

THE PROSECUTION OF INCITEMENT TO GENOCIDE IN SOUTH AFRICA

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1 Introduction

The phenomenon of collective violence¹ is complex and, as yet, not wholly understood.² This notwithstanding, the incidence of collective violence is not entirely unpredictable. This is especially true of one particularly egregious form thereof, namely, genocide.³ Inflammatory speech, insidious propaganda and incitement to crime - all of which are directed at a specific group - are recurring hallmarks of the hatred that invariably precedes genocide. Just as sparks under certain conditions are more conducive to causing a fire, acts of communication that feed on, disseminate, and actively intensify pre-existing hatred towards a particular group often represent a precursor to as well as a powerful catalyst for genocide.

Most acts precursory to or preparatory of genocide are not directly criminalised under international law.⁴ Widespread or repeated instances of hate speech, for

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¹ Collective violence may be defined as: "[T]he instrumental use of violence by people who identify themselves as members of a group – whether this group is transitory or has a more permanent identity – against another group or set of individuals, in order to achieve political, economic or social objectives." See Krug 2002 whqlibdoc.who.int 215.

² Ceretti "Collective Violence" 8; Jonassohn 1998 migs.concordia.ca: "In spite of the attempts by some psychological theories, it is difficult to understand how people who have lived peacefully in the same communities, have worked together, and have intermarried, can suddenly kill in the most brutal way."

³ Early in 1994, three months prior to the genocide of the Tutsis in Rwanda in April of the same year, Major General Romeo Dallaire unsuccessfully tried to warn the United Nations about the impending genocide. The international community was also aware of the hate speech and propaganda activities of *Radio Télévision Libres des Mille Collines* (RTLM) prior to the genocide (see Schabas *Genocide* 333). It is now widely accepted that timely intervention may have saved countless lives. Conceivably, and with the benefit of hindsight, the pro-active prosecution of individuals for the inchoate crime of incitement to genocide may have gone some way towards preventing or at least minimising the spread of the massacre. It must be acknowledged, however, that there would almost certainly have been a lack of political will on the part of the Hutu-dominated government of the time to initiate such prosecutions.

⁴ The preparatory act of "studies and research for the purpose of developing the technique of genocide" was included in the Secretariat Draft of the Genocide Convention but excluded from

example, may amount to acts precursory to or preparatory of genocide in that they increase the general risk of genocide.⁵ Yet hate speech is neither specifically prohibited under the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) (hereafter the *Genocide Convention*), nor under the *Rome Statute of the International Criminal Court* (hereafter the *Rome Statute*).⁶ In this regard, a distinct and particularly egregious form of hate speech, namely, direct and public incitement to commit genocide, represents a recognised exception. It is firmly established as an international crime under the *Genocide Convention* and the *Rome Statute* as well as under customary international law.⁷

In 1996, the International Criminal Tribunal for Rwanda (ICTR) became the first legal institution to hand down a conviction for direct and public incitement to commit genocide in *Prosecutor v Akayesu*.⁸ Despite its criminalisation under the *Genocide Convention*, the actual prosecution of incitement to genocide represents a relatively new development on the international legal stage. Furthermore, although incitement to genocide is now also criminalised in many domestic legal systems, the prosecution thereof is almost without precedent on the domestic level.⁹ This is so in spite of the fact that in general international criminal justice, and in particular the *Rome Statute*, place the primary responsibility for prosecuting international crime on domestic legal systems. The ability and willingness of states party to this project (including South Africa) to align themselves with their international legal obligations to prosecute international crimes, including the crime of direct and public incitement to commit

the final version of the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

⁵ See Schabas 2000 *McGill LJ* 144: "The road to genocide in Rwanda was paved with hate speech." However, hate speech in and of itself does not automatically constitute direct and public incitement to genocide. This is discussed in more detail below (see para 5.2).

⁶ However, various international human rights instruments contain provisions aimed at combatting hate speech by requiring its prohibition within states. Notable in this regard are Art 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) and Art 20 of the *International Covenant on Civil and Political Rights* (1966).

⁷ See Art III(c) of the *Genocide Convention* and Art 25(3)(e) of the *Rome Statute of the International Criminal Court* (1998). Regarding the status of direct and public incitement to genocide as a crime under customary international law, see para 6.2.3 below.

⁸ ICTR *Prosecutor v Akayesu* (Trial Chamber: Judgment) Case No ICTR-96-4-T, 2 September 1998 (hereafter *Akayesu*).

⁹ In March 2013, Yvonne Basebya was convicted of incitement to genocide by the Hague District Court in the Netherlands. See *Basebya* District Court of The Hague, Case No 09/748004-09, 1 March 2013.

genocide, have become a matter of crucial importance to the future success of the international regime of criminal law. The success of the project will be measured broadly on two fronts: first, in terms of achieving the goal of accountability for perpetrators of international crime, and, secondly, in terms of the ability of the international criminal law regime as a whole to prevent violations of international law in the long run. As will be discussed below, the goal of prevention is of particular significance in relation to genocide and direct and public incitement to commit genocide.

The aims of this article are first, to provide a brief historical and teleological overview of the crime of direct and public incitement to genocide under international law, and second, to examine the criminalisation of incitement to genocide under South African law as well as the country's capacity to prosecute the crime domestically. It is argued that South Africa is not, at present, ideally placed to reap the preventative benefits of prosecuting incitement to commit genocide at the domestic level. It is submitted that the amendment of existing national legislation, namely, the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (hereafter the ICC Act), to provide for a separate statutory offence of direct and public incitement to commit genocide will remedy this defect.

2 The role of incitement before and during genocide

Incitement to commit genocide is not only morally blameworthy conduct in violation of the norms of the international community, but also extremely dangerous conduct in that it typically precedes and actively pursues the commission of acts of genocide. History confirms that incitement is one of the most dangerous "sparks" in the early stages of genocide. The prosecution of Julius Streicher before the International Military Tribunal at Nuremberg (hereafter the Nuremberg IMT) provides compelling evidence of the destructive effects that incitement to genocide may have. Streicher was renowned for his fierce hatred of Jews and, over the course of many years prior to the Second World War, had urged for the extermination of the Jews in Europe through numerous articles in the anti-Semitic newspaper, *Der Stürmer*, of which he

was the founder. In one of his articles, for example, he referred to Jews in the generic sense as "a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind".¹⁰ In this example, the attempt to dehumanise Jewish persons in order to facilitate the destruction of the group is incontrovertible. Today the culmination of the efforts of Streicher and others, namely, the Jewish Holocaust, represents a lasting memorial to the extreme menace posed by incitement to genocide. Shortly after the War Streicher was convicted of crimes against humanity by the Nuremberg IMT for his role in the persecution (on political and racial grounds) of Jewish people during the Holocaust. The conviction of Julius Streicher at the Nuremberg IMT represented *de facto* the first conviction for incitement to genocide at the international level. However, the crimes of direct and public incitement to commit genocide and also of genocide were only later recognised under international law in the *Genocide Convention* of 1948.

The dangers of inflammatory speech burst onto the world stage following the horrors of the Holocaust. The adoption of the *Genocide Convention* shortly thereafter was a manifestation of, amongst other things, a new international awareness concerning the role of speech in the preparation for and execution of genocide. From a broader perspective, however, the potential dangers of speech have long been recognised. There is, for example, an age-old Japanese proverb, which holds that "the tongue is more to be feared than the sword". The 18th century English writer and poet, Martin Tupper, also warned of "the misery and crime an aggravating tongue can cause". There is also recognition of the dangers of inflammatory speech in *The Bible*¹¹, according to which "the tongue can no man tame; it is an unruly evil, full of deadly poison".

The perils of incitement to genocide were first judicially recognised, albeit indirectly, at the Nuremberg IMT. The Nuremberg IMT described the role of Julius Streicher, also in metaphorical terms, as one of having "infected the German mind with the

¹⁰ *Nazi Conspiracy and Aggression: Opinion and Judgment* (United States Government Printing Office Washington 1947) 129 (hereafter *Nazi Conspiracy and Aggression*).

¹¹ *The Bible*, Book of James 3:8 (King James Version).

virus of anti-Semitism".¹² The Tribunal held further that he had in effect injected a "poison" into the minds of thousands of Germans, "which caused them to follow the National Socialist policy of Jewish persecution and extermination."¹³ More recently, in *Prosecutor v Nahimana et al*,¹⁴ the ICTR Trial Chamber held that Hassan Ngeze, the owner and editor of the virulently anti-Tutsi newspaper, *Kangura*, had "poisoned the minds of his readers" thereby causing thousands of innocent deaths.

Genocide does not arise in a vacuum, nor is it an absolutely spontaneous event.¹⁵ It builds momentum over many years in a process driven by complex historical and political causes. In the build-up to genocide it is typical for messages of hate to precede calls to action.¹⁶ During the negotiation of the *Genocide Convention* the Russian delegation noted, in reference to the Holocaust, that:¹⁷

It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed.

More recently, the United Nations Committee on the Elimination of Racial Discrimination¹⁸ listed the following as "factors known to be important components of situations leading to conflict and genocide": "Systematic and widespread use and

¹² *Nazi Conspiracy and Aggression* 129.

¹³ *Nazi Conspiracy and Aggression* 130.

¹⁴ ICTR *Prosecutor v Nahimana et al* (Trial Chamber: Judgment) Case No ICTR-99-52-T, 3 December 2003 para 1101 (hereafter *Nahimana* (Trial Chamber)). The case is discussed at para 5.2 below.

¹⁵ The relative "predictability" of genocide is further evinced by Dr. Gregory Stanton's well-known attempt to standardise the genocidal "process" through the identification of the eight "predictable but not inexorable" stages of genocide. The eight stages are classification, symbolisation, dehumanisation, organisation, polarisation, preparation, extermination and denial. The first six of the eight stages identified by Stanton may be described as preparatory stages involving, for example, classification of a group or groups, dehumanisation of the victim group and polarisation through inflammatory speech. According to Stanton, incitement to commit genocide is especially common in the polarisation stage, but may continue during the actual genocide. See Stanton Date Unknown www.genocidewatch.org.

¹⁶ This was, for example, the case in Germany where the fictitious book, *Protocols of the Elders of Zion*, played an instrumental part in stirring up feelings of anti-Semitism. It is interesting to note that the book was first published as a self-contained work in 1905, almost thirty years before the rise of Hitler in German politics.

¹⁷ UN Doc A/C.6/SR.84 (1948) 241 (statements by Mr. Morozov).

¹⁸ UN Doc CERD/C/67/Misc.8 (2005).

acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media", as well as "[g]rave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority."

An understanding of the trends preceding genocide remains somewhat underdeveloped. This is largely due to the fact that they can be identified through the *post facto* study of the build-up to genocide within a specific context only. It may also be attributable to the fact that the prosecution of the perpetrators of genocide has hitherto been directed mostly at the so-called "big fish" perpetrators or architects of genocide, which most often involves the determination of liability in respect of completed acts of genocide.

The horrors of the Holocaust have bestowed upon the world the maxim of "never again"¹⁹ in respect of the crime of genocide. Since then, the international community has failed to uphold this motto. This notwithstanding, it is today generally accepted that the unique and reprehensible nature of genocide, the *crime of crimes*, calls for a preventative legal response. Although the criminalisation of genocide is widely preached *inter alia* as a means through which to deter genocide, only timeous and pro-active prosecution of incitement to commit genocide can be viewed as a concrete manifestation of the preventative purposes underlying the law related to genocide and genocide-related acts.²⁰ The benefits of the prosecution of perpetrators of incitement to genocide can be realised only through the prosecution

¹⁹ Consider, for example, the following remarks of the UN Secretary General, Ban Ki-moon: "The Holocaust, the killing fields of Cambodia, the genocides in Rwanda and Srebrenica, and other large-scale tragedies underlined the failure of individual States to live up to their responsibilities and their obligations under international humanitarian law. These events also raised troubling questions about the will and capacity of the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, *as well as their incitement. 'Never again' is the oft-heard cry. But I am haunted by the fear that we do not live up to this call*" (my emphasis). See Ki-moon 2012 www.un.org.

²⁰ See Benesch 2011 voicesthatpoison.files.wordpress.com: "Incitement is of particular interest for genocide prevention since it is often a precursor to – if not also a prerequisite for – genocide and other forms of mass violence."

thereof on the domestic level and, where there is an unwillingness or inability to do so, before international courts.

3 Unpacking the crime of incitement in South African law

In South African law, as in most common law systems, incitement constitutes a distinct crime of an inchoate or incomplete nature as opposed to a mode of complicity.²¹ As such, it is among the exceptions to the general rule that criminal laws prohibit only the consequences or circumstances brought about by a person's unlawful conduct or omission. Therefore, incitement essentially has a relatively limited application. The prosecution thereof is primarily dependent on the failure of the incitee, for whatever reason, to successfully commit the crime towards which s/he has been moved by the inciter. Should the incitement be successful – that is, should it lead to the commission of the incited crime by the incitee - the inciter may be prosecuted as a co-perpetrator of or accomplice to the particular crime in question, depending on the surrounding circumstances of the case.²²

3.1 *The common law crime of incitement*

Incitement is a crime under South African common law.²³ Although incitement now constitutes a statutory offence, the early judicial interpretation of the common law crime of incitement remains relevant and must be considered here. South African courts are likely also to turn to common law sources and case law for general guidance in any future domestic prosecution of incitement to genocide.

²¹ Cassese *International Criminal Law* 402. As opposed to civil law systems that treat incitement as a form of complicity in relation to the actual offence.

²² Burchell *Principles* 642. Burchell argues that incitement should be confined to situations where the incitee did not react to the inciter's urgings because the completion of the crime means that the inciter must be prosecuted either as a perpetrator acting through an agent or as an accomplice in relation to the incitee's criminal action(s). The doctrine of common purpose (or joint criminal enterprise under international law) may also find application where the act of incitement is successful.

²³ *S v Nihovo* 1921 AD 485.

At common law, the crime of incitement consists of an unlawful communication by the inciter to the incitee(s), made with the intent to move, influence, encourage or prompt the incitee(s) towards the commission of crime.²⁴ Proof of a causal link between the act of incitement and an unlawful result is not required. The crime is committed even though the incitee remains unresponsive to the inciter's efforts to move him/her towards the commission of crime.²⁵ According to the judgment in *S v Nkosiyana*,²⁶ "the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime." As such, the crime of incitement is essentially premised on the inciter's guilty mind accompanied by conduct in the form of some *effective* act of communication directed to the incitee(s).²⁷ Such acts of communication may take various forms, all of which are of only "secondary importance" in determining the accused's liability.²⁸

Incitement cannot be committed negligently. Some form of intent on the part of the accused must be present. In this regard, *dolus eventualis* will suffice, in which case it must be shown that "the accused foresaw the possibility that his communication would reach and influence the mind of the incitee(s) but proceeded anyway".²⁹

3.2 The Riotous Assemblies Act 17 of 1956

The broad scope of incitement under the common law was largely retained in its statutory form. According to section 18(2)(b) of the *Riotous Assemblies Act*:

[A]ny person who [...] incites, instigates, commands, or procures any other person to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence [...]

²⁴ See *S v Nkosiyana* 1966 4 SA 655 (A) 658 (hereafter *Nkosiyana*); Kemp *Criminal Law* 260; Burchell *Principles* 642.

²⁵ See *S v Nkhovo* 1921 AD 485; *Nkosiyana* paras 658H-659B.

²⁶ *Nkosiyana* paras 658H-659B.

²⁷ Should the act of communication be ineffectual, in the sense that the inciter does not successfully reach the incitee's mind; the crime is that of attempted incitement - an incomplete inchoate crime.

²⁸ *Nkosiyana* para 658H.

²⁹ Kemp *Criminal Law* 261; Burchell *Principles* 645.

Furthermore, according to the section, such a person is "liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable". This represents the maximum punishment that the inciter may receive upon conviction. In practice the inciter often receives a lighter punishment than that for which an actual perpetrator of the crime to which s/he was incited would be liable.³⁰

4 The definition of genocide³¹

Before proceeding to a discussion of the crime of direct and public incitement to commit genocide under international law, it is necessary to provide a brief outline of the essential elements of the crime of genocide.

The *Rome Statute* represents a near codification of the core crimes under international law. As such it contains an authoritative definition of the crime of genocide. Article 6 of the Statute defines genocide as follows:³²

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Genocide requires a specific form of *dolus (dolus specialis)*, namely, genocidal intent. According to the ICTY Appeals Chamber in *Krstić*.³³

³⁰ Snyman *Strafreg* 316.

³¹ The term "genocide" is attributed to Raphael Lemkin. The word is an amalgamation of the Greek word *genos*, meaning "race" or "group", and the Latin word *caedere*, which denotes "killing".

³² This definition is taken verbatim from the *Genocide Convention*, Art II.

³³ ICTY *Prosecutor v Krstić* (Appeals Chamber: Judgment) Case No IT-98-33-A, 19 April 2004 para 134; see also ICTY *Prosecutor v Krstić* (Trial Chamber: Judgment) Case No IT-98-33, 2 August 2001 para 700: "It can [...] be argued [...] that genocide is the most serious crime because of its requirement of the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. In this sense, even though the criminal acts themselves involved in a genocide may not vary from those in a crime against humanity or a crime against the laws and customs of

[The] gravity [of the crime of genocide] is reflected in the stringent requirements of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established.

In *Akayesu*,³⁴ the ICTR Trial Chamber held that in order for any of the five underlying acts listed in article 2(2) of the ICTR Statute³⁵ (also those acts listed in article 6 of the *Rome Statute*) to constitute genocide:

...the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.

Thus, to be guilty of genocide, a perpetrator must harbour the intent to contribute towards the destruction, at least in part, of one of the four groups mentioned above, *as such*. The qualifier "as such" denotes an intention to destroy the group as a separate and distinct entity.³⁶ Thus, when members of a group are targeted due to their membership of that group and the offender's intent is *discriminatory* in nature, it is not sufficient to warrant a conviction for genocide, as the offender did not intend his or her *actus reus* to contribute to the *destruction* of a protected group.³⁷

war, the convicted person is, because of his specific intent, deemed to be more blameworthy." In general, caution should be applied to the determination of the existence of genocidal intent. The crime of genocide has developed as one of the few crimes that are viewed as so egregious that they offend humanity as a whole. A failure to uphold the distinction between criminal acts intentionally perpetrated against members of a group and criminal acts perpetrated with the intent to contribute to the destruction of a protected group (the strict threshold of genocidal intent), may lead to the exploitation of the label of genocide and will ultimately detract from the international moral resonance reflected in the definition of the crime of genocide.

³⁴ *Akayesu* para 521 (footnote omitted).

³⁵ UNSC Resolution 955 (1994).

³⁶ ICTY *Prosecutor v Jelusic* (Trial Chamber: Judgment) Case No IT-95-10-T, 14 December 1999 para 79.

³⁷ ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 43 para 187; see also Kemp *Criminal Law* 531-533; Werle *International Criminal Law* 276.

5 Direct and public incitement to commit genocide under international law

5.1 *The Convention on the Prevention and Punishment of the Crime of Genocide (1948)*

Article III(c) of the *Genocide Convention* criminalises "direct and public incitement to commit genocide". As indicated by the full title of the Convention, it tackles the problem of genocide through a two-pronged approach based on prevention and punishment. However, it has been noted that this approach is in practice mostly skewed towards punishment.³⁸ Nonetheless, the crime of direct and public incitement to commit genocide was specifically included in the Convention due to its critical role in the planning of genocide.³⁹ The specific aim underlying the criminalisation of direct and public incitement to commit genocide is to timeously prevent the perpetration of concrete acts of genocide through the prosecution of a separate, inchoate offence.⁴⁰ This specific aim supports or enhances the preventative purpose that generally underlies the criminalisation and punishment of conduct amounting to genocide. Thus, the crime of incitement to genocide may be described as a crime intended to serve a super-preventative purpose.

The drafting history of the *Genocide Convention* sheds some light on the scope and meaning of the prohibition of direct and public incitement to commit genocide under international law. Schabas⁴¹ provides the following summation as regards the drafting history of the Convention from a procedural perspective:

Drafting of the Convention proceeded in three main stages. First, the United Nations Secretariat composed a draft text. Prepared with the assistance of three experts, Raphael Lemkin, Vespasian Pella and Henri Donnedieu de Vabres, it was actually a compendium of concepts meant to assist the General Assembly rather than any attempt to provide a workable instrument or to resolve major differences. Second, the Secretariat draft was reworked by an Ad Hoc Committee set up under the authority of the Economic and Social Council. Finally, the Ad Hoc Committee draft was the basis of negotiations in the Sixth Committee of the General Assembly,

³⁸ Schabas 2000 *McGill LJ* 170.

³⁹ *Akayesu* para 551.

⁴⁰ Cassese *International Criminal Law* 403.

⁴¹ Schabas Date Unknown untreaty.un.org.

in late 1948, which agreed upon the final text of the Convention, submitting it for formal adoption to the plenary General Assembly.

In the Secretariat Draft Convention, incitement to genocide was formulated as "direct public incitement to any act of genocide, whether the incitement be successful or not".⁴² The subsequent Ad Hoc Committee Draft provided that "direct incitement in public or in private to commit the crime of genocide whether such incitement be successful or not" is a punishable act.⁴³ The Sixth Committee of the General Assembly thereafter considered the draft of the Ad Hoc Committee. During these deliberations the USA expressed concern about the potential impact of this formulation of incitement to genocide as regards the freedom of the press, aggressively campaigning along with several other states for the total removal of the provision relating to incitement to genocide.⁴⁴ However, Belgium proposed an amendment which excluded the phrase "whether the incitement be successful or not".⁴⁵ It was reasoned that this would create a definition broad enough to allow each state to decide for itself whether or not acts of genocide are required before the prosecution of incitement to genocide could take place.⁴⁶ The Sixth Committee also voted in favour of deleting the reference to private incitement. As a result, the final wording of Article III(c) of the *Genocide Convention*, although it does qualify the crime by requiring proof of "direct" and "public" incitement to commit genocide, is an open-ended definition in the sense that it makes no explicit reference to the success (or failure) of the act of incitement. Nor does it define the qualifiers "direct" and "public".⁴⁷ The final wording, although quite open-ended, represents a "precise

⁴² UN Doc E/447 (1947), Art II(II)(2).

⁴³ UN Doc E/AC.25/12 (1948), Art IV(c).

⁴⁴ See Schabas *Genocide* 321-322. Earlier in the drafting process, the USA proposed adding the phrase "when such incitement takes place under circumstances which may reasonably result in the commission of acts of genocide." This was to ensure that freedom of speech could be limited only so as to prevent "clear and present danger" to the rights of others. See UN Doc E/623 (1948) 14 and 37. See also Schabas 2000 *McGill LJ* 152.

⁴⁵ Belgium also proposed dropping the phrase "or in private", the inclusion of which was supported by, amongst others, Venezuela on the basis that "[i]ncitement could be carried out in public, but it could also take place in private, through individual consultation, by letter or even by telephone" and that "[it] was necessary to punish both forms of incitement." See UN Doc A/C.6/SR.84 (1948) 208. See also Schabas 2000 *McGill LJ*.

⁴⁶ See Cassese *International Criminal Law* 403-404.

⁴⁷ As will be discussed further in para 5.2, the ICTR will leave behind a valuable body of jurisprudence as regards the meaning of "direct" and "public" incitement.

and measured formulation" aimed at balancing the goals of preventing genocide and respecting the freedom of expression.⁴⁸

South Africa acceded to the *Genocide Convention* in 1998. Accordingly, South Africa has an international legal obligation to prosecute or extradite (*aud dedere aut judicare*) perpetrators of genocide as well as of direct and public incitement to commit genocide. Under the rules governing state responsibility, South Africa may incur international responsibility for a failure to do so. South Africa, however, has taken a positive step to avoid such liability by enacting national legislation, namely, the ICC Act, which will be discussed further below.

5.2 Jurisprudence of the International Criminal Tribunal for Rwanda⁴⁹

The ICTR was created by the United Nations Security Council (hereafter the UNSC) to prosecute perpetrators of genocide, crimes against humanity and serious violations of international humanitarian law committed between 1 January 1994 and 31 December 1994 in Rwanda or outside Rwanda by Rwandan citizens.⁵⁰ Article 2(3)(c) of the ICTR Statute criminalises "direct and public incitement to genocide", which is listed as one of five punishable acts under the Statute. Direct and public incitement to commit genocide constitutes a distinct crime under the Statute. Article 2(3)(c) was first interpreted by the Tribunal in *Akayesu*⁵¹ and thereafter further

⁴⁸ Mendel "Study on International Standards" 6-7.

⁴⁹ The ICTR's "sister tribunal", the International Criminal Tribunal for the Former Yugoslavia (ICTY), has jurisdiction to prosecute perpetrators of incitement to genocide committed in the territory of the former Yugoslavia since 1991. Article 4(3)(c) of the ICTY Statute makes "direct and public incitement to genocide" a prosecutable offence. However, since there have been no convictions of individuals for direct and public incitement to genocide at the ICTY, and due to the identical wording of Art 4(3)(c) of the ICTY Statute and Art 2(3)(c) of the ICTR Statute, this article considers only the latter and the interpretation thereof by the ICTR.

⁵⁰ UNSC Resolution 955 (1994), Art 1.

⁵¹ Since the first conviction for the crime of direct and public incitement to commit genocide before the ICTR in *Akayesu* in 1998, much attention has been devoted to the distinction between direct and public incitement to commit genocide, hate speech and persecution as a crime against humanity. This debate, as well as the debate as regards the limitation of the right to freedom of expression and freedom of speech in relation to speech crimes, is beyond the scope of this article. However, considering the judgment in *African National Congress v Harmse: In Re Harmse v Vawda (Afriforum Intervening)* 2011 5 SA 460 (GSJ), in which it was held that "the publication and chanting of the words '*dubula ibhunu*', *prima facie* satisfies the crime of incitement to commit murder" (para 139), as well as South Africa's international legal obligations towards the prosecution and prevention of genocide, it is submitted that it is highly unlikely for the domestic

explicated in *Nahimana et al.*⁵² These cases in particular have provided valuable interpretive guidance as to the scope of direct and public incitement to commit genocide.

Jean-Paul Akayesu was indicted before the ICTR on fifteen counts, which included direct and public incitement to commit genocide (count fourthe). The Trial Chamber found that Akayesu had incited the killing of Tutsis by urging the population to eliminate of "the accomplices of the *Inkotanyi*".⁵³ At the time Akayesu was the *bourgmestre* of the Taba commune in the Prefecture of Gitarama, Rwanda. Whilst in this position of power, Akayesu seized the opportunity to (ab)use his authority and to convey a message that would be interpreted as a call to kill Tutsis in general.⁵⁴ The Trial Chamber found that he possessed the "intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such".⁵⁵

Regarding the open-ended definition of direct and public incitement to genocide, the Trial Chamber in *Akayesu*⁵⁶ held that:

...it cannot [...] be inferred that the intent of the drafters was not to punish unsuccessful acts of incitement. In light of the overall *travaux* [*préparatoires* of the

criminalisation of incitement to genocide to constitute an unjustified limitation of the right to freedom of expression in s 16 of the *Constitution of the Republic of South Africa*, 1996. Sections 16(2)(b)-(c) of the *Constitution* provide that freedom of expression does not extend to "incitement of imminent violence" or "advocacy of hatred [...] that constitutes incitement to cause harm." Furthermore, in terms of the general parameters of s 36 of the *Constitution* the amendment of the ICC Act to reflect the specific crime of direct and public incitement to commit genocide would explicitly provide for the limitation of the right to freedom of expression in terms of a law of general application. Such a limitation would be reasonable and justifiable in an open and democratic society since it is not only strongly reflective of the values in the *Constitution*, particularly the right to human dignity in the Bill of Rights, but also directed at the prevention of egregious harm to all members of South African society.

⁵² See Zahar 2005 *Criminal Law Forum* 33-34: "From the point of view of legal precedent, however, the judgment in *Nahimana et al* would seem to stand alone. The centrality of the incitement charge to the case, the wealth of material underpinning it, the size of the written judgment - with its 1,110 paragraphs and pioneer narrative voice - ensure that any future litigation on the subject, in an international or domestic setting, will start here." The author also offered sharp criticism of the Trial Chamber's judgment. See also Orentlicher 2006 *Am U Int'l L Rev*, who also provides a critical perspective on the judgment.

⁵³ *Akayesu* para 673. *Inkotanyi* refers to soldiers of the Rwandan Patriotic Front (RPF).

⁵⁴ *Akayesu* para 673.

⁵⁵ *Akayesu* para 674.

⁵⁶ *Akayesu* para 561.

Genocide Convention], the Chamber holds the view that the drafters of the Convention simply decided not to specifically mention that such a form of incitement could be punished.

The prosecution of incitement to commit genocide does not require proof of the existence of a current or completed genocide. According to the Trial Chamber"⁵⁷

...the fact that [inchoate offences] are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.⁵⁸

The Trial Chamber thus highlighted the preventative objective underlying punishment for direct and public incitement to commit genocide.

As regards the definitional elements of the crime, the Trial Chamber in *Akayesu*⁵⁹ held that direct and public incitement to commit genocide denotes:

...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.

Furthermore:⁶⁰

The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It 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. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely,

⁵⁷ *Akayesu* para 562.

⁵⁸ See also Cassese *International Criminal Law* 419: "...dispensing with proof of a causal link has thus far been a way of distinguishing incitement to genocide from modes of responsibility like instigation or complicity, and thus avoids redundancy." See also Werle 2007 *JICJ* 972: "Incitement also covers cases where genocide has been completed but where the causal nexus of an act of instigation cannot be proven."

⁵⁹ *Akayesu* para 559.

⁶⁰ *Akayesu* para 560.

to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

Therefore, it may be said that the fault requirement of direct and public incitement to genocide is the same as that for genocide proper, namely, genocidal intent (as discussed at para 4).

The *Nahimana* case differs markedly from the *Akayesu* case in that the charges against the accused revolved around the systematic use of mass media channels, radio and print media, to incite genocide (hence the case is widely referred to as the *Media* case). Two of the accused were the founders of the virulently anti-Tutsi radio station, *Radio Télévision Libres des Mille Collines* (RTLM), Ferdinand Nahimana and Jean-Bosco Barayagwiza. The third accused was the founder, owner and editor of the Hutu extremist newspaper *Kangura* (the imperative form of the *Kinyarwanda* word meaning "awaken"), Hassan Ngeze.

The ICTR Trial Chamber convicted all three accused *inter alia* of direct and public incitement to genocide. The convictions of Nahimana and Barayagwiza for incitement to genocide were based on their failure, as superiors at RTLM, to take reasonable and necessary measures to prevent the perpetration of criminal acts among their staff.⁶¹ On appeal, the Appeals Chamber overturned the conviction of Barayagwiza on the basis that, unlike Nahimana, he did not exercise effective control over RTLM journalists at the time that certain criminal speeches were broadcast. The Appeals Chamber also confirmed the conviction of Ngeze on the basis of certain articles in *Kangura* that amounted to direct and public incitement to genocide.

The Appeals Chamber judgment confirmed incitement as an inchoate crime.⁶² The Appeals Chamber held that "the crime of direct and public incitement to commit

⁶¹ See *ICTR Statute*, Art 6(3): "The fact that any of the acts referred to in arts 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

⁶² *ICTR Prosecutor v Nahimana et al* (Appeals Chamber: Judgment) Case No ICTR-99-52-A, 28 November 2007 para 678 (hereafter *Nahimana* (Appeals Chamber)). See also *Nahimana* (Trial Chamber) para 1015.

genocide is an inchoate offence, punishable even if no act of genocide has resulted therefrom".⁶³ Consequently, the prosecution is not required to prove a causal connection between the act of incitement and subsequent acts of genocide in order to secure a conviction for direct and public incitement to genocide.⁶⁴

The judgment in *Nahimana* also provides a further nuance to the definition of the crime of incitement to commit genocide by drawing a line between direct and public incitement to commit genocide and hate speech. In this regard, the ICTR Appeals Chamber⁶⁵ held as follows:

The Appeals Chamber therefore concludes that when a defendant is indicted pursuant to Article 2(3)(c) of the Statute, he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide.

Furthermore, the Appeals Chamber confirmed that context was an important factor in the determination of whether or not direct incitement to genocide had been committed.⁶⁶ For the purpose of defining direct incitement, it appears that the actual words used are less important than the understanding thereof by the target audience and that:⁶⁷

⁶³ *Nahimana* (Appeals Chamber) para 678.

⁶⁴ This was essentially a moot point since the fact that genocide occurred in Rwanda in 1994 was a wellknown, notorious fact of which the ICTR Appeals Chamber has since taken judicial notice. See ICTR *Prosecutor v Karemera, Ngirumpatse, Nzirorera* (Decision on prosecutor's interlocutory appeal of decision on judicial notice) Case No ICTR-98-44-AR73(C) paras 34-35. See also *Mugesera v Canada (Minister of Citizenship and Immigration)* (2005) 2 SCR 100, 2005 SCC 40. This case was primarily concerned with the deportation of a Rwandan national, who had been granted residence in Canada. Such deportation was initiated pursuant to a Canadian law that allowed for the deportation of residents who have committed crimes. It was alleged that Mugesera had committed incitement to genocide in a speech made prior to leaving Rwanda. In the speech, Mugesera suggested that Tutsi corpses must be sent back to Ethiopia via the Nyaborongo River. The Canadian Supreme Court, with reference to the Trial Chamber decision in the *Media* case, held that "incitement [to genocide] is punishable by virtue of the criminal act alone irrespective of the result" (para 85).

⁶⁵ *Nahimana* (Appeals Chamber) para 693.

⁶⁶ *Nahimana* (Appeals Chamber) para 715; see also *Akayesu* para 557, in which the Trial Chamber held that "the direct element of incitement should be viewed in the light of its cultural and linguistic content."

⁶⁷ *Akayesu* para 558. In ICTR *Prosecutor v Muvunyi* (Trial Chamber: Judgment) Case No ICTR-2000-55A-T, 12 September 2006 para 502 it was held that: "The 'direct' element requires more

...acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the person for whom the message was intended immediately grasped the implication thereof.

Furthermore, the Appeals Chamber was asked, by way of an *amicus curiae* brief, to determine whether the Trial Chamber had confused (or at least blurred the lines of distinction) between hate speech and incitement.⁶⁸ However, the Appeals Chamber took the view that this was not the case⁶⁹ and clarified its position as follows:⁷⁰

The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion. In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the *travaux préparatoires* to the *Genocide Convention*.

The *ad hoc* tribunals have reached separate conclusions as to whether hate speech which does not amount to direct and public incitement to commit genocide⁷¹ may be prosecuted for persecution as a crime against humanity.⁷²

than a vague or indirect suggestion of incitement, and implies that the expression which is alleged to be inciteful, specifically provoke another to engage in criminal conduct. In considering whether incitement is direct, the specific context in which it takes place is important. Cultural and linguistic factors, as well as the kind of audience the message is addressed to, could help determine whether a particular speech qualifies as direct incitement. An important consideration for the Trial Chamber is whether the members of the audience to whom the message was directed immediately understood its implication" (footnotes omitted).

⁶⁸ Numerous scholars shared this concern. See for example, Orentlicher 2006 *Am U Int'l L Rev.*

⁶⁹ *Nahimana* (Appeals Chamber) para 715.

⁷⁰ *Nahimana* (Appeals Chamber) para 692 (footnotes omitted).

⁷¹ Wouters and Verhoeven 2010 dx.doi.org 21: "[It] is clear that incitement to genocide should not be equated with all forms of hate speech. Hate speech's primary purpose is to distill hatred among the population against a particular group, which often includes the use of denigrating language to describe the targeted group. Despicable as this may be, as long as hate speech is not accompanied with an intent to incite the public to commit genocidal acts, it cannot be regarded as incitement to genocide." (footnote omitted)

⁷² See ICTY *Prosecutor v Kordić and Čerkez* (Trial Chamber: Judgment) Case No IT-95-14/2-T, 26 February 2001 para 209, where it was held that encouraging or promoting hatred on political grounds "does not by itself constitute persecution as a crime against humanity." However, in *Nahimana* (Trial Chamber) para 1072, the ICTR Trial Chamber held that "hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Art 3(h) of its Statute. In *Ruggiu*, the Tribunal so held, finding that the radio broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of 'the fundamental rights to life, liberty and basic humanity enjoyed by

Hitherto, the distinction between public and private incitement has not given rise to any significant controversy as regards the interpretation thereof.⁷³ In *Akayesu*,⁷⁴ with reference to the definition of the International Law Commission's *Draft Code of Crimes against the Peace and Security of Mankind* (1996),⁷⁵ public incitement was defined as:

...a 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.

5.3 Article 25(3)(e) of the Rome Statute of the International Criminal Court

The *Rome Statute* strongly reflects the wording of the *Genocide Convention* as regards the definition of direct and public incitement to commit genocide. According to article 25(3)(e):

In accordance with this Statute a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide.

From the above it is clear that incitement to commit any of the other offences under article 5 of the Statute (crimes against humanity, war crimes and aggression) does not constitute a crime under the Rome Statute. This also forms part of the *Rome Statute's* inheritance from the *Genocide Convention* and from the respective Statutes of the *ad hoc* tribunals.

members of the wider society" (footnote omitted). In *Nahimana* (Appeals Chamber) the issue seems to have been left open. See Gordon 2013 *Vanderbilt J Transnat'l L*.

⁷³ Timmerman expounds on the dangers respectively associated with public and private incitement: "Whilst *public incitement* [...] is primarily dangerous because it leads to the creation of an atmosphere of hatred and xenophobia and entails the exertion of influence on people's minds, *incitement in private* is dangerous because the instigator succeeds in triggering a determination in the instigatee's mind to commit a particular crime" (my emphasis). See Timmerman 2006 *IRRC* 825.

⁷⁴ *Akayesu* para 556.

⁷⁵ *Draft Code of Crimes against the Peace and Security of Mankind* (1996), Art 2(3)(f).

The approach to direct and public incitement to commit genocide in the *Rome Statute* differs from the approach thereto in the respective Statutes of the *ad hoc* tribunals in one significant respect. Direct and public incitement to commit genocide is not explicitly treated as an independent substantive crime under the *Rome Statute*. Article 5 of the *Rome Statute* lists the substantive crimes within the jurisdiction of the Court only as genocide, crimes against humanity, war crimes and aggression.⁷⁶ These crimes are further distinguished through being individually defined in separate provisions in the Statute (respectively in articles 6, 7 and 8). Thus, in contrast to the criminalisation of direct and public incitement to commit genocide as a distinct crime under the *Genocide Convention* as well as in the respective statutes of the *ad hoc* tribunals, the *Rome Statute* does not explicitly create the separate crime of direct and public incitement to commit genocide. Rather, incitement to genocide is regarded as a mode of responsibility in respect of genocide that may lead the ICC to an interpretation of the crime that differs from what we have seen hitherto.⁷⁷ This argument is supported by the location of the reference to direct and public incitement to commit genocide in article 25 entitled "Individual Criminal Responsibility" and specifically in article 25(3), which deals generally with modes of participation. Davies⁷⁸ has argued that the *Rome Statute* presents a "watered down" version of the prohibition of direct and public incitement to commit genocide under international law. He argues that the classification of incitement in the *Rome Statute* as a mode of participation in a core crime rather than as a separate crime means that a conviction for incitement to genocide is predicated on showing a causal link between such incitement and subsequent acts of genocide.⁷⁹ He argues that this may frustrate efforts to obtain convictions of

⁷⁶ With regards to aggression, the original text of the *Rome Statute* stipulated that the Court may not prosecute acts of aggression until the crime was defined and conditions for the exercise of jurisdiction were set out [Art 5(2)]. At the Kampala Review Conference, Art 5(2) was recalled from the Statute and a number of amendments accepted. Article 8 *bis* contains a definition of the crime of aggression while Art 15 *bis* and Art 15 *ter* set out the grounds for the exercise of jurisdiction over the crime of aggression. The Court may not, however, exercise jurisdiction before 1 January 2017, whereafter State Parties may decide to activate such jurisdiction.

⁷⁷ Cassese *International Criminal Law* 404.

⁷⁸ Davies 2009 *Harv Hum Rts J*.

⁷⁹ Davies 2009 *Harv Hum Rts J* 269-270.

perpetrators of incitement to genocide, such as those successfully (and correctly) handed down in *Akayesu* and *Nahimana* by the ICTR.⁸⁰

However, it is also quite plausible for incitement to be treated, as it has been by the ICTR, as a separate (inchoate) crime under the Statute.⁸¹ As regards the interpretation of the *Rome Statute* on this point, it is beyond the scope of this article to attempt to provide a definitive answer. In any event, the interpretation of direct and public incitement to commit genocide under the *Rome Statute* remains to be clarified by the ICC as no person has yet been charged under article 25(3)(e) of the Statute. With this in mind, and considering that it took ten years for the ICC to hand down its first conviction,⁸² it seems safe to conclude that it is unlikely that the ICC will provide any guidance to South African courts in the very near future as to the scope of direct and public incitement to commit genocide under the *Rome Statute*.

6 Prosecuting incitement to genocide in South Africa

6.1 Contemporary relevance of the crime in South Africa

The role of incitement before and during genocide has been outlined above (para 2). These considerations are by no means immaterial to post-transitional South Africa. Although it may be said that the South African transition to democracy has been successful, a successful political transition does not automatically equate to complete social reconciliation, which is a long-term objective. The lack of true social reconciliation and the contemporary relevance of the crime of incitement to commit genocide are exemplified by an ongoing debate surrounding the existence of a so-called "*Boer* genocide" in South Africa. Those who argue in favour of its existence frequently cite crime statistics (the high murder rate among white South African

⁸⁰ Davies 2009 *Harv Hum Rts J* 269-270.

⁸¹ See for example, Werle 2007 *JICJ* 956: "While Art 25(3)(a) to (d) addresses modes of criminal participation, subparagraphs (e) and (f) deal with incitement to genocide and with attempt and abandonment; this might be seen as misleading from a structural point of view, because neither incitement to genocide nor attempt can be classified as modes of participation, but should rather be classified as inchoate crimes."

⁸² See ICC *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Judgment) Case No ICC-01/04-01/06, 14 March 2012.

farmers relative to other population groups) along with the failure to act preventatively on the part of the South African government as proof of an ongoing genocide. However, this in and of itself does not provide conclusive proof of the existence of a "*Boer genocide*" in South Africa as genocidal intent on the part of the alleged perpetrator(s) must first be proved. Others have argued that the singing of the song *Dubula Ibhunu* (parts of the lyrics of the song may be translated to mean "*shoot the Boer/farmer*", "*shoot the Boers/farmers they are rapists/robbers*")⁸³ constitutes incitement to commit genocide.⁸⁴

Within these often heated debates, the politics of accusation and denial have tended to cloud the actual facts and legal issues. While the term "genocide" is now part of the global lexicon, there may still be a general misapprehension as regards the legal requirements of genocide under international law, which is not confined only to South Africa. This article is not directly concerned with these issues. Nor will I attempt to discern whether or not any international crimes have been or are being committed in South Africa. However, it is valuable to contemplate these controversies from a broader perspective as they illustrate the potential long-term

⁸³ See Benesch 2011 voicesthatpoison.files.wordpress.com. According to Benesch, speech asserting that the audience faces serious danger from the victim group is a hallmark of incitement (known as "accusation in a mirror").

⁸⁴ In *African National Congress v Harmse: In Re Harmse v Vawda (Afriforum Intervening)* 2011 5 SA 460 (GSJ) para 139, the High Court held that "the publication and chanting of the words *Dubula ibhunu prima facie* satisfies the crime of incitement to commit murder." According to Snyman, the use of the phrase "Kill the Boer, kill the farmer" is "without a doubt punishable as incitement to murder" (see Snyman *Strafreg* 312 fn 90). One would indeed be hard pressed to deny a measure of similarity between the song "*Dubula Ibhunu*" and the song "*Tubatsembe*" ("We will kill them all"), which was sung by Hutu extremists prior to the Rwandan genocide. On the other hand, the cultural meaning of the song and the specific circumstances under which it was sung will also be put on the scale in order to determine if the song constitutes direct incitement to murder or genocide. It may be possible to defend the song on the basis of its cultural and historical significance, thereby denying that it is intended to incite violence against whites. One may also argue that the lyrics of the song are not to be taken literally and pose no clear and present danger in respect of violence or acts of genocide. In this regard one may perhaps liken the song to the French national anthem, *La Marseillaise*, which contains the following lyrics: "To arms citizens! Form your battalions! March! March! Let impure blood water our fields!" Overall, the message conveyed must be unambiguous as regards the meaning that attaches thereto because of the specific context in which it is made as well as the specific audience to which it is directed. See *Nahimana* (Appeals Chamber) para 701: "The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, 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."

value of clear legal prohibitions that may help to pro-actively counter instances of collective violence, especially genocide. Nevertheless, it must be remembered that the crime of direct and public incitement to commit genocide is narrow in scope in general, which is a result of its inchoate nature as well as the fact that it must be committed with a particular form of fault, namely, genocidal intent.⁸⁵

6.2 Avenues for the prosecution of incitement to commit genocide in South Africa

As yet there have been no prosecutions for incitement to genocide in South Africa. In view of existing domestic and international law as regards incitement and incitement to genocide outlined above, it is possible to argue that there are currently three legal avenues available for the domestic prosecution of incitement to genocide in South Africa. Each of these is discussed separately below.

6.2.1 Prosecution under the Riotous Assemblies Act 17 of 1965

De facto incitement to genocide may be prosecuted as the purely domestic and distinct statutory crime of incitement under the *Riotous Assemblies Act* read together with the ICC Act. The wording of section 18 of the *Riotous Assemblies Act* (see para 3.2 above) seems to indicate that the inciter need only have intent (in any form)⁸⁶ as regards moving the incitee towards the commission of "any offence" under South African criminal law in order to be held liable. Arguably, "any offence" includes the statutory crime of genocide as per the ICC Act as well as genocide as a customary international law crime under section 232 of the *Constitution of the Republic of South Africa*, 1996.

⁸⁵ According to Schabas, however, proving genocidal intent on the part of an inciter is in practice aided by the fact that genocidal intent can often be readily inferred from the content of the message. See Schabas *Genocide* 326. The prosecution of incitement to commit genocide is also to an extent aided by its inchoate nature. International and foreign jurisprudence has confirmed that a conviction for incitement to commit genocide is not premised on furnishing proof that actual acts of genocide have taken place or that such acts will take place in the future. Thus, in order to prosecute incitement to genocide at the domestic level, the prosecution is not required to navigate through the political minefield of proving the existence of an act of genocide.

⁸⁶ However, as was noted above (in para 5.2), an inciter must harbour genocidal intent in order to be convicted of incitement to genocide.

The prosecution of incitement to genocide as statutory incitement holds the potential pragmatic benefit that the act of incitement in question does not necessarily have to be "direct" or "public" (as is required under international law) in order for it to result in criminal liability. These qualifiers are unknown to the legal concept of incitement in South African criminal law. Therefore, the scope of incitement to genocide under the *Riotous Assemblies Act* is potentially broader than that of the international law crime of direct and public incitement to genocide, which should, at least in theory, enhance the preventative value of the crime. Furthermore, a person may be liable for incitement under South African law even where the specific identity of the incitee is unknown to the inciter.⁸⁷ For example, a speech provoking or inciting genocide that is made to a public audience that consists of individuals unknown to the speaker would constitute the offence of incitement to genocide under the *Riotous Assemblies Act*. Also, it is well established that the act of incitement need not be successful in order to constitute a crime under South African law.⁸⁸

However, in spite of the advantages that the prosecution of incitement to genocide under the *Riotous Assemblies Act* may hold, there are various reasons to doubt that the *Riotous Assemblies Act* is a proper basis for the prosecution of incitement to genocide. A significant criticism that can be levelled against prosecution in terms of the *Riotous Assemblies Act* relates to its limited jurisdiction, especially in comparison with that which is provided for in respect of crimes under the ICC Act.⁸⁹ The broad(er) prescriptive and enforcement jurisdiction provided for under the ICC Act (see para 6.2.2) reflects the seriousness of the offence and the interests of the international community in the suppression and punishment not only of the core international crimes such as genocide, but also preventative prosecution of crimes

⁸⁷ *R v Segale* 1960 1 SA 721 (A). In this case, the appellant's conviction for inciting "non-European" labourers on the Witwatersrand as a group to commit a statutory offence, which consisted of a "stay away" from work in protest, was upheld. Thus, a person may be guilty of incitement under the *Riotous Assemblies Act* 17 of 1956 even without focusing the act of incitement on any specific individual(s).

⁸⁸ See para 3 above.

⁸⁹ In general, South African courts exercise jurisdiction only in respect of crimes committed within South African territory. See Joubert *Criminal Procedure* 39-40. However, in *S v Basson* 2007 1 SACR 566 (CC) it was recognised that a South African court has jurisdiction to try an offence under the *Riotous Assemblies Act*, *in casu* conspiracy under s 18(2)(a), where there is a "real and substantial link" between the offence and South Africa (para 226).

related thereto, such as incitement to genocide. Limiting the prosecution of incitement to genocide to the narrow jurisdictional ambit of the *Riotous Assemblies Act* would undermine the new vision of ICL in which the enforcement of international criminal norms rests primarily on the willingness and ability of states to actively put an end to impunity for the perpetrators of international law crimes by extending the traditional limits of their criminal jurisdiction.⁹⁰

A further reason to doubt whether the *Riotous Assemblies Act* should serve as the basis for the prosecution of incitement to genocide in South Africa is the fact that it could then be argued that the hitherto non-existent crimes of incitement to commit crimes against humanity and incitement to commit war crimes can also be prosecuted thereunder pursuant to the "incitement to *any offence*" argument. This is clearly an unacceptable result not supported by any international legal authority.

Finally, there is a possibility that the prosecution of incitement to genocide may be opposed on the basis that it violates the principle of legality. Accordingly, it could be argued that direct and public incitement to commit genocide is, like the other crimes under the ICC Act, a distinct crime under international law. However, unlike genocide, crimes against humanity and war crimes, which are explicitly defined and criminalised by way of the ICC Act, conduct amounting to direct and public incitement to genocide is not domestically proscribed and criminalised. Thus, it could be argued that the *Riotous Assemblies Act* cannot serve as a basis for the prosecution of incitement to genocide until the ICC Act is amended to specifically proscribe and provide for such a crime.⁹¹ Prior to such amendment, the principle *nullum crimen sine lege* may be invoked to preclude any prosecutorial efforts based on a joint reading of the *Riotous Assemblies Act* and the ICC Act.

⁹⁰ See also para 7.1 below.

⁹¹ Should the ICC Act be amended thus, the use of the *Riotous Assemblies Act* as a basis for the prosecution of incitement to genocide would become redundant. As regards amendment of the ICC Act, see para 7 below.

6.2.2 The crime of direct and public incitement to genocide under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

In order to honour its obligations regarding the prosecution of international crime pursuant to the *Rome Statute*, as well as to bring its substantive criminal law in line with the scheme of complementarity contained therein, South Africa has enacted national implementation legislation in the form of the ICC Act. Through the ICC Act, the crimes under the *Rome Statute* have become part of South African law. According to section 4(1) of the ICC Act:⁹²

Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence [...].

According to section 1(vii) of the ICC Act, references to "crime" in the Act "means the crime of genocide, crimes against humanity and war crimes" (a reflection of article 5 of the *Rome Statute*). In turn, the respective definitions of these crimes have become part of South African national law through Schedule I, which is appended to the ICC Act. Parts 1 to 3 of the Schedule contain, respectively, the definitions of genocide, crimes against humanity and war crimes which are derived entirely from the definitions contained, respectively, in articles 6 to 8 of the *Rome Statute*. Consequently, the core crimes of international law are now part of the body of criminal offences that constitute South African criminal law and may be prosecuted as such if the offence falls within the jurisdiction provided for in the ICC Act.

⁹² The ICC Act further stipulates that persons found guilty under the ICC Act are "liable upon conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment." Since the distinct acts (or modes of participation), which may be committed with genocidal intent, vary greatly in their severity, a minimum sentencing provision would have made little sense. The wording of the ICC Act as regards punishment is broad enough to provide the necessary discretion to a court to hand down a sentence that is fair under the specific circumstances. In this regard the court may consider the quantum and quality of the punishment meted out by international criminal courts for similar offences.

According to the feature of complementarity contained in article 17 of the *Rome Statute*, read together with the jurisdictional requirements in section 4(3) of the ICC Act, South Africa bears primary responsibility for the prosecution of the perpetrators of the crimes contained in the *Rome Statute* and may do so before a domestic court if:

- (a) that person is a South African citizen; or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic; or
- (c) that person, after the commission of the crime, is present in the territory of the Republic; or
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

A crime committed outside the territory of South Africa in any of these four circumstances is regarded as having been committed within the territory of South Africa. Section 4(3) is of particular significance since it extends jurisdiction to persons who are not South African citizens but present in South African territory and to non-South Africans who have committed core crimes against South African citizens. According to Du Plessis⁹³ this is "a progressive and potentially far-reaching aspect of South Africa's ICC Act." The ICC Act thus provides for qualified extraterritorial jurisdiction in respect of crimes transplanted from the *Rome Statute*.

The ICC Act does not make any explicit references to "direct and public incitement to commit genocide" as specifically provided for in article 25(3)(e) of the *Rome Statute*. Therefore, the criminalisation of incitement to genocide under the ICC Act can at best be read into that Act with reference to the values, principles and rights contained in the *Constitution*, the purpose of the ICC Act itself, and the objectives and obligations outlined in the *Rome Statute*. The long title of the ICC Act outlines the purposes of the Act as *inter alia* ensuring both the effective implementation of the *Rome Statute* in South Africa and that the country complies with its obligations set out in the *Rome Statute*. According to section 2 of the ICC Act, any court applying the Act must consider, and may apply, conventional international law

⁹³ Du Plessis 2007 *JICJ* 463.

(including particularly the *Rome Statute* and, for example, the *Genocide Convention*), customary international law and comparable foreign law.⁹⁴

However, the ICC Act refers only to genocide, crimes against humanity and war crimes as "crime" for the purposes of the Act.⁹⁵ The failure to explicitly recognise incitement to genocide in the ICC Act, whether unintentional or deliberate, represents a legislative oversight. Whatever the reason for the oversight, the fact remains that this legislative omission poses a fundamental problem as regards the prosecution of incitement to genocide under the ICC Act, namely, that the crime of incitement to genocide does not exist as a distinct crime in terms of the Act. Arguably the reading-in of a substantive crime would represent a step too far, since any conviction pursuant to such a reading-in would violate the fundamental constitutional and criminal law principle of *nullum crimen sine lege* as well as the judiciary's constitutional imperative, in accordance with the constitutional principle of separation of powers, to respect the exclusive right of Parliament to make national laws.

6.2.3 Section 232 of the Constitution: The crime of direct and public incitement to commit genocide under customary international law

In theory, direct and public incitement to commit genocide may be prosecuted directly in terms of the common law.⁹⁶ According to section 232 of the *Constitution*:

⁹⁴ The decision in *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 10 BCLR 1089 (GNP) provides evidence of the willingness of the South African judiciary to interpret the ICC Act in a purposive manner that may broaden the Act's scope. The case concerned an application for judicial review of a decision by the South African Police Service ("SAPS") not to investigate allegation of torture constituting crimes against humanity committed by Zimbabweans against Zimbabweans in Zimbabwe. In a precedent setting judgment, the Court directed the SAPS to conduct an investigation into the matter. The Court referred specifically to the purpose and object of the ICC Act (para 31) and highlighted "an international consensus on the normative desirability of prosecuting [perpetrators of crimes against humanity]" (para 27). It must be noted, however, that the Respondents have obtained leave to appeal the decision before the Supreme Court of Appeal. As regards the use of foreign law in the interpretation of the ICC Act, the judgment of the Supreme Court of Canada in *Mugesera* is noteworthy (see fn 64 above).

⁹⁵ ICC Act, s 1 (Definitions).

⁹⁶ See Kemp *Criminal Law* 564-565.

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The existence of the crime of incitement to genocide under customary international law would have to be established through evidence showing widespread and uniform state practice accompanied by *opinio juris (sive necessitatis)*. Thus, it must be shown that there was, at the time that the offence was committed, a belief among states that direct and public incitement to commit genocide is prohibited by customary international law and that the prosecution thereof constitutes an obligation under international law. The presentation of such an argument in a South African court is unprecedented, and to deal with it fully is beyond the scope of this article. However, it must be pointed out that proving the existence of the crime under customary international law is "no simple task" from a pragmatic point of view.⁹⁷

The task is arguably made less difficult by the fact that direct and public incitement to commit genocide as a crime has existed in near-codified form since the adoption of the *Genocide Convention*. It might be argued broadly that such a crime does exist under customary international law, by referring to the widespread ratification of the *Genocide Convention* and contending that as a result the Convention as a whole forms part of customary international law. Such an argument could be supported with reference to the jurisprudence of the *ad hoc* tribunals and article 25(3)(e) of the *Rome Statute*. Pursuant to the above argument, direct and public incitement to genocide is, due to it being a customary international law crime, a prosecutable offence under South African law on the basis of the indirect incorporation thereof by section 232 of the *Constitution*.

There is to date no precedent for the prosecution of international crimes pursuant to section 232 of the *Constitution*. Any prosecution on this basis faces two problems: first, proving the existence of the crime under customary international law and,

⁹⁷ Kemp *Criminal Law* 565.

second, with regard to the principle of legality.⁹⁸ Thus, the prosecution of incitement to commit genocide as a crime under customary international law in South Africa, although theoretically possible, is improbable at present.⁹⁹

7 Should the ICC Act be amended to specifically provide for the crime of direct and public incitement to commit genocide?

7.1 The need to amend the ICC Act?

Unlike the *Riotous Assemblies Act*, the ICC Act is specifically intended to reflect, within the South African criminal justice system, an international consensus on the normative desirability of the prohibition of certain forms of conduct under international law. This consensus is further reflected in the general willingness of states to stretch the traditional limits of their criminal jurisdiction in respect of certain international crimes in order to put an end to the culture of impunity in respect of international crimes. The jurisdiction provided for under the ICC Act broadly reflects South Africa's acquiescence in these developments. As discussed above, this commitment to a limited form of extraterritorial criminal jurisdiction would not be reflected by the prosecution of incitement to genocide pursuant to the *Riotous Assemblies Act*, in terms of which enforcement jurisdiction is based on the traditional principle of territoriality and thus more limited. Nor can it be. The *Riotous Assemblies Act* came into being in the early stages of apartheid with the broad purpose of preventing hostilities between racial groups that were mostly state engineered.¹⁰⁰ Most of the provisions in the Act have since been repealed. Furthermore, the Act was promulgated well before the widespread acceptance of the

⁹⁸ It could be hypothesised that the inaugural prosecution of direct and public incitement to genocide solely on the basis of s 232 and its criminalisation under customary international law would be unconstitutional since it would violate the *nullum crimen sine lege* principle in s 35(3)(l) of the *Constitution*, which holds that every accused person has the right "not to be convicted for an act or omission that was not an offence under either national *or international* law at the time it was committed or omitted." It could be argued that the prosecution of a crime that exists purely under customary international law and the existence of which might be proved in court only after the commission thereof is inconsistent with s 35(3)(l) of the *Constitution*.

⁹⁹ Kemp *Criminal Law* 564.

¹⁰⁰ The long title of the Act reads as follows: "To consolidate the laws relating to riotous assemblies and the prohibition of the engendering of feelings of hostility between the European and non-European inhabitants of the Republic and matters incidental thereto [...]."

universality principle, a legal development that is reflected in both the *Rome Statute* and the ICC Act. For these reasons, the prosecution of incitement to commit genocide under the *Riotous Assemblies Act* would amount to using anachronistic legislation to combat a form of criminality which is not only a unique species of international crime, but also novel to the South African domestic legal system.

Clearly, it is preferable to prosecute incitement to genocide under the ICC Act rather than under any of the other theoretical options outlined above. However, this immediately presents a further problem, namely, the lack of legal certainty regarding the prohibition of incitement to genocide under the ICC Act. This problem is to some extent related to the fact that there is also currently a measure of uncertainty regarding the scope of the crime of direct and public incitement to commit genocide under the *Rome Statute*, which is unlikely to be resolved in the near future.

Considering the various strengths and weaknesses of the available options for the prosecution of direct and public incitement to commit genocide under South African law (as outlined in para 6.2), it is submitted that the ICC Act must be amended to provide for the crime of direct and public incitement to commit genocide under South African law. Although it is hypothetically possible to invoke the *Riotous Assemblies Act* as a basis for prosecution or for the separate crime of direct and public incitement to commit genocide to be read into the ICC Act, the proposed amendment will provide legal certainty as regards the existence of the crime (proscribing certain conduct) and also provide for the punishment thereof as required by the principle of legality. It must also be considered that, unlike the core crimes under the *Rome Statute*, there has to date been no act of constitutional ratification in respect of the distinct crime of incitement to genocide as required from Parliament in respect of international agreements under section 231 of the *Constitution*.

The creation of a distinct domestic crime of incitement to genocide would place South Africa in a position to prosecute incitement to genocide pre-emptively and preventatively. The submission to amend the ICC Act is supported by South Africa's

international legal obligation pursuant to the *Genocide Convention* to prevent and prosecute genocide as well as by the substance of the non-binding, emerging norm of "responsibility to protect" (R2P).¹⁰¹ Thus, the amendment will be valuable not only from a preventative perspective, but is also necessary as a measure that will make South Africa compliant with its international legal obligations.

7.2 The way forward

It is submitted that the ICC Act should be amended so as to criminalise direct and public incitement to commit genocide in South Africa. An in-depth discussion of the legislative details surrounding such an amendment is beyond the scope of this article. However, it is at this stage clear that the definitional elements of the crime consist broadly of the following: 1) direct and public incitement; 2) made with the intent to advocate, promote or cause the commission of acts of genocide; and 3) committed with genocidal intent (the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such). Furthermore, considering the established approach to common law and statutory incitement under South African law as well as the existing international and foreign jurisprudence regarding direct and public incitement to commit genocide, there is no need to qualify the prohibition any further by, for example, providing that the crime is committed "irrespective of the success thereof."

Finally, the proposed legislative amendment would not pose a problem as regards the *nulla poena sine lege* principle as the ICC Act provides for the imposition of penalties in section 4(1). Considering the inchoate nature of the crime, the maximum punishment would very rarely be imposed. This, however, must be considered on a case by case basis and lies within the discretion of the court, which must take into account all relevant factors.

¹⁰¹ See UNGA Resolution 60(1) (2005) para 138. R2P is an emerging norm of international security and human rights that views sovereignty as a responsibility and not as an absolute right. Accordingly, states have a responsibility to protect their citizens from various international crimes.

8 Conclusion

International problems often originate at the domestic level. For this reason, the prevention and punishment of international crimes must, as far as possible, be addressed primarily from within domestic legal systems. It is now widely accepted that the future success of the project of international criminal justice is vested in the ability and willingness of states as regards the prosecution of international crimes, with the ICC acting as an institution of last resort in respect of the core crimes of international law. South Africa has, through ratification of the *Rome Statute* as well as adoption of the ICC Act, formally indicated its willingness to be a partner in this project. These are laudable developments. However, a willingness to prosecute international crimes domestically amounts to little without enabling the domestic legal system to do so effectively. These crimes have been created by the international community and are partly aimed at the prevention of collective violence. Thus, they are pro-active legal rules requiring pro-active measures for their implementation by states. Incitement to genocide is arguably the best example of such a preventative crime, yet it is not at present clearly defined and explicitly criminalised in South African law. In general, there is a lack of recognition of the fact that words may be as dangerous as physical weapons in the context of genocide and especially in the preliminary stages thereof. To counteract this danger, another kind of 'weapon' may be used, namely, timely domestic prosecution pursuant to a clearly defined and pre-existing criminal prohibition of incitement to genocide.

It must be reiterated that the inherently narrow scope of the domestic crime of incitement is reduced even further in the context of incitement to commit genocide on account of the additional requirement of genocidal intent on the part of the inciter as well as the fact that only direct and public manifestations thereof are criminalised. However, the assumption that the commission of incitement to genocide may be a rare occurrence in South Africa, and the successful prosecution thereof perhaps even less likely, do not trivialise its criminalisation (it may be compared to the crime of treason). On the contrary, the fact that incitement to genocide is *super-preventative* in nature and purpose creates a crime of unique and

crucial importance, particularly within divided societies and especially in the long run. In South Africa, the controversy over the "Kill the Boer" song indicates the potential value of legal certainty as regards the domestic prosecution of incitement to genocide. Simply put, effective prevention of genocide at the domestic level requires effective prevention of the historical precursor to genocide, namely, incitement to genocide, especially considering the fact that it is the only precursory act of genocide currently criminalised under international law. At present, only the prosecution and punishment of acts of genocide are clearly provided for by South African criminal law. The existence of clear legal rules that address (mostly) genocide after the fact but not genocide before the fact is incongruous, especially bearing in mind the goal of genocide prevention. For this reason, as well as taking into account the instrumental role of incitement before and during genocide as outlined in para 2, it is submitted that it is both logical and essential for the distinct crime of direct and public incitement to commit genocide to be recognised by South African criminal law. It is further submitted that legislative amendment of the ICC Act will provide the most effective solution to the problems outlined in this article.

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List of abbreviations

Am U Int'l L Rev	American University International Law Review
Harv Hum Rts J	Harvard Human Rights Journal
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal
IRRC	International Review of the Red Cross
JICJ	Journal of International Criminal Justice
McGill LJ	McGill Law Journal
OHCHR	Office of the High Commissioner for Human Rights
RPF	Rwandan Patriotic Front
RTL	Radio Télévision Libres des Mille Collines
R2P	Responsibility to Protect
SAPS	South African Police Service
UN	United Nations
UNESCOR	United Nations Economic and Social Council Official Records
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNSC	United Nations Security Council
USA	United States of America
Vanderbilt J	Vanderbilt Journal of Transnational Law
Transnat'l L	