiracy to commit genocide. Indeed, unless one adopts some view similar to this, one is left with the possibility that in failing to penalize conspiracy to commit genocide, the parties to the Rome Statute were in *breach* of their obligations under the Genocide Convention. That cannot be the correct analysis.

In any event, it is unclear what practical consequences might flow from a putative norm of 'customary international law' prohibiting conspiracy to commit genocide. All future prosecutions before the ICC are by definition governed by the ICC Statute. Although the international community might still in the future resort to ad hoc Tribunals in specific circumstances, we have long since past the time when an international criminal tribunal might apply customary international law in the total absence of a specific penal statute that governs its activities. Indeed, the whole trend in both domestic and international criminal law has been the rejection of prosecution for common law crimes in favor of legislatively enacted penal statutes and prosecutions that conform to the principle of legality and *nullem crimin sine lege* (criminal offences must be provided for by law). Of course, it might be possible to establish a customary norm if there were sufficient evidence of domestic prosecutions for conspiracy to commit genocide, although as the following section makes clear, such prosecutions are rare.

A better way of expressing the tension between the ICTY and ICTR Statutes and Article 6 of the ICC Statute is that the Security Council considers conspiracy to commit genocide to be an international crime, though the drafters of the ICC do not. At the very least, the Security Council believed this to be the case for Yugoslavia and Rwanda, and it is unclear how it could be anything other than a general principle applicable in other regions (and at other times) as well. It is genuinely unclear how to resolve this tension. While a Security Council pronouncement under Chapter VII of the UN Charter is binding and arguably hierarchically superior over any voluntary treaty commitment,⁹⁶ the whole point of the ICC Statute was the voluntary creation of an international penal code for the new Court to apply. No scholar has explicitly and successfully resolved this problem of conflicting authority.

⁹⁵ See Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27, art. 30(3) and 30(4) (between states that are parties to both treaties, the 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'). Although the Vienna Convention entered into force in 1969, and the Genocide Convention was concluded more than two decades earlier, the Vienna Convention rule embodies customary norms of treaty interpretation.

⁹⁶ See D. Shelton, 'Normative Hierarchy in International Law', 100 *American Journal of Int'l Law* (2006) 291.

6. Domestic Prosecutions and Legislation

Although there have been a few domestic prosecutions for genocide, there have been no known domestic prosecutions for incitement or conspiracy to commit genocide. But several states have enacted domestic legislation that covers conspiracy to commit genocide and incitement to commit genocide, consistent with their obligations under the Genocide Convention. For example, Austria's criminal code penalizes conspiracy to commit genocide, which carries a ten-year prison term.⁹⁷ The Canadian War Crimes Act makes conspiracy to commit genocide within or outside of Canada an offence, though incitement is not covered under that law.⁹⁸ In the US, federal law makes directly and publicly inciting another to commit genocide to be unlawful punishable by a fine of \$500,000 or five years in prison or both, though the jurisdiction is limited by the principles of territoriality or active nationality.⁹⁹ The US provision on genocide includes no mention of conspiracy, but presumably the general federal statute on conspiracy applies to this criminal provision as well.¹⁰⁰ The Italian law on genocide includes a specific provision on conspiracy to commit genocide that yields one to six years in prison,¹⁰¹ while incitement carries a term of three to twelve years.¹⁰² In 1996, the Swiss government charged a Rwandan national named Niyonteze with instigation to commit homicide and other offences related to the Rwandan genocide, but he could not be charged with genocide or incitement to commit genocide because Switzerland had not yet enacted domestic legislation criminalizing genocide in accordance with the Genocide Convention.¹⁰³

In another well-publicized case, Canadian officials attempted to have Mugesera removed from Canada for his contribution to the Rwandan genocide for a famous speech delivered in 1996.¹⁰⁴ The government argued that it constituted incitement to commit genocide and that Mugesera had deliberately failed

⁹⁷ *Strafgesetzbuch*, section 321. ⁹⁸ Bill C-19.

⁹⁹ 18 U.S.C. § 1091. In cases of genocide proper 'where death results', the statute authorizes the death penalty, or a life sentence and a \$1 million fine. In cases where death does not result, the statute allows a \$1 million fine or a prison term of 20 years or both.

¹⁰⁰ 18 U.S.C. § 371.

¹⁰¹ Prevention and Repression of the Crime of Genocide, Art. 7.

¹⁰² Prevention and Repression of the Crime of Genocide, Art. 8.

¹⁰³ For a description of the case, see W.A. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes"', 1 *Journal Int'l Criminal Justice* (2003), 39, at 47–9. On appeal, the convictions for homicide, attempted homicide, and instigating homicide were reversed, but convictions were allowed for serious violations of the Geneva Conventions. On appeal again to the *Tribunal militaire de cassation*, the court upheld the convictions based on the Geneva Convention because there was a sufficient nexus between the defendant's criminal acts and the armed conflict. See *N and Military Prosecutor of the Military Tribunal of First instance 2 v. Military Appeals Tribunal 1A*, Cassation Judgment, ILDC 349 (CH 2001).

¹⁰⁴ *Ibid.*, at 50 for a description of the underlying facts.

to disclose his participation in his paperwork when he immigrated to Canada. A federal court overturned the finding that he was under a duty to disclose this information. In 2005, the Supreme Court of Canada held that Mugesera could be deported.¹⁰⁵ Specifically, the court held that ‘the Minister does not need to establish a direct causal link between the speech and any acts of murder or violence,’ thus confirming the inchoate nature of the offence. Furthermore, the court gave a gloss on the ‘direct and public’ standard: ‘In order for a speech to constitute a direct incitement, the words used must be clear enough to be immediately understood by the intended audience.’ Applied to the facts of the case, the court concluded that Mugesera’s message was ‘delivered in a public place at a public meeting and would have been clearly understood by the audience.’ As for the required *mens rea*, the Supreme Court of Canada held that ‘[t]he guilty mind is an intent to directly prompt or provoke another to commit genocide. The person who incites must also have the specific intent to commit genocide. Intent can be inferred from the circumstances.’ Applying this standard to Mugesera’s speech, the court concluded that Mugesera ‘was aware that ethnic massacres were taking place when he advocated the killing of members of an identifiable group distinguished by ethnic origin with intent to destroy it in part.’ Although the court was interpreting the Canadian Criminal Code,¹⁰⁶ it is important to note that the decision was a review of an immigration deportation order, not a criminal prosecution.

7. Concluding Remarks

Although the ICTR has helped develop a nascent jurisprudence of conspiracy to commit genocide, the future of this criminal category is uncertain. The crime’s exclusion from the statute of the permanent ICC will no doubt hamper judicial development of the doctrine. Future ad hoc Tribunals might apply the concept, as might domestic courts applying either national criminal law or international law. Only time will tell whether conspiracy to commit genocide is indeed the

¹⁰⁵ *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 S.C.R. 100, 2005 S.C.C. 40, available at: <http://csc.lexum.umontreal.ca/en/2005/2005scc40/2005scc40.html> (last visited 10 January 2009).

¹⁰⁶ Criminal Code of Canada, section 318 (‘Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.’). See also section 319(1) (public incitement of hatred) (‘Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.’); section 319(2) (wilful promotion of hatred) (‘Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.’).

‘afterglow of a dying concept’ or a continuing and viable strategy for stopping and prosecuting genocidal plans. Incitement raises its own distinct issues regarding the manner in which the international judiciary should penalize verbal conduct. However, the fact that the Rome Statute includes an explicit provision penalizing incitement to commit genocide means that the ICC will have the opportunity to develop the jurisprudence of incitement even if conspiracy to commit genocide remains out of their grasp.

State Responsibility for Conspiracy, Incitement, and Attempt to Commit Genocide

Jens David Ohlin

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1. Introduction

The lack of case law or actual adjudication presents an impediment to a complete scholarly assessment of the possibility of state responsibility for conspiracy, incitement, and attempt to genocide. Nonetheless, it is possible to determine the outer contours of these notions without reference to their direct application in the case law. As a matter of methodology, one can harness the already well-developed understanding of the category of attempts from the criminal law, the concept of state responsibility under international law, and our doctrinal understanding of individual responsibility for conspiracy and incitement to commit genocide. Taken together, one can telegraph the outer contours of state responsibility for these crimes and how they might be applied in the future by the International Court of Justice (ICJ). The discussion will, of necessity, remain speculative. A full analysis follows.

2. State Responsibility for Conspiracy and Incitement to Commit Genocide

No court or competent international authority has ever held a state responsible for conspiracy or incitement to commit genocide. However, the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as

the ‘Genocide Convention’ or ‘Convention’) clearly anticipates state responsibility for such acts.¹ In the only direct case dealing with state responsibility for genocide, the ICJ in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (hereinafter referred to as the ‘*Bosnian Genocide case*’) considered the issue and declined to hold Serbia responsible for conspiracy, incitement, or complicity.² However, the court’s rationale stemmed from the same rationale for its failure to hold Serbia responsible for genocide proper: i.e., insufficient evidence that the relevant actors were organs of the Serbian government or acting under their direct control.³ Consequently, the court’s analysis suggests that in cases where such evidence is present, state responsibility for conspiracy or incitement is possible.

Specifically, the Court noted that:

It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as ‘[c]onspiracy to commit genocide’ (Art. III, para. (b)), or as ‘[d]irect and public incitement to commit genocide’ (Art. III, para. (c)), if one considers, as is appropriate, only the events in Srebrenica.⁴

As regarding incitement, the court concluded that it was not proven ‘that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina.’⁵

The Court offered no other analysis, preferring instead to rely on its previous holding that imputation to Serbia of genocidal acts by soldiers on the ground was impossible without more direct evidence.⁶ However, the Court did suggest a standard that must be met before evidence of incitement would be accepted: ‘In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.’⁷ It would appear that the Court was suggesting that state responsibility would require clear evidence such as specific speeches or official documents, authored by a duly authorized government official, specifically inciting the citizenry to commit genocidal acts. If such facts were presented to the ICJ in a future case, it would appear that the court would be hard pressed to deny state responsibility for incitement.⁸

¹ See generally, Articles I and V of the Genocide Convention. See also A. Cassese, *International Law* (2nd edn., Oxford University Press, 2005), 443 (Convention considers genocide ‘an international delinquency entailing the responsibility of the State whose authorities engage in, or otherwise participate in the commission of genocide’).

² ICJ, Judgment, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ Reports (2007) (hereinafter: ICJ 2007 Judgment), § 417.

³ ICJ 2007 Judgment, cit. *supra* note 2, , § 417.

⁴ *Ibid.*, § 417.

⁵ *Ibid.*

⁶ *Ibid.*, §§ 385–412.

⁷ *Ibid.*, § 417.

⁸ The Court was applying the International Law Commission’s (ILC) Articles on State Responsibility. See ICJ 2007 Judgment, cit. *supra* note 2, § 414.

The conclusion reached by the Court, however, was heavily criticized by scholars, as well as the one dissenting judge in the case, Judge Al-Khasawneh.⁹ Judge Al-Khasawneh referred in his dissent to ‘massive and compelling evidence’ of Serbian governmental involvement. Furthermore, he specifically noted that had the majority employed a different methodology for considering the evidence, then Serbian responsibility for conspiracy or incitement to commit genocide would have been established:

This implies that the charge that genocide took place also in other parts of Bosnia and Herzegovina and that the FRY was responsible not only for its failure to prevent genocide but for being actively involved in it either as a principal or alternatively as an accomplice or by way of conspiracy or incitement would in all probability have been proven had the Court not adopted the methodology discussed below.¹⁰

As for methodology, Al-Khasawneh noted that the Court only received redacted copies of the most crucial documents and did not demand unredacted copies of the material. Furthermore, the Court was free to draw an adverse inference from Serbia’s failure to provide the information, in accordance with Article 49 of the ICJ Statute, even to the point of assuming that the documents were totally adverse to the position taken by the Serbian government.¹¹ The dissent also faulted the majority for its application of the effective-control test, and that the court should have recognized that, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber did in *Čelebići*, that:

the ‘overall control’ test could thus be fulfilled even if the armed forces acting on behalf of the ‘controlling state’ had autonomous choices of means and tactics although participating in a common strategy along with the controlling State.¹²

According to the dissent, this view is also supported by the ICTY *Tadić* opinion, in which the Appeals Chamber believed that it was applying basic principles of international law regarding attribution of state responsibility (not just rules of international humanitarian law).¹³ Had these methodological points been addressed, the Court might have found sufficient evidence of state responsibility for conspiracy and incitement to commit genocide.

⁹ See Dissenting Opinion of Vice-President Al-Khasawneh, § 3.

¹⁰ See Dissenting Opinion of Vice-President Al-Khasawneh, § 31.

¹¹ Al-Khasawneh argued that this would have been consistent with the *Corfu Channel Case* where the court noted that ‘[b]y reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.’ See Judgment, *Corfu Channel (United Kingdom v. Albania)*, ICJ Reports (1949), 18, cited in the ICJ 2007 Judgment, cit. *supra* note 2, Dissenting Opinion of Vice-President Al-Khasawneh, § 35.

¹² ICTY, Judgment, *Prosecutor v. Delalić*, Appeals Chamber, 20 February 2001, § 47.

¹³ See Dissenting Opinion of Vice-President Al-Khasawneh, § 38, citing ICTY Judgment, *Prosecutor v. Tadić*, 15 July 1999, Appeals Chamber, § 98 (whether the Federal Republic of Yugoslavia (FRY) was responsible for the acts of the VRS (Army of the Republika Srpska) under rules of attribution under international law).

3. State Responsibility for Attempt to Commit Genocide

There is little positive law regarding state responsibility for attempted genocide. Given that, according to the interpretation of the ICJ, the Genocide Convention contemplates state responsibility for genocide and that punishable acts of genocide are defined under Article III to include attempts, there is no reason that state responsibility would not attach in cases of attempted genocide. However, as in individual responsibility for attempt to commit genocide, there is some confusion over the exact contours of the ‘attempt’ element of the crime. Under criminal law, attempts generally require an intention to commit the crime, an act requirement, and incompleteness that stems from an outside factor (as opposed to a defendant’s abandonment of the crime, which is therefore a defence). However, the crime of genocide already includes an aspect of incompleteness, since the crime does not require the *actual* destruction of a protected group, but merely requires one of the predicate acts contained in Article II of the Convention (e.g. killing members of the group, etc.) performed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’ So it is unclear whether ‘attempt to commit genocide’ involves a completed predicate act that fails to generate a successful genocide or whether it involves a frustrated predicate act, such as an attempted killing performed with genocidal intent. The former would appear to be unnecessary as a separate crime because it would already be covered by crime of genocide proper, while the latter interpretation might stand in some tension with the plain meaning of Article II, which requires completed acts such as a (presumably completed) ‘killing’. The Genocide Convention specifically prohibits attempt to commit genocide in Article III(d), but includes no definition.¹⁴

The ICJ decision in the *Bosnian Genocide* case did not directly address the crime of attempted genocide. In its original submissions to the court, Bosnia asked the ICJ to declare Serbia responsible for, inter alia:

destroying in part, and *attempting to destroy* in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population . . .¹⁵

The second count also included a reference to attempts:

That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide¹⁶

¹⁴ For a complete analysis of this issue, see Chapter 17 of this volume.

¹⁵ ICJ 2007 Judgment, *supra* note 2, § 65 (emphasis added). ¹⁶ *Ibid.*

Strangely, though, Bosnia's final submissions in the case included no mention of attempt whatsoever, for no apparent reason.¹⁷ Consequently, the court refused to directly resolve the question.

Nonetheless, the Court's conclusions of law may be scrutinized to shed light on this issue. First, the allegations in the final submissions still included aspects of attempt. For example, the court noted:

Article II (c) of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.¹⁸

Although not attempt to commit genocide per se, this is a perfect example of conceptual confusion over whether attempt to commit genocide involves an incomplete predicate act or an incomplete genocide. The above allegation that Bosnian Serb forces 'attempted to deport and expel the protected group from the areas' appears to suggest an incomplete predicate act. However, in the very next sentence, the Court shifts to a Serb attempt 'to eradicate all traces of the culture of the protected group', which suggests not an incomplete predicate act but a larger incomplete program of cultural genocide. Both interpretations of the crime of attempt appear in close succession in this single paragraph, without the Court's apparent awareness of the possible theoretical implications for either criminal law theory or the practical implications for developing the correct elements of the charge in order to determine liability.

In evaluating this legal allegation of so-called 'cultural genocide', the concept of attempt figured prominently in the court's analysis. The ICJ noted that Bosnia:

claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in "an attempt to wipe out the traces of their very existence".¹⁹

¹⁷ *Ibid.*, § 416 ("The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to commit genocide (Art. III, para. (b)), direct and public incitement to commit genocide (Art. III, para. (c)), attempt to commit genocide (Art. III, para. (d))—though no claim is made under this head in the Applicant's final submissions in the present case—and complicity in genocide (Art. III, para. (e)). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent's responsibility in the commission of the genocide itself.")

¹⁸ ICJ 2007 Judgment, *supra* note 2, § 320.

¹⁹ *Ibid.*, § 335.

However, the court concluded that cultural genocide was not covered by the express terms of the Genocide Convention because:

the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention.²⁰

The Court also noted that the concept was not supported by the preparatory work of the Convention.²¹

That being said, the ICJ did explicitly declare that state responsibility for attempted genocide was not possible in situations where the state was already responsible for a completed genocide. It is unclear why the court felt entitled to make this doctrinal pronouncement, since it explicitly declined to consider Bosnia's original allegation that Serbia should be held responsible under the Genocide Convention for attempt to commit genocide. Nonetheless, the ICJ concluded that it would be 'untenable both logically and legally' to hold a state responsible for both genocide and one of the other modes, including attempt, complicity, or conspiracy to commit genocide. This conclusion is consistent with the criminal law doctrine of merger, whereby crimes of attempt merge into their completed analogues.²² (Otherwise, every defendant convicted of a completed offence would be guilty, *by definition*, of the attempted offence). Although this analysis seems obvious, it does reveal something crucial: that the ICJ regards attempted genocide as dealing with the overall crime, not the underlying criminal act. It is, for example, entirely possible to imagine a situation where an overall genocide occurs, but of the underlying acts, some are completed (leading to the overall genocide) while others are not, and the legal question stemming from such a scenario would be which of the underlying actions give rise to state responsibility. But, on the contrary, the ICJ appears to have understood attempt to commit genocide as applying only to those situations where an overall genocide never happens. Unfortunately, the court never listed the elements of attempt to commit genocide and how they differ from genocide proper.

4. Concluding Remarks

Now that the ICJ has made its first determinations regarding state responsibility for genocide under the Convention, it is highly likely that more cases will follow.

²⁰ *Ibid.*, § 344.

²¹ *Ibid.*, citing *Report of the International Law Commission on the work of its Forty-eighth Session, Yearbook of the International Law Commission* (1996), Vol. II, Part Two, pp 45–6, § 12.

²² That being the case, many common law jurisdictions reject the doctrine of merger for conspiracy, thus allowing defendants to be charged both with a completed offence and conspiracy to commit the offence, and to receive consecutive sentences for each.

It only took sixty years for this to happen. Future litigants before the court are now likely to pursue as many legal theories as possible to increase their likelihood of success; one can therefore hope that the issues of attempt, conspiracy, and incitement to commit genocide will be explicitly litigated before the ICJ and that the Court will offer a definitive and clear pronouncement on these issues. The question for the next century of international law is whether the Court might hold a state responsible for attempt, conspiracy, or incitement to commit genocide, even in the absence of liability for genocide proper. The very possibility raises the stakes for international legal disputes.