

**Incitement, Instigation,  
Hate Speech and War Propaganda  
in International Law**

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## Summary

The author critically analyzes the status of the different speech acts related to hate propaganda in international law, that is, hate speech, direct and public incitement, instigation, and war propaganda. The thesis begins with an explanation of the concept of inchoate crimes, as much of the debate on the speech acts concerned centers around the issue of whether they are inchoate or not, that is, whether they can be punished without the need for the crime sought to be instigated to be committed.

The author then analyzes the development of the crime of direct and public incitement (to genocide) as well as instigation generally in international law, and surveys early attempts to criminalize hate speech. The judgments by the International Military Tribunal at Nuremberg in the *Streicher* and *Fritzzsche* cases are discussed, as well as decisions under Control Council Law No. 10 and by German de-Nazification courts. The *travaux préparatoires* of the Genocide Convention are then looked at in detail. This is followed by an analysis of the case law of the International Criminal Tribunals for Rwanda and the former Yugoslavia with regard to instigation and direct and public incitement, as well as other punishable preparatory acts such as conspiracy, attempt and complicity.

The international approach is then criticized, in particular its practice of regarding only direct and public incitement to genocide as inchoate, whilst instigation generally is treated as not inchoate. The author distinguishes between direct and public incitement, which is directed at a large group of people and the danger of which therefore lies in its uncontrollability once it has entered the public sphere and the concomitant creation of a climate of violence, and instigation in private, which is dangerous as it involves the determination of a particular individual to commit a crime. In the context of the latter, the author refers to the German and Swiss domestic law approaches and argues that instigation should also be regarded as an inchoate crime, since, as soon as the instigatee has been “determined” – that is, has taken the decision – to commit the crime, the danger is present, which justifies the intervention of criminal law in order to prevent the substantive crime from being committed, which, in the case of international crimes, is even more urgent than in the case of domestic crimes.

Subsequently, the author evaluates the prohibition of hate speech in various international treaties, including, *inter alia*, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the European Convention on Human Rights. Finally, the possible criminalization of hate speech under international law is discussed. First, the philosophical implications are assessed, as well as the different justifications for criminalizing hate speech, including the need to protect the human dignity and equality rights of the victims of such speech as well as utilitarian justifications such as the need to protect the public peace and the dangers of hate speech in that it may contribute to the creation of a climate of hatred and violence directed against a specific group. The author then discusses three possible ways in which hate speech can be treated as an international crime: as a crime *per se*, as incitement to genocide, and as the crime against humanity of persecution. The latter is given preference, as it best addresses the nature of hate speech and reflects most adequately the motivations underlying its criminalization.

Finally, the status of war propaganda under international law is analyzed. War propaganda has been addressed in three different areas of international law: international humanitarian law, *jus ad bellum* and international human rights law.

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Here war is harmless like a monument:  
A telephone is talking to a man;  
Flags on a map declare that troops were sent;  
A boy brings milk in bowls. There is a plan

For living men in terror of their lives,  
Who thirst at nine who were to thirst at noon,  
Who can be lost and are, who miss their wives  
And, unlike an idea, can die too soon.

Yet ideas can be true, although men die:  
For we have seen a myriad faces  
Ecstatic from one lie,

And maps can really point to places  
Where life is evil now.  
Nanking. Dachau.

*W. H. Auden (Summer 1938)*

## 1. Introduction

In 1920, thirteen years before Hitler came to power in Germany, the so-called *Protocols of the Elders of Zion* were published in Germany for the first time, amidst a flurry of other anti-Semitic writings. They purportedly consisted of the minutes from a fabricated meeting of Jewish elders in Berne in 1897, and contained allegations of a Jewish conspiracy to rule the world and enslave Christians.<sup>1</sup> Viciously anti-Semitic, by 1933 they had gone through 33 editions.<sup>2</sup> An eyewitness, writing in 1920, described the effect which the publication of the pamphlet had in Germany:

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.<sup>3</sup>

When the First World War broke out in 1914, American opinion was fundamentally opposed to intervention in the war. Only a few years later, a vigorous anti-German propaganda campaign had succeeded in turning the national mood around:

German Americans who failed to demonstrate their loyalty often met threats of being tarred and feathered and hanged. Many fervent “patriots” had no compunction about harassing, intimidating, or physically assaulting German Americans.<sup>4</sup>

One way in which the propagandists succeeded in creating a pro-war enthusiasm in the population was through propaganda films, a major group of which depicted German soldiers as brutal and merciless killers committing the worst kinds of atrocities. One movie showed a German officer throwing a baby out of a window before raping the infant’s nurse. The effect

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

<sup>2</sup> *Ibid.*, p. 21.

<sup>3</sup> Cited in: *ibid.*, p. 22.

<sup>4</sup> M. Sonntag, ‘Fighting Everything German in Texas. 1917-1919’, (1994) 56 *Historian* 655, pp. 668-669.

of such movies was “to fuel the audience’s contempt and hatred for the enemy”, leading to excesses such as those described above.<sup>5</sup>

On 4 June 1994, in one of many similar broadcasts on *Radio-Télévision Libre des Mille Collines* (RTL), Katanabwira 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.<sup>6</sup>

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*:

They kept saying Tutsis were cockroaches. Because they had given up on them we started working and killed them.<sup>7</sup>

On the night of 15 to 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 against Ahmici, aimed at “cleansing” the area of its Muslim inhabitants. The meeting approved of an order to kill all the military-age men, expel the civilians and set the houses on fire.<sup>8</sup> A witness had testified that Kordić’s comment upon hearing that civilians might get killed, was “so what”.<sup>9</sup> 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.<sup>10</sup>

These different accounts indicate that hate speech and war propaganda; direct and public incitement; and instigation are located on different stages of a continuum leading to

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<sup>5</sup> R. A. Wells, ‘Mobilizing Public Support for War: An Analysis of American Propaganda During World War I’, paper prepared for delivery at the Annual Meeting of the International Studies Association, New Orleans, LA, 24-27 March 2002, available at [www.isanet.org/noarchive/robertwells.html](http://www.isanet.org/noarchive/robertwells.html) [last accessed 12 December 2005].

<sup>6</sup> *Prosecutor v. Nabimana et al.*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, para. 396.

<sup>7</sup> F. Keane, ‘Deliver Us from Evil’, *The Independent Magazine*, 3 April 2004, p. 16.

<sup>8</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, para. 631.

<sup>9</sup> *Ibid.*, para. 627.

<sup>10</sup> *Ibid.*, para. 834.

the crimes sought to be brought about, or, in the case of war propaganda, war. Whilst hate speech and war propaganda occur early on and serve to mentally prepare the masses for certain crimes or a war planned by (most often) the country's leaders, incitement (or instigation) usually directly precedes the crimes whose commission is sought. It has – particularly recently, in the years since the Rwandan genocide – been recognized that the presence of incitement to hatred and hate propaganda may therefore indicate an impending genocide or at least violence and conflict.

Thus, the Committee on the Elimination of Racial Discrimination issued a decision concerning early warning procedures, in this case elaborating a “special set of indicators related to genocide” which would allow the Committee “to detect and prevent at the earliest possible stage developments in racial discrimination that may lead to violent conflict and genocide”.<sup>11</sup> The Committee explained that the list of indicators would allow the Committee to evaluate the presence of “factors known to be important components of situations leading to conflict and genocide”.<sup>12</sup> Two of the indicators mentioned by the Committee are of particular relevance. These are, firstly, the “[s]ystematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media”; and, secondly, “[g]rave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic, dehumanization and demonisation of minorities, or condone or justify violence against a minority”.<sup>13</sup>

It is well documented that major genocides of the 20th century, such as the Holocaust and the Rwandan genocide of 1994,<sup>14</sup> were preceded and prepared by extensive hate propaganda, which employed as one of its major techniques the dehumanization of the intended victims. In Germany, hate speech played a major role in the creation of a climate which prepared the ground for the Shoah, as the District Court of Jerusalem acknowledged in *Eichmann*, stating that “[o]ut of this soil of hatred for the Jews grew the actions of the

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<sup>11</sup> Committee on the Elimination of Racial Discrimination, Decision on Follow Up to the Declaration on Prevention of Genocide: Indicators of Patterns of Systematic and Massive Racial Discrimination, UN Doc. CERD/C/67/Misc.8, 19 August 2005, p. 1. *See* also Report of the Committee on the Elimination of Racial Discrimination, Supplement No. 18, UN Doc. A/54/18, 29 September 1999, para. 18(a).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, p. 2.

<sup>14</sup> It is less clear what influence hate speech had on the preparation and execution of the Armenian genocide, but it appears that it did not play as important a role as during the preparation of either the Holocaust or the Rwandan genocide.



Accused”.<sup>15</sup> Anti-Semitic propaganda was omnipresent even before Hitler came to power in 1933. Anti-Semitic writings such as the *Protocols of the Elders of Zion* rendered it “ideologically acceptable for politicians, editors, academics, scientists, and laymen to blame Jews for Germany’s social, economic, and moral troubles”.<sup>16</sup> The *Protocols* sparked off pogroms in Russia and worse in Germany.<sup>17</sup> They suggested to Germans that the only solution to the economic crisis, the “loss of traditional values” as well as the “intermixture of Aryan blood” lay in depriving the Jewish people of their human rights, separating them, and eventually eliminating them.<sup>18</sup> Hitler was well aware of the powers of propaganda, and, together with Joseph Goebbels, the “master manipulator of crowds”,<sup>19</sup> exploited it to the fullest extent. Goebbels himself recognized the influence of the radio, without which he believed it to have been impossible for the Nazis to seize and hold on to total power. Thus, he described the radio as the “first and most influential intermediary between [...] movement and nation, between idea and man”,<sup>20</sup> and claimed that “films constitute one of the most modern and scientific means of influencing the masses”.<sup>21</sup> He was proven right when, upon seeing a propaganda film like *Jud Süß*, which, whilst not directly calling for the murder of Jewish people, was nonetheless intended to prepare Germans for exactly that,<sup>22</sup> some viewers were so frantic that they left the Berlin cinemas “screaming curses at the Jews: ‘Drive the Jews from the Kurfürstendamm! Kick the last Jews out of Germany!’”<sup>23</sup>

The example of Nazi Germany has led Alexander Tsesis to conclude that:

The German experience contradicts the view that only speech posing an immediate threat of harm is dangerous enough to warrant statutory censure. To the contrary, the most dangerous form of bigotry takes years to develop, until it becomes culturally acceptable first to libel, then to discriminate, and finally to persecute outgroups.<sup>24</sup>

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<sup>15</sup> *Attorney-General of the Government of Israel v. Eichmann*, District Court of Jerusalem, Judgment of 12 December 1961, 36 ILR 18, para. 231.

<sup>16</sup> Tsesis, *supra* note 1, p. 20.

<sup>17</sup> *Ibid.*, p. 21.

<sup>18</sup> *Ibid.*, p. 22.

<sup>19</sup> R. E. Herzstein, *The War That Hitler Won: The Most Infamous Propaganda Campaign in History*, London: Hamish Hamilton 1979, p. 59.

<sup>20</sup> Cited in: *ibid.*, p. 176.

<sup>21</sup> Cited in: *ibid.*, p. 272.

<sup>22</sup> *Ibid.*, p. 310.

<sup>23</sup> *Ibid.*, p. 426.

<sup>24</sup> Tsesis, *supra* note 1, p. 26.

In Rwanda, symbolic language was used to stigmatize and dehumanize the Tutsi, “by attributing to [them] a set of characteristic labels, each one more horrific than the next: cockroach, feudal lord, snake, subversive, enemy”.<sup>25</sup> This rejection of the Tutsi minority from the Rwandan community was achieved moreover by depicting them as “*une race irrémédiablement dominatrice et complotieuse dont la force de nuisance transcende les frontières, au détriment de Hutu voués au rôle de victimes*”.<sup>26</sup> These characterizations created a climate of fear in which the Hutu were convinced of the need to take preemptive action in order to defend themselves.<sup>27</sup>

As will be explained in this paper, the specific danger of hate speech lies in the fact that in dehumanizing and denigrating the victim group, it starts a “continuum of destruction”.<sup>28</sup> This is mainly achieved by separation and exclusion of the victims from the community of humankind or the “human commonwealth”. They are treated as an “outgroup”, and hate speech thus builds an insurmountable wall between the victim group and those remaining in the “ingroup”, rendering sentiments of empathy or identification with the victims impossible.<sup>29</sup> Metaphors comparing the victimized group to insects or animals bearing diseases regularly accompanies the dehumanization: in Rwanda, the Tutsi were called *inyenzi*, or cockroaches.<sup>30</sup> This contributes to the creation of the climate of violence, as Jonathan Glover expounds: “[s]uch images and metaphors create a psychological aura or tone which [...] may be at least as important as explicit beliefs which can be criticized as untrue”.<sup>31</sup> Similarly, David Kretzmer argues that such hostile beliefs are a “necessary condition” for racist acts.<sup>32</sup> The capacity of human beings to convince themselves that others (the members of the victimized group) are not fellow human beings, but subhumans or animals, has also been referred to by biologists and sociologists. Irenäus Eibl-

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<sup>25</sup> J. Mukimbi, ‘The Seven Stages of the Rwandan Genocide’, (2005) 3 *JICJ* 823, p. 829.

<sup>26</sup> “An irremediably domineering and plotting race whose harmful force transcends the borders, to the detriment of the Hutu condemned to the role of victims” [my translation]: J.-P. Chrétien, *Rwanda: Les médias du génocide*, Paris: Editions Karthala 2002 (2<sup>nd</sup> ed.), p. 34.

<sup>27</sup> *Nahimana et al.*, *supra* note 6, para. 179.

<sup>28</sup> E. Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence*, Cambridge: Cambridge University Press 1989, p. 95.

<sup>29</sup> *Ibid.*, p. 120.

<sup>30</sup> *Nahimana et al.*, *supra* note 6, para. 358.

<sup>31</sup> J. Glover, *Humanity: A Moral History of the Twentieth Century*, Pimlico 2001, p. 339.

<sup>32</sup> D. Kretzmer, ‘Freedom of Speech and Racism’, (1987) 8 *Cardozo L. Rev.* 445, p. 463. *See also* M. Cherif Bassiouni, *Introduction to International Criminal Law*, Ardsley, New York: Transnational Publishers, Inc. 2003, pp. 727-728.

Eibesfeldt regards the ability of humans to demonize their fellow human beings as their most dangerous characteristic, because only that can turn them into merciless killers.<sup>33</sup>

The danger of hate speech and the consequences to which incitement, instigation, hate speech and war propaganda may lead are thus readily perceived, and the need to restrict them or penalize them in one form or another is widely recognized. The manner in which to do so and the precise constituent elements of the offenses in question are, however, contested and in the case of hate speech, in certain countries, notably the United States, the debate is over whether and in what form it may be restricted at all. Furthermore, the legal differences between incitement to hatred, (direct and public) incitement and instigation are not always clear. An analysis of the philosophical debate surrounding the justifiability of criminalizing these modes of expression, as well as hate speech, will assist in adequately circumscribing and defining their components and international legal status. Generally, (direct and public) incitement and instigation incur individual criminal responsibility, whereas hate speech and incitement to hatred are addressed in human rights treaties and declarations: States are under an obligation to prevent and prohibit such speech. Article 7 of the 1948 Universal Declaration of Human Rights,<sup>34</sup> for example, guarantees the right not to be discriminated against and states: “All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

This paper 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 paper, as a considerable part of the debate centers around whether they are inchoate or not. This will be followed by a description of the various punishable (inchoate) acts relating to hate crimes. The main part of this paper will consist of an analysis of the status of incitement and hate speech in international law, which is in turn succeeded by a critical analysis of the international approach, making reference in particular to the philosophical foundations and implications involved. Ways in which the shortcomings of the international approach can be improved will be indicated. Lastly, the status of war propaganda in international law will be briefly

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<sup>33</sup> I. Eibl-Eibesfeldt, *Grundriß der vergleichenden Verhaltensforschung*, Vierkirchen-Pasenbach: BuchVertrieb Blank GmbH 2004 (8<sup>th</sup> ed.), p. 775.

<sup>34</sup> Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, G.A. Res. 217, U.N. Doc. A/810 (1948).

addressed. Such propaganda has been circumscribed in the areas of both human rights law and international humanitarian law, albeit in distinct ways and inspired by different motivations.

## 2. Inchoate Crimes

The word “inchoate” denotes something that has “just begun” or is “underdeveloped”,<sup>35</sup> “partially completed” or “imperfectly formed”.<sup>36</sup> Inchoate offenses are thus incomplete offenses, which are committed despite the fact that the substantive offense, that is, the offense whose commission they were aiming at, is not completed and the intended harm is not realized. Black’s Law Dictionary describes such an offense as “[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment”.<sup>37</sup> In English common law, there are three general inchoate offenses, attempt, conspiracy and incitement (or solicitation in American law). All of them may incur criminal liability even though the crime they were intended to bring about does not materialize.<sup>38</sup> 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.

As the intended harm does not actually result, the question is why inchoate offenses 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”.<sup>39</sup> 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”,<sup>40</sup> 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,

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<sup>35</sup> A. Ashworth, *Principles of Criminal Law*, Oxford: Oxford University Press 2003 (4<sup>th</sup> ed.), p. 445.

<sup>36</sup> B. A. Garner (ed.), *Black’s Law Dictionary*, St. Paul, Minn.: West Group 1999 (7<sup>th</sup> ed.), p. 765.

<sup>37</sup> *Ibid.*, p. 1108.

<sup>38</sup> *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.

<sup>39</sup> Ashworth, *supra* note 35, p. 446.

<sup>40</sup> *Ibid.*

reasoning that the punishment should orientate itself at the degree of antisocial behavior, which is the same in both cases.<sup>41</sup>

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*,<sup>42</sup> 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 law-givers, i.e., laws that have the potential to be valid for everyone at all times.<sup>43</sup> 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.<sup>44</sup> 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”.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> In order to 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.<sup>48</sup>

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

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<sup>41</sup> *Model Penal Code and Commentaries*, Official Draft and Revised Comments, American Law Institute (1985), Adopted by the American Law Institute 24 May 1962, Section 5.05 (1). See A. Ripstein, *Equality, Responsibility, and the Law*, Cambridge: Cambridge University Press 1999, p. 219.

<sup>42</sup> I. Kant, *Grundlegung zur Metaphysik der Sitten*, Stuttgart: Reclam 1961.

<sup>43</sup> *Ibid.*, pp. 82-83.

<sup>44</sup> *Ibid.*, p. 87.

<sup>45</sup> *Ibid.*, p. 106.

<sup>46</sup> See also Ashworth, *supra* note 35, p. 472.

<sup>47</sup> Ripstein, *supra* note 41, p. 241.

<sup>48</sup> *The King v. Barker* [1924] N.Z.L.R. 865 *per* Salmond, J. See also *D.P.P. v. Stonehouse* [1978] A.C. 55 *per* Lord Diplock. See also Ashworth, *supra* note 35, p. 472.

of harm.<sup>49</sup> 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.

### **3. Incitement / Instigation and Hate Speech in International Law**

#### **3.1. The Various Punishable Acts Relating to Hate Propaganda**

As already indicated in the Introduction, the problem of hate propaganda has been addressed in different ways in international law. On the one hand, in the area of international human rights law, incitement to hatred and war propaganda have been prohibited; that is, several international and regional human rights conventions impose an obligation on States parties to either prohibit such speech acts or even criminalize them. These conventions include, for example, the International Covenant on Civil and Political Rights (ICCPR)<sup>50</sup> and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>51</sup> On the other hand, international criminal law has continuously developed to impose individual criminal responsibility for speech acts such as direct and public incitement to genocide, first established as a crime (albeit not under that name) in the jurisprudence of the International Military Tribunal (IMT) at Nuremberg, and subsequently included in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>52</sup> Instigation or incitement in general have been included in the statutes of the International Criminal Tribunals, and have since been defined in the tribunals' jurisprudence. Furthermore, aside from being prohibited in human rights law, war propaganda is also subject to certain restrictions in international humanitarian law.

#### **3.2. International Criminal Law: Incitement/Instigation and Early Attempts to Criminalize Hate Speech**

##### *3.2.1. Nuremberg: Streicher, Fritzsche*

Incitement to genocide as a crime under international law was born when the International Military Tribunal at Nuremberg held judgment over the accused Julius

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<sup>49</sup> Ashworth, *supra* note 35, p. 446.

<sup>50</sup> International Covenant on Civil and Political Rights, 999 UNTS 171, (1966) 6 ILM 368 (entered into force 23 March 1976), Article 20.

<sup>51</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969), Article 4.

<sup>52</sup> Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 October 1948, 78 UNTS 277 (entered into force January 1951).

Streicher and Hans Fritzsche in 1946. Whilst the term “incitement to genocide” as such was not yet known 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 moreover 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”.<sup>53</sup> 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, an evil-doer, a disseminator of diseases” or “swarms of locusts which must be exterminated completely”.<sup>54</sup> The Tribunal found that by means of such hate propaganda, Streicher “incited the German people to active persecution”,<sup>55</sup> as well as to “murder and extermination”, acts which in the IMT’s view represented a crime against humanity,<sup>56</sup> of which Streicher was convicted and sentenced to death by hanging.<sup>57</sup>

The Tribunal found it to have been proven 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 required *mens rea* of the offense. 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”<sup>58</sup> indicated that the crime in question – that is, crime against humanity as 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.<sup>59</sup> This would of course mean that the incitement in question would not be an inchoate

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<sup>53</sup> As explained to Leon Goldensohn, prison psychiatrist of the jail of the IMT at Nuremberg in 1946: R. Gellately (ed.), *The Nuremberg Interviews Conducted By Leon Goldensohn*, New York: Alfred A. Knopf 2004, p. 252.

<sup>54</sup> (1946) 22 *Trial of German Major War Criminals* p. 501.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, p. 502.

<sup>57</sup> *Ibid.*, p. 529. See also T. Taylor, *The Anatomy of the Nuremberg Trials*, Toronto: Little, Brown and Co. 1992, pp. 376-380.

<sup>58</sup> (1946) 22 *Trial of German Major War Criminals* p. 502.

<sup>59</sup> J. F. Metz, ‘Rwandan Genocide and the International Law of Radio Jamming’, (1997) 91 *AJIL* 628, p. 637.

offense. 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;<sup>60</sup> instead, it dwelled on the effect which 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".<sup>61</sup> The Tribunal therefore did not leave any 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.<sup>62</sup> 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".<sup>63</sup> 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. This idea of the effect on the mind of the main perpetrator will be discussed further below, *inter alia* in connection with the Genocide Convention debates.

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 had not been proven that he knew the news he transmitted to have been falsified.<sup>64</sup> The Tribunal was "not prepared to hold that [his broadcasts] were intended to incite the German people to commit atrocities on conquered peoples".<sup>65</sup> Its comments strongly suggest that its reasons for acquitting Fritzsche lay in the fact that, firstly, he lacked the necessary intent, or that such intent had not been proven to the Tribunal's

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<sup>60</sup> K. J. Madders, 'War, Use of Propaganda in', in: (2000) 4 *Encyclopedia of Public International Law* 1394, p. 1395; 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', (2004) 45 *Va. J. Int'l L.* 139, p. 144.

<sup>61</sup> (1946) 22 *Trial of German Major War Criminals* p. 502.

<sup>62</sup> Gellately, *supra* note 53, p. 47; see also Taylor, *Anatomy*, *supra* note 57, pp. 460-462.

<sup>63</sup> (1946) 22 *Trial of German Major War Criminals* p. 526.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*



satisfaction,<sup>66</sup> and secondly, that his speeches were not sufficiently direct or unequivocal in calling for the murder of the Jewish people.

### 3.2.2. Fritzsche Revisited: Prosecution by 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 conducted in post-World War II Germany. The court decided that Fritzsche belonged into 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 labor for his participation as a *Hauptschuldiger* in the criminal Nazi regime.<sup>67</sup> The judges pointed out that throughout his career with the German radio, Fritzsche’s speeches corresponded to the Nazi ideology; moreover, after 1942, when he was given responsibility for the political direction of the German radio and was appointed head of the radio division in the propaganda ministry with the rank of a *Ministerialdirektor*, Fritzsche’s influence on the formation of the public opinion increased considerably.<sup>68</sup> The court concluded that Fritzsche developed an altogether “*außerordentliche Propaganda für die NS-Ideologie*”.<sup>69</sup> He was “*einer der einflussreichsten und aktivsten Propagandisten der Nazi-Ideologie*”.<sup>70</sup> The court held that Fritzsche therefore belonged to the group of those mainly responsible. He was given the highest penalty as he had been an “*intellektueller Urheber*”<sup>71</sup> who influenced wide circles of the German people through his propagandistic activity and convinced them of the Nazi ideology.<sup>72</sup>

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 tribunal. The court stressed that through his radio addresses,

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<sup>66</sup> *Nahimana*, *supra* note 6, para. 982; L. J. Martin, *International Propaganda: Its Legal and Diplomatic Control*, Minneapolis: University of Minnesota Press 1958, p. 206; Madders, *supra* note 60, p. 1395.

<sup>67</sup> *Hans Fritzsche Judgment*, Aktenzeichen I/2398, Spruchkammer I, Stadtkreis Nürnberg, 31 January 1947, Staatsarchiv München, SpKa Karton 475, p. 1 [hereinafter *Fritzsche Spruchkammer I Judgment*].

<sup>68</sup> *Ibid.*, p. 3.

<sup>69</sup> “Extraordinary propaganda for the NS ideology” [my translation]: *ibid.*

<sup>70</sup> “One of the most influential and active propagandists of the Nazi ideology” [my translation]: *ibid.*, p. 4.

<sup>71</sup> “Intellectual originator” [my translation]: *ibid.*

<sup>72</sup> *Ibid.*

Fritzsche exercised an extraordinarily strong influence over a large part of the German people.<sup>73</sup> It referred to Fritzsche's support for Goebbels' "Lügenpropaganda"<sup>74</sup> in that he distributed untrue news, and condemned his use of "Schimpfpropaganda", that is, defamation of the leaders of the enemy countries, including Churchill, Roosevelt and Lord Halifax.<sup>75</sup>

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".<sup>76</sup> He alleged that Jewish people were encouraging the American and British soldiers and profited 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".<sup>77</sup> 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 stoked up 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.*<sup>78</sup>

The essence of his criminal conduct, therefore, was the fact that through his propaganda, he knowingly contributed to the creation of a certain "mood" amongst Germans, which "favored" 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

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<sup>73</sup> *Hans Fritzsche Appeals Judgment*, Ber.-Reg.-Nr. BKI/695, Berufungskammer I, Nürnberg-Fürth, 30 September 1947, Staatsarchiv München, SpKa Karton 475, p. 8 [hereinafter *Fritzsche Berufungskammer I Judgment*].

<sup>74</sup> "Lie propaganda" [my translation]: *ibid.*, p. 9.

<sup>75</sup> *Ibid.*

<sup>76</sup> "The domination of Jewry – and [...] the destruction of the German people" [my translation]: *ibid.*, p. 10.

<sup>77</sup> My translation; 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.*

<sup>78</sup> "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" [my translation]: *ibid.*

violence, but the overall effect of which was the creation of a violent atmosphere or state of mind amongst 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 aufgebracht*”<sup>79</sup> through the Nazi press and the entire party apparatus, and that there were concentration camps in which prisoners were treated inhumanly.<sup>80</sup> *Berufungskammer I* emphasized that the number of Germans who were influenced by Fritzsche’s propaganda in favor of Nazism could not easily be overestimated.<sup>81</sup>

### 3.2.3. *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 United States Military Tribunal,<sup>82</sup> 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.<sup>83</sup> Dietrich, not Goebbels, had control over the press section in that Ministry.<sup>84</sup> 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

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<sup>79</sup> “Systematically incited against the Jews” [my translation]: *ibid.*, p. 15.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, p. 17. On 10 August 1950, however, the Minister for Political Liberation in Bavaria decided to shorten the term of imprisonment in a labor camp, to which Fritzsche had been condemned, by four years. Fritzsche’s term therefore ended on 29 September 1950. The Minister reasoned that at the present time, the penalty imposed 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.

<sup>82</sup> 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*, Frankfurt am Main: Fischer Taschenbuch Verlag 2000 (2<sup>nd</sup> ed.), pp. 187-198.

<sup>83</sup> 14 TWC 314, pp. 565-576.

<sup>84</sup> *Ibid.*, p. 566.

continuation in power”.<sup>85</sup> It dwelled on the anti-Semitism which was abounding in press and periodical directives, which instructed newspaper and magazine editors and contributors to “especially [...] indicate the noxiousness of the Jews”;<sup>86</sup> stress “[t]he anti-Semitic campaign still more [...] as an important propagandistic factor in the world struggle”;<sup>87</sup> and “keep[...] awake in the German people the feeling that Judaism constitutes a world danger”.<sup>88</sup> 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”,<sup>89</sup> 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”.<sup>90</sup> 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 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.<sup>91</sup>

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.

### 3.2.4. *The Genocide Convention: Travaux Préparatoires*

#### 3.2.4.1. Incitement to Genocide

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,

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<sup>85</sup> *Ibid.*, p. 569.

<sup>86</sup> *Ibid.*, p. 572 [emphasis in original].

<sup>87</sup> *Ibid.*, p. 573.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, p. 575 [emphasis in original].

<sup>90</sup> *Ibid.* [emphasis in original].

<sup>91</sup> *Ibid.*, p. 576.

the domination of the so-called ‘higher’ races and the extermination of the so-called ‘lower’ races”.<sup>92</sup>

The *Draft Convention for the Prevention and Punishment of Genocide* prepared by the UN Secretariat<sup>93</sup> criminalized “direct public incitement to any act of genocide, whether the incitement be successful or not”.<sup>94</sup> In its comments on the draft Convention, the Secretariat specified that “direct public incitement” referred to “direct appeals to the public by means of speeches, radio or press, inciting it to genocide”.<sup>95</sup> 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 to prepare a draft Genocide Convention, which was composed of the ECOSOC members China, France, Lebanon, Poland, USA, USSR and Venezuela.<sup>96</sup> The *Ad Hoc* Committee was to take into consideration the *Secretariat Draft*, comments by governments on that draft, as well as all other drafts submitted by Member Governments.<sup>97</sup>

Commenting upon the *Secretariat Draft*, the US 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 [...].<sup>98</sup>

This proposal is remarkable given the US delegation’s staunch opposition to the inclusion of any incitement provision later on in the debates.<sup>99</sup> It is also remarkable in that it represented

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<sup>92</sup> 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).

<sup>93</sup> UN Doc. E/447, 26 June 1947 [hereinafter *Secretariat Draft*].

<sup>94</sup> *Ibid.*, p. 7 (Article II (II)(2)).

<sup>95</sup> *Ibid.*, p. 31.

<sup>96</sup> ECOSOC Res. No. 117 (VI), 3 March 1948.

<sup>97</sup> UN Doc. E/AC.25/2.

<sup>98</sup> UN Doc. E/623, 30 January 1948, p. 14. This proposal by the US was considered to be “commendable” by the Netherlands: UN Doc. E/623/Add.3, 22 April 1948, p. 1.

<sup>99</sup> See *infra*, p. 18.

a more detailed provision on incitement than those submitted by other delegations; the French Draft Convention on Genocide, for instance, simply stated that “[a]ny attempt, provocation or instigation to commit genocide is also a crime”.<sup>100</sup> 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”.<sup>101</sup>

The Draft Convention drawn up by the *Ad Hoc* Committee eventually provided for individual criminal responsibility for “direct incitement in public or in private to commit genocide whether such incitement be successful or not”.<sup>102</sup> The Commentary to the *Ad Hoc Committee Draft* reveals that the qualification “in public or in private” was adopted by 5 votes with 2 abstentions,<sup>103</sup> which signifies that it enjoyed a fair amount of support amongst 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”, whilst incitement was considered *private* when “conducted through conversations, private meetings or messages”.<sup>104</sup> Private incitement would seem to correspond to instigation or solicitation as defined in domestic jurisdictions.<sup>105</sup> 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’”.<sup>106</sup> The French delegate expressed his agreement, remarking that in French law, “the term ‘incite’ covered both public and private incitement”.<sup>107</sup>

The Commentary to the *Ad Hoc Committee Draft* further identifies *direct* incitement as “that form of incitement whereby an individual invites or urges other individuals to commit

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<sup>100</sup> 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.

<sup>101</sup> Article V(2), *Basic Principles*, *supra* note 92.

<sup>102</sup> Article IV(c), ‘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.

<sup>103</sup> Addendum, ‘Commentary on Articles Adopted by the Committee’, UN Doc. E/AC.25/W.1/Add.1, 27 April 1948, p. 2.

<sup>104</sup> *Ibid.*

<sup>105</sup> See *infra*, pp. 42-46.

<sup>106</sup> *Ad Hoc* Committee, Summary Records of the 16<sup>th</sup> Meeting (22 April 1948), UN Doc. E/AC.25/SR.16, 29 April 1948, p. 2 (Mr. Perez-Perozo).

<sup>107</sup> *Ibid.* (Mr. Ordonneau).

genocide”.<sup>108</sup> Whilst this explanation does not appear to clarify the term “direct” too much, it presumably expresses the idea that the perpetrator clearly and unmistakably communicates to the addressees the need that they 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”.<sup>109</sup>

It is furthermore worthy of note that whilst it was decided to retain the qualification “whether such incitement be successful or not”, certain delegations regarded these words as superfluous,<sup>110</sup> 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.<sup>111</sup> However, other delegations argued that the inclusion of the phrase would stress the preventive purpose of the Convention,<sup>112</sup> and it was eventually adopted by 4 votes to none, with 3 abstentions.<sup>113</sup>

The US delegation finally voted against the whole paragraph criminalizing incitement to genocide,<sup>114</sup> 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.<sup>115</sup>

This approach reflects the conventional American reluctance to restrict freedom of speech, but constituted a significant shift from its earlier agreement “to the principle of suppressing

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<sup>108</sup> ‘Commentary on Articles Adopted by the Committee’, *supra* note 103, p. 1.

<sup>109</sup> N. Robinson, *The Genocide Convention*, New York: Institute of Jewish Affairs 1960, p. 67 [emphasis in original].

<sup>110</sup> ‘Commentary on Articles Adopted by the Committee’, *supra* note 103, p. 2.

<sup>111</sup> E/AC.25/SR.16, p. 3 (Mr. Azkoul). Both the French and the US representatives agreed in considering the phrase unnecessary: *ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ad Hoc* Committee, Summary Records of the 24<sup>th</sup> Meeting (28 April 1948), UN Doc. E/AC.25/SR.24, 12 May 1948, p. 7.

<sup>115</sup> *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 26<sup>th</sup> 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 28<sup>th</sup> 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).

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.<sup>116</sup>

The *Ad Hoc Committee Draft* was then discussed by the ECOSOC<sup>117</sup> 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 of racial, national or religious hatred, “as a method of forestalling outbreaks of genocide”,<sup>118</sup> whilst the US delegation criticized the provision dealing with direct incitement.<sup>119</sup> The Soviet Union submitted a proposed amendment to the General Assembly, again including a provision penalizing propaganda for hatred and genocide.<sup>120</sup> The Belgian delegation submitted a proposal amending the incitement provision to read “[d]irect and public incitement to commit genocide”,<sup>121</sup> and Iran proposed deleting Article IV(c) on incitement to genocide altogether.<sup>122</sup>

The Sixth Committee of the General Assembly then discussed the *Ad Hoc Committee Draft* between 21 September and 10 December 1948.<sup>123</sup> 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”.<sup>124</sup>

During the discussions on 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”.<sup>125</sup> Interestingly, the US delegate declared that there was “no great difference

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<sup>116</sup> *Ad Hoc Committee*, Summary Records of the 5<sup>th</sup> Meeting (8 April 1948), UN Doc. E/AC.25/SR.5, 16 April 1948, p. 8.

<sup>117</sup> ECOSOC, Official Records, 7<sup>th</sup> Session (1948), UN Docs. E/SR.218 (26 August 1948) and E/SR.219 (27 August 1948).

<sup>118</sup> E/SR.218, *supra* note 117, p. 714 (Mr. Katz-Suchy, Poland); *see also* E/SR.219, *supra* note 117, p. 720 (Mr. Pavlov, USSR).

<sup>119</sup> *Ibid.*, p. 725 (Mr. Thorp, USA).

<sup>120</sup> 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.

<sup>121</sup> ‘Belgium: amendments to the draft convention on genocide (E/794)’, UN Doc. A/C.6/217, 5 October 1948.

<sup>122</sup> ‘Iran: amendments to the draft convention on genocide (E/794) and draft resolution’, UN Doc. A/C.6/218, 5 October 1948.

<sup>123</sup> Official Records of the 3<sup>rd</sup> Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings, 21 September to 10 December 1948.

<sup>124</sup> Sixty-Fourth Meeting, UN Doc. A/C.6/SR.64, 1 October 1948, p. 17 (Sir Hartley Shawcross).

<sup>125</sup> Eighty-Fourth Meeting, *supra* note 115, p. 207.



between the Belgian amendment and the *Ad Hoc* Committee text”,<sup>126</sup> suggesting that it was evident that such incitement was an inchoate offense. The Venezuelan delegation stressed that “[a]ll legislations regarded incitement to crime as punishable”; whilst 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”<sup>127</sup> – that is, Venezuela also regarded incitement as an inchoate offense. The delegate moreover underlined the need to punish those who committed this crime, as genocide was “usually the result of hatred instilled in the masses by inciters”.<sup>128</sup> 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”.<sup>129</sup> He also vigorously opposed the deletion of the phrase “whether such incitement be successful or not”, which in his opinion was “anything but superfluous”, as 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”.<sup>130</sup> Despite this comment by the Venezuelan delegate, most delegations appear to have regarded the qualification as superfluous 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”.<sup>131</sup>

The Yugoslavian 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 through propaganda”, and concluded that therefore, “[t]he first step in the campaign against genocide would be to prevent incitement to the crime”.<sup>132</sup> Addressing the US delegation’s concern with 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”.<sup>133</sup> Instead, the retention of the incitement provision was necessary, because “[i]t was precisely in connexion with genocide that the suppression of

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<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, p. 208 (Mr. Pérez Perozo).

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, p. 214 (Mr. Abdoh).

<sup>132</sup> *Ibid.*, p. 216 (Mr. Bartos).

<sup>133</sup> *Ibid.* (Mr. Spanien).

propaganda was absolutely essential”.<sup>134</sup> He also favored 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”.<sup>135</sup> Later, he specified that “all national legislation treated incitement to crime, *even if not successful*, as a separate and independent breach of the law”.<sup>136</sup> The Haitian delegate equally favored retaining the article punishing incitement to genocide, “whether successful or not”.<sup>137</sup>

The UK delegate, whilst agreeing that in theory incitement “could be considered as a separate act”, 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.<sup>138</sup> Disagreeing with these arguments, the Australian and Swedish delegates both objected to the deletion of sub-paragraph (c).<sup>139</sup> 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”.<sup>140</sup> 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.<sup>141</sup>

The intrinsic danger of incitement was also stressed as a reason for criminalizing incitement by the Danish delegate,<sup>142</sup> whilst the Czechoslovakian delegate emphasized that “[d]irect incitement to murder” was a crime “in all countries”.<sup>143</sup> The Uruguayan delegate also favored

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<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> Eighty-Fifth Meeting, UN Doc. A/C.6/SR.85, 27 October 1948, p. 227 (Mr. Spanien) [emphasis supplied].

<sup>137</sup> Eighty-Fourth Meeting, *supra* note 115, p. 217 (Mr. Demesmin).

<sup>138</sup> *Ibid.*, p. 218 (Mr. Fitzmaurice).

<sup>139</sup> *Ibid.*, pp. 218-219 (Mr. Dignam and Mr. Petren, respectively).

<sup>140</sup> *Ibid.*, p. 219 (Mr. Dihigo).

<sup>141</sup> *Ibid.* (Mr. Morozov).

<sup>142</sup> Eighty-Fifth Meeting, *supra* note 136, p. 220 (Mr. Federspiel).

<sup>143</sup> *Ibid.*, p. 221 (Mr. Zourek).

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 with complicity.<sup>144</sup> The Egyptian delegate, the delegate from the Philippines, and the Ecuadorian delegate were also in favor of retaining the incitement provision.<sup>145</sup>

The US amendment proposing the deletion of sub-paragraph (c) was rejected by 27 votes to 16, with 5 abstentions.<sup>146</sup> The deletion of the words “or in private” was adopted by 26 votes to 6, with 10 abstentions.<sup>147</sup> Finally, the deletion of the words “whether such incitement be successful or not” was also adopted, albeit by a closer margin, with 19 votes for and 12 votes against the deletion, and 14 abstentions.<sup>148</sup> 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.<sup>149</sup> The South African representative agreed with this view.<sup>150</sup> This has led Nehemiah Robinson to conclude that “incitement is punishable generally regardless of the results, unless only successful incitement is explicitly [*sic*] declared punishable”.<sup>151</sup>

The whole Article IV was finally adopted as amended by 35 votes to none, with 6 abstentions.<sup>152</sup> Subsequently, the text of the articles of the Convention, as well as two resolutions, were submitted to the Drafting Committee, which in turn submitted a report to the Sixth Committee on 23 November 1948.<sup>153</sup> The report and revised text were considered by the Sixth Committee from the 128<sup>th</sup> to the 134<sup>th</sup> Meeting, and a definitive text was adopted.<sup>154</sup> This text was then submitted to the Plenary Meeting of the General Assembly, together with the report of the Sixth Committee<sup>155</sup> and amendments by the USSR and

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<sup>144</sup> *Ibid.*, p. 222 (Mr. Manini y Ríos).

<sup>145</sup> *Ibid.*, pp. 223-224, 229 (Mr. Raafat, Mr. Inglés, and Mr. Correa, respectively).

<sup>146</sup> *Ibid.*, p. 229.

<sup>147</sup> *Ibid.*, p. 230.

<sup>148</sup> *Ibid.*, p. 232.

<sup>149</sup> *Ibid.*, p. 231.

<sup>150</sup> *Ibid.*, p. 232.

<sup>151</sup> Robinson, *supra* note 109, p. 67.

<sup>152</sup> Ninety-First Meeting, UN Doc. A/C.6/SR.91, 4 November 1948, p. 301.

<sup>153</sup> UN Doc. A/C.6/288.

<sup>154</sup> Official Records of the Third Session of the General Assembly, Sixth Committee, Summary Records of Meetings, 21 September to 10 December 1948.

<sup>155</sup> UN Docs. A/760 & A/760 corr. 2.

Venezuela,<sup>156</sup> and was discussed during the General Assembly's 178<sup>th</sup> and 179<sup>th</sup> Meetings. Subsequently, the text of the Genocide Convention was adopted unanimously and without abstentions by the General Assembly on 9 December 1948.<sup>157</sup>

#### 3.2.4.2. Hate Propaganda

In addition to a provision on incitement to genocide, the *Secretariat Draft* of the Genocide Convention also included an article criminalizing “[a]ll forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act”.<sup>158</sup> In including such propaganda, the *Secretariat Draft*, therefore, covered a rather wide variety of speech acts; in this context, it is particularly interesting that the Secretariat was conscious of the need to avoid an “excessively wide” definition of genocide,<sup>159</sup> and therefore does not appear to have regarded its inclusion of various speech acts, including propaganda, as contributing to too wide a notion of the crime of genocide. In its comment, the Secretariat explained that such propaganda was to be distinguished from incitement in that the former would “not recommend the commission of genocide”, but would rather “carry on such general propaganda as would, if successful, persuade those impressed by it to contemplate the commission of genocide in a favourable light”.<sup>160</sup> The focus here is clearly on the impact the propaganda would have on the minds of the addressees, which in the Secretariat's view was likely to be more forceful and effective than actual incitement:

Such propaganda is even more dangerous than direct incitement to commit genocide. Genocide cannot take place unless a certain state of mind has previously been created.<sup>161</sup>

As the Secretariat elaborates, most people taking part in a genocide would consider themselves to be upright citizens “incapable of committing individual crimes for gain or in order to satisfy personal vengeance”.<sup>162</sup> They therefore need to be convinced of the necessity to commit genocide, because the group to be destroyed is depicted and perceived as “a very

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<sup>156</sup> UN Docs. A/766 & 770, respectively.

<sup>157</sup> UN Doc. A/PV.179.

<sup>158</sup> *Secretariat Draft*, *supra* note 93, p. 7 (Article III).

<sup>159</sup> *Ibid.*, p. 16.

<sup>160</sup> *Ibid.*, p. 32.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

great evil”, it is believed to “represent[...] error and perversion”, to “imperial[...] society, the nation, some religion, some political or social system”, or to be “an obstacle to progress”.<sup>163</sup> Propaganda therefore constitutes “the philosophical and ideological preparation for genocide”.<sup>164</sup> As it was aware of the possible conflict with the right to freedom of speech, the Secretariat stressed that in order for propaganda to be punishable under the Convention, it needed to possess certain characteristics. First of all, it had to be public, which excluded “private conversations”, which in the Secretariat’s view were “not likely to bring about the psychological and moral conditions in which genocide can be committed”.<sup>165</sup> Secondly, the propaganda had to have a “systematic and hateful character”, as in order to make the genocide appear as a necessary and acceptable act, the group to be destroyed needed to be shown “in an odious light”, which meant that “the propaganda must necessarily be heavily charged with hatred and must be systematic, that is to say, repeated methodically”.<sup>166</sup> Thirdly, in contrast to incitement to genocide, which covered openly advocating the crime, propaganda was punishable if it tended to “provoke genocide” or to “make it appear as a necessary, legitimate or excusable act”.<sup>167</sup> It is therefore clear that the Secretariat was keenly aware of the dangers of hate propaganda and that it indeed considered such propaganda to prepare the ground for a genocide and thus to be an indispensable factor in the creation of the genocidal state of mind without which the commission of a genocide is almost impossible. The prohibition of propaganda is hence to a great extent motivated by the desire to *prevent* the commission of genocide, which, of course, was an important motivation for drafting the Genocide Convention.<sup>168</sup>

The idea of preventing genocide by outlawing hate propaganda was also endorsed by the delegation of the USSR in the subsequent discussions in the ECOSOC, where the delegate stressed “the importance of the need to prevent the crime of genocide by fighting against discrimination and not tolerating the stirring up of hatred against certain groups, which finally led to genocide”.<sup>169</sup> Other delegations, however, were opposed to the inclusion of a provision criminalizing propaganda. In its comments on the *Secretariat Draft*, the US

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<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*, p. 33.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*, pp. 33-34.

<sup>168</sup> See G.A. Res. 96 (I), 11 December 1946.

<sup>169</sup> Economic and Social Council, Official Records, Sixth Session (1948), 140<sup>th</sup> Meeting, 13 February 1948, p. 147 [Mr. Arturian].

avored the deletion of the article, explaining that in accordance with its domestic law, “the right of free speech is not to be interfered with unless there is a clear and present danger that the utterance might interfere with a right of others”.<sup>170</sup> In cases where propaganda does amount to a “clear and present danger”, it “takes on the character of ‘incitement’ and is covered in the preceding Article”.<sup>171</sup> These comments are interesting for several reasons: firstly, according to the idea underlying the *Secretariat Draft*, propaganda is to be distinguished from incitement in that it does not directly call for specific genocidal acts to be committed, but more generally denigrates the group to be destroyed and serves to create a public climate or state of mind in which the destruction of the group is perceived as acceptable and even necessary.<sup>172</sup> Secondly, it could easily be argued that even such general propaganda inevitably interferes with the rights of others, primarily the victimized individuals’ right not to be discriminated against or their right to life.<sup>173</sup> Lastly, it is worthy of note that propaganda is regarded as constituting incitement under certain circumstances.

The USSR was very aware of the dangers of hate propaganda and the effect it had had in Nazi Germany,<sup>174</sup> 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.<sup>175</sup>

The USSR therefore persistently urged delegates to include a provision criminalizing such speech in the Convention. In its *Basic Principles*, it argued that:

The convention should make it a punishable offence to engage in any form of propaganda for genocide (the press, radio, cinema, etc.) aimed at inciting racial, national or religious enmity or hatred and also designed to provoke the commission of acts of genocide.<sup>176</sup>

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<sup>170</sup> E/623, *supra* note 98, p. 14.

<sup>171</sup> *Ibid.*

<sup>172</sup> This corresponds to the discussion below relating to hate speech: *see* p. 66.

<sup>173</sup> *See X. v. Federal Republic of Germany*, (1982) 29 Eur. Comm. HRDR. 194, p. 198 (discussed *infra*, p. 57). *See* also the discussion *infra*, p. 62.

<sup>174</sup> *See, e.g.*, Principle I, *Basic Principles*, *supra* note 92, p. 1.

<sup>175</sup> E/AC.25/SR.5, *supra* note 116, p. 13.

<sup>176</sup> Principle VI, *Basic Principles*, *supra* note 92, p. 1.

Presumably this means that propaganda for genocide would be punishable where the propagandist possesses the specific intent to incite “enmity or hatred” against a protected group and also possesses the further specific intent to “provoke the commission of acts of genocide”. In the eyes of the Soviet Union, the concept of genocide was closely connected with propaganda inciting racial and national hatred; for this reason, they opposed the inclusion of political groups amongst the protected groups: the Soviet representative did not regard crimes committed for political reasons to be connected to propaganda inciting national and racial hatred and therefore believed that they could not be included in the category of crimes which made up the notion of genocide.<sup>177</sup> Clearly, the inclusion of political groups would moreover render a provision criminalizing propaganda slightly worrisome, as there would be a danger of political dissent being characterized as genocide propaganda and suppressed. This consideration might have influenced some delegates when they later voted on whether to adopt the Soviet proposal to include a provision criminalizing propaganda.<sup>178</sup> Evidence can be found in comments made by the US delegate during the debates on the *Ad Hoc Committee Draft* in the Sixth Committee of the General Assembly, explaining his opposition to the provision criminalizing incitement to genocide:

If it were admitted that incitement was an act of genocide, any newspaper article criticizing a *political* group, for example, or suggesting certain measures with regard to such group for the general welfare, might make it possible for certain States to claim that a Government which allowed the publication of such an article was committing an act of genocide; and yet that article might be nothing more than the mere exercise of the right of freedom of the Press.<sup>179</sup>

In the Draft Convention prepared by the *Ad Hoc Committee*, propaganda was not included. The inclusion of “indirect propaganda in favour of genocide” – that is,

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<sup>177</sup> E/AC.25/W.4, *supra* note 115, p. 8. The Lebanese delegate later on made comments to the same effect: *Ad Hoc Committee*, Summary Records of the 13<sup>th</sup> Meeting (20 April 1948), UN Doc. E/AC.25/SR.13, 29 April 1948, p. 2 (Mr. Azkoul). See also E/AC.25/SR.24, *supra* note 114, p. 5 (Mr. Morozov).

<sup>178</sup> See W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge: Cambridge University Press 2000, p. 482.

<sup>179</sup> Eighty-Fourth Meeting, *supra* note 115, p. 213 (Mr. Maktos) [emphasis supplied]. This sentiment was echoed by the Iranian delegate, who feared that the possibility of punishing propaganda aimed at inciting racial hatred might have the result that “political strife between parties could be interpreted as propaganda of that sort, which could, in certain circumstances, provide national authorities with an excuse for violating the freedom of the Press and, in other cases, give rise to disputes between the Powers and aggravate international tension”: Eighty-Seventh Meeting, UN Doc. A/C.6/SR.87, 29 October 1948, p. 248 (Mr. Abdoh). See also *ibid.*, p. 249 (Mr. Manini y Ríos, Uruguay); *ibid.*, pp. 251-252 (Mr. Fitzmaurice, UK).

“propaganda which is intended to incite national, racial or religious hatreds and to lead to genocide, but is not a direct incitement to genocide”<sup>180</sup> – as proposed by the Soviet Union was rejected by 5 votes to 2 during the 16<sup>th</sup> Meeting of the *Ad Hoc* Committee.<sup>181</sup> A number of delegates were concerned that such a provision would infringe on freedom of expression and “give free rein to tendentious or abusive acts of repression”.<sup>182</sup> Initially, however, during the debates in the 5<sup>th</sup> Meeting, the US representative had “agreed to the principle of suppressing propaganda for genocide”, where it involved a violation of the rights of others and American courts adjudicated over the crime.<sup>183</sup> As indicated above, it can be argued that propaganda for genocide would necessarily involve a violation of the rights of others.

In contrast to the US, 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”.<sup>184</sup> Again, the effect of propaganda on the minds of the audience in creating a certain state of mind or genocidal climate is underlined as a reason for sanctioning such speech acts. In effect, whilst disagreeing on the precise wording of such a provision, several delegates favored the penalization of propaganda for genocide. The French delegate objected to an enumeration of the means of propaganda, which he argued would be too restrictive and would therefore “run the risk of allowing new and unforeseen forms of propaganda to go unpunished, such as aircraft tracing watchwords in the sky”.<sup>185</sup> Consequently, he favored using the more general term “provocation”.<sup>186</sup> Interestingly, therefore, the French delegate’s opposition to the Soviet propaganda provision is grounded in his concern that it might be too restrictive. The Polish representative also agreed with the need to include propaganda in the Convention, where it was, firstly, “aimed at inciting national enmities”, and, secondly, “characterized by the incitement to commit genocide”.<sup>187</sup> In apparent agreement with the French delegate, the Chinese delegate also expressed his opinion that “provocative acts aimed at committing”

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<sup>180</sup> ‘Commentary on Articles Adopted by the Committee’, *supra* note 103, p. 3.

<sup>181</sup> E/AC.25/SR.16, *supra* note 106, p. 11.

<sup>182</sup> ‘Commentary on Articles Adopted by the Committee’, *supra* note 103, p. 3.

<sup>183</sup> E/AC.25/SR.5, *supra* note 116, p. 8 (Mr. Maktos).

<sup>184</sup> *Ibid.*, p. 10 (Mr. Azkoul).

<sup>185</sup> *Ibid.*, pp. 13, 14 (Mr. Ordonneau). He subsequently reiterated this concern: E/AC.25/SR.16, *supra* note 106, p. 10.

<sup>186</sup> E/AC.25/SR.5, *supra* note 116, p. 13.

<sup>187</sup> *Ibid.*, p. 14 (Mr. Rudzinski).



genocide should be punishable;<sup>188</sup> however, in the following meeting, he insisted that he “fully reserved his position on the question of propaganda”.<sup>189</sup> Both the Polish delegate and the Venezuelan delegate considered that propaganda constituted a form of incitement.<sup>190</sup>

During the 16<sup>th</sup> Meeting, the US reiterated its concern that a provision criminalizing propaganda would infringe on freedom of speech and of the press.<sup>191</sup> In reply to these comments, the Polish representative recalled that the majority of the Committee had agreed to the need to punish incitement to genocide, and explained that the Soviet proposal to criminalize propaganda addressed “a particular method of incitement because it was extremely effective” and far more dangerous than where a single person verbally incited to commit genocide.<sup>192</sup> He specified that hate propaganda as such would not suffice for a conviction, but that the propaganda would have had to have been carried on “systematically and with intent to instigate the crime”.<sup>193</sup> This would ensure that in practice, the provision would find application only in “the most extreme cases”.<sup>194</sup> It therefore appears that those delegates who favored inserting a propaganda provision in the Convention, were motivated by the need to stop systematic and widespread propaganda of the kind engaged in by the Third Reich. As will be further discussed below, a criminalization of such propaganda is most appropriately achieved by describing it as the crime against humanity of persecution.<sup>195</sup>

The Lebanese delegate stated that he took the Polish delegate’s comments to mean that incitement to hatred *per se* would not be sufficient to be punished under the propaganda provision; it had to be accompanied by incitement to genocide.<sup>196</sup> In that case, the Soviet amendment would be superfluous, as it would already be covered by the provision dealing with incitement.<sup>197</sup> Both the Chinese and the French delegate pronounced themselves to be in agreement with these comments, whilst the Venezuelan delegate argued that “a convention should keep to generic terms”.<sup>198</sup> As the Soviet delegate pointed out, all of them

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<sup>188</sup> *Ibid.*, p. 15 (Mr. Lin Mousheng).

<sup>189</sup> *Ad Hoc* Committee, Summary Records of the 6<sup>th</sup> Meeting (9 April 1948), UN Doc. E/AC.25/SR.6, 18 April 1948, p. 3.

<sup>190</sup> *Ibid.*, p. 4 and p. 5, respectively (Mr. Rudzinski and Mr. Perez-Perozo).

<sup>191</sup> E/AC.25/SR.16, *supra* note 106, p. 7 (Mr. Maktos).

<sup>192</sup> *Ibid.*, p. 8 (Mr. Rudzinski).

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> *See infra* pp. 72-80.

<sup>196</sup> E/CN.25/SR.16, *supra* note 106, p. 8 (Mr. Azkoul). The Soviet delegate subsequently confirmed this interpretation: *ibid.*, p. 10 (Mr. Morozov).

<sup>197</sup> *Ibid.*, p. 9.

<sup>198</sup> *Ibid.* (Mr. Lin Mousheng, Mr. Ordonneau and Mr. Perez-Perozo, respectively).

agreed with the substance of the Soviet proposal, but disagreed only in that they considered that its objective was already achieved by the clause criminalizing incitement.<sup>199</sup> The only objection of principle came from the US, which, he argued, was unnecessary, as the amendment was “in [no] way contrary to the laws of the United States, as was clearly shown by the ruling of Justice Holmes of the United States Supreme Court, which stated that freedom of speech was not even a defence for persons crying ‘fire’ in a theatre, since their action might endanger human lives”.<sup>200</sup> Consequently, although the rejection of the propaganda provision, *inter alia*, by the *Ad Hoc* Committee caused the Soviet delegation to vote against the *Ad Hoc Committee Draft* as a whole<sup>201</sup> and the Polish delegation to abstain,<sup>202</sup> it should not be viewed as signifying that the delegates opposed the criminalization of hate propaganda; on the contrary, many believed it to be covered by the article concerning incitement. This is confirmed by the statement of the French and Venezuelan delegates explaining their negative vote to the Soviet proposal. They declared that they had “voted against the USSR representative’s proposal because they considered its aim sufficiently achieved by Article III c [on incitement to genocide]”.<sup>203</sup>

During the debates in the Sixth Committee of the General Assembly, the Yugoslav representative insisted on the dangers of propaganda and the need to penalize it, arguing that “[g]enocide was usually preceded by a propaganda campaign to stir up national, racial or religious hatred”, and that “all propaganda for aggressive war” needed to be punished.<sup>204</sup> Similarly, speaking in the context of direct incitement to genocide, the Polish representative argued that “when dealing with crimes of such a dangerous character, the law should intervene before the crime could be committed”; at the instant time – that is, shortly following the Second World War – “[t]he instigators of hatred were numerous [...] and should be prevented from carrying out their dangerous work”.<sup>205</sup> Addressing the argument that outlawing hate propaganda would infringe on freedom of information, the Polish delegate found that

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<sup>199</sup> *Ibid.* (Mr. Morozov).

<sup>200</sup> *Ibid.*, p. 10.

<sup>201</sup> E/CN.25/SR.26, *supra* note 115, p. 6 (Mr. Morozov).

<sup>202</sup> *Ibid.*, p. 8 (Mr. Rudzinski).

<sup>203</sup> *Ibid.*, p. 14 (Mr. Ordonneau and Mr. Perez-Perozo).

<sup>204</sup> Sixty-Third Meeting, UN Doc. A/C.6/SR.63, 30 September 1948, p. 9 (Mr. Bartos).

<sup>205</sup> Sixty-Fourth Meeting, *supra* note 124, p. 19 (Mr. Lachs).

spreading hatred was a strange form of conveying information. Members should keep in mind how powerful a weapon was Hitler's propaganda. Hatred was likely to breed crime and war.<sup>206</sup>

Similarly, the Czechoslovakian representative emphasized the need to prohibit "propaganda for racial or religious hatred", since "such propaganda led directly to genocide". Dwelling on the harm caused by this kind of propaganda, he pointed out that "it was Hitler's *Mein Kampf* which had inspired all the shocking crimes of recent years, including genocide and the war of aggression".<sup>207</sup> The Soviet delegate again urged the suppression of "propaganda which stirred up the hatred leading to genocide".<sup>208</sup>

As already indicated above,<sup>209</sup> when arguing for the need to criminalize incitement, the Venezuelan delegate emphasized that genocide was "usually the result of hatred instilled in the masses by inciters", thereby revealing a concept of incitement which includes and coincides to a large extent with hate propaganda.

In the discussions in the Sixth Committee relating to the Soviet amendment adding a provision criminalizing propaganda for genocide, the Soviet delegation again stressed that such propaganda was "the cause of acts of genocide", and needed to be punished in order for the convention to be "an effective instrument".<sup>210</sup> Whilst the Greek delegate considered such a provision unnecessary, as propaganda "aimed at [...] provoking the commission of acts of genocide" was already covered by sub-paragraph (c) dealing with incitement,<sup>211</sup> the French delegate emphasized his "wholehearted sympathy" with the Soviet amendment, but again criticized the enumeration of examples.<sup>212</sup> Instead, he proposed amending the Soviet amendment to read:

All forms of public propaganda which inflame racial, national or religious enmities or hatreds, with the object of provoking the commission of crimes of genocide.<sup>213</sup>

Whilst it is not entirely clear in how far this provision represents an improvement against the Soviet amendment, it in any case shows the French concern with propaganda and their

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<sup>206</sup> *Ibid.*, p. 20.

<sup>207</sup> Sixty-Sixth Meeting, UN Doc. A/C.6/SR.66, 4 October 1948, p. 30 (Mr. Prochazka).

<sup>208</sup> Sixty-Seventh Meeting, UN Doc. A/C.6/SR.67, 5 October 1948, p. 39 (Mr. Morozov).

<sup>209</sup> See *supra* p. 20.

<sup>210</sup> Eighty-Sixth Meeting, UN Doc. A/C.6/SR.86, 28 October 1948, p. 245 (Mr. Morozov).

<sup>211</sup> *Ibid.* (Mr. Spiropoulos).

<sup>212</sup> *Ibid.*, p. 246 (Mr. Chaumont).

<sup>213</sup> *Ibid.*

willingness to see its prohibition included in the Convention. The Haitian delegate saw no difficulties in adopting the amendment, arguing that “[n]othing [...] was more conducive to the crime [of genocide] than the dissemination of ideas of hatred”.<sup>214</sup> Finding it “difficult to imagine propaganda in favour of genocide which would not at the same time constitute incitement to that crime”,<sup>215</sup> the Venezuelan delegate opposed any enumeration of acts of propaganda implicitly included in sub-paragraph (c), as such an enumeration would “necessarily be incomplete”.<sup>216</sup>

The Polish representative again passionately outlined the dangers of hate propaganda:

The most horrible crime ever known to the world had been brought about by preaching hatred of certain human groups. It was unnecessary directly to incite future perpetrators to commit acts of genocide. It was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties, in order to create an atmosphere favourable to the perpetration of the crime. It was necessary, therefore, to outlaw that form of propaganda, which was as dangerous if not more dangerous than direct incitement to the commission of genocide.<sup>217</sup>

Nonetheless, the Soviet amendment was decisively rejected.<sup>218</sup> However, in explaining his vote in favor of Article IV criminalizing direct and public incitement, the Soviet delegate explained that he had done so “in view of the arguments [...] advanced when the USSR amendments [concerning propaganda] had been rejected [...], namely, that cases of incitement by public propaganda were covered by the idea of direct incitement in public”.<sup>219</sup> It is therefore clear that the USSR interpreted the debates such that certain forms of public propaganda constituted direct and public incitement to genocide.

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<sup>214</sup> *Ibid.*, p. 247 (Mr. Demesmin).

<sup>215</sup> Eighty-Seventh Meeting, *supra* note 179, p. 250 (Mr. Pérez Perozo).

<sup>216</sup> *Ibid.*, p. 251.

<sup>217</sup> *Ibid.* (Mr. Lachs).

<sup>218</sup> The first part of the amendment, penalizing propaganda “aimed at inciting racial, national or religious enmities or hatreds”, was rejected by 28 votes to 11, with 4 abstentions; the second part, criminalizing propaganda “aimed at provoking the commission of acts of genocide”, was rejected by 30 votes to 8, with 6 abstentions: *ibid.*, p. 253.

<sup>219</sup> Ninety-First Meeting, *supra* note 152, p. 301.

### 3.2.5. *Instigation / Incitement as Interpreted by the International Criminal Tribunals*

The International Criminal Tribunals have generally drawn a distinction between incitement or instigation as such and direct and public incitement to genocide. Incitement *per se* has been regarded to be punishable only where it leads to the commission of the substantive crime, which means that it is not an inchoate crime;<sup>220</sup> 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 only applicable 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 or incitement in general, 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 *Blaskić*, an ICTY Trial Chamber defined instigating as “prompting another to commit an offence”,<sup>221</sup> whilst the ICTR understood it to mean “urging, encouraging or prompting” another person to commit a crime.<sup>222</sup> There must be a “causal connection between the instigation and the *actus reus* of the crime”,<sup>223</sup> this has been held to mean that the instigation must have “directly and substantially contributed” to the other person’s commission of the substantive offense,<sup>224</sup> or must at least have been a “clear contributing factor”.<sup>225</sup> 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.<sup>226</sup>

As regards the required *mens rea*, the instigator must act intentionally, that is, he or she must have “intended to provoke or induce the commission of the crime”, or must at

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<sup>220</sup> See also W. A. Schabas, ‘Le Génocide’, in: H. Ascencio, E. Decaux & A. Pellet (eds.), *Droit international pénal*, Paris: Éditions A. Pedone 2000, 319, p. 326.

<sup>221</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 280; see also *Kordić and Čerkez* Trial Judgment, *supra* note 8, para. 387; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 601.

<sup>222</sup> *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, para. 381.

<sup>223</sup> *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001, para. 30; see also *Blaškić* Trial Judgment, *supra* note 221, para. 278; *Semanza*, *supra* note 222, para. 381; *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-A-T, Judgment and Sentence, 22 November 2004, para. 593; *Prosecutor v. Mubimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, 28 April 2005, para. 504; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, para. 762.

<sup>224</sup> *Prosecutor v. Nindabahizi*, Case No. ICTR-2001-71-I, Judgment and Sentence, 15 July 2004, para. 456.

<sup>225</sup> *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, para. 252.

<sup>226</sup> *Kvočka et al.*, *supra* note 225, para. 252; *Kordić and Čerkez* Trial Judgment, *supra* note 8, para. 387.

least have been “aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts”.<sup>227</sup> At the same time, the accused must again be proven to have “directly or indirectly intended that the crime in question be committed”.<sup>228</sup>

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”.<sup>229</sup> 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”.<sup>230</sup> 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 incitement or instigation generally to be direct and public in order to be punishable.<sup>231</sup> Therefore, unlike direct and public incitement to commit genocide, as will be discussed below, instigation need not be direct and public.<sup>232</sup>

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”.<sup>233</sup>

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.<sup>234</sup>

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<sup>227</sup> *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003, para. 60; see also *Kvočka et al.*, *supra* note 225, para. 252.

<sup>228</sup> *Blaškić* Trial Judgment, *supra* note 221, para. 278; see also *Kordić and Čerkez* Trial Judgment, *supra* note 8, para. 386; *Bagilishema*, *supra* note 223, para. 31.

<sup>229</sup> *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment and Sentence, 6 December 1999, para. 38; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment, 27 January 2000, para. 120.

<sup>230</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 481.

<sup>231</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001, paras. 478-483.

<sup>232</sup> *Ibid.*; *Kamubanda*, *supra* note 223, para. 593.

<sup>233</sup> *Musema*, *supra* note 229, para. 120; *Rutaganda*, *supra* note 229, para. 38; *Ndindabizi*, *supra* note 224, para. 456; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 17.

<sup>234</sup> *Akayesu* Trial Judgment, *supra* note 230, para. 562.

Considering that in the same judgment, the Trial Chamber held that, in contrast to direct and public incitement to genocide, incitement or instigation in general was not inchoate, it would appear that it regarded direct and public incitement as much more dangerous than mere instigation.

In the same case, the Tribunal also outlined the *mens rea* elements of the offense: 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.<sup>235</sup>

In *Ruggiu*, the ICTR again stressed that incitement to genocide was inchoate.<sup>236</sup> 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.<sup>237</sup>

The “direct” element in incitement to genocide was explained in *Akayesu (TC)*, 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.<sup>238</sup> Thus, a statement could be implicit yet still direct.<sup>239</sup> 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

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<sup>235</sup> *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*, 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*, Brussels: Bruylant 2003, 281, p. 287.

<sup>236</sup> *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment and Sentence, 1 June 2000, para. 16.

<sup>237</sup> *Ibid.*, para. 22. The relationship between hate speech and persecution as a crime against humanity will be discussed in detail *infra*, pp. 72-80.

<sup>238</sup> *Akayesu* Trial Judgment, *supra* note 230, para. 557.

<sup>239</sup> *Ibid.*

incitement can be viewed as direct or not”.<sup>240</sup> The Tribunal concluded that in the particular case at hand, the accused had been shown to possess “the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group”.<sup>241</sup> 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 IMT at Nuremberg and the German courts in the trial of Fritzsche, as well as during the Genocide Convention debates. As will be expounded further below, this notion also plays a role in the criminalization of hate speech.

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 additionally a founding member of the *Coalition pour la Défense de la République* (CDR) party, whilst 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 Defense 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 between 1 January 1994 to 31 December 1994, the Chamber held that 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

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<sup>240</sup> *Ibid.*, para. 558. In the Indictment of Simon Bikindi, a composer and singer of inflammatory songs, the Prosecutor explained 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, 4 September 1998, para. 39(x).

<sup>241</sup> *Ibid.*, para. 674.



with their exclusion”.<sup>242</sup> Although the Chamber’s analysis in this regard has been criticized for “turn[ing the drafters’] reasoning upside down”,<sup>243</sup> 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.

Furthermore, the Chamber extensively analyzed international jurisprudence – both in the areas of international criminal law and international human rights law – with regard to incitement, hate speech and the right to freedom of speech, in order to define where permissible speech protected by the right to freedom of expression ended and the illegitimate, criminal act of incitement began. The Chamber’s reliance on human rights jurisprudence<sup>244</sup> may be open to question. Prohibitions under human rights law are not necessarily rules of international criminal law.<sup>245</sup> Treating an act which is prohibited under the former as automatically incurring individual criminal liability can give rise to a serious charge of violating the principle of *nullum crimen sine lege*, as, for instance, in the *Norman Child Soldiers case* before the Special Court for Sierra Leone (SCSL).<sup>246</sup>

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.<sup>247</sup>

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

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<sup>242</sup> *Nabimana et al.*, *supra* note 6, para. 104. *See* also para. 1017.

<sup>243</sup> G. Della Morte, ‘De-Mediatizing the *Media Case*’, (2005) 3 *JICJ* 1019, p. 1024.

<sup>244</sup> The Chamber stated that it “consider[ed] international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues”: *Nabimana et al.*, *supra* note 6, para. 1010.

<sup>245</sup> *See* A. Zahar, ‘The ICTR’s “Media” Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide’, (2005) 16 *Criminal Law Forum* 33, p. 47.

<sup>246</sup> In that case, the issue was whether recruitment of child soldiers, prohibited under international human rights law, had already evolved into an international crime incurring individual criminal responsibility at the time when the acts were committed. Whilst the Court held that it had, Judge Robinson disagreed in a forceful dissent: *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004.

<sup>247</sup> *Nabimana et al.*, *supra* note 6, para. 1015.

of any kind”.<sup>248</sup> 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:

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.<sup>249</sup>

### 3.2.6. *The Rome Statute*

During the Diplomatic Conference in Rome, the drafters rejected the suggestion to extend the incitement provision to apply also to crimes against humanity, war crimes and aggression.<sup>250</sup> There were also proposals to provide for solicitation, which was to be defined as, 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 commission of such crime”. The crime would not have been inchoate.<sup>251</sup> In the end, however, solicitation was included in the Rome Statute without defining it in any way.<sup>252</sup> As indicated above, incitement was only included 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.<sup>253</sup>

### 3.2.7. *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

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<sup>248</sup> *Ibid.*, para. 1021.

<sup>249</sup> *Ibid.*, para. 1022.

<sup>250</sup> W. A. Schabas, *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press 2004 (2<sup>nd</sup> ed.), p. 30; Schabas, ‘Le Génocide’, *supra* note 220, 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*, Ardsley, New York: Transnational Publishers, Inc. 1998, p. 142.

<sup>251</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), G.A., 51<sup>st</sup> Sess., Supp. No. 22, UN Doc. A/51/22, 1996, p. 56, in: Bassiouni, *supra* note 250, p. 483.

<sup>252</sup> 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9\*, entered into force 1 July 2002, Article 25(3)(b).

<sup>253</sup> *Ibid.*, Article 25(3)(e).

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”.<sup>254</sup> Similarly, the Uruguayan delegate argued that the phrase “whether such incitement be successful or not” was unnecessary, as “incitement was a crime in itself only when it was not successful”; if it was successful, it would be equivalent with complicity.<sup>255</sup> The UK delegate also submitted that whilst in theory, incitement could 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.<sup>256</sup>

These considerations can be summarized in two questions: firstly, 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 secondly, 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”,<sup>257</sup> conspiracy to commit genocide is therefore an agreement between several individuals to commit genocide, with the common genocidal intent.<sup>258</sup> Each member of the conspiracy must have acted intentionally and must possess the specific genocidal intent.<sup>259</sup> Moreover, whilst the contributions of the various conspirators may differ, they are all equally responsible for the acts of their co-conspirators. Furthermore, conspiracy is an inchoate offense: the mere agreement to commit genocide is punishable.<sup>260</sup> 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.<sup>261</sup> 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

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<sup>254</sup> E/AC.25/W.4, *supra* note 115, p. 12.

<sup>255</sup> Eighty-Fifth Meeting, *supra* note 136, p. 222 (Mr. Manini y Ríos). *See also* remarks to the same effect by the Iranian delegate: Eighty-Fourth Meeting, *supra* note 115, p. 214 (Mr. Abdoh).

<sup>256</sup> *Ibid.*, p. 218 (Mr. Fitzmaurice).

<sup>257</sup> *Musema*, *supra* note 229, para. 187; *Nahimana et al.*, *supra* note 6, para. 1045.

<sup>258</sup> *Musema*, *supra* note 229, para. 191.

<sup>259</sup> *Ibid.*, para. 192; *Nahimana*, *supra* note 6, para. 1042.

<sup>260</sup> *Musema*, *supra* note 229, para. 193; *see also* *Bagosora et al.*, Decision on Motions for Judgement of Acquittal, *supra* note 233, para. 12.

<sup>261</sup> G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford: Oxford University Press 2005, p. 253.

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”.<sup>262</sup>

Whilst 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”.<sup>263</sup> 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”.<sup>264</sup> 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”.<sup>265</sup> “Aiding and abetting” is thus included in the notion of complicity, which however also prohibits conduct broader than aiding and abetting. Whilst generally for complicity, proof of the specific intent to commit genocide is required for a conviction, where an accused is merely charged with aiding and abetting, a consistent line of ICTY and ICTR case law holds that the accused must only be shown to have had knowledge of the principal perpetrator’s intent.<sup>266</sup> 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.<sup>267</sup>

Several points are of interest when one compares incitement and complicity. Firstly, 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. Secondly, where instigation has been charged before the ICTY or ICTR, this has always been done in connection with planning and ordering, as well as aiding and abetting.<sup>268</sup>

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<sup>262</sup> See *ibid.*, p. 257.

<sup>263</sup> *Semanza*, *supra* note 222, para. 393 [emphasis supplied].

<sup>264</sup> *Ibid.*, para. 395.

<sup>265</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 139.

<sup>266</sup> *Ibid.*, para. 140; *Akayesu* Trial Judgment, *supra* note 230, para. 545; *Musema*, *supra* note 229, para. 181; *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 December 2004, para. 501. This interpretation has, however, been criticized repeatedly in the academic literature: see, e.g., Schabas, *Genocide*, *supra* note 178, p. 221; Mettraux, *supra* note 261, pp. 212-214.

<sup>267</sup> *Akayesu* Trial Judgment, *supra* note 230, para. 530.

<sup>268</sup> See the following indictments: *Semanza*, *supra* note 222, Case No. ICTR-97-20-I, Third Amended Indictment, 12 October 1999; *Bagilishema*, *supra* note 223, Case No. ICTR-95-1A-I, Amended Indictment, 17 September 1999; *Muhimana*, *supra* note 223, Case No. ICTR-95-1B-I, Indictment, 3 February 2004; *Kajelijeli*, *supra* note 223, Case No. ICTR-98-44A-I, Amended Indictment Pursuant to the Tribunal Order Dated 25 January 2001, 25 January 2001; *Ndindabahizi*, *supra* note 224, Case No. ICTR-2001-71-I, Amended Indictment, 7 July 2003;

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 offense 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 offense of solicitation would be regarded as having merged with the substantive offense.<sup>269</sup> Whilst, of course, incitement to genocide has 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 favor 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 subsequent section.

### 3.2.8. Critique of the International Approach to Incitement

It appears that the terms “instigation” and “incitement” *per se* are interchangeable; however, incitement, where it is public, takes on a different meaning. This is the case, as has been seen, as regards 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 only punishable when the substantive crime incited was committed. Only where incitement was public has it been interpreted by the international courts to be an inchoate offense. In the

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*Rutaganda*, *supra* note 229, Case No. ICTR-96-3-I, Indictment, 12 February 1996; *Akayesu*, *supra* note 230, Case No. ICTR-96-4-I, Amended Indictment; *Blaškić*, *supra* note 221, Case No. IT-95-14-I, Second Amended Indictment, 25 April 1997, para. 6.0; *Kordić and Čerkez*, *supra* note 8, Case No. IT-95-14/2-I, First Amended Indictment, 30 September 1998, paras. 19 & 21; *Krstić*, *supra* note 221, Case No. IT-98-33-I, Amended Indictment, 27 October 1999, para. 18; *Kvočka*, *supra* note 225, Case No. IT-98-30/1-I, Amended Indictment, 21 August 2000, para. 16; *Naletilić and Martinović*, *supra* note 227, Case No. IT-98-34-PT-I, Second Amended Indictment, 16 October 2001, para. 23.

<sup>269</sup> *Lewis v. State*, 404 A.2d 1073, 1083 (Md. 1979); see also J. Dressler, *Understanding Criminal Law*, New York / San Francisco: Matthew Bender & Co., Inc. 1995 (2<sup>nd</sup> ed.), p. 387.

following discussion, the term “incitement” will be used to refer to *public* incitement, and “instigation” to describe incitement in the more general sense.

According to 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”.<sup>270</sup> Albin Eser similarly sees the main difference in the fact that whilst instigation is addressed to a particular individual or particular individuals, incitement is directed towards an undefined group of people.<sup>271</sup> The same author submits that whilst 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”.<sup>272</sup> Incitement is particularly dangerous, as “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”.<sup>273</sup> 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, poring oil on the flames, so to speak”.<sup>274</sup> 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”.<sup>275</sup> Therefore, the longer that public incitement is allowed to continue, the greater becomes the influence which the inciter holds over the incitees as well as the incitement’s effectiveness and the likelihood of criminal acts being committed as a result.<sup>276</sup> Public incitement thus seriously jeopardizes the “peaceful coexistence of free individuals”,

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<sup>270</sup> K. Ambos, ‘Article 25’, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos Verlagsgesellschaft 1999, p. 486.

<sup>271</sup> 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: Oxford University Press 2002, 767, p. 804.

<sup>272</sup> 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 & F. K. Hazan (eds.), *Freedom of Speech and Incitement Against Democracy*, Kluwer Law International 2000, 119, p. 124.

<sup>273</sup> *Ibid.*, p. 146.

<sup>274</sup> M. Kremnitzer & K. Ghanayim, ‘Incitement, Not Sedition’, in: *ibid.* at 147, p. 163.

<sup>275</sup> *Ibid.*, p. 164.

<sup>276</sup> *Ibid.*

which it is the function of criminal law to guarantee,<sup>277</sup> and must consequently be proscribed through criminal sanctions.

The creation of an atmosphere which provides fertile ground for the later commission of criminal acts inspired by hatred is a recurring justification for the criminalization of public incitement, as well as hate speech, as will be seen below. With regard to 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,<sup>278</sup> 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, for instance in *Akayesu*, the creation of a particular state of mind in the audience, which would induce its members to commit genocidal acts, was repeatedly referred to. In *Nabimana 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 stressed the “utmost gravity” of the crime of direct and public incitement to genocide, and has underlined 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.<sup>279</sup>

Moreover, whilst with regard to incitement 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” 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

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<sup>277</sup> *Ibid.*, p. 150.

<sup>278</sup> *See supra* p. 21.

<sup>279</sup> *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-S, Decision of the President on the Application for Early Release of Georges Ruggiu, 12 May 2005.

deserves to be looked at in greater detail. In German law, instigation (*Anstiftung*) is penalized in § 26 of the German Penal Code (*Strafgesetzbuch*, StGB):<sup>280</sup>

*Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat.*<sup>281</sup>

The reason for punishing an instigator under German law has been seen in the fact that the instigator, in influencing the will of the perpetrator of the act instigated, is originally responsible for the commission of the main act. At the same time, instigation also represents a wrong in itself.<sup>282</sup> 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*").<sup>283</sup> 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 StGB, which provides that the attempt to convince another person to commit a crime or to instigate a crime is also punishable, although in that case the punishment is milder. The difference between the crime of instigation and the crime of attempted instigation lies in whether the instigator succeeds in provoking in the perpetrator the decision to commit the crime, in which case the crime of instigation has been committed. Whether or not exterior circumstances ultimately prevent the commission of the crime ought therefore not to matter for the *actus reus* of instigation to be complete. Where, for various reasons, the instigator does not succeed in causing the perpetrator to take the decision to commit the crime, and the crime is not committed, the instigator would be guilty of attempted incitement, and would be punished less harshly. It is submitted that this is sensible as in such case the danger of harm occurring is obviously considerably less than where the main perpetrator has taken the concrete decision to commit the crime in question. Similarly, where the instigatee has taken the decision to commit the crime, the danger is present, whether or not he then goes on to commit the crime or is prevented from doing so by exterior circumstances. However, as indicated before, it is clear

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<sup>280</sup> 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).

<sup>281</sup> "Whosoever has intentionally determined another to commit the latter's intentionally committed criminal act is to be punished as an instigator in the same way as a perpetrator" [my translation].

<sup>282</sup> Cramer & Heine, *Schönke & Schröder: Strafgesetzbuch*, 2001 (26<sup>th</sup> ed.), § 26, para. 1/2.

<sup>283</sup> *Ibid.*, para. 4.



from the wording of § 26 that it only penalizes instigation where it has been successful,<sup>284</sup> whilst instigation which is not followed by the commission of the substantive crime is punished as attempted instigation.

In contrast with § 26 and § 30, § 111 of the German StGB punishes the “*öffentliche Aufforderung zu Straftaten*”<sup>285</sup> and provides that whoever publicly, in an assembly or through the distribution of writings invites others to commit a crime, is punished on equal terms with an instigator. The decisive difference between this provision and § 26 criminalizing instigation lies in the fact that the former does not call for another person as “*Bestimmungsobjekt*” – that is, there is no need for there to be another individual who must be “determined” or convinced to take the decision to commit the crime.<sup>286</sup> This makes sense as where the incitement is public, the danger lies in the fact that it quickly becomes uncontrollable, as indicated above.

Article 24(5)(1) of the Swiss Penal Code (*Schweizerisches Strafgesetzbuch*) provides that whoever intentionally determines someone to commit the crime which the latter has intentionally committed, will be punished in the same way as the perpetrator. The attempt to instigate is punished in the same way as the attempt to commit any other crime.<sup>287</sup>

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 “*Tatenschluß*”) in the main perpetrator.<sup>288</sup> This requirement that, for instigation to be successful, it needs to induce the instigatee to take the decision to commit the substantive crime (the *Entschluß zur Tat* or *Tatenschluß*), is reminiscent of the language used by the IMT at Nuremberg to describe the effect which Streicher’s propaganda had on the minds of the German people,<sup>289</sup> as well as the phrase “making another person decide” in the *travaux préparatoires* of the Rome Statute.<sup>290</sup>

The Swiss Federal Council, after examining what changes were necessary in the Swiss Criminal Code in order for it to comply with the requirements of the Genocide Convention,

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<sup>284</sup> R. Maurach, F.-C. Schroeder & M. Maiwald, *Strafrecht: Besonderer Teil*, Teilband 2: Straftaten und Gemeinschaftswerte, Heidelberg: C. F. Müller Juristischer Verlag (7<sup>th</sup> ed.), p. 360.

<sup>285</sup> “Public invitation to commit crimes” [my translation].

<sup>286</sup> Maurach, *supra* note 284, p. 361.

<sup>287</sup> Article 24(5)(2).

<sup>288</sup> *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.

<sup>289</sup> See *supra* p. 11; this language was also cited by the ICTR in *Nabimana et al.: Nabimana et al.*, *supra* note 6, para. 981.

<sup>290</sup> See *supra* p. 37.

concluded that “direct and public incitement” was covered by two different provisions of the Criminal Code: it fell within 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.*<sup>291</sup>

Where the incitement remains under the threshold of such “determination”, but is nonetheless due to its form and content sufficiently urgent to “influence the addressee’s will”, the act would fall within the crime of “*öffentliche Aufforderung zu einem Verbrechen oder zur Gewalttätigkeit*”<sup>292</sup> pursuant to Article 259 of the Criminal Code.<sup>293</sup> Consequently, the Swiss legislators view “direct and public incitement to commit genocide” as covering both situations where the inciter succeeds in *instigating* his addressees, that is, he convinces them to take the decision to commit the crime, and situations where, although he fails in convincing them to take such 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 take the decision to commit the crime. The idea of “influencing someone’s will” is, of course, rather vague and unclear; however, it appears to express an idea akin to what the proponents of a propaganda provision in the Genocide Convention debates argued was the effect of propaganda – the creation of a certain state of mind or climate under which the addressees were then 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. This idea will be discussed in more detail below.

What is particularly appealing about the German-Swiss approach is the idea that instigation is regarded as having been committed as soon as the *Tatentschluss* has been evoked in the mind of the instigatee. 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 ought 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

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<sup>291</sup> “When such a public incitement reaches such an intensity that it suffices for the ‘determination’ (i.e. the formation of a decision to commit the crime) of another person or persons to commit genocide” [my translation]: *Botschaft*, *supra* note 288, p. 5340.

<sup>292</sup> “Public invitation to / encouragement of a crime or violence” [my translation].

<sup>293</sup> *Botschaft*, *supra* note 288, p. 5340.

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.<sup>294</sup> Furthermore, as has been pointed out above, during the Genocide Convention debates, many delegates considered incitement an inchoate crime, and often referred to their national laws for illustration. It appears that when they made this argument, they were not referring specifically to direct and public incitement, but rather to incitement (or instigation) more generally. There is therefore no obvious reason for considering it as not inchoate under international law; by contrast, there are important reasons for considering it to be an inchoate crime. One of these reasons lies in the rationale underlying the criminalization of instigation, which consists, as in the case of incitement, in the need to obviate the inherent danger of other crimes being committed. In the case of incitement, this danger is a result of the creation of a certain atmosphere or state of mind amongst a large group of people which after the incitement becomes uncontrollable. In the case of instigation, the danger is to be found in the specific urging and instructing of another specified 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”,<sup>295</sup> it appears to make little sense that instigation to such crimes should not be punished 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.<sup>296</sup>

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<sup>294</sup> See, e.g., Germany (§ 30 StGB); Switzerland (Article 24(5)(2) Swiss Penal Code); United States (*US v. Freeman*, 761 F.2d 549, 552 (9<sup>th</sup> Cir. 1985); *US v. Barnett*, 667 F.2d 835, 842-43 (9<sup>th</sup> Cir. 1982); *People v. Botiger*, 142 Cal. App. 3d 974, 191 Cal. Rptr. 408 (5<sup>th</sup> 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 (59<sup>th</sup> ed.), 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 (Article 31, Korean Criminal Code, in: G. O. W. Mueller (ed.), *The Korean Criminal Code*, London: Sweet & Maxwell 1960, p. 39); Rwanda (s. 91(4) *Code Pénal Rwandais*); South Africa (Art. 16(2) South African Constitution).

<sup>295</sup> *Kambanda*, *supra* note 240, para. 16; *Prosecutor v. Serashugo*, Case No. ICTR-98-39-S, Sentencing Judgment, 2 February 1999, para. 15.

<sup>296</sup> In practice, this is unlikely to be accepted in the foreseeable future: as has been pointed out above, this proposal was decisively rejected during the drafting sessions on the Rome Statute.

### 3.3. International Human Rights Law: The Obligation to Prohibit Hate Speech.

#### *3.3.1. The International Covenant on Civil and Political Rights and the Human Rights Committee*

Article 20(2) of the ICCPR specifically proscribes “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. The ICCPR has been widely ratified; as of 7 October 2005, there are 154 States parties,<sup>297</sup> seven of whom have entered reservations with regard to Article 20(2).<sup>298</sup>

The *travaux préparatoires* of the ICCPR demonstrate that Article 20 was inspired by the abhorrence felt towards the atrocities of the Nazi regime during the Second World War, and the urgent need to prevent a recurrence of such horrors.<sup>299</sup> As during the Genocide Convention debates, it was primarily the Soviet Union which initiated the momentum towards a prohibition of incitement to hatred. Already in 1947, the Soviet representative Borisov in the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed criminalizing advocacy of national, racial or religious hatred or discriminatory action with the same effect.<sup>300</sup> Despite the rejection of the proposal by the Sub-Commission, the latter nonetheless recommended to the Human Rights Commission the adoption of corresponding provisions in the international human rights covenant.<sup>301</sup> Several subsequent proposals submitted by the Soviet Union, China and France were defeated in the Human Rights Commission, mainly due to efforts by the delegates from the United States and the United Kingdom, until a new Sub-Commission draft was finally adopted in 1953.<sup>302</sup> The discussions of the provision in the Human Rights Commission revolved around similar concerns as had troubled the delegates debating the Genocide Convention several years earlier. Some delegations were worried that it might lead to an undue infringement of freedom of speech, whilst others stressed the manipulative effects of propaganda, which they considered could only be adequately addressed by means of criminal

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<sup>297</sup> See [www.ohchr.org/english/countries/ratification/4.htm](http://www.ohchr.org/english/countries/ratification/4.htm) [last accessed 5 November 2005].

<sup>298</sup> These are Australia, Belgium, Luxembourg, Malta, New Zealand, the United Kingdom and the United States: [www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm) [last accessed 5 November 2005].

<sup>299</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl: N. P. Engel 2005 (2<sup>nd</sup> ed.), p. 468.

<sup>300</sup> UN Doc. E/CN.4/Sub.2/21.

<sup>301</sup> UN Doc. E/CN.4/52, pp. 4-5.

<sup>302</sup> Nowak, *supra* note 299, p. 469. This draft read as follows: “Any advocacy of national, racial or religious hostility that constitutes an incitement to hatred and violence shall be prohibited by the law of the State”: Article 26 Human Rights Commission draft, 1954, UN Doc. E/2573, p. 69.

sanctions. Eventually, Article 20 only contained the obligation to prohibit incitement to hatred, without the requirement to impose criminal sanctions for such acts.<sup>303</sup>

During the debates in the Third Committee of the General Assembly, countries divided along similar lines according to whether they favored sanctioning of hate speech or not as they had during the Genocide Convention deliberations. As Manfred Nowak points out, the debates therefore reflected “the political differences of opinion between East and West at the time of the Cold War”.<sup>304</sup> Whilst for Western countries, freedom of speech was of vital importance, Eastern countries were more concerned with other rights, such as the right to life and equality and the prohibition of discrimination. Article 20 can thus be regarded as a positive obligation to guarantee these rights.<sup>305</sup>

Nowak submits that as Article 20(2) was drafted as a response to the hate propaganda campaigns by the Nazis, which led to the murder of millions of human beings on discriminatory grounds, it should be interpreted to require States parties to prohibit the advocacy of hatred in public and not in private.<sup>306</sup> This interpretation appears reasonable also in light of the discussions preceding the signing of the Genocide Convention, where private incitement to genocide was rejected.<sup>307</sup>

In its General Comment No. 11/19 of 29 July 1983, the Human Rights Committee, established under Part IV, Articles 28 to 45, of the ICCPR, emphasized that Article 20 was “fully compatible with the right of freedom of expression”, guaranteed in Article 19, as the exercise of that right “carrie[d] with it special duties and responsibilities”.<sup>308</sup> It further specified that States were under an obligation to pass “a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”.<sup>309</sup> However, there is no need for such law to impose individual criminal responsibility.

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<sup>303</sup> See UN Doc. A/2929. See also Nowak, *supra* note 299, p. 470.

<sup>304</sup> *Ibid.*, p. 471.

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*, p. 475.

<sup>307</sup> See *supra* p. 22.

<sup>308</sup> General Comment 11/19, 29 July 1983, HRI/GEN/1/Rev.6, para. 2. See also D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford: Clarendon Press 1991, pp. 484-490.

<sup>309</sup> General Comment 11/19, *supra* note 308, para. 2.

Furthermore, in its General Comment No. 29 of 31 August 2001,<sup>310</sup> the Human Rights Committee explained that, in addition to those rights explicitly declared non-derogable in Article 4 of the ICCPR, there were several others which enjoyed the same status. Amongst these, it counted Article 20. Consequently, a State may not invoke a state of emergency to justify engaging in war propaganda or advocacy of national, racial or religious hatred amounting to incitement to discrimination, hostility or violence.<sup>311</sup> This underlines the unconditional importance which that article enjoys within the framework of the Covenant.

Similarly, the Human Rights Committee has showed its concern with hate speech in its concluding observations on the reports submitted by States parties under Article 40 of the ICCPR. Thus, it has expressed itself to be “concerned about manifestations of hate speech and intolerance in the public domain which are occasionally echoed by certain media the State party” in its concluding observations on the second periodic report of Slovenia, and has urged the country to “adopt strong measures to prevent and prohibit the advocacy of hate and intolerance that constitutes prohibited incitement and fulfil the provisions of article 20”.<sup>312</sup>

The Human Rights Committee, which under the Optional Protocol is enabled to receive and decide upon communications from individuals claiming to be victims of violations of their rights guaranteed by the ICCPR,<sup>313</sup> has referred to Article 20(2) in a few cases where the applicants claimed a violation of the right to freedom of expression under Article 19. In *J. R. T. and the W. G. Party v. Canada*,<sup>314</sup> J. R. T., a Canadian citizen, and the W. G. Party had attempted to promote the Party’s policies by means of tape-recorded messages warning those dialing a certain phone number “of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles”.<sup>315</sup> Subsequently, the Canadian Human Rights Commission ordered the ceasing of this telephone service,<sup>316</sup> applying a section of the Canadian Human

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<sup>310</sup> General Comment 29, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11.

<sup>311</sup> *Ibid.*, para. 13(e).

<sup>312</sup> Human Rights Committee, Eighty-fourth session, UN Doc. CCPR/CO/84/SVN, 25 July 2005, para. 13; *see* also Fifth Periodic Report, Norway, UN Doc. CCPR/C/NOR/2004/5, 18 November 2004, paras. 186-188, 194-196.

<sup>313</sup> Optional Protocol to the ICCPR, 21 UN G.A.O.R., Supp. No. 16, UN Doc. A/6316, (1966) 999 UNTS 302 (entered into force 23 March 1976).

<sup>314</sup> *J. R. T. and the W. G. Party v. Canada*, Communication No. 104/1981 (18 July 1981), UN G.A.O.R., 38<sup>th</sup> Sess., Supp. No. 40, UN Doc. A/38/40, Annex XXIV (1983) 231, 4 *HRLJ* 193.

<sup>315</sup> *Ibid.*, para. 2.1.

<sup>316</sup> *Ibid.*, para. 2.4.

Rights Act of 1978 which made illegal the communication by means of telephone of “any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination”.<sup>317</sup> The applicants refused to comply with this order, for which Mr. T. was sentenced to prison and the W. G. Party fined.<sup>318</sup> After several unsuccessful appeals in Canadian courts, the applicants transmitted a communication to the Human Rights Committee, complaining of a violation of Article 19 of the ICCPR. The Committee held the application to be inadmissible, partly because “the opinions which Mr. T. s[ought] to disseminate through the telephone system clearly constitute[d] the advocacy of racial or religious hatred which Canada ha[d] an obligation under article 20 (2) of the Covenant to prohibit”.<sup>319</sup>

Twelve years later, in *Faurisson v. France*,<sup>320</sup> the Human Rights Committee held that the so-called “Gayssot Act” passed by the French legislature in 1990, which made it a crime to dispute the existence of the category of crimes against humanity defined in the London Charter of 8 August 1945, did not violate the applicant’s right to freedom of expression. The applicant was a professor of literature who had doubted the existence of gas chambers for extermination purposes at Nazi concentration camps. The Committee held the communication to be admissible and decided the case on the merits. Whilst it ignored Article 20, instead applying the criteria of the limitation clause in Article 19(3), the Committee nonetheless declared the Gayssot Act to be a permissible and indeed necessary infringement of the right to freedom of expression.<sup>321</sup> In an individual opinion, Rajsoomer Lallah argued that the Committee should have referred to Article 20(2) rather than Article 19(3),<sup>322</sup> declaring that “the statements of the author amounted to the advocacy of racial or religious hatred constituting incitement, at the very least, to hostility and discrimination towards people of the Jewish faith which France was entitled under article 20, paragraph 2, of the Covenant to proscribe”.<sup>323</sup> In a further concurring individual opinion co-signed by Eckart

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<sup>317</sup> Canadian Human Rights Act, promulgated 1 March 1978, section 13(1); *J. R. T. and the W. G. Party v. Canada*, *supra* note 314, para. 2.2.

<sup>318</sup> *Ibid.*, para. 2.8.

<sup>319</sup> *Ibid.*, para. 8 (b).

<sup>320</sup> *Faurisson v. France*, Communication No. 550/1993, UN Doc. CCPR/C/58/D/550/1993 (1996), UN G.A.O.R., 52d Sess., Supp. No. 40, UN Doc. A/52/40, Appendix (1999) 84.

<sup>321</sup> *Ibid.*, para. 9.7.

<sup>322</sup> *Ibid.*, Individual Opinion by Rajsoomer Lallah (concurring), para. 11.

<sup>323</sup> *Ibid.*, para. 9.

Klein, Elizabeth Evatt and David Kretzmer explained why the French legislation, which was wide enough to punish acts falling short of explicit incitement, should be upheld: because there might be cases

“where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a *pattern* of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so”.<sup>324</sup>

Finally, in *Ross v. Canada*,<sup>325</sup> the Committee referred to both Articles 19(3) and 20(2).<sup>326</sup> In this case, a teacher in Canada had been transferred to a non-classroom teaching position within the school where he worked pursuant to an order by a Human Rights Board of Inquiry, which had decided that his anti-Semitic writings and public statements impaired his ability to be impartial and poisoned the school environment. This order had been upheld by the Canadian Supreme Court. The teacher complained of a violation of his rights under Articles 18 and 19 of the ICCPR.<sup>327</sup> The Committee declared the communication to be admissible. On the merits, it found that whilst the removal of the teacher from his teaching position constituted a limitation of his right to freedom of expression,<sup>328</sup> the restrictions in the instant case were permissible as they were directed against statements “of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities’ right to be protected from religious hatred”.<sup>329</sup> Justification for such restrictions could also be found in Article 20(2) of the ICCPR.<sup>330</sup>

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<sup>324</sup> *Ibid.*, Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), para. 4 [emphasis in original].

<sup>325</sup> *Ross v. Canada*, Communication No. 736/1997, UN Doc. CCPR/C/70/D/736/1997 (2000).

<sup>326</sup> See Nowak, *supra* note 299, pp. 478-479.

<sup>327</sup> Article 18 protects freedom of thought, conscience and religion.

<sup>328</sup> *Ross v. Canada*, *supra* note 325, para. 11.1.

<sup>329</sup> *Ibid.*, para. 11.5.

<sup>330</sup> *Ibid.*



### 3.3.2. *The International Convention on the Elimination of all Forms of Racial Discrimination and the Committee on the Elimination of Racial Discrimination*

The CERD contains the most extensive and elaborate prohibition of hate speech and propaganda, albeit limited to racial grounds.<sup>331</sup> It is significant to note that 170 States are currently party to this Convention,<sup>332</sup> and are thus bound by its provisions.<sup>333</sup> This extremely wide ratification lends weighty support to an argument that they are at least emerging rules of customary international law.<sup>334</sup> Article 4 enjoins States parties to “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination”. Specifically, States parties must *criminalize* “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”.<sup>335</sup> In requiring States to declare incitement to hatred punishable by law, that is, to impose individual criminal responsibility for such acts, it goes much further than Article 20 of the ICCPR, which only obligates States to prohibit such acts. States are further obligated to “declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination”, and to criminalize “participation

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<sup>331</sup> See M. Bidault, ‘La Discrimination Raciale comme Infraction Internationale dans la Convention des Nations Unies de 1965’, in: Ascencio, Decaux & Pellet, *supra* note 220, 361.

<sup>332</sup> As of 7 October 2005: [www.ohchr.org/english/countries/ratification/2.htm](http://www.ohchr.org/english/countries/ratification/2.htm) [last accessed 5 November 2005].

<sup>333</sup> It is, of course, important to note that several States have made reservations to various articles of the Convention and are hence not bound by the obligations contained in those articles. With regard to Article 4 – the provision which will be discussed here – reservations limiting the scope or application of Article 20 in one form or another have been entered by the following fourteen countries: Australia, Austria, Bahamas, Belgium, Fiji, France, Ireland, Italy, Japan, Monaco, Switzerland, Tonga, United Kingdom, and United States of America.

<sup>334</sup> Treaties as basis for formation of custom: see *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, (1969) ICJ Reports 3, pp. 156 to 158 (Dissenting Opinion by Vice President Koretsky). See also M. Akehurst, ‘Custom as a Source of International Law’, (1974-75) 47 *BYBIL* 1, who explains that treaties are a form of State practice (p. 44). Baxter considers treaties to be better proof of what States regard themselves as being bound by than “the actual conduct of States”: “The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts”: R. R. Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’, (1965-6) 41 *BYBIL* 275, p. 300.

<sup>335</sup> Article 4(a).

in such organizations and activities”.<sup>336</sup> Lastly, they must not allow “public authorities or public institutions, national or local, to promote or incite racial discrimination”.<sup>337</sup>

The Committee on the Elimination of Racial Discrimination, created pursuant to Article 8 of the CERD, has further elaborated on the obligations of States parties under this article. In its General Recommendation XV, the Committee expounded the meaning and scope of Article 4.<sup>338</sup> It stressed the importance of this article, explaining that when it was adopted, it was seen as “central to the struggle against racial discrimination”, and arguing that “[t]he proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was properly regarded as crucial”.<sup>339</sup> Interestingly, the Committee then refers to the specific danger of hate propaganda, recognizing that “threats and acts of racial violence easily lead to other such acts and *generate an atmosphere of hostility*”.<sup>340</sup> As I have outlined above, the idea of a climate of hatred and violence created by hate speech was also raised during the deliberations leading to the creation of the Genocide Convention.<sup>341</sup> Lastly, the Committee explains that the prohibition of incitement to hatred is compatible with the right to freedom of speech.<sup>342</sup> In General Recommendation XXIX, the Committee enjoined States parties to “take strict measures against any incitement to discrimination or violence against [descent-based] communities, including through the Internet”.<sup>343</sup> A year later, in General Recommendation XXX, adopted at its sixty-fifth session, the Committee again addressed the problem of how to protect against hate speech, recommending, *inter alia*, that States parties “[t]ake resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of ‘non-citizen’ population groups,

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<sup>336</sup> Article 4(b).

<sup>337</sup> Article 4(c).

<sup>338</sup> General Recommendation XV on organized violence based on ethnic origin (Art. 4), Report of the Committee on the Elimination of Racial Discrimination, G.A.O.R., Supplement No. 18, UN Doc. A/48/18 (1993).

<sup>339</sup> *Ibid.*, para. 1.

<sup>340</sup> *Ibid.*, para. 2 [emphasis supplied].

<sup>341</sup> *See supra* p. 31.

<sup>342</sup> General Recommendation XV, *supra* note 338, para. 4 [emphasis supplied].

<sup>343</sup> General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent), Report of the Committee on the Elimination of Racial Discrimination, G.A.O.R., Supplement No. 18, UN Doc. A/57/18 (2002).

especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large”.<sup>344</sup>

In considering the reports, comments and information submitted by States parties under Article 9 of the CERD in its annual report, the Committee has frequently made reference to States parties’ legislation (or lack thereof) regulating incitement to hatred, and has either welcomed the existence of such laws,<sup>345</sup> deplored their non-existence,<sup>346</sup> or expressed concern regarding their inadequacy.<sup>347</sup> In its comments, the Committee has revealed an exceptional lack of concern with freedom of speech and a corresponding preference for broad hate speech legislation. Commenting on Cypriot legislation criminalizing incitement to racial hatred, for example, the Committee “expresses satisfaction” that following an amendment, “it is no longer necessary that [such] incitement [...] be intentional in order for the offence to be committed”.<sup>348</sup> As outlined above, one of the elements of inchoate offenses was the requirement that the offender act intentionally or at least knowingly; the Committee blatantly ignores this requirement, demonstrating its crucial concern with the dangers of hate speech. Similarly, in another report, the Committee criticizes the Czech Republic for declaring punishable only *active* participation in organizations promoting and inciting racial discrimination, and “urges” it to review the legislation and “declare punishable *any* participation in organizations that promote and incite racial discrimination”.<sup>349</sup> Furthermore, the Committee has emphasized that Article 4 is not to

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<sup>344</sup> General Recommendation XXX on discrimination against non-citizens, para. 12, Report of the Committee on the Elimination of Racial Discrimination, G.A.O.R., Supplement No. 18, UN Doc. A/59/18 (2004), para. 469.

<sup>345</sup> As with regard to Romania (Report of the Committee on the Elimination of Racial Discrimination, G.A.O.R., Supplement No. 18, UN Doc. A/50/18 (1995), para. 269), Belgium (*ibid.*, UN Doc. A/52/18 (1997), para. 217), Mauritius (*ibid.*, UN Doc. A/55/18 (2000), para. 228), Sweden (*ibid.*, para. 328; *ibid.*, UN Doc. A/59/18 (2004), para. 214), Cyprus (*ibid.*, UN Doc. A/56/18 (2001), para. 262), Switzerland (*ibid.*, UN Doc. A/57/18 (2002), para. 247), Estonia (*ibid.*, para. 349), Hungary (*ibid.*, para. 372), Côte d’Ivoire (*ibid.*, UN Doc. A/58/18 (2003), para. 23), Poland (*ibid.*, para. 158), Islamic Republic of Iran (*ibid.*, para. 422), United Kingdom of Great Britain and Northern Ireland (*ibid.*, para. 524).

<sup>346</sup> As with regard to Egypt (*ibid.*, UN Doc. A/56/18 (2001), para. 287), Bolivia (*ibid.*, UN Doc. A/58/18 (2003), para. 338).

<sup>347</sup> As with regard to Iraq (*ibid.*, UN Doc. A/54/18 (1999), para. 350), Zimbabwe (*ibid.*, UN Doc. A/55/18 (2000), para. 197), the Czech Republic (*ibid.*, para. 281; *ibid.*, UN Doc. A/58/18 (2003), para. 382), Georgia (*ibid.*, UN Doc. A/56/18 (2001), para. 92), China (*ibid.*, para. 242), Belgium (*ibid.*, UN Doc. A/57/18 (2002), para. 51), Croatia (*ibid.*, para. 98), Hungary (*ibid.*, para. 376), New Zealand (*ibid.*, para. 425), Fiji (*ibid.*, UN Doc. A/58/18 (2003), para. 91), Morocco (*ibid.*, para. 139), Tunisia (*ibid.*, para. 254), Albania (*ibid.*, para. 311), Finland (*ibid.*, para. 407), Latvia (*ibid.*, para. 446), Republic of Korea (*ibid.*, para. 494), Brazil (*ibid.*, UN Doc. A/59/18 (2004), para. 64), Argentina (*ibid.*, para. 245), Madagascar (*ibid.*, para. 316), Portugal (*ibid.*, para. 366).

<sup>348</sup> Cyprus, *supra* note 345.

<sup>349</sup> Czech Republic, *supra* note 347 [emphasis in original].

be interpreted restrictively, criticizing in a report of 1993 that the United Kingdom's restrictive interpretation "violate[d] the purpose and objective of the Convention and [wa]s incompatible with General Recommendation XV".<sup>350</sup>

The Committee has also dealt with several specific cases of violations of Article 4 CERD in opinions on communications submitted by individuals under Article 14 CERD. Some of these were rejected at the admissibility stage,<sup>351</sup> whilst in others no violation by the State party was found.<sup>352</sup> However, in *L.K. v. The Netherlands*,<sup>353</sup> the Committee found a violation of Article 4(a) CERD where a Moroccan citizen visiting a house for which he had been offered a lease had heard shouts of "No more foreigners" and had been warned that if he were to accept the lease, the house would be burned down and his car would be damaged.<sup>354</sup> The Committee held that these comments and threats constituted "incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin".<sup>355</sup> The State party was responsible as it had failed to investigate "with due diligence and expedition".<sup>356</sup>

Most recently, in *Jewish Community of Oslo et al. v. Norway*,<sup>357</sup> the Committee again found a violation of Article 4. In this case, a group known as the "Bootboys" organized and took part in a march commemorating the Nazi leader Rudolf Hess. The man heading the march, Terje Sjolie, gave a speech claiming, *inter alia*, that "our people and country are being plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts" and that his group would "follow in [Hitler's and Hess's] footsteps" and "fight for what [it] believe[s] in".<sup>358</sup> The Committee considered that these statements clearly constituted "incitement at least to racial discrimination, if not to

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<sup>350</sup> Report of the Committee on the Elimination of Racial Discrimination, G.A.O.R., Supplement No. 18, UN Doc. A/48/18 (1993), para. 416.

<sup>351</sup> See, e.g., *POEM and FASM v. Denmark*, Communication No. 22/2002: Denmark, UN Doc. CERD/C/62/D/22/2002, 15 April 2002.

<sup>352</sup> See, e.g., *Lacko v. Slovak Republic*, Communication No. 11/1998: Slovak Republic, UN Doc. CERD/C/59/D/11/1998, 21 October 1998.

<sup>353</sup> Communication No. 4/1991: Netherlands, UN Doc. CERD/C/42/D/4/1991, 16 March 1993.

<sup>354</sup> *Ibid.*, paras. 2.1, 6.3.

<sup>355</sup> *Ibid.*, para. 6.3.

<sup>356</sup> *Ibid.*, para. 6.6.

<sup>357</sup> Communication No. 30/2003: Norway, UN Doc. CERD/C/67/D/30/2003, 22 August 2005.

<sup>358</sup> *Ibid.*, para. 2.1.

violence”,<sup>359</sup> and the Norwegian Supreme Court’s acquittal of Sjolie therefore gave rise to a violation of Article 4.<sup>360</sup>

Through its broad interpretation of Article 4 CERD and consistent evaluation of States parties’ compliance with their obligations under that article, the Committee has exerted a fair amount of pressure on States to enact stricter hate speech legislation, and has increased the visibility of the need for such legislation and consequently the attention it receives internationally.

### *3.3.3. The European Convention on Human Rights, the European Commission of Human Rights and the European Court of Human Rights*

Whilst the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>361</sup> does not contain an article imposing a specific obligation on States parties to prohibit hate speech, its Article 10, which grants the right to freedom of expression, provides in paragraph 2 that the exercise of this right, “since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”. The right to freedom of expression may thus be restricted, provided the restriction in question passes a three-fold test. Firstly, the interference with the right must be “prescribed by law”: it must have an adequate basis in domestic law, which means that it must be “adequately accessible” and “formulated with sufficient precision”.<sup>362</sup> Secondly, the interference must pursue a legitimate aim, that is, it must be in the interests of national security, public safety or any other of the listed goals. Lastly, the restriction is subject to a proportionality test: it must be “necessary in a democratic society”, which has been interpreted to imply that it must correspond to a

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<sup>359</sup> *Ibid.*, para. 10.4.

<sup>360</sup> *Ibid.*, para. 10.5.

<sup>361</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). As of 22 August 2005, 45 States are party to the ECHR: [www.echr.coe.int](http://www.echr.coe.int) [last accessed 5 November 2005].

<sup>362</sup> *Sunday Times v. U.K.*, (1979-80) 2 EHRR 245, Series A, No. 30, para. 49.

“pressing social need” and that it must be “proportionate to the legitimate aim pursued”.<sup>363</sup> With regard to this balancing exercise, States are accorded a certain margin of appreciation, which may vary; generally, it is likely to be broad where a case presents a controversial political, economic or social issue, e.g., the control of obscene publications.<sup>364</sup>

The European Commission of Human Rights has declared several applications alleging an infringement of freedom of expression in cases involving hate speech inadmissible, holding that the restrictions in question – here legislation criminalizing hate speech – were justified and proportionate.<sup>365</sup> In *X. v. Germany*, the Commission held that whilst German legislation prohibiting an individual from displaying pamphlets describing the Holocaust as a lie involved an interference with the right to freedom of expression, the limitation was authorized under Article 10(2). It was prescribed by law, in this case § 130 of the *Strafgesetzbuch*; had a legitimate purpose, namely the protection of the rights of others: here the law sought to prevent a “defamatory attack against the Jewish [sic] community and against each individual member of this community”;<sup>366</sup> and it was necessary in a democratic society:

Such a society rests on the principles of tolerance and broadmindedness which the pamphlets in question clearly failed to observe. The protection of these principles may be especially indicated vis-à-vis groups which have historically suffered from discrimination.<sup>367</sup>

The European Court of Human Rights addressed the issue of hate speech in *Jersild v. Denmark*,<sup>368</sup> where it found there to have been a violation of freedom of speech. The applicant was a journalist who had interviewed three members of the racist group “The Greenjackets” on television. In the course of the interview, the latter made derogatory

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<sup>363</sup> *Silver v. U.K.*, (1983) 5 EHRR 347, Series A, No. 61, para. 97(c); see S. C. Vance, ‘The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles’, [2004] 14 *Transnat’l L. & Contemp. Probs.* 201, pp. 208-209.

<sup>364</sup> *Handyside v. U.K.*, (1976) 1 EHRR 737, Series A, No. 24, para. 57.

<sup>365</sup> *Glimmerveen and Hagenbeek v. The Netherlands*, (1979) 18 Eur. Comm. HRDR. 187, 4 EHRR 260; *X. v. Germany*, *supra* note 173; *H., W., P. and K. v. Austria*, (1989) 62 Eur. Comm. HRDR. 216; *Ochsenberger v. Austria*, (1994) 18 EHRR CD170; *Walendy v. Germany*, (1995) 80-A Eur. Comm. HRDR. 94; *Remer v. Germany*, (1995) 82-A Eur. Comm. HRDR. 117; *Honsik v. Austria*, (1995) 83-B Eur. Comm. HRDR. 77; *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v. Germany*, (1996) 84-A Eur. Comm. HRDR. 149; *Marais v. France*, (1996) 86-A Eur. Comm. HRDR. 184. See D. McGoldrick and T. O’Donnell, ‘Hate-Speech Laws: Consistency with National and International Human Rights Law’, (1998) 18 *Legal Studies* 453, pp. 465-469.

<sup>366</sup> *X. v. Germany*, *supra* note 173, p. 198.

<sup>367</sup> *Ibid.*

<sup>368</sup> *Jersild v. Denmark*, (1995) 298 Eur. Ct. H.R. (Ser. A), 19 EHRR 1.

statements about immigrants and ethnic groups in Denmark. Following the interview, the applicant had been convicted for aiding and abetting their violation of Article 266(b) of the Danish Penal Code, which criminalized hate speech. Whilst the European Court of Human Rights found that this conviction violated Article 10 ECHR, as it did not pass the proportionality test,<sup>369</sup> it pointed out with regard to the three “Greenjackets” that their remarks “were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10”.<sup>370</sup>

#### *3.3.4. The American Convention on Human Rights, UN Commission on Human Rights and Other Bodies*

The American Convention on Human Rights (ACHR) provides for the protection of the right to freedom of expression in Article 13. Article 13(5) specifies that “[a]ny propaganda for war or any advocacy of national, racial or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law”. Neither the Inter-American Court of Human Rights nor the Inter-American Commission on Human Rights have yet interpreted the meaning of this provision.<sup>371</sup> In the Inter-American system, hate speech has been far less of a concern than in the European and the international systems. Instead, the focus has been on the failure of governments to protect and guarantee the right to free speech rather than governments’ failure to reign in hate speech. Thus, the reports of the Special Rapporteur for Freedom of Expression in the Inter-American system have emphasized abuses of free speech such as threats and attacks against journalists,<sup>372</sup> measures against newspapers or journalists ordered by courts<sup>373</sup> as well as assassinations<sup>374</sup> and detentions of journalists.<sup>375</sup>

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<sup>369</sup> *Ibid.*, para. 37.

<sup>370</sup> *Ibid.*, para. 35.

<sup>371</sup> *Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2004*, Organization of American States, available at [www.cidh.org/Relatoria/showarticle.asp?artID=459&IID=1](http://www.cidh.org/Relatoria/showarticle.asp?artID=459&IID=1) [last accessed 25 January 2006], para. 5.

<sup>372</sup> *Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003*, Organization of American States, available at [www.cidh.org/Relatoria/showarticle.asp?artID=139&IID=1](http://www.cidh.org/Relatoria/showarticle.asp?artID=139&IID=1) [last accessed 25 January 2006], e.g.: paras. 19-28 (Argentina); 34 (Belize); 35-37 (Bolivia); 66-75 (Colombia); 101 (Ecuador); 154-167 (Haiti); 192-196 (Mexico); 236-239 (Nicaragua).

<sup>373</sup> See, e.g.: *ibid.*, paras. 29-31 (Argentina); 41 (Brazil); 47-51 (Chile); 281-287 (Dominican Republic); 104-106 (USA).

<sup>374</sup> See, e.g.: *ibid.*, paras. 56-60 (Colombia).

<sup>375</sup> See, e.g.: *ibid.*, paras. 86-98 (Cuba).

Moreover, as the Special Rapporteur has pointed out in his 2004 report, “the Inter-American Court regards the American Convention’s freedom of expression provisions as more ‘generous’ than their counterparts under the European Convention and the ICCPR”.<sup>376</sup> The Court itself has stated in an advisory opinion that, compared to the ECHR and the ICCPR, “the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas”.<sup>377</sup> These considerations have led the Special Rapporteur to conclude that the reference in Article 13(5) to hate propaganda which amounts to “incitement to lawless violence or to any other similar action” “suggest[s] that violence is a requirement for any restrictions”.<sup>378</sup>

The UN Commission on Human Rights has also addressed the issue of incitement to hatred in various resolutions and statements. Thus, in resolution 2004/6 on “Combating defamation of religions”, it deplored “the use of the print, audio-visual and electronic media, including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination towards Islam or any other religion”.<sup>379</sup> Similarly, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its resolution 1998/6, suggested that the impending World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance “focus, *inter alia*, on both situations of ethnic conflict and other patterns of discrimination which are based on race, colour, descent, or national or ethnic origin, as well as the topics of ethnic conflict, [...] *hate speech* and remedies for racial discrimination”.<sup>380</sup>

Similarly, in a 1995 resolution entitled “Prevention of incitement to hatred and genocide, particularly by the media”, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities condemned the existence of a radio station in

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<sup>376</sup> *Ibid.*, para. 44.

<sup>377</sup> Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), 13 November 1985, Ser. A No. 5, para. 50.

<sup>378</sup> 2004 Report, *supra* note 371, para. 46.

<sup>379</sup> ‘Combating defamation of religions’, Commission on Human Rights resolution 2004/6, UN Doc. E/CN.4/2004/127, 13 April 2004, operative para. 7. See also ‘Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance’, Commission on Human Rights resolution 2004/16, UN Doc. E/CN.4/2004/127, 16 April 2004; *ibid.*, Commission on Human Rights resolution 2005/5, UN Doc. E/CN.4/2005/L.10/Add.6, 14 April 2005.

<sup>380</sup> ‘World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance’, Sub-Commission resolution 1998/6, 26<sup>th</sup> meeting, 20 August 1998, para. 13.



what was then Zaire, and described as “criminal practices” its practice of “broadcast[ing] with complete impunity [...] ‘information’ inciting racial hatred among Burundi citizens and stirring up genocidal hatred”.<sup>381</sup> In 1998, the Security Council issued a resolution urging “all States and relevant organizations to cooperate in countering radio broadcasts and publications that incite acts of genocide, hatred and violence in the [Great Lakes] region”.<sup>382</sup>

The dangers of hate speech and incitement have been addressed by many other international bodies, organizations and groups.<sup>383</sup> In his most recent report, submitted pursuant to Commission resolution 2005/38, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression warned that “new and old technologies are increasingly used as more or less sophisticated tools for political propaganda, including racial discrimination and hate speech, thus contributing to the proliferation of polarization of ideas and ethnic tension”.<sup>384</sup> The Working Group on Minorities, in its report on its eleventh session, recommended that governments consider “[e]nacting appropriate legislation to prevent and proscribe hate speech and other forms of incitement to violence against persons belonging to minorities”.<sup>385</sup> In a Joint Statement on Racism and the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression recognized “as harmful all forms of expression which incite or otherwise promote racial hatred, discrimination, violence and intolerance and note that crimes against humanity are often accompanied or preceded by these forms of expression”.<sup>386</sup>

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<sup>381</sup> Sub-Commission resolution 1995/4, UN Doc. E/CN.4/Sub.2/Res/1995/4, 18 August 1995. *See also* UNESCO, ‘Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, *Apartheid* and Incitement to War’, Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session in Paris, on 28 November 1978.

<sup>382</sup> UN Doc. S/RES/1161 (1998), 9 April 1998, operative para. 5.

<sup>383</sup> In addition to those discussed below, *see also* ‘Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference: Contribution of the Sub-Commission on the Promotion and Protection of Human Rights: Note by the Secretary-General’, UN Doc. A/CONF.189/PC.1/13, 23 February 2000, para. 4 (h); ‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’, UN Doc. S/2005/335, 23 May 2005, para. 10.

<sup>384</sup> UN Doc. E/CN.4/2006/55, 30 December 2005, para. 3.

<sup>385</sup> ‘Prevention of Discrimination and Protection of Minorities’, Report of the Working Group on Minorities on its eleventh session, UN Doc. E/CN.4/Sub.2/2005/27, 8 July 2005, para. 16 (k).

<sup>386</sup> 27 February 2001, available at [www.osce.org/documents/html/pdf/html/194\\_en.pdf-2.html](http://www.osce.org/documents/html/pdf/html/194_en.pdf-2.html) [last accessed 17 January 2006]. *See also* Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom

### 3.4. Development Towards Hate Speech as an International Crime?

#### 3.4.1. *The Need to Criminalize Hate Speech*

##### 3.4.1.1. Freedom of Speech v. Equality and Human Dignity

Criminalizing hate speech – as well as incitement and instigation – plainly conflicts with the right to freedom of speech. However, as I have shown above, certain restrictions on this right have generally been accepted in domestic jurisdictions as well as in the jurisprudence of international courts and adjudicatory bodies like the Human Rights Committee. Even the United States, traditionally the most outspoken supporter of the right to freedom of expression, recognizes that limitations in certain cases are necessary, albeit only where there is an imminent danger of harm. As indicated above, the European Court of Human Rights has developed an elaborate test in order to ascertain whether a restriction of the right to free speech is justified or not, including a proportionality test. The European Commission on Human Rights has held, in accordance with Article 10 of the ECHR, that the right can legitimately be restricted for the purposes of protecting the rights of others. Thus, in *X v. Germany*, discussed above, the Commission found that § 130 of the StGB was founded on the legitimate purpose of protecting the rights of others, as it was designed to prevent a “defamatory attack” directed against the Jewish people, individually and as a group.

Nonetheless, freedom of speech is an important right. Natural rights theory as developed by John Locke, for example, takes as its premise that man in a state of nature is fundamentally free to act, and voluntarily gives up a certain part of that freedom when entering into a social contract with other men. Consequently, society is only justified in restraining man’s actions insofar as they injure others.<sup>387</sup> John Stuart Mill believed that freedom of speech was a necessary instrument in the pursuit of the truth.<sup>388</sup> Various other arguments have been advanced in favor of freedom of speech;<sup>389</sup> one that appears to be particularly relevant in the present context is based on the fact that the language used to

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of Expression, 21 December 2005, available at [www.osce.org/documents/pdf\\_documents/2005/12/17603-1.pdf](http://www.osce.org/documents/pdf_documents/2005/12/17603-1.pdf) [last accessed 17 January 2006].

<sup>387</sup> See D. S. Bogen, ‘The Origins of Freedom of Speech and Press’, (1983) 42 *Md. L. Rev.* 429, pp. 450-451.

<sup>388</sup> See Kretzmer, *supra* note 32, p. 468.

<sup>389</sup> See, e.g., *ibid.*, pp. 467-492; F. Schauer, ‘The First Amendment as Ideology’, (1992) 33 *Wm. & Mary L. Rev.* 853; G. Anastaplo, ‘Freedom of Speech and the Silence of the Law’, (1985) 64 *Tex. L. Rev.* 443; R. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution*, Oxford: Oxford University Press 1996, pp. 195-213.

describe the discriminating speech will necessarily be vague, which means that it could easily be abused.<sup>390</sup> Consequently, there are important reasons for criminalizing only worse kinds of hate speech, in clearly defined circumstances.

The rights most likely to be infringed by hate speech are equality rights,<sup>391</sup> such as the right to be free from discrimination,<sup>392</sup> as well as the right to life. Hate speech denies the members of the victimized group the right to participate as members of equal worth in the social life of the community of the State; they are viewed as less worthy, as subhuman, and are thereby excluded.<sup>393</sup> It discriminates against them<sup>394</sup> and humiliates them, thus violating their human dignity, a value whose importance is expressly recognized in the Universal Declaration of Human Rights, which states that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.<sup>395</sup> In the case of hate speech, therefore, a balancing exercise must be undertaken, weighing the speaker’s interest in being able to express his opinions freely against the victim’s interest in preserving his or her human dignity and not being discriminated against.<sup>396</sup>

#### 3.4.1.2. Human Dignity, Clear and Present Danger and Disturbance of Public Peace

In the United States, a danger of imminent physical harm has generally been seen as the only justification for restricting freedom of speech in cases of hate speech. In the famous 1919 Supreme Court case *Schenck v. United States*, Justice Holmes formulated what came to be known as the “clear and present danger test”:

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<sup>390</sup> See *ibid.*, pp. 488-489.

<sup>391</sup> See R. C. Post, ‘Racist Speech, Democracy, and the First Amendment’, (1991) 32 *Wm. & Mary L. Rev.* 267, p. 272.

<sup>392</sup> K. Boyle, ‘Hate Speech – the United States Versus the Rest of the World?’, (2001) 53 *Me. L. Rev.* 487, p. 490.

<sup>393</sup> See F. Kubler, ‘How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights’, Hofstra University School of Law Law Review, available at [www.hofstra.edu/Academics/Law/law\\_rev/kubler.cfm](http://www.hofstra.edu/Academics/Law/law_rev/kubler.cfm) [last accessed 4 April 2004], p. 363.

<sup>394</sup> On States’ obligation to eradicate all forms of racial discrimination in this context, see S. Farrior, ‘Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech’, (1996) 14 *Berkeley Journal of International Law* 1, pp. 6-21.

<sup>395</sup> G.A. Res. 217 (1948), UN Doc. A/810.

<sup>396</sup> See R. Dworkin, *Taking Rights Seriously*, London: Duckworth 1977, p. 193.

The question in each case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.<sup>397</sup>

Subsequently, in *Brandenburg v. Ohio*, the Supreme Court fine-tuned this theory by explaining that mere advocacy of violence and crime was not protected where it was “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.<sup>398</sup>

Clearly, then, according to US jurisprudence, the justification for restricting hate speech lies solely in its inherent danger; where such danger of “imminent lawless action” is not present, US courts do not regard a restriction of the speech in question as justified.<sup>399</sup> Considerations of human dignity do not generally enter into the equation. This is readily apparent when one contemplates the case of *Collin v. Smith*,<sup>400</sup> in which a Court of Appeals upheld the right of members of the American Nazi party to march in uniform through a largely Jewish community, a considerable number of them survivors of the Holocaust, and display Nazi signs and emblems. The Court ruled that ordinances passed by the town – the Village of Skokie – to prevent the picketing were unconstitutional, as the requirements of the clear and present danger test were not fulfilled. The fact that the Jewish people’s and especially the Holocaust survivors’ human dignity would suffer an attack were the Nazis allowed to walk through their village, not to mention the almost certain occurrence of psychological suffering, was of little relevance in the Court’s view.<sup>401</sup>

However, where other States have agreed to restrict hate speech more extensively – be it in their domestic laws or internationally –, other concerns have predominated, among them the need to protect human dignity. Thus, in several reports, the Committee on the Elimination of Racial Discrimination has evoked the “fundamental principle of respect for

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<sup>397</sup> *Schenck v. United States* (1919) 249 U.S. 47, p. 52.

<sup>398</sup> *Brandenburg v. Ohio* (1969) 395 U.S. 444, p. 447. See also *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377.

<sup>399</sup> See J. P. Cronan, ‘The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard’, (2002) 51 *Cath. U. L. Rev.* 425, pp. 429-441; A. Stephens, ‘First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming From Speech Allegedly Causing Bodily Injury’, 94 *A.L.R. Fed.* 26; M. Munn, ‘The Effects of Free Speech: Mass Communication Theory and the Criminal Punishment of Speech’, (1994) 21 *Am. J. Crim. L.* 433.

<sup>400</sup> *Collin v. Smith* (1978) 578 F.2d 1197 (U.S. Court of Appeals, 7<sup>th</sup> Cir.). See I. L. Horowitz & V. C. Bramson, ‘Skokie, the ACLU and the Endurance of Democratic Theory’, (1979) 43 *Law & Contemp. Probs.* 328.

<sup>401</sup> Despite this general trend in the US jurisprudence to concentrate on the danger of speech acts to result in physical harm, there have been decisions which have followed a different trend: see, e.g., *Beauharnais v. People of the State of Illinois*, (1952) 343 U.S. 250 and *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568.

human dignity” when reminding States parties of their obligations under the CERD, stressing that this principle “requires all States to combat dissemination of racial hatred and incitement to racial hatred”.<sup>402</sup>

In Germany, human dignity has been considered as an important reason for criminalizing hate speech. It is even specifically mentioned in one of the provisions criminalizing incitement to hatred: § 130(2) of the German StGB criminalizes the incitement to hatred directed against parts of the population or against a national, racial, religious or ethnic group by means of public writings or through the media, as well as *attacks on the human dignity of others* by insulting, treating with scorn or libeling parts of the population or a predetermined group through the same means of communication. Additionally, § 130(1) makes it a crime to incite hatred against parts of the population or invite others to commit violent or arbitrary acts against them,<sup>403</sup> or *attack their human dignity* by insulting, maliciously pouring scorn over or libeling them,<sup>404</sup> if it is done in a way which is likely to disturb the public peace. Thus, the values which are to be protected by Article 130 are the public peace, on the one hand, and human dignity, on the other.

The concept of human dignity is of central importance within the framework of the German constitution – the *Grundgesetz* – in that human dignity represents the fundamental principle on which the system of basic rights is founded. It is guaranteed in the first article of the *Grundgesetz*, which declares that the dignity of man is inviolable. The German Constitutional Court has held that human dignity cannot be lost through undignified behavior.<sup>405</sup> Moreover, human dignity is not measured against an individual’s capacity to act in a self-determined way, nor against his or her capacity to reason or self-legislate, if one prefers to use Kant’s terminology, but is instead determined by humanness as such, that is, the “[*im*] menschlichen Sein angelegten potentiellen Fähigkeiten”.<sup>406</sup>

Under German law, in order for there to be an attack against an individual’s human dignity, it is necessary that the people under attack are denied their right to live as persons of equal worth in the community of the State, and that they are treated as beings who are less

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<sup>402</sup> Report of the Committee on the Elimination of Racial Discrimination, G.A.O.R., Supplement No. 18, UN Doc. A/58/18 (2003), para. 407; *ibid.*, UN Doc. A/59/18 (2004), para. 245.

<sup>403</sup> § 130(1)(1).

<sup>404</sup> § 130(1)(2).

<sup>405</sup> BVerfGE 87, 209 (228).

<sup>406</sup> “The potential abilities which are grounded in human nature” [my translation]: BVerfGE 39, 1 (41). See also G. Foerstner, *Kollektivbeleidigung, Volksverhetzung und “lex Tucholsky”*: Eine Untersuchung zu Äußerungsdelikten und Meinungsfreiheit, Berlin: Berlin Verlag, Arno Spitz GmbH 2002, p. 165.

worthy. The attack must thus be directed against the core of their personality which constitutes their human dignity, and not merely against particular personality traits.<sup>407</sup> Courts have interpreted this requirement differently. Whilst the Frankfurt District Court (*Oberlandesgericht*) found that the attack on human dignity should be primarily interpreted as a denial of the right to life in a biological sense, that is, the right to exist as a human being as such,<sup>408</sup> the Bavarian District Court rejected this interpretation, arguing that it was sufficient that the perpetrators denied the victims their social right to live as people of equal worth in the community.<sup>409</sup> It appears that in the literature, the latter interpretation has been preferred.<sup>410</sup> In Germany, the public peace has also been regarded as a fundamental value which incitement to hatred is likely to infringe, and has thus provided a justification for criminalizing hate speech in that country. The justification for limiting hate speech because of its likelihood to disturb the public peace corresponds to a certain extent to the American concern with “clear and present danger”, in that it is concerned with the potential consequences of hate speech. As in the case of incitement, the dangerousness of hate speech lies in its tendency to create a particular culture or climate – a “specific pattern of popular assumptions and beliefs stigmatizing specific groups as inferior and harmful”.<sup>411</sup> The reference to public peace has met with criticism from certain quarters, notably the Committee for the Elimination of Racial Discrimination, which in a 1999 report expressed concern regarding “[t]he fact that the condemnation of racist propaganda and incitement to racial hostility is qualified by a reference to public peace” in Austrian hate speech legislation.<sup>412</sup> This rejection of the disturbance of public peace as a justification for prohibiting hate speech goes hand in hand with the Committee’s endorsement of the need to protect human dignity as the underlying rationale for criminalizing such legislation.

The conceptual differences between the American treatment of hate speech – epitomized in the “clear and present danger” and “near certainty” tests – (as well as the idea of preventing a disturbance of the public peace) and the European (primarily German) ideal of human dignity are rooted in fundamentally opposed philosophical theories. Whilst the

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<sup>407</sup> BGH NJW 1994, 1421. See also Foerstner, *supra* note 406, pp. 184-185.

<sup>408</sup> OLG Frankfurt, NJW 1995, 143, 144.

<sup>409</sup> BayObLG, NJW 1995, 145, 146.

<sup>410</sup> Foerstner, *supra* note 406, pp. 189-191.

<sup>411</sup> Kubler, *supra* note 393, p. 368.

<sup>412</sup> Report of the Committee on the Elimination of Racial Discrimination, G.A.O.R., Supplement No. 18, UN Doc. A/54/18 (1999), para. 33.

“near certainty” test reveals a decidedly consequentialist foundation, the perceived need to protect human dignity goes back to the Kantian tradition.

The “near certainty” or “clear and present danger” tests are consequentialist in that they concentrate on future harm which is likely to follow from the speech act in question. Hate speech is only to be restricted where there is a near certainty that it will lead to future injury. However, as has been pointed out by Miriam Gur-Arye, the test is flawed because a single speech act does not normally have the potential to lead to imminent harm. This is the case because, as has been indicated above, the danger of hate speech lies in the creation of a climate of violence, of a mental state in which people are prepared to commit violent acts. A single act of hate speech contributes to the creation of this climate, but is not by itself able to create it. The atmosphere of violence is gradually built up through an accumulation of single acts of hate speech.<sup>413</sup> This means that if the “near certainty” test is applied strictly, only the most extreme cases of hate speech, if at all, would be sanctioned, and many or most speech acts, which cumulatively contribute to the culture or climate of violence and are therefore in the long run extremely dangerous, would be considered to be protected by the right to free speech. Yet, even if one reformulates the “near certainty” or “clear and present danger” tests and instead adopts a test which takes account of these considerations, the fundamental rationale would still be a utilitarian one.

In contrast to the crime of instigation, however, the dangerousness of hate speech is not the only reason for criminalizing it. As has been discussed above, the injury to human dignity has been regarded as an important consideration for the criminalization of hate speech in § 130 of the German StGB, and the Committee for the Elimination of Racial Discrimination has similarly stressed the significance of the “fundamental principle of respect for human dignity”. Avishai Margalit has defined dignity as “the expression of the feeling of respect persons feel toward themselves as human beings”.<sup>414</sup> Margalit submits that human beings deserve respect because of their capacity for “radical freedom”, that is, the ability to “reevaluat[e] one’s life at any given moment, as well as the ability to change one’s life from this moment on”.<sup>415</sup> Even the worst criminals are conceivably able to reevaluate

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<sup>413</sup> M. Gur-Arye, ‘Can Freedom of Expression Survive Social Trauma: The Israeli Experience’, (2003) *Duke J. Comp. & Int’l L.* 155, p. 175.

<sup>414</sup> A. Margalit, *The Decent Society*, Cambridge, Massachusetts: Harvard University Press 1996 (trans. Naomi Goldblum), p. 51.

<sup>415</sup> *Ibid.*, p. 70. See also J.-P. Sartre, *L’Être et le Néant*, Gallimard 1976.

their lives and decide to live in an honorable manner in the future. As Margalit explains, “respecting humans means never giving up on anyone, since all people are capable of living dramatically differently from the way they have lived so far”.<sup>416</sup> By contrast, humiliating human beings consists in treating or seeing them as “nonhuman” or “subhuman”.<sup>417</sup> Hate speech does exactly this; oftentimes it goes even further and engages in demonization. All these forms of humiliation involve a rejection of an individual from the “human commonwealth”.<sup>418</sup> Such a rejection includes the idea of loss of control; that is, humiliation represents “the deliberate infliction of utter loss of freedom and control over one’s vital interests”.<sup>419</sup> Humiliating acts “show the victims that they lack even the most minuscule degree of control over their fate – that they are helpless and subject to the good will (or rather, the bad will) of their tormentors”.<sup>420</sup> Hate speech has precisely this effect. It excludes the victim group from the “human commonwealth” by means of stigmatization and, through its influence on the addressees who are incited to hatred against the victim group, demonstrate to the latter their utter helplessness and lack of control. As with other forms of humiliation, there is “a constant threat of living a life unworthy of a human being”.<sup>421</sup>

The idea of humiliation as excluding an individual from the “human commonwealth” is linked with the denial of his or her human rights, which, as we have seen, is also an effect of hate speech. Thus, in *Ruggiu*, the ICTR stated that hate speech represented a denial of the victim’s human rights, and had “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”.<sup>422</sup> Human rights are those rights which an individual possesses merely by virtue of being human, and their denial therefore expresses an attitude which regards the victim as less than human and consequently his or her rejection from the human community.

Furthermore, the injury to his or her dignity inflicts psychological harm on an individual, which expresses itself in “low self-esteem, seclusion and alienation”.<sup>423</sup> Studies on the psychological harm caused by hate speech have moreover found the following reactions

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<sup>416</sup> Margalit, *supra* note 414, p. 71.

<sup>417</sup> *Ibid.*, pp. 89, 104.

<sup>418</sup> *Ibid.*, p. 90.

<sup>419</sup> *Ibid.*, p. 115.

<sup>420</sup> *Ibid.*, p. 116.

<sup>421</sup> *Ibid.*, p. 122.

<sup>422</sup> *Ruggiu*, *supra* note 236, para. 22.

<sup>423</sup> Gur-Arye, *supra* note 413, p. 185.



in the victims: “self-hatred, humiliation, isolation, impairment of the capacity to form close interracial relationships, and adverse effects on relationships within a given group”.<sup>424</sup> Moreover, as Margalit submits, humiliation leaves psychological scars which “heal with greater difficulty than the physical scars of someone who has suffered only physical pain”.<sup>425</sup>

An analysis of the minds of those who have committed hate crimes and been actively involved in mass atrocities reveals how the stigmatization of the victims and their exclusion from the human community enabled the perpetrators to engage in said acts and simultaneously allowed them to remain convinced that these acts were necessary and in fact corresponded to what the prevailing morality required of them.<sup>426</sup> As Harald Welzer writes, many of the German concentration camp officials believed themselves to be decent, upright and morally correct agents who, whilst sending human beings to the gas chambers without any psychological or moral qualms (neither then nor later), were nonetheless upset and showed indignation when it was suggested to them years after that in their dealings with particular individuals, they failed to act with moral integrity.<sup>427</sup> Instead, to demonstrate how he had remained a decent and compassionate man, Franz Stangl, the concentration camp commander of Treblinka, for example, recounted how he granted a concentration camp inmate his request for a more humane death for his father who had been designated for death in the gas chamber, thus easing the father’s (inevitable) death.<sup>428</sup> The reason for this paradox lay to a large extent in the fact that they believed themselves to be doing what was necessary, as well as the conviction that they were acting against an ‘outgroup’ created through prior stigmatization,<sup>429</sup> which was in turn achieved primarily by means of hate propaganda. This conditioning of the minds of the perpetrators, which meant that the majority of them would not suffer feelings of guilt or other psychological problems, whilst those victims who survived were plagued by traumata and sentiments of guilt (often for having survived whilst so many others perished) for years afterwards,<sup>430</sup> can easily be recognized as extremely dangerous. As Welzer argues, the fact that the perpetrators of genocides and crimes against humanity are from a socio-psychological point of view normal

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<sup>424</sup> Kretzmer, *supra* note 32, p. 466. See also Post, *supra* note 391, pp. 273-274.

<sup>425</sup> Margalit, *supra* note 414, p. 87.

<sup>426</sup> H. Welzer, *Täter: Wie aus ganz normalen Menschen Massenmörder werden*, Frankfurt am Main: S. Fischer Verlag 2005, pp. 29-32.

<sup>427</sup> *Ibid.*, p. 27.

<sup>428</sup> *Ibid.*, pp. 28-29.

<sup>429</sup> *Ibid.*, pp. 33-34.

<sup>430</sup> *Ibid.*, p. 13.

contains more terror than the idea that they might have had any socialization deficits, were sadistic, brutalized or the like: “*Es war viel schlimmer: Sie haben einfach etwas getan, von dem sie glaubten, dass es von ihnen erwartet wurde.*”<sup>431</sup> In the case of Nazi Germany, the perpetrators’ minds had been utterly conditioned by the prevailing particular Nazi morality, without which the genocide would not have been feasible.<sup>432</sup>

For various reasons, therefore, States have considered it necessary in their domestic jurisdictions to criminalize hate speech under certain circumstances. This paper will now turn to the question whether hate speech can also be considered an international crime, rather than merely being prohibited under international human rights law. Antonio Cassese has defined the purpose of allocating an act the status of an international crime as the protection of “values considered important by the whole international community and consequently binding all States and individuals”.<sup>433</sup> As there is therefore a “universal interest in repressing these crimes”, they are *prima facie* subject to universal jurisdiction.<sup>434</sup> An argument can therefore be made that were hate speech considered an international crime, it could be prevented and stigmatized more effectively. It is submitted, however, that only the worst kind of hate speech ought to be considered an international crime, for various reasons. Firstly, this would address certain freedom of speech concerns which were identified above. Secondly, as international crimes are the worst kinds of crimes, including mass killings and atrocities such as genocide and crimes against humanity, anything but the worst and most dangerous hate speech would not be comparable in gravity with the other international crimes, and consequently would not deserve to be placed in the same category. Lastly, it makes sense to deal with hate propaganda of a lesser degree through prohibition rather than criminalization, as it could be argued that this allows for more effective prevention. This is due to the fact that the burden of proof in case of crimes is much higher than in case of civil law prohibitions; whilst the prosecutor’s burden in a criminal case is beyond reasonable doubt, the burden of proof in a civil law case is the balance of probabilities.

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<sup>431</sup> “It was much worse: they simply did something which they believed was expected of them” [my translation]: *ibid.*, p. 39.

<sup>432</sup> *Ibid.*, p. 40.

<sup>433</sup> A. Cassese, *International Criminal Law*, Oxford: Oxford University Press 2003, p. 23.

<sup>434</sup> *Ibid.*

### 3.4.2. Hate Speech as a Crime Per Se?

One possible way of arguing that hate speech has acquired the status of an international crime would be to submit that there is sufficiently consistent and widespread State practice as well as *opinio juris* for hate speech to be a crime under customary international law. Such an argument would be based on the fact that many States from many different areas of the world have criminalized hate speech in one form or another,<sup>435</sup> and also that the wide ratification of the CERD means that a large majority of States are bound by its norms, which include the requirement to criminalize incitement to hatred. Moreover, in certain areas of the world, regional organizations obligate Member States to criminalize incitement; thus, Member States of the European Union are obliged to ensure that “public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin” is a criminal offense.<sup>436</sup> Whilst it is therefore surely true that the majority of States are required to criminalize and/or do criminalize hate speech, it is nonetheless submitted that the criminalization of hate speech is still controversial in certain quarters, notably the United States, and the ways in which States criminalize hate speech also vary. Moreover, the proposition of enlarging the application of the crime of incitement to encompass also war crimes and crimes against humanity was rejected during the debates on the Rome Statute. No crime of incitement to hatred is included as such in that document, which is an important consideration for concluding that at most, the crime of incitement to hatred is an *emerging* norm of customary international law.<sup>437</sup>

### 3.4.3. Hate Speech as Incitement to Genocide

During the debates on the Genocide Convention, as outlined above, several delegates alluded to the similarities between hate propaganda and incitement to genocide, and many of them considered that hate propaganda aiming at the commission of genocide was encompassed within the concept of public incitement to genocide. Following its holding

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<sup>435</sup> See *Nahimana et al.*, *supra* note 6, para. 1075.

<sup>436</sup> 1996/443/JHA: Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, Official Journal L 185, 24/07/1996 P. 0005-0007, Title I (A)(a).

<sup>437</sup> See the *Norman Child Soldiers case* (*supra* note 246) before the SCSL, where the SCSL – including the dissenting judge Geoffrey Robertson – regarded the fact that recruitment of child soldiers was included as a crime in the Rome Statute as important proof that by the time of the promulgation of the Rome Statute at the latest, such recruitment had become an international crime under customary law.

in *Akayesu* that the “direct” element was to be evaluated in accordance with the cultural context and depended on the audience, in *Nahimana et al.*, the ICTR appears to have loosened the concept of incitement to genocide even further, recognizing as calls for action instances of hate speech which could not be described as unambiguous calls for genocidal acts:

RTLM broadcast a message of fear, provided listeners with names, and encouraged them to defend and protect themselves, incessantly telling them to ‘be vigilant’, which became a coded term for aggression in the guise of self-defence.<sup>438</sup>

Moreover, the ICTR recognized the close link between hate speech and public incitement, in that hate speech, which undertook to dehumanize and humiliate the Tutsi population, represented a step prior to incitement, which then called publicly and urgently for action against the “enemy”.<sup>439</sup> With regard to the magazine *Kangura*, the Tribunal explained that much of its contents “combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population”.<sup>440</sup> Explicitly recognizing the central role which hate propaganda played in the genocide, the Tribunal affirmed that “[t]hrough fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy”.<sup>441</sup> Referring to the crash of President Habyarimana’s plane, the Tribunal eloquently concluded with regard to RTLM, *Kangura* and CDR:

But if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded.<sup>442</sup>

An analysis of domestic provisions criminalizing incitement and hate speech also shows that some States treat them as closely related. Thus, § 130 of the German StGB combines incitement to hatred and incitement to violence against certain groups of the population, whilst Article 24 of the French Law on the Freedom of the Press criminalizes

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<sup>438</sup> *Nahimana et al.*, *supra* note 6, para. 1028.

<sup>439</sup> See W. K. Timmermann, ‘The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?’, (2005) 18 *LJIL* 257, p. 270.

<sup>440</sup> *Nahimana et al.*, *supra* note 6, para. 1036.

<sup>441</sup> *Ibid.*, para. 950.

<sup>442</sup> *Ibid.*, para. 953.

public statements which provoke discrimination, hatred or violence against individuals.<sup>443</sup> It therefore appears that certain cases of extremely vicious hate propaganda, if they can be characterized in one way or another as calls for violence (which may be veiled, as we have seen in the ICTR’s treatment of the “direct” element) and are engaged in with the specific intent to commit genocide, could be regarded as falling within the definition of direct and public incitement to genocide.<sup>444</sup>

#### *3.4.4. Hate Speech as a Crime Against Humanity (Persecution)*

Hate speech can, if certain conditions are fulfilled, constitute the crime against humanity of persecution. In fact, the treatment of vicious hate propaganda in this way goes back to the Nuremberg Trials, where the IMT at Nuremberg held 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”.<sup>445</sup> Of course, in that case, it was incitement to *crimes* – “murder and extermination” – which was considered to constitute persecution, whilst the present argument is that incitement to *hatred* should be regarded as persecution. Similarly, in *Ruggiu* also, the ICTR found that Ruggiu committed acts of persecution, namely:

direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of 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.<sup>446</sup>

Ruggiu was convicted of both persecution and direct and public incitement to genocide for the same acts. What is particularly important about the cited paragraph is that the Tribunal recognized the particular evil of hate speech, which lies not only in the danger that it may lead to further crimes, but in the fact that it severely violates the victims’ human dignity in

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<sup>443</sup> Law on the Freedom of the Press, ch. 4, Article 24, 29 July 1881, J.O., 22 September 2000.

<sup>444</sup> Timmermann, *supra* note 439, p. 271.

<sup>445</sup> (1946) 22 *Trial of German Major War Criminals* p. 502.

<sup>446</sup> *Ruggiu*, *supra* note 236, para. 22.

that it rejects them from the society in which they live, and eventually even from the “human commonwealth” itself.

The US Tribunal in the *Ministries Case*, in its judgment convicting Dietrich, appeared to go farther in that it convicted Dietrich of crimes against humanity, holding that he implemented such crimes and participated in them through his anti-Semitic press and periodical directives.<sup>447</sup>

In two more recent cases, courts have characterized hate speech, where particular requirements are fulfilled, as amounting to the crime against humanity of persecution. Both the ICTR in *Nahimana et al.* and the Canadian Supreme Court in *Mugesera* came to this conclusion. First of all, however, the main *chapeau* elements of crimes against humanity will be briefly outlined, as well as the specific *actus reus* and *mens rea* elements of the crime of persecution. Originally, it was thought that there had to be a nexus with an armed conflict, but since the ICTY Appeals Chamber judgment in *Tadić*, it is clear that under customary international law, crimes against humanity may also be committed in peacetime.<sup>448</sup> In *Kunarać*, the ICTY Appeals Chamber outlined the different *chapeau* elements of crimes against humanity.<sup>449</sup> Firstly, there needs to be an attack, which has been said to encompass “any mistreatment of the civilian population”.<sup>450</sup> Secondly, the accused’s acts must be part of the attack, which does not mean that they have to be committed in the midst of the attack, but they must not be isolated acts, either.<sup>451</sup> Thirdly, the attack must be directed against a civilian population. It need not be directed against the entire population, but must be directed against a population rather than “a limited and randomly selected number of individuals”.<sup>452</sup> The population must be the primary object, not an incidental target.<sup>453</sup> Fourthly, the attack needs to be widespread or systematic. Whilst “widespread” alludes to the “large-scale nature of the attack and the number of victims”, “systematic” denotes the “organised nature of the acts of violence and the improbability of their random occurrence”.<sup>454</sup> Fifthly, the perpetrator must know that his acts form part of a pattern of widespread or systematic crimes directed against the civilian population and must also know

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<sup>447</sup> *Ministries Case*, *supra* note 83, p. 576.

<sup>448</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, para. 251.

<sup>449</sup> *Prosecutor v. Kunarać*, Case No. IT-96-23, Judgment, 12 June 2002, para. 85.

<sup>450</sup> *Ibid.*, para. 86.

<sup>451</sup> *Ibid.*, para. 100.

<sup>452</sup> *Ibid.*, para. 90.

<sup>453</sup> *Ibid.*, para. 91.

<sup>454</sup> *Ibid.*, para. 94.

that his acts fit into such a pattern. He must possess the intent to commit the underlying offense and know that or be reckless as to whether his acts form part of the attack.<sup>455</sup>

The crime of *persecution* has been recognized as a crime against humanity since the Statute of the IMT at Nuremberg. In *Kordić and Čerkez*, the ICTY Appeals Chamber summarized the elements of this crime, explaining that persecution consists of any act or omission which discriminates in fact and denies or infringes upon a fundamental right laid down in either treaty or customary law, and which was carried out deliberately with the intention to discriminate on a listed ground.<sup>456</sup> The listed grounds in the ICTR and ICTY Statutes are political, racial and religious grounds,<sup>457</sup> whilst the ICC Statute adds “national, ethnic, cultural, gender [...] or other grounds that are universally recognized as impermissible under international law”.<sup>458</sup> Furthermore, the acts must be of a gravity equal to the other crimes against humanity. They can reach such a level of gravity if the effects are similar.<sup>459</sup> Therefore, acts of persecution must be evaluated “in their context by looking at their cumulative effect”.<sup>460</sup> The protected interest in the case of persecution has been held to lie in all “elementary and inalienable rights of man”.<sup>461</sup> This is implicit in the definition of “persecution” laid down in the Rome Statute, which describes it as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.<sup>462</sup>

The *Tadić* Trial Chamber found that persecution included a large variety of acts, which could *inter alia* be physical, economic or judicial, as long as they infringed upon an individual’s right to equal enjoyment of his or her fundamental rights.<sup>463</sup>

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<sup>455</sup> *Ibid.*, para. 102.

<sup>456</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, para. 101. *See also* *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 621.

<sup>457</sup> ICTR Statute, Article 3(h); ICTY Statute, Article 5(h).

<sup>458</sup> Rome Statute, Article 7(1)(h). *See also* G. Witschel & W. Rückert, ‘Article 7(1)(h) – Crime Against Humanity of Persecution’, in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, New York: Transnational Publishers 2001, pp. 94-97; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague / London / Boston: Kluwer Law International 1999 (2<sup>nd</sup> ed.), p. 327.

<sup>459</sup> *Kordić and Čerkez* Appeal Judgment, *supra* note 456, para. 102.

<sup>460</sup> Mettraux, *supra* note 261, p. 184; *Kupreškić*, *supra* note 456, para. 622; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 November 2002, para. 247; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003, para. 736; *Prosecutor v. Nikolić*, Case No. IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 110.

<sup>461</sup> *Blaškić* Trial Judgment, *supra* note 221, para. 220.

<sup>462</sup> Rome Statute, Article 7(2)(g).

<sup>463</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 710.

In its judgment, the IMT at Nuremberg specifically referred to magazines such as *Der Stürmer*, which “disseminate[d] hatred of the Jews”, as having engaged in the persecution of the Jewish people,<sup>464</sup> thus acknowledging that hate propaganda could constitute persecution. In *Kvočka*, the ICTY Trial Chamber declared that “harassment, humiliation, and psychological abuse” could constitute persecution if it formed part of “a discriminatory attack against a civilian population” and occurred “in combination with other crimes or, in extreme cases alone”.<sup>465</sup> As demonstrated above, hate speech inevitably involves humiliation as well as psychological abuse, and could therefore amount to persecution.

As indicated above, in the *Secretariat Draft* of the Genocide Convention, hate propaganda was considered punishable where it was “charged with hatred” and “systematic, that is to say, repeated methodically”, as well as public.<sup>466</sup> Comments by delegates during the 16<sup>th</sup> Meeting of the *Ad Hoc* Committee confirm this view.<sup>467</sup> As already indicated above, in deciding to criminalize propaganda of this kind, delegates appear to have been motivated by the need to prevent widespread and systematic propaganda of the kind employed by Nazi Germany. These characteristics of propaganda closely correspond to the *chapeau* requirement of crimes against humanity that the acts committed be part of a “widespread or systematic attack”, the public nature of hate propaganda making it likely that it would be widespread.

During the debates in the Sixth Committee of the General Assembly, remarks by the Polish delegate arguing in favor of the incitement provision indicate that he viewed such incitement as a form of persecution:

[H]ow could protection against incitement to genocide be denied to certain groups, particularly in view of the fact that the groups to be protected by the convention were for the most part extremely weak and helpless to defend themselves against their *persecutors*?<sup>468</sup>

That hate propaganda can amount to persecution was explicitly confirmed in *Nahimana* et al., where the Accused were in fact convicted of persecution on the basis of

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<sup>464</sup> (1946) 22 *Trial of German Major War Criminals* pp. 501-502; see also The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission*, London: His Majesty’s Stationery Office 1948, p. 198.

<sup>465</sup> *Kvočka*, *supra* note 225, para. 190.

<sup>466</sup> *Secretariat Draft*, *supra* note 93, p. 33.

<sup>467</sup> See the comments by the Polish delegate during the debates in the 16<sup>th</sup> Meeting of the *Ad Hoc* Committee, cited *supra*, p. 28: E/AC.25/SR.16, *supra* note 106, p. 8 (Mr. Rudzinski).

<sup>468</sup> Eighty-Fifth Meeting, *supra* note 136, p. 226 (Mr. Lachs) [emphasis supplied].



their vicious hate speech.<sup>469</sup> The ICTR found that “hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds”, reached the same level of gravity as the other acts which constituted crimes against humanity, and therefore amounted to persecution.<sup>470</sup> The Tribunal specifically pointed out that hate speech “destroys the dignity of those in the group under attack”, and emphasized that it could cause “irreversible harm”.<sup>471</sup> It distinguished hate speech as persecution from incitement, explaining that persecution “is defined also in terms of impact”, and “is not a provocation to cause harm”, but “is itself the harm”.<sup>472</sup> This corresponds to what was expounded above, that hate speech as such is harmful in that it represents an attack on someone’s dignity and humiliates the victims, and is therefore intrinsically wrong – that is, its evil does not depend on its potential to spark off acts of physical violence. The Tribunal explained further that the writings of *Kangura* and the broadcasts of RTLM “condition[ed] the Hutu population and creat[ed] a climate of harm”, thereby giving birth to “the conditions for extermination and genocide in Rwanda”.<sup>473</sup> Moreover, it held that “persecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms”.<sup>474</sup> Here, the Tribunal thus goes a step further than it did in *Ruggiu*, where it had found that incitement to genocide constituted persecution. As an example of hate speech amounting to persecution, it mentioned the *Kangura* article *A Cockroach Cannot Give Birth to a Butterfly*.<sup>475</sup>

Most recently, the Canadian Supreme Court has also held that hate speech can amount to the crime against humanity of persecution. In *Mugesera*,<sup>476</sup> the Canadian Supreme Court had to decide whether to reinstate a deportation order against an active member of a radical Hutu party, who in 1993 had successfully applied for permanent residence in Canada. The deportation order had been issued under s. 27 of the *Immigration Act* on the basis of a speech which Mugesera had given in Rwanda in 1992, and with which, the Canadian Minister of Citizenship and Immigration had decided, he had incited to murder, genocide

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<sup>469</sup> See C. A. MacKinnon, ‘Prosecutor v. Nahimana, Barayagwiza & Ngeze’, (2004) 98 *AJIL* 325, p. 328. See also *Bagosora et al.*, Decision on Motions for Judgement of Acquittal, *supra* note 233, para. 32.

<sup>470</sup> *Nahimana et al.*, *supra* note 6, para. 1072.

<sup>471</sup> *Ibid.*

<sup>472</sup> *Ibid.*, para. 1073.

<sup>473</sup> *Ibid.*

<sup>474</sup> *Ibid.*, para. 1078.

<sup>475</sup> *Ibid.*

<sup>476</sup> *Mugesera v. Canada (Minister of Citizenship and Immigration)*, (2005) SCC 40. For commentary, see J. Rikhof, ‘Hate Speech and International Criminal Law: The *Mugesera* Decision by the Supreme Court of Canada’, (2005) 3 *JICJ* 1121.

and hatred, thereby committing a crime against humanity. S. 27 of the *Immigration Act*<sup>477</sup> provides for the removal after admission of a permanent resident who “is a member of an inadmissible class described in paragraph 19(1)”. S. 19(1)(j) of the same Act provides that no one is to be granted admission with regard to whom there are “reasonable grounds to believe” that he or she has “committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada”. The Supreme Court held that the deportation order had been valid and should be reinstated.<sup>478</sup>

Defining the elements of the crime of incitement to hatred, laid down in s. 319 of the *Criminal Code*, the Court held that “wilful promotion of hatred” required that the accused “had as a conscious purpose the promotion of hatred against the identifiable group, or [that] he or she foresaw that the promotion of hatred against that group was certain to result and nevertheless communicated the statements”.<sup>479</sup> Moreover, the speaker had to “desire that the message stir up hatred”, even though it did not need to be proven that the statements actually resulted in the stirring up of hatred.<sup>480</sup> With regard to the *actus reus*, the Court found that “hatred” referred to “emotion of an intense and extreme nature that is clearly associated with vilification and detestation”,<sup>481</sup> whilst “promoting” was equivalent to “actively support[ing] or instigat[ing]”, and required “[m]ore than mere encouragement”.<sup>482</sup> In order to determine whether the statement expressed hatred, the Court considered “the understanding

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<sup>477</sup> R.S.C. 1985, c. I-2, s. 27(1)(a).

<sup>478</sup> The Supreme Court thereby overturned a unanimous decision by the Federal Court of Appeal ((2003) FCA 325), in which the latter had dismissed the Minister of Citizenship and Immigration’s appeal against the Appeal Division of the Immigration and Refugee Board’s holding that there was no basis for allegations that Mugesera was guilty of crimes against humanity or of misrepresentation in his immigration application, and allowed Mugesera’s appeal against the Appeal Division’s holding that the allegations against him in respect of incitement to murder, genocide and hatred were justified. The Federal Court of Appeal had found, *inter alia*, that Mugesera’s speech did not meet the requirements of a crime against humanity, as there was “no evidence that the speech was part of a widespread or systematic attack”. According to the court, there was “nothing in the record to indicate that the massacres which had taken place up to then were co-ordinated and for a common purpose”, nor was there “evidence in the record that Mr. Mugesera’s speech was part of any strategy whatever”, and “the Minister ha[d] not established that Mr. Mugesera was prompted by ethnic considerations”: *ibid.*, para. 58.

<sup>479</sup> *Mugesera*, *supra* note 476, para. 104.

<sup>480</sup> *Ibid.*

<sup>481</sup> *Ibid.*, para. 101, citing *R. v. Keegstra*, (1990) 3 SCR 697, p. 777.

<sup>482</sup> *Mugesera*, *supra* note 476, para. 101, referring to *Keegstra*, *supra* note 481.

of a reasonable person in the context”,<sup>483</sup> that is, “the speech’s audience and [...] its social and historical context”.<sup>484</sup> The Court then turned to consider the elements of crimes against humanity.<sup>485</sup>

Finally, the Court turned towards the question whether incitement of hatred could amount to a crime against humanity, and specifically persecution. Finding that “the criminal act of persecution is the gross or blatant denial of a fundamental right on discriminatory grounds”,<sup>486</sup> the Court discussed ICTR and ICTY case law, and found that the ICTR’s holding in *Ruggin* suggested that “hate speech always denies fundamental rights”, and that “[t]he equality and the life, liberty and security of the person of target-group members cannot but be affected”.<sup>487</sup> It reasoned that in certain cases, such denial of fundamental rights could be of a gravity equal to the other acts enumerated as crimes against humanity.<sup>488</sup> Applying this reasoning to the particular case at hand, the Court concluded:

A speech such as Mr. Mugesera’s, which actively encouraged ethnic hatred, murder and extermination and which created in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents, bears the hallmarks of a gross or blatant act of discrimination equivalent in severity to the other underlying acts [...]. The criminal act requirement for persecution is therefore met.<sup>489</sup>

Having found that at the time of Mugesera’s speech, a systematic attack directed against Tutsi and moderate Hutu was taking place in Rwanda, that the speech was directed against those groups, and that “[a] persecutory speech which encourages hatred and violence against a targeted group furthers an attack against that group”, the Court held that the speech “not only objectively furthered the attack, but also fit into a pattern of abuse

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<sup>483</sup> *Mugesera*, *supra* note 476, para. 103, referring to *Canadian Jewish Congress v. North Shore Free Press Ltd.*, (1997) 30 C.H.R.R. D/5 (B.C. H.R.T.), para. 247.

<sup>484</sup> *Mugesera*, *supra* note 476, para. 103.

<sup>485</sup> The Court’s analysis essentially corresponds to the analysis above, *i.e.*, a prohibited act must have been committed, which was part of a widespread or systematic attack “directed against any civilian population or any identifiable group of persons”; and the accused knew of the attack and knew that or was reckless as to whether his act comprised part of the attack: *ibid.*, para. 119.

<sup>486</sup> *Ibid.*, para. 145.

<sup>487</sup> *Ibid.*, para. 147.

<sup>488</sup> *Ibid.*

<sup>489</sup> *Ibid.*, para. 148.

prevailing at that time”, and consequently was part of “a systematic attack directed against a civilian population that was occurring in Rwanda at the time”.<sup>490</sup>

In denying the human rights of the target group – particularly the right to be free from discrimination and the right to life – as well as severely violating their human dignity, hate speech is particularly suited to be regarded as the crime against humanity of persecution. Hate propaganda creates a climate in which the commission of violent acts against the victim community is regarded as acceptable and even necessary, thus encouraging a ny widespread or systematic attack directed against the victim group.

This conclusion is reinforced by the considerations developed above with regard to freedom of speech concerns and the effectiveness of prohibition as against criminalization, where it was submitted that only the most aggravated and truly dangerous hate speech should be regarded as a crime under international law. As was outlined above, there are valid reasons for allowing hate speech up to a certain degree of gravity. It could for example be argued that those who engage in hate speech end up discrediting themselves if they are allowed to do so in public. However, whether or not this is the case depends to a large extent on the surrounding circumstances and context in which the hate speech is uttered, that is, the overall state and the generally accepted particular morality prevalent in the society in question. Where a society is healthy in the sense that the underlying morality accepted by its members is characterized by tolerance, civic courage and philanthropy, then any racist or xenophobic speech would be generally received with expressions of disgust and disbelief and would not be taken seriously, and would indeed lead to those engaging in it discrediting themselves. On the other hand, where a society is “sick” and out of balance and there is a danger of upheaval and overthrow of the prevailing universalist and tolerant morality and its substitution with a particular morality marked by homophobia, racism or ethnic or religious hatred and antagonisms, hate speech becomes particularly dangerous, and the humiliation of members of the victim group as well as the injury to their dignity is particularly grave. In such situations, hate propaganda must be criminalized. As it is likely to be part of a “widespread or systematic attack”, it can appropriately be criminalized as the crime against humanity of persecution.

Hate speech which is less grave and therefore cannot be considered to amount to persecution is more appropriately dealt with by means of prohibition under international

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<sup>490</sup> *Ibid.*, para. 169.

human rights law. As there is probably no society which is so healthy as to be immune from the influence of hate speech, a prohibition of certain kinds of hate speech should generally always exist. How much prohibition or even criminalization is needed in a certain society should ideally be determined in each individual case, as such need is dependent on the context, that is, the situation and prevailing morality in the country in question. This could, for example, be done by emulating the “margin of appreciation” doctrine developed by the European Court of Human Rights.<sup>491</sup>

## 6. War Propaganda

### 6.1. War Propaganda Under IHL: Permissible Ruse(s) of War or Violation of IHL?

The use of propaganda in times of war goes back to ancient times.<sup>492</sup> It has been employed for a variety of purposes, including to raise support for the war effort at the home front, influence the enemy’s home front to one’s advantage, cause dissension among the enemy’s allies, and demoralize the enemy’s armed forces or bring about chaos in its military and logistic systems.<sup>493</sup> Multifarious means of propaganda have been used, such as leaflets, newspapers distributed by airplanes or balloons, broadcasting, films, trench loudspeakers, postal campaigns, speeches, as well as “black’ or covert propaganda not revealing the true source of the information (e.g. Britain’s secret radio station in World War II, *Soldatensender Calais*)”.<sup>494</sup>

Generally, the use of propaganda in wartime is regarded as legally permissible in customary international law, which developed with regard to subversive propaganda.<sup>495</sup> This view receives support from Article 21 of the 1923 Hague Rules of Air Warfare,<sup>496</sup> which provides that aircraft can be employed for the purpose of disseminating propaganda, which has been said to include the dropping of defeatist or subversive leaflets inciting revolt and

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<sup>491</sup> See above, p. 56.

<sup>492</sup> For a historical survey, see P. M. Taylor, *Munitions of the Mind: A History of Propaganda from the Ancient World to the Present Day*, Manchester University Press 1995 (2<sup>nd</sup> ed.).

<sup>493</sup> Madders, *supra* note 60, p. 1394.

<sup>494</sup> *Ibid.*

<sup>495</sup> *Ibid.*; D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press 1995, p. 203, para. 474.

<sup>496</sup> Rules of Air Warfare, Part II of: Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, drafted by a Commission of Jurists at the Hague, December 1922 to February 1923, adopted 19 February 1923, Parliamentary Papers, Cmd. 2201, Miscellaneous No. 14 (1924).

desertions.<sup>497</sup> Article 21 moreover specifies that the crew members of aircraft who have engaged in such acts “are not to be deprived of their rights as prisoners of war on the ground that they have committed such an act”. Kevin Madders submits that “[u]niform State practice of all sides regarding subversive propaganda in World War II left its legality unquestioned”;<sup>498</sup> instead, States answered such propaganda with counter-propaganda, thus strengthening an emerging customary rule.<sup>499</sup> It is thus permissible to avail oneself of political and military propaganda by means of spreading false information in order to weaken the enemy’s will to resist or to undermine its military discipline.<sup>500</sup>

During the debates surrounding the drafting of the Genocide Convention, several delegates made reference to propaganda in times of war intended to “raise the morale of [a State’s] citizens”, which, in contrast to propaganda for genocide, they considered to be legal.<sup>501</sup> However, propaganda aimed at “the total destruction of an enemy country as such” would be impermissible.<sup>502</sup> According to the Soviet delegate, the criterion by which to distinguish permissible war propaganda from impermissible propaganda lay in “the motives by which the propaganda was inspired”; where propaganda “preached the domination of the so-called ‘inferior’ races by the so-called ‘superior’ races”, it should be sanctioned, as it would then constitute “a violation of the laws of war”.<sup>503</sup>

In conventional humanitarian law, propaganda is generally regarded as belonging to the category “ruses of war”.<sup>504</sup> Such means of warfare are not prohibited, and have been defined in Article 37(2) of Additional Protocol I<sup>505</sup> as

acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do

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<sup>497</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge: Cambridge University Press 2004, p. 207.

<sup>498</sup> Madders, *supra* note 60, p. 1394.

<sup>499</sup> *Ibid.*; Fleck, *supra* note 495, p. 203, para. 474.

<sup>500</sup> *Ibid.*

<sup>501</sup> E/AC.25/SR.5, *supra* note 116, p. 10 (Mr. Azkoul, Lebanon).

<sup>502</sup> *Ibid.*, p. 11 (Mr. Ordonneau, France).

<sup>503</sup> *Ibid.* (Mr. Morozov).

<sup>504</sup> Madders, *supra* note 60, p. 1394.

<sup>505</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, entered into force 7 December 1978.

not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.<sup>506</sup>

Consequently, propaganda which is perfidious, that is, which invites the confidence of the enemy by leading him to believe that he is entitled to protection under the rules of international humanitarian law, is prohibited.<sup>507</sup>

Dieter Fleck lists as “[c]lassic forms of propaganda” which are generally regarded as ruses of war:

The spreading of false rumours; the erosion of adverse armed forces’ fighting morale by the dissemination of misleading information; the incitement of enemy combatants to rebel, mutiny, or desert; and the incitement of the entire enemy population to revolt against its government.<sup>508</sup>

Furthermore, with regard to the rules applicable in occupied territories, Article 51(1) of Geneva Convention IV provides that “[n]o pressure or propaganda which aims at securing voluntary enlistment [by protected persons into the armed or auxiliary forces of the Occupying Power] is permitted”. Moreover, any kind of war propaganda in occupied territories would appear to run counter to the spirit and the principles in accordance with which such territories are to be administered. The 1907 Hague Regulations<sup>509</sup> provide, for example, that the Occupying Power is to “respect[...], unless absolutely prevented, the laws in force in the country”,<sup>510</sup> and prohibit forcing the inhabitants of such territory to “swear allegiance to the hostile Power”.<sup>511</sup>

Although Article 51(1) of Geneva Convention IV is the only provision in conventional international humanitarian law which refers to propaganda, Article 57 of Additional Protocol I, dealing with precautionary measures, implies that incitement to attacks or violence against civilians and the corresponding propaganda must likewise be prohibited. Thus, Article 57(2)(a)(i) obliges military planners of an attack to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects”;

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<sup>506</sup> See also J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, Cambridge: Cambridge University Press 2005, p. 204.

<sup>507</sup> Article 37(1), Additional Protocol I.

<sup>508</sup> Fleck, *supra* note 495, p. 203, para. 474.

<sup>509</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

<sup>510</sup> Article 43.

<sup>511</sup> Article 45.

clearly, engaging in incitement to attacks against civilian objects would not mean doing everything feasible to verify that the attacks are not directed against civilian objects. These rules prohibiting attacks on civilians have moreover become part of customary international humanitarian law.<sup>512</sup>

Incitement to violations of international humanitarian law is specifically prohibited in the *Turku Declaration*,<sup>513</sup> which forbids incitement to hostage-taking, pillage, “violence to the life, health and physical or mental well-being of persons, in particular murder, torture, mutilation, rape, as well as cruel, inhuman or degrading treatment or punishment and other outrages upon personal dignity”, “deliberate deprivation of access to necessary food, drinking water and medicine”, as well as “collective punishments against persons and their property”.<sup>514</sup>

As Fleck points out, it is however the case that whilst propaganda in the shape of incitement to such acts would be prohibited, many accepted forms of hostile propaganda represent essentially incitement to commit crimes, as for example “to desert to the enemy, which is a crime sanctioned with severe penalties according to all legal systems, as are all acts of mutiny and treason”.<sup>515</sup> Under international humanitarian law, these are acceptable ruses of war. On the other hand, incitement to (or instigation of) war crimes is clearly prohibited and this prohibition thus restricts the “permissible contents of the propagandist’s product”.<sup>516</sup>

Even in the case of that propaganda which is still permissible under international humanitarian law, a change in perception concerning the advisability of allowing it might be taking place in at least some quarters. During the 27<sup>th</sup> International Conference of the Red Cross and the Red Crescent in 1999, many delegations stressed the importance of combating the culture of violence, and some brought up the “problem of the manipulation of

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<sup>512</sup> Henckaerts & Doswald-Beck, *supra* note 506, pp. 3, 51, 68.

<sup>513</sup> Declaration of Minimum Humanitarian Standards (*Turku Declaration*), UN Doc. E/CN.4/Sub.2/1991/55, 2 December 1990.

<sup>514</sup> Article 3.

<sup>515</sup> Fleck, *supra* note 495, p. 204, para. 475.

<sup>516</sup> Madders, *supra* note 60, p. 1395. *See* Article 6(1) ICTR Statute; Article 7(1) ICTY Statute; Article 6(1) Statute of the Special Court for Sierra Leone.



information by the media and of incitement to hatred and violence”.<sup>517</sup> Presumably, the Rwandan genocide has led to a new recognition of the dangers of propaganda.

## 6.2. War Propaganda as a Breach of **Jus Ad Bellum**?

Whilst international humanitarian law concerns the *jus in bello*, and thus the use of propaganda *during* war, the use of propaganda *for* war is addressed by the *jus ad bellum* – the law relating to the use of force in international law. As the precedents of the Nuremberg and Tokyo trials following the Second World War show, the use of propaganda in relation to the planning and preparation of an aggressive war can entail individual criminal responsibility for those engaging in the propaganda in order to instigate the war, where such individuals have participated in a conspiracy to commit a crime against peace.<sup>518</sup>

As regards the Statute of the ICC, there has been a debate whether incitement to aggression should be punishable, for example under circumstances where one State instigates another State to wage an aggressive war against a third State. William Schabas gives the example of the 1974 occupation of East Timor by Indonesia, which “is widely believed to have been conducted at the instigation of United States President Gerald Ford and Secretary of State Henry Kissinger, who visited Jakarta only hours before the attack and apparently authorised it to proceed”.<sup>519</sup>

Furthermore, as Oppenheim has submitted, subversive (or “revolutionary”) propaganda by the Government of a State or on its behalf against a foreign State will engage the former’s international responsibility, as it would represent a breach of international law.<sup>520</sup> Whitton has argued that as States are prohibited from engaging in aggressive war, “incitement through radio propaganda or otherwise to commit such an act may properly be considered a violation of an international duty”.<sup>521</sup> He has further maintained that international propaganda which is “abusive or inflammatory” can be regarded as being prohibited as it would constitute “a type, or corollary, of unlawful intervention”.<sup>522</sup>

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<sup>517</sup> ‘Protection of victims of armed conflict through respect for international humanitarian law’, Report of the Plenary Commission; Theme I of the Plan for Action, 27<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 31 October to 6 November 1999.

<sup>518</sup> Madders, *supra* note 60, p. 1395.

<sup>519</sup> Schabas, *Introduction*, *supra* note 250, pp. 33-34.

<sup>520</sup> Oppenheim, *International Law*, London: Longman’s 1955 (8<sup>th</sup> ed.), p. 293.

<sup>521</sup> J. B. Whitton, ‘International Propaganda’, Book Review, (1958) 72 *Harv. L. Rev.* 396, pp. 399-400.

<sup>522</sup> *Ibid.*, p. 400.

### 6.3. War Propaganda Under International Human Rights Law: Article 20 ICCPR

Article 20(1) ICCPR provides that “[a]ny propaganda for war shall be prohibited by law”. As already indicated *supra*, according to the Human Rights Committee’s General Comment No. 29 regarding states of emergency, Article 20 is non-derogable. Whilst many delegates in the Third Committee of the General Assembly argued that the term “propaganda” had already been used in various national and international legal norms, General Assembly resolutions and judgments by the IMT Nuremberg,<sup>523</sup> the exact meaning of the term is still contested. As the Committee of Experts of the Council of Europe warned, the uncertain meaning of “propaganda” signifies that it is in danger of being abused; “it might[, for example,] be invoked by a hostile critic against a scientific military treatise or a statement of policy on international security”.<sup>524</sup> The prohibition of war propaganda, similar to the prohibition of incitement to hatred in the Genocide Convention, represented a reaction to the intensive propaganda for war and incitement to racial hatred conducted by Nazi Germany before and during the Second World War. As during the discussions preceding the adoption of the Genocide Convention, the Soviet Union here again specifically directed its proposals against propaganda for fascism and Nazism.<sup>525</sup> It can therefore be said that the purpose of Article 20(1) is to outlaw propaganda for war which is similar in scale and kind to that engaged in by Nazi Germany.<sup>526</sup>

Nowak defines propaganda within the meaning of Article 20 as “intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerated allegations of fact”, which also includes “negative or simplistic value judgements whose intensity is at least comparable to that of provocation, instigation or incitement”.<sup>527</sup> Clearly, the public character of propaganda increases its intensity and potential effect. As it is by definition public, it must be distributed by means of communication capable of reaching a large audience, such as the press, radio or television.<sup>528</sup> Only intentional actions are covered, but it suffices if the propaganda only “creates or reinforces a willingness to go to war, even if there is no objective, concrete threat

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<sup>523</sup> UN Doc. A/5000, para. 47.

<sup>524</sup> CE Doc. H(70)7, 46 (para. 180). *See also* Nowak, *supra* note 299, p. 472.

<sup>525</sup> UN Doc. E/CN.4/223.

<sup>526</sup> Nowak, *supra* page 299, p. 472.

<sup>527</sup> *Ibid.*

<sup>528</sup> *Ibid.*

of war”.<sup>529</sup> States must refrain from engaging in war propaganda themselves, but are also under an obligation to prohibit such propaganda by private persons.<sup>530</sup>

The term “war” has been interpreted by the Human Rights Committee in its General Comment 11/19 to refer to “an act of aggression or breach of the peace contrary to the Charter of the United Nations”.<sup>531</sup> The term “aggression” is defined in an annex to General Assembly Resolution 3314, adopted in 1974,<sup>532</sup> as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition”.<sup>533</sup>

Thus, only such propaganda is sanctioned by Article 20(1) which has as its purpose the promotion of use of armed force which is directed against the “sovereignty, territorial integrity or political independence of another State” or which is in any other way “inconsistent with” the UN Charter. This obviously gives rise to the same problems of interpretation as Article 2(4) of the UN Charter generally, where proponents of a right to humanitarian intervention or a right to rescue nationals abroad have argued that such a use of force would not be directed against the territorial integrity or political independence of another State, and would also not be inconsistent with the purposes of the UN Charter.<sup>534</sup>

The ‘Definition of Aggression’ does then, however, list a non-exhaustive number of acts, which are *prima facie* to represent acts of aggression, and which include, the invasion by armed forces of another State’s territory and military occupation; bombardment; blockade of ports or coast; an attack on the armed forces of another State; the use one’s armed forces, which are within the territory of another State by agreement, in contravention of the conditions governing their presence on the territory; allowing one’s territory to be used by another State in order to commit an act of aggression against a third State; and sending mercenaries or armed bands to carry out any of the other acts.<sup>535</sup>

Whilst States must prohibit such propaganda, it is not clear whether they must do so by means of criminal sanctions, although it has been argued that that would be the only

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<sup>529</sup> *Ibid.*, p. 473.

<sup>530</sup> *Ibid.*

<sup>531</sup> General Comment 11/19, *supra* note 308, para. 2.

<sup>532</sup> ‘Definition of Aggression’, G.A. Res. 3314 (XXIX), 14 December 1974.

<sup>533</sup> *Ibid.*, Article 1.

<sup>534</sup> See, e.g., W. M. Riesman, ‘Criteria for the Lawful Use of Force in International Law’, (1985) 10 Yale J. Int’l L. 279, p. 281.

<sup>535</sup> ‘Definition of Aggression’, *supra* note 532, Article 3.

effective way of enforcing such a prohibition.<sup>536</sup> Some States, such as Germany, do impose criminal sanctions. § 80 a StGB, entitled “Incitement to Aggressive War”,<sup>537</sup> provides:

*Wer im räumlichen Geltungsbereich dieses Gesetzes öffentlich, in einer Versammlung oder durch Verbreiten von Schriften [...] zum Angriffskrieg [...] aufstachelt, wird mit Freiheitsstrafe von drei Monaten bis zu fünf Jahren bestraft.*<sup>538</sup>

It is not necessary that Germany enter into an aggressive war, which means that the pure intention suffices. It is not even necessary that the peace be jeopardized.<sup>539</sup> As instigation and incitement to hatred under German law, incitement to aggressive war is therefore inchoate. Colombian law also provides for “instigation of war”,<sup>540</sup> specifying similarly that it is an inchoate crime:

*El colombiano, o el extranjero que deba obediencia a la nación, que realice actos dirigidos a provocar contra Colombia guerra u hostilidades de otra u otras naciones, incurrirá en prisión de diez a veinte años. Si hay guerra o se producen las hostilidades, la pena imponible se aumentará hasta en una tercera parte.*<sup>541</sup>

However, the article deals with war propaganda directed against Colombia itself, whereas the German provision addresses propaganda which is intended to provoke Germany into embarking upon an aggressive war against other countries. The Colombian provision therefore does not correspond to the purpose of Article 20 ICCPR, which is realized by the German provision.

The danger of war propaganda is similar to that of hate propaganda or incitement to hatred in that it also psychologically prepares the population to engage in certain violent acts. In the case of war propaganda, the population’s animosities are being focused and directed against nationals of another country or other countries. To achieve this aim, war propaganda

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<sup>536</sup> Nowak, *supra* note 299, p. 474.

<sup>537</sup> “*Aufstacheln zum Angriffskrieg*”.

<sup>538</sup> “Whosoever, within the territorial jurisdiction of this law, publicly or in an assembly or through the distribution of writings incites to an aggressive war, will be punished with imprisonment for three months to five years” [my translation].

<sup>539</sup> Maurach, *supra* note 284, p. 353.

<sup>540</sup> J. O. Torres, *Código Penal y Código de Procedimiento Penal*, Bogotá: Editorial TEMIS Librería 1985, Art. 114 ‘Instigación a la guerra’.

<sup>541</sup> ‘The Colombian, or the foreigner who owes obedience to the nation, who commits acts directed towards provoking a war or hostilities by another nation or other nations against Colombia, incurs a prison sentence of ten to twenty years. If there is a war or hostilities occur, the punishment to be imposed will be increased by a third’ [my translation]: *ibid.*

regularly avails itself of many of the same methods as hate propaganda: an unbridgeable chasm is created in the minds of the addressees between them and the nationals of the target country. The latter are depicted as dangerous and often also as lacking human characteristics, convincing the addressees of the necessity of the planned war.

A prime example of such propaganda was the psychological preparation of Austrians and Germans before World War I. An Austrian propaganda poster of 1914, for example, showed a fist crushing an ugly little man wearing oriental clothing and holding a smoking cannon ball or grenade in his left hand and dropping a knife from his right hand. On the sleeve covering the arm of the person whose fist is crushing the man, one can read the inscription “Österr.,” an abbreviation for “Austria”. The caption to the drawing reads “... *Serbien muss sterben!*”, meaning “Serbia must die”.<sup>542</sup> In Germany, the propaganda slogan “*Gott strafe England!*”<sup>543</sup> was omnipresent, and poems such as the following drove young men into the war:

*Wir kaempfen mit Singen,  
Mit froehlichem Klingen  
Die heilige Schlacht.  
Wir fuerchten die Not nicht,  
Wir scheuen den Tod nicht.  
Feinde, habt Acht!*

*Denn wir sind die Harten,  
Die Felsenerstarren,  
Ein jungstarkes Heer.  
Wir kaempfen froehlich,  
Wir sterben selig.  
Heilige Wehr!*<sup>544</sup>

The effect of the mass enthusiasm for war caused by the propaganda is noted by the artist Käthe Kollwitz, who observes on 12 August 1914 how a man throws himself in front

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<sup>542</sup> B. Hamann, *Der erste Weltkrieg: Wahrheit und Lüge in Bildern und Texten*, Munich : Piper Verlag 2004, p. 17.

<sup>543</sup> “God shall punish England” [my translation]: *ibid.*, p. 23.

<sup>544</sup> “We fight whilst singing, / With happy sounds / The holy battle. / We do not fear deprivations, / We do not shy away from death, / Enemies, watch out!; Because we are the hard ones, / Those frozen to rocks, / A young and strong army. / We fight merrily, / We die ecstatically. / Holy Fight!” [my translation]: last two stanzas of S. Heymann, ‘Deutsche Kriegsfreiwillige’, cited in: *ibid.*, p. 47.

of a train and loses his legs; she later reads in the newspaper that he tried to commit suicide because he had been declared unfit for military service.<sup>545</sup> The writer and pacifist Stefan Zweig concludes:

*Wie nie fühlten die Tausende und Hunderttausende Menschen, was sie besser im Frieden hätten fühlen sollen: daß sie zusammengehörten ... Jeder einzelne erlebte eine Steigerung seines Ichs, er war nicht mehr der isolierte Mensch von früher, er war eingetaut in eine Masse, er war Volk, und seine Person, seine sonst unbeachtete Person hatte einen Sinn bekommen. [...]Keine Stadt, keine Gruppe, die nicht dieser grauenhaften Hysterie des Hasses verfiel. [Der Krieg braucht] einen gesteigerten Zustand des Gefühls, er braucht Enthusiasmus für die eigene Sache und Haß gegen den Gegner.<sup>546</sup>*

The importance of criminalizing vicious war propaganda is therefore also readily apparent. It is submitted that a criminalization of war propaganda internationally would be best achieved by emulating the German provision or extending “direct and public incitement” to the crime of aggression. However, it must be conceded that this is unlikely to occur; as indicated above, States refused to extend incitement to the other crimes under the ICC’s jurisdiction.

## 7. Conclusion

The current importance of sanctioning the modes of expression here discussed becomes evident when one considers the virulent incitement to hatred and terrorist acts amongst certain extremist Islamist groups, which not only advocate the eradication of the State of Israel, but also incite attacks directed against other Western countries. Some hate propaganda appears even in official newspapers, such as the Palestinian Authority daily *Al Hayat*, which in March 2004 published a cartoon depicting Ariel Sharon eating Palestinian babies.<sup>547</sup> The international terrorist group Al Qaeda has recently started to offer weekly TV “news” shows, ready to download from the Internet, devised to inspire support for the

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<sup>545</sup> *Ibid.*, p. 26.

<sup>546</sup> “As never before did the thousands and hundreds of thousands of people feel what they had better felt during peacetime: that they belonged together ... Every single one of them experienced an elevation of his self, he was no longer the isolated human being of before, he was part of a mass, he was the people, and his person, his previously disregarded person, had been given a purpose. [...] No town, no group that did not succumb to this horrible hysteria of hatred. [War needs] an elevated state of emotion, it needs enthusiasm for its own cause and hatred against the enemy” [my translation]: cited in: *ibid.*, p. 26.

<sup>547</sup> See [www.honestreporting.com/articles/45884734/critiques/Ending\\_the\\_Incitement.asp](http://www.honestreporting.com/articles/45884734/critiques/Ending_the_Incitement.asp) [last accessed 12 December 2005].

terrorist organization.<sup>548</sup> The terrorist organization Hizbullah uses its TV station Al-Manar to glorify suicide attacks, call for a jihad and disseminate the most extreme anti-Semitism. In addition to “news” reports, Al-Manar offers TV shows such as the quiz show “Journey to Jerusalem”, in which questions such as “A Jew is ... firstly, a cockroach, secondly, a pig, thirdly, a snake?” are asked. With every correct answer, the participant approaches Jerusalem. In one episode of an anti-Semitic series shown during Ramadan, which is based on the “Protocols of the Elders of Zion”, a Jewish ritual murder of a Christian child is depicted, which is said to be perpetrated for the purposes of baking matza bread for Pessakh with the child’s blood.<sup>549</sup>

History shows that hate speech and war propaganda occur first in time, followed by public incitement and instigation. The instigation of and specific call for criminal acts, such as genocide, is not likely to be successful without the prior creation of a climate of violence by means of hate speech. Likewise, the population of a country is unlikely to unconditionally support a war without war propaganda, which creates an atmosphere of fear and convinces people that the national survival depends on defeating the enemy State.

This climate is achieved primarily through the demonization and dehumanization of opponents, which invariably involves a violation of their human dignity through a process of humiliation, which is equivalent to the victim group’s expulsion from the human community. Hate speech and propaganda must be criminalized because of its violation of human dignity, which is in turn closely connected with an infringement of their right to life, equality and non-discrimination, but also because of the inherent danger which is grounded in hate speech’s (and war propaganda’s) crucial position on the “continuum of destruction”. I have argued that in the case of incitement to hatred, such criminalization is best achieved by treating hate speech as the crime against humanity of persecution. Dealing with it in such a way also answers freedom of speech concerns, as incitement to hatred would only amount to persecution if the other requirements of crimes against humanity are fulfilled – in particular, that the words be part of a “widespread or systematic attack”. War propaganda, on the other hand, could most appropriately be criminalized by treating it as incitement to aggressive war; however, it must be admitted that this is unlikely to occur as during the debates on the Rome

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<sup>548</sup> Y. Musharbash, ‘Al-Qaida startet Terror-TV’, SPIEGEL ONLINE, 7 October 2005, available at [www.spiegel.de/politik/ausland/0,1518,378445,00.html](http://www.spiegel.de/politik/ausland/0,1518,378445,00.html) [last accessed 7 October 2005].

<sup>549</sup> D. Kilpert, ‘Leuchtturm des Hasses: Wie der Hisbollah-Fernsehsender al-Manar Propaganda gegen Juden und Israel verbreitet’, *Jüdische Allgemeine*, 22 December 2005, p. 2.

Statute States rejected extending direct and public incitement to the other crimes over which the ICC has jurisdiction; furthermore, a definition of aggression has not yet been agreed upon.

Once the climate of violence has been created, direct and public incitement to crimes builds on it, exacerbating the situation by further heating up passions and directing the masses' hatred towards specific goals, in the case of genocide, the destruction of the target group. Instigation, on the other hand, is directed at private individuals; its danger lies in the fact that a specified individual is specifically urged and instructed to commit a crime. Through this special influence, the instigator may determine the perpetrator to commit the crime in question. Once the perpetrator has taken the decision to commit the crime (the *Tatentschluss*), the danger is present and imminent. The criminality of instigation ought not therefore depend on whether the substantive crime is committed; this holds particularly true for international crimes, which are by definition the worst and most condemned. However, the instigator also profits from and is largely dependent on the psychological preparation of the perpetrators through the preceding hate propaganda, and therefore instigation also represents a further step on the continuum of violence.



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