

How the Rome Statute Weakens the International Prohibition on Incitement to Genocide

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I. INTRODUCTION

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide¹ criminalizes not only genocide itself, but also other acts including direct and public incitement to genocide. The criminalization of incitement to genocide serves at least two important goals. First, it helps to ensure that the people who may bear the greatest responsibility for bringing about genocide — like Hassan Ngeze, the newspaper publisher who “poisoned the minds of his readers, and by his words and deeds caused the death of thousands of innocent civilians,”² according to the International Criminal Tribunal for Rwanda (ICTR) — can be punished. Second, it gives the international community the opportunity to try to prevent future genocides by prosecuting individuals who incite genocide before their incitement is successful.

But the full effectiveness of the criminalization of incitement is threatened by the Rome Statute of the International Criminal Court, which reduces the status of incitement from a crime in its own right to a mode of criminal participation in genocide. Unlike the Rome Statute, the Genocide Convention and the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia all treat incitement as a separate crime. The status of incitement as a separate crime has several important effects. First, it makes the task of proving that a defendant has committed incitement comparatively straightforward, in that it is unnecessary for the prosecutor to perform the sometimes difficult task of showing a causal link between the incitement and a subsequent act of genocide. Second, in com-

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1. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

2. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment, ¶ 1101 (Trial Chamber Dec. 3, 2003), *aff'd*, Case No. ICTR 99-52-A, Judgment (Appeals Chamber Nov. 28, 2007). *But see* Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 497 (2008) (observing that Ngeze's newspaper, *Kangura*, had a circulation of a few thousand in a country of eight million mostly illiterate people).

bination with the modes of criminal participation listed in the tribunals' statutes, it makes it possible to charge a defendant with aiding and abetting the incitement of genocide. Third, it allows prosecutors to charge individuals with incitement to genocide even when it may not be possible to prove that the atrocities that were subsequently committed amounted to genocide rather than crimes against humanity or war crimes. Finally, it makes it possible to try to prevent genocide when it has not yet occurred by indicting and prosecuting individuals who incite genocide before the incitement comes to fruition.

All these effects depend on the status of incitement as a separate crime rather than a mode of criminal participation. The Rome Statute, by listing incitement as a mode of participation rather than as a crime in itself, and by not including incitement in the list of crimes over which the ICC has jurisdiction, renders the prohibition on incitement far less effective than it has been in the jurisprudence of the ICTR. The states parties to the Rome Statute can and should address this problem by making a simple textual change so that the Rome Statute treats incitement in the same way as the ICTR and ICTY Statutes do.

The remainder of this Note proceeds in three parts. Part II starts by describing how the Genocide Convention and the tribunals' statutes treat incitement as a separate crime. Part II(A) describes several ICTR cases involving incitement, and explains how the charges of incitement in many of those cases would have been substantially more difficult to prove if incitement had been regarded as a mode of participation rather than as a crime in itself. Part II(B) discusses three other ways in which the status of incitement as a separate crime assists in the prevention and punishment of genocide and incitement. Part III explains how the Rome Statute's text and structure reduce the status of incitement to that of a mode of participation, and responds to some counterarguments concerning the proper interpretation of the Rome Statute. Part IV briefly concludes by proposing that the Rome Statute be amended to correct the problem.

II. INCITEMENT UNDER THE GENOCIDE CONVENTION, ICTR STATUTE, AND ICTY STATUTE

The ICTY and ICTR Statutes provide for various forms of individual criminal responsibility: an individual can be held responsible for a crime if he or she "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of" the crimes listed and defined in the statutes.³ Separately from their general provisions on indi-

3. Statute of the International Tribunal for Rwanda art. 6.1, Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 7.1, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute].

vidual criminal responsibility, both statutes also declare that “the following acts shall be punishable: . . . conspiracy to commit genocide . . . direct and public incitement to commit genocide . . . attempt to commit genocide . . . complicity in genocide.”⁴ These punishable acts form part of the statutes’ articles defining genocide. Thus, the statutes seem to somewhat awkwardly list certain forms of individual criminal responsibility in one generally applicable article and other forms, applicable to genocide alone, in another article.⁵

The two statutes take this approach because their definitions of genocide replicate the Convention on the Prevention and Punishment of the Crime of Genocide,⁶ a document that does not make a clear separation between primary and secondary liability. The Convention essentially treats genocide, conspiracy, incitement, attempt, and complicity as five distinct crimes, each of which shall be punishable in its own right. The Convention refers to conspiracy, incitement, attempt, and complicity not as forms of criminal responsibility but as “other acts” that states parties to the Convention are obligated to prevent and punish in addition to genocide itself.⁷ Therefore — as the ICTR has recognized — under the Genocide Convention and the tribunals’ statutes, direct and public incitement is not a way in which a person can be guilty of genocide; it is a separate crime punishable in its own right.⁸

An advantage of this approach that has been widely appreciated is that it makes it easier for states to fulfill the “Prevention” aspect of the purposes for which the international community adopted the Genocide Convention. A person can be convicted of direct and public incitement to commit genocide even in a situation where no genocide has (yet) occurred. This purpose was important to many of the states that took an active role in the drafting of the Genocide Convention.⁹

4. ICTR Statute, *supra* note 3, art. 2.3; ICTY Statute, *supra* note 3, art. 4.3.

5. The tribunals initially struggled with the question of how to interpret the fact that the statutes are structured in this way — particularly with respect to complicity and aiding and abetting, concepts that substantially overlap. See Chile Eboe-Osuji, “Complicity in Genocide” Versus “Aiding and Abetting Genocide”: *Construing the Difference in the ICTR and ICTY Statutes*, 3 J. INT’L CRIM. JUST. 56 (2005) (discussing the tribunals’ approaches to this issue in *Akayesu*, *Krstic*, and *Semanza*); see also Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 HARV. HUM. RTS. J. 241 (2008); Daniel M. Greenfield, *The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters*, 98 J. CRIM. L. & CRIMINOLOGY 921 (2008).

6. See Genocide Convention, *supra* note 1.

7. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 259 (2000).

8. See Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Judgment, ¶ 678 (Appeals Chamber Nov. 28, 2007) (“[I]nstigation under Article 6(1) of the Statute is a mode of responsibility By contrast, direct and public incitement to commit genocide under Article 2(3)(c) is itself a crime”); see also SCHABAS, *supra* note 7, at 266 (“In specifying a distinct act of ‘direct and public incitement’, the drafters of the Genocide Convention sought to create an autonomous infraction, one that . . . is an inchoate crime, in that the prosecution need not make proof of any result.”).

9. See SCHABAS, *supra* note 7, at 269.

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Another advantage of this approach is that it avoids what could otherwise be a difficult problem of proving a causal link between an act of incitement and a subsequent act of genocide. If incitement is a crime in its own right, then it is not necessary for a prosecutor to prove that an act of incitement has any causal connection to another person's subsequent act of genocide, such as a massacre or a mass rape.¹⁰ The defendant can simply be found guilty of incitement, rather than being held secondarily liable for an act of genocide that he incited another person to commit. If incitement were instead understood as a form of participation in the underlying crime of genocide, the prosecutor would have to show that the inciter should be held liable for a particular, subsequent act of genocide, to which the act of incitement had some causal connection.¹¹

To see why this distinction is important, it is helpful to look at the factual settings of the cases in which the ICTR has found individuals guilty of incitement. In all of these cases, the evidence was clear that the defendant had directly and publicly incited others to commit genocide. But in several cases, it would have been difficult and perhaps impossible to prove that the incitement had led to any particular person's subsequently committing an act of genocide for which the inciter could be held responsible.

A. *The ICTR's Incitement Cases and the Potential Challenge of Proving Causation*

1. *Nahimana and Incitement Through the Mass Media.* — In *Prosecutor v. Nahimana*,¹² the ICTR found two defendants guilty of direct and public

10. See *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment, ¶ 1015 (Trial Chamber Dec. 3, 2003) (“The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement.”), *aff'd*, Case No. ICTR-99-52-A, Judgment (Appeals Chamber Nov. 28, 2007); Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L.J. 87, 107 (2001). Gopalani observes:

[T]he [ICTR]'s jurisprudence only requires a possible causal link. The possible causal link requirement comports with the court's holding [in *Akayesu*] that incitement is punishable whether it is successful or not. Similar to a common-law inchoate offense, direct and public incitement is a separate and specific crime, which is punishable by virtue of the criminal act alone.

Id.

11. Exactly how strong this causal connection would have to be is an open question, since no incitement cases have yet been litigated at the ICC and the Rome Statute does not specify. The court might not require the prosecutor to show that the incitement was the proximate cause of the genocidal act, nor that the incitement was what caused the direct perpetrator to form the intention to commit genocide. But it would be absurd to hold a defendant criminally responsible for an act of genocide that he did not cause at all. For instance, a defendant could hardly be said to be responsible for an act of genocide that occurred before the defendant's act of incitement. Likewise, a defendant whose writings amounted to incitement could not reasonably be held to have directly incited an act of genocide committed by an illiterate person.

12. Case No. ICTR 99-52-A, Judgment (Appeals Chamber Nov. 28, 2007).

incitement to commit genocide.¹³ The two defendants were held responsible for broadcasts on the radio station *Radio Television Libre des Mille Collines* (RTLM)¹⁴ and for articles in the newspaper *Kangura*¹⁵ that amounted to direct and public incitement. The tribunal was able to find the defendants guilty of incitement through a careful examination of the language used in the radio broadcasts and newspaper articles, understood in the cultural and linguistic context of Rwanda in 1994.¹⁶

If the prosecutor had had to prove that the defendants' acts of incitement had caused particular people to commit particular acts of genocide, the task of obtaining the convictions of these three defendants would have been much more difficult — perhaps prohibitively so. This is because radio and other mass media — the most effective means of incitement to genocide — put considerable distance between the speaker and the audience. In order to actually prove that communications by the *Nabimana* defendants had caused acts of genocide, the prosecutor would have had to establish certain key facts, each of which could pose a considerable evidentiary challenge.¹⁷

To begin with, the prosecutor would have needed to show that a perpetrator of genocide had actually listened to a particular broadcast on RTLM, or read a particular issue of *Kangura*, in which language that amounted to incitement was used. This in itself could well be difficult. The vast majority of what was said on RTLM or written in *Kangura* did not amount to direct incitement to genocide, even if it did express hatred toward Tutsis.¹⁸ So the prosecutor would need to first convince the court that a particular statement did constitute incitement, and then find a way to establish that the perpetrator had actually been listening to the radio at the moment when the statement was made (or had read a particular article that contained that statement). But how would this be done? How many people can remember with certainty that another person was listening to the radio at a particular hour on a particular date, several years ago?

13. See *id.* The trial chamber also found a third defendant, Jean-Bosco Barayagwiza, guilty of incitement, but the appeals chamber overturned this conviction (while upholding Barayagwiza's conviction on other charges). See *id.* ¶ 1096.

14. Two of the defendants, Ferdinand Nahimana and Barayagwiza, were among the founders of the station. See *Nabimana*, Case No. ICTR 99-52-T, ¶¶ 5–6. Nahimana controlled RTLM's finances and editorial policy. See *Nabimana*, Case No. ICTR-99-52-A, ¶ 794.

15. The defendant Hassan Ngeze was the founder and editor-in-chief of *Kangura*. See *Nabimana*, Case No. ICTR-99-52-T, ¶ 7.

16. See, e.g., *id.* ¶¶ 468–471.

17. See Joshua Wallenstein, Note, *Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for the Incitement of Genocide*, 54 STAN. L. REV. 351, 397 (2001) (“The most difficult element of the [*Nabimana*] case, were it necessary to be proven, would be the causal nexus between the actions of the accused and the criminal actions of others.”).

18. See *Nabimana*, Case No. ICTR 99-52-A, ¶¶ 738–751 (examining several individual RTLM broadcasts that might have been thought to constitute incitement, and concluding that it could not determine beyond a reasonable doubt that any of them rose to that level); *id.* ¶¶ 770–774 (finding that three specific *Kangura* articles constituted incitement).

The type of witness most likely to remember such a thing might be one who was himself implicated in genocide — one who remembered the inciting communication because he had enjoyed it or been influenced by it himself, and who had subsequently committed an act of genocide or who knew someone else who had listened to the same broadcast and subsequently committed such an act. But such a witness's credibility would be open to question. If the witness had himself been convicted of genocide, his willingness to testify might be thought to be motivated by a desire to reduce the length of his sentence, seek a pardon, or seek parole. His testifying might also be motivated by a desire for publicity, or to rehabilitate his own public image. Or, if the witness had come to regret his participation in genocide, his testifying might be motivated by anger or resentment against someone seen as an author of the genocide as a whole. And if the witness had been accused or indicted but not yet convicted of genocide and was testifying against the inciter in exchange for a grant of immunity, the witness's credibility might be even more subject to doubt. Certainly it would be open to the defense to impute to the witness any of these motives, depending on which seemed most plausible under the circumstances.¹⁹

Moreover, even if it was established that a particular individual had listened to or read a communication that amounted to incitement, the prosecutor would still have to show that that individual had in fact committed an act of genocide. But genocide is not easy to prove. The prosecutor must prove not only that the perpetrator committed some act that formed part of an overall genocide, but also that that individual had the *mens rea* that is part of the definition of the crime: "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."²⁰ This specific intent is not self-evident from the fact that a person commits an act of violence in the context of a genocide. As Professor Dermot Groome points out, individual actors in a genocide may have any of a variety of motivations.

The difficulties in establishing genocide are further complicated by the collective nature of the crime. Historical manifestations of genocide have always involved large numbers of actors, with each contributing in varying degrees to the harm to the targeted group. . . . In complex criminal acts that are the culmination of a multitude of persons, genocidal intent may be found in an equivalent multitude of places. While the simplest formulation would be characterized by senior state officials and every person contributing to the *actus reus* sharing the same genocidal

19. Cf. Prosecutor v. Muvunyi, Case No. ICTR 2000-55A-A, ¶¶ 129–131 (Appeals Chamber Aug. 29, 2008) (doubting the credibility of a witness who was an *Interahamwe* militiaman and who may have been motivated to exaggerate the defendant's role in acts of genocide in order to minimize his own role).

20. Genocide Convention, *supra* note 1, art. II; ICTY Statute, *supra* note 3, art. 4.2; ICTR Statute, *supra* note 3, art. 2.2; Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

intent, that is not the reality of this complex crime. It may be that the direct perpetrators harbor genocidal intent, whereas state officials do not. Conversely, the state's senior leaders may be the architects of a carefully calculated genocidal plan that employs a multitude of others as instrumentalities who themselves do not possess genocidal intent. For example, leaders may exploit nationalism to foment fear, causing an explosion of violence directed at the protected group but whose direct perpetrators lack the *dolus specialis* [i.e., specific intent] of genocide and are motivated by a misperceived need for self-defense. These leaders may, with genocidal intent, be relying on the traditional discipline of soldiers to gain their participation in an *actus reus* for which the soldiers themselves have no relevant *dolus specialis*.²¹

Therefore, in order to secure a conviction for incitement to genocide, the prosecutor would have to establish the specific intent in the mind of the individual direct perpetrator, in addition to proving that he had committed the act itself after receiving a communication that amounted to incitement.

Thus, if incitement to genocide had been treated as a mode of criminal participation under the ICTR Statute, the prosecution in *Nahimana* would have had to take several potentially difficult additional steps in order to obtain a conviction on that basis. It was the status of incitement as a separate crime that made it reasonably possible to obtain a judgment that reflected Nahimana and Ngeze's responsibility for using the mass media to incite genocide.²²

In addition to Nahimana and Ngeze, the ICTR has convicted a few other defendants for their involvement in incitement through RTLM broadcasts. These included Jean Kambanda, who was the prime minister of Rwanda during the 1994 genocide and became the first former head of government to be convicted of genocide²³ when he pled guilty to crimes including direct and public incitement.²⁴ Kambanda admitted that he had committed incitement by speaking both via RTLM and at various public meetings.²⁵ He also admitted that he had publicly encouraged RTLM to continue to incite massacres of Tutsis, calling the station "an indispensable weapon in the fight against the enemy."²⁶

21. Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 *FORDHAM INT'L L.J.* 911, 919–20 (2008) (footnotes omitted).

22. All three defendants were, of course, convicted of other crimes as well. But, considering the particularly important role of the media in the Rwandan genocide, the convictions of Nahimana and Ngeze for incitement are arguably of special significance for the purpose of establishing the truth about how the genocide came about.

23. See Jeremy Greenstock, *International Human Rights and Standards*, 23 *FORDHAM INT'L L.J.* 398, 400 (1999).

24. See *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment (Trial Chamber Sept. 4, 1998), *aff'd*, Case No. ICTR 97-23-A, Judgment (Appeals Chamber Oct. 19, 2000).

25. See *id.* ¶ 39(vii)–(viii).

26. See *id.* (vii).

Another who pled guilty to inciting genocide over RTLM's airwaves was Georges Ruggiu, a Belgian national who became interested in Rwandan politics, moved to Rwanda, and worked as journalist and broadcaster for RTLM in 1994.²⁷ He acknowledged that through his radio broadcasts he had repeatedly encouraged the killing of Tutsis.²⁸ Also pleading guilty was Joseph Serugendo,²⁹ who served as a member of RTLM's governing board³⁰ and provided "technical assistance and moral support"³¹ to the station during the genocide. Among other actions, Serugendo supervised technicians who restored RTLM's broadcasting capacity after its studio in Kigali was destroyed.³²

Ruggiu, Serugendo, and Kambanda were all convicted at least partly on the basis of radio broadcasts that incited genocide.³³ Although all three pleaded guilty, their pleas were presumably motivated in part by the likelihood that they would be convicted. Their convictions, like those of the *Nabimana* defendants, were thus made reasonably possible by the status of incitement as a separate crime under the ICTR Statute, which made it unnecessary for prosecutors to prove that the relevant radio broadcasts had caused specific acts of genocide.

2. *Akayesu and Incitement Through In-Person Speech.* — The ICTR found that Jean-Paul Akayesu, the *bourgmestre* of Taba commune, had used his respected and powerful position in the community to commit direct and public incitement to genocide, as well as directly committing genocide and other crimes.³⁴ Akayesu was "a well known and popular figure in the local community"³⁵ who, as *bourgmestre*, was "the leader of the commune and commonly treated with great respect and deference."³⁶ The trial chamber found that Akayesu had given a speech that he knew "would be construed as a call to kill the Tutsi in general"³⁷ before a crowd of over a hundred people.³⁸

27. See *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment, ¶¶ 38–43 (Trial Chamber June 1, 2000).

28. See *id.* ¶¶ 44–45, 50–51.

29. *Prosecutor v. Serugendo*, Case No. ICTR 2005-84-I, Judgment, ¶ 4 (Trial Chamber June 12, 2006).

30. *Id.* ¶ 16.

31. *Id.* ¶ 24.

32. *Id.* ¶¶ 25–27. Serugendo was also a member of the National Committee of the *Interabamwe* militia. *Id.* ¶¶ 16, 20–21. He admitted that before the genocide, he had been involved in planning the incitement of hatred and violence toward Tutsis through "political meetings and rallies" as well as through the establishment and operation of RTLM. *Id.* ¶¶ 21–22.

33. Since Kambanda's and Serugendo's convictions involved incitement at mass meetings as well as through RTLM, this analysis only applies to the aspects of their cases that were predicated on the radio broadcasts.

34. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment (Trial Chamber Sept. 2, 1998), *aff'd*, Case No. ICTR-96-4-A, Judgment (Appeals Chamber June 1, 2001).

35. *Id.* ¶ 51.

36. *Id.* ¶ 54.

37. *Id.* ¶ 673(iv).

38. *Id.* ¶¶ 672–674.

The trial chamber found that there was “a causal relationship between Akayesu’s speeches at the gathering . . . and the ensuing widespread massacres of Tutsi in Taba.”³⁹ However, this finding was not necessary to the trial chamber’s decision to find Akayesu guilty of incitement; the chamber held that “direct and public incitement to commit [genocide] must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.”⁴⁰

Because of the relatively small size of the audience to which Akayesu spoke, as well as the fact that Tutsis were subsequently massacred in the area where he was the respected community leader, it was relatively easy for the trial chamber in *Akayesu* to say that the direct and public incitement had been a causal factor in the massacres. In this respect, the circumstances of the incitement in *Akayesu* were different from those in cases like *Nabimana* and *Ruggiu*, in which the trial chambers did not make findings as to whether the incitement at issue had actually caused acts of genocide to be committed.

However, the *Akayesu* trial chamber’s statement that the incitement had been successful would have been harder to make if it had been necessary to the judgment. Perhaps the tribunal could still have reached that conclusion, but the defense would surely have contested it and made the prosecution work to prove it. The prosecutor would have had to show that particular individuals in the audience of Akayesu’s speech had subsequently committed acts of genocide. This might not have been prohibitively difficult, since Akayesu made the speech to a gathered crowd of people, some of whom might well have been able to testify that other individuals had heard the speech and gone on to commit acts of genocide (though those perpetrators’ *mens rea* would still need to be proved). But since the tribunal understood incitement to be a separate crime and not a mode of participation, it could forgo this kind of factual inquiry and observe in passing that the incitement had been successful — an observation that amounted to an *obiter dictum* rather than a contested finding of fact.

The ICTR has convicted a few other defendants for inciting genocide through speeches at public meetings. As previously noted, Jean Kambanda pleaded guilty to incitement through speeches at public meetings as well as on the radio. Juvénal Kajelijeli, a *bourgmestre* like Akayesu, was also found guilty of incitement on the basis of speeches he gave at public meetings.⁴¹ Eliézer Niyitegeka, who was Minister of Information during the genocide,

39. *Id.* ¶ 673(vii); *see id.* ¶ 675 (“In addition, the Chamber finds that the direct and public incitement to commit genocide as engaged in by Akayesu, was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of Taba.”).

40. *Id.* ¶ 562.

41. Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, ¶¶ 5–6, 856–861 (Trial Chamber Dec. 1, 2003), *aff’d*, Case No. ICTR 98-44A-A (Appeals Chamber May 23, 2005).

was likewise found guilty of incitement on the basis of his speeches at public meetings.⁴²

A more unusual set of factual circumstances, one that would have made it particularly difficult to prove a causal link between the defendant's speech and a subsequent genocidal act, is presented by the case of Simon Bikindi. Bikindi was a popular singer and a public figure of some importance among Hutus.⁴³ He was accused of inciting Hutus to commit genocide through the lyrics of some of his songs,⁴⁴ as well as through public speeches.⁴⁵ The trial chamber found that most of the actions of which Bikindi was accused either fell outside the tribunal's temporal jurisdiction⁴⁶ or did not constitute direct and public incitement to genocide.⁴⁷ However, the trial chamber did hold Bikindi responsible for incitement on the basis of one action in particular, in which he drove along a road as part of a convoy of *Interahamwe* militia, in a vehicle that had a public address system, speaking over the loudspeaker to crowds of people along the road and exhorting them to kill Tutsis.⁴⁸

Under these unusual circumstances, the problems of proof that would have arisen if incitement were not understood as a separate crime could well have made it impossible to convict Bikindi. Much like someone speaking on the radio, Bikindi communicated to a substantial number of individuals who were not all gathered together in one place. It would have been hard to prove that any particular person heard any specific utterance of Bikindi's and then acted on it. Prosecutors would have had to prove, first, that a particular *genocidaire* had been standing by the road when Bikindi's vehicle drove past; second, that Bikindi had said something amounting to incitement at a moment when he was in earshot of that particular audience member; and third, that that individual had subsequently committed an act amounting to genocide with the requisite *mens rea*.

The case of Bikindi demonstrates that even when incitement is not committed through the mass media, it may sometimes be quite difficult to prove a causal link between a defendant's speech and another person's subse-

42. Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, ¶¶ 430–437 (Trial Chamber May 16, 2003), *aff'd*, Case No. ICTR 96-14-A (Appeals Chamber July 9, 2004).

43. See Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 41 (Trial Chamber Dec. 2, 2008) ("It is not disputed that Bikindi was a well-known singer, composer, member, and leader of the *Irindiro* ballet." (footnote omitted)); *id.* ¶ 111 ("Bikindi was considered to be an important figure and a man of authority in the youth movement.").

44. See *id.* ¶¶ 186–264.

45. See *id.* ¶¶ 123–185. Bikindi was also accused of other crimes and forms of criminal participation, including genocide, conspiracy to commit genocide, complicity in genocide, and murder and persecution as crimes against humanity; he was acquitted of everything except incitement to genocide. See *id.* ¶ 441.

46. See, e.g., *id.* ¶ 402 (finding that Bikindi "addressed [a] crowd . . . in 1993 advocating that Tutsi be killed").

47. See, e.g., *id.* ¶ 421 (holding that Bikindi's songs did not amount to direct and public incitement, and furthermore, he was not responsible for their dissemination or deployment in 1994).

48. See *id.* ¶¶ 422–423.

quent act of genocide. And even in the cases involving incitement committed through speeches at public meetings, proving the causal link would likely present some additional challenge for the prosecution. Because incitement is a separate crime under the ICTR Statute, prosecutors have not been faced with this burden. The status of incitement as a separate crime has thus played an important role in making it reasonably possible to obtain the convictions of individuals whose words helped to bring about the Rwandan genocide.

B. Other Advantages of the Tribunal Statutes' Treatment of Incitement

1. *Prosecutions for Incitement to Genocide When Genocide is Difficult to Prove.* — An important advantage of the Convention's and the tribunal statutes' treatment of incitement as an independent offense is that charges of incitement to genocide can be brought in response to a situation in which atrocities have been committed against an identifiable group but actual genocide has not been proved.

It can be difficult to prove that a particular act was an act of genocide, even in a situation involving widespread killings of people from identifiable racial, ethnic, or religious groups.⁴⁹ The most prominent example of this difficulty has been in the International Court of Justice (ICJ) case brought by Bosnia against Serbia under the Genocide Convention concerning the conflict in the Balkans during the 1990s. The only action that the ICJ was willing to call genocide was the mass murder of Bosnian Muslim men at Srebrenica.⁵⁰ The main difficulty in proving genocide is in satisfying the *mens rea* requirement: the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."⁵¹ As the ICJ case shows, it can be difficult to find strong enough evidence to support the inference that a perpetrator of atrocities intended not only the harm he inflicted on his victims but also the destruction (in whole or in part) of the group of which the victims were members.

According to the ICTR, the *mens rea* of direct and public incitement to genocide is the same specific intent as for genocide itself.⁵² But proving

49. See *supra* text accompanying notes 18–21; see also Groome, *supra* note 21, at 917–20.

50. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, ¶ 297 (Feb. 26); see also Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, 31 *FORDHAM INT'L L.J.* 871, 887–89 (2008) (discussing the ICJ's finding of genocide at Srebrenica).

51. Genocide Convention, *supra* note 1, art. II; ICTY Statute, *supra* note 3, art. 4.2; ICTR Statute, *supra* note 3, art. 2.2.; Rome Statute, *supra* note 20, art. 6.

52. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 560 (Trial Chamber Sept. 2, 1998), *aff'd*, Case No. ICTR 96-4-A, Judgment (Appeals Chamber June 1, 2001). However, Professor Albin Eser argues that at least under the Rome Statute, "the inciter . . . must merely know and want the incited persons to commit the crime with genocidal intent while he himself might have completely different motives." Albin Eser, *Individual Criminal Responsibility*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 806 (Antonio Cassese et al. eds, 2002). But see Kai Ambos, *Article 25: Individual Criminal Responsibility*, in *COMMENTARY ON THE ROME STATUTE OF*

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that a defendant accused of incitement had this intent may be far less of a challenge than when the defendant is the direct perpetrator of an atrocity. Inciters, unlike other perpetrators, provide strong evidence of their intentions through their own public statements that constitute incitement. Once a court has been persuaded that a speech or an article, understood in its cultural and linguistic context, constituted direct and public incitement to genocide, it is hard to then deny that the speaker intended his words to result in genocide.⁵³

Thus, at least in some circumstances, it could turn out to be considerably easier to convict a defendant of incitement to genocide than to convict any of the killers who did the inciter's bidding by actually committing genocide. This would be true in a situation that was like Rwanda in that broadcast media played an important role in instigating and encouraging genocide, but like Bosnia in that many individual defendants could plausibly argue that their crimes amounted to something less than genocide because they lacked the requisite intent. It might only be possible to convict direct perpetrators in such cases of war crimes or crimes against humanity, but at least the inciters could be convicted of incitement to genocide, a conviction that might best reflect their culpability.

2. *Secondary Responsibility for Incitement.* — The fact that the tribunals' statutes make direct and public incitement to genocide an independent crime while also providing for various forms of secondary liability makes it possible to hold a range of individuals responsible beyond those who directly commit the incitement. In *Nahimana*, the ICTR held Ferdinand Nahimana responsible, via superior responsibility under Article 6.3 of the statute, for direct and public incitement to genocide which was committed by the staff of RTLM and which he failed to prevent or punish.⁵⁴ And in *Serugendo*, the defendant admitted having "aided and abetted" RTLM's genocidal broadcasts by providing "technical assistance and moral support."⁵⁵ He was found guilty under Article 6.1,⁵⁶ which provides for criminal responsibility

THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 743, 761–62, 62 n.165 (Otto Triffterer ed., 2d ed. 2008) (rejecting Professor Eser's view and maintaining that an inciter must have specific genocidal intent).

53. See, e.g., *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶¶ 422–425 (Trial Chamber Dec. 2, 2008) (finding that despite some evidence of the defendant's having been on good terms with Tutsis at other times, the wording and manner of his public call for Hutus to kill Tutsis left "no doubt as to his genocidal intent at the time"); *Akayesu*, Case No. ICTR 96-4-T, ¶¶ 673–674 (inferring the defendant's genocidal intent from the content and circumstances of his speech).

54. See *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Judgment, ¶¶ 856–857 (Appeals Chamber Nov. 28, 2007). Jean-Bosco Barayagwiza was also found guilty on this basis, but the Appeals Chamber overturned his conviction. See *id.* ¶ 858. The trial chamber found Nahimana guilty of incitement to genocide partly on the basis of Article 6.1, see *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment, ¶ 1033 (Trial Chamber Dec. 3, 2003), but his conviction on that basis was overturned on appeal, see *Nahimana*, Case No. ICTR 99-52-A, ¶ 776.

55. *Prosecutor v. Serugendo*, Case No. ICTR 2005-84-I, Judgment, ¶ 24 (Trial Chamber June 12, 2006).

56. *Id.* ¶ 4.

for those who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of”⁵⁷ the crimes covered by the statute.

As these cases suggest, the ability to prosecute people who play important but indirect roles in the incitement of genocide could be a valuable option in many situations. For example, a speechwriter who produces a stirring, eloquent, genocide-inciting speech for a politician to deliver might well deserve to be prosecuted and imprisoned.⁵⁸ A manager or executive, like Nahimana or Serugendo, who oversees, supervises, or otherwise substantially assists the operations of a radio station that repeatedly broadcasts calls for genocide — even if he or she is not directly responsible for deciding what goes on the air — might again merit prosecution in the future. A politician who, like Kambanda, encourages a radio station or other mass media institution to incite genocide might deserve to be held criminally responsible for incitement. Thus, the tribunal statutes’ treatment of incitement as a crime in itself allows prosecutors to cast a relatively wide net of secondary liability that can encompass all those who are responsible — whether directly or indirectly — for incitement to genocide.

3. *Prosecutions When No Genocide Has Occurred: Prevention or Political Football?* — The fact that incitement is a crime in itself under the Genocide Convention and the tribunal statutes also means that a person can be prosecuted for incitement when no genocide has (yet) occurred. Some of the drafters of the Genocide Convention viewed such prosecutions as a potential means of preventing future genocides.⁵⁹ On the other hand, governments and others for whom freedom of speech is particularly important have expressed concern that the criminalization of incitement has the potential to lead to the suppression of some legitimate speech.⁶⁰ Such concerns may be most justified when national governments rather than international courts are prosecuting individuals for incitement.⁶¹ But even at the international level,

57. ICTR Statute, *supra* note 3, art. 6.1; *see also* ICTY Statute, *supra* note 3, art. 7.1 (same language).

58. If charging such a person with aiding and abetting incitement were not an available option, a prosecutor could try to indict such a speechwriter for incitement itself, but it might be difficult to secure a conviction, considering that speechwriting is arguably neither direct (since someone else gives the speech) nor public (since speeches are typically written in private). Such an act fits more naturally under the label of aiding and abetting, and illustrates why this type of criminal responsibility should be available.

59. *See* SCHABAS, *supra* note 7, at 269.

60. *See, e.g., id.* at 268–69 (discussing U.S. resistance to the inclusion of incitement in the Genocide Convention because of concerns about freedom of the press).

61. A reasonable argument can be made that there is more reason to be concerned about infringements on freedom of speech by organs of national governments (including domestic courts) than about similar infringements by international courts. National governments may be tempted to suppress speech for ulterior reasons such as harassing their political opponents, whereas international courts have relatively little to gain from illegitimately suppressing freedom of speech. But international tribunals are not without their own self-interested institutional motivations, and anyway, even a purely public-spirited entity may still strike the wrong balance between preserving freedom of speech and preventing atrocities.

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there have been what some would consider to be politically motivated calls for judicial proceedings to suppress the speech of one political figure whose speeches may have risen to the level of incitement to genocide.

These recent calls for prosecution⁶² have centered on the controversial President of Iran, Mahmoud Ahmadinejad, who has made several public statements that are at least open to being interpreted as direct and public incitement to genocide. He has certainly publicly called for the elimination of the state of Israel and predicted that its existence will soon come to an end.⁶³ He has called Israeli Jews “bloodthirsty barbarians” and “filthy bacteria,” and has suggested that the Holocaust did not occur.⁶⁴ The Australian Prime Minister, Kevin Rudd, has stated that his government is considering bringing a claim of incitement to the ICJ;⁶⁵ one scholar has suggested that the ICC would be the better forum.⁶⁶

Whether Ahmadinejad’s public statements really amount to direct and public incitement to genocide is a debatable question. Calling for the state of Israel to be destroyed is not quite the same thing as calling for the elimination of all Jews, or of Israeli Jews; neither is predicting the state’s destruction, denying the Holocaust, or using dehumanizing language to describe Jews.⁶⁷ On the other hand, the ICTR has rightly held that incite-

62. E.g., Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran’s President for Advocating Israel’s Destruction and Piecing Together Incitement Law’s Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853 (2008) (calling for ICC prosecution of Ahmadinejad for both incitement to genocide and persecution as a crime against humanity). Professor Susan Benesch notes two other prominent calls for Ahmadinejad’s indictment:

In December 2006, a group of notable figures including Harvard law professor Alan Dershowitz, former Canadian Minister of Justice Irwin Cotler, and Holocaust survivor Elie Wiesel collectively called for Ahmadinejad to be indicted for incitement to genocide because of the Iranian President’s public remarks against Israel, including his statement calling for that country to be “wiped off the map.” The group compared the situation to Europe in the 1930s, warning that Ahmadinejad might go on to commit genocide unless stopped. On June 20, 2007, the U.S. House of Representatives passed a nonbinding resolution, 411-2, urging the U.N. Security Council to charge Ahmadinejad with incitement to genocide. Ahmadinejad’s speech was reprehensible and perhaps even dangerous, but did not constitute incitement to genocide, in my view.

Benesch, *supra* note 2, at 490–91 (footnotes omitted).

63. See Gordon, *supra* note 62, at 864–66.

64. See *id.* at 866–68 (quoting various news accounts).

65. See *id.* at 855–56.

66. See *id.* at 920.

67. It is also a debatable question, well beyond the scope of this Note, whether such statements might constitute persecution as a crime against humanity, see *id.* at 907–09, and whether prosecuting a person for hate speech that falls short of direct and public incitement to genocide or other group violence but that may amount to persecution is too great an infringement on the human right to freedom of speech. Cf. Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT’L L. REV. 557, 559 (2006) (arguing that the *Nahimana* trial chamber “depart[ed] from established jurisprudence” when it “convicted all three defendants of persecution as a crime against humanity based upon speech that constitutes incitement to racial hatred but does not necessarily constitute incitement to racial violence”); *id.* at 576–89 (developing this argument); *id.* at 596 (arguing that a definition of crimes against humanity that extends to cover hate speech is “susceptible to abuse” and may allow “governments hostile to an independent press” to “find new tools for repression”).

ment may be “direct” without being explicit; calls for genocide can be couched in euphemisms and yet be fully understandable by their audiences.⁶⁸

Regardless of whether it would be appropriate to hold Ahmadinejad responsible for direct and public incitement, the very existence of this crime in its own right — coupled with the increasing prominence of international criminal law since the creation of the ICC — makes it likely that prominent instances of hateful speech will continue to be met by calls for prosecution for incitement. But such calls run the risk of inappropriately politicizing international criminal law and thereby bringing it into disrepute. Courts (international or domestic) to which such claims are brought may have a tricky line-drawing task before them, given the need to try to prevent genocide from taking place without allowing international criminal law to be used to suppress political speech that is hateful and offensive.

One way for courts to draw a line separating incitement to genocide from mere hate speech is to look at the circumstances in which the speech appears, in order to determine whether there is any realistic danger that the speech may actually trigger atrocities. For instance, Professor Benesch observes that if someone stood up in Times Square today and shouted out some of the most inflammatory “rants that were broadcast over Rwandan radio before and during the 1994 genocide,” obviously no genocide would occur as a result.⁶⁹ Incitement to genocide is only realistically possible under certain conditions:

To commit incitement to genocide, a speaker must have authority or influence over the audience, and the audience must already be primed, or conditioned, to respond to the speaker’s words. Incitement to genocide is an inchoate crime, so it need not be successful to have been committed, but it would be absurd to consider a speech incitement to genocide when there is no reasonable chance that it will succeed in actually inciting genocide. And to prosecute a case like this would be a needless (and possibly harmful) restriction of the right to free speech.⁷⁰

By making distinctions based on the context in which a hateful message is spoken or broadcast, prosecutors and courts can make use of incitement’s status as a separate crime in order to try to prevent genocide from taking

68. See *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment, ¶ 44 (Trial Chamber June 1, 2000) (discussing the meanings of several euphemisms used by the defendant to incite genocide); *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 557 (Trial Chamber Sept. 2, 1998) (“incitement may be direct, and nonetheless implicit”), *aff’d*, Case No. ICTR 96-4-A, Judgment (Appeals Chamber June 1, 2001); see also Benesch, *supra* note 2, at 506; William A. Schabas, Commentary, *International Decision, Mugesera v. Minister of Citizenship and Immigration*, 93 AM. J. INT’L L. 529, 530 (1999).

69. See Benesch, *supra* note 2, at 494.

70. *Id.* (footnotes omitted); see *id.* at 498 (proposing a six-pronged test to distinguish incitement from hate speech).

place, while avoiding conflicts with freedom of speech.⁷¹ Indeed, the focus on context in the ICTR's incitement cases suggests that the tribunal may be in effect following this approach already.⁷²

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In summary, the establishment of direct and public incitement to genocide as a separate crime in the Genocide Convention and the tribunals' statutes has several important effects. It makes it far easier than it would otherwise be for prosecutors to prove that a defendant has committed incitement, by eliminating the need to show that the act of incitement was causally connected to a specific subsequent act of genocide. It makes it possible, in some hypothetical but plausible scenarios, to charge individuals with incitement to genocide even when it may not be possible to prove that the atrocities that have taken place constitute genocide. It also creates (under the tribunals' statutes, and under any other body of law that makes incitement a separate crime and also recognizes the relevant forms of liability) the possibility of charging individuals with aiding and abetting or complicity in incitement to genocide. And it allows for the preventive use of the law to bring charges against those who incite genocide even when the incitement has not (yet) had its intended effect.

III. DIRECT AND PUBLIC INCITEMENT TO GENOCIDE UNDER THE ROME STATUTE

The Rome Statute makes a crucial departure from earlier legal instruments with respect to incitement to genocide. It denies incitement the status of an independent crime, and instead presents it as a type of individual criminal responsibility for genocide. This change undoes all of the effects described above. Consequently, even when a genocide clearly has taken place, the Rome Statute's treatment of incitement makes it less likely that anyone will actually be held accountable for incitement.

Article 5 of the Rome Statute lists the crimes over which the ICC has jurisdiction. This article is unlike anything in the Yugoslavia and Rwanda tribunals' statutes, both of which state that the tribunals have jurisdiction over "serious violations of international humanitarian law . . . in accordance

71. Of course, deciding whether a particular instance of speech constitutes incitement or mere hate speech may nonetheless be tricky. Compare Gordon, *supra* note 62, at 893–907 (arguing that Ahmadinejad's statements constitute incitement), with Benesch, *supra* note 2, at 528 (arguing that even if Ahmadinejad's statements are properly understood as calling for genocide, they should not be considered direct and public incitement because it is unlikely that the Iranian public will actually commit genocide in response).

72. The *Akayesu* trial chamber's requirement of a "possible causal link" between the incitement and acts of genocide can be understood as following this approach. See *Akayesu*, Case No. ICTR 96-4-T, ¶ 349; see also Gopalani, *supra* note 10, at 107.

with the provisions of the present Statute” within particular spatial and temporal limits.⁷³ In contrast, Article 5 of the Rome Statute lists genocide, crimes against humanity, war crimes, and aggression as the crimes over which the ICC has jurisdiction. Absent from this list is incitement to genocide. Thus, Article 5 in itself establishes that incitement is not an independent offense under the Rome Statute.⁷⁴

In addition, Article 6, which defines genocide, includes only the text from Article II of the Genocide Convention — defining genocide itself, but not listing the “other acts” including incitement that are enumerated in Article III of the Genocide Convention. This approach differs from that of the ICTY and ICTR statutes, both of which include these “other acts” in their articles defining genocide. Instead, direct and public incitement to genocide is relegated to Article 25 of the Rome Statute, on “Individual Criminal Responsibility.” Every other clause in Article 25.3 enumerates and describes forms of individual responsibility that are applicable across all the crimes covered by the Rome Statute, such as responsibility for directly committing the crime, soliciting it, ordering it to be done, or aiding and abetting the crime. But Article 25.3(e), on incitement, applies only to genocide.

Thus, the Rome Statute treats incitement as a particular form of individual criminal responsibility for the underlying crime of genocide. Just as it would be impossible for the ICC to convict someone of aiding and abetting genocide without the prosecutor showing that an act of genocide had in fact taken place and the defendant had aided and abetted it, the same is true of incitement. Under the Rome Statute, convicting a person of incitement to genocide means holding him responsible for the genocide itself⁷⁵ — just as an aider and abettor is held responsible for the underlying crime in which he has participated through aiding and abetting.

Despite the seemingly clear effect of the placement of incitement in Article 25, several commentators have stated or assumed that incitement is nonetheless a separate crime under the Rome Statute. Professor Albin Eser, for example, describes Article 25.3(e) as “in substance identical to Article III(c) of the Genocide Convention of 1948 and its equivalents in the ICTY

73. ICTY Statute, *supra* note 3, art. 1; ICTR Statute, *supra* note 3, art. 1.

74. See SCHABAS, *supra* note 7, at 258. Professor Schabas explains:

Article 5(1)(a) of the Rome Statute limits the jurisdiction of the International Criminal Court to the crime of genocide, making no mention of any “other acts.” Article 25 provides for individual criminal responsibility for genocide in cases of attempt, incitement, conspiracy and complicity. In other words, under the Rome Statute, the “secondary” offender commits the crime of genocide, whilst under the Genocide Convention and the statutes of the *ad hoc* tribunals he or she is guilty of an “other act.”

Id.

75. See *id.*

and ICTR Statutes.”⁷⁶ While that interpretation is certainly normatively preferable for the purpose of effectively preventing and punishing genocide, it is unfortunately not the one that is best supported by the text and structure of the Rome Statute. Section A of this Part responds to some anticipated counterarguments concerning the meaning of Article 25; section B addresses a possible counterargument concerning the similarity between incitement and attempted crimes; and section C considers whether the Rome Statute’s drafters intended incitement to be a separate crime, and if so, whether that intention should govern how the statute is interpreted.

A. Interpreting Article 25

1. *Is Incitement Redundant if It Is Not a Separate Crime?* — One argument for the view that incitement must be a separate crime in the Rome Statute is based on the claim that incitement understood as a mode of criminal participation would be redundant with the other modes listed in Article 25.⁷⁷ But it is not clear that any of Article 25’s other provisions would actually cover all forms of incitement. For instance, it is questionable whether a radio broadcast that calls for the destruction of a group can be described as a form of soliciting or inducing the crime under section 3(b) of Article 25. The word “induce” suggests a communication that actually causes a perpetrator to decide to commit the act, rather than reinforcing a decision already made — a condition that may often be untrue or unprovable in the case of a radio broadcast. And the word “solicit” can be read to require a closer connection between the solicitor, the perpetrator, and the crime, such as when a person hires or persuades another to commit a specific criminal act, rather than when someone publicly expresses general support for people committing genocide. Likewise, it seems a stretch to say that an inciting radio broadcast necessarily “assists” or “contributes to” a specific act of genocide, under sections 3(c)–(d) of Article 25. Such a broadcast may well be of no help at all to the perpetrators of the act, who may have formed their own intentions before ever hearing it.

Even if one or more of these words could be read expansively enough to include all forms of incitement, Article 22.2 counsels against using expansive interpretations of ambiguous language against defendants: “In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.” While Article 22.2 literally applies only to the definitions of crimes,⁷⁸ it reflects the general principle that am-

76. Eser, *supra* note 52, at 803; accord Ambos, *supra* note 52, at 761; Robert Cryer, *General Principles of Liability in International Criminal Law*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 233, 252 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004).

77. Cf. Eser, *supra* note 52, at 804 (arguing that Article 25.3(e) “would be meaningless if it required at least the attempt to commit genocide, not to mention the fact that the incitement to at least attempted genocide would be covered by subparagraph (b)”); Ambos, *supra* note 52, at 760.

78. Even if one were to read Article 22.2 narrowly to apply only to the Rome Statute’s definitions of crimes and not also to the definitions of the terms in Article 25, it would still make sense to apply

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biguous language in criminal laws should be construed in defendants' favor, known as the rule of lenity.⁷⁹ For the sake of fairness, and also because the rule of lenity is a general principle of law,⁸⁰ ambiguous language in Article 25 ought to be construed in favor of defendants. Thus, it is far from clear that if incitement were absent from Article 25, it would be appropriate to interpret other provisions as covering the same ground.

Furthermore, even if one concluded that incitement as a mode of criminal participation is entirely redundant with other provisions of Article 25, that conclusion would not resolve the interpretive issue at hand. The reason to read a legal text to avoid redundancy is based on the assumption that its drafters would not have deliberately included unnecessary material. But that assumption cannot reasonably be applied to a text that is only *arguably* redundant.⁸¹ It is reasonable to suppose that the Rome Statute's drafters

Article 22.2's rule to the question whether incitement to genocide is a crime in itself or a mode of criminal participation. That question clearly does concern the definition of a crime, although it is not one of the crimes enumerated in Articles 5 through 8 of the statute.

79. See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 84–85 (2005) (describing the rule of lenity as a “widespread requirement” that finds support in ICTY and ICTR jurisprudence); see generally Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998) (describing the rule of lenity in the context of English and U.S. legal history and defending it from contemporary critiques).

80. Article 21.1 states that the “Court shall apply: . . . In the second place, where appropriate, applicable treaties and the principles and rules of international law.” The principles of international law can be derived from, *inter alia*, “the general principles of law recognized by civilized nations.” Statute of the International Court of Justice art. 38.1(c). In addition, Article 21.1 states that the Court shall apply “general principles of law derived by the Court from national laws of legal systems of the world.” Thus, Article 21.1 twice authorizes the Court to look to general principles of law when interpreting the Rome Statute.

The rule of lenity is a general principle of law. See Danner & Martinez, *supra* note 79, at 84 (calling it a “widespread requirement” that is “derived from municipal criminal law systems” and “ha[s] been absorbed into international criminal law”); Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008) (calling it a “precept [that] undergird[s] the principle of legality”); see also Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 93 (Trial Chamber Dec. 5, 2003) (explaining that if a criminal statute is ambiguous, “the benefit of the doubt should be given to the subject and not to the legislature which has failed to explain itself” (quoting Prosecutor v. Delalic, Case No. IT-94-21-T, Judgment, ¶ 413 (Trial Chamber Nov. 16, 1998))), *aff'd*, Case No. IT-98-29-A, Judgment (Appeals Chamber Nov. 30, 2006); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 103 (Trial Chamber May 21, 1999) (“[I]f a doubt exists, for a matter of statutory interpretation, that doubt must be interpreted in favour of the accused.”), *aff'd*, Case No. ICTR-95-1-A, Judgment (Appeals Chamber June 1, 2001). Therefore, the rule of lenity, as a general principle of law, should be applied to the interpretation of Article 25.

81. Cf. Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 37–38 (2008). Redish and Murashko argue:

[T]he well-known descriptive canon of statutory interpretation that suggests nothing in statutory text is surplusage . . . , when critically examined, might lose its bite for several reasons. First, descriptive canons draw their strength from the assumption that they accurately generalize how legislators communicate through text. When that assumption breaks down, so too does the canon's claim to validity. In particular, the canon presuming the absence of surplusage has long been criticized for assuming something quite unrealistic about Congress — namely, that legislators are aware of how the various parts of the statute intertwine.

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included incitement in Article 25 because they wanted to make it absolutely clear that incitement was one of the modes of criminal participation covered by the statute.⁸²

Finally, avoidance of (arguable) redundancy is not a sufficient reason to override the clear meaning of other aspects of the Rome Statute. As previously noted, the statute does not list incitement among the crimes over which the ICC has jurisdiction; it does not include incitement in its definition of the crime of genocide; and it does list incitement among the modes of criminal participation. The argument from redundancy would have to do a great deal of work in order to overcome the clear textual and structural evidence that incitement is a mode of participation and not a separate crime under the Rome Statute.

2. *Does the Absence of Reference to Commission or Attempt Mean That Incitement Must Be a Separate Crime?* — Article 25 does not specifically state that a person can only be held liable for a genocide that actually occurs or is attempted. In contrast, the article does include this stipulation with respect to the other modes of participation that are listed.⁸³ An argument can be made that liability for incitement under the Rome Statute must therefore extend to instances in which the incitement does not result in genocide or attempted genocide.⁸⁴ That would mean that incitement must be a crime in itself, since in such instances there would be no underlying act of genocide for which the inciter could be held criminally responsible.

The principal reason why this argument is insufficiently persuasive has already been suggested above. The rule of lenity counsels that an ambiguous provision should be interpreted in favor of the defendant. In accordance with this principle, one should be very reluctant to rely on an interpretation that expands criminal liability on the basis of a mere absence of language. That absence must be made to do a great deal of work in order to overcome the fact that incitement is situated in the structure of the Rome Statute as a mode of participation and is not listed as an independent crime.⁸⁵

82. Cf. *id.* at 38 n.58 (noting that an “additional reason[] for ignoring the surplusage canon in a particular case [is that] the drafter might want to restate an earlier provision using the language that, to the drafter, appears clearer.”)

83. See Rome Statute, *supra* note 20, art. 25.3(b) (“which in fact occurs or is attempted”); *id.* art. 25.3(c) (“commission or attempted commission”); *id.* art. 25.3(d) (same).

84. Cf. Ambos, *supra* note 52, at 761 (noting that Article 25.3(e) “only requires the incitement ‘to commit genocide’ without the additional requirement that it ‘in fact occurs or is attempted’ (as, for example, is required in a general manner by subparagraph (b))”).

85. It is also worth noting that the words “which occurs or is attempted” and “commission or attempted commission” that appear in Article 25 do not seem to perform a limiting function. Even without those words, it would be self-evident that, for instance, a defendant cannot be held liable for aiding or abetting a crime that was neither committed nor attempted. Rather, the purpose of these words in Article 25 is most likely to make clear that the modes of criminal participation apply to attempted crimes as well as to completed crimes. If these words do not limit the scope of liability in the first place, the claim that their absence should be read to cause an extension of liability seems particularly tenuous.

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B. *Incitement and Attempted Crimes*

The Rome Statute's treatment of incitement is somewhat comparable to its treatment of attempts to commit crimes. Like incitement to genocide, attempted genocide is listed in Article 3 of the Genocide Convention as a separate crime and in Article 25 of the Rome Statute as a mode of criminal participation. But, unlike incitement, attempt under the Rome Statute applies to all the crimes within the ICC's jurisdiction, and not just to genocide.

Professor Gerhard Werle describes the placement of both incitement and attempt in Article 25 as "misleading from a structural point of view," since unlike the other items listed in Article 25.3, incitement and attempt are not "modes of participation" but rather "inchoate crimes."⁸⁶ The argument of this Note, of course, is that incitement is *not* an "inchoate crime" under the Rome Statute, because its placement within the statute's structure is not merely "misleading" but has a clear substantive effect. Given the similarity between the statute's treatment of incitement and its treatment of attempt, it is relevant to ask whether the two concepts should be interpreted in the same way. In other words, does attempt under the Rome Statute suffer from the same problem as incitement? And if so, should the Rome Statute be interpreted to treat both incitement and attempted crimes as independent offenses, despite the textual and structural indications to the contrary? Or is the problematic treatment of incitement under the Rome Statute unique and distinguishable from the treatment of attempted crimes?

A closer look at the Rome Statute's treatment of attempted crimes shows that it is indeed distinguishable from the statute's treatment of incitement. Consequently, regardless of exactly how the Rome Statute's provisions concerning attempted crimes should be interpreted (a task beyond the scope of this Note), the provision on incitement cannot be dealt with in the same way.

The essential difference between incitement and attempt is that attempt cannot possibly be understood as a mode of criminal participation whereby someone can be held responsible for an underlying crime. With attempt, there is no underlying crime; the only crime is the attempt itself, and if the attempt is not considered to be a crime in itself, then there is no crime at all. But incitement is different: it can be understood as *either* a crime in itself or a mode of participation in an underlying crime. Therefore, the placement of incitement in Article 25 of the Rome Statute is not absurd. Article 25 lists several modes of criminal participation, and incitement can be understood as such a mode of participation. Understanding it in that way reduces its power and utility considerably, as previously discussed; but

86. See Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 INT'L CRIM. JUST. 953, 956 (2007).

although that is an unfortunate outcome, it is not an absurd one. Therefore, it is at least plausible that the Rome Statute's drafters could have intended the result that the statute's text produces, namely, the reduction of incitement from the status of a crime in itself to merely a mode of criminal participation.

But the same is not true of attempted crimes. Since attempt cannot be understood as a mode of participation in an underlying crime, but only as a crime in itself, the Rome Statute's treatment of attempted crimes is flatly absurd if taken literally. It calls out for an interpretation that would fulfill the clear intentions of the statute's drafters, even if such an interpretation would fit uneasily with the text of Article 5.

Article 5 of the Rome Statute lists the crimes over which the ICC has jurisdiction. It does not include attempted crimes (nor incitement, as previously noted). Yet the statute's drafters clearly intended for attempted crimes to be covered: not only is attempting to commit a crime listed in Article 25, but it is also mentioned in subsections 25.3(b), (c), and (d). Probably the simplest way to reconcile the conflict between Article 5's failure to cover attempted crimes and Article 25's inclusion of them is to treat attempted crimes as being included by implication in Article 5. On this reading, Article 5 would be understood to grant the ICC jurisdiction over genocide, war crimes, crimes against humanity, aggression, and attempts to commit any of these four crimes. Such a reading — which would treat attempted crimes as being included in the court's jurisdiction by necessary implication — would probably not be an unreasonable stretch, considering the absurdity that would result from the alternative of excluding attempted crimes altogether from the court's jurisdiction.

However, the absence of incitement as a separate crime from the jurisdiction of the ICC is not absurd in the same way that the absence of attempt would be. Therefore, the reading of the Rome Statute that fits best with its text and structure is that incitement is not treated as a separate crime, but only as a mode of participation in an underlying crime.

C. The Intentions of the Drafters

The drafting of the Rome Statute was a complex process in which many contentious issues were at stake,⁸⁷ so perhaps it is not surprising that no attention seems to have been paid during that process to the conceptual and practical differences between treating incitement to genocide as a separate crime and treating it as a mode of criminal participation.⁸⁸ Accounts of the

87. See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 121–22 (2007) (describing the “cornucopia of controversies” facing the delegates at the Rome Conference).

88. This section's conclusions about the drafters' likely intentions are based on the incomplete information that is available. Cryer et al. explain the “problem of *travaux préparatoires*” in interpreting the Rome Statute:

Rome Conference and of the preparatory meetings that preceded it generally indicate that reaching agreement on a definition of genocide was a simple task compared to, for instance, agreeing on the more complex definitions of crimes against humanity and war crimes.⁸⁹

The placement of incitement to genocide in Article 25, rather than in Article 6 as part of the definition of genocide, has been described as essentially a matter of housekeeping.⁹⁰ The Preparatory Committee's draft, which was the Rome Conference's starting point, left open the question whether incitement would be included as part of the article defining genocide or as one of the modes of criminal participation.⁹¹ But when the decision was made at the Rome Conference to put incitement in Article 25, there seems to have been no debate about the substantive effects of placing incitement in one article or the other.⁹² The simplest explanation for this is

One result of the informal process of negotiation at Rome is that there are only limited records of the conference. Another factor is that some of the provisions result from the negotiations during the Preparatory Committee in New York, rather than during the conference. Except for those few provisions which follow the draft prepared by the International Law Commission, therefore, or the history of which is to be found in the formal conference record, there is a marked absence of the *travaux préparatoires* which are usually to be expected in the drafting of a major treaty. The reasoning behind most of the texts which emerged from New York and from Rome is not to be found in the records of the views of delegates who argued for them or in an examination of the written proposals for amendments. The lack of standard *travaux préparatoires* means that those seeking for help with a difficult or controversial provision of the Statute will have to place more reliance than would normally be the case on written commentaries and books about the ICC; if these record the recollections of the negotiators at the conference they are the nearest things to *travaux* that we have, although they cannot always be relied upon to be neutral.

Id. at 123.

89. See, e.g., Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 79 (Roy S. Lee ed., 1999) (describing the negotiations with respect to the inclusion and definition of genocide, crimes against humanity, and war crimes in the Rome Statute); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 *Geo. L.J.* 381, 425, 425 n.269 (2000) ("The definition of genocide is relatively uncontroversial, for it tracks article II of the Genocide Convention.").

90. See Sadat & Carden, *supra* note 89, at 425 n.269 ("The drafters moved article III of the Genocide Convention, which deemed punishable . . . direct and public incitement to genocide, . . . to article 25 of the Rome Statute, where [it] more properly belong[s] as part of the General Part of the Statute."); Andreas Zimmermann, *Crimes Within the Jurisdiction of the Court, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE* 129, 133–34 (Otto Triffterer ed., 2d ed. 2008).

91. See Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act*, U.N. Doc. A/CONF.183/2/Add.1, reprinted in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 115, 120, 142 (M. Cherif Bassiouni ed., 1998). There was disagreement among delegations to the Preparatory Committee over whether to include incitement in the definition of genocide or put it into what became Article 25, but the records do not indicate what was the basis of the disagreement. See Preparatory Committee on the Establishment of an International Criminal Court, *Proceedings of the Preparatory Committee During March–April and August 1996*, reprinted in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra*, at 385, 395.

92. See 2 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 15–July 17, 1998, *Official Records* 147–54, U.N. Doc. A/CONF.183/13 (2002) (summarizing debate in the Committee of the Whole at the Rome Conference, indicating that the committee discussed the definitions of genocide and crimes against humanity at the

likely that the delegates were under considerable time pressure and no one at the time recognized the importance of the difference.⁹³

Before the Rome Statute was drafted, there was no clear consensus on what should be the role of incitement in international criminal law. Earlier documents were in disagreement on two main points: whether incitement to genocide should be a separate crime or a mode of criminal participation, and whether the criminalization of incitement should be limited to genocide or extended to other crimes as well. The Genocide Convention, drafted in 1948, of course treats incitement to genocide as a separate crime and has nothing to say about incitement to other crimes. The ICTY and ICTR Statutes follow the Genocide Convention. The International Law Commission (ILC)'s 1954 Draft Code of Offences Against the Peace and Security of Mankind follows the Genocide Convention in that it treats incitement as a separate crime, but also differs in that it encompasses incitement to all the crimes in the Draft Code, not just to genocide.⁹⁴ The ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind likewise treats incitement as covering all crimes; however, it changes incitement from a separate crime to a mode of participation in a crime "which in fact occurs."⁹⁵ The 1996 Draft Code in turn served as an important starting point for the Preparatory Committee, whose draft became the basis for the Rome Statute.⁹⁶

These successive changes in the treatment of incitement, from the Genocide Convention to the successive ILC Draft Codes to the Rome Statute, may have resulted from countervailing pressures for the broadening and narrowing of the concept of incitement. On the one hand, it is easy to see the argument for broadening incitement to cover serious crimes other than

same time, and that no delegate voiced disagreement with an initial German proposal to adopt the Genocide Convention's definition of genocide while putting incitement into what would become Article 25).

93. Cf. CRYER ET AL., *supra* note 87, at 124 ("[T]he pressure of time and the fact that some of the major issues were left until the last two days resulted in difficulties in the text which cannot be explained except by an understanding of how the Statute was negotiated."). Translation issues and related conceptual confusion may also have played a role. See Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 189, 200 (Roy S. Lee ed., 1999) (describing a problem with the translation of "incitement" into Arabic that may have affected the decision whether to extend incitement in Article 25 to cover all crimes).

94. See Int'l Law Comm'n, *Draft Code of Offences Against the Peace and Security of Mankind* art. 2, in *Report of the International Law Commission on the Work of its Sixth Session*, [1954] 2 Y.B. INT'L L. COMM'N 150, U.N. Doc. A/CN.4/SER.A/1954/Add.1 ("The following are offences against the peace and security of mankind: . . . Direct incitement to commit any of the offences defined in the preceding paragraphs of this Article . . .").

95. See Int'l Law Comm'n, *Draft Code of Crimes Against the Peace and Security of Mankind* art. 2.3, in *Report of the International Law Commission on the Work of Its Forty-Eight Session, May 6–July 26, 1996*, at 17, 18–19, U.N. Doc. A/51/10, available at http://untreaty.un.org/ilc/documentation/english/A_51_10.pdf. The ILC's commentary on the 1996 Draft Code, curiously, does not acknowledge its discontinuity with the Genocide Convention and the ICTY and ICTR Statutes in this respect. See *id.* art. 2, cmt. 16, at 22.

96. See CRYER ET AL., *supra* note 87, at 121; Saland, *supra* note 93, at 198.

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genocide in order to ensure the appropriate punishment of individuals who play important but indirect roles in bringing about those atrocities. But on the other hand, because criminalizing incitement means criminalizing speech, there are good reasons to worry that extending the prohibition too broadly might interfere with freedom of speech.⁹⁷ If incitement is to be applied to a variety of crimes, as was proposed in the ILC Draft Codes, then making it into a mode of criminal participation (as the 1996 Draft Code did) is a way to reduce the potential threat to freedom of speech by limiting criminal liability to cases in which incitement is successful.

But the drafters of the Rome Statute ended up deciding that incitement would apply only to genocide. Having done so, they apparently did not seriously consider the possibility of going back to the Genocide Convention's treatment of incitement as a separate crime. The result was that the Rome Statute's treatment of incitement is weaker than that of any of the major documents that preceded it: the prohibition on incitement to genocide is weaker than that of the tribunals' statutes and the Genocide Convention because it is not made a separate crime, and yet the reach of liability for incitement is narrower than in the ILC Draft Codes because it extends only to genocide.

This history does not yield firm conclusions about the intentions of the Rome Statute's drafters with respect to incitement. If anything, it suggests that most delegates did not focus on the issue and did not clearly understand what was at stake. Those delegates who did have clear intentions were not all in agreement: some wanted to extend incitement to all the crimes covered by the statute, while others, motivated by concerns about freedom of speech, resisted this expansion.⁹⁸ The tendency of commentators to assume that the Rome Statute does make incitement a separate crime⁹⁹ suggests that many wanted that to be the outcome. But the reading best supported by the text and structure of the statute is that incitement to genocide is a mode of criminal participation, not a separate crime. There is no clear evidence that the statute's drafters collectively intended it to be otherwise.

IV. CONCLUSION: THE CASE FOR AMENDING THE ROME STATUTE

Compared to the Genocide Convention and the ICTY and ICTR statutes, the Rome Statute's treatment of direct and public incitement to genocide is weak. By classifying incitement as a mode of participation in an underly-

97. Cf. SCHABAS, *supra* note 7, at 266 ("The crime of incitement butts up against the right to freedom of expression, and the conflict between these two concepts has informed the debate on the subject.").

98. *See id.* at 272 ("There were unsuccessful efforts to enlarge . . . incitement so as to cover the other core crimes but the same arguments that had been made in 1948, essentially based on the sanctity of freedom of expression, resurfaced.").

99. *See supra* note 76.

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ing crime rather than as a crime in itself, the Rome Statute makes it much harder to hold anyone accountable for incitement. Under the Rome Statute, a person who commits incitement can only be held responsible for the acts of genocide that resulted therefrom. Thus, it is necessary for the prosecutor to show not only that the defendant directly and publicly incited genocide, but also that the incitement had some causal connection to a subsequent act of genocide; otherwise, there is no underlying crime for which the inciter can be held responsible. While the ICTR's decision in *Akayesu* suggests that this kind of causal link can sometimes be shown, it is likely to often be difficult or impossible to show such a link, particularly when the inciter speaks through the mass media. If the ICTR Statute had treated incitement in the same way the Rome Statute does, it might well have been impossible to convict the defendants in cases like *Nahimana*, *Bikindi*, and *Ruggiu* of incitement.

In addition to the practical effect of making it easier to obtain convictions against defendants like *Nahimana* and *Ngeze*, the tribunal statutes' treatment of incitement as a separate crime has other important benefits. It makes it possible to convict individuals of incitement to genocide even if their audiences or followers can only be proven to have committed war crimes or crimes against humanity rather than genocide. It also makes it possible to convict a defendant of incitement to genocide on a theory of superior responsibility or aiding and abetting. Lastly, if the ICC treated incitement as a separate crime, it would be able to indict and prosecute individuals who incite genocide even before any genocide actually occurs, in an effort to prevent the genocide from occurring — although the ability to do this would create an opportunity for public pressure on the ICC to indict prominent figures who engaged in hateful political speech that did not amount to incitement.

The international community should amend the Rome Statute in order to give the ICC the advantages of treating incitement to genocide as a separate crime. Incitement should be deleted from Article 25 and added to Article 5 as one of the crimes over which the ICC has jurisdiction. And it should be added to Article 6 as an 'other act' that shall be punishable — just as it is presented in the Genocide Convention and in the tribunals' statutes. The adoption of this simple amendment would improve the ICC's ability to promote international justice and security by holding accountable individuals who directly and publicly incite genocide.