MEMORANDUM

To: Deputy Prosecutor of the International Criminal Tribunal for Rwanda

From: Tyler Letey

Date: December 18, 1998

Re: On the basis of national legislation and case law as well as international practice what types of accessory participation, in the sense of an overt act in furtherance of a conspiratorial object, attract liability for the crime of Conspiracy to commit Genocide?

International War Crimes Project
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I. Introduction

A. Question Asked

On the basis of national legislation and case law as well as international practice what types of accessory participation, in the sense of an overt act in furtherance of a conspiratorial object, attract liability for the crime of Conspiracy to commit Genocide?

B. Summary of Conclusion

The Tribunals established after World War II opened a debate as to the application of the concept of conspiracy in international criminal law. Based upon this debate, international statutes, individual State law, and the international acceptance of the crime of conspiracy to commit genocide, the only overt act required to be culpable for the crime of conspiracy to commit genocide is the agreement of two or more people to commit the crimes.

II. Factual Background

According to the findings of the Trial Chamber of the Akayesu case, the distinction between the Hutu and the Tutsi was an invention of Rwanda's colonizers. The Tutsi, because of their lighter skin color, were thought to be more intelligent by the German and Belgian colonial authorities.\(^1\) Because of this distinction, the minority Tutsi held the majority of the country's resources when the Belgians began their transfer of power to the native population in the 1950's.\(^2\) Believing that the Hutu would keep their ties to the Belgian government and to further the advancement of suffrage, the Belgian Government initiated democratic elections in Rwanda. As early as 1959, outbreaks of violence

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\(^2\) Id.
between the Tutsi and the Hutu over political issues began to occur. The elections of June 1960 granted a significant majority to the Hutu, and the Tutsi population fled the country.

In February of 1961 Belgium granted self-rule. Political and social unrest has been present since then. On April 6 1994, President Habyarmana’s plane crashed near Kilgali, killing all on board including Burundian President Ntaryamirai. Immediately after the crash was publicly announced over the Radio the Rwandan army erected roadblocks around Kilgali, and the Presidential Guard began killing Tutsi and Hutu in favor of the establishment of some Tutsi power in the country. On April 12, 1994, public authorities again instigated the people to kill the Tutsi minority. The Tutsi, looking for safe haven were enticed into churches, schools, hospitals and government building. The Hutu took advantage of the trapped Tutsi, thus making the murders easier. From April 6, 1994, to April 18, 1994, when the RPF retook Kilgali, 500,000 to 1,000,000 Tutsi had been killed.³

The authority to prosecute for conspiracy to commit genocide can be found in Article 2 of the International War Crimes Tribunal for Rwanda, which states:

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the others enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such:
   a) Killing members of the group;
   b) Causing serious bodily or mental harm to members of the group;
   c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   d) Imposing measures intended to prevent births within the group;
   e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
   a) Genocide;
   b) Conspiracy to commit genocide;
   c) Direct and public incitement to commit genocide;

³ ld.
d) Attempt to commit genocide;
e) Complicity in Genocide.  

III. Legal Discussion

A. Introduction

In order to find the definition of conspiracy, as well as the elements that are required for conspiracy to be legally punishable in international courts, this memorandum first analyzes previous usage of conspiracy in the international setting (Nuremberg and Tokyo War Crimes Tribunals and the United Nations Genocide Convention). After this historical analysis, the memorandum examines the current interpretation of conspiracy through the Rome Statute of the International Criminal Court, the European Union Statutes, Amnesty International and individual state interpretation of conspiracy through State penal codes.

B. Nuremberg and Tokyo Applications

1. Drafting of the Nuremberg Charter

The initial concept of charging the Nazi war criminals with conspiracy originated with Colonel Bernays of the United States.

Colonel Bernays of the JAGD (Judge Advocate General's Department) gave an interesting talk on the possibility of bringing charges against the whole scheme of the Nazi totalitarian war, using for the promotion of its ends methods of warfare which were in conflict with the established rules of war. This was virtually upon the theory of conspiracy and I then told them of my experience as limited states attorney in finding that only by [charging] conspiracy could we properly cope with the evils which arose under our complicated development of big business.  

At the time, conspiracy was a Western concept that had never been used by much of the world's legal systems. "The conspiracy count was new not only to international law, but to the French and Russian allies, whose civil-law systems had no such doctrine,"6 Although the concept was foreign to much of the world it was thought of as a potential crime that could be used against the Nazi organizers that could not be directly connected to specific crimes already accepted in criminal law. With much debate and hesitance the Nuremberg Charter finally accepted the concept of conspiracy. Article 6 of the Chapter provided:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.7

But, conspiracy was not defined in the Nuremberg Charter. In the opinion of the Nuremberg Tribunal, the conspiracy must be clearly outlined in its purpose. The conspiracy cannot be "too far removed from the time of decision and action." The planning, to be criminal, must not rest solely on the declaration of a party program.8 The Charter also determined that the Tribunal must examine whether a "concrete plan to wage war" existed, and determine the participants in that concrete plan.9

Clearly, this did not mean that the debate as to the application of the conspiracy was over. Since the Charter's statement above did not actually define what conspiracy entailed the entire debate began again. The Nuremberg Tribunal concluded that:

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7 1 TMWC 226 quoted in Levy, 406
8 See 1 TMWC 226 quoted in Levy, 406
9 See Id.
in the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war. 10

The Tribunal took a very narrow, literal interpretation of Article 6, thus the conspiracy could only be used to convict for preparation and initiation of war. That is not to say that the courts would not have used conspiracy charges in the areas of prosecution if the Article were to be written differently. Scholars remarked "if there was any weakness in the tribunal's findings, I believe it lies in its very limited construction of the legal concept of conspiracy." 11 "One is at a loss to understand why conspiracy to prepare an aggressive war should be a crime per se while conspiracy to set up a death camp should not be.,,12

When used by the prosecution, one of the major defenses used by the Germans in the Nuremberg trials was the argument that Adolph Hitler was the sole leader, and such that all of the crimes were his idea. Therefore they were not conspirators, just subservience following orders. This was met with little support. Hitler "had to have the cooperation of statesman, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated.,,13 A criminal organization is analogous to a criminal conspiracy in that in both cooperation is necessary for the criminal purpose to be completed, and the

10 Id.
12 Pomorski, 222 quoted in Levy, 406
group must be formed or used in connection with the commission of crimes denounced by
the chapter. 14

The prosecution countered that "the argument that such common planning cannot
exist where there is a complete dictatorship is unsound. A plan in the execution of which
a number of persons participate is still a plan, even though conceived by only one of them;
and those who execute that plan do not avoid responsibility by showing that they acted
under the direction of the man who conceived it.,,15 Hitler, alone could not make
aggressive war. The co-operation of government officials, military leaders, influential
people, and business-men was required. When these people, with knowledge of Hitler's
aims, gave him their co-operation, they made themselves conspirators to the crimes
planned. "They are not to be deemed innocent because Hitler made use of them, if they
knew what they were doing.,,,16

This lack of application of conspiracy in the Nuremberg trials was understandable.
It was a new concept that was met with apprehension. The Charter was not in a situation
where they could dedicate large amounts of time to debate the subject, thus the Charter
ended up leaving the courts to apply a loosely defined concept. In the Nuremberg trials
conspiracy did not play the significant role that its advocates had hoped. For the Tokyo
Tribunal's the concept of conspiracy, equally new, was met with the same hesitation and
criticism as well as the same defenses.

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14 See Id.
15 See Judgment: The Law as to the Common Plan of Conspiracy
16 Id.
2. Tokyo Application

Because of the originally of the crime, the prosecution spent much of their time not arguing facts, but trying to explain conspiracy. "This discrepancy between lay and legal understanding of conspiracy worked to discredit the conspiracy indictments and conviction of the Tokyo defendants even more than those in Nuremberg."17 The prosecution spent much of their time explaining the meaning of conspiracy in legal doctrine versus the more conventional understanding prevalent among historians and the wider public.18

Based upon this interpretation, the Tokyo Tribunal only thought that military and government leaders should be charged with conspiracy.19 Justice Hu C. Anderson advocated that only "policy-making capacity" should be charged.20 The Tokyo Tribunal's final judgment stated:

A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfillment they become conspirators.21

In retrospect, the much debated and analyzed concept of conspiracy did not have the dramatic impact that was hoped by its western supporters. As stated above, this apprehension was understandable. The concept was new to most of the world, the Charter was hesitant in applying the concept, and the judges in the Tribunal were hesitant

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18 See Osiel, 534
19 Appleman, at 231
20 Appleman, at 210
21 1 Tokyo Judgment 31
to apply the concept. The courts did not want to be in the position of initiating a new law that most of the world did not adhere to or understand, and did not want to punish criminals for a crime that was not in existence at the time of the conspiracy.

Because of the limited discussion time by the Nuremberg Charter, and the chance to evaluate the legal effects that conspiracy had in the Tribunals, the United Nations formed the United Nations Genocide Convention which reevaluated the concept of conspiracy. Because much more time was spent debating and analyzing the concept of conspiracy in the Genocide Convention a better understanding of the intentions of the international community can be found in the Ad Hoc Committee for the Genocide Convention notes.

3. United Nations Genocide Convention

The United Nations Ad Hoc Committee for the Genocide Convention was established to debate and resolve international criminal laws so that if the situation arise again the United Nations would be more prepared. During the Committee debates much time and effort was spent on finalizing the elements of the crime of conspiracy. The United Nations Secretary General stated: "Genocide can hardly be committed in 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."

22 The Secretary General thus concluded that the magnitude of the threat posed to humanity by genocide dictates that an agreement to commit genocide is all that is necessary to be punishable in order to

safeguard against the reoccurrence of such acts. 23 Further, the preparatory acts that were required consisted of (a) Studies and research for developing techniques of genocide, 24 (b) establishment or installing and the manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide, 25 and (c) Issuing instruction or orders and distributing tasks with a view of committing genocide. 26

Although this was the opinion of the Secretary General, the Ad Hoc Committee deleted preparatory acts because many argued that there needed to be overt acts beyond agreement. "Mr. Perozo of Venezuela noted that in Latin America the preparation of a crime was not punishable in itself. It had to at least be followed by the beginning of commission and thus attempt.,, 27 Mr. Morozov, representing Russia, also disagreed that preparatory acts constituted conspiracy by saying "construction would be complicity, but instruction would be conspiracy" (relating to the construction of concentration camps, limiting preparatory acts). 28 This was countered by Mr. Raafat of Egypt who stated: "the setting up of the installations and the manufacture or supply of substances were serious offences from the point of view of complicity; the act of giving instruction or assigning tasks constituted conspiracy.,, 29

The conclusion to the discussion of preparatory acts was a compromise. The commentary to the Report of the Ad Hoc Committee on Genocide concluded that in the

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23 See id.
24 id. Art. II (I)(2)(a)
25 id. Art. II (I)(2)(b)
26 id. Art. II (I)(2)(c)
27 UN GAOR, Ad Hoc Comm. on Gen., 6th Session, 17th Mtg., at 4, UN Doc. E/AC.25/SR 17 (1948) quoted in Lippman, 42
28 UN GAOR, Ad Hoc Comm. on Gen., 6th Comm., 3rd Session, 86th mtg., at 234 (1948) quoted in Lippman, 42
29 id. at 237
"most serious cases, preparatory acts" could be punished as conspiracy. The example given by the Committee was the construction of crematory ovens or the adaptation of motor-cars to the purpose of killing the occupants with noxious gases. Such acts requiring the co-operation of certain number of persons, would accordingly come under the heading of "conspiracy to commit genocide" if genocide were not finally committed.³⁰

Addressing the much used defense argument in the Nuremberg and Tokyo trials that one person can lead the entire operation, thus no conspiracy the Ad Hoc Committee stated:

a plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them, and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it... when they with knowledge of his aim, gave him their cooperation, they made themselves parties to the plan he had initiated.³¹

Even though the United Nations Secretary General did not think that preparatory acts were required for conspiracy, the Committee concluded otherwise. So, even three years after the concept of conspiracy was first brought to international attention it still did not have the effect that the Western cultures had hoped. This hesitation in the Committee was based upon the same arguments as the Nuremberg Charter, it was too new of a concept. Added to this hesitation was the polarization of the globe after World War II. States were left weary of what the intentions of their enemies were. The Eastern Bloc thought that it was a western ploy to stop communism.

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³⁰ See Ad Hoc Conlin. on Genocide to the Economic and Social Council in the meetings of the Committee Held on Lake Success, New York, at 8 quoted in Lippman, 43
³¹ Appleman, 54
Even after the application of conspiracy, although limited, in the Nuremberg and Tokyo Tribunals and the Ad Hoc Committee for the Genocide Convention debates, the concept of conspiracy and what it entailed was still not completely settled. In an effort to further block the atrocities of World War II from happening again the International Law Commission was established.

4. International Law Commission

After the completion of World War II the War Crimes Tribunals, the International Law Commission was established. On December 12, 1952 the Commission stated:

Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefore and liable to punishment.

The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from the responsibility under international law or mitigate punishment.

The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires.

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Crime against peace: (i) Planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances; (ii) participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (1).

The International Law Commission thus stated that when domestic law does not recognize conspiracy in international laws can still be applied. Based upon this statement another step toward international acceptance of the concept of conspiracy was established.

In the short period from the start of the Nuremberg Charter to the establishment of the

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International Law Commission the concept of conspiracy made major strides from being a potential crime to being an established and accepted crime. Although accepted, the application was not needed for years to come and the debate of the concept had lost favor. But it can be fair to say that conspiracy would play a much more significant role if the Nuremberg Tribunals were to take place today.

All of the above events took place in the 1940's and early 1950's. It is necessary to look at more modern applications of conspiracy. The Rome Statute of the International Court, which was written last year, is the most recent international law on the subject matter.

C. Rome Statute of the International Court

For the most recent interpretations of conspiracy it is best to look at international legislation within the last few years. After the totality of World War II had been comprehended, there had been little need to push for more clarification of conspiracy until the crimes were committed in the former Yugoslavia and Rwanda during the 1990's. Based upon growing international desire for a permanent international criminal tribunal, the Rome Statute of the International Criminal Court was established in July 1998. Article 25: Individual Responsibility, is relevant to the issue of conspiracy. Article 25 provides:

1. The Court shall have jurisdiction over natural persons pursuant to this statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this statute.
3. 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 fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assist in its commission or its attempted commission, including providing the means for its commission;
(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;
(e) In respect of the crime of genocide, directly and publicly incites other to commit genocide;
(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of the circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Although the term conspiracy is not specifically used, 3(d) of the Rome Statute incorporates the concepts of conspiracy and further states that the mere knowledge of the intention to commit a crime is punishable. The Rome Statute expands the concept of conspiracy beyond the application used during the Second World War. Conspiracy now closely resembles the intentions of the initial supporters of conspiracy at Nuremberg.

33 Rome Statute of the International Court. Art. 25
34 Id.
elements of conspiracy for Rome focus on the joining of the group, the knowledge of the unlawful acts to take place and the intent to commit the acts.

D. European Union

The formation of the European Union has led to a significant number of treaties, among them the European Union: Convention relating to extradition between the Member States of the European Union, Explanatory Report, Article 3 provides:

...a series of objective elements is used:
-it must be a behavior contributing to the commission by a group of persons acting with a common purpose of one or more offences of the types mentioned in paragraph 4,
-the contribution may be of any nature and it will be a matter of objective evaluation in a given case whether the behavior contributes to the commission of one or more offences. As it is stated in this paragraph, the behavior need not consist of the participation of the person in the actual execution of the offence or offences concerned. The contribution can in fact, be ancillary in nature (mere material preparation; logistic support to the movement or harbouring of persons and similar conduct). The paragraph does not provide that the person contributing to the commission of the offence must be a 'member' of the group. Therefore, if a person having no part as a member of a closely organized group contributes to the criminal activity of the group, either occasionally or permanently, also this kind of contribution shall be covered by the provision in question, provided the other elements constituting the contribution, as indicated in paragraph 4, exist....This test qualifies the contribution in two ways: firstly, the contribution must be intentional, so non intentional contributions are excluded. Secondly, the nature of criminal groups and the circumstances whereby the contribution is given vary and so there is a requirement that an element of knowledge is specified". 35

In the Case of SA Hercules v. EC Commission 36 the Court of First Instance was left with the job of interpreting the statutes of European Community Treaties. In SA Hercules the court concluded that Article 85(1) which used concepts like "concerted

36 SA Hercules Chemicals NVv. EC Commission 4 CMLR 84 (1992)
actions” and "concerted practices" originated from the American Sherman Act concept of conspiracy. The court stated: “It is apparent from American case law, that anti-competitive effects are not necessary as a constituent element of 'conspiracy', just as no act other than the conspiracy need be committed.,37

Based upon European Union statutes and case law it is clear that the European Union was using American case law, and the concept of conspiracy even when the term "conspiracy" is not specifically used. The case law and statutes of the European Union thus concluded that mere establishment of the conspiracy is the only overt act required.

E. Amnesty International Report

Even though Amnesty International is a private organization, they are well respected for their work throughout the world. It is their opinion that conspiracy is punishable under international law and should be.

"Although the common law concept of conspiracy as a separate crime is foreign to some other national legal systems, states which do not have conspiracy as a crime in their criminal codes have accepted that a person can be held criminally responsible for a crime under international law where that person planned or conspired to commit that crime.,38

The Amnesty International Report does not discuss the elements of conspiracy, but reiterates the fact that conspiracy is accepted internationally as a criminal activity.

37 Id.
38 Amnesty International Report IOR 04/01/97
F. Individual Country Penal Codes

The following is a representation of penal codes from different regions of the world.\textsuperscript{39} This analysis is used to determine the likelihood of the use of the concept of conspiracy in penal codes and how the States interpret conspiracy in their penal codes. Of the twelve States analyzed the first eleven States recognize the concept of conspiracy in their penal codes with nine of those only requiring agreement for the conspiracy to be completed and two requiring a more significant overt act, with two States not recognizing conspiracy.

1. Australia

"Two views can be advanced as to the justification for a crime of conspiracy. The more limited is that an agreement between two or more people to commit a crime is under most circumstances a sufficient menace to the well-being of society to require that the agreement itself be made an offence. The second is that under some circumstances an agreement between two or more people to do certain things is a social menace which should be an offence against the criminal law regardless of whether the actions they have in mind are criminal offences. It is the second of these views which has dominated the common law development of conspiracy throughout Australia...\textsuperscript{40} Australia thus finds agreement to be a sufficient act to fulfill the crime of conspiracy.

2. France

France, who was hesitant to accept conspiracy as a charge in Nuremberg and Tokyo, now recognizes the crime of conspiracy in Article 265 and 266 of the French Penal


\textsuperscript{40} Brent Fisse, \textit{Howard's Criminal Law}, 356 (1990)
Code. Article 265 provides: Every combination, regardless of duration or the number of its members, and every agreement, for the purpose of planning or committing crimes against persons or property, is a felony against the public peace. Article 266 provides: Any person who joins a conspiracy or participates in a combination as provided in the preceding Article, shall be punished by hard labor for a limited time. Notwithstanding application of the provisions of the law of May 30, 1854, on the Execution of the Punishment of Hard Labor, the punishment of transportation may also be imposed. Any person guilty of a felony under this Article who, prior to prosecution, denounces the combination or discloses the conspiracy to the public authorities, shall be exempt from punishment. France thus establishes the punishment of conspiracy for each and every agreement.

3. Germany

The German Penal Code makes two references that are pertinent. Section 49b. Conspiracy to Commit Murder: 1. Anybody participating in a conspiracy directed at the commission of felonies against human life or considering such as means to other ends, or who supports such a conspiracy, shall be punished by imprisonment of not less than three months. 2. In especially serious cases the punishment is confinement in a penitentiary of up to five years. Under section 220a the conspiracy to commit genocide is punishable by three to fifteen years imprisonment. The German Penal Code makes specific reference to conspiracy and establishes punishment for the mere consideration of committing murder.

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41 Penal Code, Art. 265 (France)
42 id., Art. 266
43 Penal Code, Art. 49b. (Gennany)
44 Pickard. 144
4. India

Section 96 of the Indian Penal Code: Whoever previously abets any offence punishable with imprisonment, by engaging in a conspiracy to commit that offence, shall, if any act or any illegal omission takes place in pursuance of that conspiracy, and in order to committing that offence, be punished with imprisonment of any description provided for that offence, for a term which may extend to one fourth part of the longest term provided for that offence, or such fine as is provided for that offence, or both. India requires any act in furtherance of the conspiracy for the crime to be punishable, thus agreement constitutes conspiracy.

5. Nigeria

"Conspiracy is nowhere defined in the Code, and since the common law is in force in Nigeria the word must bear the same meaning as in England, as an agreement of two or more persons to do an act which it is an offence to agree to do. Direct evidence of an agreement is not indispensable, and it is open to the trial court to infer compliance from the fact of doing things toward a common end. While a mere future intention is not punishable as a conspiracy, even if two or more persons share it, the offense of conspiracy is complete as soon as two of more agree to carry the intention into effect. So, Nigeria adheres to Common Law, and punishes the crime of conspiracy in the same manner as the United Kingdom.

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45 Penal Code, Sect. 96 (India)
6. Romania

Article 357: Genocide: ...An agreement for the purpose of committing the offence of genocide is punishable by five to fifteen years imprisonment, prohibition of exercise of certain rights, and partial confiscation of property. If the act is committed during wartime, the penalty is death and total confiscation of property. An agreement for the purpose of committing the offense of genocide is punishable by five to fifteen years' imprisonment, prohibition of exercise of certain rights, and partial confiscation of property. Romania punishes for the agreement to commit conspiracy.

7. South Korea

Article 255: Preparations: Conspiracy: A person who makes preparations or conspires with intent to commit the crime of Article 250 or 253, shall be punished by penal servitude for not more than ten years. Article 250: Murder: Killing an Ascendant: Section (1). A person who kills another shall be punished by death, penal servitude for life or for not less that five years. South Korea requires the intent to commit the crime.

8. United Kingdom

The United Kingdom defines conspiracy in the Criminal Justice Act of 1993, Section 5 as: 
"(3) A person may be guilty of conspiracy to defraud if: (a)a party to the agreement constituting the conspiracy, or a party’s agent, did anything in England and Wales in relation to the agreement before its formation, or (b) a party to it became a party

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@ Jd., Art. 357 (Romania)
48 Penal Code, Art. 255 (S. Korea)
49 Jd., Art 250
in England and Wales... Consequently, the United Kingdom recognizes conspiracy and punishes for the agreement to commit an unlawful act as well.

9. United States

The United States defines conspiracy as "(1) an agreement between two or more persons, which constitutes the act; and (2) an intent thereby to achieve a certain objective which, under the common law definition, is the doing of either an unlawful act or a lawful act by unlawful means." 51

The elements of what overt acts are required for conspiracy is still not completely settled in American case law, for each individual statute that relates to conspiracy. But the Supreme Court has consistently held that barring specific reference to the overt acts required for a conspiracy conviction the Supreme Court has held that no overt acts actually occur. The First Circuit court in US v. Crochiere 52 debated this issue and provided:

The Supreme Court case of US v. Shabani, 513 US 10, 130 (1994), we think, requires a holding that sec. 241 53 contains no overt act requirement. In Shabani, the Court found that there was no overt act requirement where the language of the drug conspiracy statute, there 21 USC sec. 846 did not require proof of an overt act, and the common law conspiracy at the time the statute was enacted did not require an overt act. See US v. Paiva, 892 F.2d 148, 155 (1st Cir. 1989). The Supreme Court noted that the language of the statute does not require "that an overt act be committed to further the conspiracy, and the Court has not inferred such a requirement for congressional silence in other conspiracy statutes." Shabani, 513 US at 13 (citing Nash v. US, 229 US 372, 378 (1913), holding that no overt act is required for conspiracy liability under the Sherman Act, and Singer v. US, 54

50 Criminal Justice Act 1993. Sec 5
53 Sec. 241 states that it is unlawful for two or more persons to conspire to injure, oppress, threaten, or intimidate any person in any State. Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. or because of his having so exercised the same...
323 US 338, 340 (1945), holding that no overt act is required for conspiracy liability under the Selective Service Act). 54

Thus the United States law only requires one act to make the conspiracy and that act is formed in the agreement to conspire. As stated above these nine States recognize the concept of conspiracy and all nine only require the overt act of agreement to be liable for conspiracy, and these nine countries represent all different parts of the globe: America, Western Europe, Eastern Europe, Asia, Africa and Australia.

10. Japan

Article 26: Co-Principals: (1) Two or more persons who join in the commission of a crime are all principles (2) Where two or more persons conspire to commit a crime and any conspirator commits the crime pursuant to their common design, the other conspirators are also principals. 55 Article 268: Intentional Homicide: A person who kills another shall be punished by death or by imprisonment for life 0 not less than five years. 56 Article 272: Preparation: A person who makes preparations with intent to violate Article 268 shall be punished by imprisonment for five years or less: Provided, that punishment may be remitted in light of circumstances. 57 Japan makes specific reference to the crime of conspiracy, however it requires that the crime be committed. Thus, completion of the crime is necessary to punish for conspiracy. Of the States analyzed Japan is the only State that requires a substantial act to be liable for conspiracy. And that act is completion.

With this interpretation of conspiracy you can not stop the actions before they occur,

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5 Penal Code, Art. 26 (Japan)
56 Id., Art 268
57 Id., Art. 272
which is one of the strengths of convicting for conspiracy, stop the criminals before the crime can be done.

11. Argentina

The Argentinean Penal Code does not make specific reference to conspiracy. The closest concept is Article 42 and 45. Article 42: Anybody who for the purpose of committing an intentional crime commences with the execution but does not consummate it for reasons beyond his control shall be punished in accordance with the rules prescribed by Article 44.\(^{58}\) Article 44: The punishment shall be that provided for the perpetrator, reduced by one third to one half.\(^{59}\) Article 45: Anybody who has participated in the perpetration of a deed or has rendered any assistance or cooperation to the perpetrator or perpetrators, without which it would not have been possible to carry it out, shall be subject to the punishment prescribed for the crime. The same punishment shall be imposed upon anybody who has directly instigated another person to commit it.\(^{60}\) Article 45 is punishment for accomplices, so Argentina does not follow conspiracy in their penal code.

12. China

China does not make specific reference to the crime of conspiracy. The closest Article that the Chinese Penal code has is preparation. Article 19: Preparation of a crime is either the preparation of an instrument or the creation of conditions for the commission of a crime. Punishment for preparatory offenses may be lighter than that for an

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\(^{58}\) Penal Code, Art. 42 (Argentina)  
\(^{59}\) Id., Art. 44  
\(^{60}\) Id., Art. 45
accomplished offense and may be either mitigated or remitted. 61 Because the penal code does not seem to closely resemble conspiracy for this evaluation it will be assumed that they do not recognize conspiracy in their penal code.

Conspiracy, while thought of as a Western concept for criminal purposes fifty years ago, is now established in penal codes globally. Of the twelve penal codes discussed, ten recognize conspiracy and nine of those find the agreement to commit unlawful acts the required overt act to be culpable for conspiracy. One finds that the underlying crime must be committed and two States do not recognize the concept of conspiracy. Based upon this evaluation it is clear that conspiracy is excepted in international law by the individual State penal codes analysis and that agreement is the only overt act required.

IV. Conclusion

Based upon the debate that took place during the formation of the Nuremberg and Tokyo trials and the following international conventions, international statutes, individual State penal codes and the global acceptance of the crime of conspiracy, it is internationally accepted and appropriate to charge the crime of conspiracy to commit genocide when the only overt act is the agreement by two or more people to knowingly commit an unlawful act, and that those that join the conspiracy after the initial agreement are culpable for the crimes committed in furtherance of the conspiracy.

61 Penal Code, Art. 19 (China)