

## INCITING GENOCIDE WITH WORDS

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INTRODUCTION .....	278
I. EARLY JURISPRUDENCE: AVOIDING EXPLICIT CAUSATION .....	282
II. DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA .....	287
A. <i>Explicit Causality Analysis in Akayesu</i> .....	287
B. <i>The Nahimana Trial Chamber's Incoherent Jurisprudence</i> .....	289
C. <i>Confusion at the Nahimana Appeals Chamber</i> .....	292
D. <i>Causation: Compensating for Absence of Specific Intent?</i> .....	295
E. <i>Consequences of the ICTR's Causality Jurisprudence</i> ..	298
III. THE "GHOST OF CAUSATION" IN INTERNATIONAL SPEECH CRIMES .....	299
A. <i>Benesch's "Likelihood of Genocide"</i> .....	300
B. <i>Revisiting Cause and Effect in Rwanda</i> .....	301
C. <i>Application of the Benesch Factors in General</i> .....	302
IV. RESOLVING THE CONFUSION: ICG AND AUSTIN'S THEORY OF SPEECH ACTS .....	304
A. <i>Austin's Speech Act Theory and Legal Scholarship</i> ..	305
B. <i>Austin's Speech Act Theory</i> .....	306
C. <i>Application to ICG and Other Inchoate Crimes</i> .....	308
V. SPEECH AND CAUSATION IN COMPLETED CRIMES .....	314
CONCLUSION .....	319

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## INTRODUCTION

*Several witnesses stated that during the atrocities “the Rwandese carried a radio set in one hand and a machete in the other.” . . . The radio was a powerful tool for the dissemination of ethnic hatred. Radio National and RTLM freely and regularly broadcasted ethnic hatred against the Tutsis.*<sup>1</sup>

During the 1994 genocide in Rwanda, observers emphasized the role of media propaganda in inciting Rwandan Hutus to attack the Tutsi minority group, with one claiming that the primary tools of genocide were “the radio and the machete.”<sup>2</sup> As a steady stream of commentators<sup>3</sup> referred to “radio genocide” and “death by radio” and “the soundtrack to genocide,” a widespread consensus emerged that key responsibility for the genocide lay with the Rwandan media.<sup>4</sup> Mathias Ruzindana, prosecution expert witness at the ICTR, supports this notion, writing, “In the case of the 1994 genocide in Rwanda, the effect of language was lethal . . . hate media . . . played a key role in the instigation of genocide.”<sup>5</sup> Legal precedents from the International Criminal Tribunal for Rwanda (ICTR) solidified this view as doctrine, finding that certain public statements by Hutu political leaders and RTLM radio broadcasts constituted direct and public incitement to commit genocide against ethnic Tutsis.<sup>6</sup>

1. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 280 (May 21, 1999).

2. JEAN-PIERRE CHRÉTIEN ET AL., RWANDA: LES MÉDIAS DU GÉNOCIDE 191 (1995).

3. Scott Straus documents numerous instances of the “genocide by radio” theory. Scott Straus, *What Is the Relationship Between Hate Radio and Violence? Rethinking Rwanda’s ‘Radio Machete’*, 35 POL. & SOC’Y 609, 612–13 (2007). A number of scholars have reproduced this language, including Justin La Mort and Darryl Li. See Justin La Mort, *The Soundtrack to Genocide: Using Incitement to Genocide in the Bikindi Trial to Protect Free Speech and Uphold the Promise of Never Again*, 4 INTERDISC. J. HUM. RTS. L. 43, 50–51 (2009) (describing the “media trial” of three Hutu leaders and their participation in “Radio Machete” that “broadcast names and directions of Tutsi and Hutu political opponents who were subsequently killed” and “relentlessly sent the message ‘the Tutsi were the enemy and had to be eliminated once and for all.’”); Darryl Li, *Echoes of Violence: Considerations on Radio and Genocide in Rwanda*, 6 J. GENOCIDE RES. 9 (2004) (discussing the role that Radio-Télévision Libre des Mille Collines (RTLM) played in the Rwandan genocide).

4. NEIL J. MITCHELL, AGENTS OF ATROCITY: LEADERS, FOLLOWERS AND THE VIOLATION OF HUMAN RIGHTS IN CIVIL WAR (2004); François Misser & Yves Jaumain, *Death by Radio*, 23 INDEX ON CENSORSHIP 72 (1994).

5. Mathias Ruzindana, *The Challenges of Understanding Kinyarwanda Key Terms Used to Instigate the 1994 Genocide in Rwanda*, in PROPAGANDA, WAR CRIMES TRIALS AND INTERNATIONAL LAW: FROM SPEAKERS’ CORNER TO WAR CRIMES 145, 145 (Predrag Dojčić, ed., 2012).

6. See, e.g., Prosecutor v. Ndirabatswe, Case No. ICTR-99-54-T, Judgment and Sentence, ¶¶ 1366–69 (Dec. 20, 2012); Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶¶ 422–26 (Dec. 2, 2008); Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment, ¶¶ 966–969, 1033–39 (Dec. 3, 2003); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment and Sentence, ¶¶ 430–37 (May 16, 2003); Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment and Sentence, ¶¶ 44–45, § IV (June 1, 2000); Prosecutor v. Kambanda, Case No.

Recognition of incitement to commit genocide under international criminal law is not confined to the ICTR. International criminal tribunals have accorded great weight to the role of propaganda as they sought to understand the origins and causes of armed conflict. As at the Nuremberg trials of 1945–46, propaganda became one of the International Criminal Tribunal for the Former Yugoslavia’s (“ICTY”) overarching explanations for why neighbors became killers during the 1991–95 conflict in the former Yugoslavia. The ICTY charged defendants such as Dario Kordić and Radoslav Brđanin with complicity to commit genocide—in part on the basis of evidence from their public speeches.<sup>7</sup> At other ICTY trials, prosecutors cited speeches and propagandistic broadcasts as evidence of defendants’ participation in a joint criminal enterprise to commit crimes against humanity.<sup>8</sup> For instance, the Trial Chamber in *Brđanin* identified propaganda as a primary driver of the Balkans conflict:

Prior to the outbreak of the armed conflict, the SDS [Serbian Democratic Party] started waging a propaganda war which had a disastrous impact on the people of all ethnicities, creating mutual fear and hatred and particularly inciting the Bosnian Serb population against the other ethnicities. Within a short period of time, citizens who had previously lived together peacefully became enemies and many of them, in the present case mainly Bosnian Serbs, became killers, influenced by a media, which by that time, was already under the control of the Bosnian Serb leadership.<sup>9</sup>

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ICTR-97-23-S, Judgment and Sentence, ¶¶ 39(v)–(vii),(x), 40(3) (Sept. 4, 1998); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 673–75 (Sept. 2, 1998).

7. Both defendants were acquitted of any liability for crimes against humanity on the basis of their speeches. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

8. *Brđanin*, IT-99-36-T, ¶¶ 80, 323–32. See also Prosecutor v. Popović et al., Case No. IT-05-88-T, Judgment, ¶¶ 1812–1821 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010) (describing the role of Milan Gvero, Assistant Commander for Morale of the Bosnian Serb Army, in the widespread promotion and dissemination of propaganda); Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Third Amended Indictment, ¶ 14(c) (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2009) (“Disseminating, encouraging, and/or facilitating the dissemination of propaganda to Bosnian Serbs intended to engender in Bosnian Serbs fear and hatred of Bosnian Muslims and Bosnian Croats or to otherwise win support for and participation in achieving the objective of the joint criminal enterprise.”); Prosecutor v. Šešelj, Case No. IT-03-67, Third Amended Indictment, ¶¶ 5, 10(b) (Int’l Crim. Trib. for the Former Yugoslavia Dec. 7, 2007) (alleging that Šešelj participated in a joint criminal enterprise by making “inflammatory speeches in the media, during public events, and during visits to the volunteer units . . . instigating those forces to commit crimes. . . .”). For a discussion on incitement and the poetry of Radovan Karadžić, see also Jay Surdukowski, Note, *Is Poetry a War Crime? Reckoning for Radovan Karadžić the Poet-Warrior*, 26 MICH. J. INT’L L. 673 (2005).

9. *Brđanin*, IT-99-36-7, ¶ 80. See Nidzara Ahmetasević, *Hague Recognizes Propaganda’s Role in Srebrenica Genocide*, BALKAN INSIGHT (July 7, 2010, 12:55:23 PM), <http://www.balkaninsight.com/en/article/hague-recognises-propaganda-s-role-in-srebrenica-genocide> (describing the ICTY’s judgment against Gvero for the role he played, by using propaganda, in the joint criminal enterprise to ethnically cleanse the Srebrenica area of eastern Bosnia); see also Prosecutor v. Milošević, Case No. IT-02-54, Ex. 446 (Mar. 14, 2006) (report

Over the last decade, this trend has continued unabated: international criminal courts have increasingly targeted public speech that incites intergroup violence.<sup>10</sup> For example, since its founding in 2002, the International Criminal Court has issued warrants of arrest against four individuals (Ahmad Harun, Callixte Mbarushimana, William Ruto and Joshua arap Sang) charged with ordering, inducing or co-perpetrating war crimes and crimes against humanity during speeches or radio broadcasts.<sup>11</sup> As international tribunals target speech crimes with ever more alacrity, one legal scholar advocates extending the scope of international law to encompass a new atrocity speech offense: “incitement to commit war crimes.”<sup>12</sup>

The ICTR’s decisions on direct and public incitement to commit genocide (hereafter, “ICG”) exhibit some contradictory elements that warrant further attention. ICG is an inchoate crime under international criminal law: its underlying intended crime (in this case, genocide) need not actually occur for the crime to be proven. It should follow, therefore, that to prove ICG, prosecutors need not show a causal link between a speech act and subsequent genocidal acts. Demonstrating that a speech, broadcast, or

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by expert witness, Renaud de La Brosse entitled “Political Propaganda and a Plan to Create a ‘State for All Serbs’: Consequences of Using the Media for Ultra-Nationalist Ends”).

10. For discussions on the growing criminalization of propaganda in international law, see MICHAEL G. KEARNY, *THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW* (2007); Susan Benesch, *The Ghost of Causation in International Speech Crime Cases*, in *PROPAGANDA, WAR CRIMES TRIALS AND INTERNATIONAL LAW*, *supra* note 5, at 254 [hereinafter Benesch, *Ghost of Causation*]; Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485 (2008) [hereinafter Benesch, *Vile Crime*]; Gregory S. Gordon, *Formulating a New Atrocity Speech Offense: Incitement to Commit War Crimes*, 43 LOY. U. CHI. L.J. 281 (2012) [hereinafter Gordon, *New Atrocity Speech Offense*]; Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607 (2010) [hereinafter Gordon, *Music and Genocide*]; 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) [hereinafter Gordon, *From Incitement to Indictment?*]; Wibke Kristin Timmerman, *Incitement in International Criminal Law*, 88 INT’L REV. RED CROSS 823 (2006) [hereinafter Timmerman, *Incitement*]; Wibke Kristin Timmerman, *The Relationship Between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda*, 18 LEIDEN J. INT’L L. 257 (2005) [hereinafter Timmerman, *Relationship Between Hate Propaganda*]. With regard to domestic jurisdictions, see *Mugesera v. Canada*, which issued a deportation order based on a speech made by the defendant in Rwanda in 1992 that the court deemed incitement to commit genocide. *Mugesera v. Canada* (Minister of Citizenship and Immigration, [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.)). In England and Wales, the Racial and Religious Hatred Act makes it an offense to incite hatred against a person on the grounds of his or her religion. Racial and Religious Hatred Act 2006, 2006, c. 1 (Eng. & Wales).

11. Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 363–67 (Jan. 23, 2012); Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges (Dec. 16, 2011), Section VII.3.b., §304–315; Prosecutor v. Ahmad Muhammad Harun & Ali Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest (Apr. 27, 2007).

12. Gordon, *New Atrocity Speech Offense*, *supra* note 10, at 301–07.

publication represented a public and direct call to exterminate a protected group ought to be sufficient to establish criminal responsibility for ICG. Nonetheless, ICTR judges have repeatedly advanced robust claims about the direct, causal relationship between speeches and media broadcasts and subsequent public violence in their factual findings on the Rwandan genocide. Moreover, some judgments refer to causation in their legal analysis and suggest that causation may be a necessary element in the legal doctrine of ICG. Such a move constitutes a radical departure from at least a century of the criminal law of inchoate crimes.

This Article examines the framework of criminal accountability for direct and public incitement to commit genocide and critically evaluates the claim made in ICTR Trial Chamber judgments that a causal connection exists between propagandistic speech acts and genocidal acts of violence. Parts I and II track and evaluate the development of international jurisprudence on propaganda in the context of domestic and international armed conflict, from the Nuremberg Trials to the ICTR judgments. Part II also questions the place of causation in ICTR jurisprudence and underlines the ambiguities in contemporary legal reasoning on ICG. Part III then critiques the “likelihood of genocide” matrix developed by Susan Benesch, finding that while Benesch’s approach is valuable in its attention to the context of speech acts, additional intellectual groundwork is needed: first, to establish the formal legal basis for inchoate speech crimes such as ICG, and second, to separate such inchoate crimes from other modes of international legal liability for speech acts in connection with crimes.<sup>13</sup> Next, drawing upon the theoretical framework of one of the foremost philosophers of language in the twentieth century, J.L. Austin, Parts IV and V disentangle the intention of the speaker from the consequences of speech acts. Part IV explains Austin’s theory, drawing on it to recommend reforms to ICG jurisprudence. In determining incitement to commit genocide, international law might usefully differentiate between three aspects of performative utterances, or what Austin terms the “locutionary” (the meaning and content), “illocutionary” (its force), and “perlocutionary” (the consequences) qualities of speech acts.<sup>14</sup> Specific intent to commit genocide is found in the content, meaning, and force of speech acts, rather than in consequences, which can be an unreliable guide to intention. Part V finds that by using this template, international tribunals might better distinguish modes of liability that require causation (such as instigating, ordering, and aiding and abetting) from inchoate crimes such as direct and public incitement to commit genocide, where the meaning and the force of public statements—rather than their consequences—is paramount. Other benefits of this approach would include refocusing attention on the prevention of genocide and clarifying and narrowing the range of impermissible speech.

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13. See Benesch, *The Ghost of Causation in International Speech Crime Cases*, *supra* note 10.

14. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 94–101 (1975).

I. EARLY JURISPRUDENCE: AVOIDING EXPLICIT  
THEORIES OF CAUSATION

*A large number of the ordinary members of the German nation would never have participated in or tolerated the atrocities committed throughout Europe if they had not been conditioned to barbarous convictions and misconceptions by the constant grinding of the Nazi propaganda machine.*

Captain D.A. Sprecher<sup>15</sup>

Before delving into recent international jurisprudence on speech crimes, it is worth noting the elements of U.S. law that have influenced international thinking on this issue. U.S. constitutional law places well-known legal protections on freedom of speech, but there is also a fairly long tradition of First Amendment jurisprudence that limits violent speech and “‘fighting’ words” that “by their very utterance inflict injury.”<sup>16</sup> The enduring incitement case in U.S. law is *Brandenburg v. Ohio* (1969), which dealt with a Ku Klux Klan leader in Ohio (Clarence Brandenburg) whom a trial court fined \$1000 and sentenced to one to ten years’ imprisonment for inciting violence against African-Americans and Jews at a public televised rally in 1964.<sup>17</sup> The U.S. Supreme Court reversed Brandenburg’s conviction, noting that while his speech was “derogatory,” it merely advocated vague and abstract measures and did not represent incitement to “imminent lawless action.”<sup>18</sup> On its own, mere advocacy of force or violence is not prohibited under U.S. law. Under the *Brandenburg* test, public speech does not warrant First Amendment protection when three criteria are met: 1) the speech is intended to incite violence or lawlessness; 2) it “is likely to incite . . . such action”; and 3) such lawlessness is likely to occur imminently.<sup>19</sup> A number of issues remain unresolved, however, and Healy notes that *Brandenburg* “does not tell us how likely it must be that speech will lead to unlawful conduct or how imminent that conduct must be.”<sup>20</sup> U.S. law warrants a mention here because elements of the judicial reasoning found in *Brandenburg*, and the gray areas surrounding likelihood and imminence, resurface later in the international criminal law of incitement.

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15. Thomas J. Dodd, Prosecution Oral Presentation Against Fritzsche, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center, *available at* <http://archives.lib.uconn.edu/islandora/object/20002:1536#page/1/mode/2up>.

16. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

17. *Brandenburg v. Ohio*, 395 U.S. 444, 444–46 (1969).

18. *Id.* at 446, 448–49. Up until that point, the standard had been the “clear and present danger” test of the *Schenck* decision (1919). *Schenck v. United States*, 249 U.S. 47, 52 (1919).

19. *Brandenburg*, 395 U.S. at 447.

20. Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 660 (2009). For more discussion of the complexities of *Brandenburg* jurisprudence, see Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971 (2010).

In international criminal law, responsibility for propaganda and violent speech was first established in 1945–46 at the International Military Tribunal (IMT) at Nuremberg in the *Streicher* case.<sup>21</sup> Founder and publisher of *Der Stürmer*, a vicious anti-Semitic German weekly, Julius Streicher was convicted in 1946 of “persecution on political and racial grounds in connection with war crimes,” punishable as a crime against humanity under the IMT Charter.<sup>22</sup> Streicher’s case was exceptional in that he was the only defendant convicted and executed at Nuremberg solely on Count Four of Crimes Against Humanity. The Tribunal justified its sentence by finding that the defendant had knowledge of Hitler’s policy of extermination of the Jews, yet he continued to incite Germans “to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions.”<sup>23</sup> Nevertheless, the fleeting, almost cursory decision failed to settle unambiguously the nature of Streicher’s liability. Nor, according to Margaret Eastwood, did it “specifically define the *mens rea* necessary for an act of incitement to genocide.”<sup>24</sup>

It is instructive to consider the grounds on which Nuremberg prosecutors sought to convict two Nazi propagandists for crimes against humanity, when no precedent existed in international law. We can learn a great deal about prosecutors’ strategizing in 1945–46 from the trial briefs and memoranda held in the archives of Thomas J. Dodd, executive trial counsel at Nuremberg. Dodd’s papers reveal that the prosecution held the two propaganda defendants—Streicher and Hans Fritzsche<sup>25</sup>—liable for crimes against humanity as accessories or abettors who incited and encouraged others. Pre-trial briefs refer to Fritzsche as “a principal conspirator in abetting aggressive wars,” whose actions “create[d] in the German people the requisite psychological and political conditions for aggressive war.”<sup>26</sup> His noteworthy role was “preparing Nazi Germany for aggressive war and for the barbarities committed by the Nazis both within Germany and abroad.”<sup>27</sup> Similarly, the prosecutors’ brief on Streicher stated that “[d]efendant Streicher is an accessory to the persecution of the Jews

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21. International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT’L L. 172, 296 (1947) [hereinafter Nuremberg Judgment and Sentences].

See also Jens David Ohlin, *Incitement and Conspiracy to Commit Genocide*, in THE U.N. GENOCIDE CONVENTION—A COMMENTARY 207, 210 (Paola Gaeta ed., 2009).

22. Nuremberg Judgment and Sentences, at 294–96, 331.

23. *Id.* at 295–96, 333.

24. Margaret Eastwood, *Hitler’s Notorious Jew-Baiter: The Prosecution of Julius Streicher*, in PROPAGANDA, WAR CRIMES TRIALS AND INTERNATIONAL LAW, *supra* note 5 at 203, 220.

25. Hans Fritzsche was Head of the German Home Press Department and number two to Minister of Propaganda Joseph Goebbels. Fritzsche was acquitted on all counts by the Tribunal. Nuremberg Judgment and Sentences at 327–29.

26. Thomas J. Dodd, *The Individual Responsibility of the Defendant Hans Fritzsche*, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center, available at <http://archives.lib.uconn.edu/islandora/object/20002%3A1529#page/5/mode/2up>.

27. *Id.*

within Germany and in occupied territories . . . [who] actively supported, recommended, and promoted the program of extermination.”<sup>28</sup> In an interview some twenty years after the Nuremberg trials, British prosecutor Mervyn Griffith-Jones<sup>29</sup> confirmed that the prosecution’s case against Streicher rested upon his involvement as an accessory to genocide; Streicher’s incitement and encouragement of a policy of extermination of the Jews made him “a party to the murder of millions of people.”<sup>30</sup>

U.S. prosecutors at Nuremberg, meanwhile, consciously avoided introducing any causation arguments into their propaganda cases. For example, they forswore leading evidence of a court record of the trial of a member of the *Sturm Abteilung*, or “Stormtroopers,” for the 1934 murder of a Jew, in which the defendant testified that his act was incited by a story about ritual murder published in *Der Stürmer*.<sup>31</sup> The prosecution team anticipated Streicher’s defense rejoinder that no direct evidence had been introduced to prove that his propaganda did, in fact, influence those directly participating in persecution or extermination by reminding the Tribunal that causation was “tangential to the charge brought against Streicher.”<sup>32</sup> Instead, prosecutors concentrated the courtroom’s attention on the explicit message contained in Julius Streicher’s words themselves. Here, the primary prosecution exhibit was the May 1939 issue of *Der Stürmer*, in which Streicher declared, “The Jews in Russia must be killed. They must be exterminated root and branch.”<sup>33</sup>

Prosecutors also focused on the mental states of the propagandist and the German population, noting that Streicher “incited a fear and hatred of Jews which made persecution in the first instance, and finally, the program of mass murder which he openly advocated, a psychological possibility.”<sup>34</sup> While the prosecution refrained from claiming that Streicher’s propaganda caused genocide, time and time again it referred to how it prepared the

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28. Thomas J. Dodd, *The Individual Responsibility of the Defendant Hans Fritzsche*, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center, available at <http://archives.lib.uconn.edu/islandora/object/20002%3A1942#page/1/mode/2up>.

29. As an historic figure, Griffith-Jones is (in)famous for prosecuting Penguin books for publishing D.H. Lawrence’s *Lady Chatterley’s Lover* in 1960. Richard Vinen, *Servant Problems*, 5 HISTORICALLY SPEAKING 2, 2–5 (2003), available at <http://www.bu.edu/historic/hs/november03.html#vinen>.

30. Eastwood, *supra* note 24, at 220.

31. Thomas J. Dodd, Defense of Streicher, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center, available at <http://archives.lib.uconn.edu/islandora/object/20002%3A1953#page/1/mode/2up>; Thomas J. Dodd, Office of U.S. Chief of Counsel Memorandum for Mr. Dodd, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center (May 29, 1946), available at <http://archives.lib.uconn.edu/islandora/object/20002%3A1953#page/1/mode/2up>.

32. Thomas J. Dodd, Individual Responsibility of the Defendant Julius Streicher, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center, available at <http://archives.lib.uconn.edu/islandora/object/20002%3A1942#page/1/mode/2up>.

33. *Nuremberg Judgment and Sentences*, at 295.

34. See Individual Responsibility of the Defendant Julius Streicher, *supra* note 32.

ground psychologically and rendered mass crimes thinkable. A May 1946 memo of from Harriet Zetterberg Margolies to fellow prosecutor Dodd lays out the prosecution's case theory: "Streicher helped to create, through his propaganda, the psychological basis necessary for carrying through a program of persecution which culminated in the murder of six million men, women, and children."<sup>35</sup> Captain Drexel Sprecher's oral presentation to the courtroom likewise asserted that Fritzsche's inciting remarks "helped fashion the psychological atmosphere of utter and complete unreason and hatred."<sup>36</sup>

Nuremberg judges followed the prosecution's lead in the *Streicher* decision, converging on the psychology and mental states of the German populace. They eschewed identifying a specific causal connection between Streicher's speeches or publications and any particular criminal acts, but rather emphasized the relationship between his propaganda and the broader anti-Semitic mindset of Germans: "In his speeches and articles, week after week, month after month, [Streicher] infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution."<sup>37</sup> Therefore the IMT decision postulated a connection, not between the defendant's acts and concrete genocidal acts, but between the defendant's acts and the minds of other Germans, through the metaphor of viral contagion. The IMT's commentary on the matter was spare and the entire decision was barely two pages, but the ICTR Trial Chamber later recognized that "the judgment does not explicitly note a direct causal link between Streicher's publication and any specific acts of murder."<sup>38</sup> In sum, both prosecutors and judges constructed Streicher's criminal responsibility upon accomplice liability, and upon intention and psychological states, rather than causation and a demonstrable nexus between propaganda and particular material crimes.

In the aftermath of Nuremberg, on December 9, 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide ("UN Genocide Convention"), which in Article III(c) declared "direct and public incitement to commit genocide" an international crime.<sup>39</sup>

Given the brevity of judicial commentary in *Streicher* and the dearth of ICG cases in international courts for nearly a half century after Nuremberg, the ICTR—established in 1994—had little jurisprudence to guide its

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35. Office of U.S. Chief of Counsel Memorandum for Mr. Dodd, *supra* note 31, at 1.

36. Prosecution Oral Presentation Against Fritzsche, *supra* note 15, at 23.

37. *Nuremberg Judgment and Sentences*, at 294. On the trial of Streicher, see Eastwood, *supra* note 24, at 203; TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 376–80 (1992).

38. Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment, ¶ 981 (Dec. 3, 2003).

39. Convention on the Prevention and Punishment of the Crime of Genocide art. 3(c), Dec. 9, 1948, 78 U.N.T.S. 227 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

reasoning on the role of propaganda in the Rwandan genocide.<sup>40</sup> What little direction existed on how to interpret Article III(c) of the UN Genocide Convention lay in the Report of the International Law Commission's forty-eighth session in 1996, during which the Commission drafted a non-binding "Code of Crimes Against the Peace and Security of Mankind."<sup>41</sup> Rupturing with domestic criminal codes as well as the precedent set at Nuremberg, the International Law Commission stipulated that direct and public incitement "is limited to situations in which the other individual actually commits that crime."<sup>42</sup> According to the 1996 Code, criminal responsibility only applies when an individual "directly and publicly incites another individual to commit such a crime *which in fact occurs* (my emphasis)."<sup>43</sup>

William Schabas is justifiably critical of the International Law Commission's formulation, which he says "revealed a serious misunderstanding" and "obviously departed from the spirit of article III(c)" by requiring the underlying crime to be consummated.<sup>44</sup> I would venture a step further and argue that the fragility of the ICTR's jurisprudence on incitement originates in the defective guidance in the International Law Commission's 1996 Code, which restricted the crime of direct and public incitement to commit genocide to instances in which the crime of genocide actually occurs.<sup>45</sup> That ICTR Trial Chamber judges were influenced by the ILC's 1996 Code is apparent: they cite it approvingly in nearly all the incitement decisions, starting with the Tribunal's very first case, that of Jean-Paul Akayesu.<sup>46</sup>

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40. The ICTR was established on November 8, 1994 by UN Security Council Resolution 955. S.C. Res. 955, para. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

41. Rep. of the Int'l Law Comm'n, *Draft Code of Crimes Against the Peace and Security of Mankind*, 48th Sess., July 17, 1996, U.N. Doc. A/CN.4/L.532; U.N. GAOR 51st Sess., Supp. No. 10, art. 2.3(f), *reprinted in* [1996] 2 Y.B. INT'L L. COMM'N 17.

42. *Id.* at 22.

43. *Id.* art. 2.3(f).

44. WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 324 (2d ed. 2009).

45. *Draft Code of Crimes Against the Peace and Security of Mankind*, *supra* note 41.

46. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 475, 556, 587 (Sept. 2, 1998). *See also* *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶ 387, 96 n.867 (Dec. 2, 2008); *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment on Appeal, ¶ 1011 (Nov. 28, 2007); *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment and Sentence, ¶ 17 (June 1, 2000); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶¶ 87, 95, 229 (May 21, 1999). This flawed legal formulation could have travelled from the International Law Commission to the international criminal tribunals in various ways, including through a transfer of personnel, since at least one Commissioner (Patrick L. Robinson) participating in the 1996 session later became an ICTY judge in 1998 and ICTY President in 2008. *Former Presidents*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *available at* <http://www.icty.org/sid/155> (last visited Nov. 21, 2014).

## II. DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

This Part reviews the ICTR's groundbreaking case law on direct and public incitement to commit genocide, the first application of the UN Genocide Convention's incitement provisions by an international criminal tribunal. This Part focuses on one key aspect of this jurisprudence: the prominent and ambiguous role of causation in the Tribunal's incitement rulings. In reviewing the applicable law, the rulings tend to reiterate the standard legal formulation that as an inchoate crime, ICG may occur regardless of the consequences of a speech or broadcast. Nevertheless, as this Article discusses in greater detail below, a number of the initial ICTR judgments advanced in their findings of fact a clear causal link between speeches or broadcasts and actual genocide or other material crimes. Subsequent ICTR rulings went even further, and references to causation seeped into their legal findings and altered the way in which the ICTR Trial Chamber conceptualized the legal contours of incitement. Reviewing the entire corpus of ICTR case law in incitement to commit genocide, one might reasonably ask whether the ICTR judges' attention to causation in adjudicating ICG has elevated it to the level of a requisite element of the crime. Reasonable grounds exist for and against the proposition, but both sides could agree that the successive trial and appeal rulings contain a great deal of ambiguity and conflicting language.

### A. *Explicit Causality Analysis in Akayesu*

In its very first case, in 1998, the ICTR confronted a defendant charged with direct and public incitement to commit genocide. The Trial Chamber convicted Jean-Paul Akayesu of direct and public incitement to commit genocide under Article 2(3)(c) of the ICTR Statute.<sup>47</sup> The Trial Chamber verdict in *Akayesu* contained a novel aspect that distinguished it from *Streicher*, namely its explicit claims about the causal effects of inciting speech. In its legal findings, the Trial Chamber formally confirmed the accepted legal position that ICG is an inchoate crime that can be completed "regardless of the result achieved."<sup>48</sup> In its factual findings section, however, the Trial Chamber asserted conspicuously the causal effects of one of Akayesu's inciting speeches: "The Chamber is of the opinion that there is a causal relationship between Akayesu's speeches at the gathering of 19 April 1994 and the ensuing widespread massacres of Tutsi in Taba."<sup>49</sup> The three international judges saw it as noteworthy that Akayesu's call to arms "was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of Taba."<sup>50</sup>

One plausible explanation is that the *Akayesu* court introduced causation as a way of shoring up the "directness" aspect of the conviction of the

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47. *Akayesu*, Case No. ICTR-96-4-T, at ¶¶ 674–75.

48. *Id.* ¶ 562.

49. *Id.* ¶ 673(vii).

50. *Id.* ¶ 675.

accused for direct and public incitement. Given the euphemistic and coded speech of the defendant, the prosecution was not able to present evidence against Akayesu as clear and direct as Streicher's exhortations, such as: "The Jews in Russia must be killed. They must be exterminated root and branch."<sup>51</sup> In order to conclude that Akayesu directly incited his followers to commit genocide, the judges in *Akayesu* were compelled to adopt an expansive view that encompassed implicit as well as explicit calls to exterminate a protected group. The *Akayesu* Trial Chamber based its understanding of the cultural meaning of speeches on the report, relying heavily on the testimony of Dr. Mathias Ruzindana, the prosecution's expert witness on Kinyarwanda linguistics.<sup>52</sup> The Trial Chamber found that Akayesu's exhortations to fight "the Inkotanyi" (literally "warriors") to a crowd of 100 people at Gishyeshye in the early hours of April 19, 1994 "would be construed as a call to kill the Tutsi in general."<sup>53</sup> *Akayesu's* capacious interpretation of euphemistic calls to genocide set a precedent that the Trial Chamber would enlarge in later cases such as *Ruggiu*, where it stated that "the term 'Inyenzi' ["cockroach"] became synonymous with the term 'Tutsi.'"<sup>54</sup> Over time, the Tribunal came to interpret a defendant's use of the expression "go to work" to mean, "[G]o kill the Tutsis and Hutu political opponents of the interim government."<sup>55</sup> It appears that the Trial Chamber made its repeated causal declarations in order to justify the inclusion of euphemistic speech within the "directness" requirement of the crime of ICG.

*Akayesu's* treatment of causation went beyond merely fulfilling the directness requirement of ICG, however. The judgment seemingly elevated causation to a legal requirement to prove incitement, even though the Trial Chamber embedded its pronouncement in the factual findings section of the decision: "the Chamber feels that it is not sufficient to simply establish a possible coincidence between the Gishyeshye meeting and the beginning of the killing of Tutsi in Taba, but that *there must be proof of a possible causal link* between the statement made by the Accused during the said meeting and the beginning of the killings" (emphasis in origi-

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51. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945–1 OCTOBER 1946, at 303 (1947).

52. For a summary of the expert witness report, see Ruzindana, *supra* note 5, at 145, 145–70.

53. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 673(iv) (Sept. 2, 1998). The judgment notes that "Inkotanyi" means literally "warriors," and was a term commonly used to refer to soldiers of the Rwandan Patriotic Front. *Id.* ¶ 147. Furthermore, "Inkotanyi" has pre-colonial origins and in that period had no mono-ethnic connotations. The judgment glosses the use of the term in 1994 thus: "it should be assumed that the basic meaning of the term Inkotanyi is the RPF army." *Id.* The official website of the Rwandan Patriotic Front still proclaims "Inkotanyi" beneath its homepage banner headline. RWANDAN PATRIOTIC FRONT, <http://www.rpfinkotanyi.org/en/index.php> (last visited Nov. 21, 2014).

54. Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment and Sentence, ¶ 44(iii) (June 1, 2000).

55. *Id.* at ¶ 44(iv).

nal).<sup>56</sup> This demand for proof ostensibly removed ICG from the category of inchoate crimes and re-categorized it among forms of criminal liability (such as ordering, instigating, and aiding and abetting) that require actual commission of the underlying crime.<sup>57</sup>

### B. *The Nahimana Trial Chamber's Incoherent Jurisprudence*

Subsequent ICG trials at the ICTR referred to and amplified the causal element introduced in *Akayesu*, even as they simultaneously reiterated the inchoate nature of the crime. The judgment that gave greatest prominence to the causal effects of speech acts was *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*.<sup>58</sup> International legal scholar Diane Orentlicher called *Nahimana*, also known as the “Media Trial,” “the most important judgment relating to the law of incitement in the context of international criminal law since the judgment at Nuremberg more than fifty-seven years earlier.”<sup>59</sup>

Briefly, the facts of the case are as follows: the three defendants in the Media Trial all owned major Rwandan media outlets. Ferdinand Nahimana and Jean-Bosco Barayagwiza were both government ministers and founders of the main independent radio station Radio Télévision Libre des Mille Collines (RTL). Hassan Ngeze was the owner and editor of *Kangura*,<sup>60</sup> a newspaper widely distributed in Rwanda before the genocide.<sup>61</sup> Surprisingly, all three were convicted of direct commission of genocide as a result of their leadership positions at RTL and *Kangura* and their responsibility for publications and radio broadcasts. The Trial

56. *Akayesu*, Case No. ICTR-96-4-T ¶ 349 (emphasis added).

57. ANTONIO CASSESE & PAOLA GAETA, CASSESE'S INTERNATIONAL CRIMINAL LAW 193 – 205 (3rd ed. 2013) (indicating that each of the modes of liability listed here require the commission of the crime, that is, they are not inchoate crimes like incitement to commit genocide) [hereinafter CASSESE & GAETA].

58. *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment (Dec. 3, 2003). For legal commentary on the Media Trial, see Susan Benesch, *Inciting Genocide, Inciting Free Speech*, 21 *WORLD POL'Y J.* 62 (2004) [hereinafter Benesch, *Inciting Genocide*]; Benesch, *Vile Crime*, *supra* note 10; H. Ron Davidson, *The International Criminal Tribunal for Rwanda's Decision in The Prosecutor v. Ferdinand Nahimana et al.*, *The Past, Present, and Future of International Incitement Law*, 17 *LEIDEN J. INT'L L.* 505 (2004); Gordon, *New Atrocity Speech Offense*, *supra* note 10; Gordon, *Music and Genocide*, *supra* note 10; Gregory S. Gordon, *A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 *V.A. J. INT'L L.* 139 (2005) [hereinafter Gordon, *War of Media*]; Catharine A. Mackinnon, *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, *Case No. ICTR 99-52-T*, 98 *AMER. J. INT'L L.* 325 (2009); Christopher Scott Maravilla, *Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law*, 17 *TUL. J. INT'L & COMP. L.* 113 (2009); Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 *NEW ENG. J. INT'L & COMP. L.* 17 (2005); Alexander Zahar, *The ICTR's "Media" Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide*, 16 *CRIM. L.F.* 33 (2005).

59. Orentlicher, *supra* note 58, at 17.

60. Which according to the glossary in the *Nahimana* Judgment literally means “wake others up.”

61. *Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 7, 10.

Chamber defended this conviction on the grounds that “[e]ditors and publishers have generally been held responsible for the media they control.”<sup>62</sup> As Orentlicher explains: “the trial chamber in effect treated *Kangura* and RTLM themselves as perpetrators of genocide and convicted the defendants by virtue of their relationship to the media organs in question.”<sup>63</sup>

The three defendants in the Media Trial were also convicted of ICG, in a verdict that asserted a clear causal connection between speeches and radio broadcasts and subsequent public violence. The ruling asserts no less than sixteen times that speech acts directly caused genocidal killings, using language such as:

Many of the individuals specifically named in RTLM broadcasts after 6 April 1994 were subsequently killed. . . While the extent of causation by RTLM broadcasts in these killings may have varied somewhat, depending on the circumstances of these killings, the Chamber finds that a causal connection has been established by the evidence.<sup>64</sup> . . .

Without a firearm, machete, or any physical weapon, he [Nahimana] caused the deaths of thousands of innocent civilians.<sup>65</sup>

*Nahimana* put a number of disparate and incongruent models of causation in play. In descending order of robustness, it found a direct “specific causal connection,”<sup>66</sup> but also conceded that “the extent of causation by RTLM broadcasts in these killings may have varied somewhat,”<sup>67</sup> and later acknowledged that RTLM broadcasts may not have been the immediate proximate cause of killings and that there may have been a number of intervening factors in addition to the communication.<sup>68</sup> In identifying the mechanisms through which propaganda exerted its causal force, *Nahimana* mixed its metaphors, combining the image of spreading gasoline with Nuremberg’s portrayal of a propagandist injecting poison into the mind of a civilian population:

RTLM “spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country.” This is the poison described in the Streicher judgment.<sup>69</sup>

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62. *Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 1001.

63. Orentlicher, *supra* note 58, at 33 (citing *Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶¶ 970–77 to justify her interpretation).

64. *Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 482.

65. *Id.* ¶ 1099.

66. *Id.* ¶ 949.

67. *Id.* ¶ 482.

68. *Id.* ¶ 952.

69. *Id.* ¶ 1078. *Nahimana* summarized *Streicher* in some detail before proceeding to gauge the consequences of the publications and broadcasts of the three accused. *Id.* ¶ 981.

He [Ngeze] poisoned the minds of his readers, and by words and deeds caused the death of thousands of innocent civilians.<sup>70</sup>

In its factual findings section on RTLM broadcasts, *Nahimana* identified three types of evidence connecting the radio station's transmissions to the genocide. First, some of the Tutsi individuals specifically mentioned by name in broadcasts before and after 6 April 1994 were subsequently killed.<sup>71</sup> That RTLM broadcasts motivated listeners to take action was proven by the testimony of one witness who reported being accosted in the street by an attacker who referred to the content of a broadcast.<sup>72</sup> Finally, the nexus between broadcasts and killings was found in the threat perceived by individuals who had been named in RTLM broadcasts.<sup>73</sup>

Assertions of causation, thus far confined to the factual findings section of *Akayesu* and subsequent judgments, also featured in *Nahimana*'s analysis of applicable case law. In a special section on "causation" in the legal discussion of genocide, the Trial Chamber attributed a causation role generally to "the media."<sup>74</sup> The same section noted that while the downing of the Rwandan president's plane may have triggered the genocide, "RTLM, *Kangura*, and CDR were the bullets in the gun."<sup>75</sup> When it turned to consider the separate charge of ICG, the Trial Chamber provided an inconsistent review of the applicable law. *Nahimana* makes reference to *Akayesu*'s factual finding of a causal relationship between the defendant's speech and widespread massacres—but mistakenly elevates causation to an element of the *legal* findings section of the *Akayesu* decision.<sup>76</sup> A few sentences later it backpedals, reaffirming that causation is "not requisite to a finding of incitement."<sup>77</sup>

The Trial Chamber's disjointed perspective on causation in ICG encroached on its reasoning on other legal matters, such as *Nahimana*'s formulation of incitement as a *continuing crime*—which, similarly to the crime of conspiracy, continues in time until the target crime is fulfilled or completed. "[T]he crime of incitement . . . continues to the time of the commission of the acts incited,"<sup>78</sup> the Trial Chamber wrote. "[T]he Chamber notes . . . that the crime of direct and public incitement to commit genocide, like conspiracy, is an inchoate offense that continues in time until the completion of the acts contemplated."<sup>79</sup> As a result, the Chamber adopted the view that it could exercise its jurisdiction over "inchoate of-

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70. *Id.* ¶ 1101. *See id.* ¶ 243 ("The ethnic hatred that permeates *Kangura* had the effect of poison, as evidenced by the testimony of the witnesses.").

71. *Id.* ¶ 478.

72. *Id.* ¶ 479.

73. *Id.* ¶ 480.

74. *Id.* ¶ 952.

75. *Id.* ¶ 953.

76. *Id.* ¶ 1015.

77. *Id.*

78. *Id.* ¶ 104.

79. *Id.* ¶ 1017.

fenses that culminate[d] in the commission of acts in 1994.”<sup>80</sup> This view is problematic because it carries certain assumptions: first, that genocidal acts in 1994 actually resulted from prior inciting speech, and second, that such commission is relevant to the adjudication of ICG, even though the formal legal position is that the target crime need not be completed for ICG to constitute a crime. Orentlicher correctly observes that “[t]his characterization is hard to reconcile with the trial chamber’s view that, as an inchoate offense, incitement is a crime regardless of whether it has its intended effect (in the case of incitement to commit genocide, provoking listeners to commit genocide). If the criminality of incitement does not turn upon its impact, it is not readily apparent that this offense should be considered to have ‘ended’ when it achieves its aim.”<sup>81</sup>

### C. Continued Confusion at the Nahimana Appeals Chamber

In 2007, the Appeals Chamber in *Nahimana* corrected some of the more egregious mistakes of fact and law in the Trial Chamber judgment and reversed a number of its findings. As for the genocide charge (that is, the charge of its direct commission), the Appeals Chamber acquitted all three defendants of genocide convictions resulting from their leadership positions at RTLM and *Kangura*. The Appeals Chamber found that there was “no evidence that Appellant Nahimana played an active part in the broadcasts after 6 April 1994 which instigated the commission of genocide. Furthermore, the appeal record contains no evidence that Appellant Nahimana had, before 6 April 1994, given instructions to RTLM journalists to instigate the killing of Tutsi.”<sup>82</sup> In acquitting Nahimana on the separate charge of instigating genocide, the Appeals Chamber rejected the Trial Chamber’s evidence of a link between RTLM broadcasts and acts of genocide, declaring such evidence, “at the very least, tenuous.”<sup>83</sup>

Furthermore, the ICTR Appeals Chamber in *Nahimana* seemed to introduce a new criterion of temporality, in which genocidal speech acts had to be uttered very near or simultaneous with the onset of an actual genocide. The Appeals Chamber upheld the incitement convictions against Nahimana for speeches and broadcasts after April 6, 1994 and against Ngeze for publications of *Kangura* in early 1994 before the start of the genocide.<sup>84</sup> It overturned the ICG conviction of defendant Barayagwisa, however, on the grounds that he was no longer in a position of superior responsibility at the station after April 6, 1994, when the genocide began. The Appeals Chamber found that “although it is clear that RTLM broad-

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80. *Id.* ¶ 104.

81. Orentlicher, *supra* note 58, at 45.

82. *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgment on Appeal, ¶ 597 (Nov. 28, 2007).

83. *Id.* ¶ 513. This comment refers specifically to prosecution evidence for the time period before April 6, 1994, although Nahimana was also acquitted of incitement for the period after April 6th. *Id.* at 346.

84. *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgment on Appeal, at 346–347 (Nov. 28, 2007).

casts between 1 January and 6 April 1994 incited ethnic hatred, it has not been established that they directly and publicly incited the commission of genocide.”<sup>85</sup>

Successive ICTR verdicts reaffirmed the *Nahimana* Appeals Chamber’s temporal criterion. In 2008, for example, Rwandan pop musician Simon Bikindi was convicted on the basis of his calls to violence made over a public address system while genocide was occurring.<sup>86</sup> According to Gordon, the Tribunal implicitly confirmed the temporality criterion formulated in *Nahimana* by absolving Bikindi of liability for anti-Tutsi songs written before the genocide and maintained that only words uttered at or near the time of genocidal violence may constitute incitement.<sup>87</sup>

On the question of the Trial Chamber’s construal of incitement as a “continuing crime,” the ICTR Appeals Chamber pronounced that the Trial Chamber had made an error in law in considering that incitement continues in time until the completion of the crime’s intended purpose, and therefore ICG cannot be considered a “continuing crime” like conspiracy.<sup>88</sup> Instead, the Appeals Chamber correctly reaffirmed that the crime of ICG “is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time.”<sup>89</sup>

While the *Nahimana* Appeals Chamber cleared up a number of inconsistencies in the Trial Chamber judgment, it did not overtly address the Trial Chamber’s reasoning on the relevance of causation in determining whether ICG had been committed. In some instances, however—for instance, insofar as it introduced a new temporality criterion—it implicitly confirmed the centrality of causation and a proven chronological nexus with the target crime.

Why does this matter? What is at stake, jurisprudentially, in the ICTR case law on direct and public incitement to commit genocide? Put simply, because they represent the first case law since Nuremberg, the ICTR’s legal precedents on ICG are likely to influence international criminal law for some time to come. It is fair to say that this has been one of the most controversial areas of international criminal law in the last twenty years, and several leading legal commentators have found the ICTR’s reasoning on ICG sorely wanting. *Nahimana* is perhaps the most contentious of all the ICTR’s judgments, and both its Trial Chamber and Appellate Chamber opinions have sparked controversy. Diane Orentlicher, for example, calls the Trial Chamber decision “problematic,” characterized by “unpersuasive reasoning,” and representing such a rupture with existing law of hate speech and incitement that it potentially violated the legal principle

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85. *Id.* at ¶¶ 636, 754.

86. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶¶ 422, 426 (Dec. 2, 2008).

87. Gordon, *Music and Genocide*, *supra* note 10, at 263. For the relevant section, see *Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶¶ 255, 421.

88. *Nahimana*, Case No. ICTR-99-52-A, Judgment on Appeal, ¶ 723.

89. *Id.*

of non-retroactivity.<sup>90</sup> Alexander Zahar, an attorney at the ICTR and ICTY, pronounces the same ruling “a very poor precedent,” and states that the judges drifted into “legal activism, at worst legal absurdity.”<sup>91</sup> Perhaps most damning is the view expressed by Judge Theodor Meron in his partly dissenting opinion in the *Nahimana* Appeals Chamber judgment. Meron felt that there were so many errors of fact and law in the *Nahimana* Trial Chamber judgment that “remanding the case, rather than undertaking piecemeal remedies, would have been the best course.”<sup>92</sup>

Perhaps Meron’s call for a complete retrial was justified. Even though the *Nahimana* Appeals Chamber corrected many mistakes in the trial ruling, it glossed over others and left room for future misinterpretation—especially given that it did not explicitly overturn the International Law Commission’s view that the UN Genocide Convention’s article III(c) on direct and public incitement to commit genocide only applies to acts of incitement that “in fact occurs.” The exact role of causation in determining ICG was one of those issues that was not fully presented and worked through, and it continues to cast a shadow over the jurisprudence of the Tribunal, even after the *Nahimana* Appeals Chamber judgment. The inconsistency both within the ICTR’s incitement jurisprudence and between the Appellate Chamber ruling and other sources of international law thwarts the imperative to formulate unambiguous provisions in this new field of international criminal law. It may also violate the rights of the accused to be judged according to a coherent corpus of legal precedent. That future tribunals will encounter such contradictory characterizations of ICG destabilizes the legitimacy of international criminal law.

It is worth considering what might induce professional judges to abandon centuries of convention on the law of inchoate crimes to claim a causal connection between speech acts and the crime of genocide—and even to include causation in legal discussions of incitement without a doctrinal reason to do so. In the beginning, as this Article has already noted, the causation claims proposed in *Akayesu* were a way of establishing the directness aspect of the defendant’s inciting speech. But why has the causation element plagued a succession of judgments and even been elevated from the factual findings to the legal discussion of judgments? In looking for clues to explain a sudden rupture in legal reasoning, it can be fruitful to look for the places in the text of judicial decisions where the logic breaks down. In venturing a new legal precedent on the role of causation in inchoate crimes, the Trial Chamber in *Nahimana* tied itself in analytical knots:

With regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause

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90. Orentlicher, *supra* note 58, at 558–59, 576.

91. Zahar, *supra* note 58, at 33–34, 48.

92. *Nahimana*, Case No. ICTR-99-52-A, Judgment on Appeal, at 375 (Meron, J., dissenting).

genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. *That the media intended to have this effect is evidenced in part by the fact that it did have this effect.*<sup>93</sup>

The second sentence of this paragraph appears to be a non sequitur, or at the very least contradicts the sentence before it. Either way, placing the two statements sequentially defies logical coherence. Sentence three engages in a perplexing reverse logic, where proof of intention is discovered (“in part”) in the consequences of a speech act. The *Nahimana* Appeals Chamber did not find this reasoning erroneous, on the grounds that in some circumstances, the fact “that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide, and that this was indeed the intent of the author of the speech.”<sup>94</sup>

Can intentions in fact be read from subsequent acts? At times, yes: for instance, when individual A encourages individual B to commit a crime and B commits the crime in the way that A intended. And yet this is not an infallible method; a speech act could lead to one outcome when the speaker in fact intended another. What matters here, however, is not whether effects (always, or even sometimes) prove intentions beyond reasonable doubt, but that the ICTR judges contended that this was so, and felt the need to repeatedly accentuate this point as they justified the centrality of causation in determining ICG.

#### D. Causation: Compensating for Absence of Specific Intent?

The causation element may have been a method for the ICTR to compensate for tenuous evidence for specific intent—allowing judges to reverse-engineer intention based on genocidal acts that occurred after a speech or broadcast. The key to understanding how causation functioned in judicial reasoning at the ICTR can be found in the problem of proving specific intent to commit genocide, a particularly arduous exercise that has vexed jurists for decades at international tribunals. This is relevant for ICG cases because the type of intention in direct and public incitement to commit genocide is not just any common-garden variety criminal intention. ICG requires specific intent (*dolus specialis*) to eliminate a protected group as such, in whole or in part.<sup>95</sup> Under international criminal law, specific intent calls for proof of a higher-order purpose, above and beyond the standard intention merely to commit a prohibited act.<sup>96</sup> There are times

93. Prosecutor v. Ferdinand Nahimana et al., Case No. ICTR-99-52-T, Judgment, ¶ 1029 (Dec. 3, 2003) (emphasis added).

94. *Nahimana*, Case No. ICTR-99-52-A, Judgment on Appeal, ¶ 709.

95. See generally SCHABAS, *supra* note 44; see also Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 140 (April 19, 2004) (establishing any genocide charge requires proof of specific intent).

96. For specific intent in genocide jurisprudence, see SCHABAS, *supra* note 44, at 260–64.

when the ICTR judges' deliberations on specific intent border on ulterior intent and even motive, where the intent transcends a wrongful act to target a larger objective for the sake of which the act is done. For instance, the *Akayesu* Trial Chamber introduced "ulterior motive"<sup>97</sup> into its definition of specific intent. Subsequent ICTR judgments continued with this conflating of motive and intent, and their discussions of intention referred to an "ulterior purpose" and "ulterior motive" to destroy a group.<sup>98</sup>

The heightened burden of proof for specific intent constitutes the main reason why many defendants have been acquitted of genocide, especially at the International Criminal Tribunal for the Former Yugoslavia.<sup>99</sup> Proving specific intent therefore emerges as the judicial motivation to explain why causation featured in the way it did in ICTR judgments on incitement to commit genocide. The central issue that the judges faced in a number of the early ICG cases like *Akayesu* and *Nahimana* was the yawning gap between the high threshold of specific intent to commit genocide and the paucity of prosecution evidence for *mens rea*. Despite the conventional wisdom in journalistic and human rights circles that the pro-government radio and press was full of daily calls for genocide in 1994, strong evidence for genocidal *mens rea* was not presented by the prosecution in *Nahimana*. Former ICTR attorney Zahar finds himself "puzzled by the court's inability to come up with a single example—broadcast on RTLM or printed in *Kangura*—of a blatant call on Hutu to hunt down and destroy the Tutsi ethnic group."<sup>100</sup> He notes that while the thirty-seven fragments of RTLM cited in the judgment are "brutal," full of ethnic animus and likely deserving of a penal response, "the fragments do not read like

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97. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 522 (Sept. 2, 1998) ("The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element.").

98. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 165 (Jan. 27, 2000); Prosecutor v. Rutaganda, Case No. ICTR-97-32-T, Judgment, ¶¶ 59–60 (Dec. 6, 1999).

99. Defendants acquitted of genocide (direct commission) at the ICTY include Brđanin, Gvero, Jelišić, Krajišnik, Krstić, and Stakić. See Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment on Appeal, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); Prosecutor v. Popović et al., Case No. IT-05-88-T, Judgment, ¶ 1834 (Int'l Crim. Trib. for the Former Yugoslavia Jun 10, 2010); Prosecutor v. Jelišić, Case No. IT-95-10-A, Judgment on Appeal, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia, July 5, 2001); Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment on Appeal, ¶ 280 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment on Appeal, ¶ 268 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment on Appeal, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006). For a discussion of the demands of proving specific intent in ICTY cases, see RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 91 (Cambridge University Press Law, 2011). There is no explicit judicial deliberation in the ICTY case law on the question of causation. James G. Stewart has also observed this fact: "There is something quite peculiar about international criminal justice as a discipline: causation has escaped direct treatment by almost all courts and scholars." James G. Stewart, *Overdetermined Atrocities*, 10 J. INT'L CRIM. JUST. 1189, 1194 (2012).

100. Zahar, *supra* note 58, at 37–38.

direct and public incitement to commit genocide.”<sup>101</sup> Zahar finds it remarkable that “the prosecutor was not able to arrange for a single witness to testify that he or she was incited by appeals or hints . . . to commit genocide.”<sup>102</sup> The allure of causation was that it compensated for the fragility of the prosecution evidence for specific intent, and allowed judges to reverse-engineer intention from the acts occurring after a speech or broadcast.

This line of explanation finds additional support when we consider the negative examples that exist in ICG case law—that is, those trials in which causation made no appearance at all in the final judgment. Two cases warrant mention here: that of Rwandan pop star Simon Bikindi and the most recent ICG case to date, that of Augustin Ngirabatware, decided on December 2012.<sup>103</sup> In each of these cases, the inciting words of the accused were much more explicitly, purposefully, and directly genocidal.

Even though the Trial Chamber attested that Bikindi’s “songs inspired action,”<sup>104</sup> and that “broadcasts of Bikindi’s songs had an amplifying effect on the genocide,”<sup>105</sup> the defendant was convicted solely for his unequivocal calls to eliminate Tutsis, delivered in person over a public loudspeaker system. The plain and unvarnished bluntness of Bikindi’s speech formed the basis of the Trial Chamber’s determination of specific intent, rather than any putative causal effects of his words. In fact, the *Bikindi* judgment openly acknowledges that one witness did not testify to any causal link between Bikindi’s speech to a crowd and a subsequent killing, as the prosecutors’ indictment had claimed.<sup>106</sup>

Next, the Trial Chamber in *Ngirabatware* made no references to causation whatsoever in the judgment, in strong contrast to *Akayesu*, *Nahimana*, and *Ruggiu*. Instead, it arrived at its conclusions regarding the genocidal state of mind of the accused solely on the basis of the content of Ngirabatware’s speech at a roadblock in 1994:

His instruction to ‘kill Tutsis’ objectively and unambiguously called for an act of violence prohibited by Article 2(2) of the Statue, and the Chamber has no doubt that Ngirabatware made this statement with the intent to directly incite genocide.<sup>107</sup>

As a working hypothesis, then, we might posit that in ICG judgments where the prosecution’s evidence of specific intent is incomplete and precarious, then causation language in the final judgment performs the function of filling the evidentiary gaps in proving specific intent to commit

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101. *Id.* at 38.

102. *Id.* at 41.

103. *See* Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, Judgment (Dec. 20, 2012); Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment (Dec. 2, 2008).

104. *Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶ 253.

105. *Id.* at ¶ 264.

106. *Id.* at ¶ 126.

107. *Ngirabatware*, Case No. ICTR-99-54-T, Judgment, ¶ 1368.

genocide. But where a defendant's words are direct and explicitly genocidal—Ngirabatware's "kill Tutsis," for instance—then causation fades away entirely in the judgment.

E. *Long-Term Consequences of the ICTR's Causality Jurisprudence*

Having diagnosed the reasons why causation has been such a feature of ICG jurisprudence at the ICTR, it is worth weighing the possible long-term consequences of the Tribunal's jurisprudence. One potential negative consequence relates to the challenging issue of genocide prevention. Prevention is an underlying principle of enforcement against inchoate crimes like ICG, yet thus far, no defendant has been indicted for ICG in the absence of an actual genocide.<sup>108</sup> This is perplexing, especially if one considers that the overriding motivation of the drafters of the UN Genocide Convention for including ICG as a crime was genocide prevention; that is, in proscribing incitement to commit genocide, the objective was to interdict the first steps in a deadly chain of events.<sup>109</sup> An early draft of the Genocide Convention, prepared by the Ad Hoc Committee on Genocide in April and May 1948, criminalized "direct incitement in public or in private to commit genocide, whether such incitement be successful or not,"<sup>110</sup> and the *Akayesu* Trial Chamber noted that the "specific crime" of ICG was established in the Convention "in particular, because of its critical role in the planning of a genocide."<sup>111</sup>

In this light, the ICTR's elevation of causality in the determination of ICG thwarts the prevention clauses of the UN Genocide Convention.<sup>112</sup> By finding directness and specific intention in outcomes, by insisting on "proof of a possible causal link," and by introducing a temporality criterion that posits that incitement to commit genocide can only occur at or near an actual genocide, the existing case law could hinder a range of preventative international responses to early genocidal speech. Such responses might range from jamming radio transmissions to issuing an indictment against those most responsible as they launch a campaign of genocidal propaganda. According to Jean-François Gaudreault-DesBeins, the concern with causation at the ICTR "forces the potential victims of hate propaganda to bear or absorb all risks" of inciting speech.<sup>113</sup> If there is an unspoken condition that courts will find ICG only in the context of actual genocide, and prosecutors therefore feel they must prove a causal nexus between inciting speech and genocidal acts, then such prosecutors

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108. There have been no indictments for incitement to commit genocide at the ICTY, Special Court for Sierra Leone or in the Extraordinary Chambers in the Courts of Cambodia.

109. See SCHABAS, *supra* note 44, at 521.

110. Rep. of the Ad Hoc Comm. on Genocide to the Econ. & Soc. Council, Apr. 5–May 10, 1948, U.N. Doc. E/794, Annex, art.iv(c), at 55 (1948).

111. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 551 (Sept. 2, 1998).

112. Genocide Convention arts. 1, 8.

113. Jean-François Gaudreault-DesBeins, *From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide*, 46 MCGILL L.J. 121, 125 (2000).

are likely to wait until genocide is underway before charging an individual for ICG. This formulation thwarts any preventive force that criminalizing ICG could have, and encourages the international community to adopt a “wait and see” approach. The central rationale of the crime of direct and public incitement to commit genocide is to deter the kind of public exhortations to commit genocide that ordinarily precede the onset of violence. International criminal tribunals have been criticized for being reactive and failing in their prevention and deterrence functions,<sup>114</sup> and the ICTR’s incitement jurisprudence only compounds this shortcoming.

### III. THE “GHOST OF CAUSATION” IN INTERNATIONAL SPEECH CRIMES CASES

*Causation slips into judicial rulings on incitement to genocide for several reasons, all of which are signs of systemic difficulties in international criminal law. First, there is a void to fill. Causation stands in for a tool that courts are lacking: a systematic method for identifying incitement to genocide. That crime, like other speech crimes in international law, has not clearly been defined.*

Susan Benesch<sup>115</sup>

Legal scholars and speech crimes experts have tried to resolve the inconsistencies in the formulation of ICG at the ICTR in various ways. In the noteworthy edited collection *Propaganda, War Crimes Trials and International Law*, leading international speech crimes expert Susan Benesch lucidly identifies the ways in which the “ghost of causation” has haunted the international law of ICG.<sup>116</sup> Benesch observes that in ICG cases, ICTR judges have made stirring pronouncements on causation, even when such pronouncements are neither required by law nor justified by the circumstantial evidence presented before the Tribunal. On the causal connection between speech acts and subsequent violence, she recognizes that “[i]t is difficult to prove such a nexus, since the effect of speech on large groups of people is hard to measure, poorly understood, and is only one of a constellation of forces that affect why people act as they do.”<sup>117</sup>

Benesch’s framework makes a significant contribution to ICG legal scholarship by focusing our attention on the conditions under which an inciting speech act might be successful. However, examining her proposed model in the context of Rwanda reveals the need for additional intellectual groundwork: first, to establish the formal legal basis for inchoate speech crimes such as ICG, and second, to separate inchoate crimes from

114. See, e.g., MARK OSIEL, *MAKING SENSE OF MASS ATROCITY* xiv–xv (2009). *But see* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001) (defending the prevention capabilities of international tribunals). See SCHABAS, *supra* note 44, at 529 (reviewing criticisms of the Clinton Administration and the international community for failing to act in the Rwandan genocide).

115. Benesch, *Ghost of Causation*, *supra* note 10, at 257.

116. *Id.* at 254.

117. *Id.* at 257.

other modes of liability for speech acts in connection with international crimes.

A. *Benesch's "Likelihood of Genocide"*

In the place of unfounded claims about the consequences of speeches and broadcasts, Benesch, *pace Brandenburg*, advances a framework for assessing the *likelihood* that a speech act could have resulted in genocide, based upon the context of the speech act and the foreseeability that the speech act would have genocidal consequences.<sup>118</sup> Her matrix for evaluating the gravity of a speech act is comprised of five indicators.<sup>119</sup> This section summarizes her proposed criteria below, and I encourage readers to consult Benesch's publications for a fuller and more detailed rendition:

1. The degree of authority and influence of the speaker;
2. The disposition of the intended audience and its capacity to commit violent acts;
3. The content of the speech acts and the degree to which they were repetitive, dehumanized the victims, and were understood as a call to violence;
4. The socio-historical context and history of inter-group relations; and
5. The form of transmission of the speech and degree of persuasiveness of the form.<sup>120</sup>

These criteria, Benesch is careful to say, would not replace existing law of ICG. Rather, they are formulated principally to assist prosecutors at international tribunals, and to guide international agencies and governments as they decide whether to intervene or prevent genocide.<sup>121</sup> Instead of determining direct causation, Benesch's criteria assess the *likelihood* that a speech act could have foreseeable genocidal consequences. By offering more nuanced and specific guidance on the contextual conditions and likelihood that a speech act could incite violence, Benesch's framework complements and enhances existing ICTR case law.

At first glance, Benesch seems to have identified the most appropriate "*conditions of satisfaction*"<sup>122</sup> for potentially harmful utterances. Nevertheless, Benesch's framework prompts a number of questions. It would be useful to know, for example, whether—and if so, then how exactly—the five criteria are grounded in social science research on the causal effects of

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118. *Id.* at 262.

119. *Id.* at 262–64.

120. *Id.*

121. *See id.* at 262. *See also* Alexander C. Dale, Note, *Countering Hate Messages that Lead to Violence: The United Nations' Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts*, 11 DUKE J. COMP. & INT'L L. 109 (2001) (regarding jamming radio broadcasts during genocide by the international community).

122. To borrow a phrase from John Searle which refers to "the conditions in the world which must be satisfied if the intentional state is to be satisfied." JOHN SEARLE, *MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION* 29 (2010).

propaganda and hate speech, so that the reader might assess the criteria on the basis of rigorous empirical studies. It would also be beneficial to have supporting social science evidence on the degree of relevance and relative weight of each of the factors; for instance, is the authority of the speaker more or less important than the history of inter-group relations? Research might also inform us about variation within the individual categories: for instance, do some types of authority figures (for example, religious figures, government officials or military leaders) command more influence in a labile population than others, and if so, then when and why? Research on propaganda and inciting speech may point toward other factors not included by Benesch that also demand consideration, such as the role of moral disgust as the psychological mechanism that underlies the effectiveness of dehumanizing language.<sup>123</sup>

### B. *Revisiting Cause and Effect in Rwanda*

The Article raises the above questions about Benesch's model for evaluating speech acts because recent empirical social science studies cast doubt upon the international tribunal's account of the role of propaganda and the media in 1994 Rwanda.<sup>124</sup> On the basis of one hundred interviews of convicted perpetrators in a Kigali prison, Rwandan cultural anthropologist Charles Mironko found that many ordinary villagers either did not receive genocidal radio transmissions or did not interpret them in the way they were intended.<sup>125</sup> Mironko therefore urges caution in ascribing a causal link between RTLM broadcasts and genocidal killings: "[T]his information *alone* did not cause them to kill."<sup>126</sup> Scott Straus's more quantitative study of the relationship between radio and violence in Rwanda both corroborates and extends Mironko's study.<sup>127</sup> Straus identifies a number of flaws in the ICTR's reasoning and fact-finding: RLTM's coverage was very uneven, especially in rural areas, and only ten percent of the population owned a radio in 1994; the initial violence did not correspond with areas of broadcast coverage and the most extreme and inflammatory broadcasts came after most of the killings had been carried out.<sup>128</sup> Straus complements his quantitative analysis with 200 perpetrator interviews, and these revealed that radio listeners did not necessarily internalize the ele-

123. See, e.g., Lasana T. Harris & Susan T. Fiske, *Dehumanized Perception: A Psychological Means to Facilitate Atrocities, Torture and Genocide?*, 175 J. PSYCHOL. 219 (2011) (discussing two recent cognitive neuroscience experiments on dehumanizing language).

124. See, e.g., Richard Carver, *Broadcasting & Political Transition: Rwanda and Beyond*, in AFRICAN BROADCAST CULTURES: RADIO IN TRANSITION 188 (Richard Fardon & Graham Furniss eds., 2000).

125. Charles Mironko, *The Effect of RTLM's Rhetoric of Ethnic Hatred in Rural Rwanda*, in THE MEDIA AND THE RWANDA GENOCIDE 125, 129–30 (Allan Thompson ed., 2007).

126. *Id.* at 134.

127. SCOTT STRAUS, *THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA* (2d ed. 2006); Straus, *supra* note 4.

128. Straus, *supra* note 3, at 616–20, 622.

ments of anti-Tutsi propaganda. Perhaps most crucially, no respondent cited the radio broadcasts as the most important reason for their participation in the genocide.<sup>129</sup>

Both Mironko and Straus's respondents reported that that peer pressure from male neighbors and kin exerted more influence on their participation in killing than did government and radio propaganda.<sup>130</sup> Like Mironko, Straus infers that the radio broadcasts functioned as a device to coordinate attacks and were meant primarily for local authorities, who played the main role in mobilizing citizens directly: "Radio did not cause the genocide or have direct, massive effects. Rather, radio emboldened hard-liners and reinforced face-to-face mobilization. . . ."<sup>131</sup> This social science research offers quite a different model of violence than that asserted by the ICTR judges: instead of positing a relationship between leaders' speeches and popular genocidal acts, it points towards speeches as a form of communication between elites, who then recruited on a personal or kin basis.

Economist David Yanagizawa-Drott, the only social science researcher cited by Benesch in her piece, is an outlier in his finding that approximately 10 per cent of the participation in the genocide can be attributed to the radio broadcasts, corresponding to an estimated 50,000 murders.<sup>132</sup> At this point we can reliably say only that the empirical evidence on the effect of propaganda is mixed, and until more conclusive evidence is available, it would be prudent to approach with circumspection ICTR judges' forceful claims about a direct connection between speech acts and violence.

### C. *Application of the Benesch Factors in General*

In evaluating Benesch's model, other questions arise related to the adversarial process of the international criminal courtroom. If the prosecution is to build its theory of an incitement case on *probable* causation, then it is not at all evident what type and threshold of probability the prosecution is aiming for. In my reading, ICTR case law has set the threshold of proving causation for ICG quite a bit lower than the conventional "cause-in-fact" or "but-for" causation threshold of certain areas of U.S. law.<sup>133</sup> Under the "but-for" standard, the defendant's conduct is a cause in fact of

129. *Id.* At 626.

130. *Id.* at 628–29. *See also* Mironko, *supra* note 125.

131. *Id.* at 631.

132. David Yanagizawa-Drott, "Propaganda and Conflict: Evidence from the Rwandan Genocide," 129 Q. J. ECON. 1947 (2014). . .

133. International criminal tribunals do not apply the but-for test of causation as a matter of course. This is generally stated in the Kordić and Čerkez Trial Chamber judgment at §391. *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 391 (Feb. 26, 2001). Reviewing key speech crimes cases such as *Nahimana AC* we learn that for indirect modes of liability such as instigation: "The *actus reus* of instigating implies prompting another person to commit an offense. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused." *Id.* At §480. This position on the *actus reus* of instigation was refined further by the ICTY Trial Chamber in the *Blaškić*

the particular prohibited result if the result would not have occurred in the absence of the defendant's conduct.<sup>134</sup> No international criminal tribunal has yet to provide a definitive statement on how a standard of probable causation could, in incitement to commit genocide cases, relate to the general criminal law requirement to prove a crime beyond reasonable doubt. Until it does, we are in uncharted waters.

Additionally, Benesch's matrix is explicitly designed as a tool of analysis to guide the prosecution in identifying the crime of ICG. But if it can confirm incitement, then so, too, must it be able to refute incitement if it aspires to be a testable and verifiable theory. However, Benesch does not elaborate on the conditions under which a particular speech act would *not* meet the requirements for ICG, and this suggests a worrying confirmation bias in the model.

Under what conditions would a speech act not constitute ICG? The proposed framework appears overly directed towards making a finding of ICG: it leads the user into a spectrum of criminal liability where the answer to the question "Does this particular speech act constitute direct and public incitement to commit genocide?" will likely vary from "a little bit" to "a lot." Benesch does not assist a court to identify the conditions in which the response is "not at all." In addition, it is a cause for concern that Benesch does not acknowledge how the context can cut both ways, and how listeners may hear an inciting message, but reject it and turn away.

If Benesch's model is consciously designed to guide the prosecution at an international tribunal, then we can expect it to be challenged by defense counsel as neither neutral nor objective. Experienced criminal defense attorneys may reasonably ask a series of thorny questions such as, "Why should a court or international body use these five criteria and not another five? Are not these criteria avowedly created to assist the prosecution side of the case, and would their origin not lead defense counsel and possibly the court to question their neutrality and objectivity? How are these criteria grounded in legal precedent, and, invoking the *Frye* test, to what degree are they accepted within a community of scholars and experts on propaganda and incitement?"<sup>135</sup>

The concern here is that Benesch proposes a model that aims to be predictive without actually being testable. It is a probabilistic framework,

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case: "Although it must be proved that the instigation was a clear contributing factor to the commission of the crime, it need not be a *conditio sine qua non*." *Id.* At §270.

134. See, e.g., *Velazquez v. State*, 561 So. 2d 347 (Fla. Dist. Ct. App. 3d Dist. 1990). J.W. Cecil Turner traces the origins of the but-for test to an 1874 English homicide case, *R v. Towers*, 12 Cox 530 (T.A.C. 1847). J.W. CECIL TURNER, *KENNY'S OUTLINES OF CRIMINAL LAW* 18 (1958).

Andre Moenssens observes that in rare instances if the "but for" test of causation-in-fact fails, then US criminal courts may use a "substantial factor" test in which, for instance, two separate defendants acting independently, commit two separate acts, each of which alone will not bring about the prohibited result, but when considered together, will. See MOENSSENS, *CRIMINAL LAW* 119 (7th ed. 2003); JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* (6th ed. 2006).

135. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

yet one which does not clearly identify the threshold of probability to be employed, nor its criteria of falsifiability. In this way, it suffers from the same ambiguity that afflicts ICTR rulings: while the *Akayesu* Trial Chamber requires proof of a “possible causal link,” Benesch proposes a similar method that relies upon “the *likelihood* that the speech could have caused genocide.”<sup>136</sup> Insofar as Benesch does not explain how her model is testable and falsifiable on an evidentiary basis, it occupies the same uncomfortable halfway house of potential causation as do the ICTR decisions themselves. On the principle of legality, should we not be wary of convicting individuals of international speech crimes based upon a test of probability that is ill defined?

#### IV. RESOLVING THE CONFUSION: ICG AND AUSTIN’S THEORY OF SPEECH ACTS

*Scholars typically define or categorize inchoate crimes only in the negative, as crimes that are not consummate, and even this distinction is unexplained. What is needed instead is an affirmative account of the inchoate category . . . a conceptual framework to support the claim or intuition that recognizing this category is useful . . . .*

Michael T. Cahill<sup>137</sup>

*There is something which is at the moment of uttering being done by the person uttering.*

J.L. Austin<sup>138</sup>

Cahill’s quote is symptomatic of the critical legal commentary on inchoate crimes, which are often considered theoretically wobbly compared with completed or “consummated” crimes. In the criminal courtroom, their negative conceptualization and amorphous nature may also render them vulnerable to judicial revisionism. As we have seen at the ICTR, when international criminal tribunal judges are presented with evidence regarding the causal effects of inciting speech, they seemingly cannot resist invoking them in their factual findings, and they even come to weave causation into the fabric of their legal reasoning. In taking up Cahill’s challenge, the aim of this Part is to provide a proper philosophical grounding for direct and public incitement to commit genocide.

In resolving the confusion surrounding causation in the international law of ICG, I turn to the theories of British philosopher of language J.L. Austin. As one of the more influential philosophers of the twentieth century, the literature on Austin’s theory of speech acts is too vast to review

136. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 349 (Sept. 2, 1998); see Benesch, *Ghost of Causation*, *supra* note 10, at 256;

137. Michael Cahill, *Defining Inchoate Crimes: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 754 (2012) (footnote omitted).

138. AUSTIN, *supra* note 14, at 60.

here, yet fortunately some excellent retrospectives of his work are available.<sup>139</sup> In my engagement with speech act theory, I primarily rely upon Austin's own writings, augmented by those of his leading modern proponent, U.S. philosopher John Searle.

The thesis advanced here is that Austin provides us with a theory of speech acts that, if applied in international criminal law, would advance a coherent development of ICG jurisprudence. Crucially, Austin's conceptualization of utterances disaggregates three aspects of each utterance and chronologically orders them. By breaking each speech act into three dimensions, we can differentiate the aspects of the meaning and the persuasive force from the subsequent effects of a speech act. And by differentiating the meaning and persuasive force dimensions from the consequences, we can see how an inchoate speech crime like incitement to commit genocide might pertain to what a speaker meant and what he was encouraging others to do, rather than the consequences of his or her words. Such a process would focus courts on the content and conduct of his or her speech act, rather than its subsequent effects in the world—and thereby facilitate the prevention of incitement rather than its *ex post facto* punishment. Subsequent effects of the inciting speech act, including any potential uptake and criminal acts committed by listeners, would then be relevant to modes of liability for completed crimes such as ordering, instigating and aiding and abetting.

#### A. Austin's Speech Act Theory and Legal Scholarship

I do not pretend that Austin's theories are straightforward or uncontroversial; however, they are applicable to our discussion because they have featured prominently in debates on the relationship between language and the law over the last fifty years. As Nicola Lacey demonstrates, Austin had a profound impact on one of the foremost philosophers of law in the twentieth century, H.L.A. Hart, even though Hart seldom made reference to Austin explicitly.<sup>140</sup> More recently in the United States, speech act theory has featured prominently in the writings of feminist legal scholars seeking to establish ordinances recognizing pornography as a civil

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139. See, e.g., THE PHILOSOPHY OF J.L. AUSTIN (Martin Gustafsson & Richard Sørli eds., 2011); JAMES LOXLEY, PERFORMATIVITY (2006). For classic philosophical texts inspired by Austin, see Stanley Cavell, *Passionate and Performative Utterance: Morals of Encounter*, in *CONTENDING WITH STANLEY CAVELL* 177–98 (Russell B. Goodman ed., 2005); STANLEY CAVELL, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY* (1979); PAUL GRICE, *STUDIES IN THE WAYS OF WORDS* (1986); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969).

140. NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 133 (2004). For an application of ordinary language philosophy to the law generally, and criminal law in particular, see DANIEL YEAGER, *J.L. AUSTIN AND THE LAW: EXCULPATION AND THE EXPLICATION OF RESPONSIBILITY* (2006). Yeager explores the implications of Austin's theories for inchoate crimes such solicitation and conspiracy, but his objectives are different from mine in this article. *Id.* at 137–39.

rights violation.<sup>141</sup> More generally, Austin has inspired many advocates of heightened legal regulation of hate speech. For example, in his influential book *Speech, Crime, and the Uses of Language*, Kent Greenawalt observes that some kinds of speech go beyond mere assertions of fact and, in threatening, ordering, or exhorting, become “situation-altering utterances” that change the social context in which we live.<sup>142</sup> Given their practical and decisive effects, such as changing a person’s status or enforcing contractual obligations, Greenawalt argues that some such utterances lie outside the scope of the principle of free speech and therefore are “subject to regulation on the same bases as most non-communicative behavior.”<sup>143</sup>

While they might be similar in some ways—that is, they are forms of speech that cause or may have the potential to cause harm *per se*—hate speech, pornography, and ICG are quite distinct as categories of criminal law. ICG is always and everywhere illegal and has achieved the global status of *jus cogens*, whereas hate speech and pornography are illegal only to varying degrees and are legal in many settings. To my knowledge, no scholar of international criminal law has thus far engaged with speech act theory in analyzing the crime of ICG, which is perhaps surprising given its ubiquity in domestic hate-speech debates.<sup>144</sup> None have applied Austin’s theory of speech acts to distinguish between forms of criminal liability that require proof of criminal consequences (such as instigating persecution and deportation) and non-causal speech crimes (such as ICG and hate speech as a form of persecution).

### B. Austin’s Speech Act Theory

Now, to the argument itself. A direct call for the destruction of a group protected by the 1948 UN Genocide Convention in a public setting, even if utterly ignored by its intended audience, is a criminal act. This type of “genocidal speech” is a crime *per se*, by virtue of what it itself does.<sup>145</sup> Standard theories justify the category of inchoate crimes by conceiving of the proscribed crime as an initial step towards a grievous target crime.<sup>146</sup> In order to provide firmer foundations for these classic criminal law argu-

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141. See, e.g., CATHARINE A. MACKINNON, *ONLY WORDS* (1993); Rae Langton, *Speech Acts and Unspeakable Acts*, 22 *PHIL. & PUB. AFF.* 293 (1993).

142. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57–59 (1989).

143. *Id.* at 58. Defenders of unfettered free speech such as Franklyn Haiman charge Greenawalt with conflating words and deeds, arguing instead that language is largely symbolic and devoid of any subsequent effects. FRANKLYN S. HAIMAN, “SPEECH ACTS” AND THE FIRST AMENDMENT 1–4 (1992). Another renowned critic of the movement to curtail pornography, sexist language and “hate speech” is Stanley Fish. See, e.g., STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO* (1994).

144. Predrag Dojčinović, a scholar and investigator at the ICTY, has used the theories of John Searle in a creative fashion to examine instigation and hate speech as a form of persecution. Predrag Dojčinović, *Word Scene Investigations: Toward a Cognitive Linguistic Approach to the Criminal Analysis of Open Source Evidence in War Crimes Cases*, in *PROPAGANDA, WAR CRIMES TRIALS AND INTERNATIONAL LAW*, *supra* note 5, at 71–117.

145. Genocide Convention art. 3(c).

146. See Cahill, *supra* note 137 at 754–55.

ments, we need to delve deeper into the philosophy of language, and comprehend how speech acts are specifically acts, and how words do things. We might profitably start with J.L. Austin's *How To Do Things With Words*, a groundbreaking treatise that transformed both philosophy and linguistics.<sup>147</sup>

Austin was part of a mid-twentieth century movement in the philosophy of language associated with the figure of Ludwig Wittgenstein, who discovered meaning in concrete usage of language rather than through theories of semantics. Austin's famous credo was, "To *say* something is to *do* something."<sup>148</sup> Austin challenged the "descriptive fallacy" of prevailing philosophical orthodoxy, which held that sentences could be evaluated on the basis of the accuracy of their referential account of the world.<sup>149</sup> Instead, speech acts are *acts*—deeds in and of themselves—and therefore can be assessed according to what each individual speech act does: that is, according to its function.

In *How to Do Things With Words*, Austin draws our attention to a category of language overlooked by the descriptive model of language. In a class of sentences that Austin calls "performative utterances," the utterance is the act itself.<sup>150</sup> Examples include, "I marry you," "I warn you the bull is dangerous," "I apologize," "I find you guilty," "I congratulate you," "I welcome you," and so on.

Austin identifies three aspects of performative utterances: the locutionary, the illocutionary, and the perlocutionary aspects.<sup>151</sup> The locutionary aspect, or locution, contains the semantic and grammatical attributes that together denote the meaning of a proposition. That is, they convey the utterance as one "with a certain sense and a certain reference."<sup>152</sup> John Searle glosses the locutionary attribute as the "content of the act . . . the propositional content."<sup>153</sup> The illocutionary element of a speech act, or illocution, denotes the use or function of the sentence: that is, its force and the degree to which it urges, advises, or orders.<sup>154</sup> Loxley defines the il-

147. AUSTIN, *supra* note 14.

148. *Id.* at 12.

149. *Id.* at 100. Here, Austin got a little carried away. Just because some sentences are performative utterances that achieve a result in their very utterance ("I promise"), does not mean that all sentences are of this kind. John Searle, Austin's foremost successor in philosophy, accepts that many speech acts aim to match an independent existing reality and can be evaluated on this basis. SEARLE, *supra* note 122, at 11–12 (2010).

150. AUSTIN, *supra* note 14, at 6.

151. *Id.* at 94–101.

152. *Id.* at 94.

153. In this quote, Searle (p. 137–138) breaks down the "illocutionary act" into two dimensions; the propositional content which refers to the locutionary aspect and the type of act it is and the force it has, which refers to the illocutionary aspect. JOHN R. SEARLE, *MIND, LANGUAGE AND SOCIETY: PHILOSOPHY IN THE REAL WORLD* 137 (1998). In this quote, Searle (p. 137–138) breaks down the "illocutionary act" into two dimensions; the propositional content which refers to the locutionary aspect and the type of act it is and the force it has, which refers to the illocutionary aspect.

154. AUSTIN, *supra* note 14, at 98.

locutionary force of an utterance as “the function it performs” in, for example, “promising, threatening, ordering, or persuading.”<sup>155</sup> Austin dedicates most of his energy in *How to Do Things with Words* to dissecting the illocutionary quality of speech acts such as informing, ordering, warning, and threatening; that is, those “utterances which have a certain (conventional) force.”<sup>156</sup>

The third or perlocutionary property of a performative utterance, or perlocution, invites analogy to the causation analysis that plagues ICG jurisprudence. Perlocution refers to the consequences a speech act has for the feelings, thoughts, or actions of a listener.<sup>157</sup> The concrete effects of a perlocution may be, *inter alia*, to convince, persuade, deter, surprise, or mislead. Austin is careful to say that speech acts do not always persuade in the way they are intended, as this depends on the “uptake” by the listener.<sup>158</sup> Austin is careful to point out that there may be “infelicities,” or conditions under which performative utterances are unfulfilled or invalid,<sup>159</sup> and that speech acts may also have unintended consequences.<sup>160</sup> Loxley says of the perlocutionary aspects of an utterance: “[T]hey are not predictable or regular.”<sup>161</sup>

To summarize, then, Austin distinguishes between the three orders of a speech act thus: “the locutionary act . . . which has a *meaning*; the illocutionary act which has a certain *force* in saying something; the perlocutionary act which is *the achieving of certain effects* by saying something.”<sup>162</sup> In the argument that follows, I follow attentively Austin’s distinctions between the meaning, force, and effects of a speech act.

### C. Application to ICG and Other Inchoate Crimes

How might we apply Austin’s theory of speech acts to the international law of incitement? As it happens, Austin was quite cognizant of the ramifications of his theory of speech acts for the law, observing that performative speech acts comprise the operative or contractual element of a legal instrument that serves to effect an authorized transaction.<sup>163</sup> Furthermore, Austin included as “performative utterances” a number of examples that authorize, sanction, warn, or threaten, and so it seems fair to include incitement under the general category of illocutionary performa-

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155. LOXLEY, *supra* note 139, at 168.

156. AUSTIN, *supra* note 14, at 108.

157. *Id.* at 101. Loxley defines the perlocutionary aspect as follows: “[t]he perlocutionary aspect of an utterance is any effect it achieves on its hearers or readers that is a consequence of what is said.” LOXLEY, *supra* note 139, at 169.

158. AUSTIN, *supra* note 14, at 116–17.

159. AUSTIN, *supra* note 14, at 14.

160. *See id.* at 101, 106.

161. LOXLEY, *supra* note 139, at 169.

162. AUSTIN, *supra* note 14, at 122.

163. *Id.* at 6–7. An example could be as follows, “Upon my death, I hereby bestow my entire estate to my Schnauzer, Pepper Pot.”

tive utterances.<sup>164</sup> The appropriateness of Austin's model of language to our discussion is apparent in the example he used to illustrate the distinction between locutions, illocutions and perlocutions. This is reproduced below, as it appears in the original text:

Act (A) or Locution

He said to me "Shoot her!" meaning by 'shoot' shoot and referring by "her" to *her*.

Act (B) or Illocution

He urged (or advised or ordered, &c.) me to shoot her.

Act (C.a) Perlocution

He persuaded me to shoot her.

Act (C.b) [or Perlocution]

He got me to (or made me, &c.) shoot her.<sup>165</sup>

Distinguishing between the three orders of speech acts helps to justify and explain incitement as an inchoate crime, and to provide grounds for my questioning of the causal language that characterizes the ICTR's incitement rulings. Since it is an inchoate crime, intent to commit genocide focuses upon the locutionary and illocutionary aspects of a speech act, not on the perlocutionary dimensions. Notwithstanding ICTR jurisprudence that would suggest otherwise, direct and public incitement to commit genocide criminalizes steps A and B, regardless of, and ideally in advance of and with the aim of preventing, steps C.a. and C.b. In the law of ICG, the specific intent to commit acts C.a. and C.b. can be found in the logically prior stages A and B.

Moreover, Austin's emphasis on illocutions assists in our comprehension of incitement as a crime that is constituted on the basis of its meaning and what exactly it is urging or encouraging others to do. Parallel arguments have been made with regard to hate speech.<sup>166</sup> Philosopher Rae Langton advances one thesis directly based on Austin's philosophy of speech acts. Langton makes the case that pornography is in itself an act of discrimination and therefore constitutes unprotected speech that may be subjected to statutory limitations.<sup>167</sup> Langton emphasizes what she calls "authoritative illocutions;" that is, speech acts whose force can officially justify, promote, condone, and legitimate acts of subordination and discrimination.<sup>168</sup> One such speech act she considers is, "Blacks are not permitted to vote," as uttered by a legislator in apartheid South Africa.<sup>169</sup> In

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164. *Id.* at 57–58.

165. *Id.* at 101–02.

166. See, e.g., JEREMY WALDRON, *THE HARM IN HATE SPEECH* 4–6 (2012); Maravilla, *supra* note 58; Joseph Rikhof, *Hate Speech and International Criminal Law: The Mugesera Decision by the Supreme Court of Canada*, 3 J. INT'L CRIM. JUST. 1121, 1126 (2005).

167. Langton, *supra* note 141.

168. *Id.* at 305. See also Benesch, *Ghost of Causation*, *supra* note 10, at 262 (recently advocating this approach).

169. Langton, *supra* note 141.

this instance, Langton observes that “[t]he authoritative role of the speaker imbues the utterance with a force that would be absent were it made by someone who did not occupy that role.”<sup>170</sup> Langton helps us to understand how ICG is a crime because of what it *itself* does: namely to legitimate, authorize, and condone genocidal behavior.

Speech act theory conventionally draws sharp lines among the meaning, the force, and the effects of a speech act. To what degree are these three orders in fact distinct and chronological? Austin’s illustration of an inciting speech act above presents the three orders sequentially, listing them as “A, B, C.a, C.b” and indicating a series progression. It stands to reason that locutions precede perlocutions, since logically a proposition cannot have a consequence until a listener has heard and comprehended the proposition.

However, the locutionary and illocutionary aspects of a speech act may occur almost simultaneously; the propositional content and the force may be conveyed in the same moment. Similarly, some speech acts may have aftereffects that arrive within moments of, or even simultaneously with, the statement itself. For instance, a listener might be convinced or repelled by an inciting utterance in the instant that it is delivered—although again, since humans are not simple automatons, they may come to question and even repudiate their initial response.

Refocusing on the problem of the role of causation in ICG helps to resolve these matters somewhat. While morally reprehensible, simply believing that the speaker is justified in his or her public and direct call for genocide is not in itself a crime under international criminal law, which does not proscribe mere thoughts. All of the specifically criminal perlocutionary acts that may or may not follow an inciting speech act (for example, extermination or deportation of a protected group, in whole or in part) must both logically and practically come after the utterance is completed. Therefore, while some perlocutionary acts could be considered more or less simultaneous with illocutions, all *criminal* perlocutions—and especially those, such as genocide, that require widespread and systematic collective orchestration—logically occur after locutions and illocutions.

Austin’s writings provide firm foundations for this interpretation, and at various points he insists on the distinction between the performative utterance and its consequences, stating, “We have then to draw the line between an action we do (here an illocution) and its consequences.”<sup>171</sup> Austin asserts there is “a break at a certain regular point between the act (our saying something) and its consequences (which are usually not the *saying* of anything),”<sup>172</sup> and he finds a “regular natural break in the chain” between illocutions and their consequences.<sup>173</sup> While Austin accepts that a

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170. *Id.*, at 304.

171. *See* AUSTIN, *supra* note 14, at 111 (providing an illustrative example). *See also id.* at 23.

172. *Id.* at 112.

173. *Id.* at 113.

connection may be identified between a speech act and its physical consequences, this chain of causation “does not seem to prevent the drawing of a line . . . between the completion of the illocutionary act and all consequences thereafter.”<sup>174</sup> Austin’s logical distinction between the meaning and force of a speech act on the one hand, and their consequences on the other, is endorsed in the post-Austin philosophical literature, with Searle reaffirming that “[w]e need to distinguish illocutionary acts . . . from the effects or consequences that illocutionary acts have on hearers.”<sup>175</sup>

But more remains to be said about how speech act theory relates to criminal intention. The speaker’s intention is the ultimate issue in an ICG trial, and it is standard orthodoxy in both speech act theory and the law of inchoate crimes that the subjective intention of the speaker can be found only in what Austin terms the locutionary and illocutionary attributes of an utterance. Searle draws our attention to the “theory of intentionality” built into the distinction between the locutionary, illocutionary, and perlocutionary aspects of a speech act—in which the speaker’s intention is concentrated in the meaning and force of a speech act, and not in its effects, which are unpredictable and dependent on the disposition and subsequent behavior of the listener.<sup>176</sup> Searle writes:

Typically, illocutionary acts have to be performed intentionally. If you did not intend to make a promise or statement, then you did not make a promise or statement. But perlocutionary acts do not have to be performed intentionally . . . . The fact that illocutionary acts are essentially intentional, whereas perlocutionary acts may or may not be intentional, is a consequence of the fact that the illocutionary act is the unit of *meaning* in communication . . . . Illocutionary acts, meaning, and intention are all tied together . . . .<sup>177</sup>

Only the locutionary and illocutionary aspects of the speech act are entirely under the control of the speaker. Where ICG is charged, only the utterances of the speaker are under legal scrutiny for the evidence they might contain of intention to commit genocide. In most situations, the hearer may decide whether the illocutionary force of a statement is convincing or not, and even if it is persuasive, then the listener still can decide not to act. Even in the most hierarchical situations—such as the structure of command and control commonly found in military organizations, in which a superior gives orders to a subordinate, perlocutionary acts are only partially under the control of the speaker. History is full of examples where subordinates ignored or disobeyed an order, only carried out part of an order, misunderstood the order, deserted from their unit, or sought to carry out an order but failed because of their incompetence or because

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174. *Id.* at 114.

175. SEARLE, *supra* note 139, at 136.

176. *See id.* at 137–39.

177. *Id.* at 137.

circumstances prevented them.<sup>178</sup> As John Searle observes, with most speech acts, “the perlocutionary effects on the hearer are in large part up to the hearer.”<sup>179</sup>

If an international court does not distinguish between the three orders of a speech act, then it may be prone to mistaken suppositions about where the intention of speech acts lies. Dressler’s *Understanding Criminal Law* observes that actual causation and *mens rea* (criminal intention) are “independent concepts, each of which must be proven in criminal prosecution. Frequently, however, these doctrines are confused.”<sup>180</sup> Austin himself is quite clear that we must distinguish between intended and unintended consequences of speech acts:

Since our acts are actions, we must always remember the distinction between producing effects or consequences which are intended or unintended; and (i) when the speaker intends to produce an effect it may nevertheless not occur, and (ii) when he does not intend to produce it, it may nevertheless occur.<sup>181</sup>

One famous example from the United Kingdom illustrates in domestic criminal law how consequences, or perlocutionary acts, can be a false guide to meaning and intention. For example, in a famous British case, teenager Derek Bentley was hanged in 1953 for the murder of a police officer during a burglary attempt, even though the officer was shot by Bentley’s friend and accomplice, Christopher Craig, then aged 16.<sup>182</sup> When confronted by police officers during the burglary of a warehouse, Bentley was alleged to have called out to Craig, “Let him have it, Chris.” Bentley, who did not possess a gun, was at that moment overpowered and docile, and he had warned police about the dangerous mental state of his accomplice. Fifteen minutes later, after Bentley had already been arrested and handcuffed, Craig shot Police Constable Sidney Miles dead while resisting arrest. The prosecutor’s opening words claimed that Bentley “incited Craig to begin the shooting and, although technically under arrest at the actual time of the killing of Miles, was party to that murder and equally responsible in law.”<sup>183</sup> The jury, as directed by Judge Goddard in his summing up, interpreted Bentley’s “Let him have it” statement as deliberate incitement to murder, rather than a call to surrender the weapon: a line of reasoning

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178. See JAROSLAV HASEK, *THE GOOD SOLDIER SCHWEIK* (2010). The U.S. Army’s Uniform Code of Military Justice certainly recognizes the possibility of soldiers’ non-compliance and under “10. Punitive Articles,” includes the following violations of the code: Desertion (885), Contempt Toward Officials (888), Disrespect Toward Superior Commissioned Officer (889), and Failure to Obey an Order or Regulation (892). See 10 U.S.C. §§ 801–946 (1950), available at UNIFORM CODE OF MILITARY JUSTICE, <http://www.ucmj.us>.

179. SEARLE, *supra* note 122, at 190.

180. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 185 (Lexis Nexis eds., 5th ed. 2009).

181. AUSTIN, *supra* note 14, at 106.

182. *R v. Derek William Bentley*, [2001] 1 Crim. App. R. 307 (Eng.).

183. *Id.* § 1.

based in part upon the actual outcome.<sup>184</sup> Over time, however, the British legal establishment found fault with Judge Goddard's direction to the jury regarding Bentley's alleged incitement.<sup>185</sup> The Bentley case became a cause célèbre and a touchstone in the eventually successful campaign to ban the death penalty in Great Britain. In 1998, Derek Bentley was granted a posthumous pardon by the highest criminal appeals court in England and Wales.<sup>186</sup>

Austin's framework also has implications for the "directness" aspect of the crime of direct and public incitement to commit genocide. Krauss and Chiu write, "When the locutionary and illocutionary force of an utterance (that is, its literal and intended meaning) are the same, the result is termed a *direct speech act*; when an utterance's locutionary and illocutionary force are different. . . , the result is termed an *indirect speech act*."<sup>187</sup> So for the incitement to be direct, the meaning and force of the utterance must coincide. If the two are not aligned in this way, then the speech act is indirect—which, depending on the facts, may constitute a moral transgression or even another international crime (such as hate speech that constitutes persecution, a crime against humanity)—and falls short of ICG. In my reading, the implication of Austin's philosophy of speech acts for international criminal law is to narrow the range of impermissible statements to those that are comparable to Julius Streicher's "The Jews in Russia must be killed. They must be exterminated root and branch," or ICTR defendant Augustin Ndirabatswe's "kill Tutsis."<sup>188</sup>

This narrowing range of utterances that would qualify as incitement does not *a priori* exclude euphemisms,<sup>189</sup> if the prosecution can show that the overwhelming majority of listeners understood a euphemistic form of speech as a direct (rather than circuitous, oblique or veiled) call to commit genocide.<sup>190</sup> Readers familiar with the hate speech literature in the United

184. See *id.* §II(3).

185. And the standard of proof to be applied in the case.

186. See Duncan Campbell, *The Bentley Case: Justice at Last, 45 Years Too Late for 'Meek and Sheeplike' Derek Bentley*, *GUARDIAN* (London), July 31, 1998 (describing the posthumous quash of Derek William Bentley's conviction). *Bentley Trial Unfair Through Flawed Summing-Up*, *TIMES* (London), July 31, 1998 (describing how conviction was overturned due to the standard of proof applied due to the judge's incorrect summing up).

187. ROBERT KRAUSS & CHI-YUE CHIU, *Language and Social Behavior*, in 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 44 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

188. *Nuremberg Judgment and Sentences*, at 295.

189. The Bikindi TC judgment discusses the use of euphemisms for Tutsis such as "accomplices" and cockroaches" during inciting radio broadcasts: "A reading of the RTLTM transcripts reveals assimilation between the Inkotanyi – designation used for the "enemy", the Rwandan Patriotic Front (RPF) – and, on some occasions, the Tutsi ethnic group. It also reveals that the derogatory term "Inyenzi", meaning cockroach, was used for the assailants and, more generally, the Tutsi ethnic group. From April to June 1994, RTLTM journalists called on listeners to seek out and take up arms against Inkotanyi and Inyenzi, the RPF, and its "accomplices", the Tutsi ethnic group." Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, at ¶ 114.

190. Mere comprehension is not in itself a perlocutionary aspect of an utterance, it is simply an indication that the locutionary and illocutionary aspects have been heard and un-

States might find this outcome somewhat surprising, since advocates of hate speech regulation such as Greenawalt and Langton cited earlier have tended to use ordinary language philosophy to expand the range of speech acts *not* protected by the First Amendment to the U.S. Constitution.<sup>191</sup> In the case of the international law of ICG, speech act theory has the reverse effect, perhaps as a result of the uniqueness of the specific intent element of the crime of genocide. While references to causation in the ICG judgments of the ICTR Trial Chamber have compendiously widened the scope of utterances that would qualify as ICG, speech act theory appears to narrow the aperture, for the reasons given.

#### V. SPEECH AND CAUSATION IN COMPLETED CRIMES

Thus far, I have sought to demonstrate the relevance of J.L. Austin's speech act theory for international courts tasked with determining whether the crime of ICG has occurred. I have argued that an international court can find evidence of specific intent in the locutionary and illocutionary aspects of the utterances of the accused, and not in their consequences. This shift in emphasis has a number of ramifications, the first being that it augurs a move towards prevention—and the possible emergence of international criminal tribunals as a mechanism for proscribing early calls for genocide by political leaders, and thereby standing a better chance of preventing humanitarian catastrophes.

If we accept the clarifications given in this Article regarding causation, then we need to consider situations where an individual encourages an audience to commit genocide and then the crime of genocide actually occurs, and also where prosecutors possess clear and compelling evidence that certain speech acts led to specific criminal acts that may amount to genocide. My recommendation is that prosecutors and judges refrain from attempting to smuggle the perlocutionary aspects of speech acts into the category of ICG, and instead turn to the forms of criminal liability already in usage in international criminal law and which are more appropriate for crimes that are attempted or consummated. I refer specifically to aiding and abetting, inducing, instigating, ordering, and soliciting.<sup>192</sup> While these terms have illocutionary aspects according to Austin's speech act theory, in international law there is no dispute that each of these modes of liability requires that the crime be completed or attempted. This requirement distinguishes these crimes unmistakably from ICG. Article 25 of the 1998

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derstood by the listener. Perlocutions entail responses, that is, being convinced, taking alarm, and in Austin's view, mostly the undertaking of non-verbal physical actions.

191. See Greenawalt, *supra* note 142; Langton, *supra* note 141.

192. International criminal law defines and differentiates planning, instigating, ordering, and aiding and abetting in a number of places, including the *Brdanin* Trial Judgment. Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgment, ¶¶ 267–74 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004). The literature on international criminal law's "modes of liability" is vast, and one might start with chapters 9–11 of Antonio Cassese's *International Criminal Law*. See CASSESE & GAETA *supra* note 58, at 161–205.

Rome Statute of the International Criminal Court, which addresses individual criminal responsibility, states:

3. . . . [A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: . . .
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.<sup>193</sup>

Note the reference to “a crime which in fact occurs or is attempted.” In each instance, the assistance, support, command, encouragement, or solicitation must have a perlocutionary aspect: that is, an effect on the commission of the offense commensurate with the mode of liability charged.<sup>194</sup> Where genocide is in fact carried out, or a serious attempt is made to commit genocide, a range of modes of liability may apply—running the gamut from high to low levels of criminal responsibility.<sup>195</sup>

At the higher level, there is “ordering,” in which a *de facto* or *de jure* superior issues a written or verbal command to a subordinate to commit a criminal offense, when that superior is in position of superior (or command) responsibility within a military or political hierarchy or organization.<sup>196</sup> Ordering pertains to instigating speech acts by a political or military leader that had foreseeable effects on the actions of his or her followers and subordinates, motivating them to commit prohibited acts.

At the lowest level of criminal responsibility in international criminal law, we have “aiding and abetting,”<sup>197</sup> which requires “practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime.”<sup>198</sup> In the last few years, ICTR and ICTY Appeals Chamber judges have radically reinterpreted the requirements for this form of liability, leading to a string of acquittals. In 2013, in a controversial decision, the ICTY Appeals Chamber Judgment in *Perišić*

193. Rome Statute of the International Criminal Court art. 25.3(b)–(c), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

194. See CASSESSE & GAETA *supra* note 57, at 214.

195. The attentive reader will note that in this Section, I do not include the mode of liability of joint criminal enterprise on the grounds that, following Schabas’s lead, “the role of joint criminal enterprise complicity in genocide has to date remained largely theoretical . . . any genuine utility of joint criminal enterprise in genocide prosecutions remains unproven.” SCHABAS, *supra* note 44, at 355.

196. On ordering, see CASSESSE & GAETA *supra* note 57, at 204–05. See also ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 375 (3rd ed. 2014).

197. Prosecutor v. Tihomir Blaskić (Case No. IT-95-14-A), Appeals Chamber Judgment, 29 July 2004.

198. Prosecutor v. Kayishema and Ruzindana (Case No. ICTR-5-1-T), Trial Chamber Judgment, 21 May 1999, §126.

required for conviction that the aider or abettor share the criminal intent of the primary perpetrator and provide “specific direction” to the material perpetrators as an element of the *actus reus* of the crime.<sup>199</sup> While international criminal law generally understands aiding and abetting as entailing practical assistance<sup>200</sup> in the commission of the crime, the definition also includes providing “encouragement or moral support.”<sup>201</sup> In this way, abetting and incitement are conceptually related.

William Schabas understands abetting to be the same as “incitement when the underlying crime occurs.”<sup>202</sup> Schabas cites the *Black’s Law Dictionary* definition of “abet”—“to encourage, incite, or set another to commit a crime”—and observes that it derives from the old French “*à betier*, meaning to bait or excite.”<sup>203</sup> In cases where genocide has actually occurred, abetting seems to be the appropriate form of criminal responsibility to hold accountable radio DJs, journalists, and other propagandists who do not occupy a position of superior responsibility within a political or military hierarchy. Implicitly, this was the type of criminal responsibility favored by the prosecution and judges in *Streicher*, and there are good reasons to follow it.

Positioned midway between aiding and abetting and ordering on the continuum of responsibility, there is instigation, which is commonly glossed as “prompting another to commit an offense” and which again is conceptually adjacent to incitement.<sup>204</sup> Indeed, in U.S. criminal law, instigation and incitement are routinely equated and subsumed under the wider crime of “solicitation.”<sup>205</sup> By creating two distinct categories, international tribunals have differentiated incitement from instigation, defining the former as a direct and public inciting speech act, whereas the latter may take many forms (that is, not only speech) and may be expressed or

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199. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment on Appeal (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013). On “specific direction” as a necessary element of the *actus reus* of aiding and abetting, see *id.* §2(a). US law regarding the *mens rea* of accomplice liability requires the accomplice to share the criminal intent of the principal in a “community of purpose” in the unlawful undertaking. JOSHUA DRESSLER, *supra* note 180, at 480 (5th ed. 2009) (quoting *State v. Duran*, 526 P.2d 188, 189 (N.M. Ct. App. 1974)).

200. See Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment on Appeal, ¶ 137 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

201. See Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 271 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

202. SCHABAS, *supra* note 44, at 324–25.

203. *Id.* at 325.

204. Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Judgment on Appeal, ¶ 480 (Nov. 28, 2007) (“The *actus reus* of instigating implies prompting another person to commit an offense.”).

205. In the American Law Institute’s Model Penal Code, a person is guilty of the crime of solicitation if “he commands, encourages or requests another person to engage in conduct which would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.” MODEL PENAL CODE § 5.02(1) (1985).

implied, private or public.<sup>206</sup> In all cases, the instigation must have substantially contributed to the physical element of the crime, and the *Brđanin* Trial Judgment demands that “[t]he *nexus* between instigation and perpetration requires proof.”<sup>207</sup> Causality is a central element of instigation; the ICTY Trial Chamber in *Blaskić* stated that “[t]he essence of instigating is that the accused causes another person to commit a crime.”<sup>208</sup> At the ICTY, in the trial of Vojislav Šešelj, the Serb nationalist leader is charged with instigating actual crimes against humanity on the basis of three speeches he gave during the 1991–95 armed conflict in the former Yugoslavia.<sup>209</sup>

Even though there are clear grounds upon which to separate inchoate speech crimes such as incitement from modes of criminal liability such as instigating, the genocide case law of the ICTR has unfortunately conflated incitement and instigation. Wibke K. Timmerman points out this confusion, noting that incitement is defined in terms of instigation in two cases at the ICTR: the Trial Chamber in *Rutaganda* and *Musema* opined that “incitement . . . involves instigating another, directly and publicly, to commit an offense.”<sup>210</sup> This statement is misguided in many ways, not least because instigation is not a crime but rather a form of responsibility for manifold different crimes, whereas ICG is a crime in and of itself.<sup>211</sup> Responding to this confusion, Timmerman recalls that German and Swiss domestic legal doctrine sharply differentiate incitement and instigation. Both define incitement as an inchoate crime and instigation as a mode of liability for crimes that are attempted or completed.<sup>212</sup>

To be clear: while I have sought to clarify the confusion on causation for the inchoate crime of ICG, causation is absolutely necessary for the

206. In distinguishing between instigation as a mode of liability and incitement as an inchoate crime, ICTR judges declared in *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgment, ¶ 512 (June 20, 2009) (“Instigation under Article 6 (1) is a mode of liability; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute. By contrast, direct and public incitement is itself a crime, requiring no demonstration that it in fact contributed in any way to the commission of acts of genocide.”).

207. *Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 269. For more on instigation in international criminal law, see ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 379-80 (2d ed. 2010).

208. *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment, ¶ 270 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

209. *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Third Amended Indictment, ¶ 5 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 7, 2007).

210. Timmerman, *Incitement*, *supra* note 10, at 840 (referencing *Prosecutor v. Rutaganda*, Case No. ICTR-97-32-I, Judgment, ¶ 38 (Dec. 6, 1999); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 120 (Jan. 27, 2000)).

211. The ICTR Trial Chamber in *Kalimanzira* states that, “Instigation under Article 6(1) is a mode of liability . . . By contrast, direct and public incitement is itself a crime. . . .” *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgment, ¶ 512 (June 22, 2009).

212. Timmerman, *Incitement*, *supra* note 10, at 848–50.

modes of liability for consummated crimes.<sup>213</sup> Of course, the devil is in the details, and I do not presume that it is a straightforward matter to connect an inciting speech act to a criminal offense in any actual criminal case before an international criminal tribunal. Criminal causation has been defined in centuries of case law and jurisprudence, and genocide convictions for speech acts using a “completion” mode of liability (aiding, inducing, instigating, ordering, soliciting) must satisfy the standard conventions of criminal law and prove their case beyond reasonable doubt. Austin argues that for a speech act to be successful, the speaker must secure the “uptake” of the audience—wherein the audience members comprehend what the speaker is urging or ordering them to do, and are successfully persuaded to act to achieve the speaker’s intended goal.<sup>214</sup> To function as intended, a speech act must go beyond the locutionary and illocutionary aspects and have demonstrable perlocutionary effects. Whether this occurs depends upon context and convention, requiring “the uttering of certain words by certain persons in certain circumstances.”<sup>215</sup> Langton correctly observes that “the context determines the uptake secured.”<sup>216</sup>

Recently, scholars have constructed tests and frameworks for determining the significance of contextual factors in speech crimes cases, and these are relevant to our understanding of completed crimes. ICTY prosecutor Predrag Dojčinović agrees that the existing model of international criminal law is inadequate for evaluating speech acts and he identifies the conditions of satisfaction under which speech acts have perlocutions, or concrete effects, and reviews the kind of evidence that might be considered to demonstrate such effects.<sup>217</sup> Drawing from recent studies in cognitive linguistics and the work of John Searle, Dojčinović develops a highly innovative model in which some instigating speakers have a unique “mental fingerprint”<sup>218</sup> that can be documented to demonstrate a link between the instigator and the instigated.<sup>219</sup> This concept refers to a unique phrase that is coined and used by the accused in his or her speech. Dojčinović illustrates his theory with the example of Serb nationalist politician Vojislav Šešelj, who coined the term the “Karlobag-Ogulin-Karlkovac-Virovitica line”—indicating the boundary of Serb lands in Croatia. Each

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213. Where speech crimes are alleged, prosecutors may indict either the inchoate crime (ICG) or the consummated crime (e.g., instigating genocide), but not both simultaneously. Citing the US Model Penal Code, Cahill observes that most criminal codes “prohibit imposition of liability for both an inchoate crime and the target offense of that crime.” Cahill, *supra* note 137, at 753.

214. AUSTIN, *supra* note 14, at 117–18.

215. *Id.* at 14. Austin uses the naming of a ship as an example, and explains that the person naming a ship must be authorized to do so. He illustrates this by reflecting that if he himself walked idly by a ship and named it the “Mr. Stalin,” it would be an ineffective speech act, since it was not uttered by the right person in the right circumstances. *Id.* at 23.

216. Langton, *supra* note 141, at 301.

217. Dojčinović, *supra* note 144, at 71.

218. *See id.*, at 95–96 for a discussion of the “mental fingerprint” concept.

219. *Id.* at 95.

time military or paramilitary actors used such extreme nationalist concepts as justification for their criminal violations, Dojčinović writes, their mental state was cognitively “fingerprinted,” potentially constituting evidence of mental causation and shared criminal intent. This creates, says Dojčinović an “evidentiary feedback loop as one of the links between the instigator and the instigated.”<sup>220</sup> There is some evidence that Nuremberg prosecutors adopted something akin to a “mental fingerprint” approach in the trial brief they prepared to argue for Julius Streicher’s criminal liability, noting that “three speeches given by Streicher ‘gave birth to the watchword which, 14 years later, was to become the official policy of the Nazi Government—the Annihilation of the Jews.’ These speeches were: (1) in Nurnberg, 23 Nov. 1932, (2) in the Bavarian Diet, 20 Nov. 1924, and (3) in Nurnberg, 3 April 1925.”<sup>221</sup> There is unfortunately not enough space here to evaluate further these possible avenues of investigation and potential legal innovation, and here I can say only that I am open to these models in cases of completion liability such as instigation, but not in relation to ICG.

A second caveat is that if causation is going to play a crucial role in completion modes of criminal liability related to speech acts, then the threshold of proof for speech crimes ought to be clarified more rigorously than it is presently. International criminal law would greatly benefit from a much clearer and fuller judicial explanation of the degree of causation that could demonstrate beyond a reasonable doubt that a nexus exists between the originating speech act and a criminal outcome. This will require resolving the gray areas of uncertainty that exist in international jurisprudence, and answering the as yet unanswered question—what is the degree of certainty necessary for a court to determine that a speech act has actually caused a criminal offense?

#### CONCLUSION

In this Article, I have argued that the ICTR has adopted a confusing approach to causation in its jurisprudence on direct and public incitement to commit genocide. Causation is, however, essential for modes of liability such as aiding and abetting, instigation, and ordering, which require that the underlying crime (in this case, genocide) be attempted or completed. I have provided a number of arguments for why the prevailing international criminal law of ICG is problematic, and sought to clarify matters via a novel argument using Austin’s ordinary language philosophy. Performative speech acts are acts, and they can be evaluated according to what they mean, what they encourage others to do, and what consequences they have. In what they mean and what they urge, speech acts can be considered criminal acts in and of themselves. This approach also has the advantage of tracking the statutory basis of the International Criminal Court:

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220. *Id.* at 95.

221. Thomas J. Dodd, Trial Brief Concerning Streicher, University of Connecticut Archives & Special Collections at the Thomas J. Dodd Research Center, *available at* <http://archives.lib.uconn.edu/islandora/object/20002%3A1943#page/1/mode/2up>.

Article 25, defining “Individual Criminal Responsibility,” does not require causation or completion for ICG. Yet it does require that all other crimes listed in the Rome Statute actually occur or be attempted when criminal responsibility rests upon ordering, soliciting, or inducing the crime.

If we accept that the current prevailing law of ICG is ambiguous and needs to be clarified, then this might be accomplished in various ways. Thus far, the ICTR Appeals Chamber has not reviewed the relevance of causation for ICG directly, and since the Tribunal will soon complete its work, that potential avenue is likely closed. The ICTY, however, is still hearing cases that involve international speech crimes: Bosnian Serb political leader Radovan Karadžić is charged with having instigated, ordered and aided and abetted genocide against a part of the Bosnian Muslim and Bosnian Croat national, ethnic, and religious groups. Serb leader Vojislav Šešelj faces charges of having ordered, instigated and aided and abetted in the planning, preparation or execution of persecutions of Croat, Muslim and other non-Serb civilian populations. The International Criminal Court has issued warrants in several of its early cases, notably Ahmad Harun of the Sudan and Joshua Arap Sang of Kenya, charging defendants with inducing, ordering, co-perpetrating or abetting war crimes and crimes against humanity on the basis of speeches and radio broadcasts.

Finally, the problems in the international law of ICG seem to have sprung from the International Law Commission’s 1996 criminal code for war crimes and crimes against humanity. Perhaps it falls to the ILC to reaffirm incitement as an inchoate crime and clarify how causation is relevant to speech acts that result in attempted or completed crimes. This would not be such a severe blow to the legitimacy of the International Law Commission—and over time might even enhance its authority, especially if we recall that historically, international criminal law has been constructed from a patchwork of international declarations and decisions drawn from a variety of national and international legal settings. If the international criminal law of ICG is to sharpen and cohere over time, it will no doubt do so in a piecemeal way, through future decisions handed down by international courts such as the International Criminal Court, as well as national criminal courts.