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Conspiracy to Commit Genocide and its Exclusion From the ICC Statute

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1. Introduction

The criminal classification 'conspiracy' may denote either a substantive crime or a mode of liability. As a substantive crime, it punishes the agreement of two or more persons to commit a crime, irrespective of whether the intended crime is committed or not.[1] It is generally recognized as a crime specific to the common law tradition. Conspiracy as a form of liability attributes responsibility to co-conspirators where the intended crime is committed.[2] It is included, for instance, in the Nuremberg Charter.[3]

Conspiracy to commit genocide was first set out in Article III of the 1948 Genocide Convention.[4] Experts drafting the text intended conspiracy to commit genocide to be an inchoate crime under Anglo-American law. It was adopted to punish the mere act of reaching an agreement to commit genocide, even when no "preparatory act" had taken place.[5] The low threshold of *actus reus* was set both in view of "the gravity of the crime of genocide and of the fact that in practice genocide is a collective crime, presupposing the collaboration of a greater or smaller number of persons".[6] During the subsequent discussion over the draft, a number of states that did not have the concept of conspiracy in their domestic law pointed out that the provision needed to be applied according to principles of each penal system.[7]

The Statute of the International Criminal Court ('ICC') adopts verbatim Article II of the Genocide Convention, which sets out the definition of genocide, but only partially incorporates Article III and excludes conspiracy to commit genocide. This is a marked difference from the statutes of the International Criminal Tribunals for the Former Yugoslavia ('ICTY') and Rwanda ('ICTR'), both of which include verbatim the text of Articles II and III.[8] ICTY and ICTR case law reinforces the concept of conspiracy to commit genocide as an independent crime. Nevertheless, a literal reading of 'conspiracy to commit genocide' would open to the interpretation that it is a mode of liability, as are the other punishable acts under Article III of the Genocide Convention. The subsequent discussion over the draft Genocide Convention also indicates a certain degree of reluctance among states to fully embrace conspiracy as an independent crime. Such reluctance re-emerged at international level during the negotiation of the ICC Statute.

Against the background of an analysis of how conspiracy to commit genocide has been applied before the ICTY and ICTR, this brief asks what could be the consequences for the ICC for lacking jurisdiction over such conspiracy. It concludes by addressing the implications for states that

1 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 196 (http://www.legal-tools.org/doc/235bac/); George P. Fletcher, *Amicus Curiae* Brief of Specialists in Conspiracy and International Law in Support of Petitioner in Hamdan v. Rumsfeld, 2006 WL 53979, p. 9 (http://www.legal-tools.org/doc/89ec56/).

2 Allison M. Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", in *California Law Review*, 2005, vol. 93, pp. 116-117 (http://www.legal-tools.org/doc/105b86/); Anna Sanders, "New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability After Sosa", in *Berkeley Journal of International Law*, 2010, vol. 28, no. 2, p. 624 (http://www.legal-tools.org/doc/2bc1d9/).

3 Charter of the International Military Tribunal, 8 August 1945 (http://www.legal-tools.org/doc/64ffdd/). The last paragraph of Article 6 reads: "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".

4 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (http://www.legal-tools.org/doc/498c38/).

5 UN Doc. E/447, p. 31.

6 UN Doc. E/794, p. 20.

7 UN Doc. A/C.6/SR.84, pp. 207–212.

8 Article 4, Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, S/RES/827 (http://www.legal-tools.org/doc/dc079b/); and Article 2, Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, S/RES/955 (http://www.legaltools.org/doc/8732d6/).

seek to import genocide into national criminal law. For the purposes of this brief, 'conspiracy to commit genocide' is used to indicate an independent crime unless otherwise specified.

2. Role of Conspiracy to Commit Genocide Before the ICTY and ICTR

2.1. Cumulative Convictions of Genocide and Conspiracy to Commit Genocide

According to settled jurisprudence of the ICTY and ICTR, conspiracy to commit genocide consists of an agreement between two or more persons to commit genocide. The individuals involved in the agreement must have the intent to destroy in whole or in part a national, ethnic, racial or religious group as such.[9] The dispute surrounding the subject, rather, is on why there is a need to convict for a crime of conspiracy where the substantive crime of genocide has been established. The prior agreement is often inferred from the subsequent co-ordinated manner of genocidal activities. The same acts serve as the basis for genocide conviction. The pertinent rule, as pronounced by the Čelebići Appeals Chamber, states that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.[10]

Genocide and conspiracy to commit genocide apparently have different objective elements, so convictions of both may be entered simultaneously under the Čelebići test. While the rule seems clear-cut, some trial chambers have rejected cumulative convictions by referring to the inchoate nature of conspiracy. According to the Musema Trial Chamber, the *travaux préparatoires* of the Genocide Convention showed that "the crime of conspiracy was included to punish acts which, in and of themselves, did not constitute genocide". The converse implication, said the Chamber, was that no purpose would be served in convicting an accused who had already been found guilty of genocide, for conspiracy to commit genocide on the basis of the same acts.[11] In Popović, the Trial Chamber held that the fundamental principle underlying the decision of multiple convictions was "one of fairness to the accused". It considered that with the crime of genocide already proven, the justification for punishing the prior conspiracy was "less compelling", in light of the "unique nature of the offence of conspiracy".[12]

The new issue raised in Popović was the relevancy of the genocide conviction through the mode of liability of joint criminal enterprise ('JCE'). When first invoking the JCE theory, the Tadić Appeals Chamber explained that "most of the time international crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design".[13] The objective side of JCE comprises three requirements: a plurality of persons; a common purpose which amounts to or involves the commission of a crime within the jurisdiction of the tribunal; and the accused's significant contribution to the crimes.[14] The ICTY Appeals Chamber, when comparing JCE and the crime of conspiracy, stated that "[w]hilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement".[15] In theory, where genocide is convicted through JCE, a conspiracy charge can almost certainly be proved. Such correlation was seen in Popović and later in Gatete.[16] In Popović, the Trial Chamber considered conviction of conspiracy alongside a JCE-based genocide conviction redundant and unfair to the accused, since the basis for both convictions was the accused's participation in an agreement to murder with the requisite intent.[17] The Gatete Trial Chamber referred to the Popović reasoning when rejecting cumulative convictions.[18]

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9 *Nahimana* v. Prosecutor, ICTR Case No. 99-52-A, Appeal Judgment, 28 November 2007, para. 894 (http://www.legal-tools.org/doc/04e4f9/).

10 Prosecutor v. *Delalić et al.*, ICTY Case No. IT-96-21-A, Appeal Judgment, 20 February 2001, para. 412 (http://www.legal-tools.org/doc/051554/).

11 Prosecutor v. *Musema*, ICTR Case No. 96-13-A, Trial Judgment, 27 January 2000, para. 198 (http://www.legal-tools.org/doc/6a3fce/).

12 Prosecutor v. *Popović et al.* ('Popović Trial Judgment') ICTY Case No. IT-05-88-T, Trial Judgment, 10 June 2010, paras. 2123–2124 (http://www.legal-tools.org/doc/481867/).

13 Prosecutor v. *Tadić* ('Tadić Appeal Judgment') ICTY Case No. IT-94-1-A, Appeal Judgment, 15 July 1999, para. 191 (http://www.legal-tools.org/doc/8efc3a/).

14 Prosecutor v. *Gatete* ('Gatete Trial Judgment') ICTR Case No. 2000-61-T, Trial Judgment, 31 March 2011, para. 577 (http://www.legal-tools.org/doc/f6c347/); Prosecutor v. *Brđanin*, ICTY Case No. IT-99-36-A, Appeal Judgment, 3 April 2007, para. 364 (http://www.legal-tools.org/doc/782cef/); Prosecutor v. *Kvočka et al.*, ICTY Case No. IT-98-30/1-A, 28 February 2005, Appeal Judgment, para. 96 (http://www.legal-tools.org/doc/006011/); Prosecutor v. *Ntakirutimana et al.*, ICTR Cases Nos. 96-17-A and 96-10-A, Appeal Judgment, 13 December 2004, para. 466 (http://www.legal-tools.org/doc/af07be/); Prosecutor v. *Vasiljević*, ICTY Case No. IT-98-32-A, Appeal Judgment, 25 February 2004, para. 100 (http://www.legal-tools.org/doc/e35d81/); Prosecutor v. *Krnojelac*, ICTY Case No. IT-97-25-A, 17 September 2003, Appeal Judgment, para. 31 (http://www.legal-tools.org/doc/46d2e5/).

15 Prosecutor v. *Milutinović et al.*, ICTY Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 23 (http://www.legal-tools.org/doc/d51c63/).

16 Popović Trial Judgment, paras. 1175, 1180, 1181 and 1184 (Popović), paras. 1302, 1319 and 1322 (Beara), see *supra* note 12; Gatete Trial Judgment, paras. 608 and 629, see *supra* note 14.

17 Popović Trial Judgment, para. 2125, see *supra* note 12.

18 Gatete Trial Judgment, paras. 660–662, see *supra* note 14.

On the other side of the spectrum, cumulative convictions were entered in several cases in straightforward application of the Čelebići test.[19] This approach was eventually endorsed by the Gatete Appeals Chamber which reiterated the principle that a trial chamber was "bound to enter convictions for all distinct crimes have been proven in order to fully reflect the criminality of the convicted person".[20] According to the Appeals Chamber, neither the inchoate nature of conspiracy, nor the fact that the substantive crime of genocide was established upon the doctrine of JCE, could justify exceptions to this principle. The Appeals Chamber found that cumulative convictions was in keeping with the purpose of the Genocide Convention since the drafters also intended to punish "the collaboration of a group of individuals resolved to commit genocide", which cannot be achieved by punishing perpetration of the crime of genocide alone.[21] The Appeals Chamber continued to point out that "the issue of cumulative convictions arises only between crimes", therefore the consideration of similarities between the crime of conspiracy and the form of responsibility of JCE had no merit.[22]

To look beyond the dispute, the function of JCE before the *ad hoc* tribunals is virtually identical to conspiracy as a theory of liability.[23] Had the international judges acknowledged conspiracy as a liability theory, JCE would have been redundant, and the question of cumulative convictions for genocide and conspiracy to commit genocide would not have risen before the tribunals.

2.2. Standalone Convictions of Conspiracy to Commit Genocide

Unlike in situations of cumulative convictions, conspiracy has a more obvious role to play in cases where the accused participated in an agreement to commit genocide, but cannot be convicted of genocide for lack of significant contribution to the crime. In Nzabonimana, an ICTR Trial Chamber found that most of the accused's acts were insufficient for genocide conviction but constituted conspiracy to commit genocide.[24] For instance, the Chamber found that while neither Nzabonimana's distribution of weapons in Tambwe Commune nor his role in establishing the Tambwe Commune Crisis Committee substantially contributed to the subsequent genocide, his co-ordination with another individual in these two matters showed an agreement between the two to kill the members of the Tutsi population in Tambwe Commune.[25]

3. Exclusion of Conspiracy to Commit Genocide From the ICC Statute

3.1. Drafting Process

During the drafting of the ICC Statute, conspiracy to commit genocide seemed controversial but was not widely discussed by exhausted drafters.[26] The Co-ordinator for Part 3 of the Statute on 'General Principles of Criminal Law' expressed his concerns over the "thorny" problem of conspiracy covered by paragraphs (d) and (e)(ii), "although he hoped that use of the compromise language of the recently adopted International Convention for the Suppression of Terrorist Bombing might help solve that problem".[27] The relevant part, Article 23(7)(d) of the draft reads as follows:

> [With [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;

While the whole text of Article 23(7)(e)(ii) was placed between square brackets:

> Agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifest their intent [and such a crime in fact occurs or is attempted][28]

In that the aforementioned provisions require the agreed crime to be committed or at least attempted, they do not envision an inchoate crime as interpreted by the *ad hoc* tribunals.

The crime of conspiracy to commit genocide is not included in the final text of the ICC Statute, nor is it incorporated in any other form. According to David Scheffer, the U.S. chief negotiator at the Rome Conference, civil law countries "do not embrace the crime of conspiracy … and require evidence that the defendant acted with respect to the underlying crime".[29] The 'common purpose' liabil-

19 Prosecutor v. *Nahimana*, ICTR Case No. 99-52-T, Trial Judgment, 3 December 2003, para. 1043 (http://www.legal-tools.org/doc/45b8b6/).

20 *Gatete* v. Prosecutor, ICTR Case No. 00-61-A, Appeal Judgment, 9 October 2012, para. 261 (http://www.legal-tools.org/doc/1d0b08/).

21 *Ibid.*, para. 262, citing *Ad Hoc* Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee, Economic and Social Council, E/794, 24 May 1948, p. 20.

22 *Ibid.*, para. 263.

23 Danner and Martinez, 2005, p. 119, see *supra* note 2.

24 Prosecutor v. *Nzabonimana*, ICTR Case No. 98-44D-T, Trial Judgment, paras. 1725–1736 and 1744-1749 (http://www.legal-tools.org/doc/00cb8e/).

25 *Ibid.*, paras. 1733–1736 and 1748.

26 William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2009, p. 315 (http://www.legal-tools.org/doc/28256f/).

27 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Official Records, Volume II, p. 132 (http://www.legal-tools.org/doc/78fea6/).

28 Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, pp. 48–49 (http://www.legal-tools.org/doc/816405/).

29 David Scheffer, "Why Hamdan is Right about Conspiracy Li-

ity eventually adopted in Article 25(3)(d) is reminiscent of conspiracy as a mode of liability.

3.2. Implications of Lack of Jurisdiction Over Conspiracy to Commit Genocide

In any case, the ICC has no jurisdiction over the crime of conspiracy to commit genocide. This may put limits on the Court's function to prevent genocide, although up until now, genocide cases were all tried *ex post facto*. In fact, the genocide in Srebrenica was committed *after* the ICTY was established. In other words, no prompt prosecution of conspiracy to commit genocide has been conducted to prevent the actual genocide from occurring. That being said, the theoretical function of conspiracy charges in crime prevention will not be realized by the ICC.

The above-mentioned Nzabonimana case shows another function of the crime of conspiracy in punishing genocide: it may most adequately characterize certain preliminary acts which fall short of constituting a significant contribution to the subsequent genocide. Without the conspiracy charge, those acts, which are deplorable in terms of the gravity of the crime of genocide, may go unpunished.

The last scenario, which is most common in the existing international practice, is where both conspiracy to commit genocide and subsequent genocide are proven. Here conspiracy mainly serves to show the additional guilt of the accused in co-ordination and organization of genocide activities. Nevertheless, a separate conviction of conspiracy to commit genocide is no longer indispensable for the purpose of punishment since the role of conspirator may be treated as an aggravating circumstance in sentencing, and the co-ordinated character of the criminal conduct may be captured by forms of liability such as co-perpetration or common plan. This means that genocide will be treated in the same way as other crimes under the ICC's jurisdiction, as far as conspiracy is concerned.

4. Conclusion

Conspiracy to commit genocide is designed to deal with the collective nature of genocide. With the proliferation of the JCE doctrine which contains similar elements and purposes, the role of conspiracy to commit genocide has become less obvious in certain circumstances. On the other hand, conspiracy as an inchoate crime has been used to fill the gap when evidence is insufficient to establish genocide.

In conclusion, the author is of the opinion that the absence of conspiracy to commit genocide in the ICC Statute will not leave a conspicuous gap in the Court's ability to respond to genocide. This is especially so if the *ex post facto* character of international criminal trials remains unchanged. Yet at times the Court might find itself shorthanded when seeking to punish acts which were conducive to, but fell short of, genocide.

At the time of writing, the Genocide Convention had 146 States Parties.[30] Whether to interpret conspiracy to commit genocide as a crime or as a mode of liability is now primarily a national consideration. Most states who have already taken legislative actions choose to incorporate only Article II and leave the substantive offence of genocide to general criminal law provisions dealing with participation.[31] But in the event states were to regard conspiracy to commit genocide as an independent crime, it is not logical to import only the crime of genocide and not the crime of conspiracy to commit genocide. States should carefully analyze international practices in this regard, both positive and problematic ones. In particular, the function of the crime of conspiracy to prevent genocide may be balanced with existing criminal provisions on participation. On the other hand, it is worth considering whether the ICC Statute signals a tendency to interpreting conspiracy as a mode of liability.

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PURL: http://www.legal-tools.org/doc/ece3cf/.

ability" (http://www.legal-tools.org/doc/0e1595/); see also, Robert Cryer *et al*., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2010, p. 228 (http://www.legal-tools.org/doc/f691a2/).

30 UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#1, last accessed at 7 June 2014.

31 Schabas, 2009, pp. 405–408, see *supra* note 26.

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