

INCITING VIOLENCE AND PROPAGATING HATE THROUGH THE MEDIA: RWANDA AND THE LIMITS OF INTERNATIONAL CRIMINAL LAW

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SUMMARY

The media played a significant role during the 1994 genocide in Rwanda. Media messages took two forms: incitement to kill (or “incitement to violence”), and hate propaganda (or “hate speech”). In 2003, the International Criminal Tribunal for Rwanda (ICTR) convicted three media leaders of, amongst others, genocide and incitement to commit genocide. This contribution is an attempt to find out whether these convictions are based on the speech and responsibility for speech through the media – distinct from other actions including utterances outside the context of the media – of the accused. If any of these convictions are in fact based on media messages, does “incitement to violence” or “hate speech” constitute the basis for such convictions? Conceding the difficulties of disentangling these different forms of speech, the conclusion is that the convictions are based on “incitement to violence”, and not on “hate speech” as such.

1 BACKGROUND TO THE *MEDIA TRIAL CASE*

One of the most distressing aspects of the 1994 genocide in Rwanda has been the role of collective “hate speech” or “hate propaganda” through the mass media, using the airwaves and the printed word. During and shortly before the genocide in Rwanda, two radio stations, Radio Rwanda and *Radio Télévision Libre des Mille Collines* (RTLM) operated officially in Rwanda, while another (Radio Muhabura, the mouthpiece of the Rwandese Patriotic Front (RPF)) transmitted into parts of the country. A number of written publications, among them *Kangura*, also appeared.¹

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¹ The use of especially RTLM and *Kangura* has been documented and is not discussed in detail here, see eg, A 19, *Broadcasting genocide – Censorship, propaganda and state-sponsored violence in Rwanda 1990 – 1994* (London Article 19 1996); Chalk “Hate Radio in Rwanda” in Adelman and Suhrke (eds) *The Path of a Genocide – The Rwanda Crisis from Uganda to Zaire* (2000).

Broadly stated, the disconcerting media messages took two forms: incitement to violence and hate speech (or “hate propaganda”). In their first manifestation, the media messages took the form of an encouragement to kill, either by naming specified individual targets, or by making a more general appeal to kill members of a particular group. The clearest example of specific identification was the announcement or publication of lists containing names, with a message that those persons should be killed or exterminated. However, the messages were also implicit, for example publishing names in a particular context, identifying them as “enemies”, but not directly calling for their death. A concrete example of such incitement to violence is the cover of *Kangura* number 26, which depicts a machete, next to the following question: “What weapons shall we use to conquer the Inyenzi once and for all?”.² Messages in the second category (grouped together here as “hate propaganda”) fall short of an explicit or implicit encouragement to take life or to cause harm. Examples of hate propaganda are messages diminishing the worth of another group, infusing racial hatred, contempt and denigration, or stigmatizing one group as the “enemy”. Under these circumstances, there is no specific call to arms or action, either explicitly or by necessary implication. An example is the following statement from the “Ten Commandments” published in *Kangura*: “Every Hutu male must know that all Tutsi are dishonest in their business dealings. They are only seeking ethnic supremacy.”³

The main involvement of the international community in Rwanda’s genocide came after the event, in the process of punishing perpetrators. International law had at its disposal the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) to serve as substantive grounds for possible prosecution.⁴ In terms of its first provision, state parties undertake *to prevent* and punish the crime of genocide. However, the Genocide Convention directs itself mainly at situations where human rights violations take the form of genocide or related forms of violence, and operates retrospectively, deciding whether individuals have transgressed. Only two “punishable acts”, direct and public incitement to commit genocide and complicity in genocide,⁵ have preventive aims. The assumption is that prevention is best realised at the domestic level, through the application of domestic measures, rather than through international intervention. Beyond the promise of a judicial organ “as may have jurisdiction”,⁶ the Genocide Convention does not provide for a monitoring mechanism, leaving it to states to penalise and prosecute. The promise saw some fulfilment when the International Tribunal for the ex-Yugoslavia (ICTY)

² See *eg*, par 926 of Case ICTR-99-52-T (hereinafter “the *Media Trial* case”), see www.ictr.org.

³ The *Media Trial* case, par 139.

⁴ Adopted by the UN in 1948, entering into force in 1951, and ratified by Rwanda on 16 April 1975.

⁵ A 3(b) and (c) of the Genocide Convention. For direct and public incitement to commit genocide it is the act of incitement, rather than the effect of the incitement that needs to be proved. For conspiracy to genocide there is no requirement of a “successful” genocide. The prosecution needs only prove that the accused conceived of a genocidal plan together, irrespective of whether the plan was put into operation, or whether deaths have in fact ensued. The fact that deaths did occur, that the desired effect of conspiracy resulted, may serve as proof for the conspiracy.

⁶ A 6 of the Genocide Convention.

was created as an ad hoc UN tribunal in 1993. Building on this precedent, the International Tribunal for Rwanda (ICTR) was established in 1994, reflecting the substantive provisions of the Genocide Convention in its Statute.⁷

Under its Statute, the ICTR has jurisdiction to prosecute those responsible for committing genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions and the Additional Protocol II thereto. The crime of genocide is defined as an act committed “with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”.⁸ In addition to having jurisdiction over specific acts exemplifying genocide, such as “killing members of a group”,⁹ the ICTR may also prosecute persons who have committed “other acts”, including “conspiracy”, “attempt”, “complicity” and “incitement” to commit genocide.¹⁰

2 THE MEDIA TRIAL CASE

On 3 December 2003, a Chamber of the ICTR handed down judgment in a case involving the media’s role in the genocide, *Prosecutor v Nahimana, Barayagwiza and Ngeze*,¹¹ finding all three accused, Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, guilty of genocide, conspiracy to commit genocide, public and direct incitement to genocide, as well as crimes against humanity (extermination and persecution) for events that took place in Rwanda during 1994.¹² The Chamber sentenced two of the accused to life imprisonment, but Barayagwiza received a reduced sentence resulting from a previous finding that his fair trial rights had been violated while awaiting trial.¹³

The most remarkable aspect of this case is the link of the three accused to the media, rather than to political (“Hutu”) power. The accused were media leaders, the intellectuals or *ideologues* of the genocide: a historian, a lawyer and a journalist. The first accused, Nahimana, studied at the National University of Rwanda, at Butare, and went on to become a history lecturer there at the age of 27. His progress in academia was swift – by 30 he had been elevated to the position of Dean of the Faculty of Arts. His elevation continued, seeing him taking senior administrative positions at the Ruhengeri campus of the university. His role was even greater in his next

⁷ Established by UN Security Council Resolution 955 of 8 November. Since its establishment in 1995, the International Criminal Tribunal for Rwanda (ICTR) has finalized cases against eighteen accused persons, see www.ictor.org. In 2002 the Statute of the International Criminal Court (ICC) entered into force. The jurisdiction of the ICC includes genocide (in a 6) and lists direct and public incitement to genocide as a form of individual criminal responsibility over which the ICC has jurisdiction in respect of the crime of genocide (a 25(3)(e)).

⁸ A 2(2) of the Statute of the ICTR.

⁹ A 2(2)(a) of the Statute of the ICTR.

¹⁰ A 2(3) of the Statute of the ICTR.

¹¹ The *Media Trial* case.

¹² The temporal jurisdiction of the ICTR is limited to crimes committed between 1 January and 31 December 1994.

¹³ See the *The Prosecutor v Barayagwiza*, case ICTR-97-19-AR72, Decision (Prosecutor’s Request for Revision or Reconsideration) of the ICTR Appeals Chamber, dated 31 March 2000, in which the Chamber orders that if Barayagwiza is found guilty, his sentence shall be reduced to take account of the violation of his rights in the pre-trial phase.

assignment, as chief of the Rwandese Information Service (*Office Rwandais de l'Information* – ORINFOR), until 1992. The creation of the radio station RTLM in 1993 was “his initiative and his design, which grew out of his experience as Director of ORINFOR and his understanding of the power of the media”.¹⁴ He is described as “the mastermind” and “principal ideologist of RTLM”, having founded it and having served on the *comité d'initiative* (steering committee). At the height of the genocide, in June 1994, he accompanied the President to the Organization of African Unity (OAU) Assembly meeting in Tunis, apparently as his advisor.¹⁵ Barayagwiza, the second accused, is a lawyer by training, and held a number of senior government positions, including that of Director of Political Affairs in the Ministry of Foreign Affairs. Barayagwiza, one of the co-founders of RTLM, also served on its *comité d'initiative*, and was described by the Chamber as the “number two” at RTLM.¹⁶

While it is not alleged that these two men served as content editors or were involved in the daily running of the radio station, they were responsible for the general editorial policy. Nahimana’s role is more prominent, in that he had *de facto* managerial control over the radio station, at least until 6 April 1994, by for example presiding over the programme committee and signing cheques on behalf of RTLM. In the period preceding the genocide, Nahimana and Barayagwiza represented RTLM in discussions with the Ministry of Information, where concerns about the radicalising content of broadcasts were raised.¹⁷ The Chamber found that they retained at least *de iure* control of the station after 6 April, although evidence of their “active support” was less.¹⁸ Nonetheless, Nahimana visited the station on 8 April 1994, and in June 1994 intervened to ensure that negative broadcasts about the UN Assistance Mission for Rwanda, UNAMIR, were scaled down.¹⁹ Neither of them did anything to prevent messages clearly inciting violence, even when they “knew what was happening at RTLM”.²⁰ Ngeze was the lesser intellectual of the three, initially working as a journalist and later becoming founder and editor-in-chief of *Kangura*, probably the most well-known publication in Rwanda in the period after 1990.²¹

Two of the main charges that were levelled against the accused, genocide and incitement to commit genocide, are considered here. As could be expected, the accused also belonged to political parties, in some instances playing a very important role in the political or military sphere, and acted in those capacities. Barayagwiza was a founder and “decision-maker” of the Coalition for the Defence of the Republic (CDR). His public speeches, his chanting of “let’s exterminate them” (calling for the extermination of Tutsi’s) and his supervision of roadblocks where Tutsi’s were killed, are separated from his culpability flowing from his management responsibilities of RTLM.²²

¹⁴ The *Media Trial* case, par 974.

¹⁵ Par 540; he was also apparently the designated ambassador to Germany (par 679).

¹⁶ Par 567.

¹⁷ Par 970.

¹⁸ Par 972.

¹⁹ Par 972.

²⁰ Par 972.

²¹ Par 122.

²² See *eg*, par 279, 339-341 and 975.

Ngeze was also a founding member of CDR. His order that Tutsi's be killed in Gisenyi, his supervision at roadblocks where Tutsi's were killed, his distribution of weapons to be used against the Tutsi population, and his individual use of a megaphone and speeches to call for genocidal acts to be committed, are likewise not taken into account for the purpose of this investigation.²³

To be sure, the conviction of Nahimana and Barayagwiza can be ascribed in major part to violent actions on their part or direct appeals to violence made by them outside the media context. The question thus arises: To what extent are the convictions *attributable to their involvement in the media*? Put differently: Is the *Media Trial* case a precedent showing that a conviction of genocide (or incitement to genocide) may under international criminal law be based solely on media speech, or responsibility for such speech? And if so, can such a conviction be based on hate speech (or "hate propaganda"), or does the speech have to meet the requirements of "incitement to violence"? In order to provide an answer, an attempt is made here to separate "incitement to violence" and "hate propaganda" through the media from their violent acts and incitement in other contexts.²⁴ As there is no evidence of non-media related violence against Nahimana, his case is the clearest example of culpability for actions by the media.²⁵

However, it is not always easy to keep involvement in a political capacity and as a member of the media separate, especially as the Chamber sees no need to do so. A previous ICTR case, against Eliézer Niyitegeka, also demonstrates this point. The accused was a radio journalist by profession before the genocide, working for Radio Rwanda, and became Minister of Information in the "interim" government. Unlike the accused in the *Media Trial* case, he was only charged with counts related to direct involvement in incitement and violence, and not related to his role as journalist.²⁶

3 GENOCIDE

3.1 *Dolus specialis*

For a conviction on genocide, the perpetrator must have a specific intent (*dolus specialis*), that of destroying, in whole or in part, members of a national, ethnic, racial or religious group, as well as any stable group similar to these groups.²⁷ The requirement of specific intent is unproblematic in respect of "incitement to violence" offences, as the direct intention to kill is apparent from the publication of named, identified individuals, or of generalised information about people to be killed. The intent of the three

²³ See *eg*, par 836, 837, 955, 956 and 968. In fact, at the height of the genocide *Kangura* did not appear, due to Ngeze's military action and "moving around" (par 130).

²⁴ It is conceded that the activities of the accused not related to the media often conflate with those actions related to RTLM and *Kangura*.

²⁵ In his case, his intellectual work was independent of RTLM, such as his essay "Rwanda: Current Problems and Solutions", written in 1003 and re-circulated in 1994 (par 667), which was delinked from his activities related to RTLM.

²⁶ Case No ICTR-96-14-T.

²⁷ *Prosecutor v Akayesu* ICTR-96-4-T, see www.ictor.org par 516. See also on the elements of genocide; and *Boot Genocide, Crimes Against Humanity, War Crimes* (2002) 406-450.

accused is established by way of the “message they convey through the media they control”.²⁸ Nahimana was the “mastermind” who “set in motion the communications weaponry”.²⁹ In establishing Barayagwiza’s intent, the Chamber did not specifically refer to his role in RTLM, but rather to his words and deeds at public meetings and political rallies.³⁰ Ngeze’s intent transpires from his editorship of, and his own writings in, *Kangura*.³¹

3 2 *Actus reus*

In addition, the perpetrator must fulfill the requirements of the specific act (*actus reus*) which gives expression to his specific intent, such as killing or causing harm. To prove the killing, a distinct and separate “intention to kill” need not be established – only an *actus reus*, an unlawful act causing death or harm, needs to be proved. As for the underlying offence, that of “killing”, the *actus reus* is the dissemination of information for which the accused either were directly or indirectly responsible. Nahimana’s *actus reus* lies principally in setting up RTLM and then letting it run its course undisturbed. The *actus reus* of Barayagwiza lies in his superior responsibility for RTLM broadcasts prior to 6 April 1994, and his failure to prevent the escalation of incitement to violence over the airwaves thereafter. Ngeze’s relevant *actus reus* was founding, owning and editing *Kangura*, “a publication that instigated the killing of Tutsi civilians”.³²

3 3 Causation

The more problematic aspect of proving genocide in respect of the media is that of causation, that is, linking the media message, for which the accused are responsible, to the ensuing killing by others. The killing of identified individuals is covered to the extent that there is in fact proof of killing of such specific individuals. The Chamber referred to the “specific causal connection” that was established when individuals whose names had been broadcast on RTLM “were subsequently killed”,³³ finding that “to varying degrees” their deaths were “causally linked to the broadcast”.³⁴ In these instances, there is little doubt about causation if these individuals are killed, or people are killed in locations identified in broadcasts.

Radio is an effective and direct tool, combining emotional utterances in the heat of the moment with immediacy, as exemplified by listeners frequently calling in to RTLM.³⁵ Under such circumstances, radio becomes a conduit to cause death and harm, and the broadcaster and those responsible for the broadcast become co-perpetrators. The radio listeners are the means through which the design of the masterminds operates. In this context, the importance of radio in Rwanda as the main means of

²⁸ Par 957.

²⁹ Par 966.

³⁰ Par 975.

³¹ Par 968.

³² Par 977A.

³³ Par 949.

³⁴ Par 487.

³⁵ See also A 19 fn 1 above, 70.

communication in a hilly and disconnected country has to be kept in mind. Chalk estimates that there were between 400 000 and 500 000 radio receivers in houses and offices at the time, and seven transmitters relaying the broadcasts all over the country.³⁶ This should be contrasted with the more limited impact of the written medium in a country where only approximately 30 percent of the population is literate.³⁷ Indeed, the names published in *Kangura* were not causally linked to specific killings that later ensued.³⁸

Leaving aside those instances where specific killings took place, more pertinent questions arise about the generalised instigation of killing. In this regard, some dangers of uncritically importing domestic criminal law concepts into international criminal law are highlighted. Domestic criminal law is principled on establishing the guilt of individual perpetrators, usually for harming one specified individual or, exceptionally, more than one. However, domestic criminal law provides for indeterminate intent (*dolus indeterminatus generalis*) to commit homicide, in terms of which the perpetrator need not intend to harm or cause harm to a specific individual, but at random. As far as generalised killings are concerned, the Chamber's judgment may be read as an extension of this form of intent to international criminal law.

In arriving at its conclusion that the requirement of causation had been met for both specific and generalised killings, the Chamber did not subscribe to the theory of causation requiring a *conditio sine qua non*. The *conditio sine qua non* doctrine links an outcome to a "proximate cause", thus rejecting causes that are "too remote".³⁹ The downing of the presidential plane was accepted as the spark that set the killing in motion, termed by the Chamber the "immediately proximate cause".⁴⁰ The fact that there was such a *conditio sine qua non* did not in the Chamber's view "diminish the causation to be attributed to the media" (as a "non-proximate" but relevant cause).⁴¹ In other words, the Chamber accepted that there was more than one cause for the genocide. This broadened notion of causality is further supported by the Chamber's statement that the killing could be "said to have resulted, *at least in part*",⁴² from the media's messages. Further support for this broadened concept is found in the gun-metaphor, which describes the plane downing as the "trigger", and the media *as well as the CDR* as the "bullets" in the gun. Put differently, the genocide was "caused" by the downing of the plane, by military and political factors, such as the CDR's preparations, as well as the media's messages. The element of causation thus fulfilled the accused are found guilty on the basis of "incitement to violence" by the media.

³⁶ See Chalk 95.

³⁷ But see *Media Trial* par 235: in terms of the "oral tradition" prevailing in Rwanda, word of mouth secures the spread of messages. One witness testified that between 1 500 and 3000 copies of each issue of *Kangura* were printed (par 122).

³⁸ *Media Trial* case, par 206.

³⁹ See generally Hart and Honoré *Causation in the Law* (1985).

⁴⁰ *Media Trial* case, par 952.

⁴¹ Par 952.

⁴² Par 953, emphasis added.

For “hate propaganda” to amount to genocide, there must thus be a causal link between dissemination of hate and the eventual causing of death. Applying its broadened concept of causality, the Chamber finds criminal accountability in the “message of ethnic targeting for death”.⁴³ But are messages falling short of incitement to violence still “targeting for death”? It may be argued that the Chamber accepted that they are when it found Nahimana guilty for “the words broadcast ... intended to kill on the basis of ethnicity”.⁴⁴ In its judgment, the Chamber also mentions in one breath stereotyping messages causing contempt and furthering hostility towards the Tutsi as a group, on the one hand, and messages to “seek out and take arms against the enemy”, on the other. In the words of the Tribunal, the messages after 6 April intensified in broadcasting “ethnic hatred and a call for violence”,⁴⁵ again not de-linking “incitement to violence” acts (“take arms”) from “hate propaganda”. That remark is later followed by the intensified broadcasts which “called explicitly for the extermination of the Tutsi population”.⁴⁶ However, in the pre-6 April phase broadcasts did not call for the “explicit” killing of Tutsis. Had a strict theory of causation been applied, the downing of the plane and the ensuing events would have been conceived as breaking any possible causal chain between the pre-6 April media messages and the genocide.

To fully appreciate the Chamber’s finding, it must be borne in mind that the more general message of hatred and the more specific message of targeted killing were inextricably linked. “Hate propaganda” messages inform the Chamber’s finding on genocide, but the culpability arises primarily from the killings, linked to identities and specifics. Applying a broad understanding of causation, the Chamber seems to find that these “killings” would not have been possible without messages of hatred, the requisite cultural climate and the constant genocidal moral imperative provided by the media. However, no instance of “hate propaganda”, in isolation, is taken as sufficient to establish the element of causation. In other words, even though “hate speech” by itself would not have been sufficient to lead to a conviction of genocide, it forms part of the chain of causation that supports such a finding.⁴⁷

⁴³ Par 953.

⁴⁴ Par 966.

⁴⁵ Par 971.

⁴⁶ Par 974.

⁴⁷ It may be argued that this construction amounts to little more than saying that hate propaganda provided a “motive” to kill, and that “motive”, intention and causation should be distinguished. But just as the messages have been only one element in proving causation, it may be argued that it is only a partial motivation as well – people receiving these messages are not under a collective state of hypnosis, nor are they passive instruments or empty vessels waiting to be “filled” with meaning. Postulating hate speech as sole causative agent or motivation does not account for multiple other possibilities, such as peer pressure and de-individualisation as member of a group, or may be inspired by vengeance for the death of a family member. The cause or the motive of killing may be instructions by military leaders, in themselves testimony to the fact that radio broadcasts were not sufficient or replaced the military message.

4 DIRECT AND PUBLIC INCITEMENT TO GENOCIDE

An ICTR Chamber elaborated on the elements of the crime of “direct and public incitement to genocide” in a previous case, *The Prosecutor v Akayesu*.⁴⁸ These elements are discussed before applying them to the *Media Trial* case.

4 1 “Incitement”

The incitement must be “accompanied” by a subjective intent similar to that required for a conviction on a charge of genocide – the *dolus specialis* to destroy in whole or in part a protected group.⁴⁹ In the words of the *Akayesu* judgment, this 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”.⁵⁰ The *actus reus* is an act of incitement to *genocide*, in other words, an action aimed at prompting another to commit genocide.⁵¹

4 2 “Public”

Under the requirement that the incitement must be “public”, the Chamber in *Akayesu* understood “truly public forms of incitement” such 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”.⁵²

4 3 “Direct”

The “direct” element of incitement is met by acts that take “a direct form and specifically provoke another to engage in a criminal act”, but must go beyond “mere vague or indirect suggestion”.⁵³ In the Chamber’s view, because this element depends on a multiplicity of factors, including the “cultural and linguistic content”,⁵⁴ “the audience”,⁵⁵ “the culture of Rwanda” and “whether the persons for whom the message was intended immediately grasped the implication thereof”,⁵⁶ it needs to be determined on a “case-by-case basis”.⁵⁷ By focusing on the audience (as the receivers of the message), the Chamber (implicitly) subscribes to a notion prevalent in post-modern thinking, namely that the meaning of a text is not pre-determined by the

⁴⁸ ICTR-96-4-T, see www.ictt.org. On the elements of “incitement to commit genocide”, see eg, Schabas, *Genocide in International Law* (2000) 266-280.

⁴⁹ See Ambos “Article 25 Individual Criminal Responsibility” in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 475 488.

⁵⁰ *The Prosecutor v Akayesu supra* par 560.

⁵¹ *Ibid.*

⁵² *The Prosecutor v Akayesu supra* par 556.

⁵³ *The Prosecutor v Akayesu supra* par 557.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *The Prosecutor v Akayesu supra* par 558.

⁵⁷ *Ibid.*

author (the sender), but is constructed by the audience (the receivers).⁵⁸ This implies that the Tribunal need not try to establish the “intention” of the author, but should rather reconstruct the understanding of the audience as reflected in their response.

Another Chamber adopted a similar approach to establishing meaning in *The Prosecutor v Niyitegeka*.⁵⁹ A witness (GK) testified about a meeting in Kibuye prefecture, at which the accused and the Prime Minister made speeches. They made calls for vigilance against the “enemy”, the “accomplices”, the “Inkotanyi”. The witness testified that the “words were a “pretext”, similar to the language used on RTLM to talk about the enemy without saying “Tutsi”,⁶⁰ adding that “in Kinyarwanda we do not deal with issues in a direct manner”.⁶¹ Given an opportunity for questions after the speeches, the director of the hospital, Léonard Hitimana, asked some questions about the security of survivors, including children, at the hospital. As a result, he was ridiculed.⁶² The defence argued that, in the absence of expert evidence about the interpretation of the words used at the meeting, a literal interpretation of the words rather than the witness’s interpretation should be followed. In other words, a restrictive meaning should be given to the terms “enemy”, as relating to the external forces of the RPF, and as identified collaborators, but not to civilians generally. However, the Chamber found as follows: “Witness GK was testifying to his personal understanding of the words used in their context and his impression as a member of the audience how that audience would have understood those words. As a Rwandan, and someone who was present at the meeting and personally heard those words, he would be in a better position than an expert to understand the nuances and hidden meanings of the words used, and to assess the reaction of the audience at the meeting.”⁶³

Applying the opposite approach, that of establishing the intention of the author in such a situation, the Canadian Federal Court of Appeal found that Leon Mugusera’s infamous 1992 speech, which led to him fleeing to Canada, fell short of incitement to genocide.⁶⁴ A permanent resident in Canada may be deported if it is established that he committed criminal acts before obtaining permanent residence. The Canadian Federal Court of Appeal therefore tested the speech against the crimes of incitement to murder, hatred and genocide, as they exist under Canadian law. Finding that the speech may have contained some “misplaced or unfortunate” statements, and used “brutal language”,⁶⁵ the court concluded that it fell short of proof that he incited murder or genocide. “What would make him guilty is violence in the message that indicated *the speaker intended* to lead

⁵⁸ See eg, Barthes “The Death of the Author” in Heath (translated) *Image – Music – Text* (1987).

⁵⁹ Case No. ICTR-96-14-T.

⁶⁰ *The Prosecutor v Niyitegeka supra* par 240.

⁶¹ *Ibid.*

⁶² *The Prosecutor v Niyitegeka supra* par 241.

⁶³ *The Prosecutor v Niyitegeka supra* par 247.

⁶⁴ In these proceedings, Mugusera was not an accused, but the purpose of answering that question was related to deportation proceedings.

⁶⁵ *Mugesera v Canada (Minister of Citizenship and Immigration)* 2003 FCA 32 http://decisions.fca-caf.gc.ca/fca/2003/2003fca325_judgment_of_8_September_2003.pdf, par 240.

the audience he was addressing to commit reprehensible acts.”⁶⁶ On the basis of the available evidence, and adopting a textual approach, the court overturned the decision of the Trial Division, thus annulling the order for the deportation of Mugesera and his family.⁶⁷

4 4 Causation

For a conviction of incitement, no causal link to an act of genocide is required.⁶⁸ During the drafting of the Genocide Convention, an initial draft proposed the addition of the phrase “whether such incitement be successful or not” after the formulation of the crime “direct and public incitement”. Although this proposal was defeated, it would be wrong to conclude that the drafters intended an appeal to be “successful” in order to qualify as “incitement”. To the contrary, seemingly persuasive was the argument that the phrase was superfluous, as the word “incitement” does not imply a successful consequence (*ie*, the result of genocide in fact occurring).⁶⁹ The fact that the incitement in fact leads to genocide does not render the messages less punishable *as incitement*. In *Akayesu*, the Tribunal held that acts of incitement are punishable even if they “fail to produce results”,⁷⁰ or “failed to produce the result expected by the perpetrator”.⁷¹ I argue that there is a causal element in the concept of incitement itself. The sender has to encode a message that reaches a receiver, otherwise there cannot be incitement, but merely an attempt to incite. The message may fail to reach an audience because it is not transmitted “publicly”, but it may also fail because it does not “reach” its intended audience in some other way. I would suggest that if X is unsuccessful *in arousing an audience*, he attempts to commit incitement, but not incitement as such.⁷²

The question is not whether the incitement has *produced the specific result* or not, but whether the message has *led to incitement*, whether, at least in part, it constitutes a reason for action, or has rendered the action proposed more likely than it would have been without the “incitement”.⁷³ Attempt is not punishable under the Genocide Convention or ICTR Statute. If X in fact incites his audience, even only momentarily, he is guilty of incitement, notwithstanding the lasting effect or the subsequent actions of those incited. The effect of the words on the receivers “colours” or identifies

⁶⁶ *Mugesera v Canada (Minister of Citizenship and Immigration) supra* par 209, (emphasis added).

⁶⁷ For the judgment of the Trial Division see *Mugesera v Canada (Minister of Citizenship and Immigration) [2001] 4 F.C. 421*.

⁶⁸ See also Schabas 277: “Because direct and public incitement is by its nature inchoate or incomplete, it is impossible to prove such a causal link.”

⁶⁹ See *eg*, “incitement was a crime in itself only when it was not successful; when it was, it was equivalent to complicity” (UN Doc. Official Records of the 3rd Session of the GA, Part I, Legal Questions, Sixth Committee, 1948, (hereinafter Official Records), 87th meeting, 85th meeting 222 (Uruguay)).

⁷⁰ *The Prosecutor v Akayesu supra* par 560. See also *The Prosecutor v Ruggiu* ICTR-97-31-1, 1 June 2000 par 16.

⁷¹ *The Prosecutor v Akayesu supra* par 562.

⁷² It must be kept in mind that the message may also lead to thought, rational analysis, considered acceptance or rejection. In such instances one can hardly talk of “incitement” on the part of the receiver of the message. It is thus argued that there needs to be a causal link between the utterance of the sender and the state of mind of the receiver.

⁷³ Hart and Honoré 54.

the utterance as “incitement”. To this limited extent, there is a causal link-requirement between the words and the actions, in order for words to constitute “incitement”. Put differently, the subjective intent of the sender is irrelevant; the message needs to be received in a particular way, which will be distilled from objective factors, such as the reaction of the audience, and the text of the message, *as interpreted by the audience*.

4 5 “Incitement to genocide” distinguished from legitimate freedom of expression and hate speech

In the *Media Trial* case, all three accused were found guilty of incitement to commit genocide. In its judgment, the Chamber was alert to the borderline between incitement to genocide, hate propaganda (“promotion of ethnic hatred”) and legitimate “discussion of ethnic consciousness”.⁷⁴ However, it never clearly and comprehensively analysed this distinction, leaving it to readers to draw their own inferences. These divisions are not watertight: Even if “generating resentment” and “stereotyping”, on the one hand, may be distinguished from “calling for violence”, on the other, it is mostly still so that the call for violence depends on, and is embedded in, the stereotyping and resentment that fuels it and makes it possible.

In the Chamber’s view, expression is protected under the right to freedom of expression, and is thus legitimate if it includes “advocacy of an ethnic consciousness regarding the inequitable distribution of privilege in Rwanda”.⁷⁵ Protected, too, is historical information and political analysis, for example “public discussion of the merits of the Arusha Accords”.⁷⁶ An example of such protected speech is the “moving personal account” Barayagwiza gave over RTLM in 1993 about his experiences as a Hutu.⁷⁷ An important factor distinguishing protected speech from “hate speech” is the factual truth underlying a statement. The Chamber drew a distinction between the impact of “words themselves” (or “the statement itself”) and that of “the reality conveyed by the words” (or the “information conveyed by the statement”).⁷⁸ A statement that 70% of taxis in Rwanda were owned by Tutsi’s would, for example, be protected if it were true. If false, such a statement would be an untrue generalisation and would then fall into the category that the Chamber designates “promotion of ethnic hatred”.⁷⁹

“Promotion of ethnic hatred” (or “hate speech”) is distinguishable from protected free speech in its stereotyping (“harmful ethnic stereotyping”)⁸⁰ of ethnicity and denigration of the other. However, it falls short of incitement to genocide in not combining a “call to action” or “calls of violence” with the stereotyping and denigration. A broadcast on RTLM that the Tutsi is “the one who have all the money” is a generalisation that constitutes “harmful ethnic

⁷⁴ *Media Trial* case par 1020.

⁷⁵ Par 1019.

⁷⁶ Par 1020.

⁷⁷ Par 1019.

⁷⁸ Par 1020 and 1021.

⁷⁹ Par 1020.

⁸⁰ Par 1021.

stereotyping”⁸¹ without calling “on listeners to take action of any kind”.⁸² Promotion of ethnic hatred results in resentment rather than violence. This distinction is also made in respect of *Kangura*. The article “A cockroach cannot give birth to a butterfly” is cited as an example of a piece of writing “brimming with ethnic hatred”, thus falling into the category of “promoting ethnic hatred”, but falling short of constituting genocide in not calling “on readers to take action against the Tutsi population”.⁸³

“Incitement to commit genocide” consists of stereotyping and denigration, plus an implicit or direct call to violence. Even if the media has an educative (or “advocacy-oriented”) purpose, and disseminates views that “constitute ethnic hatred and calls for violence”,⁸⁴ without distancing itself therefrom, the message amounts to incitement to genocide. Content aside, other important factors that convert hate speech into incitement are the context, the “positioning of the media”, as well as the tone and manner of presentation. Incitement is the combination of “ethnic hatred and fear-mongering” with a “call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices”.⁸⁵

4 6 Basis of the finding in the *Media Trial* case

In respect of Barayagwiza and Nahimana, the basis for the conviction on the charge of incitement was very broad: Referring back to its finding that each had genocidal intent, and was “responsible for RTLM programming”, the Chamber found them guilty of incitement.⁸⁶ It is thus not at all clear that the Chamber restricted itself to actions earmarked as “incitement to violence” above, but this is assumed, based on the fact that the Chamber made the three-fold distinction mentioned above,⁸⁷ albeit only implicitly, calling it “critical”.⁸⁸ In respect of Ngeze’s involvement with *Kangura*, the ground for conviction is not much clearer – it lies in the use of the print media to “instill hatred, promote fear, and incite genocide” and in “playing a significant role, in creating the conditions that led to acts of genocide”.⁸⁹ None of these actions seems to clearly constitute a “call to violence”. The reference to “incite genocide” in the first phrase is circular, though, as it begs the question what Ngeze did to “incite genocide”. The second phrase seems to import a notion of causation, which is not required for the conviction at all. But the picture does become clearer if one refers to other remarks by the Chamber, noting that *Kangura* “combined ethnic hatred ... with a call to violence”. This aspect, it is argued here, is the basis of the conviction.⁹⁰

But does their conviction on the basis of incitement extend to “hate propaganda”? As should be clear by now, the impediment to a conviction on

⁸¹ Par 1021.

⁸² Par 1021.

⁸³ Par 1037.

⁸⁴ Par 1024.

⁸⁵ Par 1036.

⁸⁶ Par 1033 and 1034.

⁸⁷ See par 4 5 above.

⁸⁸ Par 1020.

⁸⁹ Par 1038.

⁹⁰ Par 1036.

a charge of “incitement to commit genocide” in respect of words falling short of calls to violence is not causation, as it is in respect of genocide, but proof of specific intent. Can the intent to commit genocide be derived from messages falling short of calling for killing? In this respect, the Chamber notes that causation corroborates intention – genocidal intent may be derived from the fact that genocide occurs, or in the Tribunal’s words: “That the media intended to have this effect is evidenced in part by the fact that it did have this effect”.⁹¹ Does this mean that the hate propaganda carried a latent message “to commit genocide”, that only becomes clear if and when the genocide is in fact committed?⁹² Such reasoning seems to be going too far. As indicated above, the media messages operate on at least three levels – only one of which relates to genocide as such. My conclusion is that, although the Chamber takes hate propaganda into account and does rely thereon to reinforce and strengthen its finding primarily based on messages inciting violence, the Chamber would not have found the accused guilty of incitement to commit genocide if there had been evidence of hate propaganda only. In any event, the judgment and a strict reading of the elements of the crime seem to allow for such an interpretation.

5 CONCLUSION

The ICTR judgment in the *Media Trial* case confirms that those responsible for media messages (and speech, generally) explicitly or implicitly calling for violence and playing some part in causing such violence (in the form of death or other harm), are guilty of the crimes of genocide and incitement to genocide if they also display the required *dolus specialis*. The question remains open whether messages that fall short of making a direct or indirect “call to arms” (thereby constituting incitement to violence) can also lead to conviction under those international crimes. In the *Media Trial* case, the calls for violence and the hate propaganda were so intricately interconnected that the Chamber makes no effort to disentangle them from one another. Indeed, there was no need for the Chamber to do so, as the lesser forms of speech are always embedded in, overshadowed by, and to some extent concealed by, the more dramatic and serious forms of incitement. The Chamber itself refers to this aspect when it observes that the “broadcasts collectively conveyed a message of ethnic hatred and a call for violence ...”.⁹³ Any *ex post facto* attempt to disentangle these “categories of speech” seems destined to remain inconclusive, and will amount to an artificial separation of issues. In any event, the *Media Trial* judgment does not provide an unequivocal precedent that “hate propaganda” is punishable under international criminal law. The only previous case in which speech acts led to a conviction is that of Julius Streicher, convicted by the International Military Tribunal at Nuremberg on 1 October 1946.⁹⁴ In that case, Streicher’s conviction was based on his call for the extermination of Jews, embedded in

⁹¹ Par 1029.

⁹² As the Chamber found that incitement is a continuing or inchoate crime that “continues to the time of the commission of the acts incited” (par 104, emphasis added), even speech uttered before 1 January 1994 may fall within the ICTR’s jurisdiction. However, this temporal extension does not convert incitement to hatred into incitement to violence.

⁹³ The *Media Trial* case par 971.

⁹⁴ See *Media Trial* case par 981.

the knowledge of the reality of their continued extermination. Like *Media Trial, Streicher* is a precedent for culpability under international law for “incitement to murder and extermination” constituting “persecution on political and racial grounds”, and not for hate speech.⁹⁵

A conclusion that “hate propaganda” does not fall to be punished under either genocide or incitement to genocide finds support in the drafting history of the Genocide Convention. An amendment proposed by the USSR during the drafting of the Genocide Convention, calling for the extension of the Convention to cover hate speech, was defeated. Proponents of its inclusion underlined the importance of prevention, rather than punishment, and the historically proven use of “mob psychology”, insinuation and suspicion to “create an atmosphere favourable” to the commission of genocide.⁹⁶ Arguments against such inclusion were: Criminalising hate propaganda may stifle free speech, as it is open to abuse. More convincing, perhaps, was the argument that hate speech was considered “out of place in a convention on genocide”, in the absence of any requirement that the propaganda or speech was intended to destroy “a specific group, which was an essential part of the definition of genocide”.⁹⁷ The Indian delegate best articulated this position when he mentioned that India already punishes hate propaganda in its domestic law, and called on the USSR to do the same, adding that a convention on genocide is not the place to establish hate propaganda as a crime under international law.⁹⁸

Demeaning speech that may be harmful, that may lead to hostility, or even racial tension – but which still falls short of incitement to violence – thus does not amount to a crime under international criminal law. “Hate speech”, in the form of “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”,⁹⁹ is prohibited under the International Covenant on Civil and Political Rights (ICCPR), and in numerous domestic legal systems.¹⁰⁰ It is in those frameworks that these issues have to be dealt with – at least for the time being.

⁹⁵ *Streicher* judgment, *Trials of Major War Criminals before the International Military Tribunal*, Vol XXII, 548-549.

⁹⁶ UN Doc. Official Records, 87th meeting 251 (Poland).

⁹⁷ UN Doc. Official Records, 86th meeting 245 (Greece).

⁹⁸ UN Doc. Official Records, 87th meeting 254 (India).

⁹⁹ A 20(2) of the ICCPR.

¹⁰⁰ In respect of South Africa, see *eg*, s 16(2) of the Constitution (and the determination of the South African Human Rights Commission (SAHRC) in *Freedom Front v SAHRC* – http://www.sahrc.org.za/hate_speech.PDF – that the slogan “Kill the farmer, kill the boer” amounts to hate speech under that provision), as well as s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; in respect of Canada, s 319 of the Criminal Code of Canada; Germany prohibits attacks on human dignity by incitement to hate (a 130 of the Criminal Code), prohibits race-hatred writings (a 131); a 185 provides for the offence of insult (see also the conviction of the musical group “Landser” for disseminating messages of hatred towards foreigners and Jews: Christoph Seils “Neonazi-Musiker zu Haft verurteilt” 23 December 2003, *Frankfurter Rundschau*, 1).