

Incitement in international criminal law

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Abstract

The author critically analyses in this article the status of incitement in international criminal law. After a discussion of the relevant judgments by the Nuremberg Tribunal and related courts, including German de-Nazification courts, the travaux préparatoires of the Genocide Convention and the case-law of the International Criminal Tribunals, the international approach is criticized, particularly its practice of regarding only direct and public incitement to genocide as inchoate, whilst instigation generally is treated as not inchoate. The author recommends the adoption of an approach modelled on German and Swiss domestic law and argues that instigation per se should also be regarded as an inchoate crime.

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In 1920, thirteen years before Hitler came to power in Germany, the so-called *Protocols of the Elders of Zion* was published in Germany for the first time, amidst a flurry of other anti-Semitic writings. They purportedly consisted of the minutes of a fabricated meeting of Jewish elders in Berne in 1897, and contained allegations of a Jewish conspiracy to rule the world and enslave Christians.¹ Viciously anti-Semitic, by 1933 they had gone through thirty-three editions.² An eyewitness

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writing in 1920 described the effect in Germany of the publication of the pamphlet:

In Berlin I attended several meetings which were entirely devoted to the *Protocols*. The speaker was usually a professor, a teacher, an editor, a lawyer or someone of that kind. The audience consisted of members of the educated class, civil servants, tradesmen, former officers, ladies, above all students Passions were whipped up to the boiling point. There, in front of one, in the flesh, was the cause of all ills – those who had made the war and brought about the defeat and engineered the revolution, those who had conjured up all our suffering I observed the students. A few hours earlier they had perhaps been exerting all their mental energy in a seminar under the guidance of a world-famous scholar. ... Now young blood was boiling, eyes flashed, fists clenched, hoarse voices roared applause or vengeance.³

On the night of 15–16 April 1993 Dario Kordić, at the time president of the Croatian Democratic Union of Bosnia and Herzegovina, the principal Bosnian Croat political party, convened a meeting at his house at which a decision was taken by several politicians, including Kordić, to plan an attack on Ahmici, aimed at “cleansing” the area of its Muslim inhabitants. The meeting approved an order to kill all men of military age, expel the civilians and set the houses on fire.⁴ A witness had testified that Kordić’s comment on hearing that civilians might get killed was “so what?”⁵ The trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that by these and similar actions, Kordić had planned, instigated and ordered various war crimes and crimes against humanity.⁶

On 4 June 1994, in one of many similar broadcasts on Radio-Télévision Libre des Mille Collines (RTL), Kantano Habimana called for 100,000 young men to be “recruited rapidly”, who

should all stand up so that we will kill the Inkotanyi and exterminate them ... [T]he reason that we will exterminate them is that they belong to one ethnic group. Look at the person’s height and his physical appearance. Just look at his small nose and then break it.⁷

Incitement such as this spurred on the massacres which made up the Rwandan genocide of 1994. Its effectiveness is evidenced in the testimony of a former *génocidaire*:

1 A. Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, New York University Press, New York, 2002, p. 20.

2 *Ibid.*, p. 21.

3 Cited in *ibid.*, p. 22.

4 *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgement (Trial Chamber), 26 February 2001, para. 631.

5 *Ibid.*, para. 627.

6 *Ibid.*, para. 834.

7 *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence (Trial Chamber), 3 December 2003, para. 396.

They kept saying Tutsis were cockroaches. Because they had given up on them we started working and killed them.⁸

These accounts illustrate that incitement or instigation (which is often considered to be synonymous with incitement), can be committed in public as well as in private, and can be direct and explicit as well as indirect. They indicate, as this article will demonstrate, that the danger of public incitement is different from that of incitement in private. Whilst public incitement such as that described in the first and last accounts regarding Nazi Germany and Rwanda is primarily dangerous because it leads to the creation of an atmosphere of hatred and xenophobia and entails the exertion of influence on people's minds, incitement in private is dangerous because the instigator succeeds in triggering a determination in the instigatee's mind to commit a particular crime.

This article will begin with a brief technical discussion of the notion of inchoate crimes. An understanding of the rationale underlying the criminalization of such acts is indispensable for an analysis of the speech acts dealt with in this article, as a considerable part of the debate centres around whether they are inchoate or not. The status of incitement and instigation in international law is then outlined, followed by a critical analysis of the international approach. Ways in which the shortcomings of the international approach can be improved will be indicated.

Inchoate crimes

The word "inchoate" denotes something that has "just begun" or is "under-developed",⁹ "partially completed" or "imperfectly formed".¹⁰ Inchoate offences are thus incomplete offences, which are deemed to have been committed despite the fact that the substantive offence, that is, the offence whose commission they were aiming at, is not completed and the intended harm is not realized. *Black's Law Dictionary* describes such an offence as "A step toward the commission of another crime, the step in itself being serious enough to merit punishment".¹¹ In English common law there are three general inchoate offences: attempt, conspiracy and incitement (or solicitation in US law). All of them may incur criminal liability even though the crime they were intended to bring about does not materialize.¹² In the case of incitement, the crime is completed despite the fact that the person incited fails to commit the act to which he or she has been incited.

8 F. Keane, "Deliver us from evil", *Independent Magazine*, 3 April 2004, p. 16.

9 A. Ashworth, *Principles of Criminal Law*, 4th edn, Oxford University Press, Oxford, 2003 p. 445.

10 B. A. Garner (ed.), *Black's Law Dictionary*, 7th edn, West Group, St. Paul, Minn., 1999, p. 765.

11 *Ibid.*, p. 1108.

12 *Ibid.* *Black's Law Dictionary* names the term "choate" as the antonym of "inchoate", meaning "complete in and of itself" and "having ripened or become perfected": p. 234. However, this term does not appear to be generally used to denote preparatory criminal acts which, in order to give rise to individual criminal responsibility, need to be followed by the crime sought to be brought about.

Since the intended harm does not actually result, the question is why inchoate offences should incur individual criminal responsibility at all. As Ashworth explains, one rationale lies in the fact that “the concern [in criminal liability] is not merely with the occurrence of harm but also with its prevention”.¹³ In terms of moral culpability, there is no difference between an individual who attempts to commit a crime and fails and another who succeeds; the outcome in both cases is a matter of chance. As criminal law should concern itself with culpability rather than “the vagaries of fortune”,¹⁴ it follows that both the unsuccessful attempter and the individual who successfully completes the crime should be punished. The American Law Institute similarly fails to distinguish between attempts and completed crimes, reasoning that the punishment should orient itself by the degree of anti-social behaviour, which is the same in both cases.¹⁵

Although it is certainly debatable whether the punishment for attempts and other inchoate crimes ought to be exactly the same as for the crime sought to be brought about, this approach in any case appears to accord full respect to individual autonomy in the Kantian sense. In his *Grundlegung zur Metaphysik der Sitten*,¹⁶ Kant postulates that as beings endowed with the capacity to reason, humans enjoy autonomy of the will, that is, they are able to regard themselves as general lawgivers, that is, of laws that have the potential to be valid for everyone at all times.¹⁷ All rational beings must always be treated as ends in themselves, and never merely as means to an end, in order to accord full respect to their dignity, which is the dignity of rational beings who do not obey any law except the law which they simultaneously give themselves.¹⁸ This means also that for practical reasons the will of rational beings must be free, as only under the idea of freedom is it possible to conceive of their will as their “own will”.¹⁹ This idea of the human being as free and autonomous would seem to imply that in punishing an individual for an inchoate crime, one merely respects his or her free choice to bring about the commission of a criminal act and punishes him or her accordingly.²⁰

Arthur Ripstein regards the denial of the rights of others as an essential reason for punishing individuals for certain acts. Those committing inchoate crimes thereby violate the autonomy of others and deny their rights.²¹ In order to

13 Ashworth, above note 9, p. 446.

14 Ibid.

15 *Model Penal Code and Commentaries*, official draft and revised comments, adopted by the American Law Institute on 24 May 1962, American Law Institute, 1985, Section 5.05 (1). See A. Ripstein, *Equality, Responsibility, and the Law*, Cambridge University Press, Cambridge, 1999, p. 219.

16 I. Kant, *Grundlegung zur Metaphysik der Sitten*, Reclam, Stuttgart, 1961.

17 Ibid., pp. 82–83.

18 Ibid., p. 87.

19 Ibid., p. 106.

20 See also Ashworth, above note 9, p. 472.

21 Ripstein, above note 15, p. 241.

incur criminal responsibility, however, they must do so intentionally or at least knowingly: the act must speak for itself – *res ipsa loquitur* – in disclosing a criminal intent.²²

Additionally, a consequentialist justification for penalizing inchoate crimes can be found in the fact that such criminalization permits law enforcement officers and the judiciary to become involved before any harm has occurred, and thus serves to reduce the incidence of harm.²³ In cases where there is a substantial likelihood of harm occurring, and where that harm is of a particularly egregious nature, this justification is especially pertinent.

Incitement in international law

Nuremberg: Streicher, Fritzsche

Incitement to genocide first became a crime under international law when the International Military Tribunal (IMT) at Nuremberg passed judgment on the accused Julius Streicher and Hans Fritzsche in 1946. While the term “incitement to genocide” was not yet known as such and the accused were instead charged with crimes against humanity, this charge was based on acts which would today fall within the definition of incitement to genocide. Both Streicher and Fritzsche were furthermore charged with crimes against peace, and Fritzsche with war crimes.

Julius Streicher was the founder and editor of the anti-Semitic weekly magazine *Der Stürmer*, the aim of which, according to Streicher himself, was to “unite Germans and to awaken them against Jewish influence which might ruin our noble culture”.²⁴ In its judgment, the IMT described how in leading articles and letters, some of them written by Streicher himself, Jewish people were depicted as “a parasite, an enemy, and an evil-doer, a disseminator of diseases” or “swarms of locusts which must be exterminated completely”.²⁵ The Tribunal found that by means of such hate propaganda, Streicher “incited the German people to active persecution”,²⁶ as well as to “murder and extermination”, acts which in the IMT’s view represented a crime against humanity,²⁷ of which Streicher was convicted and was sentenced to death by hanging.²⁸

The Tribunal found it to have been proved beyond reasonable doubt that Streicher had had “knowledge of the extermination of the Jews in the Occupied Eastern Territory”, but did not specify whether such knowledge was part of the

22 *The King v. Barker* [1924] NZLR 865 *per* Salmond, J. See also *D.P.P. v. Stonehouse* [1978] AC 55 *per* Lord Diplock. See also Ashworth, above note 9, p. 472.

23 Ashworth, above note 9, p. 446.

24 As explained to Leon Goldensohn, prison psychiatrist of the IMT jail at Nuremberg in 1946. R. Gellately (ed.), *The Nuremberg Interviews conducted by Leon Goldensohn*, Alfred A. Knopf, New York, 2004, p. 252.

25 (1946) 22 *Trial of German Major War Criminals*, p. 501.

26 *Ibid.*

27 *Ibid.*, p. 502.

28 *Ibid.*, p. 529. See also T. Taylor, *The Anatomy of the Nuremberg Trials*, Little, Brown, Toronto, 1992, pp. 376–80.

required *mens rea* of the offence. It has been argued that the Tribunal’s holding that “Streicher’s incitement to murder and extermination at a time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds ..., and constitutes a Crime against Humanity”²⁹ indicated that the crime in question – that is, a crime against humanity in the form of incitement to murder and extermination – required proving the existence of a causal link between the incitement and the substantive crime, which meant in turn that “both inciting words and the physical realization of their message” had to be established.³⁰ This would of course mean that the incitement in question would not be an inchoate offence. However, the IMT did not explicitly state that the substantive crime must follow or that there must be a causal link between the incitement and the crime;³¹ instead, it dwelt on the effect that Streicher’s propaganda had on the minds of the Germans: Streicher “infected the German mind with the virus of anti-Semitism” and “injected” poison “into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination”.³² Consequently, even though the Tribunal made reference to the extermination and persecution which was then perpetrated as a result of such influencing of people’s minds, it nonetheless did not leave any *explicit* precedent determining incitement to genocide not to be an inchoate crime.

Hans Fritzsche was a senior official in Goebbels’s Ministry of Popular Enlightenment and Propaganda as well as head of the ministry’s Radio Division from 1942 onwards.³³ Under the count of crimes against humanity, he was accused of having “incited and encouraged the commission of War Crimes by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities”.³⁴ Here, also, the Tribunal emphasized the effect of the incitement on the minds of the Germans – that is, the addressees of the incitement, which suggests that the Tribunal regarded it as an important element of the crime.

Fritzsche was acquitted, the Tribunal reasoning that his “position and official duties were not sufficiently important ... to infer that he took part in originating or formulating propaganda campaigns”; that his speeches “did not urge persecution or extermination of Jews”; that the evidence had shown that he twice tried to stop publication of *Der Stürmer* (albeit unsuccessfully); and that it

29 (1946) 22 *Trial of German Major War Criminals*, p. 502.

30 J. F. Metzler, “Rwandan genocide and the international law of radio jamming”, (1997) 91 *AJIL* 628, p. 637.

31 K. J. Madders, “War, use of propaganda in”, in *Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law 2000, Vol. 4, pp. 1394–5; G. S. Gordon, ““A war of media, words, newspapers, and radio stations”: The ICTR media trial verdict and a new chapter in the international law of hate speech”, *Virginia Journal of International Law*, No. 45, 2004, p. 139, at p. 144.

32 (1946) 22 *Trial of German Major War Criminals*, p. 502.

33 Gellately, above note 24, p. 47; see also Taylor, *Anatomy*, above note 28, pp. 460–2.

34 (1946) 22 *Trial of German Major War Criminals*, p. 526.

had not been proven that he knew the news he transmitted to have been falsified.³⁵ The Tribunal was “not prepared to hold that [his broadcasts] were intended to incite the German people to commit atrocities on conquered peoples”.³⁶ Its comments strongly suggest that its reasons for acquitting Fritzsche lay in the fact that, first, he lacked the necessary intent or such intent had not been proved to the Tribunal’s satisfaction³⁷ and, second, his speeches were not sufficiently direct or unequivocal in calling for the murder of the Jewish people.

Fritzsche revisited: prosecution by the *Spruchkammer I* in Nuremberg and appeal to the *Berufungskammer I*

Following his acquittal before the IMT at Nuremberg, Hans Fritzsche was prosecuted before a German court, the *Spruchkammer I* in Nuremberg, in connection with the de-Nazification trials which were then being conducted in post-Second World War Germany. The court decided that Fritzsche belonged to the category of “*Gruppe I – Hauptschuldige*”, that is, the first group of Nazi criminals comprising those most guilty, and sentenced him to nine years of forced labour for his participation as a *Hauptschuldiger* in the criminal Nazi regime.³⁸ The judges pointed out that throughout his career with the German broadcasting service, Fritzsche’s speeches corresponded to the Nazi ideology; moreover, after 1942, when he was given responsibility for the political direction of the German broadcasting service and appointed head of the Propaganda Ministry’s Radio Division with the rank of *Ministerialdirektor*, Fritzsche’s influence on the formation of public opinion increased considerably.³⁹ The court concluded that Fritzsche developed an altogether “außerordentliche Propaganda für die NS-Ideologie”.⁴⁰ He was “einer der einflussreichsten und aktivsten Propagandisten der Nazi-Ideologie”.⁴¹ The court held that Fritzsche therefore belonged to the group of those primarily responsible. He was given the highest penalty, as he had been an “*intellektueller Urheber*”⁴² who influenced wide circles of the German people through his propagandistic activity and convinced them of the Nazi ideology.⁴³

Fritzsche subsequently appealed to *Berufungskammer I*, which rejected the appeal and confirmed the lower court’s decision. The appeals chamber’s judgment is interesting in that it offers elaborate reasons for its decision on the one hand and, on the other hand, makes reference to the judgment of the IMT at Nuremberg, explaining why its conclusion differs from that of the international

35 Ibid.

36 Ibid.

37 *Nahimana*, above note 7, para. 982; L. J. Martin, *International Propaganda: Its Legal and Diplomatic Control*, University of Minnesota Press, Minneapolis, 1958, p. 206; Madders, above note 31, p. 1395.

38 *Hans Fritzsche Judgment*, Aktenzeichen I/2398, *Spruchkammer I*, Stadtkreis Nürnberg, 31 January 1947, Staatsarchiv München, SpKa Karton 475, p. 1.

39 Ibid., p. 3.

40 “Extraordinary propaganda for the NS ideology” (all translations are by the author). Ibid.

41 “One of the most influential and active propagandists of the Nazi ideology”. Ibid., p. 4.

42 “Intellectual originator”. Ibid.

43 Ibid.

tribunal. The court stressed that through his radio speeches, Fritzsche exercised an extraordinarily strong influence over a large part of the German people.⁴⁴

As for Fritzsche's use of anti-Semitic propaganda, the chamber underlined that he incited hatred against the Jewish people, repeatedly describing them as those responsible for the war, and claiming that the war was about "die Herrschaft des Judentums – und ... die Vernichtung des deutschen Volkes".⁴⁵ He alleged that Jewish people were encouraging the US and British military and profiting immensely from the so-called liberated peoples, and predicted that Jews would soon be killed everywhere as they were being killed in Europe, as it was "hardly to be assumed that the nations of the New World [would] forgive the Jews the misery of which the Old World did not acquit them".⁴⁶ Though acknowledging the findings of the IMT Nuremberg that his broadcasts did not specifically call for the persecution or extermination of the Jewish people, the chamber observed that Fritzsche's propaganda intensified the hatred which the Nazis had fomented against the Jewish people. Furthermore,

Wenn er auch nicht direkt zur Verfolgung oder Ausrottung der Juden aufgefordert hat, so half er doch in hervorragendem Masse mit, im deutschen Volke eine Stimmung zu schaffen, welche der Verfolgung und Ausrottung des Judentums günstig war.⁴⁷

The essence of his criminal conduct, therefore, was the fact that through his propaganda he knowingly contributed to the creation of a certain "mood" among Germans, which "favoured" or made possible the persecution and annihilation of the Jewish people. The German court went a step further than the Nuremberg Tribunal in that it held Fritzsche criminally responsible for anti-Semitic propaganda per se, without additional calls for acts of violence, but the overall effect of which was the creation of a violent atmosphere or state of mind among the future perpetrators and bystanders. The chamber thus acknowledged the dangers of such general hate propaganda and drew what it appears to have regarded as the logical consequence: that criminalization of such propaganda was necessary to prevent mass murders and genocides.

The chamber stressed that when engaging in anti-Semitic propaganda, Fritzsche knew that Germans had been "systematisch gegen die Juden aufgehetzt"⁴⁸ through the Nazi press and the entire party apparatus, and that there were concentration camps in which prisoners were treated inhumanly.⁴⁹ *Berufungskammer I* emphasized that the number of Germans who

44 *Hans Fritzsche Appeals Judgment*, Ber.-Reg.-Nr. BKI/695, Berufungskammer I, Nürnberg-Fürth, 30 September 1947, Staatsarchiv München, SpKa Karton 475, p. 8.

45 "The domination by the Jews – and ... the destruction of the German people". *Ibid.*, p. 10.

46 The original reads, "kaum anzunehmen, dass die Nationen dieser Neuen Welt den Juden das Elend, von dem die Alte Welt sie nicht frei sprach, verzeihen werden". *Ibid.*

47 "Even though he did not directly call for the persecution or extermination of the Jews, he nonetheless helped to an extraordinary extent to create amongst the German people a mood which was favorable to the persecution and extermination of Jewry." *Ibid.*

48 "Systematically incited against the Jews". *Ibid.*, p. 15.

49 *Ibid.*

were influenced by Fritzsche's propaganda in favour of Nazism could not easily be overestimated.⁵⁰

Convictions under Control Council Law No. 10: the case of Otto Dietrich

To prosecute those Nazi conspirators and criminals who could not be dealt with by the Nuremberg Tribunal itself, the Allies enacted Control Council Law No. 10, which had essentially the same content as the Nuremberg Charter. In the *Ministries* case before the US Military Tribunal,⁵¹ one of the accused was Otto Dietrich, a Nazi propagandist who held the post of Reich press chief from 1937 and State Secretary of the Ministry of Public Enlightenment and Propaganda under Goebbels from 1938 until 1945.⁵² Dietrich, not Goebbels, had control over the press section in that ministry.⁵³ The Tribunal recognized the important influence which press propaganda had in garnering support for the Nazi regime, stating that it was "one of the bases of Hitler's rise to power and one of the supports to his continuation in power".⁵⁴ It dwelt on the anti-Semitism rife in press and periodical directives, which instructed newspaper and magazine editors and contributors to "*especially ... indicate the noxiousness of the Jews*";⁵⁵ stress "[t]he anti-Semitic campaign still more ... as an important propagandistic factor in the world struggle";⁵⁶ and "keep ... awake in the German people the feeling that Judaism constitutes a world danger".⁵⁷ It quoted a directive enjoining periodicals to "treat ... this subject [i.e., the "propaganda against Jewry"] in the framework of the *rousing of feelings* of hatred",⁵⁸ and held that "a well thought-out, oft-repeated, persistent campaign to *arouse the hatred* of the German people against Jews was fostered and directed by the press department and its press chief, Dietrich".⁵⁹ The Tribunal concluded that

[The directives'] clear and expressed purpose was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to

50 Ibid., p. 17. On 10 August 1950, however, the Minister for Political Liberation in Bavaria decided to shorten by four years the term of imprisonment in a labour camp to which Fritzsche had been condemned. Fritzsche's imprisonment therefore ended on 29 September 1950. The minister reasoned that the penalty imposed currently appeared "unusually harsh" compared with more recent judgments against other accused with a similar degree of responsibility. "Entscheidung, Betrifft Erlass der Arbeitslagerhaft für Hans Fritzsche, Ministerialdirektor a.D. im früheren Reichspropagandaministerium, verwahrt im Lager Eichstätt", Minister für politische Befreiung in Bayern, Munich, 10 August 1950, 33/6711 F 1232, m/St./6373, Staatsarchiv München, SpKa Karton 475.

51 See R. A. Blasius, "Fall 11: Der Wilhelmstraßen-Prozeß gegen das Auswärtige Amt und andere Ministerien", in G. R. Ueberschär (ed.), *Der Nationalsozialismus vor Gericht: Die alliierten Prozesse gegen Kriegsverbrecher und Soldaten 1943–1952*, 2nd edn, Fischer Taschenbuch Verlag, Frankfurt am Main, 2000, pp. 187–98.

52 14 TWC 314, pp. 565–76.

53 Ibid., p. 566.

54 Ibid., p. 569.

55 Ibid., p. 572 (emphasis in original).

56 Ibid., p. 573.

57 Ibid.

58 Ibid., p. 575 (emphasis in original).

59 Ibid. (emphasis in original).

subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.

By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews.⁶⁰

It thus effectively recognized that Dietrich's incitement to hatred amounted to crimes against humanity committed against the Jewish people, without specifying that his guilt depended on any further persecutory measures having been carried out.

The Genocide Convention: *travaux préparatoires*

The Genocide Convention was inspired by the need to prevent a crime as abominable as the Holocaust from ever being committed again. The drafters were acutely aware of the dangers of doctrines such as Nazism, which propagated racial, national and religious hatred. Several delegations referred to the perceived link between genocide and "Fascism-Nazism and other similar race "theories" which preach racial and national hatred, the domination of the so-called "higher" races and the extermination of the so-called "lower" races".⁶¹

The Draft Convention for the Prevention and Punishment of Genocide, prepared by the UN Secretariat,⁶² criminalized "direct public incitement to any act of genocide, whether the incitement be successful or not".⁶³ In its comments on the draft Convention, the Secretariat made it clear that "direct public incitement" referred to "direct appeals to the public by means of speeches, radio or press, inciting it to genocide".⁶⁴ As the draft specified that it was irrelevant for the purposes of liability "whether the incitement be successful or not", the crime of incitement to genocide was regarded as inchoate.

Subsequently, the Economic and Social Council (ECOSOC) established an Ad Hoc Committee composed of the ECOSOC members China, France, Lebanon, Poland, United States, the USSR and Venezuela to prepare a draft Genocide Convention.⁶⁵ The Ad Hoc Committee was to take into consideration

60 Ibid., p. 576.

61 Article I, "Basic Principles of a Convention on Genocide (Submitted by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948)", UN Doc. E/AC.25/7, 7 April 1948 (hereinafter "Basic Principles"). See also UN Doc. E/AC.25/W.1/Add.3, 30 April 1948, p. 6: "Crimes of genocide have found fertile soil in the theories of Nazism and Fascism and other similar theories preaching racial and national hatred" (proposed Lebanese amendment to the Preamble of the draft Convention drawn up by the Ad Hoc Committee); Ad Hoc Committee, Summary Records of the 22nd Meeting (27 April 1948), UN Doc. E/AC.25/SR.22, 5 May 1948, pp. 3–4 (Mr Morozov and Mr Azkoul); Sixty-fifth Meeting of the Sixth Committee of the General Assembly, UN Doc. A/C.6/SR.65, 2 October 1948, p. 26 (Mr Kovalenko, Ukrainian Soviet Socialist Republic).

62 UN Doc. E/447, 26 June 1947 (hereinafter "Secretariat Draft").

63 Ibid., p. 7 (Article II (II)(2)).

64 Ibid., p. 31.

65 ECOSOC Res. No. 117 (VI), 3 March 1948.

the Secretariat Draft and comments by governments on that draft, as well as all other drafts submitted by member governments.⁶⁶

Commenting on the Secretariat Draft, the United States suggested reformulating the provision dealing with incitement in the following manner:

Direct and public incitement of any person or persons to any act of genocide, whether the incitement be successful or not, when such incitement takes place under circumstances which may reasonably result in the commission of acts of genocide ...”⁶⁷

This proposal is remarkable, given the US delegation’s staunch opposition to the inclusion of any incitement provision later on in the debates.⁶⁸ It is also remarkable in that it represented a more detailed provision on incitement than those submitted by other delegations; the French draft Convention on Genocide, for instance, simply stated that “Any attempt, provocation or instigation to commit genocide is also a crime.”⁶⁹ Interestingly, therefore, the US draft at this stage was not significantly different from the draft submitted by the USSR, which provided for the criminalization of “[d]irect public incitement to commit genocide, regardless of whether such incitement had criminal consequences”.⁷⁰ The USSR was very aware of the dangers of hate propaganda and the effect it had had in Nazi Germany,⁷¹ stating at one point during the debates in the Ad Hoc Committee that

The recent war had revealed in a disturbing manner the very pernicious nature of the influence of the hitlerite Press on people’s minds. That Press could be held responsible for the death of several million human beings.⁷²

The Lebanese delegation supported the USSR stance, “urg[ing] the necessity of mentioning in the Convention acts of propaganda constituting in some way a psychological preparation for the crime of genocide”.⁷³ The effect of propaganda on the minds of the audience in creating a certain state of mind or genocidal climate is here underscored as a reason for sanctioning such speech acts.

The draft Convention formulated by the Ad Hoc Committee eventually provided for individual criminal responsibility for “direct incitement in public or

66 UN Doc. E/AC.25/2.

67 UN Doc. E/623, 30 January 1948, p. 14. This proposal by the United States was considered to be “commendable” by the Netherlands: UN Doc. E/623/Add.3, 22 April 1948, p. 1.

68 See below.

69 UN Doc. E/623/Add.1, 5 February 1948; see also the Chinese draft, which declared it to be “illegal to conspire, attempt, or incite persons, to commit [genocide]”: Article I, “Draft Articles for the Inclusion in the Convention on Genocide proposed by the Delegation of China on 16 April 1948”, UN Doc. E/AC.25/9, 16 April 1948.

70 Basic Principles, Article V(2), above note 61.

71 See e.g. Principle I, *ibid.*, p. 1.

72 Ad Hoc Committee, Summary Records of the 5th Meeting (8 April 1948), UN Doc. E/AC.25/SR.5, 16 April 1948, p. 13.

73 *Ibid.*, p. 10 (Mr Azkoul).

in private to commit genocide whether such incitement be successful or not”.⁷⁴ The commentary on the Ad Hoc Committee Draft reveals that the qualification “in public or in private” was adopted by five votes, with two abstentions,⁷⁵ which signifies that it enjoyed a fair amount of support among the delegates. Public incitement is defined as incitement in the shape of “public speeches or ... the press, ... the radio, the cinema or other ways of reaching the public”, while incitement was considered private when “conducted through conversations, private meetings or messages”.⁷⁶ Private incitement would seem to correspond to instigation or solicitation as defined in domestic jurisdictions.⁷⁷ The addition of the qualification “in private” in the draft Convention appears rather bizarre, considering that the term was eventually taken out again. It originated in a proposal by the Venezuelan delegate, who argued that it would “obviate the need to insert further particulars, such as “press, radio, etc.””.⁷⁸ The French delegate expressed his agreement, remarking that in French law, “the term “incite” covered both public and private incitement”.⁷⁹

The commentary on the Ad Hoc Committee Draft further identifies *direct* incitement as “that form of incitement whereby an individual invites or urges other individuals to commit genocide”.⁸⁰ While this explanation does not particularly appear to clarify the term “direct”, it presumably expresses the idea that the perpetrator clearly and unmistakably communicates to the addressees the need for them to commit genocide. In his commentary on the Genocide Convention, Nehemiah Robinson submits that direct incitement is “incitement which *calls* for the commission of acts of Genocide, not such which *may result* in such commission”.⁸¹

It is furthermore worthy of note that while it was decided to retain the qualification “whether such incitement be successful or not”, certain delegations regarded these words as superfluous,⁸² considering that incitement was *per definitionem* an inchoate crime. Thus the Lebanese delegate stated that he regarded this qualification as “unnecessary and even tautological”, but would not oppose it.⁸³ However, other delegations argued that the inclusion of the phrase would

74 Article IV(c) of the Draft Convention on Prevention and Punishment of the Crime of Genocide, UN Doc. E/AC.25/12, 19 May 1948 (hereinafter “Ad Hoc Committee Draft”). See also “Report of the Committee and Draft Convention drawn up by the Committee”, UN Doc. E/794, 24 May 1948, p. 20.

75 Addendum, “Commentary on articles adopted by the Committee”, UN Doc. E/AC.25/W.1/Add.1, 27 April 1948, p. 2.

76 *Ibid.*

77 See below.

78 Ad Hoc Committee, Summary Records of the 16th Meeting (22 April 1948), UN Doc. E/AC.25/SR.16, 29 April 1948, p. 2 (Mr Perez-Perozo).

79 *Ibid.* (Mr Ordonneau).

80 Commentary, above note 75, p. 1.

81 N. Robinson, *The Genocide Convention*, Institute of Jewish Affairs, New York, 1960, p. 67 (emphasis in original).

82 Commentary, above note 75, p. 2.

83 E/AC.25/SR.16, (Mr Azkoul). Both the French and the US representatives agreed in considering the phrase unnecessary. *Ibid.* p. 3.

stress the preventive purpose of the Convention,⁸⁴ and it was eventually adopted by four votes to none, with three abstentions.⁸⁵

The US delegation finally voted against the whole paragraph criminalizing incitement to genocide,⁸⁶ declaring that

Any “direct incitement” to achieve the forbidden end and which might be feared would provoke by its very nature the committing of this crime would generally partly constitute an attempt and/or a conspiracy to permit [*sic*] the crime. To make such incitement illegal it is sufficient to make the attempt and the conspiracy illegal without their [*sic*] being any need to list specifically in the Convention acts constituting direct incitement.⁸⁷

This approach reflects the conventional US reluctance to restrict freedom of speech, but constituted a significant shift from its earlier agreement “to the principle of suppressing propaganda for genocide”, provided that such propaganda involved a violation of the rights of others and that “American courts were the judges” over such propaganda.⁸⁸

The Ad Hoc Committee Draft was then discussed by ECOSOC⁸⁹ and transmitted without change to the General Assembly, which discussed it under consideration of several proposed amendments. During the ECOSOC discussions, the Polish and Soviet delegates again underlined the importance of punishing propaganda for racial, national or religious hatred “as a method of forestalling outbreaks of genocide”,⁹⁰ while the US delegation criticized the provision dealing with direct incitement.⁹¹ The Soviet Union submitted a proposed amendment to the General Assembly, again including a provision penalizing propaganda for hatred and genocide.⁹² The Belgian delegation submitted a proposal amending the incitement provision to read “[d]irect and public incitement to commit genocide”,⁹³ and Iran proposed deleting Article IV(c) on incitement to genocide altogether.⁹⁴

84 *Ibid.*

85 *Ibid.*

86 Ad Hoc Committee, Summary Records of the 24th Meeting (28 April 1948), UN Doc. E/AC.25/SR.24, 12 May 1948, p. 7.

87 Ad Hoc Committee, meeting held on 30 April 1948, portions of report adopted in first reading, UN Doc. E/AC.25/W.4, 3 May 1948, p. 12. See also Ad Hoc Committee, Summary Records of the 26th Meeting (30 April 1948), UN Doc. E/AC.25/SR.26, 12 May 1948, p. 13 (original wording deleted and replaced by UN Doc. E/AC.25/SR.26/Corr.1 (1 June 1948)) (Mr Maktos); Ad Hoc Committee, Summary Records of the 28th Meeting (10 May 1948), UN Doc. E/AC.25/SR.28, 9 June 1948, p. 7 (Mr Maktos). The US continued to hold this view during the debates in the Sixth Committee of the General Assembly: see Eighty-fourth Meeting, UN Doc. A/C.6/SR.84, 26 October 1948, p. 213 (Mr Maktos).

88 Above note 72, p. 8.

89 ECOSOC, Official Records, 7th Session (1948), UN Docs. E/SR.218 (26 August 1948) and E/SR.219 (27 August 1948).

90 E/SR.218, *ibid.*, p. 714 (Mr Katz-Suchy, Poland); see also E/SR.219, *ibid.*, p. 720 (Mr Pavlov, USSR).

91 *Ibid.*, p. 725 (Mr Thorp, United States).

92 Article IV(f), “Union of Soviet Socialist Republics: amendments to the draft convention on genocide (E/794)”, UN Doc. A/C.6/215/REV.1, 9 October 1948.

93 “Belgium: amendments to the draft convention on genocide (E/794)”, UN Doc. A/C.6/217, 5 October 1948.

94 “Iran: amendments to the draft convention on genocide (E/794) and draft resolution”, UN Doc. A/C.6/218, 5 October 1948.

The Sixth Committee of the General Assembly then discussed the Ad Hoc Committee Draft between 21 September and 10 December 1948.⁹⁵ The UK representative remarked that “[w]hen a man was accused of conspiring, inciting, or committing a crime, perpetrated for political, racial or national reasons, he was punishable under the laws of any country”.⁹⁶

During the discussions of the Belgian amendment, the Belgian representative explained that in order to “clarify article IV and to make it juridically sound”, his delegation’s amendment omitted the phrases “or in private” and “whether such incitement be successful or not”.⁹⁷ Interestingly, the US delegate declared that there was “no great difference between the Belgian amendment and the Ad Hoc Committee text”,⁹⁸ suggesting that it was evident that such incitement was an inchoate offence. The Venezuelan delegation stressed that “[a]ll legislations regarded incitement to crime as punishable”; while some considered it to be a form of complicity, “others, such as the Venezuelan legislation, regarded it as a special offence, regardless of the results it produced”⁹⁹ – that is, Venezuela also regarded incitement as an inchoate offence. The delegate moreover stressed the need to punish those who committed this crime, as genocide was “usually the result of hatred instilled in the masses by inciters”.¹⁰⁰ He then opposed the deletion of the term “in private”, arguing that incitement could also be committed “through individual consultation, by letter or even by telephone”.¹⁰¹ He also vigorously opposed the deletion of the phrase “whether such incitement be successful or not”, which in his opinion was “anything but superfluous”, since in the case of legislation treating incitement as a form of complicity, “the person concerned might escape punishment if the crime to which he incited others, could not have been committed”.¹⁰² Despite this comment by the Venezuelan delegate, most delegations appear to have regarded the qualification as unnecessary, as they considered the inchoate nature of incitement to be self-evident. Thus the Iranian delegate argued that the phrase was superfluous “for if incitement were successful, the idea of complicity would be involved”.¹⁰³

The Yugoslav delegate reiterated the need to criminalize incitement to genocide. Referring to General Assembly Resolution 96(I) and its demand that the Convention address both the prevention and the punishment of genocide, he explained that “the first stage of those crimes [of genocide] had been the preparation and mobilization of the masses, by means of theories disseminated

95 Official Records of the 3rd Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings, 21 September to 10 December 1948.

96 Sixty-fourth Meeting, UN Doc. A/C.6/SR.64, 1 October 1948, p. 17 (Sir Hartley Shawcross).

97 Eighty-fourth Meeting, above note 87, p. 207.

98 Ibid.

99 Ibid., p. 208 (Mr Pérez Perozo).

100 Ibid.

101 Ibid.

102 Ibid.

103 Ibid., p. 214 (Mr Abdoh).

through propaganda”, and concluded that, therefore, “[t]he first step in the campaign against genocide would be to prevent incitement to the crime”.¹⁰⁴ Addressing the US delegation’s concern regarding freedom of speech, the French delegate denied that the latter was involved, as “that freedom could not in any way imply a right to incite people to commit a crime”.¹⁰⁵ Instead, the retention of the incitement provision was necessary, because “[i]t was precisely in connexion with genocide that the suppression of propaganda was absolutely essential”.¹⁰⁶ He also favoured punishing unsuccessful incitement, indicating that the French Penal Code included “measures for the suppression of propaganda in favour of abortion, whether that propaganda was successful or not”.¹⁰⁷ Later, he specified that “all national legislation treated incitement to crime, *even if not successful*, as a separate and independent breach of the law”.¹⁰⁸ The Haitian delegate equally favoured retaining the article punishing incitement to genocide, “whether successful or not”.¹⁰⁹

The UK delegate, while agreeing that in theory incitement “could be considered as a separate act”, said that in practice, given the large-scale and long-term nature of genocide, incitement would in almost all cases eventually result in conspiracy, attempt or complicity. That being the case, it was unnecessary to punish genocide at as early a stage as incitement.¹¹⁰ Disagreeing with these arguments, the Australian and Swedish delegates both objected to the deletion of sub-paragraph (c).¹¹¹ Similarly, the Cuban delegate pronounced himself to be against the deletion of the incitement provision, arguing that incitement to genocide should be criminalized “because of the essential part it played in the commission of the crime”.¹¹²

The intrinsic danger of incitement was also stressed by the Danish delegate as a reason for criminalizing incitement,¹¹³ while the Czechoslovakian delegate emphasized that “[d]irect incitement to murder” was a crime “in all countries”.¹¹⁴ The Uruguayan delegate also favoured retention of the provision, submitting that “to punish incitement to genocide was the best method of preventing the perpetration of that crime”. He furthermore considered the phrase “whether such incitement be successful or not” to be superfluous, as “incitement was a crime in itself only when it was not successful”; otherwise it would be equivalent to complicity.¹¹⁵ The Egyptian delegate, the delegate from the

104 Ibid., p. 216 (Mr Bartos).

105 Ibid. (Mr Spanien).

106 Ibid.

107 Ibid.

108 Eighty-fifth Meeting, UN Doc. A/C.6/SR.85, 27 October 1948, p. 227 (Mr Spanien) (emphasis added).

109 Eighty-fourth Meeting, above note 87, p. 217 (Mr Demesmin).

110 Ibid., p. 218 (Mr Fitzmaurice).

111 Ibid., pp. 218–19 (Mr Dignam and Mr Petren, respectively).

112 Ibid., p. 219 (Mr Dihigo).

113 Eighty-fifth Meeting, above note 108, p. 220 (Mr Federspiel).

114 Ibid., p. 221 (Mr Zourek).

115 Ibid., p. 222 (Mr Manini y Ríos).

Philippines and the Ecuadorian delegate were also in favour of retaining the incitement provision.¹¹⁶

The US amendment proposing the deletion of sub-paragraph (c) was rejected by twenty-seven votes to sixteen, with five abstentions.¹¹⁷ The deletion of the words “or in private” was adopted by twenty-six votes to six, with ten abstentions.¹¹⁸ Finally, the deletion of the words “whether such incitement be successful or not” was also adopted, albeit by a narrower margin, with nineteen votes for and twelve votes against the deletion, and fourteen abstentions.¹¹⁹ Both the UK and Polish delegates emphasized that they did not consider that the deletion of this phrase would have “any effect from the legal point of view” – incitement would be punishable whether successful or not.¹²⁰ The South African representative agreed with this view.¹²¹ This has led Nehemiah Robinson to conclude that “incitement is punishable generally regardless of the results, unless only successful incitement is explicitly declared punishable”.¹²²

Article IV in its entirety was finally adopted as amended by thirty-five votes to none, with six abstentions.¹²³ Subsequently the text of the articles of the Convention, as well as two resolutions, was submitted to the Drafting Committee, which in turn submitted a report to the Sixth Committee on 23 November 1948.¹²⁴ The report and revised text were considered by the Sixth Committee from the 128th to the 134th Meetings, and a definitive text was adopted.¹²⁵ This text was then submitted to the Plenary Meeting of the General Assembly, together with the report of the Sixth Committee¹²⁶ and amendments by the USSR and Venezuela,¹²⁷ and was discussed during the General Assembly’s 178th and 179th Meetings. Thereafter the text of the Genocide Convention was adopted unanimously and without abstentions by the General Assembly on 9 December 1948.¹²⁸

Incitement as interpreted by the International Criminal Tribunals

The International Criminal Tribunals have generally drawn a distinction between incitement or instigation generally and direct and public incitement to genocide. In the following discussion, the term “incitement” will be used to refer to *public* incitement, and “instigation” to describe incitement in the more general sense.

116 *Ibid.*, pp. 223–4, 229 (Mr Raafat, Mr Inglés, and Mr Correa, respectively).

117 *Ibid.*, p. 229.

118 *Ibid.*, p. 230.

119 *Ibid.*, p. 232.

120 *Ibid.*, p. 231.

121 *Ibid.*, p. 232.

122 Robinson, above note 81, p. 67.

123 Ninety-first Meeting, UN Doc. A/C.6/SR.91, 4 November 1948, p. 301.

124 UN Doc. A/C.6/288.

125 Official Records of the Third Session of the General Assembly, Sixth Committee, Summary Records of Meetings, 21 September to 10 December 1948.

126 UN Docs. A/760 & A/760 corr. 2.

127 UN Docs. A/766 & 770, respectively.

128 UN Doc. A/PV.179.

Instigation has been considered to be punishable only where it leads to the commission of the substantive crime, which means that it is not an inchoate crime;¹²⁹ the instigation must be causally connected to the substantive crime in that it must have contributed significantly to the commission of the latter, the instigator must act intentionally or be aware of the substantial likelihood that the substantive crime will be committed, and he must intend to bring about the crime instigated. By contrast, direct and public incitement has been held to be an inchoate crime, which is applicable only in connection with the crime of genocide.

Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have addressed instigation – provided for in Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute, which lists forms of individual criminal responsibility – in several cases. In *Blaškić*, an ICTY trial chamber defined instigating as “prompting another to commit an offence”,¹³⁰ while the ICTR understood it to mean “urging, encouraging or prompting” another person to commit a crime.¹³¹ There must be a “causal connection between the instigation and the *actus reus* of the crime”;¹³² this has been held to mean that the instigation must have “directly and substantially contributed” to the other person’s commission of the substantive offence,¹³³ or must at least have been a “clear contributing factor”.¹³⁴ However, “but for” causation is not required, that is, the Prosecutor need not prove that the crime would not have been committed had it not been for the accused’s acts.¹³⁵

As regards the required *mens rea*, the instigator must act intentionally, that is, must have “intended to provoke or induce the commission of the crime”, or must at least have been “aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts”.¹³⁶ At the same time the accused must again be proven to have “directly or indirectly intended that the crime in question be committed”.¹³⁷

129 See also W. A. Schabas, “Le génocide”, in H. Ascencio, E. Decaux & A. Pellet (eds.), *Droit international pénal*, Éditions A. Pedone, Paris, 2000, p. 319, at p. 326.

130 *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement (Trial Chamber), 3 March 2000, para. 280; see also *Kordić and Čerkez* Trial Judgment, above note 4, para. 387; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (Trial Chamber), 2 August 2001, para. 601.

131 *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (Trial Chamber), 15 May 2003, para. 381.

132 *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement (Trial Chamber), 7 June 2001, para. 30; see also *Blaškić* Trial Judgment, above note 130, para. 278; *Semanza*, above note 131, para. 381; *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-A-T, Judgement and Sentence (Trial Chamber), 22 November 2004, para. 593; *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgement and Sentence (Trial Chamber), 28 April 2005, para. 504; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence (Trial Chamber), 1 December 2003, para. 762.

133 *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-I, Judgement and Sentence (Trial Chamber), 15 July 2004, para. 456.

134 *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgement (Trial Chamber), 2 November 2001, para. 252.

135 *Kvočka et al.*, *ibid.*, para. 252; *Kordić and Čerkez*, Trial Judgment, above note 4, para. 387.

136 *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgement (Trial Chamber), 31 March 2003, para. 60; see also *Kvočka et al.*, above note 134, para. 252.

137 *Blaškić* Trial Judgment, above note 130, para. 278; see also *Kordić and Čerkez* Trial Judgment, above note 4, para. 386; *Bagilishema*, above note 132, para. 31.

There has been a certain amount of confusion in the case-law with regard to the relationship between instigation and incitement. In *Rutaganda* and, later, in *Musema*, the ICTR held that “incitement to commit an offence, under Article 6(1), involves instigating another, directly and publicly, to commit an offence”.¹³⁸ Similarly, in the *Akayesu* trial chamber judgment it was found that “instigation under Article 6(1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide”.¹³⁹ In its later judgment in the same case, the Appeals Chamber of the ICTR, however, found that this view was mistaken, and that there was no need for instigation generally to be direct and public in order to be punishable.¹⁴⁰ Therefore, unlike direct and public incitement to commit genocide, as will be discussed below, instigation need not be direct and public.¹⁴¹ An omission, as well as an act, can constitute instigation,¹⁴² and mere presence at the time and place where a crime is being committed can amount to instigation or encouragement, particularly where the accused occupies a position of authority.¹⁴³

Lastly, instigation in accordance with the International Criminal Tribunals’ jurisprudence is not an inchoate crime, but is “punishable only where it leads to the actual commission of an offence intended by the instigator”.¹⁴⁴

By contrast, direct and public incitement to genocide has been interpreted differently. The ICTR has addressed and defined the elements of the crime of direct and public incitement to genocide in a number of decisions. In the *Akayesu* Trial Judgment, the ICTR emphasized the inchoate nature of the crime by declaring that

Genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.¹⁴⁵

Considering that in the same judgment the trial chamber held that, in contrast to direct and public incitement to genocide, instigation in general was not

138 *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement and Sentence (Trial Chamber), 6 December 1999, para. 38; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement (Appeals Chamber), 27 January 2000, para. 120.

139 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (Trial Chamber), 2 September 1998, para. 481.

140 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement (Appeals Chamber), 1 June 2001, paras. 478–83.

141 *Ibid.*; *Kamuhanda*, above note 132, para. 593.

142 *Kordić and Čerkez*, Trial Judgement, above note 4, para. 387; *Blaškić* Trial Judgement, above note 130, para. 280.

143 *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement and Sentence (Trial Chamber), 27 January 2000, para. 865; see also *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgement (Trial Chamber), 7 May 1997, para. 690.

144 *Musema* Appeal Judgement, above note 140, para. 120; *Rutaganda*, above note 138, para. 38; *Ndindabahizi*, above note 133, para. 456; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal (Trial Chamber), 2 February 2005, para. 17. See also W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge, 2006, pp. 299–300.

145 *Akayesu* Trial Judgement, above note 139, para. 562.

inchoate, it would appear that it regarded direct and public incitement as much more dangerous than instigation in general.

In the same case the Tribunal also outlined the *mens rea* elements of the offence: the inciter must possess “the intent to directly prompt or provoke another to commit genocide” and must also have the specific intent to destroy, in whole or in part, a protected group.¹⁴⁶

In *Ruggiu*, the ICTR again stressed that incitement to genocide was inchoate.¹⁴⁷ It moreover compared the accused, who had been a radio commentator on RTLM engaging in incendiary broadcasts, to Julius Streicher, commenting that “the accused, like Streicher, infected peoples’ minds with ethnic hatred and persecution”. The Tribunal found Ruggiu guilty of both direct and public incitement to commit genocide and the crime against humanity of persecution, holding that in the instant case, his acts of incitement themselves constituted persecution:

Those acts were direct and public 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 wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.¹⁴⁸

The “direct” element in incitement to genocide was explained in *Akayesu* (trial chamber), where the ICTR began by stating that it should be considered “in the light of its cultural and linguistic content”, because it depended on the audience whether a certain utterance would be perceived as direct or not.¹⁴⁹ Thus, a statement could be implicit yet still direct.¹⁵⁰ The Tribunal therefore considered it necessary to determine on a “case-by-case basis” if, “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”.¹⁵¹ The Tribunal concluded that in the particular case at hand, the accused had been shown to possess “the intent to directly create a

146 *Ibid.*, para. 560. See also *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Decision on Tharcisse Muvunyi’s Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (Trial Chamber), 13 October 2005, para. 61; J. R. W. D. Jones, “The inchoate forms of genocide: attempts, direct and public incitement and conspiracy”, in L. Burgogue-Larsen (ed.), *La Répression Internationale du Génocide Rwandais*, Bruylant, Brussels, 2003, 281, p. 287.

147 *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence (Trial Chamber), 1 June 2000, para. 16.

148 *Ibid.*, para. 22.

149 *Akayesu*, Trial Judgement, above note 139, para. 557.

150 *Ibid.*

151 *Ibid.*, para. 558. In the indictment of Simon Bikindi, a composer and singer of inflammatory songs, the Prosecutor submitted that the accused’s exhortation of Hutus to “work” represented a “coded reference advocating the extermination of the Tutsi”: *Prosecutor v. Bikindi*, Case No. ICTR-2001-72-I, Amended Indictment Pursuant to Decision of 11 May 2005, 20 May 2005, para. 34. Similarly, in *Prosecutor v. Kambanda*, the ICTR quoted the accused’s “incendiary phrase ... “you refuse to give your blood to your country and the dogs drink it for nothing””: Case No. ICTR-97-23-S, Judgement and Sentence (Trial Chamber), 4 September 1998, para. 39(x).

particular state of mind in his audience necessary to lead to the destruction of the Tutsi group”.¹⁵² It is notable that the Tribunal refers to the creation of a certain state of mind, an element which, as we have seen, has also been of importance before the International Military Tribunal at Nuremberg and the German courts in the trial of Fritzsche, as well as during the Genocide Convention debates.

In *Nahimana et al.*, the ICTR again addressed the crime of direct and public incitement to genocide. The three accused all had leading positions in the media before and during the genocide of 1994. Ferdinand Nahimana and Jean-Bosco Barayagwiza were co-founders of the notorious radio station Radio Télévision Libre des Mille Collines (RTLM) and Barayagwiza was in addition a founding member of the Coalition pour la Défense de la République (CDR) party, while Hassan Ngeze, a journalist, was the founder and editor-in-chief of the newspaper *Kangura*, and also a founding member of the CDR party. In this case, known as the “Media Case”, the chamber made several important pronouncements with regard to the elements of the crime of incitement to genocide. First of all, dismissing objections by the defence that certain allegations of crimes mentioned in the indictment fell outside the temporal jurisdiction of the Tribunal, which was by its Statute limited to the period from 1 January 1994 to 31 December 1994, the chamber held that, where the incitement was successful, the crime of incitement continued until the commission of the acts incited. Therefore acts of incitement committed before 1 January 1994 would come within the ICTR’s jurisdiction unless the substantive crime had been committed before that date. The Chamber argued that the choice of 1 January 1994 rather than 6 April 1994 – the day when the genocide began – as the starting date for the ICTR’s jurisdiction, which had been made in order to include the planning stage of the crimes, showed “an intention that is more compatible with the inclusion of inchoate offences that culminate in the commission of acts in 1994 than it is with their exclusion”.¹⁵³ Although the chamber’s analysis in this regard has been criticized for “turn[ing the drafters’] reasoning upside down”,¹⁵⁴ it is submitted that this characterization of direct and public incitement as a continuing crime makes sense as it reflects the long-term insidious effect which such incitement has on people’s minds. It properly acknowledges the tendency of incitement to create a certain state of mind, which the Tribunal had recognized in its earlier case-law.

The chamber also reiterated that a causal relationship between the incitement and the acts incited was not required in order to hold an individual responsible for direct and public incitement to genocide, emphasizing that it was “the potential of the communication to cause genocide that makes it incitement”. Where this potential was “realized”, both the crime of genocide and the crime of incitement to genocide had been committed.¹⁵⁵

152 *Ibid.*, para. 674.

153 *Nahimana et al.*, above note 7, para. 104. See also para. 1017.

154 G. Della Morte, “De-mediatizing the *Media case*”, JICJ, Vol. 3, 2005, p. 1019, at p. 1024.

155 *Nahimana et al.*, above note 7, para. 1015.

Finally, the Tribunal distinguished incitement from hate propaganda, explaining that broadcasts such as one alleging about the Tutsi that “they are the ones who have all the money” did not constitute direct incitement, as they did “not call on listeners to take action of any kind”.¹⁵⁶ The Tribunal also highlighted the importance of the context in which the utterances in question were made for determining whether they constituted incitement or not:¹⁵⁷

A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement.¹⁵⁸

The Rome Statute

During the Diplomatic Conference in Rome the drafters rejected the suggestion that the incitement provision be extended to apply also to crimes against humanity, war crimes and aggression.¹⁵⁹ There were also proposals to provide for solicitation, which was to be defined thus: with the purpose of “encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime”, “command[ing], [order[ing]], request[ing], counsel[ing] or incit[ing] the *other* person to engage [or participate] in the

¹⁵⁶ *Ibid.*, para. 1021.

¹⁵⁷ While direct and public incitement to genocide has thus been discussed extensively in the jurisprudence of the ICTR, it has not played any significant role in ICTY proceedings, and there have been no decisions or judgments discussing this crime. However, it is interesting to note that in its pleadings before the International Court of Justice (ICJ) in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1996 ICJ Rep., Bosnia and Herzegovina submitted that certain acts for which Serbia could be held responsible amounted to incitement to genocide: *Memorial of the Government of the Republic of Bosnia and Herzegovina*, 15 April 1994, para. 5.4.2.1. Interestingly, its submissions on this issue mirror somewhat the reasoning employed by the ICTR. Thus, it is alleged that “[i]n their desire to create ethnically pure Serbian areas, and to realise their nationalistic and territorial ambitions, the Serb forces used TV, Radio and Newspapers extensively to vilify Muslims and Croats. This in turn resulted in an atmosphere in which hatred initially led to discrimination in many areas Inevitably, this turned to violence against Muslims and Croats. For example, in Banja Luka (which had a population of 30,000 Muslims), a local leader of Serb forces stated on television that there was room for only 1,000 Muslims, and that the other 29,000 would have to leave, “one way or another””. *Ibid.*, para. 2.2.6.1 (emphasis added). Moreover, it is pleaded that “[i]ncitement to ethnic and religious hatred and genocide is combined with strategic plans aiming at realizing the “Greater Serbia” through killing, deportation, expulsion, ill-treatment or rape of non-Serbs and, particularly, members of the Muslim population”. *Ibid.*, para. 6.4.2.3. However, in its Judgment the ICJ did not make any pronouncement on these allegations.

¹⁵⁸ *Ibid.*, para. 1022.

¹⁵⁹ W. A. Schabas, *An Introduction to the International Criminal Court*, 2nd edn, Cambridge University Press, Cambridge, 2004, p. 30; Schabas, above note 130, p. 326; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/ Conf.183/2/Add.1, 1998, p. 59, in M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, Ardsley, New York, 1998, p. 142.

commission of such crime”. The crime would not have been inchoate.¹⁶⁰ In the end, however, solicitation was included in the Rome Statute without defining it in any way.¹⁶¹ As indicated above, incitement was included only with regard to genocide, and was formulated in the same way as in the Genocide Convention, namely as “direct” and “public” incitement to commit genocide.¹⁶²

Other preparatory acts and their relationship to incitement

As indicated above, during the Genocide Convention deliberations the US representative suggested that the provision relating to direct and public incitement to genocide was superfluous in that the preparatory act which it was meant to describe was already sufficiently covered by the provisions on attempt and conspiracy, as any direct incitement “would generally partly constitute an attempt and/or a conspiracy to [commit] the crime”.¹⁶³ Similarly, the Uruguayan delegate argued that the phrase “whether such incitement be successful or not” was unnecessary, since “incitement was a crime in itself only when it was not successful”; if it was successful, it would be equivalent to complicity.¹⁶⁴ The UK delegate also submitted that while incitement could in theory be regarded as a separate act, in practice, because of the large-scale and long-term nature of genocide, incitement would in almost all cases result in conspiracy, attempt or complicity.¹⁶⁵

These considerations can be summarized in the form of two questions: first, what are the legal distinctions between incitement to commit genocide on the one hand and attempt, conspiracy and complicity to commit genocide on the other?; and, second, is it necessary to have a separate provision criminalizing incitement to genocide?

The ICTR has defined conspiracy as an “agreement between two or more persons to commit an unlawful act”;¹⁶⁶ conspiracy to commit genocide is therefore an agreement between several individuals to commit genocide, with the common genocidal intent.¹⁶⁷ Each member of the conspiracy must have acted intentionally and must possess the specific genocidal intent.¹⁶⁸ Moreover, while the contributions of the various conspirators may differ, they are all equally responsible for the

160 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), G.A., 51st Sess., Supp. No. 22, UN Doc. A/51/22, 1996, p. 56, in Bassiouni, *ibid.*, p. 483.

161 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9*, entered into force 1 July 2002, Article 25(3)(b).

162 *Ibid.*, Article 25(3)(e).

163 E/AC.25/W.4, above note 87, p. 12.

164 Eighty-fifth Meeting, above note 109, p. 222 (Mr Manini y Ríos). See also remarks to the same effect by the Iranian delegate: Eighty-fourth Meeting, above note 87, p. 214 (Mr Abdoh).

165 *Ibid.*, p. 218 (Mr Fitzmaurice).

166 *Musema* Appeal Judgement, above note 138, para. 187; *Nahimana et al.*, above note 7, para. 1045.

167 *Musema* Appeal Judgement, above note 138, para. 191.

168 *Ibid.*, para. 192; *Nahimana et al.*, above note 7, para. 1042.

acts of their co-conspirators. Furthermore, conspiracy is an inchoate offence: the mere agreement to commit genocide is punishable.¹⁶⁹ The underlying reasoning for this lies in the fact that the crime which is the subject of the conspiracy is of exceptional gravity, as well as in the need to prevent such a crime.¹⁷⁰ Similarly, an attempt to commit genocide is necessarily inchoate, and in order to convict someone of an attempt, the individual in question must have acted with the intent to commit genocide. Article 25(3)(f) of the Rome Statute defines “attempt” as the beginning of the commission of the crime “by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions”.¹⁷¹

While the definitions of conspiracy and attempt are thus fairly clear, the meaning of complicity has given rise to certain complications in the case-law of the ad hoc Tribunals. In *Semanza*, the ICTR defined complicity as “aiding and abetting, *instigating*, and procuring”.¹⁷² Complicity in genocide has been held to refer to “all acts of assistance and encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide”.¹⁷³ In *Krstić*, the ICTY Appeals Chamber explained the difference between “aiding and abetting” and “conspiracy”, stating that “the terms “complicity” and “accomplice” may encompass conduct broader than that of aiding and abetting”.¹⁷⁴ “Aiding and abetting” is thus included in the notion of complicity, which, however, also prohibits conduct broader than aiding and abetting. While a conviction for complicity generally requires proof of the specific intent to commit genocide, a consistent line of ICTY and ICTR case-law holds that where an accused is merely charged with aiding and abetting, he or she must only be shown to have had knowledge of the principal perpetrator’s intent.¹⁷⁵ Furthermore, an individual can only be held liable for complicity in genocide where the crime of genocide has actually been committed. Complicity in genocide is thus not an inchoate crime.¹⁷⁶

Several points are of interest when one compares incitement and complicity. First, as indicated above, the ICTR has used the word “instigation”, *inter alia*, to define complicity. This is in line with its treatment of instigation *per se* as a crime which is not inchoate. Second, where instigation has been charged

169 *Musema* Appeal Judgement, above note 138, para. 193; see also *Bagosora* et al., Decision on Motions for Judgement of Acquittal, above note 144, para. 12.

170 G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005, p. 253.

171 See *ibid.*, p. 257.

172 *Semanza*, above note 131, para. 393 (emphasis added).

173 *Ibid.*, para. 395.

174 *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement (Appeals Chamber), 19 April 2004, para. 139.

175 *Ibid.*, para. 140; *Akayesu* Trial Judgement, above note 139, para. 545; *Musema* Appeal Judgement, above note 138, para. 181; *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement (Appeals Chamber), 13 December 2004, para. 501. This interpretation has, however, been criticized repeatedly in the academic literature: see e.g. W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2000, p. 221; Mettraux, above note 170, pp. 212–14.

176 *Akayesu* Trial Judgement, above note 139, para. 530.

before the ICTY or ICTR, this has always been done in connection with planning and ordering, as well as aiding and abetting.¹⁷⁷ Furthermore, there have been no convictions solely for instigation. This tends to support to a certain extent the remarks by the Uruguayan delegate during the Genocide Convention deliberations cited above, in that a separate crime of instigation or incitement, if it is not inchoate, would always be equivalent to complicity and it would consequently be pointless to have such a separate crime. Support for this view can also be found in the way in which this issue has been treated in the criminal law of several countries; in US law, for example, solicitation can be a basis for accomplice liability where the substantive offence is subsequently committed. In such a case, if the accused is convicted and punished for the substantive crime as an accomplice, he would not be punished for solicitation, as the offence of solicitation would be regarded as having merged with the substantive offence.¹⁷⁸ While incitement to genocide has of course been unequivocally recognized as an inchoate crime and there is therefore no overlap between that specific form of incitement and complicity, it is submitted that incitement or instigation *per se* should also be regarded as an inchoate crime. Aside from the fact that this would be a more coherent approach, the inherently dangerous nature of acts of instigation, in that they set things in motion and plant the idea of the crime in the principal perpetrator's mind, would appear to favour such an interpretation. Moreover, this would also correspond to the way in which many domestic legal systems approach the matter. This idea will be further developed in the following section.

Critique of the international approach to incitement

As indicated above, it would appear that the terms “instigation” and “incitement” *per se* are interchangeable; where it is public, however, incitement takes on a different meaning. This is the case, as has been seen, in the way in which the International Criminal Tribunals have interpreted these crimes; they considered both terms to refer to the same speech act, which was punishable only when the substantive crime incited was committed. Only public incitement has been interpreted by the international courts as being an inchoate offence. According to

¹⁷⁷ See the following indictments: *Semanza*, above note 131, Case No. ICTR-97-20-I, Third Amended Indictment, 12 October 1999; *Bagilishema*, above note 132, Case No. ICTR-95-1A-I, Amended Indictment, 17 September 1999; *Muhimana*, above note 132, Case No. ICTR-95-1B-I, Indictment, 3 February 2004; *Kajelijeli*, above note 132, Case No. ICTR-98-44A-I, Amended Indictment Pursuant to the Tribunal Order Dated 25 January 2001, 25 January 2001; *Ndindabahizi*, above note 133, Case No. ICTR-2001-71-I, Amended Indictment, 7 July 2003; *Rutaganda*, above note 138, Case No. ICTR-96-3-I, Indictment, 12 February 1996; *Akayesu*, above note 139, Case No. ICTR-96-4-I, Amended Indictment; *Blaškić*, above note 130, Case No. IT-95-14-I, Second Amended Indictment, 25 April 1997, para. 6.0; *Kordić and Čerkez*, above note 4, Case No. IT-95-14/2-I, First Amended Indictment, 30 September 1998, paras. 19 & 21; *Krstić*, above note 130, Case No. IT-98-33-I, Amended Indictment, 27 October 1999, para. 18; *Kvočka*, above note 134, Case No. IT-98-30/1-I, Amended Indictment, 21 August 2000, para. 16; *Naletilić and Martinović*, above note 136, Case No. IT-98-34-PT-I, Second Amended Indictment, 16 October 2001, para. 23.

¹⁷⁸ *Lewis v. State*, 404 A.2d 1073, 1083 (Md. 1979); see also J. Dressler, *Understanding Criminal Law*, 2nd edn, Matthew Bender & Co., Inc., New York / San Francisco, 1995, p. 387.

Kai Ambos, the difference between instigation and incitement ordinarily “lies in the fact that the former is more specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general”.¹⁷⁹ Albin Eser similarly sees the main difference in the fact that while instigation is addressed to a particular individual or particular individuals, incitement is directed towards an undefined group of people.¹⁸⁰ The same author submits that while instigation is penalized because of “the participation of the inciter (as an accessory) in the criminal act of another”, public incitement is criminalized because of “the special dangerousness associated with the incitement of an indeterminate group of people”.¹⁸¹ Incitement is particularly dangerous, since “the more [it] carries over into the social sphere and into the general public”, the more it “lead[s] to a ... decrease in the controllability of the spoken and written word”.¹⁸² Once they are disseminated in public, words of hatred and incitement tend to spread rapidly and become impossible to control. As Mordechai Kremnitzer and Khaled Ghanayim submit, the potential danger “in a frenzied and excited crowd is obvious, and there is also the chance of further provocation, pouring oil on the flames, so to speak”.¹⁸³ They stress the potential inherent in acts of public incitement “to create an overall environment conducive to criminal activity and violence, where terror and subversion of the rule of law and the democratic order reign”.¹⁸⁴ Therefore the longer public incitement is allowed to continue, the greater the influence which the inciter holds over the incitees becomes, as well as the incitement’s effectiveness and the likelihood of criminal acts being committed as a result.¹⁸⁵ Public incitement thus seriously jeopardizes the “peaceful coexistence of free individuals”, which it is the function of criminal law to guarantee,¹⁸⁶ and must consequently be proscribed through criminal sanctions.

The creation of an atmosphere conducive to the later commission of criminal acts inspired by hatred is a recurrent justification for the criminalization of public incitement. As has been noted above, during the debates on the Genocide Convention several delegates stressed the intrinsic danger of incitement to hatred and genocide, and argued that it prepared the ground for the commission of the crime of genocide. Thus, the Soviet delegate stated that the inciters of genocide were in fact those mainly responsible for the eventual commission of genocide,¹⁸⁷

179 K. Ambos, “Article 25”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 486.

180 A. Eser, “Individual criminal responsibility”, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford University Press, Oxford, 2002, p. 767, at p. 804.

181 A. Eser, “The law of incitement and the use of speech to incite others to commit criminal acts: German law in comparative perspective”, in D. Kretzmer and F. K. Hazan (eds.), *Freedom of Speech and Incitement against Democracy*, Kluwer Law International, The Hague, 2000, p. 119, at p. 124.

182 *Ibid.*, p. 146.

183 M. Kremnitzer and K. Ghanayim, “Incitement, not sedition”, in *ibid.*, p. 147, at p. 163.

184 *Ibid.*, p. 164.

185 *Ibid.*

186 *Ibid.*, p. 150.

187 Eighty-fourth Meeting, above note 87, p. 219 (Mr Morozov).

implying that without the creation of a public mood of hatred and aggression the commission of the crime would be unlikely. Similarly, in the jurisprudence of the ICTR reference has repeatedly been made, for instance in *Akayesu*, to the creation of a particular state of mind in the audience that would induce its members to commit genocidal acts. In *Nahimana et al.*, the Tribunal emphasized the continuing influence of incitement on the audience, which in its view persisted until the substantive crime was committed. The ICTR has repeatedly underscored the “utmost gravity” of the crime of direct and public incitement to genocide, and has stressed that “the media ... was a key tool used by extremists in Rwanda to mobilize and incite the population to genocide”, a view which led it to deny an application by Georges Ruggiu for early release.¹⁸⁸

Moreover, while the general context in which the speech is made and the prevailing circumstances at the time have to be taken into account when considering whether an act of incitement is direct, the same requirement does not apply to instigation.

German and Swiss law also distinguish instigation from incitement, using the “private versus public” dichotomy. Instigation requires the “determination” or inducement of the perpetrator – that is, the instigator must succeed in convincing the addressee to take a conscious decision to commit the substantive crime. This approach is commendable for various reasons and deserves to be looked at in greater detail. In German law, instigation (*Anstiftung*) is penalized in §26 of the German Penal Code (*Strafgesetzbuch*, StGB):¹⁸⁹

Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat.¹⁹⁰

Under German law the reason for punishing an instigator lies in the fact that the instigator, in influencing the will of the perpetrator of the act instigated, is deemed originally responsible for the commission of the main act. At the same time, instigation also constitutes an offence in itself:¹⁹¹ the crime of instigation has been committed as soon as the instigation has brought about in the perpetrator’s mind the decision to commit the crime (“Entschluß zur Tat”).¹⁹² Furthermore, where the person instigated – the main perpetrator – fails to commit the crime the instigator sought to bring about or commits a lesser act, the instigator will be guilty of attempted instigation, punishable under §30 of the German Penal Code, which provides that the attempt to convince another person to commit a crime or to instigate a crime is also punishable. The difference between the crime of instigation and the crime of attempted instigation lies in whether the instigator

188 *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-S (Trial Chamber), Decision of the President on the Application for Early Release of Georges Ruggiu, 12 May 2005.

189 Version of 13 November 1998 (BGBl. I S. 3322), BGBl. III/FNA 450-2, last changed through the law of 24 August 2004 (BGBl. I S. 2198).

190 “Whosoever has intentionally persuaded another to deliberately commit an illegal act shall, as instigator, be punished in the same way as a perpetrator.”

191 Cramer and Heine, *Schönke & Schröder: Strafgesetzbuch*, 26th edn, 2001, §26, para. 1/2.

192 *Ibid.*, para. 4.

succeeds in inducing in the perpetrator the decision to commit the crime, in which case the crime of instigation has been committed. For the *actus reus* of instigation to be complete it should therefore not matter whether or not external circumstances ultimately prevent the commission of the crime. Where the instigator does not succeed for various reasons in causing the perpetrator to decide to commit the crime and the crime is not committed, he or she would be guilty of attempted instigation and would be punished less harshly. It is submitted that this is sensible, as in such a case the danger of harm occurring is obviously considerably less than where the main perpetrator has made the concrete decision to commit the crime in question. Similarly, where the instigatee has made the decision to commit the crime, the danger is present whether or not he or she then goes on to commit the crime or is prevented by external circumstances from doing so. However, as mentioned above, it is clear from the wording of §26 that instigation as such is penalized only where it has been successful,¹⁹³ whereas instigation which is not followed by commission of the substantive crime is punished as attempted instigation.

In contrast to §26 and §30, §111 of the German Penal Code punishes the “öffentliche Aufforderung zu Straftaten”,¹⁹⁴ and provides that whosoever publicly, in an assembly or through the distribution of writings, invites others to commit a crime, shall be punished on the same terms as an instigator. The decisive difference between this provision and §26 criminalizing instigation lies in the fact that §111 does not call for another person as “Bestimmungsobjekt” – that is, there is no need for there to be another individual who must be caused selectively to decide to commit the crime.¹⁹⁵ This makes sense, as the danger in public incitement is that it can quickly become uncontrollable, as pointed out above.

The Swiss Penal Code (*Schweizerisches Strafgesetzbuch*) stipulates that “Whoever intentionally encourages or directs or plans a completed felony or misdemeanour shall be punished equally with the principal. Whoever attempts to induce another to commit a felony shall be punished for the attempt of this felony.”¹⁹⁶

Similar to the German provision on instigation, under Swiss law instigation occurs when it has brought about the decision to commit the crime in question (the “*Tatentschluss*”) in the main perpetrator.¹⁹⁷ This requirement that, for instigation to be successful, it needs to induce the instigatee to decide to commit the substantive crime (the *Entschluß zur Tat* or *Tatentschluss*), is

193 R. Maurach, F.-C. Schroeder and M. Maiwald, *Strafrecht: Besonderer Teil, Teilband 2: Straftaten und Gemeinschaftswerte*, 7th edn, C. F. Müller Juristischer Verlag, Heidelberg, p. 360.

194 “Public invitation to commit crimes”.

195 Maurach, above note 193, p. 361.

196 “Wer jemanden zu dem von ihm verübten Verbrechen oder Vergehen vorsätzlich bestimmt hat, wird nach der Strafandrohung, die auf den Täter Anwendung findet, bestraft. Wer jemanden zu einem Verbrechen zu bestimmen versucht, wird wegen Versuchs dieses Verbrechens bestraft.” Article 24(5)(1) and (2) of the Swiss Penal Code. English translation from Hartwig Roggemann (ed.), *Sources of Comparative Law*, East European Institute of the Free University of Berlin, Vol. 59.

197 *Botschaft betreffend das Übereinkommen über die Verhütung und Bestrafung des Völkermordes sowie die entsprechende Revision des Strafrechts*, No. 99.033, 31 March 1999, p. 5340.

reminiscent of the language used by the International Military Tribunal at Nuremberg to describe the effect that Streicher's propaganda had on the minds of the German people,¹⁹⁸ as well as the phrase "making another person decide" in the *travaux préparatoires* of the Rome Statute.¹⁹⁹

The Swiss Federal Council, after examining what amendments were needed for the Swiss Penal Code to comply with the requirements of the Genocide Convention, concluded that "direct and public incitement" was covered by two different provisions of the Penal Code, one being Article 24, criminalizing instigation,

wenn eine derartige öffentliche Aufreizung eine solche Intensität erreicht, dass sie zur "Bestimmung" (d.h. zum Hervorrufen eines Tatentschlusses) eines oder mehrerer anderer zur Begehung eines Genozids genügt.²⁰⁰

Where the incitement remains below the threshold of inducement actually to commit a crime, but, owing to its form and content, is nonetheless sufficiently insistent to "influence the addressee's will", the act would fall within the crime of "öffentliche Aufforderung zu einem Verbrechen oder zur Gewalttätigkeit"²⁰¹ pursuant to Article 259 of the Criminal Code.²⁰² Consequently, the Swiss legislators view "direct and public incitement to commit genocide" as covering not only situations in which the inciter succeeds in *instigating* his addressees, that is, he convinces them to decide to commit the crime, but also situations in which, although he fails to bring about such a decision, the inciter nevertheless "influences their will". It is therefore broader than instigation, encompassing both instigation and acts which are even "more" inchoate in that the addressee does not even need to make the actual decision to commit the crime. The idea of "influencing someone's will" is, of course, somewhat vague and unclear; it does, however, appear to express an idea akin to the argued effect of propaganda according to the proponents of a propaganda provision in the Genocide Convention debates, namely the creation of a certain state of mind or atmosphere in which the addressees were able to take the decision to commit genocidal acts. This is very interesting, as it would seem to make it possible to include acts of hate propaganda for genocide in the definition of direct and public incitement to genocide.²⁰³

What is particularly appealing about the German and Swiss approach is the idea that instigation is regarded as having been committed as soon as the decision to commit the criminal act (*Tatentschluss*) has been planted in the

198 See p. 828 above; this language was also cited by the ICTR in *Nahimana et al.*, above note 7, para. 981.

199 See p. 843 above.

200 "When such a public incitement reaches such an intensity that it suffices for the "inducement" (i.e. the formation of a decision to commit the crime) of another person or persons to commit genocide": *Botschaft*, above note 197, p. 5340.

201 "Public invitation / encouragement to commit a crime or violence".

202 *Botschaft*, above note 197, p. 5340.

203 For a development of this idea see W. K. Timmermann, "The relationship between hate propaganda and incitement to genocide: A new trend in international law towards criminalization of hate propaganda?", *LJIL*, Vol. 18, 2005, p. 257.

instigatée's mind. As soon as this occurs the danger is present, and only external circumstances or events will prevent the commission of the crime. At this stage the instigator is to be considered guilty of instigation and punished. It is submitted that instigation in international criminal law ought to be considered an inchoate crime. This also accords with what appears to be a general trend in the criminal law of many countries, which consider instigation a crime whether or not the substantive crime is subsequently committed or not.²⁰⁴ Furthermore, as noted above, during the Genocide Convention debates many delegates considered incitement to be an inchoate crime and often cited their national laws as illustration. It appears that when they put forward this argument, they were not referring specifically to direct and public incitement, but rather to instigation generally. There is therefore no obvious reason for considering it as not inchoate under international law, whereas there are conversely important reasons for considering it to be an inchoate crime. One of these reasons is found in the rationale underlying the criminalization of instigation, namely the need, as in the case of incitement, to obviate the inherent danger of other crimes being committed. In the case of incitement, this danger is a result of creating a certain atmosphere or state of mind among a large group of people, in public, which after the incitement becomes uncontrollable. In the case of instigation, the danger lies in the specific urging and instructing of another specific person to commit a crime. As an international crime is *per definitionem* one of the worst crimes – genocide, for one, having been repeatedly described as the “crime of crimes”,²⁰⁵ it appears to make little sense not to punish instigation to such crimes in cases where the substantive crime does not follow. Of course, once it is accepted that instigation in general is inchoate, then it should for reasons of consistency also be accepted that direct and public incitement, as a specific form of instigation, ought to apply to all international crimes and not merely genocide.²⁰⁶

204 See e.g. Germany (§30 StGB); Switzerland (Swiss Penal Code, Art. 24(5)(2)); United States (*US v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); *US v. Barnett*, 667 F.2d 835, 842–43 (9th Cir. 1982); *People v. Bottger*, 142 Cal. App. 3d 974, 191 Cal. Rptr. 408 (5th Dist. 1983); *Morgan v. Robinson*, 156 F. Supp. 2d 1133 (C.D. Cal. 2001); *People v. Burt* (1955) 45 Cal.2d 311, 288 P.2d 503, 51 A.L.R.2d 948; *State v. Hudon* (1930) 103 Vt. 17, 151 A. 562; *State v. Quinlan* (1914) 86 N.J.L. 120, 91 A. 111, aff'd on reh. 87 N.J.L. 333, 93 A. 1086; *State v. Ysea*, (1998) 191 Ariz. 372, 956 P.2d 499; *Lopez v. State*, 864 So. 2d 1151 (Fla. Dist. Ct. App. 2d Dist. 2003); *McGann v. State*, 30 S.W.3d 540 (Tex. App. Fort Worth 2000); *Branche v. Com.*, (1997) 25 Va. App. 480, 489 S.E.2d 692; Canada (s. 464(a) Criminal Code); *R. v. Ford*, [2000] 145 C.C.C. (3d) 336 (Ont. C.A.), para. 28; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, para. 56; Mexico (Article 209, *Código Penal para el Distrito Federal*, Mexico: Editorial Porrúa, 59th edn, p. 57); United Kingdom (*R. v. Marlow*, [1997] Crim. L.R. 897; *R. v. Goldman*, [2001] Crim. L.R. 822); Italy (§12.11.1. – L. 9 October 1967, n. 962, *Prevenzione e repressione del delitto di genocidio* (G.U. 30 October 1967, n. 272)); Korea (Korean Criminal Code, Art. 31, in G. O. W. Mueller (ed.), *The Korean Criminal Code*, Sweet & Maxwell, London, 1960, p. 39); Rwanda (s. 91(4) *Code Pénal Rwandais*); South Africa (South African Constitution, Art. 16(2)).

205 *Kambanda*, above note 151, para. 16; *Prosecutor v. Serashugo*, Case No. ICTR-98-39-S, Sentencing Judgement (Trial Chamber), 2 February 1999, para. 15.

206 In practice, this is unlikely to be accepted in the foreseeable future: as pointed out above, this proposal was decisively rejected during the drafting sessions on the Rome Statute.

Conclusion

During the debates on the Genocide Convention, the Soviet delegate forcefully argued that

It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so He asked how, in those circumstances, the inciters and organizers of the crime should be allowed to escape punishment, when they were the ones really responsible for the atrocities committed. The peoples of the world would indeed be puzzled if the Committee, basing its decision on purely political arguments of doubtful validity, were to state that the instigators of genocide, those who incited others to commit the concrete acts of genocide, were to remain unpunished.²⁰⁷

Since then, the events that occurred in Rwanda in 1994 have shown this view to be correct. As has been repeatedly recognized, *inter alia* by the ICTR, incitement by the media and individuals alike played an important role in triggering and spurring on the atrocities committed in the months after 6 April 1994. The dangers of incitement – be it public, where its effect is to create an atmosphere of violence and hatred, or private, where it results in the instigatee's determination to commit the crime the instigator seeks to bring about – are tangible and undeniable. The omnipresence of the Internet and the opportunities it offers for spreading inciting messages have considerably aggravated this danger.²⁰⁸

207 Eighty-fourth Meeting, above note 87, p. 219 (Mr Morozov).

208 The international terrorist group al Qaeda, for instance, recently started to offer weekly television "news" shows ready to download from the Internet and designed to inspire support for the terrorist organization. Y. Musharbash, "Al-Qaida startet Terror-TV", SPIEGEL ONLINE, 7 October 2005, available at <www.spiegel.de/politik/ausland/0,1518,378445,00.html> (last visited 30 November 2006).