Incitement in International Criminal Law

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Abstract

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

We 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 article explain 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.

Keywords: Incitement, Genocide, Hate Propaganda.
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 of a fabricated meeting of Jewish elders in Berne in 1897, and contained allegations of a Jewish conspiracy to rule the world and enslave Christians. Viciously anti-Semitic, by 1933 they had gone through thirty-three editions.

On the night of 15–16 April 1993 Dario Kordic, 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 Kordic, to plan an attack on Ahmici, aimed at “cleansing” the area of its Muslim inhabitants. The meeting approved an order to kill all men of military age, expel the civilians and set the houses on fire. A witness had testified that Kordic’s comment on hearing that civilians might get killed was “so what?”. The trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that by these and similar actions, Kordic had planned, instigated and ordered various war crimes and crimes against humanity. They kept saying Tutsis were cockroaches. Because they had given up on them we started working and killed them.

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

This article will begin with a brief technical discussion of the notion of inchoate crimes. An understanding of the rationale underlying the criminalization of such acts is indispensable for an analysis of the speech acts dealt with in this article, as a considerable part of the debate centres around whether they are inchoate or not.

Inchoate crimes

The word “inchoate” denotes something that has “just begun” or is “underdeveloped”, “partially completed” or “imperfectly formed”. Inchoate offences are thus incomplete offences, which are deemed to have been committed despite the fact that the substantive offence, that is, the offence whose commission they were aiming at, is not completed and the intended harm is not realized.
In English common law there are three general inchoate offences: attempt, conspiracy and incitement (or solicitation in US law). All of them may incur criminal liability even though the crime they were intended to bring about does not materialize.

Since the intended harm does not actually result, the question is why inchoate offences should incur individual criminal responsibility at all. As Ashworth explains, one rationale lies in the fact that “the concern [in criminal liability] is not merely with the occurrence of harm but also with its prevention”.

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”, it follows that both the unsuccessful attempter and the individual who successfully completes the crime should be punished.

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, Kant postulates that as beings endowed with the capacity to reason, humans enjoy autonomy of the will, that is, they are able to regard themselves as general lawgivers, that is, of laws that have the potential to be valid for everyone at all times. 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.

Incitement in international law

Nuremberg: Streicher, Fritzsche

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

The Tribunal found it to have been proved beyond reasonable doubt that Streicher had had “knowledge of the extermination of the Jews in the Occupied Eastern Territory”, but did not specify whether such knowledge was part of the required mens rea of the offence. It has been argued that the Tribunal’s holding that “Streicher’s incitement to murder and extermination at a time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds …, and constitutes a Crime against Humanity” indicated that the crime in question – that is, a crime against humanity in the form of incitement to murder and extermination – required proving the existence of a causal link between the incitement and the substantive crime, which meant in turn that “both inciting words and the physical realization of their message” had to be established. This would of course mean that the
incitement in question would not be an inchoate offence. Hans Fritzsche was a senior official in Goebbels’s Ministry of Popular Enlightenment and Propaganda as well as head of the ministry’s Radio Division from 1942 onwards.33 Under the count of crimes against humanity, he was accused of having “incited and encouraged the commission of War Crimes by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities”. Here, also, the Tribunal emphasized the effect of the incitement on the minds of the Germans – that is, the addressees of the incitement, which suggests that the Tribunal regarded it as an important element of the crime.

Fritzsche was acquitted, the Tribunal reasoning that his “position and official duties were not sufficiently important … to infer that he took part in originating or formulating propaganda campaigns”; that his speeches “did not urge persecution or extermination of Jews”; that the evidence had shown that he twice tried to stop publication of Der Stürmer (albeit unsuccessfully); and that it had not been proven that he knew the news he transmitted to have been falsified. The Tribunal was “not prepared to hold that [his broadcasts] were intended to incite the German people to commit atrocities on conquered peoples”.

Fritzsche revisited: prosecution by the Spruchkammer I in Nuremberg and appeal to the Berufungskammer I Following his acquittal before the IMT at Nuremberg, Hans Fritzsche was prosecuted before a German court, the Spruchkammer I in Nuremberg, in connection with the de-Nazification trials which were then being conducted in post-Second World War Germany. The court decided that Fritzsche belonged to the category of “Gruppe I – Hauptschuldige”, that is, the first group of Nazi criminals comprising those most guilty, and sentenced him to nine years of forced labour for his participation as a Hauptschuldiger in the criminal Nazi regime.38 The judges pointed out that throughout his career with the German broadcasting service, Fritzsche’s speeches corresponded to the Nazi ideology; moreover, after 1942, when he was given responsibility for the political direction of the German broadcasting service and appointed head of the Propaganda Ministry’s Radio Division with the rank of Ministerialdirektor, Fritzsche’s influence on the formation of public opinion increased considerably. The court stressed that through his radio speeches, Fritzsche exercised an extraordinarily strong influence over a large part of the German people.

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”. He alleged that Jewish people were encouraging the US and British military and profiting immensely from the so-called liberated peoples, and predicted that Jews would soon be killed everywhere as they were being killed in Europe, as it was “hardly to be assumed that the nations of the New World [would] forgive the Jews the misery of which the Old World did not acquit them”.46 Though acknowledging the findings of the IMT Nuremberg that his broadcasts did not specifically call for the persecution or extermination of the Jewish people, the chamber observed that Fritzsche’s propaganda intensified the hatred which the Nazis had fomented against the Jewish people. The essence of his criminal conduct, therefore, was the fact that through his propaganda he knowingly contributed to the creation of a certain “mood”
among Germans, which “favoured” or made possible the persecution and annihilation of the Jewish people. The 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. Were influenced by Fritzsche’s propaganda in favour of Nazism could not easily be overestimated.

Convictions under Control Council Law No. 10: the case of Otto Dietrich To prosecute those Nazi conspirators and criminals who could not be dealt with by the Nuremberg Tribunal itself, the Allies enacted Control Council Law No. 10, which had essentially the same content as the Nuremberg Charter. In the Ministries case before the US Military Tribunal, 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. Dietrich, not Goebbels, had control over the press section in that ministry. The Tribunal recognized the important influence which press propaganda had in garnering support for the Nazi regime, stating that it was “one of the bases of Hitler’s rise to power and one of the supports to his continuation in power”.

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

The Genocide Convention: travaux préparatoires

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

The Draft Convention for the Prevention and Punishment of Genocide, prepared by the UN Secretariat,62 criminalized “direct public incitement to any act of genocide, whether the incitement be successful or not”. In its comments on the draft Convention, the Secretariat made it clear that “direct public incitement” referred to “direct appeals to the public by means of speeches, radio or press, inciting it to genocide”.

Universal condemnation of genocide brought the international community together in 1948 to draft the Convention on the Prevention and Punishment of the Crime of Genocide,1 thus signalling the world’s disdain for those who would perpetrate genocide in the strongest possible terms. To this day the Genocide Convention holds a unique place in international law. It is recognized as compelling and overriding law (jus cogens), articulating and establishing obligations owed by all members of the international community to all members of the international community (obligatio erga omnes).
Genocide is a crime almost unfathomable in its cruelty and its scale. As defined in the *Genocide Convention*, “genocide” refers to five acts:10
(a) Killing members of a group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within a group;
(e) Forcibly transferring children of a group to another group.

Subsequently, the Economic and Social Council (ECOSOC) established an Ad Hoc Committee composed of the ECOSOC members China, France, Lebanon, Poland, United States, the USSR and Venezuela to prepare a draft *Genocide Convention*.65 The Ad Hoc Committee was to take into consideration the Secretariat Draft and comments by governments on that draft, as well as all other drafts submitted by member governments.

The US proposal is remarkable, given the US delegation’s staunch opposition to the inclusion of any incitement provision later on in the debates. It is also remarkable in that it represented a more detailed provision on incitement than those submitted by other delegations; the French draft Convention on Genocide, for instance, simply stated that “Any attempt, provocation or instigation to commit genocide is also a crime. 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. 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”. The effect of propaganda on the minds of the audience in creating a certain state of mind or genocidal climate is here underscored as a reason for sanctioning such speech acts. in private to commit genocide whether such incitement be successful or not”. The commentary on the Ad Hoc Committee Draft reveals that the qualification “in public or in private” was adopted by five votes, with two abstentions,75 which signifies that it enjoyed a fair amount of support among the delegates. Public incitement is defined as incitement in the shape of “public speeches or … the press, … the radio, the cinema or other ways of reaching the public”, while incitement was considered private when “conducted through conversations, private meetings or messages”. The commentary on the Ad Hoc Committee Draft further identifies direct incitement as “that form of incitement whereby an individual invites or urges other individuals to commit genocide”. While this explanation does not particularly appear to clarify the term “direct”, it presumably expresses the idea that the perpetrator clearly and unmistakably communicates to the addresses the need for them to commit genocide.

The US delegation finally voted against the whole paragraph criminalizing incitement to genocide,86 declaring that Any “direct incitement” to achieve the forbidden end and which might be feared would provoke by its very nature the committing of this crime would generally partly constitute an attempt and/or a conspiracy to permit [sic] the crime. To make such incitement illegal it is sufficient to make the attempt and the conspiracy illegal without their [sic] being any need to list specifically in the Convention acts constituting direct incitement.
The Ad Hoc Committee Draft was then discussed by ECOSOC and transmitted without change to the General Assembly, which discussed it under consideration of several proposed amendments. During the ECOSOC discussions, the Polish and Soviet delegates again underlined the importance of punishing propaganda for racial, national or religious hatred “as a method of forestalling outbreaks of genocide”, while the US delegation criticized the provision dealing with direct incitement.

During the discussions of the Belgian amendment, the Belgian representative explained that in order to “clarify article IV and to make it juridically sound”, his delegation’s amendment omitted the phrases “or in private” and “whether such incitement be successful or not”. Interestingly, the US delegate declared that there was “no great difference between the Belgian amendment and the Ad Hoc Committee text”, suggesting that it was evident that such incitement was an inchoate offence. The Venezuelan delegation stressed that “[a]ll legislations regarded incitement to crime as punishable”; while some considered it to be a form of complicity, “others, such as the Venezuelan legislation, regarded it as a special offence, regardless of the results it produced” – that is, Venezuela also regarded incitement as an inchoate offence. The delegate moreover stressed the need to punish those who committed this crime, as genocide was “usually the result of hatred instilled in the masses by inciters”. Addressing the US delegation’s concern regarding freedom of speech, the French delegate denied that the latter was involved, as “that freedom could not in any way imply a right to incite people to commit a crime”. Instead, the retention of the incitement provision was necessary, because “[i]t was precisely in connexion with genocide that the suppression of propaganda was absolutely essential”.

The UK delegate, while agreeing that in theory incitement “could be considered as a separate act”, said that in practice, given the large-scale and long-term nature of genocide, incitement would in almost all cases eventually result in conspiracy, attempt or complicity. That being the case, it was unnecessary to punish genocide at as early a stage as incitement.110 Disagreeing with these arguments, the Australian and Swedish delegates both objected to the deletion of sub-paragraph (c). 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”. The intrinsic danger of incitement was also stressed by the Danish delegate as a reason for criminalizing incitement,113 while the Czechoslovakian delegate emphasized that “[d]irect incitement to murder” was a crime “in all countries”. The Uruguayan delegate also favoured retention of the provision, submitting that “[t]o punish incitement to genocide was the best method of preventing the perpetration of that crime”. The Egyptian delegate, the delegate from the Philippines and the Ecuadorian delegate were also in favour of retaining the incitement provision.

The US amendment proposing the deletion of sub-paragraph (c) was Both the UK and Polish delegates emphasized that they did not consider that the deletion of this phrase would have “any effect from the legal point of view” – incitement would be punishable whether successful or not.120 The South African representative agreed with this view.

Article IV in its entirety was finally adopted as amended by thirty-five votes to none, with six abstentions.123 Subsequently the text of the articles of the Convention, as well as two
resolutions, was submitted to the Drafting Committee, which in turn submitted a report to the Sixth Committee on 23 November 1948. Instigation has been considered to be punishable only where it leads to the commission of the substantive crime, which means that it is not an inchoate crime; the instigation must be causally connected to the substantive crime in that it must have contributed significantly to the commission of the latter, the instigator must act intentionally or be aware of the substantial likelihood that the substantive crime will be committed, and he must intend to bring about the crime instigated. By contrast, direct and public incitement has been held to be an inchoate crime, which is applicable only in connection with the crime of genocide.

Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have addressed instigation – provided for in Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute, which lists forms of individual criminal responsibility – in several cases. 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 accuser’s acts. As regards the required mens rea, the instigator must act intentionally, that is, must have “intended to provoke or induce the commission of the crime”, or must at least have been “aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts”. At the same time the accused must again be proven to have “directly or indirectly intended that the crime in question be committed”.

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”. 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”.

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

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. The “direct” element in incitement to genocide was explained in Akayesu (trial chamber), where the ICTR began by stating that it should be considered “in the light of its cultural and linguistic content”, because it depended on the audience whether a certain utterance would be
perceived as direct or not. Particular state of mind in his audience was necessary to lead to the destruction of the Tutsi group”. It is notable that the Tribunal refers to the creation of a certain state of mind, an element which, as we have seen, has also been of importance before the International Military Tribunal at Nuremberg and the German courts in the trial of Fritzscbe, as well as during the Genocide Convention debates.

In the 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 from 1 January 1994 to 31 December 1994, the chamber held that, where the incitement was successful, the crime of incitement continued until the commission of the acts incited. Therefore acts of incitement committed before 1 January 1994 would come within the ICTR’s jurisdiction unless the substantive crime had been committed before that date.

Finally, the Tribunal distinguished incitement from hate propaganda, explaining that broadcasts such as one alleging about the Tutsi that “they are the ones who have all the money” did not constitute direct incitement, as they did “not call on listeners to take action of any kind”. 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.

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) and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). 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.52 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.
The Rome Statute During the Diplomatic Conference in Rome the drafters rejected the suggestion that the incitement provision be extended to apply also to crimes against humanity, war crimes and aggression. There were also proposals to provide for solicitation, which was to be defined thus: with the purpose of “encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime”, “command[ing], [order[ing]], request[ing], counsel[ing] or incit[ing] the other person to engage [or participate] in the commission of such crime”. The crime would not have been inchoate. In the end, however, solicitation was included in the Rome Statute without defining it in any way. Conspiracy is an inchoate offence: the mere agreement to commit genocide is punishable. 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. Similarly, an attempt to commit genocide is necessarily inchoate, and in order to convict someone of an attempt, the individual in question must have acted with the intent to commit genocide. Article 25(3)(f) of the Rome Statute defines “attempt” as the beginning of the commission of the crime “by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions”.

In Krstic’, 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”. “Aiding and abetting” is thus included in the notion of complicity, which, however, also prohibits conduct broader than aiding and abetting. While a conviction for complicity generally requires proof of the specific intent to commit genocide, a consistent line of ICTY and ICTR case-law holds that where an accused is merely charged with aiding and abetting, he or she must only be shown to have had knowledge of the principal perpetrator’s intent.

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. There have been no convictions solely for instigation. This tends to support to a certain extent the remarks by the Uruguayan delegate during the Genocide Convention deliberations cited above, in that a separate crime of instigation or incitement, if it is not inchoate, would always be equivalent to complicity and it would consequently be pointless to have such a separate crime. Support for this view can also be found in the way in which this issue has been treated in the criminal law of several countries; in US law, for example, solicitation can be a basis for accomplice liability where the substantive offence is subsequently committed. In such a case, if the accused is convicted and punished for the substantive crime as an accomplice, he would not be punished for solicitation, as the offence of solicitation would be regarded as having merged with the substantive offence.

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”.

Albin Eser similarly sees the main difference in the fact that while instigation is addressed to a particular individual or particular individuals, incitement is directed towards an undefined group.
of people. The same author submits that while instigation is penalized because of “the participation of the inciter (as an accessory) in the criminal act of another”, public incitement is criminalized because of “the special dangerousness associated with the incitement of an indeterminate group of people”. Incitement is particularly dangerous, since “the more [it] carries over into the social sphere and into the general public”, the more it “lead[s] to a … decrease in the controllability of the spoken and written word”.

The creation of an atmosphere conducive to the later commission of criminal acts inspired by hatred is a recurrent justification for the criminalization of public incitement. As has been noted above, during the debates on the Genocide Convention several delegates stressed the intrinsic danger of incitement to hatred and genocide, and argued that it prepared the ground for the commission of the crime of genocide. Thus, the Soviet delegate stated that the inciters of genocide were in fact those mainly responsible for the eventual commission of genocide, implying that without the creation of a public mood of hatred and aggression the commission of the crime would be unlikely. Similarly, in the jurisprudence of the ICTR reference has repeatedly been made, for instance in Akayesu, to the creation of a particular state of mind in the audience that would induce its members to commit genocidal acts.

Where the instigator does not succeed for various reasons in causing the perpetrator to decide to commit the crime and the crime is not committed, he or she would be guilty of attempted instigation and would be punished less harshly. It is submitted that this is sensible, as in such a case the danger of harm occurring is obviously considerably less than where the main perpetrator has made the concrete decision to commit the crime in question. Similarly, where the instigatee has made the decision to commit the crime, the danger is present whether or not he or she then goes on to commit the crime or is prevented by external circumstances from doing so. However, as mentioned above, it is clear from the wording of 126 that instigation as such is penalized only where it has been successful, whereas instigation which is not followed by commission of the substantive crime is punished as attempted instigation.

In contrast to 126 and 130, 1111 of the German Penal Code punishes the “öffentliche Aufforderung zu Straftaten”, and provides that whosoever publicly, in an assembly or through the distribution of writings, invites others to commit a crime, shall be punished on the same terms as an instigator. The decisive difference between this provision and 126 criminalizing instigation lies in the fact that 1111 does not call for another person as “Bestimmungsobjekt” – that is, there is no need for there to be another individual who must be caused selectively to decide to commit the crime. This makes sense, as the danger in public incitement is that it can quickly become uncontrollable, as pointed out above.

The Swiss Penal Code (Schweizerisches Strafgesetzbuch) stipulates that “whoever intentionally encourages or directs or plans a completed felony or misdemeanor shall be punished equally with the principal. Whoever attempts to induce another to commit a felony shall be punished for the attempt of this felony.” Similar to the German provision on instigation, under Swiss law instigation occurs when it has brought about the decision to commit the crime in question (the “Tatentschluss”) in the main perpetrator. This requirement that, for instigation to be successful, it needs to induce the instigatee to decide to commit the substantive crime (the Entschluß zur Tat
or Tatentschluss), is reminiscent of the language used by the International Military Tribunal at Nuremberg to describe the effect that Streicher’s propaganda had on the minds of the German people,198 as well as the phrase “making another person decide” in the travaux préparatoires of the Rome Statute. The Swiss Federal Council, after examining what amendments were needed for the Swiss Penal Code to comply with the requirements of the Genocide Convention, concluded that “direct and public incitement” was covered by two different provisions of the Penal Code, one being Article 24, criminalizing instigation, when 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 genu¨gt.

What is particularly appealing about the German and Swiss approach is the idea that instigation is regarded as having been committed as soon as the decision to commit the criminal act (Tatentschluss) has been planted in the instigatee’s mind. As soon as this occurs the danger is present, and only external circumstances or events will prevent the commission of the crime. At this stage the instigator is to be considered guilty of instigation and punished. It is submitted that instigation in international criminal law ought to be considered an inchoate crime.

Conclusion

During the debates on the Genocide Convention, the Soviet delegate forcefully argued that It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so …. He asked how, in those circumstances, the inciters and organizers of the crime should be allowed to escape punishment, when they were the ones really responsible for the atrocities committed. The peoples of the world would indeed be puzzled if the Committee, basing its decision on purely political arguments of doubtful validity, were to state that the instigators of genocide, those who incited others to commit the concrete acts of genocide, were to remain unpunished.207 Since then, the events that occurred in Rwanda in 1994 have shown this view to be correct. As has been repeatedly recognized, inter alia by the ICTR, incitement by the media and individuals alike played an important role in triggering and spurring on the atrocities committed in the months after 6 April 1994. The dangers of incitement – be it public, where its effect is to create an atmosphere of violence and hatred, or private, where it results in the instigatee’s determination to commit the crime the instigator seeks to bring about – are tangible and undeniable. The omnipresence of the Internet and the opportunities it offers for spreading inciting messages have considerably aggravated this danger.

State-sanctioned incitement to genocide is a singular and unique threat to international peace and security. While over 60 years have passed since the international community sought to address it by prohibiting genocidal incitement, this juridical response – absent tangible action to enforce it – has proven manifestly inadequate. We continue to be haunted by the recent preventable genocides in Rwanda and the former Yugoslavia, while our collective failure to end genocide in Darfur results in more lives lost on a daily basis.

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.
References


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


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

Blas´kic´ Trial Judgment, above note 130, para. 278; see also Kordic´ and C ´ erkez Trial Judgement, above note 4, para. 386; Bagilishema, above note 132, para. 31.


Ibid., para. 4.


Ibid., p. 146.

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

Ibid., p. 164.


Musema Appeal Judgement, above note 138, para. 193; see also Bagosora et al., Decision on Motions for Judgement of Acquittal, above note 144, para. 12.
Ibid., p. 218 (Mr Fitzmaurice).
Musema Appeal Judgement, above note 138, para. 187; Nahimana et al., above note 7, para. 1045.
Ibid., para. 192; Nahimana et al., above note 7, para. 1042.
Nahimana et al., above note 7, para. 104. See also para. 1017.
Nahimana et al., above note 7, para. 1015.

Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence (Trial Chamber), 1 June 2000, para. 16.
Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgement and Sentence (Trial Chamber), 6 December 1999, para. 38; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement (Appeals Chamber), 27 January 2000, para. 120.
Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Trial Chamber), 2 September 1998, para. 481.
Kordic’ and C ’ erkez, Trial Judgement, above note 4, para. 387; Blasˇkic´ Trial Judgement, above note 130, para. 280.
Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement and Sentence (Trial Chamber), 27 January 2000, para. 865; see also Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgement (Trial Chamber), 7 May 1997, para. 690.
Musema Appeal Judgement, above note 140, para. 120; Rutaganda, above note 138, para. 38; Ndindabahizi, above note 133, para. 456; Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal (Trial Chamber), 2 February 2005, para. 17. See also W. A.

Prosecutor v. Naletilic´ and Martinovic´, Case No. IT-98-34-T, Judgement (Trial Chamber), 31 March 2003, para. 60; see also Kvocˇka et al., above note 134, para. 252.

Ibid., pp. 223–4, 229 (Mr Raafat, Mr Ingle´s, and Mr Correa, respectively).
Ibid., p. 229.
Ibid., p. 230.
Ibid., p. 232.
Ibid., p. 231.
Ibid., p. 232.
Robinson, above note 81, p. 67.
UN Docs. A/760 & A/760 corr. 2.
UN Docs. A/766 & 770, respectively.
UN Doc. A/PV.179.
bid., p. 216 (Mr Bartos).
Ibid. (Mr Spanien).
Ibid.

Eighty-fourth Meeting, above note 87, p. 217 (Mr Demesmin).
Ibid., p. 218 (Mr Fitzmaurice).
Ibid., pp. 218–19 (Mr Dignam and Mr Petren, respectively).
Ibid., p. 219 (Mr Dihigo).
Eighty-fifth Meeting, above note 108, p. 220 (Mr Federspiel).
Ibid., p. 221 (Mr Zourek).
Ibid., p. 222 (Mr Manini y R´os).

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


Article 2 of the Genocide Convention, supra note 1.

