

**NEW ENGLAND SCHOOL OF LAW  
RWANDA GENOCIDE PROSECUTION PROJECT**

**RELATIONSHIP BETWEEN ARTICLE 2(3) AND ARTICLE 6(1)**

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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. The Relationship Between Article 2(3) and Article 6(1) of the Statute of the ICTR**

Article 2(3) of the Rwanda Tribunal Statute deals with the crimes of genocide. Article 6(1) of the Rwanda Tribunal Statute considers individual criminal responsibility. Individual criminal responsibility is a key principle in international law. Individual criminal responsibility is also a key principle in Article 2(3).

The main differences between the Articles are the secondary offenses of conspiracy, incitement, attempt and complicity under Article 2(3) can be proved without proving the actual commission of genocide. Also, Article 6(1) of the Statute unlike Article 2(3) does not provide for the crime of conspiracy. The definition of conspiracy is unclear in the international community. Generally, it appears to mean the agreement between two or more persons to carry out a plan. Conspiracy will be helpful to convict high-level officials who did not implicitly commit genocide or crimes against humanity.

The territorial and temporal jurisdiction of the Tribunal has taken into account the crimes of incitement (Article 2(3)) and instigation (Article 6(1)). The essential difference between the two elements is the fact that it is irrelevant, under incitement, whether a subsequent crime is then committed. The crimes of incitement or instigation that occurred before the start of the temporal jurisdiction may fall under the Tribunal's jurisdiction. The Rwanda Tribunal may allow such crimes if one can find a causal nexus with a subsequent crime that occurred within the temporal jurisdiction. The crimes of conspiracy and complicity that also occurred before the temporal jurisdiction can be allowed under this 'causal nexus' principle.

Attempt to commit genocide under Article 2(3) has no corresponding provision in Article

6(1). The prosecution of an attempt is not logical due to the tribunal's limited resources and the fact Rwanda has already detained thousands of individuals for the actual commission of crimes.

The crime of complicity to commit genocide under Article 2(3) is similar to the aided and abetted provision of Article 6(1). Neither Article addresses the issue of complicity after the commission of the crime. However, historically it appears such acts of complicity or aiding and abetting after the crime has been committed incurs criminal responsibility.

## **II. FACTUAL BACKGROUND**

On April 6, 1994, the Rwandan President, Juvénal Habyarimana died when his plane was shot down by a surface to air missile. This violent episode ignited the widespread and systematic murder of Tutsis and moderate Hutus throughout Rwanda. The estimates of the number of people killed during the next 4 months range from 500,000 to one million civilians.<sup>1</sup> On November 8, 1994, in response to the widespread evidence of massacres, The Security Council adopted Resolution 955 that provides for the establishment of a Rwanda Tribunal and the adoption of its attached statute.

## **III. LEGAL DISCUSSION**

### **A. Scope of Article 2(3) and Article 6(1): Similarities and Differences**

#### **1. Article 2(3)**

Article 2(3) deals solely with genocide. The definition of genocide in Article 2 of the

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<sup>1</sup>Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT'L. 501, 502 (1996)..

Rwanda Tribunal Statute comprises the appropriate parts of the Genocide Convention<sup>2</sup> duplicated in the Yugoslavia Tribunal Statute.<sup>3</sup> The Nuremberg Tribunal condemned criminal acts that were clearly acts of genocide without declaring them to be genocide.<sup>4</sup> The Prosecution for the Nuremberg Tribunal listed genocide in their indictment under war crimes and crimes against humanity.<sup>5</sup> Article (2) of the Rwanda Tribunal Statute states the definition of genocide:

Genocide means any of the following acts committed with intent to destroy; in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;

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<sup>2</sup>Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, arts. II and III, 78 U.N.T.S. 277.

<sup>3</sup>Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), art 4, U.N. Doc. S/25704 (1993). Article 4 of the Yugoslavian Statute adopts verbatim the definition of genocide found in the 1948 Genocide Convention. James C. O'Brien, *The International Tribunal For Violations of International Humanitarian Law in the Former Yugoslavia*, 87 Am. J. Int'l L. 639, 648 (1993).

<sup>4</sup>"It will be observed that in these statements the Tribunal did not make any reference to the term and conception of genocide, within which acts like those referred to above are compromised. However, the findings of the Tribunal have not been without influence on the subsequent events in the sphere of the progressive development of international law." UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 199-200 (1948).

<sup>5</sup>"By inclusion of this specific charge the Prosecution attempted to introduce and to establish a new type of international crime." *Id.* at 196-97.

(e) Forcibly transferring children of the group to another group;

Article 2(3) makes the following acts punishable:

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

The principles of the Genocide Convention, which Article 2 of the Rwanda Tribunal statute is directly taken from, have been declared customary international law by the International Court of Justice in the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>6</sup> As such, the Court ruled that States must recognize and are bound by the underlying principles of the Genocide Convention.<sup>7</sup> This recognition extends to the Conventions definitions and the individual criminal responsibility it assumes.<sup>8</sup> Article IV of the Genocide Convention provides that “Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>9</sup>

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<sup>6</sup>Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal For The Former Yugoslavia*, 5 EJIL 360, 368 (1994).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, art IV, 78 U.N.T.S. 277.

The crimes of genocide under Article 2(3) affords the Rwanda Tribunal a distinct advantage in comparison to the other crimes set forth in the Statute. Genocide is the only crime in which secondary offenses under Article 2(3) are treated separately from the main offense of committing genocide.<sup>10</sup> In other words, to prove conspiracy, incitement, attempt to commit genocide or complicity in genocide there is no need to prove the actual commission of genocide.

The focus of the Rwanda Tribunal is on genocide, which is the first group of crimes addressed by the Tribunal under its statute.<sup>11</sup> The failure to limit the jurisdiction of the Tribunal to genocide was one of Rwanda's main objections to the Tribunal.<sup>12</sup> The Security Council refused to explicitly limit the jurisdiction of the Tribunal to genocide, ostensibly because it would result in the exclusion of atrocities committed by the Tutsis.<sup>13</sup> However, despite the Rwanda delegate's fears, it appears that it was the intention of the drafters of the Tribunal's

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<sup>10</sup>VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE RWANDA TRIBUNAL 184 (1997) [hereinafter MORRIS & SCHARF].

<sup>11</sup>*Id.* at 167.

<sup>12</sup>"Thirdly, in view of all this, my delegation was surprised to see in the draft statute that the International Tribunal, instead of devoting its meagre human resources, and probably equally meagre financial ones, to trying the crime of crimes, genocide, intends to disperse its energy by prosecuting crimes that come under the jurisdiction of internal tribunals. Furthermore, nothing in the draft resolution and statute indicates the order of priority for crimes considered by the Tribunal. In these conditions, nothing could prevent the Tribunal from devoting its resources on a priority basis to prosecuting crimes of plunder, corporal punishment or the intention to commit such crimes, while relegating to a secondary level the genocide that brought about its establishment." U.N. SCOR, 49th Sess., 3453rd mtg. At 15, U.N. Doc. S/PV.3453 (1994).

<sup>13</sup>Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT'L L. 501, 508 (1996). The exclusion of Tutsi atrocities would send "the wrong political, as well as legal, message." *Id.*

Statute to center the prosecution of the Tribunal on genocide.<sup>14</sup>

## 2. Article 6(1)

Article 6(1) deals with individual criminal responsibility. Article 6(1) states that “a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.”<sup>15</sup> Article 3 refers to crimes against humanity and Article 4 addresses ‘violations of Article 3 common to the Geneva Convention and of Additional Protocol II. Crimes against humanity have considerable overlap with crimes of genocide.<sup>16</sup> Crimes of genocide can be interpreted as a part of the broader category of crimes against humanity.<sup>17</sup> Both groups of crimes are crimes under customary international law.<sup>18</sup> “The core prohibitions of crimes against humanity and the crime of genocide constitute jus cogens norms.”<sup>19</sup> In the situation in Rwanda it appears that the crime of genocide and the crimes against

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<sup>14</sup>“The focus of the jurisdiction of the Tribunal is not on war crimes, but on genocide, as Rwanda had requested.” Statement of New Zealand, U.N. SCOR, 49th Sess., 3453rd mtg. at 5, U.N. Doc. S/PV.35453 (1994).

<sup>15</sup>Article 6 of the Rwanda Tribunal Statute reproduces Article 7 of the Yugoslavia Tribunal Statute. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, art. 7, U.N. Doc. S/25704 (1993).

<sup>16</sup>Theodor Meron, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 554, 558 (1995).

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

humanity cover most of the murders that have occurred.<sup>20</sup>

### 3. Individual Criminal Responsibility

Both Article 2(3) and Article 6(1) share the principle of individual responsibility.

“Individual responsibility for unlawful behavior is the essence of criminal law.”<sup>21</sup> The Nuremberg Charter recognized the idea of individual responsibility for crimes in the international context.<sup>22</sup> According to the commentary on the Draft Code of Crimes against the Peace and Security of Mankind:

The principle of individual responsibility and punishment for crimes under international law recognized at Nurnberg is the cornerstone of international criminal law. This principle is the enduring legacy of the Nurnberg Charter and Judgement which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable to punishment.<sup>23</sup>

The Statutes of the International Criminal Tribunal for Yugoslavia and Rwanda and the 1954 draft Code have validated this principle of individual criminal responsibility.<sup>24</sup>

The individual criminal responsibility that Article 6(1) of the Rwanda Tribunal Statute

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<sup>20</sup>Theodor Meron, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 554, 558 (1995).

<sup>21</sup>MORRIS & SCHARF at 231.

<sup>22</sup>Article 6 of the Nuremberg Charter provides the definition for crimes against peace, war crimes and crimes against humanity. The first clause of the Article states: “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.” Nuremberg Charter, art. 6 *reprinted in*, UNITED NATIONS, THE CHARTER AND JUDGMENT OF THE NURNBERG TRIBUNAL 92-93.

<sup>23</sup>Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10 (A/51/10) [1996], at 19 [hereinafter the Draft Code of Crimes Against the Peace and Security of Mankind].

<sup>24</sup>*Id.*

espouses applies to the whole cross section of society. Individual criminal responsibility makes no distinction between private citizens, government officials, army officials, paramilitary groups.<sup>25</sup> The Nuremberg Tribunal approved this principle.<sup>26</sup> The 1948 Genocide Convention adopted the principle that public or private officials could be held liable for the crime of genocide.<sup>27</sup> The 1949 Geneva Conventions provided that a State's respect for international humanitarian norms includes the respect of such norms by the State's military and civilian population.<sup>28</sup> Reports about the events in Rwanda show that nearly all groups of Rwanda society were involved in the horrible events that transpired.<sup>29</sup>

#### 4. Conspiracy

Under Article 2(3) of the Rwanda Tribunal Statute conspiracy to commit genocide is a punishable act.<sup>30</sup> Article 6(1) does not mention the crime of conspiracy.<sup>31</sup> Neither the Nuremberg Charter, the Rwanda Tribunal Statute nor the Genocide Convention has clearly

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<sup>25</sup>MORRIS & SCHARF at 245.

<sup>26</sup>"Crimes against humanity can be committed both by persons acting as organs of the state and by individuals in their private capacity..." UNITED NATIONS, THE CHARTER AND JUDGMENT OF THE NURNBERG TRIBUNAL: HISTORY AND ANALYSIS 70 (1949).

<sup>27</sup>MORRIS & SCHARF at 245.

<sup>28</sup>*Id.*

<sup>29</sup>*Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, at para. 58, U.N. Doc. S/1994/1405 (1994).

<sup>30</sup>Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda (November 8, 1994), reprinted in 33 I.L.M. 1598.

<sup>31</sup>*Id.* at art. 6(1).

defined conspiracy.<sup>32</sup> Indeed, conspiracy is a foreign notion in many legal systems.<sup>33</sup> Many countries do not recognize conspiracy as a crime in their criminal codes.<sup>34</sup> However, even widely accepted terms in legal systems such as incitement, attempt and complicity are open to many different interpretations.<sup>35</sup>

The Charter and Judgment of the Nurnberg Tribunal can provide some guidance on the meaning of conspiracy. The Charter for the Nurnberg Trials, specifically Article 6(a) “provides that conspiracy to commit crimes against peace is punishable, but contains no such express provision in regard to conspiracy to commit war crimes or crimes against humanity.”<sup>36</sup> Conspiracy means to conspire or take part in an alliance to achieve an unlawful object.<sup>37</sup> The

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<sup>32</sup>NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 69 (1960).

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* The Swedish delegate to the United Nations stated, “incitement, conspiracy, attempt, complicity, etc.-is subject to certain variations in many systems of criminal law represented here. When these expressions have to be translated in order to introduce the text of the Convention into our different criminal codes in other languages, it will no doubt be necessary to resign ourselves to the fact that certain differences in meaning are inevitable.” *Id.* at 69-70.

<sup>36</sup>THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS 196 (1948).

<sup>37</sup>THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 196 (1948). Article 6 of the Nuremberg Charter states: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” Nuremberg Charter Art. 6 *reprinted in*, THE UNITED NATIONS, THE CHARTER AND JUDGMENT OF THE NURNBERG TRIBUNAL: HISTORY AND ANALYSIS at 93.

Tribunal believed that conspiracy “must be clearly outlined in its purpose” and “must not be too far removed from the time of decision and of action.”<sup>38</sup> It concluded that conspiracy was not sufficient to create a separate and distinct crime with respect to war crimes or crimes against humanity.<sup>39</sup> Conspiracy could only be punishable for crimes against peace.<sup>40</sup> Article 6 of the Charter is only designed to establish the responsibility of participating in a common plan.<sup>41</sup> In other words, the mention of conspiracy in Article 6 of the Nuremberg Charter is not to create a crime separate from a common plan.

The Tribunal ruled that even if a sole person conceives a plan, those who carry out the plan do not avoid responsibility by claiming they acted under the direction of the man who conceived it.<sup>42</sup> For a charge of conspiracy, there must be a concrete plan, one must have knowledge of the plan’s purpose and contribute significantly to the development or completion of that plan.<sup>43</sup>

Several of the defendants charged with conspiracy at Nuremberg were acquitted because

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<sup>38</sup>UNITED NATIONS, THE CHARTER AND JUDGMENT OF THE NURNBERG TRIBUNAL: HISTORY AND ANALYSIS 52 (1949).

<sup>39</sup>MORRIS & SCHARF at 271-272.

<sup>40</sup>UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 196 (1948).

<sup>41</sup>*Id.*

<sup>42</sup>UNITED NATIONS, THE CHARTER AND JUDGMENT OF THE NURNBERG TRIBUNAL: HISTORY AND ANALYSIS 52 (1949).

<sup>43</sup>*Id.* at 52-53.

the evidence failed to show they knowingly participated in a common plan to wage war.<sup>44</sup> The Fritzsche Case is such an example.<sup>45</sup> Fritzsche managed the German press of 2,300 newspapers. One of his duties was to deliver the directives of the Propaganda Ministry to these papers and instruct the press on the course of the war.<sup>46</sup> It was Dietrich, his superior, who prepared the instructions.<sup>47</sup> Fritzsche was also head of the Radio Division of the Propaganda Ministry.<sup>48</sup> As head, Fritzsche attended Goebbel's daily meetings, where he was instructed in the propaganda and news for that day.<sup>49</sup> The Tribunal ruled:

Fritzsche had no control of the formulation of these propaganda policies. He was merely a conduit to the press of the instructions handed to him by Dietrich...Never did he achieve sufficient stature to attend the planning conferences which led to aggressive war; indeed according to his own uncontradicted testimony he never even had a conversation with Hitler. Nor is there any showing that he was informed of the decisions taken at these conferences. His activities cannot be said to be those that fall within the definition of the common plan to wage aggressive war as already set forth in the Judgment.<sup>50</sup>

In contrast the defendant Rosenberg was convicted of conspiracy or of planning to commit crimes against humanity<sup>51</sup>. The Tribunal came to this conclusion from Rosenberg's

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<sup>44</sup>*Id* at 53.

<sup>45</sup>INTERNATIONAL MILITARY TRIBUNAL, XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 582-585 (1948).

<sup>46</sup>*Id.* at 583.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at 585.

<sup>50</sup>INTERNATIONAL MILITARY TRIBUNAL, XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 583-584 (1948).

<sup>51</sup>*Id.*

active involvement in numerous Nazi policies.<sup>52</sup> The Tribunal found:

Rosenberg bears a major responsibility for the formulation and execution of occupation policies in the occupied Eastern Territories...In preparing the plans for the occupation, he had numerous conferences with Keitel, Reider, Goring, Funk, Ribbentrop, and other high Reich authorities...In April and May of 1941 he prepared several drafts of instructions concerning the setting up of the administration in the Occupied Eastern Territories...Rosenberg attended Hitler's conference of 16 July 1941, in which policies of administration and occupation were discussed...With his appointment as Reich Minister for the Occupied Eastern Territories on 17 July 1941, Rosenberg became the supreme authority for those areas. He helped to formulate the policies of Germanization, exploitation, forced labor, extermination of Jews and opponents of Nazi rule, and he set up the administration which carried them out.<sup>53</sup>

From these two cases it appears that the Tribunal felt numerous actions constituted a conspiracy: actual formulation of policies, meetings with high level officials in the Nazi regime to discuss the formulation and implementation of policies and the actual administration of these policies. This may be very helpful to the current situation in Rwanda. Overwhelming evidence shows that the massacres were pre-planned and coordinated by high level officials of the Rwanda government.<sup>54</sup> Conspiracy to commit genocide will help in the prosecution of high-level officials who did not actually carry out the Genocide but were essential to the planning of genocide.

In United States law conspiracy consists of two elements: (1) An agreement between two or more persons, which constitutes the act, and (2) An intent to achieve an unlawful objective.<sup>55</sup>

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<sup>52</sup>*Id* at 539-540.

<sup>53</sup>*Id* at 540.

<sup>54</sup>Report on the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, U.N. ESCOR, U.N. Doc.E/CN.4/1995/70, 51st Sess; 11 November 1994.

<sup>55</sup>WAYNE R. LAFAYE AND AUSTIN W. SCOTT, JR., CRIMINAL LAW 525 (2nd ed. 1986).

The rationale for conspiracy is that it allows the law the ability to intervene and prevent persons who manifest the traits of criminality.<sup>56</sup> More importantly, conspiracy enables the law to combat the immense danger of group activity.<sup>57</sup> This rationale is the overriding reason why the Tribunal should use conspiracy to its advantage. The attacks on the Tutsis was clearly a group activity.<sup>58</sup>

United States case law may provide some assistance to the type of conspiracy cases that will be presented to the Rwanda Tribunal. The United States law on the Racketeer Influenced and Corrupt Organizations (RICO) offense deals with the issue of a large organized criminal enterprise. RICO was created to combat organized criminal activity. In United States v Brooklier, the Court ruled that the defendant the head of the Los Angeles La Cosa Nostra who planned and agreed to an informants murder was guilty of conspiracy under RICO.<sup>59</sup> Thus, applying this reasoning in Rwanda, leaders of the genocide who planned and agreed to genocide can be guilty of conspiracy.

The negotiating record for the Genocide Convention reveals that “conspiracy is alien to many legal systems.”<sup>60</sup> For example, neither French nor Danish law recognizes conspiracy.<sup>61</sup>

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<sup>56</sup>*Id* at 530.

<sup>57</sup>*Id.*

<sup>58</sup>Amnesty International, Mass Murder by Government Supporters and Troops in April and May 1994 AFR 47/11/94, at 1.

<sup>59</sup>United States v Brooklier, 685 F.2d 1208, 1220 (1982).

<sup>60</sup>NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 69 (1960). “Even exact meaning of such accepted terms as ‘incitement,’ ‘attempt’, ‘complicity,’ and others are subject to certain variations in different legal systems.”

<sup>61</sup>U.N. GAOR 6th Comm., 3rd Sess., 84th mtg. at 210-211, U.N. Doc. E/794 (1948) [hereinafter Summary Records of the 6th Committee]. The principles of French law call for the

The United States delegate to the Genocide Convention argued that conspiracy should be punished even if there was no actual commission of genocide.<sup>62</sup> Additionally the delegate believed genocide could not occur without a conspiracy taking place.<sup>63</sup> He defined conspiracy as an “agreement between two or more persons to commit an unlawful act.”<sup>64</sup> The Egyptian delegate remarked that “the convention of genocide would have to be applied by all fifty-eight states; it was not therefore a law based on the penal code of any particular State.”<sup>65</sup> This delegate informed the convention that conspiracy under Egyptian law meant “the connivance of several persons to commit a crime, whether the crime was successful or not.”<sup>66</sup> Haiti believed that, “Conspiracy might remain a purely mental process without ever being translated into action.”<sup>67</sup> Despite the fact conspiracy is a foreign idea to many countries, it became part of the Genocide Convention. Unless they made a specific reservation to this provision, all Parties to the Convention are obliged to punish the crime of conspiracy..<sup>68</sup>

The most similar element to conspiracy under Article 6(1) of the Rwanda Tribunal

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suppression of conspiracy. *Id.* at 210.

<sup>62</sup>*Id.* at 214.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.* at 212.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 217.

<sup>68</sup>NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 70 (1960).

Statute is the provision dealing with the planning stage of the crime. This element corresponds to Article 2(3) of The Draft Code of Crimes against the Peace and Security of Mankind. This addresses the responsibility of an individual co-conspirator who conspires to commit a crime.<sup>69</sup> The Draft Code finds that “an individual who participates *directly* in the planning or conspiring to commit a crime incurs responsibility for that crime.”<sup>70</sup> “The term ‘directly’ indicates that the individual must in fact participate in some meaningful way in formulating the criminal plan or policy, including endorsing such a plan or policy proposed by another.”<sup>71</sup> An important distinction in the Draft Code is that to incur criminal responsibility for conspiring, the crime must in fact occur.<sup>72</sup> Thus, conspiracy wields a greater advantage than planning under Article 6(1). There is no need to add the extra burden of proving the commission of the crime.

### 5. Attempt

Article 2(3) of the Rwanda Tribunal Statute mentions attempt to commit genocide as a punishable act. Article 6(1) has no corresponding provision. Thus, this may be an avenue to utilize. The subsequent Military Tribunal to the Nuremberg Tribunal recognized the possibility that a person could be guilty of a war crime although he only attempted the offense and the offense was never completed.<sup>73</sup> The recognition of attempt as an offense under Article III of the

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<sup>69</sup>Draft Codes of Crimes Against the Peace and Security of Mankind. art. 2(3)(e) at 18.

<sup>70</sup>*Id.* at 24-25.

<sup>71</sup>*Id.* at 25.

<sup>72</sup>*Id.*

<sup>73</sup>UNITED NATIONS WAR CRIMES COMMISSION, XV LAW REPORTS OF CRIMINAL TRIALS 89 (1949).

Genocide Convention did not create any controversy.<sup>74</sup>

The International Law Commission in its Draft Code recognizes attempt which it defines as follows:

An individual who forms the intent to commit a crime, commits an act to carry out this intention and fails to successfully complete the crime only because of some independent factor which prevents him from doing so. Thus an individual incurs criminal responsibility for unsuccessfully attempting to commit a crime only when the following elements are present: (a) intent to commit a particular crime; (b) an act designed to commit it, and (c) non-completion of the crime for reasons independent of the perpetrator's will. The phrase "By taking action commencing the execution of a crime" is used to indicate that the individual has performed an act which constitutes a significant step towards completion of the crime. The phrase "which does not in fact occur" recognizes that the notion of attempt by definition only applies to situations in which an individual endeavours to commit a crime and fails in this endeavour.<sup>75</sup>

The attempt to commit genocide would be applicable in a situation in which acts of genocide were not completed.<sup>76</sup> Thus attempt to commit genocide, like conspiracy to commit genocide, allows the Prosecutor the benefit of not having to prove a subsequent crime. However, in the present case there are reportedly thousands of persons detained by the Rwanda authorities who are allegedly responsible for committing, planning, instigating or ordering genocide.<sup>77</sup> Thus, it may be perceived a waste of the Tribunal's limited resources to go after the secondary crime of attempt.

#### **6. Incitement Under Article 2(3) in Relation to Article 6(1) Initiation or Instigation of a**

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<sup>74</sup>NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 66 (1960).

<sup>75</sup>Draft Code Against the Peace and Security of Mankind, art. 2(3)(g) at 27.

<sup>76</sup>MORRIS & SCHARF at 187.

<sup>77</sup>*Id.*

## Crime

Although both incitement and initiation or instigation may be very similar, there are some subtle differences. “‘Public incitement’ is, in substance, a species of the broader concept ‘conspiracy’ and ‘attempt.’”<sup>78</sup> A committee for drafting the Genocide Convention proposed that direct incitement be punishable whether the act was committed in public or private.<sup>79</sup> The Committee also believed that incitement should be punishable despite whether it is successful or not.<sup>80</sup> The final wording of incitement under Article III of the Genocide Convention as reproduced in Article 2(3) of the Rwanda Tribunal Statute creates two elements: the incitement must be (1) a public statement and (2) a call for direct action.<sup>81</sup> Incitement in private was excluded because the delegates felt it was not serious enough to be included in the Convention.<sup>82</sup> Despite the absence in the statute’s wording “of whether the incitement was successful or not”, incitement is generally regarded as punishable despite the results of the incitement.<sup>83</sup> In other words, it is irrelevant after an act of incitement whether acts of genocide are then carried out or if

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<sup>78</sup>NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 67 (1960). Even if incitement was not specifically included in the Genocide Convention, it would be punishable under ‘conspiracy to commit genocide’ and ‘attempt to commit genocide’ of Article III of the Genocide Convention. *Id.*

<sup>79</sup>*Id.* at 70.

<sup>80</sup>*Id.*

<sup>81</sup>MORRIS & SCHARF at 185.

<sup>82</sup>NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 67 (1960).

<sup>83</sup>*Id.*

such acts are successful. This position is the general standing of common law systems.<sup>84</sup> Civil law systems usually require that the incitement must be successful to establish liability.<sup>85</sup> Final determination of whether an incitement conviction before the ICTR will require proof that the incitement actually led to acts of genocide must await a judicial finding.<sup>86</sup>

The negotiating record of the Genocide Convention provides some insight into incitement. All governments that sent delegates to the Convention recognized incitement as a crime.<sup>87</sup> Some viewed it as a crime of complicity while others recognized incitement as its own criminal offense.<sup>88</sup> The Nurenberg Tribunal found “That incitement to commit a war crime may be itself punishable, irrespective of whether that crime is ever committed, is proved by cases in which the giving of criminal orders which were never carried out, has nevertheless been punished by the courts.”<sup>89</sup>

Under Article 6(1) instigation includes, as an example, the government radio broadcasts encouraging or inciting Hutus to commit genocide or other atrocities against the Tutsis.<sup>90</sup> There

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<sup>84</sup>Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int’L. 349, 355 n.40 (1997).

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>Summary Records of the 6th Committee at 208.

<sup>88</sup>*Id.*

<sup>89</sup>UNITED NATIONS WAR CRIMES COMMISSION, XV LAW REPORTS OF TRIALS OF WAR CRIMINALS 89 (1949).

<sup>90</sup>There have been many reports on the use of incitement thru the use of speeches, rumors and tracts. These methods are used to portray the Tutsis as “bloodthirsty, power hungry-hungry and determined to impose their rule on the people of Rwanda by means of the gun”. There are

are widespread reports that the use of radio broadcasts was prevalent in Rwanda to incite the people to commit crimes against the Tutsis.<sup>91</sup>

Instigation under Article 6(1) is broader. It covers crimes other than genocide. The principle of instigation under Article 6(1) relates to Article 2(3) of the Draft Code.<sup>92</sup> The draft Code defines an instigator as any individual “who directly and publicly incites another individual to commit a crime incurs responsibility for that crime.”<sup>93</sup> Public action means “communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large.”<sup>94</sup> Direct incitement requires encouraging another person to engage in immediate criminal behavior. The encouragement must be for the person to take a specific

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allegations that the Tutsis intended to exterminate the people of Rwanda. There were repeated appeals to the Hutu to the “ten commandments”, which promote apartheid to prevent the Tutsis from gaining power. Report on the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, U.N. Doc. E/CN.4/1995/7, 51st Sess; 28 June 1994.

<sup>91</sup>The Radio-Television Libre des Mille Collines (RTLM) and Radio Rwanda, the national broadcasting station controlled by the President has been deeply involved in the incitement of ethnic hatred and violence. The RTLM, known as the ‘killer radio station’, called for the extermination of the Tutsis and played a key role in the massacres. In April of 1994 the radio decreed that “by 5 May, the cleansing of the Tutsi must be completed” and that “the grave is still only half full, who will help us to fill it?”. A senior official of the United Nations has pointed out that a large majority of the rural population is illiterate and listen attentively to these broadcasts. They hold their radios in one hand and their machetes in the other, ready to take action. *Id.*

<sup>92</sup>MORRIS & SCHARF at 240.

<sup>93</sup>Draft Code Against the Peace and Security of Mankind at 26.

<sup>94</sup>*Id.*

action. A vague inference to some form of action will not be enough.<sup>95</sup> The draft Code describes the actions, the medium used and the results of an instigator: “an individual may communicate the call for criminal action in person in a public place or by technological means of mass communication, such as radio or television. This public appeal for criminal action increases the likelihood that at least one individual will respond to the appeal and, moreover, encourages the kind of mob violence in which a number of individuals engage in criminal conduct.”<sup>96</sup>

There is essentially one main difference between Article 2(3) and 6(1). Under Article 6(1) a crime must be caused by the incitement.. If there is no subsequent crime than the instigator is not liable.

The Nuremberg Tribunal ruled on the idea of incitement in the Fritzsche Case.<sup>97</sup> Fritzsche an official of the Propaganda Ministry was charged with incitement by falsifying news in his radio broadcasts to arouse the Germans to commit atrocities.<sup>98</sup> The Court ruled that his broadcasts were definitely anti-Semitic but his broadcasts did not promote persecution or extermination of the jews:

It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples...His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.<sup>99</sup>

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<sup>95</sup>*Id.*

<sup>96</sup>*Id.* at 26-27.

<sup>97</sup>INTERNATIONAL MILITARY TRIBUNAL, XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 583 (1948).

<sup>98</sup>*Id.* at 584.

<sup>99</sup>*Id.* at 584-585.

In contrast, the radio broadcasts in Rwanda advocated the persecution and extermination of the Tutsis.<sup>100</sup>

The British Military Tribunal also recognized incitement in the Essen Lynching Case.<sup>101</sup> The facts of the Essen Lynching Case are as follows: three captured British airmen were to be escorted to the nearest Luftwaffe unit for interrogation. The commanding officer told the German escort, within the earshot of a mob, that the airmen deserved to be shot and that the escorts should not interfere if civilians attacked the airmen. Once escorted out of the barracks, a crowd threw sticks and stones at the airmen. When the escort reached a bridge the mob threw the airmen over the bridge and those that survived were either shot or kicked to death by the mob.

The British court brought up the commanding officer on charges of an instigation. The Prosecution discussed the definition of an instigation under British law. The Prosecutor pointed out that an instigator may be regarded as a principal and it is of no consequence if he is not there when the crime was committed.<sup>102</sup> The commanding officer was found guilty.<sup>103</sup>

With this precedent the Rwanda Tribunal can make the argument that a commander who instigates individuals thru words to attack others is liable for incitement, even if he is not present during the commission of the crime. This is relevant to the speeches and broadcasts made by

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<sup>100</sup>Report on the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission resolution E/CN.4/s-3/1 of 25 May 1994, U.N. Doc. E/CN.4/1995/7, 51st Sess; 28 June 1994.

<sup>101</sup>UNITED NATIONS WAR CRIMES COMMISSION, I LAW REPORTS OF TRIALS OF WAR CRIMINALS 88 (1947).

<sup>102</sup>*Id.* at 90.

<sup>103</sup>*Id.* at 90-91.

government officials in Rwanda.

#### **a. Territorial Jurisdiction**

Article 7 of the Rwanda Tribunal Statute extends to the territory of Rwanda and to the other states around Rwanda where Rwandan citizens committed serious violations of international humanitarian law. They conceived this extended jurisdiction to include the broadcasts of Radio-Television Libre Des Mile Collides and other stations that have aided in the incitement of the Hutus to commit genocide.<sup>104</sup> Since the victory of the Tutsi armed forces these radio stations have been broadcasting from a mobile base outside Rwanda.<sup>105</sup> Thus, incitement was a factor in determining the territorial jurisdiction of the Rwanda Tribunal.

#### **b. Temporal Jurisdiction**

As established by Article 7 of the Statute, the temporal jurisdiction of the Rwanda Tribunal covers the crimes committed January 1, 1994 thru December 1, 1994.<sup>106</sup> The crash of

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<sup>104</sup>Daphna Shrager and Ralph Zacklin, *The International Criminal Tribunal For Rwanda*, 5 EJIL 501, 506 (1996). The extended territorial jurisdiction was also intended to encompass the refugee camps in neighboring countries. These camps had remnants of the Hutu army and units that played a large part in the massacres. Gross violations of international humanitarian law were also taking place in the camps. *Id.*

<sup>105</sup>*Id.*

<sup>106</sup>The Rwanda delegation objected to the temporal jurisdiction of the Tribunal. They claimed that the genocide was the result of careful planning that begun much earlier than 1994. In fact they claim massacres of certain sub-groups of Tutsis began in earnest in the early 1990s. Also the statements of the late President Habyarimana in 1992 and of his adviser, Dr. Mugesera in 1992, reveal that there was already in place a road map for the genocide of Tutsis. The government of Rwanda also objected to the end date for temporal jurisdiction. They proposed that 17 July 1994 as the end date. This date would only include the crimes of genocide and other crimes against humanity that were committed by the Hutu regime. U.N. SCOR, 49th Sess., 3453rd mtg. at 14-15, U.N. Doc. S/PV.3453 (1994).

the airplane of Rwanda's President and his subsequent death on April 6, 1994 is generally considered the catalyst to the civil war and acts of genocide that followed. However the Security Council decided that the temporal jurisdiction should start on January 1, 1994 so that the Tribunal would have jurisdiction over the planning stages of the crimes.<sup>107</sup>

A question arises as to whether the crimes of conspiracy and instigation that were commenced before 1994 can be prosecuted. Evidence of preparatory activities and planning before 1994 may be relevant to establish responsibility for later acts.<sup>108</sup> The Nuremberg Tribunal looked at crimes against humanity committed before the war to have a substantive link with another crime that falls under the Tribunal's jurisdiction to allow prosecution of such crimes.<sup>109</sup> The authorities realized the difficulties in showing a relation between a defendant and certain large scale enterprises carried out over a long period of time.<sup>110</sup> In the trial of Josef Altstotter and Others, the Tribunal allowed evidence of acts that occurred before the commencement of war in 1939.<sup>111</sup> The defendants, all former Judges of the Reich, had been instrumental in transforming the German legal system. They were charged with committing and conspiring to commit war crimes and crimes against humanity. Although they were charged

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<sup>107</sup>U.N. SCOR, 49th Sess., 3453rd mtg. at 5, U.N. Doc. S/PV.3453 (1994).

<sup>108</sup>MORRIS & SCHARF at 304.

<sup>109</sup>James C. O'Brien, *The International Tribunal For Violations of International Humanitarian Law in the Former Yugoslavia*, 87 Am. J. Int'l L. 639, 650-51 (1995).

<sup>110</sup>UNITED NATIONS WAR CRIMES COMMISSION, XV LAW REPORTS OF TRIALS OF WAR CRIMINALS 56 (1949).

<sup>111</sup>UNITED NATIONS WAR CRIMES COMMISSION. VI LAW REPORTS OF TRIALS OF WAR CRIMINALS 73 (1948).

with acts that occurred after 1939, evidence of the defendants actions during the period of 1933 to 1936 and the defendants positions held in Germany were relevant to show the atmosphere in which the defendants acted and to “show knowledge, motive and intent on their part” for guilt in the commission of crimes.<sup>112</sup>

The Tribunal’s discussion of conspiracy leads to the conclusion that evidence of conspiracy will have to occur near the actual act. The Tribunal stated that the conspiracy “must not be too far removed from the time of decision and of action.”<sup>113</sup> Criminal planning for German war criminals can not rest on the party programme in 1920 or the political assertions preached in ‘Mein Kampf.’<sup>114</sup>

Despite the limitations on temporal jurisdiction Article 6 and Article 2(3) of the Rwanda Statute may cover the acts brought up by the Rwanda government in their objection to the temporal jurisdiction.<sup>115</sup> Thru complicity the planning, preparation or aiding or abetting of acts committed in 1994, even if the preparation occurred before 1994, may be included in the temporal jurisdiction.<sup>116</sup> Article (6) and Article 2(3) could conceivably cover acts that occurred

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<sup>112</sup>*Id.*

<sup>113</sup>UNITED NATIONS, THE CHARTER AND JUDGMENT OF THE NURNBERG TRIBUNAL 52 (1949).

<sup>114</sup>*Id.*

<sup>115</sup>Payam Akhavan, *The International Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 Am. J. Int’l L. 501, 506 (1996).

<sup>116</sup>Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int’l 349, 354 (1997).

prior to January 1, 1994.<sup>117</sup> However there must be a “causal nexus between those acts and the completion of the crime during 1994.”<sup>118</sup> A continuum of criminality must be in place from the planning and preparation phases to the execution phase.<sup>119</sup> Even applying this causal nexus, many killings and massacres will be exempt from prosecution.<sup>120</sup> Many crimes in Rwanda began and were completed before the start of the Tribunal’s temporal jurisdiction.<sup>121</sup>

The offense under Article 2(3), ‘direct and public incitement to commit genocide’ is punishable without a nexus with a subsequent commission of genocide.<sup>122</sup> “It appears that incitement to commit genocide is punishable under the ICTR Statute even without proof that the incitement actually led to subsequent acts of genocide.”<sup>123</sup> However because of the temporal jurisdiction, acts of incitement completed before 1994 would not be punishable under this Statute

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<sup>117</sup>Payam Akhavan, *The International Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 Am. J. Int’L. 501, 506 (1996).

<sup>118</sup>*Id.*

<sup>119</sup>*Id.*

<sup>120</sup>Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke Comp. & Int’l 349, 354 (1997).

<sup>121</sup>“The extermination of a sub-group of Tutsis, the Bahimas, in Mutara in October 1990; the extermination of another Babutsi sub-group, the Bagogwes...in January and February of 1991; the massacre of over 300 Batutsi...in March 1992; and the massacre of more than 400 Batutsi...in January 1993.” U.N. SCOR, 49th Sess., 3453rd mtg. at 15, U.N. Doc. S/PV.3453 (1994).

<sup>122</sup>Payam Akhavan, *The International Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 Am. J. Int’L. 501, 506 (1996).

<sup>123</sup>Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke Comp. & Int’L 349, 354-355 (1997).

unless a causal nexus is established with a later act of genocide in 1994.<sup>124</sup> Thus, “significant acts of incitement would not be covered.”<sup>125</sup>

### 7. Complicity & Aiding and Abetting

There is overlap between Article 2(3) that enumerates the offense of complicity in genocide and the responsibility for individual criminal responsibility under Article 6(1).<sup>126</sup> Complicity is defined as a state of being an accomplice.<sup>127</sup> The Ad Hoc Committee of the Genocide Convention understood complicity to be “the accessoriality before and after the act and to aiding and abetting in the commission of a crime included in the Convention.”<sup>128</sup> The Genocide Convention only allows complicity for acts of genocide.<sup>129</sup> As a result complicity in attempt and incitement are not punishable.<sup>130</sup> Attempt and conspiracy are planning acts and are

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<sup>124</sup>Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 Am. J. Int'l. 501, 506 (1996).

<sup>125</sup>Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke Comp. & Int'l. 349, 354 (1997). On November 26, 1992, Dr. Leon Mugesera, one of President Habyarimana's advisers called for the 'final solution, Rwandese-style' to the Tutsi people. Such incitement will not be punishable under the Rwanda Statute. Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 Am. J. Int'l. 501, 506 (1996).

<sup>126</sup>MORRIS & SCHARF at 187.

<sup>127</sup>BLACK'S LAW DICTIONARY 285 (6TH ed. 1990).

<sup>128</sup>NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 69 (1960).

<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

not crimes for the actual commission of genocide.<sup>131</sup> For an individual to be liable under complicity, the perpetrator of the actual act of genocide must be convicted or in the alternative there must be sufficient evidence that genocide has occurred.<sup>132</sup>

Complicity in Article 2(3) of the Rwanda Tribunal Statute is similar to the ‘aided and abetted’ provision in Article 6(1). The Draft Code of Crimes against the Peace and Security of Mankind relates to the principle of aiding and abetting under Article 6(1).<sup>133</sup> Any individual who “aids, abets or otherwise assists in the commission of a crime by another individual is liable for that crime.”<sup>134</sup> The individual must knowingly assist the perpetrator of the crime and the assistance must directly and substantially contribute to the commission of the crime.<sup>135</sup> This principle of criminal responsibility for complicity is consistent with Article 6(1) of the Rwanda Tribunal Statute.<sup>136</sup>

The French war crimes trials recognized the notion of complicity.<sup>137</sup> The Nuremberg

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<sup>131</sup>*Id.*

<sup>132</sup>MORRIS & SCHARF at 187.

<sup>133</sup>*Id.* at 243.

<sup>134</sup>Draft Code of Crimes against the Peace and Security of Mankind at 24.

<sup>135</sup>*Id.*

<sup>136</sup>“The principal of individual criminal responsibility for complicity in the commission of a crime set forth in subparagraph (d) is consistent with the Nurnberg Charter (article 6), the Genocide Convention (article III, paragraph (e)) and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7, paragraph 1)...This principle is also consistent with the Nurnberg Principles (Principle VII) and the 1954 draft Code (article 2, paragraph 13 (iii)) adopted by the Commission. *Id.*

<sup>137</sup>UNITED NATIONS WAR CRIMES COMMISSION, XV LAW REPORTS OF TRIALS OF WAR CRIMINALS 56 (1949).

Tribunal referred to Articles 59 and 60 of the French Code Penal as being relevant to the charge of complicity.<sup>138</sup> Article 59 provides that “the accomplices to a crime or a delict shall be visited with the same punishment as the authors thereof,”<sup>139</sup> Article 60 defines complicity as any person, “who has wittingly aided or assisted the author or authors of the crime or offence in any acts preparatory to, or facilitating its perpetration, or in its execution...”<sup>140</sup> Article 4 of the French Ordinance of 28th August, 1944 states “Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices insofar as they have organised or tolerated the criminal acts of their subordinates.”<sup>141</sup>

The Trial of Karl Adam Golkel and Thirteen Others shows the British view of complicity.<sup>142</sup> The accused in this case were under the command of a German officer who ordered the executions of British parachutists who were prisoners’ of war. The accused were all somehow connected to the execution of the parachutists. One defendant was found guilty for widening the ditch for the bodies and guarding the execution site from intruders. Another was guilty for driving an officer who was choosing the execution site and for driving the prisoner’s to the site ; another was guilty of driving an officer to the execution, acting as a guard and filling

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<sup>138</sup>*Id.* at 57.

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

<sup>141</sup>*Id.*

<sup>142</sup>UNITED NATIONS WAR CRIMES COMMISSION, V LAW REPORTS OF TRIALS OF WAR CRIMINALS 45-53 (1948).

up the graves. The Prosecutor in summing up what the meaning of complicity is stated:

“It is for the members of the Court to decide what participation is fairly within the meaning of those words. But it is quite clear that those words do not mean that a man actually had to be present at the site of the shooting; a man would be concerned in the shooting if he was 50 miles away if he had ordered it and had taken the executive steps to set the shooting in motion. You must consider not only the physical acts done at the scene of the shooting, but whether a particular accused ordered it or took part in organising it, even if he was not present at the wood.”

From the British and French point of view the Rwanda Tribunal can prosecute individuals who did not actually witness the crime. A person can be guilty of complicity for such menial activity as driving a person around for choosing the execution site, or digging or filling up the graves.

#### **a. Ex Post Facto Complicity**

The Rwanda Tribunal Statute does not directly confront the issue of criminal responsibility for providing assistance to those who have already committed a crime.<sup>143</sup> The International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind “concluded that complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.<sup>144</sup> The general rule of complicity was adopted in the trials of the Nuremberg Tribunal<sup>145</sup>.

The possible range of persons who may be held guilty of war crimes or crimes against

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<sup>143</sup>MORRIS & SCHARF at 244.

<sup>144</sup>Draft Code of Crimes against the Peace and Security of Mankind at 24.

<sup>145</sup>UNITED NATIONS WAR CRIMES COMMISSION, XV LAW REPORTS OF TRIALS OF WAR CRIMINALS 49 (1949). *See* Essen Lynching Case.

humanity is not limited to those who physically performed the illegal deed. Many others have been held to be sufficiently connected with an offence to be held criminally liable and here the generally established rules relating to complicity have proved a useful guide to the courts.<sup>146</sup>

The intention of the United States Military Tribunal operating under Law No. 10 of the Control Council was to have accessories after the fact incur criminal liability.<sup>147</sup> The Tribunal in discussing the fate of war crimes defendant Pohl, exemplified this specific type of criminal liability:

The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates, does not exculpate him. This was a broad criminal programme, requiring the co-operation of many persons, and Pohl's part was to conserve and account for the loot. Having knowledge of the illegal purposes of the Action and of the crimes which accompanied it, his active participation even in the after phases of the Action make him *particeps criminis* in the whole affair...<sup>148</sup>

#### IV. CONCLUSION

Article 2(3) of the Rwanda Tribunal Statute and Article 6(1) subscribe to the internationally recognized principle of individual criminal liability. Article 6(1) covers a broader range of crimes. However, Article 2(3) has a distinct advantage in the fact that the secondary offenses to the Article do not require the proof of the actual commission of genocide. The Tribunal would best be served by pursuing acts such as conspiracy, planning, complicity, incitement and instigation since these acts in connection with genocide or other crimes seemed to have occurred on a massive scale. These offenses will help bring to justice the individuals

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<sup>146</sup>*Id.* at 49.

<sup>147</sup>*Id.*

<sup>148</sup>*Id.* at 52.

responsible for coordinating this international tragedy.