NAME : JULIET R A OKOTH

STUDENT NUMBER: 2925646

TOPIC: CONSPIRACY TO COMMIT GENOCIDE AS UNDERSTOOD THROUGH THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SUPERVISOR: PROF. DR. GERHARD WERLE

RESEARCH PAPER SUBMITTED, IN PARTIAL FULFILMENT OF THE DEGREE OF MASTERS OF LAW: TRANSNATIONAL CRIMINAL JUSTICE AND CRIME PREVENTION

OCTOBER 2009

AT THE FACULTY OF LAW, THE UNIVERSITY OF THE WESTERN CAPE, SOUTH AFRICA

DECLARATION

I declare that *Conspiracy to commit genocide as understood through the jurisprudence of the International Criminal Tribunal for Rwanda* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student: Juliet R A Okoth

Date: _____

Siganture: _____

ACKNOWLEDGEMENT

In the first place and above all, I thank God for his love and grace. Seeing me into and through this programme is a miracle.

I am especially grateful to Professor Dr. Gerhard Werle and Professor Dr. Lovell Fernandez for giving me an opportunity to be a part of the International Criminal Justice programme. It has been an unforgettable and life changing experience.

I am forever indebted to Professor Werle for his supervision without which I would not have completed this research paper. Being an expert in the field of International Criminal Law your intellectual guidance has been invaluable. I am grateful for the confidence you had in me by suggesting that I carry out this study.

I would also like to thank Professor J D Ohlin for sending me your insightful article that has greatly aided my study. As of right I would also like to thank Dr. Raymond Koen your editorial assistance has greatly shaped this research paper.

I am also grateful to the entire pioneer class of 2009, the intellectual debate and cultural exchange have made me a better person both intellectually and socially.

To crown it all,my special thanks goes to my family and friends, your prayers have been answered, and your support is immeasurable. Thank you to all who have contributed to this study in one way or another.

LIST OF ABBREVIATIONS

CDR	*Coalition pour la Defense de la Republique*(Coaliton for the Defence of the Republic)
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
MDR	*Mouvement Democratique Republican* (Democratic Republican Movement)
MRND	Mouvement Revolutionnaire National pour le Developpement (National Revolutionary Movement for Development)
RPF	Rwandan Patriotic Front

TABLE OF CONTENTS

CHAPTER 3: THE ICTR JURISPRUDENCE AND CONSPIRACY TO COMMIT GENOCIDE

CHAPTER 4: CONSPIRACY AS A TOOL OF ACCOUNTABILITY

CHAPTER ONE

INTRODUCTION

O Conspiracy,

Shamest thou to show thy dangerous brow by night,

When evils are most free? O, then, by day

Where wilt thou find a cavern dark enough

To mask thy monstrous visage? Seek none, Conspiracy;

Hide it in smiles and affability;

For if thou path, thy native semblance on,

Not Erebus itself were dim enough

To hide thee from prevention.

- Julius Caesar Act II Scene I

1.1 Background to Study

In 1995, following the atrocious crimes committed in Rwanda, the United Nations Security Council, with Resolution 955, established the International Criminal Tribunal for Rwanda (ICTR) in an effort to hold the alleged perpetrators of these crimes accountable. One unique tool that has been used by the ICTR is the crime of conspiracy to commit genocide.[1] Investigations by the office of the prosecutor of the ICTR have been carried out on the premise that the atrocities committed in Rwanda constituted one overarching and interconnected crime of genocide.[2] It is believed that for the Rwandan tragedy to have taken place in the presence of a government,

[1] Article 2(3)(b) ICTR Statute.
[2] Othman (*2005*:224).

its armed forces and an entrenched civil administration, there must have been either a conspiracy of silence or a conspiracy of participation to allow perpetrators to kill.[3]

The crime of conspiracy is well established in common law jurisdictions.[4] The crime is considered to be an appealing legal device to fight the special dangers flowing from complex, organised and clandestine criminal groups.[5] Perhaps because of its vagueness,[6] conspiracy has been described by Learned Hand an American philosopher and judge, as "the darling of the modern prosecutor's nursery", apparently for the distinct advantage it gives the prosecution. [7]

The significant role which conspiracy plays in common law jurisdictions led to its introduction into the international realm in the Nuremberg Charter with respect to crimes against peace under Article 6.[8]This occurred despite the resistance by France and the Soviet Union, where the crime of conspiracy was then unknown or applied to a very limited extent.[9]

In 1948, the Convention on the Prevention and the Punishment of the Crime of Genocide (the Genocide Convention) was ratified and it entered into force on 12 January 1951.[10]The Genocide Convention establishes genocide as an international crime. Article 3(b) of the Convention makes conspiracy to commit genocide a punishable crime. The *travaux preparatoires* of the Genocide Convention show that

[3] Othman (2005:234).
[4] Cassese (2008:227).
[5] Fichtelberg (2006:149).
[6] La Fave (2003: 613).
[7] *Harrison v. United States*, 7 F.2d 259(2d Cir.1925) cited in La Fave (2003:615).
[8] "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
a) Crimes against Peace:namely,planning,preparation,initiation,or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances; or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;...."
[9] Fichtelberg (2006:161).
[10] Adopted by Resolution 260(III) A of U.N General Assembly on 9 December 1948.

the rationale for including such a crime was to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide shall be punishable.[11] The report of the Secretary-General of the United Nations on the Convention asserted that "genocide can hardly be committed on a large scale without some form of agreement. Hence the mere fact of conspiracy should be punishable even if no 'preparatory act' has yet taken place".[12]The adoption of this Convention marked the second instance in which conspiracy was recognised in international criminal justice.

In 1993 to manage the conflict in the former Yugoslavia, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY).[13] Article 4(3)(b) of the ICTY Statute provides for conspiracy to commit genocide. The ICTR was later established in 1994 and its Statute also provided for conspiracy to commit genocide.[14]

In 1998, the Rome Statute of the International Criminal Court (Rome Statute) was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (ICC).[15]In departure from tradition the Rome Statute has failed to provide expressly for the crime of conspiracy to commit genocide. This departure raises the question of whether the crime of conspiracy to commit genocide has any relevance in the modern practice of international criminal law, and of its status in customary international law.

[11] *P v Musema* (TC), para 185.

[12] Draft Convention on the Crime of Genocide, Commentary, U.N. Secretary-General, at 71, U.N. Doc. E/447 (1947). See Fitchelberg (2006:165).

[13] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/808 (1993) annex.

[14] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994) annex.

[15] The Rome Statute was adopted on 17 July 1998 and came into force on 1 July 2002.U.N.Doc.A/CONF.183/99.

Conspiracy as a charge has been used most extensively before the ICTR in comparison to any other international criminal tribunal.[16] This study will examine the tribunal's interpretation of the crime of conspiracy to commit genocide and its effectiveness as a tool of accountability. It will consider also the implications of failing to expressly provide for it in the Rome Statute.

1.2 Research Questions

The main question this study intends to address is what constitutes the crime of conspiracy to commit genocide, and whether it will play any significant role following the failure by the drafters to provide expressly for it in the Rome Statute. The secondary questions to be considered are:

- What are the elements of the crime?
- Can one be convicted for both the crime of conspiracy to commit genocide and the substantive crime of genocide, based on the same set of facts?
- Is the crime recognised in any other mode of participation in the Rome Statute?

1.3 Significance of the Study

Although, crime of conspiracy to commit genocide is established under customary international law,[17]the failure to expressly provide for it in the Rome Statute creates a doubt on this status, and raises the question as to its relevance as a tool of

[16] Othman (2005:191).
[17] See the Genocide Convention article III (b), Werle (2009:228) para 622, Cassese (2008:227).

accountability. An analysis of the ICTR jurisprudence on the crime of conspiracy to commit genocide would clarify the rationale of its existence and show its effectiveness as a tool of accountability in international criminal law. This study will contribute not only towards a clearer understanding of the crime of conspiracy to commit genocide but also towards a better understanding of the crime of conspiracy in general.

1.4 Literature Review

Several scholars argue that the perception of the concept of conspiracy differs in the common and civil law jurisdictions.[18] In the common law systems, when two or more people agree to commit a crime, the act of agreeing itself is punishable irrespective of whether the purpose of the agreement is carried out or not. The crime is complete upon conclusion of the agreement.[19]

Generally, in civil law systems the concept of conspiracy being punishable even where no crime has been committed is unknown. Conspiracy in this instance rests on the principle that a person cannot be punished for mere criminal intent or for preparatory acts committed.[20] Where conspiracy is recognised in the civil law system, there is a requirement of an overt act. The rationale for this is that an idea not yet put into action does not cause any harm to society.[21] In the legal systems where it exists, it is punishable only when its purpose is to commit certain crimes considered very

[18] See Bantekas and Nash (2007:34), Cassese (2008:227), Fitchelberg (2006:151).
[19] La Fave (2003:615).
[20] *P v Musema* (TC),para 186.
[21] See Othman (2005:194).In other countries like Germany the crime of conspiracy is provide for(S 30 of the German Criminal Code).

serious, such as undermining the security of the State.[22] More recently, the crime has been applied to the fight against organised crime in several civil law jurisdictions.[23]

This systemic difference in perception of the crime has led to different conceptions of the crime in the international arena.Bantekas and Nash postulate that conspiracy in the Nuremberg Tribunal and Charter was employed as a particular form of perpetration of the crime of aggression rather than as an inchoate crime.[24] In departure from both the Nuremberg Charter and Tribunal, the inclusion of conspiracy in Article III, together with the actual perpetration of genocide, in the Genocide Convention evidences that conspiracy in this instance was intended to be an inchoate crime.[25] This position has been confirmed by the ICTR jurisprudence. [26]

Contrary to customary international law, the Rome Statute has failed to provide directly for the crime of conspiracy to commit genocide. Article 25(3)(d) of the Rome Statute, which is said to provide indirectly for conspiracy, is seen to be more akin to the Nuremberg common plan, since it requires attempt or completion. This is not the case with conspiracy as an inchoate crime. Under the Rome Statute, the conspiracy that seems to be recognised is a form of participation in crime and

[22] *P v Musema* (TC),para 186 .
[23]See article 115 of the Italian Penal Code, and article 450-1, French Penal Code. However, Germany, though a civil law country provides for conspiracy that punishes mere agreement in S 30 of the German Criminal Code. In S 30(2) 'A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable....'.Also see Bohlander (2009:175). Bohlander, however, seems to suggest that the conspiracy in this case is not an inchoate crime but more a mode of participation modelled on the general concept of attempts.
[24] Bantekas and Nash (2007:34).
[25] Bantekas and Nash (2007:35).
[26] *P v* Musema(TC),para 193.

liability.[27]However, Kittichaisaree opines that the crime of conspiracy has been covered indirectly in Article 25(3)(d) of the Rome Statute, and that the ICC, in the case of genocide, is likely to interpret this provision by seeking guidance from the jurisprudence of the ICTR.[28] This view is questionable, as the crime of conspiracy in the Rome Statute is formulated as a mode of participation, in contrast to the crime of conspiracy to commit genocide in the Genocide Convention, which is punishable in itself without its results having been realised or attempted to be realised. A closer study of the ICTR case law on conspiracy is, therefore, necessary.

1.5 Methodology

I shall analyse the case law of the ICTR, the texts of relevant international instruments, and whatever evidence exists of identifiable State practice. Also, I shall scrutinise leading textbooks, law journal articles, and various other texts, including internet legal sources.

1.6 Overview of Chapters

The study consists of four chapters. The first chapter is the introduction. The second chapter will analyse the concept of the crime of conspiracy in the common law systems. The third chapter will be a critical analysis of the jurisprudence of the ICTR with respect to the crime of conspiracy to commit genocide. The fourth chapter is the final chapter in this study and will analyse the place of conspiracy to commit genocide in the Rome Statute and its effectiveness as a tool of accountability for the crime of genocide. The conclusion and recommendations will also be in chapter four.

[27] Bantekas and Nash (2007:36).
[28] Kittichaisaree (2001: 248).

CHAPTER 2

THE CONCEPT OF CONSPIRACY

"If we are on the outside, we assume a conspiracy is the perfect working of a scheme. Silent nameless men with unadorned hearts. A conspiracy is everything that ordinary life is not. It's the inside game, cold, sure, undistracted, forever closed off to us. We are the flawed ones, the innocents, trying to make some rough sense of the daily jostle. Conspirators have logic and a daring beyond our reach. All conspiracies are the same taut story of men who find coherence in some criminal act."

Don Delillo.

2.1 INTRODUCTION

The drafting history of the Genocide Convention shows that conspiracy to commit genocide in the Convention was intended to be conspiracy in the common law systems.[29] This makes it imperative to elaborate on the concept of conspiracy in the common law systems. The nature of conspiracy as perceived in the common law systems has been the subject of much debate. To demystify the nature of the crime and the purpose for its existence, this chapter will explain the origin of the crime, its elements, and the justification for the existence of the crime of conspiracy in the common law system.

2.2 Development of the Crime of Conspiracy[30]

The word conspiracy comes from two Latin words, "con" and "spirare" which mean "to breathe together".[31]The crime of conspiracy emerged during the reign of Edward

[29] See *P v Musema* (TC), para 185.
[30] See Sayre (1922: 393) for a more detailed account of the history of conspiracy.
[31] Othman (2005:192).

I.[32] Initially, it was established to prevent malicious prosecution. There was a notoriety of people coming together and making false indictments. To curb this vice, it was made criminal for persons to combine to procure false indictments or to bring appeals or to maintain vexatious suits. [33]The crime of conspiracy would be complete only after the person falsely accused had been charged and acquitted.[34]In 1611 the court in *Poulterer's case* stated that the gist of conspiracy is the agreement, which agreement is punishable even if its purpose was not achieved. [35] This was the first significant expansion of the crime. The 17th century saw the expansion of the ambit of conspiracy to the commission of any crime.[36] Lord Denman's famous statement in 1832 gave conspiracy the shape it has today. He stated that a conspiracy indictment must charge a "conspiracy to do an unlawful act, or lawful act by unlawful means".[37] Thus, for jurisdictions that continue to retain common law crimes, conspiracy is defined as "a combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means."[38]

In many jurisdictions the crime of conspiracy is now codified. This has been done to minimise what is viewed as the ambiguity and confusion of conspiracy law. This has led to the emergence of statutory conspiracy.[39]

At common law, conspiracy is a distinct and separate crime from the crime the conspirators plan to commit. It is an inchoate or preparatory crime. Like other crimes, it requires proof of an *actus reus* and a *mens rea*.

[32] La Fave (2003:614).
[33] La Fave (2003:614).
[34] La Fave (2003:614).
[35] 77 Eng.Rep. 813(1611) cited in La Fave (2003:614).
[36]La Fave (2003:614).
[37] *Rex v Jones*, 110 Eng.Rep.485 (1832) cited in La Fave (2003:614).
[38] Punja (2003:26).
[39]Punja (2003:26).

2.3 The Agreement

The *actus reus* of conspiracy is the agreement itself. It consists of the physical acts, words or gestures which show the mutual consent by the conspirators. The agreement forms the essence or the gist of the crime of conspiracy.[40] In the words of Lord Campbell, "conspiracy is nothing; the agreement is the thing."[41]As soon as the agreement is formed the crime is complete. The agreement need not be explicit; a mere tacit understanding would be sufficient.[42] It need not be in writing or a speaking of words which expressly communicates the agreement. It may be inferred from the facts and circumstances of the case.[43] To hold someone liable for conspiracy requires more than mere knowledge of the conspiracy, or passive acquiescence to a plan.[44]Several persons may be parties to a single conspiracy, even if they have never dealt directly with one another or known of one another's existence. The question is whether they are aware of one another's participation.[45]It is sufficient if there is some form of communication. This point was recognised by the English court of Criminal Appeal in *Meyrick*.[46]The court noted that the prosecution need not establish direct communication between all alleged conspirators. It recognised that such agreements may be made in various ways, there may be one person round whom the rest revolve or may be a conspiracy of another kind where there is chain communication "A communicates with B, B with C, C with D & so on to the end of the list of conspirators". It is not necessary that each member of the conspiracy knows all of the details of the conspiracy; however, the mere presence at meetings is not

[40] La Fave (2003:622).
[41] Reg V. Hamp, (1852) 6 Cox C.C 442,445 cited in Othman (2005:199).
[42] La Fave (2003:622).
[43] See *Ianneli v. United States*, 420 U.S 770, 95 S.Ct.1284, 43 L.Ed.2d 616 (1975) cited in La Fave (2003:622).
[44]Othman (2005:200).
[45] La Fave (2003:636).
[46] (1929)21 Crim App R 94 cited in Gillies (1990:17).

sufficient to qualify someone as a member of the conspiracy. [47]The concept of agreement in conspiracy is not similar to a contractual agreement. It is less demanding than the contractual agreement, but it is more than criminal negotiation.[48] A single person acting alone cannot be guilty of conspiracy. However, if a co-conspirator dies before the trial, the surviving co-conspirator may still be charged with conspiracy.[49]

The clandestine nature of the crime of conspiracy makes it difficult to prove by direct evidence. Courts, being sympathetic to this problem, have established that, it is not necessary to prove the existence of the agreement by direct evidence.[50]The agreement may be deduced from certain criminal acts of the accused persons, done in pursuance of apparent criminal purposes in common between them. Raju an Indian legal scholar elaborates on this point:

"If you see several men taking several steps, all tending towards one obvious purpose, and you see them through a continued portion of time, taking steps that lead to an end, why, it is for you to see whether these persons had not combined together to bring about that end, which their conduct so obviously appears adapted to effectuate."[51]

As a general rule, such an inference can be made only where the circumstances are such that no other reasonable interpretation exists.[52] Although establishing the existence of conspiracy requires proof of overt acts done in pursuance of the conspiracy, the offence itself requires no overt act besides the agreement unless demanded by Statute.[53] Nonetheless, in practice, nearly all conspiracies which are

[47] Othman (2005:200).
[48] Othman (2005:200).
[49] Othman (2005:202).
[50] La Fave (2003:623).
[51] See V.B Raju, Commentaries on the Indian Penal code at p 461 cited in Obote- Odora (2001) para 32.
[52] Obote-Odora (2001) para 33.
[53] Othman (2005:197).

prosecuted have been carried in whole or in part. The prosecution usually seeks to show their content by referring to the overt acts.[54] In principle, an accused may be convicted of both conspiracy and the substantive criminal act.[55]

2.4 The Mental Element

The *mens rea* requirement for the crime of conspiracy is twofold. The parties must not only intend to agree but must also intend to achieve the objective of their agreement.[56] The objective ought to be criminal or if non-criminal, it must be covered by the law of conspiracy. An example of an agreement whose objective is criminal is an instance, where a non-custodial parent conspires with another person to kidnap the parent's child, and the child is abducted during a court-approved visit. An example where conspiracy occurs if the purpose of the agreement is lawful but, the means used to achieve it are illegal, would occur where the custodial parent chooses to retrieve the child, who has been kidnapped by the noncustodial parent and makes an agreement to use unlawful force.[57]

2.5 The Rationale for Conspiracy Law

Two main reasons have been given to justify the crime of conspiracy. First, it is seen as an inchoate crime, which provides law enforcement with the tools to arrest would-be criminals at the moment they agree to commit a criminal act, before making any movement towards carrying out the actual crime, which is the object of conspiracy. It attacks the criminal conduct at an earlier stage than attempt, and is seen as a more

[54] Gillies (1990:16).
[55] Obote-Odora (2001) para 52.
[56] Othman (2005:201).
[57] Illustration cited from http://www.answers.com/topic/conspiracy.

effective preventive measure, since it is not restricted by the requirement of proximity.[58]

Second, it is a means of striking against the special danger that is associated with group criminal conduct.[59]Section 5.03 of the American Model Penal Code clearly sets out the danger thereof,

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

The sentiments of this law have been echoed by the U.S. Supreme Court. [60]The court while declaring conspiracy as a "distinct evil," it noted that a conspiracy posed 'a threat to the public' over and above the threat of commission of the substantive crime. This is because when persons combine to commit a crime it increases the probability of other crimes being committed and also because, it "decreases the probability that the individuals involved will depart from their path of criminality".[61]

2.6 Conclusion

The crime of conspiracy is especially valued in common law systems for its prophylactic role and establishing group criminality. It is established as an inchoate crime punishable irrespective of its results. Conspiracy has been an important tool of

[58] Othman (2005:201).
[59] La Fave (2005:620).
[60] *U.S. v. Recio* (2003, p. 822 ;) cited in Meierhenrich (2006:344).
[61] Contrast with Giles (1990:7). Giles criticises the rationale given for the crime. The first rationale he sees as being merely a 'pragmatic or opportunistic justification' rather 'than one of principle' on account of it criminalising group intent which contrasts the approach of criminal law to individuals. The criticism for the second rationale is that it is illogical, merely based on what seems to be the laws apparent aversion to numbers. He argues that what the law should focus on is the nature and effect of the act carried out and not the number of people who carry it out.

accountability in web like organised crimes.[62] It has particularly been effective in the prosecution of crimes involving illicit trafficking in drugs and narcotics, money laundering, traffic in human persons and terrorism. [63]

The important role conspiracy had played in criminal law in the domestic front, led to its introduction into international criminal law. This was especially advocated for with respect to the crime of genocide considering the serious nature of the crime. This calls for an analysis of the application of the crime of conspiracy to commit genocide, which will be the focus of the next chapter.

[62] Fichtelberg (2006:161).
[63] Fichtelberg (2006:161).

CHAPTER 3

THE ICTR JURISPRUDENCE AND CONSPIRACY TO COMMIT GENOCIDE

"*Who is that man over there? I don't know him. What is he doing? Is he a conspirator? Have you searched him? Give him till tomorrow to confess, then hang him! -- hang him!*" Oscar Wilde

3.1 Introduction

The genocide that occurred in Rwanda is perceived to have been largely as a result of a conspiracy. This perception guided the prosecution in charging a majority of the accused persons with conspiracy to commit genocide.[64] The prosecution strategy, has led to the development of jurisprudence of conspiracy to commit genocide, by the ICTR.This chapter will analyse the ICTR's interpretation of the crime.

3.2 The Case Law

The tribunal's case law so far has addressed the issue of conspiracy in nine cases: *Kajelijeli, Kambanda, Musema, Nahimana et al, Niyitegeka, Ntagerura et al, Ntakirutimana, Seromba* and *Bagosora et al.*[65] Of the nine cases, a conspiracy was found by the trial chamber to exist in three of them,namely,*Kambanda*,*Niyitegeka* and *Nahimana et al*. However, the conviction in the *Nahimana* case was overturned by the appeal chambers.

[64] Othman (2005:224).

[65] *P v Kajelijeli* judgement (TC), paras.785-798; *P v Kambanda* judgement (TC), para. 40;*P v Musema* judgement (TC), paras.184-198,937-941; *P v Nahimana et al* judgement(TC),paras.1040-1055,also *P v Nahimana et al* judgement (AC),paras.893-912; *P v Niyitegeka* judgement (TC) ,paras.422-479; *P v Ntagerura et al* judgement (TC),paras.41,50,51,70 ; *P v Ntakirutimana* judgement (TC),paras.797-801,838-841; *P v Seromba* judgement(TC), paras 344-351 ; *P v Bagosora et al* judgement (TC), paras. 2084-2113.

I shall give a brief outline of each of the cases before setting out the ICTR's interpretation of the issues arising with respect to the crime of conspiracy to commit genocide.

3.2.1 Prosecutor vs Jean Kambanda

The accused, a former prime minister, was convicted on his own plea of guilty. He pleaded guilty, *inter alia,* to conspiring with other ministers and officials in his government, among them Pauline Nyiramasuhuko, Andre Ntagerura, Eliezer Niyitegeka and Edouard Karemera, to commit genocide after 8 April 1994. He admitted to having participated in meetings where the course of massacres was actively followed, and his government took no action to stop them. He also acknowledged having participated in high level security meeting which encouraged the fight against the Rwandan Patriotic Front (RPF) and its "accomplices" who were understood to be the Tutsi and moderate Hutu.

3.2.2 Prosecutor vs Alfred Musema

The accused a former director of the public enterprise, the Gisovu Tea Factory was charged with having conspired with others to destroy the Tutsi community in Bisesero region. He was acquitted of this count. The chamber noted that the prosecutor had neither alleged clearly nor adduced evidence that the accused conspired with others to commit genocide.

3.2.3 Prosecutor vs Ntakirutimana and Ntakirutimana

The accused persons, Elizaphan Ntakirutimana, a former pastor of the SDA church, and his son Gerard, a medical doctor by profession, were charged in two

indictments. One involved an attack against the Tutsi in a hospital complex where they were hiding, known as Mugonero.It was alleged that the accused had conspired with each other and with another, known as Charles Sikubwabo, to destroy the Tutsi. This charge failed. Although the prosecution was able to prove that Gerard had attended a meeting with the commander of the *gendarmerie* camp, it did not prove the substance of the meeting or show that the other two accused had attended the meeting, or collaborated or reached an agreement with Gerard. The second indictement charged both Elizaphan and Gerard with having conspired to destroy the Tutsi in the area known as Bisesero,in Gishyita and Gisovu Communes,Kibuye Prefecture. While the chamber found that Gerard had attended three meetings between 10 and 18 June 1994, at which he made statements on the need to eliminate the Tutsi, and also participated in the distribution of weapons, and discussed the planning of attacks, it was found that Elizaphan was not present, nor did he collaborate with Gerard. The charge failed as the chamber was not able to draw any inference that the two conspired.

3.2.4 Prosecutor vs Juvenal Kajelijeli

The accused, a former *bourgemestre* of Mukingo commune, was charged *inter alia* with having conspired with one Joseph Nzirorera (a former minister in the *Mouvement Revolutionnaire National pour le Developpement* (MRND) governments and a fellow native of Mukingo commune, from whom it is alleged Kajelijeli benefited in authority and status from this association) and other influential people, to work out a plan to exterminate the civilian Tutsi population and eliminate members of the opposition, so the MRND could remain in power. The chamber found there was not sufficient evidence to prove beyond a reasonable doubt that the accused had

conspired with others to destroy the Tutsi population, or the opposition. The prosecution failed to prove that the killings occurring after 6 April 1994 were the result of a conspiracy in which the accused was involved, neither did it prove that the accused had conspired to commit genocide by omission.

3.2.5 Prosecutor vs A Seromba

The accused, a former parish priest for Nyange parish, was charged, *inter alia,* with having conspired with Gregoire Ndahimana, a *bourgemestre* of Kivumu commune,Flugence Kayishema,a police inspector of Kivumu commune, Télesphore Ndungutse, Gaspard Kanyarukiga and other persons not known to the Prosecutor, to kill or cause serious bodily or mental harm to members of the Tutsi population. This charge failed because the chamber found the prosecution had not proved it beyond reasonable doubt.

3.2.6 Prosecutor vs F Nahimana, J Barayagwiza and H Ngeze

In this case the trial chamber convicted Nahimana, a former lecturer of history, a founding member of the company known as *Radio Television Libre des Milles Collines SA*(RTLM), and a member of the party MRND;Barayagwiza, a lawyer by training, founding member of the Coalition pour la Defense de la Republique(CDR) party, member of the committee which founded the company of RTLM ,and also a former director of Political Affairs in the Ministry of Foreign Affairs; and Ngeze, a journalist who founded the newspaper, Kangura, and held the post of Editor-in-Chief, and also a founding member of the CDR party. The accused persons were found guilty of having conspired with one another, and others, through personal collaboration, as well as consciously interacting with one another, using the

institutions which they controlled, namely, RTLM, Kangura and CDR to promote a joint agenda which was targeting of the Tutsi population for destruction. This finding was, however, reversed by the appeals chamber which felt that while the factual basis for the conviction was consistent with a joint agenda to commit genocide,it was not the only reasonable conclusion from the evidence.

3.2.7 Prosecutor vs Niyitegeka

The accused, a former journalist at Radio Rwanda and a founding member of the *Mouvement Démocratique* Républicain (MDR) opposition party, was found guilty of having conspired with others, among them local administrative officials such as the prefect of Kibuye, Clement Kayishema, Interahamwe leaders, political leadership of the MDR, including members of the interim government, to kill or cause serious bodily or mental harm to members of the Tutsi population. The accused was found to have participated in various meetings where he actively participated in planning attacks against the Tutsi in Bisesero.In one meeting he promised to supply weapons,and in another he distributed the weapons and sketched a plan on how to go about the attacks.

3.2.8 Prosecutor vs Andre Ntagerura,Emmanuel Bagambiki,Samuel Imanishwe

Ntagerura, a former minister in the Rwandan government, was charged together with Bagambiki, a former prefect of Cyanagugu commune, and Samuel Imanishiwe, a lieutenant in the Rwandan armed forces, who had also served as the acting commander of the Cyanagugu military camp. They were alleged to have held a large number of meetings among themselves or with others to incite, prepare, organise and commit genocide in diverse locations throughout Cyanagugu. The trial chamber

dismissed the count of conspiracy to commit genocide and made no factual findings, because the paragraphs alleging conspiracy in the indictment failed to allege facts that would constitute material elements of the crime of conspiracy, and failed to identify any criminal purposes for the meetings. The chamber found that the paragraphs alleging conspiracy were not only vague but also failed to plead any identifiable criminal conduct on the part of the accused persons.

3.2.9 Prosecutor vs T Bagosora et al

Colonel Bagosora, the Directeur de Cabinet of the Ministry of Defence, General Gratien Kabiligi, the head of operations bureau (G-3) of the army general staff, Major Aloys Ntabakuze, the commander of the elite Para Commando Battalion, and Colonel Anatole Nsengiyumva, the commander of the Gisenyi operational sector, were alleged to have conspired amongst themselves and with others from late 1990 through 7 April 1994 to exterminate the Tutsi population. The evidence relied on by the prosecution was mostly circumstantial. Among the conspiratorial acts alleged was Bagosora's alleged comment about the coming of 'apocalypse', reference in a letter to a 'Machiavellian plan', drafting of a target list, and the arming of the civilian militia. The chamber noted that while certain aspects of the evidence had indications which may be construed as evidence of a plan to commit genocide, this, however, was not the only inference to be drawn from the evidence. The four accused were acquitted of the count of conspiracy.

3.3 The Law

3.3.1 Definition of Conspiracy to Commit Genocide

In *Musema* the trial chamber defined conspiracy to commit genocide as 'an agreement between two or more persons to commit the crime of genocide'. [66]

Conspiracy to commit genocide has its *actus reus and mens rea*.

3.3.2 Conspiracy as an Inchoate Offence and its Continuing Nature

In *Nahimana et al,* the trial chamber noted that 'conspiracy is an inchoate offence, and as such has a continuing nature that culminates in the commission of the acts contemplated by the conspiracy'.[67] The reasoning adopted by the chamber justified its decision to consider acts of conspiracy prior to 1994 that resulted in the commission of genocide in 1994.The chamber observed that those acts fell within its temporal jurisdiction. The relevance of admitting evidence that was considered to fall outside the temporal jurisdiction of the chamber was later clarified in *Bagosora*.The chamber stated that such evidence would be admitted if there was no compelling reason to exclude it, because it was relevant in 'establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994; and demonstrating a deliberate pattern of conduct.'[68]

[66] *P v Musema* (TC), para 191.See also *P v Niyitigeka* (TC), para 423; *P v Ntakirutimana and Ntakirutimana* (TC),para 798; *P v Kajelijeli* (TC), para *787; P v Niyitegeka* (TC), para 423; *P v Nahimana et al* (TC), para 1041; *P v Seromba* (AC), paras 218,221; *P v Bagosora et al* (TC), para 2087.
[67] *P v Nahimana et al* (TC), para 1044.
[68] *P v Bagosora et al* (TC), para 2091.

3.3.3 The Mental Element

The *mens rea* for conspiracy to commit genocide is similar to that of the crime of genocide. The persons involved must all share the *dolus specialis* of genocide, namely, the intent to destroy in whole or in part a national, ethnical, racial or religious group as such.[69]The Chamber does not expressly consider the second aspect of intent, which is the intention of the alleged conspirators to enter into an agreement. However, this may be inferred from the chamber's analysis of the factual circumstances of the cases.

3.3.4 The Material Element

The existence of an agreement between individuals to commit genocide is the *actus reus*.[70] It is the essence of the charge of conspiracy.[71] This fact has been noted by the trial chamber in *Nahimana*, when it stated, that 'the offence of conspiracy requires the existence of an agreement, which is the defining element of the crime of conspiracy'.[72]

The purpose of the conspiracy need not be successful. It is the act of conspiracy itself, in other words, the process of conspiracy, which is punishable and not its result.[73]

The existence of an agreement between members of a conspiracy may be established through direct or indirect evidence. In *Nahimana* the chamber stated,

[69] *P v Nahimana et al* (AC), paras 894, 896; *P v Musema* (TC), para 192; *P v Bagosora et al* (TC), 2087; *P v Niyitegeka* (TC), 423.
[70] *P v Seromba* (AC), para 221; *P v Nahimana et al.* (AC), para 896.
[71] *P v Nahimana et al* (TC), para 1045.
[72] *P v Nahimana et al* (TC), para 1042.
[73] P v *Musema* (TC), para 193; *P v Kajelijeli* (TC), para 788; *P v Niyitegeka* (TC), para 423.

'the existence of a formal or express agreement is not needed to prove the charge of conspiracy'.[74] It may be established by the existence of meetings planning for genocide, or may also be inferred from circumstantial evidence.[75] To constitute evidence of an agreement, it is important that the action of the group members working within a unified framework be 'concerted and coordinated.'[76] The mere similarity of conduct is not enough.[77]A tacit understanding of the criminal purpose by those participating in the conspiracy is sufficient. As noted in *Nahimana* :

'A coalition, even an informal coalition, can constitute such a framework so long as those acting within the coalition are aware of its existence their participation in it, and its role in furtherance of their common purpose.'[78]

In *Niyitegeka*, the Tribunal inferred the existence of a conspiracy to commit genocide based on circumstantial evidence, from various actions of the accused. These included his participation in and attendance at meetings to discuss the killing of Tutsi, his planning of attacks against Tutsi, and his promise and distribution of weapons to attackers.[79] At paragraph 428 the chamber noted,

"Bearing in mind that the Accused and others acted together as leaders of attacks against Tutsi . . . taking into account the organized manner in which the attacks were carried out, which presupposes the existence of a plan, and noting, in particular, that the Accused sketched a plan for an attack in Bisesero at a meeting . . . to which the people in attendance . . . agreed, the Chamber finds that the above facts evidence the existence of an agreement between the Accused and others . . . to commit genocide."

[74] *P v Nahimana et al* (TC), para 1045.
[75] *P v Seromba* (AC), para 221; *P v Bagosora et al* (TC), para 2088.
[76] *P v Nahimana et al* (TC), para 1047.
[77] *P v Bagosora et al* (TC), para 2088.
[78] *P v Nahimana et al* (TC), para 1047.
[79] *P v Niyitegeka* (TC), paras 427-429.

The chamber drew an interesting inference in the case of *Nahimana*, when it inferred conspiracy from institutional coordination. The chamber confirmed that, 'conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their personal links with each other'.[80] The chamber recognised that, 'institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action'. [81] The trial chamber found that the three accused were guilty of conspiracy to commit genocide through personal collaboration as well as through interaction among the institutions, namely, RTLM, Kangura and CDR which were within their control.[82]However, this finding was reversed by the appeals chamber because in its view, though the factual basis for the conviction was consistent with a joint agenda to commit genocide, it was not the only reasonable conclusion from the evidence.[83]

The evidence adduced must show that the members of the conspiracy had indeed reached an agreement. The mere showing of a negotiation in process does not suffice.[84] It is not necessary for the chamber to conclude that all of the accused conspired together; it will suffice if the prosecution can establish that the accused conspired with at least one other, with whom they are alleged to have planned to commit genocide.[85]

[80] *P v Nahimana et al* (TC), para 1048.
[81] *P v Nahimana et al* (TC), para 1048.
[82] *P v Nahimana et al* (TC), paras 1054-1055.
[83] P v *Nahimana et al* (AC),paras 906,910.
[84] *P v Kajelijeli* (TC), para 787.
[85] *P v Bagosora et al* (TC), para 2096.

The jurisprudence of the Chamber shows that the existence of a conspiracy has been established mainly through inference from circumstantial evidence as opposed to direct evidence. This practice may be attributed mostly to the clandestine nature of the crime, which makes it difficult to prove the crime through direct evidence, for example evidence of actual participation in a meeting in which the accused agreed with others to commit genocide. This would require a witness who attended the meeting and heard the arrangements made or, in the instance of a co-conspirator making a confession. Nonetheless, the ICTR has not been too eager to infer the existence of a conspiracy, especially when of the view that it is not the only reasonable inference that may be made from the evidence. This was the case with the appeals chamber judgment in *Nahimana*, as well as in the trial chamber judgements of *Kajelijeli* and *Bagosora*.

In the later case of *Bagosora*, the prosecution had argued that there were certain indications in the evidence of a prior plan or conspiracy, to perpetrate genocide or other politically motivated killings, which could have been triggered upon resumption of hostilities between the government and the RPF.The evidence produced by the prosecution to prove conspiracy included, the cycle of ethnic violence against the Tutsi that often followed attacks by the RPF.The prosecution also alleged that elements of the government and security forces, failed to timely intervene or participated in the attacking of the Tutsi. Evidence was also given of a campaign to secretly arm and train civilian militiamen and efforts to put in place a 'civil defence system'. Furthermore, the prosecution produced evidence to show that the accused persons had participated in the preparation of lists primarily aimed at identifying suspected "accomplices" of the RPF and opponents of the Habyarimana regime or

MRND party. The Chamber found that the accused persons were involved in some of these efforts in varying degrees. However, the Chamber argued that though it could not exclude that there were in fact plans prior to 6 April to commit genocide in Rwanda, in the context of the ongoing war with the RPF, the evidence did not invariably show that the purpose of arming and training these civilians, or the preparation of lists was to kill Tutsi civilians. It was of the view that while the preparations were completely consistent with a plan to commit genocide, they were also consistent with preparations for a political or military power struggle. The Chamber observed that, when confronted with circumstantial evidence, it may only convict where it is the only reasonable inference. In its holding the Chamber noted it could not be excluded that the extended campaign of violence directed against Tutsis, as such, became an added or an altered component of these preparations. The Chamber held that it was not satisfied that the prosecution had proved beyond reasonable doubt that the four accused conspired amongst themselves or with others to commit genocide before it unfolded on 7 April 1994.[86]

3.3.5 Cumulative Convictions

The main issue that arises here is whether the trial chamber may convict simultaneously on a charge of a substantive offence and that of conspiracy to commit the substantive offence. May an accused be convicted simultaneously or only in the alternative, on the basis of offences arising from the same facts or from a single set of facts? Conflicting decisions have been given by the ICTR.

[86] *P v Bagosora et al* (TC), paras 2097-2113.

The trial chamber in *Musema* confirmed that an accused person may be charged with both the offence of conspiracy and the substantive crime of genocide. This is because conspiracy to commit genocide is a separate crime from genocide. Since conspiracy does not merge with the crime committed pursuant to it, the prosecution is permitted to charge the accused with both. This has been the practice in the ICTR.Two main reasons exist in support of this practice. The first reason is that, prior to the presentation of evidence, it is difficult to know which of the charges against the accused will be proved.[87] Secondly, the two crimes being separate, the cumulative charging is important to hold the accused accountable for both crimes, reflecting the totality of crimes the accused has committed.[88]

The issue of conviction was first dealt with in *Musema*. The trial chamber discussed the civil and common law approaches to the issue. Under civil law systems, if conspiracy is successful and the substantive offence is consummated, the accused will be convicted only of the substantive offence and not the conspiracy. However, under common law systems, an accused may, in principle, be convicted of both conspiracy and a substantive offence, in particular where the objective of the conspiracy extends beyond the offences actually committed.[89]Furthermore, though the trial chamber observed that conspiracy in the Genocide Convention was an inchoate crime more akin to the common law systems, it went ahead to adopt a definition of conspiracy it considered more favourable to the accused. This definition reflected more of the civil law approach to conspiracy. It stated that an accused

[87] Othman (2005:205).
[88] Obote-Odora(2001) para 95.
[89] *P v Musema* (TC),paras 196-197.

cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same facts.

However, in other cases the trial chamber has convicted the accused for both the crime of conspiracy and the substantive crime of genocide, departing from the reasoning adopted in *Musema*. This was case in *Kambanda*, *Nahimana* and *Niyitigeka*. In *Nahimana* the chamber observed that cumulative charging was generally permissible only if the crimes involved had materially distinct elements. [90] The Chamber acknowledged that planning is an act of commission of genocide recognised in the ICTR Statute. It established that the defining element for the offence of conspiracy being the agreement, an accused can be held criminally responsible for both the act of conspiracy and the substantive offence of genocide, which is the object of the conspiracy.[91]

The argument usually advanced against the conviction of an accused on two or more counts in relation to the same facts, is that it amounts to judging the accused twice for the same crime. In other words, it violates the principle of double jeopardy or a substantive *non bis in idem* principle in criminal law.[92] The ICTR jurisprudence has confirmed that multiple convictions need not be sustained by different factual situations.[93]The principle of cumulative convictions recognises that a single criminal act may offend two or more criminal provisions and justify a finding of guilt on multiple counts.[94] The chamber in *Akayesu* set out the instances where this practice was justified. It stated that it was acceptable to convict an accused of two or more

[90] *P v Nahimana et al* (TC),paras 1043, 1089-1090.
[91] *P v Nahimana et al* (TC),paras 1089-1090.
[92] See *P v Akayesu* (TC), para 462.
[93] *P v Akayesu* (TC), paras 461-470.
[94] Obote-Odora (2001) para 97.

offences based on the same set of facts only where the offences have differing elements, or where the laws in question protect different social interests, or where it is necessary to record a conviction for more than one of the offences in order to reflect what crimes an accused had committed.[95]The chamber also noted that the accused suffers no prejudice as the chamber, to avoid double punishment for the same acts, imposes concurrent sentences for each cumulative charge.[96]

The rationale adopted by the chamber in *Nahimana* is sound reasoning and reflects good law consistent with ICTR jurisprudence. In some cases it is necessary to record a conviction for more than one offence, though the said offences arise from a single set of facts, to reflect the totality of the accused's culpable conduct. The chamber having confirmed that conspiracy to commit genocide is itself an independent and separate crime from genocide, it has held that in principle, it is legally proper to indict and convict an accused person of the crime of conspiracy to commit genocide and the substantive crime of genocide. In addition, the same set of facts may be used to prove both counts.

3.4 CONCLUSION

The ICTR's interpretation of conspiracy to commit genocide, affirms the incorporation of common law conspiracy in international crimes. The case law shows that conspiracy to commit genocide has been important, especially in holding the top brass accountable. This chapter has analysed the ICTR's interpretation of conspiracy to commit genocide. The ICTR's definition of the crime and establishing the contours of the elements of the crime have been consisitent.The only

[95] *P v Akayesu* (TC), para 468.
[96] *P v Akayesu* (TC), paras 463,464,465,466.

inconsistency has arisen with respect to whether in the case of consummation of genocide, the accused should be convicted of conspiracy and genocide on the basis of the same facts. Majority of the ICTR decision support conviction on both. However, following the adoption of the Rome Statute, the future of conspiracy to commit genocide looks bleak. This calls for an analysis of the position of conspiracy to commit genocide in the Rome Statute, and the role it is likely to play if any, as a tool of accountability in the future.

CHAPTER FOUR

CONSPIRACY AS A TOOL OF ACCOUNTABILITY

4.1 Introduction

Conspiracy to commit genocide has been used to a great extent by the ICTR as a tool of accountability. The prosecution team preferred to make use of it, on the basis that the extensive manner in which the crime of genocide was perpetrated in Rwanda could only have been possible within the framework of a plan.[97] This rationale echoes the sentiments of the United Nations Secretary-General, when conspiracy to commit genocide was included as a crime in the Genocide Convention.

In spite of the wide use of the crime, with over 50% of accused persons having been charged with conspiracy to commit genocide, convictions have been few. [98] Only three convictions have been achieved so far, with one being overturned by the appeals chamber. The surreptitious nature of the crime makes it difficult to prove. The prosecution often has to rely on circumstantial evidence, which can secure a conviction only if no other reasonable explanation exists.[99]With this standard of proof and the nature of the crime involved, the task of the prosecution is no doubt a daunting one. This raises the questions about whether the crime of conspiracy to commit genocide is not only an effective tool of accountability, but also whether it is relevant. This chapter shall have an analysis of the position of conspiracy to commit genocide in the Rome Statute, its status under customary international law, its

[97] Othman (2005: 224).
[98] Othman (2005:191).
[99] See *P v Bagosora et al* (TC),para 2110; *P v Nahimana et al*(AC),paras 906,910.

effectiveness as a tool of accountability and its place in the future of international criminal law.

4.2 The Rome Statute and Conspiracy to Commit Genocide

The Rome Statute, while incorporating the list of five genocide acts contained in Article II (a)-(e) of the Genocide convention, has failed to incorporate article III (b) on conspiracy to commit genocide. It is suggested however, that the Rome Statute does in fact provide for conspiracy as a mode or form of participation akin to the conspiracy of the Nuremberg Charter in Article 25 (3) (d).[100]

The Article 25 (3) reads in part:

"In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime,aids,abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

[100] See Bantekas and Nash (2007:34).

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the court; or

ii) Be made in the knowledge of the intention of the group to commit the crime."

Participation in part (d) of the Article is considered the weakest mode of participation.[101] It involves any other contribution not provided for by another form of participation, to the commission or attempted commission of a crime by a group of people acting with a common purpose. In addition, it recognises that one contributing to the common purpose does not have to share the group's intention since mere knowledge would suffice. The jurisprudence of the ICTR shows that conspirators are usually the main planners of a crime. They would fall mostly into the group of persons already acting with a common purpose, which the participant in this instance intends to support. The fact that the participation in this section of Article 25(3), does not require the sharing of the intent to commit the crime shows that the participation in question would not fall under a conspiracy. Conspirators have to share the intent to commit the crime, more specifically with conspiracy to commit genocide; the accused must have the *dolus specialis* of genocide, that is, the intent to destroy any of the protected groups in whole or in part. Conspiracy covers preparatory acts

[101] Werle (2009:184) para 493.

usually at an earlier stage than attempt. The clause 'in any other way contributes' refers to contribution to a criminal act already past the preparatory stage. Therefore, Article 25(3)(d) would not qualify as providing for conspiracy either expressly or implicitly.[102]

The failure to provide for conspiracy means that it cannot be charged as a separate crime in respect to any other crime. Scholars have different views on the reason for the omission of the crime of conspiracy to commit genocide.Schabas observes that this inconsistency is the result of inadvertence on the part of the drafters of the Rome Statute.[103]Cassese, however, sees the inconsistency as a result of the lack of support, particularly from the civil law countries, which in opposition, raised similar concerns as those raised at Nuremberg.[104]The latter sentiments, which I believe to be the case, have also found support from several scholars.[105]Another interesting view for failure to incorporate the crime is that of Fletcher, who attributes it to the cooling of passions generated by the Yugoslavia and Rwanda tragedies. The calm period that followed after the atrocities resulted "in a more defensible statute from the perspective of criminal law theory."[106]

4.3 Evidence of Customary Law

Whether this exclusion of conspiracy to commit genocide represents a departure from customary international law generates different sentiments. The proponents of its status under customary international law argue that there is evidence of State

[102] Contrast with Bantekas and Nash (2007:34).
[103] Schabas, (2008:155).
[104] Cassese, (2008:146).
[105] See Kittichaisaree (2001:235), Othman (2005:222). Othman argues that the 'From the Rome deliberations, it is most likely to have been the result of political compromise.'
[106] See Ohlin (2009:200).

practice and *opinion juris.* The evidence of State practice is reflected in the adoption of the Genocide Convention, which has been signed and ratified by a large number of States.[107] It first recognised the crime of conspiracy to commit genocide. The crime was later provided for in the ICTY and ICTR Statutes. Cassese observes that, 'like most other substantive provisions of the [Genocide] Convention, it has turned into customary law.' Several States have also enacted legislation that criminalise conspiracy to commit genocide; examples are Germany, Austria, Canada, Italy and Kenya.

The dissenting view, which is a minority, doubt the establishment of conspiracy to commit genocide as a norm of customary international law.[108]This school of thought argue that, though the ICTY and ICTR Statutes recognise conspiracy to commit genocide, the Statutes are considered to be binding pronouncements of international law, and not evidence of widespread State practice.[109]This may be supported by the reservation expressed by some States when the two ad hoc tribunals were set up by the Security Council under Chapter VII of the UN Charter.[110] Further, the prosecution by the ICTR of the crime of conspiracy to commit genocide is not considered evidence of State practice as its actions cannot be attributed to any State.[111] The lack of domestic prosecution of conspiracy is considered further evidence of absence of State practice. The recognition of conspiracy to commit genocide in the Genocide Convention does not establish it as a norm under customary international law. Rather, it is considered to be a norm established by treaty law and its value as a

[107] As of 2008, 140 states had ratified or acceded to the treaty. Information accessed from Wikipedia on 13th October 2008.
[108] Ohlin (2009:200).
[109] Ohlin (2009:200).
[110] Lattanzi and Schabas (1999:79).
[111] Ohlin (2009:200).

source of law can be balanced, therefore, against another treaty, the Rome Statute.[112] In this instance of conflict, the Rome Statute, being the more recent Statute, would override the Genocide Convention.[113]

It is submitted that the dissenting view does not reflect the true position. The assertion that the crime of conspiracy to commit genocide is established under customary international law is correct. The decisions of international tribunals such as the ICTY and ICTR are indirect evidence of State practice and beliefs.[114]Further evidence of State practice is seen in States being signatories to the Genocide convention and enactment of legislation by States recognising the crime. This is sufficient evidence of treaty practice by the States, and the lack of domestic prosecution would not suffice to disprove State Practice. The Rome Statute, under Article 21, recognises the law which the ICC shall apply. In the first instance, its main source of law is the Statute itself, Elements of Crimes and Rules of Procedure and Evidence. In the second instance, the ICC will refer to applicable treaties and the 'principles and rules of international law'. These principles and rules of international law mainly refer to customary international law.[115]Explicitly leaving customary international law untouched means that the question of the Rome Statute overriding principles of customary international law recognised in the Genocide convention does not arise.[116] Nonetheless, the failure to provide for conspiracy to commit genocide in the Rome Statute could be an indication that several states wanted to change the applicability of conspiracy to commit genocide as a crime.

[112] Ohlin (2009:200).
[113] Ohlin (2009:200).
[114] See Werle (2009:51).*Cf* Prosecutor v. Krstic, ICTY (TC), paras 541 et seq.
[115] Werle (2009:62) para 181.
[116] *Cf* Fichtelberg (2006:166).

4.4 A Lacuna in the Law, or a Dying Concept?

The failure to provide expressly for conspiracy to commit genocide in the Rome Statute raises the question of whether there is a gap in the law, or whether the crime of conspiracy to commit genocide is a dying concept that will play no role as a tool of accountability in the future.

Much criticism has been raised against certain aspects of the crime of conspiracy, particularly from the common law perspective. The criminalisation of an agreement without more is seen to pose a danger that may lead to convictions based merely on inferences and association.[117] The accused in a conspiracy charge is seen to occupy an uneasy seat, bearing a particularly heavy burden.[118]The accused is more likely to be punished for what he said as opposed to what he did or for merely associating with others found guilty. The silence of an accused person may be interpreted to be an admission, and in the case of co-accused, they are likely to be prodded into accusing or contradicting each other, making it difficult to defend oneself against a charge of conspiracy.[119]In addition, the charging of an accused with both conspiracy and the substantive offence is seen to offend the double jeopardy rule.[120]

The prosecution's alleged procedural advantages only seem to compound the accused person's disadvantage. The prosecution may allege several offences in one count, evading the rule prohibiting multiplicity of criminal allegations.[121] Secondly, the prosecution has leeway to charge the accused with agreeing to do what he did as

[117] See Othman (2005:197).
[118] Per Justice Jackson in Krulewitch v.USA cited in Othman (2005:206).
[119] Othman (2005:206).
[120] Othman (2005:198).
[121] Othman (2005:198).

opposed to charging him with doing it, or charge him with both. The rationale for this is that before evidence is adduced in court it is difficult to determine which of the charges will be proved. The addition of a conspiracy charge to the substantive offence is seen as tending to complicate and prolong a trial.[122]These advantages that the prosecution seems to have, threaten to destroy the protection an accused is entitled to in a system that respects the rule of law.

In the international arena, the accused person's position is more precarious because of the unfamiliar territory of law that both the accused and his lawyers have to chart.[123]Having to face the crime of conspiracy, 'already a potent prosecutorial weapon' makes his position much weaker than it would be on the domestic front.[124]This would explain the scepticism towards the crime, especially in the international context.

To rebut the above fears, several measures have been adopted to remedy the disadvantages an accused person could encounter. The ICC, international tribunals and any other international adjudicating institutions are required to observe international standards of justice. This requires upholding the presumption of innocence, fairness and due process, and accepting that the standard of proof for culpability is proof beyond reasonable doubt. The judges who dispense justice at the International Court and tribunals are professionals of high standing, who ensure that

[122] Othman (2005:198).
[123] Fichtelberg (2006:150).
[124] Fichtelberg (2006:172).

the accused's right to a fair trial is upheld. Rules of procedure also exist to ensure that the accused does not suffer any prejudice in conducting his defence.[125]

The history of genocide has shown that the crime encompasses mass killing, usually preceded by secret planning by individuals in positions of authority. This makes conspiracy an important and integral part of the crime of genocide. To prevent genocide it is important to pre-empt the commission of the crime, making it necessary to punish preparatory acts such as the mere agreement to commit genocide. This fact led to the recognition of conspiracy to commit genocide in the Genocide Convention. The failure to include it in the Rome Statute is a clear indication that the crime will not be used as a tool of accountability in the ICC. This exclusion creates a gap and may present a major setback in the prosecution of the crime of genocide, especially where the crime was a result of conspiracy, as was the case in Rwanda.

To a great extent, the law of attempt and the doctrine of joint commission in Article 25(3) are likely to fill this gap.[126]The jurisprudence of the ICTR shows that conspiratorial acts are often proved by inference from circumstantial evidence, which mainly consists of acts of the conspirators which have been carried out far enough to fulfil the test of criminal attempt. With respect to joint commission, the ICC has adopted a joint control over the crime approach in establishing criminal liability. This requires the existence of an agreement by two or more persons, co-ordinated essential contribution by each co-perpetrator and fulfilment of the subjective

[125] Othman (2005:207).
[126] Othman (2005: 224).

elements of the crime.[127]This, to a great extent, captures the elements of conspiracy, save that the requirement of essential contribution requires more participation than mere agreement.

Invariably most international crimes are committed in accord with others, which means that almost all accused before the ICC will be part of a larger organisation, making conspiracy an important issue to consider for future international proceedings.[128]

4.5 Conclusion

The ICTR has 'brought to life' the law of conspiracy to commit genocide, having been the first tribunal to deal with the crime. It has established that conspiracy to commit genocide is an inchoate crime, separate from the crime of genocide. The mere agreement to commit genocide is punishable, irrespective of its result. This interpretation of conspiracy to commit genocide corresponds with the common law understanding of conspiracy. The basis of this interpretation is that the drafters of the Genocide Convention, intended to codify the common law concept of conspiracy because of the serious nature of the crime of genocide. Therefore, conspiracy to commit genocide is defined as an agreement to commit genocide. The members of such a conspiracy must all share the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. There must be a concerted agreement to act among the members of the conspiracy. The agreement between them need not be explicit; it may be inferred from circumstantial evidence. In most instances the same evidence

[127] See *P v Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), see also *P v Katanga and Ngudjolo Chui*,ICC (Pre-Trial Chamber).
[128] Fichtelberg (2006:175).

may be used to prove both the crime of conspiracy and the substantive crime of genocide. Though the chamber in *Musema* adopted the merger doctrine on its decision on whether to convict for both conspiracy to commit genocide and genocide, this view was rejected by other trial chambers which allowed convictions for both genocide and conspiracy to commit genocide, as both crimes are considered to have different material elements. Conspiracy requires the existence of an agreement while genocide itself does not.

This jurisprudence developed by the ICTR is good law shedding light on the elements of conspiracy to commit genocide. However, the few convictions that have been achieved are a clear indication of the difficulty of proving the crime. It puts to question whether it is prudent to expend resources trying to prove conspiracy, especially in the case where genocide has been consummated. In most instances the perpetrators are likely to be found guilty of genocide in any case.

The genocide that took place in Rwanda is believed to largely have been part of an over-arching conspiracy, which involved a long period of planning. The harmony exhibited in the events that followed the shooting down of the presidential plane on 6 April 1994, the timing, the synchronic action of those in authority, and the media campaign promoting ethnic hatred makes sense only as part of a common purpose. However, the few conspiracy convictions may put a dent into this interpretation, leaving room for several other theories to be perpetuated, leading to a distortion of the truth of the Rwandan tragedy.However,it is submitted that the few convictions are a reflection of the court's prudence in its restrictive interpretation of the crime of conspiracy to commit genocide, to avoid any case of perverting justice, in its zeal to write history. Nonetheless, as a tool of accountability, conspiracy to commit genocide

has helped to establish the truth, that the genocide in Rwanda was prepared, planned and organised before it was executed.

Conspiracy to commit genocide is established under customary law and the failure to provide for it directly or indirectly in the Rome Statute does not derogate this status.

4.6 Recommendation

This jurisprudence by the ICTR will play an important role in any adjudicative forum that has to deal with conspiracy to commit genocide in the future. Though the gap created by the failure to provide for conspiracy to commit genocide in the Rome Statute may be seen as insignificant, it would be prudent for States to consider an amendment to provide expressly for it in the Rome Statute, considering the unique role the crime has played in the ICTR.

Word count; 9,867 text, including footnotes 11,045.

BIBLIOGRAPHY

PRIMARY SOURCES

Case Law

ICTR

The Prosecutor vs Alfred Musema Case No ICTR 96-13-A Judgement of 27 January 2000.

Alfred Musema (Appellant) vs The Prosecutor Case No ICTR-96-13-A Judgement of 16 November 2001.

The Prosecutor vs Athanase Seromba Case No. ICTR -2001-66-T Judgement of 13 December 2006.

The Prosecutor vs Eliezer Niyitegeka Case No. ICTR 96-14-T Judgement of 16 May 2003.

The Prosecutor vs Elizaphan Ntakirutimana & Gerard Ntakirutimana Case No. ICTR 96-10-T & ICTR -96-17-T Judgement of 21 February 2003.

The Prosecutor vs Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze Case No. ICTR 99-52-T Judgement of 3 December 2003.

Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) vs The Prosecutor Case No. ICTR-99-52-A Judgement of 28 November 2007.

The Prosecutor vs Andre Ntagerura, Emmanuel Bagambiki,Samuel Imanishimwe Case No. ICTR-99-46-T Judgement of 25 February 2004.

The Prosecutor vs Jean Kambanda Case No.ICTR 97-23-S Judgement of 4 September 1998.

The Prosecutor vs Juvenal Kajelijeli Case No.ICTR 98-44A-T Judgement of 1 December 2003.

The Prosecutor vs Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva No.ICTR-98-41-T Judgement of 18 December 2008.

ICTY

Prosecutor v. Krstic, ICTY (TC), judgment of 2 August 2001.

ICC

P v Thomas Lubanga Dyilo, ICC (Pre-Trial Chamber), decision of 29 January 2007 case no. ICC-01/04-01/06.

P v Katanga and Ngudjolo Chui,ICC (Pre- Trial Chamber), decision of 30 September 2008 case no. ICC-02/05-01/07.

International Instruments

Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the U.N General Assembly on 9th December 1948.Entry into force: 12th January 1951.

Statute of the International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 808, UN Doc. S/RES/808 (1993).

Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955, UN Doc. S/RES/955 (1994).

Rome Statute of the International Criminal Court adopted on 17th July 1998 and entered into force on 1st July 2002.

SECONDARY SOURCES

Books

Bantekas I and Nash S (2007), *International Criminal Law*, London Routledge.Cavendish,2 Park Square, Milton Park,Abingdon,Oxon OX14 4 RN,UK .

Bohlander M (2009), *Principles of German Criminal Law*, North America,Hart Publishing c/o International Specialized Book Services 920 NE 58th Avenue,Suite 300 Portland.

Cassese A., (2008), *International Criminal Law*, 2nd ed. Oxford,Oxford University Press, Great Claredon Street,Oxford OX_2 6DP.

Gillies P, (1990),The Law of Criminal Conspiracy,2nd ed. Sydney,The Federation Press P.O.Box 45, Annadale,NSW,2038.

Fletcher P. G (1998), *Basic Concepts of Criminal Law*, New York, Oxford University Press 198 Madison Avenue,New York,New York 10016.

Fletcher P. G (2000), *Rethinking Criminal Law*, New York, Oxford University Press,198 Madison Avenue, New York.

Kittichaisaree K (2001), *International Criminal Law*, New York, Oxford University Press, 198 Madison Avenue,New York,New York 10016.

La Fave R. W (2003), *Criminal Law* 4th ed.Horn Book Series, Thomson West,610 Opperman Drive United States of America.

Lattanzi,F and Schabas,W (eds.)(1999) *Essays on the Rome Statute of International Criminal Court Teramo*: IL Sirente Press.

Mettraux G. (2005), *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS,* Oxford, Oxford University Press,Great Clarendon Street, Oxford ox 2 6DP.

Othman M C. (2005), *Accountability for International Humanitarian Law Violations:The Case of Rwanda and East Timor*, Berlin Heidelberg, Springer.

Schabas W (2000), *Genocide in International Law: the crime of crimes,* Cambridge, Cambridge University Press,The Edinburg Building, Campbridge CB2 8RU,UK.

Schabas W (2006), *The UN International Criminal Tribunals*. The former Yugoslavia, Rwanda and Sierra Leone, Cambridge, Cambridge University Press, The Edinburg Building, Campbridge CB2 8RU,UK.

Schabas W A, (2007) *An Introduction to the International Criminal Court*, 3rd ed. Cambridge, Cambridge University Press, The Edinburg Building, Campbridge CB2 8RU,UK.

Werle G., (2009) *Principles of International Criminal Law*, 2nd ed. The Hague, T.M.C Asser Press, P.O.Box 16163, 2500 BD The Hague, The Netherlands.

Articles

Fichtelberg,A 'CONSPIRACY AND INTERNATIONAL CRIMINAL JUSTICE'(2006)17 Criminal Law Forum 149-176.

Meierhenrich J. 'CONSPIRACY IN INTERNATIONAL LAW' (2006) 2 *Annu.Rev.Law Soc.Sci.*Down loaded from arjournals.annual reviews.org

Obote-Odora A. 'Conspiracy to Commit Genocide: Prosecutor v Jean Kambanda and Prosecutor v Alfred Musema' (2001) 8 *Murdoch University Electronic Journal of Law.*

Ohlin J D 'Attempt,Conspiracy and Incitement to Commit Genocide' (2009) In The UN Genocide Convention:A Commentary,Paola Gaeta forthcoming publication.

Punja R K. 'MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE ICTR ISSUE: WHAT IS THE DISTINCTION BETWEEN "JOINT CRIMINAL ENTERPRISE" AS DEFINED BY THE ICTY CASE LAW AND CONSPIRACY IN COMMON LAW JURISDICTIONS?' (2003), Case Western Reserve University School of Law International War. Crimes Research Lab <law.cas.edu/war-crimes-Research-Portal.

Sayre, 'Criminal Conspiracy', (1922) 35 *Harvard Law Review* 393.

Schabas, 'Article 6 Genocide',in Triffterer,O (ed.) (2008)2nd ed.*Commentary on the Rome Statute of the International Criminal Court* :Observers' Notes Atticle by Article,Munchen,Verlag C.H.Beck oHG,Wilhelmstrase 9, 80801 Munchen,Germany.

UNIVERSITY OF WESTERN CAPE

RESEARCH PROPOSAL

Name of Candidate:	Juliet R A Okoth
Student number:	2925646
Proposed degree:	LLD
Department:	International Criminal Justice
Supervisor:	Prof. Dr. Gerhard Werle
Date:	27th January 2010

1. ABSTRACT

The advent of international criminal law has been feted as a great development in the history of mankind. International crimes can no longer be committed with impunity. The group dynamics involved in the commission of international crimes has led to the introduction certain controversial concepts from domestic criminal law, in the effort to establish criminal responsibility. The crime of conspiracy is one such controversial concept, described as a transplant from the United States criminal law system.

This thesis will examine the role conspiracy has played as a crime in international criminal law. It compares and contrasts the function of conspiracy law in the prosecution of crimes in the Nuremberg and Tokyo tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It will also analyse the role it is likely to play in the future of prosecuting international crimes before the ICC following the failure to include it as an inchoate offence in the Rome Statute. By tracing the function of conspiracy in international criminal law, the thesis will show the significant role conspiracy plays in establishing criminal responsibility with respect to group dynamics in international criminal law.

2. Background to Study

The crime of conspiracy plays an important role in the prosecution of complex, organised and clandestine criminal groups.[1] This makes it an important tool when dealing with international crimes whose commission largely involves organised groups that manifest a criminal intent. It has been described as a, 'legal weapon that works well against the mob'.[2]

The crime of conspiracy is well established in common law jurisdictions.[3] It is considered to be an appealing legal device to fight the special dangers flowing from criminal groups.[4] Perhaps because of its vagueness,[5] conspiracy has been

[1] Fichtelberg(2006:149).
[2] Fichtelberg(2006:149).
[3] Cassese (2008:227).
[4] Fichtelberg (2006:149).
[5] La Fave (2003: 613).

described by Learned Hand an American philosopher and judge, as "the darling of the modern prosecutor's nursery", apparently for the distinct advantage it gives the prosecution. [6] At common law, conspiracy is a distinct and separate crime from the crime the conspirators plan to commit. Conspiracy like attempt to commit a crime is an inchoate crime. Both conspiracy and attempt share the specific intent to commit a crime and the taking of some steps toward fulfilling the criminal purpose but not enough to complete the crime. The crime of conspiracy is committed when two or more persons agree to carry out an unlawful act or a lawful act by unlawful means. While merely agreeing to commit crime suffices as conspiracy, attempt requires action that goes beyond mere plotting or preparation. Conspiracy is punished in part because group offenses are considered to pose more danger than offenses committed by individuals.

Though conspiracy is considered an important tool in combating criminal enterprises, it has been criticised as being ambiguous and prone to abuse by prosecutors, threatening the safeguards which constitute a healthy notion of due process.[7]The crime has been used by prosecutors to exploit vulnerable defendants. Conspiracy may be used to cast a wide net catching a number of individuals likely to be innocent of any wrong doing.[8] Conspiracy may be used to repress freedom of association and speech, threatening the basic principles of a liberal democratic society.[9] Conspiracy has been criticised for undermining the delicate balance between individual accountability and organised criminal groups by applying criminal liability to all members of a group perceived to be criminal, creating an unacceptable form of collective guilt.[10]

The significant role conspiracy plays in common law jurisdictions led to its introduction into the international realm in the Nuremberg Charter. The prosecutor representing the United States while advocating for inclusion of the charge of conspiracy, asserted that the atrocities committed by the Nazi regime were the inevitable outcome of the criminal conspiracy of the Nazi party.[11] This led to the

[6] *Harrison v. United States*, 7 F.2d 259(2d Cir.1925) cited in La Fave (2003:615).
[7] Fichtelberg(2006:157).
[8] Fichtelberg(2006:157).
[9] Fichtelberg(2006:158).
[10] Fichtelberg(2006:159).
[11] Fichtelberg(2006:161).

introduction of the concept of conspiracy under Article 6 of the Nuremberg charter.[12]The charter provided, "Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the following crimes are responsible for all acts performed in execution of the plan."[13]This introduction was made despite the resistance by France and the Soviet Union, where the crime of conspiracy was then unknown or applied to a very limited extent.[14]

In 1948, the Convention on the Prevention and the Punishment of the Crime of Genocide (the Genocide Convention) was ratified and it entered into force on 12 January 1951.[15]The Genocide Convention establishes genocide as an international crime. Article 3(b) of the Convention makes conspiracy to commit genocide a punishable crime. The *travaux preparatoires* of the Genocide Convention show that the rationale for including such a crime was to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide shall be punishable.[16] The report of the Secretary-General of the United Nations on the Convention asserted that "genocide can hardly be committed on a large scale without some form of agreement. Hence the mere fact of conspiracy should be punishable even if no 'preparatory act' has yet taken place".[17]The adoption of this Convention marked the second instance in which conspiracy was recognised in international criminal justice.

In 1993 to manage the conflict in the former Yugoslavia, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY).[18] Article 4(3)(b) of the ICTY Statute provides for conspiracy to commit

[12] "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a) Crimes against Peace:namely,planning,preparation,initiation,or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances; or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;...."

[13] Fichtelberg (2006:161).

[14] Fichtelberg (2006:161).

[15] Adopted by Resolution 260(III) A of U.N General Assembly on 9 December 1948.

[16] *P v Musema* (TC), para 185.

[17] Draft Convention on the Crime of Genocide, Commentary, U.N. Secretary-General, at 71, U.N. Doc. E/447 (1947). See Fitchelberg (2006:165).

[18] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/808 (1993) annex.

genocide. The ICTR was later established in 1994 and its Statute also provided for conspiracy to commit genocide.[19]

Conspiracy as a charge has been used most extensively before the ICTR in comparison to any other international criminal tribunal.[20] In 1995, following the atrocious crimes committed in Rwanda, the United Nations Security Council, with Resolution 955, established the International Criminal Tribunal for Rwanda (ICTR) in an effort to hold the alleged perpetrators of these crimes accountable.[21] Investigations by the office of the prosecutor of the ICTR have been carried out on the premise that the atrocities committed in Rwanda constituted one overarching and interconnected crime of genocide.[22] It is believed that for the Rwandan tragedy to have taken place in the presence of a government, its armed forces and an entrenched civil administration, there must have been either a conspiracy of silence or a conspiracy of participation to allow perpetrators to kill.[23]

The Rome Statute of the International Criminal Court (Rome Statute) was adopted in 1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (ICC).[24]Departing from tradition the Rome Statute has failed to provide expressly for the crime of conspiracy to commit genocide. This departure raises the question of whether the crime of conspiracy to commit genocide has any relevance in the modern practice of international criminal law, and of its status in customary international law. After Nuremberg conspiracy in the international scene has only been recognised with respect to the crime of genocide. Nonetheless, the concept of conspiracy has had a central role in influencing modes of criminal liability in international criminal law.[25] The crime of conspiracy is considered an important legal tool in preventing crime. However, it has been surrounded with controversy both within domestic criminal law and international criminal law. A balancing act must be achieved on how far the law can go to prevent crime by punishing persons who have not accomplished their criminal purpose. In

[19] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994) annex.
[20] Othman (2005:191).
[21] Article 2(3)(b) ICTR Statute.
[22] Othman (*2005*:224).
[23] Othman (2005:234).
[24] The Rome Statute was adopted on 17 July 1998 and came into force on 1 July 2002.U.N.Doc.A/CONF.183/99.
[25] Meierhenrich(2006:354).

the international scene controversy surrounding the crime of conspiracy arises from the different perceptions of the common law and civil law jurisdictions.

This study will critically analyse the use of the crime of conspiracy as a tool of accountability in international criminal law. It will look into the controversy surrounding the concept of conspiracy, its legitimacy and effectiveness as a tool of accountability. It will consider also what role it is likely to have in establishing criminal responsibility before the ICC following the adoption of the Rome Statute.

3. TITLE

The concept of conspiracy law in international criminal law.

4. KEY WORDS

Criminal Conspiracy

International Criminal Law

Conspiracy to commit genocide

International Criminal Tribunal for Rwanda

International Criminal Court for Yugoslavia

International Criminal Court

Inchoate crimes

Joint Criminal Enterprise

Modes of participation

Criminal Organisation

5. Research Questions

The main question this study intends to address is what constitutes the crime of conspiracy ,what role it has played in the development of international criminal law and whether it will play any significant role following the failure by the drafters to

provide expressly for it in the Rome Statute. The secondary questions to be considered are:

- What are the elements of the crime?
- What crimes does it apply to in international criminal law?
- What influence have the common law and civil law jurisdictions interpretation of criminal conspiracy had in its development in international criminal law?
- How effective has conspiracy been in the prosecution of criminal enterprises in international criminal law?
- Does the crime have any place the modes of participation in the Rome Statute?

6. Significance of the Study

In spite of the effective role conspiracy plays in the prosecution of criminal groups, the crime has been marred with controversy both in the domestic and international fronts. The difference in application of conspiracy in the common law and civil law jurisdiction has led to uncertainty of its use in international criminal law. This has led to the failure to expressly provide for crime of conspiracy to commit genocide in the Rome Statute, although it is established under customary international law,[26] creating doubt on this status. This raises the question as to the relevance of the crime of conspiracy as a tool of accountability. A critical analysis of its evolution in the domestic and international front will clarify the precise legal contours of the crime of conspiracy and the rationale of its existence, questioning its legitimacy and effectiveness as a crime in international criminal law where group dynamics are involved. This study will contribute towards a clearer understanding of the crime of conspiracy in general.

[26] See the Genocide Convention article III (b), Werle (2009:228) para 622, Cassese (2008:227).

7. Literature Review

Several scholars argue that the perception of the concept of conspiracy differs in the common and civil law jurisdictions.[27]In the common law systems, when two or more people agree to commit a crime, the act of agreeing itself is punishable irrespective of whether the purpose of the agreement is carried out or not. The crime is complete upon conclusion of the agreement.[28]

Generally, in civil law systems the concept of conspiracy being punishable even where no crime has been committed is unknown. Conspiracy in this instance is founded on the principle that a person cannot be punished for mere criminal intent or for preparatory acts committed.[29]Where conspiracy is recognised in the civil law system, there is a requirement of an overt act. The rationale for this is that an idea not yet put into action does not cause any harm to society.[30]In the legal systems where it exists, it is punishable only when its purpose is to commit certain crimes considered very serious, such as undermining the security of the State.[31] More recently, the crime has been applied to the fight against organised crime in several civil law jurisdictions.[32]

This systemic difference in perception of the crime has led to different conceptions of the crime in the international arena.Bantekas and Nash postulate that conspiracy in the Nuremberg Tribunal and Charter was employed as a particular form of perpetration of the crime of aggression rather than as an inchoate crime.[33] In departure from both the Nuremberg Charter and Tribunal, the inclusion of conspiracy in Article III, together with the actual perpetration of genocide, in the Genocide

---

[27] See Bantekas and Nash (2007:34), Cassese (2008:227), Fitchelberg (2006:151).
[28] La Fave (2003:615).
[29] *P v Musema* (TC),para 186.
[30] See Othman (2005:194).In other countries like Germany the crime of conspiracy is provide for(S 30 of the German Criminal Code).
[31] *P v Musema* (TC),para 186 .
[32]See article 115 of the Italian Penal Code, and article 450-1, French Penal Code. However, Germany, though a civil law country provides for conspiracy that punishes mere agreement in S 30 of the German Criminal Code. In S 30(2) 'A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable....'.Also see Bohlander (2009:175). Bohlander, however, seems to suggest that the conspiracy in this case is not an inchoate crime but more a mode of participation modelled on the general concept of attempts.
[33] Bantekas and Nash (2007:34).

Convention evidences that conspiracy in this instance was intended to be an inchoate crime.[34] This position has been confirmed by the ICTR jurisprudence. [35]

Contrary to customary international law, the Rome Statute has failed to provide directly for the crime of conspiracy to commit genocide or in any case conspiracy as an inchoate offence. Article 25(3)(d) of the Rome Statute, which is said to provide indirectly for conspiracy, is seen to be more akin to the Nuremberg common plan, since it requires attempt or completion. This is not the case with conspiracy as an inchoate crime. Under the Rome Statute, the conspiracy that seems to be recognised is a form of participation in crime and liability.[36]However, Kittichaisaree opines that the crime of conspiracy has been covered indirectly in Article 25(3)(d) of the Rome Statute, and that the ICC, in the case of genocide, is likely to interpret this provision by seeking guidance from the jurisprudence of the ICTR.[37] This view is questionable, as the crime of conspiracy in the Rome Statute is formulated as a mode of participation, in contrast to the crime of conspiracy to commit genocide in the Genocide Convention, which is punishable in itself without its results having been realised or attempted to be realised.

Meierhenrich observes that conspiracy has played a central role in providing doctrinal underpinnings in the controversial idea of criminal organisations found in the Nuremberg trials, and the concept of joint criminal enterprise established in the International Criminal Tribunal for Yugoslavia.[38]Fichtelberg opines that while criminal conspiracy can be used effectively to prosecute groups existing for criminal purposes, "it spreads the paint of criminality too widely".[39]Fichtelberg observes that criminal conspiracy is prone to abuse, posing a great threat to the rule of law especially at the international level.[40]

The controversy that the crime of conspiracy has generated at the international level makes it necessary to study its journey and position in international criminal law. This

---

[34] Bantekas and Nash (2007:35).
[35] *P v* Musema(TC),para 193.
[36] Bantekas and Nash (2007:36).
[37] Kittichaisaree (2001: 248).
[38] Meierhenrich(2006:354).
[39] Fichtelberg(2006:157).
[40] Fichtelberg(2006:157).

is important to establish the precise legal contours of the crime, critically evaluate its legality, use and possible development.

7. Methodology

I intend to mainly use the available written texts and electronic sources at the various university libraries.I shall analyse the jurisprudence of the Nuremberg and Tokyo trials, ICTY, ICTR, ICC, the texts of relevant international instruments, and whatever evidence exists of identifiable State practice. Also, I shall scrutinise leading textbooks, law journal articles, and various other texts, including internet legal sources.

8. Overview of Chapters

The study consists of four chapters. The first chapter is the introduction. It will set out the introduction of conspiracy law in international criminal law, tracing its journey from Nuremberg to the adoption of the Rome Statute.

The second chapter will have a comparative analysis of the concept of the crime of conspiracy in the common law and civil law jurisdictions. An understanding of the perception of the concept from the different systems will clarify the controversy surrounding the crime at the international level.

The third chapter will be a critical analysis of the jurisprudence of the Nuremberg and Tokyo trials, the ICTY and ICTR with respect to the crime of conspiracy. It will look at the influence the concept of conspiracy has had on the various tools of accountability recognised in the jurisprudence of the international tribunals.

The fourth chapter is the final chapter in this study and will analyse the place of conspiracy in the Rome Statute and its effectiveness as a tool of accountability in international criminal law. The conclusion and recommendations will also be in chapter four.

9. PRELIMINARY BIBLIOGRAPHY

PRIMARY SOURCES

Case Law

ICTR

The Prosecutor vs Alfred Musema Case No ICTR 96-13-A Judgement of 27 January 2000.

Alfred Musema (Appellant) vs The Prosecutor Case No ICTR-96-13-A Judgement of 16 November 2001.

The Prosecutor vs Athanase Seromba Case No. ICTR -2001-66-T Judgement of 13 December 2006.

The Prosecutor vs Eliezer Niyitegeka Case No. ICTR 96-14-T Judgement of 16 May 2003.

The Prosecutor vs Elizaphan Ntakirutimana & Gerard Ntakirutimana Case No. ICTR 96-10-T & ICTR -96-17-T Judgement of 21 February 2003.

The Prosecutor vs Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze Case No. ICTR 99-52-T Judgement of 3 December 2003.

Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) vs The Prosecutor Case No. ICTR-99-52-A Judgement of 28 November 2007.

The Prosecutor vs Andre Ntagerura, Emmanuel Bagambiki,Samuel Imanishimwe Case No. ICTR-99-46-T Judgement of 25 February 2004.

The Prosecutor vs Jean Kambanda Case No.ICTR 97-23-S Judgement of 4 September 1998.

The Prosecutor vs Juvenal Kajelijeli Case No.ICTR 98-44A-T Judgement of 1 December 2003.

The Prosecutor vs Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva No.ICTR-98-41-T Judgement of 18 December 2008.

ICTY

Prosecutor v. Krstic, ICTY (TC), judgment of 2 August 2001.

ICC

P v Thomas Lubanga Dyilo, ICC (Pre-Trial Chamber), decision of 29 January 2007 case no. ICC-01/04-01/06.

P v Katanga and Ngudjolo Chui,ICC (Pre- Trial Chamber), decision of 30 September 2008 case no. ICC-02/05-01/07.

International Instruments

Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the U.N General Assembly on 9th December 1948.Entry into force: 12th January 1951.

Statute of the International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 808, UN Doc. S/RES/808 (1993).

Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955, UN Doc. S/RES/955 (1994).

Rome Statute of the International Criminal Court adopted on 17th July 1998 and entered into force on 1st July 2002.

SECONDARY SOURCES

Books

Bantekas I and Nash S (2007), *International Criminal Law*, London Routledge.Cavendish,2 Park Square, Milton Park,Abingdon,Oxon OX14 4 RN,UK .

Bohlander M (2009), *Principles of German Criminal Law*, North America,Hart Publishing c/o International Specialized Book Services 920 NE 58th Avenue,Suite 300 Portland.

Cassese A., (2008), *International Criminal Law*, 2nd ed. Oxford,Oxford University Press, Great Claredon Street,Oxford OX_2 6DP.

Gillies P, (1990),The Law of Criminal Conspiracy,2nd ed. Sydney,The Federation Press P.O.Box 45, Annadale,NSW,2038.

Fletcher P. G (1998), *Basic Concepts of Criminal Law*, New York, Oxford University Press 198 Madison Avenue,New York,New York 10016.

Fletcher P. G (2000), *Rethinking Criminal Law*, New York, Oxford University Press,198 Madison Avenue, New York.

Kittichaisaree K (2001), *International Criminal Law*, New York, Oxford University Press, 198 Madison Avenue,New York,New York 10016.

La Fave R. W (2003), *Criminal Law* 4th ed.Horn Book Series, Thomson West,610 Opperman Drive United States of America.

Lattanzi,F and Schabas,W (eds.)(1999) *Essays on the Rome Statute of International Criminal Court Teramo*: IL Sirente Press.

Mettraux G. (2005), *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS,* Oxford, Oxford University Press,Great Clarendon Street, Oxford ox 2 6DP.

Othman M C. (2005), *Accountability for International Humanitarian Law Violations:The Case of Rwanda and East Timor*, Berlin Heidelberg, Springer.

Schabas W (2000), *Genocide in International Law: the crime of crimes,* Cambridge, Cambridge University Press,The Edinburg Building, Campbridge CB2 8RU,UK.

Schabas W (2006), *The UN International Criminal Tribunals.* The former Yugoslavia, Rwanda and Sierra Leone, Cambridge, Cambridge University Press, The Edinburg Building, Campbridge CB2 8RU,UK.

Schabas W A, (2007) *An Introduction to the International Criminal Court*, 3rd ed. Cambridge, Cambridge University Press, The Edinburg Building, Campbridge CB2 8RU,UK.

Werle G., (2009) *Principles of International Criminal Law*, 2nd ed. The Hague, T.M.C Asser Press, P.O.Box 16163, 2500 BD The Hague, The Netherlands.

Articles

Fichtelberg,A 'CONSPIRACY AND INTERNATIONAL CRIMINAL JUSTICE'(2006)17 Criminal Law Forum 149-176.

Meierhenrich J. 'CONSPIRACY IN INTERNATIONAL LAW' (2006) 2 *Annu.Rev.Law Soc.Sci.*Down loaded from arjournals.annual reviews.org

Obote-Odora A. 'Conspiracy to Commit Genocide: Prosecutor v Jean Kambanda and Prosecutor v Alfred Musema' (2001) 8 *Murdoch University Electronic Journal of Law.*

Ohlin J D 'Attempt,Conspiracy and Incitement to Commit Genocide' (2009) In The UN Genocide Convention:A Commentary,Paola Gaeta forthcoming publication.

Punja R K. 'MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE ICTR ISSUE: WHAT IS THE DISTINCTION BETWEEN "JOINT CRIMINAL ENTERPRISE" AS DEFINED BY THE ICTY CASE LAW AND CONSPIRACY IN COMMON LAW JURISDICTIONS?' (2003), Case Western Reserve University School of Law International War. Crimes Research Lab <law.cas.edu/war-crimes-Research-Portal.

Sayre, 'Criminal Conspiracy', (1922) 35 *Harvard Law Review* 393.

Schabas, 'Article 6 Genocide',in Triffterer,O (ed.) (2008)2nd ed.*Commentary on the Rome Statute of the International Criminal Court* :Observers' Notes Atticle by Article,Munchen,Verlag C.H.Beck oHG,Wilhelmstrase 9, 80801 Munchen,Germany.