

8-15-2010

Counterfeit Conspiracy: The Misapplication of Conspiracy as a Substantive Crime in International Law

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Cornell Law School Graduate Student Papers. Paper 24.
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COUNTERFEIT CONSPIRACY:
THE MISAPPLICATION OF CONSPIRACY AS A
SUBSTANTIVE CRIME IN INTERNATIONAL LAW

*Taylor Reeves Dalton**

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I. INTRODUCTION

In the International Criminal Tribunal for Rwanda (ICTR) case *Prosecutor v. Musema*, the trial chamber held that an individual can be found guilty solely for the crime of conspiracy to commit genocide even if no genocide takes place.¹ The trial chamber found its jurisdiction to punish the crime of conspiracy under its establishing statute, but looks almost exclusively at national legal traditions to determine its content.² It cites no other international law supporting its decision to incorporate domestic concepts into the crime. In contrast, the Rome Statute of the International Criminal Court, which relatively recently entered into

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¹ *Prosecutor v. Musema*, TJ, ¶194.

² *See Id.* at ¶¶ 186-191, 196-198, & 939.

force, seems to have intentionally dropped the crime of conspiracy to commit genocide from its list of crimes under its jurisdiction.³ This legal and conceptual discord raises the question of whether conspiracy is actually a legitimate substantive international crime, and whether tribunals should continue to apply it.

Confusion over the status of conspiracy in international criminal law may stem from the interplay between *jus ad bellum* and *jus in bello*. Conspiracy was most prominently addressed during the Nuremberg Trials where it was paired with the crime of aggression.⁴ The crime of aggression falls under *jus ad bellum*. War crimes, like genocide and crimes against humanity, fall under the category of *jus in bello*. However, the true issue threatening the legitimacy of international criminal law is not the confusion of what type of law conspiracy should fall under, but whether conspiracy should be made a substantive crime at all. The divergent views of the common law and civil law traditions are evidence that there the crime is not universal and would be foreign to apply one conception to the other. Not respecting this difference would threaten the legitimacy of the entire program.

This paper will attempt to demonstrate that there is no firm foundation in international criminal law to support conspiracy as a substantive crime that can stand alone. In Part II, the problem regarding conspiracy as a part of international criminal law will be presented, particular through the ICTR cases of *Musema* and *Nahimana* which will frame the analysis. Each of those cases claimed that a substantive crime of conspiracy existed in international law without much discussion of its source or content. Next in Part III, a general outline of the concept of inchoate crimes will be presented along with some general concepts that are at the core of the theory of conspiracy. Most of the work in this discussion will be done in Part IV where possible sources of a substantive crime of conspiracy in international criminal law will be searched for. Different sources of international criminal law will be presented and possible sources of a substantive crime of conspiracy will be highlighted. Finally, in Part V this paper will analyze the most pertinent sources presented in Part IV and assess whether a substantive crime of conspiracy actually exists and whether such claims as those in the ICTR cases are valid. The ultimate goal of this inquiry is to reveal and critique the muddled and haphazard way that courts have applied legal principles to international criminal law.

³ See *infra* Part IV(b)(iii).

⁴ See *infra*, Part IV(d)(i).

II. PROBLEM: IS THERE A SUBSTANTIVE CRIME OF CONSPIRACY?

George Fletcher distinguishes three branches of law that are associated with conspiracy—two of which have been accepted in international law.⁵ The first branch he calls the “Nuremberg version,” which holds that the collective planning, preparing, initiating, and waging of aggressive war is a punishable offense under international law.⁶ In the second branch he finds conspiracy as a component of the complicity in the commission of a substantive crime.⁷ These two branches of law, conspiracy as related to the crime of aggression and as a mode of liability, have been accepted in international criminal law.⁸ With the third branch we get to the problem; the third branch is the substantive crime of conspiracy as it is found in the United States. Fletcher argues that this branch of law has not been adopted in international law. The status of the concept of conspiracy is unclear and was most explicitly applied in the ICTR.

a. *ICTR Cases*

Alfred Musema, a director of a state-owned tea factory, was alleged to have played a crucial role in the Rwandan genocide. In *Prosecutor v. Musema*, an ICTR trial court held that conspiracy to commit genocide should be defined as an agreement between a group to commit genocide.⁹ The trial court found that the required intent for the substantive crime of conspiracy to commit genocide is the same intent required for the crime of genocide, namely the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such.¹⁰ The trial court states, “It emerges from this definition that, as far as the crime of conspiracy to commit genocide is concerned, it is, indeed, the act of conspiracy itself, in other words, the process (“*procédé*”) of conspiracy, which is punishable and not its result.”¹¹ The trial chamber went on to state that a crime of conspiracy to commit genocide can stand alone even if no genocide took place.¹² However, the tribunal noted that if the genocide did occur, the individual could not be convicted of

⁵ George P. Fletcher, *Amicus Curiae Brief Hamdan v. Rumsfeld* at 7-9 (2006) [hereinafter Fletcher Brief].

⁶ See *infra* Part V(d); Fletcher Brief *supra* note 5, at 7-8.

⁷ See *infra* Part V(d); Fletcher Brief *supra* note 5, at 8.

⁸ Fletcher Brief *supra* note 5, at 7-8.

⁹ *Musema*, TJ, ¶ 191.

¹⁰ *Id.* at ¶ 192.

¹¹ *Id.* at ¶ 193.

¹² *Id.* at ¶ 194.

both a conspiracy to commit genocide and genocide itself.¹³ The defendant would simply be convicted of the crime of genocide and punishment for conspiring would be consumed by the substantive crime.

In coming to this conclusion, the *Musema* trial chamber looked to the differences in civil and common law jurisdictions to determine the content of the crime of conspiracy to commit genocide.¹⁴ The court first appropriated the common law *actus reus* elements for conspiracy.¹⁵ It then rejected the common law principle that a defendant can be convicted of both conspiracy and the substantive crime, in favor of the civil law tradition that once the object crime is committed then there is no reason to punish the defendant for his *résolution criminelle* or criminal intent.¹⁶ This cherry picking of doctrines does not follow any rubric and is in essence arbitrary. They cite to no guiding principles in international law to legitimize their adoption of various aspects of domestic legal systems. In addition the charge of conspiracy is supported by the same set of facts as the object crime of genocide.¹⁷ Ultimately, the trial chamber found that the prosecutor failed show sufficient evidence of an agreement to commit genocide.¹⁸ It is arguable that the trial chamber's real reason for dismissing the conspiracy charge was because it had enough evidence to convict Musema of the substantive crime of genocide.¹⁹ This reasoning extends into another ICTR case that looks to U.S. legal theory to determine the substance of the crime of conspiracy.

In *Nahimana and others*, the ICTR trial court expanded on the ideas touched on by the *Musema* court.²⁰ Ferdinand Nahimana was a co-founder of the radio station Radio Télévision Libre des Mille Collines (RTLM). During the Rawandan genocide, the radio station broadcast information and propaganda that was key in the coordination and incitement of the killing of Tutsis. Nahimana was convicted for not doing anything by using his influence to stop the radio broadcasts. In the trial court, Nahimana was found guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and

¹³ *Id.* at ¶ 198.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 191.

¹⁶ *Id.* at ¶¶ 196-98.

¹⁷ *Id.* at ¶ 937.

¹⁸ *Id.* at ¶ 940.

¹⁹ *Id.* at ¶ 941; *see also* ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW 183 (2008).

²⁰ *Nahimana and others*, AJ, ¶ 1048.

crimes against humanity, and he was sentenced to life imprisonment.

The Appeals Chamber reversed the trial court's conspiracy conviction that was based on an inference of an agreement. It reiterates the components of the crime of conspiracy to commit genocide as consisting of the existence of an agreement between individuals to commit genocide—*actus reus*, and the intent to destroy in whole or in part national, ethnical, racial or religious group as such—*mens rea*.²¹ The court notes that an agreement can be inferred from circumstantial evidence as long as a conspiracy to commit genocide is the only reasonable inference that can be made based on the evidence.²² “Concerted” and “coordinated” action of a group can constitute circumstantial evidence.²³ The Appeals Chamber specifically looked to U.S. case law in determining whether a tacit agreement satisfies the *actus reus* requirement.²⁴ The appellate body found that a reasonable trier of fact could not have found that, based on the evidence presented, an inference of an agreement to commit conspiracy was the only reasonable inference to be drawn.²⁵ The ICTR has therefore held that conspiracy to commit genocide is a substantive crime that stands alone.²⁶ This holding and the content of the holding seem to clash with general principles of international criminal law.

III. INCHOATE CRIME THEORY AND CONSPIRACY

A substantive crime of conspiracy is considered to be an inchoate crime. An inchoate crime is especially an incomplete crime, i.e. a crime committed in the course of perpetrating or planning another crime.²⁷ This other, “failed” crime is called the *object crime* of the conspiracy. The rationale behind criminalizing inchoate crimes is the idea that the acts leading up to a crime were steps taken in an effort to do something illegal, regardless of whether the perpetrator was caught before the actual crime was committed or not. The seemingly benign acts are not actually so innocent. There is thus a hope that criminalizing the acts leading up to a crime will have a deterrence effect on society as a whole.²⁸

²¹ *Id.* at ¶ 894.

²² *Id.* at ¶ 896.

²³ *Id.* at ¶ 897.

²⁴ *Id.* at ¶ 898 (citing *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975)).

²⁵ *Id.* at ¶ 912.

²⁶ *Musema*, TJ, ¶ 194; *Nahimana and others*, AJ, ¶ 1044.

²⁷ DAVID LUBAN, JULIE R. O’SULLIVAN, AND DAVID P. STEWART, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 188 (2010).

²⁸ *See United States v. Feola*, 420 U.S. 671, 693-94 (1975).

Conspiracy is inherently a group crime requiring collective action. The basis of the crime is the *agreement* by a group to commit a crime.²⁹ The *mens rea* element of the crimes requires that each member of the conspiracy must have knowledge of the facts making up the crime the group intends to commit and the intent to carry out the plan.³⁰ The crime is almost exclusively found in common law legal systems. Civil law systems shy away from these types of inchoate crimes.

IV. IF IT EXISTED, WHAT IS ITS SOURCE?

The sources of international law, and similarly international criminal law, have been listed in Article 38 of the 1945 Statute of the International Court of Justice. The list provides for four main sources of international law: international custom; international conventions and treaties; general principles of law recognized by civilized nations; and “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”³¹ The resolutions of international organizations like the Security Council are also form a part of international law. Treaty law and customary law are thought to be of equal validity in that new custom can supersede old treaties, and new treaties can supersede existing custom. In addition, both function as a source for the other, e.g. treaty law can “codify” pre-existing custom or give rise to new customary norms. An example of the interplay between treaty law and custom is the Vienna Convention on the Law of Treaties, which clarified and crystallized existing customary law. When a treaty’s provisions are regarded as a part of customary law, those provisions are generally applicable to non-parties to the treaty. Here, this paper will explore the different sources of international law for a foundation for a substantive crime of conspiracy.

a. *Customary International Law*

Simply, customary international law is formed by consistent state practice combined with *opinio juris* or a sense of legal obligation that the consistent state practice is required. State practice is found by looking to the practice of the international community and assessing whether there is sufficient consistency, although absolute uniformity is not necessary. The practices of the states most likely to be affected are the most relevant. The

²⁹ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 227 (2d ed. 2008).

³⁰ *Id.*

³¹ Statute of the International Court of Justice, art. 38(1) (1946).

relevant state practice must be carried out as being required by a legal obligation.³² Evidence of a sense of legal obligation can be found in the negative response by the international community to deviations in state practice. The strongest form of international law is a form of customary law called *jus cogens*. *Jus cogens* is a preemptory norm that supersedes all other sources of international law and binds all states regardless of objection.³³ Most of the main international crimes, e.g. crime of aggressive war, crimes against humanity, and genocide, make up *jus cogens*, as well as prohibitions on apartheid, slavery, and torture.

The most prominent source of international criminal law is the law of war. The law of war pre-dates World War II and was primarily made up of customary law. It has slowly been codified by a series of conventions and treaties that crystallize its provisions. There does not seem to be any custom in the international realm for holding an individual liable for the substantive crime of conspiracy. Individuals were not generally held liable under international law until very recently; international law primarily dealt with states. Thus, the customary law of war most likely did not have any provision for conspiracy at the international criminal level. Other sources that evidence customary law are United Nations General Assembly Resolutions. These resolutions often evidence *opinio juris* that can be coupled with state practice. There is a resolution in particular that “codifies” the principles in the Nuremberg trials, which is discussed below.³⁴ The resolution may evidence custom, but it is particularly narrow and may not comport with state practice as between civil and common-law countries.

b. *Treaty Law*

Treaty law serves as an explicit source of international law and functions much like either a contract or legislation. Treaty law is a major source of obligations and rights and is often the most explicit and clear form of international law. There are a number of treaty regimes and conventions that specifically deal with international criminal law and the role of conspiracy within that law. The following are a few of the most relevant treaty regimes that address or might address the concept of conspiracy in international law.

³² See *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ Reports 4 at 44 (1969).

³³ See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 art. 53 (1969).

³⁴ See *infra* Part IV(d)(i).

i. *Laws of War*

The laws of war are primarily composed of a number of multi-lateral treaties. The two main treaties regimes are the Geneva and the Hague Conventions. The 1949 Geneva Conventions do not refer to conspiracy as a crime in its contemplation of having individual states enforcing the “grave breaches” through domestic proceedings.³⁵ Therefore, as mentioned above the laws of war do not explicitly contain a substantive crime.³⁶

ii. *Genocide Convention*

The Genocide Convention is the convention or treaty with most prominent use of conspiracy as a substantive crime. The Genocide Convention includes the charge of conspiracy as a direct response to Nazis Germany’s actions against the Jewish population. Article 3 of the Convention states:

The following acts shall be punishable:

- (a) Genocide;
- (b) *Conspiracy to commit genocide*;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.³⁷

The Convention makes explicit the crime of conspiracy to commit genocide and this explicit proclamation is a direct result of the drafters’ abhorrence for genocide and desire to criminalize even the planning a genocide. Many of the provision in the Genocide Convention have become a part of customary law, and it is possible that article 3 cited above has become a part of customary law since it has been adopted in the statutes establishing the International Criminal Tribunal for the former Yugoslavia

³⁵ See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War (Aug. 12, 1949) art. 129-30, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

³⁶ See *infra* Part IV(a).

³⁷ Convention on the Prevention and Punishment of the Crime of Genocide, (Dec. 9, 1948) art. 3 (emphasis added) [hereinafter Genocide Convention].

(ICTY) and the ICTR—although it was not adopted in the International Criminal Court (ICC).³⁸

iii. *Statutes Establishing the International Tribunals and Courts*

The various statutes that establish the *ad hoc* tribunals and the International Criminal Court (ICC) are also a place to look for the concept of conspiracy as a substantive crime. These statutes were either created through Security Council resolutions or through the multi-lateral treaty process, and are based on existing international law.

The 1945 London Charter of the International Military Tribunal is the statute that gives the Nuremberg tribunal jurisdiction over various crimes that include a conspiracy component. Article 6 of the London Charter provided the jurisdiction of the tribunal and enumerated crimes against peace, war crimes, and crimes against humanity as acts falling within the jurisdiction of the court.³⁹ Article 6 goes on to state: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”⁴⁰ The purpose of this phrase was to allow the tribunal to reach back to pre-war acts committed against German Jews in the years from 1933 to 1939.

This type of conspiracy principle was inserted by U.S. lawyer Murray Bernays who thought that the entire Nazis party should be treated as a gang of criminals who seized the government in Germany and used the power of the state as a tool to carry out their illegitimate ends. Both French and Russia delegates at the London debates disagreed with the concept because the civil law countries do not have a similar concept. They were particularly abhorred by the fact that each individual would be responsible for all acts committed by the group simply through an agreement and nothing else. This extended form of liability would mean that one lowly Nazis guard would be responsible for millions of murders.

Later, both major *ad hoc* tribunals established in the 1990s would have the crime of conspiracy incorporated into their jurisdiction under the crime of genocide. The statutes establishing these tribunals and courts include jurisdiction over violations of the

³⁸ CASSESE *supra* note 29, at 228.

³⁹ Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 284, art. 6. [hereinafter Nuremberg Charter]

⁴⁰ *Id.*

law of war. The Statute of the International Criminal Tribunal for the former Yugoslavia states that “conspiracy to commit genocide” is a crime within the tribunal’s jurisdiction.⁴¹ The Statute of the International Criminal Tribunal for Rwanda provides for the same exact crime⁴²—both being derived from the Genocide Convention.⁴³ The Statute of the Special Court for Sierra Leone, establishing a court to try individuals for war crimes who involved in the Sierra Leone Civil War, provides that “[a] person 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 shall be individually responsible for the crime.”⁴⁴ Crimes falling under that court’s jurisdiction include crimes against humanity⁴⁵ and violations of the Geneva Conventions;⁴⁶ however, the statute does not provide for jurisdiction over the crime of genocide or conspiracy to commit genocide explicitly.

The Rome Statute,⁴⁷ which establishes the International Criminal Court, adopted every part of the Genocide Convention, except for the part regarding conspiracy.⁴⁸ Article 6 of the Rome Statute eliminates the conspiracy prong of the crime of genocide:

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:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life

⁴¹ Statute of the International Criminal Tribunal for the former Yugoslavia (May 25, 1993), art. 4(3)(b) 32 I.L.M. 1192 (ICTY Statute).

⁴² Statute of the International Criminal Tribunal for Rwanda (Nov. 8, 1994), art. 2(3)(b) 33 I.L.M. 1598 (ICTR Statute).

⁴³ *See supra* Part IV(b)(ii).

⁴⁴ Statute of the Special Court for Sierra Leone, (Jan. 16, 2002) art. 6(1) (SCLC Statute).

⁴⁵ *Id.* at art. 2.

⁴⁶ *Id.* at art. 3.

⁴⁷ Rome Statute of the International Criminal Court (July 17, 1998) 37 I.L.M. 999 (Rome Statute).

⁴⁸ Antonio Cassese, *Genocide* in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 335, 347 (eds. Cassese, Gaeta & Jones, 2002).

calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.⁴⁹

This omission is likely a signal that the drafters did not think it prudent to include conspiracy. The signal may be pointing to the fact the drafters did and do not consider a substantive crime of conspiracy as being a part of international criminal law. This recent omission in the creation of a new legal regime raises the issue to a new level.

c. General Principles of Law: Domestic Law

Courts can use general principles of law to fill gaps in international law that will help make sense of the entire legal schema. General principles of law carry less weight and are quite controversial in international law because of their uncertain status. There is a strong preference for treaty and customary law because they are thought to better capture the spirit of the law most consented to by most nations. If international law, through treaties or custom, fails to provide an appropriate standard or guide for a court, then a court may look to the domestic legal systems for guidance in determining appropriate standards. In the case of international conspiracy, there has been much focus on the domestic approaches to conspiracy, especially the differences between the common and civil law traditions.

Many international courts and commentators look to the United States' legal system for guidance or a reference point. In the United States, conspiracy is a substantive crime in addition to being a mode of liability.⁵⁰ The United States federal code in, 18 U.S.C. §371, provides for three basic elements for the crime of conspiracy. There are other conspiracy statutes in the federal code,⁵¹ but this one best outlines the main elements. These elements include; an agreement to achieve an unlawful objective

⁴⁹ Rome Statute, art 6.

⁵⁰ See Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 118-19 (2005).

⁵¹ See 21 U.S.C. §§846 and 963. "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id.*

must exist, the defendant must knowingly and voluntarily participate in the conspiracy, and there needs to be an overt act committed in furtherance of the conspiracy.⁵² However, many statutes, both federal and state, and the common law omit the overt act requirement.⁵³ The first element is usually considered the plurality requirement and the third element, the overt act requirement. It is this third requirement that distinguishes the crime of conspiracy from the mere discussion of a crime under federal law. It is taking the thoughts and putting them into action. That simple act condemns the whole group, even if others in the conspiracy do nothing. To avoid liability, a conspirator must take active steps to get out of the conspiracy, but that may not be enough. If the group succeeds in committing the object crime, they can still be charged with conspiracy as a substantive crime in addition to being charged with the object crime.⁵⁴ Thus, conspiracy does not combine with the object crime to create one substantive crime, but remains its own crime.

As a mode of liability, conspiracy can be used to convict a defendant for the substantive crimes of the defendant's co-conspirators. Shortly after the adoption of the Nuremberg Charter, the U.S. Supreme Court incorporated conspiracy as a mode of liability into federal criminal law. *Pinkerton v. United States*⁵⁵ held that each conspirator is responsible for all reasonably foreseeable crimes committed by the group in the furtherance of the conspiracy. This form of responsibility is known as "*Pinkerton* Liability." Under *Pinkerton* liability, a large conspiracy with many acts going on in different places can produce a large number of crimes that an individual is liable for. Prosecutors in the U.S. use conspiracy as a powerful weapon to leverage and convict defendants in criminal organizations, providing many substantive and procedural advantages.⁵⁶ *Pinkerton* liability is very broad and captures all the members of the conspiracy without differentiating the level of participation in the furtherance of the plan. *Pinkerton* liability is not a part of many U.S. state jurisdictions, the Model Penal Code, and civil law jurisdictions.⁵⁷ The third category of the joint criminal enterprise doctrine is similar to this form of liability, but a wholly separate mode of liability.⁵⁸ The doctrine of joint

⁵² *United States v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986).

⁵³ See, e.g., 21 U.S.C. §§846 and 963

⁵⁴ *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

⁵⁵ 328 U.S. 640, 647 (1946).

⁵⁶ See LUBAN, ET AL. *supra* note 27, at 519 for a list of advantages conspiracy provides for federal prosecutors in the U.S.

⁵⁷ LUBAN, ET AL. *supra* note 27, at 880.

⁵⁸ See Fletcher Brief *supra* note 5, at 7 ("[T]he international doctrine of 'joint criminal enterprise,' [. . .] has nothing to do with crime of conspiratorial agreement.").

criminal enterprise is different from *Pinkerton* liability in that it does not impose automatically, and generally apply, liability to all members of the group.⁵⁹ It requires a case-by-case analysis of the participation of each member of the group.⁶⁰

The civil law tradition, especially in continental Europe, does not include the substantive crime of conspiracy. An illustrative example of a civil law approach is the 1930 Italian Penal Code that states, “So far as the law does not provide to the contrary, if two or more persons agree to commit a criminal act and the act is not committed, no one may be punished for the simple fact of the agreement.”⁶¹ The *Musema* court claimed to have found a comparable concept to conspiracy called *complot* in the civil law tradition; however, this claim seems dubious.⁶² It is well settled that civil law systems do not favor an inchoate crimes like the Anglo-American style conspiracy doctrine.

d. *Judicial Decisions*

Judicial decisions can also be a source for international law, although they are somewhat secondary to both custom and treaty law. For instance, the Statute for the International Court of Justice states that the Court’s decisions do not have precedential effect.⁶³ Judicial law at the international level most closely reflects a civil law tradition, rather than a common law tradition with precedent. International courts and tribunals have limited jurisdiction as defined in their founding charters or statutes. They are generally considered to be lacking the power to create new law to fill gaps in international law—although using the various sources of international law creatively would allow a court to deal with ambiguities. Only the most relevant international court decisions pertaining to the law of criminal conspiracy are presented here.

i. *International Military Tribunals*

In *United States v. Goering* the defendants were charged with “Crimes against Peace by the planning, preparation, initiation and waging of wars of aggression” and “War Crimes” and “Crimes against Humanity,” as well as “participating in the formulation or execution of a common plan or conspiracy to commit all these

⁵⁹ *Id.* at 21-22.

⁶⁰ *Id.*

⁶¹ Italian Penal Code § 115 (1930).

⁶² *See infra* Part V.

⁶³ Statute of the International Court of Justice, art. 59 (1946).

crimes.”⁶⁴ The court’s analysis contains references to both “conspiracy” and “common plan” to commit war crimes. The evidence presented by the prosecution was offered to support the charges of both conspiring and the common plan, as well as the charges of planning and waging war.⁶⁵ The scope of the conspiracy in this case spanned twenty-five years, beginning with the formation of the Nazis party—creating a huge class of possible defendants.⁶⁶ The court quotes the prosecution that states “any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal.”⁶⁷ It uses this expansive definition of the conspiracy to levy liability on a wide group of individuals and to deal with the problem of organizational responsibility.⁶⁸ Nonetheless, the court notes that the only substantive crime of conspiracy is that related to the crime of aggressive war.⁶⁹ Here, the defendants were charged with the crime of conspiracy even though the substantive crime, i.e. aggression, had occurred. This trial was not a case of a failed attempt at starting an illegal war where conspiracy stood alone.

The substantive law of Nuremberg was not considered genuine international crimes until 1950 when the U.N. General Assembly declared them to be universal principles of international law.⁷⁰ The only mention of conspiracy in the 1950 U.N. Nuremberg principles is the mention in relation to “crimes against peace:”

- (a) Crimes against peace:
 - (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
 - (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).⁷¹

⁶⁴ *United States v. Goering* (Sept. 30 1946) IMT, § 411 available at <http://avalon.law.yale.edu/imt/09-30-46.asp>.

⁶⁵ *Id.* at § 466.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ DAVID LUBAN, *LEGAL MODERNISM* 366 (1994).

⁶⁹ *Goering supra* note 64, at § 468.

⁷⁰ *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and Judgment of the Tribunal*, U.N. GAOR, 5th Sess. Supp. No. 12, U.N. Doc. A/1316 (July 29, 1950).

⁷¹ *Id.* at Principle VI(a).

Here the mention of conspiracy is probably as a mode of liability to the crime of aggression, not as a substantive crime on its own. No mention of conspiracy is found under later subsections outlining war crimes or crimes against humanity.

The form of liability that has arisen out of the IMT refers to the collective planning, preparing, initiating, and waging of aggressive war.⁷² George Fletcher analyzes the inclusion of conspiracy in the IMT as it applies to the crime of aggression as not adding anything to the substance of the crime.⁷³ He states that the crime of aggression is inherently a crime of collective action—an inherent conspiracy.⁷⁴ Conspiracy is not doing any of the work in the description and it is a redundant charge. Therefore, the substantive crime of conspiracy to commit a crime of aggression is only criminalized if the crime of aggression does not happen. Once the plan comes to fruition the crime of aggression absorbs the crime of conspiracy.⁷⁵

In the Tokyo Tribunal, the court found one defendant, foreign minister Shigemitsu, guilty of the crime of aggression, but acquitting him of conspiracy.⁷⁶ In another case, the tribunal found defendant ambassador Shiratori guilty of conspiracy and acquitted him of the crime of aggression.⁷⁷ The convictions were also tried in the context of a successful commencement of a war of aggression.

ii. *Ad Hoc Tribunals*

As described above in Part II, the ICTR in the *Muesma* and *Nahimana and others* cases have addressed the issue of criminal conspiracy as it pertains to the crime of genocide.⁷⁸ Another ICTR case where the concept of conspiracy was employed in the *Kambanda* case, where the same trial chamber as the one that heard the *Musema* case held that the defendant was guilty, after temporarily pleading guilty, of both genocide and conspiracy to commit genocide.⁷⁹ Jean Kambanda was the interim Prime Minister of Rwanda, and was accused of distributing weapons with the knowledge that they would be used in genocide. A similar result was reached in the *Niyitegeka* case where the defendant,

⁷² Fletcher Brief *supra* note 5, at 8.

⁷³ *Id.* at 14.

⁷⁴ *Id.*

⁷⁵ CASSESE *supra* note 29, at 161 & 228.

⁷⁶ *Id.* at 161.

⁷⁷ *Id.*

⁷⁸ See *supra* Part II.

⁷⁹ *Kambanda*

Minister of Information in the Interim Government and participant in attacks on Tutsi refugees, was found guilty of both crimes.⁸⁰

The ICTY has and is currently trying defendants for conspiracy to commit genocide. For instance Zdravko Tolimir, Assistant Commander for Intelligence and Security of the Bosnian Serb Army, is currently being tried for *inter alia* genocide and conspiracy to commit genocide for events that took place in Srebrenica.⁸¹ In addition, the trial chamber in *Prosecutor v. Popović et al.* is expected to render judgment on June 10, 2010, where four defendants are charged with *inter alia* genocide and conspiracy to commit genocide.⁸² The charges allege that the men entered an agreement with others with the intent to kill and cause physical and mental harm to Muslims in Srebrenica, with the purpose to destroy, in part, a national, ethnic, racial, or religious group, as such.⁸³ The plan came to fruition in the Srebrenica Massacre which did actually take place in July 1995, resulting in thousands of deaths and the displacement of thousands refugees.⁸⁴ The court's analysis of the conspiracy charge will provide useful insight into its status in international criminal law.

Conspiracy has most often been used in the *ad hoc* tribunals as part of the conceptual development of a mode of liability in international criminal law. The Anglo-American concepts of conspiracy have been incorporated into the ICTY and ICTR and have been blended with the civilian doctrines of accomplice liability to create the doctrine of joint criminal enterprise.⁸⁵ The ICTY has discussed conspiracy as a mode of liability in comparison to joint criminal liability, for example in the *Milutinović* case where Dragoljub Ojdanić challenged the court's jurisdiction. The ICTY emphasizes that the two modes of liability are very different, stating: "while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise."⁸⁶ Ojdanić was charged both as a superior⁸⁷ and for planning, instigating, ordering, committing and otherwise aiding and abetting in the planning, preparation or

⁸⁰ *Niyitegeka*, TJ, ¶¶ 459, 480, 502.

⁸¹ *Zdravki Tolimir*, Case information Sheet, "Srebrenica" (IT-05-88/2) available at http://www.icty.org/x/cases/tolimir/cis/en/cis_tolimir_en.pdf.

⁸² *Popović et al.*, Case Information Sheet, "Srebrenica" (IT-05-88) available at http://www.icty.org/x/cases/popovic/cis/en/cis_popovic_al_en.pdf.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ LUBAN, ET AL. *supra* note 27, at 188.

⁸⁶ *Prosecutor v. Milutinovic et al.* (May 21, 2003) Case No. IT-99-37-AR72, ¶ 23 ("Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise")

⁸⁷ ICTY Statute, art. 7(3).

execution of those crimes.⁸⁸ Most of the ICTY cases address conspiracy as a mode of liability. The pending cases described above should be enlightening as to how this court treats conspiracy as a substantive crime.

iii. *Juridic Writings*

As a side note to the actual law described above, certain writings and draft laws may be helpful in interpreting the current state of international criminal law. The International Law Commission is charged with the “promotion of the progressive development of international law and its codification.”⁸⁹ The United Nations General Assembly established the Commission in 1948. The Commission has created a number of treaty regimes, including the Vienna Conventions, as well as creating the Rome Statute establishing the ICC. Article 2 of the International Law Commission’s Draft Code of Crimes states: “An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual: [. . .] [d]irectly participates in planning or conspiring to commit such a crime which in fact occurs.”⁹⁰ In this formulation, conspiracy is only punishable if the object crime “in fact occurs.” This would preclude conspiracy from being an inchoate crime that can stand alone; however, it seems to comport with the practice of past international courts.

V. ANALYSIS AND RESOLUTION

The use of conspiracy as an inchoate crime has varied over the decades and in the variously constituted courts; however, any use in international criminal law was likely impermissible and was a misapplication of the concept. Through surveying the various sources of the inchoate crime of conspiracy, it is clear that the theory is convoluted and there is much ambiguity as to its status. One main source of confusion is the conflation of conspiracy as a substantive crime and conspiracy as a mode of liability. As stated earlier, conspiracy as a mode of liability is most likely a part of criminal law. In those cases, the object crime must have been committed for liability to flow to the defendant. Nonetheless, a substantive crime of conspiracy most likely is not a part of international criminal law, or to the extent it is used by international tribunals, it is a misapplied and the tribunals are

⁸⁸ ICTY Statute, art. 7(1).

⁸⁹ “Establishment of an International Law Commission,” U.N. G.A. Res. 174(II) (Nov. 21 1947).

⁹⁰ Draft Code of Crimes Against the Peace and Security of Mankind, art. 2(3)(e) (1996).

acting *ultra vires*. Some commentators seem to think that the principles of conspiracy law are not existent in international law altogether.⁹¹ The disconnect between decisions in the ICTR and the Rome Statute omitting conspiracy from its jurisdiction, suggest that this problem had not been resolved and may persist into the future.

Examining the possible sources of a substantive crime of conspiracy produces various rationales for why there is no substantive crime of conspiracy in international criminal law. The first being the scarceness of the concept in international treaty law and in the statutes establishing the international courts and tribunals. Although many of the statutes establishing the international tribunals provide for a crime of conspiracy as related to a particularly heinous object crime, e.g. genocide and aggression, these principles are not given any substance by the statutes and the charge is rarely levied in cases where the object crime did not occur. In addition, the trend seems to be to move away from having a substantive crime of conspiracy in the statutes as is the case with the Rome Statute. Further, the crime of conspiracy is not likely a part of customary law because of the inconsistency of practice given the divergent positions of the civil and common law legal systems. Applying a principle that is rejected by most legal systems around the world seems to be unfair and violate the principle of *non crimen sine lege*.

The IMT seems to be the most prominent source for finding conspiracy in international law. However, as pointed out by commentators, the London Agreement of 1945 was created after the crimes had been committed.⁹² Thus any conviction of a conspiracy was used in the context of completed substantive crimes. No defendant in the Nuremberg IMT was convicted of conspiracy as a sole substantive crime.⁹³ This is a common trend in international criminal law. The use of conspiracy at Nuremberg was more for “shock value and [a] moral message.”⁹⁴

The Tokyo Tribunals and the ICTR seem to be the only courts to recognize the conspiracy as a substantive offense that can stand alone from the object crime. Although the Genocide Convention provides for a substantive crime of conspiracy, and the main tribunals have jurisdiction to try this crime, actually applying the principle may be a mistake. The content and substance of the crime is unclear and requires the courts to reach beyond established international law to attempt to deal with the foreign concept. In particular, the ICTR case law poses a number of

⁹¹ See LUBAN, ET AL. *supra* note 27, at 189 & 859.

⁹² CASSESE *supra* note 29, at 227.

⁹³ *Id.* at 161.

⁹⁴ See LUBAN, ET AL. *supra* note 27, at 366-370.

problems in applying the principle of conspiracy as a substantive crime.

In the midst of trying to determine the content of the crime of conspiracy the court engaged in questionable reasoning. First, the *Musema* court also strangely said it would adopt “the definition of conspiracy most favorable to *Musema*.”⁹⁵ Why would a court do this? What principle of law were they applying here? This seems arbitrary and has no clear basis in settled international law. In doing so, the *Musema* trial chamber conflated different concepts from common and civil law traditions. It purported to find common law concepts of conspiracy within the civil law tradition.⁹⁶ It claimed that the concept of *complot* as it exists in the civil law tradition is similar to the common law concept of conspiracy.⁹⁷ *Complot* is punishable with regard to extremely serious crimes like threatening state security.⁹⁸ The court presumably only seemed to be citing to French law.⁹⁹ Commentators of the court criticize its lack of citations to sources of the civil law concepts that it uses.¹⁰⁰ In addition the court has not been consistent in applying the principle. There is a conflict between the *Musema* court stating that an individual cannot be convicted of both conspiracy to commit genocide and genocide, and the *Kambanda* court that found a defendant guilty of both conspiracy and the object crime. This disconnect highlights the haphazard nature of the ICTR’s rulings.

The ICTY so far has resorted to the doctrine of joint criminal enterprise not an American style conspiracy charge in its cases; however, it will be interesting to see how the ICTY deals with the conspiracy charges in its pending cases. The doctrine of joint criminal enterprise seems better equipped to be employed by international courts and tribunals to extend liability. The doctrine incorporated elements of conspiracy into its definition. Involvement in a “common plan” under the doctrine of joint criminal enterprise is much broader than the mode of liability of conspiracy.

The United States Supreme Court has weighed in on whether there is an international substantive crime of conspiracy, particularly looking to the laws of war. The laws of war are the precursors to international criminal law and it is pertinent to discover whether the foundational principles of international criminal law contain such a substantive crime. In an *amicus curiae*

⁹⁵ *Musema*, TJ, ¶ 198.

⁹⁶ ZAHAR & SLUITER *supra* note 19, at 184.

⁹⁷ *Musema*, TJ, ¶ 186.

⁹⁸ *Id.*

⁹⁹ ZAHAR & SLUITER *supra* note 19, at 184.

¹⁰⁰ *Id.*

brief filed in the *Hamdan v. Rumsfeld*¹⁰¹ case, George Fletcher argued that the laws of war do not include the substantive crime of conspiracy.¹⁰² In that case, the defendant Hamdan was charged with conspiracy to commit acts of terrorism in a military commission. The commissions only have jurisdiction under the Uniform Code of Military Justice (UCMJ) for offences established by statute or by the law of war.¹⁰³ Since Congress had not granted military commission to try cases of conspiracy, the only head of jurisdiction available to the commissions would be the laws of war. Fletcher then goes through the development of the laws of war since the IMT and comes to the conclusion that the substantive crime of conspiracy is not a part of it. Fletcher claims that the substantive crime of conspiracy is neither found in international customary law or in treaty law governing the laws of war, especially pointing to the Geneva and Hague Conventions.¹⁰⁴ Justice Stevens writing for a plurality agrees with Fletcher and finds, through statute and common law, that conspiracy is not apart of the law of war, and thus the military commissions do not have jurisdiction to try Hamdan.¹⁰⁵ Nevertheless, the outcome of the case did not turn on this fact because Justice Kennedy did not join this part of Stevens's opinion, which made it a plurality.¹⁰⁶ George Fletcher describes the references to conspiracy in the Genocide Convention and the statutes of the ICTY and ICTR as "the afterglow of a dying concept."¹⁰⁷

The divergence in the approaches of the common law and the civil law systems creates a major problem in adopting conspiracy as a substantive crime, regardless of whether the contours of the crime are clearly defined. It is true that in most common law legal systems, the substantive crime of conspiracy exists; therefore, a group of individuals is guilty of a substantive offense as soon as they agree to commit a criminal act.¹⁰⁸ However, George Fletcher puts it simply, "[C]onspiracy is foreign to every legal system outside the English-speaking world."¹⁰⁹ Civil law countries use other legal devices to accomplish the same goals as the common law states do with the concept of conspiracy.¹¹⁰ Civil law, or civil law-like, countries constitute a

¹⁰¹ 548 U.S. 557 (2006).

¹⁰² Fletcher Brief *supra* note 5.

¹⁰³ 10 U.S.C. §821 (1998).

¹⁰⁴ Fletcher Brief *supra* note 5, at 10-13.

¹⁰⁵ *Hamdan*, 548 U.S. at 595-612 (J. Stevens opinion).

¹⁰⁶ *Hamdan*, 548 U.S. at 655 (J. Kennedy opinion).

¹⁰⁷ Fletcher Brief *supra* note 5, at 12.

¹⁰⁸ In some jurisdictions, more than a mere agreement is required. The legal system requires so act to further or commence the planned crime.

¹⁰⁹ Fletcher Brief *supra* note 5, at 15.

¹¹⁰ *See generally*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978).

substantial part of the world's legal systems. Most of South America, Africa, Asia, and almost all of Europe have civil law systems, including Rwanda, the former Yugoslavia, and Germany. The common law is primarily limited to English-speaking world.¹¹¹ This disparity should counsel against the adoption of a minority principle into international criminal law.

VI. CONCLUSION

After examining the jumble of sources for the concept of the substantive crime of conspiracy in international law, we have seen that the overlapping and sometimes contradictory norms create great confusion that is often exacerbated by the international courts and tribunals. Because it has been demonstrated that the existence of a substantive crime of conspiracy in international criminal law is dubious, and most likely wrong, courts should not employ it in their reasoning. This area is continuing to develop and the move taken by in the Rome Statute of removing the crime of conspiracy from its jurisdiction is a step in the right direction. International criminal law should best comport with the legal concepts that a majority of the world would expect to be bound under to remain a legitimate legal system.

¹¹¹ The common law is essentially only used in the British Commonwealth and the United States.