DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE: LESSONS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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Abstract

The law regarding incitement to commit genocide has been controversial since its inception. During the drafting of the 1948 Genocide Convention incitement was restricted to 'direct' and 'public' speech with limited further guidance. The offence remained untested until the first conviction for incitement to genocide at the International Criminal Tribunal for Rwanda in 1998. Consequently, the ICTR was tasked with establishing its definition and scope. However, the lack of guidance resulted in inconsistent jurisprudence. The term 'direct' proved particularly problematic, as its ordinary meaning fails to appreciate that in different societies communication takes varying forms.

Through an appraisal of ICTR incitement jurisprudence, this thesis argues that direct and public incitement requires clear definitions for its constitutive and evidentiary elements. While the cases largely reached a consensus on the constitutive elements (direct, public, incitement and intent), these were not consistently applied. This thesis does not attempt to redefine direct and public incitement *per se*, but advocates that in order to allow for cultural variance in communication, direct should be read to mean 'clearly understood as incitement within its own context'. Moreover, public should be read in its ordinary meaning: 'done, seen, or existing in open view'. The definitions of evidentiary elements aim to identify the distinction between incitement and legitimate expression, which constitutes an original contribution. This involves: (i) considering the content and purpose of the speech to find whether the speech intended to inform or provoke, thereby distinguishing between informative statements and opinions; (ii) examining whether the speech had the 'requisite persuasive force' to incite acts of genocide through an analysis of the influence of the speaker, the seriousness of the message and the speech as a whole; and, (iii) showing whether speech posed a credible threat to the target group in light of its contemporary context.

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Contents

Abbreviations

CDR	Coalition for the Defence of the Republic
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ECOSOC	Economic and Social Council
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
MICT	Mechanism for International Criminal Tribunals
MRND	Mouvement Républicain National pour la Démocratie et le Développement (The National Republican Movement for Democracy and Development)
NMT	Nuremberg Military Tribunal
OHCHR	United Nations Human Rights Council
RPF	Rwandan Patriotic Front
RTLM	Radio Télévision Libre des Mille Collines
SDS	Serb Democratic Party
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

1. Introduction

1.1 Context

In a statement delivered during the 66th Session of the UN Committee on the Elimination of Racial Discrimination, Leon Saltiel argued that 'the Holocaust did not begin with gas chambers. It began with words'.[1] Similarly, at the International Criminal Tribunal for Rwanda (ICTR), a witness testified that the notorious Radio-Télévision Libre des Mille Collines (RTLM) 'spread petrol throughout [Rwanda] little by little, so that one day it would be able to set fire to the whole country'.[2] The notoriety of the violent, ethnic rhetoric in Rwanda 'brought into the limelight' the incredible potential for words to create an atmosphere in which atrocity offences can occur.[3] As a result, international and national courts have 'increasingly targeted public speech that incites inter-group violence'.[4] However, the international regulation of speech has proven controversial. Thus, in international criminal law incitement is only prohibited when it directly and publicly encourages genocide, and there are few other criminal sanctions for harmful speech.[5]

The Office of the Prosecutor at the International Criminal Court (ICC) has issued warrants of arrest against a number of individuals for ordering, inducing or co-perpetrating war crimes and crimes against humanity on the basis of speech.[6] However,

[1] A senior fellow at UN Watch; Leon Saltiel, 'How to Fight Incitement to Genocide' (*UN Watch*, March 2005) <https://www.unwatch.org/issue-130-fight-incitement-genocide/> accessed 17 September 2017.

[2] *Prosecutor v Nahimana et al* (Judgment and Sentence) ICTR-99-52-T, T Ch I (3 December 2003) [437].

[3] Mathias Ruzindana, 'The Challenges of Understanding Kinyarwanda Key Terms Used to Instigate the 1994 Genocide in Rwanda' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2012) 145.

[4] Richard A Wilson, 'Inciting Genocide with Words' (2015) 36 Michigan Journal of International Law 277, 280.

[5] Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277, art III(c); the Rome Statute prohibits ordering, soliciting or inducing the commission of a crime under the jurisdiction of the court 'which in fact occurs or is attempted'; Rome Statute of the International Criminal Court (Adopted 17 July 1998 entered into force 1 July 2002) 2187 UNTS 3, art 25(3)(b).

[6] *Prosecutor v Harun and Kushayb* (Warrant of Arrest) ICC-02/05-01/07 (27 April 2007); *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10 (16 December 2011); *Prosecutor v Ruto, Kosgey and Sang* (Decision on the Confirmation of Charges) ICC-01/09-01/11 (23 January 2012); *Prosecutor v Ntaganda* (Warrant of Arrest) ICC-01/04-02/06 (13 July 2012); *Prosecutor v Gbagbo and Blé Goudé* (Decision on Prosecution Requests to Join the Cases) ICC-02/11-01/15 (11 March 2015); *Prosecutor v Al-Hassan* (Warrant of Arrest) ICC-01/12/01/18 (27 March 2018).

none of these warrants have been issued in relation to direct and public incitement to commit genocide. Consequently, even though incitement to genocide has been punishable in international law since the 1948 Genocide Convention (the Convention), to date, only the ICTR has produced direct precedent with a small number of trials from national jurisdictions also assessing the crime in the context of the Rwandan Genocide.[7] Outside the ICTR, trials centred on speech 'have not enjoyed a sterling track record, with a high failure rate for the prosecution'.[8] For example, at the ICC, the case against Mbarushimana was terminated at the pretrial stage, and the case against Ruto and Sang was dismissed 'after the prosecution's case collapsed amid charges of witness intimidation and bribery'.[9] At the International Criminal Tribunal for the former Yugoslavia (ICTY), *Šešelj*, a trial centred on propaganda, ended with acquittal for all nine counts of crimes against humanity.[10] Therefore, despite the suggestion that there has been an increased interest in speech offences, this has not manifested in a development of incitement jurisprudence outside the context of Rwanda.

On the 31st December 2015 the ICTR closed following the delivery of the final judgment on appeal in *Nyiramasuhuko*.[11] During its mandate, it indicted 93 individuals for genocide and other serious violations of international criminal law committed during the Rwandan Genocide of 1994.[12] It rendered 45 appeals judgments and 55 first-instance judgments, and concluded proceedings against 85 accused, including five transfers to national jurisdictions.[13] Between the opening of the first case, *Akayesu*, and the conclusion of the final trial chamber judgment, *Ngirabatware*, the trial chambers

[7] Genocide Convention (n 5) art III(c); *Mugesera v Canada* (Minister of Citizenship and Immigration) [2005] 2 SCR 100; Rb The Hague 1 March 2013, ECLI NL RBDHA 2013 BZ4292 (*Public Prosecutor/Yvonne Basebya*).

[8] Richard A Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press 2017) 7.

[9] ibid 7. See also *Mbarushimana* (Decision on the Confirmation of Charges) (n 6); *Ruto and Sang* (Decision on Defence Applications for Judgments of Acquittal) (n 6) [135].

[10] *Prosecutor v Šešelj* (Judgment) IT-03-67-T, T Ch III (31 March 2016). See also Wibke Timmerman, 'Inciting Speech in the Former Yugoslavia: The Šešelj Trial Chamber Judgment' (2017) 51 Journal of International Criminal Justice 133.

[11] *Prosecutor v Nyiramasuhuko et al* (Appeals Judgment) ICTR-98-42-A, A Ch (14 December 2015).

[12] UNSC 'Letter dated 17 November 2015 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council' (17 November 2015) UN Doc S/2015/884.

[13] ibid; UNSC 'Letter dated 15 May 2014 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council' (15 May 2014) UN Doc S/2014/343.

heard testimony from 3,062 witnesses and examined approximately 20,000 exhibits.[14] Consequently, the ICTR represents a significant milestone in international criminal justice.

1.2 Research Focus

The ICTR has produced the entirety of the international decisions on incitement to commit genocide. Accordingly, following the closure of the ICTR, there is an opportunity to analyse this body of jurisprudence. The analysis of cases will show that the ICTR trial chambers largely reached a consensus on the definitions of the constitutive elements of incitement (direct, public, incitement and intent). However, they were not consistently applied in all cases, betraying an uncertainty that has arisen, both from the drafting of the offence and the approach of the ICTR. Thus, despite the volume of cases produced by the Tribunal, identifying incitement is still not a straightforward task.

The indisputable constitutive elements of incitement to genocide consist of the material and mental elements of a crime. Firstly, the *actus reus* of incitement requires that the actor directly and publicly incited genocide; and, secondly, a conviction requires both the *dolus specialis* of genocide, that being, the intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' alongside the general intent to directly and publicly incite genocide.[15] This is a complex task, requiring a court or tribunal to: (i) establish on a factual level whether the accused spoke, wrote, or published the words; (ii) identify what these words meant and whether they encouraged the audience to commit genocide, even if genocide did not result (as per article II of the Convention, genocide is not limited to killing); [16] (iii) show that the audience understood this as an encouragement to commit genocide; (iv) prove that this was public; and, (v) demonstrate that the speaker intended to incite genocide. Therefore, establishing that the actor directly and publicly incited genocide requires a number of evidentiary factors to be considered, many of which have not been clearly outlined by the ICTR.

[14] UN Doc S/2015/884 (n 12); *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch 1 (2 September 1998); *Prosecutor v Ngirabatware* (Judgment) ICTR-99-54-T, T Ch II (20 December 2012).

[15] Genocide Convention (n 5) art II.

[16] ibid art II.

By drawing on an analysis of ICTR cases assessed in the light of the theoretical background and drafting history of the offence, this thesis aims to propose clear definitions for the constitutive and evidentiary elements of incitement. The evidentiary elements will help to define the line between protected and prohibited speech by distinguishing incitement from legitimate expression. This involves considering: the content and purpose of the speech to identify the distinction between informative statements and opinions; the persuasive force of the speech, which includes the influence of the speaker and the seriousness of the message; and context.

With reference to the principles of international criminal law, which dictate that offences must be given strict interpretation and definitions must avoid analogy, this thesis does not attempt to expand the offence to encompass a broader spectrum of hate speech, neither does it attempt to exclude any of the existing elements. Rather, the focus is on direct and public incitement to commit genocide, particularly how this may be applied in future. Consequently, this calls for a critique of ICTR incitement cases. This will identify problems the Tribunal encountered in its work in order to understand why there was inconsistent and sometimes incoherent application of the offence and in order to consider how these challenges may be addressed in future.

An essential part of this consideration is the issue of language and the challenge of cross-cultural communication. In order to identify incitement, the international judge is required to build an understanding of words that were spoken in a particular context to a particular audience. This brings the cultural subjectivity of speech into focus, showing that language and communication are at the core of the incitement analysis. This magnifies the task of the court. However, the significance of this is often overlooked by lawyers and legal scholars. In order to understand the controversies and challenges facing international incitement trials, particularly regarding the extent to which implicit speech can be said to be direct, it is essential to understand these issues, and to consider how they might be addressed. Consequently, this discussion emphasises the inherent complexity of multi-lingual and multi-cultural incitement trials. By focussing on linguistic understanding this thesis aims to give a different insight into incitement to commit genocide.

Thus, this thesis has three primary aims: (i) to appraise the whole of the ICTR's incitement jurisprudence to identify the controversial, problematic and positive aspects

of its analysis, particularly highlighting the problems encountered in the application of the offence; (ii) to use this analysis to identify and define the constitutive and evidentiary elements of incitement; and (iii) to emphasise the importance of understanding speech in international incitement trials, showing that this is an underdeveloped area of the law.

There are a number of issues that demonstrate the originality of this research. Firstly, the acknowledgement and analysis of cross-cultural communication as part of the incitement analysis, which emphasises the importance of establishing meaning in international incitement trials. While this was conducted to a certain extent by the ICTR, this is an element of incitement trials that has largely been overlooked in scholarly research. Secondly, the identification of evidentiary aspects of the incitement analysis that help to distinguish incitement from legitimate speech, including the difference between informative statements and opinions, the persuasive force of the speech, the seriousness of the message and the influence of the speaker. Finally, the issue of context, which is the area that provides the most significant original contribution. While this received mention by the ICTR, it was used in a number of different ways but rarely defined clearly. Thus, this thesis aims to provide a definition for context and differentiate between the various forms employed by the Tribunal. Context plays its most significant role with regard to direct incitement, as this helps to identify whether the speech was clearly understood as inciting genocide when spoken by the speaker and heard by the target audience. This relies on a clear understanding of the context in which the speech was delivered. This has seemed to be most applicable for implicit speech, which may contain euphemistic and culturally specific phrases that are obscure to outsiders, and yet the audience may still understand the speech as encouraging genocide when taken in its proper context.

1.2.1 Defining Key Terms

At the outset, there are four key terms that need to be defined. Firstly, speech; its general use suggests that this only refers to the spoken word, thereby conveying the idea that when talking about prohibiting speech this is only concerned with what people say out loud. This is misleading. For the purposes of this analysis, speech is used as an umbrella term, encompassing words and images that are spoken, written, printed, published or broadcast through any means. Secondly, incitement; while this usually

refers to the encouragement of any offence, particularly in the context of domestic criminal law, when the term is used alone in the context of this thesis it refers only to direct and public incitement to commit genocide. If incitement is used to refer to another offence, for example incitement to hatred or violence, this will be made explicit.

Next, the term genocide; coined by Raphael Lemkin, this term developed into a legal concept.[17] Throughout this thesis, when genocide is discussed, it refers to the specific legal meaning as set out by Article II of the Genocide Convention, the carrying out of specified acts against a member of a national, ethnical, racial, or religious group for reason of their membership to that group.[18] These acts are not limited to killing, and include 'causing serious bodily or mental harm'; deliberate infliction of 'conditions of life calculated to bring about' the 'physical destruction' of the target group 'in whole or in part'; 'imposing measures intended to prevent births'; and, 'forcibly transferring children'.[19] These acts must be carried out with the special intent of genocide, namely to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.[20] Therefore, when genocide is mentioned, this refers to the umbrella of offences under Article II, unless otherwise specified. When this thesis refers to the Rwandan Genocide, it specifically refers to the timeframe that the ICTR in *Akayesu* considered constituted genocide in Rwanda, April to July 1994.[21]

Finally, context; this is a 'dynamic, not a static concept', to be 'understood as the surroundings, in the widest sense' that form the background to an utterance.[22] However, this has four specific uses for the purpose of this thesis. Firstly, external context is used to identify how the audience understood the speech by making use of linguistic, cultural, historical and social factors; secondly, speech context helps to distinguish incitement from legitimate expression by considering extra-linguistic cues, tone of voice, accompanying images or actions, and previous speech; thirdly, the speaker's personal context helps to illustrate their intent by considering their political

[17] Stefan Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct' (2009) 42 Creighton Law Review 347, 347. See also Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (2nd edn, The Lawbook Exchange Ltd 2009).

[18] Genocide Convention (n 5) art II.

[19] ibid art II (b) – (e).

[20] ibid art II.

[21] *Akayesu* (Judgment) (n 14) [112] – [129].

[22] Jacob L Mey, *Pragmatics: An Introduction* (Blackwell 1994) 38.

and community affiliations; and, finally, contemporary context, which refers to the surrounding circumstances of the speech in order to show that genocide could have resulted from the incitement.

1.3 Chapter Outline

As a starting point for the analysis, Chapter Two considers the theoretical distinction between prohibited and permissible speech. Historical examples will show the inherent harm of inciting speech, demonstrating the role that words have played in the orchestration of atrocity offences. These examples will illustrate the hallmarks of incitement, outlining the speech techniques that may facilitate a finding that a speaker aimed to encourage genocide. This chapter also draws upon theories of punishment to examine the justifications for criminalising malicious speech. This focuses on Austin's theory of speech acts, which considers that speech is a positive act in its own right, and punishable as such, when the speaker intends to achieve something through their words and when the words have the potential to fulfil their aim.[23] In light of this it is possible to define incitement as a positive, harmful act in its own right, which helps to draw the distinction between speech that is deserving of protection, even though it may be repugnant, and speech that is sufficiently dangerous to warrant criminalisation.

Building upon this analysis, Chapter Three assesses the developments in the law of incitement with reference to the principles of interpretation in order to confirm that the discussion of theory is consistent with international law. Firstly, a discussion of the International Military Tribunal at Nuremberg (IMT) and the drafting of the Genocide Convention shows the inspiration for the prohibition of incitement and highlights the reasons for the inclusion of the direct and public elements. With reference to the *Travaux Préparatoires* of the Convention, this chapter aims to begin to build definitions for these terms, arguing that while direct was a poor choice of word, this was intended to distinguish incitement from general propaganda and, therefore, it was intended to define the idea that incitement had to be clearly understood as encouraging the commission of genocide. The second section of this chapter focuses on the International Law Commission's (ILC) Draft Code and the Rome Statute. This discussion aims to

[23] John L Austin, *How to do Things with Words* (2nd edn, Harvard University Press 1975) 60, 94; Kent Greenawalt, *Speech, Crime and the Uses of Language* (OUP 1989) 58.

show that even though the ICC exists within its own legal system, future courts are likely to rely on ICTR jurisprudence owing to the similarities between the offences in the Rome Statute and the Convention. Therefore, definitions derived from ICTR jurisprudence will be relevant to future incitement cases.

Chapter Four introduces the importance of context and illustrates the inherent difficulties of assessing incitement in multi-cultural and multi-lingual trials. This discussion will emphasise the important, but complex, task of understanding speech in incitement trials. This is relevant for two main reasons: (i) understanding speech is essential to identifying incitement, however, it is a task that is often overlooked and, therefore, it has rarely been the focus of academic analysis; and, (ii) this chapter considers how people communicate and acknowledges cultural differences in speech in order to demonstrate that direct cannot be read simply according to its ordinary meaning, as this is too narrow an interpretation. Particularly at the outset, the ICTR faced the challenge of establishing understanding between the Tribunal's personnel and the Rwandan witnesses and accused. This was magnified by the syntactically complex and polysemic nature of Kinyarwanda, the language of Rwanda. Kinyarwanda was the only language spoken by many of the Rwandan participants in the trials and completely unfamiliar to the judges and legal personnel. With reference to sociolinguistics, this chapter aims to show that both the factual content of the speech and its external context are essential to facilitating understanding. Using the example of Rwanda, this discussion will highlight key contextual factors for examination and provide a background to the analysis of ICTR cases.

The following chapters are centred on the ICTR, providing an overview of the incitement jurisprudence, assessing the main themes of the judgments and the problems encountered by the Tribunal with the aim of clarifying and defining the constitutive and evidentiary elements of incitement. Chapter Five explores the seminal incitement case of *Akayesu*. As the first case in international law to assess incitement, it outlined the constitutive elements of the Convention offence, forming the foundation of subsequent judgments. This chapter focuses on the Tribunal's approach to defining incitement and its elements, particularly the establishment of the so-called context-based assessment for direct incitement, and the ICTR's approach to public incitement. This chapter will show that, while it has been suggested that public is the least complex element of the

incitement provision, in application it encountered problems that could have been avoided had the ICTR considered the element in light of its ordinary meaning.

Chapter Six builds upon *Akayesu's* approach to incitement, by emphasising the importance of evidentiary elements in order to distinguish incitement from legitimate speech. This has three main points of investigation: firstly, to emphasise the importance of a full analysis of available evidentiary elements; secondly, to address the question of the grammatical form of the speech; and, thirdly, to consider how inciting speech may be distinguished from legitimate expression with reference to the Media Trial. It will be shown that, while the Media Trial is a controversial and divisive case, there are a number of significant elements to be taken from it. With reference to relevant international human rights law and cases it is possible to identify incitement by considering the content and purpose of the speech, which distinguishes between informative statements and opinions, and the requisite persuasive force, which considers the influence on the speaker and the seriousness of the message.

Chapter Seven focuses on context. This has four main aims: (i) to identify whether there is legal and jurisprudential support for an evidentiary element of contemporary context; (ii) to consider the extent to which the ICTR's search for causation was a poorly explained evidential search for contemporary context; (iii) to define an evidential element of contemporary context; and, (iv) to outline the difficulties with evidentiary elements. Finally, the concluding chapter ties together the analysis of the cases and theories in order to define the elements of the offence, both constitutive and evidentiary, particularly focussing on the persuasive force of the speech, defined by considering the seriousness of the message and authority of the speaker, the distinction between incitement and legitimate expression, and, finally, context.

1.4 Literature Review

The academic commentary surrounding this area of law has been described as 'fragmented'.[24] While a number of studies have been produced in recent years, they differ from this thesis as several of these consider incitement to genocide as part of a

[24] Gregory S Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (OUP 2017) 3.

broader spectrum of speech offences, or potential speech offences. Conversely, the focus of this thesis is the existing international offence of direct and public incitement to commit genocide, with no attempt to broaden its scope. Rather, this thesis takes the position that regardless of whether speech ought to be subject to greater regulation in international criminal law, direct and public incitement should be retained as a separate, inchoate offence. Accordingly, while recommendations are made for future application, this does not attempt to redefine direct and public incitement, but to interpret the elements in light of the analysis at the ICTR.

Gordon has criticised what he perceives to be a 'scholarly obsession' with direct and public incitement to commit genocide.[25] However, it does not seem true to assert that any 'obsession' has manifested itself in a significant volume of research that addresses the offence as a whole. Several studies on incitement focus on individual cases or specific areas of the law, a substantial portion of which were completed before the final decision on appeal at the ICTR.[26] Allan Thompson's edited collection, *The Media and the Rwanda Genocide*, focuses exclusively on the role of speech broadcast by the mass media during the Rwandan Genocide, yet only four of the chapters in this study focus on legal issues, and this book was completed before the conclusion of the Appeal in the Media Trial.[27] Thus, it was unable to explore some of the challenges that would face the ICTR in its later cases. Similarly, both the edited collections on genocide

[25] ibid 5.

[26] See also Alexander Zahar, 'The ICTR's "Media" Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide' (2005) 16 Criminal Law Forum 33; Diane F Orentlicher, 'Criminalizing Hate Speech in the Crucible of Trial: *Prosecutor v Nahimana*' (2006) 21 American University International Law Review 557; Robert H Snyder, '"Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi' (2007) 25 Georgia Journal of International and Comparative Law 645; Catherine A MacKinnon, 'Prosecutor v Nahimana, Barayagwiza & Ngeze' (2009) 103 American Journal of International Law 97; Justin La Mort, 'The Soundtrack to Genocide: Using Incitement to Genocide in the *Bikindi* Trial to Protect Free Speech and Uphold the Promise of Never Again' (2010) 4 Interdisciplinary Journal of Human Rights Law 43; Susan Benesch, 'Song as a Crime Against Humanity: The First International Prosecution of a Pop Star' in Henry F Carey and Stacey M Mitchell (eds), *Trials and Tribulations of International Prosecution* (Lexington Books 2015).

[27] Charity Kagwi-Ndungu, 'The Challenges in Prosecuting Print Media for Incitement to Genocide' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007); Jean Marie Biju-Duval, '"Hate Media" – Crimes Against Humanity and Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007); Simone Monasebian, 'The Pre-Genocide Cases Against RTLM' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007); Binaifer Nowrojee, 'A Lost Opportunity for Justice: Why did the ICTR not Prosecute Gender Propaganda?' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007).

from Paul Behrens and Ralph Henham contain single chapters focussed on incitement, one from Tonja Salomon and the other from Wibke Timmerman and William Schabas.[28] While both these chapters address a number of relevant issues, they are limited in length and, therefore, they are fairly brief.

Additionally, there are a number of studies that situate the analysis of incitement within the context of hate speech, human rights law or freedom of expression, taking a broader approach to speech offences.[29] However, incitement to genocide often occupies only a small portion of the discussion. For example, Michael Herz and Peter Molnar's *The Content and Context of Hate Speech: Rethinking Regulation and Responses* contains one chapter on incitement to genocide, by Irwin Cotler.[30] Similarly, Wibke Timmerman's book, *Incitement in International Law,* considers incitement as part of a spectrum of speech offences, including persecution and instigation.[31] Incitement to genocide forms part of one chapter, but the focus of the text as a whole is the treatment of hate speech in international human rights law, looking to the crimes of persecution, instigation and incitement as part of this.

Gregory Gordon's *Atrocity Speech: Foundation, Fragmentation, Fruition* is similarly broad.[32] While he analyses a substantial volume of ICTR jurisprudence, this is not the sole focus of his study. He looks at the 'overall chronology of the law's formulation' analysing 'how each of the crimes has evolved individually over time'.[33] This addresses international atrocity speech fairly generally, looking at the whole spectrum of prohibited speech, particularly considering the extent to which hate speech is, or should be, regulated. While this is a comprehensive and invaluable volume of

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[28] Tonja Salomon, 'Freedom of Speech v Hate Speech: The Jurisdiction of "Direct and Public Incitement to Commit Genocide" in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International Comparative and Contextual Aspects* (Ashgate 2007); Wibke Timmerman and William Schabas, 'Incitement to Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2014).

[29] Michael Kearney, *The Prohibition of Propaganda for War in International Law* (OUP 2007); Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012).

[30] Irwin Cotler, 'State-Sanctioned Incitement to Genocide: The Responsibility to Prevent' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012).

[31] Wibke Timmerman, *Incitement in International Law* (Routledge 2016).

[32] Gordon (n 28).

[33] ibid 3.

work, that has informed some of the discussion in this thesis, it may be distinguished owing to its broader focus. Moreover, there is an absence of discussion of some evidential elements that form the foundation of this thesis: the distinction between incitement and legitimate expression; the persuasive force of incitement; the influence of the speaker; the seriousness of the message; and, context. Additionally, Gordon argues for a change in the definition of direct and public incitement, advocating the removal of the public element altogether, despite its importance being affirmed through the Convention, Rome Statute and ICTR jurisprudence.[34] As has been noted, this thesis does not attempt to advocate change of the international prohibition of incitement. Rather, it takes the existing prohibition and enriches the elements in light of the ICTR jurisprudence.

Richard Wilson's book, *Incitement on Trial: Prosecuting International Speech Offences*, considers speech offences through the lens of social science.[35] This primarily considers the presence of causation in incitement prosecutions and argues that once a substantive offence has been caused, ordering and complicity are the most appropriate offences.[36] This analysis proposes a model for monitoring political speech, thereby focussing on prevention.[37] This book can be distinguished from many of the others in this area by virtue of the social science approach, an area of research that has influenced some discussion in this thesis, especially the reference to Austin's theory of speech acts. However, Wilson's work differs from this thesis owing to his focus on causation with a view to preventing atrocity. While this thesis acknowledges prevention as a merely aspirational aim of international criminal law, this is not the focus, as it is argued that this is not currently a practical or achievable aim. Therefore, this thesis focuses on culpability after the act of incitement, arguing that the current definition does not aim at prevention.

Aside from Gordon's, noted above, some academic studies have attempted to redefine or enrich direct and public incitement. Notably Susan Benesch's 'reasonably

[34] ibid 294 – 295.
[35] Wilson, *Incitement on Trial* (n 8).
[36] ibid 248.
[37] ibid 249 - 265.

possible consequences' test.[38] This breaks incitement down into six elements: the nature of the message and audience understanding; the relationship between the speaker and the audience; a context of recent violence; lack of marketplace of ideas; dehumanisation and threat of attack; and previous dissemination of similar messages.[39] Benesch mentions the importance of audience understanding, hinting at the need to build a picture of how the speech was understood in its original context. However, this is not fully explored through this article, rather, its difficulty is acknowledged with limited further analysis.[40]

The 'reasonably possible consequences' test aims to distinguish incitement to genocide from hate speech. While elements of the test are useful, showing a consideration of the boundary between legitimate and prohibited speech, this is not informed by the whole of the body of cases produced by the ICTR. While jurisprudence up until the commencement of *Bikindi* is discussed, the test is not derived from it. Rather, it appears to ignore some of the influential factors considered in those cases, thereby indicating that it is unlikely to be applied in future. Additionally, this test is not a legal framework, and is designed as a guide to aid in interpretation without consideration of the principles of international law to show that this is justifiable. Finally, the test is rigid in its application, requiring all six elements to be satisfied, which does not reflect the fact that the vast variety of cultures and situations subject to the jurisdiction of international criminal law necessitates a degree of flexibility in approach. However, it is a well-thought-out and influential test that demonstrates that inciting speech often follows a pattern.

Carol Pauli took inspiration from communications research to devise a test that targets prevention by examining the potential influence of radio broadcasts.[41] Some elements of the test are similar to the ICTR's analysis, for example, the test considers aspects of the idea of context, and the relationship between audience and speaker. However, it differs as it lowers the threshold of criminal speech to below the standard

[38] Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48 Virginia Journal of International Law 485.

[39] ibid 498.

[40] ibid 520 – 521.

[41] Carol Pauli, 'Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention' (2010) 61 Alabama Law Review 665.

accepted by the ICTR, thereby advocating a change to the parameters of direct and public incitement. Pauli's approach more clearly aims at prevention, or prior intervention, rather than dealing with criminal liability for incitement after the fact, as she accepts that the current international provision does not aim at prevention.

While some volumes have considered the issue of language at international courts, this is largely in the context of general issues of translation, or access to fair trial rights, rather than against the backdrop of incitement to commit genocide, a crime that is inherently reliant upon the court's ability to understand.[42] Mathias Ruzindana, an expert linguist in the ICTR's translation section, addressed the issue of expert evidence in an edited collection by Predrag Dojčinović.[43] He looked to the specific challenge of defining Kinyarwanda key terms in the context of incitement. This has been an invaluable resource. However, Ruzindana's chapter may be distinguished from this thesis as even though it shows some of the issues of language, this is not a legal analysis, and does not explain how these findings might provide evidential assistance to a future court or tribunal.

[42] Nancy A Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2013); Catherine S Namakula, *Language and the Right to Fair Hearing in International Criminal Trials* (Springer 2014).

[43] Ruzindana (n 3).

2. Justifying the Legal Regulation of Incitement to Commit Genocide

2.1. Introduction

The central aim of this thesis is to assess the ICTR's incitement jurisprudence to identify the positive and problematic aspects of its analysis, and, in light of this discussion, to define and enrich the constitutive elements of incitement, but primarily to identify the evidential elements, particularly aiming to distinguish incitement from legitimate expression. At the outset, it is important to understand the theoretical foundations of the international offence. The punishment of incitement poses a number of problems, both 'theoretical and practical', and, therefore, the international offence has been controversial since its inception.[1] Arguments for the protection of freedom of expression have underpinned legal decisions and the drafting of legal prohibitions, causing speech offences to be approached with caution.[2] However, this chapter aims to show how incitement may be distinguished from these debates by defining incitement as a performative act in its own right, and, therefore, different from mere expression. Consequently, the central aim of this chapter is to define the point at which the law can legitimately intervene to prohibit speech with reference to historical examples and theories of punishment.

The question of what causes people to rise up and kill their neighbours has been the subject of some significant examples of genocide research.[3] This chapter acknowledges that while there are a number of contributory factors, if spoken by the

[1] Joseph Jaconelli, 'Incitement: A Study in Language Crime' (2018) 12 Criminal Law and Philosophy 245, 246 – 247.

[2] UNGA Sixth Committee (3rd Session), 'United States of America: Amendments to the Draft Convention for the Prevention and Punishment of the Crime of Genocide (E/794)' (4 October 1948) UN Doc A/C.6/214; UNGA Sixth Committee (3rd Session) 'Eighty-fifth Meeting Held at the Palais de Chaillot, Paris, on Wednesday 27 October 1948, at 3:20 pm' (27 October 1948) UN Doc A/C.6/SR.85, 221; Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2009) 170.

[3] James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (2nd edn, OUP 2007) 9. See also Christopher R Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (Penguin 2001); Olaf Jensen and Claus-Christian Szejnmann (eds), *Ordinary People as Mass Murderers: Perpetrators in Comparative Perspectives* (Palgrave Macmillan 2008); David Livingstone Smith, *Less Than Human: Why We Demean, Enslave and Exterminate Others* (St Martin's Griffin 2012).

right people in the right circumstances, words have the power of weapons.[4] Perpetrators of genocide know that to prepare people to kill their neighbours, or to torture and rape, they must create 'a certain state of mind that enables the killers to dehumanize their victims'. [5] The first section of this chapter draws upon historical examples of inflammatory speech designed to encourage violence in order to indicate recurring techniques and highlight hallmarks that can assist in identifying incitement. Owing to the volume of examples from which to draw, this is not a comprehensive analysis, rather, this focuses on a few illustrative examples.

The second part of this chapter examines relevant theories of criminal law to show the legal justifications for the punishment of the offence, arguing that despite its controversy, it is justifiably punished. This considers the harm in violent speech and assesses the potential for the prohibition of incitement to assist in the prevention of international crimes, arguing that prevention is not a realistic aim for incitement. This discussion will define the distinction between prohibited and legitimate speech with reference to Austin's theory of speech acts, showing how incitement may be classified as a positive act on the part of the speaker. This suggests that to be distinguished from protected speech, it must be capable of achieving the speaker's intended outcome, even if it is unsuccessful.

2.2. The Power of Words

It has been asserted that without the 'malevolent vitriol' that preceded the Rwandan Genocide, it would have been unlikely that it could happen on such a scale.[6] From 1993 to 1994, RTLM broadcast messages calling for the extermination of the enemy, consequently, the Genocide 'is commonly associated with media incitement to

[4] *Prosecutor v Tadić* (Opinion and Judgment) ICTY-94-I-T (7 May 1997) [96]; *Prosecutor v Nahimana et al* (Judgment and Sentence) ICTR-99-52-T, T Ch I (3 December 2003) [539], [953].

[5] Tonja Salomon, 'Freedom of Speech v. Hate Speech: The Jurisdiction of "Direct and Public Incitement to Commit Genocide"' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2007) 141.

[6] Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York University Press 2002) 26.

mass violence'.[7] In one example given in the Media Trial at the ICTR, Kantano Habimana, RTLM's main presenter, called for men to be recruited who:

> should all stand up so that we will kill the Inkotanyi and exterminate them […] the 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.[8]

Accordingly, the Judgment drew analogies between words and weapons, taking note that 'today's wars are not fought using bullets only, it is also a war of media, words, newspapers and radio stations'.[9] The Judgment surmised that 'if the downing of [President Habyarimana's] plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun'.[10]

Throughout human history, 'harmful social movements' have employed violent, racist rhetoric to elicit 'widespread cultural acceptance of exclusionary and supremacist ideologies'.[11] Thus, historic analysis is 'crucial' as it 'exposes the association between hate propaganda and discriminatory actions', illustrating recurrent techniques used by speakers to inflame ethnic tensions and encourage violence.[12] For example, in 1915 the Ottoman authorities commenced a campaign of massacre and deportation against the Armenian population.[13] Following the deportation order, the Turkish War Office sought 'to deflect blame from the Turkish government by labelling the Armenians a national security threat'.[14] The Ottoman weekly *Harb Mecmuasi* (War Magazine) acted as the conduit, convincing the Turkish people of 'the need to rid

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[7] Gregory S Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (OUP 2017) 46. See also *Nahimana* (Judgment) (n 4).

[8] *Nahimana* (Judgment) (n 4) [396].

[9] ibid [539].

[10] The Coalition for the Defence of the Republic (CDR) was a Rwandan far-right Hutu Power political party noted for its extremist anti-Tutsi beliefs; *Kangura* was the newspaper containing language designed to ignite ethnic violence against Tutsi; *Nahimana* (Judgment) (n 4) [539], [953].

[11] Tsesis (n 6) 1.

[12] ibid 3.

[13] Raffi Sarkissian, 'The Armenian Genocide: A Contextual View of the Crime and Politics of Denial' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2007) 3 – 4.

[14] Vahakn Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus* (Berghahn Books 1995) 220.

ourselves of these Armenian parasites'.[15] The Armenian people were compared to 'traditionally unclean animals such as rats, dogs, and pigs', and reduced from humans to 'disease organisms infecting the body of the state'.[16]

In 1934 in Nazi Germany, Reinhard Heydrich, considered to be one of the architects of the Holocaust, said 'one does not fight rats with revolvers, but with poison and gas'.[17] This sinister statement foreshadowed the Nazi policy of slaughter. By transforming the Jewish people into something less than human, the Nazis justified their actions. Under editor Julius Streicher, the virulently anti-Semitic newspaper *Der Stürmer* described the Jew as 'a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind'.[18] Streicher published articles advocating the eradication, 'root and branch', of the 'criminal' race.[19] The IMT described these violent and racist words as the 'poison [Streicher] injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination'.[20]

In the former Yugoslavia, through a programme of 'ethnic cleansing', Bosnian Serb forces subjected Muslim and Croatian populations to a 'reign of terror in an effort to expel them so as to "purify" the country'.[21] The Serb Democratic Party (SDS), led by Radovan Karadžić, took control of the media, using it as a tool of aggression.[22] In *Tadić* the ICTY noted that, by spring 1992, only SDS controlled television channels were available, and all programmes 'broadcast anti-Muslim and anti-Croat propaganda'.[23] The media presented Serbia as 'threatened by its neighbours, and Serbs as disenfranchised minorities'.[24] *Politika*, Serbia's leading newspaper, called upon the

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[15] Smith (n 3) 145. See also Gordon, *Atrocity Speech Law* (n 7) 35.

[16] Smith (n 3) 145.

[17] Martin Kitchen, *A History of Modern Germany: 1800 to 2000* (Blackwell 2006) 278.

[18] Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL 172, 294.

[19] ibid 294 – 295.

[20] ibid 294 – 295.

[21] Gordon, *Atrocity Speech Law* (n 7) 42.

[22] *Prosecutor v Karadžić* (Public Redacted Version of Judgment Issued on 24 March 2016) IT-95-5/18-T (24 March 2016); Kemal Kurspahic, *Prime Time Crime: Balkan Media in War and Peace* (United States Institute of Peace Press 2003) 98.

[23] *Tadić* (Opinion and Judgment) (n 4) [92].

[24] Susan L Carruthers, *The Media at War* (Macmillan Press 2000) 45.

readers to defend themselves, declaring that 'the whole Serb people is attacked'.[25] The media published 'pictures of mutilated soldiers' and spread 'rumours that crimes were committed against Bosnian Serbs'.[26]

The Trial Chamber in *Brđanin* considered the 'disastrous impact' of propaganda.[27] This analysis suggested that, 'within a short space of time', speech incited 'the Bosnian Serb population against the other ethnicities' and fostered 'mutual fear and hatred' between citizens 'who had previously lived together peacefully'.[28] People became killers, influenced by a media that had 'created a climate where people were prepared to tolerate the commission of crimes and to commit crimes'.[29] In *Babić*, the defendant was accused of making ethnically violent, inflammatory speeches during public events in the former Yugoslavia between 1991 and 1995.[30] He argued that he had been 'strongly influenced and misled by Serbian propaganda', particularly at the start of his political career.[31] While the *Babić* Trial Chamber acknowledged that propaganda could be held at least partially responsible for the offences committed during the conflict, ICTY jurisprudence on this has remained largely inconclusive.[32]

These represent only a small number of instances where speech has been used to inflame ethnic tensions. While these are all drawn from the 20th century, it is not a recent phenomenon. Gordon cites the example of Ancient Egypt to show the 'ancient lineage' of the relationship between speech and atrocity.[33] Tsesis connects racist speech and the 'entrenchment of black slavery in the United States'.[34] Kiernan refers to the Roman siege of Carthage, noting the words of Marcus Porcius Cato '*Delenda est*

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[25] Aryeh Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* (Times Books 1998) 196.

[26] *Prosecutor v Brđanin* (Judgment) IT-99-36-T, T Ch II (1 September 2004) [82].

[27] ibid [80].

[28] ibid [80].

[29] ibid [80].

[30] *Prosecutor v Babić* (Judgment) IT-03-72 (29 June 2004).

[31] ibid [24].

[32] ibid [24]; See also *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-T, T Ch (26 February 2001); *Brđanin* (Judgment) (n 26); Gregory S Gordon, 'Hate Speech and Persecution: A Contextual Approach' (2013) 46 Vanderbilt Journal of Transnational Law 303; Wibke Timmerman, 'Inciting Speech in the Former Yugoslavia: The Šešelj Trial Chamber Judgment' (2017) 15 Journal of International Criminal Justice 133.

[33] Gordon, *Atrocity Speech Law* (n 7) 31.

[34] Tsesis (n 6) 4.

Carthago (Carthage Must be Destroyed)', which constitutes possibly 'the first recorded incitement to genocide'.[35] These words were repeated at every speech given by Cato at the Roman Senate from 153 BC until 149 BC when Rome began a three-year siege that cost the lives of at least 150,000 Carthagians.[36] This shows that, throughout human history, violent speech has become inextricably linked with atrocity.

While this is not necessarily the product of recent times, neither is it a problem that may be relegated to the past. Violence in Burundi has routinely been characterised by ethnic and inflammatory speech, and this has recurred in recent years.[37] In June 2016 the UN High Commissioner for Human Rights noted utterances by members of the *Imbonerakure* that amounted to incitement to violence against political opponents, with strong ethnic overtones.[38] While the UN concluded that this did not amount to incitement to genocide, the speech was considered to be concerning, given the 'painful past' of the region.[39]

In Myanmar, following decades of repression and discrimination, the minority Rohingya have been subjected to an on-going campaign of violence and deportation.[40] In 2012, Human Rights Watch reported that 'the hostilities were fanned by anti-Muslim media accounts and local propaganda'.[41] Government officials refer to the Rohingya as

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[35] Ben Kiernan, 'The First Genocide: Carthage, 146 BC' (2004) 203 Diogenes 27, 27.

[36] ibid 27.

[37] UNSC Verbatim Record (9 November 2015) UN Doc S/PV/7553; René Lemarchand, *Burundi: Ethnic Conflict and Genocide* (Cambridge University Press 1997) xi; Pal Ahluwalia, 'Burundi: We Cannot Allow Another Genocide' (2016) 14 African Identities 1, 1.

[38] The *Imbonerakure* are the armed youth militia wing of Burundi's ruling party; Zeid Ra'ad Al Hussein, 'Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, on the Situation in Burundi' (*United Nations Human Rights Office of the Commissioner*, 29 June 2016) <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20215&LangID=E#sthash.7SSLAAxJ.dpuf> accessed 10 August 2016.

[39] UN Doc S/PV/7553 (n 37) 8. See also OHCHR 'Report of the United Nations Independent Investigation on Burundi (UNIIB) Established Pursuant to Human Rights Council Resolution S=24/I' (20 September 2016) UN Doc A/HRC/33/37 (Advance Unedited Version); UNSC 'Statement by the President of the Security Council' (2 August 2017) UN Doc S/PRST/2017/13; OHCHR 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54.

[40] UNGA, 'Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar' (29 June 2016) UN Doc A/HRC/32/18; UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar' (14 March 2017) UN Doc A/HRC/34/67; OHCHR, 'Report of the Independent International Fact-Finding Mission on Myanmar' (24 August 2018) UN Doc A/HRC/39/64 (Advance Unedited Version). See also Francis Wade, 'Fleas We Greatly Loathe' (2018) 40(13) London Review of Books 23.

[41] Human Rights Watch, '"The Government Could Have Stopped This": Sectarian Violence and Ensuing Abuses in Burma's Arakan State' (*Human Rights Watch*, July 2012)

intruders or as '*Kalar'*, a controversial word which has 'a variety of disturbing' and 'pejorative' meanings.[42] Violence against Rohingya escalated, and while UN Special Rapporteurs called upon the government of Myanmar to stop the persecution of the minority group, this proved largely ineffective.[43] These examples show that despite high profile prosecutions at the ICTR for incitement, this has not ended the use of speech in atrocity, and neither has it led to preventive action.

2.2.1. Techniques of Incitement to Genocide

While each of the examples cited is unique in terms of time and circumstance, there are elements that are 'thematically interchangeable, and thoroughly familiar'.[44] The victims of genocide, the 'out-group', are targeted by the 'in-group' for reason of their 'actual or perceived' national, ethnic, racial or religious identity, which makes them 'different'.[45] Words play an active role in developing this perception, facilitating and justifying atrocities. As Salomon notes, 'the first stage of genocide has always been the preparation and mobilization of the masses by means of propaganda'.[46] As shown by the above examples, this takes two main forms: dehumanisation and the creation of a threat.

Dehumanisation is part of a development of thinking that 'empowers'[47] the in-group to 'overcome a normal, innate human repugnance at killing other humans'.[48] For killing to occur on a large scale, the victims cannot be perceived as equals. This technique of speech 'reinforces and extends' the difference between the in-group and

<https://www.hrw.org/report/2012/07/31/government-could-have-stopped/sectarian-violence-and-ensuing-abuses-burmas-arakan> accessed 4 October 2017.

[42] ibid.

[43] UNGA 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar' (8 September 2017) UN Doc A/72/382; UN Doc A/HRC/39/64 (n 40); *Request Under Regulation 46(3) of the Regulations of the Court* (Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute") ICC-RoC46(3)-01/18, Pre-Trial Ch I (6 September 2018).

[44] Carruthers (n 24) 46.

[45] David Moshman, 'Us and Them: Identity and Genocide' (2007) 7 Identity: An International Journal of Theory and Research 115, 116. See also Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277, art II.

[46] Salomon (n 5) 141.

[47] Smith (n 3) 13.

[48] Steven K Baum, *The Psychology of Genocide: Perpetrators, Bystanders, and Rescuers* (Cambridge University Press 2008) 172.

the out-group, dividing the world into 'us' and 'them'.[49] However, the technique of dehumanisation goes beyond the in-group/out-group dynamic that can be present in any society; it goes so far as to attempt to exclude the out-group from humanity.[50]

To be targeted for killing, the out-group must be 'clearly defined as something less than fully human'.[51] If they are no longer human, they no longer share interests or values with the in-group. They cannot have the same 'feelings and suffering'[52] so are 'unworthy of empathic treatment' and 'deserving of violent action'.[53] Indeed, it extends beyond this; by defining the target group in this way, they become 'creatures that it is always acceptable to kill with impunity and relief'.[54] One victim of the Rwandan Genocide recounted that 'Hutu thought of Tutsi as animals. They did not have the value of a human being […] you could pass some people and they shout at you saying, "Look at that cockroach", "Look at that snake"'.[55] Similarly, Nazi propaganda defined Jewish people as parasites, 'the lice of civilized humanity'.[56] Ultimately, they were perceived as *Ungeziefer* (vermin).[57] Through this process, the out-group is stripped of their humanity and consequently their human rights. Thus, their slaughter is 'no more a violation of individual rights than the killing of cockroaches […] or the pulling of weeds'.[58]

As shown above, in the context of mass killing, the target group are often defined as an enemy or wrongdoer, constituting a threat to the life and liberty of the in-group. Thus, the orchestrators of genocide aim to convince their audience that the

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[49] Moshman (n 45) 123.

[50] Gordon, *Atrocity Speech Law* (n 7) 30. See also Tsesis (n 6) 179.

[51] Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (Yale University Press 1990) 28.

[52] Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press 2002) 62.

[53] Tsesis (n 6) 6; See also Moshman (n 45) 123.

[54] Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48 Virginia Journal of International Law 485, 503. See also Staub (n 52) 62.

[55] Daniel Goldhagen, *Worse Than War: Genocide, Eliminationism and the On-going Assault on Humanity* (Abacus 2012) 353. See also Binaifer Nowrojee, 'A Lost Opportunity for Justice: Why Did the ICTR Not Prosecute Gender Propaganda?' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007) 367.

[56] Jeffrey Herf, *The Jewish Enemy: Nazi Propaganda During World War II and the Holocaust* (Harvard University Press 2009) 121.

[57] Salomon (n 5) 141.

[58] Moshman (n 45) 121.

victim group seeks to harm them or help their enemies to do so.[59] The out-group are identified as the enemy, as they are seen to be 'exploiting' the in-group, 'striving for or plotting to gain power, which they will use to harm the dominant group'.[60] The technique of creating a threat is sometimes called the 'accusation in a mirror'.[61] This term is taken from the *Note Rélative à la Propagande d'Expansion et de Récrutement*, written by a Rwandan propaganda theorist to explain 'how to sway the public most effectively'.[62] While this document did not devise the technique, the author emphasises the importance of the 'accusation in a mirror' in persuading 'the public that the adversary stands for war, death, slavery, repression, injustice, and sadistic cruelty'.[63]

By building a picture of threat, the speaker reinforces pre-existing fears. By using 'established anti-Semitic stereotypes', the Nazis created a *Feinbild* (face of an enemy) of Jews.[64] They projected 'what they took to be the Jew's collective and conspiratorial agency – their destructive goals and degenerate values' so that 'nothing short of mass execution could save the planet from their diabolical project of world domination'.[65] Thus, they often described the Jewish people as 'vicious, bloodthirsty predators, rather than parasites'.[66] This was also a prevalent feature of anti-Tutsi speech in Rwanda.[67] In Léon Mugesera's 1992 speech he argued that 'these people called *Inyenzis* are now on their way to attack us […] They only want to exterminate us: they have no other aim. Are we really waiting till they come to exterminate us?'.[68]

It is possible to see that, as part of this technique, the orchestrators fabricate false threats, encouraging their people to act to defend themselves from the out-group. Marcus summarises it as a 'rhetorical practice in which one falsely accuses one's

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[59] Nicholas Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2010) 28; Gordon, *Atrocity Speech Law* (n 7) 31.

[60] Staub (n 52) 62.

[61] Benesch, 'Vile Crime' (n 54) 504 – 506.

[62] Alison des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch 1999) 57.

[63] ibid 57.

[64] Salomon (n 5) 141.

[65] Smith (n 3) 92.

[66] ibid 15.

[67] See also Christopher C Taylor, 'The Cultural Face of Terror in the Rwandan Genocide of 1994' in Alexander Hinton and Kenneth Roth (eds), *Annihilating Difference: The Anthropology of Genocide* (University of California Press 2002) 140.

[68] *Mugesera v Canada* (Minister of Citizenship and Immigration) [2005] 2 SCR 100, Appendix III, [18].

enemies of conducting, plotting, or desiring to commit precisely the same transgressions that one plans to commit against them'.[69] For example, in 1990 the Rwandan Government staged an attack on Kigali, blaming it on the Tutsi, all with the intent of furthering this aim.[70] Where dehumanisation renders the target group less human, and, therefore, an acceptable target, the creation of a threat makes it necessary to kill in order to preserve the safety and liberty of the in-group.

While these themes are recurrent and thus recognisable, there is diversity of culture and language. The examples show that euphemism, metaphor and coded speech are directed to a specific audience, but regardless of the apparent ambiguity to outsiders, the target audience understand the meaning of the words.[71] This is not a simple or immediate process. It is not possible to begin with outright exhortations to kill without first laying groundwork. There is a progression of language, and a development of the use of words that builds an understanding for the audience. For example, in Rwanda, the word *inyenzi* (cockroach), became synonymous with Tutsi; for the target audience this reference was unmistakable.[72] Consequently, in order to be able to determine whether the speech constituted incitement, courts must develop an understanding of the language used. This will be explored in Chapter Four.

Owing to the broad spectrum of hateful speech and the variations in national prohibitions, defining the threshold for incitement proved to be a challenging task for the drafters of the Genocide Convention, as will be shown in Chapter Three.[73] However, the drafters were clear that there was a distinction between general propaganda and incitement, choosing to prohibit only the latter.[74] While the exploration

[69] Kenneth Marcus, 'Accusation in a Mirror' (2012) 43 Loyola University Chicago Law Journal 357, 359.

[70] Peter Uvin, 'Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence' (1999) 31 Comparative Politics 253, 260; Robert Melson, 'Modern Genocide in Rwanda: Ideology, Revolution, War and Mass Murder in an African State' in Robert Gellately and Ben Kiernan (eds), *The Specter of Genocide: Mass Murder in Historical Perspective* (Cambridge University Press 2003) 334.

[71] See also Penelope Brown and Stephen C Levinson, *Politeness: Some Universals in Language Usage* (Cambridge University Press 1987) 91.

[72] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) [90], [339].

[73] See also Ameer Gopalani, 'The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?' (2001) 32 California Western International Law Journal 87, 93.

[74] ECOSOC 'Ad Hoc Committee on Genocide Summary Record of the Sixteenth Meeting, Lake Success, New York, Thursday, 22 April 1948, at 2:15 pm' (29 April 1948) UN Doc E/AC.25/SR.16, 8.

of historical context does not explicitly define this distinction, it illustrates that the inclusion of these techniques helps to show that the speech aims to cause harm to the out-group by stripping their humanity and targeting them for destruction, thereby helping to identify a distinction between inciting speech and legitimate expression. The ICTR referred to these techniques in its analysis, showing that dehumanisation and the creation of a threat are hallmarks of incitement, and may facilitate a finding that speech encouraged the commission of genocide.[75] However, owing to the diversity of culture and language, identifying the boundary between legitimate and prohibited speech is largely context dependant.[76] Regardless, it is possible to conceive a conceptual distinction between incitement and hate speech through an analysis of theories of criminal law.

2.3. Punishing Incitement to Commit Genocide

The examples shown above illustrate that atrocity offences are often accompanied by inflammatory speech. Regardless of its prevalence, in any discussion of crime, domestic or international, questions will arise as to whether that crime is justifiably punished. In international law there is a strong resemblance to domestic punishment in the way 'in which the political community calls wrongdoers to account'.[77] However, punishment in national legal systems 'can be appraised in terms of the objectives of a single community'.[78] The interests served by international criminal law are not so clear. It represents something quite extraordinary; the prosecutors charge individuals from a variety of jurisdictional backgrounds with acts

[75] *Prosecutor v Ruggiu* (Judgment and Sentence) ICTR-97-32-I, T Ch I (1 June 2000) [44(i)], [44(iii)]; *Prosecutor v Muvunyi* (Retrial: Judgment) ICTR-00-55A-T, T Ch III (11 February 2010) [126].

[76] *Akayesu* (Judgment) (n 72) [557 – 558]; *Prosecutor v Ngirabatware* (Judgment) ICTR-99-54-T, T Ch II (20 December 2012) [1361], [1363].

[77] Massimo Renzo, 'A Criticism of the International Harm Principle' (2010) 4 Criminal Law and Philosophy 267, 281.

[78] Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 Stanford Journal of International Law 39, 45.

of unimaginable violence.[79] This renders the question of the justification of punishment in international criminal law 'even more compelling'.[80]

This is magnified in the context of inchoate offences, an umbrella term that traditionally encompasses attempts, conspiracy and incitement.[81] These offences signify an act that is defined as a 'step towards the commission of another crime, the step in itself being serious enough to merit punishment'.[82] Even in domestic jurisdictions, these are somewhat controversial as they give rise to liability even if the intended crime is not successful or not completed.[83] Since the intended harm does not result, 'the question is why inchoate offences should incur individual criminal responsibility at all'.[84] Consequently, during the drafting of the Convention, the incitement provision was the subject of disagreement and extensive discussion, as will be shown in Chapter Three. While some delegates, notably Iran and the United States of America, wished to remove the provision altogether, it was perceived as essential to achieving the aim of prevention, thus, it was retained.[85] However, the extent to which this is achievable will be challenged, and it will be shown that incitement requires further justification as it cannot be satisfactorily justified by the aim of prevention.

Considering the relevant theories of punishment in the context of international criminal law addresses two main questions: firstly, whether the prohibition of incitement is justified despite its controversy; and secondly, how incitement may be distinguished from legitimate speech, which links to the central aim of this thesis.

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[79] Allison Marston Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 California Law Review 75, 77.

[80] David Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2012) 576.

[81] *Akayesu* (Judgment) (n 72) [552]; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 96.

[82] Bryan A Garner, *Black's Law Dictionary* (7th edn, West Group 1999) 1108.

[83] Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (OUP 2010) 117; Ashworth and Zedner, *Preventive Justice* (n 81) 95 – 96, 97.

[84] Wibke Timmerman, 'Incitement in International Criminal Law' (2006) 88 International Review of the Red Cross 824, 826.

[85] UN Doc A/C.6/214 (n 2); UNGA Sixth Committee (3rd Session) 'Iran: Amendments to the Draft Convention for the Prevention and Punishment of the Crime of Genocide (E/794)' (5 October 1948) UN Doc A/C.6/218; UN Doc A/C.6/SR.85 (n 2) 216, 220, 226 -227.

2.3.1. Preventing Atrocity Offences by Punishing Speech

While international criminal law has, to a certain extent, claimed retribution as one of its aims, it has been largely shaped by deterrence and prevention.[86] However, as Henham notes, there is an 'absence of meaningful discussion of penal purpose in the establishment or foundation documents' of international criminal law.[87] The *ad hoc* Tribunals rarely endorsed a philosophy of punishment except in the context of sentencing practice, where some chambers noted the significance of deterrence.[88] Similarly, the preamble of the Rome Statute outlines a determination to 'put an end to impunity' thereby contributing 'to the prevention of such crimes'.[89] This echoes the Genocide Convention, which was 'inspired by the aim to prevent a crime as horrendous as the Holocaust from ever being perpetrated again' and adopted to 'liberate mankind' from 'an odious scourge'.[90] At the forefront of the drafters' minds was the knowledge of the atrocities that could result from doctrines such as Nazism, 'with its vicious anti-Semitic and racist ideology'.[91] Consequently, in Article I, the contracting parties confirmed their undertaking 'to prevent and punish' genocide as a crime under

[86] While other theories certainly have their place in an examination of criminal justice generally, they have not had a notable influence on international law. See also ECOSOC, 'Rule of Law, Crime Prevention and Criminal Justice in the United Nations Development Agenda Beyond 2015' (16 May 2014) UN Doc E/CN.15/2014/L.6/Rev.1, 4; UNSC Res 2150 (16 April 2014) UN Doc S/RES/2150; *Prosecutor v Kunarac* (Sentencing Judgment) IT-96-23 (22 February 2001) 844; Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 (3) Virginia Law Review 415, 444; Ralph Henham, 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 International and Comparative Law Quarterly 81, 88; James Meernik, 'Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia' (2003) 47 (2) The Journal of Conflict Resolution 140, 144.

[87] Henham, 'Some Issues for Sentencing' (n 86) 86.

[88] *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) [28]; *Prosecutor v Delalić et al* (Judgment) IT-96-21-T (16 November 1998) [1234] (Čelebići); *Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T (6 December 1999) [255]; *Prosecutor v Aleksovski* (Judgment) IT-95-14/1-A (24 March 2000) [185]. See also Vagn Joensen, 'Address to the United Nations Security Council: Final Report on the Completion Strategy of the International Criminal Tribunal for Rwanda by Judge Vagn Joensen, President' (*United Nations Mechanism for International Criminal Tribunals* December 2015) < http://unictr.unmict.org/en/news/address-united-nations-security-council-final-report-completion-strategy-international-criminal> accessed 17 September 2017.

[89] Rome Statute of the International Criminal Court (Adopted 17 July 1998 entered into force 1 July 2002) 2187 UNTS 3, preamble.

[90] Wibke Timmerman and William Schabas, 'Incitement to Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2014) 146.

[91] Genocide Convention (n 45) preamble; Timmerman and Schabas (n 90) 146.

international law.[92] However, there is some degree of scepticism about the potential deterrent effect of punishment in both national and international jurisdictions.[93]

There are high expectations of international criminal justice.[94] It has the aim of general deterrence of atrocities and incorporates offences with a so-called 'preventive dimension' to stop future harm.[95] It is traditionally considered that the prohibition of incitement is inextricably linked to the aim of prevention.[96] Punishing incitement, like conspiracy and attempt, recognises the desirability of preventing a crime before it can take place, imposing liability for acts that fall short of the substantive act of genocide but come sufficiently close to pose a threat to public order.[97] As Ashworth argues, 'if a certain form of harmful wrongdoing is judged serious enough to criminalize, it follows that the state should assume responsibility for taking steps to protect people from it'.[98] Therefore, in theory, punishing acts of incitement assists in the prevention of harm that would surely result if these encouragements prove successful in their aim, and, therefore, permits intervention 'prior to the realisation of any concrete harm', but only where harm is likely to occur.[99] Consequently, it may be asserted that incitement can be distinguished from general hate speech owing to the likelihood that it will lead to future harm.

However, as Akhavan and Sloane argue, despite the 'obvious desirability' of prevention, it appears that the potential deterrent effect of international criminal law is

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[92] Genocide Convention (n 45) art I.

[93] UN Doc S/RES/2150 (n 86); *R v Sargeant* (1974) 60 Cr App Rep 74, 77 – 78; *R v Fairman* [1983] Crim L R 197; *Prosecutor v Tadić* (Appeals Chamber) IT-94-1-A*bis* (26 January 2000) [56].

[94] Christoph Safferling, 'Can Criminal Prosecution be the Answer to Massive Human Rights Violations?' (2004) 5 (12) German Law Journal 1469, 1470; Sloane (n 78) 45.

[95] Juan E Méndez, 'The United Nations and the Prevention of Genocide' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2007) 226.

[96] Timmerman and Schabas (n 90) 146.

[97] Jonathan Herring, *Criminal Law* (7th edn, Palgrave Macmillan 2011) 321.

[98] Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15 New Criminal Law Review 542, 543. See also Mark Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 (2) Northwestern Law Review 539, 561.

[99] Andrew Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Hart Publishing 2010) 285.

largely aspirational.[100] The reports of the Special Rapporteur on genocide from 1978 and 1985 judged the Genocide Convention to be inadequate, arguing that its existence had no impact on the perpetration of the crime.[101] Harff noted that between the Second World War and 2003 'nearly fifty' 'political mass murders' and genocides occurred, which 'cost the lives of at least 12 million and as many as 22 million noncombatants'.[102] The combined result of the criticism of the Nuremberg Trials, a lack of political will and the Cold War meant that between 1948 and the 1990s 'numerous cases of massive violations of human rights and humanitarian law occurred […] without triggering action'.[103] It was not until the tragic events in Rwanda and Yugoslavia that international courts began to apply the offences.[104] However, the commencement of prosecutions did not put an end to these crimes. As noted above, atrocities are still on-going.[105] Additionally, the creation of the ICTY did not stop crimes being committed in the former Yugoslavia between 1993 and 1995.[106]

Despite the evidence that atrocities occurred, it is difficult to definitively state whether international criminal law has had any deterrent impact.[107] However, it is possible to show that the incitement provision has not fulfilled its 'preventive dimension'.[108] The prohibition of incitement has never triggered intervention before genocide has happened, neither has it yet been used to stop on-going harm. It has only been assessed in relation to the Rwandan Genocide, and all of the prosecutions took

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[100] Payam Akhavan, 'Preventing Genocide: Measuring Success by What does Not Happen' (2011) 22 Criminal Law Forum 1, 4, 8. See also Sloane (n 78) 74.

[101] ECOSOC, 'Study of the Question of the Prevention and Punishment of the Crime of Genocide: Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur' (4 July 1978) UN Doc E/CN.4/Sub.2/416, 439 – 440; ECOSOC, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr B Whitaker' (2 July 1985) UN Doc E/CN.4/Sub.2/1985/6, 71. See also George Finch, 'The Genocide Convention' (1949) 43 The American Journal of International Law 732, 733; William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Trials* (OUP 2012) 14.

[102] Barbara Harff, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955' (2003) 97 American Political Science Review 57, 57.

[103] Méndez (n 95) 226. See also Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95(1) The American Journal of International Law 7, 9; Akhavan, 'Preventing Genocide' (n 100) 2 – 3.

[104] *Akayesu* (Judgment) (n 72).

[105] Text to n 37.

[106] Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 27.

[107] Henham, 'Some Issues for Sentencing' (n 86) 88. See also Akhavan, 'Preventing Genocide' (n 100).

[108] See also Méndez (n 95) 226.

place after the Genocide had ended. As Akhavan argues, this is owing in part to the fact that it is not possible to predict, 'with a reasonable measure of accuracy, which situations may lead to genocide', thus making it difficult to determine whether speech is likely to lead to genocide.[109] Indeed, ICTR jurisprudence suggests that owing to the prevalence of ambiguity in the inciter's language, it is difficult to determine whether speech was understood as incitement outside the context of on-going genocide.[110]

As a result, the preventive dimension of incitement is an aspirational, rather than practical, goal, one that will likely not be achieved under the current mechanisms of international criminal law.[111] Consequently, acknowledging the desirability of prevention 'is not tantamount to providing sufficient ground for criminalization',[112] and, therefore, the rationale of the prohibition of incitement cannot be prevention. At the time the Convention was written, preventive aspirations may have been the reason for including incitement, but this is no longer justifiable. It could be seen that this might have consequences for the inchoate nature of incitement. However, the continued inchoate nature of incitement is justified by the need for accountability for those that encourage genocide, particularly in light of the harm principle, outlined below. This is confirmed by the established treatment of incitement as inchoate at the ICTR.[113]

2.3.2. The Harm in Incitement

Husak posits that 'criminal law is unjustified unless it is designed to prevent *harm*, prohibit conduct that is *wrongful*, and imposes a punishment that is *deserved*'.[114] Moreover, Mill stated that 'the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others', and, therefore, punishment must be imposed only where it is in response to

[109] Akhavan, 'Preventing Genocide' (n 100) 4, 8.

[110] *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-98-42-T, T Ch II (24 June 2011) [4645]; *Prosecutor v Ngirabatware* (Judgment and Sentence) ICTR-99-54-T, T Ch II (20 December 2012) [1364]; See also Jaconelli (n 1) 246.

[111] Jakob von Holderstein Holtermann, 'A "Slice of Cheese" – A Deterrence Based Argument for the International Criminal Court' (2010) 11 Human Rights Review 289, 300 – 301.

[112] Ashworth and Zedner, 'Prevention and Criminalization' (n 98) 553.

[113] *Akayesu* (Judgment) (n 72) [561].

[114] Douglas Husak, 'Why Criminal Law: A Question of Content?' (2008) 2 Criminal Law and Philosophy 99, 108.

harm.[115] Derived from this idea, the harm principle is described as the line between conduct that is suitable for criminalisation, and conduct that is not.[116] This line is not clearly demarcated. Not every act that causes harm to another will justify the deprivation of liberty.[117] This is a source of controversy for inchoate offences, particularly incitement.

Butler argues 'that words wound seems incontestably true, and that hateful, racist, misogynist, homophobic speech should be vehemently countered seems incontrovertibly right'.[118] However, this is not a universally held position. It is notoriously difficult to criminalise hate speech. It forms a category of offence that is not always clearly harmful, and opponents of its punishment emphasise the importance of preserving freedom of expression.[119] The right to freedom of expression is established as one of the fundamental civil and political rights, included in all human rights treaties and protected in domestic legislation.[120] For example, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) states that 'everyone shall have the right to hold opinions without interference' and 'the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds […] either orally, in writing or in print, in the form of art, or through any other media of his choice'.[121] This is particularly directed at protecting the freedom to communicate ideas in public.[122] However, there are certain circumstances under which the curtailment of freedom of expression is justified.[123] As Salomon questions, 'what is freedom of speech worth if a genocide is prepared and committed in its

[115] John Stuart Mill, *On Liberty* (Cosimo 2005) 13.

[116] Jonathan Herring, *Great Debates in Criminal Law* (2nd edn, Palgrave Macmillan 2012) 1.

[117] Schabas, *Unimaginable Atrocities* (n 101) 34.

[118] Judith Butler, *Excitable Speech: A Politics of the Performative* (Psychology Press 1997) 408.

[119] Barendt (n 2) 170. See also UN Doc A/C.6/214 (n 2); UN Doc A/C.6/218 (n 85); UN Doc A/C.6/SR.85 (n 2) 216, 220, 226 -227.

[120] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 19; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 entered into force 5 January 1969) 660 UNTS 195, art 5(viii); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 10; US Constitution, Amendment I; Human Rights Act 1998, s 10.

[121] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 24 March 1976) 999 UNTS 171, art 19.

[122] Wibke Timmerman, *Incitement in International Law* (Routledge 2016) 54.

[123] Barendt (n 2) 170.

name?'.[124] Thus, in international criminal law, speech is prohibited when it can be distinguished from legitimate expression, when it directly and publicly incites the commission of genocide.[125]

This shows that there is a balance to be struck in punishing repugnant speech without unduly prohibiting expression. However, partially owing to 'the difficulty of clearly delineating the notion of incitement' there is no clear-cut or easily definable point at which 'words start to become murder instruments'.[126] Benesch describes speech as a spectrum, 'with protected speech at one end, unprotected hate speech in the middle, and incitement to genocide at the other end'.[127] Yet, 'incitement to genocide isn't merely a louder or more ominous version of hate speech'.[128] Thus, distinguishing prohibited speech from legitimate speech is not straightforward. There is concern that the difficulty in defining criminal speech has the potential consequence of inadvertently encouraging repressive governments to impose legal restrictions on legitimate speech and the press, by exploiting the idea that the media fuels violence.[129] In light of this, the *Amicus Curiae* Brief, submitted to the Appeals Chamber in the Media Trial, urged caution in defining and applying incitement, arguing that an ambiguous idea of what constitutes it could 'encourage the stifling of speech that offends those in power because it is critical of them'.[130]

Owing to the lack of jurisprudence on incitement, the ICTR looked to domestic law and international human rights instruments in search of answers to problems that sources of international criminal law were unable to clearly solve.[131] However, the

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[124] Salomon (n 5) 142.

[125] Genocide Convention (n 45) art III (c).

[126] Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 219; Salomon (n 5) 142.

[127] Benesch, 'Vile Crime' (n 54) 493.

[128] Susan Benesch, 'Inciting Genocide, Pleading Free Speech' (2004) 21(2) World Policy Journal 62, 65.

[129] UN Doc A/C.6/SR.85 (n 2) 221; Joel Simon, 'Of Hate and Genocide: In Africa, Exploiting the Past' (2006) 44 (5) Columbia Journalism Review 9, 9.

[130] Open Society Justice Initiative, '*Amicus Curiae* brief in *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor* (ICTR Case No. ICTR-99-52-A)' (*Open Society Institute* 2007) < https://www.opensocietyfoundations.org/sites/default/files/ictr-nahimana-amicus-brief-20061215.pdf> accessed 22 September 2017, 2. See also *Prosecutor v Nahimana et al* (Decision on the Admissibility of the *Amicus Curiae* Brief Filed by the "Open Society Justice Initiative" and on its Request to be Heard at the Appeals Hearing) ICTR-99-52-A, A Ch (12 January 2007).

[131] *Nahimana* (Judgment) (n 4) [1074 – 1075].

ICTR faced criticism for conflating incitement and hate speech.[132] In his partly dissenting opinion at the Appeal Chamber in the Media Trial, Judge Meron pointed to a lack of consensus in domestic legislation.[133] Additionally, he observed the number of reservations to the relevant provisions in international human rights instruments, outlining that 'it is abundantly clear that there is no settled norm of customary international law that criminalizes hate speech'.[134]

The Media Trial Appeals Chamber noted a distinction between hate speech and incitement, arguing that they were not satisfied that 'hate speech alone can amount to a violation of the rights to life, freedom, and physical integrity of the human being'.[135] They concluded that 'speech cannot, in itself, directly kill members of a group, imprison or physically injure them'.[136] However, where speech was accompanied by a campaign of violence against the Tutsi, they were satisfied that the speeches were of equivalent gravity to other crimes against humanity.[137] This shows that the ICTR viewed speech as harmful only when it had the potential to trigger violence against the target group, emphasising the limited preventive impact of the incitement provision.

It is sometimes considered that inciters are too far removed from any potential future crime and as such their actions cannot be seen as manifestly dangerous or harmful.[138] Conversely, Wilson argues that by considering Austin's theory of speech acts, it is possible to define incitement as a harmful act in its own right, thereby distinguishing it from permissible speech and showing why it should be punished regardless of its consequences.[139] In his analysis, Wilson draws a distinction between the conception of incitement as an inchoate offence and incitement as a positive act,

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[132] *Prosecutor v Nahimana et al* (Appeals Judgment) ICTR-99-52-A, A Ch (28 November 2007) [689], [692 – 696]; *Prosecutor v Nahimana et al* (Appeals Judgment Partly Dissenting Opinion of Judge Meron) ICTR-99-52-A, A Ch (28 November 2007) [13]; Benesch, 'Vile Crime' (n 54) 493.

[133] *Nahimana* (Appeals Judgment Partly Dissenting Opinion of Judge Meron) (n 132) [8], [11].

[134] ibid [8].

[135] *Nahimana* (Appeals Judgment) (n 132) [986].

[136] ibid [986].

[137] ibid [988]. See also Richard A Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press 2017) 41.

[138] Wayne LaFave and Austin Scott, *Criminal Law* (2nd edn, West Pub Co 1986) 488 – 489; Chris Clarkson, Heather Keating and Sally Cunningham, *Clarkson and Keating Criminal Law* (6th edn, Sweet and Maxwell 2007) 535.

[139] Wilson (n 137) 2. See also Mill (n 115) 56 – 67.

attempting to separate it from any potential 'subsequent effects'.[140] He argues that defining incitement as inchoate renders it 'theoretically wobbly compared with completed or "consummated" crimes'.[141] In contrast, by asserting that incitement is a completed speech act in itself, it can be seen as a 'crime *per se,* by virtue of what it itself does'.[142] Thus, the focus of analysis should be on its meaning and persuasiveness, as what matters is 'the content and force of a speech act'.[143]

Austin's theory of speech acts argues that 'to say something *is* to do something'.[144] Accordingly, 'there is something which is *at the moment of uttering being done by the person uttering*'.[145] This suggests that the point at which speech becomes subject to international criminal sanctions is where it intends to provoke a particular outcome, and has the potential to achieve that goal, thereby becoming a positive action. Similarly, the Trial Chamber in the Media Trial distinguished speech that conveyed news or factual information in an informative or educational sense, and speech designed to provoke or bring about another harmful action.[146] Thus, the Judgment differentiated between informative expression and speech that has a performative function.

Even Mill, a 'free-speech stalwart',[147] acknowledged a distinction between actions and opinions, asserting that 'no one pretends that actions should be as free as opinions'.[148] Consequently, when speech is expressed as 'a positive instigation to some mischievous act', it loses any protection.[149] He refers to the context of the expression as the important factor in determining whether speech can be seen as a criminal act. He gives an example of an 'excited mob' gathered outside the home of a corn dealer, arguing that if the crowd are told, either orally or written on a placard, that corn dealers are 'starvers of the poor' then such an action 'may justly incur punishment' as this poses

[140] Wilson (n 137) 57.
[141] ibid 56.
[142] ibid 58.
[143] ibid 57.
[144] John L Austin, *How to do Things with Words* (2nd edn, Harvard University Press 1975) 94.
[145] ibid 60.
[146] *Nahimana* (Judgment) (n 4) [1024].
[147] Wilson (n 137) 2.
[148] Mill (n 115) 13, 67.
[149] ibid 67.

a credible threat to the corn dealer.[150] The reason for this is that the mob are predisposed to hear such speech as an active encouragement, the speaker is taken seriously by the audience and that the speaker knows the mob will hear the words in that way.

Greenawalt argues that 'utterances of these sorts are situation-altering and are outside the scope of free speech. Such utterances are ways of doing things, not of asserting things'.[151] This suggests that situation-altering utterances ought to be subject to the same regulation as non-verbal conduct. Conversely, Haiman argued that words and deeds should not be conflated, as language is largely symbolic. He argued against the notion 'that certain types of speech are really speech acts and should therefore be treated differently from "pure" speech that is subjected to the same scrutiny and possible regulation by society as other kinds of regulable action, behaviour, or conduct'.[152] However, even the most speech-protective societies prohibit speech that is threatening and dangerous, or that solicits a criminal offence.[153] Therefore, speech may be defined as a positive or performative act when it poses a credible threat to the target group. In order to amount to a credible threat, the speech must be disseminated by someone that has the authority to encourage the audience to act, they must be taken seriously by the audience and the words must be spoken in a situation where they have the potential to bring about such conduct.

Within their own national jurisdictions, most states prohibit forms of racist, sexist or other intolerant speech.[154] Where they differ is in the point at which they consider speech to be sufficiently harmful to warrant criminalisation. For example, countries such as the Netherlands actively enforce hate speech laws 'premised on the need to protect human dignity quite apart from any interest in safeguarding public order'.[155] Conversely, the United States of America is possibly the most famous

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[150] ibid 67 - 68.

[151] Kent Greenawalt, *Speech, Crime and the Uses of Language* (OUP 1989) 58.

[152] Franklyn Haiman, "*Speech Acts" and the First Amendment* (Southern Illinois University Press 1993) 1 – 2.

[153] See also ECOSOC 'Ad Hoc Committee on Genocide, Summary Record of the Sixth Meeting, Lake Success, New York, Friday 9 April 1948 at 2pm' (18 April 1948) UN Doc E/AC.25/SR.6, 5.

[154] Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69 Modern Law Review 543, 543.

[155] Gregory 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 Virginia Journal of International Law 139, 147.

example of a speech-protective country.[156] The First Amendment of the US Constitution states that 'Congress shall make no law […] abridging the freedom of speech, or of the press'.[157] However, this does not mean to suggest that all speech is protected. In *Brandenburg v Ohio*, it was held that the First Amendment would not protect speech that 'is directed to inciting or producing imminent lawless action and is likely to produce such action', similar to the idea above that the speech must pose a credible threat.[158] Regardless, the almost universal domestic stance of prohibiting speech that is threatening or that solicits an offence did not translate into international cooperation, as will be shown in Chapter Three.

Therefore, while states do not wholly agree upon the point at which speech ought to become criminal, on an individual level they acknowledge that 'words have the potential to enable and indeed to induce mass murder' and, consequently, the prohibition of such speech on an international level is justifiable.[159] This is reinforced by the argument that, in the context of international criminal law, speech has 'gone beyond mere insult, libel and slander to incite others to commit mass atrocities', thereby distinguishing it from the examples of threatening or insulting speech subject to the jurisdiction of national criminal courts.[160] Both the Trial and Appeals Chambers of the Media Trial emphasised the danger of the 'potential' of incitement to cause genocide.[161] In *Ruggiu,* the accused admitted that he deprived the victims of the 'rights to life, liberty and basic humanity enjoyed by members of wider society' by encouraging his audience to kill.[162] The aim was the 'death and removal' of the Tutsi from society 'or eventually even from humanity itself'.[163] Thus, in international law, incitement is punished not only for its contribution to the denial of fundamental rights for the individuals of the target group, but also for its potential to trigger acts of genocide.[164]

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[156] Heinze (n 154) 544 – 545.
[157] US Constitution (n 121) Amendment I.
[158] *Brandenburg v Ohio* 295 U.S. 444, 447 (1969).
[159] Salomon (n 5) 142.
[160] Wilson (n 137) 2.
[161] *Nahimana* (Judgment) (n 4) [1015]; *Nahimana* (Appeals Judgment) (n 132) [711].
[162] *Ruggiu* (Judgment) (n 75) [22].
[163] ibid [22].
[164] *Mugesera* (n 68) 156. See also *R v Keegstra* [1990] 3 SCR 697, 748; Tsesis (n 6) 2.

It is this potential that is significant. This discussion has shown that there are a number of contributory factors, which help to distinguish incitement from legitimate expression. This shows similarities between the way states recognise and prohibit harmful speech, and Austin's theory of speech acts. Consequently, the punishment of speech is justified when the speaker aims to achieve something through their words and the speech has the potential to fulfil this aim, also defined as performative speech. Moreover, Austin's theory shows that incitement transcends the boundaries between mere expression of opinion and punishable conduct. This is affirmed by the existence of national prohibitions of speech that calls for immediate violence. Thus, conceiving of incitement as a positive act in its own right helps to identify its conceptual distinction from hate speech, thereby contributing to the central aim of this thesis.

Incitement is identified by considering its content, purpose, and persuasive force. Thus, the speech must contain an expression of encouragement to commit genocide, the words must be spoken seriously with the intent to bring about the destruction, in whole or in part, of a protected group and it must have the potential to induce such conduct, posing a credible threat to the target group.[165] To ascertain its content, the courts must consider the factual content of the speech, referring to the hallmarks of incitement highlighted through the historical analysis. To determine the persuasive force of the speech, the courts must consider the speaker and their relationship to the audience, assessing whether they have the influence or authority to induce such an act. The speech must be delivered in a context where it has the potential to provoke immediate violence. Finally, as Sumner asserts, this is 'a broadly empirical matter' that can only be decided on a case-by-case basis, according to the evidence.[166]

2.4. Conclusion

This chapter aimed to consider the theoretical and historical foundations of the international offence in order to define the point at which the law should intervene to prohibit speech. In order to achieve this, the discussion identified the recurring hallmarks of inciting speech, illustrated the conceptual underpinning of the

[165] Austin (n 144) 9. See also Genocide Convention (n 45) art II.

[166] Leonard Sumner, 'Criminalizing Expression: Hate Speech and Obscenity' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (OUP 2011) 33. See also *Akayesu* (Judgment) (n 72) [179 – 183], [347], [361]; *Prosecutor v Akayesu* (Sentence) ICTR-96-4-T, T Ch I (2 October 1998) [673].

international prohibition of incitement and began to define incitement. This discussion has shown that identifying speech techniques such as dehumanisation and the creation of a threat contribute to a finding that speech was intended to incite, and that incitement may be distinguished from legitimate expression by considering its content, purpose, and persuasive force.

The discussion of historical examples demonstrated the link between atrocity and inflammatory speech, showing that, throughout history, the orchestrators of mass killing have manipulated their audience and encouraged participation through words. Despite the variance in language, culture and context, there are recurring themes. This identified that the hallmarks of inciting speech include: dehumanisation through culturally specific pejorative terms, and the creation of a threat. These speech techniques cause harm to the target group by eroding their humanity and targeting them for slaughter, using fear, suspicion and hatred to foster an environment in which violence can occur. Consequently, the presence of these techniques can facilitate a finding that the speech aimed to encourage genocide.

Through an analysis of the theories underpinning a prohibition of incitement, this chapter demonstrated that while there are two primary justifications that are often cited, incitement's preventive dimension and the harm in speech acts, the first aim is aspirational, as the occurrence of incitement has not yet triggered preventive action. However, in reference to the second aim it was possible to conceive that incitement is justifiably punished, regardless of its consequences. When delivered in the right context speech has the power to be 'situation-altering', thereby distinguishing it from the expression of opinion or the dissemination of information.[167]

By defining incitement according to Austin's theory of speech acts it is possible for it to be conceived as a positive, performative act capable of causing harm. Thus, to be distinguished from permissible speech, the speaker must encourage the commission of genocide, it must be taken seriously as inciting genocide and it must have the potential to induce the intended outcome, regardless of whether this aim is successful. This also shows the importance of establishing meaning, as understanding speech is central to the task of assessing incitement. Without building this understanding, it

[167] Greenawalt (n 151) 58.

would be impossible to determine whether speech had a performative function within its given context.

While this chapter has considered incitement, it has not addressed the elements of the international offence: direct and public. Through a discussion of the IMT, the Convention and the Rome Statute, Chapter Three will build upon this analysis by considering how these elements ought to be interpreted and by showing that this theoretical conception of incitement is consistent with international law. This will show that while there was limited guidance for interpretation, the *Travaux* of the Convention give some insight into the offence. For example, the drafters of the Convention did not exclude the possibility that incitement may contain implicit encouragement. Rather, regardless of the language used, it had to be clearly and immediately understood as encouraging genocide by its target audience, which helps to form the definition of direct. This chapter will serve two purposes, firstly to show how these qualifying elements may be interpreted. Secondly, this will show the foundations upon which the ICTR built their incitement cases, looking to illustrate the limited assistance available to the Tribunal at the start of its work.

3. The International Offence of Incitement to Commit Genocide: Origins and Developments

3.1. Introduction

On the 9th December 1948, the UN General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide and proposed it for ratification. [1] This marked a milestone in public international law, 'laying the foundation for a new common ethos, uniting the international community following the tumultuous and divisive events of the Second World War'.[2] Yet, in the years that followed, the offences it created remained largely dormant, and, while the body of relevant international treaties has developed, the definition of incitement to commit genocide remains mostly unchanged. Thus, even though there are now four further instruments that deal with the prosecution of incitement, the Convention remains the principal source of law.[3] However, owing to the numerous revisions during the process of negotiation and the resultant lack of guidance, the Convention creates a 'degree of uncertainty' regarding the provision.[4]

This thesis aims to examine the ICTR's incitement cases in order to identify the positive and problematic aspects of its analysis, and to use this discussion to propose definitions for the constitutive and evidentiary elements of incitement. The Convention offence of incitement forms the foundation of this. Understanding the ICTR jurisprudence relies on an appreciation of the Convention offence, as it was repeated verbatim in the Statute for the ICTR.[5] Thus, the *Travaux* of the Convention contain the relevant interpretive material for the offences under the ICTR's Statute. This chapter serves the additional function of ensuring that any definitions proposed are consistent

[1] Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277.

[2] Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) v.

[3] UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955; Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (1996) art 2 (3)(f); Rome Statute of the International Criminal Court (Adopted 17 July 1998 entered into force 1 July 2002) 2187 UNTS 3, art 25(3)(e). See also William Schabas, 'Hate Speech in Rwanda: The Road to Genocide' (2000) 46 McGill Law Journal 141, 155.

[4] Tahlia Petrosian, 'Secondary Forms of Genocide and Command Responsibility under the Statutes of the ICTY, ICTR and ICC' (2010) 17 Australian International Law Journal 29, 30.

[5] UN Doc S/RES/955 (n 3).

with the international prohibition of incitement, particularly in light of the principle of *nullum crimen sine lege.*

Chapter Two concluded that incitement is distinguished from legitimate speech by reason of its content, its purpose, and its persuasive force. Facilitating this analysis are the 'hallmarks of incitement', such as dehumanisation and creation of a threat, which help to show that speech was intended to encourage genocide. Thus, in order to amount to incitement, the speech must encourage the extermination (in whole or in part) of a protected group under the Convention. It must be taken seriously as inciting genocide and must have the potential to induce the intended outcome, posing a credible threat to the target group, regardless of whether this aim was achieved. This chapter seeks to affirm these theoretical findings through an analysis of the international prohibition.

This chapter will build upon this analysis through two substantive sections. The first will show the emergence of the international prohibition of incitement, considering its origins through a discussion of the IMT and the drafting of the Convention. This will highlight the reasons that the Convention included the qualifiers (direct and public) and will show the limited guidance and lack of clarity for these elements, thereby framing the subsequent discussion of ICTR cases. The second section of this chapter considers the developments made to the offence through the ILC Draft Code and the Rome Statute, showing that there was a missed opportunity for clarification. While the focus of this thesis is the lessons that can be drawn from the ICTR's analysis, this discussion is important because the overarching aim of this thesis is to propose definitions to be used in future cases. Therefore, it is important to establish the extent to which ICTR jurisprudence will remain relevant. Even though the Rome Statute contains 'subtle but significant differences' from the Convention it is likely that these will have minimal impact on subsequent application.[6] Thus, this chapter will argue that while the ICC exists within its own legal system, the Convention and ICTR jurisprudence still provide the main source of interpretive material for incitement. Therefore, definitions derived from the ICTR's analysis will be relevant for future incitement cases.

[6] Schabas, 'Hate Speech' (n 3) 155.

3.2. The Origins of Direct and Public Incitement to Commit Genocide

3.2.1. The International Military Tribunal at Nuremberg

At the outset it is important to recognise that the IMT has faced criticism. Even during the proceedings there was a sense of 'unease' about the legal basis of the trials.[7] This was founded in the accusation of selectivity of indictments and the perception that the IMT represented 'victor's justice'.[8] In the absence of significant Nazi Party members, such as Hitler, Himmler and Goebbels, people that never achieved 'sufficient stature to attend the planning conferences which led to aggressive war', such as Hans Fritzsche, were placed on trial at Nuremberg.[9] Consequently, subsequent tribunals have attempted to distance themselves from Nuremberg.[10] For example, in *Tadić* the judges at the ICTY emphasised the need 'to avoid some of the flaws' in the IMT proceedings.[11]

Additionally, it is important to note that the crimes under the Nuremberg Charter were not the same as those subject to the jurisdiction of the ICTR or ICTY. Neither direct and public incitement nor genocide existed as independent crimes prior to the creation of the Convention. Rather, components of these offences formed part of count four of the indictment, persecution as a crime against humanity, a concept 'not identical with that of genocide'.[12] To incur liability, speech had to form part of, and contribute to, 'the general persecution of Jewish people'.[13] While the case against

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[7] Richard Overy, 'The Nuremberg Trials: International Law in the Making' in Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press 2006) 1 – 2.

[8] Danilo Zolo, *Victor's Justice: From Nuremberg to Baghdad* (Verso 2009) 28; The *ad hoc* Tribunals and the ICC have also been accused of selectivity of indictments, but a complete discussion of this lies outside the scope of this thesis. See also Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 209 – 229; William Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 John Marshall Law Review 535; Christopher Gevers, 'International Criminal Law and Individualism: An African Perspective' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law* (Routledge 2014).

[9] *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172, 294, 328.

[10] See also Francine Hirsch, 'The Soviets and Nuremberg: International Law, Propaganda and the Making of the Postwar Order' (2008) 198 American Historical Review 701.

[11] *Prosecutor v Tadić* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) IT-94-I (10 August 1995) [21].

[12] Josef Kunz, 'The United Nations Convention on Genocide' (1949) 43 The American Journal of International Law 738, 739. See also *Judgment of the Nuremberg International Military Tribunal* (n 9) 296.

[13] Wibke Timmerman, *Incitement in International Law* (Routledge 2016) 171.

Streicher and Fritzsche provides only analogous jurisprudence, the origins of the incitement offence are evident in the decision. Therefore, despite 'evident drawbacks',[14] *Streicher* and *Fritzsche* form part of the foundation of modern incitement law, inspiring the drafters of the Convention[15] and, until *Akayesu*, representing the only judicial authority on international atrocity speech.[16] Accordingly, they provide 'both a legislative and judicial framework upon which subsequent international instruments and judicial analyses […] have been built'.[17] Thus, evaluating the IMT decision is not simply an exercise in historical curiosity, it helps to situate the Convention in context and 'provides an insight' into how words were first treated as internationally criminal.[18]

The Judgment contains three elements that became relevant during the drafting of the Convention. Firstly, the IMT emphasised the significance of speech in contributing to atrocities. This paved the way for the existence of incitement to genocide as an independent crime in its own right, rather than forming a component of another offence. Secondly, in a similar vein to the ICTR, the IMT sought proof that the speech urged killing or persecution and was clearly understood as such. Finally, the IMT emphasised the importance of considering the position of the speaker and their knowledge of the on-going persecution in order to show that they had the requisite intent to incite persecution.

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[14] Overy (n 7) 2.

[15] ECOSOC, 'Ad Hoc Committee on Genocide: Summary Record of the Fifth Meeting, held at Lake Success, New York, Tuesday 8 April 1948' (16 April 1948) UN Doc E/AC.25/SR.5, 13; UNGA Sixth Committee (3rd Session) 'Eighty-Fourth Meeting Held at the Palais de Chaillot, Paris, on Tuesday, 26 October 1948, at 3:15pm' (26 October 1948) UN Doc A/C.6/SR.84, 215.

[16] While the subsequent Nuremberg Military Tribunal *Ministries Case* assessed speech in relation to Otto Dietrich, Dietrich's trial concerned dissemination of more general propaganda that falls outside the scope of the modern offence of incitement, thus it will not be assessed here; Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 Volume XIV* (US GPO 1950) 40. See also *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) [550]; Gregory S Gordon, 'The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law' (2014) 75 Ohio State Law Journal 571, 582.

[17] Avitus Agbor, *Instigation to Crimes Against Humanity: The Flawed Jurisprudence of the Trial and Appeal Chambers of the International Criminal Tribunal for Rwanda (ICTR)* (Martinus Nijhoff Publishers 2013) 49 – 50.

[18] Margaret Eastwood, 'Hitler's Notorious Jew-Baiter: The Prosecution of Julius Streicher' in Predrag Dojčinović, *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2012) 221.

3.2.1.1. The Trial of Julius Streicher and Hans Fritzsche

Julius Streicher was the editor of *Der Stürmer*, a 'lewd and disgusting' anti-Semitic tabloid newspaper, with an estimated circulation of half a million people at its peak.[19] Known as 'Jew-Baiter Number One', his publications dehumanised the Jewish population and called for their extermination.[20] He compared them to 'locusts' and vermin, describing them as 'a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interests of mankind'.[21] Evidence was brought of 26 articles published between 1941 and 1944 that 'demanded annihilation and extermination in unequivocal terms'.[22] The IMT found that, through these words, Streicher 'incited the German people to active persecution'.[23] Consequently, he was responsible for garnering support and, thus, the IMT defined his role as akin to an accessory to murder 'perhaps on a scale never attained before'.[24]

The case against Streicher was controversial[25] and 'exceptional',[26] indicating 'that the Allies recognized the need to account on some level for the virulence of the Nazi hatred of Jews'.[27] Although he was less involved in the formulation of war policy than some of his co-conspirators, it was considered that 'his crime is no less the worse'.[28] The IMT concluded that hate speech and propaganda infected 'the German

[19] *Judgment of the Nuremberg International Military Tribunal* (n 9) 294. See also Airey Neave, *Nuremberg: A Personal Record of the Trial of the Major Nazi War Criminals in 1945 – 6* (Hodder and Stoughton 1978) 89; Claudia Koonz, *The Nazi Conscience* (Harvard University Press 2003) 228 - 229.

[20] *Judgment of the Nuremberg International Military Tribunal* (n 9) 294.

[21] ibid 294.

[22] ibid 295.

[23] ibid 294.

[24] International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg 14 November 1945 – 1 October 1946 Vol V* (Nuremberg: Secretariat of the Tribunal 1947) 92, 118.

[25] Eastwood, 'The Prosecution of Julius Streicher' (n 18) 219.

[26] Richard A Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press 2017) 28.

[27] Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (OUP 2005) 64 – 65.

[28] International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg 14 November 1945 – 1 October 1946 Vol IX* (Nuremberg: Secretariat of the Tribunal 1947) 515. See also *Judgment of the Nuremberg International Military Tribunal* (n 9) 294.

mind with the virus of anti-Semitism'.[29] Thus, through Streicher's conviction the IMT emphasised the significant role of speech in facilitating atrocity. While he was ruled to have sufficient capacity to stand trial, his mental health was questionable.[30] Streicher was described as a 'leering fanatic' of low intelligence and he was despised by the other defendants.[31] His behaviour had been considered an embarrassment to the Party; he had been ostracised after 1940 and had played no part in Nazi government policy.[32] Furthermore, while the circulation of his paper had been fairly large at its height, adult Germans did not take it overly seriously; many of his readers were impressionable schoolchildren.[33]

Even though adult Germans did not take him seriously, this did not mean that his message was any less serious or dangerous as his propaganda deliberately targeted children. The Nazi regime had designed a deliberate programme of education and training for the German youth and 'controlled the dissemination of information and the expression of opinion'.[34] Streicher engaged in this campaign of indoctrination by disseminating books for children, which contained anti-Semitic pictures and text, and books for teachers, which emphasised the necessity of teaching anti-Semitism in schools.[35] The prosecution at the IMT entered a number of pieces of evidence illustrating Streicher's influence on the German youth, noting that it was 'easy' for him to indoctrinate children 'as they were impressionable and excited to have such an important Nazi speaking to them'.[36] Thus, his target audience took him seriously, and his message was delivered to them with the authority granted by State endorsement.[37]

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[29] *Judgment of the Nuremberg International Military Tribunal* (n 9) 294. See also Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48 Virginia Journal of International Law 485, 509.

[30] International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg 14 November 1945 – 1 October 1946 Vol I* (Nuremberg: Secretariat of the Tribunal 1947) 153 – 154.

[31] Neave (n 19) 88. See also Gustave Gilbert, *Nuremberg Diary* (Eyre and Spottiswoode 1948) 27, 181 – 185.

[32] *Judgment of the Nuremberg International Military Tribunal* (n 9) 294; Gilbert (n 31) 181, 183; Neave (n 19) 88.

[33] Neave (n 19) 89.

[34] International Military Tribunal, *Vol I* (n 30) 34.

[35] Margaret Eastwood, 'Lessons in Hatred: The Indoctrination and Education of Germany's Youth' (2011) 15 The International Journal of Human Rights 1291, 1296.

[36] ibid 1295.

[37] See also International Military Tribunal, *Vol I* (n 30) 33.

Fritzsche, a radio commentator and chief in the Ministry of Propaganda, was accused of inciting and encouraging 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'.[38] The prosecution argued that he 'took a particularly active part in [the] "enlightenment" concerning the Jewish question'; 'even the defendant Streicher, the master Jew-baiter of all time, could scarcely outdo Fritzsche in some of his slanders against the Jews'.[39] However, it could not be proven that he intended to incite people to commit atrocities, as his speeches did not clearly call for the extermination of the Jewish people.[40] Instead, he was responsible for arousing 'popular sentiment in support of Hitler and the German war effort'.[41] He was acquitted, as 'broad, unspecific, anti-Semitic remarks', that did not call for extermination, did not fall within the scope of the IMT's charter.[42]

As Timmerman and Schabas suggest, this does not suggest that 'Fritzsche would have to *explicitly* urge persecution or the extermination of the Jewish people'.[43] Rather, this shows that his speech had to be more than general propaganda. While there was evidence of anti-Semitism in his speech, Fritzsche was acquitted as he did not 'urge persecution or extermination'.[44] In contrast, Streicher was convicted on the basis of his calls for the extermination, 'root and branch', of the Jewish people.[45] Like the drafters of the Convention, the IMT asserted that speech had to be more than racist; it had to urge destruction, even if that encouragement was not explicit.

The IMT emphasised the significance of knowledge of the on-going campaign of persecution. It could not be proven that Fritzsche knew he was spreading 'false

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[38] *Judgment of the Nuremberg International Military Tribunal* (n 9) 326 - 328. See also Robert W Cooper, *The Nuremberg Trial* (Penguin Books 1947) 277.

[39] International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg 14 November 1945 – 1 October 1946 Vol VI* (Nuremberg: Secretariat of the Tribunal 1947) 56.

[40] *Judgment of the Nuremberg International Military Tribunal* (n 9) 328.

[41] ibid 328.

[42] Timmerman, *Incitement* (n 13) 171. See also *Judgment of the Nuremberg International Military Tribunal* (n 9) 328; Michael Kearney, *The Prohibition of Propaganda for War in International Law* (OUP 2007) 42.

[43] Wibke Timmerman and William Schabas, 'Incitement to Genocide in Paul Behrens and Ralph Henham (eds) *Elements of Genocide* (Routledge 2014) 156.

[44] *Judgment of the Nuremberg International Military Tribunal* (n 9) 328.

[45] ibid 294, 296.

news', as he was not sufficiently important to have been the founder of Nazi policies or the formulator of the propaganda campaigns.[46] He was considered 'a conduit for propaganda, not a legally responsible part'.[47] He was not part of a common plan or conspiracy and lacked knowledge of the on-going extermination of the Jews, consequently, he did not have the requisite intent to incite persecution.[48] Conversely, Streicher was conscious of Nazi policy and published his articles in full awareness of the extermination of the Jewish people, thereby proving that he had the requisite intent and knowledge to incite his readers.[49]

This shows the first judicial acknowledgment of the contribution of speech to international atrocity offences, which inspired the drafters of the Convention. The IMT confirmed that a speaker can be held responsible, even when it cannot be proved that they directly caused killing.[50] Additionally, the Judgment highlights the distinction between incitement and legitimate speech, showing that to be criminal, it must call for the commission of the substantive offence and the speaker must be aware of the potential impact of their speech. However, as has been shown, the Judgment was not without its problems and while there are indicators of similarities between the IMT and later incitement cases, the discussion of speech was sparse, numbering only a few pages.[51]

3.2.2. The Genocide Convention: The Foundations of the Current Legal Position

In part, the Convention arose out of the dissatisfaction stemming from the conclusion of the IMT.[52] Prior to 1948 there was no offence in law that specifically prohibited the destruction of a group for the reason of their membership to that group.

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[46] ibid 328. See also *Prosecutor v Nahimana et al* (Appeals Judgment) ICTR-99-52-A, A Ch (28 November 2007) [686]; Timmerman, *Incitement* (n 13) 171.

[47] *Nahimana* (Appeals Judgment) (n 46) [686]. See also *Judgment of the Nuremberg International Military Tribunal* (n 9) 327.

[48] *Judgment of the Nuremberg International Military Tribunal* (n 9) 328.

[49] ibid 295.

[50] *Prosecutor v Nahimana et al* (Judgment and Sentence) ICTR-99-52-T, T Ch I (3 December 2003) [1007].

[51] Wilson, *Incitement on Trial* (n 26) 31.

[52] William Schabas, 'Origins of the Genocide Convention: From Nuremberg to Paris' (2007) 40 Case Western Reserve Journal of International Law 35, 50. See also UNGA Sixth Committee (3rd Session) 'Sixty-Third Meeting Held at the Palais de Chaillot, Paris, on Thursday, 30 September 1948, at 10:30 am' (30 September 1948) UN Doc A/C.6/SR.63, 6.

In 1944, Raphael Lemkin coined the term genocide to describe the 'destruction of a nation or ethnic group', 'not only through mass killings, but also through a coordinated plan of different actions aiming at the destruction of essential foundations of the life of a national group, with the aim of annihilating the groups themselves'.[53] The Convention enshrined this in law, under Article II, creating a new offence in genocide.[54] Under Article III, conspiracy, direct and public incitement, attempt and complicity were prohibited as punishable acts.[55]

While these offences were derived from national equivalents, they were different by virtue of their inclusion in an international law instrument and association with a new crime. Each of the acts under Article III is only punishable when carried out with the specific criminal intent of genocide: 'the intent to destroy, in whole or in part, a national, racial or religious group, as such'.[56] However, Article III provides no further definitions. This has resulted in uncertainty regarding the scope and limits of the offences. The concepts prohibited are not universally recognised, and even if two countries proscribe similar offences, it may be under different terms. During the drafting process, the Swedish representative noted that 'when these expressions have to be translated in order to introduce the text of the Convention into our different criminal codes in other languages, it will no doubt be necessary to resign ourselves to the fact that certain differences in meaning are inevitable'.[57] Thus, it is possible to see a difficulty in applying the Convention's terminology.[58]

3.2.2.1 Interpretation of International Criminal Law

The 'core requirements' for the interpretation of international law are contained in the Vienna Convention on the Law of Treaties (VCLT), Articles 31 and 32.[59] This states that 'a treaty shall be interpreted […] in accordance with the ordinary meaning

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[53] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (2nd edn, The Lawbook Exchange Ltd 2009) 79.

[54] Genocide Convention (n 1) art II.

[55] ibid art III.

[56] ibid art II.

[57] UN Doc A/C.6/SR.84 (n 15) 7.

[58] See also Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation* (Institute of Jewish Affairs 1949) 21.

[59] Vienna Convention on the Law of Treaties (Adopted 22 May 1969 entered into force 27 January 1980) 1155 UNTS 331, art 31 - 32.

to be given to the terms of the treaty in their context and in light of its object and purpose'.[60] Supplementary material, such as the preparatory work of the treaty, may be used to aid interpretation where the meaning of the provisions is 'ambiguous or obscure'.[61]

'As expressions of customary law' these rules of interpretation are applicable to not only the Rome Statute of the ICC, but 'any other norm-creating instrument' 'including the ICTY and ICTR Statutes'.[62] Cassese confirms that as these documents are legally binding on all UN Member States pursuant to Article 25 of the UN Charter, they constitute secondary legislation and, therefore, the interpretation of these instruments must be guided by the rules of interpretation laid down in the VCLT.[63] As the Statutes of the ICTR and ICTY are derived from the Convention, the Convention and associated *Travaux* form the supplementary material for the Statutes for the ICTR and ICTY. This was confirmed in *Krstić*.[64] The Trial Chamber of the ICTY interpreted Article 4 of its own statute, drawn from the Convention, in accordance with 'the general rules of interpretation of treaties laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties'.[65] This is applicable to incitement, as the Statutes for the *ad hoc* Tribunals repeat the offence of direct and public incitement verbatim.[66]

Moreover, international criminal law must give mind to the overriding importance of *nullum crimen sine lege*. The emanations of this principle relevant to the interpretation of crimes are: strict interpretation, which bars extensive or broad construction of criminal rules, and the ban on analogy, which if ignored would allow the courts to punish conduct similar or proximate to that already prohibited, thereby unduly extending the scope of existing criminal provisions.[67] The practice of the *ad hoc*

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[60] ibid art 31(1).

[61] ibid art 32.

[62] Gerhard Werle, *Principles of International Law* (Asser Press 2005) 54 – 55. See also UN Doc S/RES/827 (n 3) art 4; UN Doc S/RES/955 (n 3) art 2.

[63] Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 13. See also *Prosecutor v Milošević* (Decision on Preliminary Motions) IT-02-54, T Ch (8 November 2001) [47]; *Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A, A Ch (15 July 1999) [282] – [305]; Werle, *Principles* (n 62) 55.

[64] *Prosecutor v Krstić* (Judgment) IT-98-33-T, T Ch (2 August 2001) [541].

[65] ibid [541].

[66] UN Doc S/RES/827 (n 3) art 4; UN Doc S/RES/955 (n 3) art 2.

[67] Cassese, *International Criminal Law* (n 63) 41, 47.

tribunals has been to interpret offences in the way that gives the most favourable outcome to the accused in order to avoid falling foul of these principles.[68] These principles must be kept in mind during any exercise in interpretation and consequently it must be confirmed that the theoretical conception of incitement contained in Chapter Two is consistent with international law.

The judges at the ICTR emphasised the importance of respecting 'the intention of the drafters of the Genocide Convention'[69] and looked to the *Travaux* in an attempt to ascertain the meaning of the offences.[70] However, the *Travaux* give limited assistance. The complexity of deciphering the *Travaux* stems from the significant task of the negotiations, which required the delegates from more than 150 states, with different jurisdictional backgrounds, to come to an agreement on the definition of international offences. It is a challenge to extend the arm of the law across a multitude of jurisdictions, combining principles deriving from both Common Law and Civil Law in an attempt to create a cohesive system of criminal justice.[71] Political wrangling for jurisdictional dominance is likely to result in a provision that is the product of compromise, rather than something that is clearly defined.[72] This became evident during the drafting of the Convention. While it will be shown that the delegates generally approved of including incitement, it was subject to numerous revisions in an attempt to satisfy all parties. Consequently, as the first court to assess incitement, the ICTR was tasked with identifying its intended definition and scope with relatively little guidance.

First, looking at the ordinary meaning of the terms. While it can be said that public may be defined according to its ordinary meaning, as will be shown in Chapter Five, the terms incitement and direct are less straightforward, necessitating an analysis of the *Travaux* of the Convention. The meaning of incitement is 'subject to certain

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[68] William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 638 – 639.

[69] *Akayesu* (Judgment) (n 16) [516].

[70] ibid [501], [511], [519], [561], [701].

[71] *Prosecutor v Erdemović* (Separate and Dissenting Opinion of Judge Cassese) IT-96-22, A Ch (7 October 1997) [4].

[72] See also UNGA Sixth Committee (3rd Session) 'Eighty-fifth Meeting Held at the Palais de Chaillot, Paris, on Wednesday 27 October 1948, at 3:20 pm' (27 October 1948) UN Doc A/C.6/SR.85.

variations in different legal systems'.[73] This was also shown at the ICTR.[74] Therefore, it is not so simple as looking to its ordinary meaning. Additionally, owing to a lack of explicit statement on the matter, this will help to shed light on whether incitement was intended to be inchoate. Thus, the discussion of the *Travaux* aims to understand what speech was intended to fall within the parameters of direct and public incitement and thereby contribute to the overarching aim of distinguishing incitement from legitimate expression. To achieve this aim it is necessary to explore the reasons for the inclusion of the provision and to consider how the constitutive elements should be defined in light of speech that was clearly excluded.

3.2.2.2. Direct and Public Incitement to Commit Genocide

The prohibition of incitement was subject to debate and disagreement throughout the drafting process. While many delegates agreed that incitement warranted individual accountability to some degree, several questioned 'whether a separate provision enumerating direct and public incitement [was] necessary'.[75] The United States was entirely 'opposed to the concept of direct incitement'.[76] Their representative argued that inciting speech formed part of conspiracy, or attempt if unsuccessful, thereby rendering a separate provision irrelevant.[77] As a result, the US and Iran, supported by Chile, proposed that incitement should be removed from the draft altogether, arguing that the Convention should focus on physical acts of genocide.[78] However, this 'fails to recognize the damage that one inciter can cause, acting alone'.[79]

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[73] Robinson (n 58) 21.

[74] *Prosecutor v Nahimana et al* (Appeals Judgment Partly Dissenting Opinion of Judge Meron) ICTR-99-52-A, A Ch (28 November 2007) [8], [11].

[75] Ameer Gopalani, 'The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?' (2001) 32 California Western International Law Journal 87, 93.

[76] ECOSOC 'Report of the Committee and Draft Convention Drawn up by the Committee' (24 May 1948) UN Doc E/794, 21.

[77] ibid 21.

[78] UNGA Sixth Committee (3rd Session) 'United States of America: Amendments to the Draft Convention for the Prevention and Punishment of the Crime of Genocide (E/794)' (4 October 1948) UN Doc A/C.6/214; UNGA Sixth Committee (3rd Session) 'Iran: Amendments to the Draft Convention on Genocide (E/794)' (5 October 1948) UN Doc A/C.6/218. See also UN Doc A/C.6/SR.84 (n 15) 215; ECOSOC 'Study of the Question of the Prevention and Punishment of the Crime of Genocide: Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur' (4 July 1978) UN Doc E/CN.4/Sub.2/416, 108.

[79] Gopalani (n 75) 94.

Echoing the IMT, the drafters of the Convention highlighted the dangers of speech, noting that it encourages broader participation by instilling hatred 'in the masses'.[80] The USSR, Uruguay, and Venezuela emphasised the impact of 'violent'[81] campaigns of incitement, taking note of historical precedent, arguing that genocide is inextricably linked with 'race "theories" which preach racial and national hatred'.[82] It was emphasised that to achieve the central aims of the Convention, it would not be sufficient to punish 'other preparatory acts alone', thereby confirming that prevention was not the sole rationale for including incitement in the Convention.[83] Thus, all culprits of genocide, including inciters, must 'be included in the group of persons subject to punishment'.[84]

Freedom of expression was at the core of the US reluctance to prohibit incitement. The US delegation argued that the 'the prohibition of genocide should not be confused with measures that might result in "muzzling" the Press', noting that any provision restricting freedom of the press would conflict with US constitutional freedoms, thereby jeopardising their support of the Convention.[85] Uruguay and the Philippines acknowledged that their national legal systems attached great importance to freedom of expression and freedom of the press.[86] Yet, they 'failed to see how those freedoms could be threatened by the punishment of incitement to commit genocide, when they were in no way threatened by the punishment of incitement to commit other crimes'.[87]

The USSR emphasised that the United States did not recognise absolute freedom of expression, noting that 'under Anglo-American rules of law' the right to free speech is limited where 'there is a clear and present danger that the utterance might

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[80] UN Doc A/C.6/SR.84 (n 15) 208. See also *Judgment of the Nuremberg International Military Tribunal* (n 9) 294.

[81] UN Doc A/C.6/SR.85 (n 72) 222. See also UN Doc A/C.6/SR.84 (n 15) 208.

[82] ECOSOC 'Basic Principles of a Convention on Genocide (Submitted by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948)' (7 April 1948) UN Doc E/AC.25/7, 1.

[83] UN Doc A/C.6/SR.85 (n 72) 220, 216, 227.

[84] Robinson (n 58) 19. See also UN Doc E/794 (n 76) 22.

[85] ECOSOC 'Ad Hoc Committee on Genocide, Summary Record of the Sixteenth Meeting. Lake Success, New York, Thursday, 22 April 1948, at 2:15 pm' (29 April 1948) UN Doc E/AC.25/SR.16, 7 - 8. See also UN Doc A/C.6/SR.84 (n 15) 215.

[86] UN Doc A/C.6/SR.85 (n 72) 222 - 223.

[87] ibid 222.

interfere with the rights of others'.[88] It was asserted that all legal systems 'explicitly restricted' harmful speech by prohibiting incitement to murder 'and no one would ever claim that freedom of expression was thereby affected'.[89] Thus, as incitement to crime was 'not a new conception', prohibited in the legal systems of many countries in order to preserve the rights of others, there was 'no reason' why incitement to genocide should not be prohibited as an international crime where it was likely to pose a threat to the target group.[90] Consequently, the US proposal to delete the offence was rejected by 27 votes to 16, with five abstentions.[91] Regardless, the concerns expressed by the US impacted on the drafting of the offence, resulting in the inclusion of the terms direct and public in an attempt to 'limit possible conflicts' with freedom of expression.[92]

While the US aimed to restrict or exclude incitement, the USSR argued that its prohibition would not be enough to prevent genocide.[93] The USSR argued for the inclusion of a broader scheme of preparatory offences encompassing research for developing the technique of genocide, and all forms of public propaganda aimed at provoking the commission of genocide, or at inciting racial, national or religious hatred.[94] Thus, the Secretariat Draft sought to prohibit 'all forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act'.[95] This aimed to prohibit propaganda that did 'not recommend the commission of genocide', but formed part of a campaign to 'persuade' the audience 'to contemplate the commission of genocide in a favourable light'.[96] This was controversial. However, it helps to show what type of speech the delegates felt was necessary to prohibit.

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[88] ECOSOC 'Ad Hoc Committee on Genocide, Summary Record of the Sixth Meeting, Lake Success, New York, Friday 9 April 1948 at 2pm' (18 April 1948) UN Doc E/AC.25/SR.6, 5.

[89] UN Doc A/C.6/SR.85 (n 72) 221.

[90] ibid 222, 221-223. See also ECOSOC 'Commission on Human Rights, Third Session, Summary Record of the Sixty-Third Meeting, Lake Success, New York, Tuesday, 8 June 1948, at 10:45 am' (22 June 1948) UN Doc E/CN.4/SR.63, 4.

[91] UN Doc A/C.6/SR.85 (n 72) 229.

[92] Wolfgang Schomburg, 'About Responsibility' in Philipp Ambach and others (eds), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society: Essays in Honour of the Life and Work of Joakim Dungel* (Martinus Nijhoff Publishers 2015) 40.

[93] ECOSOC 'Draft Convention on the Crime of Genocide' (26 June 1947) UN Doc E/447 (Secretariat Draft) 32; UN Doc E/AC.25/7 (n 82) 2.

[94] UN Doc E/AC.25/SR.16 (n 85) 46. See also UN Doc E/AC.25/7 (n 82) 2.

[95] UN Doc E/447 (n 93) 33.

[96] ibid 32.

The *Travaux* indicate that some delegations, including Poland, Lebanon and China, were uncertain regarding the extent to which the incitement provision already prohibited propaganda.[97] The Venezuelan delegate argued that their penal system considered incitement to incorporate propaganda and, therefore, a separate offence would be unnecessary.[98] Similarly, China and Lebanon concluded that the extra provision would likely be superfluous, but supported its 'substance'.[99] The Venezuelan delegate suggested that the difficulties encountered by the Committee stemmed from differences in language and legal tradition.[100]

There were two reasons for the exclusion of general propaganda from the Convention. Firstly, the US was reluctant to further extend the regulation of speech. Therefore, to ensure the US vote, the representatives 'acted with circumspection' and chose to 'safeguard' freedom of speech by prohibiting incitement and not general advocacy or propaganda.[101] Secondly, the delegates concluded that propaganda would be prohibited as incitement if it took a 'definite form' and called for genocide, but the term propaganda in itself was too 'vague' to form a separate legal offence.[102] This shows an intention to follow the IMT by only criminalising speech that calls for the destruction of the target group, rather than general or ambiguous encouragement.[103] The addition of direct to the incitement provision was intended to assist in providing this distinction.[104] As will be shown in Chapter Five, direct was a poor choice of word, as its ordinary meaning indicates that incitement only applies to explicit speech.[105] However, it can be asserted that direct incitement was not intended to restrict the prohibition to explicit speech. Rather, it was intended to mean that the speech must be more than an expression of hatred and it must be understood as containing a clear exhortation to kill.[106]

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[97] UN Doc E/AC.25/SR.16 (n 85) 8 - 9.
[98] ibid 5.
[99] ibid 9.
[100] ibid 9.
[101] Gopalani (n 75) 100.
[102] Robinson (n 58) 20. See also, UN Doc E/447 (n 93) 33.
[103] *Judgment of the Nuremberg International Military Tribunal* (n 9) 294, 296, 328.
[104] Gopalani (n 75) 103.
[105] See also text to n 60 in ch 5; 'Direct', *Oxford Dictionary of English* (2nd edn Revised, OUP 2005).
[106] UN Doc E/AC.25/SR.16 (n 85) 8.

The 1948 *Ad Hoc* Committee Draft proposed prohibiting incitement whether committed in private or in public.[107] This stemmed from the observation that 'in French law the term "incite" covered both public and private incitement'.[108] However, this was ultimately rejected by 26 votes to six, with 10 abstentions.[109] The final provision excluded private incitement as it was felt that such speech 'presented no danger', as private conversations 'could have no influence on the perpetration of the crime of genocide'.[110] Only public speech was deemed capable of bringing 'about the psychological and moral conditions in which genocide can be committed'.[111]

Comments attached to the Secretariat Draft state that incitement refers to 'direct appeals to the public by means of speeches, radio or press, inciting it to genocide'.[112] Thus, public incitement can be understood to include written and verbal statements.[113] Yet, as speech is not inherently public this does not clearly define the distinction between public and private.[114] The suggested prohibition of propaganda in the Secretariat Draft gives some further insight. This asserted that the propaganda 'must be addressed to public opinion as a whole or to a fraction of it'.[115] While this contributes to the possible definition, this is still fairly vague. All that is apparent from the discussion is that it must be more than a private conversation, addressed to 'a whole or to a fraction' of 'public opinion' in undefined quantities, and it may be broadcast or published by any means.[116] However, as will be shown in Chapter Five, the ordinary meaning of public helps to provide a clearer definition.

Both the Secretariat Draft and the *Ad Hoc Committee* Draft of the Convention prohibited incitement to genocide 'whether the incitement be successful or not'.[117] However, a majority of delegations felt that this was an 'unnecessary and even

[107] UN Doc E/794 (n 76) 20.
[108] UN Doc E/AC.25/SR.16 (n 85) 2.
[109] UN Doc A/C.6/SR.85 (n 72) 230.
[110] UN Doc A/C.6/SR.84 (n 15) 214. See also Robinson (n 58) 20.
[111] UN Doc E/447 (n 93) 33.
[112] ibid 31.
[113] UN Doc E/AC.25/SR.16 (n 85) 11.
[114] See also *Nahimana* (Appeals Judgment) (n 46) [862].
[115] UN Doc E/447 (n 93) 33.
[116] UN Doc E/447 (n 93) 33.
[117] ibid 7; UN Doc E/794 (n 76) 20.

tautological' addition.[118] Uruguay argued that the phrase was 'superfluous, since incitement was a crime in itself only when it was not successful; when it was, it was equivalent to complicity'.[119] The United Kingdom abstained from voting on the proposed deletion of the phrase, arguing that this would not 'have any effect from the legal point of view'.[120] The French Delegate argued that 'all national legislation treated incitement to crime, *even if not successful*, as a separate and independent breach of the law'.[121] As a result, the vote to remove the provision was approved by 19 votes to 12, with 14 abstentions.[122] However, in the absence of an express statement, the ICTR was tasked with determining whether incitement is to be treated as inchoate.[123]

Owing to the volume of amendments, the final incitement provision was fairly vague, with limited guidance. However, it is possible to see that the drafters prohibited speech where it had the power to encourage the audience to commit genocide, recognising the danger inherent in performative speech, thereby confirming the findings in Chapter Two. Incitement was further distinguished from protected speech by affirming that such speech must be direct. This discussion shows that this does not mean to exclude implicit speech, but rather to restrict the prohibition to speech that is clearly understood as encouraging genocide. Consequently, interpreting direct as 'clearly understood as encouraging genocide within its own context' would not conflict with the Convention, rather, it upholds the intent of the drafters. Additionally, this discussion shows that the drafters deliberately excluded private speech from the prohibition, clearly intending that incitement could only be public, even if the extent of this was vaguely defined. Finally, this suggests that despite the removal of the statement, 'whether the incitement be successful or not', from the incitement provision, it is still to be treated as inchoate in international criminal law.[124]

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[118] UN Doc E/AC.25/SR.16 (n 85) 3.

[119] UN Doc A/C.6/SR.85 (n 72) 222.

[120] ibid 231.

[121] ibid 227. See also Code Pénal (Version en vigueur au 4 September 2012) art 211 – 2; Code de la Santé Publique (Version en vigueur au 7 Mars 2007) art L3421-4.

[122] UN Doc A/C.6/SR.85 (n 72) 232.

[123] *Akayesu* (Judgment) (n 16) [561].

[124] UN Doc E/447 (n 93) 7; UN Doc E/794 (n 76) 20.

3.3. The Developments in the Law on Incitement: The ILC Draft Code and the Rome Statute for the International Criminal Court

In the years between the adoption of the Convention and the creation of the *ad hoc* Tribunals, 'efforts to apply the Convention were so rare that it seemed fated to be an "historical curiosity"'.[125] As shown in Chapter Two, the lack of interest in applying and refining international crimes can partially be attributed to a lack of political will, the Cold War, and a lack of enforcement mechanism for the Convention.[126] It is arguably contradictory to assert that genocide is 'of international concern' while 'relying on a system of territorial jurisdiction'.[127] Genocide requires the complicity 'or at least the toleration' of governments; thus, in providing for its punishment solely through domestic jurisdictions, these governments would be able to avoid liability.[128] This is also true of incitement to commit genocide. Where the media is sponsored and effectively controlled by the state, 'it is implausible' that national courts would prosecute inciters under the Genocide Convention.[129] While the drafters foresaw the creation of such a court under Article VI of the Convention, permanent enforcement was not realised until the ICC was created by the 60 ratifications required for the Rome Statute to enter into force in July 2002.[130]

The discussion of the Convention showed that the prohibition of incitement was unpopular with a number of states, notably the US. As a result of the concerns expressed in relation to freedom of speech, incitement was punishable only where the speaker directly and publicly encouraged genocide. However, only limited explanations were given for these terms. Consequently, the Draft Code and the Rome Statute both presented an opportunity for the international community to refine the provisions

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[125] Michelle Jarvis and Alan Tieger, 'Applying the Genocide Convention at the ICTY: The Influence of Paradigms Past' (2016) 14 Journal of International Criminal Justice 857, 858.

[126] Payam Akhavan, 'Preventing Genocide: Measuring Success by What does Not Happen' (2011) 22 Criminal Law Forum 1, 2 – 3; William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Trials* (OUP 2012) 14.

[127] Matthew Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later' (1998) 15 Arizona Journal of International and Comparative Law 415, 505. See also UN Doc A/C.6/SR.63 (n 52) 8; George Finch, 'The Genocide Convention' (1949) 43 The American Journal of International Law 732, 733.

[128] UN Doc A/C.6/SR.63 (n 52) 8. See also, ECOSOC, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr B Whitaker' (2 July 1985) UN Doc E/CN.4/Sub.2/1985/6, 75 – 77.

[129] Gopalani (n 75) 97 - 98.

[130] Genocide Convention (n 1) art VI; Rome Statute (n 3).

contained in the Convention. However, neither document has clarified incitement. Consequently, even though there was a need for further explanation, the provision in the Rome Statute retains the essential elements of the Convention offence with no clarification. Thus, it prohibits speech only where it directly and publicly incites genocide. This is significant. This thesis aims to propose definitions for the constitutive and evidentiary elements of incitement by drawing upon the ICTR's analysis of the Convention offence. Owing to the limited changes to the offence under the Rome Statute, these definitions are relevant to any future analysis.

3.3.1. The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind (1996)

The ILC's Draft Code marked the 'second major attempt by the United Nations […] to introduce a comprehensive and universal normative framework for international criminal regulation'.[131] This non-binding document aimed to provide direction for the implementation of international crimes, particularly through the explanatory commentaries attached to the Code. Had this been successful, it would have been an invaluable tool for the *ad hoc* Tribunals. However, the culmination of nearly fifty years work was poorly received. Allain and Jones suggested that 'the ILC may well have caused the totality of its work in this area to be for nought' ensuring that a Code 'will never come into being'.[132] It was concluded that if it were to ever be applied as an instrument of international law, it would require substantial work to resolve its 'deficiencies'.[133]

The reception in academic commentary echoes the minimal enthusiasm it received from the ILC upon its conclusion. As the oldest topic on its agenda, it was a 'heavy burden' on the Commission, and, thus, its completion was marked with little more than 'a polite but half-hearted applause'.[134] Even though it was abandoned, it

[131] Timothy McCormack and Gerry Simpson, 'The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions' (1994) 5 Criminal Law Forum 1, 2.

[132] Jean Allain and John Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind' (1997) 8 EJIL 100, 117.

[133] McCormack and Simpson (n 131) 3.

[134] Martin Ortega, 'The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind' (1997) 1 Max Planck Yearbook of United Nations Law Online 283, 283.

retains a legacy. It was cited favourably in a number of ICTR judgments and formed a substantial part of the preparatory work for the Rome Statute.[135] Consequently, despite the criticisms, it retains a place in the discussion of the development of the international prohibition of incitement.

While the regulation of inflammatory speech was inspired by 'the tragic events of Rwanda' this did not manifest itself in improvements to the legal offence.[136] Rather, the incitement provision contained in the Draft Code has been described as 'defective'.[137] Despite citing Article III(c) of the Convention, the Draft Code deviates from the spirit of the original provision. Under Article 2(3)(f), the Draft Code assigns responsibility to a person 'who directly and publicly incites another individual to commit […] a crime which in fact occurs'.[138] The provision echoes the Convention by retaining direct and public as qualifying elements. However, the addition of the phrase 'a crime which in fact occurs' constituted a significant change and betrays a lack of understanding about incitement.

As the Draft Code prohibited incitement to any 'crime against the peace and security of mankind', not just genocide, it is possible to suggest that the causal element was added to prevent inchoate incitement being applied to the other crimes.[139] However, by asserting that incitement is only an offence when it is successful in its aim, the ILC made a 'serious' error, as incitement is traditionally inchoate.[140] Consequently, Wilson argues that the Code ruptures with domestic criminal law and precedent set by Nuremberg.[141] Moreover, Schabas suggests that this rendered the

[135] *Akayesu* (Judgment) (n 16) [556]; *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T, T Ch III (2 December 2009) [387]; *Nahimana* (Appeals Judgment) (n 46) [1011]; *Prosecutor v Ruggiu* (Judgment and Sentence) ICTR-97-32-I, T Ch 1 (1 June 2000) [17]; *Prosecutor v Kayishema et al* (Judgment) ICTR-95-1-T, T Ch II (21 May 1999) [87], [95], [229]; Philippe Kirsch and John Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 The American Journal of International Law 1, 3.

[136] Draft Code (n 3) art 2(3)(f), [16].

[137] Richard A Wilson, 'Inciting Genocide with Words' (2015) 36 Michigan Journal of International Law 277, 286.

[138] Draft Code (n 3) art 2(3)(f).

[139] Schabas, *Genocide* (n 68) 109.

[140] Schabas, 'Hate Speech' (n 3) 155. See also *Akayesu* (Judgment) (n 16) [561].

[141] Wilson, *Incitement on Trial* (n 26) 32.

provision 'totally redundant' owing to the inclusion of similar offences within the ambit of Article 2.[142]

The remainder of the wording of the provision is similarly problematic. By referring to the inciter encouraging 'another individual', incitement is conflated with instigation. In conflict with the Convention offence, this indicates that private incitement could also be prohibited. In contrast, the commentaries on the Draft Code explicitly note that individual criminal responsibility applies only to public instances of incitement.[143] Echoing the Convention, the commentaries conclude that private incitement is analogous to instigation, which is a form of complicity, thereby highlighting the importance of the public element of the offence.[144] This part of the analysis was favourably considered in *Akayesu* and the provision's choice of wording does not seem to have manifested itself in confusion at the ICTR.[145]

Ultimately, the Draft Code did not enhance the definition of the offence, instead it increased the potential for confusion in application. However, the ICTR incitement cases were selective in their use of the Draft Code. While the commentary's analysis of public incitement was cited favourably in a number of decisions, its problematic aspects were largely ignored; there was no mention of the phrasing 'incites another individual' and it was entirely left out of discussion on inchoate incitement.[146] Thus, it is possible to suggest that the Draft Code had a limited overall impact upon cases. However, it remains important as it forms part of the narrative of the development of the offence by contributing to the preparatory work for the Rome Statute.

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[142] Schabas, *Genocide* (n 68) 324.

[143] Draft Code (n 3) art 2 (3)(f), [16].

[144] Draft Code (n 3) art 2 (3)(f), [16]. See also *Akayesu* (Judgment) (n 16) [534], [556].

[145] *Akayesu* (Judgment) (n 16) [556]. See also *Prosecutor v Kalimanzira* (Appeals Judgment) ICTR-05-88-A, A Ch (20 October 2010) [162].

[146] *Akayesu* (Judgment) (n 16) [561] – [562], [556]; *Bikindi* (Judgment) (n 135) [387]; *Nahimana* (Appeals Judgment) (n 46) [1011]; *Ruggiu* (Judgment) (n 135) [17]; *Kayishema* (Judgment) (n 135) [87], [95], [229].

3.3.2. The Rome Statute and the Elements of Crimes

The ICC has jurisdiction over Genocide, Crimes Against Humanity, War Crimes and the Crime of Aggression.[147] In its prohibition of Genocide, the Rome Statute reflected the spirit of the Convention. Article 6 of the Statute transcribes Article II of the Convention almost verbatim.[148] It is in the equivalent of Article III, punishable acts of genocide, that the Statute differs. Contained in Part III of the Rome Statute ('general principles of criminal law'), Article 25 outlines the ways in which a person may be criminally responsible for each of the crimes within the jurisdiction of the ICC.[149] This is a general provision containing a combination of forms of liability and traditionally inchoate offences, encompassing the commission of a crime, whether individually or as part of a joint criminal enterprise, and contributory offences, such as ordering or soliciting a crime, and attempts.[150] Grouping these offences together removes the need to repeat individual criminal responsibility for each of the main crimes under the Statute and reflects the fact that large-scale atrocities are planned, controlled, and organised by people who may not participate in the physical crime.[151] However, while incitement is included in Article 25, it is 'exceptional' as it is only prohibited for genocide.[152]

On the face of it, the incitement provision contained within Article 25(3)(e) of the Rome Statute is closer to the Convention offence than it is to Article 2(3)(f) of the Draft Code. However, several of the provisions contained within the Statute did not result from negotiations conducted during the Rome conference; instead that work was done by the preparatory committee in New York, or by the ILC for the Draft Code.[153] The work was done quickly, 'without voting and by consensus', thus, the drafting committee was unable to 'draw attention to inconsistencies and ambiguities in the text'

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[147] Jurisdiction over the Crime of Aggression was activated in December 2017; Rome Statute (n 3) art 5, art 11; ICC, 'Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression' (11 June 2010) Resolution RC/Res.6.

[148] Genocide Convention (n 1) art II; Rome Statute (n 3) art 6.

[149] Rome Statute (n 3) art 25.

[150] Rome Statute (n 3) art 25.

[151] William Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge University Press 2007) 211. See also *Prosecutor v Gacumbitsi* (Appeals Judgment Separate Opinion of Judge Schomburg) ICTR-01-64-A, A Ch (7 July 2006) [20] – [21].

[152] Petrosian (n 4) 44.

[153] Kirsch and Holmes (n 135) 3.

or points of disagreement that had been raised by the preparatory committee.[154] Therefore, rather than refining the offences, the Statute transposed them from other sources, ignoring any need for clarification.

Owing to the informality of the negotiations, there are only limited written records of the conference and a 'marked absence' of conventional *Travaux Préparatoires,* thereby reducing the volume of interpretive material.[155] Under Article 21 of the Rome Statute, the judges at the ICC may only look to other applicable treaties when the Statute and Elements of Crimes do not provide sufficient guidance.[156] However, as incitement is prohibited in Article 25, it is not defined in the Elements of Crimes, which defines the specific *actus reus* and *mens rea* for Articles 6, 7 and 8 of the Statute.[157]

The primary crimes within the jurisdiction of the ICC are contained within Articles 6, 7 and 8. Conversely, the purpose of Part III is to define the general principles of international criminal law. Thus, Part III would not seem to be an obvious choice for inclusion in the Elements. However, the absence of Article 25 poses a number of problems. Firstly, this suggests that by including incitement in Article 25 it reduces its significance.[158] Secondly, Part III has been accused of being the Statute's 'most technically difficult part', as it contains offences which are subject to varying interpretations in different jurisdictions.[159] Therefore, a significant opportunity for

[154] Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2015) 149. See also Kirsch and Holmes (n 135) 3.

[155] Robert Cryer and others (n 154) 149. See also UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' (15 June – 17 July 1998) UN Doc A/CONF.183/13 (Vol II); UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Reports and Other Documents' (15 June – 17 July 1998) UN Doc A/CONF.183/13 (Vol III).

[156] Rome Statute (n 3) art 21. See also Robert Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' (2009) 12 New Criminal Law Review: An International and Interdisciplinary Journal 390, 393.

[157] Footnote 58 on page 34 notes that Article 25 is not addressed in the Elements; Elements of Crimes (entered into force 9 September 2002) ICC-ASP/1/3 (Part II-B) 34.

[158] Thomas Davies, 'How the Rome Statute Weakens the International Prohibition on Incitement to Genocide' (2009) 22 Harvard Human Rights Journal 245.

[159] Mahmoud Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 Cornell International Law Journal 443, 463. See also William Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)' (1998) 6 European Journal of Crime, Criminal Law and Criminal Justice 84, 97.

clarification was lost, and the absence of Article 25 from the Elements of Crimes seems like a glaring oversight.

Beyond the outline of the general mental element for all crimes in Article 30 of the Rome Statute, which provides that 'conduct' must be intentional, and the note in the General Introduction of the Elements of Crimes that the Elements apply to all those whose criminal responsibility may fall under Article 25, there is no elaboration of any of the terminology.[160] Thus, while the ICC operates within its own legal system, with the Rome Statute as its primary source of law, the Convention and ICTR cases remain significant as they contain the interpretive material for the incitement provision.[161]

3.3.2.1. Article 25(3)(e): Incitement to Genocide as a Mode of Participation?

Article 25(3)(e) imposes individual criminal responsibility upon an actor who 'in respect of the crime of genocide, directly and publicly incites others to commit genocide'.[162] However, it is redundant to state that someone may only incite others to commit genocide 'in respect of the crime of genocide'. Schabas argues that 'the awkward text' was born out of concerns that 'inchoate incitement might be extended by interpretation to other crimes within the subject matter jurisdiction of the court, something that was not the drafters' intent'.[163] During the negotiations there had been an unsuccessful attempt to extend incitement to other crimes under the jurisdiction of the ICC.[164] However, as it had during the drafting of the Convention, the US raised concerns about an international criminal court's potentially broad interpretation of incitement.[165] While several delegations 'adopted inflexible positions', the US 'exhibited greater rigidity than many had expected'.[166] In an attempt to secure US

[160] Rome Statute (n 3) art 30; Elements of Crimes (n 157) General Introduction [8].

[161] *Prosecutor v Germain Katanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/07, T Ch II (7 March 2014) [45], [105], [767], [789], [800], [801]. See also Robert Cryer and others (n 154) 150.

[162] Rome Statute (n 3) art 25(3)(e).

[163] Schabas, *Genocide* (n 68) 109.

[164] Per Saland, 'International Criminal Law Principles' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) 200; Schabas, 'Hate Speech' (n 3) 156.

[165] Gopalani (n 75) 90.

[166] Bassiouni (n 159) 457. See also Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 Criminal Law Forum 1, 1.

support, incitement was prohibited only in relation to genocide, deviating from the Draft Code's approach.

Some delegations felt the Rome Statute should follow the Statutes for the ICTR and ICTY, arguing that incitement 'should not be included in the General Part of the *statute* but only in the specific provision on the crime of genocide […] in order to make it clear that incitement is not recognised for other crimes'.[167] However, this argument was rejected.[168] It is possible to conceive that had incitement been prohibited under Article 6, as an act of genocide, this would have avoided some of the issues raised by the Rome Statute. Firstly, there would be greater clarity in the wording as it would be clear that incitement was prohibited only in relation to genocide without any need for extra emphasis. Secondly, it would have been included in the Elements of Crimes, and, therefore, each of the terms of the provision would have been defined. Finally, it has been suggested that the inclusion of incitement under Article 25 marks a shift from the theoretical conception of incitement as an independent crime, to incitement as a form of participation, thereby rendering it less effective.[169]

As it is traditionally an inchoate offence, incitement may be distinguished from other forms of participation listed under Article 25 and, therefore, it has been argued that its placement within the scope of this Article seems 'odd'.[170] It is not a way in which a person can be guilty of genocide; it is a crime in its own right. Thus, Davies argues that the implication of the inclusion of incitement in Article 25 is that incitement is no longer to be treated as inchoate.[171] He argues that rather than ensuring the punishment of indirect perpetrators, Article 25 treats inciters as secondary actors, and, therefore, less responsible for the crime of genocide than the person who may be incited by their words.[172] However, there is little possibility that the Rome Statute necessitates a causal link between incitement and the substantive crime of genocide. The drafting

[167] Ambos (n 166) 13. See also UN Doc S/RES/955 (n 3) art 6; UN Doc S/RES/827 (n 3) art 7.

[168] Schabas, 'General Principles' (n 159) 97.

[169] Davies (n 158) 246; Petrosian (n 4) 43.

[170] Wilson, *Incitement on Trial* (n 26) 33. See also Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 Journal of International Criminal Justice 953; Gideon Boas, James L Bischoff, and Natalie L Reid, *International Criminal Law Practitioner Library: Volume I Forms of Responsibility in International Criminal Law* (Cambridge University Press 2008) 280 – 282.

[171] Davies (n 158) 245.

[172] ibid 245.

history makes it clear that Article 25(3)(e) 'is intended to be treated in the same manner as it is in the *ad hoc* Tribunals'.[173] Given the precedent from the ICTR, incitement is 'unequivocally' inchoate.[174] As such, some commentators group incitement and attempts together, as anomalous inchoate provisions within the scope of Article 25.[175]

This is reinforced by considering that even though the Draft Code formed part of the preparatory work for the Rome Statute, the Draft Code's assertion that incitement is a crime only when the substantive offence 'in fact' occurred has been left out of Article 25(3)(e).[176] This suggests that there is no requirement for causation in the Rome Statute offence of incitement. This is also shown through the wording of Article 25(3)(b), which punishes a person who 'orders, solicits or induces the commission of such a crime which in fact occurs or is attempted'.[177] In some jurisdictions incitement and solicitation are synonymous.[178] However, they are distinct under the Rome Statute, as solicitation is applicable to all crimes under the jurisdiction of the ICC, whereas incitement is punishable only in connection to genocide. Further, the Rome Statute offence of solicitation requires the substantive offence to be attempted, thereby suggesting that in the absence of such a statement for incitement, it remains inchoate.

The discussion of the Rome Statute illustrates that there is limited likelihood of any future change in approach to the incitement provision. This affirms that future courts will consider the offence in light of ICTR jurisprudence, thereby necessitating clear definitions that outline both the constitutive and evidentiary elements of the offence. While some small changes have been made by including incitement in the general part of the Statute, it has been shown that this is unlikely to affect future application.

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[173] Boas, Bischoff and Reid, (n 170) 331.

[174] Petrosian (n 4) 44.

[175] Albin Eser, 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary (Volume One)* (OUP 2002) 803 – 818; Robert Cryer, 'General Principles of Liability' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004) 251 – 254; Boas, Bischoff and Reid, (n 170) 332 – 333.

[176] Draft Code (n 3) art 2(3)(f).

[177] Rome Statute (n 3) art 25(3)(b).

[178] Ambos (n 166) 10.

3.4. Conclusion

This chapter set out to understand the origins and developments of the incitement provision. This aimed to give context to the subsequent analysis of ICTR cases and establish the foundations of the proposed definitions. As part of this discussion, this chapter showed that despite repeated affirmations that speech contributes to genocide, it has proven complex to define precisely when this should be punished. It has been suggested that 'good definitions are in no field more essential than in criminal law'.[179] Yet, owing to numerous revisions, and the concessions made to safeguard freedom of expression during the drafting of the Convention, it has been argued that the ICTR has been 'finding defendants guilty of an ill-defined offence'.[180] This is particularly problematic in light of the principle of *nullum crimen sine lege,* which outlines that criminal rules must be as detailed as possible.[181] This affirms the need for clear definitions of both the constitutive and evidentiary elements of incitement.

This chapter considered the intended meaning of the constitutive elements of direct and public incitement, assessed whether incitement is inchoate in international criminal law, and demonstrated the continued relevance of the Convention offence of incitement. Furthermore, the Convention considered that, to be distinguished from legitimate speech, incitement must encourage genocide. This was reinforced by the IMT. While the Judgment emphasised that Streicher and Fritzsche had different states of knowledge regarding the on-going Holocaust, this was not the only distinction between the accused. The primary difference was that even though his speech was racist, Fritzsche did not call for the extermination of the Jewish People, conversely, Streicher repeatedly urged their destruction.

The discussion suggested that the drafters of the Convention chose to include the term direct in order to satisfy the concerns of speech protective societies and to define the idea that, to be punished in international law, speech must encourage genocide and be clearly understood as such by the target audience. This affirms that it is consistent with the Convention to interpret direct to mean that the target audience

[179] Kunz (n 12) 742.
[180] Benesch (n 29) 487.
[181] Cassese, *International Criminal Law* (n 63) 37, 41.

clearly understood the speech as a call for genocide, which forms part of the definition of direct. This finding increases the importance of establishing audience understanding, as will be shown in the next chapter. While public incitement is generally conceived as being the most straightforward component of the offence, Chapter Five will show that this did not manifest in straightforward application at the ICTR.[182] Consequently, it was important to look to the *Travaux* to consider how it was intended to be defined. While the drafters intended to exclude private conversations, there is limited further guidance on its interpretation. The *Travaux* discussion of incitement and the rejected prohibition of general propaganda indicate that both written and oral statements may be public, and that these should be addressed to a whole or a fraction of public opinion. However, this does not clearly delineate this element.

Despite the ILC Draft Code displaying a lack of understanding on this point, the discussion showed that the other legal instruments are clear that incitement is an inchoate offence. This was affirmed by the ICTR, and, therefore, even though incitement is prohibited in Article 25 of the Rome Statute, it remains inchoate. This is illustrated by the difference in wording between Article 25(3)(e) (incitement) and Article 25(3)(b) (ordering and soliciting an offence). Therefore, incitement is to be treated as inchoate. Finally, this discussion demonstrated that owing to the limited changes to the essential components of the incitement provision, future incitement cases will likely rely on ICTR jurisprudence.

This chapter emphasised the complexity of drafting offences for international criminal law instruments. It has been shown that the challenge of negotiation was magnified owing to the number of languages and differences in legal tradition, thereby impacting on the creation of the offence. This was particularly shown in the discussion of the proposed prohibition of general propaganda. The Venezuelan delegate emphasised that the lack of consensus regarding whether propaganda fell within the scope of incitement could be attributed to these differences.[183] As will be shown in the next chapter, the challenges of cross-cultural communication were magnified at the ICTR, becoming particularly significant in incitement trials, as the prosecution of this offence relies entirely upon the ability of the judges to understand the speech in

[182] Robert Cryer and others (n 154) 378; Timmerman and Schabas (n 43) 154.
[183] UN Doc E/AC.25/SR.16 (n 85) 5. See also Robinson (n 58) 21.

question. Consequently, the next chapter aims to address the language issues that pervaded the Tribunal and emphasise the importance of establishing the meaning of speech within its own context.

4. Cross-Cultural Communication: The Challenge of International Atrocity Speech

4.1. Introduction

Language, whether written or spoken, is the chief means by which people communicate.[1] However, this encompasses more than language as a set of words. In different societies communication takes varying forms, and the principles that underpin it are not universal; therefore, simply having technical knowledge of the words or grammatical structure 'does not ensure successful communication'.[2] The target audience have the benefit of cultural and temporal context; they are able to recognise nuances in speech, such as tone or pitch, or information conveyed through facial expressions and body language.[3] Therefore, they will find meaning in the words that may be missed by outsiders. When utterances are relayed these extra-linguistic cues are absent and, therefore, without knowledge of the culture, and linguistic and social behaviours, understanding is impossible.[4]

The international provision created by the Convention contains the term direct. In light of the rules on treaty interpretation identified in Chapter Three, this should first be considered according to its ordinary meaning. This would mean that direct would be understood as 'straightforward', 'without ambiguity' and 'to the point'.[5] This would automatically exclude all but the most explicit speech. However, as shown in Chapter Two, genocidal speech is rarely free from ambiguity. If a narrow interpretation is taken, many of these examples would not fall within the parameters of direct incitement, even if the target audience understood it as encouraging genocide. Moreover, this would fail to account for cultural differences, as it seems to assume that all communication works in the same way, yet the perception of what constitutes direct speech will vary from language to language and culture to culture. This chapter considers how people

[1] Shoshana Blum-Kulka, 'Discourse Pragmatics' in Teun A van Dijk (ed), *Discourse as Social Interaction* (Sage 2007) 38.

[2] ibid 38.

[3] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) 50, 53.

[4] Penelope Brown and Stephen C Levinson, *Politeness: Some Universals in Language Usage* (Cambridge University Press 1987) 91.

[5] 'Direct', *Oxford Dictionary of English* (2nd edn revised, OUP 2005).

communicate and acknowledges cultural differences in speech in order to demonstrate that direct cannot be read simply according to its ordinary meaning, as this is too narrow an interpretation. This aims to show that, by adopting a definition of direct that does not exclude implicit speech, the ICTR has defined direct in a way that fits the context of incitement, and therefore does not extend the scope of the offence.

Chapter Three showed that differences in legal culture underpinned the drafting of the incitement provision. Owing to varying approaches to prohibiting speech the delegates struggled to reach a consensus on the definition of incitement, leading to numerous revisions.[6] However, the challenge of reconciling cultural differences is not unique to the drafting of legal instruments. This proved significant for the ICTR, impacting every level of trial.[7] Consequently, it was inevitable that this would be magnified for incitement, the prosecution of which is entirely reliant on the judges' ability to understand speech. Not simply in a technical sense, the judges have to understand the local impact of the speech before it is possible to determine whether speech constitutes incitement. Therefore, part of the central aim of this thesis is to emphasise the important, but complex, task of understanding the cultural and linguistic context of speech, asserting that this is a central element of incitement trials. This is often overlooked by lawyers and legal scholars and, therefore, this contributes to the originality of this thesis.

This discussion is conducted in two parts. The first section highlights the general impact of cross-cultural communication at the ICTR, using this to illustrate the magnitude of the task of understanding in incitement trials. This will show that people do not always say what they mean in explicit terms, and in different cultures people use language in different ways. This affirms the finding in the previous chapter that in order to uphold the intent of the drafters of the Convention, direct ought to be read to mean 'clearly understood by the target audience as inciting genocide'. The second part of the chapter focuses on understanding the Rwandan context with specific reference to the background to the genocide and the challenges posed by Kinyarwanda, particularly the

[6] ECOSOC 'Ad Hoc Committee on Genocide Summary Record of the Sixteenth Meeting, Lake Success, New York, Thursday, 22 April 1948, at 2:15 pm' (29 April 1948) UN Doc E/AC.25/SR.16, 9.

[7] Leigh Swigart, 'African Languages in International Criminal Justice: The International Criminal Tribunal for Rwanda and Beyond' in Charles Chernor Jalloh and Alhaji BM Marong (eds), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa: Essays in Honour of Prosecutor Hassan Bubacar Jallow* (Brill Nijhoff 2015) 7.

prevalent use of inherently indirect language devices. This is relevant to the overall aims of this thesis as the analysis of ICTR incitement cases and the definitions of evidentiary and constitutive elements of incitement will rely on an understanding of Rwandan communication, particularly Kinyarwanda key terms. Therefore, this chapter will act as a point of reference. Moreover, this discussion is significant because it emphasises the importance of context. Words take on a new dimension when spoken in the context of genocide, as the atmosphere of persecution and violence against a target group brings increased threat to the use of pejorative terms. This will link to the discussion in Chapter Seven, which constitutes one of the elements of originality of this thesis.

4.2. Establishing Understanding in Multicultural Trials

4.2.1. The Cultural Disconnect Between International Personnel and Rwanda

International Courts and Tribunals seemingly operate in a sphere beyond the national. Their rules of procedure and evidence 'are a custom-made hybrid', apparently disconnected from domestic communities and laws.[8] As their jurisdiction stretches across numerous countries, cultures, and languages, they are required to navigate a complex range of cultural differences that cannot be ignored, 'not only in terms of language, skills and tools, but also with respect to socio-cultural norms and convictions about justice'.[9] However, they are 'inherently given shape and meaning in specific local contexts', necessitating an appreciation and understanding of cultural differences.[10] Failure to comprehend these differences, and the impact they may have on trial proceedings, would be detrimental.[11] Misunderstandings, failures in translation,

[8] Kingsley Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunals for Rwanda' (2002) 26 Fletcher Forum of World Affairs 21, 23.

[9] Jessica Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings' (2006) 4 Journal of International Criminal Justice 745, 763 – 764. See also Daniel Terris, Cesare P R Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (UPNE 2007) 62 – 71, 71 – 79.

[10] Tobias Kelly and Marie-Bénédicte Dembour, 'Introduction: The Social Lives of International Justice' in Marie-Bénédicte Dembour and Tobias Kelly (eds), *Paths to International Justice: Social and Legal Perspectives* (Cambridge University Press 2007) 6.

[11] Catherine S Namakula, *Language and the Right to Fair Hearing in International Criminal Trials* (Springer 2014) 5. See also *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) [130].

'cultural distance', and perception of the laws and evidence all affect courtroom communication, thereby challenging the 'credibility' of the trial.[12]

The challenges of multi-cultural trials were particularly evident in the early stages of the *ad hoc* Tribunals. As the lawyers, judges and clerks were drawn from varying regions of the globe, some were unfamiliar with the common law tradition of cross examination being employed in the courtroom. Consequently, 'their questions, while wide ranging were also meandering and imprecise'.[13] Des Forges and Longman cite an example in which a defence lawyer clumsily asked 'inappropriate and demeaning' questions of a rape victim, resulting in laughter from all three judges.[14] Unsurprisingly, the laughter was interpreted as 'insulting and humiliating to the witness' even though it had been in reaction to the style of questioning.[15]

If a witness is not accustomed to a particular mode of questioning it can be 'perceived as humiliating and outright offensive', even where it is competent.[16] This is magnified where there is a perceived insensitivity to the experiences of the witnesses, many of whom have experienced significant trauma.[17] However, the collision of legal traditions posed a 'manageable' problem that could be overcome by training and experience.[18] Conversely, cultural differences between legal personnel and Rwandans continued to manifest themselves in problems for the ICTR.

Cross-cultural understanding is often hampered by 'ethnocentric bias', under which our understanding of other cultures is 'distorted' by viewing them 'through the

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[12] Namakula (n 11) 2.

[13] Doris Buss, 'Expert Witnesses and International War Crimes Trials: Making Sense of Large-Scale Violence in Rwanda' in Dubravka Zarkov and Marlies Glasius (eds), *Narratives of Justice in and out of the Courtroom: Former Yugoslavia and Beyond* (Springer 2014) 40.

[14] Alison des Forges and Timothy Longman, 'Legal Responses to Genocide in Rwanda' in Eric Stover and Harvey Weinstein (eds), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004) 54.

[15] ibid 54.

[16] Almqvist (n 9) 750.

[17] Robert Cryer, 'A Message from Elsewhere: Witnesses before International Criminal Tribunals' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Training* (Hart Publishing 2007) 395; Christoph Hafner, 'Legal Contexts' in Jane Jackson (ed), *The Routledge Handbook of Language and Intercultural Communication* (Routledge 2012) 523.

[18] Mathias Ruzindana, 'The Challenges of Understanding Kinyarwanda Key Terms Used to Instigate the 1994 Genocide in Rwanda' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers to War Crimes* (Routledge 2012) 147.

prism of our own culture-specific practices and concepts'.[19] Wierzbicka asserts that a considerable volume of studies in speech acts suffer from this bias, noting that 'authors based their observations on English alone', taking it for granted that 'what seems to hold for the speakers of English must hold for "people generally"'.[20] However, language principles are mostly not universal, so it is impractical to apply assumptions from one language to another. This is particularly relevant for considering how to define direct incitement, as what constitutes direct speech will vary between cultures.

Each language has its own politeness conventions, which dictate 'what is socially acceptable in a given culture'.[21] For example, Brown and Levinson observe that in some cultures it would be insulting or impolite to use a person's name.[22] Wilson notes that in Rwandan society, asking direct questions 'is conventionally considered rude and somewhat childish'.[23] Albert shows that in Burundi, a culturally similar country to Rwanda, it is convention for a second speaker to explicitly state their agreement with the first speaker, even where they will proceed to express 'diametrically opposed' views, thereby indicating that speakers of Kirundi, the language of Burundi, express themselves in an inherently 'indirect' way.[24] Furthermore, Fillmore gives the example of conversational pauses, emphasising that the length of acceptable pause varies between cultures, noting that native speakers of English are not inclined to leave long pauses, repeating questions in the assumption that the listener has a 'problem of hearing or attention'.[25] Conversely, Rwandans value silence and place emphasis on

[19] Cliff Goddard and Anna Wierzbicka, 'Discourse and Culture' in Teun A van Dijk (ed), *Discourse as Social Interaction* (Sage 2007) 231. See also Geertz (n 2); Michelle Z Rosaldo, 'The Things We Do with Words: Ilongot Speech Acts and Speech Act Theory in Philosophy' in Donal Carbaugh (ed), *Cultural Communication and Intercultural Contact* (Psychology Press 2009).

[20] Anna Wierzbicka, 'Different Cultures, Different Languages, Different Speech Acts' (1985) 9 Journal of Pragmatics 145, 145.

[21] ibid 154. See also Brown and Levinson (n 4) 91 – 92, 142, 174 - 175.

[22] Brown and Levinson (n 4) 204.

[23] Richard A Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press 2017) 191. See also Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2013) 79.

[24] Ethel Albert, 'Culture Patterning of Speech Behaviour in Burundi' in John Gumperz and Dell Hymes (eds), *Directions in Sociolinguistics: The Ethnography of Communication* (Holt, Rinehart and Winston Inc 1972) 81 - 82. See also Hafner (n 17) 527.

[25] Charles Fillmore, *Santa Cruz Lectures on Deixis 1971* (Indiana University Linguistics Club 1975) 77 -78.

using words carefully, taking time to contemplate a response.[26] While this forms part of Rwandan culture and communication, it may cause them to be perceived as reticent, or less than direct, by someone from a different cultural tradition.

To a certain degree, ethnocentric bias was evident at the ICTR, where the credibility of witnesses was inevitably judged according to the cultural standards held by the lawyers. For example, Rwandan witnesses were inexperienced 'with maps, film and graphic representations of localities', thus, they demonstrated a difficulty to be 'specific about dates, times, distances and locations'.[27] This did not mean that the witnesses were being deliberately difficult in answering questions, rather, they did not see the point of the question they were being asked.[28] Ruzindana notes that, 'as a communication tool, language is need tailored. It seldom extends beyond its users' needs', thus, an illiterate farmer would have no need to know the size of the field or the length of the time spent ploughing it.[29] Nevertheless, the lawyers at the Tribunal insisted on precision, repeatedly asking questions, causing the witnesses to become withdrawn and uncomfortable with the process.[30] This demonstrates that each culture uses language in different ways, and, therefore, what is direct for a Rwandan may differ from what is direct for a speaker of English (for example). Consequently, taking direct in its ordinary meaning would be inappropriate in the context of international speech offences.

In *Akayesu* the Trial Chamber acknowledged the 'particular feature' of Rwandan culture 'that people are not always direct in answering questions, especially if the question is delicate'.[31] For example, when witnesses were asked the ordinary meaning of *inyenzi* they became reticent and were 'reluctant or unwilling' to say that the word meant cockroach, even though it became clear that they would know the

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[26] *Prosecutor v Nahimana et al* (The Kinyarwanda Language. Its Use and Impact in the Various Media During the Period 1990 – 1994: A Sociolinguistic Study, Balinda Rwigamba, Laurent Nkusi, Mathias Ruzindana) ICTR-99-52-T, T Ch I (23 March 2002) 13 – 18, 38. See also Albert (n 24) 82.

[27] *Akayesu* (Judgment) (n 11) [155] – [156]. See also *Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T, T Ch I (6 December 1999) [23].

[28] Ruzindana (n 18) 147 – 148. See also Hafner (n 17).

[29] Ruzindana (n 18) 148.

[30] ibid 149.

[31] *Akayesu* (Judgment) (n 11) [156].

meaning of the word.[32] Thus, it became evident that in order to be understood the answer might have to be 'decoded'.[33] This might appear evasive, and may 'harm credibility in certain cultures', however, this is just a 'cultural fact of life in Rwanda'.[34] As a consequence, in *Musema*, witness testimony had to be weighed according to its perceived evasiveness, noting that this may be the result of factors other than a lack of credibility.[35]

While the ICTR recognised that this was a result of differing socio-cultural norms, this did not negate the impact of the varying approaches to questioning, resulting in a degree of frustration and lack of trust between the witnesses, accused, and the international personnel.[36] This was shown through the manifestation of Rwanda's oral tradition.[37] Oral traditions rely on memory for disseminating information, sometimes referred to as a 'socialised memory', whereby information is passed from person to person by recounting and sharing information.[38] The consequence is that in recalling information, Rwandans will recount something they heard from another as though they were there, sometimes without distinguishing between what they heard from someone else and what they saw for themselves.[39] This is not in an attempt to mislead or be evasive, instead it stems from the nature of communication in an oral tradition. The danger is the 'hazard of distortion of the information each time it is passed on to a new listener'.[40] This might encounter difficulties in a common law tradition, owing to the approach to hearsay evidence.[41] However, for Rwandans, this was a perfectly acceptable way to recount and deliver information, and when asked to clarify, they were able to articulate a distinction 'between what they had heard and what they had seen'.[42]

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[32] ibid [156].

[33] ibid [156].

[34] Cryer (n 17) 391.

[35] *Prosecutor v Musema* (Judgment and Sentence) ICTR-96-13, T Ch I (27 January 2000) [19], [664], [668], [697] – [698].

[36] *Akayesu* (Judgment) (n 11) [156]; Almqvist (n 9) 758.

[37] Albert (n 24) 94.

[38] *Nahimana* (The Kinyarwanda Language) (n 26) 7. See also David C Rubin, *Memory in Oral Traditions: The Cognitive Psychology of Epic, Ballads and Counting-out Rhymes* (OUP 1995) 3, 10.

[39] *Akayesu* (Judgment) (n 11) [155].

[40] ibid [155].

[41] Criminal Justice Act 2003, s 114.

[42] *Akayesu* (Judgment) (n 11) [155].

Therefore, while the Tribunal preferred direct evidence, it considered that it had the 'discretion to cautiously consider and rely on hearsay evidence',[43] particularly where it could be supported by other 'credible or reliable' sources.[44]

4.2.2. Navigating the Cultural Divide Through Interpretation

In an attempt to 'bridge the cultural divide', the ICTR relied on expert witnesses and interpreters to guide them in linguistic understanding and through the complex background to the Rwandan genocide.[45] While Cryer argues that this demonstrated 'sensitivity to the challenges of intercultural appreciation of evidence', the approach has proven controversial as witnesses cannot always be relied upon to be neutral.[46] However, without their assistance the task of the ICTR would have been virtually impossible. As indicated above, international courts and tribunals are multilingual, and unlike in national courts, the lawyers and judges often have different cultural, linguistic and legal backgrounds from each other as well as the accused and eyewitnesses, thus all participants 'rely equally on interpretation'.[47] This was evident at the ICTR. The Tribunal's personnel came from over 90 countries with a variety of legal backgrounds.[48] Many were entirely unfamiliar with Rwandan history and culture, and none of the judges and few of the lawyers spoke Kinyarwanda. This demonstrates that, without assistance, the legal personnel would not have been equipped to identify whether a Rwandan audience would consider speech to be direct.

As Kinyarwanda was the only language spoken by many of the witnesses and accused,[49] their testimonies were interpreted into the working languages of the

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[43] *Prosecutor v Ngirabatware* (Judgment) ICTR-99-54-T, T Ch II (20 December 2012) [54] – [55].

[44] *Prosecutor v Muvunyi* (Retrial: Judgment) ICTR-00-55A-T, T Ch III (11 February 2010) [12]. See also *Rutaganda* (Judgment) (n 28) [21]; *Prosecutor v Kalimanzira* (Appeals Judgment) ICTR-05-88-A, A Ch (20 October 2010) [96]; *Ngirabatware* (Judgment) (n 43) [54] – [55].

[45] Cryer (n 17) 391. See also *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-98-42-T, T Ch II (24 June 2011) [695] – [740].

[46] Cryer (n 17) 391. See also Buss (n 13) 27; Ruzindana (n 18) 145.

[47] Ludmila Stern, 'Courtroom Interpreting' in Kirsten Malmkjær and Kevin Windle (eds), *The Oxford Handbook of Translation Studies* (OUP 2011) 328.

[48] Buss (n 13) 29. See also des Forges and Longman (n 14) 53; Nigel Eltringham, '"Illuminating the Broader Context": Anthropological and Historical Knowledge at the International Criminal Tribunal for Rwanda' (2013) 19 Journal of the Royal Anthropological Institute 338, 350.

[49] A survey carried out in 1996 found that 88% of the Rwandan population reported speaking only Kinyarwanda; Ulrich Ammon, Norbert Dittmar and Klaus L Mattheier (eds), *Sociolinguistics: An*

Tribunal, English and French.[50] A shortage of Kinyarwanda to English translators resulted in the employment of chain translation techniques; Kinyarwanda was first interpreted into French, and then from French into English. This is not an ideal means by which to interpret speech, as meaning is likely to be lost or distorted when translated twice.[51] In an attempt to mitigate misunderstandings, the French transcript was deemed authoritative, and in some cases, where the words were 'central to the factual and legal findings of the Chamber' they were reproduced in the original Kinyarwanda.[52] Regardless, there were noted discrepancies between versions of translations, and disagreements between interpreters and expert witnesses for the prosecution and defence over the intended meaning of the speech.[53]

The *Akayesu* Trial Chamber emphasised the enormity of this task, noting that 'the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English'.[54] In *Rutaganda,* the Trial Chamber noted that, owing to complexities of translation, 'the essence of the witnesses' testimonies was at times lost'.[55] This impacted pre-trial interviews carried out by investigators, and the interpretation of examination and cross-examination during court proceedings, where witnesses sometimes failed to understand questions posed to them after they had been translated.[56] This caused trial proceedings to take 'three times longer than a trial conducted in one language'.[57] The ordinary challenge of

International Handbook of the Science of Language and Society (2nd edn, De Gruyter Inc 2008) 1974. See also *Akayesu* (Judgment) (n 11) [145]; Ruzindana (n 18) 145, 157.

[50] *Akayesu* (Judgment) (n 11) [20].

[51] Ruzindana (n 18) 150.

[52] *Akayesu* (Judgment) (n 11) [145].

[53] *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T, T Ch III (2 December 2008) [191] – [192].

[54] *Akayesu* (Judgment) (n 11) [145].

[55] *Rutaganda* (Judgment) (n 28) [23].

[56] *Akayesu* (Judgment) (n 11) [20], [137], [145]; *Rutaganda* (Judgment) (n 28) [23]. See also UNGA, 'Report of the International Criminal Tribunal for the of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994' (24 September 1996) UN Doc A/51/399, 64; UNGA, 'Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994' (13 November 1997) UN Doc A/52/582, 73 – 74.

[57] UNGA, 'Seventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed

understanding was magnified in cases concerning incitement to commit genocide. As shown above, the prosecution of this offence relies entirely on linguistic comprehension, thus, not only was the Tribunal required to assess whether the words fell within the scope of incitement to genocide, but also what they actually meant.[58] Highlighting the significance of this task and the role of interpreters helps to demonstrate the importance of context to incitement trials.

The role of the interpreter is to navigate through legal and linguistic cultures, employing a 'high-level' of 'cross-cultural awareness'.[59] They act 'as a language aide and cultural bridge in order to achieve accuracy'.[60] Cryer emphasises that courtroom translation must be 'accurate to a forensic standard', acknowledging the *ad hoc* Tribunals' code of ethics for interpreters and translators.[61] Clearly, if testimony is altered by interpretation, it can infringe upon the rights to a fair trial.[62] In the context of incitement to commit genocide, an embellishment, or alteration of the sense of the utterance could have a significant impact on the outcome of the trial proceedings. However, Stern observes that lawyers and judges often think of accuracy in translation as being 'verbatim, word-for-word, literal'.[63] Often, this is impossible to achieve, as 'language cannot always be rendered literally or even by close approximation'.[64] There is a balance to be struck between achieving technical accuracy and conveying meaning.

In its most simplistic sense, translation is an 'attempt to find ways of saying in one language something that means the same as what has been said in another'.[65]

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in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994' (2 July 2002) UN Doc A/57/163, 17; These issues of translation were also evident at the IMT. See also Werner Maser, *Nuremberg: A Nation on Trial* (Richard Barry tr, Penguin Books 1977) 98.

[58] Ruzindana (n 18) 145.

[59] Virginia Benmaman, 'Legal Interpreting: An Emerging Profession' (1992) 76 The Modern Language Journal 445, 446.

[60] Stern, 'Courtroom Interpreting' (n 47) 335.

[61] Cryer (n 17) 383. See also UNICTY, 'The Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the Former Yugoslavia' (8 March 1999) UN Doc IT/144; UNMICT, 'Code of Ethics for Interpreters and Translators Employed by the Mechanism for International Criminal Tribunals' (2 November 2017) UN Doc MICT/20.

[62] Joshua Karton, 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony' (2008) 41 Vanderbilt Journal of Transnational Law 1, 10. See also Namakula (n 11).

[63] Stern, 'Courtroom Interpreting' (n 47) 335.

[64] Cryer (n 17) 383.

[65] Kwame Anthony Appiah, 'Thick Translation' (1993) 16 Callaloo 808, 808.

However, providing the technical or semantic "meaning" of a word does not facilitate understanding. As utterances are removed from their own context, the original meaning, that which is really important, is lost. It is not possible to carry across linguistic nuances and any specific connotations that the word holds in its original language and culture, whether these meanings are offensive, pejorative or otherwise.[66] Therefore, regardless of the accuracy, translation cannot convey to the new audience the same level of understanding achieved by the target listeners.[67] Thus, while the terms "translation" and "interpretation" are often used interchangeably, interpretation implies much more than word substitution as 'the interpreter does not translate words but translates meaning'.[68]

There are two approaches to translation: one is 'more literal, semantic and writer-oriented'; the other 'more communicative and reader oriented'.[69] The latter, listener focussed approach, is a pragmatic one. Pragmatics is 'the science of language seen in relation to its users'.[70] It refers to 'the intended meaning behind the surface, semantic meaning,' in light of the 'appropriate use of language according to tongue, culture and situation'.[71] This approach appreciates that 'the same phrase may have different meanings on different occasions, and the same intention may be expressed by different linguistic means'.[72] Consequently, it grants greater flexibility than a technical, semantic translation, finding the meaning of the utterance within its own context in order to convey understanding.[73] For example, Brown and Levinson refer to a person who walks into a room with an open window and says, 'it's cold in here'; semantically it is a statement of fact, pragmatically it is a request to close the window.[74]

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[66] John L Austin, *How to do Things with Words* (2nd edn, Harvard University Press 1975) 73 – 77; Ruzindana (n 18) 151.

[67] Karl Sornig, *Lexical Innovation: A Study of Slang, Colloquialisms and Casual Speech* (John Benjamins Publishing Company 1981) 1; Appiah (n 65) 811.

[68] Namakula (n 11) 28.

[69] Ludmila Stern, 'Interpreting Legal Language at the International Criminal Tribunal for the Former Yugoslavia: Overcoming the Lack of Lexical Equivalents' (2004) 2 The Journal of Specialised Translation 63, 66.

[70] Jacob L Mey, *Pragmatics: An Introduction* (Blackwell 1994) 5.

[71] Sandra Hale, *Discourse of Court Interpreting: Discourse Practices of the Law: The Witness and the Interpreter* (John Benjamins 2004) 5. See also Blum-Kulka (n 1) 38.

[72] Blum-Kulka (n 1) 38.

[73] Stern, 'Interpreting Legal Language' (n 69) 70.

[74] Brown and Levinson (n 4) 215.

Understanding this statement depends upon knowledge of the linguistic and cultural context in which it was delivered.[75] This shows that an understanding of whether speech was sufficiently direct to the target audience relies upon knowledge of the cultural context of the speech.

This can be seen in practice at the International Tribunals. At the ICTY, translating '*witness is excused* at the end of the examination as *svjedok je slobodan* ("the witness is free to go")' conveys the pragmatic rather than the semantic meaning, and will 'elicit the desired response from a Serbian-speaking counsel or a witness who might have been misled by a semantically accurate verbatim translation'.[76] Thus, by conveying the substance of what is being said, the target audience is able to understand, where a literal translation would lose the 'core' of the meaning. [77] This shows that for a Serbian-speaker, the witness is excused would be insufficiently direct to prompt them to act, whereas this would be direct for a speaker of English.

Wierzbicka notes that in translating requests from English to Polish, her example languages, they cannot be translated literally without 'losing' the intended force.[78] She cites examples of an invitation to dinner, noting that in English, 'would you like to' is appropriate and polite, whereas in Polish such a phrase would 'sound presumptuous' as it assumes that the addressee '"would like" to do it'.[79] Therefore, in order to make the request acceptable to a Polish listener, a literal translation would be inappropriate. This shows that there is a need for a margin of cultural appreciation in translation and interpretation that allows for some flexibility in order to convey the intended meaning of the utterance.

Arguably, true translation is never possible; there is no definite, settled meaning that the translator must search for.[80] For example, it is entirely possible that an utterance may be translated into two technically accurate phrases, but each may convey a

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[75] Jack Bilmes, *Discourse and Behaviour* (Springer 1986) 127.

[76] Stern, 'Interpreting Legal Language' (n 69) 71.

[77] Frances Biddle, *In Brief Authority* (Doubleday 1962) 383.

[78] Wierzbicka, 'Different Cultures' (n 20) 149.

[79] ibid 149.

[80] See also James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990) 34, 233 - 236.

different meaning. Equally, some words and expressions may take on varying meanings, depending on the context. The ICTR acknowledged that 'to understand the meaning of an utterance, it should be placed in the context of enunciation'.[81] Without knowing the context of enunciation, an interpreter 'can only list different meanings and different contexts and finally give free choice to the addressee to interpret the message in question', which would give rise to multiple understandings and translations.[82] Thus, knowledge of the original context of the speech is essential for international incitement trials, as it is necessary that judges are able to experience speech with an understanding that is as close as possible to that achieved by the original audience.[83]

However, even a pragmatic translation may miss conversation markers that will impact upon the understanding of the utterance. Hafner uses the example of "well", noting that it serves an important function in imparting 'information about attitude'.[84] This was evident at Nuremberg; interpreters translated the German 'ja' as 'yes'; while it is often used in this way, it is also used by German speakers the way that English speakers might use 'um' or 'well' when responding to a question.[85] When this is translated literally, the utterance could be understood as an admission of guilt, rather than a contemplative pause. Therefore, the challenge of the interpreter is to translate something into a second language, that may lack 'equivalent concepts and terms', that uses conversational pauses and silence in radically different ways, while retaining the sense of the original utterance.[86] This requires a complete understanding of a linguistic tradition, including the nuances and quirks of language, and non-verbal cues. This also includes an appreciation of a cultural identity, including the history of a people, combining all this information to try to convey how the original audience would have understood the speech.

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[81] *Prosecutor v Muvunyi* (Sociolinguistic Analysis of Some Polysemic Terms Produced During the War Period [1990 – 1994] in Rwanda, Evariste Ntakirutimana) ICTR-00-55A-T, T Ch III (29 January 2009) 2. See also *Nyiramasuhuko* (Judgment) (n 45) [194], [3602], [4446] – [4451].

[82] *Muvunyi* (Sociolinguistic Analysis) (n 81) 2.

[83] See also Sornig (n 67) 1.

[84] Hafner (n 17) 528.

[85] Joseph E Persico, *Nuremberg: Infamy on Trial* (Penguin Books 1994) 236; Francesca Gaiba, *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (Ottawa Press 1998) 105 – 106.

[86] Stern, 'Courtroom Interpreting' (n 47) 334.

While the ICTR did not refer to specific theories of sociolinguistics in its work,[87] it acknowledged the limitations of translation, showing an awareness that finding a literal meaning of an individual word will not convey meaning to a new audience. Moreover, a semantic translation will not help the court to identify whether the speech was sufficiently direct to the target audience within its own context. Consequently, it is necessary to appreciate that establishing meaning requires more than translation, and to keep mind of the relevant factors that facilitate this understanding. However, it is important to remain accurate to the words spoken. Thus, this requires a balance of semantic and pragmatic approaches: firstly, by establishing what words were spoken (looking at the content); and secondly, by finding what those words meant within their own context.

This discussion has emphasised that an interpretation of direct must take cultural factors into account, and, therefore, a narrow interpretation would be inappropriate and would not reflect the cultural and linguistic diversity of states subject to the jurisdiction of international criminal law. Additionally, this has shown that through a pragmatic approach it is possible to convey the impact of the speech, showing how it would have been understood by the target audience. This relies on an understanding of cultural practices, of politeness conventions, and of how people communicate within a given context. Consequently, this analysis will rely on the use of experts in culture and language that may guide the judges toward an understanding of the speech as a whole.

4.3. Understanding the Rwandan Context

In the sociolinguistic study admitted as evidence in the Media Trial, it was noted that:

> *Kinyarwanda* means more than just the language. It also refers to the Rwandan culture, to the habits and customs of the country. To know Kinyarwanda, for a Rwandan, is not only just knowing the language and mastering its grammatical structures; it is also knowing its history, the art of living with fellow citizens (linguistic, social and moral behaviour).[88]

[87] Wilson (n 23) 197.

[88] *Nahimana* (The Kinyarwanda Language) (n 26) 5.

The ICTR acknowledged that understanding the local impact of the speech requires situating it in its own context.[89] Mey defines context as a 'dynamic, not a static concept', to be 'understood as the surroundings, in the widest sense' that form the background to an utterance.[90] Similarly, the ICTR considered 'all the environment surrounding the speech act'.[91] This included the specific words used, the nature and position of the speaker, the target audience, intonation and tone of voice, alongside surrounding factors such as the physical location and the social, political, historical and cultural background to the speech.[92] This discussion has three aims: (i) to identify contextual elements that influence understanding through the example of Rwanda; (ii) to provide context for the subsequent analysis of ICTR cases; and, (iii) to demonstrate that pejorative and culturally specific terms will take on an enhanced meaning within the context of genocide, which links with the discussion in Chapter Seven.

4.3.1. Social, Political, Historical and Cultural Background to the 1994 Genocide

It is said that approximately 85% of people in Rwanda are Hutu, 14% are Tutsi and 1% are Twa.[93] However, while the Rwandan Genocide is often framed in the context of tribal violence, this idea is 'deeply misleading'[94] as the distinction is 'neither tribal nor ethnic'.[95] Prior to colonisation at least, Rwandans mostly lived peacefully together.[96] Hutu and Tutsi have none of the characteristics of tribes.[97] There is no

[89] *Akayesu* (Judgment) (n 11) [557] – [558].

[90] Mey (n 70) 38.

[91] Ruzindana (n 18) 156.

[92] Teun A van Dijk and others, 'Discourse, Ethnicity, Culture and Racism' in Teun A van Dijk (ed), *Discourse as Social Interaction* (Sage 2007) 147. See also *Akayesu* (Judgment) (n 11) [156], [557] – [558].

[93] Alison des Forges, *Leave None to Tell the Story, Genocide in Rwanda* (Human Rights Watch 1999) 1; Peter Uvin, 'On Counting, Categorizing, and Violence in Burundi and Rwanda' in David Herzer and Dominique Arel (eds), *Politics of Race, Ethnicity and Language in National Census* (Cambridge University Press 2001) 153.

[94] Scott Straus, *The Order of Genocide: Race, Power and War in Rwanda* (Cornell University Press 2006) 17.

[95] David Moshman, 'Identity, History and Education in Rwanda: Reflections on the 2014 Nobel Peace Prize' (2015) 44 Child Abuse and Neglect 1, 1. See also Robert Melson, 'Modern Genocide in Rwanda: Ideology, Revolution, War and Mass Murder in an African State' in Robert Gellately and Ben Kiernan (eds), *The Specter of Genocide: Mass Murder in Historical Perspective* (Cambridge University Press 2003) 326.

[96] Uvin, 'On Counting' (n 93) 161 – 162; René Lemarchand, *The Dynamics of Violence in Central Africa* (University of Pennsylvania Press 2009) 49 – 50.

[97] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Hurst & Co 2010) 5.

"Hutuland" or "Tutsiland"; rather, they live as neighbours. Rwanda is largely comprised of a single cultural group, the Banyarwanda.[98] The people speak the same Bantu language, Kinyarwanda, and practice the same religions,[99] therefore, Hutu and Tutsi have the same cultural background, meaning that they understand speech in the same way.

It would be too simplistic to say that the Rwandan Genocide of 1994 was a result of any single factor. It was a combined result of years of oppression, poverty and propaganda; 'long-standing, widespread, and institutionalized prejudice; the radicalization of animosity and routinization of violence; and the "moral exclusion" of a category of people, allowing first their "social death" and then their physical death'.[100] Lemarchand argues that the origins of the divide between Hutu and Tutsi are 'traceable' to colonial rule.[101] While Hutu and Tutsi existed prior to the arrival of colonists, first German then Belgian, the distinction was relatively 'fluid' and based on a number of factors: primarily, ancestry and socioeconomic status.[102] The colonists viewed the Tutsi as more 'European' than the Hutu, they were perceived as 'racially superior' with paler skin and longer noses; they controlled the wealth and land of the country: the king (*mwami*) was Tutsi, and, therefore, Tutsi were the ruling class.[103] The 1959 Revolution and subsequent departure of the Colonists ended Tutsi dominance of Rwandan society. However, this did not end the myths that surrounded both groups. Rather, it had 'intensified differences and exacerbated conflicts' and many Hutu were left with 'bitter memories of Tutsi rule', something that was later manipulated by the orchestrators of the Genocide.[104]

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[98] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda* (Princeton University Press 2002) 52; Cécile Aptel, 'International and Hybrid Criminal Tribunals: Reconciling or Stigmatizing' in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press 2013) 151.

[99] Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (Yale University Press 2007) 555.

[100] Peter Uvin, 'Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence' (1999) 31 Comparative Politics 253, 253. See also *Prosecutor v Ruggiu* (Judgment and Sentence) ICTR-97-32-I, T Ch I (1 June 2000) [44(iv)]; Philip Gourevitch, *We Wish to Inform you that Tomorrow we will be Killed with our Families: Stories from Rwanda* (Picador 1999) 6.

[101] Lemarchand (n 96) 50.

[102] Moshman (n 95) 1.

[103] Lemarchand (n 96) 54.

[104] Kiernan (n 99) 555. See also Lemarchand (n 96) 50.

On 6 April 1994, an aeroplane carrying the Rwandan and Burundian presidents was shot down as it prepared to land in Kigali, the capital city of Rwanda. This was the catalyst for the events that followed. An interim government controlled by the army rapidly replaced the collapsing remnants of President Habyarimana's regime and the *Interahamwe* militia took control of the streets. In the 100 days that followed, as many as three quarters of the Tutsi population perished, alongside some moderate Hutu neighbours.[105] Yet, while the Hutu were targeted for their political beliefs and opposition to the killings, Tutsi were killed for the reason of their Tutsi identity; all Tutsi were targets.[106]

The ICTR defines this as the point at which they could legally identify genocide as taking place in Rwanda.[107] However, the assassination had been preceded by political unrest and ongoing campaigns of persecution, partially triggered by the threat of RPF (Rwandan Patriotic Front) troops amassing in Uganda. Many members of the RPF were descendants of Tutsi refugees who had fled Rwanda between 1959 and 1963.[108] Arusha in Tanzania played host to negotiations aiming to permit the return of the RPF into Rwanda, integrating them into the Rwandan army, thereby forcing democratic concessions.[109] While opposition political parties were permitted in 1991, and a "coalition" government formed in 1992, this did little more than contribute to the resurgence in ethnic vitriol, much of which was projected over the radio. The government designated the RPF as 'the enemy', labelling them as invaders.[110] This identity was extended to encompass all Tutsi, including those who had lived and worked alongside their Hutu neighbours for generations. The government claimed that the Tutsi 'were out to exterminate Hutu' and began 'appealing for pre-emptive self-defence'.[111]

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[105] des Forges, *Genocide in Rwanda* (n 93) 6; Alison des Forges, 'Silencing the Voices of Hate in Rwanda' in Monroe E Price and Mark Thompson (eds), *Forging Peace: Intervention, Human Rights and the Management of Media Space* (Indiana University Press 2002) 236; Mamdani (n 98) 5.

[106] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Harper Collins 2010) 348.

[107] *Akayesu* (Judgment) (n 11) [123].

[108] Uvin, 'Ethnicity and Power' (n 100) 259.

[109] Aptel (n 98) 152.

[110] Melson (n 95) 334.

[111] Power (n 106) 340.

From 1990, the government of Rwanda began a methodically organised campaign against the Tutsi, culminating in genocide.[112] During this period, the Tutsi were subject to 'pilot projects for extermination' and government-backed extremist forces stockpiled and disseminated weapons in preparation for slaughter.[113] In October 1990, the Rwandan army staged an all-night attack on Kigali, 'and blamed it on the internal Tutsi'.[114] In 1993 the RPF were blamed for further murders and disappearances of Hutu, strengthening 'a sense of psychosis against "the enemy within,"', justifying 'the imprisonment of 10,000 Tutsi'.[115] However, there was limited evidence to suggest that the RPF were responsible for these attacks, rather, it seems that they were staged to look like the RPF had committed them.[116]

The Government, and an 'astounding' number of Rwandans imagined that eradicating the Tutsi population would end the RPF threat.[117] Consequently, in the years, months and days leading up to the Rwandan Genocide, propagandists consciously fostered a 'culture of terror',[118] circulating a number of narratives to 'stir hatred' and justify violence against the Tutsi.[119] As the Government relied on the participation of ordinary people, they manipulated radio broadcasts and disseminated hate to drive prejudice and encourage violence. Language marked a clear line between 'us', the in-group, the Hutu majority, and 'them', the out-group, the Tutsi.[120] Tutsi became the target of hateful propaganda, including 'explicit and regular incitations to mass murder, verbal attacks, the publication of lists with names of people to be killed,

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[112] UNSC Verbatim Record (8 November 1994) UN Doc S/PV.3453; Roméo Dallaire and Kishan Manocha, 'The Major Powers and the Genocide in Rwanda' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2007) 61.

[113] UN Doc S/PV.3453 (n 112). See also Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Arrow Books 2004) 143 – 146.

[114] Uvin, 'Ethnicity and Power' (n 100) 260. See also Melson (n 95) 334.

[115] Uvin, 'Ethnicity and Power' (n 100) 260.

[116] Dallaire, *Shake Hands with the Devil* (n 113) 110 – 118.

[117] Gourevitch (n 100) 6.

[118] Christopher C Taylor, 'The Cultural Face of Terror in the Rwandan Genocide of 1994' in Alexander Hinton and Kenneth Roth (eds),) *Annihilating Difference: The Anthropology of Genocide* (University of California Press 2002) 140.

[119] Wibke Timmerman and William Schabas, 'Incitement to Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2013) 159.

[120] See also William Schabas, 'Hate Speech in Rwanda: The Road to Genocide' (2000) 46 McGill Law Journal 141; Lynne Tirrell, 'Genocidal Language Games' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (OUP 2012) 175.

and threats to anyone having relations with Tutsi'.[121] This manifested itself in a slaughter described as 'probably the most concentrated mass killing ever seen'.[122]

4.3.2. The Challenges of Understanding Kinyarwanda

It has been shown that international justice poses problems of communication, necessitating the use of linguists and interpreters to help the judges to navigate the cultural disconnect between legal personnel and participants in the trial.[123] This is rarely more essential than in incitement cases where the prosecution is required to prove that the accused spoke certain words, that those words were designed to bring about the substantive offence, and that the speaker was aware of this potential effect, all in an entirely unfamiliar language. Kinyarwanda proved problematic for the Tribunal. For an outsider, understanding Kinyarwanda is complex. It is 'structured by euphemisms and idioms with no equivalent' and Rwandan witnesses often used concepts and proverbs that could not be translated directly.[124]

Thus, ascertaining the meaning of Kinyarwanda key terms was a challenge.[125] This was magnified by virtue of Kinyarwanda being polysemic.[126] As the words have multiple meanings, it is not enough to understand their technical, or semantic, meaning, they must be considered in their own context in order to be decoded. For example, '*gukora*' has several meanings in Kinyarwanda, including 'to do something bad', 'to work arduously', and 'thank you'.[127] During the genocide, *gukora* was synonymous with 'to work, to kill, to remove, to clean, […] finish the job, rape and take away'; it was often used euphemistically to direct the listeners to kill Tutsi and destroy their property.[128]

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[121] Uvin, 'Ethnicity and Power' (n 100) 260.

[122] John Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate 2006) 33.

[123] See also Eltringham (n 48) 350 – 351; Swigart, 'African Languages' (n 7) 596.

[124] Jonneke Koomen, 'Language Work at International Criminal Courts' (2014) 16 International Feminist Journal of Politics 581, 588.

[125] *Akayesu* (Judgment) (n 11) [145] – [154]. See also *Musema* (Judgment) (n 35) [102]; *Prosecutor v Bagilishema* (Judgment) ICTR-95-1A-T, T Ch I (7 June 2001) [190] – [193].

[126] *Bagilishema* (Judgment) (n 125) [325]. See also *Muvunyi* (Sociolinguistic Analysis) (n 81).

[127] *Nyiramasuhuko* (Judgment) (n 45) [4448].

[128] ibid [4448].

Particularly in the early stages of the Tribunal, the judges made use of experts to facilitate understanding, examining what the utterances meant (locutionary aspect), and what the utterances encouraged the listener to do (illocutionary aspect).[129] In the exercise of examining the locutionary aspect of the speech, the ICTR identified a number of Kinyarwanda key terms that had been routinely employed by speakers during the genocide. As noted above, where these were 'central to the factual and legal findings of the Chamber' they were retained in their original language.[130] This helped the judges to develop an understanding of the pejorative connotations of the terms, which would be lost in translation. For example, consider *inyenzi*: when it is translated into French it becomes *cancrelat* and in English, cockroach.[131] This is an accurate semantic translation of *inyenzi* as used during the genocide. However, understanding its impact relies on knowledge of the context. In the original Kinyarwanda *inyenzi* carries cultural notes, stemming from the history of Rwanda, referring specifically to Tutsi in a contemptuous and derogatory sense.[132] Through translation it loses its original 'abusive' and 'negative' feeling.[133] Therefore, once the sense of *inyenzi* was explained, it was used in its original language in order to try to convey its pejorative meaning.[134]

Dojčinović notes that:

> By leaving some of the words in the original language, the [Trial Chamber] has implicitly acknowledged its preconditioned cognitive inability to have a complete grasp of all conceptual resonances as the native speakers would have perceived them at any point in time before or during the tragic events in Rwanda.[135]

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[129] Wilson (n 23) 179 – 180. See also Eltringham (n 48) 350 – 351; Swigart, 'African Languages' (n 7) 596.

[130] *Akayesu* (Judgment) (n 11) [145].

[131] Ruzindana (n 18) 151. See also *Akayesu* (Judgment) (n 11) [90].

[132] *Akayesu* (Judgment) (n 11) [148] – [149]; Ruzindana (n 18) 151.

[133] *Akayesu* (Judgment) (n 11) [149].

[134] ibid [148] – [149].

[135] Predrag Dojčinović, 'Word Scene Investigations: Toward a Cognitive Linguistic Approach to the Criminal Analysis of Open Source Evidence in War Crimes Cases' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2012) 83.

As none of the judges were Rwandan, they were simply unable to understand the local impact of the words or phrases. Thus, the best the Tribunal was able to do was to attempt to situate the words in their original context and consider how the audience might have understood them.[136] As noted, while this has similarities to a pragmatic approach, this arose out of need and there was no explicit reference to any 'technical discipline such as socio-linguistics'. [137] However, even with this assessment, a second-hand understanding built in a different language is going to be a poor imitation of the original.

In practice, this required the assistance of experts, as shown above. Wilson notes that it is a feature of international criminal law that experts are called 'more frequently than in the domestic criminal setting', particularly in speech trials.[138] This formed part of the basis of the appeal in *Akayesu*; the defence team objected to the reliance on expert testimony.[139] However, the Appeals Chamber were satisfied that the expert evidence had only been used in support of material evidence provided by eyewitnesses and only on linguistic issues.[140] The Trial Chamber had relied on expert witnesses to help them understand the terms used in his speech, including *Inkotanyi, Inyenzi*, '*Icyitso/Ibyitso, Interahamwe* and the expressions used in Kinyarwanda for "rape"'.[141]

In reference to expert witness analysis, the Trial Chamber found that during the genocide *Inkotanyi* 'had a number of extended meanings, including RPF sympathizer or supporter' and in many instances it referred 'to Tutsi as an ethnic group'. [142] However, the specific connotation of *Inkotanyi* depended on the particular context of the speech. Dojčinović notes that the identification of the meaning of *Inkotanyi* in any given context is 'initially accessible only to the native speakers of Kinyarwanda'.[143] This is 'a name taken from a nineteenth-century military formation' and is used to mean members of the RPF. [144] In *Akayesu*, the Tribunal accepted that the word means

[136] *Akayesu* (Judgment) (n 11) [557].
[137] Wilson (n 23) 197; text to n 90.
[138] ibid 179.
[139] *Prosecutor v Akayesu* (Appeals Judgment) ICTR-96-4-A, A Ch (1 June 2001) [222], [227] – [228].
[140] ibid [222].
[141] *Akayesu* (Judgment) (n 11) [146].
[142] ibid [147].
[143] Dojčinović, 'Word Scene Investigations' (n 135) 84.
[144] des Forges, *Genocide in Rwanda* (n 93) 62. See also -- (*Front Patriotique Rwandais*) <rpfinkotanyi.rw> accessed 04 May 2018.

'warrior' and is a name 'borne with pride' by the RPF.[145] However, Dallaire noted that when the term was used by their opponents, it was with sarcasm and derision, and often conveyed negative meaning.[146] Similarly, the understanding of *icyitso* (*ibyitso* in plural) is context dependant. It 'is a common term which means accomplice'.[147] However, in the context of the Genocide, *icyitso* was used in a pejorative sense. The Tribunal concluded that it 'should not be seen as being synonymous with supporter', suggesting 'collaborator' provides a better understanding, illustrating how it was likely to be understood by the listener.[148]

The reliance on witnesses, coupled with the polysemic nature of Kinyarwanda, meant that the meaning of certain key terms was disputed, with prosecution and defence experts providing differing interpretations.[149] For example, in *Bikindi,* the prosecution expert translated the titles of the songs, concluding that '*Twasezereye ingoma ya cyami*' meant 'We Said Goodbye to the Monarchy' (also referred to in the Judgment as 'We Said Goodbye to the Feudal Regime'), '*Nanga Abahutu'* meant 'I Hate the Hutu', and '*Bene Sebahinzi'* meant 'Descendants of the Father of Farmers'.[150] However, the defendant and the defence expert witness argued that '*Twasezereye ingoma ya cyami*' should properly be called 'We Said Goodbye'; '*Nanga Abahutu'* was not the correct title of the song, instead it was called '*Akabyutso'*, meaning 'the Awakening', and similarly '*Bene Sebahinzi'* was actually '*Intabaza'*, or 'The Alert'.[151] 'For the sake of symmetry with the Indictment' the *Bikindi* Trial Chamber chose to refer to the titles selected by the prosecution, but did not comment further on their meanings, arguing that the titles were less important than the texts of the songs themselves.[152]

The discrepancies in translations did not end with the titles, this was also apparent in the songs, in which 'words and metaphors were translated differently, small

[145] *Akayesu* (Judgment) (n 11) [147].
[146] Dallaire, *Shake Hands with the Devil* (n 113) 116.
[147] *Akayesu* (Judgment) (n 11) [150].
[148] ibid [150].
[149] Ruzindana (n 18) 145 – 146.
[150] *Bikindi* (Judgment) (n 53) [187] – [188].
[151] ibid [188] – [189].
[152] ibid [190].

errors were found in some and some versions had extra verses'.[153] Nevertheless, the Chamber felt that the sense of the songs was conveyed and they were able to see through the numerous errors to understand their general feeling.[154] This illustrates that Kinyarwanda is open to interpretation, and the judges were at the mercy of the conflicting interpretations of experts, as they did not have a complete grasp of the language. The complexity of comprehension is augmented when speakers employ language techniques to deliberately disguise meaning and exclude foreigners.[155] In *Bikindi,* it was considered that the songs were written so that 'foreigners would not be able to understand their meaning […] if one did not have a mastery of the language, they might not understand certain words'.[156] The references to Rwandan legend and use of stylistic nuances meant that only someone with a cultural awareness of Rwanda would be able to comprehend the meaning of the songs. However, witnesses suggested that the target audience had no such difficulty finding meaning in the poetic language,[157] thereby suggesting that while it appeared ambiguous to outsiders, it was sufficiently direct for the target audience.

4.3.3. Euphemism, Proverbs and Metaphor

Proverbs and metaphors are examples of speech for which a literal, technically accurate translation would not convey understanding to an external audience. They both assume mutual knowledge and experiences between the speaker and the listener.[158] Without the benefit of a shared cultural history, this type of speech carries little meaning. In *Nyiramasuhuko,* the Trial Chamber made it clear that the audience understood what was said, even where the speech was delivered in such a way as to deliberately obscure understanding to outsiders.[159] Throughout the campaign of genocide, radio broadcasts and speeches were delivered using language which 'remained opaque to outsiders who are not fluent in Kinyarwanda, but [was] clear and

[153] ibid [191] – [192].

[154] ibid [192].

[155] *Muvunyi* (Sociolinguistic Analysis) (n 81) 3.

[156] *Bikindi* (Judgment) (n 53) [198].

[157] ibid [199].

[158] Judit Hidasi, 'Cultural Messages of Metaphors' in Erich A Barendt (ed), *Metaphors for Learning: Cross-Cultural Perspectives* (John Benjamins 2008) 103 – 104.

[159] *Nyiramasuhuko* (Judgment) (n 45) [882].

unambiguous to those who would kill as well as to those would be targeted to be killed'.[160]

While the history of genocide is littered with 'beguilingly euphemistic', metaphorical speech, this type of communication device is not limited to this context.[161] This inherently indirect mode of speech is socially engrained in many cultures.[162] Speakers employ metaphors in ordinary speech for multiple reasons, to 'enrich or enhance' language, or as a way to 'make ideas more memorable, artful or attractive'.[163] Metaphors seep into daily discourse and people find themselves able to communicate quite clearly by employing them. Sometimes a metaphor is able to carry a meaning far more eloquently than the speaker would otherwise be able to do. Through a 'mutually shared set of background beliefs, goals, [and] assumptions', the speaker is able to communicate more than they explicitly say in the knowledge that their target audience will understand.[164] Similarly, proverbs make use of cultural references in order to 'say the most possible through the least possible words'.[165]

Kinyarwanda stems from an oral tradition, something that impacts modern Rwandan communication.[166] The Tribunal noted that this translates into a more prevalent use of proverbs than is to be found in a language with a written tradition.[167] There is a rich catalogue from which to draw examples, but two seem particularly pertinent: '*nyirururimi rubi yatanze umurozi gupfa'*: 'he who failed to withhold his tongue died before the poisoner', meaning that a bad word is worse than a bad action; '*amagambo adakonyaguwe ntakwirwa mu ruhago*': 'unbroken words cannot fit in the

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[160] Charles Mironko, '*Itigero:* Means and Motive in the Rwandan Genocide' (2004) 6 Journal of Genocide Research 47, 51.

[161] Cryer (n 17) 387. See also Jasna Levinger, 'Language War-War Language' (1994) 16 Language Sciences 229; Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York University Press 2002) 9; Yared Legesse Mengistu, 'Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) 360.

[162] Tirrell (n 120) 215.

[163] Erin Steuter and Deborah Wills, *At War with Metaphor: Media, Propaganda and Racism in the War on Terror* (Lexington Books 2008) 4.

[164] Tirrell (n 120) 215.

[165] *Muvunyi* (Retrial: Judgment) (n 44) [123].

[166] *Akayesu* (Judgment) (n 11) [155]; *Nahimana* (The Kinyarwanda Language) (n 26) 7 – 8.

[167] *Muvunyi* (Retrial: Judgment) (n 44) [124]. See also *Muvunyi* (Sociolinguistic Analysis) (n 81).

pocket', meaning that speech should be considered to be something precious, and perfection in speech is not just a flow of words.[168] These examples show that a mere translation of the proverbs does not provide clarity in meaning, achieving this necessitates further explanation.

Rwandan speakers routinely use culturally specific allusion, proverbs and metaphors as communication devices.[169] As a result, information is 'conveyed between the lines, hinted at, but rarely expressed directly'.[170] This is particularly evident where the subject is delicate.[171] For example, in *Akayesu,* the Trial Chamber took note that a number of different Kinyarwanda terms were being translated as 'rape' for the reason that Rwandans would only talk about this subject euphemistically.[172] Consequently, the Chamber consulted the official trial interpreters 'to gain a precise understanding of these words', and ensure that rape was not conflated with consensual sexual activity.[173] This is significant because it shows that proverbs, euphemism and metaphor are a perfectly acceptable way of communicating in Rwanda, and would be sufficiently direct for a Rwandan audience. However, this would not fit within the ordinary meaning of direct. Therefore, too narrow an interpretation would be inappropriate, given the cultural and linguistic diversity of states subject to the jurisdiction of international criminal law.

While proverbs are a highly valued part of ordinary communication in Rwanda, several began to take on a developed meaning as they were deployed during the Genocide.[174] In *Akayesu*, witnesses claimed the accused had used a specific Rwandan proverb to convey his message: '*iyo inzoka yiziritse ku gisabo, nta kundi bigenda barakimena'*: 'if a snake wraps itself around a calabash, there is nothing that can be

[168] *Nahimana* (The Kinyarwanda Language) (n 26) 14.

[169] *Akayesu* (Judgment) (n 11) [121]; *Nyiramasuhuko* (Judgment) (n 45) [882]; Mironko (n 160) 51; Lemarchand (n 96) 135.

[170] *Akayesu* (Judgment) (n 11) [155]. See also Peter Uvin, *Life After Violence: A People's Story of Burundi* (Zed Books 2009) 28.

[171] Albert (n 24) 84, 94.

[172] *Akayesu* (Judgment) (n 11) [152]; Combs (n 23) 87.

[173] *Akayesu* (Judgment) (n 11) [152] – [153].

[174] Ruth Finnegan, *Oral Literature in Africa* (Open Book Publishers 2012) 379. See also *Muvunyi* (Retrial: Judgment) (n 44) [124]; *Nyiramasuhuko* (Judgment) (n 45) [4449].

done, except to break the calabash'.[175] This proverb was also used by the accused in *Muvunyi*.[176] In the context of the genocide this was understood to mean that if a Hutu woman was pregnant by a Tutsi man, 'the foetus had to be destroyed so that the Tutsi child which it would become should not survive'.[177] Further, the Chamber noted that in Rwandan culture breaking the calabash *(gisabo)* was considered taboo, 'yet if a snake wraps itself around a gisabo, obviously, one has no choice but to ignore this taboo in order to kill the snake'.[178] From an external perspective the meaning of this proverb is not immediately apparent, it seems innocuous enough. Yet, by appreciating the cultural, historical and linguistic context of Rwanda, the meaning becomes clear.

In *Nyiramasuhuko*, the Chamber noted that 'proverbs referring to the sweeping outside of dirt were truisms which could be easily understood'.[179] The Chamber noted that 'in the context of war' these proverbs should be understood to mean 'that the people who attacked Rwanda and came from outside needed to be thrown out of the country'.[180] The expert witness explained that 'references in proverbs to "garbage" and "rubbish" fell into the same semantic field as the word "dirt"', and could be understood in the same way.[181] It was noted that speakers used these proverbs to '[bridge] a communication gap' between them and 'peasants' by putting 'the peasant in his daily context'.[182] Therefore, speakers used proverbs 'referring to the need to separate good grains from chaff' denoting the relationship between the attacking group (bad) and the group that is attacked (good).[183] It was observed that 'peasants directly understood the need to separate and throw away the bad grain'.[184] This is important, as it emphasises that words take on an enhanced meaning when they are disseminated within the contemporary context of genocide or war.

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[175] *Akayesu* (Judgment) (n 11) [121].
[176] *Muvunyi* (Retrial: Judgment) (n 44) [63].
[177] *Akayesu* (Judgment) (n 11) [121].
[178] ibid [121].
[179] *Nyiramasuhuko* (Judgment) (n 45) [4449].
[180] ibid [4449].
[181] ibid [4449].
[182] ibid [4451].
[183] ibid [4451].
[184] ibid [4451].

Not only do proverbs reduce the distance between the speaker and the target audience, they also help 'to avoid interference or intervention by foreigners'.[185] For example, speakers avoided calling the Tutsi by their standard designation: '*abatutsi*', choosing to use culturally specific pejorative terms in order to obscure meaning for outsiders.[186] As shown in Chapter Two, inciters rarely speak in unambiguous terms. This is magnified within the context of some cultural backgrounds. Therefore, a narrow interpretation of direct would fail to account for cultural differences in communication. Moreover, a narrow interpretation would be inappropriate for the specific context of genocide, and the deliberately coded nature of genocidal speech. Rather, it is necessary to consider that even when the meaning of speech is unclear to outsiders, the target audience understands.

This discussion has shown that appreciating the local impact of the speech requires considering the whole of its surrounding context. The factors relevant to the assessment of speech in Rwanda include elements of the historical, social, political, linguistic and cultural. This has underscored the importance of the history of the relationship between the groups, showing the origins of the distinction between Hutu and Tutsi and thereby illustrating the history of persecution in Rwanda. Similarly, this discussion emphasised the importance of considering the contemporary context. The atmosphere of hostility against the Tutsi added an extra dimension of threat to the use of pejorative terms. This showed that hallmarks of inciting speech, such as dehumanisation and creation of a threat, would have been understood as encouraging genocide owing to the development of propaganda against the target group. While an absence of a contemporary context of genocide should not preclude a finding of incitement, given that it is an inchoate offence, this could be considered to be an important evidentiary component of the incitement analysis. This will be considered further in Chapter Seven.

4.4. Conclusion

This chapter served four purposes: firstly, to contribute to the overall aim of the thesis by emphasising the significance and complexity of establishing the meaning of

[185] *Muvunyi* (Retrial: Judgment) (n 44) [124]. See also *Prosecutor v Karemera et al* (Judgment and Sentence) ICTR-98-44-T, T Ch III (2 February 2012) [557].

[186] *Muvunyi* (Retrial: Judgment) (n 44) [124].

speech in incitement trials; secondly, to demonstrate the importance of avoiding a narrow interpretation of direct in light of the cultural and linguistic diversity of states subject to the jurisdiction of international criminal law, thereby providing a justification for defining direct as 'clearly understood as inciting genocide by the target audience'; thirdly, to act as an explanatory tool for subsequent chapters; and, finally, to consider the idea of context.

By understanding the complexities of translation and interpretation, it has been possible to frame the challenge facing the ICTR in its analysis of incitement. This has acknowledged that without the 'indispensable' 'linguistic, cultural and social mediation' of interpreters and expert witnesses, the Tribunal would have been unable to navigate Rwandan language and culture.[187] In light of the challenges of cultural communication, it was possible to show that a narrow interpretation of direct would be inappropriate and would not reflect the cultural and linguistic diversity of international criminal law. This indicates that the definition of direct must take these differences into account and consider whether the speech was clearly understood as inciting genocide by its target audience. This discussion has shown that this would be consistent with the context of international criminal law, and, specifically, incitement to commit genocide.

It has been shown that some of the problems encountered in incitement trials may not be solely attributed to the Convention offence; they also stem from the inherent complexities of working with unfamiliar languages and cultures. In light of theories of sociolinguistics, this chapter considered how the challenges of translation might be addressed. In considering that a complete understanding relies upon a myriad of factors, it was shown that a semantic approach alone would be insufficient for speech offences. Rather, this also requires a pragmatic approach through which the judges can grasp the intended impact of the speech. This was particularly important for understanding Rwandan communication owing to the prevalence of culturally specific proverbs and metaphors. Thus, finding the meaning of speech in international trials requires the court to establish the meaning of the speech in reference to its content (technical or semantic meaning) and context (pragmatic meaning).

[187] See also Koomen (n 124) 583, 596.

The second section of this chapter considered the contextual factors relevant to this analysis by exploring the example of Rwanda. This showed that in order to begin to understand the local impact of the speech it is necessary to consider a number of factors: (i) historical; (ii) social; (iii) cultural; (iv) linguistic; and (v) contemporary circumstances (including the physical location of the speech, the circumstances at the time of the speech, including any accompanying actions, and the existence of an ongoing campaign of persecution, violence or genocide against the target group, as this will add a dimension of threat to the understanding of pejorative words). For Rwanda it was important to acknowledge the impact of colonialism, showing how the ethnic divide had been created by manipulating the groups and defining Tutsi as the ruling class. It was also important to show that communication in Rwanda comes from an oral tradition, therefore there is an increased use of proverbs, metaphor and stories in ordinary communication. Thus, understanding Kinyarwanda requires a knowledge of the factual and mythological history of Rwanda alongside linguistic, social and moral behaviour.

As noted above, there is a tendency to approach speech with an ethnocentric bias, exemplified by the use of the term direct in the international prohibition of incitement. On the face of it, the international law offence of incitement seems to assume that all communication works in the same way, failing to account for cultural differences and nuances in speech. However, as has been indicated, the ICTR accepted that direct should be considered with reference to the context of the speech. This analysis leads into the subsequent chapter, which focuses on the approach to incitement in *Akayesu* and aims to assess the ICTR's definition of the constitutive elements of incitement.

5. Defining the Constitutive Elements of Direct and Public Incitement at the ICTR: The Influence of *Akayesu*

5.1. Introduction

The case against Jean-Paul Akayesu marked a milestone in international criminal justice.[1] It was the first judgment handed down by the ICTR, the first conviction in international law for the crime of genocide and direct and public incitement to commit genocide, and the first case since Nuremberg to consider international atrocity speech. In the fifty years between the Convention and *Akayesu* the offence had largely lain dormant, with no prosecutions and limited legal developments. Yet, from the earliest days of the ICTR it was clear that the 'ostensible link between verbal conduct and atrocity' in Rwanda meant that speech would form part of numerous cases.[2] As the first to assess incitement, the *Akayesu* Trial Chamber was tasked with laying the foundations for the cases that followed by essentially creating a system of international criminal justice out of a vacuum.[3] Consequently, the decision has been described as 'historic the day it was delivered'.[4]

This represents the most significant development in international incitement law since its inception for a number of reasons. Firstly, it acted to reaffirm the commitment to prohibiting incitement. The Judgment echoes the drafters of the 1948 Convention and the judges at Nuremberg by highlighting the 'particularly dangerous' nature of atrocity speech, deeming that a speaker could be as responsible as a person who wielded a machete and, therefore, equally deserving of punishment.[5] Secondly, in finding

[1] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998).

[2] Gregory S Gordon, *Atrocity Speech: Foundation, Fragmentation, Fruition* (OUP 2017) 136.

[3] Larissa van den Herik and Elies van Sliedregt, 'Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes' (2004) 17 Leiden Journal of International Law 537, 537 – 538. See also G Caplan, 'Rwanda: The Preventable Genocide – International Panel of Eminent Personalities' (*African Union*, July 2000) <http://www.refworld.org/docid/4d1da8752.html> accessed 7 August 2017, 179.

[4] Tonja Salomon, 'Freedom of Speech v Hate Speech: Jurisdiction of "Direct and Public Incitement to Commit Genocide" in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International Comparative and Contextual Aspects* (Ashgate 2007) 142.

[5] *Akayesu* (Judgment) (n 1) [562]. See also *Prosecutor v Muvunyi* (Retrial: Judgment) ICTR-00-55A-T, T Ch III (11 February 2010) [140].

Akayesu guilty of incitement, the Trial Chamber made efforts to elucidate the offence; it set out the 'lion's share' of the elements of the crime and shaped the approach of the cases that followed.[6] Accordingly, it is considered to be the seminal case on incitement, favourably used as a 'source of reference' in a number of subsequent decisions.[7] However, owing to the magnitude of the task, and the lack of straightforward solutions, the approach in *Akayesu* was not without its problems.

The aims of this thesis are: to appraise the whole of the ICTR jurisprudence to identify key elements of its analysis and highlight its problems; to use this analysis to inform definitions for the constitutive and evidentiary elements of incitement; and finally, to emphasise the importance of establishing the meaning of speech in international incitement trials. This chapter represents a significant contribution to the thesis aims by providing definitions for the constitutive elements (direct, public, incitement and intent). These are derived from an analysis of *Akayesu*, the foundational ICTR incitement case. As *Akayesu* shows the origins of some of the issues encountered by the Tribunal, this chapter sits at the centre of this study, tying together the threads from the previous chapters, and introducing the practical problems of application, thereby laying the groundwork for the subsequent discussion of ICTR incitement cases.

Given the significance of *Akayesu*, it is necessary to examine the facts of the case to provide context for the Trial Chamber's Judgment. Moreover, this discussion helps to identify some evidentiary elements that may facilitate a finding of incitement, such as the influence of the speaker and the seriousness of the message. The remainder of this chapter focuses on the constitutive elements. Incitement will be addressed first, looking at the Trial Chamber's approach to defining the concept as an international offence. This will illustrate the conflict between common law and civil law conceptions of the crime, as introduced by Chapter Three, and highlight the complexities of language and culture as discussed in Chapter Four. The next section will consider the

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[6] Gregory S Gordon, 'Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law' (2010) 50 Santa Clara Law Review 607, 611. See also Gordon, *Atrocity Speech* (n 2) 137.

[7] Nicholas Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2010) 138. See also *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T, T Ch III (2 December 2008) [387]; *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T, T Ch (16 May 2003) [247]; *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-98-42-T, T Ch II (24 June 2011) [468]; *Prosecutor v Karemera et al* (Judgment and Sentence) ICTR-98-44-T, T Ch III (2 February 2012) [1594]; *Prosecutor v Nzabonimana* (Judgment and Sentence) ICTR-98-44D-T, T Ch III (31 May 2012) [1753].

two dimensions of the intent element. The third will focus on direct, which builds upon Chapter Four by examining the context-based assessment. Finally, this chapter will address the public element of the offence, showing that even though public is perceived as being more straightforward than the other elements, it posed problems for the ICTR.

5.2. *Akayesu*: The Facts

As *bourgmestre* (mayor), Jean-Paul Akayesu was the 'most powerful' figure in Taba commune.[8] In this capacity he was responsible for 'maintaining law and order' and had control over the regional police.[9] In Rwanda, the *bourgmestre* has considerable authority that 'extends beyond these formal limits'.[10] He was looked upon as a 'parent', or a 'father figure'.[11] Consequently, he was deeply respected, and therefore his commands 'could not' have been disobeyed, even if they had been 'illegal or wrongful'.[12] The Judgment emphasises that this is as an important evidentiary factor; it shows that his speech was delivered with authority and would have been taken seriously by the target audience.

According to the charges against him, 'at least 2000 Tutsis were killed in Taba between the 7th April and the end of June, 1994' while he was in power.[13] He was indicted for a number of offences including genocide, complicity in genocide and direct and public incitement to commit genocide.[14] The basis of the incitement count was a speech made to a crowd of over 100 people following the murder of local teacher Sylvere Karera, who was 'accused of associating with the Rwandan Patriotic Front […] and plotting to kill Hutus'.[15] Akayesu called for assembled people to 'unite and eliminate the sole enemy: accomplices of the Inkotanyi'.[16] It was alleged that at the

[8] *Prosecutor v Akayesu* (Amended Indictment) ICTR-96-4-I (17 June 1997) [2].

[9] ibid [12].

[10] Samuel Totten and Paul R Bartrop, *Dictionary of Genocide: Volume I* (ABC-CLIO 2008) 6.

[11] *Akayesu* (Judgment) (n 1) [74] – [77]; Totten and Bartrop (n 10) 6.

[12] *Akayesu* (Judgment) (n 1) [74]. See also Christopher Scott Maravilla, 'Hate Speech as a War Crime: Public and Direct Incitement to Commit Genocide in International Law' (2008) 17 Tulane Journal of International and Comparative Law 113, 127 - 128.

[13] *Akayesu* (Amended Indictment) (n 8) [12].

[14] ibid.

[15] ibid [14].

[16] *Akayesu* (Judgment) (n 1) [361].

same meeting, Akayesu named 'at least three prominent Tutsis' who were to be killed because they were accomplices of the RPF.[17]

Akayesu was found guilty of nine of the 15 counts in the indictment, including count four, direct and public incitement to commit genocide.[18] The Chamber found that Akayesu had used his influence as the *bourgmestre* to urge the population to commit genocide.[19] He had read names from lists of 'RPF accomplices' to the crowd 'while being fully aware of the consequences of doing so'.[20] Thus, the judges determined that his acts constituted direct and public incitement to commit genocide according to their definition.[21]

5.3. The Trial Chamber's Judgment: Delineating the Offence

While the legal findings refer to a definition of incitement established in the Judgment, understanding why the Trial Chamber convicted *Akayesu* is not as straightforward as looking to a single statement of its exact meaning. In paragraph 559 of the Judgment, the Chamber notes that in its 'final analysis' it is possible to assert that 'whatever the legal system', direct and public incitement is defined as:

> directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[22]

[17] *Akayesu* (Amended Indictment) (n 8) [15].

[18] *Akayesu* (Judgment) (n 1) Verdict. See also *Prosecutor v Akayesu* (Sentence) ICTR-96-4-T, T Ch I (2 October 1998) [30]; *Prosecutor v Akayesu* (Appeals Judgment) ICTR-96-4-A, A Ch (1 June 2001).

[19] *Akayesu* (Sentence) (n 18) [673].

[20] ibid [673].

[21] ibid [674].

[22] *Akayesu* (Judgment) (n 1) [559].

While this definition was upheld by the Appeals Chamber, and applied in subsequent cases,[23] taken alone this does not provide a clear idea of the meaning or scope of incitement and its elements. Therefore, ascertaining how the Trial Chamber found *Akayesu* guilty of incitement necessitates considering how the judges defined the individual elements of the offence in light of the available interpretive materials.

5.3.1. Defining Incitement

While incitement is prohibited in some form in several national jurisdictions, the Convention created a new offence of 'direct and public incitement to commit genocide', which was transcribed verbatim into the Statute for the ICTR.[24] As noted in Chapter Three, the Statute for the ICTR is binding on all UN Member States, therefore, it constitutes secondary legislation.[25] Thus, it is subject to the rules of interpretation laid down in Articles 31 and 32 of the VCLT.[26] Moreover, in light of the principle of *nullum crimen sine lege*, the Tribunal was required to comply with the rules of strict interpretation and the ban on analogy.[27]

Consequently, the judges were expected to consider the terms of the offence in light of their ordinary meaning and if this was unhelpful, to consider supplementary material, such as the *Travaux Préparatoires* of the Genocide Convention to guide understanding.[28] However, there were two significant problems facing the ICTR. Firstly, from the outset, the definition was 'inadequate', therefore the ordinary meaning of the terms did not always provide assistance.[29] Secondly, while the qualifying

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[23] *Akayesu* (Appeals Judgment) (n 18); *Niyitegeka* (Judgment) (n 7) [431]; *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T, T Ch II (1 December 2003) [850] – [855]; *Prosecutor v Nahimana et al* (Judgment and Sentence) ICTR-99-52-T, T Ch I (3 December 2003) [1011].

[24] Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277, art III(c); UNSC Res 955 (8 November 1994) UN Doc S/RES/955, art 2; text to n 52 - 56 in ch 3.

[25] Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 13. See also *Prosecutor v Milošević* (Decision on Preliminary Motions) IT-02-54, T Ch (8 November 2001) [47]; *Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A, A Ch (15 July 1999) [282] – [305]; Gerhard Werle, *Principles of International Criminal Law* (Asser Press 2005) 55.

[26] Vienna Convention on the Law of Treaties (Adopted 22 May 1969 entered into force 27 January 1980) 1155 UNTS 331, art 31 – 32; text to n 62 – 66 in ch 3.

[27] Text to n 67 – 68 in ch 3.

[28] VCLT (n 26) art 32.

[29] Susan Benesch, 'The Ghost of Causation in International Speech Crime Cases' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers Corner to War Crimes* (Routledge 2013) 259.

elements at the 'core' of the issue distinguish the international crime from its domestic counterparts, the *Travaux* 'provide little guidance' as to their 'scope'.[30] This was magnified by the passage of time between the drafting of the Convention offence and its application in *Akayesu*, which meant that ascertaining the delegates' intentions was challenging.

Akayesu referred to the *Travaux* in a general sense, rather than to define specific terms. The Chamber justified the prohibition of incitement by referring to the Polish and Soviet delegates to emphasise the role played by speech in the planning and commission of genocide.[31] Furthermore, the analysis of the *Travaux* confirmed that incitement is to be considered to be inchoate.[32] In the absence of direct precedent, the judges also looked to the IMT prosecution of Julius Streicher as the only analogous conviction in international law, but as Streicher was on trial for a different offence, it provided a general contextual background for incitement, rather than helping to define it.[33] Thus, the Chamber conducted its own analysis of the meaning of the term. However, this was brief, occupying only a small portion of the Judgment.

In appreciation of the jurisdictionally diverse nature of international criminal law, the Chamber reviewed the offence as proscribed in common law and civil law jurisdictions, seeking to explain it in an international context.[34] Drawing upon comparative law sources, the Tribunal showed that the offence is not universally understood. Under the common law, incitement involves 'encouraging or persuading another to commit an offence', which may consist of 'threats or other forms of pressure', whereas in civil law jurisdictions, it is treated as a form of complicity or provocation.[35] The Chamber argued that in some civil law traditions provocation is comprised of the same elements as incitement to genocide, 'that is to say it is both direct

[30] *Prosecutor v Kalimanzira* (Appeals Judgment Partly Dissenting and Separate Opinion of Judge Pocar) ICTR-05-88-A, A Ch (20 October 2010) [42].

[31] *Akayesu* (Judgment) (n 1) [550] – [551]. See also UNGA Sixth Committee (3rd Session) 'Eighty-Seventh Meeting Held at the Palais de Chaillot, Paris on Friday, 29 October 1948, at 3:15 pm' (29 October 1948) UN Doc A/C.6/SR.87.

[32] *Akayesu* (Judgment) (n 1) [561].

[33] ibid [550].

[34] ibid [552] – [557].

[35] ibid [552] – [553], [555]. See also Serious Crime Act 2007, s44 – 46.

and public'.[36] Consequently, it was satisfied that provocation was sufficiently similar to incitement to assist in providing the definition.

This was a 'dictionary-based analysis'.[37] Rather than explaining incitement, the Tribunal simply substituted it for an equivalent term. This could be seen as looking at incitement according to its ordinary meaning. However, if this is the case it is unusual and relatively unhelpful that the Tribunal chose to use provocation, rather than 'urging or encouraging', particularly considering that incitement is usually conceived as a common law offence.[38] As Schabas argues, this is 'puzzling', owing to the inherently inchoate nature of incitement.[39] Provocation carries a connotation of causation, suggesting that the verbal advocacy must 'actually [result] in commission of the target crime'.[40] The Trial Chamber acknowledged this, aiming to distinguish the civil law notion of provocation from the international offence of incitement by noting that provocation requires the prosecution to 'prove a definite causation between the act characterized as incitement, or provocation in this case, and a specific offence', something that is not required for incitement.[41]

Gordon describes the Trial Chamber's attempts to reconcile civil law and common law conceptions of the applicable rules as 'equivocal and confusing', which has in turn translated into difficulty regarding whether there is a causal element to incitement.[42] For example, the *Akayesu* Trial Chamber found a causal link between the speech and the killing of Tutsi, which 'began shortly after the meeting'.[43] Even though this was not a necessary element of its investigation it was repeated in the Judgment's legal findings, where the Chamber concluded that Akayesu's incitement 'was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of

[36] *Akayesu* (Judgment) (n 1) [555].

[37] Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2008) 168.

[38] See also Jens David Ohlin, 'Incitement and Conspiracy to Commit Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 215.

[39] William Schabas, 'Hate Speech in Rwanda: The Road to Genocide' (2000) 46 McGill Law Journal 141, 161.

[40] Gordon, *Atrocity Speech* (n 2) 139.

[41] *Akayesu* (Judgment) (n 1) [557].

[42] Gordon, *Atrocity Speech* (n 2) 186.

[43] *Akayesu* (Judgment) (n 1) [14].

Taba'.[44] This has recurred in subsequent cases. As a consequence, Benesch argues that there is a 'ghost of causation' present throughout ICTR incitement jurisprudence.[45] This will be explored in Chapter Seven.

Akayesu failed to provide sufficient clarity in its analysis of incitement, leaving the key component of the offence largely unexplained, choosing an unhelpful and incorrect dictionary-based approach that created more problems than it solved. While the *Akayesu* Trial Chamber attempted to distinguish incitement from provocation, the reasoning is difficult to follow in places. It simultaneously finds similarities between the civil law concept of provocation and incitement, and distances international incitement from some essential parts of the civil law crime. Therefore, the Trial Chamber did not go sufficiently far to draw a distinction between these two offences, thereby introducing a potential conflict with the assertion that incitement is to be treated as inchoate. This was magnified by inconsistency within the Judgment, under which the legal analysis asserted that incitement is inchoate, but the factual findings sought a causal link between speech and killing.[46]

This indicates an inherent problem with incitement in international criminal law. As noted in Chapter Three, the meaning of incitement is 'subject to certain variations in different legal systems'.[47] Therefore, the approach of the Tribunal should have taken this into account, avoiding comparisons between plainly different offences. In light of this discussion it is possible to consider that incitement should have been defined as urging or encouraging rather than provocation. This would have provided a clearer explanation, satisfying the requirement that incitement be considered according to its ordinary meaning and avoiding any indication that causation is required.

5.3.2. The Two Dimensions of Intent

The Chamber's analysis of the mental element shows that a finding of incitement relies on identifying not what the speaker achieved with their words, but

[44] *Akayesu* (Judgment) (n 1) [675].

[45] Benesch, 'The Ghost of Causation' (n 29) 257.

[46] *Akayesu* (Judgment) (n 1) [562], [673].

[47] Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation* (Institute of Jewish Affairs 1949) 21; text to n 73 in ch 3.

what they aimed to achieve. The *mens rea* of incitement has two dimensions.[48] Firstly, the speaker must have the *dolus specialis* of genocide, that being the intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[49] The second requirement lies 'in the intent to directly prompt or provoke another to commit genocide'.[50] While the words 'prompt or provoke' might hint at causation, this does not require the audience to carry out the substantive offence, rather, the speaker has to intend for the audience to understand their words as containing an encouragement to commit genocide, regardless of whether genocide follows. Consequently, the *Akayesu* Trial Chamber observed that the specific intent for incitement 'implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging'.[51] The choice of wording suggests that, when assessing whether the speech falls within the parameters of incitement, the Tribunal 'must peer into the mind of two different people'.[52] The speaker must intend to encourage their audience to commit genocide, and the audience must understand it as such.

In application of the intent element to the facts, the Chamber concluded that it was proven that the accused deliberately created 'a particular state of mind in his audience necessary to lead to the destruction of the Tutsi' as an ethnic group.[53] The judges were satisfied that Akayesu was 'fully aware of the impact of his statement on the crowd and of the fact that his call to wage war against *Inkotanyi* accomplices could be construed as one to kill Tutsis in general'.[54] This would have been taken seriously by the audience, given his position in society.[55] These evidentiary elements will be explored in Chapter Six.

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[48] See also Paul Behrens, 'The *Mens Rea* of Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2014) 71.

[49] Genocide Convention (n 24) art II; *Akayesu* (Judgment) (n 1) [560]. See also Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) [256] – [257].

[50] *Akayesu* (Judgment) (n 1) [560].

[51] ibid [560].

[52] Larry May, 'Incitement to Genocide and the Rwanda Media Case' in Deidre Golash (ed), *Freedom of Expression in a Diverse World* (Springer 2010) 105.

[53] *Akayesu* (Judgment) (n 1) [674].

[54] ibid [361].

[55] *Akayesu* (Judgment) (n 1) [347]; text to n 131 in ch 6.

5.3.3. Direct Incitement: Developing the Context-Based Assessment

While none of the components of the offence have proven simple to define, the direct aspect of incitement has been considered the 'most controversial'.[56] As shown in Chapter Three, direct was included in the incitement provision in order to limit the potential scope of the offence, but with limited further guidance.[57] As the law is tasked with dealing with a number of complex issues it is 'inevitable' that this will result in a 'vocabulary of technical terms' or 'jargon'.[58] Direct is arguably one of these terms. Article 31(1) of the VCLT states that 'a treaty shall be interpreted […] in accordance with the ordinary meaning to be given to the terms of the treaty'.[59] Given its 'ordinary meaning', the word direct means 'straightforward', 'without ambiguity' and 'to the point'.[60] However, the definition given to direct by *Akayesu* acknowledged that interpreting it in this way would fail to take into account that speech that calls for genocide is rarely free from ambiguity.[61] In international criminal law, courts and tribunals are barred from extensive or broad construction of criminal rules.[62] However, through the analysis of the *Travaux* in Chapter Three and the issues of cultural communication in Chapter Four it has been shown that moving away from the ordinary meaning of direct does not conflict with that principle. This is supported by the Trial Chamber's discussion of the *Travaux*.[63]

The history of genocidal speech is littered with metaphor and euphemism.[64] Even in everyday communication, people rarely speak in direct terms, according to its

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[56] Michael Kearney, *The Prohibition of Propaganda for War in International Law* (OUP 2007) 226.

[57] Wolfgang Schomburg, 'About Responsibility' in Philipp Ambach and others (eds), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society: Essays in Honour of the Life and Work of Joakim Dungel* (Martinus Nijhoff Publishers 2015) 40.

[58] Salomon (n 4) 144.

[59] VCLT (n 26) art 31(1).

[60] 'Direct', *Oxford Dictionary of English* (2nd edn revised, OUP 2005).

[61] *Akayesu* (Judgment) (n 1) [557].

[62] Cassese (n 25) 41.

[63] *Akayesu* (Judgment) (n 1) [557]. See also UN Doc A/C.6/SR.87 (n 31) 251.

[64] See also Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York University Press 2002); Michael G Karnavas, 'Forms of Perpetration' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2013) 101; Yared Legesse Mengistu, 'Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) 360.

ordinary meaning.[65] While it is not unique to this context, it is particularly evident in Rwanda. As shown in Chapter Four, owing to Rwanda's oral tradition, speech is filled with stories and metaphor; people routinely employ euphemism and coded language to convey meaning which would be lost to outsiders.[66] There is always a subtext, yet the words themselves need not be explicit because the target audience understands.[67] Thus, the ICTR attempted to define direct in a way that would allow for an appreciation of the different factors that affect the way people communicate by acknowledging that 'a particular speech may be perceived as "direct" in one country, and not so in another'[68] as 'what is clear or unambiguous may differ from person to person, or society to society, or circumstances to circumstances'.[69]

Chapter Four showed that gauging audience understanding necessitates more than a translation of the individual words. Particular connotations attached to speech in its origin language, be they pejorative or otherwise, are lost when speech is removed from its context.[70] Consequently, it was considered that the 'direct element should be viewed in light of its cultural and linguistic content'.[71] Thus, the Chamber created the context-based assessment, which focuses on the local impact of the speech, thereby shifting the focus from the speaker to the audience.[72] Context is understood in its broadest meaning, encompassing 'all the environment surrounding the speech act': the specific words used and relevant linguistic factors in conjunction with surrounding factors including the physical location, the social, political, historical and cultural background to the speech and contemporary events.[73] Owing to the diversity in culture

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[65] Penelope Brown and Stephen C Levinson, *Politeness: Some Universals in Language Usage* (Cambridge University Press 1987) 215.

[66] See also *Akayesu* (Judgment) (n 1) [155].

[67] Donald McNeil, 'Killer Songs' *New York Times* (New York, 17 March 2002) <https://www.nytimes.com/2002/03/17/magazine/killer-songs.html> accessed 1 June 2018.

[68] *Akayesu* (Judgment) (n 1) [557].

[69] George William Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (Cameron May 2007) 205 – 206.

[70] John L Austin, *How to do Things with Words* (2nd edn, Harvard University Press 1975) 73 – 77; Mathias Ruzindana, 'The Challenges of Understanding Kinyarwanda Key Terms Used to Instigate the 1994 Genocide in Rwanda' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2012) 151.

[71] *Akayesu* (Judgment) (n 1) [557].

[72] ibid [557].

[73] Ruzindana (n 70) 156. See also *Akayesu* (Judgment) (n 1) [557] – [558].

and language this necessitates that 'an individualized factual inquiry'[74] be made on a case-by-case basis.[75]

This approach permits that 'incitement may be direct, and nonetheless implicit', so long as 'the persons for whom the message was intended immediately grasped the implication thereof'.[76] Therefore, speech may make use of coded words, colloquialism, insinuation or euphemism, yet still be direct, so long as the audience would have understood it as encouraging genocide when it was delivered in its own context. In permitting that direct could encompass implicit speech, the ICTR arguably contradicted the Convention, given that the ordinary meaning of implicit is 'suggested though not directly expressed'.[77] Similarly, this conflicts with the ILC Draft Code which states that the speech must be 'more than mere vague or indirect suggestion'.[78] However, as Schabas argued, a restrictive approach to direct incitement 'would surely be contrary to the intent of the drafters' of the Convention.[79] Viewing implicit speech as insufficiently direct would restrict liability to a very small category of speakers and prevent successful convictions in all but the most explicit cases. Therefore, direct should be read to mean that the target audience must clearly understand speech as encouraging genocide when delivered in its own context.

Convicting a speaker for incitement to genocide requires the court to conduct a multi-faceted inquiry. It is necessary to establish, on a factual basis, whether the accused spoke the words. It also requires the judges to understand the speech (locutionary aspect) and consider what it encouraged the listeners to do (illocutionary aspect).[80] Accordingly, in *Akayesu*, the central question was whether Akayesu had 'urged the population to eliminate the accomplices of the RPF' (*Inkotanyi*), and whether

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[74] Gordon, *Atrocity Speech* (n 2) 140.

[75] *Akayesu* (Judgment) (n 1) [558].

[76] ibid [557] – [558].

[77] 'Implicit', *Oxford Dictionary of English* (2nd edn revised, OUP 2005).

[78] Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (1996) art 2 (3)(f), [16].

[79] William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 331.

[80] See also Richard A Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press 2017) 179 – 180.

this 'was understood by those present to mean Tutsi'.[81] Consequently, The Trial Chamber situated the speech in the local context, noting contemporary and subsequent events, particularly the killing of Sylvere Karera, the local teacher accused of being an RPF sympathiser.[82] They also emphasised Akayesu's role as *bourgmestre*, showing that his words were delivered with authority, an important evidentiary element.[83] Additionally, the Trial Chamber sought to establish an understanding of the language used through the use of expert linguists and witnesses.[84] This discussion focussed on '*Inkotanyi*', attempting to establish whether the use of this word was sufficiently direct to be understood by the audience as a call to kill a protected group under the Convention.

As shown in Chapter Four, while *Inkotanyi* is generally used to describe the members of the Rwandan Patriotic Front, its semantic translation is 'warrior' or 'tough fighters'.[85] However, like many Kinyarwanda words, it has multiple meanings that have evolved over time, therefore understanding the word depends on its context.[86] For example, while *Inkotanyi* is used with pride by the RPF, it carries pejorative connotations when used by their opponents.[87] It became apparent that the term might also mean: the *Inkotanyi's* accomplices or sympathisers; Tutsi in general; and Hutu opposed to Habyarimana's regime.[88] The judges noted that, in this context, 'the words Tutsi and Inkotanyi were synonymous'.[89] RPF soldiers and Tutsi civilians were grouped together and became inseparable 'through dissemination via the media of the idea that every Tutsi was allegedly an accomplice of the Inkotanyi'.[90] Given the context, the Chamber established that the 'sole enemy' and 'the accomplices of the

[81] *Akayesu* (Amended Indictment) (n 8) [14]. See also *Akayesu* (Judgment) (n 1) [332].
[82] *Akayesu* (Judgment) (n 1) [320]. See also *Akayesu* (Amended Indictment) (n 8) [13].
[83] *Akayesu* (Judgment) (n 1) [72] – [77], [426].
[84] ibid [33].
[85] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Hurst & Co 2010) 401.
[86] *Prosecutor v Bagilishema* (Judgment) ICTR-95-1A-T, T Ch I (7 June 2001) [325].
[87] Alison des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch 1999) 62; Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Arrow Books 2004) 116.
[88] Ruzindana (n 70) 154.
[89] *Akayesu* (Judgment) (n 1) [339]. See also [315], [317], [332], [361].
[90] ibid [127].

Inkotanyi' were understood by those present to mean Tutsi.[91] Thus, the Chamber was satisfied that the speech amounted to direct incitement as the audience would have taken the speech seriously and understood it as a clear exhortation to kill.[92]

To an extent, *Akayesu* showed how contextual factors can be used to establish understanding. This reinforces the conclusion from Chapter Four; a speaker intending to incite genocide is likely to convey their message in a way the target audience will understand, which indicates that they will not always choose terminology familiar to an external audience, sometimes choosing culturally specific language with the objective of deliberately obscuring meaning to outsiders. However, the important factor is how the target audience understood the speech. While *Akayesu* and the context-based assessment hinted at an approach to direct that could be applied in future cases, it is not without its problems.

It has been suggested that by indicating that implicit speech could amount to direct incitement, the Chamber defined direct 'in a manner much broader than necessary to convict Akayesu'.[93] While he used a culturally specific pejorative term, *Inkotanyi*, which required decoding, the remainder of this speech was explicit, calling upon his audience to exterminate the target group. Therefore, the Chamber permitted the inclusion of implicit speech without defining the limits of this. The Judgment gives no indication of whether the speech had to take a particular grammatical form, for example, whether it should be delivered as a command, or whether it can be broader, such as praising killings that had already taken place and thereby encouraging further slaughter. This is an important question that will be considered in Chapter Six. Therefore, while it is evident that implicit speech may fall within the parameters of direct incitement, this is only vaguely defined.

Through the analysis in subsequent chapters it will be possible to see that gaps in *Akayesu's* analysis contributed to difficulties in application, and a number of

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[91] ibid [338], [361], [365].

[92] ibid [674].

[93] Justin La Mort, 'The Soundtrack to Genocide: Using Incitement to Genocide in the *Bikindi* Trial to Protect Free Speech and Uphold the Promise of Never Again' (2010) 4 Interdisciplinary Journal of Human Rights Law 43, 50. See also Susan Benesch, 'Inciting Genocide, Pleading Free Speech' (2004) 21 World Policy Journal 62, 64.

questions remain unanswered, particularly regarding the key evidentiary aspects. Firstly, simply stating that there must be a case-by-case, context-based analysis does not provide sufficient guidance for future cases. Additionally, seemingly in an attempt to prove that the speech was understood as inciting genocide, the Chamber repeatedly referred to causation, which is an unnecessary finding for inchoate incitement.[94] *Akayesu* could not be expected to pre-empt all the difficulties that future cases would encounter. As the first case at the ICTR it faced significant practical challenges, particularly in terms of communication.[95] However, considering that the *Akayesu* Trial Chamber was conducting an exercise in developing the definition, and is referred to with approval by a number of Chambers, the lack of clear guidance has posed a problem.[96]

5.3.4. Public Incitement: Distinguishing Private Conversations from Public Speech

Several of the cases that appeared before the ICTR involved speeches 'made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area'.[97] Thus, the public element of the offence was rarely the focus of analysis, with most judgments only paying it 'lip service'.[98] As some scholars have viewed public incitement as 'not too difficult' and relatively 'straightforward'[99] it has been subject to less scrutiny than direct incitement, consequently, there is an absence of significant critique on the issue of public incitement to be found in academic commentary. For example, in Timmerman's analysis of incitement to genocide, there are more than six pages dedicated to direct incitement, yet the public element receives a brief overview

[94] *Akayesu* (Judgment) (n 1) [362].

[95] Text to n 12 – 18 in ch 4.

[96] See also *Bikindi* (Judgment) (n 7) [387]; *Niyitegeka* (Judgment) (n 7) [247]; *Nyiramasuhuko* (Judgment) (n 7) [468]; *Karemera* (Judgment) (n 7) [1594]; *Nzabonimana* (Judgment) (n 7) [1753].

[97] *Prosecutor v Nahimana et al* (Appeals Judgment) ICTR-99-52-A, A Ch (28 November 2007) [758], [775], [862]; *Nzabonimana* (Judgment) (n 7) [1754].

[98] Brendan Saslow, 'Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide' (2016) 48 Case Western Reserve Journal of International Law 417, 420.

[99] Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2015) 378. See also Wibke Timmerman and William Schabas, 'Incitement to Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2013) 154.

which occupies a single page.[100] Therefore, this section will inevitably focus on cases, rather than secondary sources. Despite the lack of attention, it is still a required component of incitement to genocide, and an inability to prove that speech was public can lead to an acquittal.[101]

Akayesu's speech was delivered in front of over 100 people in an open meeting, consequently its public nature was reasonably unproblematic.[102] Even though it was not a central focus of this case, the Trial Chamber attempted to elucidate the term.[103] It confirmed that the drafters of the Convention had underscored 'their commitment' to punishing only 'the truly public forms of incitement' by excluding private conversations, noting that the speech could be written or verbal.[104] Additionally, the Chamber referred to civil law jurisdictions to show that words are public when 'spoken aloud' in a place that is 'public by definition'.[105] However, the Judgment makes no attempt to elaborate 'public by definition', and there is no explicit discussion of the ordinary meaning of the term. It simply referenced a single 'obscure' criminal judgment from the French *Cour de Cassation* in 1950, with no further clarification.[106] Consequently, it is difficult to ascertain how the Trial Chamber reached the finding that the speech was public.

In its factual findings, the *Akayesu* Trial Chamber determined that, according to witness testimony, the meeting either took place at a crossroads or on the road, but did not specifically conclude which.[107] Neither did the judges devote much explanation to whether the location itself was public. They took the view that it was undeniably so on the basis of the number of people in attendance and the fact that the audience was unrestricted, noting only that the meeting was 'in a public place'.[108] In contrast to their

[100] Wibke Timmerman, *Incitement in International Law* (Routledge 2015) 217 – 218.

[101] *Prosecutor v Kalimanzira* (Appeals Judgment) ICTR-05-88-A, A Ch (20 October 2010) [162] – [165].

[102] *Akayesu* (Judgment) (n 1) [318].

[103] ibid [556].

[104] ibid [556]. See also ECOSOC 'Ad Hoc Committee on Genocide Summary Record of the Sixteenth Meeting, Lake Success, New York, Thursday, 22 April 1948, at 2:15 pm' (29 April 1948) UN Doc E/AC.25/SR.16, 11.

[105] *Akayesu* (Judgment) (n 1) [556].

[106] Saslow (n 98) 432. See also *Akayesu* (Judgment) (n 1) [556] fn 125.

[107] *Akayesu* (Judgment) (n 1) [321], [323].

[108] ibid [674].

approach to the causal element, the judges favourably considered the Draft Code, which outlined that 'public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television'.[109] Thus, in *Akayesu,* public was divided into two factors: the place where the incitement occurred, and whether or not 'assistance was selective or limited'.[110]

The use of terminology is problematic. 'Assistance' was undefined, and, in the absence of any explanatory note, the meaning is vague, contributing to the Trial Chamber's confused approach to public incitement. A similar phrase was included in the Trial Chamber Judgment in *Ruggiu*, but the term 'assistance' was replaced with incitement, a change that does not clarify the meaning.[111] Gordon suggests that the confusion with terminology arose as the Tribunal was working with French materials.[112] Therefore, the word 'assistance' is used in the place of the French verb *assister*, meaning 'to be present at' or 'to attend'.[113] This seems likely given the French version of the *Akayesu* Judgment, which states '*l'assistance a été ou non sélectionée ou limitée'* (audience was selective or limited), thereby suggesting that '*l'assistance*' has merely been replaced with 'assistance' rather than translated to 'attendance' or 'audience'.[114] This is confirmed in later cases. For example, in *Nzabonimana* the Trial Chamber considered that the focus was on the 'place where the incitement occurred' and 'whether the audience was selective or limited'.[115]

Therefore, it can be said that the *Akayesu* interpretation of public focuses on the location and the audience. However, taken alone this is not a particularly helpful approach that leaves several questions unanswered. Firstly, this does not explain what it would mean for a speaker that stood on private property to deliver a speech to people standing on a public road. Secondly, the reference to the number of listeners poses a

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[109] ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May – 26 July 1996) UN Doc A/51/10, 26; Draft Code (n 78) art 2(3)(f), [16].

[110] *Akayesu* (Judgment) (n 1) [556]. See also *Niyitegeka* (Judgment) (n 7) [431].

[111] *Prosecutor v Ruggiu* (Judgment and Sentence) ICTR-97-32-I, T Ch I (1 June 2000) [17].

[112] Gordon *Atrocity Speech* (n 2) 189.

[113] 'Assister', *Oxford Hachette French Dictionary* (2rd end revised, OUP 2001).

[114] *Akayesu* (Judgment) (n 1) [556].

[115] *Nzabonimana* (Judgment) (n 7) [1755].

problem, as it indicates an undefined numerical threshold, with no legal basis for the idea that an audience must be a minimum size. Recalling the rules governing treaty interpretation in the VCLT, it seems that the *Akayesu* Trial Chamber over complicated matters.[116] The dictionary meaning of public is 'done, perceived, or existing in open view'.[117] This would have helped to clarify the ICTR's approach by showing that if words were spoken or published with the knowledge that they would exist in 'open view' they would be public by definition.

While the public question was relatively straightforward for the *Akayesu* Trial Chamber, subsequent cases encountered some difficulties in application. In the Media Trial, defendant Barayagwiza was initially convicted for direct and public incitement to commit genocide for his supervision at roadblocks, where he had encouraged the killing of Tutsi through the chanting of '*tubatsembatsembe'* or 'let's exterminate them', "them" being understood to mean Tutsi.[118] While this speech constitutes direct incitement, the Appeals Chamber set this conviction aside on the basis that 'only the individuals manning the roadblocks would have been the recipients of the message and not the general public', thus viewing it as a private conversation.[119]

Roadblocks have proven contentious in the analysis of public incitement. In *Nyiramasuhuko*, defendant Kanyabashi's speech was delivered to a group of people manning a roadblock. It was held that it was not sufficiently public as he had directed his speech to them and no one else.[120] As a result, even though a roadblock might conceivably be a public place, it was concluded that a speech delivered whilst running one was tantamount to instigation or conspiracy, rather than incitement.[121] This followed similar reasoning to the comments attached to the Secretariat Draft of the Convention, in which incitement refers only 'to direct appeals to the public by means of speeches, radio or press, inciting it to genocide'; it does not encompass 'orders or

[116] VCLT (n 26) art 31(1).

[117] 'Public', *Oxford Dictionary of English* (2nd edn revised, OUP 2005).

[118] *Nahimana* (Judgment) (n 23) [1035].

[119] *Nahimana* (Appeals Judgment) (n 97) [862].

[120] *Nyiramasuhuko* (Judgment) (n 7) [6008]. See also *Prosecutor v Nzabonimana* (Appeals Judgment) ICTR-98-44D-A, A Ch (29 September 2014) [120].

[121] *Nahimana* (Appeals Judgment) (n 97) [862].

instructions by officials to their subordinates'.[122] However, the ICTR's approach to subordinates is not consistent. In *Kajelijeli*, even though witness testimony indicated that the accused only spoke with *Interahamwe* and communal police 'under his authority', the Chamber convicted them for inciting the crowd at Byangabo Market.[123] There was no evidence to suggest that the accused had addressed any people other than his subordinates. While there is no significant discussion of the idea of public incitement in *Kajelijeli*, there is a suggestion that the size of the crowd was an influential factor, it was noted that the crowd was 'large', [124] amounting to approximately 500 – 700 people.[125]

Similarly, in *Ngirabatware* the Trial Chamber convicted the defendant for directly and publicly inciting genocide at a roadblock despite affirming that messages to subordinates manning a roadblock are not public.[126] The Trial Chamber's argument was based on the idea that the crowd was too large to have been composed of only the defendant's subordinates. It was suggested that 'the intended audience' was a group of 'as many as 150 to 250 people who had gathered there as opposed to only those manning it'.[127] This was affirmed by the Appeals Chamber.[128] As in *Kajelijeli,* this indicates that the ICTR considered the size of the audience to be influential, even where the defendant argued they were only addressing subordinates. As Gordon argues, 'the Chambers merely supposed that a roadblock would not be manned by as many as 150 – 200 persons',[129] and, therefore, the crowd must have included the general public.

There is no evidence to support the assumption that a roadblock could not have been manned by that many people. Roadblocks differed in size and nature.[130] They were manned by a number of different types of people: 'security forces, *gendarmes*,

[122] ECOSOC 'Draft Convention on the Crime of Genocide' (26 June 1947) UN Doc E/447, 30 - 31.

[123] *Kajelijeli* (Judgment) (n 23) [531], [676], [739], [823], [856].

[124] ibid [962].

[125] ibid [491], [532], [676], [739], [823].

[126] *Prosecutor v Ngirabatware* (Judgment and Sentence) ICTR-99-54-T, T Ch II (20 December 2012) [1366] – [1370].

[127] ibid [1367].

[128] *Prosecutor v Ngirabatware* (Appeals Judgment) MICT-12-29-A, A Ch (18 December 2014) [51].

[129] Gordon, *Atrocity Speech* (n 2) 194.

[130] See also *Prosecutor v Bagosora et al* (Judgment and Sentence) ICTR-98-41-T, T Ch I (18 December 2008) [23]; Prunier (n 85) 243.

local authorities, *Interahamwe* and civilians working together'.[131] The number of people running them is rarely mentioned. *Nyiramasuhuko* indicates that it was variable; in one instance four *gendarmes* were present, but this is an anomaly, other examples cited refer to vague and undefined 'groups' of people.[132] *Ntagerura* indicates that a large one could be operated by hundreds of people, as a witness testified that 'the *Interahamwe* mobilized more than two hundred people from the roadblock'.[133] Therefore, while it was entirely possible that the speech addressed only those manning the roadblock, the *Ngirabatware* Trial Chamber seemed to assume that the size of the audience meant that members of the public were also present. This indicates that the size of the audience was considered to be an evidentiary element of public incitement. However, this is approach is incorrect.

The premise of the appeal in *Nzabonimana* was that the number of people present is an essential factor for distinguishing between public incitement and private conversations. The appellant contested the Trial Chamber's conclusion that an audience comprised of twenty people was 'undeniably' and 'overtly' public.[134] He argued that, contrary to the Chamber's assertion, his speech constituted a private conversation and any others present were 'indirect listeners'.[135] Comparisons were drawn between *Nahimana* and *Kalimanzira,* in which the Appeal Judgments had 'characterized speeches from a vehicle as a "conversation"'.[136] The judges seemed to attribute a potential evidentiary value to the size of the audience, conceding that 'the number of persons and the medium through which the message is conveyed' may be indicative that the speech targeted the population in general.[137] However, the problem with this approach is that it also implies a minimum threshold for audience size.

Using numbers to define the public nature of the audience is arbitrary and incorrect. The focus should be on whether the speech existed in open view, and whether

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[131] *Nyiramasuhuko* (Judgment) (n 7) [518].

[132] ibid [422].

[133] *Prosecutor v Ntagerura et al* (Judgment and Sentence) ICTR-99-46-T, T Ch III (25 February 2004) [448].

[134] *Nzabonimana* (Judgment) (n 7) [1760] – [1761].

[135] *Nzabonimana* (Appeals Judgment) (n 120) [119].

[136] ibid [118].

[137] ibid [231].

the speaker can reasonably be held responsible for disseminating it in this way. In his dissenting opinion in *Kalimanzira,* Judge Pocar asserted that the suggestion that a numerical threshold is relevant 'establishes a dangerous and incorrect precedent linked with the question of what minimum audience size is required to satisfy the "public" element of the crime'.[138] The Appeals Chamber had compared the size of the audience to other cases to show that Kalimanzira's audience was insufficiently broad.[139] However, there is no indication that a speech must be made to a large group of people. While many of the convictions pertain to large assemblies, this does not mean that a smaller audience is inconsistent with international law, so long as 'the incriminating message is given in a public space to an unselected audience'.[140] Thus, while the cases at the ICTR generally involved large audiences, ranging from a fairly abstract 'over 100' in *Akayesu,*[141] to an equally vague 'approximately 5,000' in *Niyitegeka,*[142] there is no definite numerical threshold that must be crossed.

Judge Pocar's dissenting opinion in *Kalimanzira* indicates that the ICTR may have misinterpreted the ILC definition of public.[143] The Draft Code suggests that it is sufficient that the communication of a call for criminal action is 'to a number of individuals in a public place or to members of the general public'.[144] Conversely, some cases suggest that speech must fulfil both factors, permitting the accused to argue that their speech was private when the intended recipients of the speech amounted to a small number of people.

By focussing on both factors there is a grey area for indirect listeners. In *Nzabonimana* it was considered that the accused intended his speech 'to be heard by anyone in the area, rather than an exclusive or limited group', therefore, it was public.[145] Similarly, in *Kalimanzira*, it was held that the defendant could not have the requisite *mens rea* for incitement if they intended the words to be delivered to a particular

[138] *Kalimanzira* (Appeals Judgment Partly Dissenting and Separate Opinion of Judge Pocar) (n 30) [45].
[139] *Kalimanzira* (Appeals Judgment) (n 101) fn 410.
[140] *Nzabonimana* (Appeals Judgment) (n 120) [126] – [127].
[141] *Akayesu* (Judgment) (n 1) [673].
[142] *Niyitegeka* (Judgment) (n 7) [257].
[143] *Kalimanzira* (Appeals Judgment Partly Dissenting and Separate Opinion of Judge Pocar) (n 30) [45].
[144] Draft Code (n 78) art 2(3)(f), [16].
[145] *Nzabonimana* (Judgment) (n 7) [1766].

audience and not the public at large, thereby suggesting that indirect listeners cannot constitute 'the audience'.[146] This suggests that, even where the location is accessible, if the speaker addresses a specific group it does not matter who may incidentally be passing by, the speech is not public. Similarly, in *Nyiramasuhuko*, it was considered that where communication is comparable to a conversation, it is private, regardless of whether other people may hear the speaker. Thus, where the speaker addressed one woman, 'in the presence of four other men', it could not be public.[147] According to the ordinary meaning of the term these findings are incorrect as the speech was disseminated by the speaker in 'open view'. If the Tribunal had acknowledged this ordinary meaning, it would mean that where people in general are able to access the speech owing to the 'open' location, it would be public, regardless of whether the speech targeted a specific group, particularly where the speaker knew that others would be listening. Therefore, the ICTR erred in seemingly requiring that both the location and audience were public.

In *Akayesu*, the Trial Chamber drew inspiration from the Rwandan Penal Code offence of 'participation' to show that speech can be communicated in any way that demonstrates an intention for it to be heard or seen by a public audience, rather than being conveyed via private means of communication or conversation.[148] This shows that the way a speech is disseminated can indicate whether the speaker intended it to be public. This would mean that if the speaker knew that their words were accessible to the public at large, this would indicate public intent. The *Akayesu* approach considers that public intent is demonstrated by the dissemination of words or images through 'speeches, shouting or threats', 'the sale or dissemination, offer for sale or display of written material or printed matter' and the 'display of placards or posters', or 'any other means of audiovisual communication'.[149]

[146] *Kalimanzira* (Appeals Judgment) (n 101) [162].

[147] *Nyiramasuhuko* (Judgment) (n 7) [6016].

[148] *Akayesu* (Judgment) (n 1) [533].

[149] ibid [559]; *Prosecutor v Kalimanzira* (Judgment and Sentence) ICTR-05-88-T, T Ch III (22 June 2009) [515].

The *Akayesu* approach suggested that the broadcast of a message via mass communications could facilitate a finding that speech was intended to be public.[150] However, this led the appellant in *Nzabonimana* to argue that only mass communications were sufficiently public.[151] Similarly, in *Ngirabatware* the Trial Chamber confirmed that public incitement 'pertains to mass communications', noting that '"private" incitement, understood as more subtle forms of communication such as conversations, private meetings, or messages, was specifically removed from the Convention'.[152] However, rather than simply being used to illustrate the intent of the speaker, the discussion of mass communications sometimes indicated that the audience had to be significant in size in order to be sufficiently public, a position that has been shown to be incorrect. This shows that the cases are relatively contradictory and confusing, resulting in incoherent jurisprudence.

Mugwanya notes that 'there are some limitations in the ICTR's jurisprudence'.[153] Even in *Akayesu,* a case that has gone further than many others to define the key terms involved, the specific meaning of public was not fully explored and the discussion left open a number of questions that subsequent cases failed to clarify. As this discussion of the cases illustrates, defining the least controversial of the elements of incitement proved complex. A problem from the outset was the failure to define the terms used. This is a requirement of the VCLT and essential to establishing even a basic understanding of the offences under the jurisdiction of a court or tribunal.[154] This formed the foundation of the dissenting opinion of Judge Pocar in *Kalimanzira.*[155] He noted that the Appeals Chamber failed to 'break down the crime into its elements' and did not 'reveal how the term "public" is defined'.[156] Thus, it has been suggested that the ICTR should have 'endeavoured to construe the term "public" according to its natural or ordinary meaning before resorting to supplementary means

[150] *Akayesu* (Judgment) (n 1) [559]. See also *Kalimanzira* (Appeals Judgment) (n 101) [156], [160]; *Ngirabatware* (Judgment) (n 126) [1355]; *Nzabonimana* (Appeals Judgment) (n 120) [124].

[151] *Nzabonimana* (Appeals Judgment) (n 120) [126].

[152] *Ngirabatware* (Judgment) (n 126) [1355].

[153] Mugwanya (n 69) 208.

[154] VCLT (n 26) art 31(1).

[155] *Kalimanzira* (Appeals Judgment Partly Dissenting and Separate Opinion of Judge Pocar) (n 30).

[156] ibid [43].

of interpretation'.[157] As noted above, the dictionary meaning of public is 'done, perceived, or existing in open view'.[158] This would have helped to clarify the ICTR's approach by showing that if the speaker disseminates their speech in 'open view' it would be public by definition. Unlike with direct, where there were inherent issues with the term, the problems with public seemed to have been created by the ICTR's failure to clearly define the word and apply this definition consistently. Thus, this element is arguably now more difficult to apply than it was before *Akayesu*.

5.4. Conclusion

This chapter has furthered the central aims of this thesis by analysing the seminal incitement case of *Akayesu* and defining the constitutive elements of incitement. Moreover, this chapter identified some of the evidentiary factors that would facilitate a finding of incitement. This discussion has shown that despite the magnitude of its achievements, the Judgment in *Akayesu* is not without its problems. The decisions that followed are testament to the fact that the so-called '*Akayesu* definition' does not provide a one-size-fits-all formula for incitement. Indeed, many of the problems that would pervade cases at the ICTR first manifested themselves in *Akayesu*. Consequently, Gordon considers that the Trial Chamber Judgment is 'the chief culprit in sowing confusion'.[159] This chapter has illustrated this by identifying four primary problems: the definition of incitement, the analysis of direct, the approach to incitement as an inchoate offence and the ICTR's approach to public.

Firstly, in *Akayesu* there was a failure to clearly define incitement beyond a dictionary analysis of the term, providing little indication as to how it should be interpreted. It is possible to assert that much of the discussion that does not focus on the meaning of the word incitement is more useful in determining what speech might constitute the offence. Thus, understanding incitement also relies upon the discussion of direct, public, and *mens rea*. For the latter, the speaker must have the special intent of genocide, must intend to provoke their audience to commit genocide and must be 'fully aware of the impact' of their words.[160] However, the remaining components are

[157] Mugwanya (n 69) 208.
[158] 'Public', *Oxford Dictionary of English* (n 117).
[159] Gordon, *Atrocity Speech* (n 2) 196.
[160] *Akayesu* (Judgment) (n 1) [361].

not so clearly addressed. This shows the complexity of the Convention offence. Through the addition of direct and public the drafters of the Convention created an offence with numerous layers to be considered and, therefore, made it difficult for any court or tribunal to successfully apply it. Thus, it is possible to assert that confusion was already largely present; it was merely waiting for an international court to highlight its existence.

The second key problem lies in *Akayesu's* failure to outline the limits of its definition of direct incitement. In order to account for variance in cultural communication the *Akayesu* approach departs from the ordinary meaning of direct. However, this is consistent with the intent of the drafters of the *Travaux* and, therefore, does not conflict with the principle of strict interpretation. *Akayesu* shows that it would be contrary to the intent of the drafters of the Convention to exclude implicit speech from falling within the parameters of direct incitement. Furthermore, the Tribunal considered that it would be in a better position to conclude whether or not speech amounted to direct incitement if it were able to view the speech from the perspective of the audience, considering factors that may have influenced their reception of the speech. Consequently, the Chamber placed emphasis on the 'cultural and linguistic content of the speech'.[161] In doing so, the Chamber took significant steps towards providing a workable approach to incitement that would theoretically allow a court to assess speech in any context. However, as the speech in *Akayesu* was relatively explicit, the limits of this remained undefined, and there was insufficient exploration of the evidentiary elements that facilitate a finding of incitement beyond noting the significance of the position of the speaker and the contextual analysis.

The third problem lies in the Tribunal's approach to incitement as an inchoate offence. As shown above, even at the early stages of ICTR jurisprudence there was an inconsistent treatment of causation, explicitly confirming that incitement was inchoate, yet still searching for a causal nexus between the speech and killing.

Finally, the approach to public incitement has been shown to be 'deficient'.[162] Despite being considered to be the most straightforward of the constitutive elements,

[161] ibid [557].

[162] Gordon, *Atrocity Speech* (n 2) 186.

the ICTR jurisprudence has proven that this is more complex than it initially appeared. From *Akayesu* it is evident that there are two key factors to be considered, the location and the audience. However, subsequent cases could not seem to reach a consensus on whether both elements were required simultaneously, or whether size of the audience was influential. There is a lack of consistency between judgments which stems from a failure to properly define key terms in the early cases. Reference to the principles of interpretation and the VCLT suggests that *Akayesu* over complicated the element, which would better have been addressed in reference to its ordinary meaning.[163] Therefore, the definition of public ought to be: 'done, perceived, or existing in open view'.

Given that the problem regarding public can arguably be resolved with reference to the ordinary meaning of the term, there are three questions that remain unanswered at the conclusion of the discussion of *Akayesu*: (i) the extent to which implicit speech falls within the parameters of direct incitement; (ii) how to define the distinction between incitement and legitimate expression; and (iii) the extent to which the ICTR created a causal element for incitement. Chapter Six will address the first two issues by considering the evidentiary elements that identify when implicit speech constitutes direct incitement and distinguish between incitement and legitimate expression. The third of these issues, causation, will be considered in Chapter Seven.

[163] 'Public', *Oxford Dictionary of English* (n 117).

6. Distinguishing Incitement from Legitimate Expression: The Importance of Evidentiary Elements

6.1. Introduction

The previous chapter highlighted the legal and jurisprudential significance of *Akayesu,* analysing the ICTR's approach to the constitutive elements of the offence: incitement, direct, public and intent.[1] Despite acknowledging the numerous developments, the discussion identified four primary problems: firstly, the failure to define incitement beyond a dictionary-based analysis; secondly, the lack of explanation of the limits of *Akayesu's* approach to direct incitement, particularly regarding implicit speech and the question of grammatical forms; thirdly, the Trial Chamber's problematic relationship with causation; and finally, the 'deficient'[2] approach to public incitement. The so-called *'Akayesu* definition' did not provide sufficient guidance for subsequent application of the offence. This resulted in an inconsistent approach at the ICTR, with several cases reaching unclear conclusions. The previous chapter argued that it would be better to interpret public in light of its ordinary meaning. However, the other problems raised by *Akayesu* were not fully addressed, as this required a more comprehensive analysis of subsequent cases and a consideration of the evidentiary elements that facilitate a finding of incitement.

The central aims of this thesis are to conduct an appraisal of ICTR incitement jurisprudence; to use this analysis to propose definitions for the constitutive and evidentiary elements of incitement; and to emphasise the importance of establishing meaning in incitement trials. This chapter contributes to the originality of this thesis by focussing on the evidentiary elements of incitement, particularly how these elements help to distinguish incitement from legitimate expression. This is conducted in two parts: firstly, identifying the extent to which implicit speech can constitute direct incitement by emphasising the importance of evidentiary elements to the incitement analysis and addressing the question of grammatical forms; and, secondly, to identify and outline the elements that facilitate the distinction between incitement and legitimate expression.

[1] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998).

[2] Gregory S Gordon, *Atrocity Speech: Foundation, Fragmentation, Fruition* (OUP 2017) 186.

This chapter and the next show the development of the body of incitement jurisprudence at the ICTR. This excludes any cases where an indictment for incitement did not manifest in a trial, or where the judgment does not engage with the offence in detail.[3] As part of the forward-looking focus of this thesis, the analysis also engages with cases from national jurisdictions. National courts serve an important function in international criminal law, they may confirm or create customary law and contribute to the formation of general principles of law, additionally, they can serve as aids in determining the content of norms.[4] The most significant cases in providing this assistance are those in which the national courts explicitly refer to international criminal law, such as the Canadian Supreme Court case against Léon Mugesera, and the Dutch District Court decision against Yvonne Basebya.[5]

Despite the value of national courts to international criminal law, these cases are only analogous examples and must be used with 'great caution', as noted by the ICTY in *Furundžija*.[6] As van der Wilt observes, there are inherent differences between international and domestic jurisdictions, and domestic offences may differ from their

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[3] In Serugendo the accused pleaded guilty for a technical role with RTLM. He did not personally 'make anti-Tutsi or inflammatory statements over the RTLM'; *Prosecutor v Serugendo* (Judgment) ICTR-2005-84-I, T Ch (1 June 2006) [49]. See also *Prosecutor v Semanza* (Judgment and Sentence) ICTR-97-20-T, T Ch III (15 May 2003) [437] – [438]; *Prosecutor v Uwilingiyimana* (Indictment) ICTR-2005-83-I (10 June 2005); *Prosecutor v Bucyibaruta* (Indictment) ICTR-2005-85-I (16 June 2005); *Prosecutor v Bisengimana* (Judgment) ICTR-00-60-T, T Ch II (13 April 2006) [209], [219]; *Prosecutor v Bagosora et al* (Judgment and Sentence) ICTR-98-41-T, T Ch I (18 December 2008); *Prosecutor v Ntawukulilyayo* (Judgment and Sentence) ICTR-05-82-T, T Ch III (3 August 2010) [459]; *Prosecutor v Kabuga* (Amended Indictment) ICTR-98-44B-I (14 April 2011); *Prosecutor v Bizimungu et al* (Judgment and Sentence) ICTR-99-50-T, T Ch II (30 September 2011) 1972 – 1987; *Prosecutor v Ntaganzwa* (Second Amended Indictment) ICTR-96-9-I (30 March 2012); *Prosecutor v Ndimbati* (Second Amended Indictment) ICTR-95-1F-I (8 May 2012); *Prosecutor v Ryandikayo* (Second Amended Indictment) ICTR-95-1E-I (8 May 2012); *Prosecutor v Munyarugarama* (Amended Indictment) ICTR-2002-79-I (13 June 2012); *Prosecutor v Mugenzi and Mugiraneza* (Appeals Judgment) ICTR-99-50-A, A Ch (4 February 2013) [95], [129] – [142].

[4] *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T, T Ch (10 December 1998) [194]; Gerhard Werle, *Principles of International Criminal Law* (Asser Press 2005) 53.

[5] *Mugesera v Canada* (Minister of Citizenship and Immigration) [2005] 2 SCR 100; RB The Hague 01-03-2013, ECLI:NL:RBDHA:2013:BZ4292 (*Public Prosecutor/Yvonne Basebya*); -- 'Higher Appeal Rwandan Genocide Case Withdrawn' (*Prakken d'Oliveira: Human Rights Lawyers*, 28 June 2013) < http://www.prakkendoliveira.nl/nl/nieuws/hoger-beroep-rwandese-genocidezaak-ingetrokken/> accessed 15 July 2018. See also *Niyonteze v Public Prosecutor* Tribunal Militaire de Cassation (Switzerland) April 27, 2001; See also Peter J P Tak, *The Dutch Criminal Justice System: Organization and Operation* (2nd edn, Meppel: Boom Juridische Urigevers 2003); Susan Benesch, 'Inciting Genocide, Pleading Free Speech' (2004) 21 World Policy Journal 62, 67.

[6] *Furundžija* (Judgment) (n 4) [194]. See also Michael Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts' in Helmut Phillipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016).

international counterparts, as 'domestic standards may be slightly less strict'.[7] National courts have access to a broader spectrum of offences than international courts, and, therefore, some of the discussion may focus on issues outside the remit of international criminal law.[8] For example, while it has been noted that 'its impact will be mostly felt in the realm of criminal law', the decision in *Mugesera* was handed down in the context of an immigration case.[9] Therefore, these cases are used to confirm the findings from the ICTR cases, but with these differences kept in mind.

6.2. Implicit Speech and Direct Incitement: The Decisions After *Akayesu*

As noted in Chapter Five, taken in its ordinary meaning, direct would suggest that incitement must be 'straightforward', 'without ambiguity' and 'to the point'.[10] The *Akayesu* Trial Chamber affirmed that a strict approach would exclude all but the most explicit speech, thereby accepting that direct incitement could be implicit.[11] However, there was no detailed explanation of what this direct, but implicit, speech would entail. While some subsequent cases, such as *Kajelijeli* and *Nzabonimana,* contained similarly explicit exhortations to kill,[12] most involved far more implicit speech. This required a more comprehensive evidentiary discussion. Yet, there was a lack of definition and guidance on the appropriate evidentiary elements to be applied. In order to contribute to the overarching aim of defining the evidential elements, this discussion has two parts: firstly, to highlight the importance of a thorough discussion of relevant factors; and, secondly, to consider the grammatical form of the speech to identify when implicit speech can constitute direct incitement.

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[7] Harmen G van der Wilt, 'Genocide, Complicity in Genocide and International v Domestic Jurisdictions: Reflections of the Van Anraat Case' (2006) 4 Journal of International Criminal Justice 239, 240, 251.

[8] *Mugesera* (n 5) 102, 126; see also Joseph Rikhof, 'Hate Speech and International Criminal Law: The *Mugesera* Decision by the Supreme Court of Canada' (2005) 3 Journal of International Criminal Justice 1121, 1131.

[9] Rikhof (n 8) 1121.

[10] 'Direct', *Oxford Dictionary of English* (2nd edn revised, OUP 2005).

[11] *Akayesu* (Judgment) (n 1) [557] – [558].

[12] *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T, T Ch II (1 December 2003) [856]; *Prosecutor v Nzabonimana* (Judgment and Sentence) ICTR-98-44D-T, T Ch III (31 May 2012) [1757] – [1768]. See also Tonja Salomon, 'Freedom of Speech v Hate Speech: The Jurisdiction of "Direct and Public Incitement to Commit Genocide"' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2009) 146.

6.2.1. The Importance of Evidentiary Elements

As the first case to follow *Akayesu*, *Kambanda* presented an opportunity to clarify the extent to which implicit speech could constitute direct incitement. However, as this case involved a guilty plea, the Judgment was shorter than would be found in a contested trial, and the questions raised by *Akayesu* were not addressed. As Gordon notes, guilty pleas are 'neither an occasion for systematic doctrinal application nor the proper forum for significant jurisprudential development'.[13] Nevertheless, this case highlights the importance of evidentiary elements, as the absence of any meaningful discussion in *Kambanda* contributes to the uncertainty regarding implicit speech.

Even though Kambanda acknowledged that, in his capacity as interim prime minister, he visited several regions encouraging the population to commit massacres, the Judgment is vague regarding the content of the speeches.[14] Only one example of speech is given: 'you refuse to give your blood to your country and the dogs drink it for nothing'.[15] The ICTR did not explain the meaning of this implicit speech, and did not explicitly conclude whether it constituted incitement to genocide, merely describing it as 'incendiary.[16] Therefore, it is unclear whether the justification for punishing the speech rests solely upon the admission of guilt, if similar speech could constitute incitement in a contested trial, or even if this was speech for which Kambanda was convicted.[17]

Kambanda's speech contains both the 'dehumanisation' and 'accusation in a mirror' techniques outlined in Chapter Two.[18] Gordon argues that this contains a 'warning through reference to drinking blood that it was kill or be killed' by referring to the enemy, or Tutsi, drinking the blood of the Hutu if the Hutu do not act.[19] During the Genocide, speakers defined the Tutsi as subhuman, referring to them as cockroaches

[13] Gordon, *Atrocity Speech* (n 2) 144.

[14] *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) [39(x)].

[15] ibid [39{viii)], [39(x)].

[16] ibid [39(x)].

[17] See also Salomon (n 12) 145; Wibke Timmerman and William Schabas, 'Incitement to Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2014) 158.

[18] Text to n 47 – 63 in ch 2.

[19] Gordon, *Atrocity Speech* (n 2) 143.

or other vermin.[20] Thus, it could be suggested that 'dogs' was intended to mean Tutsi, as it was in *Kayishema*.[21] However, the mere existence of pejorative terms is insufficient for a finding of incitement. For speech to constitute incitement it must be understood as an encouragement to commit genocide by the target audience. Therefore, according to *Akayesu*, the speech must be considered in light of the specific circumstances of each case.[22]

Pejorative code words were a recurring theme in ICTR incitement cases. In the *Muvunyi* Retrial it was possible for the Trial Chamber to demonstrate that, in the context of Muvunyi's speech, Tutsi and 'snakes' that 'should be killed' were 'synonymous', thereby constituting a clear and unambiguous encouragement to kill.[23] However, this relied on a contextual analysis that was absent in *Kambanda*. This contextual analysis is essential, particularly for implicit speech. For example, *Ngirabatware* illustrates that even when a pejorative code-word has been used by another speaker to incite genocide, the term will not always take on the same meaning. The defendant used the term '*Inkotanyi*'.[24] In previous cases *Inkotanyi* had been defined as referring to Tutsi in general, but in this case it was defined as 'armed persons who had attacked the country from abroad'.[25] Consequently, while the *Inkotanyi* were Tutsi, not all Tutsi were *Inkotanyi,* and, therefore, the speech did not target a protected group.[26] This emphasises that the analysis of speech must be on a case-by-case basis regardless of whether the speech had been given a different meaning in another context. For that reason, even though Kambanda arguably used recognisable pejorative terms, this does not mean that they were automatically understood as referring to the Tutsi population.

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[20] Daniel Goldhagen, *Worse Than War: Genocide, Eliminationism and the On-going Assault on Humanity* (Abacus 2012) 353. See also Binaifer Nowrojee, 'A Lost Opportunity for Justice: Why Did the ICTR Not Prosecute Gender Propaganda?' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007) 367.

[21] *Prosecutor v Kayishema et al (*Judgment) ICTR-95-1-T, T Ch II (21 May 1999) [538].

[22] Text to n 75 in ch 5.

[23] *Prosecutor v Muvunyi* (Retrial: Judgment) ICTR-00-55A-T, T Ch III (11 February 2010) [126].

[24] *Prosecutor v Ngirabatware* (Judgment and Sentence) ICTR-99-54-T, T Ch II (20 December 2012) [1356].

[25] ibid [1359]. See also *Akayesu* (Judgment) (n 1) [127], [709].

[26] *Ngirabatware* (Judgment) (n 24) [1356] - [1359].

Owing to the nature of the guilty plea, *Kambanda* did not provide the forum for any extensive discussion on the scope of incitement, and, therefore, there was an absence of evidentiary analysis. It would have been useful for the Chamber to conclude whether this speech amounted to incitement, given that it was cited as an example of the defendant's incendiary speech.[27] The absence of meaningful discussion on the matter poses a problem as it remains unclear whether Kambanda's speech was understood as encouraging genocide by the target audience, and, therefore, constituted direct incitement. This contributed to the uncertainty surrounding the extent to which implicit speech amounts to direct incitement. While it is difficult to draw conclusions based on an absence of evidence, there is little that can be taken from *Kambanda* that would suggest that the speech would constitute incitement in a contested trial. Therefore, this case demonstrates that a finding that implicit speech constitutes incitement relies on an analysis of evidentiary factors.[28] Without this analysis the conclusions of the case are vague and unpersuasive.

6.2.2. The Grammatical Form of the Speech

As shown in Chapter Two, euphemistic speech and culturally specific metaphors play a 'pivotal role' in incitement.[29] This was magnified in Rwanda owing to the prevalence of implicit modes of communication, as shown in Chapter Four. This made the question of grammatical forms of the speech incredibly important. However, despite confirming that speech could be direct even if it was implicit, *Akayesu* did not give a satisfactory answer to this question. There was an absence of discussion regarding whether the speech has to be in the imperative, functioning as a command, or whether it can be broader and encompass indirect speech techniques.[30] This continued throughout the ICTR's cases. There is no explicit statement that clearly outlines the ICTR's position on indirect speech techniques. However, it is possible to identify the Tribunal's approach to grammatical form through an analysis of cases. This discussion is necessary for demarcating the parameters of direct incitement and clarifying the issue of implicit speech.

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[27] *Kambanda* (Judgment) (n 14) [39{viii)], [39(x)].

[28] See also *Prosecutor v Kalimanzira* (Judgment) ICTR-05-88-T, T Ch III (22 June 2009) [694].

[29] Gordon, *Atrocity Speech* (n 2) 214.

[30] Text to n 93 – 94 in ch 5.

Chapter Four highlighted the importance of proverbs, demonstrating that these cultural references convey a clear message that would have been immediately understood by the audience.[31] As shown, in *Muvunyi,* these are 'greatly exploited in Kinyarwanda', in part for the reason of their familiarity in an oral tradition, but also 'to avoid interference or intervention by foreigners'.[32] As shown above, a contextual analysis enabled the Chamber in *Muvunyi* to confirm that, albeit implicit and obscure to outsiders, culturally specific proverbs that target an ethnic group may be understood as an encouragement to commit genocide.[33] Similarly poetic language was considered in *Bikindi*. As Bikindi's songs made use of culturally specific metaphor and Rwandan legend, understanding them required an intricate knowledge of Rwandan language, history and culture.[34] While the Trial Chamber concluded that none of the songs constituted incitement to genocide *per se,*[35] it suggested that songs could fall within the parameters of the offence. The Judgment refers to international human rights law to show that freedom of expression is not an absolute right, existing 'to allow for open debate' and to 'encourage artistic and scholarly endeavours'.[36] Therefore, the Chamber concluded that 'depending on the nature of the message conveyed and the circumstances, the Chamber does not exclude the possibility that songs may constitute direct and public incitement to commit genocide'.[37]

Both proverbs and poetic songs were important forms of communication in Rwanda.[38] Thus, it is unsurprising that the ICTR concluded that these could constitute direct incitement, depending on the circumstances and content of the message.

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[31] Text to n 167 in ch 4. See also *Muvunyi* (Retrial: Judgment) (n 23) [122] – [125].

[32] *Muvunyi* (Retrial: Judgment) (n 23) [124]. See also [2], [120].

[33] Text to n 23; *Muvunyi* (Retrial: Judgment) (n 23) [126].

[34] *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T, T Ch III (2 December 2008) [197], [242]; Emmanuel Kwaku Akyeampong and Steven Niven, *Dictionary of African Biography Volumes 1 – 6* (OUP USA 2012) 220. See also Andrea Grieder, 'Rwanda: Healing and the Aesthetics of Poetry' in Raminder Kaur and Parul Dave-Mukherji (eds), *Arts and Aesthetics in a Globalizing World* (Bloomsbury 2015) 135 – 149.

[35] *Bikindi* (Judgment) (n 34) [421].

[36] ibid [381].

[37] ibid [389].

[38] See also Ruth Finnegan, *Oral Literature in Africa* (Open Book 2012) 265 – 289; Liz Gunner, 'Africa and Orality' in F Abiola Irele and Simon Gikandi (eds), *The Cambridge History of African and Caribbean Literature* (Cambridge University Press 2000); John Street, 'Breaking the Silence: Music's Role in Political Thought and Action' (2007) 10 Critical Review of International Social and Political Philosophy 321, 321, 330.

However, the ICTR went further, suggesting that questions[39] and post-violence condonation[40] can constitute incitement. In *Bikindi*, the question 'have you killed the Tutsi here?' was understood as direct incitement as it had followed a more explicit call to 'rise up to exterminate the minority, the Tutsi'.[41] Thus, given the context, it was understood as encouraging further killing.

Post-violence condonation is particularly implicit, and grammatically very different from an order. When taken out of context, it seems too vague to constitute direct incitement. It involves congratulating or praising the perpetrators of acts of genocide in an attempt to encourage further similar acts.[42] In *Niyitegeka*, after a massacre had taken place, the defendant used a loudspeaker to 'thank the attackers for their participation and commend them for "a good work".[43] The accused thanked attackers and 'told them to share the people's property and cattle, and eat meat so that they would be strong to return the next day to continue the "work"'.[44] The judges considered that within this context, the culturally specific coded reference, 'work', would be understood by the audience as an encouragement to kill.[45] Therefore, the Chamber in *Niyitegeka* affirmed that retrospective praise may constitute incitement to commit genocide, albeit in a subtler form than orders or requests.

This was confirmed in *Karemera*. In the days after a massacre of approximately 2000 Tutsi civilians in close proximity to the speech, the defendant paid tribute to the *Interahamwe*.[46] Owing to the context, the speech was understood as a direct call to continue attacks against the Tutsi.[47] Therefore, while this type of speech is 'patently less direct than requests or commands',[48] when it is delivered in the right context, post-

[39] *Bikindi* (Judgment) (n 34) [269]; Gordon, *Atrocity Speech* (n 2) 214.

[40] *Kambanda* (Judgment) (n 14) [39(viii)], 39[x]; *Prosecutor v Ruggiu* (Judgment and Sentence) ICTR-97-32-I, T Ch I (1 June 2000) [44(v)], [50]; *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T, T Ch (16 May 2003) [142], [257]; *Prosecutor v Karemera et al* (Judgment and Sentence) ICTR-98-44-T, T Ch III (2 February 2012) [1596].

[41] *Bikindi* (Judgment) (n 34) [281].

[42] *Ruggiu* (Judgment) (n 40) [44(v)], [50].

[43] *Niyitegeka* (Judgment) (n 40) [142], [257].

[44] ibid [142], [433].

[45] ibid [142], [257].

[46] *Karemera* (Judgment) (n 40) [1596].

[47] ibid [1598].

[48] Gregory S Gordon, 'Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law' (2010) 50 Santa Clara Law Review 607, 612.

violence condonation transcends the boundary between hate speech and incitement. This demonstrates that the Tribunal was willing to accept that direct incitement did not need to take the form of an order, so long as the audience understood the speech as encouraging genocide. The crucial issue in each of these cases was the evidential consideration of contemporary context, which forms part of the analysis in the next chapter.

The ICTR's approach to grammatical form was explicitly confirmed by the Supreme Court of Canada in *Mugesera.* Mugesera's counsel argued that incitement could not be committed in the conditional tense.[49] However, it was confirmed that 'even in the case where the passage could appropriately be characterized as a conditional one, the threat was nonetheless real and the use of the conditional did not reduce it in any way'.[50] Additionally, in places, Mugesera used the simple future tense, for example '"*tuzabanyuza*" [we will send you]', rather than could or would, thereby giving the passage certainty, acting as a promise.[51] It may be concluded that the tense of the speech is not necessarily important; speech does not have to be in the imperative, so long as the audience understand it as encouraging genocide.

The cases show that incitement is not restricted to the grammatical form of an order and can encompass a range of implicit modes of speech, so long as the speech is understood as a call to commit genocide, whether through killing or any of the acts outlined in Article II of the Convention.[52] However, there is a problem in simply stating that speech does not have to take the form of an order, as this does not provide guidance for future courts regarding the scope of implicit speech as direct incitement. The ICTR found that post-violence condonation, culturally specific pejorative terms, questions, songs and proverbs could all amount to incitement. It is evident that each of these findings depends on the content and context of the speech. By identifying what the speech encouraged the listeners to do, and whether it was likely to produce such a result in those circumstances, the ICTR was able to identify implicit speech that constituted

[49] *Mugesera* (n 5) 122.

[50] ibid 124.

[51] Narelle Fletcher, 'Words that Can Kill: The Mugesera Speech and the 1994 Tutsi Genocide in Rwanda' (2014) 11 PORTAL Journal of Multidisciplinary International Studies 1, 8.

[52] Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277, art II.

incitement. There are a number of evidential factors that are essential to this analysis, as will be outlined below.

6.3. The Media Trial: Distinguishing Incitement from Legitimate Expression

The Media Trial was described as 'the most important judgment relating to the law of incitement in the context of international criminal law' since Nuremberg.[53] While the three defendants were all charged with and convicted for various offences of genocide and crimes against humanity, incitement was at the centre of the Judgment.[54] In outlining the offence, the *Nahimana* Trial Chamber first considered the elements of the crime as laid out by *Akayesu*.[55] However, the Judgment distinguishes these cases for two reasons: firstly, the dissemination of speech via organs of mass media raised questions regarding freedom of expression; and secondly, owing to their editorial control of RTLM and *Kangura*, the defendants were on trial 'not only for their own words, but for the words of many others' thereby requiring stronger justifications for their punishment.[56] Therefore, the distinction between incitement and legitimate expression was of greater significance to the Media Trial.[57] Consequently, analysing this case is essential to achieving two of the aims of this thesis: (i) to assess the ICTR's incitement cases to identify problems in its analysis; and, (ii) to define the evidentiary elements of incitement. While the evidentiary elements relevant to the Media Trial were drawn from the focus on mass media and editorial control, this discussion will show how these factors are relevant in other contexts through examples from ICTR cases.

6.3.1. The Contribution of International Human Rights Law

The Trial Chamber derived its approach from an examination of international jurisprudence on incitement to discrimination and violence.[58] While *Akayesu* had

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[53] Diane Orentlicher, 'Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v Nahimana' (2005) 21 American University International Law Review 557, 557 – 558.

[54] *Prosecutor v Ngeze* (Amended Indictment) ICTR-97-27-I (10 November 1999); *Prosecutor v Nahimana* (Amended Indictment) ICTR-97-27-I (15 November 1999); *Prosecutor v Barayagwiza* (Amended Indictment) ICTR-97-27-I (13 April 2000); *Prosecutor v Nahimana et al* (Judgment and Sentence) ICTR-99-52-T, T Ch I (3 December 2003) [1092] – [1094].

[55] *Nahimana* (Judgment) (n 54) [978].

[56] ibid [979].

[57] Michael Kearney, *The Prohibition of Propaganda for War in International Law* (OUP 2007) 208.

[58] *Nahimana* (Judgment) (n 54) [1000] – [1010].

looked to domestic law, the *Nahimana* Trial Chamber preferred to be guided by international human rights, arguing that 'domestic law varies widely while international law codifies evolving universal standards'.[59] Orentlicher finds this problematic, arguing that it 'overwhelmingly' occupies the Trial Chamber's discussion, which fails to adequately distinguish the Convention offence from a human rights approach.[60] However, both the Trial and Appeals Chambers acknowledged the point of departure between international human rights and international criminal law, noting that speech may be hateful, but not constitute direct incitement where it does not 'call on listeners to take action of any kind'.[61]

There are difficulties with both the analysis of domestic provisions and international human rights law. As Saul suggests, reference to domestic prohibitions is unlikely to resolve uncertainty as incitement is not limited to direct and public instances in many national jurisdictions.[62] Similarly, incitement to discrimination and violence contain no explicit reference to direct and public. Thus, while the offences might have some similarities, they are not the same. In light of the discussion of the principles of international law in Chapter Three, it is important to consider the prohibition on analogy.[63] Orentlicher argues that grafting the law of these human rights treaties on to the Convention offence 'flout[s] the unambiguous intention of those who drafted the Genocide Convention' and breaches 'the defendants' right to be punished only for conduct clearly established as a crime' within the jurisdiction of the ICTR.[64] However, this is not what happened with the discussion of international human rights in the Media Trial.

International criminal law 'simultaneously *derives its origin from* and continuously *draws upon* both *international humanitarian law and human rights law*, as well as *national criminal law*'.[65] The corpus of legal provisions and decisions from

[59] ibid [1010].

[60] Orentlicher (n 53) 560 – 561.

[61] *Prosecutor v Nahimana et al* (Appeals Judgment) ICTR-99-52-A, A Ch (28 November 2007) [696]. See also *Nahimana* (Judgment) (n 54) [1009].

[62] Ben Saul, 'The Implementation of the Genocide Convention at the National Level' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 67.

[63] Text to n 67 – 68 in ch 3.

[64] Orentlicher (n 53) 559.

[65] Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 6.

the various international human rights bodies has contributed to the development of international criminal law.[66] Therefore, despite the caution that must be applied to the application of analogous human rights provisions, it is possible to assert that some of the elements drawn from this analysis are applicable to incitement to genocide, particularly regarding the distinction between incitement and legitimate expression. For example, the Chamber emphasised the importance of 'purpose' and 'context' to this analysis, which are, conceivably, 'relevant to virtually every area of incitement law'.[67]

Freedom of expression is protected by domestic,[68] regional,[69] and international law.[70] However, as noted in Chapter Three, there are limits to this protection, as domestic and international law simultaneously protect the right to be free from discrimination.[71] This is clearly outlined by the ICCPR which provides, under Article 19, that 'everyone shall have the right to freedom of expression' but that this 'carries with it special duties and responsibilities', therefore, it may 'be subject to certain restrictions [...] for respect of the rights [...] of others' and 'for the protection of national security or of public order'.[72] Under Article 20 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[73] Therefore, the ICCPR outlines that certain speech must be restricted in order to preserve the rights and liberty of others. Similarly, the International Convention on the Elimination of all forms of Racial Discrimination (CERD) requires States Parties to prohibit 'all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.[74]

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[66] ibid 6. See also Werle (n 4) 39 – 42.

[67] Orentlicher (n 53) 574.

[68] See also US Constitution, Amendment I; Human Rights Act 1998, s 10.

[69] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 10.

[70] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 19; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 entered into force 5 January 1969) 660 UNTS 195, art 5(viii).

[71] Text to n 86 – 89 in ch 3. See also UDHR (n 70) art 7.

[72] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 19.

[73] ibid art 20.

[74] CERD (n 70) art 4.

There is a clear tension in human rights law between freedom of expression and the effort to protect equality rights.[75] This demonstrates a desire to promote democracy and prevent group focussed hate speech.[76] However, there is an imbalance that suggests that dangerous speech raises greater public policy concerns than the preservation of free expression.[77] For example, Article 19 of the ICCPR permits derogations from the freedom of expression in a time of public emergency or to protect the rights of others, as does Article 4 of the CERD.[78] Conversely, the Human Rights Committee (HRC) has stated that it is not permissible to derogate from Article 20 of the ICCPR.[79]

The jurisprudence affirms this. In *Robert Faurisson v France,* the HRC considered the meaning of incitement under Article 20 of the ICCPR.[80] This opinion highlighted that the motivating purpose of the author was not the dissemination of historical fact, but the aggressive inciting of anti-Semitism, which was not protected under Article 19, but rather, necessarily restricted. This case drew attention to a number of important evidentiary elements: firstly, the value of assessing the content and purpose of the speech to show whether the speaker intended to inform or provoke the audience;[81] secondly, whether the speech would have been taken seriously by the audience (in *Robert Faurisson* the author attempted to represent the document as 'impartial academic research');[82] and, finally, the need to consider the speech within its own context.[83]

A number of cases from the European Court of Human Rights (ECtHR) are similarly valuable in the exercise of balancing freedom of expression with the right to restrict such freedoms. Much like the ICCPR, the European Convention on Human

[75] See also Stephanie Farrior, 'Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech' (1996) 14 Berkeley Journal of International Law 1, 3.

[76] Gordon, *Atrocity Speech* (n 2) 62.

[77] ibid 64.

[78] ICCPR (n 72) art 19. See also CERD (n 70) art 4; Wibke Timmerman, *Incitement in International Law* (Routledge 2016) 71 – 72.

[79] UNHRC 'CCPR General Comment No 29: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11.

[80] *Robert Faurisson v France* (1996) CCPR/C/58/D/550/1993.

[81] *Robert Faurisson v France* (1996) CCPR/C/58/D/550/1993 (Individual Opinion of Elizabeth Evatt and David Kretzmer, Co-Signed by Eckart Klein) [10].

[82] ibid [6].

[83] ibid [6]; *Robert Faurisson v France* (1996) CCPR/C/58/D/550/1993 (Views Under Article 5 Paragraph 4 of the Optional Protocol) [7.2], [9.6].

Rights (ECHR) guarantees the freedom of expression and simultaneously permits derogation where speech is likely to pose a risk to national security or the rights of others.[84] In *Jersild v Denmark*, the ECtHR was tasked with assessing the extent to which a journalist could be held responsible for spreading racial hatred by quoting three racist youths in his material.[85] As part of this, the ECtHR needed to consider whether his exercise of editorial control had contributed to the promotion of racism without sufficient counterbalancing of the extremist views expressed.[86]

The television programme was a 'serious' broadcast, 'intended for a well-informed audience'.[87] The programme was introduced with reference to recent public debate and press comments on racism, 'inviting the audience to see the interview in that context'.[88] The ECtHR found that Jersild had been wrongly convicted as the presenter was 'clearly dissociated [...] from the persons interviewed'; he described the youths as 'extremist' and rebutted 'some of the racist statements'.[89] Therefore, the ECtHR preserved the right of broadcasters to disseminate such material where it was in the public interest.[90] This emphasises the vital function of broadcasters as a 'public watchdog'.[91] However, this does not grant unrestrained rights to broadcast racist hatred. There are responsibilities associated with freedom of expression, particularly for the press. While it is possible to objectively report on the racist views of others, the broadcaster would not be protected where they disseminated their own racist views with an intent to incite the audience.[92]

The human rights treaties and cases show a difference between informative statements and opinions. Speech is protected where it aims to inform, providing an objective representation of a view with a clear distancing of the speaker from the message.[93] Conversely, speech sits beyond the protection of free expression where the

[84] ECHR (n 69) art 10.

[85] *Jersild v Denmark* (1994) 19 EHRR 1.

[86] Jan Oster, *European and International Media Law* (Cambridge University Press 2017) 19. See also *Jersild* (n 85) [31].

[87] *Jersild* (n 85) [9].

[88] Oster (n 86) 19. See also *Jersild* (n 85) [33].

[89] *Jersild* (n 85) [34].

[90] ibid [35]. See also Eric Barendt, *Freedom of Speech* (2nd edn OUP 2009) 66, 183.

[91] *Jersild* (n 85) [35].

[92] Barendt (n 90) 424. See also *Zana v Turkey* (1997) 27 EHRR 667.

[93] *Sürek and Özdemir v Turkey* (1999) ECHR 50.

speaker promotes their own view, or adds their own support to a message that targets a group, thereby constituting an attack, threat or a glorification of violence.[94] This is distinct from a simple expression of opinion. As shown in Chapter Two, speech can be defined as performative where it poses a credible threat to the target audience. To pose such a threat it must be spoken by a person that has the authority to encourage the audience to act, they must be taken seriously by the audience and the words must be spoken in a situation where they have the potential to bring about such conduct.[95] This was affirmed by the ICTR. The Media Trial identified two questions from their analysis of human rights law: whether the language was 'intended to inflame or incite to violence' and 'was there a real and genuine risk that it might actually do so?'.[96]

6.3.2. Distinguishing Incitement from Legitimate Expression: The Application of Evidentiary Elements

Following their analysis of international human rights treaties and cases, the Media Trial conceived an approach that would help to differentiate legitimate broadcasting from harmful ethnic stereotyping.[97] This involves distinguishing informative statements from opinions by: (i) finding the purpose of the words, broadly defined as 'intent', and examining the content of the speech, as the identification of pejorative slurs will facilitate a finding that the speech was intended as an attack; (ii) identifying whether the speech had the potential to bring about the desired conduct by considering its persuasive force; and, (iii) an examination of contextual factors.

The Media Trial employed context as an umbrella term to describe relevant evidential factors. However, there was a failure to provide a clear definition and distinguish it from *Akayesu's* context-based assessment.[98] The Media Trial's contextual analysis had four main objectives. Firstly, to establish the meaning of implicit speech, particularly euphemisms, metaphors and code words, following the *Akayesu* approach

[94] *Sürek v Turkey* (No 1) (1999) ECHR 51.

[95] Text to n 139 – 151 in ch 2.

[96] *Nahimana* (Judgment) (n 54) [1002].

[97] John L Austin, *How to do Things with Words* (2nd edn, Harvard University Press 1975) 60; Kent Greenawalt, *Speech, Crime and the Uses of Language* (OUP 1989) 58; John Stuart Mill, *On Liberty* (Cosimo 2005) 67 – 68; Richard A Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press 2017) 57.

[98] Salomon (n 12) 147. See also *Akayesu* (Judgment) (n 1) [557] – [558]; *Nahimana* (Judgment) (n 54) [1004], [1011].

outlined in Chapter Four.[99] Secondly, as will be shown below, speech context referred to evidential contextual factors that had not been explicitly mentioned by *Akayesu*. This included the means of dissemination of the message, the tone of the speech, repetition of similar messages and accompanying images or actions. Thirdly, personal context, such as political and community affiliations, facilitated the identification of genocidal intent.[100] Finally, as will be shown in Chapter Seven, to appreciate the impact or importance of the speech, noting that speech against a particular ethnicity would have a 'heightened impact in the context of a genocidal environment'[101] and could 'exacerbate an already explosive situation'.[102]

6.3.2.1. Informative Speech and Opinions: The Content and Purpose Approach

The Media Trial considered several factors to determine whether speech aimed to 'provoke rather than to educate those who receive it'.[103] At the centre of this is the content and purpose approach which helps to identify a distinction between legitimate informative broadcasts and the propagation of racist views. This acknowledges the value of looking at the 'actual language used' to determine, for example, whether the language 'explains the motivation for terrorist activities' or 'promotes terrorist activities'.[104] Moreover, this considers whether the 'purpose in publicly transmitting the material was of a *bone fide* nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities)'.[105]

As shown above, through the discussion of *Muvunyi*, the use of culturally specific pejorative code-words can facilitate a finding of incitement.[106] The guilty plea in *Ruggiu* confirmed that these code-words are deliberately employed by speakers to convey a specific meaning to the audience.[107] Ruggiu was a Belgian-born Francophone with no knowledge of Kinyarwanda. Despite broadcasting only in French, he was 'expressly instructed' by the manager of RTLM to use particular Kinyarwanda key

[99] *Nahimana* (Judgment) (n 54) [1005].
[100] *Nahimana* (Appeals Judgment) (n 61) [701], [711], [713].
[101] *Nahimana* (Judgment) (n 54) [1022].
[102] ibid [1004], [1011].
[103] ibid [1022].
[104] ibid [1001] – [1002].
[105] ibid [1001].
[106] *Muvunyi* (Retrial: Judgment) (n 23) [125]. See also *Niyitegeka* (Judgment) (n 40) [142], [257].
[107] *Ruggiu* (Judgment) (n 40) [44 (i)], [44(iii)].

terms.[108] Instead of using the Kinyarwanda word *'kwica'* which would provide the closest semantic equivalent of 'to kill',[109] he was instructed to euphemistically refer to killing as *'gukora'* or 'work', thereby obscuring meaning to outsiders but ensuring that the message was understood by the target audience.[110] For example, in June 1994, Ruggiu called upon RTLM listeners to 'mobilize'[111] themselves 'to work'; 'work you the youth, everywhere in the country, come to work with your army. Come to work with your government to defend your country'.[112] Even though the words would not form part of his everyday communication, owing to his lack of knowledge of Kinyarwanda, he used these terms because they conveyed a special meaning to the audience. This demonstrated that inciters deliberately communicate in euphemistic terms, in part to obscure meaning to outsiders, but in part to ensure that the message is clearly delivered to the target audience.

The use of code-words can help the court to identify that the speech had pejorative connotations. In the Media Trial, the Chamber referred to RTLM and *Kangura*'s designation of Tutsi as the enemy in light of witness testimony and previous ICTR cases.[113] For example, in an RTLM broadcast on the 30th May 1992, Habimana was reported to equate *Inkotanyi* with Tutsi, 'referring to the enemy several times first as *Inkotanyi* and then as Tutsi'.[114] This showed that Tutsi civilians and the population as a whole were targeted as the threat, and, therefore, the audience were directed against them. The use of the term *Inkotanyi* was broad and pejorative, indicating an attack against the Tutsi, rather than conveying information. This was explicitly confirmed outside the ICTR by the Supreme Court of Canada in *Mugesera*; Mugesera repeatedly used the term '*inyenzi'* rather than the standard designation '*abatutsi*', which is only used once in the speech.[115] Additionally, he used the 'core genocidal verb', '*gutsemba*', meaning to exterminate.[116] Consequently, the Court found that the use of culturally

[108] ibid [44(iv)].

[109] George William Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (Cameron May 2007) 206.

[110] *Ruggiu* (Judgment) (n 40) [44(iv)].

[111] Darryl Li, 'Echoes of Violence: Considerations on Radio and Genocide in Rwanda' (2004) 6 Journal of Genocide Research 9, 15.

[112] *Ruggiu* (Judgment) (n 40) [44(iv)] – [44(v)].

[113] *Nahimana* (Judgment) (n 54) [392] – [410], [520] – [524].

[114] ibid [395].

[115] Fletcher (n 51) 7. See also *Mugesera* (n 5) App 3, [6].

[116] Fletcher (n 51) 6.

specific pejorative terms can support a finding of incitement, as their use reinforces a negative message, and, therefore, Mugesera's use of pejorative terms and the 'core genocidal verb' contributed to the finding that he incited genocide.[117]

The examination of the content of the speech can help to identify whether it intended to inform or provoke, as the use of some hallmarks of incitement, such as culturally specific pejorative code-words can indicate that the speaker intended to attack the target group. However, it is important to remember that the mere existence of pejorative terms is insufficient for a finding of incitement in the absence of other factors. In *Kalimanzira* the Trial Chamber noted that in the 'particular circumstances of other cases', 'exhorting a crowd to unite against the "sole enemy", or to "get to work", or calling on "the majority" to "rise up and look everywhere possible" and not to "spare anybody"', had all been understood as calls to exterminate Tutsi.[118] This emphasises that the use of these terms is not enough on its own, it depends on the 'particular circumstances' of the case. Therefore, while the use of pejorative terms can facilitate a finding of incitement, this depends on it being possible to show that the audience understood them as such within their own context. This is evident in *Ngirabatware*, in which the particular circumstances suggested that the term *Inkotanyi* was not understood as constituting an attack against Tutsi generally, even though it had been understood in that way in previous cases.[119] Therefore, the identification of pejorative code words and the negative content of the speech constitutes only one aspect of the analysis.

By identifying the purpose or motivation of the speech it is possible to show whether the speech intended to inform or provoke. The Media Trial found that articles and broadcasts that aimed to 'convey historical information, political analysis, or advocacy of an ethnic consciousness regarding the inequitable distribution of privilege in Rwanda', would fall within the parameters of protected speech.[120] As an illustrative example, the Judgment referred to Barayagwiza's December 1993 RTLM interview, in which he gave 'a moving personal account of his experience of discrimination as a

[117] *Mugesera* (n 5) 123.
[118] *Kalimanzira* (Judgment) (n 28) [514].
[119] Text to n 24 - 26; *Ngirabatware* (Judgment) (n 24) [1356].
[120] *Nahimana* (Judgment) (n 54) [1019].

Hutu'.[121] The Chamber found that this did not amount to the promotion of ethnic hatred as Barayagwiza had used informative language which depicted historical fact, rather than using ethnically divisive and inflammatory terms. Consequently, the Chamber concluded that this fell 'squarely within the scope of speech that is protected by the right to freedom of expression'.[122]

In order to illustrate the difference between informative speech and opinions that constitute an attack, the Media Trial used the example of RTLM's fixation on Tutsi wealth. One broadcast stated that '70% of the taxis in Rwanda were owned by people of Tutsi ethnicity'.[123] While this might generate resentment, this would be 'the result of the inequitable distribution of wealth in Rwanda', so it would be owing to the 'information conveyed by the statement rather than the statement itself'.[124] The Chamber contrasted this with a broadcast that argued that the Tutsi 'are the ones who have all the money'; this could be distinguished from the previous statement as it was 'a generalization that has been extended to the Tutsi population as a whole'.[125] The Chamber also noted the different tone of these broadcasts, observing that the latter conveyed 'the hostility and resentment of the journalist'.[126] However, while this was ethnically divisive and conveyed hatred, this did not amount to incitement as it did not 'call on listeners to take action of any kind'.[127] Therefore, even though these factors can help to identify dangerous speech, the target audience must understand it as encouraging genocide for it to amount to incitement.

The distinction between informative speech and opinions can be identified by considering the content and purpose of the speech. This involves identifying whether: the speaker called upon listeners to take action; the language used indicated that the speaker was explaining the views of others or a fact, or promoting their own view; the speaker used culturally specific code words that they knew would be understood as an attack by the target audience.

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[121] ibid [1019] – [1020].
[122] Gordon, *Atrocity Speech* (n 2) 162. See also *Nahimana* (Judgment) (n 54) [1020].
[123] *Nahimana* (Judgment) (n 54) [1021].
[124] ibid [1021].
[125] ibid [1021].
[126] ibid [1021].
[127] ibid [1021].

6.3.2.2. The Requisite Persuasive Force: The Influence of the Speaker, the Seriousness of the Message and the Speech Context

The second element of the Media Trial's evidentiary analysis addressed whether there was 'a real and genuine risk that [the speech] might actually' provoke genocide.[128] This is linked to the discussion of performative speech in Chapter Two. Austin's theory of speech acts argues that 'to say something *is* to do something'.[129] This suggests that the point at which speech becomes subject to international criminal sanctions is where it intends to provoke a particular outcome, and has the potential to achieve that goal, thereby becoming a positive action. Speech has this potential where it is disseminated by someone that has the authority to encourage the audience to act. Further, they must be taken seriously by the audience and the words must be spoken in a situation where they have the potential to bring about such conduct. This categorises speech as dangerous because of where and when it is spoken, and because of who speaks the words. While this is inevitably a more significant question for implicit speech, as it requires a more detailed discussion of evidence, this is still relevant when the speech is explicit, as shown in *Akayesu* and *Kajelijeli*.[130]

While there was no reference to Austin's theory, this idea was given judicial support by the ICTR. Drawing upon the Judgment in *Akayesu* and the cases that followed, it is possible to identify that the ICTR considered the position of the speaker and the seriousness of the message to be important evidentiary elements of the incitement analysis.[131] As shown by the Media Trial, there are two aspects to this analysis: (i) the speaker; and (ii) the speech context. The first element involves considering the societal position of the speaker. When the speaker is in a position of influence, they are more likely to be taken seriously by their audience, and, therefore, their words pose a greater threat to the target group. The second element, speech context, is defined above as the specific circumstances of the speech that can help with

[128] ibid [1002].

[129] Austin (n 97) 94.

[130] *Akayesu* (Judgment) (n 1) [74] – [77]; *Kajelijeli* (Judgment) (n 12) [856], [959]. See also Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48 Virginia Journal of International Law 485, 521.

[131] *Akayesu* (Judgment) (n 1) [74] – [77]; *Kambanda* (Judgment) (n 14) [39(x)]; *Ruggiu* (Judgment) (n 40) [44(iv)]; *Niyitegeka* (Judgment) (n 40) [85]; *Nahimana* (Judgment) (n 54) [342]; *Bikindi* (Judgment) (n 34) [425]; *Muvunyi* (Retrial: Judgment) (n 23) [31] – [34].

determining whether the speaker had legitimately exercised their right to free expression.[132] This includes evidential contextual factors such as: the means of dissemination of the message, the repetition of similar messages and accompanying images or actions. This thesis argues that, despite the failure to focus on this element in the Media Trial, the absence of competing ideas is influential to a finding that a message was taken seriously by the audience.

The ICTR could only bring certain crimes and certain defendants to trial. Therefore, it was inevitable that those on trial were significant figures. However, this does not negate the potential evidential role of this element. It would be unreasonable to suggest that someone would be capable of inciting genocidal acts if they were not taken seriously by their audience. As shown in *Arslan v Turkey*, the ECtHR considered that a 'private individual' speaking through a work of literature had limited potential impact on national security.[133] Thus, there must be a relationship between the speaker's influence and the audience's receptiveness. The ICTR's cases support this by emphasising the authority of the speakers. For example, the Tribunal noted that Akayesu was *bourgmestre* of his region, and therefore seen as a father figure;[134] Kambanda had governmental authority as the interim prime minister;[135] Niyitegeka was a government minister whose 'mere presence [...] encouraged people';[136] and Muvunyi was a Lieutenant Colonel perceived as being responsible for 'maintaining peace and security' in the region.[137]

While it could be suggested that this evidential search for authority could make incitement a leadership crime, this is not the case. Authority is interpreted broadly and doesn't require the speaker to be 'in a position effectively to exercise control over or to direct the political or military action of a State', as for the crime of aggression.[138] Therefore, even though some cases involve speakers in military or political leadership

[132] *Nahimana* (Judgment) (n 54) [1006].

[133] *Arslan v Turkey* (1999) 31 EHRR 9, [48].

[134] *Akayesu* (Judgment) (n 1) [74] – [77]. See also Samuel Totten and Paul R Bartrop, *Dictionary of Genocide: Volume I* (ABC-CLIO 2008) 6.

[135] *Kambanda* (Judgment) (n 14) [39(x)].

[136] *Niyitegeka* (Judgment) (n 40) [85].

[137] *Muvunyi* (Retrial: Judgment) (n 23) [31] – [34].

[138] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Article 8*bis*. See also Kevin Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 The European Journal of International Law 477.

positions, such as *Niyitegeka* and *Muvunyi*, others involve broadcasters and singers, such as *Ruggiu,* the Media Trial and *Bikindi*.[139] In each of these cases the speaker was found to be sufficiently credible and influential to be taken seriously by the audience.

To identify the perceived credibility of RTLM and *Kangura*, the Media Trial considered the significance of these organs of mass media in Rwanda. Radio was particularly important, as it provided an authoritative 'source of information as well as entertainment and a focus of social life',[140] but RTLM claimed a 'legitimacy' different from other Rwandan broadcasters.[141] Unlike the government sponsored Radio Rwanda, which 'spoke in the ponderous tones of state officials, RTLM was informal and lively', it aimed to reach the ordinary citizen and proved particularly popular among the youth.[142] Similarly, *Kangura* was different in style from state newspapers, it was extravagant and 'sensational', giving the impression of 'a certain freedom of expression', which made the audience feel that the information from *Kangura* could be trusted.[143] Consequently, it was fairly popular, despite the fairly low literacy rate.[144]

This suggests that the evidential element should focus on the influence of the speaker, rather than their authority, in order to avoid incitement being perceived as a leadership crime. Therefore, a speaker has the requisite influence when they are perceived as credible by the target audience. This can also be social influence and may be culturally dependant. *Basebya* suggests that it depends on the speaker's position relative to their audience by noting that as Basebya was of good social standing and her audience were largely unemployed, uneducated youths, they were susceptible to her words and took them seriously.[145]

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[139] *Ruggiu* (Judgment) (n 40) [44(iv)]; *Bikindi* (Judgment) (n 34) [425]; *Nahimana* (Judgment) (n 54) [342]. See also Alison des Forges, 'Call to Genocide: Radio in Rwanda, 1994' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007) 44; Christine Kellow and H Leslie Steeves, 'The Role of Radio in the Rwandan Genocide' (1998) 48 Journal of Communication 107, 115.

[140] *Nahimana* (Judgment) (n 54) [342].

[141] des Forges, 'Call to Genocide' (n 139) 44. See also Kellow and Steeves (n 139) 115.

[142] des Forges, 'Call to Genocide' (n 139) 44. See also *Nahimana* (Judgment) (n 54) [342]; Keith Somerville, *Radio Propaganda and the Broadcasting of Hatred* (Palgrave Macmillan 2012) 184.

[143] *Nahimana* (Judgment) (n 54) [240]. See also Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will be Killed with Our Families* (Picador 1998) 85; Salomon (n 12) 147.

[144] *Nahimana* (Judgment) (n 54) [236]. See also Alexander Zahar, 'The ICTR's "Media" Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide' (2005) 16 Criminal Law Forum 33, 37.

[145] *Basebya* (n 5) [6(1 – 11)].

Beyond the audience's perception of the credibility of the speaker, the ICTR assigned responsibility to speakers who were aware of the dangerousness of their speech, and who were aware that they had the power to bring about genocidal acts. For example, the judges in *Ruggiu* noted that through his words, the accused 'played a crucial role in the incitement of ethnic hatred and violence' in full awareness that the RTLM broadcasts were contributing to the massacres against Tutsi.[146] Similarly, in *Bikindi*, the Trial Chamber emphasised his position as 'a well-known and popular artist' and 'an authoritative figure', noting that he 'could not have been unaware of the impact of his words'.[147] His popularity and fame gave him credibility, which meant that his audience took him seriously. Most significantly, he was aware of the potential of his words.

The Chamber emphasised the significance of the means of disseminating the message and the tone of the speaker, noting that 'the power of the human voice' added 'a quality and dimension beyond words to the message conveyed'.[148] The Media Trial referred to the ECtHR case, *Arslan v Turkey*, which contrasted literary works and mass media publications, arguing that the latter had greater potential to influence an audience.[149] When assessing RTLM, the Chamber noted that 'The visceral scorn coming out of the airwaves – the ridiculing laugh and the nasty sneer', 'heightened the sense of fear, the sense of danger and the sense of urgency giving rise to the need for action by listeners'.[150]

Pauli argues that the Media Trial could have developed this further by demonstrating that a 'message is strengthened when the media environment is limited and competing messages are weak or absent'.[151] While the Judgment refers to RTLM's popularity granting it an authoritative voice, this does not explicitly form part of their incitement analysis.[152] Additionally, the Judgment does not specifically refer to the lack

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[146] *Ruggiu* (Judgment) (n 40) [50] – [51].

[147] *Bikindi* (Judgment) (n 34) [425].

[148] *Nahimana* (Judgment) (n 54) [1031].

[149] ibid [1006]. See also *Arslan* (n 133).

[150] *Nahimana* (Judgment) (n 54) [1031].

[151] Carol Pauli, 'Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention' (2010) 61 Alabama Law Review 665, 673. See also Mark Frohardt and Jonathan Temin, 'The Use and Abuse of Media in Vulnerable Societies' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007) 390.

[152] *Nahimana* (Judgment) (n 54) [342] – [343].

of availability of other sources of information. Temple-Raston emphasises RTLM's 'lack of competition', noting that while it was 'ostensibly a private enterprise' it was extensively supported by the government and linked to the state-sponsored Radio Rwanda.[153] While RTLM was perceived as 'breaking the state monopoly on media', after its radio license was permitted the government denied all other license applications.[154] This is an important evidential discussion that was overlooked by the Media Trial and should form part of the incitement analysis. The Trial Chamber should have emphasised that RTLM was influential and taken seriously owing, in part, to the absence of competition.

While the Media Trial emphasised the importance of the means of dissemination, this was not followed by *Bikindi*. As the 'most famous musician in Rwanda',[155] the trial of Simon Bikindi largely focussed on his songs.[156] However, the delivery of a message through song is an important factor that was largely overlooked. Street argues that 'music and musicians have the power to change the thoughts and actions of people' through the repetition of songs.[157] Therefore, it can be considered that songs broaden the potential reach of a message, increasing its influence. This is especially magnified in an oral tradition, as songs have significant social functions.[158] They are used 'to report and comment on current affairs, for political pressure, for propaganda, and to reflect and mould public opinion'.[159] The prosecution expert emphasised that a song would become a '"highly efficient tool" of propaganda' when this was magnified by broadcast via the radio, which 'plays an important role in Rwanda's oral tradition'.[160] While the Chamber agreed that the popularity of the songs could assist the prosecution's case, they did not make any significant comment on the importance of songs to an oral tradition, merely acknowledging it in passing.[161]

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[153] Dina Temple-Raston, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes, and a Nation's Quest for Redemption* (Free Press 2005) 2, 49 - 50.

[154] *Nahimana* (Judgment) (n 54) [510]. See also Pauli (n 151) 688.

[155] Robert Snyder, '"Disillusioned Words like Bullets Bark": Incitement to Genocide, Music and the Trial of Simon Bikindi' (2007) 35 Georgia Journal of International and Comparative Law 645, 669.

[156] Susan Benesch, 'The ICTR's Prosecution of a Pop Star: The Bikindi Case' (2009) 17 African Yearbook of International Law 447, 447.

[157] Street (n 38) 321, 330.

[158] Finnegan (n 38) 265 – 289. See also *Bikindi* (Judgment) (n 34) [258]; Gunner (n 38).

[159] Finnegan (n 38) 265.

[160] *Bikindi* (Judgment) (n 34) [258].

[161] ibid [196], [264].

However, this is an essential tool for establishing how the audience understood the speech, which was overlooked by the Trial Chamber. Therefore, the means of dissemination and the absence of competitive voices constitute important elements of this discussion that help to show the influence of the speaker and the seriousness of the message.

The Media Trial considered the speaker's previous speech to illustrate the persuasive force of the message. For example, the repetition in RTLM broadcasts highlighted the dissemination of 'a message of fear' that 'incessantly' told the audience 'to "be vigilant", which became a coded term for aggression in the guise of self-defence'.[162] The Judgment referred to the lists of names broadcast and published by RTLM and *Kangura*, arguing that even where there was no 'explicit call to action', the audience clearly understood that this acted as an order to kill owing to the previous messages disseminated by the speaker.[163] The repetition of messages reinforces meaning by building understanding for the audience, so that they will understand a message in a particular way. For example, *Kangura* routinely portrayed the Tutsi as vicious and cunning, arguing that they used women and money as weapons against the innocent Hutu.[164] In February 1993, *Kangura* No. 40 contained an article entitled 'A Cockroach Cannot Give Birth to a Butterfly'; this defined the Tutsi as a cockroach, 'the literal meaning of the word *Inyenzi*', describing them as 'biologically distinct from the Hutu, and inherently marked by malice and wickedness'.[165]

Similarly, RTLM broadcasts regularly engaged in negative ethnic stereotyping, describing Tutsi as 'devious, disproportionately wealthy, violent and bloodthirsty'.[166] In January 1994, the most well-known 'animateur', Kantano Habimana, 'unconvincingly' argued that he had 'nothing against Tutsi', but within the same broadcast said: 'beware: Tutsis want to take things from Hutus by force or tricks'.[167] After April, this continued with increasing ferocity.[168] On the 13th May 1994, the call

[162] *Nahimana* (Judgment) (n 54) [1028].
[163] ibid [1028].
[164] ibid [180] – [182].
[165] ibid [179] – [180].
[166] Gordon, *Atrocity Speech* (n 2) 151. See also *Nahimana* (Judgment) (n 54) [364], [368], [369] – [380].
[167] *Nahimana* (Judgment) (n 54) [369] – [370].
[168] William A Donohue, 'The Identity Trap: The Language of Genocide' (2012) 31 Journal of Language and Social Psychology 13.

for extermination of *Inkotanyi* was explicitly equated with the extermination of Tutsi: 'someone must have signed the contract to exterminate the *Inkotanyi* […] to make them disappear for good […] to wipe them from human memory […] to exterminate the Tutsi from the surface of the earth'.[169] On the 4th June 1994, Habimana described 'the physical characteristics of the ethnic group as a guide to selecting targets of violence': 'the reason 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'.[170]

Furthering their analysis of the speech context, the Chamber emphasised the importance of considering the message as a whole by examining accompanying images. *Kangura* bore a number of similarities to Streicher's *Der Stürmer*, using 'vulgar' cartoons to 'persecute and denigrate' specific individuals, particularly Prime Minister Agathe Uwilingiyimana and UN peacekeeper Roméo Dallaire, depicting them in pornographic situations.[171] An especially 'notorious'[172] issue of *Kangura* from November 1991 (*Kangura* No 26) depicted Rwanda's first president, Grégoire Kayibanda and a machete, with the caption 'what weapons are we going to use to conquer the *Inyenzi* once and for all'.[173] A prosecution expert witness argued that while no written response was given to this question, the drawing of the machete was the answer.[174] The Chamber concluded that, taken as a whole, this was clearly a reference to the use of violence.[175] Consequently, in its analysis this was described as a 'notable' example 'in which the message clearly conveyed to the readers of *Kangura* was that the Hutu population should "wake up"' and exterminate the Tutsi 'as a preventative measure'.[176]

The distinction between incitement and legitimate expression relies on the examination of a number of factors. From the analysis of relevant human rights law, it

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[169] *Nahimana* (Judgment) (n 54) [397].

[170] ibid [396].

[171] *Nahimana* (Judgment) (n 54) [207] – [210]. See also Gregory 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 Virginia Journal of International L157.

[172] Gordon, *Atrocity Speech* (n 2) 148.

[173] *Nahimana* (Judgment) (n 54) [160].

[174] ibid [161].

[175] ibid [161].

[176] ibid [1036].

was possible to identify two central questions: 'was the language intended to inflame or incite to violence?' and 'was there a real and genuine risk it might actually do so?'. This has been divided into two main evidential analyses: the content and purpose approach; and, the requisite persuasive force. The content and purpose approach distinguishes informative statements from opinions by identifying an encouragement to commit genocide, hallmarks of incitement, such as culturally specific pejorative code-words to define the target group and whether the message was intended to inform or provoke. Finding that speech had the requisite persuasive force involves identifying whether the speaker could influence the audience and whether their speech was taken seriously. This necessitates the discussion of a number of evidential factors: the relationship between the speaker and audience; whether the speaker knew they would be taken seriously; the means of dissemination of the message and tone of voice; the absence of competing voices; any accompanying actions or images; and the previous conduct of the speaker (such as their other speech or broadcasts). Owing to the differences between languages and cultures, this is not an exhaustive list of factors. However, without their presence it would seem unlikely that a conviction for incitement would be justified. While there is no requirement that the speaker be successful in their aim, as incitement is inchoate, their speech must have the potential to bring about the desired outcome.

6.3.3. Criticisms of the Approach in the Media Trial

While this discussion shows that the Media Trial's analysis helps to conceptually identify the distinction between incitement and hate speech, in application the Trial Chamber made a number of errors and drew unclear conclusions. The Judgment was cited in subsequent cases, yet it received a mixed reception.[177] Academic commentary has described it as 'problematic' and characterised by 'unpersuasive reasoning',[178] as well as providing 'penetrating insights'[179] and going 'a long way toward answering significant questions'.[180] Zahar asserted that the Trial Chamber

[177] See also *Bikindi* (Judgment) (n 34) [387]; Justin La Mort, 'The Soundtrack to Genocide: Using Incitement to Genocide in the Bikindi Trial to Protect Free Speech and Uphold the Promise of Never Again' (2009) 4 Interdisciplinary Journal of Human Rights Law 43, 50.

[178] Orentlicher (n 53) 558 – 559.

[179] Catherine A Mackinnon, 'Prosecutor v Nahimana, Barayagwiza & Ngeze. Case No ICTR 99-52-A' (2009) 103 The American Journal of International Law 97, 100.

[180] Gordon, 'A War of Media' (n 171) 141 - 142.

Judgment marked 'a low point in international criminal justice, where the quality of decisions has fluctuated considerably'.[181] He accused the judges of drifting into 'legal activism, at worst legal absurdity', thereby creating 'very poor precedent'.[182] This is reflected by the partly dissenting opinion of Judge Meron on appeal. He condemned the numerous errors of fact and law, stating that 'remanding the case, rather than undertaking piecemeal remedies, would have been the best course'.[183] These criticisms have foundation. The Judgment often lacks clarity, with some conclusions difficult to understand. For example, even though the Trial Chamber conducted a relatively extensive analysis, establishing the political climate of Rwanda and demonstrating that the Media had repeatedly and exuberantly called for the destruction of Tutsi, it did not explicitly outline which speech acts amounted to incitement.[184]

The Trial Chamber concluded that while many of *Kangura's* publications were 'brimming with ethnic hatred', they did not all constitute direct incitement.[185] However, while the Judgment cites an example of an article that did not fall within the parameters of the offence, it is relatively vague regarding the publications that did, citing only two examples, both of which were published outside the temporal mandate of the Tribunal.[186] The same issue arose with RTLM. The Chamber found that RTLM had directly and publicly incited its listeners to commit genocide.[187] However, only one explicit example is given, which called upon the listeners to 'exterminate the *Inkotanyi*'.[188] Consequently, despite the relatively extensive examination of speech, it is unclear which broadcasts fall within the parameters of incitement. Thus, the Appeals Chamber found that the Trial Chamber made a serious error in failing to clearly identify the examples of speech that amount to direct and public incitement.[189]

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[181] Zahar (n 144) 33.

[182] ibid 33 - 34, 48.

[183] *Prosecutor v Nahimana et al* (Appeals Judgment Partly Dissenting Opinion of Judge Meron) ICTR-99-52-A, A Ch (28 November 2007) [1].

[184] *Nahimana* (Appeals Judgment) (n 61) [736].

[185] *Nahimana* (Judgment) (n 54) [1037].

[186] ibid [1036] – [1037].

[187] ibid [1033] – [1034].

[188] ibid [1032].

[189] *Nahimana* (Appeals Judgment) (n 61) [726] – [727].

While the Appeals Chamber rectified some of these issues, several were left unaddressed.[190] For example, on appeal, the *Amicus Curiae* argued that the Trial Chamber's 'judgement could be interpreted to subsume hate speech that does not contain a call to action of violence under the rubric of direct and public incitement to commit genocide'.[191] This was largely glossed over in the Appeals Judgment.[192] However, as shown above, this criticism does not reflect the fact that the Trial Chamber explicitly stated that incitement must include a call to action.[193] It has been shown that both Chambers recognised the point of departure between international criminal law and international human rights law, and identified elements of the latter that were relevant to any area of incitement law.[194] Therefore, while there are problems with the Trial Chamber's conclusions, which should have been clarified by the Appeals Chamber, the evidential approach that can be derived from the case is a useful tool for distinguishing incitement from legitimate expression.

Despite the Tribunal's failure to clearly explain the judges' reasoning and to draw coherent conclusions at trial, the Media Trial still represents one of the most significant incitement cases undertaken by the Tribunal. Subsequent cases should have taken the opportunity to clarify the approach to incitement introduced in the Judgment. However, they failed to systematically apply or critique these factors. This is particularly evident from *Bikindi*, which represented the first opportunity to apply or assess this analysis, yet no explicit reference is made to the elements outlined in the Media Trial. Thus, as Gordon argues, the Trial Chamber in *Bikindi* 'squandered' the opportunity to 'concretize and expand on the analytic incitement law structure set forth in its previous decisions'.[195] Regardless, through consideration of the Judgment in light of other ICTR cases, it has been possible to show the emergence of an evidentiary analysis that distinguishes between incitement and legitimate expression. This is supported by international human rights law and cases, and the analysis of theory in Chapter Two.

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[190] See also Richard A Wilson, 'Inciting Genocide with Words' (2015) 36 Michigan Journal of International Law 277, 294.

[191] *Nahimana* (Appeals Judgment) (n 61) [689].

[192] ibid [692] – [696].

[193] *Nahimana* (Judgment) (n 54) [1021].

[194] Text to n 61 – 67.

[195] Gordon, *Atrocity Speech* (n 2) 212.

6.4. Conclusion

This thesis aims to assess ICTR incitement jurisprudence to highlight the key points in its analysis and identify the problems it encountered, using this discussion to inform definitions of the constitutive and evidentiary elements of incitement. In order to achieve these aims, this chapter emphasised the importance of evidentiary elements, addressed the question of the grammatical form of the speech, and considered how inciting speech may be distinguished from legitimate expression with reference to the Media Trial and relevant international human rights law.

The analysis of *Kambanda* emphasised the importance of evidentiary factors to the incitement analysis. This demonstrated that this is particularly important for implicit speech, showing that the absence of meaningful discussion in this case contributes to the uncertain jurisprudence from the ICTR. In order to build upon this and identify when implicit speech is sufficiently direct, this chapter considered the question of grammatical form. This arose from the analysis of *Akayesu*, which identified that this was an important question that had not been explicitly addressed by the ICTR. In light of ICTR cases and the Supreme Court of Canada's decision in *Mugesera*, it was possible to show that incitement need not take the form of an order. However, this discussion criticised the ICTR for failing to provide clear guidance beyond suggesting that the speech must be analysed in context.

The Media Trial is important to the central argument of this thesis because it highlights both the advancements made in incitement cases at the ICTR and also the recurrent problems with its analysis. This discussion has shown that the *Nahimana* Trial Chamber outlined how it is possible to distinguish incitement from legitimate expression by addressing two questions: whether the language was 'intended to inflame or incite to violence?' and 'was there a real and genuine risk that it might actually do so?'.[196] This can be divided into a two-stage analysis: (i) content and purpose; and (ii) the requisite persuasive force of the speech.

The first stage, content and purpose, aims to identify whether the speech aimed to inform or to provoke. Facilitating this analysis is the presence of culturally specific

[196] *Nahimana* (Judgment) (n 54) [1002].

code-words and hallmarks of inciting speech, which may occur in any combination of the following non-exhaustive factors: dehumanisation, threat (or accusation in a mirror) and post-violence condonation. This also considers whether the speaker was disseminating merely factual information in the public interest or with the object of education, or whether they were expressing an opinion with the intention of glorifying violence or attacking the target group. This may be implicitly or explicitly expressed but must be understood as encouraging genocide by the target audience; as incitement is inchoate, it does not need to be successful.

The second stage, the requisite persuasive force, considers whether the speech had the potential to bring about the desired conduct by considering the influence of the speaker and the seriousness of the message. This examines a number of factors: the relationship between the speaker and the audience, whether the speaker knew they'd be taken seriously; and the speech context. Speech context consists of the means of dissemination, tone of voice, the existence of competing voices, accompanying images and gestures and the speaker's previous speech.

Throughout this chapter it has become apparent that every aspect of the incitement analysis relies on context, but context has rarely been defined clearly by the ICTR. This forms the focus of the next chapter. Chapter Five noted that the *Akayesu* Trial Chamber erroneously sought causation even though incitement is an inchoate offence. The next chapter argues that the ICTR did not seek causation *per se*, but, rather, sought evidence that the speech had been understood as incitement by considering contemporary and subsequent context. This chapter aims to provide legal justification for a contemporary context element, identify the difficulties posed by such an element, and consider how it should be defined.

7. The Evidential Value of Contemporary Context

7.1. Introduction

The idea of context has underpinned the analysis so far. The creation of the evidential context-based assessment constitutes one of the most important contributions from *Akayesu*.[1] As was shown in Chapter Five, context was given a broad meaning, encompassing 'all the environment surrounding the speech act': this involved considering the specific words used together with external factors, such as the language and ways of communicating in Rwanda, and the social, political, historical and cultural background to the speech.[2] This was defined as 'critical'[3] to establishing how the audience understood the speech, which is especially significant for direct incitement.[4] Chapter Six reaffirmed this importance by showing that context is relevant to the evidentiary analysis of incitement. However, this discussion highlighted the ICTR's persistent failure to provide a clear differentiation between the various forms of context used throughout the cases.

This was particularly evident from the Media Trial. While this case made a significant and valuable contribution to the development of incitement, there were a number of problems. The Trial Chamber's Judgment failed to outline the specific examples of speech that constituted incitement, it lacked adequate definitions for the evidential components of its analysis, and there was no clear distinction between its contextual approach and *Akayesu's*. In light of the ICTR's jurisprudence as a whole, it is possible to identify four elements of context. Firstly, external context is used to identify how the audience understood the speech with reference to linguistic, historical and cultural factors; secondly, speech context helps to distinguish incitement from legitimate expression by considering extra-linguistic cues, tone of voice, accompanying images or actions, and previous speech; thirdly, the speaker's personal context helps to illustrate their intent by considering their political and community affiliations; and,

[1] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) [153], [557] – [558].

[2] Mathias Ruzindana, 'The Challenges of Understanding Kinyarwanda Key Terms Used to Instigate the 1994 Genocide in Rwanda' in Predrag Dojčinović (ed) *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2012) 156.

[3] *Akayesu* (Judgment) (n 1) [153].

[4] ibid [156], [340], [557] – [558].

finally, contemporary context, which considers where and when the speech is disseminated in order to identify whether the speech could produce the desired result. The evidentiary analysis of contemporary context is apparent in several ICTR cases, but not coherently defined or applied, and, therefore, it is the focus of this chapter.

International human rights law and cases, and subsequently the Media Trial, categorized speech as dangerous because of where and when it is spoken, and because of who speaks the words.[5] Thus, it must be possible to identify 'a real and genuine risk that [the speech] might actually' provoke genocide.[6] As will be shown, a number of cases seem to have considered that in order to prove that speech was capable of inciting genocide there must be proof that the speech caused acts of genocide. This was particularly evident in the Media Trial, which contains numerous tenuous links between speech and killing despite asserting that incitement is inchoate.[7] This has been criticised in academic commentary.[8] Given the inchoate nature of incitement, seeking causation is incorrect and inappropriate. However, it is possible to show that contemporary context, including surrounding factors and subsequent conduct, may constitute a potential evidentiary tool for identifying incitement.

Drawing upon the issues identified, this chapter addresses four areas of investigation: (i) the legal and jurisprudential support for an evidentiary element of contemporary context; (ii) whether the ICTR's search for causation was a poorly explained evidential search for contemporary context; (iii) how contemporary context should be defined; and, (iv) the difficulties with evidentiary elements. This discussion contributes to two of the central aims of this thesis: firstly, the appraisal of ICTR

[5] Text to n 128 - 130 in ch 6.

[6] *Prosecutor v Nahimana et al* (Judgment and Sentence) ICTR-99-52-T, T Ch I (3 December 2003) [1002]. See also text to n 128 in ch 6; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 10.

[7] *Prosecutor v Nahimana et al* (Appeals Judgment) ICTR-99-52-A, A Ch (28 November 2007) [726] – [727].

[8] See also Gregory S Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (OUP 2017); Richard A Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press 2017); Susan Benesch, 'The Ghost of Causation in International Speech Crime Cases' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2012); Joshua Wallenstein, 'Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide' (2001) 54 Stanford Law Review 351; Richard A Wilson, 'Inciting Genocide with Words' (2015) 36 Michigan Journal of International Law 277.

incitement jurisprudence; and, secondly, the identification and definition of the constitutive and evidentiary elements of incitement. Moreover, this contributes to the originality of this thesis by focussing on the evidentiary element of context.

7.2. Support for an Evidentiary Element of Contemporary Context

As Timmerman and Schabas note, it is an 'intrinsic characteristic of incitement and hate speech' that the 'seeds of hatred' are planted in the minds of the audience, 'which grow gradually', developing an idea that violent action needs to be taken against the target group.[9] However, the international criminal offence of incitement does not encompass 'seeds of hatred' or general hate speech. The drafters of the Convention explicitly excluded speech that constituted a campaign to persuade the audience to 'contemplate' the commission of genocide; rather, the Convention only criminalises speech that takes a 'definite form' and calls for genocide.[10] As shown in Chapter Three, the incitement provision was included in the Convention to account for the danger that an inciter could cause.[11] This drew inspiration from national prohibitions, which proscribe speech that constitutes a threat to the target group.[12] Therefore, to amount to incitement, speech must have the potential to cause acts of genocide, even if it is not successful.

Similarly, international human rights law permits restrictions to be placed on freedom of expression, 'in the interests of national security' and 'for the protection of [...] others'.[13] In *Silver v United Kingdom,* the ECtHR said that any restriction on

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[9] Wibke Timmerman and William Schabas, 'Incitement to Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2014) 151.

[10] Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation* (Institute of Jewish Affairs 1949) 20. See also, ECOSOC 'Draft Convention on the Crime of Genocide' (26 June 1947) UN Doc E/447, 33; Ameer Gopalani, 'The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S Ratification of the International Criminal Court Statute?' (2001) 32 California Western International Law Journal 87, 103.

[11] Gopalani (n 10) 94.

[12] UNGA Sixth Committee (3rd Session) 'Eighty-Fifth Meeting Held at the Palais de Chaillot, Paris, on Wednesday, 27 October 1948, at 3:20pm' (27 October 1948) UN Doc A/C.6/SR.85, 222, 221-223. See also ECOSOC 'Commission on Human Rights, Third Session, Summary Record of the Sixty-Third Meeting, Lake Success, New York, Tuesday, 8 June 1948, at 10:45 am' (22 June 1948) UN Doc E/CN.4/SR.63, 4.

[13] ECHR (n 6) art 10. See also, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 19. See also International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965

freedom of speech had to correspond to a 'pressing social need'.[14] Similarly, in *Zana v Turkey*, the ECtHR held that the Applicant's speech had to be evaluated in context.[15] At that time, the location of the speech was characterized by 'extreme tension' and 'murderous attacks', therefore support given 'by the former mayor' to the perpetrators 'had to be regarded as likely to exacerbate an already explosive situation in the region'.[16] Thus, it is acknowledged that for a legitimate restriction on freedom of expression, the speech must have the potential to pose a risk to national security or to the rights and freedoms of others. This was affirmed by both Trial and Appeals Chambers in the Media Trial, which noted that the 'potential impact' of speech was context dependant.[17]

Chapter Two gave conceptual support to this idea by showing that speech is justifiably punished when it poses a credible threat to the target audience. This was derived from the discussion of Austin, Greenawalt and Mill, which defined speech as 'situation-altering', and a performative act in its own right, when the speaker is capable of influencing the audience, they are taken seriously, and the words are spoken in circumstances where they have the potential to bring about the desired conduct.[18] Therefore, speech is dangerous because of what is said, who speaks the words, and where and when it is spoken. Through the discussion of ICTR cases in the previous chapter, this has been broken down into three evidential analyses: (i) the content and purpose of the speech; (ii) the requisite persuasive force of the speech, which considers the influence of the speaker, the seriousness of the message, and the speech context; and, (iii) contemporary context.

Since *Akayesu*, international criminal law has recognised the value of considering the events surrounding the speech to identify whether the audience understood it as incitement. The Trial Chamber noted the context of the speech,

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entered into force 5 January 1969) 660 UNTS 195, art 4; Wibke Timmerman, *Incitement in International Law* (Routledge 2016) 71 – 72.

[14] *Silver v UK* (1983) 5 EHRR 347 [97].

[15] *Zana v Turkey* (1997) 27 EHRR 667 [51].

[16] ibid [59] – [60]. See also [12], [31], [51], [56].

[17] *Nahimana* (Appeals Judgment) (n 7) [694]. See also, *Nahimana* (Judgment) (n 6) [1022].

[18] John L Austin, *How to do Things with Words* (2nd edn, Harvard University Press 1975) 60, 94; Kent Greenawalt, *Speech, Crime and the Uses of Language* (OUP 1989) 58; John Stuart Mill, *On Liberty* (Cosimo 2005) 67 - 68.

showing that the defendant spoke following the murder of a local teacher, who was 'accused of associating with the Rwandan Patriotic Front […] and plotting to kill Hutus'.[19] Moreover, the crowd Akayesu addressed were 'gathered around the body of a young member of the Interahamwe'.[20] Similarly, in *Niyitegeka* the Trial Chamber referred to recent massacres.[21] However, the first explicit statement regarding the evidentiary value of contemporary context came in the Media Trial. The Trial Chamber noted that speech against a particular ethnicity would have a 'heightened impact in the context of a genocidal environment'[22] and could 'exacerbate an already explosive situation'.[23]

Subsequent cases reinforced the evidentiary value of contemporary context. For example, *Muvunyi* considered the 'large-scale massacres of Tutsis' that had 'already occurred in the area'.[24] In *Ngirabatware*, the Trial Chamber emphasised that the context surrounding the speech could facilitate a finding of incitement.[25] In other cases this evidential assessment was more implicit. However, it is possible to glean application of the evidence in light of the facts discussed.[26] In *Kalimanzira*, the Trial Chamber concluded that genocidal intent could be inferred from 'the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others'.[27] In the same case the Chamber echoed the other Judgments, finding that implicit speech could amount to incitement 'in the context of the Rwandan genocide'.[28]

Outside the ICTR, national jurisdictions have referenced the importance of contemporary context to international incitement. The Supreme Court of Canada noted the passage of time between Mugesera's speech and the Genocide, stating that

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[19] *Prosecutor v Akayesu* (Amended Indictment) ICTR-96-4-I (17 June 1997) [14].

[20] *Akayesu* (Judgment) (n 1) [211] – [215], [673].

[21] *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T, T Ch (16 May 2003) [142], [257].

[22] *Nahimana* (Judgment) (n 6) [1022].

[23] ibid [1004], [1011].

[24] *Prosecutor v Muvunyi* (Retrial: Judgment) ICTR-00-55A-T, T Ch III (11 February 2010) [131], [127].

[25] *Prosecutor v Ngirabatware* (Judgment and Sentence) ICTR-99-54-T, T Ch II (20 December 2012) [1363].

[26] See also Gordon (n 8) 146.

[27] *Prosecutor v Kalimanzira* (Judgment) ICTR-05-88-T, T Ch III (22 June 2009) [731].

[28] ibid [514].

'although we do not suggest that there is absolutely no connection between the events [...] one cannot use the horror of the events of 1994 to establish the inhumanity of the speech of November 22, 1992'.[29] Therefore, the judges stressed the importance of assessing the circumstances 'at the time of his speech'.[30] The analysis highlighted the on-going conflict with the RPF and the occupation of Northern Rwanda, which led to retaliatory massacres of Tutsi.[31] The Supreme Court drew attention to the 'context of internal political and ethnic conflict' in which he 'made his speech', observing that while he spoke during a cease fire, it was still wartime.[32]

In *Basebya*, the District Court of the Hague concluded that the speech had been delivered within the context of unlawful acts on a significant scale against the protected group.[33] Witness statements established that the audience jumped and whistled, and armed youths held machetes in the air in reaction to her speech, frightening the Tutsi, who were afraid of the consequences.[34] Consequently, the District Court had no doubt that Basebya's speech was understood as incitement to commit genocide. Therefore, national jurisdictions have confirmed the evidentiary value of contemporary context to the incitement analysis.

Through the examples from the ICTR taken in conjunction with the conceptual definition of incitement as a performative act, the drafting of the incitement provision, international human rights law and cases, and third-party national jurisdictions it has been possible to illustrate the support for the evidentiary element of contemporary context in incitement trials. However, at the ICTR this analysis was often poorly explained, thereby leading to a perception that the ICTR sought a causal link between speech and subsequent acts of genocide.

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[29] *Mugesera v Canada* (Minister of Citizenship and Immigration) [2005] 2 SCR 100, 111.

[30] ibid 111.

[31] ibid 113 - 114.

[32] ibid 115, 124.

[33] RB The Hague 01-03-2013, ECLI:NL:RBDHA:2013:BZ4292 (*Public Prosecutor/Yvonne Basebya*) [12(11)].

[34] ibid [12(15)].

7.3. A Search for Causation or an Evidential Analysis of Context?

The relationship between incitement and causation is one of the most controversial areas to emerge from ICTR cases.[35] This finds its roots in the Convention. While the drafters felt that the deletion of the phrase 'whether the incitement be successful or not' would not 'have any effect from the legal point of view', this has given rise to erratic jurisprudence.[36] This was magnified by the inclusion of a causal element to the ILC Draft Code offence, which assigned responsibility to a person 'who directly and publicly incites another individual to commit […] a crime which in fact occurs'.[37] While this was not included in the Rome Statute or the Statutes for the ICTY and ICTR, which all relied upon the same wording as the Convention offence, this is illustrative of the uncertain legal foundation upon which the ICTR built its cases.[38]

Incitement is inherently inchoate.[39] Therefore, a search for a causal nexus between speech and subsequent conduct is misguided. The existence of causation would mean that the crime is not incitement, but instigation, a form of individual criminal responsibility that requires the 'actual commission of the offence'.[40] This would render the existence of the criminal offence of incitement 'totally redundant'.[41] Therefore, asserting that incitement requires causation would constitute a 'serious' error.[42]

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[35] Wilson, 'Inciting Genocide' (n 8) 290.

[36] UN Doc A/C.6/SR.85 (n 12) 231 – 232. See also Gordon (n 8) 196.

[37] Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (1996) art 2(3)(f).

[38] Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277, art III(c); Rome Statute of the International Criminal Court (Adopted 17 July 1998 entered into force 1 July 2002) 2187 UNTS 3, art 25(3)(e). See also UNSC Res 827 (25 May 1993) UN Doc S/RES/827, art 4; UNSC Res 955 (8 November 1994) UN Doc S/RES/955, art 2.

[39] Text to n 140 in ch 3.

[40] *Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T, T Ch I (6 December 1999) [38]. See also *Prosecutor v Blašić* (Judgment) IT-95-14-T (3 March 2000) [280]; *Prosecutor v Semanza* (Judgment and Sentence) ICTR-97-20-T, T Ch III (15 May 2003) [381]; Wibke Timmerman, 'Incitement in International Criminal Law' (2006) 88 International Review of the Red Cross 823, 841.

[41] William Schabas, *Genocide in International Law* (Cambridge University Press 2009) 324.

[42] William Schabas, 'Hate Speech in Rwanda: The Road to Genocide' (2000) 46 McGill Law Journal 141, 155. See also *Akayesu* (Judgment) (n 1) [561].

Additionally, framing incitement as dependent upon definite causation would often be impossible. For example, in England and Wales there cannot be a direct causal link, as the perpetrators of the substantive offence, in taking a free, independent and voluntary act, would break the chain of causation.[43] Moreover, courts are often not able to accurately measure the impact of speech upon a group, and it is rare to find definitive evidence showing who was influenced by any given speech, particularly in the context of mass media broadcasts.[44] Benesch observes that despite the testimony of more than 100 witnesses over the course of the Media Trial, causation was not proved.[45] She argues that 'no prosecution for incitement to genocide has led evidence that speech *caused* thousands of deaths: only evidence that the speech was made, juxtaposed with separate evidence of mass violence afterward'.[46] Therefore, this chapter aims to demonstrate that the ICTR retained the inchoate nature of incitement by referring to contemporary context as merely evidentially influential.

7.3.1. A Problem of Temporal Jurisdiction: Incitement as a Continuing Offence

The Media Trial provides the clearest example of the ICTR's uncomfortable relationship with causation. Wilson argues that it gives greater 'prominence to the causal effects of speech acts' than any other incitement case.[47] This is an accurate representation. In its review of ICTR jurisprudence, the *Nahimana* Trial Chamber asserted that a 'causal relationship is not requisite to a finding of incitement'.[48] However, throughout the discussion of evidence, links were sought between media publications and killing, even where there was no proof that the killers were aware of the publication.[49] This is one of the main sources of criticism of the Trial Chamber's Judgment, particularly owing to the erroneous finding that incitement is a continuing offence.[50]

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[43] See also Andrew P Simester, 'Causation in (Criminal) Law' (2017) 133 Law Quarterly Review 416.

[44] Jonathan Leader Maynard and Susan Benesch, 'Dangerous Speech and Dangerous Ideology: An Integrated Model for Monitoring and Prevention' (2016) 9 Genocide Studies and Prevention 70, 75.

[45] Benesch, 'The Ghost of Causation' (n 8) 254.

[46] ibid 254.

[47] Wilson, *Incitement on Trial* (n 8) 36.

[48] *Nahimana* (Judgment) (n 6) [1015].

[49] Benesch, 'The Ghost of Causation' (n 8) 257.

[50] *Nahimana* (Appeals Judgment) (n 7) [720]; Wilson, *Incitement on Trial* (n 8) 39 – 40.

The prominence of causation in the Media Trial has a clear origin. It was the first ICTR Trial Chamber tasked with examining speech that took place before April 1994.[51] In fact, the Trial Chamber faced the problem that 'much of the inciting material' from *Kangura* and RTLM was published outside its temporal mandate.[52] The jurisdiction of the court was limited to a period from the 1st January 1994 to the 31st December 1994, which was far narrower than its counterpart, the ICTY.[53] The Trial Chamber argued that January 1994 was adopted as the beginning of the temporal jurisdiction, 'expressly for the purpose of including the planning stage'.[54] In an attempt to bring speech from before January 1994 within its mandate, it considered that this speech constituted a preparatory act that 'culminated in events that took place in 1994'.[55] Therefore, the Trial Chamber concluded that incitement, like conspiracy, 'is an inchoate offence that continues in time until the completion of the acts contemplated'.[56] This approach is misguided and incorrect. As Van der Wilt asserts, this as an 'obvious logical error', as 'one cannot, on the one hand, assert that incitement is a separate offence, while on the other hand deduce or measure its continuous character from the fact that it has produced the desired result'.[57] Similarly, Wilson identifies this as 'problematic' as it 'carries certain assumptions': firstly, that incitement will lead to the commission of genocide, and secondly 'that such commission is relevant'.[58] While it is true to say that preparation for genocide began before 1994, the ICTR's mandate did not permit any pre-1994 acts to form part of any conviction. Therefore, while the Chamber attempted to justify its approach, defining incitement as a continuing act was incorrect and does not reflect the inherently inchoate nature of the offence.

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[51] *Akayesu* (Judgment) (n 1) [315]; *Niyitegeka* (Judgment) (n 21) [432] – [434]; *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T, T Ch II (1 December 2003) [956].

[52] Timmerman and Schabas (n 9) 151.

[53] UNSC 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704, 39; UN Doc S/RES/955 (n 38). See also Lilian Barria and Steven Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9 The International Journal of Human Rights 349, 349.

[54] *Nahimana* (Judgment) (n 6) [104].

[55] ibid [1017].

[56] ibid [1017].

[57] Harmen van der Wilt, 'Between Hate Speech and Mass Murder: How to Recognize Incitement to Genocide' in Harmen van der Wilt, Jeroen Vervliet and Göran Sluiter (eds), *Genocide Convention: The Legacy of 60 Years* (Brill 2012) 46.

[58] Wilson, *Incitement on Trial* (n 8) 39 – 40.

The Trial Chamber had a second, 'fact-specific', reason for defining incitement as 'continuing'.[59] The March 1994 issue of *Kangura* ran a competition, comprised of eleven questions, which asked readers to identify the issues of *Kangura* that contained particular text.[60] Questions included 'in which issue of *Kangura* will you find the sentence "we have no more Tutsi because of Kanyarengwe?" and "when did *Kangura* become the voice to wake up the majority people and defend their interests?"'.[61] This was publicised through RTLM who encouraged 'readers who missed these issues to contact a magazine seller'.[62] The central point of the competition seemed to be to reinforce ideas published in earlier issues. Consequently, the Trial Chamber asserted that '*Kangura* effectively and purposely brought these issues back into circulation',[63] thereby suggesting that 'past issues of *Kangura* could be deemed to have essentially the same effect as a publication in March 1994'.[64]

The Trial Chamber asserted that these pre-1994 publications had been brought within its jurisdiction, grouping them together as one, on-going, act of incitement. Consequently, the Trial Chamber concluded that all issues of *Kangura*, from May 1990 to March 1994, fell 'within the temporal jurisdiction of the Tribunal to the extent that the publication is deemed to constitute direct and public incitement to genocide'.[65] Within the same paragraph an almost identical conclusion was drawn for RTLM broadcasts.[66] There was insufficient justification for this. As Orentlicher argues, the Chamber 'did not lay the necessary foundation' for this finding.[67] This discussion may have been of value had it been used to acknowledge that repetition of messages over a period of time leads to long-term influence, embedding an idea in the minds of the audience.[68] However, this was not the case. It was not used as evidence to show how

[59] Diane F Orentlicher, 'Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v Nahimana' (2006) 21 American University International Law Review 557, 591.

[60] *Nahimana* (Judgment) (n 6) [247].

[61] ibid [249].

[62] ibid [249], [251] – [252].

[63] ibid [257].

[64] Orentlicher (n 59) 591.

[65] *Nahimana* (Judgment) (n 6) [1017].

[66] ibid [1017].

[67] Orentlicher (n 59) 592.

[68] See also Carol Pauli, 'Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention' (2010) 61 Alabama Law Review 665, 673.

speech from 1994 constituted incitement. It was an attempt to circumvent the temporal mandate.

The Appeals Chamber did not support this, emphasising that 'the notions "inchoate" and "continuing" are independent of one another'.[69] Only one judge dissented, but still noted the absence of precedent, acknowledging that there was 'not much authority in the field'.[70] Therefore, in failing to appreciate that incitement is complete the moment the speech is uttered, the Trial Chamber had made an error of law.[71] As pre-1994 speech could be considered as 'contextual elements of the 1994 broadcasts',[72] the error of the Trial Chamber did not lie in the examination of this speech, but in asserting jurisdiction over it. However, the Appeals Chamber has been criticised for being 'perhaps too rigid'[73] as it goes further than to discount pre-1994 speech by finding that much of the material from before April 1994 could not constitute incitement.[74]

7.3.2. Distinguishing Causation from an Evidential Analysis of Contemporary Context

The ICTR had a problematic relationship with causation from the start. For example, in *Akayesu* the Trial Chamber noted that incitement is inchoate, and yet sought causation.[75] In paragraph 349 of the Judgment, the Chamber noted that 'there must be proof of a possible causal link between the statement made by the Accused [...] and the beginning of the killings'.[76] The Chamber found that such a causal relationship did exist, and therefore, the direct and public incitement 'was indeed successful'.[77] Wilson argues that this 'demand for proof' removed incitement from the category of inchoate crimes.[78] However, it does not seem that this was a 'demand for proof' *per se*.

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[69] *Nahimana* (Appeals Judgment) (n 7) [720].

[70] *Prosecutor v Nahimana et al* (Appeals Judgment Partly Dissenting Opinion of Judge Shahabuddeen) ICTR-99-52-A, A Ch (28 November 2007) [23], [25], [30].

[71] *Nahimana* (Appeals Judgment) (n 7) [723].

[72] ibid [725].

[73] Timmerman and Schabas (n 9) 154.

[74] *Nahimana* (Appeals Judgment) (n 7) [636], [754].

[75] *Akayesu* (Judgment) (n 1) [561] – [562].

[76] ibid [349].

[77] ibid [674] – [675].

[78] Wilson, 'Inciting Genocide' (n 8) 289.

Rather, the Chamber was satisfied with 'a possible causal link', which is distinct from a search for definitive proof. Moreover, the Chamber explicitly stated that incitement is inchoate. Thus, there is insufficient evidence to draw the conclusion that *Akayesu* made causation an element of incitement. Instead, this suggests that the purpose of a discussion of potential causation was not outlined, which is indicative of the lack of clarity in ICTR incitement cases. Therefore, there is a need to consider the extent to which subsequent cases examined causation, with a particular focus on the justifications given.

The cases that followed *Akayesu* each defined incitement as inchoate, thereby confirming that causation is not an element of incitement.[79] However, the problematic analysis of a causal link between speech and genocide remained. For example, in *Niyitegeka*, the Trial Chamber noted that the attackers followed the speaker's instructions, on one occasion launching an immediate attack against the Tutsi,[80] on another, attacking them the next day.[81] The erratic and inconsistent relationship with causation is particularly evident in the Media Trial. The Trial Chamber ostensibly confirmed that incitement should be considered to be inchoate.[82] Moreover, the Judgment outlines international jurisprudence on relevant human rights law and the conviction of Julius Streicher, noting the absence of 'specific causation requirement'.[83] Despite the legal findings concluding that incitement is inchoate, the factual findings continued to suggest that causation was relevant.[84]

It has been argued that the Media Trial's Trial Chamber 'welded its own causal link' between publications and killings, no matter how much time had passed between the two events.[85] The simple fact of the two events occurring was sufficient for the Trial Chamber to connect them. This was particularly evident where RTLM or *Kangura* had named a person who was later killed.[86] For example, a witness reported that RTLM

[79] *Niyitegeka* (Judgment) (n 21) [431]; *Kajelijeli* (Judgment) (n 51) [855].
[80] *Niyitegeka* (Judgment) (n 21) [238].
[81] ibid [257].
[82] *Nahimana* (Judgment) (n 6) [1013].
[83] ibid [1007].
[84] See also Gordon (n 8) 164; Wilson, 'Inciting Genocide' (n 8) 291.
[85] Benesch, 'The Ghost of Causation' (n 8) 254.
[86] *Nahimana* (Judgment) (n 6) [242].

named Daniel Kabaka, a Tutsi, as someone financing the RPF.[87] This was given particular attention by the Tribunal, as within about 24 hours of his name being broadcast, 'his residence was attacked with a grenade', and he and his daughter were subsequently killed.[88] However, while the Judgment indicates that RTLM triggered Kabaka's death, there is no proven causal link between the broadcast of his name and his murder. The authorities already knew of Kabaka; he was named in a security list and detained in 1990 along with other suspected accomplices of the RPF, thus his murder cannot be solely attributed to RTLM.[89] Therefore, the Media Trial's approach to causation is not appropriate. It is insufficient to say that RTLM, local authority figures and others encouraged killing, then there was genocide, and, therefore, one caused the other.[90]

While some Rwandans suggested they were influenced by the radio, this method of self-reporting is not always reliable, since a perpetrator may wish to deflect blame from themselves and onto the speaker.[91] Yanagizawa-Drott conducted a study using statistical methods to provide the first proof that Rwandan regions that received RTLM broadcasts saw a higher concentration of killing than those that did not.[92] However, these findings were not available to the ICTR in the Media Trial and would be unlikely to be compiled for future cases, owing to the nature of the data collection.[93] Instead, the Trial Chamber attributed a general causal role to the media. In his partly dissenting opinion on appeal, Judge Shahabuddeen stated that 'it was the acts of the appellants which led to the deeds which were done: a causal nexus between the two was manifest', yet he did not cite any examples of where this occurred.[94] As the Trial Chamber was unable to pinpoint precise evidence that could definitively tie one particular broadcast

[87] ibid [447].

[88] ibid [447].

[89] ibid [446].

[90] Charles Mironko, 'The Effect of RTLM's Rhetoric of Ethnic Hatred in Rural Rwanda' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007) 126.

[91] See also Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press 2008) 124 – 125; Benesch, 'The Ghost of Causation' (n 8) 259.

[92] David Yanagizawa-Drott, 'Propaganda and Conflict: Evidence from the Rwandan Genocide' (2014) 4 The Quarterly Journal of Economics 1947.

[93] Benesch, 'The Ghost of Causation' (n 8) 259.

[94] *Nahimana* (Appeals Judgment Partly Dissenting Opinion of Judge Shahabuddeen) (n 70) [73].

to specific killings, it created a somewhat 'disparate' model of causation,[95] acknowledging that its extent 'may have varied somewhat'.[96]

The Appeals Chamber in the Media Trial marked a shift in the way the ICTR assessed incitement and causation. Subsequent cases continued to affirm that incitement is inchoate and, therefore, causation is not a required component.[97] Yet, there was a change. Several cases acknowledged that 'the fact that a speech leads to acts of genocide could be an indication' that speech was understood to be incitement'.[98] However, this was tempered by the affirmation that this 'cannot be the only evidence adduced to concluded that the purpose of the speech [...] was to incite the commission of genocide'.[99] Therefore, subsequent cases confirmed that incitement is not dependant on a causal link, but contemporary context has an evidentiary value, as the circumstances surrounding the speech and subsequent acts of genocide can facilitate a finding that speech was understood as encouraging genocide. Yet, there is no clear guidance for the application of this evidentiary assessment.

From some cases there is an indication of a difference in the extent to which this is valuable, depending on whether the speech is implicit or explicit. Wilson argues that *Ngirabatware* contains no reference to causation 'whatsoever in the judgment'.[100] This is true for the explicit speech for which Ngirabatware was convicted.[101] Like *Kajelijeli*, in which the defendant was convicted for calling upon the audience to 'exterminate the Tutsis', this was a clear and unequivocal call to commit genocide.[102]

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[95] Wilson, *Incitement on Trial* (n 8) 37.

[96] *Nahimana* (Judgment) (n 6) [242], [482], [952]. See also Alexander Zahar, 'The ICTR's "Media" Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide' (2005) 16 Criminal Law Forum 33, 37 – 38.

[97] *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T, T Ch III (2 December 2008) [419]; *Kalimanzira* (Judgment) (n 27) [510]; *Muvunyi* (Retrial: Judgment) (n 24) [24]; *Prosecutor v Karemera et al* (Judgment and Sentence) ICTR-98-44-T, T Ch III (2 February 2012) [1593].

[98] *Kalimanzira* (Judgment) (n 27) [514]; *Muvunyi* (Retrial: Judgment) (n 24) [26]. See also *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-98-42-T, T Ch II (24 June 2011) [6000], [6010], [6022], [6026]; *Ngirabatware* (Judgment) (n 25) [1354].

[99] *Kalimanzira* (Judgment) (n 27) [514]; *Muvunyi* (Retrial: Judgment) (n 24) [26].

[100] Wilson, *Incitement on Trial* (n 8) 47.

[101] *Ngirabatware* (Judgment) (n 25) [1366]. See also [1360], [1365], [1369]; while this was confirmed on appeal, this is currently under review by the MICT; *Prosecutor v Ngirabatware* (Appeals Judgment) MICT-12-29-A, A Ch (18 December 2014) 105]; *Prosecutor v Ngirabatware* (Decision on Ngirabatware's Motion for Review) MICT-12-29-R, A Ch (19 June 2017).

[102] *Kajelijeli* (Judgment) (n 51) [856].

However, for implicit speech, the Trial Chamber considered whether or not killing had taken place as part of its deliberations.[103] This shows a potential difference in the evidentiary assessment of implicit and explicit speech. Where the speech was explicit, the Chamber did not seek further evidence of contemporary or subsequent violence, yet for implicit speech, the contemporary context was a focal point. This will be considered below.

Cases outside the ICTR confirm that incitement is inchoate. In *Mugesera* the Supreme Court of Canada stated that no 'direct causal link' need be established between the speech and any killing, affirming that incitement is inchoate.[104] Similarly, in *Basebya,* it was confirmed that incitement is an inchoate offence in Dutch Criminal Law, committed by a person who 'in public, either verbally, or in writing or through images, incites another or others to commit any criminal offence'.[105] While the District Court established that the Tutsi were afraid of the consequences of her speech, no direct causal link was considered, particularly owing to the lack of evidence that Basebya was in the region at the time the court deemed the Genocide had started.[106]

It has been argued that, after the Media Trial, the discussion of causation performed the 'function of filling the evidentiary gaps'.[107] Therefore, the discussion did not aim to definitively prove that speech caused killing, but rather to demonstrate its 'likely impact', thereby confirming that causation is not an element of incitement, but an evidentiary tool.[108] This links to the discussion of performative speech, as it shows that the Tribunal were concerned with whether the speech posed a credible threat to the target group.[109] However, the definition and scope of this evidentiary element is not clear. This calls for further consideration, particularly for the purposes of future application, in order to ensure that the mistakes of the ICTR regarding causation are not repeated and the inchoate nature of incitement is retained.

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[103] *Ngirabatware* (Judgment) (n 25) [1364].

[104] *Mugesera* (n 29) 103, 136.

[105] Dutch Penal Code, art 131; Genocide Convention Implementation Act, arts 1(1) – 1(2);)); *Basebya* (n 33) [3(5)].

[106] *Basebya* (n 33) [12(15)].

[107] Wilson, *Incitement on Trial* (n 8) 47.

[108] *Nahimana* (Judgment) (n 6) [1007].

[109] Text to n 18, 113 – 114.

7.4. Defining a Contextual Element

It has been possible to show that the ICTR acknowledged the evidential value of contemporary context. However, there is an absence of clear definition. This was a recurrent problem at the ICTR, particularly for contextual elements. The appellants in the Media Trial queried the use of context to find that implicit speech may be direct.[110] Additionally, the appellants criticised the references to political and community affiliations.[111] The Appeals Chamber dismissed both arguments, considering that they were legitimate uses of contextual factors.[112] This demonstrates that the ICTR were introducing contextual elements without outlining their appropriate limits, explaining how they formed part of the incitement analysis or showing why they were legitimate. Therefore, a definition is required.

As noted above, speech may be defined as 'situation-altering' where it has the power to bring about the desired consequences, thereby posing a credible threat to the target audience. [113] In order to constitute this threat, the speech must be: disseminated by someone that has the authority to encourage the audience to act; taken seriously by the audience; and, spoken in a situation where it has the potential to bring about the desired outcome. Wilson asserts that 'a single act of inciting genocide alone could likely not, in the absence of other factors', trigger acts of genocide.[114] This suggests that for a finding of incitement, there must be 'other factors' to indicate that acts of genocide may occur. It seems that the ICTR took a similar position.

Gordon and Wilson both argue that the extent of the ICTR's emphasis on the subsequent and surrounding factors demonstrated a need for proximity between the speech and a pattern of genocide.[115] This was particularly evident in the Media Trial. The Trial Chamber had emphasised that 'a statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the

[110] *Nahimana* (Appeals Judgment) (n 7) [685]. See also [682], [698] – [715].
[111] ibid [713].
[112] ibid [701], [711], [713].
[113] Austin (n 18) 60, 94; Greenawalt (n 18) 58; Mill (n 18) 67 - 68.
[114] Wilson, *Incitement on Trial* (n 8) 41.
[115] See also Gordon (n 8) 213 – 214; Wilson, *Incitement on Trial* (n 8) 41.

context of a genocidal environment'.[116] It has been argued that the Appeals Chamber took this further, suggesting that speech must be 'simultaneous' with genocide in order to constitute incitement.[117] If this were true it would pose a problem for the future of inchoate incitement, particularly if the so-called preventive dimension is considered to be a justification.

As noted above, *Nahimana* was the first ICTR Trial Chamber to be asked to rule on speech that took place before April 1994.[118] Yet, on appeal, the judges overturned convictions for pre-April 1994 speech.[119] Many of the ICTR's cases focus on speech that took place after April 1994, and, thus, do not provide a satisfactory answer to this question. However, in *Ngirabatware* the Trial Chamber convicted the defendant for direct and public incitement on the basis of a speech delivered in February 1994.[120] While *Ngirabatware* demonstrates that a conviction for incitement is not entirely reliant on the existence of a manifest pattern of genocide, this conviction was for explicit speech, where he directed the audience to 'kill Tutsi'.[121] This raises the question of whether implicit speech could be said to constitute incitement outside the context of a manifest pattern of genocide.

When speech explicitly calls for genocide, the evidentiary assessment is inevitably less comprehensive. The task of identifying whether the speech was understood as incitement is magnified when it is implicit, as it is far harder for an external audience to construct an understanding proximate to that of the intended listeners. This is evident from the ICTR incitement cases. For example, in *Kajelijeli*, a case involving a clear exhortation to 'kill and exterminate' Tutsis,[122] there was no need

[116] *Nahimana* (Judgment) (n 6) [1022].

[117] Catherine A Mackinnon, 'Prosecutor v Nahimana, Barayagwiza & Ngeze' (2009) 103 The American Journal of International Law 97, 98. See also *Nahimana* (Appeals Judgment) (n 7) [636], [754]; Wilson, *Incitement on Trial* (n 8) 40 – 42.

[118] *Akayesu* (Judgment) (n 1) [315]; *Niyitegeka* (Judgment) (n 21) [432] – [434]; *Kajelijeli* (Judgment) (n 51) [956].

[119] *Nahimana* (Appeals Judgment) (n 7) [513]; Mackinnon (n 117) 98. See also Timmerman and Schabas (n 9) 151.

[120] *Ngirabatware* (Judgment) (n 25) [1366] – [1369].

[121] ibid [1366] – [1369].

[122] *Kajelijeli* (Judgment) (n 51) [856].

to exhaustively analyse the content and understanding of the speech.[123] Similarly, in *Nzabonimana*, discussion of the speech is sparse, owing to its unequivocal and unambiguous nature.[124] In cases involving implicit speech there was far greater consideration of surrounding factors. As has been shown, in cases such as *Kalimanzira,*[125] *Muvunyi*[126] and *Nyiramasuhuko*,[127] the Tribunal sought 'circumstantial' evidence of subsequent violence in an attempt to prove that implicit speech was sufficiently direct.[128] This served to demonstrate that, even when it was delivered in such a way as to deliberately obscure meaning to outsiders, the speech was clearly understood by the audience.[129]

Owing to the presence of both implicit and explicit speech on the indictment, *Ngirabatware* provides the best example of the contrast between the evidential analyses. As in previous cases, the Judgment determined that the 'actions of the audience following the speech can [...] be indicative of how they understood the speech'.[130] This was applied to Ngirabatware's implicit speech. This was considered to be insufficiently direct 'to imply an imminent attack',[131] as 'no evidence was adduced to prove that any killings occurred there'.[132] In contrast, where the speech was explicit, the Trial Chamber referred to the politically charged atmosphere in February 1994, but made no mention of any acts of genocide that may have followed.[133] This indicates that contemporary context is relevant to both implicit and explicit speech, but to different extents. The Trial Chamber was satisfied with a politically charged atmosphere to indicate that explicit speech posed a credible threat. However, for implicit speech the absence of proximate acts of genocide ruled out a finding of direct incitement.

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[123] Tonja Salomon, 'Freedom of Speech v Hate Speech: The Jurisdiction of "Direct and Public Incitement to Commit Genocide"' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2009) 146. See also Gordon (n 8) 147.

[124] *Prosecutor v Nzabonimana* (Judgment and Sentence) ICTR-98-44D-T, T Ch III (31 May 2012) [1758] - [1759], [1765], [1771].

[125] *Kalimanzira* (Judgment) (n 27) [514].

[126] *Muvunyi* (Retrial: Judgment) (n 24) [26], [131], [133], [127]. See also *Prosecutor v Muvunyi* (Retrial: Appeal Judgment) ICTR-00-55A-A, A Ch (1 April 2011).

[127] *Nyiramasuhuko* (Judgment) (n 98) [4645], [3792], [3832], [6000], [6010], [6022], [6026].

[128] Text to n 98.

[129] *Nyiramasuhuko* (Judgment) (n 98) [882].

[130] *Ngirabatware* (Judgment) (n 25) [1364].

[131] ibid [1359].

[132] ibid [1364].

[133] ibid [300] – [301], [319].

It is possible to demonstrate a degree of distinction between the evidential discussion of implicit and explicit speech. However, it is unclear whether this is merely owing to the greater need for evidential analysis, or whether implicit speech relies on contemporary context of genocide for a finding of incitement. As the only confirmed conviction for speech before April 1994 was for the explicit speech in *Ngirabatware*, the ICTR's jurisprudence does not provide a satisfactory answer for this.

An assertion that an existence of a nationwide campaign of genocide is necessary for a finding of incitement would be problematic. It is not an element of the crime, and while some cases have come close to suggesting this, there is no legal basis for such an idea. In *Krstić*, the ICTY emphasised that genocide 'does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against civilian population'.[134] Moreover, the 'perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference'.[135] Therefore, a nationwide campaign of genocide can only form part of an evidentiary analysis, it is not a constitutive element of genocide or any of its associated offences, such as incitement.

This is confirmed by cases from third-party national jurisdictions. Mugesera's speech was 'deliberately opaque'.[136] While it was acknowledged that some individual elements of the speech did not conclusively fall within the parameters of incitement, 'taken together' they contained a 'deliberate call for the murder of Tutsi'.[137] As shown above, the Supreme Court of Canada stressed the importance of assessing the circumstances of Rwanda in 1992, 'the time of his speech'.[138] The Court found that he spoke within a 'context of internal political and ethnic conflict', observing that while

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[134] *Prosecutor v Krstić* (Appeals Judgment) IT-98-33-A, A Ch (19 April 2004) [223]. See also Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary (Volume I)* (OUP 2002) 340.

[135] *Krstić* (Appeals Judgment) (n 134) [223].

[136] Narelle Fletcher, 'Words that Can Kill: The Mugesera Speech and the 1994 Tutsi Genocide in Rwanda' (2014) 11 PORTAL Journal of Multidisciplinary International Studies 1, 10. See also Jan Wouters and Sten Verhoeven, 'The Domestic Prosecution of Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2014) 192.

[137] *Mugesera* (n 29) 139. See also Wouters and Verhoeven (n 136) 192; Fletcher (n 136) 4, 6.

[138] Text to n 30; *Mugesera* (n 29) 111. See also Wouters and Verhoeven (n 136) 192.

he spoke during a cease fire, it was still wartime.[139] Similarly, the District Court of the Hague identified the potentially toxic political climate of Rwanda and prevalence of poisonous anti-Tutsi propaganda, which had sensitised Basebya's audience to her message.[140] The Court was satisfied that Basebya's speech had been delivered in a context of unlawful acts on a significant scale against the protected group.[141] Therefore, Basebya's speech was understood as incitement to commit genocide.

In the absence of any explicit definition of an evidential contemporary context element from the ICTR incitement cases it has been necessary to examine the corpus of jurisprudence in order to identify, firstly, that such an element exists and is theoretically justifiable, and, secondly, what would constitute contemporary context in future cases. *Ngirabatware* provides a useful gauge for measuring whether the speech posed a credible threat to the target group, by considering whether it was sufficiently direct 'to imply an imminent attack', in light of the context.[142] This indicates that there must already be steps in place that have defined the victims as the targets for destruction. This is supported by the cases from national jurisdictions, which suggest that implicit speech could provoke genocide when spoken within the 'toxic political climate' of 'poisonous' propaganda, 'unlawful acts on a significant scale against the protected group' and a 'context of internal political and ethnic conflict'.[143] The cases suggest that there is a difference between explicit and implicit speech. However, the same question can be applied: was the speech sufficiently direct 'to imply an imminent attack', in light of the context? For implicit speech there will inevitably be a greater need for evidential analysis in order to prove that it was understood as encouraging an 'imminent attack'.

The ICTR has provided a definition for overall context, albeit for genocidal intent, which is relevant to the incitement analysis.[144] The relevant factors include:

[139] *Mugesera* (n 29) 113 - 115, 124.
[140] *Basebya* (n 33) [59(1 – 31)], [12(14)].
[141] ibid [12(11)].
[142] *Ngirabatware* (Judgment) (n 25) [1359].
[143] *Mugesera* (n 29) 115, 124; *Basebya* (n 33) [12(11)].
[144] *Bikindi* (Judgment) (n 97) [420]. See also *Mugesera* (n 29) 82; Wouters and Verhoeven (n 136) 192.

> the systematic targeting of the victims on account of their membership of a protected group, the exclusion of members of other groups, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, or the political doctrine that gave rise to the acts referred to.[145]

These are not dissimilar from the criteria gleaned from third-party national cases. Moreover, as shown above, speech is considered to be performative when it has the power to bring about the intended conduct. For incitement this relies on it being spoken in a situation where acts of genocide may occur as a consequence of the speech. This would include the 'systematic targeting' of the victim group, their exclusion, the occurrence of 'destructive and discriminatory acts' and a 'political doctrine' that gives rise to these acts. Defining contemporary context in this way would ensure the retention of the inchoate nature of incitement, so long as future courts are clear in separating the evidential analysis from causation. While it has been asserted that prevention is not a justifiable or realistic aim of incitement, as shown in Chapter Two,[146] this finding suggests that a speaker may be convicted of incitement outside the context of ongoing acts of genocide, when it is sufficiently direct 'to imply an imminent attack', in light of the context.

7.5. The Difficulties of Evidentiary Elements

There are a number of potential difficulties with a contemporary context element. As shown above, the application of this element raises questions regarding incitement's preventive potential and its status as an inchoate offence, which have been addressed. It has also been shown through the appeal in the Media Trial that the absence of any definition or guidance for the application of this element resulted in criticism. However, the absence of guidance was not only a problem for contemporary context. This is also apparent in the application of the other evidentiary elements.

Bikindi and *Karemera* were separated by four years, in which time the Tribunal decided three further incitement cases. Despite this passage of time, these two cases have similarities in the way in which the Tribunal struggled to balance the discussion of the evidentiary elements. Owing to the defendant's influential position as a famous

[145] *Bikindi* (Judgment) (n 97) [420].
[146] Text to n 111 – 113 in ch 2.

Rwandan singer, the Trial Chamber in *Bikindi* focussed on conduct that fell outside the temporal mandate of the Tribunal, and, therefore, could only amount to a contextual analysis.[147] Similarly, *Karemera* emphasised contemporary contextual factors so heavily that the defendants appealed on the basis that they had been convicted for incitement for what they did not say.[148]

7.5.1. *Bikindi:* Influence on Trial

As the 'most famous musician in Rwanda',[149] Simon Bikindi was a 'well-known, popular artist whose songs had been playing for years on the radio', particularly on RTLM.[150] Thus, the Trial drew 'keen interest'.[151] The prosecution alleged that Bikindi's songs formed part of a genocidal propaganda campaign by 'extolling Hutu solidarity and encouraging ethnic hatred and the attacking and killing of Tutsi'.[152] His music, 'with its rousing tunes and anti-Tutsi lyrics', provided Hutu Power 'anthems'.[153] Despite the existence of other charges against him, his songs were at the centre of the Trial Chamber's analysis. Thus, it has been suggested that the focus of the Trial was whether a 'song can constitute an international crime'.[154]

The central problem with the Judgment is that it focuses on speech that fell outside the Tribunal's mandate to the detriment of the incitement analysis.[155] It was made clear from the outset that none of Bikindi's conduct before 1994 could form part of a conviction.[156] His songs were composed outside the temporal jurisdiction of the Tribunal and there was no evidence that he played a role in their dissemination or

[147] UN Doc S/RES/955 (n 38); *Bikindi* (Judgment) (n 97) [3], [26] – [28].

[148] *Prosecutor v Karemera et al* (Appeals Judgment) ICTR-98-44-A, A Ch (29 September 2014) [479].

[149] Robert Snyder, '"Disillusioned Words like Bullets Bark": Incitement to Genocide, Music and the Trial of Simon Bikindi' (2007) 35 Georgia Journal of International and Comparative Law 645, 669.

[150] Anthony Oberschall, 'Propaganda, Hate Speech and Mass Killings' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers Corner to War Crimes* (Routledge 2012) 171. See also *Bikindi* (Judgment) (n 97) [256] – [263].

[151] Susan Benesch, 'The ICTR's Prosecution of a Pop Star: The Bikindi Case' (2009) 17 African Yearbook of International Law 447, 447.

[152] *Bikindi* (Judgment) (n 97) [186].

[153] Darryl Li, 'Echoes of Violence: Considerations on Radio and Genocide in Rwanda' (2004) 6 Journal of Genocide Research 9, 19.

[154] Benesch, 'The Bikindi Case' (n 151) 447.

[155] See also UN Doc S/RES/955 (n 38).

[156] *Bikindi* (Judgment) (n 97) [3], [26] – [28].

interpretation during the Genocide.[157] However, of the 116-page Judgment, 20 pages were devoted entirely to his songs, and 18 of those were given over to the question of meaning.[158] As part of this the Chamber heard extensive evidence from experts examining how Bikindi's songs were received, and what his intentions might have been as their author.[159] It is striking that the lead expert for the prosecution, Jean de Dieu Karangwa, spent more time testifying than anyone else, including the defendant.[160]

It could be suggested that this analysis was necessary, particularly owing to the linguistic complexity of the songs. While several ICTR cases were challenged by the nuances of Kinyarwanda, especially in its early years, no speech was as complex as Bikindi's. His songs were poetic and made use of culturally specific metaphor and Rwandan legend.[161] Therefore, understanding them required intricate knowledge of Rwandan language, history, and culture, which is reflected in the Judgement's comprehensive analysis.[162] Even though the songs contained poetic language and culturally specific references, it was concluded that 'within the context of the events of 1993 – 1994 in Rwanda', their message 'was properly understood' by the intended audience.[163] The prosecution asserted that the 'main message' of the songs was to call upon Hutu 'to unite' to fight Tutsi, thereby inciting killings.[164] However, the Chamber differentiated between their interpretation at the time they were composed and their dissemination during the Genocide, finding that during the Genocide, RTLM deployed the songs with increasingly inflammatory interpretations, targeting the Tutsi as the enemy. While this had an 'amplifying effect on the genocide', there was insufficient

[157] ibid [119], [122], [187], [193] – [194], [262] – [263], [421].

[158] James E Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (OUP 2015) 72. See also *Bikindi* (Judgment) (n 97) [186] – [264].

[159] *Bikindi* (Judgment) (n 97) [6], [17], [29], [36], [188] – [189], [191], [197] – [198], [207] – [249], [258].

[160] Parker (n 158) 75 – 76. See also *Prosecutor v Bikindi* (Minutes of Proceedings: Trial Day 26) ICTR-01-72-T, T Ch III (13 February 2007); *Prosecutor v Bikindi* (Minutes of Proceedings: Trial Day 27) ICTR-01-72-T, T Ch III (14 February 2007); *Bikindi* (Judgment) (n 97) [188] – [189], [192], [195], [197], [207], [209] – [211], [217] – [221], [233] – [236], [247] – [248], [258].

[161] *Bikindi* (Judgment) (n 97) [197], [242]; Emmanuel Kwaku Akyeampong and Steven Niven, *Dictionary of African Biography Volumes 1 – 6* (OUP USA 2012) 220. See also Andrea Grieder, 'Rwanda: Healing and the Aesthetics of Poetry' in Raminder Kaur and Parul Dave-Mukherji (eds), *Arts and Aesthetics in a Globalizing World* (Bloomsbury 2015) 135 – 149.

[162] See also *Bikindi* (Judgment) (n 97) [211] – [213], [217], [219], [247].

[163] ibid [199], [233], [236].

[164] ibid [236].

evidence to suggest that these songs had been composed 'with the specific intention to incite' attacks and killings of the Tutsi.[165]

Given the attention that *Bikindi* attracted,[166] the painstakingly comprehensive analysis of songs would have been appropriate if the conclusions from the Judgment had been clear. The judges agreed that the songs constituted anti-Tutsi propaganda, encouraged ethnic hatred and were disseminated during the genocide to incite killing.[167] However, with limited elaboration, the Trial Chamber concluded that none of the songs constituted incitement to genocide *per se.*[168] It was difficult to reconcile the Chamber's conclusions with its analysis. The discussion of the offence of incitement was relatively sparse, only providing a skeleton outline of the crime.[169] This was exacerbated by the lack of structure in the Judgment, and the disparate approach to identifying the different elements of incitement. For example, direct is outlined in the examination of freedom of expression and not referred to in the legal findings.[170]

While relatively unambiguous in terms of content, the speech that formed the basis of his conviction was supported by fairly limited evidence. The prosecution alleged that at various dates in 1993 and 1994, Bikindi 'used a vehicle outfitted with a public address system to broadcast his musical compositions' and encourage extermination of the Tutsi.[171] However, witness testimony was inconsistent and the evidence was not conclusive as to whether he led the convoy or which songs he broadcast.[172]

Bikindi was selected for prosecution from hundreds of potential defendants for the reason of his songs.[173] It has been argued that if he was 'only a murderer and not a

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[165] ibid [255], [264].

[166] Benesch, 'The Bikindi Case' (n 151) 447.

[167] *Bikindi* (Judgment) (n 97) [253], [264].

[168] ibid [421].

[169] ibid [419].

[170] ibid [387], [419].

[171] ibid [265] – [266]; *Prosecutor v Bikindi* (Appeals Judgment) ICTR-01-72-A, A Ch (18 March 2010) [69].

[172] *Bikindi* (Judgment) (n 97) [271] – [276], [281].

[173] Susan Benesch, 'Song as a Crime Against Humanity: The First International Prosecution of a Pop Star' in Henry Carey and Stacey Mitchell (eds), *Trials and Tribulations of International Prosecution* (Lexington Books 2015) 68.

musician, he would not be one of the select few chosen for prosecution by the Tribunal'.[174] In forming the conviction, the Tribunal acknowledged his significance, noting his position as 'a well-known and popular artist' and 'an authoritative figure'.[175] Owing to the temporal mandate, Bikindi could not be convicted on the basis of his songs. Neither could he be held responsible for the use of his songs to incite genocide. Regardless, throughout the Judgment the Trial Chamber consistently returned to his songs and his position as an influential Rwandan singer. These factors could only be evidentiary and could not form the foundation of a conviction on their own. The disproportionate focus on conduct for which he could not be held criminally responsible is detrimental to the Judgment. There is a lack of clear explanation for the findings, and in places the reasoning is difficult to follow. This is magnified by the skeletal outline of incitement and the minimal discussion of the speech for which he was convicted. As the first case to follow the Media Trial, *Bikindi* presented an opportunity to clarify the elements outlined in that case.[176] This opportunity was missed. However, an analysis of the Judgment emphasises the importance of a separation between the constitutive and evidentiary elements of incitement, and clear definitions and guidance for the application of these elements.

7.5.2. *Karemera*: Convicted on the Basis of Context?

Karemera demonstrates problems arising from a failure to clearly explain the reasons for the conviction, which led to an appeal on the grounds that the defendants had been convicted for what they did not say.[177] Both defendants were charged with direct and public incitement on the basis of two relatively implicit speeches from May 1994.[178] Following previous judgments, the Trial Chamber referred to external context, including cultural and linguistic factors, to establish audience understanding.[179] The Chamber concluded that, as there had been recent killings in the local area, both

[174] Justin La Mort, 'The Soundtrack to Genocide: Using Incitement to Genocide in the *Bikindi* Trial to Protect Free Speech and Uphold the Promise of Never Again (2009) 4 Interdisciplinary Journal of Human Rights Law 43, 46.

[175] *Bikindi* (Judgment) (n 97) [425].

[176] Gordon (n 8) 212.

[177] *Karemera* (Appeals Judgment) (n 148) [479].

[178] *Karemera* (Judgment) (n 97) [1592], [1596], [1601].

[179] ibid [1594].

speeches were understood as a direct call to continue attacks against the Tutsi.[180] The Chamber particularly emphasised the contemporary context of the first speech, noting that in the two days prior to the speech, 2,000 Tutsi civilians had been slaughtered and buried in mass graves close by.[181]

An element of the Trial Chamber's analysis is controversial. The Chamber argued that the 'most striking message delivered' referred to what the speakers did not say.[182] The Trial Chamber argued that the defendants did not reject comments paying tribute to the *Interahamwe* 'for their contributions in restoring peace'.[183] 'By not condemning, or even addressing, the recent massacre […] the speakers condoned the killings' and incited the population to continue killing.[184] On appeal Karemera argued that nothing in the speech could be interpreted as a direct call to commit genocide, claiming that he had been found guilty 'based on what was not said in the speeches'.[185]

This speech was made as part of the interim government's programme of 'pacification' tours.[186] The Trial Chamber was not convinced that these speeches advocated peace, rather they described it as 'abstract rhetoric', finding that 'no reasonable individual who sought peace' would have failed to condemn the massacre of 'innocent civilians'.[187] However, the absence of condemnation was not the sole basis for the conviction. It was alleged that at this meeting Karemera spoke and 'paid tribute to the *Interahamwe*, calling on them to flush out, stop and combat the enemy'.[188] Against 'such a backdrop', the Trial Chamber felt that Karemera's words could 'only be understood as an unequivocal endorsement of the killings'.[189] The Appeals Chamber affirmed this, finding that, given the climate of Rwanda in May 1994, this 'tribute' rendered any statements about the restoration of peace 'hollow'.[190] Thus, the Appeals

[180] ibid [1598], [1602].
[181] ibid [1597]; *Karemera* (Appeals Judgment) (n 148) [475].
[182] *Karemera* (Judgment) (n 97) [989].
[183] ibid [1596]; *Karemera* (Appeals Judgment) (n 148) [475], [479].
[184] *Karemera* (Judgment) (n 97) [1597].
[185] *Karemera* (Appeals Judgment) (n 148) [479].
[186] ibid [476].
[187] *Karemera* (Judgment) (n 97) [990] – [991]; *Karemera* (Appeals Judgment) (n 148) [476].
[188] *Karemera* (Judgment) (n 97) [1596].
[189] ibid [991].
[190] *Karemera* (Appeals Judgment) (n 148) [486].

Chamber rejected the submission that the defendants had been convicted for what they did not say.

The problem stemmed from the Trial Chamber's explanation. The Appeals Chamber's approach makes it clear that the conviction is on the basis of speech that was understood as incitement. However, owing to the focus of the analysis, the Trial Chamber indicated that they were punishing the defendants for the context in which the speech was delivered, rather than for their speech.

Bikindi and *Karemera* demonstrate a need to balance the discussion of relevant contextual factors with the conduct for which the accused can be held criminally liable to ensure that any conviction is clearly rooted in a criminal act on the part of the defendant. In light of a similar concern, the Trial Chamber in *Bagilishema* cautioned against relying too much on contextual elements, submitting that criminal action and intent had to be established by relying on the 'actual conduct of the accused'.[191] Therefore, *Bikindi* and *Karemera* demonstrate the recurring problem of a failure to clearly outline the reasons for the decisions at the ICTR, which emphasises the importance of a consistent, balanced application of a well-defined offence, and a clear separation between the constitutive and evidentiary elements.

7.6. Conclusion

The *Kalimanzira* Trial Chamber noted that 'the inchoate nature' of incitement 'allows intervention at an earlier stage, with the goal of preventing the occurrence of genocidal acts'.[192] Gordon argues that for this to be possible, the offence of incitement would need to be well-defined.[193] Throughout this chapter it has been demonstrated that, while it is possible to identify important evidentiary elements from the ICTR's incitement cases, this is often by gleaning their application from the discussion of facts, and, therefore, there is no explicit definition or guidance. Chapter Three noted the importance of the principle of *nullem crimen sine lege* to international criminal law.

[191] *Prosecutor v Bagilishema* (Judgment) ICTR-95-1A, T Ch I (7 June 2001) [63]. See also Larissa J van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Publishers 2005) 112.

[192] *Kalimanzira* (Judgment) (n 27) [510].

[193] Gordon (n 8) 215.

For a criminal offence to be applied, the exact behaviour that is prohibited must be defined 'as clearly as possible'.[194] However, at the ICTR the evidentiary elements were not clearly defined or outlined and not consistently applied, with some cases betraying a failure to demarcate a merely evidential analysis from conduct for which the accused could be criminally liable.

This chapter has contributed to the overarching aims of this thesis by analysing the ICTR's cases to identify the lessons that can be learnt from its approach. Further, through the analysis of contemporary context this chapter has concluded the task of defining the evidentiary elements that may facilitate a finding of incitement, thereby contributing to the originality of this thesis. This chapter aimed to consider: (i) the legal justification for an evidentiary element of contemporary context; (ii) whether there was a search for causation or an evidentiary analysis of context in the ICTR's incitement trials; (iii) how a contemporary contextual element should be defined; and, (iv) the problems with evidentiary elements. While this thesis aims to consider the lessons that can be drawn from the ICTR's incitement cases, it is evident that the third-party national jurisdiction cases are essential to the task of affirming the application of the ICTR's jurisprudence, particularly for the future. Therefore, this chapter referred to the Supreme Court of Canada in *Mugesera* and the District Court of the Hague in *Basebya*.

An evidentiary element of contemporary context may be justified by first considering incitement as a performative act. This considers speech to be dangerous where it has the power to bring about the desired consequences, thereby posing a credible threat to the target audience.[195] This relies on words being spoken in a situation where they have the potential to bring about such conduct. This was supported with reference to relevant human rights cases, such as *Silver v United Kingdom* and *Zana v Turkey* from the ECtHR. This discussion demonstrated that ICTR incitement cases frequently turned to the surroundings of the speech to ascertain how it was understood. Particularly important was the note in the Media Trial that speech against a particular ethnicity would have a 'heightened impact in the context of a genocidal environment'[196] and could 'exacerbate an already explosive situation'.[197] This was affirmed with

[194] Gerhard Werle, *Principles of International Law* (Asser Press 2005) 33.
[195] Austin (n 18) 60, 94; Greenawalt (n 18) 58; Mill (n 18) 67 - 68.
[196] *Nahimana* (Judgment) (n 6) [1022].
[197] ibid [1004], [1011].

reference to third-party national jurisdictions. Therefore, it was concluded that there is sufficient justification for an evidentiary element of contemporary context.

Causation has proven to be controversial. This stemmed from the ICTR's tendency to try to identify a causal link between speech and subsequent conduct, even where that link was tenuous. This arose out of the absence of clear explanations regarding the evidentiary value of contemporary context and the attempt to grapple with the ICTR's narrow temporal jurisdiction. However, this discussion showed that despite the difficult relationship between the ICTR and causation, incitement is still an inchoate offence.

An overview of ICTR cases aimed to define a contemporary context element. This sought to identify: (i) whether the existence of such an element would mean that incitement could only be committed in the context of ongoing genocide; (ii) whether this element would apply equally to implicit and explicit speech; and, (iii) how contemporary context should be defined. Through an analysis of cases from the ICTR, ICTY and third-party national jurisdictions it was shown that a nationwide campaign of genocide is not an element of incitement. Therefore, incitement may be committed outside the context of ongoing genocide. However, the speech must have the potential to bring about the desired conduct. For incitement this relies on it being spoken in a situation where acts of genocide may occur as a consequence of the speech. This would include the 'systematic targeting' of the victim group, their exclusion, the occurrence of 'destructive and discriminatory acts' and a 'political doctrine' that gives rise to these acts.[198] While it was possible to demonstrate a degree of potential distinction between implicit and explicit speech, this did not seem to mean that implicit speech can only amount to incitement within the context of genocide. Rather, this indicated that implicit speech requires a more comprehensive evidential analysis owing to its nature.

Throughout this chapter it has been shown that there are numerous difficulties with the evidentiary analysis of contemporary context. Firstly, the possible impact on the so-called preventive purpose of incitement; secondly, the potential conflict with incitement's inchoate nature; and, thirdly, the difficulty striking a balance between the evidentiary analysis of context and the actual punishable conduct of the accused.

[198] *Bikindi* (Judgment) (n 97) [420].

Through the application of clear definitions, an appropriate balance between evidential discussions, and a focus on conduct that gives rise to criminal liability, these issues could be avoided.

8. Lessons from the ICTR: Identifying Incitement to Commit Genocide

The aim of this final chapter is to summarise the thesis as a whole and set out what it has achieved by addressing its three inter-linked research aims: (i) to emphasise the importance of understanding speech in international incitement trials, showing that this is an underdeveloped area of the law; (ii) to appraise the whole of the ICTR's incitement jurisprudence to identify the controversial, problematic and positive aspects of its analysis, particularly highlighting the problems encountered in the application of the offence; and (iii) to use this analysis to identify and define the constitutive and evidentiary elements of incitement.

There are a number of issues that demonstrate the originality of this research. Firstly, the analysis of cross-cultural communication as part of the incitement analysis. Secondly, the identification of evidentiary aspects of the incitement analysis that distinguish incitement from legitimate speech, including the difference between informative statements and opinions, the persuasive force of the speech, the seriousness of the message and the influence of the speaker. Finally, the issue of context, which is the area that provides the most significant original contribution. While this received mention by the ICTR, it was used in a number of different ways but rarely defined clearly. Thus, this thesis aims to provide a definition for context and differentiate between the various forms employed by the Tribunal.

Applying the incitement provision at the ICTR was not a straightforward task. This was for four main reasons: punishing incitement in international law is inherently controversial; there is no clear definition or guidance for the international offence, particularly its evidential elements; the cases contain no consistently applied structure; and multi-cultural and multi-linguistic trials present a significant challenge. This thesis aimed to address each of these issues by identifying and defining the constitutive and evidential elements of the offence to provide clarity for future international incitement trials. This was achieved by outlining the constitutive components of the incitement analysis, (incitement, direct, public and intent), identifying relevant evidential factors, and exploring the important, but often overlooked, stage of establishing the meaning of the speech. As was shown in Chapter Three, even though the ICC operates within its

own legal system, with the Rome Statute as its primary source of law, the Convention and ICTR cases contain the relevant interpretive material for the incitement provision.[1] Therefore, the definitions derived from ICTR cases will still be applicable in future.

The controversy of incitement has two main sources: firstly, the prohibition of speech is sometimes perceived as encroaching on freedom of expression;[2] and secondly, incitement is traditionally considered to be an inchoate offence, so punishable even where it does not lead to the commission of its intended substantive crime.[3] Thus, this thesis set out to define the point at which words may be justifiably punished. Through an analysis of the theories of punishment and historical examples it was possible to identify a theoretical justification.

While it is sometimes considered that incitement is prohibited in international law in order to prevent genocide, it has never achieved its preventive aim.[4] Cases have only been brought in relation to Rwanda, after the Genocide had ended. Therefore, prevention alone does not provide sufficient justification for punishing incitement. With reference to Austin's theory of speech acts, it is possible to show that incitement is justifiably punished regardless of whether any criminal conduct results from the speech.[5] Austin's theory considers that speech is a positive act in its own right, and punishable as such, when the speaker intends to achieve something through their words and when the words have the potential to fulfil their aim.[6] Thus, to constitute a criminal act in its own right, the speech must contain an encouragement to destroy a protected

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[1] *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07, T Ch II (7 March 2014) [45], [105], [767], [789], [800], [801]; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2015) 150.

[2] UNGA Sixth Committee (3rd Session), 'United States of America: Amendments to the Draft Convention for the Prevention and Punishment of the Crime of Genocide (E/794)' (4 October 1948) UN Doc A/C.6/214; UNGA Sixth Committee (3rd Session) 'Eighty-fifth Meeting Held at the Palais de Chaillot, Paris, on Wednesday 27 October 1948, at 3:20 pm' (27 October 1948) UN Doc A/C.6/SR.85, 221; Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2009) 170.

[3] UN Doc A/C.6/214 (n 2); UN Doc A/C.6/SR.85 (n 2) 221; Barendt (n 2) 170; Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (OUP 2010) 117; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 95 – 97.

[4] UN Doc A/C.6/214 (n 2); UNGA Sixth Committee (3rd Session) 'Iran: Amendments to the Draft Convention for the Prevention and Punishment of the Crime of Genocide (E/794)' (5 October 1948) UN Doc A/C.6/218; UN Doc A/C.6/SR.85 (n 2) 216, 220, 226 -227.

[5] John L Austin, *How to do Things with Words* (2nd edn, Harvard University Press 1975) 60, 94.

[6] ibid; Kent Greenawalt, *Speech, Crime and the Uses of Language* (OUP 1989) 58.

group, it must be understood as incitement, and it must have the potential to bring about its intended result, even if it is ultimately unsuccessful.[7]

Historical examples of the link between speech and violence demonstrate that speech has the power to contribute to genocide, in some circumstances. Despite differences in language and culture, there are hallmarks of inciting speech that have recurred throughout history, particularly dehumanisation and the creation of a threat (or accusation in a mirror). These techniques of incitement erode the humanity of the victim group, designating them for slaughter. Consequently, it was considered that identifying these techniques in speech helps to distinguish incitement from legitimate expression.

The criminalisation of incitement is justified in theory. However, it has proven complex to define precisely when speech should be punished in international law. During the drafting of the Convention, the incitement provision was subject to numerous revisions owing to different domestic stances on the prohibition of speech.[8] Even though the drafters ultimately agreed to prohibit 'direct and public incitement to commit genocide' in Article III(c) of the Convention, there was limited guidance on the meaning and scope of these terms.[9]

While a review of the *Travaux Préparatoires* of the Convention does not provide a comprehensive guide, it gives some limited insight into the intended application of the offence. Firstly, this showed that the drafters intended only to prohibit speech that encouraged genocide, demonstrating that it had to be more than general propaganda or racist remarks.[10] Secondly, private conversations were deliberately excluded as they were considered insufficiently harmful or dangerous to warrant international criminalisation.[11] Additionally, the term direct was used by the drafters to define the idea that the incitement had to be clearly understood as encouraging the commission of genocide. Finally, it was confirmed that incitement is to be treated as an inchoate offence in international criminal law. It was shown that even though there are

[7] Austin (n 5) 9. See also Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277, art II.

[8] ECOSOC 'Ad Hoc Committee on Genocide Summary Record of the Sixteenth Meeting, Lake Success, New York, Thursday, 22 April 1948, at 2:15 pm' (29 April 1948) UN Doc E/AC.25/SR.16, 9.

[9] Genocide Convention (n 7) art III(c).

[10] UN Doc E/AC.25/SR.16 (n 8).

[11] UNGA Sixth Committee (3rd Session) 'Eighty-Fourth Meeting Held at the Palais de Chaillot, Paris, on Tuesday, 26 October 1948, at 3:15 pm' (26 October 1948) UN Doc A/C.6/SR.84, 214.

now four further instruments that prohibit the crime (including the Statutes for the ICTY and ICTR which repeat the Convention verbatim), none of these instruments have provided further clarification of the meaning of incitement or any of its components.[12] Consequently, the ICTR was left to form its own definition.

8.1. The Importance of Establishing Meaning in International Incitement Trials

Understanding the difficulty of translation and interpretation framed the challenge facing the ICTR. Differences in cultural communication impacted every level of the trials, from the gathering of evidence through to the operation of the courtroom.[13] This was magnified for incitement, the prosecution of which is entirely reliant on the judges' ability to understand speech. In these cases, the court is not only tasked with determining whether speech is criminal, but it also has to ascertain what the words mean. This necessitates more than a simply technical understanding. In order to ascertain whether the speech was sufficiently direct, the judges are required to consider whether the audience understood the speech as encouraging genocide. Therefore, before it is possible to determine whether speech falls within the parameters of the international offence of incitement, the judges have to understand the local impact of the speech.

An essential part of this is an appreciation that what is direct will vary from language to language and culture to culture, therefore it is essential to account for cultural differences and avoid ethnocentric bias. This is particularly important for interpreting the direct component of incitement, as what is direct for one culture or language, may not be direct for another. For example, in Rwanda proverbs, stories and metaphor are prevalent even in daily communication.[14] This is significant as these

[12] UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955; Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (1996) art 2 (3)(f); Rome Statute of the International Criminal Court (Adopted 17 July 1998 entered into force 1 July 2002) 2187 UNTS 3, art 25(3)(e). See also William Schabas, 'Hate Speech in Rwanda: The Road to Genocide' (2000) 46 McGill Law Journal 141, 155.

[13] Leigh Swigart, 'African Languages in International Criminal Justice: The International Criminal Tribunal for Rwanda and Beyond' in Charles Chernor Jalloh and Alhaji BM Marong (eds), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa: Essays in Honour of Prosecutor Hassan Bubacar Jallow* (Brill Nijhoff 2015) 7.

[14] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) [155]; *Prosecutor v Nahimana et al* (The Kinyarwanda Language. Its Use and Impact in the Various Media During the Period

forms of communication would be sufficiently direct to a Rwandan audience, even when they seem obscure to outsiders. Therefore, this must be reflected in the international definition of direct incitement, as a narrow interpretation would be inappropriate and would not reflect the cultural and linguistic diversity of international criminal law.

The important, but complex, task of establishing the local impact of the speech in order to show whether speech was sufficiently direct forms an essential part of incitement trials. Understanding language requires more than just a comprehension of the technical or semantic meaning of individual words. With reference to pragmatics, Chapter Four showed that understanding requires knowledge of language and grammatical structures, culture, and also linguistic and social behaviours. The intended recipients of speech will find meaning in the words that may be missed by outsiders. They have the benefit of temporal and cultural context, which enhances comprehension. They are able to recognise nuances in speech, such as tone and pitch, or gestures displayed through facial expressions and body language, that may be lost upon the latter group.[15] Understanding is rendered more difficult when utterances are relayed, as these non-verbal cues are absent.[16] Thus, the target listeners are better placed to hear the intended meaning. Furthermore, the tendency to approach communication with an ethnocentric bias poses a problem as each culture uses language in different ways.[17]

Identifying how the audience understood the speech in international incitement trials requires a two-stage analysis of content and context. Content looks to the semantic translation of the speech, acknowledging that this does not convey meaning and that sometimes translation is not possible. Context aims to show how the speech was understood by the target audience. This is a 'dynamic, not a static concept', to be 'understood as the surroundings, in the widest sense' that form the background to an utterance.[18] Thus, it refers to 'all the environment surrounding the speech act' such as

1990 – 1994: A Sociolinguistic Study, Balinda Rwigamba, Laurent Nkusi, Mathias Ruzindana) ICTR-99-52-T, T Ch I (23 March 2002) 7 – 8.

[15] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) 50, 53.

[16] Penelope Brown and Stephen C Levinson, *Politeness: Some Universals in Language Usage* (Cambridge University Press 1987) 91.

[17] Cliff Goddard and Anna Wierzbicka, 'Discourse and Culture' in Teun A van Dijk (ed), *Discourse as Social Interaction* (Sage 2007) 231. See also Geertz (n 15).

[18] Jacob L Mey, *Pragmatics: An Introduction* (Blackwell 1994) 38.

the physical location and the historical and social background to the speech, alongside linguistic factors, such as relevant politeness conventions, that will impact on the understanding of the speech.[19]

While this analysis was conducted in several ICTR cases, this arose out of need, rather than from any explicit reference to sociolinguistics. For example, *Akayesu* emphasised that interpretation relies 'on the context, the particular speech community, the identity of and relation between the orator and the listener, and the subject matter of the question'.[20] In subsequent decisions, the Tribunal attempted to build on *Akayesu* by emphasising the importance of context.[21] By taking note of cultural, historical and political factors, and considering the linguistic nuances of Kinyarwanda, the Tribunal was able to begin to understand the local impact of the speech.[22]

The analysis of ICTR cases reinforced the importance of understanding by highlighting the prevalence of implicit speech in incitement cases. This was particularly apparent in *Bikindi* and *Ngirabatware*. In *Bikindi*, the speaker employed poetic language that drew inspiration from Rwandan myth and legend.[23] Therefore, understanding his speech and identifying whether it was sufficiently direct not only required a thorough knowledge of Kinyarwanda, but also the social and historical context of Rwanda. In *Ngirabatware*, the speaker used the term *Inkotanyi*. While previous cases had found that this was largely used to refer to the Tutsi people as a whole, in *Ngirabatware* the context indicated that this was intended to refer specifically to the RPF, and, therefore, did not target a group for reason of their ethnicity.[24] This showed that with the aid of language experts, the ICTR developed a competent

[19] Mathias Ruzindana, 'The Challenges of Understanding Kinyarwanda Key Terms Used to Instigate the 1994 Genocide in Rwanda' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers Corner to War Crimes* (Routledge 2012) 156; *Akayesu* (Judgment) (n 14) [557] – [558].

[20] *Akayesu* (Judgment) (n 14) [156].

[21] *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T, T Ch III (2 December 2008) [387]; *Prosecutor v Karemera et al* (Judgment and Sentence) ICTR-98-44-T, T Ch III (2 February 2012) [1594]; *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T,T Ch (16 May 2003) [247]; *Prosecutor v Nzabonimana* (Judgment and Sentence) ICTR-98-44D-T, T Ch III (31 May 2012) [1753]; *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-98-42-T, T Ch II (24 June 2011) [468].

[22] *Bikindi* (Judgment) (n 21) [177]; *Niyitegeka* (Judgment) (n 21) [142], [238], [257]; *Nzabonimana* (Judgment) (n 21) [1753].

[23] *Bikindi* (Judgment) (n 21) [197] – [199].

[24] *Prosecutor v Ngirabatware* (Judgment and Sentence) ICTR-99-54-T, T Ch II (20 December 2012) [1359].

understanding of Rwandan language and culture. However, even though the Tribunal gained experience with Rwandan communication, this did not reduce the need to conduct a linguistic analysis on a case-by-case basis.

8.2. Appraising the ICTR's Incitement Jurisprudence

In order to provide an overview of the ICTR's incitement jurisprudence and identify the successes and problems of its analysis, this thesis examined each of the significant incitement cases.[25] This excluded cases where the accused was not brought to trial, or where there was insufficient evidence for a thorough discussion of an incitement charge.[26] While the appraisal of ICTR cases showed that the Tribunal developed a significant body of incitement jurisprudence that contributes to the understanding of the offence, the quality of the analysis in the judgments varied. The analysis of the ICTR's incitement cases as a whole identified four problems: (i) the failure to precisely define some key terms; (ii) the problematic relationship with causation; (iii) a lack of clear reasoning, leading to a difficulty identifying links between the cases' analyses and their conclusions; and (iv) the inconsistent application of the offence.

[25] *Akayesu* (Judgment) (n 14); *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998); *Prosecutor v Ruggiu* (Judgment and Sentence) ICTR-97-32-I, T Ch I (1 June 2000); *Niyitegeka* (Judgment) (n 21); *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T, T Ch II (1 December 2003); *Prosecutor v Nahimana et al* (Judgment and Sentence) ICTR-99-52-T, T Ch I (3 December 2003); *Bikindi* (Judgment) (n 21); *Karemera* (Judgment) (n 21); *Prosecutor v Kalimanzira* (Judgment) ICTR-05-88-T, T Ch III (22 June 2009); *Prosecutor v Muvunyi* (Retrial: Judgment) ICTR-00-55A-T, T Ch III (11 February 2010). *Nyiramasuhuko* (Judgment) (n 21); *Nzabonimana* (Judgment) (n 21); *Ngirabatware* (Judgment) (n 24).

[26] *Prosecutor v Semanza* (Judgment and Sentence) ICTR-97-20-T, T Ch III (15 May 2003) [437] – [438]; *Prosecutor v Uwilingiyimana* (Indictment) ICTR-2005-83-I (10 June 2005); *Prosecutor v Bucyibaruta* (Indictment) ICTR-2005-85-I (16 June 2005); *Prosecutor v Bisengimana* (Judgment) ICTR-00-60-T, T Ch II (13 April 2006) [209], [219]; *Prosecutor v Serugendo* (Judgment) ICTR-2005-84-I, T Ch (1 June 2006) [49]; *Prosecutor v Bagosora et al* (Judgment and Sentence) ICTR-98-41-T, T Ch I (18 December 2008); *Prosecutor v Ntawukulilyayo* (Judgment and Sentence) ICTR-05-82-T, T Ch III (3 August 2010) [459]; *Prosecutor v Kabuga* (Amended Indictment) ICTR-98-44B-I (14 April 2011); *Prosecutor v Bizimungu et al* (Judgment and Sentence) ICTR-99-50-T, T Ch II (30 September 2011) 1972 – 1987; *Prosecutor v Ntaganzwa* (Second Amended Indictment) ICTR-96-9-I (30 March 2012); *Prosecutor v Ndimbati* (Second Amended Indictment) ICTR-95-1F-I (8 May 2012); *Prosecutor v Ryandikayo* (Second Amended Indictment) ICTR-95-1E-I (8 May 2012); *Prosecutor v Munyarugarama* (Amended Indictment) ICTR-2002-79-I (13 June 2012); *Prosecutor v Mugenzi and Mugiraneza* (Appeals Judgment) ICTR-99-50-A, A Ch (4 February 2013) [95], [129] – [142].

8.2.1. The Failure to Define Key Terms

As the seminal incitement case, *Akayesu* made a number of positive developments to the incitement analysis, providing the most detailed discussion of the constitutive elements of incitement (direct, public, incitement and intent), which was affirmed in subsequent cases.[27] Additionally, the Trial Chamber acknowledged the complexities of working in multi-cultural and multi-linguistic trials, taking a broad approach to interpreting direct, arguing that it is context dependant, thereby emphasising the importance of establishing the meaning of the speech and accounting for diversity in cultural communication.[28]

Despite the significance of this development, there were a number of questions that remained unanswered at the conclusion of the Judgment. These stemmed from a failure to define key terms. Firstly, the dictionary-based analysis of incitement did not go sufficiently far to distance international incitement from the civil law concept of provocation; secondly, the Trial Chamber concluded that direct need not mean 'explicit' without defining the extent to which implicit speech could fall within the parameters of incitement; and, thirdly, the Tribunal's approach to public incitement.

In *Akayesu*, the Trial Chamber defined the public element as including the place where the incitement occurred, and whether or not 'assistance was selective or limited'.[29] While Chapter Five demonstrated that the use of the word 'assistance' was owing to issues of translation, the problematic wording was repeated in *Niyitegeka*.[30] Furthermore, owing to the lack of clarity in explanation, *Akayesu's* approach to public incitement led the appellant in *Nzabonimana* to argue that the public element pertained exclusively to mass communications.[31] While the Appeals Chamber did not accept this argument, it demonstrates a need for clearly defined elements.[32] The Tribunal in *Akayesu* erred by not considering the ordinary meaning of public in light of the

[27] *Bikindi* (Judgment) (n 21) [387]; *Niyitegeka* (Judgment) (n 21) [247]; *Nyiramasuhuko* (Judgment) (n 21) [468]; *Karemera* (Judgment) (n 21) [1594]; *Nzabonimana* (Judgment) (n 21) [1753].

[28] *Akayesu* (Judgment) (n 14) [153], [557] – [558].

[29] ibid [556].

[30] *Niyitegeka* (Judgment) (n 21) [431].

[31] *Prosecutor v Nzabonimana* (Appeals Judgment) ICTR-98-44D, A Ch (29 September 2014) [126].

[32] ibid [126].

interpretive principles of international law.[33] Consequently, public should be considered to mean that the speech is 'done, perceived or existed in open view'.[34]

This demonstrates that, from the beginning of ICTR incitement cases, there was a failure to properly define key terms. The absence of clear definitions has also had an impact on the evidentiary elements. This thesis has demonstrated the importance of context to the incitement analysis. However, while context is used in a number of different ways by the Tribunal, it is rarely defined with precision. In *Akayesu*, and subsequent chambers, context was used to identify how the audience understood the speech and was comprised of a number of external factors.[35] In the Media Trial it was used to show that the speech could be distinguished from legitimate expression, by considering the message as a whole and referring to the speaker's previous speech.[36] In the Media Trial, *Bikindi, Muvunyi* and *Karemera* it was used to illustrate the intent of the speaker, by considering their position in society, their political affiliations, and their previous conduct.[37] In the Media Trial, *Kalimanzira, Muvunyi, Nyiramasuhuko* and *Ngirabatware*, contemporary context was used as potential evidence that implicit speech was understood as incitement by the target audience.[38] Therefore, the Tribunal often referred to context as an umbrella term to encompass relevant factors, but did not explicitly outline the distinction between its different purposes. Consequently, the lines between the elements of the incitement analysis became blurred. This will be addressed below.

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[33] *Prosecutor v Kalimanzira* (Appeals Judgment Partly Dissenting and Separate Opinion of Judge Pocar) ICTR-05-88-A, A Ch (20 October 2010) [43].

[34] 'Public', *Oxford Dictionary of English* (2nd edn Revised, OUP 2005).

[35] *Akayesu* (Judgment) (n 14) [557] – [558]; *Niyitegeka* (Judgment) (n 21) [247]; *Bikindi* (Judgment) (n 21) [387]; *Nyiramasuhuko* (Judgment) (n 21) [468]; *Karemera* (Judgment) (n 21) [1594]; *Nzabonimana* (Judgment) (n 21) [1753].

[36] *Nahimana* (Judgment) (n 25) [1004] - [1006].

[37] ibid [1008] – [1009]; *Bikindi* (Judgment) (n 21) [425]; *Muvunyi* (Retrial) (n 25) [31] – [34]; *Karemera* (Judgment) (n 21) [1597].

[38] *Prosecutor v Nahimana et al* (Appeals Judgment) ICTR-99-52-A, A Ch (28 November 2007) [513]; *Kalimanzira* (Judgment) (n 25) [514]; *Muvunyi* (Retrial) (n 25) [26]; *Nyiramasuhuko* (Judgment) (n 21) [6009] – [6010], [6026] – [6027]; *Ngirabatware* (Judgment) (n 24) [1364].

8.2.2. A Problem of Causation?

Benesch suggests that there is a 'ghost of causation' in ICTR incitement cases.[39] While *Akayesu* ostensibly confirmed that incitement is inchoate, the Judgment refers to causation, drawing links between the speech and subsequent killings.[40] The conclusion that incitement is inchoate was repeated in each of the subsequent cases. Yet, several of these cases, including *Akayesu* and the Media Trial, drew links between speech and killing, even where there was minimal proof.[41] Chapter Seven demonstrated that this acted as an evidentiary tool, particularly for implicit speech. Thus, while there is no requirement that the court finds a causal link for speech to amount to incitement, a context of 'systematic targeting' of the victim group, their exclusion, the occurrence of 'destructive and discriminatory acts' and a 'political doctrine' that gives rise to these acts can act as evidentiary support that speech would be understood as inciting genocide.[42] Consequently, the problem was not that the ICTR referred to contemporary or subsequent violence as an evidentiary tool, it was that it failed to clearly explain why these events were significant.

8.2.3. Lack of Clear Reasoning

Several of the ICTR's judgments fail to clearly explain their reasoning and do not adequately link their analyses with their conclusions. This was particularly evident in the Media Trial; the Trial Chamber was criticised for not explicitly outlining which examples of speech amounted to direct and public incitement and why.[43] Similarly, in *Bikindi,* the Judgment concludes that the songs did not constitute incitement to genocide *per se*, with limited elaboration.[44] In *Karemera,* the Trial Chamber's analysis led to an appeal in which the appellants argued that they had been convicted for what they did

[39] Susan Benesch, 'The Ghost of Causation in International Speech Crime Cases' in Predrag Dojčinović (ed), *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2012) 254.

[40] *Akayesu* (Judgment) (n 14) [349], [362], [673] – [675].

[41] ibid [349], [362], [673] – [675]; *Nahimana* (Judgment) (n 25) [242], [446] – [447].

[42] Text to n 142 – 146 in ch 7. See also *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T, T Ch III (2 December 2008) [420]; *Mugesera v Canada* (Minister of Citizenship and Immigration) [2005] 2 SCR 100, 82, 115, 124; Jan Wouters and Sten Verhoeven, 'The Domestic Prosecution of Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2014) 192.

[43] *Nahimana* (Appeals Judgment) (n 38) [726] – [727].

[44] *Bikindi* (Judgment) (n 21) [421].

not say.[45] These Trial Chambers failed to clearly explain why the defendants had been convicted or acquitted for speech listed on the indictment. Therefore, even where the judgments had been competent in places, the lack of clear explanation has made it difficult to identify how conclusions were reached, thereby impacting negatively on the analysis as a whole.

This was not limited to the conclusions of the cases. In Chapter Six the discussion of the guilty plea in *Kambanda* illustrated the importance of a thorough evidentiary discussion, particularly for implicit speech. Only one specific example of speech was given in the Judgment, but with limited analysis beyond a vague statement that the speech was 'incendiary'.[46] Owing to the absence of evidentiary analysis it is difficult to ascertain whether this speech was understood as inciting genocide. Even considering this case in light of subsequent judgments it did not seem that this could constitute incitement. Therefore, *Kambanda* contributed to the lack of clarity regarding the extent to which implicit speech can amount to direct incitement.

8.2.4. Inconsistent Application of the Offence

While *Akayesu* and the Media Trial made steps toward a workable approach to incitement, this did not manifest itself in consistent application of the offence. For example, while the Media Trial distinguished incitement from legitimate speech in relation to its purpose and context, subsequent chambers did not explicitly refer to this analysis.[47] Additionally, even though cases such as *Kalimanzira, Muvunyi* and *Ngirabatware* outline the offence in similar fashions, in application there were some differences, particularly for public incitement.[48] For example, there was a lack of certainty regarding whether the number of people present was a relevant factor.[49] The problems arising from inconsistent application of the offence are most evident in *Bikindi* and *Karemera*. As shown above, both cases have been criticised for their imbalanced focus, concentrating on evidentiary elements rather than the criminal

[45] *Prosecutor v Karemera et al* (Appeals Judgment) ICTR098-44-A, A Ch (29 September 2014) [479].

[46] *Kambanda* (Judgment) (n 25) [39(x)].

[47] Gregory S Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition (*OUP 2017) 214 - 215.

[48] *Kalimanzira* (Judgment) (n 25) [509] – [516]; *Muvunyi* (Retrial) (n 25) [23] – [30]; *Ngirabatware* (Judgment) (n 24) [1352] – [1355].

[49] *Kalimanzira* (Appeals Judgment Partly Dissenting and Separate Opinion of Judge Pocar) (n 33) [41]; *Ngirabatware* (Judgment) (n 24) [1367].

conduct of the accused.[50] Consequently, they emphasise the importance of consistent and balanced application of a clearly defined offence.

The analysis of ICTR cases has shown that there are a number of issues in the judgments. Many find their origin in the vague definitions for the constitutive and evidentiary elements of the offence. Therefore, this thesis has drawn upon the ICTR's incitement jurisprudence, taken in conjunction with historical examples, relevant theories of criminal law and sociolinguistics, and the drafting of the international prohibition of incitement, in order to propose definitions that clarify these elements for application in future cases.

8.3. The Constitutive and Evidentiary Elements of Incitement

As noted in Chapter One, the indisputable constitutive elements of incitement to genocide consist of the material and mental elements of a crime. Firstly, the *actus reus* of incitement requires that the actor directly and publicly incited genocide; and, secondly, a conviction requires both the *dolus specialis* of genocide, that being, the intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' alongside the intent to directly and publicly incite genocide.[51]

Establishing that the actor directly and publicly incited genocide requires a number of evidentiary factors to be considered, many of which have not been clearly outlined by the ICTR. By drawing on an analysis of ICTR cases assessed in light of the principles of interpretation of international criminal law, the drafting history of the offence and the theoretical background, this thesis aimed to propose clear definitions for the constitutive and evidentiary elements of incitement. This formed part of the originality of this thesis.

The identification of evidentiary aspects of the incitement analysis helps distinguish incitement from legitimate speech. Firstly, the content and purpose approach considers whether the speaker aimed to inform or provoke the audience by highlighting a difference between informative statements and opinions. Secondly, the analysis of the persuasive force of the speech demonstrates that the speaker and their

[50] *Bikindi* (Judgment) (n 21) [421]; *Karemera* (Appeals Judgment) (n 45) [479].
[51] Genocide Convention (n 7) art II.

message had the power to bring about genocide by considering the seriousness of the message and the influence of the speaker. The most significant original contribution comes from the discussion of the evidentiary element of context. While this received mention by the ICTR, this was used in a number of different ways but rarely defined clearly. Thus, this thesis aims to provide a definition for context, identify which contextual elements are relevant to each of the constitutive elements of incitement, and differentiate between the various forms employed by the Tribunal: (i) external context; (ii) speech context; (iii) personal context of the speaker; and (iv) contemporary context.[52] Context plays its most significant role with regard to direct incitement, as this helps to identify whether the speech was clearly understood as inciting genocide when spoken by the speaker and heard by the target audience.

8.3.1. Direct and Public Incitement to Commit Genocide

In light of civil law approaches, the Trial Chamber in *Akayesu* defined incitement as provocation. Provocation carries a connotation of causation, which was acknowledged by the Trial Chamber in *Akayesu.*[53] Therefore, in order to uphold the inchoate nature of incitement and sufficiently differentiate incitement from the civil law concept of provocation, this thesis has argued that incitement should be considered to mean 'urging or encouraging' and thereby follow the definition given by common law jurisdictions.[54]

Given its ordinary meaning, direct means straightforward, without ambiguity and to the point.[55] However, the ICTR adopted a wider interpretation. In permitting that direct incitement could encompass implicit speech, the Tribunal recognised that speech that calls for genocide is rarely free from ambiguity.[56] Moreover, as emphasised in Chapter Four, taking a strict approach would fail to account for the radically different ways that different cultures use language. This analysis has confirmed that incitement does not have to take any particular grammatical form: it does not have to be an order, it can take a broader form such as post-violence condonation. What is important is that

[52] Text to n 82 – 85.

[53] *Akayesu* (Judgment) (n 14) [557].

[54] Jens David Ohlin, 'Incitement and Conspiracy to Commit Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 215.

[55] 'Direct', *Oxford Dictionary of English* (2nd edn revised, OUP 2005).

[56] *Akayesu* (Judgment) (n 14) [557].

it contains an encouragement or inducement to commit genocide, and that it was understood by the audience as such.

Accordingly, the Appeals Chamber in *Nahimana* concluded that 'if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide'.[57] Thus, in light of the analysis in this thesis, direct is interpreted to mean that the speech must be clearly understood as incitement by the original audience when spoken in its original context.

While the Convention did not clearly outline what was meant by public incitement, it is clear that private conversations were deliberately excluded.[58] In elucidating public, the *Akayesu* Trial Chamber followed civil law authority whereby it is sufficient if the speech is delivered in a place that is public by definition.[59] This suggests that it is characterised by a call for criminal action delivered in a public place, or to members of the general public through means of mass media, such as radio and television.[60] This definition raised a number of issues. Firstly, the Trial Chamber failed to explain what they meant by 'public by definition'. Secondly, subsequent judgments, such as the appeal in *Kalimanzira* and the *Nyiramasuhuko* Trial Chamber, placed greater emphasis on the size of the audience than the location of the speech.[61]

As was emphasised in Chapters Three and Five, the VCLT requires that the terms in a treaty be interpreted in light of their ordinary meaning.[62] Thus, public should be read to mean that the words must be spoken, be seen, or exist in open view, which indicates that they exist in a place that is accessible to people in general or spoken to an unrestricted audience, but it is not necessary that both criteria be fulfilled.[63] Facilitating a finding of public incitement is public intent, whereby speech is

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[57] *Nahimana* (Appeals Judgment) (n 38) [701].

[58] UN Doc A/C.6/SR.84 (n 11) 214.

[59] *Akayesu* (Judgment) (n 14) [556].

[60] Draft Code (n 12) art 2 (3) (f), [16]; ILC, 'Report of the International Law Commission on the Work of its Forty-Eighth Session' (6 May – 26 July 1996) UN Doc A/51/10.

[61] *Prosecutor v Kalimanzira* (Appeals Judgment) ICTR-05-88-A, A Ch (20 October 2010) [162]; *Nyiramasuhuko* (Judgment) (n 21) [6008].

[62] Vienna Convention on the Law of Treaties (Adopted 22 May 1969 entered into force 27 January 1980) 1155 UNTS 331, art 31(1).

[63] 'Public', *Oxford Dictionary of English* (n 34).

disseminated through means that demonstrate an intention for it to be seen or heard by people in general, such as displaying speech on posters or placards, communication through speeches, shouting or threats and dissemination via organs of mass media.[64]

For a finding of incitement, the prosecution must prove 'dual intent'. It must be shown that the speaker intends to prompt their audience to commit genocide, and also that they have the special intent of genocide, defined as the intent to eliminate a protected group under the Convention.[65] Additionally, in light of the finding in *Akayesu*, the speaker must be fully aware of the impact of their speech.[66]

8.3.2. Distinguishing Incitement from Legitimate Expression: The Evidentiary Elements of Incitement

The distinction between incitement and legitimate expression is central to identifying incitement. This thesis has derived the evidential factors that contribute to this discussion from historical examples of violent speech, the theoretical justifications for incitement, the drafting of the international prohibition, relevant international human rights law, the ICTR jurisprudence, and the relevant cases from national jurisdictions.

Taken as a whole, this analysis has identified that to be criminal and, therefore, distinct from permissible speech, incitement must be more than general propaganda or racist remarks. The speech must contain encouragement to commit genocide, the words must be spoken seriously with the intent to bring about the destruction, in whole or in part, of a protected group, and the speech must have the potential to bring about the desired conduct, whether it is successful or not. The speech does not have to take any particular grammatical form. However, it must contain an encouragement to commit genocide against a protected group under the Convention, whether implicitly or explicitly expressed.

The analysis has shown that the key aspects to the evidentiary finding of incitement can be defined in three categories: (i) content and purpose; (ii) the requisite persuasive force; and, (iii) context.

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[64] *Akayesu* (Judgment) (n 14) [533], [559]; *Kalimanzira* (Appeals Judgment) (n 61) [162].
[65] *Akayesu* (Judgment) (n 14) [560].
[66] ibid [361].

8.3.2.1. The Content and Purpose Approach: Distinguishing Informative Statements from Opinions

The jurisprudence from international human rights law demonstrates that distinguishing incitement from legitimate expression involves an analysis of the content and purpose of the speech.[67] For example, in *Robert Faurisson v France*, the HRC highlighted that the motivating purpose of the author was not the dissemination of historical fact, but the aggressive inciting of anti-Semitism.[68] Therefore, the speech was not legitimate or protected, but as it constituted an attack against the target group it was restricted. Conversely, in *Jersild v Denmark*, the presenter had distanced himself from the persons being interviewed, and, thus, was considered to be providing an objective and serious account of extremist views, serving as a 'public watchdog' and acting in the public interest by drawing attention to the material, rather than promoting it.[69] Therefore, Jersild was considered to be legitimately exercising free expression rights.

This can be considered to be defined along the lines of informative statements and opinions. However, speech is not automatically protected if it is a statement of fact, and not automatically prohibited if it is an opinion, as statements of fact could be used to incite genocide and opinions could be protected. The distinction is more nuanced than this. From the analysis of international human rights, it is evident that in order to sit beyond the protection of free expression, the speech must constitute an attack against a target group that threatens their rights or reputation. In application to the international criminal law offence of incitement to genocide, the Media Trial considered that to amount to criminal speech, it must aim to provoke genocide, regardless of whether this aim was achieved.

In light of this analysis, distinguishing incitement from legitimate speech relies on a two-stage analysis. Firstly, content: this considers the words used by the speaker and is facilitated by the hallmarks of inciting speech, such as: dehumanisation, creation of a threat (or accusation in a mirror) and post-violence condonation. This is supported by the identification of culturally specific pejorative terms used to describe the target

[67] *Jersild v Denmark* (1994) 19 EHRR 1; *Robert Faurisson v France* (1996) CCPR/C/58/D/550/1993.
[68] *Robert Faurisson* (n 67).
[69] *Jersild* (n 67) [35]. See also Barendt (n 2) 66, 183, 424.

group, as pejorative slurs will facilitate a finding that the speech was intended as an attack, as indicated by *Ruggiu*.[70]

Secondly, purpose: broadly defined as intent, this serves to identify a distinction between informative statements and opinions. This is ascertained by considering whether or not the speech aimed to disseminate news or information, and whether there was 'clear distancing' from any potentially inflammatory statement to 'ensure that no harm results'.[71] Protected informative statements can be defined as providing an objective representation of a view which is distinct from the speaker's own.[72] This speech is protected to preserve the public watchdog function of the press and permit access to information, but also to avoid liability for a person who simply states a fact with no attempt to use this information to attack a group. On the other hand, there is no such protection where the speaker promotes their own view or adds support to a message that glorifies violence or constitutes a threat to the target group.[73]

8.3.2.2. The Requisite Persuasive Force: The Influence of the Speaker, the Seriousness of the Message and the Speech Context

The justification for the punishment of incitement stems from Austin's theory of speech acts, which argues that 'to say something *is* to do something'.[74] This means that speech can be defined as a punishable act where a speaker intends to encourage genocide and where the speech has the potential to achieve this outcome, which is identified by considering its content and persuasive force. This does not rely on any subsequent conduct in order for the speaker to be liable, it is criminal in its own right. The discussion of international human rights law gives legal support to this view. Cases such as *Arslan v Turkey* demonstrate that the courts must consider the potential that the speech will influence the audience and, thus, bring about the desired conduct.[75] Derived from this analysis, the Media Trial posed two questions: whether the language was 'intended to inflame or incite to violence?' and 'was there a real and genuine risk that

[70] *Ruggiu* (Judgment) (n 25) [44 (i)], [44(iii)].
[71] *Nahimana* (Judgment) (n 25) [1024].
[72] *Sürek and Özdemir v Turkey* (1999) ECHR 50.
[73] *Sürek v Turkey* (No 1) (1999) ECHR 51.
[74] Austin (n 5) 94.
[75] *Arslan v Turkey* (1999) 31 EHRR 9.

it might actually do so?'.[76] The first refers to the content and purpose analysis outlined above, the second refers to the persuasive force of the speech. Therefore, the speech must have the potential to induce the intended conduct, posing a credible threat to the target group, regardless of whether this aim is achieved.[77]

Identifying the requisite persuasive force of the speech involves showing whether the speaker could influence the target audience and whether the message was taken seriously. Firstly, the influence of the speaker: this looks to their position in society and their relationship to their target listeners, aiming to show that the speech was delivered by someone with authority who the audience considered to be credible.[78] Authority is defined broadly, so it is not limited to government officials, this can also include people of local significance, such as community leaders, and popular or influential people, such as singers and radio broadcasters. Therefore, rather than being described as authority, this should more properly be considered as influence in order to distinguish incitement from leadership crimes. Secondly, the seriousness of the message: this involves examining the speech context. This analysis looks at the message as a whole, including extra-linguistic cues, for example the tone of the speaker, any accompanying gestures, actions or images, and the means of dissemination.[79] This also considers the speaker's previous speech. In the Media Trial the Trial Chamber emphasised the repetition in RTLM broadcasts, illustrating that by repeating a message, the radio created a climate of fear.[80] Finally, the availability of a marketplace of ideas should be considered, as a lack of availability of other sources of information can increase the likelihood that speech is taken seriously.[81]

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[76] *Nahimana* (Judgment) (n 25) [1002].

[77] Austin (n 5) 9. See also Genocide Convention (n 7) art II.

[78] *Akayesu* (Judgment) (n 14) [74] – [77]; *Bikindi* (Judgment) (n 21) [347], [425]; Samuel Totten and Paul R Bartrop, *Dictionary of Genocide: Volume I* (ABC-CLIO 2008) 6.

[79] *Bikindi* (Judgment) (n 21) [258].

[80] *Nahimana* (Judgment) (n 25) [1028].

[81] Carol Pauli, 'Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention' (2010) 61 Alabama Law Review 665, 673. See also Mark Frohardt and Jonathan Temin, 'The Use and Abuse of Media in Vulnerable Societies' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007) 390.

8.3.2.3. Context

Arguably relevant to each of the evidentiary elements of incitement, context has rarely been defined clearly. The ICTR incitement cases demonstrate four aspects of the contextual analysis. (i) external context; (ii) speech context; (iii) personal context of the speaker; and (iv) contemporary context.

External context refers to the factors that show how the speech was understood by the target audience. This is a 'dynamic, not a static concept', to be 'understood as the surroundings, in the widest sense' that form the background to an utterance.[82] Thus, it is used in a general sense, referring to 'all the environment surrounding the speech act' such as the physical location and the historical and social background to the speech, alongside linguistic factors, such as relevant politeness conventions, that will impact on the understanding of the speech.[83] Owing to the diversity of cultural and linguistic traditions subject to the jurisdiction of international criminal law, this is to be conducted on a case-by-case basis.[84]

Speech context was defined as part of the discussion on the persuasive force of the speech. This encompasses the relevant contextual factors specific to the speech that will indicate whether the message was taken seriously by the audience. Personal context includes the relevant factors that might indicate the speaker's intent, and whether they knew that their speech would be taken seriously as inciting genocide. The ICTR cases have shown that these factors include: the nature and position of the speaker, their political and community affiliations, the actions that accompanied the speech (whether physical or verbal), their previous speech or actions against the target group, and their knowledge of any ongoing campaign of persecution.

The final contextual element, and that which has been the most vaguely defined by ICTR incitement jurisprudence and academic commentary, is the contemporary context of the speech. This considers when and where the speech was delivered in order to show that it had the potential to bring about the desired conduct. In light of the analysis of ICTR cases, international human rights cases and the cases from national

[82] Mey (n 18) 38.
[83] Ruzindana (n 18) 156; *Akayesu* (Judgment) (n 14) [557] – [558].
[84] *Akayesu* (Judgment) (n 14) [558].

jurisdictions arising from the Rwandan Genocide, it is possible to consider that speech has the potential to result in genocide where there is 'systematic targeting' of the victim group, their exclusion, the occurrence of 'destructive and discriminatory acts' and a 'political doctrine' that gives rise to these acts.[85] Thus, it is not restricted to a manifest pattern of ongoing genocide, but rather, it includes circumstances where genocide might reasonably occur in light of the overall pattern of conduct against the victim group. Defining contemporary context in this way would ensure the retention of the inchoate nature of incitement, so long as future courts are clear in separating any evidential analysis from causation.

8.4. Conclusion

An appraisal of ICTR incitement jurisprudence identified that the ICTR encountered numerous problems in applying the international offence, which stemmed from the controversy of incitement as an inchoate offence, the lack of definition and guidance for its application, the lack of consistency in the cases and the inherent challenges of multi-cultural and multi-linguistic speech trials. However, by building a picture of incitement as a whole, through historical analysis, theories of punishment, the drafting of the international offence, relevant human rights law, ICTR jurisprudence and cases from national jurisdictions, it was possible to propose definitions for the constitutive and evidentiary elements of incitement, thereby achieving the overarching aims of this thesis.

The ICTR has concluded its work. However, more incitement cases may still arise from the Rwandan Genocide. There are still outstanding indictments from the ICTR, which are now subject to the jurisdiction of the ICTR's residual mechanism (MICT), and domestic courts may still exercise universal jurisdiction over those suspected of inciting genocide in Rwanda in 1994. Regardless, central to this thesis has been its forward-looking focus. Despite the general unwillingness to pursue international prosecutions for speech outside the ICTR, incitement to commit genocide is not uniquely Rwandan. Indeed, as shown in Chapter Two, ethnic violence is characterised by violent speech, and this did not end with Rwanda.

[85] Text to n 142 - 146 in ch 7. See also *Bikindi* (Judgment) (n 21) [420]; *Mugesera* (n 42) 82, 115, 124; Wouters and Verhoeven (n 42) 192.

Therefore, while the analysis has focussed on jurisprudence from the ICTR, the discussion of the elements of incitement is relevant to other contexts. By underscoring the importance of establishing meaning, and outlining how this can be achieved, this thesis has explicitly acknowledged that in different societies communication takes varying forms, and, therefore, inciting speech in future contexts will likely be different from incitement in Rwanda. Thus, this thesis recognises that understanding speech relies on more than just finding a technical meaning; it necessitates a consideration of how it was understood within its own cultural and linguistic context by its target audience. While this is a subjective analysis, this must not come at the cost of consistency.

Clear definitions for the constitutive and evidentiary elements of incitement cannot solve the problems of incitement on their own. However, they provide a suggested foundation for future cases, demonstrating that the issues faced by the ICTR are not insurmountable. Regardless of the context, it is clear that consistent application of clearly defined elements is required.

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