

# THE HARTFORD GUIDELINES ON SPEECH CRIMES IN INTERNATIONAL CRIMINAL LAW



The Peace and Justice Initiative  
*Towards Universal Implementation of the ICC Statute*



human rights  
institute



# The Hartford Guidelines on Speech Crimes in International Criminal Law

Richard Ashby Wilson and Matthew Gillett





# Colophon

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Cover photo: People gather as Serbian Radical Party (SRS) ultra-nationalist leader Vojislav Šešelj (C) gives a speech during a anti-government demonstration, protesting ICTY's decision for Radovan Karadžić on March 24, 2016 after Radovan Karadžić trial at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague of Netherlands.

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# 1. Executive summary

1. The Hartford Guidelines on Speech Crimes in International Criminal Law are a comprehensive survey of individual criminal responsibility for harmful speech acts under international criminal law. The Guidelines offer a restatement of current international law concerning speech crimes with a view to assisting international agencies, national authorities and other actors contemplating appropriate regulatory responses to inciting speech and associated human rights violations. As such, they provide legal actors with an urgently needed, authoritative and systematic legal framework for regulating and sanctioning speech that violates international legal standards.
2. Speech crimes are a decidedly unsettled area of international criminal law. There is confusion regarding the inchoate status of incitement to genocide, a lack of clarity about whether hate speech could constitute an element of persecution (a crime against humanity) in the Statute of the International Criminal Court, and general uncertainty regarding the evidence required to demonstrate causation for modes of liability such as instigation. Crucially, the preventative potential of the legal regulation of speech remains unrealized.
3. A key recommendation of the Guidelines is that prosecutors consider indicting for inchoate speech crimes (in which the speech act is the crime itself) in cases where the speech act in question plainly indicates that the speaker's intention was to incite genocide or the persecution of a protected group. As with all inchoate crimes, such indictments contribute to the prevention and deterrence of other core international crimes and therefore should be used in the preliminary stages of a deteriorating political situation. Under existing international criminal law, there are two stand-alone and inchoate speech crimes; hate speech as a form of

persecution (a crime against humanity), and direct and public incitement to commit genocide. Yet there are problems with respect to each crime in the International Criminal Court's Statute, which omits to address hate speech altogether and places incitement to genocide in an article dealing with forms of criminal responsibility, not stand-alone crimes.

4. Hate speech is now established in the case law of the international criminal tribunals for the former Yugoslavia and Rwanda, and these Guidelines recommend the inclusion of hate speech as a form of the crime of persecution in article 7 of the Statute of the International Criminal Court. Second, by positioning direct and public incitement to commit genocide alongside modes of liability for completed crimes, article 25 of the Rome Statute of the International Criminal Court (ICC) seemingly converts incitement from an inchoate stand-alone crime to a contingent mode of liability, potentially requiring the commission of genocide before mounting a prosecution. Such a stance undermines the preventative value of direct and public incitement to genocide.
5. To overcome this ambiguity and enhance the preventative function of the ICC, the Guidelines recommend amending article 25(3)(e) of the Rome Statute to include a form of liability of intentionally, directly and publicly inciting the commission of any crime under the Statute, irrespective of whether those crimes are attempted or committed. The proposed amendment would require that the inciting speech significantly increase the likelihood of the commission of an offense.
6. Preventative doctrine conventionally requires that there is a substantial likelihood that a speech act will cause subsequent lawless action. Prosecuting speech crimes therefore presupposes a risk assessment of the speech act in question. The Guidelines advance a risk assessment framework that is informed by the latest social science research that has identified many of the key ingredients of mass persuasion. The Guidelines distill these findings into a checklist of indicative factors known to elevate the risk of violence, including; the political context of the speech act, the emotional state of the audience and the historical and political context of the country, and the perceived charisma, credibility and authority of the speaker, their use of graphic and dehumanizing language, the degree to which they summon up cultural symbols and cultivate historical grievances, their calls for revenge, their ability to access and control an array of means of communication, and their identification of a clear path of violent action that their audience can follow.
7. If the speaker encourages crimes and the crimes are completed, then their speech may be assessed under various modes of liability that attach to the underlying crime. Under current international criminal law, the most relevant modes of liability for completed crimes are instigating (or, under the Rome Statute, inducing and soliciting), ordering, aiding and



abetting (complicity), and co-perpetration/joint criminal enterprise. Of these, ordering and complicity are generally the most appropriate: the military context of ordering will, in many cases, establish shared intentionality, including the use of common propagandist expressions of moral support and encouragement. Complicity accurately applies to the encouragement or moral support that a propagandist often provides. The Guidelines discuss these modes of liability in detail, along with examples of precedents in which speech acts have been prosecuted and adjudicated on such a basis.

8. The Guidelines go beyond *lex scripta* by outlining best practice in the monitoring, investigation and prosecution of speech crimes, and by addressing the use of new media fora to commit or contribute to speech crimes. The discussion further supports its arguments by reference to relevant case law in order to equip, *inter alia*, judges, prosecutors, defense counsel and legal researchers, in both international and domestic jurisdictions, with the tools to effectively address speech crimes in the context of crimes against humanity and impending genocide.



## 2. Introduction

9. Armed conflicts and mass atrocities are usually preceded by propaganda campaigns in which public figures and opinion-shapers foment ethnic, national, racial or religious hatred and incite their followers to commit acts of violence. International criminal tribunals (ICTs) face unique challenges when adjudicating speech crimes, particularly direct and public incitement to commit genocide and other crimes against humanity committed, encouraged or aggravated through speech. Indeed, such a task typically requires a delicate balance between respecting freedom of expression, a fundamental right protected by conventional and customary international law, and the need to redress potentially harmful speech and punish those who incite others to genocide or the persecution of victims on political, racial, national, ethnic, cultural, religious, gender or other grounds – acts that are universally recognized as impermissible under international law.<sup>1</sup>
  
10. In the context of international and transnational law, there are three primary strata for analyzing speech crimes in relation to freedom of expression. First, speech can be assessed under international criminal law to determine whether it constitutes a crime or a contribution to a crime, and thereby attracts individual criminal responsibility. Second, it can be assessed under the provisions of international human rights law that require States to prohibit certain forms of speech, notably article 20 of the International Convention on Civil and Political Rights (ICCPR) and article 4 of the Convention on the Elimination of All forms of Racial Discrimination (CERD). Third, it can be assessed under the related provisions of international

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1.The Rome Statute, article 7(1)(h).

human rights law that protect the right to freedom of expression but allow States to impose such restrictions as are legally enacted and necessary (notably, article 19(3) of the ICCPR).

11. The relationship between the three strata of analysis is somewhat complicated. For present purposes, however, it is sufficient to point out that the first stratum, which focuses on international criminal law, is not strictly anchored to the other two. Because international criminal law focuses on individual criminal responsibility, its tests for liability do not precisely mirror the tests by state authorities for human rights violations. At the same time, there is a strong imperative for harmony between international criminal law and the international human rights instrument over the issue of speech acts: article 21 of the Rome Statute requires that its provisions are interpreted and applied in a manner “consistent with internationally recognized human rights”,<sup>2</sup> and the ad hoc tribunals have consistently held that their statutes reflect the internationally recognized human rights relevant to their work.<sup>3</sup> However, the second and third strata, which focus on necessarily prohibited speech acts and the limitations that generally apply to restricting freedom of expression, should be harmonious and consistent given that they concern provisions within the same instruments, such as articles 19 and 20 of the ICCPR.
12. These Guidelines are primarily concerned with the first stratum of analysis, focusing on international criminal law prohibitions, and therefore they mainly concentrate on the circumstances in which speech acts qualify as international crimes *per se*, or contributions to such crimes. However, they also assess the other two strata, particularly in relation to the range of possible regulatory responses open to States. As such, the analysis presented here provides a well-rounded account of the position of international law *vis-à-vis* speech crimes.
13. One of the primary motivations behind this project is the desire to enhance the preventative power of international criminal law. Speech acts typically precede and exacerbate the physical commission of atrocities. Inciting speech acts can intensify inter-group animosity, lead to continued cycles of violence, and undermine efforts to achieve peace and reconciliation. Consequently, repressing harmful speech acts may enhance efforts to prevent atrocities. However, prevention is commonly regarded as one of the least developed components of international criminal justice. More broadly, international actors lack objective criteria to guide their decisions as to when and how to intervene to prevent mass atrocities. The following analysis therefore presents a relevant legal framework to determine, at an international

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2. *Ibid.*, article 21(3).

3. See, for example, *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 12, fn. 46.

level, when speech should be considered criminal and to provide objective legal criteria by which to assess when international intervention is warranted.

*One of the primary motivations behind this project is the desire to enhance the preventative power of international criminal law.*

14. The report is organized as follows:
  - Section 3 reviews the landscape of international criminal law, with reference to the main international criminal tribunals, and presents a framework for the following analysis.
  - Section 4.1 discusses the right to freedom of expression, identifying the current conventional international legal framework.
  - Section 4.2 summarizes the prohibition on hate speech and inciting speech under international law, identifying the cornerstone provisions in conventional international law.
  - Section 5.1 provides an overview of the instances in which speech has been charged as a crime per se at international courts.
  - Section 5.2 outlines the instances in which speech has been charged and prosecuted as a contribution to a crime under recognized modes of liability in international criminal law, including contribution to a common criminal plan, ordering, soliciting and inducing (also known as instigating), aiding and abetting, and attempt.
  - Section 6 discusses the investigation of speech crimes, focusing on the type of evidence relevant to prosecuting speech crimes, including evidence generated by the social sciences.
  - Section 7 looks at the potential deterrent effect of the investigation and prosecution of speech crimes from the perspective of the preventive function of international criminal law, in order to reduce the risk of commission of other core international crimes.
  - Section 8 sets out the new challenges in this field, highlighting in particular the impact of the growing influence of social media on the perpetration of speech crimes.



### 3. International criminal courts and tribunals

15. The modern framework of international criminal law was born at the end of the Second World War. Seeking to address the mass crimes committed by the Axis powers, the Allies established the Nuremberg and Tokyo tribunals to prosecute the major war criminals and other high-ranking perpetrators. Over the decades that followed, a number of Nazi-era defendants were also tried for war crimes and crimes against humanity in domestic jurisdictions in, *inter alia*, Israel (Eichmann), France (Barbie, Papon, Touvier), West Germany (the Frankfurt Auschwitz Trials) and the United Kingdom (Sawoniuk).
  
16. In the early 1990s, following the end of the Cold War, two major armed conflicts erupted in the former Yugoslavia and Rwanda. The United Nations Security Council, acting under Chapter VII of the United Nations Charter, initiated two ad hoc tribunals, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993<sup>4</sup> and the International Criminal Tribunal for Rwanda (ICTR) in 1994,<sup>5</sup> to prosecute the core international crimes committed in those conflicts. The tribunals indicted more than 250 individuals and also

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4. UN Security Council Resolution 827 on the establishment 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, 25 May 1993, UN Doc S/RES/827 (1993).

5. UN Security Council Resolution 955 on the establishment of an International Criminal Tribunal for Rwanda and adoption of the Statute of the Tribunal, 8 November 1994, UN Doc S/RES/955 (1994).

fostered national prosecutions. As a result, they bequeathed a legacy of case law on genocide, crimes against humanity and war crimes and an international criminal procedure that has been highly influential for the applicable law and procedures of subsequent international criminal tribunals. They also introduced modern practices into the investigation of war crimes. Once their mandates had been fulfilled, the ad hoc tribunals' jurisdiction, rights, obligations and residual functions were entrusted to the Mechanism for the International Criminal Tribunals (MICT).<sup>6</sup>

fig. 1. The ICTY in The Hague, the Netherlands.



17. Other courts applying international criminal law include the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the War Crimes Chamber in Bosnia and Herzegovina, and the Special Tribunal for Lebanon (STL). These are hybrid courts that, to varying degrees, contain a mix of international and national staff, and apply both domestic and international criminal law. Such courts emerge from a collaboration between the international community, usually in the form of the United Nations, and national governments.
18. These Guidelines focus mainly on the world's first permanent international court, the International Criminal Court. The Rome Statute, the treaty that established the ICC in 1998, entered into force in 2002 and has been ratified by more than 120 states. However, two regions are

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6. UN Security Council Resolution 1966, 22 December 2010, Annex 1 Statute of the Mechanism for the International Criminal Tribunals.



under-represented, the Middle East and Asia, and a number of significant global powers are absent from the list of Member States, including China, India, Russia and the United States.



fig. 2. The ICTR in Arusha, Tanzania.

19. Unlike the ICTY and ICTR, which were vested by the Security Council with primacy over crimes falling within the tribunals' jurisdiction, the ICC does not enjoy primary jurisdiction over domestic prosecutions. Instead, it holds a more circumscribed complementary jurisdiction. Under the principle of complementarity, the domestic efforts of any State to investigate or prosecute crimes within its jurisdiction are given preference over ICC proceedings. This principle is based on respect for the primary jurisdiction of States and considerations of efficiency and effectiveness, as States generally have the best access to evidence and witnesses, as well as the resources to carry out proceedings.
20. The ICC's proceedings can only supersede domestic proceedings if the national authorities are considered unwilling or unable to undertake genuine measures to punish the crimes in question.<sup>7</sup> Recourse to the ICC is a backstop measure for such instances, which often result from a deterioration in, or breakdown of, judicial institutions during an armed conflict. In this

7. The key question underlying complementarity is the degree of overlap or "sameness" between the national case and the case before the ICC. Whether or not the national case concerns the same conduct as the ICC case "depend[s] upon the facts of the specific case" (*Prosecutor v. Saif Al-Islam Gaddafi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547-Red, 21 May 2014, §71). For a case to be inadmissible, the national investigation or prosecution must cover the same individual

respect, the ICC reflects a similar approach to that taken by international human rights instruments and bodies, which are by default fall-back options, designed to be used where national systems have failed to adhere to human rights standards concerning matters occurring within their jurisdictions. For this reason, and because of the ICC’s operational constraints and limited budget, the burden of addressing speech crimes will necessarily fall to domestic authorities in the vast majority of cases.

fig. 3. The ICC in The Hague, the Netherlands.



21. International human rights law underpins the interpretation and application of the Rome Statute, article 21(3) of which reads: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion

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and substantially the same conduct as alleged in the ICC proceedings. In this respect, the ICC Appeals Chamber has determined that “[t]he mere preparedness to take [investigative steps] or the investigation of other suspects is not sufficient” because the investigative steps must be “in relation to the suspects who are the subject of the proceedings before the Court” (*Prosecutor v. Uhuru Muigai Kenyatta et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-02/11-274, 30 August 2011, §39).

or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”. Furthermore, under article 69(7), evidence obtained in violation of the Rome Statute or of internationally recognized human rights is inadmissible where such a violation either casts substantial doubt on the reliability of the evidence or its admission would be antithetical to and would seriously damage the integrity of the proceedings.

*The sanctioning of prohibited speech by international criminal courts must not infringe upon recognized freedom of speech protections under international human rights law.*

22. The sanctioning of prohibited speech by international criminal courts must not infringe upon recognized freedom of speech protections under international human rights law.<sup>8</sup> As noted by the ICTR in the case of *Nahimana, Barayagwiza and Ngeze*, international human rights law “has been [sufficiently] well developed in the areas of freedom from discrimination and freedom of expression [as] to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards”.<sup>9</sup> As mentioned above, the following analysis focuses primarily on international criminal law; however, in order to provide the broader legal context underpinning the criminalization of speech acts, it begins by setting out the international human rights legal framework relating to the protection of freedom of speech and the regulation of hate speech.

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8. The *Nahimana* Trial Chamber, identifying the constituent elements of direct and public incitement to commit genocide, resorted to international jurisprudence on incitement to discrimination and violence, highlighting the relevance of international human rights law on protection of freedom of speech and freedom from discrimination (*Nahimana, Barayagwiza and Ngeze* [henceforth *Nahimana et al.*] TC §§1000, 1010).

9. *Nahimana et al.* TC §1010.



## 4. Freedom of expression and the regulation of prohibited speech

23. Freedom of expression or freedom of speech is an essential component of any democratic society:<sup>10</sup> it is inherent to a person's dignity<sup>11</sup> and is regarded as a fundamental attribute of both democratic deliberation and artistic expression, and a vital means of holding political representatives and other powerful political actors to account. Without access to information and the freedom to express their views, citizens cannot exercise their most basic civil and political "rights".
24. The Guidelines acknowledge that when regulating or adjudicating speech crimes the inherent value of freedom of speech cannot be ignored. Freedom of speech is the default setting of democracy and may only be justifiably encroached upon by criminal law in rare instances. Additionally, we acknowledge the diversity of approaches worldwide, and therefore recognize that national governments exercise a margin of discretion in the regulation of expression. These Guidelines do not encourage international tribunals to criminalize merely deroga-

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10. This claim is expanded upon fully in United Nations Human Rights Committee General Comment No. 34 (2011).

11. See *Nahimana et al.* AC §986, noting that the right to dignity is found in the Universal Declaration on Human Rights, "the Preamble of which expressly refers to the recognition of dignity inherent to all human beings, while the Articles set out its various aspects".

tory or repellent political speech unless it rises to the level of incitement<sup>12</sup> to genocide or another international core crime, or to a crime of comparable gravity to war crimes, crimes against humanity and genocide as defined by the Rome Statute. The Guidelines therefore are focused on persecutory or inciting speech that is connected to or encourages international core crimes, or on speech that is particularly grave in and of itself due to the context of, *inter alia*, widespread political violence, armed conflict, war crimes, crimes against humanity and/or genocide.

25. In focusing on the role and potential of international criminal law, the Guidelines by no means envisage criminal law as the only mechanism of response. Instead, they advocate a graduated and escalating rubric of intervention. This begins with monitoring and detecting hate speech, then moves on to the condemnation of inciting speech acts, the filing of civil law suits and other strategic litigation, and ultimately to the deployment of criminal sanctions at the national level or, when the principle of complementarity applies, by the ICC or another competent tribunal with jurisdiction over such offenses. Complementary mechanisms accompanying these specific interventions include education, promoting inter-communal understanding, and other programs designed to address sectarian divisions.
26. The bedrock principles underlying the following discussion are the right to freedom of expression, the right to equality, and the right to be free from racial violence<sup>13</sup> and discrimination.<sup>14</sup> Although there is a potential for tension between these rights, they can be reconciled through careful analysis and application, as set out in the discussion. In order to attain this careful balance, the United Nations Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights (ICCPR) has indicated that article 19, which guarantees freedom of expression, is compatible with article 20, which sets out the obligation on States

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12. In these Guidelines, "inciting speech" and "incitement" mean discriminatory speech combined with an appeal to commit a crime: for instance, to attack members of a protected group. In short, incitement implies hate speech plus a call to violence. Without the call to violence, which may be implicit and coded as well as explicit, hate speech lacks the same intention to cause violent acts as is present in incitement. The *Nahimana et al. AC*, §692, distinguishes between hate speech and incitement to genocide. Direct and public incitement to genocide is a subcategory of the general category of incitement that intentionally, directly and publicly calls for the destruction in whole or in part of a group protected under the UN Genocide Convention of 1948, as such.

13. Mendel (2006, p. 10).

14. See *Nahimana et al. TC* §983, which resorted, *inter alia*, to conventional international law codifying the principles to be free from discrimination and to freedom of speech, while identifying the constituent elements of direct and public incitement to commit genocide.

Parties to prohibit incitement to discrimination, hostility or violence.<sup>15</sup> The following analysis also seeks to ensure the maximum efficacy of the provisions of international criminal law that address speech crimes.

## 4.1 Freedom of expression in international law

27. The right to freedom of expression is recognized by several leading international instruments. For example, the Universal Declaration of Human Rights contains an influential, although non-binding, formulation of the right to freedom of expression. As the Declaration is regarded as reflecting the general principles of international law concerning the fundamental rights of humanity, it represents an authoritative guide to the interpretation of the United Nations Charter.<sup>16</sup> Article 19 states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.<sup>17</sup> Article 19(2) of the ICCPR continues: “Everyone shall have the right to freedom of expression”, subject to certain restrictions provided for in article 19(3) such as “respect [for] the rights or reputations of others [and] the protection of national security or of public order, or of public health or morals”.<sup>18</sup>
28. Freedom of expression under the jurisprudence of the European Court of Human Rights is also subject to a test of balance, much like the one used for the ICCPR. Article 10<sup>19</sup> of the

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15. UN Office of the High Commissioner for Human Rights General Comment 11: Prohibition of propaganda for War and inciting national, racial or religious hatred (29 July 1983): “The exercise of [the right of freedom of expression] carries with it special duties and responsibilities ... For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”.

16. Brownlie (2003, p 535).

17. Universal Declaration of Human Rights, G.A. res. 217 A(III), U.N. Doc. A/810 (1948). ICJ Judge Tanka in his dissenting opinion in the South West Africa Cases (Second Phase) referred to the UDHR as “not binding in itself” but “evidence of the interpretation and application” of the UN Charter’s human rights provisions.

18. Article 20 of the ICCPR requires States to take measures to repress hate speech. Both articles require a delicate balancing test (The International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316. 999 U.N.T.S. 171, entered into force 23 March 1976).

19. Article 10(1): “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and

European Convention on Human Rights codifies the right to freedom of expression. The Court has clarified that any restrictions to that right must (i) be prescribed by law, (ii) have a legitimate aim or (iii) be considered necessary in a democratic society due to the existence of a “pressing social need”, and that any intervention must be “proportionate to the legitimate aims pursued”.<sup>20</sup>

29. According to article 13(1)<sup>21</sup> of the Inter-American Convention on Human Rights, “everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”. There exists an *ab initio* presumption that article 13 covers all types of speech, including that considered “offensive, shocking, unsettling, unpleasant or disturbing to the State or to any segment of the population”.<sup>22</sup> The right set forth in article 13(1) may be limited for the purpose of ensuring the

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regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”. Article 10(2): “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S., 222, entered into force 3 September 1953, as amended by Protocols Nos. 3, 5, and 8, entered into force 21 September 1970, 20 December 1971 and 1 January 1990, respectively).

20. See *Jersild v. Denmark* judgment of 23 September 1994, Series A no. 298, p. 21 §§34- 34. Available from <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>. All web links are active and accessible at the time of publication. See also *Lehideux and Isorni v. France* (1998); *Otegi Mondragon v. Spain* (2011); *Faruk Tempel v. Turkey* (2011).

21. Article 13(1): “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”. Article 13(2): “The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a) respect for the rights or reputations of others, or b) the protection of national security, public order, or public health or morals” (American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, OEA/Ser. L./V/II.23 doc. rev. 2, entered into force 18 July 1978).

22. Organization of American States – Office of the Special Rapporteur for Freedom of Expression Inter-American Commission on Human Rights, The Inter-American Legal Framework regarding the Right to Freedom of Expression (30 December 2009) Doc. OEA/Ser.L/V/II/ICIDH/RELE/INF. 2/09, §31. See also,



moral protection of children and adolescents (article 13(4)) and for proscribing war propaganda or the advocacy of hatred (article 13(5)), along with restrictions for other purposes (article 13(2)).<sup>23</sup>

*According to article 13(1) of the Inter-American Convention on Human Rights, “everyone has the right to freedom of thought and expression”.*

30. The African Charter on Human and Peoples’ Rights also proclaims the right to freedom of expression. Article 9 states that “every individual shall have the right to receive information” and “the right to express and disseminate his opinions within the law”.<sup>24</sup> In addition to this provision, the African Commission on Human and Peoples’ Rights has adopted a declaration that expands more on the right to freedom of expression:<sup>25</sup> the Declaration of Principles on Freedom of Expression in Africa reaffirms article 9 of the Charter and emphasizes “the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms”.
31. More importantly, Part I of the Declaration states: “Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy”. It also sets out that “[e]veryone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination”.<sup>26</sup>
32. The robust protection of free speech remains in place in particular contexts, as the doctrine of parliamentary privilege applied in several jurisdictions illustrates. This principle, originally established in the 1689 English Bill of Rights (article 9), protects public representatives against prosecution for political speech, allowing them to express themselves freely in a parliamentary debate. It declares that “the freedom of speech and debates or proceedings in

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for example, IACtHR Case of *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment 2 July 2004, §113; and IACtHR Case of “The Last Temptation of Christ” (*Olmedo-Bustos et al. v. Chile*), Merits, Reparations and Costs, Judgment 5 February 2001, §69.

23. The other purposes that may be served are respect for the rights or reputations of others, or the protection of national security, public order, or public health or morals (article 13(2)).

24. African Charter on Human and Peoples’ Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

25. Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples’ Rights, 32nd Session (17-23 October 2002) Banjul, The Gambia. Available from <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html>.

26. *Ibid.*, article I, §2.

Parliament ought not to be impeached or questioned in any court or place out of Parliament”. An analogous principle is recognized by the United States Constitution, article 1(6): “The Senators and Representatives shall ... in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place”. However, speeches made within settings that are arguably analogous to parliament, including speeches containing divisive and inciting content, may be subject to international law, depending on the context. The prosecution in the ICTY *Karadžić* trial sought to rely on several statements that the accused made before the Assembly of the breakaway Republika Srpska. The ICTY rejected the application of parliamentary privilege under international law in this context.<sup>27</sup>

33. In sum, the main international legal instruments are unanimous in their view that freedom of expression broadly, and freedom of political speech in particular, are essential to the process of democratic deliberation and political accountability, and are safeguarded except in rare instances. The next section examines the exceptional circumstances in which political speech may be prohibited.

## 4.2 The regulation of prohibited speech

### 4.2.1 The international framework

34. The United Nations General Assembly Resolution 59, adopted in 1946, declares that freedom of information, a fundamental human right, “requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to see the facts without prejudice and to spread knowledge without malicious intent”.<sup>28</sup> Additionally, the Universal Declaration of Human Rights states, in article 7, that “[a]ll are entitled to

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27. *Prosecutor v Karadžić* Trial Transcript, 7 November 2013, p. 43150. In *Karadžić*, the ICTY held that the defense failed to show that this privilege applies at the level of international law and rejected the motion to prevent Karadžić’s statements in the Bosnian Serb Assembly from being used as evidence against him.

28. UN General Assembly Resolution 59 (I) (1946).

equal protection against any discrimination ... and against any incitement to such discrimination”.

35. The international boundaries on free speech and freedom of expression largely stem from two instruments: The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>29</sup> and the ICCPR.<sup>30</sup> CERD and the ICCPR were created within the framework of the United Nations in 1965 (entering into force in 1969) and in 1966 (entering into force in 1976), respectively. Both are implemented by human rights treaty bodies: the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination. Unlike the UN Declaration on Human Rights, they are legally binding on the states that sign and ratify them.
36. The ICCPR is a key international treaty with 169 States Parties, while the Human Rights Committee is the body of independent experts that monitors implementation of the rights set out in the ICCPR. States are obliged to report on their policies to this body. Article 20(2) of the ICCPR states that “[a]ny propaganda for war shall be prohibited by law” and that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. Article 20 further states that certain types of speech not only may, but must be, restricted.
37. The CERD expressly guarantees “freedom of opinion and expression”, which it lists alongside “other civil rights” that are to be granted and protected; however, some States have interpreted Holocaust denial as a fundamental tenet of contemporary anti-Semitism, and have made efforts to curb it. The Convention in fact has also been key in the conceptualization of hate speech as discrimination. Article 4(a), for example, says that States Parties to the Convention:

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29. Article 5: “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (viii) ‘the right to freedom of opinion and expression’” (International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S., 195, entered into force 4 January 1969).

30. *Ibid.*, p 11.

38. *Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.*
39. Article 4(b) of CERD further requires the prohibition of organizations and all other organized propaganda activities that “promote and incite racial discrimination”, and the recognition of participation in such organizations or activities as an offense punishable by law.
40. Clearly, the terms of CERD surpass those of the ICCPR. By requiring states to criminalize the spread of ideas based on racial superiority or hatred, ICCPR prohibits a broader range of conduct. Whereas the ICCPR focuses on the “advocacy” of racial or religious hatred, CERD conjunctively requires that the advocacy itself constitute “incitement to discrimination, hostility or violence”. Conversely, CERD disjunctively prohibits not just the dissemination of ideas, but also incitement to racial discrimination, as well as all acts of violence or incitement, thus implying that the dissemination itself need not amount to incitement. Moreover, the additional requirement to prohibit organizations that promote and incite racial discrimination and to criminalize participation in such organizations is a potentially far-reaching obligation, going beyond those set out in the ICCPR.

## 4.2.2 Regional legal systems

### Europe

41. The European Convention on Human Rights (ECHR) is accompanied by the European Court of Human Rights, which was set up in 1959 to rule on alleged violations of the Convention and has done so more than ten thousand times to date. Article 10 of the ECHR guarantees freedom of expression, but it also states:
42. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder and*

*crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

43. When deciding cases involving hate speech, the European Court of Human Rights considers if it is justified to impose restrictions on freedom of expression in accordance with article 10(2) of the ECHR. The Court follows this approach if the conduct in question constitutes hate speech but is not likely to violate the fundamental values of the Convention.
44. Unlike article 17, article 10 seeks a balance between the freedom of expression in paragraph 1 and the protection of the rights of others in paragraph 2. For a restriction to be legitimate it must be based on a law, pursue a legitimate aim and be necessary for a democratic society. Article 17 states: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.
45. Under article 17, the violation of a right provided for in the ECHR is prohibited. When adjudicating cases involving hate speech, the Court considers whether the remarks would be removed from the protection of article 10 (guaranteeing freedom of expression) by article 17 (prohibiting the abuse of rights). It adopts this approach in situations where the comments in question amount to hate speech and negate the fundamental values of the Convention.<sup>31</sup> In contrast, it adopts a narrower approach when dealing with speech that does not necessarily negate fundamental values. This requires the Court to balance the right to free speech in article 10(1) against the obligation to protect the rights of others in article 10(2). Additionally, when it holds that the speech act does not merit protection under the Convention, it sometimes refers to article 14 which requires that the rights it contains are secured without discrimination, which is prohibited on certain grounds.
46. The European Court of Human Rights has a lengthy history of dealing with freedom of speech cases, in particular those relating to Holocaust denial.<sup>32</sup> In several decades

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31. *Norwood v. United Kingdom* (2004); *Pavel Ivanov v. Russia* (2006); *M'bala M'Bala v. France* (2015)

32. Note that the majority of the European States have criminal provisions that would capture

of jurisprudence on the issue, it has developed an exceptional regime based on article 17 (which prohibits the abuse of rights). According to the Court, the criminalization of Holocaust denial does not necessarily constitute a breach of freedom of expression, although some prosecutions for related conduct have been held to violate rights protected by the Convention.<sup>33</sup> The Court has since moved away from the Holocaust to consider the denial of historical facts beyond the Nazi genocide. However, there is no universal policy in Europe on Holocaust denial, and it is illegal only in a number of states such as Austria, Belgium, Germany and France. Domestic legislative solutions in Europe are diverse, a vivid testimony to these countries' contrasting historical experiences. Along with Holocaust denial, other forms of speech that have been found to fall under the abuse clause of article 17 (and removed from the protection of the ECHR) are inciting ethnic hatred or manifesting anti-Semitic or Islamophobic motives.<sup>34</sup>

47. In terms of policy recommendations, the European Commission against Racism and Intolerance, a body within the Council of Europe, adopted a document in December 2015 outlining the measures that Member States should implement to combat hate speech. Point 10 states:
48. *[Member States] should take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected.*
49. Other Council of Europe instruments addressing hate speech in some form include the Additional Protocol to the Convention on Cybercrime, the European Convention on Transfrontier Television, and the Convention on preventing and combatting violence against women and domestic violence.<sup>35</sup>

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Holocaust denial. See Lobba (2015, p. 238).

33. *Gauraudy v. France* (2003)

34. *Molnar v. Roumanie*, Appl. no. 16637/06, Decision of 23 October 2012, §23; *W.P. and Others v. Poland*, Appl. no. 42264/98, Decision of 2 September 2004, §2(b)(iii), at 11; *Norwood v. United Kingdom*, Appl. no. 23131/03, Decision of 16 November 2004, at 4. See also Lobba (2015).

35. Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Council of Europe, Strasbourg, ETS No.189, entered into force 3 January 2006; European Convention on Transfrontier Television, Council of Europe, Strasbourg, ETS No. 132, entered into force 1 March 2002; Convention on preventing and

## Africa

50. The African Charter of People's Rights pronounces that "every individual shall have the duty to respect and consider fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance".<sup>36</sup> The African Court on Human and Peoples' Rights could potentially utilize this provision in relation to hate speech, but so far it has not expressed an opinion on this topic. Like other international instruments, the 2002 Declaration of Principles on Freedom of Expression in Africa envisages instances where the right to freedom of expression could be limited. According to Part XIII (2) of the Declaration, the right to freedom of expression should be restricted on public order or national security grounds when there is a real risk of harm to a legitimate interest in democratic society and a close causal link between the risk of harm and the specific form of expression.

## The Americas

51. Article 13(1) of the Inter-American Convention on Human Rights protects freedom of speech and includes in this protection all types of speech, including that considered "offensive, shocking, unsettling, unpleasant or disturbing to the State or to any segment of the population".<sup>37</sup> However, freedom of expression may sometimes be limited to ensure respect for the rights or reputations of others, and to protect national security, public order, or public health and morals. The Convention also specifies in article 13(4) that public entertainments may be subject to prior censorship "for the sole purpose of regulating access to them for the moral protection of childhood and adolescence", and in article 13(5) that instances of war propaganda or advocacy of hatred that incite lawless violence are excluded from the article's ambit. The Convention states: "Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law".

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combating violence against women and domestic violence, Council of Europe, Strasbourg, CETS No.210, entered into force 8 January 2014.

36. African Charter of People's Rights, article 28.

37. Organization of American States – Office of the Special Rapporteur for Freedom of Expression Inter-American Commission on Human Rights, The Inter-American Legal Framework regarding the Right to Freedom of Expression (30 December 2009) Doc. OEA/Ser.L/V/II/CIDH/RELE/INF. 2/09, §31. See also, e.g., IACtHR. *Herrera-Ulloa v. Costa Rica* (Preliminary Objections, Merits, Reparations and Costs), Judgment 2 July 2004, §113; IACtHR. "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) v. *Chile* (Merits, Reparations and Costs), Judgment 5 February 2001, §69

52. On this point, the Inter-American Commission of Human Rights holds that:
53. *The imposition of sanctions for the abuse of freedom of expression under the charge of incitement to violence (understood as the incitement to commit crimes, the breaking of public order or national security) must be backed up by actual, truthful, objective and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair or disturbing), but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective.*<sup>38</sup>
54. In summary, public international law comprehensively protects freedom of expression and also lists the conditions under which political communication may be limited, and the most common grounds for potential regulation pertain to propaganda for war, incitement of crimes and advocacy of national, religious, or racial hatred. Clearly these divergent aims must be balanced carefully to ensure that robust democratic speech is the norm and banned speech the rare exception. Since the international conventions articulate these principles at a high level of abstraction, it is not always clear how they might be balanced in practice. Regional human rights courts have provided guidance on this question, and yet there is a great deal of variance based upon countries' differing historical experiences of democracy and authoritarianism. International criminal law clarifies these questions in extensive and concrete detail, addressing the most egregious cases where denigrating and inciting speech is accompanied by, and sometimes causally related to, mass atrocities against civilians and on the battlefield.

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38. Organization of American States – Office of the Special Rapporteur for Freedom of Expression Inter-American Commission on Human Rights, op. cit., §58. The Inter-American Court of Human Rights ruled against restrictions on freedom of expression in, for example, *Uzcátegui et al. v. Venezuela* (2012) §169-173; *Norín Catrیمان et al. v. Chile* (2014) §370-373; and *López Lone et al. v. Honduras* (2015) §184.



## 5. Liability for speech acts under international criminal law

55. The preceding survey of public international law has set out the rules, instruments and jurisprudence relating to the right to freedom of expression and the limits on this right. It is apparent that international law allows, and may even require, the criminalization of certain types of speech (e.g. direct and public incitement to genocide) in certain contexts such as a widespread or systematic attack on a civilian population or genocide.
56. However, not all regulation of speech – at least in the first instance – falls within the purview of international criminal law. Other international bodies with the competence to address inciting speech include the United Nations Human Rights Council, United Nations General Assembly and United Nations Security Council, and regional organizations such as the Council of Europe, the European Commission, the African Union and the Inter-American Commission on Human Rights. Given their capacity and legitimacy, however, States are the best positioned, in the first instance, to respond to occurrences of speech crimes in their jurisdictions, and most international human rights regimes accord them a margin of discretion as to how they address hate speech at the domestic level. The institutions of international criminal law therefore serve as a complement to other international, regional and domestic mechanisms of accountability and regulation.
57. The following analysis focuses specifically on liability for speech acts under international criminal law. It addresses the possibility of speech acts being charged, firstly, as crimes *per se*,

and secondly, as modes of liability for completed crimes. While the primary doctrinal focus in these Guidelines is on the provisions of the Rome Statute of the ICC, the Court's lack of developed jurisprudence means that it is necessary to pay considerable attention to the case law from other international courts and tribunals, particularly the ICTR and ICTY.

## 5.1 Speech charged as a crime

58. Under international criminal law, speech has been charged as a crime in and of itself (as opposed to a way of fulfilling the elements of a mode of liability) in only a very limited number of instances.<sup>39</sup> Thus far, speech acts have not been charged in isolation at international tribunals since international criminal law addresses the gravest atrocity crimes, which usually involve widespread physical violence. However, the jurisprudence indicates that certain types of speech acts may be crimes in and of themselves: as direct and public incitement to genocide, as persecution (a crime against humanity), and potentially, as “other inhumane acts” (as an element of a crime against humanity at the ICC).

### 5.1.1 Direct and public incitement to commit genocide

59. The crime of direct and public incitement to genocide<sup>40</sup> was established as one of the acts prohibited by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide<sup>41</sup> (the Genocide Convention) in 1948. However, it was not applied in an international tribunal until the *Akayesu* case at the ICTR in 1998, when approximately 18 defendants, including Jean-Paul Akayesu, were convicted of inciting genocide in Rwanda (eight of the

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39. Some domestic criminal codes address conduct paralleling persecution. For example, Article 130.1 (Incitement to Hatred) of the German Criminal Code punishes “[w]hoever, in a manner capable of disturbing the public peace, incites hatred against a national, racial, religious group or a group defined by their ethnic origins” (author’s translation).

40. For more on direct and public incitement against genocide, see Benesch (2004, 2008, 2012). The ICTR has clearly stated that direct and public incitement to genocide is an inchoate crime: see *Nahimana et al.* AC §678. However, under the Rome Statute of the ICC, direct and public incitement to genocide has been included in the provision on modes of liability (as article 25(3)(e)), introducing some ambiguity regarding the nature of direct and public incitement to genocide.

41. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 227, entered into force 12 January 1951.

accused were acquitted).<sup>42</sup> Since then, however, there have been no other convictions for direct and public incitement to genocide at an international court.

60. During the Rwandan genocide, the ICTR defendants made public statements which included such exhortations as:
  61. *“Exterminate the Tutsis”*.<sup>43</sup>
  62. *“You know the minority population is the Tutsi. Exterminate quickly the remaining ones”*.<sup>44</sup>
  63. *“Kill Tutsis”*.<sup>45</sup>
  64. *“The reason we will exterminate them is that they belong to one ethnic group”*.<sup>46</sup>
65. Some also thanked perpetrators for their participation in the genocide, and commended them for their “good work”.<sup>47</sup>
66. One of the motivations behind the Convention’s inclusion of incitement to genocide as one of its five distinct crimes<sup>48</sup> (each punishable in its own right) was genocide prevention.<sup>49</sup> The goal was to interdict the steps that could be seen as precursors to genocidal killings and violent

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42. Convictions for direct and public incitement to commit genocide at the ICTR include *Akayesu*, *Bikindi*, *Kajelijeli*, *Kalimanzira*, *Kambanda*, *Kanyabashi*, *Karempera* and *Ngirumpatse*, *Muvunyi*, *Nahimana*, *Ngeze*, *Ndayambaje*, *Ngirabatware*, *Niyitegeka*, *Nteziryayo*, *Nzabonimana*, *Ruggiu* and *Serugendo*. The following were acquitted of the charge: *Barayagwiza*, *Bicamumpaka*, *Bizimungu*, *Mugenzi*, *Mugiraneza*, *Nsabimana*, *Nyiramasuhuko*, and *Semanza*.

43. *Kajelijeli* TC §856

44. *Bikindi* TC §§422, 426. The quote is cited in the judgment at §266.

45. *Ngirabatware* TC §1368. Similarly, the accused Juvénal Kajelijeli uttered “exterminate the Tutsis” and this was sufficient to convict him of direct and public incitement to commit genocide: see *Kajelijeli* TC §856 and *Kajelijeli* AC §§90, 105.

46. *Nahimana et al.* AC §756

47. *Niyitegeka* TC §257.

48. The UN Genocide Convention’s five crimes related to genocide are: commission of genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempting genocide and complicity in genocide.

49. *Akayesu* TC §551.

crimes before such atrocities take place.<sup>50</sup> The *Akayesu* Trial Chamber noted that the Convention established the “specific crime” of direct and public incitement to commit genocide “in particular, because of its critical role in the planning of a genocide”.<sup>51</sup> Although the ICTR has closed its doors, it has left an indispensable corpus of jurisprudence for future tribunals addressing direct and public incitement to genocide. Nevertheless, as we see below, certain complications in the formulation and interpretation of the elements of this crime still persist.

### *Actus reus* (the physical element)

67. Article III(c) of the Genocide Convention codifies “direct and public incitement to commit genocide”, and a number of ICTR cases have since delineated the elements of the crime. In *Akayesu*, the ICTR described such incitement as:
68. *[D]irectly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public spaces at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public spaces or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.*<sup>52</sup>
69. Subsequent ICTR cases adopted this definition while further explaining and clarifying its elements.<sup>53</sup>
70. Direct and public incitement to genocide is listed in article III(c) in the Genocide Convention as an inchoate offense, punishable in its own right, irrespective of whether genocide occurs.<sup>54</sup> When the Contracting Parties to the Convention included direct and public incitement to genocide in its terms, they sought to target the initial substantial steps that could lead to violent genocidal acts.<sup>55</sup> Neither the Convention nor the later body of jurisprudence from the

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50. See Schabas (1999, p. 521) and Davies (2009, p. 247).

51. *Akayesu* TC §551.

52. *Akayesu* TC §559.

53. See, e.g., *Muvunyi* TC §27; *Kalimanzira* TC §515; *Kajelijeli* TC §851. See also *Nzabonimana* AC §125, citing the Draft Code of Crimes against the Peace and Security of Mankind, p. 22.

54. Genocide Convention, article 3(c). See also *Nzabonimana* AC §234 and *Nahimana et al.* AC §678.

55. See *Nahimana et al.* AC §678, which refers to the fact that many delegations voted to reject an American-proposed amendment to remove incitement from the list of punishable acts. These States explained that it was important to make direct and public incitement to commit genocide punishable even when it was not followed by acts, so that the Convention should be an effective instrument for the prevention of genocide.

ad hoc tribunals require proof of result in order to determine whether the crime has been committed; it is only necessary to show that the speaker directly conveyed in his or her public speech acts the intention to incite others to commit genocide. It is the intent of the speaker that is at issue, not the effectiveness of the speech in causing criminal actions.<sup>56</sup>

71. **1) The “direct” element:** In the first incitement to genocide case at the ICTR, the *Akayesu* Trial Chamber considered the euphemistic and coded language of the accused, and had to decide whether such speech satisfied the “directness” element of the crime of direct and public incitement to commit genocide.
72. The Trial Chamber held that the term “direct” implies that “the incitement assume[s] a direct form and specifically provoke[s] another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement”.<sup>57</sup> Yet it recognized that directness must be interpreted in the context of cultural and linguistic variability:
73. *[T]he Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as ‘direct’ in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit. The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.*<sup>58</sup>
74. On the 19 April, 1994, Jean-Paul Akayesu gave a speech in the town of Gishyeshye to a gathering of over 100 Hutus in which he called on the crowd to unite to eliminate what he termed the sole enemy. The ICTR was satisfied beyond reasonable doubt that the audience had construed Akayesu’s call to fight against the “accomplices” of the *inkotanyi* (literally, warriors) as a call

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Note that an early draft of the Genocide Convention, prepared by the Ad Hoc Committee on Genocide in April and May 1948, criminalized “direct incitement in public or in private to commit genocide, whether such incitement be successful or not” (Rep. of the Ad Hoc Comm. on Genocide to the Econ. & Soc. Council, Apr. 5–May 10, 1948, U.N. Doc. E/794, Annex, art.iv(c), §55 (1948)).

56. “Incitement to genocide in international law”, *Holocaust Encyclopedia*, United States Holocaust Memorial Museum. Available from <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007839>.

57. *Akayesu* TC §§557-558.

58. *Akayesu* TC §§557-558.

to kill the Tutsi in general.<sup>59</sup> Akayesu admitted before the ICTR that to label anyone in public as an “accomplice of the RPF [the Rwandan Patriotic Front]” would place such a person in grave danger. Therefore, the Court concluded that Akayesu had created a particular state of mind in his audience that was likely to lead to the destruction of the Tutsi group, and found him guilty of direct and public incitement to genocide under article 2(3)(c) of the ICTR Statute. Akayesu’s conviction was affirmed on appeal.

75. The interpretation of euphemistic calls to genocide in *Akayesu* set a precedent that the Trial Chamber enlarged in later cases such as *Ruggiu*, where it stated that “the term ‘*inyenzi*’ (cockroach) became synonymous with the term ‘Tutsi’”.<sup>60</sup> Over time, the Tribunal came to interpret the defendant’s use of the expression “go to work” to mean: “[G]o kill the Tutsis and [the] Hutu political opponents of the interim government”.<sup>61</sup>
76. An example of indirect speech of potential relevance to direct and public incitement to genocide was Prime Minister Jean Kambanda’s statement: “You refuse to give your blood to your country and the dogs drink it for nothing”.<sup>62</sup> In entering a conviction for direct and public incitement to genocide, the Trial Chamber further took note of Kambanda’s expression of support for Radio Television Libre des Mille Collines (RTLM), which played a crucial role in creating an atmosphere of charged racial hostility in Rwanda. Kambanda specifically stated that the radio station was “an indispensable weapon in the fight against the enemy”.
77. It further noted his attendance at a rally in Butare during which the president of the Rwanda’s interim government, Théodore Sindikubwabo, delivered a speech that was construed as inciting the Hutu population to kill Tutsis.<sup>63</sup> While these statements did not contain explicit calls for violence, the Trial Chamber appears to have considered them to be significantly inciting in the context of the ongoing Rwandan genocide. Criminal courts may place considerable weight on the contextual circumstances, and the likely impact and import of statements, even where the statements do not, on the face of it, contain unequivocal calls for violence.

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59. *Akayesu* TC §673(iv). The judgment notes that *Inkotanyi* was commonly used to refer to soldiers of the Rwandan Patriotic Front (§147).

60. *Ruggiu* Amended Indictment §44(iii).

61. *Ruggiu* Amended Indictment §44(iv).

62. *Kambanda* TC §39(x).

63. Note that the Trial Judgment refers to the Indictment paragraph detailing Kambanda’s attendance at the Butare rally as a basis for his conviction for direct and public incitement to genocide (*Kambanda* TC §40(3), referring, *inter alia*, to the Indictment, §314). However, in the list of admissions from Kambanda set out in the Judgment, attendance at this rally is not specified.

78. 2) **The “public” element:** The second element is the “public” aspect of incitement. The Trial Chamber in *Akayesu* stated that words are public “where they were spoken aloud in a place that [is] public by definition”,<sup>64</sup> while the International Law Commission characterizes incitement as public where it is directed at “a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television”.<sup>65</sup> On this point, the *Karemera and Ngirumpatse* Appeals Chamber recalled that the public element of incitement may be established by the “dissemination of inciting messages via the media”.<sup>66</sup>
79. The *Kalimanzira* Appeal Judgment sought to further define the public element. The two subordinate factors it articulated are (1) the number of people in an audience and (2) the medium of the speech. The judgment provides a useful summary of the preceding cases in which the public element had been discussed, ““A review of the jurisprudence is illustrative of what acts have constituted public incitement at the Tribunal. In a first group of cases, inciting speeches at public meetings to ‘crowds’ of people – ranging from ‘over 100’ to approximately 5,000 individuals – were found to constitute public incitement”.<sup>67</sup>
80. In *Nahimana*, the Appeals Chamber used those two subordinate factors to reverse Jean-Bosco Barayagwiza’s conviction for incitement. It determined that the audience was selective and limited to individuals at roadblocks, and so the public element was not fulfilled, “[T]he supervision of roadblocks cannot form the basis for the Appellant’s conviction for direct and public incitement to commit genocide; while such supervision could be regarded as instigation to

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64. *Akayesu* TC §556.

65. United Nations International Law Commission (1996), Report of the International Law Commission to the General Assembly, 51 U.N. ORGA Supp. (No. 10), U.N. Doc. A/51/10(1996), p. 26, as cited in *Akayesu* TC §556.

66. *Karemera and Ngirumpatse* AC §499.

67. *Kalimanzira* AC §156, footnote 410 continues to add: “The *Akayesu* Trial Chamber found that a speech in a public place to ‘a crowd of over 100 people’ urging the population ‘to eliminate the enemy’ constituted direct and public incitement (*Akayesu* TC §§672-674). The conviction was upheld on appeal: see *Akayesu* AC §238, p. 143.... It was later clarified in *Nzabonimana* ACJ, §231, that the number of people in an audience or addressees was not a requirement of the public element, a view that echoed the separate opinion of Judge Pocar in the *Kalimanzira* ACJ §45. This should be stressed as the earlier case law was not clear in this respect and could have led to a distinct understanding given the fact that the cases were concerned with large audiences. In fact, in *Nzabonimana* the audience in question comprised 30 people...which triggered the discussion as to whether there should have been a minimum threshold”.

commit genocide, it cannot constitute public incitement, since only the individuals manning the roadblocks would have been the recipients of the message and not the general public”.<sup>68</sup>

81. Similarly, the accused Hutu politician Callixte Nzabonimana argued on appeal that his speech was private, based on the characteristics of his audience. He claimed that the group was selective and limited because the audience was composed of political officials. The Appeals Chamber agreed,<sup>69</sup> and clarified that “an individual may communicate the call for criminal action in person in a public place or by technical means of mass communication, such as by radio or television”.<sup>70</sup>

### *Mens rea* (the mental element)

82. Direct and public incitement to commit genocide requires the specific intent to eliminate one of the four groups (ethnic, racial, religious and national) protected by the Genocide Convention, in whole or in part.<sup>71</sup> In international criminal law, specific intent is also referred to as *dolus specialis*, defined as “a particular state of mind or a specific intent with respect to the overall consequence of the prohibited act”.<sup>72</sup>
83. The ICTR Trial Chamber in the *Akayesu* case determined the *mens rea* requirement for the crime of direct and public incitement to commit genocide as “the intent to directly prompt or provoke another to commit genocide”,<sup>73</sup> and stated that this “implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging”. This means that “the person who is inciting to commit genocide must himself have the special intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.<sup>74</sup>
84. Under international criminal law, specific intent is considered the highest form of intent, requiring demonstration that the accused was seeking to achieve a specific purpose.<sup>75</sup> With respect to the crime of direct and public incitement to genocide, discriminatory intent is not

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68. *Nahimana et al.* AC §862.

69. *Nzabonimana* AC §§231, 384.

70. *Nzabonimana* AC §125, citing the Draft Code of Crimes against the Peace and Security of Mankind, p. 22.

71. Krstić AC §140 established that any genocide charge requires proof of specific intent.

72. *Akayesu* TC §571, quoting the Report of the International Law Commission on the Work of its 48th session, 6 May-26 July 1996, U.N. GAOR., 51<sup>st</sup> Sess., Supp. No. 10, at 88, (U.N. Doc. A/51/10 (1996)).

73. *Akayesu* TC §560

74. See also *Ruggiu* TC §14; *Niyitegeka* TC §431; *Nahimana et al.* TC §1012.

75. For specific intent in genocide jurisprudence, see Schabas (1999, pp. 260-264).



sufficient, since it must also be shown that the perpetrator was aware that his or her speech acts incited a wider plan to exterminate members of a national, ethnic, racial or religious group, specifically on the basis of their membership of that group (“as such”).<sup>76</sup> For a speech act to constitute incitement to genocide, it must envisage group destruction and include an awareness of the genocidal consequences of each particular act that is incited.

*Direct and public incitement to commit genocide requires the specific intent to eliminate one of the four groups (ethnic, racial, religious and national) protected by the Genocide Convention, in whole or in part.*

85. In certain speech-crime cases, the genocidal state of mind of the accused was determined solely on the basis of the content of their speech. For instance, in assessing Augustin Ngirabatware’s speech at a roadblock in 1994, the ICTR Trial Chamber found that “[h]is instruction to ‘kill Tutsis’ objectively and unambiguously called for an act of violence prohibited by article 2(2) of the Statute, and the Chamber has no doubt that Ngirabatware made this statement with the intent to directly incite genocide”.<sup>77</sup>
86. However, in terms of *mens rea*, the question also arises as to whether those who publish other people’s words containing direct and public incitement to genocide may also be convicted. The Trial Chamber in the *Nahimana* case addressed this topic and provided some lines of guidance. It noted that “editors and publishers have generally been held responsible for the media they control” and that “in determining the scope of this responsibility, the importance of intent ... whether or not the purpose in publicly transmitting the material was of a bona fide nature” (e.g. historical research, the dissemination of news and information, or the public accountability of government authorities).<sup>78</sup>
87. The Trial Chamber noted that the actual language used in the (re)publication may be an indicator of intent. The United Nations Human Rights Committee, for example, considered that the term “magic gas chamber” in *Faurisson* revealed an anti-Semitic motivation rather than an interest in historical truth. On the other hand, in *Jersild*, the European Court of Human Rights considered that the interviewer’s comments, distancing himself from the racist remarks of his interviewee, were critical in determining that the purpose of the pro-

76. See *Akayesu* TC §560; *Muvunyi* TC §§504-505; *Nahimana et al.* AC §1035.

77. *Ngirabatware* TC §1368. Similarly, the accused Juvénal Kajelijeli uttered “exterminate the Tutsis” and this was sufficient to convict him of direct and public incitement to commit genocide: see *Kajelijeli* TC §856 and *Kajelijeli* AC §90, §105.

78. *Nahimana et al.* TC §1001.

gram was to disseminate news rather than to spread racist views.<sup>79</sup> However, in *Nahimana*, the Trial Chamber took a relatively blunt approach, noting that publishers and editors can be regarded as equally responsible on the grounds that they are providing a forum for such speech, and that owners of media outlets have “the power to shape the editorial direction”.<sup>80</sup>

### Contemporaneity and causation

88. In *Nahimana*, the ICTR Appeals Chamber repeated the established legal position that direct and public incitement to genocide is an inchoate crime, but the outcome of the case nonetheless placed considerable weight on the fact that the inciting speech acts and the genocide itself were contemporaneous. Historian Ferdinand Nahimana was charged with direct and public incitement to genocide, based on his speeches and broadcasts prior to 6 April 1994, in which he called for the killing of specific individuals. However, the Appeals Chamber held that the genocidal speech acts had to be uttered very near to, or simultaneous with, the onset of an actual genocide, and it overturned the convictions against Nahimana on the basis that the temporal gap allowed too much space for subsequent new factors (*nova causa interveniens*) to have been the primary reasons for the killings. It stated that “the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing”.<sup>81</sup>
89. The Appeals Chamber also overturned Nahimana’s conviction for a variety of other reasons, including the fact that some broadcasts referred to members of the RPF and not to Tutsis in general, they called for the murder of specific persons, and although some broadcasts were definitely made to “heat heads” and incite violence, they did not meet the threshold of direct and public incitement.<sup>82</sup> In doing so, the Chamber drew a distinction between the incitement of ethnic hatred and the incitement of genocide, stating: “[A]lthough it is clear that RTLM broadcasts between 1 January and 6 April 1994 incited ethnic hatred, it has not been established that they directly and publicly incited the commission of genocide”.<sup>83</sup> In this sense, it appeared to place considerable weight on the actual occurrence of genocide as an indicator that the perpetrator’s words were intended to incite genocidal acts and were not merely directed at ethnic divisions or more innocuous ends such as demonizing an enemy’s military force. However, it was on this basis that the Chamber upheld the convictions for incitement laid against Nahimana for his speeches and broadcasts after 6 April 1994 and

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79. *Nahimana et al.* TC §1001.

80. *Nahimana et al.* TC §1001.

81. *Nahimana et al.* AC §513.

82. *Nahimana et al.* AC §§736-754.

83. *Nahimana et al.* AC §§636, 754.

against Hassan Ngeze for publication of his *Kangura* newspaper in early 1994, before the start of the genocide.<sup>84</sup>

90. Successive ICTR verdicts have also taken into account the contemporaneity of the incitement and the actual commission of violent crimes against a targeted group.<sup>85</sup> In 2008, Rwandan pop musician Simon Bikindi was convicted on the basis of his public appeals to Hutus – “You know the minority population is the Tutsi. Exterminate quickly the remaining ones” – over a public-address system while the genocide was occurring.<sup>86</sup> However, the *Bikindi* Trial Chamber found that the prosecution failed to establish that Bikindi played a role in the dissemination of three songs, written prior to 1994, encouraging ethnic hatred of the Tutsis.<sup>87</sup> Furthermore, it also ruled that there was insufficient evidence that Bikindi composed these songs with the specific intention of inciting attacks and killings during the genocide.<sup>88</sup>
91. One reading of the ICC’s Elements of Crimes (2011) could lend support to the contemporaneousness requirement. To the extent that the parameters of the crime of genocide under article 6 control the definition of direct and public incitement to genocide under article 25(3)(e), they could prevent incitement being prosecuted as an inchoate offense. For example, they state in article 6(a)(4) (genocide by killing) that “[t]he conduct [must have taken] place *in the context of* a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction (our emphasis)”. Since no defendant at the ICC has been charged with incitement to genocide, it is unknown how the contextual requirement would be interpreted. While we do not favor this interpretation, it could reasonably be expected to mean that the incitement to commit genocide would have to occur in the context of an actual and ongoing genocide against a protected group. Furthermore, the Elements of Crimes state in article 6 (a-b) that “[t]he term ‘in the context of’ would include the initial acts in an emerging pattern” and “[t]he term ‘manifest’ is an objective qualification”. This wording could support an interpretation that isolated and highly preliminary acts are not within the scope and jurisdiction of the ICC. Such an interpretation would obviously undermine the preventative potential of the inchoate crime of incitement to genocide.
92. This discussion raises the question of whether direct and public incitement to genocide can be prosecuted as an inchoate crime or whether the speech acts must occur in the context of

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84. *Nahimana et al.* AC §§346–347.

85. *Bikindi* TC §425. See Gordon (2010) on the *Bikindi* case.

86. *Bikindi* TC §422, §426. The quote is cited in the judgment at §266.

87. *Bikindi* TC §421.

88. *Bikindi* TC §255.

an actual genocide and be causally connected to genocidal acts. While the Trial Chamber in *Nahimana* reaffirmed that causation is “not requisite to a finding of incitement”, it also attributed a causal role to “the media” generally.<sup>89</sup> The Trial Chamber judgment emphasized the significance of a direct causal nexus between speeches and radio broadcasts and subsequent public violence, although this may have been a consideration concerning the sufficiency of the evidence in the circumstances rather than a strict legal requirement.<sup>90</sup>

93. However, some ambiguity surrounds the relevance of causation for the crime of incitement to genocide. In *Akayesu*, the Trial Chamber demanded that “*there must be proof of a possible causal link* between the statement made by the Accused during the said meeting and the beginning of the killings” (emphasis in original).<sup>91</sup> While it is ambiguous whether the Trial Chamber was referring to direct and public incitement to genocide or some other form of responsibility for genocide, such as complicity or instigation, the ICTR Appeals Chamber has repeatedly confirmed that direct and public incitement to genocide is an inchoate offense that does not require genocide to actually occur.<sup>92</sup>
94. Confusion regarding the inchoate nature of incitement to genocide resurfaced again in the Rome Statute, which places direct and public incitement to genocide under article 25(3)(e). As article 25(3) sets out the modes of liability for completed crimes, this positioning may suggest that genocide must actually occur in order to lay a charge of direct and public incitement. Article 25(3)(e) states that a person is liable for punishment of a crime within the jurisdiction of the Court if that person “in respect of the crime of genocide, directly and publicly incites others to commit genocide”. Since all the other modes of liability also listed in article 25(3) require that the underlying crime either occurs or is attempted, this suggests that direct and

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89. *Nahimana et al.* TC §952.

90. *Nahimana et al.* TC §482.

91. *Akayesu* TC §349 (emphasis added).

92. See, e.g., the *Nahimana et al.* Appeal Judgment, §§678, 720: “[T]he crime of direct and public incitement to commit genocide is an inchoate offense, like conspiracy to commit genocide (Article 2(3)(b) of the Statute) and attempt to commit genocide (Article 2(3)(d) of the Statute”); the *Nzabonimana* Appeal Judgment, §234: “[T]he Appeals Chamber recalls that direct and public incitement is an inchoate crime and that it is punishable even if no act of genocide has resulted therefrom. In light of this, the *actus reus* of direct and public incitement is satisfied when a person directly and publicly incites the commission of genocide, irrespective of whether his or her acts were likely to cause the crime of genocide. Accordingly, the Appeals Chamber rejects Nzabonimana’s contention that, to establish direct and public incitement to commit genocide, it must be proven that the accused’s actions were likely to cause the commission of the crime of genocide”; and *Bikindi* AC § 149.

public incitement to genocide may also be construed as a mode of liability, and can therefore only be charged after an actual or attempted genocide has taken place.

*Prevention is the principle underlying inchoate crimes like incitement to commit genocide.*

95. The inclusion of incitement to genocide alongside modes of liability for completed crimes in article 25 apparently resulted from an oversight on the part of the Statute's drafters.<sup>93</sup> However, if inciting genocide is indeed construed as a mode of liability, then this would potentially defeat the prevention element of the Genocide Convention.<sup>94</sup> Prevention is the principle underlying inchoate crimes like incitement to commit genocide. However, to date, no defendant has yet been indicted for inciting genocide in the absence of an actual genocide.<sup>95</sup>
96. These Guidelines reaffirm the inchoate nature of direct and public incitement to genocide. A direct call, made in a public setting, for the destruction of a group protected by the Genocide Convention, even if utterly ignored by its intended audience, is a criminal act. Inciting genocide is a crime *per se*, by virtue of what the act itself does.<sup>96</sup> Indeed, standard theories justify the category of inchoate crimes by conceiving of the proscribed crime as constituting in itself an initial and substantial step towards a grave target crime.<sup>97</sup>
97. As no defendant at the ICC has been charged with incitement to genocide, it remains unclear how article 25(3)(c) will be interpreted. Some international legal scholars recommend repositioning direct and public incitement to commit genocide from article 25(3)(e) to article 5 of the Rome Statute (listing the crimes under the jurisdiction of the Court) and article 6 (defining the crime of genocide). This would establish incitement to genocide as a distinct, inchoate crime and preclude the requirement to prove causation in future incitement cases

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93. In his study of the drafting of the incitement to genocide provision in the Rome Statute, Davies (2009, p. 266) concludes that "no attention seems to have been paid during that (drafting) process to the conceptual and practical differences between treating incitement to genocide as a separate crime and treating it as a mode of criminal participation". See also Schabas (2000, p. 264); Ohlin (2009, p. 199).

94. Davies (2009, p. 245) concludes that the ICC's Rome Statute undermines "the full effectiveness of the criminalization of incitement".

95. To date, there have been no indictments for direct and public incitement to commit genocide at the ICC or ICTY, or at hybrid tribunals such as the SCSL and the ECCC. However, in the case of the ad hoc tribunals (the ICTY and ICTR) the institutions were established after the events that were viewed as genocidal had already occurred. On the preventative aspects of criminal justice, see Ashworth and Zedner (2014).

96. UN Genocide Convention, Article 3(c).

97. See Cahill (2012, pp. 754-755).

at the ICC. However, transferring direct and public incitement to genocide to article 6 may render it subject to the requirement in the ICC's Elements of Crimes (mentioned above) that each listed underlying form of genocide took place "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction". We propose an alternative course, namely the establishing of a new mode of liability under article 25 for inciting any of the crimes in the Rome Statute, as set out below:

98. The rallying cry, "never again", is heard after each successive genocide. With mankind's capacity to cause death and destruction greater than ever before, the importance of preventing genocide, and other serious group-based violence, before it manifests is self-evident. Nonetheless, the preventive function of international criminal law remains underdeveloped.
99. Direct and public incitement to genocide is a case in point. When the Contracting Parties to the Genocide Convention of 1948 included direct and public incitement to genocide in its terms, they sought to target incipient efforts to foment group-based hostility that could evolve into violent genocidal acts. Whereas the Genocide Convention clearly provides that direct and public incitement is an inchoate head of liability and does not require the completion of genocide, the Rome Statute of the ICC does not appear to replicate this approach. In the Rome Statute, direct and public incitement is located in article 25, with the modes of liability rather than the crimes. Because of this placement, it is unclear whether genocide need actually be committed in order for direct and public incitement to be charged. If it is necessary to wait for genocide to occur before its proponents and advocates can be prosecuted, then the preventive function of this form of liability will be significantly curtailed.
100. The following proposal therefore seeks to address the most serious forms of unlawful speech. The Peace and Justice Initiative and the University of Connecticut Human Rights Institute have formulated an amendment to article 25(3)(e) of the Rome Statute, which reads as follows:
101. *Intentionally, directly, and publicly incites others to commit any of the crimes contained in the Statute, thereby significantly increasing the likelihood of their occurrence. For the purpose of this provision it is not necessary that the incited crime(s) be committed or attempted.*

102. At present, article 25(3)(e) of the Rome Statute refers only to direct and public incitement of genocide. The proposed amendment would see a form of liability<sup>98</sup> included in the Rome Statute covering not only those persons who urge others to commit genocide, but also those who call for crimes against humanity, war crimes and (potentially) the crime of aggression. It would remove the current anomaly whereby direct and public calls for crimes such as extermination, rape or torture are not criminalized per se.
103. The proposed amendment would redress the current ambiguity in the formulation of direct and public incitement to genocide in the Rome Statute,<sup>99</sup> which has created confusion as to whether it is an inchoate crime (as the ad hoc tribunals considered) or a mode of liability requiring genocide to actually occur, as indicated by its placement in article 25 and the lack of wording to the contrary.
104. Importantly, the proposed amendment confirms the inchoate nature of this form of liability. This would strengthen the Court's preventive function, as the direct and public incitement could be prosecuted without waiting for the execution of the atrocity. This contrasts with its more restricted jurisdiction over soliciting and inducing crimes under article 25(3)(b), for example, which require that the crime either occurs or is attempted (i.e. the perpetrator began to execute the crime but was thwarted by circumstances). Where direct and public calls are made for the commission of atrocities, the international community should not have to wait, like an

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98. Direct and public incitement is here referred to as a "form of liability" rather than a "mode of liability" as it differs from the traditional conception of modes of liability as contributions to crimes that occur. In this sense, the proposed direct and public incitement formulation is similar to the form of liability of attempt under article 25(3)(f) of the Rome Statute.

99. The current formulation and placement of direct and public incitement to genocide in the Rome Statute could lead to confusion. The ICTY and the ICTR both included direct and public incitement within their jurisdictions (articles 4(3) and 2(3), respectively) and treated it as an inchoate crime. Whereas it appeared settled that direct and public incitement to genocide is an inchoate crime under customary international law, the Rome Statute of the ICC includes direct and public incitement in article 25, with the modes of liability rather than the crimes. Because of this placement, it is unclear whether genocide need actually be committed in order for direct and public incitement to be charged. If it is necessary to wait for genocide to occur before its proponents and advocates can be prosecuted, then the preventive function of this form of liability will be significantly curtailed.

ambulance at the bottom of a cliff, for the violence to manifest before measures can be taken against those urging such crimes.

105. The proposed amendment makes it necessary to show that the incitement “significantly” increased the likelihood of genocide. This filter is designed to exclude less serious speech acts, such as fanciful calls for crimes or statements by persons with no real possibility of prompting anyone to commit grave crimes. The term “significantly” is well-known to international lawyers, and can thus benefit from the guidance of international case law. The term “significance” is also used in the social sciences in statistical tests of correlation and causation the social science literature.<sup>3</sup> In this manner, the proposed amendment can be interpreted in light of existing legal and academic sources of guidance. To avoid any doubt, the proposed amendment explicitly states that the incitement must be intentional.

106. Several legal sources provide support for the direct and public incitement of atrocity crimes, including:

106.1. The ICCPR, article 20(1) (“Any propaganda for war shall be prohibited by law”) and article 20(2) (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”).

106.2. CERD, article 4: “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and



all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination”.

106.3. The Genocide Convention, article 3(c) (“The following acts shall be punishable ... direct and public incitement to commit genocide”) and article 5 (“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III”).

107. At a time when extreme violence is so prevalent and the fires of discriminatory hatred so easily stoked, it could not be more essential to enhance the preventive function of international criminal law. Enacting the proposal set out above would be a measured but firm step towards realizing the law’s potential.

### Distinguishing incitement to genocide from instigation

108. Even though there are clear grounds on which to separate inchoate crimes (such as direct and public incitement to genocide) from modes of liability for completed crimes (such as instigating), the case law of the ICTR has sometimes appeared to merge incitement and instigation. Occasionally, confusion has crept into the description of these two concepts: the Trial Chamber in *Rutaganda and Musema*, for example, opined that “incitement ... involves instigating another, directly and publicly, to commit an offense”.<sup>100</sup>

109. Whereas direct and public incitement is a crime *per se*, instigation is a mode of liability, as discussed below. Causality is critical to instigation. For example, in *Blaškić*, the ICTY Trial Chamber declared that “[t]he essence of instigating is that the accused causes another person to commit a crime”.<sup>101</sup>

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100. Referencing *Rutaganda* TC §38; *Musema* TC §120. On resolving this confusion, see Wilson (2015, pp. 278-320).

101. *Blaškić* TC §270. See section 5.2.9 below for a discussion on causality.

110. ICTR chambers have also commented on the difference between direct and public incitement to genocide and instigation. The *Nahimana et al.* Appeals Chamber stated:

111. *First, instigation is a mode of responsibility; an accused will incur criminal responsibility only if one of the crimes in the Statute is in fact carried out and the instigation substantially contributed to its commission. By contrast, direct and public incitement to commit genocide is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide; indeed it is punishable even if no act of genocide has resulted therefrom.<sup>102</sup> ... Second, the crime under Article 2(3)(c) ICTRSt/4(3)(c) ICTYSt requires that the incitement to commit genocide must have been direct and public, whereas instigation as a mode of liability does not need to be direct and public for liability to arise.<sup>103</sup>*

## 5.1.2 Hate speech as persecution

112. Much denigrating and inciting speech falls short of advocating genocide, yet it may still represent participation in the persecution of a protected group (a crime against humanity). The crime of persecution concerns the denial of fundamental rights to persons because they belong to a specific group or collectivity.<sup>104</sup> The ICC has defined persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”,<sup>105</sup> while the ad hoc tribunals have defined it as “an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)”.<sup>106</sup>

113. This section examines cases brought before international tribunals where it was alleged that speech acts made in the context of a widespread or systematic attack on a civilian population constituted the crime of persecution.

102. *Nahimana et al.* AC §678.

103. *Nahimana et al.* AC §679.

104. The key provisions are: ICC Statute, Article 7(1)(h), Article 7(2)(g), Elements of Crimes; ICTY Statute, Article 5(h); ICTR Statute, Article 3(h).

105. ICC Statute, Article 7(2)(g).

106. *Nahimana et al.* AC §985; *Krnojelac* AC §185.

### *Actus reus* (the physical element)

114. At the ICC, persecution is regarded as a crime against humanity under article 7(1)(h) if it is directed against “any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [grounds] as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law”. It remains an open question, however, as to whether the ICC includes other grounds that are universally recognized under international law, in particular sexual orientation<sup>107</sup> and disability.<sup>108</sup> Convictions for persecution have been secured for various acts committed with persecutory intent, ranging from murder<sup>109</sup> and rape<sup>110</sup> to the destruction of property<sup>111</sup> and denial of employment.<sup>112</sup>
115. It is well established at the ad hoc tribunals that “it is not necessary that these underlying acts of persecution amount to crimes in international law”.<sup>113</sup> Rather, they must meet a gravity test which demands that “the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of a gravity equal to the crimes listed under article 3 of the Statute”.<sup>114</sup> More stringently, the ICC Statute applies a gravity threshold for the admissibility of any case in article 17(1)(d).
116. Two leading cases have confirmed that hateful speech may constitute the crime of persecution under international criminal law. These are the *Nahimana et. al.* case from the ICTR, and the *Šešeljić* case from the ICTY. Whereas the Appeals Chamber in *Nahimana* laid the ground-

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107. *Toonen v. Australia* is the landmark decision in this respect. In 1994, the Human Rights Committee held that articles 17 and 26 of the ICCPR prohibit discrimination on the grounds of sexual orientation. Communication No. 488/1992: Australia, CCPR/C/50/D/488/1992, *Nicholas Toonen v. Australia*, 4 April 1994, paras. 8.2-8.7. Also, the United Nations High Commissioner for Refugees (UNHCR) advises that individuals who fear persecution on account of their sexual orientation or gender identity may be considered members of a “particular social group” (UNHCR, Guidance Note on Refugee Claims, paras. 37 and 41).

108. Declaration on the Rights of Mentally Retarded Persons; the Declaration on the Rights of Disabled Persons; the World Program of Action concerning Disabled Persons; the Tallinn Guidelines for Action on Human Resources Development in the Field of Disability[14]; the Principles for the Protection of Persons with Mental Illness[15]; and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

109. *Lukić and Lukić* TC §1000.

110. *Šainović* AC §1604.

111. *Babić* AC §3.

112. *Brdanin* AC §290.

113. *Nahimana et al.* AC §987; *Brdanin* AC §296; *Kvočka* AC §323.

114. *Nahimana et al.* AC, §985; *Krnojelac* AC, §185; *Brdanin* AC §296.

work in holding that speech acts could constitute persecution, it stopped short of actually entering a conviction based solely on the accused's words, as it noted this was unnecessary in light of the violent physical acts that also constituted underlying aspects of the crime of persecution.<sup>115</sup> In contrast, the MICT Appeals Chamber (on appeal from an ICTY Trial Judgment) in *Šešelj* specifically entered a persecution conviction for the accused's speech acts at a location called Hrtkovci, as described in more detail below. The *Šešelj* case was likely the last opportunity for the Appeals Chamber of the MICT (covering the case law of the ICTY and ICTR) to address speech crimes *per se*. It constitutes a highly significant precedent that will undoubtedly be cited in future cases concerning alleged speech crimes. Due to the central relevance of these judgments for the prosecution of speech acts as acts of persecution, they are the primary focus of the following analysis.

117. Persecution, like all crimes against humanity, must be committed in the context of a widespread or systematic attack on a civilian population, following an organized policy of violence. The ICTR Appeals Chamber in *Nahimana* emphasized the fact that the hate speech in question must be contemporaneous with the atrocities committed.<sup>116</sup> The contextual element of hate speech is valid because the element of scale has always been part of the definition of crimes against humanity: such crimes must occur in the context of “a widespread or systematic attack directed against any civilian population”.<sup>117</sup>
118. If a context of violent physical atrocities is necessary in order to charge hate speech as persecution, this reduces the preventative power of using persecution to convict such speech before it manifests itself in physical violence. However, it remains open (as a matter of law) as to whether persecution can be applied to the serious deprivation of rights without necessarily requiring physical violence.
119. On the one hand, the rule at the ICC is that the persecution must occur in connection with another crime listed in article 7 of the Rome Statute (crimes against humanity).<sup>118</sup> On the

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115. *Nahimana et al.* AC §988.

116. *Nahimana et al.* AC §988: “The Appeals Chamber accordingly finds that the hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus after the beginning of a systematic and widespread attack on the Tutsi) themselves constituted underlying acts of persecution”.

117. Article 7.1 of the Rome Statute of the ICC states that “[f]or the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” and then it goes on to list the *actus reus*.

118. At the ICC, the Rome Statute requires that persecution be charged in connection with other crimes

other, the ad hoc tribunals have held that no such connection is required,<sup>119</sup> even though persecution, as a crime against humanity, is typically charged in connection with other crimes falling within the tribunals' jurisdiction.<sup>120</sup> In sum, the ad hoc tribunals appear more permissive than the ICC with respect to the requirement of a nexus between hate speech and other acts of persecution.

*Persecution, like all crimes against humanity, must be committed in the context of a widespread or systemic attack on a civilian population.*

### *Mens rea* (the mental element)

120. Persecution must be committed intentionally. At the ICC, article 7(2) defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. The ICTY and ICTR, meanwhile, previously held that persecution must be carried out deliberately “with the intention to discriminate on one of the listed grounds”,<sup>121</sup> which include “national, political, ethnic, racial or religious grounds”.<sup>122</sup> Discriminatory intent is thus at the heart of persecution and distinguishes it from other crimes against humanity.<sup>123</sup>

### Other persecution cases with a hate speech element

#### ***Streicher***

121. In international criminal law, the jurisprudence on hate speech as a form of persecution rests on *Streicher*, a case in which the International Military Tribunal at Nuremberg convicted the defendant, Julius Streicher, on Count 4 (crimes against humanity), holding that “[i]n his speeches and articles ... [he] incited the German People to active persecution”. It concluded that “Streicher’s incitement to murder and extermination, at the time when Jews in the East were being killed under the most horrible conditions, clearly constitutes persecution on

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falling under the Court’s jurisdiction; see article 7(1)(h). See also Boas et. al. (2008, p. 88).

119. At the ad hoc Tribunals, the jurisprudence recognizes that persecution is a crime in and of itself and does not need to be committed in connection with any other specific crime falling within the courts’ jurisdictions; *Kvočka* AC §323.

120. *Brdanin* AC §290.

121. *Krnojelac* AC, §185, citing with approval *Krnojelac* TC §431, and reiterated in *Simić* AC §177; *Stakić* AC §§327-328; *Kvočka et al.* AC §320; *Kordić and Čerkez* AC§101; *Blaškić* AC §131; *Vasiljević* AC §113; and *Nahimana et al.* AC §985.

122. *Akayesu* TC §578; *Bagilishema* TC §81.

123. *Akayesu* AC §§447-469.

political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity”.<sup>124</sup>

122. The primary evidence against Streicher was an article he wrote in the May 1939 issue of the pro-Nazi publication, *Der Stürmer*, which read: “The Jews in Russia must be killed. They must be exterminated root and branch”.<sup>125</sup> The *Streicher* verdict also noted that his articles in *Der Stürmer* “termed the Jew as a germ and a pest, not a human being, but ‘a parasite, an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind’”.<sup>126</sup> The Tribunal accordingly sentenced him to death.<sup>127</sup>

fig. 4. Public reading of *Der Stürmer*, in Worms, 1935. German Federal Archive, image 133-075.



123. The conviction of Streicher contrasts with the acquittal at Nuremberg of Hans Fritzsche, head of the German Home Press Department at Joseph Goebbels’ Ministry of Propaganda. Fritzsche was acquitted on all counts on the grounds that it was not established that he had originated or formulated propaganda policies, or that he was aware that he was dis-

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124. International Military Tribunal (Nuremberg), (1947), §295-96.

125. International Military Tribunal (Nuremberg), (1947), Judgment and Sentences §295.

126. Van Schaack and Slye (2010, p. 883).

127. International Military Tribunal (Nuremberg), (1947), Judgment and Sentences §302.

seminating false news.<sup>128</sup> Furthermore, while his speeches were anti-Semitic, they did not urge the persecution or extermination of the Jews, and he twice attempted to suppress the publication of *Der Stürmer*. Fritzsche's case is instructive, nonetheless, as there have been many more acquittals than convictions for hate speech at international tribunals. Finally, it should be noted that Fritzsche was later convicted by a West German denazification court and sentenced to nine years in prison. He was released in 1950 after a diagnosis of cancer.

### **Ruggiu**

124. At the ICTR, Belgian RTLM broadcaster Georges Ruggiu pleaded guilty to the charge of persecution for “direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society”.<sup>129</sup> Ruggiu admitted to making the following broadcasts over RTLM: he congratulated the “valiant combatants” who were engaged in a battle against “the *inyenzi* (cockroaches)” at Nyamirambo; he indicated that the government would reward anyone who killed or captured a white man fighting on the side of the RPF; he also indicated that the Hutu population were having a “good time” killing “the *inyenzi*” and that they were determined to chase “the *inyenzi-inkotanyi* (the army of cockroaches)” out of the country; and he called upon the youth to “work” with the Rwandan army.<sup>130</sup>

### **Nahimana et al.**

125. The case of *Nahimana et al.* was dubbed Rwanda's “Media Trial” as two of the accused, Ferdinand Nahimana and Jean-Bosco Barayagwiza, ran the radio station, RTLM, and the third defendant, Hassan Ngeze, owned and edited the *Kangura* newspaper. Both media outlets actively encouraged genocide against the Tutsis in 1994. In this case, the Trial Chamber held that the speech itself constituted persecution and therefore there was no need for it to contain a call to action or be linked directly to acts of violence.<sup>131</sup> According to the Chamber, the specific instances of hate speech that qualified as persecution included: a February 1993 article in *Kangura*, which it described as “brimming with ethnic hatred but [that] did not call on readers to take action against the Tutsi population”;<sup>132</sup> “[t]he RTLM interview broadcast on June 1994, in which Simbona interviewed by Gaspard Gahigi, talked of the cunning and

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128. International Military Tribunal (Nuremberg), (1947), Judgment and Sentences §§327-329; *Nahimana et al.* TC §982.

129. *Ruggiu* TC §22.

130. *Ruggiu* TC §44(v).

131. *Nahimana et al.* TC §1073.

132. *Nahimana et al.* TC §1037.

trickery of the Tutsi, also constitutes persecution”;<sup>133</sup> and “[t]he portrayal of the Tutsi woman as a *femme fatale*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and *Kangura*”.<sup>134</sup> In *Nahimana*, the ICTR Trial Chamber held:

126. *[H]ate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute ... Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.*<sup>135</sup>

fig. 5. Ferdinand Nahimana (l), a founder of Radio Television Libre des Milles Collines and Hassan Ngeze (r), former member of the MRND and editor for the *Kangura* newspaper, at the ICTR in 2003.



133. *Nahimana et al.* TC §1078.

134. *Nahimana et al.* TC §1079.

135. *Nahimana et al.* TC §1072.



127. The *Nahimana* Appeals Chamber upheld the convictions for persecution, noting that the speech included calls for violence against Tutsis in the context of a murderous campaign and so amounted to criminal persecution.<sup>136</sup> The ICTR Appeals Chamber stated that it is not “convinced by the argument that mere hate speech cannot constitute an underlying act of persecution because discourse of this kind is protected under international law”,<sup>137</sup> but it did not definitively find that hate speech can constitute an act of persecution in and of itself.
128. The Appeals Chamber upheld the view that *Nahimana*’s hate speech attained a level of gravity corresponding to other crimes against humanity, noting that it occurred in the context of a widespread campaign of persecution and genocide.<sup>138</sup> In evaluating the gravity of a speech act, the Tribunal indicated that speech acts can be considered together with underlying acts of persecution, and “[i]t is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity”.<sup>139</sup>
129. Two inter-related questions arise in the context of hate speech charged as the crime of persecution:<sup>140</sup> firstly, whether hate speech *per se*, without a call to violence, could constitute the denial of a fundamental right, and secondly, whether hate speech *per se*, without any connection to actual violence, could be sufficiently grave as to constitute the crime of persecution.

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136. *Nahimana et al.* AC §987.

137. *Nahimana et al.* AC §987, fn.2262.

138. *Nahimana et al.* AC §988

139. *Nahimana et al.* AC §987. See also the partially dissenting opinion of Judge Pocar at §3 which concurs with this point. In contrast, see the partially dissenting opinion of Judge Meron at §16 which disagrees with this point, stating that this approach “fails to appreciate that speech is unique” because non-criminalized speech enjoys special protection.

140. *Nahimana et al.* AC §987 avoids addressing this issue. Dissenting on this point, Judge Meron appears to have misunderstood the *Nahimana* majority. Judge Meron argued that “mere hate speech”, being speech that does not constitute “a direct threat of violence or an incitement to commit imminent lawless action”, cannot constitute persecution (Judge Meron Dissent, §4, §13). However, the Majority pointed out that it declined to address the issue of “mere hate speech” constituting persecution in and of itself, and that the accused’s convictions were based on the totality of his discriminatory conduct, which included speech that was linked with actual violence (*Nahimana et al.* AC §987). Meron attempted to counter the majority by arguing that speech is “unique”, but failed to address the majority’s point, well-established in the jurisprudence of the ICTY and ICTR, that underlying conduct constituting persecution need not constitute a crime in and of itself and can be considered jointly with other conduct.

The Trial Chamber in *Nahimana* answered the first question positively, and the Appeals Chamber did not contradict this finding; but the Appeals Chamber explicitly declined the answer the second question.

130. The *Nahimana* Trial Chamber unambiguously defined hate speech as an inchoate crime in which “there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence”.<sup>141</sup> The *Nahimana* Appeals Chamber clarified that “hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings, and therefore constitutes ‘actual discrimination’”.<sup>142</sup> It also held that speech inciting violence against a population on the basis of ethnicity or any other discriminatory ground violates the right to security of the members of the targeted group and therefore constitutes actual discrimination.
131. However, the Appeals Chamber did not decide the question of whether hate speech *per se*, without the occurrence of violence, could be sufficiently grave as to constitute persecution, since the accused was convicted for speeches and broadcasts he had made in the context of acts of violence against the targeted group.<sup>143</sup>

***Kordić and Čerkez***

132. By comparison, persecution in the form of hate speech was not affirmed in *Kordić and Čerkez* at the ICTY. In this case, the ICTY Trial Chamber excluded speech falling short of incitement to criminal violence from qualifying as persecution (without providing examples of the specific speech at issue), stating:
133. *The Trial Chamber notes that the Indictment against Dario Kordić is the first indictment in the history of the International Tribunal to allege [hate speech] as a crime against humanity. The Trial Chamber, however, finds that this act as alleged in the Indictment, does not by itself constitute persecution as a crime against humanity. It is not enumerated as a crime elsewhere in the International Tribunal Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5. Furthermore, the criminal*

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141. *Nahimana et al.* TC §1073.

142. *Nahimana et al.* AC §986.

143. *Nahimana et al.* AC §987: “The Appeals Chamber is of the view that it is not necessary to decide here whether, in themselves, mere hate speeches not inciting violence against the members of a group are of a level of gravity equivalent to that for other crimes against humanity”.

*prohibition of this act has not attained the status of customary international law. Thus, to convict the accused for such an act as is alleged as persecution would violate the principle of legality.*<sup>144</sup>

### **Šešelj**

134. In *Šešelj*, the MICT Appeals Chamber (on appeal from the ICTY) added to the ICTR's jurisprudence on hate speech in a case where the accused, Serb nationalist politician Vojislav Šešelj was charged with committing persecution as a crime against humanity by "[d]irect and public denigration through 'hate speech' of the Croat, Muslim and other non-Serb populations ... on the basis of their ethnicities".<sup>145</sup> The Appeals Chamber analyzed the persecution charges, reversed in part the prior Trial Chamber acquittal and found that Šešelj's speech in the village of Hrtkovci constituted a violation of the fundamental right to security of the Croatian population in the village, which was sufficiently grave to constitute a crime against humanity.<sup>146</sup> At the same time, the Appeals Chamber rejected the Prosecution's argument that his speech in Hrtkovci amounted to the physical commission of deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity, as it was not convinced that "Šešelj's speech was 'an integral part' of the force that drove the [Croatian] population out".<sup>147</sup>
135. Two aspects of the *Šešelj* Appeal Judgment will be particularly relevant for future cases in which speech acts are charged as acts of persecution. First, the Appeals Chamber commenced its analysis by looking at the specific content of Šešelj's speech to determine whether his words constituted a violation of the right to security of the Croatian population of Hrtkovci. It noted that he stated that "there is no room for Croats in Hrtkovci" and that he "called on the Serbian population to:
136. *'give every Serbian family of refugees the address of one Croatian family. The police will give it to them, the police will do as the government decides, and soon we will be the government. [ ... ] Every Serbian family of refugees will come to a Croatian door and give the Croats they find there their address in Zagreb or other Croatian town. Oh, they will, they will. There will be enough buses, we*

144. *Kordić* TC §209.

145. *Šešelj* Indictment, §§15, 17(k).

146. *Šešelj* AC §163.

147. *Šešelj* AC §151. However, the Appeals Chamber found that his speech did substantially contribute to the deportation, persecution (forcible displacement) and other inhumane acts (forcible transfer) of the Croatian population and so held him responsible for instigating these crimes; as described below.

*will drive them to the border of Serbian territory and they can walk on from there, if they do not leave before of their own accord.”<sup>148</sup>*

137. The Appeals Chamber noted that the accused told Croatians thinking of returning to Hrtkovci that “no, you have nowhere to return to”, that he said that the Serbian population of Hrtkovci and the surrounding villages would “promptly get rid of the remaining Croats” and that on hearing his words, the crowd chanted the crowd chanted “Croats, go to Croatia”.<sup>149</sup> This focus on the precise terms and ideas used in speeches is notable. In accordance with its emphasis on the exact content of Šešelj’s speeches, the Appeals Chamber upheld the defendant’s acquittal for the crimes in Vukovar,<sup>150</sup> on the basis that it was unsure as to the exact content of the speeches.<sup>151</sup>
138. Second, in relation to gravity, the Appeals Chamber placed emphasis on the fact that Šešelj incited violence (particularly in the form of expulsion) of the Croatian population in Hrtkovci, and that given the “relative peace” that had prevailed in Hrtkovci prior to Šešelj’s speech, his words had the effect of “infecting the village with hatred and violence, which led to the departure of Croatian civilians in the ensuing months, thereby expanding the wider attack against the non-Serbian population in Croatia and Bosnia and Herzegovina”.<sup>152</sup> In this respect, the Appeals Chamber looked to the impact of Šešelj’s words in the specific context in which they occurred to determine the gravity of his criminal conduct. The Appeals Chamber’s approach indicates that it is not so much the existence of conflict or peace that is dispositive of the gravity issue, but rather the impact of an accused’s words in terms of increasing the prevalence of hatred and violence that will determine whether the speech acts will result in liability under international criminal law.
139. Importantly the Appeals Chamber in *Šešelj*, cited *Nahimana* for the points that (1) “speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes “actual discrimination”, and (2) “the context in which the underlying act of persecution takes place is particularly important for the purpose of assessing its gravity”.<sup>153</sup> As

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148. *Šešelj* AC §161.

149. *Šešelj* AC §162.

150. *Šešelj* AC §137.

151. *Šešelj* AC §137.

152. *Šešelj* AC §163.

153. *Šešelj* AC §159.

with all crimes against humanity, the Appeals Chamber confirmed that persecution must occur as part of a widespread or systematic attack directed against a civilian population.<sup>154</sup>

140. An additional relevant point concerns the Appeals Chamber's references to dignity. Despite analyzing Šešelj's speech on 6 May as a violation of the right to security of the Croatian population, the Appeals Chamber also held that the speech constituted a violation of their "right to respect for dignity as human beings".<sup>155</sup> However, the Appeals Chamber did not indicate which instrument or provision it was relying on as the source of this right to dignity. Previously, in *Nahimana*, the Appeals Chamber referred to the "recognition of dignity inherent to all human beings" in the Preamble of the Universal Declaration of Human Rights as the basis for the right to dignity.<sup>156</sup> The Appeals Chamber's repeated reference to dignity begs the question of whether dignity is a fundamental right under customary or applicable treaty law, or whether it is rather a principle that is used to justify the specific rights set out in human rights instruments.<sup>157</sup> The idea of dignity *per se*, without elaboration in the form of specific rights, can be a vague and highly malleable concept. As such, it has the potential to be used to significantly restrict free expression, particularly expression involving criticism of elites and authority figures. Whilst the precedential value of the Appeals Chamber's passing reference to this purported "right to respect for dignity" is unclear, it is likely to be re-visited in future cases of alleged speech crimes, particularly if the speech in question did not incite or instigate violence.

### 5.1.3 Other inhumane acts

#### *Actus reus* (the physical element)

141. "Other inhumane acts" refer to the infliction of harm (to the mental or physical health of the victim) of a similar gravity to that inflicted in other crimes against humanity. It is unclear whether this requirement would permit or exclude speech acts qualifying as other inhumane acts. As the crime of other inhumane acts is not exhaustively defined as a specific underlying act, it is a catch-all provision that may include a variety of conduct not otherwise captured in the ICC Statute's provisions.

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154. Šešelj AC §75.

155. Šešelj AC §163.

156. *Nahimana et al.* AC fn.2256.

157. See Conor O'Mahony, "There is no such thing as a right to dignity", *International Journal of Constitutional Law*, Volume 10, Issue 2, 30 March 2012, Pages 551–574.

142. Under the Rome Statute, the crime of other inhumane acts is defined under article 7(1)(k) as a crime against humanity. Other relevant instruments include the statutes of the ICTY, ICTR and ECCC. As a crime against humanity, these acts must be committed in the context of an organized widespread or systematic attack.

### *Mens rea* (the mental element)

143. No special *mens rea* is set out in relation to other inhumane acts, and therefore the usual *mens rea* under Article 30 of the Rome Statute would apply, namely that the crime was committed with intent and knowledge. Other inhumane acts can potentially be committed through speech. As we saw previously, Vojislav Šešelj was charged and convicted at the ICTY/MICT with, *inter alia*, instigating other inhumane acts (forcible transfer and deportation) as crimes against humanity through “[d]irect and public denigration through ‘hate speech’ of the Croat, Muslim and other non-Serb populations ... on the basis of their ethnicities”, with particular reference to his speeches in Vukovar and Hrtkovci.<sup>158</sup>

### Restatement on hate speech as an *actus reus* of persecution

144. The jurisprudence for hate speech as a form of persecution constitutes one conviction at Nuremberg (*Streicher*) and two convictions at the ICTR (*Ruggiu and Nahimana*) and one conviction at the ICTY (*Šešelj*). Following the *Nahimana* and *Šešelj* Appeals judgments, hate speech may constitute the crime against humanity persecution if it occurs in the context of a widespread and systematic campaign against a civilian population, even if the words do not necessarily amount to a call for violence, so long as it constitutes a violation of a fundamental right and the cumulative effect of hate speech combined with other persecutory acts meets the gravity threshold. The ICC framework on hate speech is more restrictive than at the ad hoc tribunals. It includes a nexus requirement for the acts of persecution, and article 7 of the Rome Statute does not list hate speech as one of the *actus reus* elements of persecution. Thus, for the ICC to prosecute hate speech, in and of itself, as the crime against humanity of persecution, article 7 must be amended to include hate speech, or else case law must interpret article 7(1)(k) (other inhumane acts) as including hate speech.

<sup>158</sup>Šešelj Indictment, §15, 17(k).

## 5.2 Speech charged as a contribution to a crime (modes of liability)

145. There are various modes of liability under which a speech act may contribute to an offense. The following analysis focuses first on the modes most applicable to cases concerning speech acts, namely ordering, instigating (inducing or soliciting), and aiding and abetting. Commission, including co-perpetration (at the ICC) and joint criminal enterprise (at the ICTY), is addressed at the end of the section as it is less applicable to speech that incites crimes.

### 5.2.1 Ordering

146. Ordering as a mode of criminal responsibility is unique to international criminal law and can be traced back to the Nuremberg trials.<sup>159</sup> It is one of the most important modes of liability for speech acts that cause criminal offenses.
147. Ordering as a form of liability is included in the statutes of the ICTY, ICTR and SCSL. Article 25(3)(b) of the Rome Statute imposes individual criminal responsibility on anyone who orders the commission of a crime within the ICC jurisdiction, whether it occurs or is attempted.<sup>160</sup> Ordering requires that a person in a position of authority (*de jure* or *de facto*)<sup>161</sup> to instruct another person(s) to carry out or omit to carry out an act that, either way, results in criminal conduct.<sup>162</sup> The ICTY and ICTR have both held that the fundamental aspect of the crime of ordering is that a “person in a position of authority uses it to convince another to commit an offense”.<sup>163</sup>
148. Ordering as a mode of individual criminal liability requires three elements. First, there must be a relationship of authority between the person who is ordering and the person who is

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159. Van Sliedregt (2012 p. 105) provides a useful history of ordering as a form of criminal responsibility in international criminal law.

160. Article 7(1) of the ICTY Statute; article 6(1) of the ICTR Statute; article 6(1) of the SCSL.

161. This authority requirement need not rise to the level of effective control in the command responsibility sense: *Kahumanda* AC §75; *Gacumbitsi* AC §182; *Galić* AC §176; *Nahimana et al.* AC §481, fn. 211; *Sesay et al.* AC §164; *Milošević* AC §290.

162. *Kordić and Čerkez* AC §28; *Semanza* AC §361; *Setako* AC §240; *Krajišnik* AC §662; *Hategekimana* AC §67; *Ntaganda* Confirmation Decision, §145.

163. Cryer (2014, p. 375, fn. 210).

executing the order. This specific element sets ordering apart from other modes of liability such as instigating, inducing and soliciting. Second, the order must consist of an instruction. Third, the order must contain the relevant mental element.

149. In the wording of article 25(3)(b) of the ICC Statute, ordering appears as a form of secondary liability, where an individual is held to be liable only when the crime that he or she orders occurs or is attempted. This is consistent with the formulation provided by the ICTY in *Kordić and Čerkez* and the ICTR in *Akayesu*.<sup>164</sup>

### A position of authority

150. Ordering is distinctive in that it requires, as its hallmark, a hierarchical relationship of authority between the speaker and their audience.<sup>165</sup> As the International Law Commission's Commentary to its 1996 Draft Criminal Code states, "[t]his principle of criminal responsibility applies to an individual who is in a position of authority and uses his authority to compel another individual to commit a crime".<sup>166</sup> The element of authority was confirmed by the ICTY Appeals Chamber which held that "the *actus reus* of ordering requires that a person in a position of authority instruct another to commit an offense".<sup>167</sup>
151. The authority to order may be *de facto* as well as *de jure*.<sup>168</sup> A formal superior-subordinate relationship (in the sense of responsibility) is not required, and subsequent jurisprudence has confirmed that it is sufficient that the accused has the authority to order the commission of an offense.<sup>169</sup> ICC case law has reinforced this interpretation, holding that the elements of ordering overlap with those of soliciting and inducing. The only exception is that ordering carries the requirement that the person who orders the crime is in a position of authority

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164. *Kordić and Čerkez* TC §388; *Akayesu* TC §483.

165. See *Blaškić* TC §474, §601 and *Gacumbitsi* AC §181-2 on the relevance of authority in the concept of ordering. At the ICC, the Pre-Trial Chamber in *Ntaganda* confirmed that the person ordering must be in a position of authority (Decision on the Confirmation of Charges, §145). See Jackson (2015, p. 68) for a discussion of the relationship of authority between the person issuing the order and the principal perpetrator in international criminal law.

166. United Nations International Law Commission (1996), *Draft Code of Crimes against the Peace and Security of Mankind*, Art. 2 (Individual Responsibility), Commentary, §8.

167. *Milošević* AC §290.

168. *Bošković and Tarčulovski* AC §160. *De facto* control is discussed at §163.

169. *Brdanin* TC §270 and *Gacumbitsi* AC §182.



*vis-à-vis* the perpetrator(s) who carries it out, which is not a necessary element of either soliciting or inducing.<sup>170</sup>

### **Actus reus (the physical element)**

*The actus reus of ordering requires that a person in a position of authority instruct another to commit an offense.*

152. The objective element of ordering is met when a person in a position of authority instructs another person to commit an offense. The term “instructing” requires a positive action by the individual in the position of authority: ordering cannot be committed by omission (that is, failing to order).<sup>171</sup>
153. The prosecution is not required to provide a taped or paper copy of an order to secure a conviction,<sup>172</sup> nor are they required to prove that the person who issued the order passed it directly to the material perpetrator;<sup>173</sup> indeed, a person who passes an order down a chain of command can still be held responsible for ordering an international crime.<sup>174</sup>
154. Circumstantial evidence is sufficient to prove liability for ordering.<sup>175</sup> On appeal, the decision in *Kordić and Čerkez* held that:

155. *[A] reasonable trier of fact could have concluded that an order was given to attack at 5.30 a.m., to kill all Muslim men of military age, to expel civilians, and to set houses on fire, and that this order was approved at the meeting of the political leadership, which was attended by Kordić. It is not necessary to determine who exactly initiated the order going beyond the written orders signed by Blaškić. Relevant for the purposes of this case is only the possible and reasonable inference that Dario Kordić was the political planner, instigator and co-author of a criminal plan and order leading, inter alia, to the massacre in Ahmići, thus establishing his criminal responsibility for the acts emanating from this general political plan. A reasonable trier of fact could infer from the*

170. *Gbagbo* Confirmation Decision, §243; *Blé Goudé* Confirmation Decision, §159.

171. *Galić* AC §167; *Sesay et al.* AC §164; *Blaškić* AC §§42, 468; *Nahimana et al.* AC §481.

172. Cryer (2014)

173. *Blaškić* TC §282. See also Cryer (2014, pp. 375-376).

174. See Cryer (2014, p. 375) citing International Military Tribunal (Nuremberg), (1947), Judgment and Sentences §172, §283; *Kupreškić* TC §200, §862.

175. Cryer (2014, p. 375).

*hierarchy and leading regional political role of Kordić that the afore-mentioned crimes could not have been committed without his approval.*<sup>176</sup>

156. The superior order must have had a “direct and substantial effect” on the commission of the crime(s).<sup>177</sup> Within a military context, discipline and an ethos of obedience usually ensures that an order will be complied with and the directness element fulfilled, even if the order is unlawful.<sup>178</sup> As a result, the responsibility of lower-ranking soldiers for following an order is greatly diminished (although not entirely extinguished), and primary responsibility for the crime resides with the officer giving the order.<sup>179</sup>
157. The ICTR Appeals Chamber in *Gacumbitsi* provided a number of examples of concrete orders given by the accused to attackers that had a direct and substantial effect on the commission of crimes:<sup>180</sup>
- 157.1. On 14 April 1994, after giving a speech telling people “to arm themselves with machetes and ... to hunt down all the Tutsi”, the appellant led assailants to Kigarama, where they engaged in an attack on Tutsis “carried out under the appellant’s personal supervision”.
- 157.2. At Nyarubuye parish, on 15 April 1994, the appellant “instructed the communal police and the Interahamwe to attack the refugees and prevent them from escaping”, which they did.
- 157.3. On 16 April 1994, the appellant “directed” an attack at Nyarubuye parish, during which the assailants “finished off” survivors and looted the parish building.

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176. *Kordić and Čerkez* AC §698.

177. *Kamuhanda* AC §75; *Aleksovski* AC §61; *Taylor* AC §368, §589, §592; *Nahimana et al.* AC §492; *Boškoski and Tarčulovski* AC §160.

178. At the ICC, article 33 on “Superior orders and prescription of law” states: “1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful”.

179. Jackson (2015: p. 68) affirms that “[o]rdering does not rest on persuasion but on command”.

180. *Gacumbitsi* AC §184.

- 157.4. On 17 April 1994, the appellant ordered a group of attackers to kill 15 Tutsi survivors of previous attacks at Nyarubuye parish, which they immediately did. *A discriminatory speech act may allow a court to infer intent.*

### *Mens rea* (the mental element)

158. In terms of intent, the accused must either intend to commit the crime(s) (direct intent)<sup>181</sup> or, alternatively, when giving an order, they must be aware of the “substantial likelihood” that a crime will be committed as a result.<sup>182</sup> As such, they can be considered to have accepted responsibility for the commission of the crime.<sup>183</sup> It is not required that an order is manifestly illegal for an individual to be held liable for giving such an order.<sup>184</sup> The *mens rea* of the person who issued or passed the order down a chain of command is the crucial factor in determining what particular crime he or she is liable for ordering, not the *mens rea* of the person who executed it.<sup>185</sup>
159. A discriminatory speech act may allow a court to infer intent, but case law has demonstrated that this is generally not the only or decisive piece of evidence. For instance, the ICTY Appeals Chamber examined Vujadin Popović’s order that “all *balijas* have to be killed” – the term “*balijas*” is widely understood in the region as a highly derogatory Serbian epithet for Muslims. The Trial Chamber used this term to determine the defendant’s subjective state of mind. When combined with other, physical acts that illustrated his criminal intent, Popović’s use of the term helped to convict him of planning and ordering the genocide at Srebrenica.<sup>186</sup>

## 5.2.2 Soliciting, inducing, instigating

160. Article 25(3)(b) of the Rome Statute sets out the individual criminal responsibility of anyone who solicits or induces the commission of a crime (that either takes place or is attempted) within ICC jurisdiction. According to Robert Cryer *et al.* (2014), “[s]oliciting or inducing in article 25(3)(b) of the Rome Statute seems to be the same as instigating, which is understood

181. *Kordić and Čerkez* AC §29; *Bošković and Tarčulovski* AC §68; *Taylor* AC §589; *Ntagerura et al.* AC §365.

182. *Blaškić* AC §§42, 345, 428, 468, 481, 517, 543, 600, 645; *Kordić and Čerkez* AC §30; *Ntagerura et al.* AC fn. 733; *Nahimana et al.* AC §481; *Bagosora and Nsengiyumva* AC fn. 642.

183. *Blaškić* AC §42.

184. *Blaškić* TC §282.

185. *Blaškić* TC §282.

186. *Popović* AC §§468-70.

as ‘prompting’ (ICTY), ‘urging’ or ‘encouraging’ (ICTR) another to commit a crime”.<sup>187</sup> The modes of liability for soliciting, inducing and instigating require acts or omissions<sup>188</sup> that prompt a person to commit a crime.<sup>189</sup>

161. While instigation is not included as such in the Rome Statute, the acts of soliciting and inducing, according to article 25(3)(b), cover the same conduct and thus require the same elements as instigating. These three modes of liability are different from ordering in that they do not require a relationship of authority.<sup>190</sup>

### *Actus reus* (the physical element)

162. The *Bemba et al.* Trial Chamber held that soliciting and inducing “fall into the broader category of ‘instigating’ or ‘prompting another person to commit a crime’ in the sense that they refer to a form of conduct by which a person exerts psychological influence on another person as a result of which the criminal act is committed”.<sup>191</sup> The Trial Chamber described soliciting as asking or urging the physical perpetrator to commit the criminal act without the need for the person soliciting to be in a “certain relationship” with the physical perpetrator,<sup>192</sup> and inducing as exerting influence over the physical perpetrator “either by strong reasoning, persuasion or conduct implying the prompting of the commission of the offense”.<sup>193</sup> Inducing, in comparison to soliciting, represents a stronger method of instigation; soliciting does not require the exertion of influence over the physical perpetrator.<sup>194</sup>
163. At the MICT (ICTY), the *Šešelj* case provides the clearest example of instigating crimes purely through speech acts. The Appeals Chamber in *Šešelj* ruled that his speech in Hrtkovci in 1992 substantially contributed to the crimes of deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity committed against the Croatian population in this village over the ensuing months and was convinced that *Šešelj* intended to prompt the commission of the crimes or, at the very least, was aware of

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187. Cryer (2014, p. 376).

188. *Nahimana et al.* AC §595; *Taylor* AC §589; *Blaškić* TC §§280, 337; *Galić* TC §168; *Brdanin* TC §269.

189. *Nchamihigo* AC §§188, 230; *Ndindabahizi* AC §117; *Kordić and Čerkez* AC §27; *Karera* AC §317; *Nahimana et al.* AC §480.

190. *Gbagbo* Confirmation Decision, §243; ICC, *Blé Goudé* Confirmation Decision, §159.

191. *Bemba et al.* TC §73. See also *Mbarushimana* Confirmation Decision, fn. 661; *Gbagbo* Confirmation Decision §243.

192. *Bemba et al.* TC §75.

193. *Bemba et al.* TC §76. See also *Ntaganda* Confirmation Decision §153.

194. *Bemba et al.* TC §76.

the substantial likelihood that they would be committed in furtherance of his instigation.<sup>195</sup> The Appeals Chamber noted that this speech “constituted a clear appeal for the expulsion of the Croatian population in Hrtkovci” and that “soon after Šešelj’s speech, many Croatians and other non-Serbians left for Croatia either out of fear, or by way of fraudulent housing exchanges with Serbian refugees in a context of coercion, harassment, and intimidation, which was met with inaction by the local authorities”.<sup>196</sup> Given that the Appeals Chamber upheld Šešelj’s acquittal for committing these crimes, its approach demonstrates the difference between commission – for which the accused’s conduct needs to be an “integral part” of the harm visited on the victims, and instigating – for which the accused’s action need only “substantially contribute” to the crimes.

164. Even in relation to instigating, the Appeals Chamber made fine distinctions. In relation to Šešelj’s speeches in the Bosnian context, including his calls to “show the balijas, the Turks and the Muslims [ ... ] the direction to the east” as “[t]hat’s where their place is”, the Appeals Chamber held that these were inflammatory,<sup>197</sup> but that the impact, if any, that his words had on the perpetrators of crimes was not established to the requisite certainty to justify entering a conviction.<sup>198</sup>
165. As the Trial Chamber in *Blaškić* stated, “the essence of instigating is that the accused causes another person to commit a crime”.<sup>199</sup> The ICTY held that instigation must be a clear contributory element in the commission of the crime, but not necessarily constitute a *conditio sine qua non*.<sup>200</sup> Indeed, “[i]nstigation can take many different forms; it can be express or implied, and entail both acts and omissions”,<sup>201</sup> and is thus distinct from ordering, which requires a positive action. The instigation, then, must have substantially contributed to the physical element of the crime, but does not need to be the only cause.<sup>202</sup>
166. *It requires some kind of influencing the principal perpetrator ... [but] does not necessarily presuppose that the original idea or plan to commit the crime was generated by the instigator. Even if the principal perpetrator was already*

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195. Šešelj AC §154.

196. Šešelj AC §154.

197. Šešelj AC §132-133.

198. Šešelj AC §132-133.

199. *Blaškić* TC §270; *Orić* TC §274; *Kordić and Čerkez* AC §27.

200. *Blaškić* TC §270; *Orić* TC §274; *Kordić and Čerkez* AC §27.

201. *Blaškić* TC §270.

202. *Gacumbitsi* AC §129; *Kordić and Čerkez* AC §27

*pondering on committing a crime, the final determination can still be brought about by persuasion or strong encouragement of the instigator. However, if the principal perpetrator ... has definitely decided to commit the crime, further encouragement or moral support may merely, though still, qualify as aiding and abetting.*<sup>203</sup>

167. Formally, instigating, soliciting and inducing do not require a hierarchical relationship of authority. They can refer to a speaker acting in a non-official capacity in a horizontal peer relationship. Thus, instigators/solicitors/inducers do not need to be in a position of authority or a superior-subordinate relationship with the material perpetrator. Unlike the superior officer who issues an order, the instigator/inducer relies primarily on their skills of persuasion.
168. In practice, however, cases related to instigating at the ICTY and ICTR that have set precedents have either been those of military commanders (Blaškić and Čerkez) or political leaders who wielded substantial military and political authority (Kordić, Šešelj, and Gacumbitsi). Despite the formal elements of instigation, international tribunals have tended to uphold the charge against military officials rather than radio presenters or political demagogues who addresses a wider public over whom they exert little authority.
169. Instigating (in the ICTR and ICTY statutes and jurisprudence) and inducing (article 25(3)(c) of the ICC Statute) are synonymous in international criminal law, and legal theorists such as Elies van Sliedregt (2012, p. 108) generally regard the two as the same. Both terms share the same conceptual kernel that criminal liability is incurred when the accused prompts another person to commit an offense.<sup>204</sup>
170. The causation element of instigating requires that the speaker makes a “substantial contribution” to the commission of a crime, a higher level of causation than is required for joint criminal enterprise (JCE), which demands a “significant contribution”.<sup>205</sup> A substantial contribution is exceedingly hard to demonstrate beyond reasonable doubt when the accused is charged with instigating or inducing on the basis of speech acts. This is clearly visible in the collapse of the prosecution cases against Callixte Mbarushimana and against William Samoei Ruto and Joshua Arap Sang at the ICC, as well as in the original acquittal by the Trial Chamber

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203. Orić TC §271.

204. Kordić and Čerkez AC §27; Kvočka et al. TC §252. See also Bemba et al. TC §81, implying that “soliciting” and “inducing” are equivalent terms.

205. Nevertheless, for instigating, it should be noted that the act of the accused “need not be a *conditio sine qua non*” of the commission of the crime (Blaškić TC §270).

of Vojislav Šešelj for instigating crimes against humanity at the ICTY (but later convicted on appeal).

*Instigating, soliciting and inducing do not require a hierarchical relationship of authority.*

171. Even in the case of *Nahimana et al.* – the high-water mark of criminalizing speech crimes in international criminal law – Ferdinand Nahimana was acquitted of instigating genocide by the Appeals Chamber for lack of direct evidence that concretely linked specific speeches to specific offenses. However, his conviction for the inchoate crime of direct and public incitement to commit genocide was upheld, showing how, even when the same pattern of facts is presented to the court, the causation element can derail the prosecution’s case for instigation. Barayagwiza, one of Nahimana’s co-defendants, was found guilty by the Appeals Chamber of instigating persecution<sup>206</sup> for speeches made after 6 April 1994, which “substantially contributed” to the commission of acts of persecution against the Tutsi.<sup>207</sup> At the ICC, the early signs are that it will maintain the direct causation element and thus require that the instigator’s/inducer’s speech acts have a “direct effect” on the commission or attempted commission of the crime.<sup>208</sup>
172. What kind of evidence of causation could satisfy an international tribunal that an individual instigated the material perpetrators to commit proscribed acts? In the case of Sylvestre Gacumbitsi, who was convicted at the ICTR of instigating rape, the Appeals Chamber cited the testimony of Witness TAQ: “On 16 April 1994, around 9 a.m., the Accused, who was driving around in Rubare *cellule*, in the Nyarubuye *secteur*, using a megaphone, asked that Hutu young men whom ... girls had refused to marry should be looked for so that they should have sex with the young girls, adding that ‘in the event [that] they [the girls] resisted, they had to be killed in an atrocious manner’”. Placed in context, and taking into account Gacumbitsi’s influence among his audience due to his position as mayor of the district, such an utterance constituted an incitement to rape Tutsi women. That is why, immediately after his speech, “a group of attackers attacked Witness TAQ and seven other Tutsi women and girls with whom she was hiding, and raped them”.<sup>209</sup>
173. The testimonies of a speaker’s followers (or insiders), who reliably affirm that they were motivated to take certain actions after hearing his or her words, represents the ideal evidence for the charge of instigating. In *Ruto and Sang*, and *Šešelj*, the prosecution began their cases

206. *Nahimana et al.* AC §345.

207. *Nahimana et al.* AC §988.

208. *Ntaganda* PTC Decision on the Confirmation of Charges, §153.

209. *Gacumbitsi* AC §107.

with a collection of former devotees willing to testify how they were moved to act violently by the speakers' exhortations. Over the course of a prosecution case, however, insider witnesses are often subjected to bribery and intimidation: for example, Šešelj was convicted three times by the ICTY Trial Chamber for publicizing the names of protected witnesses during his trial. As a logistical matter, international tribunals have, on the whole, lacked the necessary coercive and institutional capacity to protect prosecution witnesses against a sustained and concerted effort to pressure them. In the absence of insiders, the prosecution must mount a circumstantial case that relies on the chronology of events to prove causality.

### *Mens rea* (the mental element)

174. In instigation, as with ordering, the accused must either possess the intention to commit the crime<sup>210</sup> or be “aware of the substantial likelihood” that a crime would result.<sup>211</sup> ICTY jurisprudence clearly states: “[A] person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in execution of that instigation has the requisite *mens rea* for establishing responsibility... [for] instigating. Instigating with such awareness has to be regarded as accepting that crime”.<sup>212</sup>
175. The ICTY took the decision to hold an accused liable for instigating an international crime through speech in the *Brđanin* case. The accused, Radoslav Brđanin, was convicted at trial for having instigated crimes via “several inflammatory and discriminatory statements, *inter alia*, advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay on the territory of the ARK [Autonomous Region of Krajina]”.<sup>213</sup> These findings were upheld on appeal.<sup>214</sup>
176. The latest statement on inducing in international criminal law comes from the ICC in the *Ntaganda* case, and it confirms the jurisprudence of the ad hoc tribunals and combines *actus reus* and *mens rea* elements:

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210. *Boškoski and Tarčulovski* AC §68; *Nchamihigo* AC §61; *Taylor* AC §589; *Nahimana et al.* AC §480; *Kordić and Čerkez* AC §29.

211. *Kordić and Čerkez* AC §32; *Boškoski and Tarčulovski* AC §§68, 174; *Nchamihigo* AC §61; *Nahimana et al.* AC §480.

212. *Kordić and Čerkez* AC §32; Orić TC §279.

213. *Brđanin* TC §360. The ARK (Autonomous Region of Krajina) was a Serb controlled region in Bosnia, later incorporated into the Republika Srpska.

214. *Brđanin* AC §§307-319.



177. *The Chamber recalls that, in order to make a finding on Mr. Ntaganda's criminal responsibility for the mode of liability of inducing, the following objective and subjective elements must be fulfilled: (a) the person exerts influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out; (b) the inducement has a direct effect on the commission or attempted commission of the crime; and (c) the person is at least aware that the crimes will be committed in the ordinary course of events as a consequence of the realization of the act or omission.*<sup>215</sup>

*Complicity is an ideal category of criminal responsibility for rogue politicians, media personalities and other individuals who incite others to commit crimes.*

### 5.2.3 Aiding and abetting

178. Aiding and abetting (also known as complicity) is a principal mode of liability for inciting speech that contributes to the commission of a crime. Aiding and abetting is included in the ICTR and ICTY Statutes,<sup>216</sup> and Article 25(3)(c) of the ICC Statute imposes individual criminal responsibility on a person who, “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission”.<sup>217</sup> Because it has a lower causation requirement than other modes of liability, aiding and abetting may be the most accurate way of conceptualizing how non-military propagandists and demagogic politicians actually contribute to a collective criminal enterprise.
179. Accessorial liability makes it possible to hold those who help another person to commit an offense criminally responsible, even though they are not themselves the principal material perpetrator and their acts do not directly cause the offense. Here, “help” can refer to actions, omissions, practical assistance or moral encouragement that substantially contribute to the crime.<sup>218</sup> Since the essence of accomplice liability lies in the assistance and encouragement provided to others, this is most relevant for propagandists, who are more often than not

215. *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, §153.

216. ICTY Statute, article 7(1), and ICTR Statute, article 6(1).

217. It should be noted, however, that this requirement of “purpose” is unique to the ICC and is not replicated at other international criminal tribunals.

218. Stewart (2013, p. 11).

supportive accomplices rather than direct instigators of crimes. Accomplice liability was the theory of criminal responsibility favored by the prosecution and judges at Nuremberg in the *Streicher* trial, and there are compelling reasons to follow this lead. Complicity is therefore an ideal category of criminal responsibility for rogue politicians, media personalities and other individuals who incite others to commit crimes but who may not hold elected office or occupy a position of military command. Recent ICC jurisprudence has held that there is no specific threshold for the level of assistance required to establish liability for aiding and abetting other than that it “must have furthered, advanced or facilitated the commission”<sup>219</sup> of the offense.

### *Actus reus* (the physical element)

180. Aiding and abetting consists of acts or omissions<sup>220</sup> that assist, encourage or lend moral support to the perpetration of crimes,<sup>221</sup> and which have a “substantial effect”<sup>222</sup> on their commission. This threshold is higher than the “significant” contribution or effect required for joint criminal enterprise. Even though international criminal law generally understands aiding and abetting as lending practical assistance<sup>223</sup> in the commission of a crime, the definition also includes providing “encouragement or moral support”.<sup>224</sup>
181. The *Akayesu* case clarified that aiding and abetting, “which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto”.<sup>225</sup> While, in theory, each of these could be used separately to incur criminal responsibility, international criminal law has, for the sake of convenience, linked them together as “aiding and abetting”.<sup>226</sup>

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219. *Bemba et al.* Judgment, TC §94.

220. *Nahimana et al.* AC §482; *Gacumbitsi* AC §140; *Brdanin* AC §274; *Orić* AC §43; *Mrkšić and Šljivancanin* AC §§134-135; *Ntawukulilyayo* AC §214.

221. *Blaškić* AC §46; *Taylor* AC §§362, 369; STL, Applicable Law Decision, §226.

222. *Tadić* AC §229(iii); *Aleksovski* AC §164; *Vasiljević* AC §102(i); *Fofana and Kondewa* AC §§52, 71, 75, 84; *Orić* AC §43; *Muvunyi* AC §79; *Nahimana et al.* AC §§482, 672, 934. The term “substantial effect” has also been used alongside “substantial contribution” (e.g., in *Mrkšić et al.*, AC §81). Jackson (2015, p. 72), however, does not see a meaningful distinction between the two terms.

223. *Krstić* AC §137.

224. *Šainović* AC §1626, §1649; *Furundžija* TC §§233-235; *Brdanin* TC §271.

225. *Akayesu* TC §484. In the same paragraph, the judgment indicated that in order to make a finding of aiding and abetting, “either aiding or abetting alone is sufficient to render the perpetrator criminally liable”.

226. See *Kamuhanda* TC §596; *Semanza* TC §384; *Limaj et al.* TC §516; *Kaing* TC §533; *Kajelijeli* TC §765.

182. Since the conduct of the person who aids or abets must have a substantial effect on the commission of the crime, this strongly suggests that minimal assistance will be insufficient.<sup>227</sup> Indeed, as the *Taylor* Appeal Judgment pointed out, “[t]he jurisprudence is replete with examples of acts that may have had some effect on the commission of the crime, but which were found not to have a sufficient effect on the crime for individual criminal liability to attach”.<sup>228</sup> That being said, it is not necessary for the assistance to have been so directly connected to the crime that it would not have occurred without it (i.e., but-for causation).
183. While, on paper, aiding and abetting shares the same causal threshold as instigating, ordering and planning (that is, a substantial contribution), the principles arising from the case law suggest that the actus reus threshold for aiding and abetting is rather more flexible than other accessory modes of liability. For example, the ICTY Appeals Chamber in *Simić* stated: “It is not required that a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime be shown, or that such conduct served as a condition precedent to the commission of the crime”.<sup>229</sup>
184. Other cases have held that the act of being present at the crime scene as a spectator, when the accused is in a position of authority,<sup>230</sup> can be seen as providing tacit encouragement to or approval of the crime in question.<sup>231</sup> Whether acts that are not causally related to the offense can qualify as aiding and abetting will depend on the nature of the contribution and the pattern of facts in the case.
185. Aiding and abetting can be rendered before, during or even after the commission of the crime.<sup>232</sup> Likewise, the principal or physical perpetrators of the crime need not have been identified, tried or convicted, even when it comes to *dolus specialis* crimes.<sup>233</sup>

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227. See, contra, Cryer (2014, p. 371). See Stewart (2013, p. 19) for a discussion of de minimis contributions in aiding and abetting.

228. *Taylor* AC §390 (and cases cited at fn. 1231).

229. *Simić* AC §85. See also *Bemba et al.* TC §94; *Ntawukulilyayo* AC §214; *Mrkšić and Šljivančanin* AC §81; *Rukundo* AC §52; *Kalimanzira* AC §86.

230. This is not to be confused with authority in the command responsibility sense: *Sesay et al.* AC §451; *Furundžija* TC §207.

231. *Kayishema and Ruzindana* AC §§201-202; Šainović et al. AC §1687; *Bemba et al.* TC §89; *Ngirabatware* AC §150; *Brđanin* AC §273, §277; *Muvunyi* AC §80.

232. *Blaškić* AC §48; *Fofana and Kondewa* AC §§71-72; *Mrkšić and Šljivančanin* AC §81; *Taylor* AC §367; *Nuon and Khieu* 002/01 TC §712; *Bemba et al.* TC §96.

233. *Aleksovski* AC §165; *Krstić* AC §143; *Brđanin* AC §355; *Ngirabatware* AC §149.

186. Practically, in international criminal trials, no direct connection between the principal perpetrators of the crime and the accused is required, as aiding and abetting establishes criminal liability in terms of the accused's relationship to the crimes, not to individual persons.<sup>234</sup> With the exception of *ex post facto* aiding and abetting, the perpetrators need not even know of the existence of the aider and abettor or of his or her assistance or contribution.<sup>235</sup>
187. Furthermore, the location of the *actus reus* can take place away from the scene of the crime; the accused need not be physically present.<sup>236</sup> The Appeals Chamber in *Brdanin* also upheld the view that the accused can be convicted for acts that had a substantial effect on the commission of a crime, even if the principal perpetrator(s) is unknown.<sup>237</sup> In this formulation, the aider and abettor may be relatively peripheral to the planning, coordination and execution of the crime, and there is no burden on the prosecutor to show that the accused had a proximate and significant connection to the principal perpetrators themselves.
188. Each individual act does not have to exert a “substantial effect” on the outcome to qualify as aiding and abetting, thus allowing for cumulative causation of a series of contributing acts. ICTY and SCSL case law have firmly established that multiple concurrent acts may be sufficient to jointly produce a substantial effect. The SCSL's Appeal Judgment in *Taylor* confirmed that:
189. *The facts of a case may involve multiple acts or conduct which, considered cumulatively, can be found to substantially contribute to the crime charged. As the ICTY Appeals Chamber has held, it is not necessary to show that each given act constituted substantial assistance in order to satisfy the actus reus requirement of aiding and abetting. This is common-sense. As this Appeals Chamber has held, a trier of fact is called upon to determine whether the accused's acts and conduct, not each individual act, had a substantial effect on the commission of the charged crime*.”<sup>238</sup>

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234. *Taylor* AC §§366-338.

235. *Tadić* AC §229(iii); *Vasiljević* AC §102; *Brdanin* AC §349; *Milutinović* TC, vol. 1, §92; *Simić* TC §161.

236. *Blaškić* AC §48; *Simić* AC §85; *Ngirabatware* AC §150; *Mrkšić and Šljivančanin* AC §81; *Bemba et al.* TC §96; *Fofana and Kondewa* AC §§71-72.

237. *Brdanin* AC §355.

238. *Taylor* AC §362, fn. 1128, citing *Blagojević and Jokić* AC §284, which held that “[a] finding that certain members of the Bratunac Brigade rendered practical assistance does not necessarily reflect that each given act constituted substantial assistance in order to satisfy the *actus reus* requirement of aiding and abetting”. See also *Kamuhanda* AC §§71-72.

### *Mens rea* (the mental element)

190. For aiding and abetting the accused must have knowledge that his or her acts assist in the commission of a crime and be aware of the crime's essential elements.<sup>239</sup>
191. Under customary international law, aiding and abetting entails knowledge, not purpose,<sup>240</sup> in relation to the commission of the crime: "In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal".<sup>241</sup> In this respect, as set out in the SCSL jurisprudence,<sup>242</sup> the knowledge requirement for aiding and abetting effectively requires "awareness of the substantial likelihood that a crime would be committed".<sup>243</sup> It is sufficient for the accused to have been aware of the essential elements of the crime that he or she aids and abets; they need not know of the precise crime that was committed because it is enough, in this context, to have been aware that one of a number of crimes would be committed.<sup>244</sup>
192. The *mens rea* element of aiding and abetting under customary international law stands in stark contrast to the "common plan, design or purpose"<sup>245</sup> of joint criminal enterprise. Aiding and abetting has a less demanding *mens rea* test, and proof of a shared intent between the accomplice and the direct perpetrators is not required.<sup>246</sup> "In the case of aiding and abetting, no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required".<sup>247</sup>

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239. *Tadić* AC §229(iii)-(iv); *Kvočka et al.* AC §§89-90; *Aleksovski* AC §§162-163; *Lukić and Lukić* AC §428; *Mrkšić and Šljivančanin* AC §§49, 159; *Blagojević and Jokić* AC §127; *Vasiljević* AC §102; *Orić* AC §43; *Brdanin* AC §§484, 487.

240. *Taylor* AC §408, §§436-437.

241. *Tadić* AC §229(iii)-(iv). See also *Kvočka et al.* AC §§89-90; *Aleksovski* AC §§162-163; *Lukić and Lukić* AC §428; *Mrkšić and Šljivančanin* AC §49, §159; *Blagojević and Jokić* AC §127; *Vasiljević* AC §102(ii); *Orić* AC §43; *Brdanin* AC §§484, 487; *Blaškić* AC §49.

242. See *Brima et al.* AC §§242-243; *Fofana and Kondewa* AC §366; *Sesay et al.* AC §546; *Taylor* AC §§414, 438, 533, fns. 1284, 1363-1364. See also *Taylor* AC – Concurring Opinion of Justice Fisher, §§712-713.

243. *Blaškić* AC §49; *Mrkšić and Šljivančanin* AC §159.

244. *Aleksovski* AC §162; *Krnjelac* AC §51; *Blaškić* AC §50; *Simić* AC §86; *Blagojević and Jokić* AC §222; *Karera* AC §321; *Ngirabatware* AC §158.

245. In establishing the mental elements for JCE, *Tadić* AC §227 refers to "[t]he existence of a common plan, design or purpose to commit a crime".

246. *Blagojević and Jokić* AC §221; *Simić* AC §86.

247. *Tadić* AC §229.

**Aiding and abetting at the ICC: a heightened *mens rea* requirement?**

193. The ICC Statute appears to articulate a higher *mens rea* element for aiding and abetting than prior international criminal tribunals. Article 25(3)(c) holds a person criminally responsible for a crime if that person, “for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission” (emphasis added). By adding the term “for the purpose of”, the Statute appears to introduce a heightened mental element that potentially raises the *mens rea* requirement.
194. If this is interpreted as imposing a purpose standard of *mens rea*, then the language of the ICC Statute diverges sharply from the knowledge standard used for aiding and abetting in the majority of criminal jurisdictions.<sup>248</sup> Aiding and abetting has yet to be fully adjudicated at the ICC, so there is still a degree of uncertainty as to its interpretation. The ICC’s Pre-Trial Chamber in *Mbarushimana* indicated that the purpose of the aider and abettor refers to facilitating the commission of the crime and does not imply shared intention with the material perpetrator: “[T]he jurisprudence of the ad hoc tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under Article 25(3)(c) of the Statute, the aider and abettor must act with the purpose of facilitating the commission of that crime”.<sup>249</sup> This reading of purpose was subsequently confirmed in *Bemba et al.*, which went on to state that Article 25(3)(c) was higher than the overarching mental element contained in Article 30 of the ICC Statute.<sup>250</sup>
195. If applied strictly, the ICC’s purpose test is likely to hinder the prosecution of professional propagandists such as Mbarushimana. James G. Stewart (2013, p. 24) is also critical of the requirement, on the grounds that it “gives an almost unattainable height to the subjective element of complicity, misapplying dessert and mis-communicating responsibility”. Such criticism is echoed by other commentators, who advocate for the retention of knowledge.<sup>251</sup>
196. These guidelines recommend that the word “purpose” in article 25(3)(C) should refer simply to the intention to facilitate the crime, and not imply a shared purpose of the principal perpetrator to commit the crime. Domestic and international criminal tribunals should adhere to the long-standing knowledge standard of *mens rea*, a standard that is the settled law of aiding and abetting at international criminal tribunals and in the preponderance of national

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248. However, it is consistent with the US Model Penal Code at §2.06(4).

249. *Mbarushimana* PTC I §281.

250. *Bemba et al.* TC §§97-98.

251. Cryer (2014, p. 374), Jackson (2015, p. 80), Stewart (2013, pp. 24-7), Van Sliedregt (2012, p. 129).

criminal jurisdictions. Stated plainly, the accomplice need not share the purpose to commit an international crime, but he or she must have knowledge of the material perpetrator's intention to commit the crime.<sup>252</sup>

### ***Ex post facto* aiding and abetting**

197. The causal link – substantial contribution – becomes problematic with respect to *ex post facto* aiding and abetting, or complicity after the fact. In such cases, the assistance comes after the commission of the crime. How then can there be any causal nexus between the acts and the preceding crime? In such cases, the *ex post facto* acts “reflect an understanding that an offer made before or during the commission of a crime, of assistance to be provided after the fact, may encourage or morally support the perpetrator and thereby have a substantial effect on the commission of the crime”.<sup>253</sup>
198. The ICTY has thus convicted individuals for aiding and abetting murder after the underlying crime was committed. For instance, Vidoje Blagojević, commander of the Bratunac Brigade of the Bosnian Serb Army (VRS) and Dragan Jokić, chief of engineering, were found criminally responsible for reburying the bodies of the victims of the genocide at Srebrenica.<sup>254</sup> It also follows that encouragement or moral support (including those provided *ex post facto*) can only form a substantial contribution to a crime when the principal perpetrators are aware of it.<sup>255</sup>

### **Aiding and abetting by omission**

199. Causation is not required when aiding and abetting occurs by omission. In the ICTY's *Mrkšić* case, it became apparent that aiding and abetting by omission is only relevant when the accused has a legal duty to act in the circumstances.<sup>256</sup> As a commanding officer, Major Veselin Šljivančanin of the Yugoslav People's Army (JNA) was responsible for Croatian prisoners in his care at the Ovčara camp near Vukovar, and he possessed the recognized duty, *inter alia*, to protect them.<sup>257</sup> Although the crimes were planned and executed by others, Šljivančanin failed to intervene to protect the prisoners despite knowing of the likelihood that they would be mistreated. He was thus considered responsible as an aider and abettor by omission of the

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252. An approach, adopted in *Krstić* AC §142, that Schabas (2009, p. 351) summarizes but criticizes in favour of a lesser *mens rea* standard.

253. ECCC, *Nuon and Khieu* 002/01 TC §712.

254. See *Blagojević* TC. The Trial Chamber indicated (at §314) that aiding and abetting after the fact required a prior agreement between the principal and accomplice.

255. *Brdanin* AC §§273, 277.

256. *Brdanin* AC §274; *Orić* AC §101.

257. *Mrkšić et al.* AC §131-5.

subsequent crimes committed against the prisoners. Meanwhile, the *Bizimungu et al.* Trial Chamber held that the accused had shared a close temporal and geographical proximity with the underlying crimes in those cases where aiding and abetting by omission were proven.<sup>258</sup> For example, Prefect Sylvian Nsabimana was held to be guilty of aiding and abetting genocide by omission for the massacres that took place at his office after he had left for the day.<sup>259</sup> These cases demonstrate that aiding and abetting has a significantly lower causation element than other modes of liability, and again, this makes it more appropriate for speech crimes cases where the causal effects of speech acts are more likely to be indirect.

### Key cases of aiding and abetting with a speech element

200. A number of cases have considered speech as constituting the *actus reus* of aiding and abetting as a mode of liability:

#### ***Bikindi***

201. As previously noted, musician and singer Simon Bikindi was convicted of direct and public incitement to commit genocide for urging Hutus, over a loudspeaker, to “exterminate [the Tutsis] quickly”,<sup>260</sup> referring to them as “snakes”.<sup>261</sup> The prosecution also charged Bikindi with, *inter alia*, aiding and abetting persecution through several songs he wrote in the 1980s that “extolled Hutu solidarity against a common foe, characterized Tutsi as Hutu enslavers, enemies or enemy accomplices and were composed with the specific intention to disseminate pro-Hutu ideology and anti-Tutsi propaganda, and to encourage ethnic hatred”. Furthermore, it held that these songs were “deployed in 1994 in Rwanda in a propaganda campaign to promote contempt for and hatred of the Tutsi population and to incite the listening public to target and commit acts of violence against the Tutsi”.<sup>262</sup>
202. However, while Bikindi had composed, recorded and performed the songs prior to the genocide, the prosecution did not prove that he had performed or disseminated them at the time of the massacres. While his songs were broadcast over the radio during the genocide, it was not proven that he had any control over their use; mere acquiescence did not amount to tacit approval or encouragement that had a substantial effect on the perpetration of the

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258. *Bizimungu et al.* TC §1902.

259. *Nyiramahuhuko et al.* TC §§5890-5906.

260. *Bikindi* TC §422, §426. The quote is cited in the judgment at §266.

261. *Bikindi* AC §50.

262. *Bikindi* TC §436.



crimes.<sup>263</sup> Hence, the prosecution did not appeal Bikindi's acquittal for aiding and abetting international crimes.

### **Brđanin**

203. Radoslav Brđanin was convicted at trial for aiding and abetting crimes against Bosnian Muslims and Croats on the basis of his public speeches which contained extreme discriminatory animus towards non-Serbs:

204. *[Brđanin's] inflammatory and discriminatory statements ... in light of the positions of authority that he held, amount to encouragement and moral support to the physical perpetrators of crimes. Moreover, [he] made threatening public statements which had the effect of terrifying non-Serbs into wanting to leave the territory of the ARK, thus paving the way for their deportation and/or forcible transfer by others.*<sup>264</sup>

205. However, his conviction for aiding and abetting torture was overturned on appeal because his acts and omissions (including his speech acts) did not meet the actus reus threshold of causation:

206. *[There was] scant evidence to support the inference that Brđanin's failure to intervene, together with his public attitude, actually had the effect of encouraging camp and detention facilities personnel to commit acts of torture. The same [was] said of the inference that camp and detention facility personnel were aware of Brđanin's alleged support for their crime of torture.*<sup>265</sup>

### **Šešelj**

207. Vojislav Šešelj's speeches and propaganda were viewed within the context of aiding and abetting crimes against humanity. However, the Trial Chamber held that the defendant did not show sufficient criminal intent, and it was not proven that his speeches calling for expulsions and forcible transfers had had a substantial effect on the perpetration of war crimes.<sup>266</sup> The defendant's acquittal for aiding and abetting crimes against humanity was upheld by the Appeals Chamber, on the grounds that Šešelj did not show the requisite awareness that crimes

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263. *Bikindi* TC §§437-440.

264. *Brđanin* TC §368.

265. *Brđanin* AC §§286.

266. *Šešelj* TC §356.

were being committed and his speech acts did not rise to the requisite level of making a substantial contribution to the commission of crimes.<sup>267</sup>

fig. 6. The ICTY courtroom in session in The Hague.  
Photo: MICT press office



## 5.2.4 Superior responsibility

208. Superior responsibility is a broad form of liability specific to international criminal law.<sup>268</sup> It is codified in article 28 of the Rome Statute, and it allows individuals in a superior position to be held responsible for crimes committed by their subordinates,<sup>269</sup> if all the necessary elements are fulfilled.<sup>270</sup> In 2016, the ICC Trial Chamber III convicted Jean-Pierre Bemba Gombo as a superior under this provision.

### Superior-subordinate relationship

209. Superior responsibility as a liability is designed to “reflect the responsibility of superiors by virtue of the powers of control they exercise over their subordinates”.<sup>271</sup> A superior-subordinate relationship can be *de facto* or *de jure*.<sup>272</sup> Within the context of command responsibility found in article 28 of the ICC Statute, this mode of liability covers not only military com-

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267. *Šešelj* AC §§, 171, 173, 181.

268. *Cryer* (2014, p. 384).

269. *Cryer* (2014, p. 384)

270. *Bemba* TC §171.

271. *Bemba* TC §172.

272. *Bantekas* (1999, pp. 573, 595).

manders, but also persons who in effect act as commanders.<sup>273</sup> Also, command responsibility applies to superiors at every level, irrespective of rank, from commanders at the highest level to military leaders with only a few individuals in their charge.<sup>274</sup> Command responsibility requires “effective command and control” or “effective authority and control” over the forces who committed the crimes.<sup>275</sup> Effective control was found by the ICC to require that the “commander has the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities”.<sup>276</sup> Any lower degree of control, such as the ability to influence, would be insufficient to establish command responsibility.<sup>277</sup> At the ICTY, in *Čelebići*, the Appeals Chamber defined the test of effective control as “a material ability to prevent or punish criminal conduct”.<sup>278</sup>

### *Mens rea* (the mental element)

210. The mental element of superior responsibility is controversial.<sup>279</sup> Article 28 of the ICC Statute sets out that to indict an individual on this charge, it must be proven that a civilian leader “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes”, whereas military superiors must have known or, “owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes”.<sup>280</sup> According to the ICC, factors that may indicate knowledge include orders to commit crimes or the fact that the accused was informed that his forces were committing crimes.<sup>281</sup> The ICTY required that the superior had actual knowledge that the subordinates were committing crimes or, alternatively, had “in his possession information of a nature, which at the least, would put him on notice of the risk of such offenses [*sic*] by indicating need for additional investigation”.<sup>282</sup> This standard applied for both military and civilian superiors.

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273. *Bemba* TC §177; ICC Statute, article 28.

274. *Bemba* TC §179.

275. *Bemba* TC §180.

276. *Bemba* TC §183.

277. *Bemba* TC §183.

278. *Čelebići* AC §256.

279. Cryer (2014, p. 388).

280. ICC Statute, article 28.

281. *Bemba* TC §193.

282. Cryer (2014, p. 388).

### Failure to take reasonable measures against violations

211. The two types of liability are separate.<sup>283</sup> If a superior knew or should have known of the crimes at the time they were committed, he cannot avoid liability by punishing his subordinates later.<sup>284</sup> The measures that a superior could take depend on his degree of effective control,<sup>285</sup> and include preventing or repressing crimes, or submitting the matter to competent authorities for investigation and prosecution.<sup>286</sup> The ICC places emphasis on the commander's actual ability to act – that is, the ability to take “all reasonable and necessary measures” within his or her power. The ICTY held that measures must be taken not only to prevent the execution of the crimes, but also their planning and preparation.<sup>287</sup> The more imminent the potential crimes of the subordinates appear, the faster the superior has to react. However, it is important to note that the superior is not “obliged to do the impossible”.<sup>288</sup>
212. The terms of article 28 indicate that either liability arises as a result of the failure of the superior to take the necessary and reasonable measures or else that the superior is only responsible for the crimes that arise as a result of his or her failure to take the necessary and reasonable measures. While the interpretation of article 28 in this respect has not been definitely settled, one Trial Chamber has held that the causation between the failure to exercise control and the perpetration of crimes is satisfied when it can be established “that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes”.<sup>289</sup>

### Key case of superior responsibility with a speech element

#### *Nahimana et al.*

213. At trial, Jean-Bosco Barayagwiza was convicted as a superior for extermination as a crime against humanity,<sup>290</sup> and Ferdinand Nahimana and Barayagwiza were both convicted as superiors for persecution as a crime against humanity.<sup>291</sup> These convictions were rendered on the basis of hate speech broadcast on the radio network, RTLM. However, on appeal, it was held

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283. *Ibid.* (p. 390).

284. *Ibid.* (p. 390).

285. *Bemba* TC §199; Cryer (2014, p. 391).

286. *Bemba* TC §199; Cryer (2014, p. 391).

287. *Orić* TC §329.

288. *Orić* TC §329.

289. *Bemba* TC §213.

290. *Nahimana et al.* TC §§1062, 1082.

291. *Nahimana et al.* TC §§1081-1082.

that only some of the broadcasts substantially contributed to extermination and persecution, and that during those broadcasts that did substantially contribute to these crimes, Barayagwiza did not exercise effective control over the radio network. He was therefore acquitted.<sup>292</sup> On the other hand, Nahimana’s conviction, as a superior, was upheld.<sup>293</sup>

### The applicability of superior responsibility to speech crimes

214. The ICC adopts a broad approach regarding the *mens rea* for military superiors:<sup>294</sup> the failure to seek information could lead to liability.<sup>295</sup> For civilians, however, the ICC Statute sets a higher *mens rea* standard than customary law.<sup>296</sup>
215. Superior responsibility is a form of liability for omission and this makes resolving the question of causation more difficult. The ICTY found that there no causal nexus need be shown that connected the superior’s omission and the crime,<sup>297</sup> as it found a causal nexus inherent in the superior relationship and the failure to prevent crimes.<sup>298</sup> By contrast, the ICC Statute, on one reading, requires evidence of causation.<sup>299</sup> However, in its first decision regarding superior responsibility, the ICC introduced a low threshold for the causation element, stating that it only applies to preventing crimes and not to punishing them,<sup>300</sup> and it only requires that the “omission increased the risk of commission of the crimes”.<sup>301</sup>

## 5.2.5 Co-perpetration

216. Article 25 (3)(a) of the ICC Statute holds that any person who commits a crime “jointly with another” is liable. The concept behind co-perpetration is that the contributions of a number of individuals can together result in the realization of a crime.<sup>302</sup>

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292. *Nahimana et al.* AC §§635, 943, 993-997.

293. *Nahimana et al.* AC §996.

294. Cryer (2014, p. 387).

295. *Ibid.*

296. *Ibid.*

297. *Čelebići* TC §§398-9.

298. *Čelebići* TC §§398-9.

299. Cryer (2014, p. 393).

300. *Bemba* PTC II §§424-5.

301. *Bemba* PTC II §§424-5.

302. *Lubanga*, PTC I§326.

217. Co-perpetration requires that a number of persons make an agreement or a plan to carry out actions that, once implemented, result in the commission of a crime in the ordinary course of events. The accused must have provided an “essential contribution” to this common plan.<sup>303</sup> In addition, he or she must be aware that they were providing an essential contribution and, apart from exceptions provided for in the ICC Statute, must have engaged in the relevant conduct with intent and knowledge (as per article 30 of the Rome Statute). In this way, co-perpetration focuses on the accused’s control over the commission of the crime(s) (*actus reus*).<sup>304</sup>

### Key case of co-perpetration with a speech element

#### ***Ruto and Sang***

218. Speech acts have been alleged by the ICC prosecutor as acts of co-perpetration. In the case of *Ruto and Sang*, the charges against the co-accused passed the pre-trial confirmation of charges stage but did not pass the “no case to answer” stage, and were set aside.
219. In the confirmation decision, it was held that there were substantial grounds to believe that:
220. *Mr. Sang, by virtue of his position within Kass FM as a key [radio] broadcaster, intentionally contributed to the commission of ... crimes against humanity ... by: (i) placing his show Lee Nee Emet at the disposal of the organization; (ii) advertising the meetings of the organization; (iii) fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyus; (iv) broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections; and (v) broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets.*<sup>305</sup>
221. At the pre-trial stage, there was evidence to proceed on the grounds that Joshua Arap Sang may have contributed to the commission of crimes by a group of persons acting with the common purpose of furthering their criminal activity (according to Article 25(3)(d)(i) of the

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303. See *Lubanga* PTC, Decision on Confirmation of Charges Pre-Trial Chamber (29 January 2007). In *Lubanga*, the Pre-Trial Chamber judges indicated that the *actus reus* element for co-perpetrating according to article 25(3)(a) necessitates a “coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime”, and this view was upheld in the Trial Chamber and Appeals Chamber judgments.

304. *Lubanga* AC §§445-447, 469, 473; *Ntaganda* Confirmation Decision, §104, §121; *Bemba* Confirmation Decision, §350; *Ruto et al.* Confirmation Decision, §292, §333; *Muthaura et al.* Confirmation Decision, §297; *Banda and Jerbo* Confirmation Decision, §136, §§150-151.

305. *Ruto et al.* Confirmation Decision, §355.

ICC Statute).<sup>306</sup> However, at the end of the prosecution’s case, the Court held that the accused had no case to answer. While the case ended without prejudice to the prosecution, leaving the potential to re-open the case in the future, no findings of guilt were entered against Sang.<sup>307</sup>



fig. 7. Mr. Ruto and defense counsel Karim Khan at the ICC in The Hague on September 10th, 2013. Photo: ICC

222. The standard of “essential contribution” for co-perpetration that has been applied at the ICC is likely to preclude the indicting of propagandists and speechifying politicians, since it is exceedingly difficult to demonstrate that the crime would not have been committed without the contribution of their utterances. Requiring that a speech act make an essential contribution is a very high bar of causality akin to *sine qua non*, and Judge Adrian Fulford strenuously argued in *Lubanga* that the Trial Chamber’s test of essential contribution is “unrealistic and artificial”<sup>308</sup> and “imposes an unnecessary and unfair burden on the prosecution”.<sup>309</sup>
223. Given the pervasive doubts expressed by judges in international tribunals regarding the efficacy of speech acts, most utterances will fall short of the threshold of constituting an essential (*conditio sine qua non*) contribution to the commission of crimes. Therefore, it is unlikely

306. *Ruto et al.* Confirmation Decision, §367(a)-(d).

307. *Ruto and Sang*, Decision on Defense Applications for Judgments of Acquittal.

308. *Lubanga* TC, Separate Opinion of Judge Adrian Fulford, §17.

309. *Lubanga* TC, Fulford Opinion, §3.

that the mode of liability of co-perpetration included in Article 25(3)(a) of the ICC Statute will be used to prosecute speech as a contribution to a crime. These Guidelines recommend that speech acts are considered under accessorial modes of liability such as instigating and aiding and abetting as well as under the theory of co-perpetration.

## 5.2.6 Joint criminal enterprise

224. Joint Criminal Enterprise (JCE) is relevant to liability for speech acts because it does not require the accused to directly provide essential contributions to crimes, but instead requires that they make a significant contribution to the common criminal purpose.
225. Sharing attributes with the common-law categories of criminal responsibility such as conspiracy or aiding and abetting,<sup>310</sup> JCE is a broad enough net to ensnare those individuals who do not make contributions that rise to the level of *sine qua non* but who still participate significantly in an extensive criminal enterprise. International criminal law has been criticized for its emphasis on individual criminal responsibility,<sup>311</sup> and JCE is international law's response to the collective nature of criminality during armed conflict and state-sponsored genocide.
226. JCE shares some elements with co-perpetration: it also requires a plurality of persons and the existence of a common plan, although the plan need not be criminal *per se*, but rather must encompass the commission of crimes. However, the major distinction is the way in which JCE focuses on the accused's intent in relation to the perpetration of a crime(s) (*mens rea*).

### *Mens rea* (the mental element)

227. JCE is divided into three categories, depending on the *mens rea*: JCE I requires the accused to possess intent regarding the charged crime, in pursuit of a common plan; JCE II requires the accused to know of a system of ill-treatment and to demonstrate the intent to participate in this system (for example, in concentration camp-style cases); and JCE III requires the accused to possess intent regarding the crime, according to a common plan, and to foresee the crime resulting from this plan but nonetheless willingly take the risk of its commission.

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310. See *Tadić* AC §229 on the distinction between JCE and aiding and abetting.

311. Clarke (2009, p. 55) argues that the idea of individual criminal responsibility is little more than a western liberal notion that turns our attention away from structural causes of violence.



### *Actus reus* (the physical element)

228. All types of JCE share the same *actus reus*: a plurality of persons, the existence of a common plan or purpose, amounting to or involving the commission of a crime, and participation in this common design.<sup>312</sup> The accused's contribution to the JCE need only be significant; it is not required to be essential.<sup>313</sup>

### Key cases of JCE with a speech element

229. International tribunals have used JCE to determine the contribution of speechifying political leaders and dedicated propagandists who are enmeshed in a collective effort to commit widespread or systematic attacks on a civilian population, such as forcible deportation from a territory. Such speakers can significantly contribute to a JCE by encouraging others to participate in a common plan to commit crimes against humanity.

#### ***Krajišnik***

230. At trial, Momčilo Krajišnik was found to have significantly contributed to a joint criminal enterprise by, *inter alia*:
231. Supporting, encouraging, facilitating or participating in the dissemination of information to Bosnian Serbs that they were in jeopardy of oppression at the hands of Bosnian Muslims and Bosnian Croats, that territories on which Bosnian Muslims and Bosnian Croats resided were Bosnian Serb land, or that was otherwise intended to engender in Bosnian Serbs fear and hatred of Bosnian Muslims and Bosnian Croats or to otherwise win support for and participation in achieving the objective of the joint criminal enterprise.<sup>314</sup>
232. This finding was upheld on appeal.<sup>315</sup>

#### ***Karadžić***

233. At trial, Radovan Karadžić was likewise found to have significantly contributed to a JCE by, *inter alia*, disseminating propaganda and speeches inciting Bosnian Serb fear and hatred of Bosnian Muslims and Croats in order to promote historical territorial claims and garner

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312. *Tadić* AC §227.

313. *Tadić* AC §§196, 202-20, 223, 227-228; *Krnjelac* AC §30-31, 97; *Vasiljević* AC §§97-99, 100, 109, 119; *Ntakirutimana* AC §§463-466; *Brdanin* AC §364-365; *Kvočka* AC §§86, 110, 116; *Brima et al.* AC §§76, 80; *Sesay et al.* AC §611; *Šainović et al.* AC §1470.

314. *Krajišnik* TC §1121.

315. *Krajišnik* AC §§216-219.

support for the creation of a largely ethnically homogeneous Bosnian Serb state in Bosnia and Herzegovina.<sup>316</sup> This case is currently on appeal before the MICT Appeals Chamber.

fig. 8. Radovan Karadžić at his initial appearance in court, 2008.

Credit: Courtesy of the UN International Criminal Tribunal for the Former Yugoslavia



### **Babić**

234. Milan Babić pleaded guilty for his participation in persecution as a crime against humanity, in accordance with JCE. In particular, Babić admitted that:

235. *[His participation included] ethnically based inflammatory speeches during public events and in the media that added to the atmosphere of fear and hatred amongst Serbs living in Croatia and convinced them that they could only be safe in a state of their own. [He] stated that during the events, and in particular at the beginning of his political career, he was strongly influenced and misled by Serbian propaganda, which repeatedly referred to an imminent threat of genocide by the Croatian regime against the Serbs in Croatia, thus creating an atmosphere of hatred and fear of the Croats.*<sup>317</sup>

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316. *Karadžić* TC §§3485-3487, 3505.

317. *Babić* TC §§24(g), 61, 79.

236. These grounds for mitigation were rejected by the Appeals Chamber, which affirmed the Trial Chamber's findings on Babić's participation in a joint criminal enterprise.<sup>318</sup>

***Prlić et al.***

237. At trial, it was found that "in several official and public statements, Jadranko Prlić did indeed engender fear, mistrust and hatred of the Muslim population among Bosnian Croats" and that "[he] exacerbated nationalist sentiments among the Bosnian Croats, thus contributing to the realization of the JCE".<sup>319</sup> Prlić's conviction for JCE was upheld by the ICTY Appeals Chamber.

**Issues with JCE as a mode of liability for speech crimes**

238. Legal scholars and international judges alike have criticized JCE III for being too broad and elastic. The main argument against it is that a person might be convicted for crimes of specific intent such as genocide without having the relevant mental element for that offense, apart from the fact that the crime was a foreseen incident of the enterprise.<sup>320</sup>
239. Despite its utility, JCE is now receding from view as the ICTY completes its work. Although the charge of JCE was used in the majority of indictments at the ICTY, from the 1999 *Tadić* Appeal Judgment onwards, it has had a more variable applicability at other international criminal tribunals. JCE was applied in the case of *Brima et al.* and the RUF (Revolutionary United Front) cases at the SCSL. The *Brima et al.* Appeals Chamber studied the common plan forming part of JCE, which it determined as not necessarily criminal in nature as long as the crimes were contemplated as a means of materializing the common plan.<sup>321</sup> However, JCE was not applied as a mode of liability in this case as the Trial Chamber held that the prosecution had improperly pleaded it in its indictment and the Appeals Chamber did not refer the matter back to the Trial Chamber for a retrial. The RUF Appeals Chamber also studied the common purpose, which it held to be criminal, and applied JCE as a mode of liability for crimes against humanity, including extermination, murder and rape, as well as war crimes including murder.<sup>322</sup> For its part, the ECCC found that JCE I and II applied to its Case 002, but that JCE III was not part of customary international law or a general principle of law and

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318. *Babić* AC §§20-22, 25, 38, 78, 81.

319. *Prlić* TC, vol. 4, §§265, 267.

320. Cryer (2014, p. 361).

321. *Brima et al.* AC §80.

322. *Sesay et al.* AC §§294-307.

therefore did not apply.<sup>323</sup> This runs counter to the *Tadić* Appeals Chamber decision that all three categories of JCE (I, II and III) are part of customary international law.<sup>324</sup>

240. When considering future international trials, it should be noted that JCE has not been adopted by judges interpreting article 25(3)(a) of the ICC Statute, and instead have generally applied the theory of “co-perpetration” in article 25(3)(a) in order to refer to two or more persons who devised a common plan to commit a crime listed in the Statute. Nevertheless, if the statutes of future international tribunals include JCE, it could serve as a useful instrument to prosecute speech as contribution to a crime, subject of course to international human rights provisions concerning freedom of expression.

### 5.2.7 Article 25(3)(d): “in any other way contributes”

241. Article 25(3)(d) of the ICC Statute holds a person liable if they “[i]n any other way contribute 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”.<sup>325</sup> This ICC article is potentially applicable to speech acts because it indicates contribution to a common purpose (like JCE).
242. According to article 25(3)(d), an individual’s contribution “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”.<sup>326</sup>
243. The article is a catch-all form of liability, which establishes the lowest objective threshold of the modes of liability in article 25(3) requiring a significant contribution. It is even lower than the “substantial contribution” requirement for aiding and abetting.<sup>327</sup> Therefore, it could be employed in prosecuting speech as contribution to a crime.<sup>328</sup>

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323. ECCC, Case 002, Decision on the Applicability of Joint Criminal Enterprise, §38.

324. *Tadić* AC §220.

325. ICC statute, article 25(3)(d).

326. *Ibid.*

327. *Ruto and Sang* PTC §354.

328. In *Katanga* TJ §1620, the Chamber held that liability under article 25(3)(d) required (i) the crime to be committed; (ii) the person who committed the crime belonged to a group acting with a common purpose; (iii) the accused made a significant contribution to the commission of the crime; (iv) this was intentional; and (v) it was made in the knowledge of the intention of the group to commit the crime.

244. Radio broadcaster Joshua Sang was charged under article 25(3)(d) for allegedly encouraging the followers of Vice-President William Ruto to commit ethnic-based atrocities during Kenya's 2007 presidential elections. In April 2016, the majority of the ICC Trial Chamber judges terminated the *Ruto and Sang* trial by declaring the proceedings a mistrial due to witness interference and political meddling. It vacated the three charges of crimes against humanity (after prosecution witnesses withdrew their testimony), without prejudice to the prosecutor's right to re-prosecute the accused at a later date.<sup>329</sup>

### 5.2.8 Attempt

245. According to article 25(3)(f), the ICC recognizes attempt as a mode of liability for all crimes, whereas the ICTY, ICTR and ECCC only recognized it in relation to genocide and contempt of court offenses.<sup>330</sup>
246. At the ICC, attempt requires that, in the ordinary course of events, the accused's conduct would have resulted in the relevant crime being completed had other circumstances not intervened, and that the accused possessed the intent required for the crime itself.<sup>331</sup>
247. Article 25(3)(f) holds liable any individual who "attempts to commit such a crime by taking action that commences its execution by means of a substantial step". Speech acts that incite violence could, in some circumstances, represent such a "substantial step" towards the commission of a crime, thus fulfilling an element of attempt, depending on the facts of the case, the gravity and the context of the speech act, and the intent of the speaker.
248. At present, attempt has yet to be used in the indictment of speech acts, and at the time of writing, no convictions on the basis of attempt have been handed down at the ICC.

### 5.2.9 Cross-cutting issue: causation

249. Defendants have been charged at international criminal tribunals with a number of crimes in contexts where these have been completed or fully executed. In such cases, inciting speech

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329. *Ruto and Sang*, Decision on Defense Application for Judgment of Acquittal, §464.

330. See ICTY Statute, article 4(3)(d); ICTR Statute, article 2(3)(d); ECCC Law, article 4.

331. ICC, *Banda and Jerbo* Confirmation Decision, §§96, 106; ICC, *Katanga and Ngudjolo* Confirmation Decision, §460.

(as well as other speech that may not necessarily rise to such a level) has been prosecuted not as a crime in and of itself, but rather as one of a number of contributing factors that jointly led to the crimes alleged. This has been achieved through modes of liability – the crucial specific link between the accused and the crimes – that ensure that the principle of individual criminal responsibility is respected. In order to successfully prosecute such cases, proof of a sufficient causal connection or nexus between the speech in question (the *actus reus* of the relevant mode) and the subsequent international crime is required. The stakes are high in cases where only speech is at issue: if the prosecution is unable to demonstrate a clear causal link between the speech and the crimes, then a court cannot typically attribute criminal responsibility and must acquit the defendant.

250. The standard or threshold for the requisite causal connection varies depending on the precise mode of liability in question. Broadly speaking, the jurisprudence of the international criminal tribunals recognizes three standards for this causal link in the *actus reus* (inciting speech) of the particular mode of liability: “significant contribution/effect” (in the context of JCE), “substantial contribution/effect” (in the context of ordering, aiding and abetting, and instigating and planning), and “essential contribution/effect” (in the context of co-perpetration at the ICC).<sup>332</sup>
251. The ICTY and ICTR have held, specifically with regard to instigating, that there must be a causal connection with the *actus reus* of the crime.<sup>333</sup> This causal connection must have “directly and substantially contributed” to the physical perpetrator’s commission of the offense,<sup>334</sup> or must have been a “clear contributing factor”.<sup>335</sup> In addition, the prosecutor does not need to prove that the crime would not have been committed had it not been for the instigator’s acts (i.e., “but for” causation).<sup>336</sup>
252. In relation to command/superior responsibility, the *Bemba* Trial Chamber found that causation could be established when the “crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the

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332. See *Bemba et al* TC §804, where the Chamber held that co-perpetrators must provide an essential contribution.

333. *Bagilishema* TC §30. See also *Blaškić* TC §278; *Semanza*, TC §381; *Kamuhanda* TC §593; *Muhimana* TC §504; *Kajelijeli* TC §762.

334. *Ndindabahizi* TC §456.

335. *Kvočka et al.* TC §252.

336. *Kvočka et al.* TC §252; *Kordić and Čerkez* TC §387.

commander exercising control properly would have prevented the crimes”.<sup>337</sup> The Trial Chamber further held that “[i]t is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it,”

*International case law is decidedly murky when it comes to the precise meaning of its causality standards.*

clarifying at the same time that command responsibility does not require “but for” causation between the commander’s omission and the crimes.<sup>338</sup> However, the ICTY held in various judgments that no causality exists within command responsibility.<sup>339</sup> The *Čelebići* Trial Chamber held “that no causal link can exist between a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offense”.<sup>340</sup> Similarly, ICTR jurisprudence has not considered a causal link as a requirement for command responsibility.<sup>341</sup>

253. It is therefore clear from the *Bemba* case and the ICTY jurisprudence considered above that international case law is decidedly murky when it comes to the precise meaning of its causality standards. There is an absence of clear, detailed and definitive appellate explanations as to what is required to establish these causal nexuses beyond reasonable doubt. In addition, because international criminal cases have generally considered speech together with other non-speech acts, courts have struggled to understand the exact role of speech in a chain of causation and its precise relationship to other contributing or intervening factors.
254. The preceding section seeks to articulate a framework that will guide legal actors in determining whether a speech act constitutes the requisite causal link to a crime sufficiently enough to justify the imposition of criminal liability. In this respect, the section outlines some of the cases that have considered speech acts in the context of modes of liability. In addition, it is worth bearing in mind that some modes of liability, because of their legal requirements, are perhaps more suited than others to the prosecution of speech acts, particularly instigating, ordering, and aiding and abetting.

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337. *Bemba* TC §213.

338. *Bemba* TC §211.

339. See, e.g., *Hadžihasanović and Kubura* AC §41; *Čelebići* TC §400; *Orić* TC §338.

340. *Čelebići* TC §400.

341. See *Case Matrix Network* (2016, p. 85). See also *Bagilishema* TC §38, which makes no reference to a causal link.





## 6. Investigating speech crimes

255. As with all international crimes, it is necessary to conduct investigations and gather evidence that can be used in court before a conviction for a speech crime can be entered. However, unlike domestic courts, the international courts do not have a police force at their disposal that can use coercive measures to secure evidence, so international investigations are typically complex and rely to a significant degree on the cooperation of the various states involved. Nevertheless, by contrast to most other international crimes, speech crimes frequently concern the public conduct of the accused, such as statements made at rallies and in the media. This characteristic enhances the prospects of obtaining evidence from remote locations, although it will generally not displace the need for either national law enforcement authorities or international investigators to conduct an investigation in the *locus delicti*. The following sub-section examines the types of evidence most relevant to proving speech crimes, as well as the investigative techniques usually employed. It also discusses the analytical methods needed to determine the meaning and import of speech within its cultural context – a crucial element in the investigation of speech crimes.

### 6.1 Evidence relevant to speech crimes

256. The key questions that prosecutors must address in an early phase of speech-related criminal investigations are the following:

256.1. What materials or information will be relevant to proving speech crimes?

- 256.2. Where can the evidence be found, how can it be obtained and how will it be preserved?
  - 256.3. What are the necessary professional qualifications for a criminal analyst working on cases of speech crimes?
  - 256.4. Which methods should be used to assess the relevance and reliability of speech-related evidence?
257. There are three main categories of speech-related evidence: (1) public records, also known as open source evidence; (2) private records; and (3) witness accounts:
- 257.1. Public records include those provided by the media, such as television and radio broadcasts and newspaper articles, as well as material in the public domain, such as books, archives, libraries, official reports, public posts on the Internet, and other publicly accessible sources.
  - 257.2. Private records include notebooks, diaries, memoranda, intercepted telephone conversations, audio and video recordings, and intelligence reports, as well as other records obtained through inter-institutional cooperation.
  - 257.3. Witness accounts refer to written or oral statements by witnesses who saw or heard the speech act (eye witnesses), which are recorded by the authorities to use in legal proceedings.
258. Different rules and procedures will be of particular relevance to each of these categories during the investigations.
259. The evidence-gathering process usually commences with a review of a range of open-source materials that can be accessed without special permission or a warrant. The ICTY, for instance, collected a range of open sources including those of the BBC Monitoring service and the Foreign Broadcast Information Service (FBIS), an open-source intelligence unit of the Central Intelligence Agency (CIA). Both BBC Monitoring and FBIS reports provided the investigation teams with useful background information that the prosecution introduced as corroborative evidence in a number of ICTY trials.
260. Fact witnesses (witnesses who have personal knowledge of the events) can provide evidence of a pattern of inciting or persecutory speech, alongside expert witnesses, who can explain the meaning and significance of the terms used in the speeches in question in the specific

context in which they were made. Reports and documents produced by local or international non-governmental organizations (NGOs), particularly those working on human rights issues, can also be relevant. Documents produced by NGOs often provide valuable leads for investigative purposes (such as the identification of witnesses, suspects and crime sites), and they may be used as separate exhibits in trials. The evidentiary weight given to NGO reports varies, depending on the issue in question, but for matters like repeated public statements or general patterns of crimes, such reports can provide useful evidence, particularly when used to corroborate other sources such as witness statements. NGO representatives, as the originators and authors of these reports, can also provide corroborative evidence.<sup>342</sup>

*Expert witnesses can explain the meaning and significance of terms.*

### 6.1.1 Gathering evidence

261. International criminal investigations are organized into special investigation teams composed of several key components: senior and other trial attorneys; investigators; researchers and criminal analysts; and interpreters and translators.<sup>343</sup>
262. While some evidence may be gathered remotely, particularly open-source materials, other forms of evidence such as written witness statements are usually gathered in the territory where the witnesses live.<sup>344</sup> The investigation team must have the appropriate authorizations to operate within a domestic jurisdiction, and these vary according to the nature of the powers granted to the ICT and its operational framework, ranging from a Chapter VII United Nations Charter broad mandate, such as that enjoyed by the ICTY and ICTR, and currently by the MICT,<sup>345</sup> to general agreements with States allowing investigations to be conducted by an international tribunal's officials in their territory, such as the Agreement on the Estab-

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342. Two NGO researchers who testified as expert witnesses before the ICTR and ICTY were Alison Des Forges and Mark Thompson (see, e.g., *Nahimana et al.* TC §53).

343. Detailed description of all of the listed OTP-ICTY investigations elements are available from <http://www.icty.org/en/about/office-of-the-prosecutor/investigations>.

344. Rule 92bis, which allows this modality of obtaining a witness testimony, was incorporated into the ICTY Rules of Procedure of Evidence (RPE) in the amendment of 1 December 2000, having been subsequently amended on 13 September 2006.

345. The cooperation framework of the MICT is also rooted in Chapter VII of the UN Charter, see UN Security Council Resolution 1966, 22 December 2010, paras 8 and 9. See also Art. 28(1), (2) of the Statute of the MICT, UN Doc S/Res/1966(2010), Annex.

lishment of the Special Tribunal for Lebanon,<sup>346</sup> and the cooperation agreements or other arrangements concluded by the ICC with States not party to the Rome Statute.<sup>347</sup> Certain entities may be unwilling to share the information they have obtained in order to prevent any perceived or potential prejudice to their ongoing or future operations. For instance, the International Committee of the Red Cross will generally not disclose information to international tribunals, even when in possession of evidence that is unavailable elsewhere.<sup>348</sup> The right not to disclose sources and sensitive information is an essential part of freedom of expression, and this right may only be abrogated in exceptional circumstances, such as an immediate threat to national security. NGOs and journalists are often reluctant to reveal the identity of their sources or to allow their representatives to provide evidence or information to assist in investigations. Consequently, in investigating speech crimes, investigators endeavor to obtain all the relevant evidence directly and seek information from other entities only when strictly necessary.

263. The preservation of evidence involves a pivotal process necessary to ensure that the integrity of the evidence is not impeached if later adduced in the proceedings. This process requires that investigators assign distinct reference numbers to each collected item, make a copy or electronic record of any original item they collect, store each item in appropriate conditions, and keep a record of everyone who has handled the evidence, referred to as “the chain of custody”. For speech acts, the recording or notes of the speech(es) must be expeditiously translated into one of the working languages of the court to allow for a thorough analysis, even while the investigations are ongoing.

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346. Article 15 of the Agreement between the UN and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, Annex B to UN Security Council Resolution 1757, 30 May 2007. Nonetheless, it may be noted that the binding character of the STL’s Statute *vis-à-vis* other UN Member States, as an annex to a UN Security Council Resolution adopted under Chapter VII powers, implies a general obligation of cooperation with the STL’s proceedings, reflected, *inter alia*, in the obligation to transfer the accused to the STL’s jurisdiction in accordance with article 22(1)(b) of the Statute, UN Doc S/Res/1757(2007), Annex.

347. Article 87(5)(a) of the Rome Statute.

348. See, Rule 10 of the MICT RPE, adopted 8 June 2012, amended 18 April 2016, MICT/1/Rev.1 (“MICT RPE”), acknowledging that the ICRC is not obliged to disclose information, including documents and any evidence, concerning the performance of its mandate. See also, *Prosecutor v Simić et al.*, Decision on the Prosecution Motion for a Ruling under Rule 73 for a Ruling Concerning the Testimony of a Witness, Case No IT-95-9-PT, 27 July 1999, §§73-74.

## 6.1.2 Analyzing evidence during the investigative phase

264. Analysis is a particularly important factor in speech-crime cases. The analysis of evidence in speech-related investigations must be based on a well-defined research methodology, and the most frequently used model of case analysis is currently based on the so-called “intelligence cycle”.<sup>349</sup> The analytical steps feed into the general investigation in the following way: (a) tasking and negotiation; (b) collection; (d) collation; (e) evaluation; (f) analysis and interpretation; (g) reporting; and (h) task review. The intelligence cycle, in fact, serves as a methodological umbrella for a number of analytical procedures and applications.
265. In addition to traditional methodological approaches to case analysis (such as content analysis, profiling, association chart analysis, and chronologies and maps), new software applications play an important role. Criminal intelligence analysts, for example, frequently employ different versions of Analyst’s Notebook and ZyFind.<sup>350</sup> Case Map,<sup>351</sup> a legal LexisNexis application used at the ICTY, proved to be a valuable tool for combining criminal intelligence and legal analytical methods. These platforms allow the collected items to be stored and categorized with additional analytical review notes or tags in a single database, and then filtered or re-organized in various ways to assist the analytical process. A typical ordering would be chronological, but it can also help analysts to isolate speeches using a specific term – for example, a derogatory term for the victim group – in order to analyze whether the speeches made by individuals holding high-level positions who are of interest to the investigation were then perpetuated by other individuals or through other media in order to spread the message.
266. The two pivotal elements underpinning the analysis of speech acts are the reliability of the source of the information and the content or meaning of the speech.
267. Investigating war-crimes propaganda means delving deeply into the most complex social, historical and cultural issues. To address this challenge, the ICTY’s Office of the Prosecutor (OTP) established a special team of academic researchers and analysts, the Leadership

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349. See, e.g., *Prosecutor v Mladić*, Case no IT-09-92, Trial Transcript, 3 December 2013 (testimony of the military expert witness Reynaud Theunens), p. 20232.

350. ZyFind was developed by ZyLab, a software developer covering a range of areas, including law enforcement and investigations, communications intelligence and security. For internal investigative and legal purposes at the ICTY, ZyFind was organized in indexes with metadata divided by either the origin of the documents or by the rules for their use. Available from <http://www.zylab.com/>.

351. Available from <https://www.lexisnexis.com/en-us/products/casemap.page>.

Research Team (LRT),<sup>352</sup> comprising historians, philologists, linguists, political scientists, sociologists, philosophers and journalists. The LRT's primary task was to provide evidence relating to the historical and cultural background of the conflict and the social networks of high-level defendants.<sup>353</sup> All its members were fluent in Bosnian, Croatian and Serbian, in both the Latin and Cyrillic scripts, as well as other languages of the region such as Albanian, Macedonian and Slovenian. One of the sub-components of this team was the Open Source Unit (OSU), which conducted research on culture-specific verbal and non-verbal expressions, such as photographs, artworks and cartoons.<sup>354</sup>

### 6.1.3 Evidentiary aspects

#### The witnesses

268. Despite the increasing range of available investigative tools, international criminal law prosecution is still heavily driven by fact witness evidence. In *Gbagbo*, Pre-Trial Chamber-I of the ICC stated its preference for direct evidence over hearsay. In referring to testimonial evidence, it considered that “to the extent possible, [it] be based on the first-hand and personal observations of the witness”.<sup>355</sup> Due to their relatively flexible approach to evidence, international trials often include a variety of categories of witnesses, including victim or survivor witnesses, insider witnesses, expert witnesses, international witnesses and perpetrator witnesses.<sup>356</sup>
269. In the context of allegations of criminal speech acts, particularly relevant witnesses are those who heard the speech and those who were victimized as a consequence of it. Credible testimony from co-perpetrators can demonstrate mental causation, where a speaker com-

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352. A general description of the LRT role within the OTP-ICTY is available from <http://www.icty.org/en/about/office-of-the-prosecutor/investigations>.

353. The knowledge and support of this team proved to be instrumental in several ICTY leadership cases, and some LRT members acted as expert witnesses in various trials.

354. For a more detailed discussion on the methodologies applied and/or recommended by former LRT members in the OTP-ICTY analytical practice, see Dojčinović (2012, pp. 33-117).

355. Situation in the Republic of Côte d'Ivoire, *Prosecutor v Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61(7)(c)(i) of the Rome Statute, Case no ICC-02/11-01/11,3 June 2013, para 27.

356. For further information, see the OTP-ICTY detailed description of the mentioned categories of witnesses and their roles in international criminal investigations and trials. Available from <http://www.icty.org/en/about/office-of-the-prosecutor/prosecutions>.

municates his or her intention to a listener who then adopts the speaker's criminal intention as his or her own. The speaker's followers (insiders), who can reliably testify to the way they were motivated, prompted or inspired to action by the speaker, provide the most relevant evidence for the charge of instigation.

270. In *Šešelj*, the prosecution opened its case with an expert witness on nationalist propaganda in Eastern Europe, Anthony Oberschall,<sup>357</sup> who offered a comprehensive content analysis of Vojislav Šešelj's political speeches, interviews, broadcast appearances, news articles, legislative speeches, and other public communications. Oberschall's evidence laid the foundations for the prosecution's case with respect to all of the charges.
271. In addition to Šešelj's *mens rea*, this evidence was particularly relevant to the influence of the accused's speech on the physical perpetrators of the crimes.<sup>358</sup> Arguably, the evidence emerging from other witnesses during the trial, particularly from the so-called insider and perpetrator witnesses, could have allowed the Trial Chamber to draw an inference as to the causal nexus between the specific speech acts of the accused and the actions of the physical perpetrators of the crimes (a form of mental causation). A different approach was adopted in *Ruto and Sang*, where the prosecution started its case with a group of former devotees willing to give depositions and testify as to how they were moved to violent action by the speaker's exhortations.<sup>359</sup>

## Documentary evidence

272. Documentary evidence has been a mainstay of international criminal prosecutions from Nuremberg to the modern day. A singular mechanism for the employment of large amounts of documentary evidence has been what is known as the "bar table motion".<sup>360</sup> This is a written motion that allows a party to seek the admission into evidence of several documents

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357. On 30 November 2007, the Pre-Trial Judge, Jean-Claude Antonetti, changed the status of Anthony Oberschall from an expert to a fact witness: see *Prosecutor v Šešelj*, Decision on Anthony Oberschall's Status as an Expert, Case no IT-03-67-T, 30 November 2007.

358. *Prosecutor v Šešelj*, Case No. IT-03-67-A, Prosecution Appeal brief, §241.

359. It may be noted, however, that in *Prosecutor v Ruto and Sang*, Decision on Defense Applications for Judgment of Acquittal, Case no ICC-01/09-01/11, 5 April 2016, para 135, the TC found insufficient evidence substantiating the link between the Ruto's "alleged utterances and the conduct of those who physically engaged in violent conduct against Kibuyu and other perceived PNU supporters". It further reasoned that the factual circumstances of the case did not support drawing an inference to establish the link. A similar finding was entered with respect to Sang's broadcasts (see §139).

360. This form of submission was first introduced in *Blaškić* TC §35.

(exhibits) without necessarily providing its contextualization through *viva voce* witnesses or written statements.<sup>361</sup> Trials involving speech crimes have particularly benefited from this novel procedural tool.

273. The prosecution in *Šešelj* resorted to introducing evidence via bar table motions to show the following: (a) the potential of specific speech acts to amount to the persecution or forcible transfer of the targeted population; (b) a combination of persecutory and discriminatory intent, as well as intent to create ethnically separate territories; (c) direct and indirect instigation of members of various military and paramilitary forces; (d) linkage to the physical perpetrators of the crimes; and (e) the contribution to and awareness of the crimes, including a number of other components of the prosecution's case.<sup>362</sup>

### Expert witnesses, cultural specificity and the meaning of words

274. Speech crimes trials often face the challenge of interpreting aspects of indirect, ambiguous and veiled speech, since speakers rarely call for the persecution or extermination of a protected group, or the commission of another core international crime, in an open, public and/or direct manner. The major challenges of interpreting coded speech are compounded by the fact that many international judges neither speak the language of the region in question, nor have a thorough knowledge of its history and culture. There have been instances where witnesses' testimony has had to be translated for the judges several times over,<sup>363</sup> potentially undermining the integrity of their accounts.
275. A review of key international trials illustrates the importance of contextual analysis in demonstrating that an utterance contributed to the commission of core international crimes.<sup>364</sup> For example, Leon Mugesera, a university professor and politician, was convicted of the crime of genocide by a Rwandan court in 2016.<sup>365</sup> On 22 November 1992, Mugesera gave

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361. For detailed guidelines on the elements a bar table motion must contain, see *Prlić at al.* TC §35.

362. Prosecution's Closing Brief, *Prosecutor v. Vojislav Šešelj*, 5 February 2012.

363. *Akayesu* TC §145 noted the difficulties inherent to the translation process which entailed translating Kinyarwanda into French and from French into English. Such difficulties also arose with Joseph Ruzindana's testimony in *Nahimana et al.* (see transcript of 26 March 2002).

364. Expert witness testimony may be called by a party and challenged by the opposing party under Rule 94 bis of the ICTR's Rules of Procedure and Evidence.

365. Leon Mugesera was extradited to Rwanda from Canada in January 2012, where the local Rwandan authorities charged him with "inciting the masses to take part in genocide, planning and preparing genocide, conspiracy in the crime of genocide, torture as a crime against mankind, and inciting hatred among people". In April 2016, the Rwandan court found Mugesera guilty of several counts, including



a speech in support of President Juvénal Habyarimana and his political program. He referred to members of other parties as “vermin” that had to be “liquidated,” and concluded his speech with a bloodcurdling warning: “Do not be afraid, know that anyone whose neck you do not cut is the one who will cut your neck”.

*The major challenges of interpreting coded speech are compounded by the fact that many international judges neither speak the language of the region in question, nor have a thorough knowledge of its history and culture.*

276. Mugesera’s speech also contained several context- and culture-specific utterances, such as *inyenzi* and *inkotanyi*.<sup>366</sup> The terms *inyenzi* and *inkotanyi*, commonly used by instigators and physical perpetrators before and during the genocide in Rwanda, were explained and contextualized effectively in all ICTR-related trials. Dr. Alison Des Forges, an expert witness<sup>367</sup> who testified before the ICTR,<sup>368</sup> explained that *inkotanyi* referred to “members of the RPF [Rwandan Patriotic Front], a term that recalls the important armies of nineteenth-century Rwanda”.<sup>369</sup>
277. Dr. Mathias Ruzindana, a linguist at the National University of Rwanda, submitted a report to, and testified as a prosecution expert witness in, the first ICTR trial, *Prosecutor v Akayesu*. Ruzindana’s report explained the meaning of the Kinyarwanda terms used by the accused, emphasizing that their meaning was context-dependent in time and space. He further explained how the meaning of ordinary words was transformed during and after the Rwandan genocide in 1994. Ruzindana testified, *inter alia*, that “the term *Inkotanyi* had a number of extended meanings, including RPF sympathizer or supporter, and, in some instances, it even seemed to make reference to Tutsi as an ethnic group”.<sup>370</sup>

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incitement to commit genocide, incitement to ethnic hatred and persecution as a crime against humanity. In view of insufficient evidence, Mugesera was acquitted of charges related to preparing and planning the genocide and conspiracy in genocide. Available from <http://www.newtimes.co.rw/section/read/199005>.

366. Transcript of the speech given by Leon Mugesera at the political rally held in Kabaya, 22 November 1992. Available from <https://www.documentcloud.org/documents/1391813-footnote-27-speech-by-leon-mugesera.html>.

367. Pursuant to Rule 94 bis of the ICTR RPE, expert witness testimony may be called by a party and may be challenged by the opposing party in cross-examination.

368. Des Forges was called as expert witness in multiple cases tried before the ICTR, including *Akayesu* and *Nahimana et al*. She was also called to testify before the Canadian Immigration Court, though her expert status was disputed.

369. Des Forges (1999).

370. *Akayesu* TC §147, §365.

278. Similarly, terms like *inyenzi* (cockroach),<sup>371</sup> *umwanzi* (enemy) and *icyitso* (accomplice) or *ibytso* (accomplices), entailed a negative connotation that was not as neutral as “supporter”,<sup>372</sup> and denoted instead the Tutsi as a group. According to the editor of *Kangura*’s testimony, when the war started, the Hutu either referred to Tutsis openly or indirectly, calling them *ibytso*.<sup>373</sup> This form of expert linguistic input, as *Akayesu* revealed,<sup>374</sup> can help investigators to identify relevant speeches (or parts of speeches) and related events, as well as select witnesses to be interviewed and understand their evidence.
279. Ruzindana’s explanations and interpretations were also central to the prosecution’s case in *Nahimana et al.* (the “media case”).<sup>375</sup> His interpretation contributed to the view that calls on the RTLM radio to exterminate the *inkotanyi* and *inyenzi* constituted a form of genocidal incitement to eradicate Tutsis as a group.<sup>376</sup> Ruzindana’s report contained transcripts of RTLM broadcasts that equated these terms with Tutsis, supporting the inference that calls to exterminate the *inkotanyi* and *inyenzi* referred to Tutsis in general as opposed to simply their military forces.<sup>377</sup> He characterized RTLM and the *Kangura* newspaper as “hate media” that played a central role in the Rwandan genocide.<sup>378</sup>
280. The importance of a culturally informed analysis of language was also recognized in the report and testimony of Rwandan linguist Dr. Evariste Ntakirutimana. His report dealt with the nature and effect of the Kinyarwanda proverbs used by those who incited the commission of core international crimes:
281. The term *gukôra*, like *inzôka*, has given rise to a number of proverbs and set expressions: (i) *gukôra ibâra*: do something bad, (ii) *gukôra ultlkôreshêje*: work hard, (iii) *urakôze cyaane*: thank you very much, (iv) *waakôze cyane*: well done, (v) Destroy someone’s house, (vi) Rob someone, steal everything he has. In the final analysis, *gukôra* unquestionably means kill the Tutsis or destroy their houses ... When reference is made to the meaning of the verb *gukôra*

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371. The term had a negative connotation, since it was used by those who wanted to exterminate the Tutsi, in whole or in part, and was often contained in RTLM broadcasts (see *Akayesu* TC §149).

372. *Akayesu* TC §150.

373. *Akayesu* TC §150.

374. *Akayesu* TC §146, §361.

375. *Nahimana et al.* TC §161.

376. See the transcript (27 March 2002, pp 39-40) in *Prosecutor v Nahimana et al.*

377. See *Nahimana et al.* TC §358. See also transcript of 10 July 2002, *inter alia*, pp. 228-229.

378. See transcript of 10 July 2002, *inter alia*, pp. 156, 195-196, 228 in *Prosecutor v Nahimana et al.*

(to work), the message conveyed to the people of Butare is unambiguous. It is a powerful message. Extreme situations require extreme means.<sup>379</sup>

282. The “directness” of these and many other utterances identified during the investigations and proceedings before the ICTR can be found in their implicit content and meaning, and the way they were directly understood by their intended audiences. Even implicit messages or utterances may amount to incitement if those addressed immediately grasp their implications, due to their cultural and linguistic content.<sup>380</sup>
283. The question of the directness of speech also arose in the *Krstić* trial. Radislav Krstić, a Bosnian Serb general, was indicted by the ICTY for genocide, crimes against humanity, and violations of the laws and customs of war. During the trial, the prosecution presented evidence that “General Krstić and his superiors also manifested genocidal intent by using dehumanizing rhetoric and racist statements that presented the VRS [the Army of Republika Srpska] as defending the Serbian people from a threat of genocide posed by ‘Ustasha-Muslim hordes’”.<sup>381</sup> The defense argued that only direct references or “calling for killings” could qualify as expressions of genocidal intent;<sup>382</sup> these were non-existent in this case and are rarely found in similar cases.
284. Although the Trial Chamber was satisfied as to the existence of the requisite genocidal intent, the Appeals Chamber took a different view. It accepted the Trial Chamber’s conclusion that “charged language is commonplace amongst military personnel during war”, but inferred from this that “no weight can be placed upon

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379. *Prosecutor v Muvunyi*, ICTR-00-55A-T, Exhibit No P2-R(B), 29 January 2009, Evariste Ntakirutimana, PhD, *Tolerance or intransigence in Sindikubwabo’s speech in Butare?*

380. *Nahimana et al.* AC §698 quotes the *Akayesu* Trial Judgment: “The Chamber will therefore consider on a case-by-case basis, whether in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof”. See also *Nahimana et al.* AC §§1004-1006; *Akayesu* TC §557; *Kajelijeli* TC §856 (in which, drawing on previous case law, the TC found that the accused’s utterances amounted to direct and public incitement to commit genocide). In the secondary literature, see Cassese (2008 p. 229) and Schabas (2009, p. 332).

381. *Krstić* TC §592.

382. *Krstić* TC §593.

Radislav Krstić’s use of derogatory language in establishing his genocidal intent”.<sup>383</sup> The Appeal Chamber’s approach signals that the assessment of speech acts is dependent not only on its cultural context, but also on the receptiveness of judges to considering derogatory speech when determining genocidal or discriminatory intent. This results in the distinct approaches taken by different chambers and possibly by different international tribunals. In another Srebrenica-related case, *Popović et al.*, the use of derogatory terms by the accused when referring to the victims, such as *balija* (Turks) for Bosnian Muslims, was considered relevant (albeit not a primary indicator) in determining Vujadin Popović’s<sup>384</sup> and Ljubiša Beara’s<sup>385</sup> criminal responsibility.<sup>386</sup>

285. Several ICTY trials have included references to historically charged ethnic and political insults such as *poturica* (*poturice* in the plural),<sup>387</sup> *balija*,<sup>388</sup> Turk,<sup>389</sup> Ustasha,<sup>390</sup> Chetnik,<sup>391</sup>

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383. *Krstić* TC §130.

384. In *Popović et al* TC §991, fn. 3278, §1004, fn. 3306, the use of derogatory language such as the terms “*balija*” and “Turk” before Bosnian Muslims were killed at the Kravica Warehouse, supported the finding of discriminatory intent with respect to the murder of Bosnian Muslims as one of the underlying acts of persecution. The further finding of murder and cruel and inhumane treatment as underlying acts of persecution was also based on the use of such derogatory language (at §1194). The Trial Chamber further recalled the evidence heard “as to speeches or remarks revealing discriminatory intent such as the announcement of Mladić in Srebrenica that ‘we give this town to the Serb people as a gift. ... [T]he time has come for us to take upon revenge upon the Turks in this region’”. (Ex. PO2048.) Such derogatory language further constituted a relevant factor, though not determinative, of genocidal intent (at §1177, §1179).

385. *Popović et al.* TC §1312, §1331. See also *Popović* AC §713.

386. *Popović et al.* TC §1194, §1331.

387. A term *poturica* was used to refer to those who converted to Islam, and also means renegade or traitor. It was commonly used by the Serbs to refer to the Muslims of Bosnia and Herzegovina, harking back to the Ottoman Empire, when Slavs from certain regions of the Balkans converted to Islam.

388. The term *balija* is of an offensive nature (see *Jelisić* TC §75 on how it was used as a derogatory word to refer to Muslims; see also *Popović* AC §713).

389. The term Turk was also used in a pejorative sense, as a synonym of *balija* (see, eg, *Jelisić* TC §75).

390. The term Ustasha refers back to the creation of the Independent State of Croatia back in April 1941 by the Ustasha movement. It was commonly used by Serbs to refer to Croats in a pejorative sense, evoking fascist atrocities during the Second World War. According to prosecution witness VS-004: “The word Ustaša, amongst all Serbs, is the worst thing you can mention, because throughout their history it was the Ustaša who committed the greatest crimes against Serbs”. (See *Prosecutor v Šešelji*, Prosecution’s Closing Brief, Case no IT-03-67-T, 5 February 2012, para 51, fn. 177, VS-004, T.3380, 3624.)

391. The word Chetnik (Četnik) derives from the word četa, meaning an armed band or detachment. A

and Shqiptar.<sup>392</sup> Each of these terms has various pejorative meanings, making it difficult to produce a single English translation and interpretation, which is why the ICTY translation service decided to “leave such terms in the original when interpreting testimony and to annotate them as derogatory in translations of evidence”. This decision was based on the fact that “there is no precise equivalent of any ethnic slur in another language, because each slur carries with it an array of cultural associations”.<sup>393</sup> With this potential ambiguity in mind, a detailed analysis during the investigative phase will allow the prosecution to determine whether expert evidence is necessary to explain the specific context-based interpretation of specific words, in combination with other evidence of their impact and intent, including testimony from insider and crime-based witnesses.

286. A number of ICTY defendants used terms that express discriminatory intent that could constitute (along with other evidence) proof of genocidal intent. One such term is “*istraga poturica*”.<sup>394</sup> The best-known use of *poturica* in Montenegrin and Serbian culture dates back to the 1847 epic poem, *The Mountain Wreath*, by Petar II Petrović Njegoš. The poem refers to a historically uncorroborated event known as *istraga poturica*, which can be translated as “annihilation (or extermination or eradication) of the converts to Islam [the *poturice*]”. It is derived from the archaic meaning of the word *istraga* (investigation). The use of the term *poturica* (also connoting a renegade or traitor) by Serbs and Montenegrins belongs to the category of derogatory or pejorative references to the Muslims of Bosnia and Herzegovina. General Ratko Mladić, who was convicted, *inter alia*, of the genocide of Bosnian Muslims at Srebrenica, used the term *poturice* in a 1993 interview at a time when his subordinates were actively involved in committing mass crimes against this group:

287. *We all know who the Turks are. As a matter of fact, these Muslims are not even Turks, they are converts [“poturice” in the original]. They have betrayed the*

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Chetnik is therefore a member of an armed guerrilla band. Chetnik detachments were irregular forces, mainly composed of volunteers, which provided intelligence services to the regular armed forces. (See *Prosecutor v Šešelj*, Prosecution’s Notice of the Revised Translation of Expert Report of Yves Tomić and C.V., Case no IT-03-67-PT, 22 January 2008. Expert Report entitled: *The Ideology of a Greater Serbia in the Nineteenth and Twentieth Centuries*, point 3.2, p 38.)

392. Shqiptar is the Albanian spelling of the noun Albanians used to refer to themselves. However, when used by non-Albanians, especially Serbs, Montenegrins and Macedonians, the word (spelled as Šiptar in Serbo-Croatian) has strong derogatory connotations (see Dojčinović (2017, p. 49, fn. 85)).

393. Elias-Bursač (2015, pp. 143-144).

394. See Davis (1996, p. 28, p. 146) on *The Mountain Wreath* and the role of religion and mythology in the Bosnian conflict.

*Serb people and repressed them for 500 years. They are the worst scum – the Serb people who changed their religion. To change a religion means to betray one’s own people, to betray oneself.*<sup>395</sup>

288. The Trial Chamber considered this term to imply a discriminatory intent.<sup>396</sup>
289. In *Prosecutor v Karadžić*, both the accused, the former Bosnian Serb president, and a defense witness made explicit references under cross-examination to *The Mountain Wreath*. The prosecution seized the moment and, having read a transcript of large parts of the poem to the court, asked whether the witness was reminded of “the fact that this poem celebrates the killing of Muslims, the destruction of their homes, and destruction of their mosques?”<sup>397</sup> Analyzing similar references in speeches during the investigation phase will allow the prosecution to integrate this culturally relevant information into its case. If multiple persons of interest refer to the same cultural work in order to spread a discriminatory message, this could also be used to demonstrate common criminal intent.

## 6.2 Monitoring incitement and hate speech

290. While these Guidelines focus on criminal liability for speech crimes in international criminal law, they recognize that a penal response is not the only, or even the most desirable, response to hate speech and incitement. A broader and less criminal-law-oriented approach to monitoring speech is warranted, and this is developed further in Annex I, below. However, the following section refers primarily to monitoring by international and national criminal justice institutions, with a view to informing the preventative dimension of criminal indictments. If implemented carefully, early monitoring and judicious intervention by international and national prosecutors could advance prevention over the short term and deterrence over the medium-to-long term.
291. To allow for monitoring, sufficient mechanisms must be established with the capacity to detect dehumanizing or dangerous speech and, ideally, to record it. This is particularly important during general elections, when hate speech and incitement are most pronounced

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395. *Mladić* TC Ex. P07719. The quote was taken from “I am Just a Soldier”, an interview with Jovan Janjić, in the Belgrade-based weekly *NIN*, 25 June 1993.

396. *Mladić* TC §3275.

397. *Prosecutor v Karadžić*, Trial Transcript, 12 February 2014, Ex. P6666, p 46879, at line 9.

and may have the most damaging consequences. Effective monitoring involves the tracking, categorizing and recording of incidents of incitement and hate speech. Careful monitoring of public discourse is an essential first step in the investigation of potential speech crimes, in order to grasp the content and identify the extent of dangerous speech, and to consider whether and how to respond. As such, it represents a vital component of any early warning system that seeks to forestall large-scale violence.

*One of the main issues is how to distinguish actionable speech from merely reprehensible speech*

292. Spreading hateful messages to large numbers of people has become easier since the growth of mass media in the twentieth century, a trend that has been intensified by the internet and social media.<sup>398</sup> However, the proliferation of social media companies with billions of daily users globally, may in turn provide a new social ecology for the monitoring of incitement and hate speech.
293. Although monitoring hate speech in a specific area of technology poses particular challenges, automated techniques can offer innovative solutions as well as new problems with respect to privacy and transparency. One of the main issues is how to distinguish actionable speech from merely reprehensible speech that, while distasteful and even offensive, does not fall within the criminal domain. Context is crucial in this respect as speech acts that are merely reprehensible in some contexts may bear criminal consequences in others. In fact, the context can denote a reasonable likelihood that the speech in question is capable of causing or increasing violence.<sup>399</sup>
294. It is not necessary, when monitoring such speech, to adhere to one set legal definition of a criminal form of hate speech. Under a broad descriptive approach, based on a number of systems, the term generally “refers to words of incitement and hatred against individuals based upon their identification with a certain social or demographic group. It may include, but is not limited to, speech that advocates, threatens, or encourages violent acts against a particular group, or expressions that foster a climate of prejudice and intolerance”.<sup>400</sup> However, it is important to acknowledge that the monitoring of speech acts can easily encroach on issues of privacy, and may in particular clash with the stronger protection of speech in private communications. Thus, monitoring efforts must be grounded in robust standards and principles, and effective policies.

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398. See Timmermann (2005, 2006, 2015).

399. See the definition of “dangerous speech” by Benesch (2013).

400. Gagliardone, Patel and Pohjonen, cited by Lucas (2014, p.5).

295. Speech-monitoring projects usually focus on elections where the participation of groups of racial supremacists, religious extremists or political radicals is likely to require specific attention, especially where they target marginalized groups such as immigrants and refugees. Such groups are typically vulnerable to hate speech and are in particular need of protection. Europe is a case in point where the populations most often affected by hate speech are, *inter alia*, immigrants, asylum seekers, Jews, Muslims and the Roma people. However, other individuals and groups identified by criteria such as gender, sexual orientation, social and/or economic condition, and age are in no less need of attention or consideration.<sup>401</sup>
296. Efforts to monitor hate speech are currently being conducted by international and regional organizations, national governments, civil society groups and social media companies, as detailed in Annex 1. However, the quality of these approaches varies, and few have issued any detailed guidance as to the basis in international criminal law for the type of speech they monitor. International criminal law is but one factor to consider in the process of monitoring a deteriorating situation, but it is a necessary one.
297. The use of coded language poses additional challenges for monitoring as the process becomes more cumbersome: the messages will hold meaning for a target audience due to the use of terms reflecting a shared culture and history but may be far harder for others to decipher. The use of such language makes the process of monitoring hate speech arduous, not only for automated monitoring systems, but also in terms of manual monitoring.<sup>402</sup>
298. Burundi, however, is a recent example where international monitoring and a robust response to incitement may have contributed to stabilizing a deteriorating situation, forestalling further mass atrocities and possibly even genocide. In November 2015, the United Nations condemned public statements in the country aimed at inciting hatred and violence between Hutus and Tutsis. “The recurring violence and killings must stop,” United Nations spokesman Stephane Dujarric told reporters, adding that Secretary-General Ban Ki-moon had said that “inflammatory rhetoric is reprehensible and dangerous [and] will only serve to aggravate the situation in the country”.<sup>403</sup> The United Nations High Commissioner for Human Rights also denounced inciting speech in 2016: “I have also been informed of speeches by members of the Imbonerakure [the youth wing of the ruling party] amounting to incitement to violence against political opponents, with strong ethnic overtones. Given Burundi’s recent history of

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401. Council of Europe (2016, p. 21).

402. Lucas (2014, p. 2).

403. Reuters (2015) U.N. condemns incitement to hatred and violence in Burundi, 6 November 2015. Available from <http://af.reuters.com/article/burundiNews/idAFL1N1311SX20151106>



ethnic bloodshed, these acts of incitement are potentially explosive. I urge the authorities to bring those responsible to justice”.<sup>404</sup>

299. On 25 October 2017, the ICC Prosecutor was authorized to open an investigation (*proprio motu*) into the situation in Burundi in relation to alleged crimes against humanity – mainly murder, rape, torture, imprisonment or severe deprivation of physical liberty, enforced disappearance and persecution<sup>405</sup> – committed by Burundian nationals in and outside the country between 26 April 2015 and 26 October 2017.<sup>406</sup> These (and many other) international responses to incitement to inter-ethnic violence were accompanied by additional measures from the United Nations, the African Union, governments and NGOs as part of a concerted international effort aimed at averting bloodshed in the country. The next section explores international prevention efforts.

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404. Statement by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights, on the situation in Burundi, Geneva, 29 June 2016. Available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20215>

405. Situation in the Republic of Burundi, Public Redacted Version of Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation of the Republic of Burundi, Case no ICC-01/17-X-9-US-Exp, 25 October 2017. The material scope of the investigation, as explicitly authorized by the PTC, could encompass any other crime against humanity, war crime, or genocide falling within the jurisdiction of the ICC, provided the contextual elements are met (see §193).

406. Given that some of the alleged crimes may have been committed before the authorized date for commencement of the investigation and the continuous nature of some of the alleged offenses, the temporal scope could expand before or after those dates (see *Ibid.* §192).



## 7. Prevention

300. This section sets out current international law regarding the legal obligations of governments and international agencies to prevent hate crimes and genocide by identifying and responding to speech that advocates such crimes. The intention here is to provide additional legal and policy suggestions that could assist in developing a framework of international prevention.

### 7.1 Deterrence

301. There is a significant body of social science research and legal findings in cases such as *Nahimana et al.* and *Šešelj* indicating that hate speech is often a precursor to, or an accelerating factor in, the commission of violent crimes.<sup>407</sup> In most instances of mass atrocities, there are early warning signs, including the political rhetoric of leaders encouraging or condoning violence, discriminatory attacks on civilians, and the arming of a population and its organization into militias.<sup>408</sup> Nuremberg prosecutors asserted that many Germans would not have participated in or tolerated

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407. Dower (1986, pp. 3-15); Harris and Fiske (2006, 2011); Lillie et al. (2015); Waldron (2012, p. 66); Yanagizawa-Drott (2014).

408. The idea of creating an early warning system to prevent genocide and mass atrocities goes back at least to Kuper (1985, p. 219).

the Holocaust had they not been influenced so powerfully by Nazi propaganda.<sup>409</sup> Consequently, the prosecution of inchoate speech crimes, irrespective of the existence of subsequent crimes involving physical violence, could provide an indirect means of deterrence.

302. Deterrence is a fundamental rationale of criminal law, however, proving the deterrent effect of criminal proceedings remains an elusive goal, both at the domestic and international levels. In general, deterrence can be divided into two categories: specific deterrence and general deterrence. The former is related to the dissuasive effect that criminal proceedings will have on the individual accused and the extent to which prosecution will reduce his or her probability of re-offending. The latter concerns the dissuasive effect of criminal proceedings on a broader or societal basis, entailing an expectation that criminal proceedings will reduce or prevent the re-occurrence of mass atrocities over the long term.
303. Both types of deterrence are difficult to measure empirically. At the international level, this problem is particularly acute, as the crimes dealt with by ICTs tend to occur in particular settings that are not easily transposable to conflicts in other regions, countries and contexts.<sup>410</sup>

## 7.2 International structures for prevention

304. Once the United Nations Security Council has determined the existence of a threat to peace, an actual breach of the peace or an act of aggression, it has broad discretion in deciding what measures to take in a given situation.<sup>411</sup> However, it is frequently deadlocked, and has often proved unable or unwilling to respond adequately to deteriorating security situations.
305. The United Nations, however, made a commitment at the 2005 World Summit to the Responsibility to Protect (R2P) doctrine, which legitimizes military intervention on

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409. Capt. D.A. Sprecher, (1945) Prosecution oral presentation in the case against Fritzsche, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center. Available at: <http://archives.lib.uconn.edu/islandora/object/20002:1536#page/1/mode/2up>

410. Jenks and Acquaviva (2014).

411. Article 39, Chapter VII, UN Charter

humanitarian grounds to prevent genocide and other atrocities, even in the absence of authorization by the Security Council.<sup>412</sup> This doctrine, along with a need to globalize risk management more generally, led the United Nations to establish a Special Adviser (to the Secretary-General) on the Prevention of Genocide and a Special Adviser on the Responsibility to Protect.<sup>413</sup>

306. It is critical that efforts taken in pursuit of these measures accord with international law, including the prohibition on the interference in State sovereignty under article 2(7) of the United Nations Charter,<sup>414</sup> the *jus ad bellum* set of criteria in customary and conventional law that governs the circumstances in which States may engage in armed conflicts, and international human rights law. Any intervention to curb incitement must err on the side of caution, respecting human rights norms and the international principle of freedom of expression.

## 7.3 The inchoate nature of incitement to genocide and the ILC's Draft Code

307. In the aftermath of the Nuremberg Trials, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in 1948. Article III(c) declares “direct and public

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412. International Commission on Intervention and State Sovereignty (2002).

413. In *Bosnia and Herzegovina v. Serbia and Montenegro* (2007, §§428-432), the ICJ determined the scope of the “duty to prevent” under the Genocide Convention. It held that the duty to prevent is one of conduct and not one of result. A State has to take all the measures in its power to prevent genocide. A State can only be held responsible for breaching an obligation to prevent if the prohibited act is committed. Finally, the ICJ emphasized the difference between a State being held responsible for complicity of a prohibited act and the violation of the duty to prevent. In contrast to complicity, the violation of the duty to prevent does not require any positive action by the State.

414. “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

incitement to genocide” an international crime in its own right.<sup>415</sup> Under the Convention, incitement to genocide is an inchoate crime. Article 6 prescribes territorial jurisdiction and recognizes international jurisdiction to adjudicate the crime of genocide and its related offenses.<sup>416</sup>

308. However, some confusion regarding the nature of incitement to genocide emerged in the International Law Commission (ILC) Draft Code of Crimes against the Peace and Security of Mankind (1996), which states that “[a]n individual shall be responsible for a crime ... if that individual ... directly and publicly incites another individual to commit such a crime *which in fact occurs*” (emphasis added).<sup>417</sup> The ILC Report on the work of its 48th session in 1996, including its commentary on the Draft Code, stated that “the phrase ‘which in fact occurs’ indicates that the criminal responsibility of an individual for inciting another individual to commit a crime ... is limited to situations in which the other individual actually commits that crime”.<sup>418</sup>
309. Under this unprecedented formulation, criminal responsibility for direct and public incitement to genocide is contingent on the commission of a crime. Furthermore, the ILC confused two crimes that are usually distinct in international law: instigation (a mode of liability that attaches to a completed crime) and incitement to genocide (an inchoate crime). The Commission equated incitement to instigation when it stated that the principle of criminal responsibility for incitement was recognized in article III(c) of the Genocide Convention, as well as articles 7(1) and 6(1) of the ICTY and ICTR statutes, respectively, which refer to instigation.<sup>419</sup> In fact, it commenced by noting that “[s]ubparagraph f) addresses the responsibility of the instigator ‘who incites another individual to commit such a crime’”.<sup>420</sup>
310. In light of the paucity of jurisprudential guidance for interpreting article III(c) of the Genocide Convention (which was incorporated verbatim into article 2 of the ICTR Statute), the ICTR’s case law was largely influenced by the ILC’s interpretation.

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415. Convention on the Prevention and Punishment of the Crime of Genocide, article 3(c).

416. Article 6: “Persons charged with genocide or any other acts enumerated under Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

417. ILC Draft Code, 1996, Art. 2(3)(f).

418. ILC Draft Code, 1996, para 16, p 22.

419. ILC Draft Code, 1996, p 22, para 16.

420. ILC Draft Code 1996, p 22, para 16.

The ICTR cited it approvingly in various incitement-related decisions.<sup>421</sup> In fact, in *Nahimana* and *Bikindi*, the ICTR appeared to establish the precedent that genocidal speech must be contemporaneous with an actual genocide for it to constitute incitement to genocide.<sup>422</sup>

311. The ILC's interpretation also influenced the drafters of the Rome Statute of the ICC, where incitement to commit genocide was placed under article 25, alongside modes of liability, as opposed to under the section on crimes, thus creating uncertainty as to whether incitement is an inchoate crime or only a mode of liability for the underlying (and completed) crime of genocide. Under the latter interpretation, direct and public incitement to commit genocide can only be charged when genocide actually occurs.<sup>423</sup> If this interpretation is eventually adopted by the ICC,<sup>424</sup> it would thwart the preventative function of incitement to genocide, which is the only preventative measure included in the Genocide Convention.

## 7.4 Inchoate crimes and prevention

312. Prevention is the central organizing principle underlying inchoate crimes. The central rationale of the crime of direct and public incitement to commit genocide is to deter the kind of public exhortations to commit genocide that ordinarily precede the onset of a violent program of extermination. By basing the evidence of "directness" and "specific intention" in actual outcomes, by insisting on proof of a possible causal link, and by requiring that the speech be contemporaneous with an actual genocide, the ICTR's body of jurisprudence hinders preventive responses to genocide.

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421. *Akayesu* TC §475. See also *Kayishema and Ruzindana* TC §87 (in relation to the adoption of the Genocide Convention's definition of genocide). This flawed legal formulation could have travelled from the International Law Commission to the international criminal tribunals in various ways, including through a transfer of personnel, since one Commissioner (Patrick L. Robinson), who participated in the 1996 session, later became an ICTY judge in 1998 and ICTY President in 2008. (Former Presidents, ICTY. Available from <http://www.icty.org/sid/155>)

422. *Nahimana et al.* AC §§346–347; *Bikindi* TC §255, §421. See also Gordon (2010, p. 262) for a critical commentary on the contemporaneity criterion.

423. This is based on the fact that article 25(3)(e) states that it applies "[i]n respect of the crime of genocide".

424. The ICC has had not yet the opportunity to pronounce on this matter as there has been no case thus far involving its consideration.

313. If amendments to the legal framework adjustments to the interpretations of the law at the ICC were made as discussed above, the ICC could play a central role in prevention by investigating and indicting political leaders for the type of speech acts that are often the precursors to mass atrocities. Targeted investigations of speech acts would have to occur in the early stages of instability, before the mass atrocity occurs. Charging hate speech as persecution (in the content of a widespread or systematic attack on a civilian population) or as incitement to genocide would entail the ICC Chief Prosecutor focusing on the speaker's intention as expressed in his or her speech acts and on the elevated risk of mass hate crimes, rather than on any direct consequences of the speech.<sup>425</sup>
314. The ICC Chief Prosecutor could issue statements against propagandists before election violence spirals out of control, and issue precautionary warnings to competing political parties in the early stages of an election cycle. For instance, in February 2015, a day before her visit to Nigeria, Chief Prosecutor Fatou Bensouda issued a press release ahead of the Nigerian state elections warning that “any person who incites or engages in acts of violence by ordering, requesting, encouraging or contributing in any other manner to the commission of crimes ... is liable to prosecution either by Nigerian Courts or by ICC”.<sup>426</sup> The 2015 Nigerian elections passed off with less ethnic conflict and religious strife than initially expected, a positive outcome that received little comment in the international media.
315. As discussed above, incitement to genocide is currently listed alongside modes of liability under article 25(3)(e) of the Rome Statute.<sup>427</sup> Introducing the above suggested amendment would re-assert and operationalize the preventative function of the ICC in relation to speech acts concerning all core international crimes listed in the Rome Statute, not just genocide.
316. There are additional ways of enhancing the preventative function of speech crimes without further amendments to the Rome Statute. The ICC Appeals Chamber

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425. In the case of hate speech as persecution as a crime against humanity, the speech act would have to occur in the context of a widespread or systematic attack on a civilian population, as is the case with all crimes against humanity.

426. International Criminal Court Office of the Prosecutor (2015). Press Release: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the general and state elections in Nigeria. 2 February 2015.

427. Article 20 of the International Covenant on Civil and Political Rights (United Nations, 1966).



could reaffirm that incitement to genocide is an inchoate crime, where the conduct is the crime and proof of intentionality does not rest upon causation. It could also confirm that incitement to genocide can transpire before a genocide is actually underway, thus nullifying the ICTR's apparent requirement (in *Nahimana* and *Bikindi*) that genocidal speech be contemporaneous with an actual genocide.<sup>428</sup>

*The ICC, however, could play a central role in prevention by investigating and indicting political leaders for the type of speech acts that are often the precursors to mass atrocities.*

317. Current United Nations treaties could also assist prevention more fulsomely than they do at present. Mechanisms for enforcing state obligations under the ICCPR could be re-visited so that states undertake administrative, judicial and legislative measures in compliance with their obligations to protect against any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence [which] shall be prohibited by law”, as provided for in article 20.<sup>429</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) could be used in a similar manner. Article 4 of ICERD compels national governments to declare punishable by law any incitement to racial discrimination, as well as incitement to violence based on racial discrimination or ethnic origin.<sup>430</sup> It should perhaps be noted here, however, that many free-speech advocates are uncomfortable with article 4, and it does not command a wide international consensus.

## 7.5 A risk assessment model for speech crimes

318. A significant factor in the decision by international prosecutors to charge incitement or hate speech is the calculation of the likelihood that violence will ensue from a speaker's utterances. Risk evaluations are often subjective and impressionistic, and may be based upon incomplete or conflicting reports about the volatility of a given political situation. The question then arises as to the risk assessment model prosecutors employ, and more specifically, how they identify the type of speech acts and surrounding conditions that are most likely to precipitate imminent violent acts.

428. *Nahimana et al.* AC \$636, \$754; *Bikindi* TC \$255, \$421.

429. Article 20 of the International Covenant on Civil and Political Rights (United Nations, 1966).

430. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations, 1965).

319. The answer is largely dependent on the situation on the ground, as every context is unique and merits a specific legal response. Social research, however, can shed light on some of the most demanding issues in the adjudication of speech crimes in international law, especially with regard to the effects of distinct types of speech on distinct audiences. Generally, social scientists adopt a multi-factorial approach to the consequences of political speech, and recent research has identified many of the key variables that characterize attempts at mass persuasion.
320. The following conditions relating to the status of the speaker, the content of the message and the context of the speech act predict the causal effects of inciting speech:
- 320.1. the speaker holds a recognized position of authority in government or a political organization;
  - 320.2. the speaker is perceived as credible by his or her audience;
  - 320.3. the speaker is perceived as charismatic by his or her audience;
  - 320.4. the speaker is particularly skillful at summoning up pre-existing cultural symbols and narratives in order to cultivate historical grievances;
  - 320.5. the speaker uses dehumanizing utterances, refers to past atrocities and calls for revenge against the out-group;
  - 320.6. the speaker resorts to intense language, replete with vivid images, graphic metaphors and exaggerations;
  - 320.7. the speech is perceived as “powerful” by the audience;
  - 320.8. the speaker’s message is widely disseminated through mass communication fora, such as radio, television or Twitter;
  - 320.9. the speaker wields a monopoly on the means of communication or has the capacity to censor and suppress information;
  - 320.10. the emotional state of the audience is influenced and/or more prone to manipulation by circumstances of insecurity and uncertainty;
  - 320.11. There is a history of intergroup conflict between the in-group and out-group;

- 320.12. There is a national political election in the next 12 months;
- 320.13. The number of instances of inter-group violence has increased in previous months, and the instances have gone unpunished;
- 320.14. the speech instills fear by labeling a perceived direct or indirect threat and then suggesting a distinct and foreseeably violent course of action that can be taken by the audience to remove the source of that threat.
321. The above list is not exhaustive and additional factors may be added as our knowledge increases.<sup>431</sup> Furthermore, the listed conditions can neither be regarded as a *conditio sine qua non*, nor as automatically denoting uptake by an audience. Moreover, the risk assessment model in itself cannot determine a court's determination of the facts: each case should be decided in the light of the applicable law, the specific evidentiary pattern and the merits of the arguments of the parties involved. What this framework does, however, is to provide the court with an *ex ante* framework for undertaking a context-specific evaluation of speech acts and identifying in broad terms the types of speakers, the contexts and the content of speech acts most likely to prompt mass crimes.
322. In addition to the factors outlined above, additional contextual factors at the societal level can be influential in determining whether speech acts will escalate into kinetic violence. The following factors are based on the authors' familiarity with recent examples of mass crimes that have come before international tribunals, namely: (1) deficient regulatory or rule-of-law frameworks, and/or deficient application or lack of enforcement of existing regulations; (2) sectarian divisions; (3) perceived historic injustices at the individual and societal levels; (4) a "weaponized society" in which civilians have ready access to military-grade weaponry; (5) a history of colonization; (6) the unquestioning loyalty of security services to the leadership; and (7) poor economic and development prospects for young men who tend to be the main material perpetrators in a conflict.
323. Identifying the prevailing circumstances that are likely to result in audience persuasion can assist criminal courts in assessing the nature of speech acts and their likely impact on the

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431. For instance, Expectancy Value Theory predicts that audience behavior is likely to be influenced by the expectation of future success and rewards (Fishbein 1967; Wigfield and Eccles, 2000). These expectations may include economic or material gain. Kalyvas (2006: 351) observes that during civil wars, ordinary people often opportunistically take advantage of the vacuum of state authority to exact revenge as well as to appropriate their neighbors' assets.

commission of crimes. A multi-factorial matrix based on the list above could assist prosecution teams and the ICC's pre-trial chamber in their assessment of the gravity of relevant utterances by politicians, prominent public figures, leaders of non-state armed groups, or other individuals in positions of influence.

324. The proposed risk assessment model could offer a significant contribution to the decision-making framework currently available to international prosecutors, who tend to rely on their internal teams' impressions of the effects of a speaker's words on a deteriorating security situation, impressions that are often characterized by incomplete and imperfect information, or informed by media biases. The more objective matrix proposed above has several advantages over the present set of established conventions at international criminal tribunals. The model quantifies and measures the conditions for the uptake of inciting speech, a process that reduces – but does not purport to eliminate – individual perceptions. Furthermore, it grounds its indicators in peer-reviewed social science research on persuasion. By stating its terms and criteria *ex ante*, the model is subject to external review by other legal actors at international tribunals, such as defense attorneys, pre-trial judges and victims' legal representatives, as well as by social scientists and other professionals with expertise in evaluating denigrating and inciting speech. As mentioned above, the matrix aims to reduce the level of ambiguity and uncertainty in risk assessments of speech acts. To the extent that it achieves this aim, it could prove a practical tool for initiating improvements in the standard practice of risk assessment.

## 8. New challenges

### 8.1 The Internet, social media and the issue of widespread dissemination

325. The Internet has indisputably allowed for global communication and access to information beyond territorial frontiers, enabling communication in real time and the dissemination of ideas and information at an unprecedented speed. Cyber-space has resulted in a forum that has simultaneously facilitated the realization of freedom of speech and made incitement more likely to manifest itself, especially given the anonymity it grants its users. Given the amplifying effects of social media, some of the types of speech identified above as likely to fuel grievances and foster violence permeate the web without restriction.<sup>432</sup> In fact, the reported reach of hate propaganda and “hate group activity” in particular has spread with social media rise, and the origins of a program of inciting speech have become far more difficult to trace.<sup>433</sup>
326. Digital communication technologies offer a novel forum for the realization of freedom of speech by easily engaging diversified audiences. Since these online spaces are a new medium for the dissemination of hate speech, their influence on the audience’s actions merits analytical observation. One possible emerging result is the creation of a vicious cycle in which

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432. For example, the global protests against an anti-Islam film trailer distributed online in 2012.

433. See Anti-Defamation League (2013), and Titley, Keen and Foldi (2014).

audiences convene around hateful content, converse in a self-selected group, and form new ideas or support their original biases aided by the hateful beliefs of others.<sup>434</sup>

327. This new challenge presents three features of particular relevance to the investigation of speech crimes: 1) speaker anonymity, rendering tracking of their origin and location particularly difficult and resource-intensive; 2) misleading information, as the facility of its publication and dissemination usually entails unsourced materials and/or unfounded facts; and 3) tampering with evidence, which is particularly facilitated by technology that enables editing, adjusting, or even the stealing of intellectual property (usually associated with breaches of privacy). Investigative techniques and methods need to be enhanced in order to counteract these difficulties.

## 8.2 Asserting territorial jurisdiction over speech crimes on the Internet

328. Another challenge relating to speech crime and new media concerns the power to establish territorial jurisdiction over online crimes. In domestic cases, courts have tended to justify jurisdiction on the basis of the target audience's location. In *Töben*, for example, Frederick *Töben had* used a host server in Australia to publish a series of blog entries in which he essentially denied the Holocaust;<sup>435</sup> however, the German Federal Court of Justice upheld Germany's jurisdiction over the case because the harmful effects of the communication in question "could be construed as having occurred in Germany".<sup>436</sup> Likewise, the French courts asserted jurisdiction over the *Yahoo!* case concerning the online sale of Nazi memorabilia (the display of Nazi signs, uniforms, and the like is prohibited under French criminal law) because "the act in question had materialized equally in French territory since the Yahoo! websites were accessible from France".<sup>437</sup>

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434. Available from <http://www.dw.com/en/the-importance-of-monitoring-online-hate-speech/a-19104789>.

435. Vagias (2016 p. 531).

436. *Ibid.* (p. 532), referring to *Re Töben*; Decision of the District Court of Mannheim, *Urt. v 10.11.1999 – 5 KLS 503 Js 9551/99*; Decision of the Federal Court of Justice (BGH), *Urt. v 12.12.2000 – 1 StR 184/00*, reported in 54(8) *NJW* (2001) pp. 624–628.

437. Vagias (2016, p. 533).

329. This audience-based approach to establishing territorial jurisdiction, however, is problematic for the ICC with regards to direct incitement to commit genocide. The Court has limited bases on which to establish its jurisdiction in the absence of a Security Council referral – namely, territorial and/or national (“active personality”) jurisdiction by a State Party (or a State accepting the ICC’s jurisdiction ad hoc), as described above. Under article 12(2)(a) of the ICC Statute, “the Court’s territorial jurisdiction is conditional upon the occurrence of ‘the conduct in question’ on State Party territory”.<sup>438</sup>
330. In the case of incitement, different countries may be involved in the publication of online content: the country in which the author writes the content, the country where the host-server is situated and the country in which the website is based. These three locations may differ but all three factors are essential for the message to go public. Nevertheless, if there is a sufficient link to where the message is received, independent of the acts of the accused, then the speech acts committed and broadcast in non-party States could easily fall within the ICC’s jurisdiction due to the re-broadcast of the message via media based in States Parties. That being said, because direct and public incitement to genocide is formulated as an apparent mode of liability under the Rome Statute, it may be necessary to establish actual genocidal acts within a State Party’s territory or by a national of a State Party in order for the speech crime to fall within the Court’s jurisdiction.

## 8.3 The role of intermediaries and news media organizations

331. The regulation of hate speech triggers a number of reasonable freedom of expression concerns, given that government regulation may be too heavy-handed;<sup>439</sup> however, hate speech regulation is also mandated by international law.<sup>440</sup> Internet intermediaries wield consid-

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438. *Ibid.* (p. 538).

439. In the United States, content-based restrictions on speech are not permitted under constitutional law: see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding that a city ordinance that prohibited expression that “arouses anger, alarm or resentment in others ... on the basis of race, color, creed, religion, or gender” impermissibly discriminated on the basis of viewpoint in violation of the First Amendment [internal quotation marks omitted]). The United States is unique in this regard and therefore cannot serve as the basis for a generalizable view on freedom of speech worldwide.

440. Citron and Norton (2011).

erable control over what we see and hear today, akin to that of influential cable television and radio talk shows. Examples include search engines like Google, Microsoft and Yahoo!; browsers like Mozilla; social network sites like Facebook and Formspring.me; micro-blogging services like Twitter; video-sharing sites like YouTube; and newsgathering services like Digg. As more and more expression appears online, these intermediaries increasingly impact the flow of information.<sup>441</sup>

332. The responsibility of intermediaries as private corporations to remove hateful and inciting content varies from country to country. Germany, as we have seen, has enacted strict legislation that requires social media companies with more than 2 million followers to remove speech that violates its incitement law within 24 hours or face a significant financial penalty. In the United States, on the other hand, intermediaries are statutorily immunized from liability for publishing content created by others, as well as for removing that content.<sup>442</sup>
333. Besides intermediaries, news organizations play an important role in countering hate speech online. Many news organizations respond to this problem through post moderation – deleting or relegating posts flagged as hate speech. Rather than amounting to censorship, such practices can in fact aid open discussion by ensuring, for instance, that women can speak up without enduring a barrage of abuse intended to intimidate and silence them.<sup>443</sup> Users are often protected by the ability to post hateful comments anonymously. Requiring users to use their real identity on online news platforms can increase the chances of holding them accountable for the hate speech they post. At the same time, this requirement is a double-edged sword: in countries with authoritarian regimes, it increases the risk that governments will be able to identify and suppress legitimate political dissent.

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441. *Ibid.* 3

442. 47 U.S.C. §230(c) (2006); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (barring claims against an online service provider under §230 because the defendant did not create the allegedly tortuous content). Intermediaries can incur liability for content that they create themselves (e.g., for their own postings that are defamatory or threatening), or for publishing content that violates copyright law. 47 U.S.C. §230(e)(1). See also Seltzer (2010, p. 171, p. 228), who notes that §230 “specifically excludes intellectual property and criminal claims from its protections”. For instance, ISPs and website operators can incur liability under the Digital Millennium Copyright Act for refusing to take down content that they have been notified violates copyright law, whereas they enjoy immunity from liability for defamatory postings created by others.

443. George (2017).



## 8.4 Issues arising in international criminal law

334. In the European Union, the Additional Protocol to the Convention on Cybercrime (2003)<sup>444</sup> directs States Parties to provide for criminal liability for the distribution of or making available racist and xenophobic content<sup>445</sup> on the Internet, insults on a discriminatory basis (articles 3 and 5), and the denial or gross minimization, approval or justification of genocide or crimes against humanity, as defined by international law and recognized by the International Military Tribunal or any other international criminal tribunals whose jurisdiction the State Party recognizes. Criminalizing denial, minimization, approval or justification is, however, left to the discretion of States, who can also require that the conduct is committed with the intent to incite hatred, discrimination or violence (article 6).
335. All of the offenses considered by the Protocol for criminalization in domestic legal systems require the conduct to be “intentional”, although it does not define intentional conduct. The Explanatory Report notes that both the Convention and the Protocol have left the “intent” requirement to national interpretation. As such, Internet service providers (ISPs) that merely serve as a conduit for or host a website or bulletin board containing racist or xenophobic material can be only held accountable if the intent requirement, as interpreted by national law, is met. As a result, the liability of ISPs, which are not required to monitor users’ activity, is limited.<sup>446</sup> Conversely, natural or legal persons who post such material will generally meet the requirement as long as the posting is intentional.<sup>447</sup> As such, it is still uncertain whether re-sharing or re-tweeting hate speech, racially supremacist material or representations of ideas that incite, promote or advocate hatred, discrimination or violence could amount to aiding and abetting. According to article 7, aiding and abetting the intentional commission of any of the offenses recognized by the Protocol should also be sanctioned in domestic law.
336. In the context of the Rome Statute, speech crimes committed in cyber-space are likely to trigger jurisdictional issues, and in particular the knotty question of territorial jurisdiction. Article 12(2)(a) of the Rome Statute<sup>448</sup> states that the ICC has territorial jurisdiction when

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444. Additional Protocol to the Convention on Cybercrime concerning the Criminalization of Acts of Racist and Xenophobic Nature Committed through Computer Systems (Council of Europe), ETS No 189, 28 January 2003, entered into force 1 March 2006.

445. *Ibid.* Article 2(1): “Racist and xenophobic material” encompasses any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence”.

446. Explanatory Report to the Additional Protocol, para 25.

447. Van Blarcum (2005).

448. In article 12 of the Rome Statute, the preconditions to the exercise of jurisdiction state: “1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the

“the conduct in question occurs” on the territory of a State Party or a State that has accepted its jurisdiction “pursuant to Article 12(2)(3)”.<sup>449</sup> However, this provision is not clear as to whether the jurisdiction covers the territory where the crime started or the territory where the consequences are manifested, or both. As a result, the adjudication of speech crimes committed in cyber-space could give rise to interpretative problems.

337. In the context of complementarity, it should be noted that the European Cybercrime Convention declares that States Parties should provide for territorial jurisdiction over the offenses contained in the Convention, without prejudice to the exercise of jurisdiction under distinct basis, in accordance with national law.<sup>450</sup>

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crimes referred to in Article 5. 2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if

the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national”.

449. *Journal of Conflict Security Law* (2016, vol. 21, no. 3, p. 523).

450. Council of Europe (2001) Article 22(1)(a), (d).

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# Annex I: Monitoring mechanisms

## a) International monitoring mechanisms

338. At the international level, there are two major treaty bodies involved in monitoring the implementation of treaties that include provisions prohibiting hate speech: the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the United Nations Human Rights Committee (HRC).
339. CERD oversees States Parties' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Under article 9(1)(a) and (b), States Parties have an obligation to submit regular reports to CERD on how they are implementing the rights set out in the Convention. The first report is due within a year of the Convention's entry into force in the State concerned, and every two years thereafter. However, CERD may request a further report at any time, as well as additional information. It examines each report and addresses its concerns and recommendations to the State Party in "concluding observations". In its effort to monitor hate speech, CERD has adopted some specific recommendations such as General Recommendations No. 35 (combating racist hate speech) and No. 7 (related to the implementation of article 4 of the ICERD).
340. The HRC is responsible for monitoring the implementation by its Member States of the rights set out in the ICCPR. According to article 40 of the ICCPR, the HCR monitoring function consists in examining reports submitted by States Parties, adopting general comments on articles of the International Covenant on Civil and Political Rights (ICCPR), and receiving

individual and interstate complaints. Both the CERD and HRC committees (article 41.1 of the ICCPR) can monitor a State Party's implementation of the treaties following an individual or interstate complaint only if the State concerned has accepted their authority to do so. The committees' monitoring actions, however, are limited to the treaty provisions for which no reservation has been entered. Thus, States Parties which entered reservations on provisions prohibiting hate speech (article 20 of the ICCPR and article 4 of the ICERD) may not be subject to international monitoring of hate speech, regardless of their acceptance of the committees' authority.

341. The United Nations Special Rapporteur on Minority Issues also plays a significant role in monitoring hate speech at the international level. Under her mandate to promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, the Rapporteur engages in consultation with governments regarding acts of hate speech and incitement to hatred against minorities. She receives complaints about hateful messages and incitement to hatred directed at minorities in the media, and makes recommendations to Member States.<sup>451</sup>
342. The United Nations Special Rapporteur on Freedom of Expression monitors "violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information".<sup>452</sup>
343. At the regional level, the Council of Europe has a country monitoring program led by the European Commission against Racism and Intolerance (ECRI). This consists of examining manifestations of racism and intolerance through speech or other means in each of the Council of Europe's Member States. The ECRI's findings, along with recommendations as to how each country might deal with the problems identified, are published in country reports. These are drafted after a contact visit to the country concerned and a confidential dialogue with the national authorities. The country monitoring applies to all Member States on an equal footing and takes place in five-year cycles, covering nine or ten countries a year. With respect to hate speech, the ECRI team looks into measures taken to deal with forms of expression that should be criminalized and, more generally, with intolerant and inciting discourse tar-

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451. Available from [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A\\_HRC\\_28\\_64\\_ENG.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_64_ENG.doc).

452. <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>.

getting vulnerable groups to the Commission.<sup>453</sup> As part of its monitoring efforts, the ECRI has adopted General Policy Recommendation No. 15 on combatting hate speech.

344. The European Union is also active in monitoring hate speech through some specific projects, such as MANDOLA, a European Union-funded project on monitoring and detecting hate speech online. This aims at monitoring the spread and penetration of online hate speech in Member States using big-data approaches, while investigating the possibility of distinguishing between potentially illegal and non-illegal hate-related speeches.<sup>454</sup>
345. A further project, Monitoring and Reporting Online Hate Speech in Europe (eMORE), is co-funded by the European Union's Rights, Equality and Citizenship Program.<sup>455</sup> The project's objective is to contribute to developing, testing and transferring a knowledge model of online hate speech and offline hate crime. It advances a joint monitoring-reporting system in order to gain a sound understanding of both online and offline phenomena and trends, and to support comparative analyzes and the harmonized combat of hate-motivated offenses at both the European and national level.<sup>456</sup>
346. Other projects funded by the European Union are Research Report Remove: Countering Cyber Hate Phenomena and PRISM, managed by the International Network Against Cyber Hate and ARCI (a national association for social promotion), respectively. In addition to these projects, the European Commission and IT companies (Facebook, Twitter, YouTube and Microsoft) have adopted a code of conduct that imposes obligations on the latter to monitor hate speech.<sup>457</sup> The code requires them to review hateful online content within 24 hours of being notified, and to take this content down if necessary.<sup>458</sup> It also obliges them to identify and promote "independent counter-narratives" to online hate speech and propaganda.<sup>459</sup> These IT companies have committed themselves to monitoring hate speech in each of the 28 European Union Member States.

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453. ECRI Country Monitoring Program. Available from [https://www.coe.int/t/dghl/monitoring/ecri/default\\_en.asp](https://www.coe.int/t/dghl/monitoring/ecri/default_en.asp)

454. Available from <http://mandola-project.eu>.

455. Available at <https://www.emoreproject.eu/>

456. Available at <http://www.emoreproject.eu/about-project/>

457. Available at [http://europa.eu/rapid/press-release\\_IP-16-1937\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1937_en.htm)

458. Ibid.

459. Ibid.

347. This agreement at the European Union level does not prevent a Member State from adopting a national policy imposing stricter obligations on the same companies. In Germany, a 2017 law entitled *Netzwerkdurchsetzungsgesetz* (NetzDG) has introduced a federal program to monitor Internet activity on social media platforms with more than 2 million users, including Twitter, Facebook and YouTube.<sup>460</sup> This establishes measures that impose fines of up to €50 million if social media companies fail to remove speech that violates German law (including hate speech, defamation and inciting speech) from their platform within 24 hours of receiving a complaint, and within seven days for “complex cases”.<sup>461</sup>

## b) Domestic monitoring mechanisms

348. Many countries have well-established mechanisms for monitoring hate crime, and because hate speech is also regarded a hate crime in some of these countries, it is included in the monitoring process. A smaller number of countries also have specific hate-speech monitoring mechanisms. Kenya, for example, has a government agency that acts as a public watchdog for hate speech: the Kenyan National Cohesion and Integration Commission (NCIC) has a complaints mechanism which allows anyone to submit a complaint to the Commission against an individual or group of people based on hate-speech allegations.<sup>462</sup> During the 2013 election, NCIC tracked the speeches of public officials and sent confidential “cessation notices” (warning letters) to those whose speech was, in its view, hateful or dangerous.<sup>463</sup>
349. In the United States, the focus remains on monitoring hate crime, although discriminatory speech and hate symbols such as swastikas are included in the officially recognized indicators of a hate crime. The 1990 Hate Crime Statistics Act (28 U.S.C., paragraph 534) provides a legal basis for monitoring by a government agency. The Federal Bureau of Investigation is in charge of performing this task. The FBI tracks and documents hate crimes motivated by a bias against race, ethnicity, ancestry, religion, sexual orientation, disability, gender and gender identity, and publishes an annual report on hate crime based on information provided

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460. Available at <http://www.bbc.com/news/technology-42510868>

461. Available from <https://www.npr.org/sections/parallels/2017/10/31/561024666/with-huge-fines-german-law-pushes-social-networks-to-delete-abusive-posts>.

462. In the NCIC’s understanding, hate speech is a use of threatening, inciting, abusive or insulting words or behavior, or the display of any written material with the intention of stirring up ethnic hatred. The NCIC definition of hate speech is available from <https://www.cohesion.or.ke/index.php/departments/enforcement-complaints-legal>.

463. Benesch (2014, pp. 8-9).

by local, state and federal law enforcement officials.<sup>464</sup> However, the underreporting of hate crimes is widely recognized to be a problem in the United States – for example, 88 per cent of law enforcement agencies report no hate crimes in their districts.<sup>465</sup>

350. In the United Kingdom, monitoring is also focused on hate crime, although hate speech is included as it is categorized as a hate crime. The country regularly adopts a four-year action plan that sets out its government’s commitment to combating hate crime.<sup>466</sup> The plan’s framework requires regional police forces to capture data on recorded hate crime under five monitored strands (disability, gender-identity, race, religion and sexual orientation) and to publish data containing official statistics on hate crime.
351. In sum, countries seem to have a preference for monitoring hate crimes rather than hate speech, yet monitoring hate speech could serve as an early warning system for hate crimes. Recent social science research demonstrates a close correlation between online hate speech and attacks on immigrants and other minority groups.<sup>467</sup> Since speech is used to spread hate, encouraging an environment of hatred and inciting violence against an identified group, it precedes hate crimes. Thus, in order to better tackle hate crime, the focus should be on monitoring hate speech, including racist and anti-immigrant speech that is often a precursor to identifiable hate crimes. With the current increase in hate speech-related incidents, the trend should be toward establishing hate speech monitoring mechanisms at a national level.

## c) Monitoring mechanisms by civil society and the private sector

352. There are a number of international projects, conducted by civil society organizations and academics, that monitor hate speech. These track down hateful messages (using both manual and automated monitoring techniques), store them in a database and publish reports on their findings. Some of the projects use their own criteria to determine what messages constitute hate speech, while others rely on a framework defined by academic experts.<sup>468</sup> Depending

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464. Available from <https://www.fbi.gov/news/stories/2015-hate-crime-statistics-released>.

465. Burch (2017).

466. Home Office (2016). *Action Against Hate: The UK Government’s Action Plan for Tackling Hate Crime*. Available from [http://www.report-it.org.uk/files/action\\_against\\_hate\\_uk\\_government\\_s\\_plan\\_to\\_tackle\\_hate\\_crime\\_2016.pdf](http://www.report-it.org.uk/files/action_against_hate_uk_government_s_plan_to_tackle_hate_crime_2016.pdf).

467. See Müller and Schwarz (2017) and Rushin and Edwards (2018) on social media and hate crimes in 2017.

468. For instance, Umati, a project in Kenya, uses Benesch’s framework for dangerous speech as guidance in identifying hate speech on online platform. See <https://dangerousspeech.org/umati-monitoring-online->

on the type of monitoring they undertake, the projects can be divided into three groups: real-time monitoring and mapping, retrospective monitoring and mapping, and discourse and content analysis.<sup>469</sup>

353. Real-time monitoring and mapping projects continuously monitor online media, and sometimes even print media, for hate speech.<sup>470</sup> Concretely, they scan selected blogs, forums, online and print newspapers, and Facebook and Twitter on a daily basis. Any messages that in their view constitute hate speech are recorded in an online database.<sup>471</sup> Umati and Uchaguzi in Kenya and Media Monitoring Project Zimbabwe are among the projects conducting this type of monitoring.<sup>472</sup>
354. Retrospective monitoring and mapping projects engage in *ex post facto* monitoring of hate speech. These projects focus on looking at archived messages or collecting messages for a short period of time and then proceeding to analyze them using mainly computerized monitoring systems.<sup>473</sup> Among the projects conducting this type of monitoring are the Demos Centre for Analysis of Social Media (United Kingdom); Humboldt State University's Geography of Hate (United States); the Network of Social Mediators (Kyrgyzstan), the Mouvement contre le racism et pour l'amitié entre les peuples (France); and the Institute of Human Rights and the Prevention of Xenophobia (Ukraine).<sup>474</sup>
355. Discourse and content analyzes projects examine potential hate messages published online within their social and political context in order to understand the meaning, motivations and ideologies behind the messages, and to unpick their components and delivery.<sup>475</sup> The main goal of these scholarly projects is to understand how hate messages are constructed and how they influence their audience.<sup>476</sup> Prentice et al. (2012), Warner and Hirschberg (2012) and Brindle (2009) have all conducted leading projects using this approach.<sup>477</sup>

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[dangerous-speech/](#)

469. Lucas (2014).

470. Ibid.

471. Ibid.

472. Ibid.

473. Ibid.

474. Ibid.

475. Ibid.

476. Ibid.

477. Ibid.



356. Major social media companies, namely Facebook, Twitter and YouTube, are also engaged in monitoring hate speech on their platforms. YouTube, for example, defines hate speech as content that promotes violence or hatred against individuals or groups based on certain attributes, such as race or ethnic origin, religion, disability, gender, age, veteran status and sexual orientation/gender identity, and it is not allowed on its platform.<sup>478</sup> YouTube recommends that its users report hate speech to its team by flagging a video or by filing an abuse report.<sup>479</sup>
357. Facebook has refined its community standards to include the prohibition of hate speech on its platform.<sup>480</sup> According to its policies, Facebook tracks messages and takes down any that include content directly attacking others based on the following characteristics: race, national origin, sexual orientation, religious affiliation, ethnicity, sex, gender or gender identity, serious disability or disease.<sup>481</sup> The company has a team of content reviewers that looks into requests by users or national governments to remove content.<sup>482</sup>
358. According to the policies set out in Twitter's rules, any hateful conduct is prohibited on its platform.<sup>483</sup> For Twitter, hateful conduct refers to conduct that promotes violence against or directly attacks or threatens others on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability or disease. It also prohibits conduct whose primary purpose is to incite harm to others on the basis of these categories. If it identifies such conduct, Twitter may temporarily lock or permanently suspend the user's account.<sup>484</sup>

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478. Youtube, Policy Center. Available from <https://support.google.com/youtube/answer/2801939?hl=en>

479. Ibid.

480. See Facebook Community Standard. Available from <https://www.facebook.com/communitystandards#hate-speech>

481. Ibid.

482. Ibid.

483. See The Twitter Rules. Available at <https://support.twitter.com/articles/18311>

484. Ibid.



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# The Hartford Guidelines on Speech Crimes in International Criminal Law

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