

# The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?

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## Abstract

This article focuses on the development of the crime of incitement to genocide and the prohibition of hate propaganda. It first examines the conflict which exists between these and the right to freedom of speech and concludes that a limitation of this right through prohibition of hate propaganda and criminalization of incitement to genocide is justifiable. The article then analyses how the crime of incitement to genocide and the prohibition of hate propaganda first developed historically, focusing on judgments by the International Military Tribunal at Nuremberg and the Genocide Convention, on the one hand, and on international conventions and case law by the Human Rights Committee and the European Court of Human Rights, on the other. Next, recent ICTR decisions are examined, in which the ICTR has considerably clarified and extended the concept of incitement to genocide. The tribunal has brought it closer to encompassing vicious hate propaganda by acknowledging that in order to incite individuals to commit genocide, incitement in the sense of instigation is insufficient; it requires the prior creation of a certain climate in which the commission of such crimes is possible. Hate propaganda leads to the creation of such a climate. It is argued that, for several reasons, virulent hate propaganda must be accorded the status of an international crime. Genocide could be prevented more effectively if such speech were criminalized. Several efforts to outlaw hate propaganda internationally in the past are examined. The article concludes that it can be regarded as a crime punishable under the Genocide Convention if a purposive interpretative approach is used, and that hate propagandists should be prosecuted for direct and public incitement to genocide if their hate speech is engaged in with the specific intent to commit genocide, and creates a substantial danger of genocide.

## Key words

Hate propaganda; incitement to genocide; International Criminal Tribunal for Rwanda; Genocide Convention; freedom of speech; purposive interpretation

## INTRODUCTION

On 6 April 1994, Rwandan President Juvénal Habyarimana's plane was shot down over Kigali airport, killing both Habyarimana and Burundian President Cyprien Ntaryamira, who had also been on board. Hours later, roadblocks were erected all over Kigali and the rest of Rwanda, and mass killings of Tutsi civilians, Hutu

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moderates, as well as reformist government ministers, such as Prime Minister Agathe Uwilingiyimana, began. The genocide was perpetrated in the course of a hundred days, during which time approximately 800,000 Tutsi and moderate Hutu were murdered, hacked to death by their machete-wielding Hutu neighbours. The answer to the question of how ordinary people were capable of committing such heinous crimes is complex, but one reason was given by a former *génocidaire* who had been listening intently to the Rwandan radio station Radio-Télévision Libre des Mille Collines: 'They kept saying Tutsis were cockroaches. Because they had given up on them we started working and killed them'.<sup>1</sup>

Over the previous four years, the radio and other media had engaged in vicious hate propaganda against the Tutsi population. This propaganda was extremely effective, as evidenced in the statement of another *ex-génocidaire*: 'It was a time of hatred. Our heads were hot. We were animals'.<sup>2</sup> The hate propaganda was accompanied by inciting speeches and direct calls for the extermination of the Tutsi population. All of them made the ensuing genocide possible. However, as I will argue, without the constant, enduring hate propaganda, which succeeded in creating a climate in which the elimination of the Tutsi population appeared not only acceptable, but necessary, to the Hutu minority, no act of incitement in the sense of instigation could have had the effect of turning an entire people into murderers. It is therefore of fundamental importance to eradicate both hate propaganda and incitement to genocide. This paper will analyse the status of both under international law, as well as the relationship between them, particularly following two recent decisions by the International Criminal Tribunal for Rwanda. I will argue that incitement should be distinguished from instigation, as incitement is much closer to the concept of hate propaganda. I will conclude with an explanation of the need for international criminalization of hate propaganda, if engaged in with the aim of causing genocide, in addition to incitement to genocide, and will indicate ways to achieve this.

## I. FREEDOM OF SPEECH

Both the crime of incitement as well as the prohibition of hate propaganda stand in direct conflict with the fundamental right to freedom of speech, and this dilemma has informed most of the attempts to criminalize these types of speech. I will, however, avoid addressing this debate and proceed on the assumption that freedom of speech is not an absolute right and is not unlimited in international law. In fact, interference with freedom of speech or expression has been accepted for far lesser crimes than hate propaganda engaged in with the aim of bringing about genocide. The 1966 International Covenant on Civil and Political Rights (ICCPR) proscribes in Article 20(2) '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence',<sup>3</sup> whilst the 1966 International

1. F. Keane, 'Deliver Us from Evil', *The Independent Magazine*, 3 April 2004, 16.

2. *Ibid.*, at 18.

3. 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, (1966) 6 ILM 368 (hereinafter 'ICCPR').

Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in Article 4(a) penalizes, among others, ‘all dissemination of ideas based on racial superiority or hatred’ and ‘incitement to racial discrimination’.<sup>4</sup> The United Nations Human Rights Committee (HRC) has confirmed that the prohibitions imposed by Article 20 are ‘fully compatible with the right of freedom of expression’.<sup>5</sup>

The HRC, the European Commission and Court of Human Rights, and the Inter-American Commission on Human Rights (IACHR) all apply the principle of proportionality in assessing whether an infringement of the rights protected under the respective conventions<sup>6</sup> by states parties is permissible.<sup>7</sup> This principle, which has the status of a general principle of international law, has always been linked with human rights law,<sup>8</sup> and is now regarded as ‘un elemento chiave per coniugare le varie istanze che si fronteggiano nell’ambito della tutela internazionale dei diritti dell’uomo’.<sup>9</sup> It reflects the realization that individuals’ rights and freedoms are ‘not absolute or without limits’; any restrictions, however, ‘must be proportionate to the legitimate aim pursued by the limitation’.<sup>10</sup> The proportionality principle has been applied in several cases – by the HRC,<sup>11</sup> the European Commission and Court of Human Rights,<sup>12</sup> and the IACHR<sup>13</sup> – where freedom of expression had been infringed. The wide application of this principle confirms that freedom of expression is not absolute and can be limited in certain circumstances. This assumption will be further substantiated through an analysis of international and national hate propaganda legislation.

Moreover, according to the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations<sup>14</sup> and the 1948 Universal Declaration of Human Rights, the principles enumerated in which have become part of customary international law,<sup>15</sup> all states are under an obligation to eradicate *all* forms of

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4. 1965 International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 UNTS 195 (entered into force 4 January 1969) (hereinafter ‘ICERD’).
  5. General Comment No. 11, 19th Sess. (1983), HRI/GEN/1/Rev. 6, para. 2.
  6. ICCPR, *supra* note 3; 1950 European Convention for the Prevention of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 Sep. 1953) (hereinafter ‘ECHR’); 1969 American Convention on Human Rights, opened for signature 22 November 1969, OAS Treaty Series No. 36, at 1, OEA/Ser. L./V/II.23 doc. rev. 2 (entered into force 18 July 1978) (hereinafter ‘ACHR’).
  7. J. Oraá, *Human Rights in States of Emergency in International Law* (1992), 144–68; *Jorge Landinelli Silva v. Uruguay*, Comm. No. 34/1978 (30 May 1978), CCPR/C/12/D/34/1978.
  8. Oraá, *supra* note 7, at 140.
  9. ‘A key element in the reconciliation of the various claims which confront each other in the area of international human rights protection’ (my translation). E. Cannizzaro, *Il Principio della Proporzionalità nell’Ordinamento Internazionale* (2000), 40.
  10. Oraá, *supra* note 7, at 140–1.
  11. *Pietrarola v. Uruguay*, Comm. No. 44/1979 (27 March 1981), UN Doc. CCPR/C/OP/1, at 65 (1984); *Garcia Lanza et al. v. Uruguay*, Comm. No. 8/1977 (3 April 1980); *Saldias de Lopez v. Uruguay*, Comm. No. 52/1979 (29 July 1981) UN GAOR, 36th Sess., Supp. No. 40, at 176, 182, UN Doc. A/36/40 (1981).
  12. Cannizzaro, *supra* note 9, at 56–7, 62–7; *Jersild v. Denmark*, 298 Eur. Ct. H.R. (Ser. A), (1995) 19 EHRR 1, at paras. 28–37 (hereinafter ‘*Jersild*’); *Marais v. France*, (1996) 86-A Eur. Comm. HRDR. 184 (hereinafter ‘*Marais*’); *Ochsenberger v. Austria*, (1994) 18 EHRR CD170; *Remer v. Germany*, (1995) 82-A Eur. Comm. HRDR. 117 (hereinafter ‘*Remer*’).
  13. Inter-American Commission for Human Rights, *Annual Report, 1985–6: Nicaragua* (1986), 165–75.
  14. Annex to UN GA Res. 2625 (XXV) (1970), in I. Brownlie (ed.), *Basic Documents in International Law* (2002), 27.
  15. A. H. Robertson and J. G. Merrills, *Human Rights in the World* (1996), 29.

racial discrimination.<sup>16</sup> This stands in apparent contradiction to the right to freedom of expression. If a state allowed vigorous hate propaganda, which necessarily promotes racial discrimination, it would violate its obligation under international law to eliminate all manifestations of racial discrimination and to promote the principle of equality. This further proves that freedom of expression cannot be without limitations.

Consequently, a limitation of freedom of speech through prohibition of hate propaganda and incitement, uttered with the intention to cause genocide, i.e. 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such',<sup>17</sup> is clearly justifiable.

## 2. HISTORICAL DEVELOPMENT OF THE CRIME OF INCITEMENT TO GENOCIDE AND THE PROHIBITION OF HATE PROPAGANDA

Historically, the criminalization of incitement to genocide in international law and the obligation of states under international law to prohibit hate propaganda have developed separately. Whilst the dangers of incitement to genocide were recognized early on, albeit reluctantly, in the 1948 Genocide Convention, hate propaganda did not receive international condemnation until 1966, when states parties' obligation to declare such propaganda illegal was enshrined in both the ICERD and the ICCPR.

### 2.1. Incitement to genocide

The concept of incitement to genocide as a crime in international law began with the trials of *Streicher* and *Fritzsche* held by the International Military Tribunal at Nuremberg in 1946. Although the accused were indicted for crimes against humanity, this charge was brought on the basis of acts which would now be described as incitement to genocide.<sup>18</sup>

Julius Streicher was the publisher and editor of *Der Stürmer*, a virulently anti-Semitic weekly newspaper, during the Third Reich. As the Nuremberg Tribunal pointed out in its judgment, he was 'widely known as "Jew-Baiter Number One"'<sup>19</sup> and, through his newspaper, vehemently called for the extermination of Jews. In a leading article in September 1938, he depicted 'the Jew' as 'a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind', and thereby, in the words of the Tribunal, 'incited the German people to active persecution'.<sup>20</sup> The Tribunal held that this 'incitement to murder and

16. *Ibid.*, at 31; Universal Declaration of Human Rights, GA Res. 217(III), Art. 7, UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) (hereinafter 'Universal Declaration'). See S. Farrior, 'Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech', (1996) 14 *Berkeley Journal of International Law* 1, at 6–21.

17. 1948 Convention for the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, Art. II, 78 UNTS 277 (entered into force 12 January 1951) (hereinafter 'Genocide Convention').

18. In addition, the accused were also charged with crimes against peace, and Fritzsche with war crimes.

19. *Streicher Judgment*, (1946) 22 *Trial of German Major War Criminals* 501, 501 (hereinafter '*Streicher*').

20. *Ibid.*

extermination' constituted a crime against humanity,<sup>21</sup> for which it convicted Streicher and sentenced him to death by hanging.<sup>22</sup> It appears to have been of decisive importance to Streicher's conviction that the incitement was committed 'at the time when Jews in the East were being killed under the most horrible conditions', and that the accused had had knowledge of this.<sup>23</sup> This has been seen to suggest that the Tribunal considered that conviction for crimes against humanity in the shape of 'incitement to murder and extermination' required the establishment of a causal link between the incitement and the actual commission of the crime incited. Therefore, 'both inciting words and the physical realization of their message'<sup>24</sup> had to be present, which meant that incitement to genocide was not regarded as an inchoate crime.<sup>25</sup> However, as has recently been pointed out by the International Criminal Tribunal for Rwanda, the *Streicher* judgment 'does not explicitly note a direct causal link between Streicher's publication and any specific acts of murder'.<sup>26</sup> Instead, the ICTR stresses the Nuremberg Tribunal's characterization of Streicher's acts as 'a poison "injected in to the minds of thousands of Germans which caused them to follow the National Socialists' policy of Jewish persecution and extermination"'.<sup>27</sup>

The *Fritzsche* judgment has inspired similarly contradictory interpretations. Hans Fritzsche was a radio commentator under the Nazi regime, and in 1942 was appointed head of the Radio Division of the Ministry of Popular Enlightenment and Propaganda, as well as Plenipotentiary for the Political Organization of the Greater German Radio.<sup>28</sup> Under his indictment for crimes against humanity, Fritzsche was charged with having 'incited and encouraged the commission of war crimes, by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities'.<sup>29</sup> However, the Tribunal decided to acquit him, reasoning that although he clearly propagated anti-Semitism, his 'speeches did not urge persecution or extermination of Jews'.<sup>30</sup> The *Fritzsche* decision has therefore been interpreted to confirm that incitement (to extermination) was considered to require both a direct call for such extermination and a causal link between such call and the act incited.<sup>31</sup> Nevertheless, that this was the Tribunal's intention can be called into question. The ICTR saw Fritzsche's lack of control and his position as a mere 'conduit' as the reasons for his acquittal, as well as the fact that it had not been

21. *Ibid.*, at 502.

22. *Sentences Judgment*, (1946) 22 *Trial of German Major War Criminals* 529, 529.

23. *Streicher*, *supra* note 19, at 502.

24. J. F. Metz, 'Rwandan Genocide and the International Law of Radio Jamming', (1997) 91 *AJIL* 628, at 637.

25. An inchoate crime is a crime which is committed 'even though the substantive offence (i.e. the offence it was intended to bring about) is not completed and no harm results': A. Ashworth, *Principles of Criminal Law* (2003), 445.

26. *Prosecutor v. Nahimana et al.*, Judgment and Sentence, Case No. ICTR-99-52-T, 3 December 2003, para. 981 (hereinafter '*Nahimana*').

27. *Ibid.*

28. *Fritzsche Judgment*, (1946) 22 *Trial of German Major War Criminals* 525, 525 (hereinafter '*Fritzsche*').

29. *Ibid.*, at 526.

30. *Ibid.*

31. Metz, *supra* note 24, at 637.

proven that he knew the ‘news’ he was spreading to be false.<sup>32</sup> Similarly, L. John Martin has regarded Fritzsche’s lack of the necessary intention as the reason for his acquittal.<sup>33</sup> The Nuremberg Tribunal therefore left no clear precedent as regards the crime of incitement to genocide.

In 1948 the Genocide Convention was opened for signature. Article III provides for ‘direct and public incitement to commit genocide’ to be ‘punishable’. During the deliberations of the Ad Hoc Committee on Genocide, the proposal to include incitement to genocide in the Convention was contested, particularly by the United States.<sup>34</sup> The original text agreed on by the Ad Hoc Committee purported to make punishable ‘direct public or private incitement to commit the crime of genocide whether such incitement be successful or not’.<sup>35</sup> The United Kingdom and Belgium, supporting the United States’ stance, favoured the deletion of the provision.<sup>36</sup> It was adopted only after both the words ‘or private’ and ‘whether such incitement be successful or not’ had been deleted. Although it has been argued that deletion of the latter cannot mean that incitement must be successful, since that would render the provision superfluous, as successful incitement ‘becomes a form of complicity, already covered by paragraph (e) of the same article’,<sup>37</sup> it is submitted that the debate surrounding this issue and the deletion of the phrase nevertheless serve to raise certain doubts regarding the requirements of incitement.

Interestingly, Article 2(3) of the International Law Commission’s 1996 Draft Code of Crimes Against the Peace and Security of Mankind states that ‘[a]n individual shall be responsible for a crime set out in article 17 [genocide], 18, 19 or 20 if that individual: . . . (f) directly and publicly incites another individual to commit such a crime *which in fact occurs*’ (emphasis added). The crime incited must follow the incitement. Furthermore, the ‘direct’ element was interpreted as ‘specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion’.<sup>38</sup> It seems that this would have the effect of rendering the crime of incitement identical with that of instigation.

The crime of incitement to genocide has also been included, in words essentially identical to those found in the Genocide Convention, in the 1954 Draft Code of Offences against the Peace and Security of Mankind,<sup>39</sup> the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY),<sup>40</sup> the 1994

32. *Nahimana*, *supra* note 26, para. 982.

33. L. J. Martin, *International Propaganda: Its Legal and Diplomatic Control* (1958), 206.

34. W. A. Schabas, ‘Hate Speech in Rwanda: The Road to Genocide’, (2000) 46 *McGill Law Journal* 141, at 152.

35. Ad Hoc Committee on Genocide, 16th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.16 (1948) at 12, cited in Schabas, *supra* note 34, at 151.

36. *Ibid.*, at 152.

37. *Ibid.*, at 154.

38. International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind (1996), Art. 2 commentary, para. 16, in Report of the International Law Commission on the Work of Its Forty-Eighth Session (6 May–26 July 1996), in *Yearbook . . . 1996*, Vol. II (Part Two) 15, UN Doc. A/51/10.

39. International Law Commission, Draft Code of Offences against the Peace and Security of Mankind, Art. 2(13)(ii), in Report of the International Law Commission Covering the Work of Its Sixth Session (3 June–28 July 1954), in *Yearbook . . . 1954*, Vol. II, 151, UN Doc. A/2693.

40. Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 4(3)(c), SC Res. 827, 3217th Mtg., UN Doc. S/RES/827 (1993).

Statute of the International Criminal Tribunal for Rwanda (hereinafter ICTR),<sup>41</sup> and the 1998 Rome Statute of the International Criminal Court.<sup>42</sup>

Until recently, the scope and exact definition of incitement to commit genocide were therefore rather unclear. It appears that it has at times been regarded as a crime substantially identical with instigation. There was a certain amount of confusion over whether it was an inchoate crime or not, and these factors resulted in it often being treated as rather different from hate propaganda. As will be seen, certain members of the Nuremberg Tribunal and delegates at the Ad Hoc Committee made it clear that they held a profoundly different view.

## 2.2. Hate propaganda

Whilst the criminalization of incitement to genocide thus proceeded in a rather ambiguous manner, hate propaganda was gradually prohibited in international as well as national law. Several attempts were made to include such a provision in the Genocide Convention itself, but they came to naught.<sup>43</sup> However, although the drafters of the Convention rejected one such proposal by the USSR,<sup>44</sup> it is remarkable that during the debates on this issue, ‘delegates believed political groups were to be protected by the convention’,<sup>45</sup> as it had been decided to include these, a decision which would only be reversed later in the session. As William Schabas points out, this factor ‘undoubtedly influenced the attitudes of some delegations towards repressing hate propaganda’.<sup>46</sup>

Subsequently, however, hate propaganda and incitement to hatred were addressed in several international conventions concerning the protection of human rights. The Universal Declaration of Human Rights proclaims the right to ‘equal protection . . . against any incitement to . . . discrimination’ in violation of the Universal Declaration.<sup>47</sup> The ICCPR prohibits ‘propaganda for war’ and ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.<sup>48</sup> Article 20 has been held to reflect customary international law.<sup>49</sup> The ACHR similarly prohibits such advocacy, if it constitutes ‘incitement . . . to lawless violence or to any other similar action against any person or group of persons’.<sup>50</sup> The most elaborate pronouncement can be found in the ICERD, which unequivocally requires all states parties to criminalize, *inter alia*, ‘all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group’, and ‘organizations,

41. Statute of the International Criminal Tribunal for Rwanda, Art. 2(3)(c), SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994).

42. Rome Statute of the International Criminal Court, Art. 25(3)(e), UN Doc. A/CONF.183.9\* (1998), available at <http://www.un.org/law/icc/statute/romefra.htm>.

43. W. A. Schabas, *Genocide in International Law* (2000), 479–82.

44. UN Doc. A/C.6/215/Rev. 1 (1948).

45. Schabas, *supra* note 43, at 482.

46. *Ibid.*

47. Universal Declaration, *supra* note 16, Art. 7.

48. ICCPR, *supra* note 3, Art. 20.

49. K. Boyle, ‘Hate Speech – The United States Versus the Rest of the World?’, (2001) 53 *Maine Law Review* 487, at 495.

50. ACHR, *supra* note 6, Art. 13(5).

and...propaganda activities, which promote and incite racial discrimination'.<sup>51</sup> The ICERD thus recognizes the connection between hate propaganda, incitement to violence and acts of violence. As the Committee on the Elimination of Racial Discrimination underlined in its General Recommendation XV, Article 4 imposes an obligation of 'effective response', which can only be satisfied through 'immediate intervention', as 'threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility'.<sup>52</sup> As will be seen in the final part of this analysis, the creation of such an 'atmosphere of hostility' is crucial in bringing about genocide. The wide acceptance and ratification of these instruments<sup>53</sup> means that a vast majority of states are bound by these requirements, and that the principles enshrined in them are at least emerging rules of customary international law.<sup>54</sup>

In their jurisprudence, the HRC as well as the European Commission and Court of Human Rights have emphasized the need to criminalize hate propaganda. As a result of the worldwide acceptance of the ICCPR, the HRC's published views are producing what has been described as 'a global human rights jurisprudence',<sup>55</sup> and its decisions and opinions are therefore greatly influential. In *J. R. T. and the W. G. Party v. Canada*,<sup>56</sup> the HRC declared a Canadian citizen's communication inadmissible in which the alleged victim claimed that his right to freedom of expression under Article 19 of the ICCPR had been infringed, when he was ordered by the Canadian Human Rights Commission to refrain from using the telephone to communicate anti-Semitic messages. The HRC declared that the messages in question 'clearly constitute[d] the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit'.<sup>57</sup> Similarly, in another communication by a Canadian citizen,<sup>58</sup> the HRC held that there had not been a violation of Articles 18 and 19 of the ICCPR when a teacher was dismissed because of his anti-Semitic writings and public statements. Again, the HRC confirmed that:

restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20(2) of the Covenant.<sup>59</sup>

51. ICERD, *supra* note 6, Art. 4(a)–(b).

52. General Recommendation 15: Organized Violence Based on Ethnic Origin (Art. 4), Comm. on the Elimination of Racial Discrimination, 42nd Sess., P 3, UN Doc. A/48/18 (1993), para. 2.

53. ICCPR: 148 ratifications; ACHR: 25 ratifications; ICERD: 161 ratifications (all as of 31 January 2002), cited in I. Brownlie and G. S. Goodwin-Gill (eds.), *Basic Documents on Human Rights* (2002), xiii, at xiv, xviii.

54. R. R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law', (1965–6) 41 BYBIL 275, 300.

55. D. McGoldrick and T. O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law', (1998) 18 *Legal Studies* 453, 471.

56. *J.R.T. and W.G.P. v. Canada* (No. 104/1981), printed in *Report of the Human Rights Committee*, UN GAOR, 38th Sess., Supp. No. 40, UN Doc. A/38/40, Annex XXIV (1983) 231, 4 HRLJ 193.

57. *Ibid.*, para. 8(b). See also D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991), 490–1.

58. *Malcolm Ross v. Canada* (No. 736/1997), CCPR/C/70/D/736/1997 (2000).

59. *Ibid.*, para. 11.5.



In *Robert Faurisson v. France*,<sup>60</sup> the HRC went even further, declaring France's criminalization of Holocaust denial through the so-called Gayssot Act permissible. An individual opinion co-signed by Eckart Klein, Elizabeth Evatt and David Kretzmer stated that, in certain cases, the right to be free from discrimination as laid down in Article 7 of the Universal Declaration of Human Rights cannot be fully protected by Article 20(2) of the ICCPR, namely:

where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a *pattern* of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.<sup>61</sup>

This represents a clear recognition of the dangers of hate propaganda falling short of actual incitement in the sense of instigation – that is, hate propaganda which is more subtle and serves to gradually create a certain climate which is at least as dangerous as actual incitement.

The European Commission of Human Rights has declared several applications alleging violations of the right to freedom of expression, protected under Article 10 ECHR, inadmissible,<sup>62</sup> proclaiming the respective states parties' infringements of the right, through legislation criminalizing hate propaganda, 'necessary in a democratic society'. In the case of *Pierre Marais v. France*, in which it upheld the legality of French laws criminalizing Holocaust denial, it stressed that 'les écrits du requérant vont à l'encontre de valeurs fondamentales de la Convention, telle que l'exprime son Préambule, à savoir la justice et la paix'.<sup>63</sup> the principles of justice and peace, which are enshrined in the ECHR, require the prohibition of such writings.

The European Court of Human Rights directly addressed the issue of hate propaganda in the case of *Jersild v. Denmark*, in which it decided that there had indeed been a violation of the right to freedom of speech. The applicant, a journalist who had conducted a television interview with three members of a racist organization during which these made abusive statements about immigrants and ethnic groups in Denmark, had been convicted of aiding and abetting their violation of a provision in the Danish Penal Code criminalizing hate propaganda. Nevertheless, as regards the three youths who made the abusive statements, the Court remarked that such

60. *Faurisson v. France* (No. 550/1993), UN Doc. CCPR/C/58/D/550/1993 (1996), printed in *Report of the Human Rights Committee*, vol. II, UN GAOR, 52d Sess., Supp. No. 40, UN Doc. A/52/40, Appendix (1999) 84.

61. *Ibid.*, (E. Evatt and D. Kretzmer, Individual Opinions and E. Klein, Concurring), para. 4.

62. *Glimmerveen and Hagenbeck v. The Netherlands*, (1979) 18 Eur. Comm. HRDR. 187, 4 EHRR 260; *X. v. Federal Republic of Germany*, (1982) 29 Eur. Comm. HRDR. 194; *H., W., P. and K. v. Austria*, (1989) 62 Eur. Comm. HRDR. 216; *Ochsenberger v. Austria*; *Walendy v. Germany*, (1995) 80-A Eur. Comm. HRDR. 94; 38 Y. B. Eur. Conv. H. R. 51; *Remer*, *supra* note 12; *Honsik v. Austria*, 83-B Eur. Comm. HRDR. 77 (1995); *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v. Germany*, (1996) 84-A Eur. Comm. HRDR. 149; *Marais*, *supra* note 12. See McGoldrick and O'Donnell, *supra* note 55, at 465–9.

63. 'The writings of the applicant go against fundamental values of the Convention, as expressed in its Preamble, that is, justice and peace' (my translation). *Marais*, *supra* note 12, at 190.

statements 'were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10'.<sup>64</sup>

It is therefore readily apparent that although the Genocide Convention is limited to 'direct and public incitement to genocide', there has been a parallel development of criminalization of hate propaganda in international law. The wide ratification and influence of both the ICCPR and the ECHR, and the related significance of the decisions of the HRC and the European Court of Human Rights, provide compelling evidence of the universal acceptance of qualifying freedom of expression in cases of hate propaganda. The dangers of hate propaganda have therefore undoubtedly been recognized. It is also interesting to note that legal theorists such as Ronald Dworkin have accepted limitations of the right to freedom of speech where competing rights would be in danger of being violated by an unrestrained exercise of that right.<sup>65</sup>

### 3. EXTENSION OF THE CRIME OF INCITEMENT TO GENOCIDE IN RECENT ICTR DECISIONS

In two major recent decisions the International Criminal Tribunal for Rwanda directly addressed the crime of incitement to genocide and elaborated on its reach and meaning. These decisions of the ICTR are of considerable importance, as the ICTR has been created by means of a UN Security Council resolution,<sup>66</sup> binding on all member states.<sup>67</sup> Moreover, by virtue of Article 38(1)(d) of the Statute of the International Court of Justice, they represent subsidiary sources of international law.

Jean-Paul Akayesu was convicted of, *inter alia*, direct and public incitement to commit genocide pursuant to Article 2(3)(c) of the ICTR Statute, for speeches made at a meeting shortly after the genocide in Rwanda had begun.<sup>68</sup> In these speeches he urged a crowd of over 100 people to eliminate 'the accomplices of the Inkotanyi',<sup>69</sup> by which he was understood to refer to members of the Tutsi minority.<sup>70</sup> Similarly, in a subsequent case, Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze were all convicted of, *inter alia*, direct and public incitement to commit genocide.<sup>71</sup> Nahimana and Barayagwiza had collaborated in the founding of Radio-Télévision Libre des Mille Collines, which the Tribunal found to have had a major role in the genocide through its constant hate propaganda.<sup>72</sup> Barayagwiza and Ngeze were founding members of the Coalition pour la Défense de la République (CDR) party, which they used as a vehicle to call for the extermination of Tutsi civilians.<sup>73</sup> Ngeze

64. *Jersild*, *supra* note 12, para. 35.

65. R. Dworkin, *Taking Rights Seriously* (1977), 193.

66. S/RES/955 (1994).

67. UN Charter Art. 25.

68. *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998 (hereinafter '*Akayesu*').

69. Inkotanyi is Kinyarwanda for 'those who fight courageously', and was used to refer to units of the RPF. R. Dallaire, *Shake Hands With the Devil: The Failure of Humanity in Rwanda* (2003), 531.

70. *Akayesu*, *supra* note 68, para. 674.

71. See generally *Nahimana*, *supra* note 26.

72. *Ibid.*, para. 1031.

73. *Ibid.*, para. 1035.

also founded and became Editor-in-Chief of the newspaper *Kangura*, which he used 'to instill hatred, promote fear, and incite genocide'.<sup>74</sup>

In *Akayesu*, the Tribunal unambiguously stressed the inchoate nature of the crime of incitement to genocide, explaining that:

genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.<sup>75</sup>

The ICTR here undoubtedly goes a step further than the drafters of the Genocide Convention, who decided against stating explicitly that incitement to commit genocide should be punished, whether or not it was successful. It also clarifies the ambiguities which remained after the Nuremberg case law, which had apparently suggested that incitement had to be successful. The Tribunal confirmed its analysis in *Nahimana*, where it denied that any causal link between the inciting words and the act incited was necessary for the crime of incitement to have occurred. Instead, '[i]t is the *potential* of the communication to cause genocide that makes it incitement'.<sup>76</sup> It would seem that here the Tribunal significantly enlarged the meaning of incitement. By emphasizing the 'potential of [a] communication to cause genocide' as the defining characteristic of incitement, it allowed for the possibility of hate propaganda to be included in the concept of incitement.

The ICTR in *Akayesu* reinforced its assessment of the inchoate nature of incitement by distinguishing it from the crime of instigation, which in its view 'involves prompting another to commit an offence', and which 'is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator'.<sup>77</sup> This analysis by the ICTR, which also emerges in its indictment of Simon Bikindi,<sup>78</sup> is surely correct, as it is in accordance with its Statute, which provides for incitement in Article 2(3)(c), whereas instigation is criminalized in Article 6(1).<sup>79</sup> It is moreover supported by evidence from national legislation from at least two countries. The German *Strafgesetzbuch* has different provisions for *Anstiftung* (instigation),<sup>80</sup> as a form of complicity, and *Volksverhetzung* (public incitement).<sup>81</sup> This corresponds to the approach taken in the Rome Statute of the International Criminal Court and the Statute of the ICTY, which similarly separate the crime of incitement to genocide, provided for in Article 25(3)(e) and Article 4(3)(c), respectively, from that of instigation, dealt with in Article 25(3)(b) and Article 7(1), respectively.<sup>82</sup> In its judgments, the ICTY has defined 'instigation'

74. *Ibid.*, para. 1038.

75. *Akayesu*, *supra* note 68, para. 562.

76. *Nahimana*, *supra* note 26, para. 1015 (emphasis added).

77. *Akayesu*, *supra* note 68, para. 482.

78. *Prosecutor v. Bikindi*, Indictment, Case No. ICTR-2001-72-1, 27 June 2001, paras. 20, 31, 34 (hereinafter '*Bikindi*').

79. Schabas, *supra* note 43, at 292.

80. StGB §§ 26, 31(1).

81. StGB § 130.

82. A. Eser, 'Individual Criminal Responsibility', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. II, at 767, 803-4.

as ‘prompting another person to commit an offence’,<sup>83</sup> specifying that ‘a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated’<sup>84</sup> and thereby affirming the conclusions drawn in the ICTR’s *Akayesu* judgment. Academic writings are also in accordance with the ICTR’s analysis. Albin Eser highlights the distinction between incitement and instigation by referring to the different reasons for their criminalization: in the case of instigation, it is ‘the participation of the inciter (as an accessory) in the criminal act of another’, while incitement is criminalized because of ‘the special dangerousness associated with the incitement of an indeterminate group of people’.<sup>85</sup> Mordechai Kremnitzer and Khaled Ghanayim have identified a further distinction between incitement and instigation, which lies in ‘the difference between the individual instigatee and unspecified incitees’.<sup>86</sup> Section 30, Amendment 39 of the Israeli Penal Law defines an instigator as someone who ‘prompts another to commit an offence demanding its commission of him or by urging or encouraging him’.<sup>87</sup> Hence, whilst instigation consists in a clear command, request or urging addressed to a specified individual or group of individuals to commit a specific crime, incitement is directed towards undefined addressees, and its purpose is rather to create a certain atmosphere within which incitees are enabled to commit the intended crimes. L. John Martin also treats hate propaganda and incitement to violence, including genocide, as interchangeable.<sup>88</sup>

The Tribunal further confirmed this notion of incitement when it addressed the issue of directness, one of the constituent elements of the crime of direct and public incitement to commit genocide. It asserted that ‘the direct element should be viewed in the light of its cultural and linguistic content’, as the perception of something as direct depended on the ‘audience’.<sup>89</sup> Incitement could be direct, albeit implicit.<sup>90</sup> This was important, as ‘[t]he history of genocide [has] show[n] that those who incite speak in euphemisms’.<sup>91</sup> During the Rwandan genocide, the *génocidaires* were exhorted to ‘work’, ‘a coded reference advocating the extermination of the Tutsi’,<sup>92</sup> and Jean Kambanda, Prime Minister of Rwanda from 8 April 1994 until approximately 17 July 1994, used the ‘incendiary phrase . . . “you refuse to give your blood to your country

83. *Prosecutor v. Blaškić*, Trial Chamber Judgment, Case No. IT-95-14, 3 March 2000, para. 280; see also *Prosecutor v. Kordić and Čerkez*, Trial Chamber Judgment, Case No. IT-95-14/2, 26 February 2001, para. 387 (hereinafter ‘*Kordić* Trial Chamber’); *Prosecutor v. Kordić and Čerkez*, Appeals Chamber Judgment, Case No. IT-95-14/2, 17 December 2004, para. 26.

84. *Kordić* Trial Chamber, *supra* note 83, para. 387.

85. A. Eser, ‘The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective’, in D. Kretzmer and F. K. Hazan (eds.), *Freedom of Speech and Incitement Against Democracy* (2000), 63 at 69. See also A. Cassese, *International Criminal Law* (2000), 189–90, 198; S. Baer, ‘Violence: Dilemmas of Democracy and Law’, in Kretzmer and Hazan, *supra* note 85, at 119, 124.

86. M. Kremnitzer and K. Ghanayim, ‘Incitement, not Sedition’, in Kretzmer and Hazan, *supra* note 85, at 147, 160.

87. Cited in *ibid.*, at 160.

88. Martin, *supra* note 33, at 124–5.

89. *Akayesu*, *supra* note 68, para. 557.

90. *Ibid.*

91. W. A. Schabas, ‘Mugesera v. Minister of Citizenship and Immigration’, (1999) 93 AJIL 529, 530.

92. *Bikindi*, *supra* note 78, para. 31.

and the dogs drink it for nothing”<sup>93</sup>. The ICTR favourably referred to the Polish delegate’s remarks in the Sixth Committee during the debates on the Genocide Convention, stressing particularly his assessment that a vital element in incitement was the creation of ‘an atmosphere favourable to the perpetration of the crime’.<sup>94</sup> It decided to ‘consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not’,<sup>95</sup> and declared itself satisfied that the accused ‘had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group’.<sup>96</sup> The Tribunal’s definition of incitement can again be regarded as wide enough to encompass hate propaganda, if engaged in with the specific intent to cause the commission of genocide. As will be seen, the creation of an atmosphere is intricately linked to hate propaganda, rather than incitement if defined as equivalent to instigation.

In *Nahimana*, the ICTR again demonstrated its rather generous view of what constituted incitement when it discussed the idea that incitement must involve a call for action. Clearly, this would have included the accused’s actual, explicit calls for violence, such as the CDR’s chanting of ‘*tubatsembatsembe*’ or ‘let’s exterminate them’.<sup>97</sup> However, the Tribunal also recognized as calls for action hate propaganda based on the pretence of self-protection, which was rather unlike the unambiguous call for extermination mentioned above:

RTLM broadcast a message of fear, provided listeners with names, and encouraged them to defend and protect themselves, incessantly telling them to ‘be vigilant’, which became a coded term for aggression in the guise of self-defence.<sup>98</sup>

Furthermore, the Tribunal drew a distinction ‘between the discussion of ethnic consciousness and the promotion of ethnic hatred’,<sup>99</sup> thereby indicating the danger involved in hate propaganda. It stressed that whilst hate propaganda, such as an RTLM broadcast declaring that the Tutsi ‘are the ones who have all the money’:

... which does not call on listeners to take action of any kind, does not constitute direct incitement, it demonstrates the progression from ethnic consciousness to harmful ethnic stereotyping.<sup>100</sup>

This analysis is interesting for two reasons. First, the ICTR’s statement clearly reflects a recognition of the dangers of hate propaganda. Secondly, it is striking that the example of hate propaganda not constituting incitement to genocide, which the ICTR uses, is one which appears to be rather harmless. Warning of the Tutsi population’s alleged ‘cunning, predatory nature’ and ‘wickedness’,<sup>101</sup> for example,

93. *Prosecutor v. Kambanda*, Judgment and Sentence, Case No. ICTR-97-23-S, 4 September 1998, para. 39(x) (hereinafter ‘*Kambanda*’).

94. *Akayesu*, *supra* note 68, para. 557.

95. *Ibid.*, para. 558.

96. *Ibid.*, para. 674.

97. *Nahimana*, *supra* note 26, paras. 95, 697.

98. *Ibid.*, para. 1028.

99. *Ibid.*, para. 1020.

100. *Ibid.*, para. 1021.

101. *Ibid.*, para. 409.

would have been a far more obviously hateful and dangerous example. This suggests that the ICTR might be willing to categorize as incitement such hate propaganda which more obviously denigrates and dehumanizes the victim group, as long as it can somehow be characterized as calling for action.

Moreover, the Tribunal repeatedly and unambiguously recognized the inextricable link between hate propaganda (denigrating and dehumanizing the Tutsi population) and incitement (conveying the urgent need for action against the 'enemy'), in that hate propaganda represents a stage prior to incitement in the process leading up to the eventual genocide. In its discussion of 'Appeal to the Conscience of the Hutu', a virulently anti-Tutsi article which was published in *Kangura* No. 6, in December 1990,<sup>102</sup> the Tribunal noted its portrayal of the Tutsi 'as the enemy, as evil, dishonest and ambitious', targeting them 'on the basis of their ethnicity'.<sup>103</sup> The ICTR then pointed out the article's warnings 'that the enemy was "still there, among us" and waiting "to decimate us"', and described the article's call on the Hutu to 'wake up' and to 'cease feeling pity for the Tutsi' as 'an unequivocal call to the Hutu to take action against the Tutsi'.<sup>104</sup> Much of *Kangura's* contents 'combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population'.<sup>105</sup> The Tribunal concluded that '[t]hrough fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy'.<sup>106</sup> Similarly, with regard to the CDR, it held that the party:

... promoted a Hutu mindset in which ethnic hatred was normalized as a political ideology. The division of Hutu and Tutsi entrenched fear and suspicion of the Tutsi and fabricated the perception that the Tutsi population had to be destroyed in order to safeguard the political gains that had been made by the Hutu majority.<sup>107</sup>

The Tribunal came to analogous conclusions with respect to RTLM.<sup>108</sup> Referring to the shooting down of Rwandan President Habyarimana's plane, which immediately preceded the genocide, the ICTR declared:

But if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded.<sup>109</sup>

By stressing the creation of an atmosphere by RTLM, *Kangura* and CDR as an indispensable prerequisite for causing the incitees to commit genocide, the ICTR *de facto* recognizes the need to prevent and punish more than just the most blatant calls for violence, such as *tubatsembatsembe*. This veiled intention finds expression in comments made by Erik Mose, the Norwegian judge contributing to the *Nahimana* judgment, before the handing down of the judgment. Voicing the opinion that half a century after the Nuremberg trials, there was a need for 'a clear global standard'

102. *Ibid.*, para. 138.

103. *Ibid.*, para. 152.

104. *Ibid.*, para. 153.

105. *Ibid.*, para. 1036.

106. *Ibid.*, para. 950.

107. *Ibid.*, para. 951.

108. *Ibid.*, para. 949.

109. *Ibid.*, para. 953.

for distinguishing between permissible and impermissible speech, he stated: 'People shouldn't be asking whether we should be setting these limits. They should be asking what took us so long to do so.'<sup>110</sup>

This view is also mirrored in the Tribunal's extensive discussion of international jurisprudence on hate propaganda,<sup>111</sup> which, as it explicitly states, it 'considers . . . to be the point of reference for its consideration of these issues', rather than United States law, which Counsel for Ngeze urged it to employ as the applicable standard.<sup>112</sup>

The Tribunal, by describing RTLM broadcasting as a 'drumbeat' and referring to 'the *process of incitement* systematically engaged in by RTLM',<sup>113</sup> reveals that its idea of the concept of incitement is extremely close to that of hate propaganda. It is engaged in over time and builds up an atmosphere in which the killing of a certain group of people appears acceptable, even necessary. As the Tribunal does not desist from stressing, 'radio heightened the sense of fear, the sense of danger and the sense of urgency', which instilled in listeners the perception that they needed to act.<sup>114</sup>

It is therefore evident that, in recent decisions, the ICTR has considerably clarified and extended the concept of incitement to genocide. It has brought it closer to encompassing hate propaganda by recognizing that, in order to incite people to commit genocide, incitement in the sense of instigation is insufficient. There must be the prior creation of a climate in which the commission of such crimes is possible. The ICTR has appreciated the importance of criminalizing hate propaganda by pronouncing itself obliged to respect international human rights jurisprudence upholding prohibitions of such propaganda, explaining that such 'international law codifies evolving universal standards'.<sup>115</sup> As a result of the ICTR's recent case law, an accused may be found guilty of incitement to genocide not only where he or she has unambiguously called for the extermination of a specific group, but also where he or she has engaged in vicious hate propaganda, as long as such propaganda can somehow be construed as a call for action. Furthermore, it is irrelevant whether such incitement is followed by genocide or not, as what is important is 'the potential of [a] communication to cause genocide'.

#### 4. THE NEED FOR INTERNATIONAL CRIMINALIZATION OF HATE PROPAGANDA

It is submitted that, for various reasons, it is of vital importance to accord hate propaganda the status of an international crime. As outlined in Part I above, most if not all countries are currently obliged to prohibit and outlaw such propaganda by virtue of several international conventions dealing with human rights. This is, however, insufficient, due to the fundamental difference between human rights protected under human rights conventions and international crimes.

110. Cited in D. Temple-Raston, 'Radio Hate', (2002) *Legal Affairs* 29, 30.

111. *Nahimana*, *supra* note 26, paras. 978–1015.

112. *Ibid.*, para. 1010.

113. *Ibid.*, para. 1031.

114. *Ibid.*

115. *Ibid.*, para. 1010.

#### 4.1. Human rights v. international crimes

Human rights treaties aim at the protection of individuals' fundamental rights, which states oblige themselves to uphold.<sup>116</sup> Their failure to do so can entail different consequences, depending on the treaty regime in question. Whilst these can include complaints by individuals to quasi-judicial bodies such as the HRC<sup>117</sup> or the CERD,<sup>118</sup> or inter-state complaints,<sup>119</sup> there is neither a duty on nor a right for other states to intervene in any other relevant manner, for example by exercising universal jurisdiction over the violators. Instead, human rights treaties govern the relationship between individuals and the respective states they live in.

By contrast, an international crime entails the *personal* criminal responsibility of individuals. The intention behind characterizing an act as an international crime is 'to protect values considered important by the whole international community and consequently binding all states and individuals'.<sup>120</sup> Furthermore, there is a 'universal interest in repressing these crimes', which means that they are *prima facie* subject to universal jurisdiction, if certain other conditions are fulfilled.<sup>121</sup> Criminalizing hate propaganda in this manner would therefore signify the international stigmatization of the individuals engaging in it, as well as the capacity of any state or international criminal tribunal, including the ICC, to exercise jurisdiction over them. There would be no more impunity, and genocide could be prevented more effectively, as demonstrated below.

#### 4.2. The *jus cogens* status of the crime of genocide

Genocide has been described as the 'crime of crimes' by the ICTR,<sup>122</sup> and has been depicted as sitting 'at the apex of the pyramid' of international crimes.<sup>123</sup> The prohibition of genocide is widely acknowledged to have acquired *jus cogens* status, imposing obligations *erga omnes*.<sup>124</sup> A *jus cogens* rule is a peremptory norm of international law

116. See McGoldrick, *supra* note 57, at 168–9.

117. 1966 Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

118. ICERD, *supra* note 4, Art. 14.

119. See e.g. ICCPR, *supra* note 3, Art. 41; ICERD, *supra* note 4, Art. 11; ECHR, *supra* note 6, Art. 33; ACHR, *supra* note 6, Art. 45.

120. Cassese, *supra* note 85, at 23.

121. *Ibid.*

122. *Kambanda*, *supra* note 93, para. 16; *Prosecutor v. Serashugo*, Sentencing Judgment, Case No. ICTR-98-39-S, 2 February 1999, para. 15.

123. Schabas, *supra* note 43, at 9.

124. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, 11 July 1996, [1995] ICJ Rep. 595, para. 31 (hereinafter '*Application of Genocide Convention case*'); *Ibid.* (Judge Lauterpacht, Separate Opinion), para. 100; *Barcelona Traction, Light and Power Company Ltd. Case (Belgium v. Spain)*, Preliminary Objections, 5 February 1970, [1970] ICJ Rep. 3, paras. 33–34; *Jorgic case*, BVerfG, 2 BvR 1290/99, German Federal Constitutional Court, Judgment of 12 December 2000, para. 16; I. Brownlie, *Principles of Public International Law* (1998), 515; Cassese, *supra* note 85, at 98; Schabas, *supra* note 43, at 444–5; M. C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', (1996) 59 *Law and Contemporary Problems* 63, 68; S. Kadelbach, *Zwingendes Völkerrecht* (1992), 276; S. Kirchner, 'Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?', (2004) 5 *German Law Journal* 47, 55; K. Parker and L. B. Neylon, 'Jus Cogens: Compelling the Law of Human Rights', (1989) 12 *Hastings International and Comparative Law Review* 411, 430.



which is non-derogable;<sup>125</sup> such norms ‘do not exist to satisfy the needs of the individual states but the higher interest of the whole international community’,<sup>126</sup> and therefore enjoy a higher status than ordinary rules of international law. Obligations *erga omnes* are ‘obligations owed towards all the other members of the international community, each of which then has a correlative right’.<sup>127</sup>

While there is a general consensus that the prohibition of genocide is *jus cogens*, it has also been recognized that the entire Genocide Convention has now not only become part of customary international law, but also imposes obligations *erga omnes*, and can even be said to enshrine rules of a *jus cogens* character. Alfred Verdross asserts that ‘all rules of general international law created for a humanitarian purpose’, among which he counts the principles laid down in the Genocide Convention, are *jus cogens*.<sup>128</sup> The International Court of Justice has declared that ‘the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*’<sup>129</sup> after, in an earlier decision, characterizing them as *jus cogens* in rather veiled terms, underlining the ‘purely humanitarian and civilizing purpose’ of the Convention, in which the states parties ‘do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention’.<sup>130</sup> Consequently, the Convention’s principles ‘are recognized by civilized nations as binding on states, even without any conventional obligation’.<sup>131</sup> The German *Bundesverfassungsgericht* has similarly confirmed that the Genocide Convention consists of norms which are *jus cogens*,<sup>132</sup> as have academic writers such as Antonio Cassese.<sup>133</sup> Whilst the *jus cogens* status of the prohibition of genocide itself can thus be regarded as established, it could be argued that the prohibition of incitement to genocide has similarly achieved *jus cogens* status, as it represents one of the norms included in the Genocide Convention.

As all crimes prohibited under *jus cogens* norms entail universal jurisdiction,<sup>134</sup> any state (or applicable international tribunal) could prosecute and punish individuals accused of incitement to genocide. Similarly, were the latter crime to be found to include some form of hate propaganda, universal jurisdiction could presumably be exercised over such crime. Universal jurisdiction over the crimes covered by the Genocide Convention has also been asserted by the scholar who coined the term

125. 1969 Vienna Convention on the Law of Treaties, Arts. 53, 64, opened for signature 23 May 1969, 1155 UNTS 331 (1969) (entered into force Jan. 27, 1980) (hereinafter ‘VCLT’).

126. A. Verdross, ‘Jus Dispositivum and Jus Cogens in International Law’, (1966) 60 AJIL 55, 58.

127. *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 151 (hereinafter ‘Furundžija’).

128. Verdross, *supra* note 126, at 59.

129. *Application of the Genocide Convention case*, *supra* note 124, para. 31.

130. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 28 May 1951, [1951] ICJ Rep. 15, at 23; see also Bassiouni, *supra* note 124, at 73; G. A. Christenson, ‘Jus Cogens: Guarding Interests Fundamental to International Society’, (1988) 28 *Virginia Journal of International Law* 585, 605–6.

131. *Reservations advisory opinion*, *supra* note 130, at 23.

132. *Jorgic case*, *supra* note 124, para. 16.

133. A. Cassese, ‘Genocide’, in Cassese et al., *supra* note 82, 335 at 338.

134. Bassiouni, *supra* note 124, at 63; *Application of the Genocide Convention case*, *supra* note 124, para. 31; *Furundžija*, *supra* note 127, para. 156; *Gesetz zur Einführung des Völkerstrafgesetzbuches*, 26 June 2002, Bundesgesetzblatt 2002 Pt. I No. 42, VStGB Article 1, Pt. 1, §1; *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

'genocide', and can be considered one of the 'fathers' of the Genocide Convention, Raphael Lemkin,<sup>135</sup> who insisted that the intention behind according the crimes covered by the Convention the status of international crimes was 'to declare these crimes punishable by any country in which the culprit might be caught, regardless of the criminal's nationality or the place where the crime was committed'.<sup>136</sup>

### 4.3. The obligation to prevent genocide

Furthermore, the obligation to prevent genocide, which is likewise imposed by the Genocide Convention,<sup>137</sup> must also be an obligation *erga omnes*.<sup>138</sup> This highlights the importance of the prevention of genocide, which has been explicitly recognized in the Convention. This is already apparent in its title, and Article I describes genocide as an international crime which the states parties 'undertake to prevent and to punish', whilst Article VIII empowers them to 'call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide'. General Assembly Resolution 96(I) of 11 December 1946, which provided the Economic and Social Council with a mandate to draft what would become the Genocide Convention, also stresses the need for prevention, inviting member states to pass 'the necessary legislation for the prevention and punishment of [genocide]', and recommending state cooperation to 'facilitat[e] the speedy prevention and punishment of the crime'.<sup>139</sup> In his Separate Opinion in the *Application of the Genocide Convention* case, Judge *ad hoc* Lauterpacht reaffirmed this duty to prevent genocide, declaring that 'a breach of duty can arise solely from failure to prevent [genocide]'.<sup>140</sup>

The inclusion of inchoate crimes such as direct and public incitement, conspiracy, or attempts<sup>141</sup> further underscores the drafters' awareness of the importance of preventing genocide, rather than just focusing on punishment. The criminalization of incitement to genocide in international law, as an inchoate crime, reflects one of the fundamental purposes of international criminal law, namely to criminalize 'conduct creating an *unacceptable risk of harm*'.<sup>142</sup>

### 4.4. The dangers of hate propaganda

It is submitted that hate propaganda creates an equally unacceptable risk of harm, and effective prevention can therefore only be achieved if hate propaganda is also criminalized. This is confirmed by William Schabas, according to whom the duty to prevent genocide can require the adoption of measures aimed at the suppression of organizations which promote hate propaganda, as well as hate propaganda itself.<sup>143</sup> The importance of putting a halt to hate propaganda to effectively prevent genocide

135. Schabas, *supra* note 43, at 24–30, 52.

136. R. Lemkin, 'Genocide as a Crime under International Law', (1947) 41 AJIL 145, 146.

137. Genocide Convention, *supra* note 17, Art. I.

138. Schabas, *supra* note 43, at 500.

139. GA Res. 96(I) UN GAOR, 1st Sess., pt. 2, at 1134, UN Doc. A/231 (1946).

140. *Application of Genocide Convention* case, *supra* note 124, para. 110 (Judge Lauterpacht, Separate Opinion).

141. Genocide Convention, *supra* note 17, Arts. III(c)–(d).

142. Cassese, *supra* note 85, at 22 (emphasis in original).

143. W. A. Schabas, 'Le Génocide', in H. Ascencio et al. (eds.), *Droit international penal* (2000), 319, at 324.

was explicitly recognized by the Security Council in several resolutions. In Resolution 1161 (1998) on Rwanda, for example, after '[r]eaffirming... the importance of countering radio broadcasts and pamphlets which spread hate and fear in the region', it '[u]rges all States and relevant organizations to cooperate in countering radio broadcasts and publications that incite acts of genocide, hatred and violence in the region'.<sup>144</sup> Similarly, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its Resolution 1995/4, expressly links the need to prevent genocide, with direct and public incitement to commit genocide, as punishable under the Genocide Convention, on the one hand, and with hate propaganda on the other.<sup>145</sup> It denounces as 'criminal practices' a Burundi radio station's 'broadcast[ing] with complete impunity... [of] "information" inciting racial hatred among Burundi citizens and stirring up [of] genocidal hatred', and stresses the need to prosecute 'the "reporters" and their sponsors'.<sup>146</sup>

Hate propaganda is at least as dangerous as incitement to genocide, if such incitement is regarded as mere instigation. People do not commit genocidal acts in a socially and emotionally neutral climate. More than instigation is necessary to drive physicians to kill their patients, teachers to dismember their pupils, ministers to pour petrol over the faithful and set them afire, or fathers to cut embryos out of the wombs of pregnant women, as happened in Rwanda.<sup>147</sup> These acts are only possible in a certain social climate, which makes such acts appear legitimate and necessary.

Persistent hate propaganda creates such a climate, usually by means of dehumanizing the victims; the Nazis compared Jewish people to animals bearing diseases,<sup>148</sup> and in Rwanda, Tutsi were called *inyenzi*, or cockroaches.<sup>149</sup> As Jonathan Glover explains, '[s]uch images and metaphors create a psychological aura or tone which... may be at least as important as explicit beliefs which can be criticized as untrue'.<sup>150</sup>

Mordechai Kremnitzer and Khaled Ghanayim draw a clear distinction between instigation and public incitement, which they characterize as substantially similar to hate propaganda engaged in with the aim of causing the commission of certain hate crimes,<sup>151</sup> and emphasize the unique dangers posed by incitement, which lie –

... in the potential for a series of these acts to create an overall environment conducive to criminal activity and violence, where terror and subversion of the rule of law and the democratic order reign. The longer an inciter's contact with the incitees continues, the greater the influence he wields over them; and the less the incitees are exposed to other influences, the greater the effectiveness of the incitement, along with the increased potential for a criminal act to be committed in its wake.<sup>152</sup>

144. S/RES/1161 (1998) (emphasis in original); see also S/RES/1049 (1996).

145. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Prevention of Incitement to Hatred and Genocide, Particularly by the Media* (Resolution 1995/4).

146. *Ibid.*

147. B. Grill, 'Der Rest ist Verdrängen', *Die Zeit*, 1 April 2004, at 12.

148. J. Glover, *Humanity: A Moral History of the Twentieth Century* (2001), 339.

149. *Nahimana*, *supra* note 26, para. 358.

150. Glover, *supra* note 148, at 339.

151. Kremnitzer and Ghanayim, *supra* note 86, at 160–1.

152. *Ibid.*, at 164.

Incitement, if seen as a form of hate propaganda, is therefore vastly more dangerous than mere instigation. It provides a justification for the criminal acts to be committed. Extensive hate propaganda sets into motion a 'continuum of destruction' by devaluing and dehumanizing the victim group.<sup>153</sup> Characterizing them as evil legitimizes their eventual destruction. By separating them as an 'outgroup' from one's own 'ingroup', hate propaganda creates a wide and unbridgeable chasm between the future perpetrators and the victims and makes empathy or identification with individuals belonging to the victim group impossible.<sup>154</sup>

In Rwanda, for example, depictions of the Tutsi as biologically different from the Hutu, and as possessing certain inherent features, including 'malice', 'wickedness', and a 'desire for revenge', which drove them to commit crimes against the Hutu, such as 'killing, looting, raping young girls and women',<sup>155</sup> created a climate of fear and hate, in which Hutu regarded it as vital to murder those they were convinced would otherwise murder them. The constant portrayal of the Tutsi as 'ruthless killers who have it in their nature to murder' meant that 'preemptive action to avoid such killing' was regarded as the only choice.<sup>156</sup> This impression was further enhanced by the media's persistent warnings of Tutsi 'infiltration' of the economy, their monopolization of credit at the banks, and their alleged taking of a disproportionate share of all kinds of desirable professions.<sup>157</sup> This 'infiltration' was described by the magazine *Kangura* as a 'disease', which, if 'not treated immediately, . . . will destroy all the Hutu'.<sup>158</sup> The effect of this propaganda has been noted by the ICTR; in the case of *Ruggiu*, for example, the accused, who was a journalist and broadcaster with RTL, 'infected peoples' [sic] minds with ethnic hatred and persecution'.<sup>159</sup> Lieutenant-General Roméo Dallaire, the Canadian Force Commander of UNAMIR, the United Nations Assistance Mission for Rwanda, early on became aware of the manipulation of Rwandans through the constant hate propaganda the media engaged in. As he later wrote,

[t]ogether these extremists created the climate in which a slaughter of an entire ethnicity could be dreamed up – an attempt to annihilate every Tutsi who had a claim on Rwanda, carried out by Rwandans on Rwandans.<sup>160</sup>

Hate propaganda likewise contributed to the climate which facilitated, if not made possible, the Holocaust planned by Hitler and committed by ordinary Germans in Nazi Germany. Even before the Nazis came to power in 1933, anti-Semitic hate

153. E. Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (1989), 62, 95.

154. *Ibid.*, at 120.

155. *Nahimana*, *supra* note 26, para. 179.

156. M. Frohardt and J. Temin, 'Use and Abuse of Media in Vulnerable Societies', USIP Special Report 110, United States Institute of Peace (2003), available at <http://www.usip.org/pubs/specialreports/sr110.pdf> (last visited 2 February 2005), at 7.

157. A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch Report, 1999, available at [http://www.hrw.org/reports/1999/rwanda/Geno1-3-10.htm#P408\\_170340](http://www.hrw.org/reports/1999/rwanda/Geno1-3-10.htm#P408_170340) (last visited 8 March 2004), at 5.

158. *Ibid.*

159. *Prosecutor v. Ruggiu*, Judgment and Sentence, Case No. ICTR-97-32-I, 1 June 2000, para. 19.

160. Dallaire, *supra* note 69, at 513–14.

propaganda had become widespread. Anti-Semitic writers such as Heinrich von Treitschke made such propaganda seem legitimate and succeeded in making it 'ideologically acceptable . . . to blame Jews for Germany's social, economic, and moral troubles'.<sup>161</sup> Anti-Semitism became respectable.<sup>162</sup> When Hitler came to power, the grounds were thus already laid in many ways; his enduring and pervasive hate campaign continued to 'render . . . respectable the public indulgence of private hatreds, as well as the moral and physical obliteration of one's chosen enemies'.<sup>163</sup> Hitler was fully aware of the powers of propaganda and, assisted by Joseph Goebbels, used it to the fullest extent.<sup>164</sup> Feature films such as *Der Ewige Jude* (*The Eternal Jew*), and *Jud Süß*, (*The Jew 'Sweet'*), although not directly propagating the murder of Jewish people, had an unambiguous message: 'The only way to save the world is to murder the Jews'.<sup>165</sup> Their aim was to prepare the Germans for the subsequent mass murder of the Jewish people.<sup>166</sup> *Jud Süß* was extremely successful; after seeing the film, some people were so agitated 'that they emerged from Berlin theatres screaming curses at the Jews: 'Drive the Jews from the Kurfürstendamm! Kick the last Jews out of Germany!'<sup>167</sup> In the *Streicher* judgment, the Nuremberg Tribunal stressed how '[i]n his speeches and articles, week after week, month after month, [Streicher] infected the German mind with the virus of anti-Semitism',<sup>168</sup> thus acknowledging the fundamental role played by hate propaganda in causing the Holocaust.

Similarly, Serbian nationalism was ignited and turned into something far more ominous through hate propaganda employed by the media. The Serbian people were overwhelmed with constant hate- and fear-mongering, denunciations, and incitement, 'a language of war before war was even conceivable in Yugoslavia'.<sup>169</sup>

Without this psychological preparation, which lays the seeds of hate and implants in people's minds the idea that the extermination of a certain group of people is necessary, genocide is not possible. Hate propaganda, as was recognized by both Hitler and the Rwandan planners of the genocide in their country, is extremely useful, if not indispensable, for creating this genocidal climate. As Hitler revealed in *Mein Kampf*:

The art of propaganda lies in understanding the emotional ideas of the great masses and finding, through a psychologically correct form, the way to the attention and thence to the heart of the masses.<sup>170</sup>

The Rwandan *génocidaires* appear to have been influenced by similar thoughts on propaganda, including a book with the title *Psychologie de la publicité et de la*

161. A. Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (2002), 20.

162. *Ibid.*, at 23.

163. R. E. Herzstein, *The War That Hitler Won: The Most Infamous Propaganda Campaign in History* (1979), 16.

164. *Ibid.*, at 58–61.

165. *Ibid.*, at 309.

166. *Ibid.*, at 310.

167. *Ibid.*, at 426.

168. *Streicher*, *supra* note 19, at 501.

169. M. Thompson, *Forging War: The Media in Serbia, Croatia, Bosnia and Hercegovina* (1999), 53.

170. Cited in Glover, *supra* note 148, at 360.

*propagande* by Roger Mucchielli.<sup>171</sup> In effect it appears that, throughout history, leaders or governments eager to start wars have always employed propaganda denigrating the people to be attacked, subjugated or murdered.<sup>172</sup> In 1095, for example, Pope Urban II used ‘blatant atrocity propaganda’ to stir people up to join his crusade.<sup>173</sup>

At the same time it must be recognized that, aside from hate propaganda, there are other factors which can influence and contribute to the creation of a genocidal climate. Such factors include what Jonathan Glover calls the ‘erosion of moral identity’, which involves the loss of one’s capacity to empathize with others;<sup>174</sup> as well as the ‘human disposition to obey’, which was particularly prevalent in Nazi Germany due to a tradition of authoritarian upbringing.<sup>175</sup> Moreover, hate propagandists often avail themselves of pre-existing social or racial tensions; in the case of Rwanda, the colonialists’ preference for Tutsi in the past had worsened, if not been the cause of, the conflict between Tutsi and Hutu,<sup>176</sup> whilst in Germany (and elsewhere in Europe), Jewish people had always served as a convenient scapegoat for all sorts of social, economic, and other ills.<sup>177</sup> However, it is hate propaganda which exacerbates these tensions and moulds them in such a manner as to produce a climate in which underlying, suppressed prejudices are brought to the surface and are made socially acceptable; the suspicion in the future perpetrators’ minds that ‘it is all the Jews’/Tutsis’ fault’ is affirmed and turned into conviction, coupled with the increasingly firm belief that action has to be taken to prevent a looming catastrophe, and/or to take justified revenge for what ‘evil’ was done to them.

#### 4.5. Efforts to outlaw hate propaganda internationally

In order to effectively prevent such atrocities as genocide from recurring, it is therefore necessary to criminalize hate propaganda, to forestall the creation of a social climate in which genocidal acts appear respectable. The need to not let hate propagandists go unpunished was forcefully insisted on by the Soviet member of the Nuremberg Tribunal, Major General Jurisprudence I. T. Nikitchenko in his dissenting opinion in the *Fritzsche* judgment. Pointing out that propaganda was regarded by Hitler and the rest of the Nazi leadership as ‘one of the most important and essential factors in the success of conducting an aggressive war’, and was ‘invariably a factor in preparing and conducting acts of aggression and in training the German populace to accept obediently the criminal enterprises of German fascism’,<sup>178</sup> Nikitchenko concluded:

171. This book was published in Paris in 1970. See Des Forges, *supra* note 157, at 1.

172. P. M. Taylor, *Munitions of the Mind: A History of Propaganda from the Ancient World to the Present Day* (1995).

173. *Ibid.*, at 73.

174. Glover, *supra* note 148, at 50–1.

175. *Ibid.*, at 331.

176. J. P. Chrétien, *Rwanda: Les médias du génocide* (2002), at 86–7.

177. N. Davies, *Europe: A History* (1997), 847.

178. *Judgment: Schacht et al.* (Dissenting Opinion of Judge Nikitchenko), (1946) 22 *Trial of German Major War Criminals* 531, 538.

The dissemination of provocative lies and the systematic deception of public opinion were as necessary to the Hitlerites for the realisation of their plans as were the production of armaments and the drafting of military plans. Without propaganda . . . it would not have been possible for German Fascism to realise its aggressive intentions, to lay the groundwork and then to put to practice the war crimes and the crimes against humanity.<sup>179</sup>

He therefore regarded Fritzsche's guilt as 'fully proven', as '[h]is activity had a most basic relation to the preparation and the conduct of aggressive warfare as well as to the other crimes of the Hitler regime'.<sup>180</sup>

The UN Secretariat in its draft Genocide Convention also recognized the need to criminalize hate propaganda.<sup>181</sup> Article III declares to be a punishable offence '[a]ll forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act'. As the Secretariat explained in its commentary, such propaganda 'would not recommend the commission of genocide', but instead would eventually, 'if successful, persuade those impressed by it to contemplate the commission of genocide in a favourable light'.<sup>182</sup> Such propaganda needed to be outlawed, as it was 'even more dangerous than direct incitement to commit genocide. Genocide cannot take place unless a certain state of mind has previously been created'.<sup>183</sup> The Soviet Union also submitted proposals to include a provision criminalizing hate propaganda, both in the Ad Hoc Committee<sup>184</sup> and in the Sixth Committee.<sup>185</sup> The Soviets argued that this was necessary, as such propaganda was 'the cause of acts of genocide', citing Hitler's *Mein Kampf* as an example.<sup>186</sup> Both France and Haiti supported the Soviet amendment.<sup>187</sup> It was eventually rejected but, as pointed out above, it should be borne in mind that delegates did so believing that the groups protected by the Convention would include political groups.

In any case, the fact that the majority of delegates refused to include a provision criminalizing hate propaganda does not provide conclusive evidence for deciding that it cannot be interpreted to include such criminalization. The applicable rules regarding treaty interpretation can be found in Part III, Section 3 of the Vienna Convention on the Law of Treaties (VCLT). Article 31 sets out the general rule of interpretation, which requires an interpretation 'in good faith', a faithfulness to 'the ordinary meaning' of the terms of the treaty 'in their context and in the light of its object and purpose'. Where such interpretation leaves the meaning 'ambiguous or obscure', or 'leads to a result which is manifestly absurd or unreasonable', 'supplementary means of interpretation', such as the *travaux préparatoires* and 'the

179. Ibid.

180. Ibid., at 540.

181. UN Doc. E/447.

182. Ibid., at 32, cited in Schabas, *supra* note 43, at 480.

183. Ibid.

184. Ibid.

185. Ibid., at 481.

186. UN Doc. A/C.6/SR.86 (citing Soviet delegate Morozov).

187. Ibid. (citing French delegate Chaumont and Haitian delegate Demesmin).

circumstances of [the treaty's] conclusion' can be taken into consideration.<sup>188</sup> It would appear that the meaning of 'direct and public incitement to commit genocide' can reasonably be described as 'ambiguous or obscure'. There is considerable controversy surrounding the term 'incitement', as outlined above, as well as the term 'direct'. Nevertheless, as seen above, recourse to the *travaux* does not conclusively establish the meaning of the provision either.

#### 4.6. The need for a purposive interpretation of Article III(c)

Yet, although the VCLT only lists the *travaux* and the circumstances of a treaty's conclusion as supplementary means of interpretation, a different interpretative approach has been advocated with regard to treaties concluded to protect human rights. In order to advance their purpose, it has been regarded as necessary to adopt a more purposive approach which would allow a 'dynamic interpretation'.<sup>189</sup> The European Court of Human Rights has followed this line in several decisions, arguing that:

the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective... [A]ny interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention'.<sup>190</sup>

The same argument has been advanced with regard to the Genocide Convention itself. In his dissent in the *Reservations Advisory Opinion*, Judge Alvarez asserted that conventions such as the Genocide Convention, which codify new and significant legal principles, and which are 'of a social or humanitarian interest' and therefore for the benefit of individuals,<sup>191</sup> must not be interpreted with reliance on the *travaux*. Instead, these kinds of convention must be distinguished from the preparatory work, as they 'have acquired a life of their own':<sup>192</sup>

[T]hey can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard. These conventions must be interpreted without regard to the past, and only with regard to the future.<sup>193</sup>

In another dissenting opinion, Judges Guerrero, McNair, Read, and Hsu Mo also emphasized the need for 'the most generous interpretation' in the case of a convention such as the Genocide Convention, which seeks to repress a crime such as genocide, the 'enormity' of which could 'hardly be exaggerated'.<sup>194</sup> Although these examples

188. VCLT, *supra* note 125, Art. 32.

189. Schabas, *supra* note 43, at 230.

190. *Soering v. UK*, (1989) 161 Eur. Ct. H.R. (Ser. A) at para. 87, (1990) 11 HRLJ 335; see also *Loizidou v. Turkey*, Preliminary Objections, (1995) 310 Eur. Ct. H.R. (Ser. A) at paras. 70, 72; *Artico v. Italy*, (1980) 37 Eur. Ct. H.R. (Ser. A) 16 at para. 33.

191. *Reservations advisory opinion*, *supra* note 130, at 51 (Judge Alvarez, Dissenting Opinion).

192. *Ibid.*, at 53.

193. *Ibid.*

194. *Reservations advisory opinion*, *supra* note 130, at 47 (Judges Guerrero, McNair, Read, and Hsu Mo, Dissenting Opinion).



do not have the status of unassailable legal precedent, they nonetheless represent a possible route for development and a source of international law within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice.

Prevention of the crime of genocide is one of the fundamental purposes of the Genocide Convention. Its Preamble expresses the intention to 'liberate mankind from such an odious scourge'. In order to effectively prevent genocide, hate propaganda must be outlawed, not merely incitement in the sense of instigation. It is submitted that hate propaganda can be regarded as a crime punishable under the Genocide Convention by employing a purposive or dynamic interpretative approach, as outlined above, in interpreting the crime of direct and public incitement to commit genocide. The beginnings of such an interpretation can already be discerned in the ICTR's recent case law. Hate propagandists should be prosecuted and punished for direct and public incitement to commit genocide if their hate propaganda is clearly aimed at and engaged in with the specific intent to commit genocide, as in the case of other acts of incitement.<sup>195</sup> They must also have 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.<sup>196</sup> Moreover, only the most violent and vicious hate propaganda should be so criminalized, where a clear link to the purpose of bringing about the commission of genocidal acts can be discerned, as well as a manifest danger that such speech will lead to genocide. Of course, commonplace remarks of a racist or prejudicial nature occur on some basic level and to some extent in every society. Clearly these would not constitute incitement to genocide, as they do not entail the degree of danger required. By contrast, virulent hate speech which creates a climate conducive to genocide, such as the propaganda found in Nazi Germany and Rwanda, constitutes a necessary ingredient in any genocide and fall squarely within the definition of incitement to genocide.

## CONCLUSION

I have argued that in order to prevent genocide, an obligation under the Genocide Convention and customary international law, hate propaganda, which usually precedes the instigation of specific acts, must be declared an international crime. This can be achieved by means of a purposive interpretation of the crime of incitement to genocide, indications of which can be perceived in recent ICTR decisions. These have drawn a clear distinction between instigation and incitement which, like hate propaganda, creates a certain atmosphere in which the victim group's destruction appears necessary.

During the 1930s and 1940s, the Swiss succeeded in 'largely eliminat[ing] both Nazi and Communist propaganda' by virtue of placing checks on 'defamation by administrative decree',<sup>197</sup> providing proof of the effectiveness of criminalizing hate propaganda.

195. Schabas, *supra* note 43, at 259.

196. Genocide Convention, *supra* note 17, Art. II.

197. D. Riesman, 'Democracy and Defamation: Control of Group Libel', (1942) 42 *Columbia Law Review* 727, 732.

In Rwanda, on the other hand, where hate propaganda was allowed to proceed unchecked, its effect remains '*d'actualité*'<sup>198</sup> years after the genocide has come to an end: the *génocidaires* who fled from Rwanda following the victory of the RPF forces now seek to impart their ideas on ethnic groups in other African countries. As Jean-Pierre Chrétien states, '[a]ujourd'hui encore, leurs [i.e., the propagandists] partisans n'en démordent pas. Le masque idéologique du génocide a la vie dure'.<sup>199</sup>

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198. 'Relevant today' (my translation). Chrétien, *supra* note 176, at 138.

199. 'Even today, their supporters remain resolute. The ideological mask of the genocide dies hard' (my translation). *Ibid.*, at 127.