Contemporary Challenges
The Global Crime, Justice and Security Journal

Vol. 2 October 2021 pp. 148-171
10.2218/ccj.v2.5294

Never Again: A Legal Chimera?

Assessing the Prophylactic Dimension of Article 3 of the Genocide Convention

Christopher Hale

LLM in Human Rights, University of Edinburgh (2019-2020)

Abstract

This article examines the scope of the duty that arises from Article 1 of the Genocide Convention[1] (hereinafter, the Convention) that imposes on States the dual obligation to prevent and punish genocide as an international crime. The analysis will focus on the legal problems arising from the punishable acts of Article 3 which asserts a prophylactic framework regarding the crime of genocide. This article argues that Article 3 is fundamental to the obligation to prevent as well as punish since the prohibited acts are inchoate (meaning incomplete). If an act of genocide is legally conceived as incomplete, it can, in theory, be repressed in the spirit of the Convention.

Keywords: the Genocide Convention, inchoate crimes, dolus specialis, incitement, International Criminal Tribunal for Rwanda

[1] "Convention on the Prevention and Punishment of the Crime of Genocide," open for signature December 9, 1948, registration no. A/RES/3/260, http://un-documents.net/a3r260.htm.

1. Introduction

Scholars have characterised the Genocide Convention as "terse" or "laconic."[2] The Convention asserts the contours of the crime of genocide in Articles 2 and 3. First, the Convention defines the scope of genocide as concerning human groups, rather than individuals, attacked on the grounds of identity: thus, genocide is "the denial of the right of existence of entire human groups."[3] The purpose of the Convention can therefore be defined as preventing the destruction of groups rather than individuals. Second, the crime of genocide comprises the conduct element (*actus reus)*, meaning acts of genocide, and a mental dimension (*mens rea)* of specific intent (*dolus specialis*) to destroy such groups "in whole or in part." Even the most egregious acts of mass slaughter of non-combatants are not legally genocide if the perpetrators cannot be proven to possess the special or ulterior intent of the crime. The group as target and the special intent of the perpetrator(s) are the foundational principles of the duty to prevent and punish under Article 1 of the Convention.[4]

Two important points arise from the legal definition of genocide in the Convention. First, Raphael Lemkin, who coined the neologism, conceived special intent as the *ultimo ratio* of genocide to develop a legal means to criminalise emerging patterns of discriminatory violence that might be suppressed before large scale loss of life occurs.[5] The requirement to establish special intent to destroy a protected group distinguishes genocide from other egregious international crimes against humanity, which are not yet codified in an international convention.[6] In customary international law, a "crime against humanity" is perpetrated against civilian populations rather than groups "as such" and is regarded as an international crime if

[2] William A. Schabas, "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crimes of Crimes," *Genocide Studies and Prevention* 2, no. 2 (2007): 101-102.

[3] United Nations General Assembly, "The Crime of Genocide," GA/Res 96 (1), December 11, 1946, https://undocs.org/en/A/RES/96(I).

[4] The definitions in Article 2 of the Convention are reproduced verbatim in the statutes of the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) and can thus be considered international customary law.

[5] Katherine Goldsmith, "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach," *Genocide Studies and Prevention: An International Journal* 5, no. 3 (2010).

[6] United Nations General Assembly, "Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries," A/74/10, 2019, https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf.

the attack is widespread and/or systemic.[7] However, proving the essential mental element of alleged acts of genocide or complicity in genocide is a formidable obstacle in practice.[8] Second, by making special intent definitive of the crime, the Convention implies a temporal dimension: it was intended to suppress the *future* enactment of the special intent to commit genocide. Nevertheless, special intent alone is insufficient to merit preventive action or punishment: Instead, the preventive capacity of the Convention is articulated in Article 3 which sets out inchoate but nonetheless punishable acts.

2. The Significance of Article 3

Schabas observes that the "other acts" of genocide articulated in Article 3 (b), (c), (d), and (e) might be regarded as "lesser crimes" that do not bear the same stigmatising capacity as Article 3 (a), GENOCIDE.[9] This distinction captures one of the core problems of the Convention, which is intended to both punish perpetrators of genocide and prevent the consummation of the crime. The purpose of the Convention, expressed in the Preamble, requires conceiving genocide in two dimensions, encompassing simultaneously the completed act, the destruction of the group, and acts taken to effectuate the act. The legal bridge that binds these dimensions is the concept of the inchoate or incomplete crime. In standard texts, such crimes are defined as follows:

> A person does not break the criminal law simply by having evil thoughts. Where, however, a person takes steps towards effecting that plan to commit a substantive offence which is more than merely preparatory, he may in the process commit one of the inchoate crimes of attempt, conspiracy, or encouraging or assisting the commission of an offence.[10]

The prosecution of individuals for committing such inchoate crimes can therefore be regarded as preventive. It can be inferred from the Convention that the drafters conceived the

[7] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2019), 37.

[8] Stahn, *A Critical Introduction to International Criminal Law,* 52.

[9] William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), 307.

[10] Michael John Allen and Ian Edwards, "Inchoate offences," in *Criminal Law* (Oxford: Oxford University Press, 2019).

crime of genocide as sequential and escalatory. This is evident in Article 3 which asserts the prophylactic value of inchoate or incomplete punishable acts of genocide, such as incitement and conspiracy, which affirm the grave risk of consummation of the specific genocidal intent. The accumulative nature of genocide means that upstream acts can be captured along a distinct spectrum of criminal liability. Furthermore, the Convention insists that perpetrators of the international crime of genocide must be shown to harbour the specific intent "to destroy in whole or in part." The distinct mental dimension of the crime acts as a legal "control" that applies to, for example, propagandistic incitements calling for the destruction of a group and acts of mass killing. The mental dimension of the crime, the specific intent to "destroy in whole or in part" implies that the "other acts" asserted in Article 3 can be conceived as "preparatory" and thus punishable upstream of the completed act, Article 3 (a).[11] To sum up, the assertion that the acts set out in Article 3 are "lesser crimes" is technically correct under common law. Under the terms of the Genocide Convention, the stigmatising capacity of such acts is enforced by the special intent of the perpetrator: Stigma is captured by the special intent that characterises all punishable acts of genocide. The purpose that frames the criminalisation of such preparative acts is the possibility to suppress them, encapsulating the preventive capacity of the Convention.

George Fletcher makes an important observation that the definitions of genocide in Article 2 can also be regarded as inchoate, as the use of the future tense demonstrates: "Deliberately inflicting on the group conditions of life *calculated to bring about* its physical destruction…" "imposing measures *intended to prevent* births within the group."[12] As will be expanded upon in this paper, both Article 2 and 3 imply a temporal or sequential dimension to the crime of genocide which girds the Convention in a preventive armoury, if special intent can be proven and therefore the grave risk to the group established. The significance of Article 3 regarding

[11] William Schabas, "Genocide and Crimes against Humanity: Clarifying the Relationship," in *The Genocide Convention: The Legacy of 60 Years*, eds. Harmen van der Wilt, Jeroen Vervliet, Goran Sluiter and Johannes Houwtink ten Cate (Koninklijke Brill, 2012), 3-14.

[12] Ruti Teitel, Roy Lee, William K. Lietzau et al., "The International Criminal Court: Contemporary Perspectives and Prospects for Ratification," *New York Law School Journal of Human Rights* 16, no. 2, (Spring 2000): 526-528.

the scope of the duty to not only punish but prevent genocide under the Convention will be addressed in the following section.

3. The Scope of the Duty to Prevent Genocide under Article 3

3.1. Inchoate Crimes

Schabas asserts that "while the final Convention has much to say about the punishment of genocide, there is little to suggest what prevention of genocide really means."[13] Under the Convention, the scope of prevention is implicit in Articles 3 and 8 which, first, define the punishable acts of genocide and, secondly, the actions that States might take to suppress such acts. Article 3 (a) asserts genocide as a punishable act, but the other acts of genocide[14] acquire their significance apropos prevention as "inchoate" or incomplete infractions: *infraction formelle* under civil law, meaning punishable as such. The gravity of such inchoate acts derives from the high risk of *future violations*, even if the principal offence, namely genocide, never takes place.[15] This follows from the legal requirement that perpetrators of the inchoate acts of Article 3 harbour the special intent to destroy in whole or in part a protected group.

It follows that Article 3 implies that genocide can be conceived in teleological terms as a "system" of acts, each one of which is *punishable* and thus the object of lawful preventive action. Schabas is thus right to argue that the convention is vocal on punishment, but he is wrong to conclude that it remains silent on prevention: The punishment – of the other acts of genocide – *constitutes prevention*. The gravity of the international crime of genocide, asserted in the language of the Convention chapeau – or preface to the treaty – affirms the obligation of States to apply the duty to prevent any of the illegal acts committed "upstream" of the completed act of genocide.

---

[13] William Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 81.

[14] Article 3: The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.
These are referred to punishable acts in Articles 4, 5, 6, 7, 8 and 9.

[15] William Schabas, "Other Acts of Genocide," in *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 308.

Nevertheless, Article 3 has provoked complex and, in some cases, unresolved legal argument. The legal problem of the "other acts" asserted in Article 3 can be broadly summed up as follows. First, preventive intervention in the territory of another State upstream of the completed act of genocide risks provoking dispute under international law. The sanctity of state sovereignty under international law has been challenged by the notion of the "Responsibility to Protect" (R2P), which arguably captures the duty to prevent under the Convention.[16] However, the principle of non-intervention is foundational in international law and remains a potent constraint on States that might resolve to respond to atrocities of any kind taking place in the territory of other states.[17] The Commentary to Article 54, paragraph 6, of the Responsibility of States for Internationally Wrongful Acts (ARISWA) succinctly asserts that "there is no clearly recognised entitlement of States… to take countermeasures in the collective interest."[18] It follows that fulfilling the obligation to prevent the punishable "other acts" of genocide asserted in Article 3 (b), (c), (d), and (e) hazards imposing significant strain on the tolerance of the international community for a preventive intervention, for example regarding the activities of radio or television stations allegedly broadcasting "direct and public incitement." Propaganda was recognised in the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[19] and the International Criminal Tribunal for Rwanda (ICTR) as a means to facilitate crimes against humanity and, in certain cases, genocide.[20] Nevertheless, it is difficult to envision a State tolerating suppression of its media by other States on the grounds that they might be engaging in direct and public incitement to genocide. The further upstream the duty to prevent is activated, the greater the risk that an interventionist

[16] Andreas S. Kolb, *The UN Security Council Members' Responsibility to Protect: A Legal Analysis* (Berlin: Springer, 2018).

[17] André Nollkaemper, "'Failure to Protect' in International Law," in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford: Oxford University Press, 2015), 6-8.

[18] "Responsibility of States for Internationally Wrongful Acts," open for signature December 12, 2001, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf .

[19] *Prosecutor v. Radoslav Brđanin (Trial Judgement)*, IT-99-36-T(2004), 34, https://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf.

[20] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Judgement and Sentence)*, ICTR-99-52-T (2003), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/trial-judgements/en/031203.pdf; Gregory S. Gordon, "'A War of Media, Words, Newspapers, and Radio Stations': The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech," *Virginia Journal of International Law* 45, no. 1 (2004); Diane F. Orentlicher, "Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana," *New England Journal of International and Comparative Law* 12, no. 17 (2005).

State or organ of the United Nations may be accused of breaching the customary norm of State sovereignty.

Secondly, the terms of Article 3 (conspiracy, incitement, attempt and complicity) are enigmatic and contentious terms. The efficacy of Article 3 to define the scope of legal prophylaxis rests significantly on the inchoate and thus preparative nature of the criminal acts that are punishable in the absence of overt action. Nevertheless, some jurists and scholars have argued that Article 3 challenges political and social rights to free association and expression, while weakening the core concept of individual liability through collective indictments.[21] These problems will be examined below, first under Article 3 (b), CONSPIRACY and second under Article 3 (c), DIRECT AND PUBLIC INCITEMENT.

3.2. Conspiracy

Under the Convention, the crime of genocide does not *expressis verbis* require multiple perpetrators to conceive a plan to destroy a protected group. In theory, it is possible for genocide to be committed by a single individual (lone génocidaire),[22] possessing the required intent and means: Article 4 refers to the punishment of "constitutionally responsible rulers, public officials or private individuals…" The systemic nature of the crime defined as "destruction in whole or in part" of a group makes the existence of a conspiracy, as a possible precondition of enactment, a reasonable inference regarding the nature of the crime.[23] By asserting conspiracy as a punishable, inchoate act, the Convention provides a powerful tool of accountability, and thus prevention, since it reflects the gravity of risk that is concomitant with a joint enterprise. Nevertheless, several legal problems arise from the application of conspiracy in indictments for genocide.[24]

[21] Orentlicher, "Criminalizing Hate Speech."

[22] William A. Schabas, "Darfur and the Odious Scourge: The Commission of Inquiry's Findings on Genocide," *Leiden Journal of International Law* 18, no. 4 (2005), 877, insists, however, that genocide has consistently been committed by states or *state like* collective entities (non-state actors) and that the "*lone genocidaire*" is a "sophomoric *hypothèse d'école."*

[23] Claus Kreß, "The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case," *Journal of International Criminal Justice* 7, no. 2 (2009): 297-306, doi:10.1093/jicj/mqp031.

[24] Mohamed C. Othman, "Conspiracy to Commit Genocide," in *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (Berlin: Springer, 2005)197-205, https://doi.org/10.1007/3-540-28885-6_6.

The first problem concerns how the crime of conspiracy is understood. In common law, a conspiracy is committed when two or more persons come to an agreement to commit a criminal act: The agreement is the statutory crime.[25] It is immaterial whether the "substantive" crime that the defendants conspired to commit is carried out. However, in many civil law systems, conspiracy can only be punished if the substantive crime is committed.[26] Agreement is not punishable; an overt criminal act is required. Conspiracy is, by and large, alien to civil law.[27] In common law, overt acts following an agreement are distinct criminal offences.[28] These fundamentally different legal concepts have produced inconsistencies in the fora of international criminal law.

Although Article 3 (b), CONSPIRACY was understood in common law terms by the drafters of the 1948 Convention,[29] the International Law Commission and the drafters of the Rome Statute did not conceive conspiracy as an inchoate crime. According to these sources, the substantive offence, in short, must be committed. It is thus a form of *complicity*. The consequences of this approach are twofold: First, the International Criminal Court cannot prosecute conspiracy to commit genocide, and second, in national State legislations under the continental tradition, there is no provision for prosecutions under the Convention Article 3 (b).[30] Since prosecuting conspiracy as an inchoate offence may provide a significant preventive mechanism under the Convention, this is a troubling omission. Notwithstanding, there have been a number of indictments of conspiracy to commit genocide before the ICTR which

[25] Criminal Law Act 1967 s 1; see also R. v. Aspinall (1876) Q.B.D., "…the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement."

[26] A useful overview of conspiracy under Civil Law systems is Wienczyslaw J. Wagner, "Conspiracy in Civil Law Countries," Journal of Criminal Law, Criminology & Political Science 42, no. 2 (1951): 171-183.

[27] Aaron Fichtelberg, "Conspiracy and International Criminal Justice," *Criminal Law Forum*, 17, no. 2 (2006): 149-176, 151.

[28] Wagner, "Conspiracy in Civil Law Countries, Journal of Criminal Law and Criminology," 171.

[29] Othman, "Conspiracy to Commit Genocide."

[30] See William Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 315-316 referring to Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July, 1996, p.25; "Rome Statute of the International Criminal Court," open for signature in July 1, 2002, https://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, Article 6.

provide important clarifications of Article 3 (b) of the Genocide Convention.[31] Since the ICTR case law demonstrates the most concerted use of conspiracy to commit genocide, the record of its proceedings provides significant and, in some cases, contentious case law.[32]

Taking the case of *Prosecutor v Musema,* the Trial Chamber recognised conspiracy to commit genocide as an inchoate offence and thus punishable "even if it fails to produce a result."[33] It must be proved that the alleged conspirators reached agreement, as required in common law: Negotiation to commit a crime is insufficient. The alleged conspirators must, furthermore, share the special intent to commit genocide. Conspiracy is thus a "double intent" crime, meaning that there is an intention to agree and an intention to commit the offence.

The contours of conspiracy as a common law crime have two principal objectives pertinent to genocide. Conspiracy recognises, firstly, the grave risks inherent in preparatory acts such as an agreement that manifests the special intent of genocide, and, secondly, that a joint agreement by a number of parties is more likely to achieve a harmful result by means of concerted action. Thus, a concerted agreement is a graver risk to a protected group. Notwithstanding the prophylactic dimension of the criminalisation of conspiracy in genocide cases, the crime represents a legal paradox since, as Goldstein noted, "conspiracy impinges on the act requirement." In other words, it can be conceptualised as lacking the *actus reus*. Unlike Article

[31] *Prosecutor v. Musema*, ICTR-96-13-T (2000), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-13/appeals-chamber-judgements/en/011116.pdf, 70; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T (2003), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-44a/trial-judgements/en/031201.pdf, 175; *Prosecutor v. Nahimana et al.*,ICTR-99-52-T (2003), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/trial-judgements/en/031203.pdf, 345; *Prosecutor v. Seromba*, ICTR-2001-66-I (2006), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-66/trial-judgements/en/061213.pdf, 90; *Prosecutor v. Bikindi*, ICTR-2001-72-T (2007), http://www.worldcourts.com/ictr/eng/decisions/2007.06.26_Prosecutor_v_Bikindi_2.htm, 5-6; *Prosecutor v. Ndindiliyimana et al.* (Case No. ICTR-00-56-T), Decision on Defence Motions Pursuant to Rule 98bis, 29 March 2007, https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-00-56/appeals-chamber-judgements/en/140211.pdf accessed 25/9/2021, 6; *Nahimana et al. v. Prosecutor*,ICTR-99-52-A (2007), 351. These indictments for conspiracy to commit genocide were pursued under the authority of Article 2(3)(b) of the Statute of the International Tribunal for Rwanda, equivalent to Article 3(b) of the Genocide Convention.

[32] The ICTY indicted individuals for conspiracy to commit genocide as part of a joint criminal enterprise (JCE) in Popović et al, IT-05-88-A, 2010.

[33] *Prosecutor v Musema*, ICTR-96-13-T (2000), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf.

3 (d), ATTEMPT, prosecutors are not obligated to look beyond proof of agreement to preparatory action or "commencement of consummation."[34]

Indictment for conspiracy thus activates legal risks long recognised in liberal democracies founded on common law. The prosecution of conspiracy can pose a threat to rights to freedom of association and to free speech, and is thus open to exploitation to repress controversial opinions or political organisations.[35] The increased possibility of abuse derives from the fact that it is not required in a conspiracy indictment to prove the charge of conspiracy by means of a formal agreement, such as a written contract: The criminal agreement may be tacit and thus inferred from words or conduct. In conspiracy trials under common law, hearsay evidence can be admissible, with certain restrictions.[36] Since conspiracy is, by definition, secretive, the prosecutor may rely on deduction and inference derived from evidence of such acts as meetings and gatherings, speeches and directives that can be taken to prove a shared agreement to commit a crime. Conspiracy has indeed been characterised as "the prosecutor's darling."[37] Nevertheless, hypothetical abuse of legal procedure is not identical to a normative critique of the contours of the crime. The foundational principle of any legal system is to protect the innocent and prosecute the guilty: The prophylactic value of Article 3 (b) remains intact if international criminal fora demonstrate respect for the fundamental legal rights of the accused.

Two further problems can be discerned in the case law of the ICTR. The first problem was implied by the ICTR Office of the Prosecutor, that concluded the Rwandan genocide was a single, interconnected crime and that its generalised and methodical nature "gave rise to the inference of coordination, hence conspiracy to destroy, in whole or in part, the Tutsi, as such."[38] The attendant legal problem that follows from the "joint agreement" definition of conspiracy

[34] Abraham S. Goldstein, "Conspiracy to Defraud the United States," *The Yale Law Journal* 68, no. 3 (1959): 406.

[35] See for example Phillip E. Johnson, "The Unnecessary Crime of Conspiracy," *California Law Review* 61, no. 5 (1973): 1137, referenced in Fichtelberg, "Conspiracy and International Criminal Justice," 157-165.

[36] See Norman M. Garlandand Donald E. Snow, "The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements," *Journal of Criminal Law, Criminology and Police Science* 63, no. 1 (1972).

[37] Andrew Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 2003), 449-460; S. A. Klein, "Conspiracy: The Prosecutor's Darling," *Brooklyn Law Review* XXIV, no. 1: 1-11.

[38] United Nations General Assembly Security Council, "Annual Report of the ICTR to the U.N. General Assembly," A/55/435-S/2000/927, October 2, 2000, https://undocs.org/pdf?symbol=en/S/2000/927, 19.

is that prosecutors may resort to ambitious joinder trials which risk conflating by association accused individuals with different levels of liability, and thus compromising the legal requirement to prove individual responsibility. This became apparent with the filing of the so called "Big" or "Global" indictment against Theoneste Bagosora and no less than 28 others in 1998.[39] Ng'arua notes that in *Bagosora* "the indictment tended to include sweeping statements as to the mode of participation of the accused, and the circumstances surrounding the commission of the crimes."[40] "Sweeping statements" implies that the prosecution failed to respect the individual contribution of alleged conspirators to the joint enterprise. It follows from this critique that in any joinder trial, the Trial Chamber is obligated to balance the joint identity of the crime as an agreement made by two or more individuals with the rights of indicted individuals. It is instructive that in the case of *Bagosora*, the indictment of Bagosora and 28 others was modified to Bagosora and *three* others; while other individuals charged were "re-grouped into thematic titles" that reflected different positions and roles.[41] In short, by refining the scope of the indictment, the ICTR Trial Chambers "learnt" how to respect individual rights in "collective" conspiracy indictments.

The second problem that arises from the application of conspiracy in indictments for genocide is that the *preparatory* crime in ICTR case law, the punishable act of conspiracy, is inferred from the criminal *acts* of the alleged conspirators, acting together, thus making indictment for an inchoate act contingent on overt actions which follow a criminal agreement. The ICTR treated conspiracy as a distinct crime, but there is a risk of tautology in proving conspiracy through the completed overt actions of genocide. This may be a legitimate prosecution strategy but raises the question of how Article 3 (b) might be instrumentalised in a *preventive* prosecution, when no overt action has taken place, following agreement.

[39] *Prosecutor v T. Bagosora and 28 Others*, ICTR-98-37-1 (1998), http://www.haguejusticeportal.net/Docs/Court%20Documents/ICTR/Bagosora_Judgment.pdf.

[40] Paul Ng'arua, "Specificity of Indictments in ICTR Genocide Trials," in *The Criminal Law of Genocide: International, Comparative, and Contextual aspects*, ed. Paul Behrens and Ralph Henham (London: Routledge, 2007), https://doi.org/10.4324/9781315615127, 177.

[41] Ng'arua, "Specificity of Indictments," 177.

Resolving this question requires asserting the dual obligation to prevent and punish under the Convention. The solution requires that future suits seeking to prevent genocide under Article 3 (b) recognize the contours of conspiracy as an inchoate crime asserted in the case law of ICTR prosecutions for (a) conspiracy and (b) commission of genocide. For example, in *Niyitegaka*, the judgement recognised evidence of meetings held by the accused Minister of Information and others to plan killing Tutsi and to distribute weapons. At the meetings, the minister proposed a plan for attacks on the following day and appointed individuals to lead the attacks. At further meetings, the Minister urged others to ensure that all Tutsi would be killed.[42] The ICTR case law in indictments for conspiracy offers significant clarification on the legal contours of conspiracy, thus validating the legal prosecution of preparatory actions.

Furthermore, from the perspective of the duty to *prevent* under the Convention, the probative challenge of proving conspiracy when genocide has not occurred warrants a lower burden of inferred and deductive proof. This argument is founded first on the legal identity of conspiracy in common law as a recognition of the greater risk of a joint enterprise and, secondly, on the preventive spirit of the Convention asserted in Article 1.

To conclude, the risk of illiberal prosecutions must be balanced against the preventive efficacy of conspiracy as an inchoate crime. Criminal prosecutions of atrocity crimes carry a heavy burden of stigmatisation. Proceedings are subject to unusual levels both of scrutiny and appeal. It is reasonable to assert that the rights of individuals accused of participating in a conspiracy under Article 3 (b) will be protected by international standards of justice, notably the presumption of innocence, fairness and due process.[43]

3.3. Direct and Public Incitement

The drafters of the Convention recognised that prejudicial rhetoric targeting religious, ethnic or national groups might have a role in the preparation of acts of genocide. The final draft, however, drew a conceptual and legal line between rhetoric expressing hatred of certain

[42] *Prosecutor v E. Niyitegaka*, ICTR-96-14 (2004), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-14/appeals-chamber-judgements/en/040709.pdf.

[43] Othman, "Conspiracy to Commit Genocide," 207.

groups, however pernicious, and the punishable act of "direct and public incitement."[44] Nevertheless, indictments under Article 3 (c) have triggered legal controversy. The fundamental reason is that criminalising incitement as an inchoate crime, without requiring proof of result, might be regarded as a "pretext to interfere with freedom of expression."[45] In brief, discriminatory rhetoric directed at certain groups might be permissible under the human right to free expression embodied in several international treaties.[46] The United States strongly resisted making incitement an inchoate crime under the Convention since, it was argued that the act might make "any newspaper article criticising a political group" a preparatory act of genocide.[47] Therefore the drafters of the Convention sought to constrain the scope of the act as "direct and public" – but provided no substantive guidance regarding the precise meaning of these words. The legal difficulties implicit in Article 3 (c) have stubbornly resisted resolution, as demonstrated in the jurisprudence of the ICTR, which indicted a number of individuals on the charge of direct and public incitement.[48]

A significant difficulty is apparent in the *Akayesu* Judgement in which the Trial Chamber debated whether a distinction should be made between inchoate incitement, where the act is unsuccessful, and incitement to take part in criminal acts, when genocide takes place as a consequence of the act of incitement.[49] In *Akayesu*, "successful incitement" was a matter of fact since the accused made an inflammatory speech to a large crowd that included members of the *Interahamwe* militia who subsequently carried out mass killings.[50] Arguably, in *Akayesu*

[44] Diane F. Orentlicher, "Criminalizing Hate Speech in the Crucible of Trial: *Prosecutor v. Nahimana*," *American University International Law Review* 21, no. 4 (2006): 569.

[45] Cited in William Schabas, *Genocide in International Law: the Crime of Crimes* (Cambridge, 2000), 269 referring to UN Doc. A/C.6/SR.84 (Fitzmaurice, United Kingdom)

[46] "Universal Declaration of Human Rights," proclaimed in December 10, 1948, https://www.un.org/sites/un2.un.org/files/udhr.pdf, Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

[47] William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide," *McGill Law Journal* 46, no. 1 (2000): 321.

[48] Indictments for the direct and public incitement of genocide before the ICTR were pursued under the authority of Article 2(3)(c) of the Statute of the International Tribunal for Rwanda, equivalent to Article 3(c) of the Genocide Convention.

[49] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4 (1998), https://unictr.irmct.org/en/cases/ictr-96-4.

[50] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4 (1998), "The Chamber is of the opinion that there is a causal relationship between Akayesu's speeches at the gathering of 19 April 1994 and the ensuing widespread massacres of Tutsi in Taba." [...] "From the foregoing, the Chamber is satisfied beyond a reasonable

"successful incitement" was also a form of complicity and/or abetting.[51] Nevertheless, the Trial Chamber affirmed that it was "satisfied beyond a reasonable doubt that, by the above-mentioned speeches made in public and in a public place, Akayesu had 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."[52] The significance of the Trial Chamber's judgement is that it affirmed that by *making the speeches,* Akayesu had committed the punishable act of direct and public incitement to genocide. The egregious consequences of his act were not irrelevant but not required to secure a conviction under the Tribunal's equivalent to Article 3 (c).

Another legal problem that the Tribunal confronted was asserting incitement as a punishable crime under the Convention distinct from free expression of opinion protected by other human rights instruments. The "Media Case" concerned the editors of *Radio Télévision Libre des Milles Collines* (RTLM) and the newspaper *Kangura*: vehicles of Hutu propaganda hostile to Tutsis before and during the outbreak of genocide in Rwanda.[53] The accused editors Jean-Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze were convicted by the ICTR of, among other offences, incitement to genocide. In this case, the Trial Chamber recognised that hate speech, provocative statements and even advocating for violence are not sufficient for a conviction under the Tribunal's equivalent to Article 3 (c).[54] The Judgement states for example:

---

doubt that, by the above-mentioned speeches made in public and in a public place, Akayesu had 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. Accordingly, the Chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide, as defined above," paragraphs 673 (vii) and 674.

[51] Schabas, "Hate Speech in Rwanda," 157.

[52] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4 (1998).

[53] See for example, Jean-Marie Biju-Duval, "'Hate Media' - Crimes Against Humanity and Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda," in *The Media and the Rwanda Genocide*, ed. Allan Thompson (London: Pluto Press, 2007), 343; Gabriele Della Morte, "De-Mediatizing the Media Case: Elements of a Critical Approach," *Journal of International Criminal Justice* 3, no. 4 (2005): 1024-25, doi:10.1093/jicj/mqi064; Gregory S. Gordon, "'A War of Media, Words, Newspapers, and Radio Stations': The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech," *Virginia Journal of International Law* 45, no. 1 (2004): 139; Orentlicher, "Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana," 17; Wibke K. Timmermann, "The Relationship Between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?," *Leiden Journal of International Law* 18, no. 2 (2005): 257; Alexander Zahar, "The ICTR's 'Media' Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide," *Criminal Law Forum* 16, no. 1 (2005): 33.

[54] *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR-99-52-T.

> The Chamber notes that not all of the writings published in *Kangura* and highlighted by the Prosecution constitute direct incitement. *A Cockroach Cannot Give Birth to a Butterfly*, for example, is an article brimming with ethnic hatred but did not call on readers to take action against the Tutsi population.[55]

The distinction was encapsulated by Learned Hand as between "keys to persuasion" and "triggers to action."[56] How then did the Trial Chamber in the "Media Case" distinguish free expression from incitement as a punishable act? The following extract from the Judgement provides an answer:

> RTLM broadcasting was a drumbeat calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase 'heating up heads' captures the process of incitement systematically engaged in by RTLM, which after 6 April 1994 was also known as 'Radio Machete'. The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach.[57]

Thus, the Trial Chamber defined "direct and public" as the synthesis of discriminatory rhetoric with calls to act addressed to listeners with a capacity to inflict harm. To sum up, "direct" means that the criminality of the act is embodied, not in offensive opinion as such but in the appeal to commit the crime of genocide, even if euphemistic language is used to this end, such as "get to work," a phrase which was understood by the listeners as an instruction to kill members of the targeted group. "Public" refers to the space or medium of utterance, such as a radio broadcast or megaphone used in a public space. Furthermore, the incitement or criminal

[55] *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR-99-52-T, 344.

[56] Masses Publhising Co. v. Patten, 244 F. 535, 541 (S.D.N.Y. 1917) (Hand, J.), quoted in Catharine A. MacKinnon, "International Criminal Tribunal for Rwanda judgment on media incitements to persecution or to commit genocide," *The American Journal of International Law* 103, no. 1 (2009): 101.

[57] *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR-99-52-T, 342-343.

utterance must be understood by the "receiver" as "directly provoking the perpetrator(s) to commit genocide."[58]

Nevertheless, convictions for incitement to genocide are likely to remain tricky in future suits. Certain aspects of the Trial Chamber Judgement in *Prosecutor v Nahimana et al* were challenged by the Appeals Chamber, which reduced the defendants' sentences and issued a rebuke to the trial court.[59] Some convictions were set aside on grounds of timing because the inciting act had taken place before the 1st of January 1994, the ICTR's jurisdictional starting point, or the critical date of the 6th of April, when the killings began. In short, the relationship between the incitement and the completed act was excessively attenuated. Liability was thus time-limited: "the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing…"[60] In its analysis of Hassan Ngeze's incendiary writings in *Kangura,* for example, published in the early months of 1994, the Appeals Chamber argued that it could not find "beyond reasonable doubt" that the publications contributed to the "commission of acts of genocide *between April and July 1994*." [61]

Does this mean that the indictment of an inchoate punishable act requires a result to occur within a certain temporal parameter? Liability is incurred by the closeness of temporal relationship of incitement to action/completion. The question raised is whether incitement be defined: (a) as a species of criminal rhetoric that calls for action with the specific intent of commissioning genocide, or (b) can the criminality of rhetorical acts only be clarified by the timing of subsequent illegal acts? The second interpretation (b) clearly weakens the *preventive* capacity of Article 3 (c).

[58] *Prosecutor v. Muvunyi*, ICTR-2000-55A-T (2006), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-00-55/trial-judgements/en/060912.pdf, 126.

[59] Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor, ICTR-99-52-A (2007), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/appeals-chamber-judgements/en/071128.pdf.

[60] Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor, ICTR-99-52-A (2007), 162.

[61] Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor, ICTR-99-52-A (2007), 164-165.

A significant legal precedent cited by the Trial Chamber in *Nahimana* is the *Streicher* case at the International Military Tribunal (hereafter IMT), convened after the Second World War in Nuremberg.[62] Julius Streicher, editor of *Der Stürmer*, was not convicted under the Convention, which was not yet part of international law, but the Trial Chamber in *Nahamina* mistakenly cited the verdict of the IMT that Streicher's conviction was for antisemitic writings that "significantly predated the extermination of the Jews in the 1940s."[63] Although the IMT referred to Streicher's pre-war activities advocating for the extinction of the Jewish people, the IMT convicted him of "persecution" on the grounds of his *continued* advocacy of extermination at a time when the accused knew such practices were taking place. Temporal jurisdiction was thus critical to the *Streicher* case and the ICTR Trial Chamber misunderstood the grounds for conviction.

The Trial Chamber's error, however, strikes at the core of the legal problem regarding Article 3 (c). Historians recognise that the impact of hate propaganda over an indefinite period may trigger genocidal violence at an unforeseen future moment.[64] Since common law does not require incitement to have a result to be indictable as a punishable act, it is hard to understand why temporal contiguity should, as the Appeals Chamber argued, be legally dispositive. Schabas argues:

> Genocide is prepared with propaganda, a bombardment of lies and hatred directed against the targeted group and aimed at preparing the "willing executioners" for the atrocious tasks they will be asked to perform. Here, then, lies the key to preventing genocide.[65]

The implication is that the "bombardment" need not be time limited: preparation ("heating up heads") may occur over months or even years. The Convention does not *exclude* hate speech on condition that it fulfils the criteria of being direct and public: The inciting rhetoric is not

[62] "The Avalon Project: Judgement: Streicher," Yale Law School, accessed August 12, 2020, https://avalon.law.yale.edu/imt/judstrei.asp.

[63] *Prosecutor v.* Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, ICTR 99-52-T, 351.

[64] David Yanagizawa-Drott, "Propaganda and Conflict: Evidence from the Rwandan Genocide," *The Quarterly Journal of Economics* 129, no. 4 (2014): 1947-1994, https://doi-org.ezproxy.is.ed.ac.uk/10.1093/qje/qju020.

[65] Schabas, "Hate speech in Rwanda."

merely hate filled opinion but an articulation of specific intent to destroy a protected group in the form of a call to action. By recognising that *Kangura* had, throughout the period between publishing its first edition in May 1990 and the genocidal events of 1994, committed incitement, the Trial Chamber offers a cogent precedent for acting at an early stage against discriminatory rhetoric uttered by individuals evidently harbouring genocidal intent.

The solution to the legal difficulty of distinguishing between free expression of hateful utterance and the crime of direct and public incitement must therefore rest on establishing a gauge of *possible consequences*: in short, the gravity of foreseeable future acts. The test framework must be applicable to establish liability when a genocide does not occur. Susan Benesch has proposed a compelling test framework that respects both the spirit and intent of the Convention and historical analyses of actual genocides.[66] Benesch proposes interrogating the facts of the allegation of incitement as follows:

1. *Was the speech understood by its audience as a call to genocide?* For example, a propagandist may not urge his listeners to "go and kill Tutsis" but might use a euphemism like "go to work" which becomes significant when it is recalled that the instrument of mass killing was the machete, a work tool. Such coded phrases may change over time and so the dispositive point is the broadly understood meaning of a term or phrase at the moment of utterance.
2. *Did the speaker have the capacity to influence his or her audience and did the audience possess the means to commit genocide?* It should be added here that the speaker should be aware that the audience has this capacity.
3. *Had the targeted group suffered recent violence?* This question is addressed to the specific vulnerability of the targeted group and whether it was customary to use violence against members of the group.
4. *Was the "marketplace of ideas" still functioning?* This may prove to be a difficult matter to resolve but refers to the possibility that in a situation where there is a risk of genocide, a

[66] Susan Benesch, "Vile Crime in Inalienable Right: Defining Incitement to Genocide," *Virginia Journal of International Law* 48, no. 3 (2008): 351-525.

monoculture of ideas significantly focused on tainting the targeted group raises the likelihood of a genocide.

5. *Did the speaker dehumanise the group and justify killing?*
6. *Had the audience received similar messages?* Historical studies of genocides consistently note that targeted groups are denied humanity and that the message is reinforced by repetition.[67]

The proposed framework, which has not yet been tested in case law, has the capacity to resolve many of the legal problems raised by Article 3 (c). Applied holistically rather than piecemeal, an interrogative approach to the facts of the indictment would clarify whether or not the acts of the accused could be legitimately interpreted as merely rhetorical or preparatory.

4. Conclusion

Like any treaty, the Genocide Convention is a living instrument. The international tribunals for the former Yugoslavia and Rwanda have provided substantial jurisprudence that can be regarded as addressing some of the lacunae in the Convention. These developments of the Convention, however, struggle to resolve some of the more intractable issues regarding the duty to prevent and punish Genocide, as set out in Article 1. The deeper issue is whether the Convention is regarded *primarily* as an instrument of prevention or retrospective punishment. Both approaches are legitimated by Article 1, but the scope of the duty articulated in Article 3 is problematic. It is perhaps inevitable that international case law that refines and interprets the Convention has been restricted to retrospective legal processes initiated when the criminal act of genocide has been consummated. Hitherto, the practice of international criminal law has provided little guidance regarding the repression of upstream punishable acts. Nevertheless, if the spirit of the Convention is to prevent as well as punish, the inchoate crimes of Article 3 remain foundational to its efficacy and require further testing in practice.

[67] There is a substantial literature on the impact of propaganda on genocides, see for example Yanagizawa-Drott, "Propaganda and Conflict: Evidence from the Rwandan Genocide."

Bibliography

Allen, Michael John, and Ian Edwards. "Inchoate offences." In *Criminal Law*. Oxford: Oxford University Press, 2019.

Ashworth, Andrew. *Principles of Criminal Law*. Oxford: Oxford University Press, 2003.

Biju-Duval, Jean-Marie. "'Hate Media' - Crimes Against Humanity and Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda." In *The Media and the Rwanda Genocide*, edited by Allan Thompson, 343-361. London: Pluto Press, 2007.

Criminal Law Act 1967.

"Convention on the Prevention and Punishment of the Crime of Genocide." Opened for signature December 9, 1948. Registration no. A/RES/3/260. http://un-documents.net/a3r260.htm.

Della Morte, Gabriele. "De-Mediatizing the Media Case: Elements of a Critical Approach." *Journal of International Criminal Justice* 3, no. 4 (2005): 1019-1033. doi:10.1093/jicj/mqi064.

Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor. ICTR-99-52-A (2007). https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/appeals-chamber-judgements/en/071128.pdf.

Fichtelberg, Aaron. "Conspiracy and International Criminal Justice." *Criminal Law Forum* 17, no. 2 (2006): 149-176. DOI:10.1007/s10609-006-9013-6.

Garland, Norman M., and Donald E. Snow. "The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements." *Journal of Criminal Law, Criminology and Police Science* 63, no. 1 (1972): 1-22. https://doi.org/10.2307/1142266.

Goldsmith, Katherine. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach." *Genocide Studies and Prevention: An International Journal* 5, no. 3 (2010): 238-257. http://dx.doi.org.ezproxy.is.ed.ac.uk/10.3138/gsp.5.3.238

Goldstein, Abraham S. "Conspiracy to Defraud the United States." *The Yale law journal* 68, no. 3 (1959): 405-463. https://doi.org/10.2307/794457.

Gordon, Gregory S. "'A War of Media, Words, Newspapers, and Radio Stations': The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech." *Virginia Journal of International Law* 45, no. 1 (Fall: 2004): 139-198.

Johnson, Phillip E. "The Unnecessary Crime of Conspiracy." *California Law Review* 61, no. 5 (1973): 1137-1188. https://doi.org/10.2307/3479790. Referenced in Fichtelberg, "Conspiracy and International Criminal Justice."

Klein, S. A. "Conspiracy: the Prosecutor's Darling." *Brooklyn Law Review* XXIV, no. 1: 1-11.

Kolb, Andreas S. *The UN Security Council Members' Responsibility to Protect: A Legal Analysis*. Berlin: Springer, 2018.

Kreß, Claus. "The Crime of Genocide and Contextual Elements: A comment on the ICC pre-trial chamber's decision in the Al Bashir case." *Journal of International Criminal Justice* 7, no. 2 (2009): 297-306. doi:10.1093/jicj/mqp031.

Masses Publishing Co. v. Patten. 244 F. 535, 541 (S.D.N.Y. 1917) (Hand, J.). Quoted in MacKinnon, Catharine A. "International Criminal Tribunal for Rwanda Judgment on Media Incitements to Persecution or to Commit Genocide." *The American Journal of International Law* 103, no. 1 (2009): 97-103. DOI: 10.2307/20456724.

Nahimana et al. v. Prosecutor. ICTR-99-52-A (2007).

Ng'arua, Paul. "Specificity of Indictments in ICTR Genocide Trials." In *The Criminal Law of Genocide: International, Comparative, and Contextual Aspects,* edited by Paul Behrens and Ralph Henham, 175-183. London: Routledge, 2007. https://doi.org/10.4324/9781315615127.

Nollkaemper, André. "'Failure to Protect' in International Law." In *The Oxford Handbook of the Use of Force in International Law,* edited by Marc Weller. Oxford: Oxford University Press, 2015.

Orentlicher, Diane F. "Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana." *New England Journal of International and Comparative Law* 12, no. 17 (2005): 557-596.

Othman, Mohamed C. "Conspiracy to Commit Genocide," in *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor,* 191-239. Berlin: Springer, 2005. https://doi-org.ezproxy.is.ed.ac.uk/10.1007/3-540-28885-6_6.

Popović et al, IT-05-88-A, (2006). https://www.icty.org/en/case/popovic.

Prosecutor v E. Niyitegaka. ICTR-96-14 (2004).
https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-14/appeals-chamber-judgements/en/040709.pdf.

Prosecutor v T. Bagosora and 28 Others. ICTR-98-37-1 (1998).
http://www.haguejusticeportal.net/Docs/Court%20Documents/ICTR/Bagosora_Judgment.pdf.

Prosecutor v Musema. ICTR-96-13-T (2000).
https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf.

Prosecutor v. Nahimana et al. ICTR-99-52-T (2003).
https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/trial-judgements/en/031203.pdf.

Prosecutor v. Bikindi. ICTR-2001-72-T (2007).
http://www.worldcourts.com/ictr/eng/decisions/2007.06.26_Prosecutor_v_Bikindi_2.htm.

Prosecutor v. Kajelijeli. ICTR-98-44A-T (2003).
https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-44a/trial-judgements/en/031201.pdf.

Prosecutor v. Musema. ICTR-96-13-T (2000).
https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-13/appeals-chamber-judgements/en/011116.pdf.

Prosecutor v. Muvunyi. ICTR-2000-55A-T (2006).
https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-00-55/trial-judgements/en/060912.pdf.

Prosecutor v. Ndindiliyimana et al. ICTR-00-56-T (2007).
https://unictr.irmct.org/en/cases/ictr-00-56

Prosecutor v. Seromba. ICTR-2001-66-I (2006),
https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-66/trial-judgements/en/061213.pdf.

Prosecutor v. Radoslav Brđanin (Trial Judgement). IT-99-36-T (2004).
https://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf.

R. v. Aspinall (1876) Q.B.D.

"Responsibility of States for Internationally Wrongful Acts." Opened for signature December 12, 2001. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

"Rome Statute of the International Criminal Court." Opened for signature in July 1, 2002. https://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf.

Schabas, William A. "Darfur and the Odious Scourge: The Commission of Inquiry's Findings on Genocide." *Leiden Journal of International Law* 18, no. 4 (2005): 871-885. doi:http://dx.doi.org.ezproxy.is.ed.ac.uk/10.1017/S0922156505003031.

___. "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crimes of Crimes." *Genocide Studies and Prevention* 2, no. 2 (2007): 101-122. http://dx.doi.org.ezproxy.is.ed.ac.uk/10.3138/gsp.2.2.101.

___. *Genocide in International Law: the Crimes of Crimes.* Cambridge: Cambridge University Press, 2000.

___. *Genocide in International Law: The Crime of Crimes.* 2nd ed. Cambridge: Cambridge University Press, 2009.

___. "Genocide and Crimes against Humanity: Clarifying the Relationship," In *The Genocide Convention: The Legacy of 60 Years*, edited by Harmen van der Wilt, Jeroen Vervliet, Goran Sluiter and Johannes Houwtink ten Cate, 1-14. Koninklijke Brill, 2012.

Stahn, Carsten. *A Critical Introduction to International Criminal Law*. Cambridge: Cambridge University Press, 2019.

Teitel, Ruti, Roy Lee, William K. Lietzau et al. "The International Criminal Court: Contemporary Perspectives and Prospects for Ratification." *New York Law School Journal of Human Rights* 16, no. 2, (Spring 2000): 505-551.

"The Avalon Project: Judgement: Streicher." Yale Law School. Accessed August 12, 2020. https://avalon.law.yale.edu/imt/judstrei.asp.

The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Judgement and Sentence). ICTR-99-52-T (2003). https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/trial-judgements/en/031203.pdf.

The Prosecutor v. Jean-Paul Akayesu. ICTR-96-4 (1998). https://unictr.irmct.org/en/cases/ictr-96-4.

Timmermann, Wibke K. "The Relationship Between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?" *Leiden Journal of International Law* 18, no. 2 (2005): 257-282. DOI:10.1017/S0922156505002633.

United Nations General Assembly Security Council. "Annual Report of the ICTR to the U.N. General Assembly." A/55/435-S/2000/927. October 2, 2000. https://undocs.org/pdf?symbol=en/S/2000/927.

United Nations General Assembly. "Draft articles on Prevention and Punishment of Crimes Against Humanity, With Commentaries." A/74/10, 2019. https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf.

United Nations General Assembly. "The Crime of Genocide." GA/Res 96 (1). December 11, 1946. https://undocs.org/en/A/RES/96(I).

"Universal Declaration of Human Rights." Proclaimed in December 10, 1948. https://www.un.org/sites/un2.un.org/files/udhr.pdf.

Wagner, Wienczyslaw J. "Conspiracy in Civil Law Countries." *Journal of Criminal Law, Criminology & Political Science* 42, no. 2 (1951): 171-183. https://doi.org/10.2307/1139875.

Yanagizawa-Drott, David. "Propaganda and Conflict: Evidence from the Rwandan Genocide." *The Quarterly Journal of Economics* 129, no. 4 (2014): 1947-1994. https://doi-org.ezproxy.is.ed.ac.uk/10.1093/qje/qju020.

Zahar, Alexander. "The ICTR's 'Media' Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide." *Criminal Law Forum* 16, no. 1 (2005): 33-48. DOI:10.1007/s10609-005-6734-x.